POTEMKIN VILLAGES[1] OF THE WEST: HOW A SIMPLE PAYMENT TO COMPENSATE LOCAL GOVERNMENTS BECAME AN UNCONTROLLABLE FEDERAL SUBSIDY

Devin Kenney[*]

[1] The term "Potemkin Village" refers to something "having a false or deceptive appearance" and is derived from Grigori Aleksandrovich Potyomkin, "a favourite of Empress Catherine II of Russia, who reputedly gave the order for sham villages to be built for empress's tour of the Crimea in 1787." *Potemkin Definition*, OXFORD DICTIONARIES, OXFORDDICTIONARIES.COM, http://www.oxforddictionaries.com/definition/english/potemkin.

[*] B.A., University of Utah, 2012; J.D., Michigan State University College of Law, 2015. I am very grateful to Professor Michael Sant'Ambrogio, of Michigan State University College of Law, for his extensive feedback and assistance while I wrote this Article. I also owe particular thanks to my wife Traci and son Lincoln for their patience and long-suffering and for the sacrifices they both made for me. Thank you.

INTRODUCTION

With one arm, the Western politician decries the federal government for failing to sufficiently reimburse the States for the government services on public lands.[2] With the other arm, ready to expel the federal government from "State" land,[3] the same politician is likely to call on the federal government to sell off or give up that land to the State.[4] How can these statements be reconciled? Although these examples come from two different states, they reflect the very real tension between the Western ideal of independence and self-sufficiency[5] and the

[2] "[p]ay [its] taxes or payments in lieu of taxes." Samantha Tipler, *County to Bill Feds $3.9M in Taxes*, HERALD NEWS (Apr. 30, 2013), http://www.heraldandnews.com/members/news/frontpage/article_3dc90118-b159-11e2-b19f-0019bb2963f4.html.

[3] Actually, the land in question is legally denoted as the "public domain." This term is subject to several definitions, many of which are loaded. For example, "[i]n its most general application, a public domain is meant to include all the land owned by a government." E. LOUISE PEFFER, THE CLOSING OF THE PUBLIC DOMAIN: DISPOSAL AND RESERVATION POLICIES, 1900-1950, at 5 (1951). The term may also refer to "all of the original public domain area which has been continuously in federal ownership" or "only . . . those 'vacant, unappropriated, unreserved' public lands." *Id.* at 6. For the purposes of this Note, the term "public domain" is used in reference to the first definition.

[4] This second sentiment is generally premised on the assumption that large tracts of "undeveloped" federal land holdings are detrimental to local economic development. *See* Robert Gehrke, *Utah Alone in Sagebrush Rebellion After Arizona Governor's Veto*, SALT LAKE TRIB. (May 15, 2012), http://www.sltrib.com/sltrib/politics/54120702-90/arizona-bill-brewer-federal.html.csp. In Utah, supporters believe that federal ownership is a leading cause for the state's lagging per-pupil spending and *see* "opening the public lands for economic development [as] the best way" to raise education spending up to the national average. Robert Gehrke, *Herbert Signs Bill Demanding Feds Relinquish Lands in Utah*, SALT LAKE TRIB. (Mar. 23, 2012), http://www.sltrib.com/sltrib/politics/53781328-90/bill-control-federal-hatch.html.csp.

[5] Bernard DeVoto, writing in 1947, summarized this phenomenon as follows:

> It shakes down to a platform: get out and give us more money. Much of the dream of economic liberation is dependent upon continuous, continually increasing federal subsidies—subsidies which it also insists shall be made without safeguard or regulation. This is interesting as economic fantasy but is more interesting because it reveals that the Western mind is infusing its dream of freedom with the economic cannibalism of the post-Civil War Stone Age.

very real fact that the federal government heavily subsidizes many Western communities, both urban and rural. [6] One of the largest sources of these subsidies is the program known as payment in lieu of taxes or PILT.[7]

What are payments in lieu of taxes and why are they divisive? Because federal lands enjoy immunity from state and local taxation,[8] the PILT program addresses the federal government's responsibility for the costs incurred by state and local governments on account of the need to provide services to these tax-immune federal holdings.[9] Pursuant to the Payment in

BERNARD DEVOTO, *The West Against Itself*, *in* THE WESTERN PARADOX: A CONSERVATION READER 45, 61-62 (Douglas Brinkley & Patricia Nelson Limerick eds., 2000).

Even today, this sentiment abounds: in support of Utah's Transfer of Public Lands Act of 2012, itself worthy of lengthy discussion, the Constitutional Defense Council declared that federal land management policy has "reduced the ability of the citizens of Utah to make a living from the land, denied the Nation much needed energy and mineral resources, limited the State's ability to fund education and ha[s] led to poor stewardship of the land." CONSTITUTIONAL DEF. COUNCIL, TOWARD A BALANCED PUBLIC LANDS POLICY: A CASE STATEMENT FOR THE H.B. 148: UTAH'S TRANSFER OF PUBLIC LANDS ACT 4 (2012), *available at* http://utah.gov/ltgovernor/docs/CDC-AGLandsTransferHB148SummaryInteractive.pdf.

[6] For an example reflecting both of these interests, *see* Editorial, *Pass PILT Bill*, SPECTRUM (Sept. 16, 2013), http://www.thespectrum.com/article/20130916/OPINION/309160014/Pass-PILT-bill ("Unless the federal government intends for land to be turned over for sale and development, it is critical that federal lawmakers get PILT [a large federal subsidy] passed, and not just on a year-by-year basis but as part of a long-term strategy in a bill that ensures payments at levels set for at least three years at a time. Doing so would help counties plan their budgets with a better idea of the revenue coming from the PILT program. It would also help ease concerns that western states have about the federal government's actions related to a key funding source that allows the west's popular landscapes to remain free from development."). Unless the Author is misreading the source, this editorial appears to insinuate that unless subsidies continue unabated, local governments would have no choice but to develop the land.

[7] "'Payments in Lieu of Taxes' (or PILT) are Federal payments to local governments that help offset losses in property taxes due to non-taxable Federal lands within their boundaries." U.S. DEP'T OF INTERIOR, *Payments in Lieu of Taxes: Welcome to the Payments in Lieu of Taxes Website*, DOI.GOV, http://www.doi.gov/pilt/index.cfm (last visited Oct. 28, 2013). These payments are distributed to every State, excluding Rhode Island, "as well as the District of Columbia, Puerto Rico, Guam, and the Virgin Islands." *Id.* More generally, "[p]ayments in lieu of taxes . . . are payments made voluntarily by [any] tax-exempt [entity] as a substitute for property taxes." DAPHNE A. KENYON & ADAM H. LANGLEY, *Payments in Lieu of Taxes: Balancing Municipal and Nonprofit Interests*, LINCOLN INST. LAND POLICY 2 (2010), *available at* http://www.lincolninst.edu/subcenters/significant-features-property-tax/upload/sources/ContentPages/documents/PILOTs%20PFR%20final.pdf.

[8] McCulloch v. Maryland, 17 U.S. 316, 327-30 (1819) (holding state taxes on federal property unconstitutional).

[9] Because the federal government has sovereign immunity federal land holdings are "immune from taxation by state and local governments." U.S. GEN. ACCOUNTING OFFICE, GAO-08-978SP, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 15-219 (3d ed. 2008), *available at* http://www.gao.gov/assets/210/203470.pdf. Payments in lieu of taxes are one method "to make [tax-exempt entities] pay for the public services they consume." KENYON, *supra* note 6, at 2-3. Examples of these services consumed by the federal government can "include police and fire protection, the bus system which transports workers and clients or consumers, public health and sanitation facilities and the courts . . . . [Furthermore,] the local government may have to add to the capacity of its physical infrastructure (e.g., sewers and roads)." ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, IN BRIEF: PAYMENTS IN LIEU OF TAXES ON FEDERAL REAL PROPERTY 21 (1981), *available at* http://www.library.unt.edu/gpo/acir/Reports/brief/B-5.pdf.

For further discussion of the purpose of the PILT program, *see* for example Don Seastone, *Revenue sharing or Payments in Lieu of Taxes on Federal Lands?*, 47 LAND ECON. 373, 376 (1971) ("The system [of payments in lieu of taxes] is based on the assumption that the magnitude of property taxes lost because federal lands are not taxable represents a close approximation to the real cost of these lands to the state and local government. Thus payments are made in the amount that would be forthcoming if the lands were subject to property taxes by state and

Lieu of Taxes Act (PILT Act), the Secretary of the Interior makes lump-sum payments to local governments—generally counties—with high percentages of non-taxable federal lands; this money may be used "for any governmental purpose."[10] To prevent overcompensation, PILT payments are limited by the amount that the local government units receive under other federal revenue sharing programs, such as mineral lease monies or timber payments.[11] In practice, however, PILT is, as noted above, a large-scale Western[12] subsidy[13] encouraging inefficient, uneconomical governance.[14] This is because this limiting provision of PILT has a giant loophole: only funds *received by* the unit of local government—the "principal provider(s) of governmental services"[15]—are deducted from PILT.[16]

A. The Complicated Exceptions to Deduction

Here is where things get complicated: in 1978, the Secretary of the Interior, the current administrator of PILT,[17] decided that a county *has not* "received" federal revenue sharing payments if (1) those payments are passed to "financially independent" service districts and (2)

local taxing authorities. . . ."); U.S. DEP'T OF INTERIOR, *supra* note 6 ("The [PILT] Law recognizes the inability of local governments to collect property taxes on Federally-owned land can create a financial impact . . . . PILT payments are one of the ways that the Federal government can fulfill its role of being a good neighbor to local communities.").

[10] Tax Analysts, *Supreme Court Considers Whether Strings Attached on Federal Payments in Lieu of Taxes*, 84 TAX NOTES TODAY 224-4, 224-4 (Oct. 31, 1984).

[11] *See* discussion *infra* note 81.

[12] Although almost every State—and many territories—receive some PILT, there is a definite skew toward the Western States. For example, in 1995 the top ten states receiving the greatest distribution of PILT were all west of Colorado, while the ten states receiving the least, with the exception of Hawaii, were all located east of the Mississippi. DARLA D. PINDELL, DAVID T. TAYLOR, & BRETT R. MOLINE, B-1055, WYOMING: PAYMENTS IN LIEU OF TAXES 15 (Feb. 1998), *available at* http://wyocre.uwagec.org/Publications/B1055.pdf. This remains substantially unchanged today: according to the most recent available data, California is set to receive the greatest amount of PILT in 2013 with almost $41.5 million. U.S. DEP'T OF INTERIOR, *Payments by State: Fiscal Year 2013*, DOI.GOV, http://www.doi.gov/pilt/state-payments.cfm?fiscal_yr=2013&as_fid=T7gZkNdAQWrim0esaTPo (last visited Oct. 28, 2013). This is followed by Utah ($35,391,052), New Mexico ($34,692,967), Arizona ($31,986,266), and Colorado ($31,986,266). *Id.* Of all states *receiving* PILT, Delaware is set to receive the least at $17,828. *Id.*

[13] Candace Webb, *What is in Lieu of Taxes?*, HOUS. CHRON., http://smallbusiness.chron.com/lieu-taxes-23021.html (last visited Oct. 3, 2013) (explaining PILT as a "federal subsidy" provided to "cities and towns that house federal organizations within their boundaries"); *see* RONALD STEENBLIK, A SUBSIDY PRIMER 8, *available at* http://www.iisd.org/gsi/sites/default/files/primer.pdf (defining a subsidy as "a financial contribution by a government, or agent of a government, that confers a benefit on its recipients").

[14] STEENBLIK, *supra* note 13, at 13 ("Generally, . . . subsidies tend to divert resources from more productive to less productive uses, thus reducing economic efficiency."). As a subsidy, PILT would be defined as a "cash payment or grant . . . . [designed] to enable an . . . organization [i.e., local governments] to cover some or all of its general costs." *Id.* at 18; *see also*, FISHERIES & AQUACULTURE DEP'T, FIPP/R698, FOOD & AGRIC. ORG. OF THE U.N., REPORT OF THE EXPERT CONSULTATION ON IDENTIFYING, ASSESSING AND REPORTING ON SUBSIDIES IN THE FISHING INDUSTRY 34 (2002), *available at* ftp://ftp.fao.org/docrep/fao/005/y4446e/y4446e00.pdf (dividing subsidies into four classes, including "[d]irect financial transfers" and defining "[d]irect financial transfers" as "all direct payments by the government"); *id.* at 35 ("The cost (revenue) to the government can usually be found in the public budget and its direct value to the [recipient] will appear directly in the cash flow of the recipient. . . .").

[15] *See* S. Rep. 94-1262.

[16] 43 C.F.R. § 44.11(1)(i) (2014).

[17] Prior to 2004, the Bureau of Land Management (BLM) administered the PILT program. Payment in Lieu of Taxes, 69 Fed. Reg. 70557-01 (Dec. 7, 2004).

this is done in accordance with State law.[18] Therefore, states have the incentive to themselves create or encourage counties to create service districts[19] responsible for a limited range of services.[20] Now, however, the conventional wisdom has eliminated step two, because if the special purpose district receives the revenue sharing payments, the county receives the maximum PILT available.[21]

Beyond the possible inefficiency[22] in encouraging the government to delegate governmental responsibilities to smaller units,[23] PILT encourages communities to develop

[18] U.S. GEN. ACCOUNTING OFFICE, ALTERNATIVES FOR ACHIEVING GREATER EQUITIES IN FEDERAL LAND PAYMENT PROGRAMS, 19 (1979), *available at* http://www.gao.gov/assets/130/128187.pdf.

[19] A special purpose or service district may provide any of a number of different services that would otherwise be the responsibility of the local government. "Special purpose districts are generally created through the county legislative authority to meet a specific need of the local community . . . . The need may be a new service, a higher level of an existing service, or a method of financing available through the creation of a special purpose district . . . ." *What Is a Special District?*, MUN. RESEARCH & SERVS. CTR. WASH (Mar. 2012), http://www.mrsc.org/subjects/governance/spd/spd-definition.aspx. The Census Bureau defines a "special district government" as "[a]ll organized local entities (other than counties, municipalities, townships, or school districts) authorized by state law to provide only one or a limited number of designated functions, and *with sufficient administrative and fiscal autonomy to qualify as separate governments*; known by a variety of titles, including districts, authorities, boards, and commissions." *Federal, State, & Local Governments: Definitions*, U.S. CENSUS BUREAU, http://www.census.gov/govs/definitions/index.html#s (last visited Jan. 7, 2013).

[20] For example, in Utah, a special service district may be created to provide for any combination of up to eighteen different governmental functions, including water, sewerage, and fire protection. UTAH CODE ANN. § 17D-1-201(1)-(18) (2014); *see also* discussion *infra* notes 152-59 and accompanying text.

[21] For example, one local Utah official openly admitted that creating such a special district "was necessary . . . in order to utilize over six hundred thousand dollars ($600,000.00) in federal money that would otherwise be deducted from [the] County's PILT payments." SPECIALLY FUNDED TRANSPORTATION SPECIAL SERVICE DISTRICT ADMINISTRATIVE CONTROL BOARD MEETING, MINUTES 1-2 (2010), http://www.washco.utah.gov/files/minutes/1-19-10%20SFTSSD%20minutes.pdf.

[22] There is actually a fairly vigorous debate in the literature as to whether or not the use of special or service districts results in the inefficient provision of public services. *Compare* Thomas Dilorenzo, *The Expenditure Effects of Restricting Competition in Local Public Service Industries: The Case of Special Districts*, 37 PUB. CHOICE 569, 576 (1981) (concluding that "regulating the growth of special districts is a way that local politicians and bureaucrats can use the powers of the state to limit entry into the local government industry"), *with* ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, THE PROBLEM OF SPECIAL DISTRICTS IN AMERICAN GOVERNMENT 68-69 (1964), *available at* http://www.library.unt.edu/gpo/acir/Reports/policy/a-22.pdf ("Profusion of special districts within an area results in fragmentation of governmental and political responsibility. . . Fragmentation of government in a given area prevents, or at least makes difficult, effective coordination of all government activities. In many instances it prevents the general public from making effective allocation of public financial resources at any given moment."); *see also* SENATE LOCAL GOV'T COMM., WHAT'S SO SPECIAL ABOUT SPECIAL DISTRICTS?: A CITIZEN'S GUIDE TO SPECIAL DISTRICTS IN CALIFORNIA 12 (4th ed., 2010) (stating, under heading "Too many special districts means inefficiency," "[m]any special districts provide the same services that counties and cities provide. Overlapping jurisdictions can create competition and conflict among special districts, and also between districts and general purpose governments."); G. Ross Stevens & Nelson Wikstrom, *Trends in Special Districts*, 30 ST. & LOC. GOV'T REV. 129, 137 (1998) (noting that the "atomization" of government services may lead to decrease in accountability to public for quality of services, but that the decentralization of services overcomes geographic barriers of "general purpose" local government). For a summary of the extant literature, see Kee Ok Park, *The Impact of Special Districts on Local Expenditures in Metropolitan Areas: An Institutional Paradox*, 27 ST. & LOC. GOV'T REV. 195, 196-99 (1995). Mr. Park notes that "if a county has small districts . . . [t]hese inefficient special districts may have to be regulated or supported by county government staff . . . [and] county officials and residents are not likely to replace their own services with those of the special districts. As a result, special district services may simply supplement or add additional services to those already provided by the county." *Id.* at 200. Whatever the utility of

natural resources through extraction rather than tourism or recreation because a community utilizing an extraction-based model receives a double-payment of federal money, whereas a conservation-minded community receives only one.[24] As one editorial from a local Western newspaper put it: "counties with large quantities of public lands can't realistically be expected to stand by and not pursue other means of generating revenue."[25] Thus, without PILT, the argument runs, local governments would have no choice but to exploit the public lands.[26] This claim is, however, an empty threat because states and counties lack authority to exploit federal land without permission of the Federal government.[27] A properly applied and justly reformed PILT would, therefore, act as a disincentive to exploitative development.[28]

---

service districts generally, however, it is hard to argue that a service district created for the sole purpose of increasing the amount of federal money received by a local governmental unit promotes overall efficiency.

[23] The boards of the district created for this purpose tend to be duplicative. In Washington County, Utah, which created a special district in order to receive an extra $600,000 in Federal funding, *id.*, almost half the governing board were also county commissioners; *see* WASHINGTON COUNTY COMMISSION MEETING MINUTES 1 (2009), *available at* http://www.washco.utah.gov/files/minutes/2009/M%202009-09-01.pdf (listing as members commissioners James J. Eardley, Alan D. Gardner, and Dennis Drake); SPECIALLY FUNDED TRANSPORTATION SPECIAL SERVICE DISTRICT ADMINISTRATIVE BOARD MEETING MINUTES 1 (2009), *available at* http://www.washco.utah.gov/files/minutes/2009/M%202009-09-01%20SPEC.pdf (listing as members James J. Eardley, Dennis Drake, Brooks Baker, Spencer Beckstrom, and Steve Haluska). Furthermore, there was also a duplication of work, as both the county and the service district had authority for road projects in the county. SPECIALLY FUNDED TRANSPORTATION SPECIAL SERVICE DISTRICT ADMINISTRATIVE BOARD MEETING MINUTES 2-3 (June. 16, 2009) http://www.washco.utah.gov/files/minutes/2009/M%202009-06-16%20SPEC.pdf ("'Public Works Director Ron White head said that the County has a current list of roads are in need of repair . . . . [A member] asked for a list of roads to be done with the SFTSSD money, separate and apart from the list of established County projects."). The County also retained authority over transportation projects; *see, e.g.*, WASHINGTON COUNTY COMMISSION MEETING MINUTES 6 (2009), *available at* http://www.washco.utah.gov/files/minutes/2009/M%202009-06-16.pdf (discussing county roads projects).

[24] For an example of how subsidies encourage public and private parties to engage in environmentally destructive activity, *see* STEENBLIK, *supra* note 13, at 6 ("They have encouraged fishing fleets to search farther and deeper than ever before, aggravating the problem of over-fishing."). The Author argues here that by allowing counties to retain both the benefits of natural resource extraction and PILT, counties are overcompensated and incentivized to pursue the extraction of natural resources. Similar to Steenblik's fishing example, in which fishermen who receive both the benefits of fish protection *and* the benefit of fish "extraction" are incentivized to destroy local fish stocks, counties are incentivized to pursue the maximum fiscal benefits available through both extraction of resources and prevention of PILT deductions for those revenues. This process, therefore, aggravates resource degradation and overuse. For examples of this process, see discussion *infra* notes 28 & 343.

[25] *Pass PILT Bill*, *supra* note 7; *see also* Tipler, *supra* note 2. They also argue that the treatment they are receiving is fundamentally unfair. "Lawmakers in Washington, D.C., wouldn't dream of putting restrictions on economic growth on areas in New York state, Ohio, Pennsylvania, Tennessee or other states. They shouldn't expect it of those of us who reside in the western United States." *Pass PILT Bill*, *supra* note 7.

[26] Some legislators during the 1994 reauthorization actually opposed PILT on the basis that developing these lands would be to put them to better use; *see, e.g.*, 140 Cong. Rec. H11,241-01 (daily ed. Oct. 7, 1994) (statement of Rep. Martin Hoke) ("[T]hrowing more money . . . will never, never solve th[e] problem. The way to solve it is to divest, have an auction, sell it off over time slowly, but surely, and get out of the land business."). Considering that the Federal government tried this strategy for over a hundred years before the current stage of land management began, such suggestions are of dubious value.

[27] This is not to say that none have tried. For example, the county supremacy movement attempted to establish local control over federally held lands, culminating in *United States v. Nye County, Nevada*, in which a district court affirmed the federal government had authority to manage the public lands in question. 920 F. Supp. 1108, 1118 (D. Nev. 1996). More recently, the County commissioners of Klamath County, Oregon sent the federal

B. Sovereign Immunity Meets Federal Land Policy: What It Means to You

In general, under the doctrine of sovereign immunity, federal land holdings are exempt from state and local taxation; however, this exemption may be waived by Congress.[29] Although some criticize this immunity,[30] in response to perceived inequities Congress opted to enact a system wherein a portion of the lost tax revenue is recouped through PILT rather than create a blanket exemption.[31]

Congress enacted PILT in 1976 on the recommendation of the Public Land Law Review Commission (PLLRC).[32] In response to growing concerns over the environment and the disposal of federally held lands,[33] the PLLRC suggested that the United States reverse the then-prevailing policy toward the active disposition of all remaining "unappropriated public domain lands."[34] As this policy was reversed, Congress recognized that the new system left the states and local

government a $3.9 million "bill" for "unpaid taxes," Tipler, *supra* note 2, and Utah lawmakers passed a bill "requiring" the federal government to relinquish title to Federal land holdings in the state, Gehrke, *supra* note 3; *see* UTAH CODE ANN. 1953 § 63L-6-603(1)(a)-(b) (2013) ("On or before December 31, 2014, the United States shall: extinguish title to public lands; and transfer title to public lands to the state.").

[28] The purpose of the deduction provision of PILT was to even out payments so that they were held, more or less, constant year to year; *see* 122 Cong. Rec. 25,742, 25,742 (1976) (statement of Rep. James Quillen) (arguing the PILT was necessary because it "w[ould] provide a predictable level of payments which does not now exist for these counties"); *id.* at 25,748 (statement of Rep. Jim Jeffords) ("The bill provides these moneys and, at the same time, keeps a lid on total payments to prevent unnecessary windfall profits in large uninhabited areas."). If this were the case, a county or local government would lack the incentive to engage in potentially lucrative, but environmentally destructive, behavior because it could not receive any additional compensation for engaging in this behavior, but would instead be forced to foot the bill for remediation efforts. On the other hand, increased tourism would lead to increased spending and local sales tax revenue, in addition to supporting local businesses.

[29] "Federal lands may not be taxed by state or local governments unless the governments are authorized to do so by Congress." M. LYNNE CORN, ENV'T & NATURAL RES. DIV., CONG. RESEARCH SERV., RL31392, PILT (PAYMENTS IN LIEU OF TAXES): SOMEWHAT SIMPLIFIED 1, 1 (2012), *available at* http://www.fas.org/sgp/crs/misc/RL31392.pdf.

[30] Abraham D. Beame, *Preface* to ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, PAYMENTS IN LIEU OF TAXES ON FEDERAL REAL PROPERTY, at iii (1981). For a more recent, if somewhat implicit criticism of this immunity, *see* John A. Swain, *The Taxation of Private Interests in Public Property: Toward a Unified Theory of Property Taxation*, 2000 UTAH L. REV. 421, 422 (2000) ("The exemption of government property from taxation is vulnerable to criticism. In basic economic terms, imposing a tax burden on private property, but not public property, distorts economic decision-making in favor of government property. . . . [B]ecause there are a multitude of different taxing jurisdictions within the United States, the exemption has a . . . pernicious effect. Specifically, one level of government is forced to subsidize another. A tax-exempt federal installation located within a school district reduces the taxable assessed value within that district. A city hall located in the school district causes a similar diminutions of the tax base. In effect, the school district is compelled to subsidize the federal and municipal governments.").

[31] Of course, PILT is only one program among a dizzying array of programs with essentially the same purpose. These programs are designed to "offset any adverse economic effects of the presence of tax-exempt federal land." Robert E. Merriam, *Preface* to ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, THE ADEQUACY OF FEDERAL COMPENSATION TO LOCAL GOVERNMENTS FOR TAX EXEMPT FEDERAL LANDS, at iii (1978).

[32] Congress established the PLLRC in 1964 to "mak[e] a comprehensive view of the public land laws of the United States and . . . recommend[] to the President and to the Congress any revisions that may be considered necessary." Wayne N. Aspinall, *The Public Land Law Review Commission: Origins and Goals*, 7 NAT. RESOURCES J. 149, 149 (1967).

[33] PUBLIC LAND LAW REVIEW COMM'N, ONE THIRD OF THE NATION'S LAND: A REPORT TO THE PRESIDENT AND TO THE CONGRESS BY THE PUBLIC LAND LAW REVIEW COMMISSION, 17 (1970).

[34] *Id.*

governments uncompensated for the burdens permanent federal control imposed[35] and agreed that local communities should be offered compensation to offset the loss in local tax revenue.[36] Because federal ownership under the former regime was considered temporary, this change, therefore, occasioned reconsideration of revenue sharing programs generally.[37]

According to the Government Accounting Office (GAO), PILT is "the most wide-ranging program" designed to compensate local governmental bodies for the costs imposed by federal land ownership[38] and was passed as part of this U.S. policy shift from disposal to retention of federal land.[39] That this shift occurred so late in the nation's history has occasioned great disparities between the Eastern and Western United States in regards to the percentage of land in federal ownership.[40] This disparity accounts for the undue *Western* interest in PILT: although these payments are of great importance to the local communities receiving them, they are very unevenly distributed between counties[41] and across the country.[42]

C. Changing PILT by Any Means Necessary (or Possible)

Despite the administrative burdens,[43] given the current political climate,[44] the best way to effect meaningful change in the PILT program is for the Department of the Interior (DOI) to

[35] *See* 43 U.S.C. § 1701(a)(1) (2006) ("Congress declares that it is the policy of the United States that the public lands be retained in Federal ownership."). This act, the Federal Land Management and Policy Act (FLPMA), also declared that "the Federal Government should, on a basis equitable to both the Federal and local taxpayer, provide for payments to compensate States and local governments for burdens created as a result of the immunity of Federal lands from State and local taxation." § 1701(a)(13).

[36] These payments were intended to "to make up for the presence of non-taxable land in their jurisdictions." CORN, *supra* note 29, at 1; *see also* 122 Cong. Rec. 25,742, 25.742 (1976) (statement of Rep. James Quillen) ("The [Public Land Law Review] Commission recommended that if Federal lands were to be removed forever from the local tax rolls, then a system of payments in lieu of taxes should be established . . . . [because] if public lands were to be retained for all of the American people, then the expense of retaining them ought to be borne by all of the citizens . . . .").

[37] PUBLIC LAND LAW REVIEW COMM'N, *supra* note 33, at 20.

[38] For example, as of 2012, "the PILT program covered 606.5 million acres . . . 94% of all federal land." U.S. GEN. ACCOUNTING OFFICE, *supra* note 9, at 15-219.

[39] *Id.*

[40] For example, "47% of the [land contained in the] 11 coterminous western states" is federally owned; this contrasts with about 4% of the lands "in the other states" being in federal ownership. ROSS W. GORTE ET AL., CONG. RESEARCH SERV., R42346, FEDERAL LAND OWNERSHIP: OVERVIEW AND DATA, Summary (2012), http://www.fas.org/sgp/crs/misc/R42346.pdf; *see also The Open West, Owned by the Federal Government*, N.Y. TIMES, Mar. 23, 2012, http://www.nytimes.com/interactive/2012/03/23/us/western-land-owned-by-the-federal-government.html?_r=0 (noting that "[t]he top states with the greatest percentage of federally owned land are all the Western states" and listing the top ten states with the greatest percentage of federally owned land).

[41] "PILT payments for [fiscal year 2012] totaled $393.0 million in mandatory spending; in contrast , the annual appropriation . . . for the bulk of funding for the [DOI] was $10.3 billion, or 26 times the PILT program. [Yet, f]or a relatively small fraction of the federal budget, PILT garners considerable attention for local reasons: (1) . . . 1850 counties were eligible for PILT [in 2012]; (2) the average payment per county . . . was $212,456; (3) while some counties received only $100 . . . , many received over $1 million and 14 received over $3 million. The resulting impact on budgets of local governments helps generate interest despite the comparatively small size of the PILT program." CORN, *supra* note 29, at 15.

[42] U.S. DEP'T OF INTERIOR, *supra* note 12.

[43] Lars Noah, *Doubts About Direct Final Rulemaking*, 51 ADMIN. L. REV. 401, 403 (1999).

engage in notice-and-comment rulemaking under 5 U.S.C. § 553.[45] Although other reforms may be proposed—for example, the abolishment of PILT entirely[46]—these are highly unlikely to succeed and might cause more harm than good.[47] By utilizing notice-and-comment rulemaking, DOI has the best opportunity to revamp its administration of PILT to bring itself into alignment with congressional intent.[48] Furthermore, this alternative is attractive because it preserves the agency's discretion to alter course in the future[49] and is the choice most likely to be upheld in court.[50]

Part I discusses the history of public land management in the United States, in particular the development of the current land management regime, as well as the creation of the Payment in Lieu of Taxes program. Part II examines the legislative intent behind the payments deduction provision of PILT, the administrative interpretation of the provision, and state laws that bypass this provision. Also, Part II considers judicial interpretations of PILT and any bearing that may have on the deduction issue, as well as Supreme Court decisions on the issue of judicial deference to administrative decisions and regulations. Part III examines whether, in the light of the aforementioned history and relevant law, DOI could enforce the Comptroller General Opinion requiring that service districts be independent and what effect such enforcement might have. Part IV considers various counter-arguments that might be made against strict enforcement of the deduction provision. Part V concludes by recommending that DOI administer PILT in a manner that more closely adheres to the original legislative purpose of the Act and recommends

[44] Essentially, Western legislators are fighting to make PILT a permanent mandatory program and Eastern legislators are fighting their efforts. 160 Cong. Rec. S385-01 (daily ed. Jan. 16, 2014) (statement of Sen. Enzi) ("We need to stop playing games with the Payment in Lieu of Taxes Program and find a way to ensure it is adequately and fairly funded now and for years to come."). As a result, the reauthorization of PILT happens on a year-year basis. *Id.* This leaves many local governments in a state of fearful limbo as they wait to know whether they can budget in PILT funds—or not. Jimmy Hancock, *PILT Funds Uncertainty Concerns Counties: Money Is Crucial For Key Public Services*, IDAHO STATE J., Feb. 4, 2014, http://www.idahostatejournal.com/members/pilt-funds-uncertainty-concerns-counties-money-is-crucial-for-many/article_5ec88de0-8d70-11e3-af6b-0019bb2963f4.html; Ian Margol, *PILT payments at risk*, KKCO 11 NEWS, Jan. 21, 2014, http://www.nbc11news.com/news/headlines/PILT-payments-at-risk-241210671.html ("Budgets across western Colorado could be taking a big hit in 2014 as congress moves to halt payments for public lands.").

[45] 5 U.S.C. § 553 (2006).

[46] *See* discussion, *infra* Subsection III.A.3.

[47] Despite the abuse, PILT does serve a legitimate need for at least some local communities.

> [P]roperty taxes fund county governments allowing them to provide essential services such as law enforcement, public safety, infrastructure maintenance, education, and health services . . . . A fully funded PILT program helps to offset the loss of these important revenues and fulfill the federal government's obligation to local communities with large amounts of federal land.

Letter from Michael B. Enzi, Senator, & Tom Udall, Senator, to Barbara Mikulski, Chairwoman, Committee on Appropriations, U.S. Senate, Richard Shelby, Vice Chairman, Committee on Appropriations, U.S. Senate, Jack Reed, Chairman, Subcommittee on Interior, Environment, Committee on Appropriations, U.S. Senate, & Lisa Murkowski, Ranking Member, Subcommittee on Interior, Environment, Committee on Appropriations, U.S. Senate (Dec. 23, 2013), *available at* http://www.scribd.com/doc/193303144/PILT-Appropriations-Letter#download.

[48] *See* discussion, *infra* Subsection II.A.1.

[49] *See* United States v. Mead Corp., 533 U.S. 218, 247 (2001) (Scalia, J., dissenting) (emphasis in original) ("Once the court has spoken, it becomes *unlawful* for the agency to take a contradictory position; the statute now *says* what the court has prescribed.").

[50] *Id.* at 228 (majority opinion); City of Arlington, Tex. v. FCC, 133 S. Ct. 1863, 1868 (2013).

that Congress amend PILT to provide more equitable payments and give states and local communities the right incentive: to manage, rather than exploit, public lands.

II. THE HISTORY OF FEDERAL LAND OWNERSHIP & MANAGEMENT POLICY

The question of federal land ownership is a divisive issue, particularly in the American West.[51] From the founding, the United States held and disposed of public lands.[52] Although similar debates occurred concerning the disposition of federal land holdings during the nineteenth century,[53] these earlier controversies were ultimately resolved as these relatively rich agricultural lands were settled and developed.[54] Further West, however, despite the best efforts of Congress,[55] settlement never really took off,[56] leaving "around 560 million acres open to entry

[51] Although federal land ownership has long been controversial, the current era of controversy is a byproduct of the changing emphasis in federal land policy from disposal to retention. Legislation in the 1970's "dashed Western hopes that the U.S. would gradually turn control of public lands over to local governments." *The Sagebrush Rebellion*, U.S. NEWS & WORLD REPORT (Dec. 1, 1980), http://www2.vcdh.virginia.edu/PVCC/mbase/docs/sagebrush.html. At the center of the issue, today as much as ever, is the basic issue of how the public domain is to be managed—and who is to manage it. *Id.* This original movement, known as the "Sagebrush Rebellion" resulted in overwhelming failure because "[t]o date, judicial challenges and legislative and executive efforts generally have not resulted in broad changes to the level of federal ownership." GORTE, *supra* note 51, at 3 (2012)*; see also* Gehrke, *supra* note 4 (discussing a contemporary attempt by the State of Utah to lay claim to federal lands in the state).

[52] For example, even prior to the creation of the Federal Constitution, the Northwest Ordinance of 1787 established a procedure for what were then the "Western lands" held by the federal government. Robert Barrett, *History on an Equal Footing: Ownership of the Western Lands*, 68 U. COLO. L. REV. 761, 766 (1997)*; see also* An Act to Provide for the Government of the Territory Northwest of the River Ohio, ch. 8, 1 Stat. 50, Art. V (1789), *reprinted in* 51 CLEV. ST. L. REV. 659, 663 (2004).

[53] For example, in 1828, Governor Ninian Edwards of Illinois "maintained that the Constitution gave the Federal government no power to exercise control over the public lands in a state after its admission to the Union." PAUL WALLACE GATES & ROBERT W. SWENSON, PUBLIC LAND LAW REVIEW COMM'N, HISTORY OF PUBLIC LAND LAW DEVELOPMENT 9 (1968). Within thirty years, after various land grants and years of land sales, "virtually all the public lands were gone" in Illinois. *Id.* at 18.

[54] Much of the early debate was over the distribution of receipts from public land sales, *not* over whether or not the lands should be sold*; see, e.g.*, *id.* at 13-15 (discussing at length the Deposit Act, which distributed the proceeds of public land sales between public lands and non-public lands states). This land was "offered for sale to help offset the new nation's Revolutionary War debts and [was] granted to settlers and railroads to encourage settlement of the western United States." Scott W. Hardt, *Federal Land Management in the Twenty-First Century: From Wise Use to Wise Stewardship*, 18 HARV. ENVTL. L. REV. 345, 352 (1994).

[55] Some thirteen years after the passage of the Homestead Act of 1862, which was intended to facilitate the settlement of the West, the Commissioner of the General Land Office wrote that, "it may be safely affirmed that, except in the immediate valleys of the mountain streams, where by dint of individual effort water may be diverted for irrigating purposes, title to the public lands cannot be honestly acquired under the homestead laws." COMM'R OF THE GEN. LAND OFFICE, DEP'T OF INTERIOR, ANNUAL REPORT OF THE COMMISSIONER OF THE GENERAL LAND OFFICE 7 (1875).

[56] Whereas much of the land East of the Mississippi was suitable for farming or agricultural production, the arid, mountainous regions of the West proved much less attractive. By 1946 then, the Secretary of the Interior described this land as "the land which nobody wanted very much, the land without people." U.S. DEP'T OF INTERIOR, ANNUAL REPORT OF THE SECRETARY OF THE INTERIOR 29 (1946). As a partial response to this, and the growing sentiment that "[n]ational pride in the possession and development of [the public lands for recreational purposes] seem[ed] to be displacing the earlier views," GATES & SWENSON, *supra* note 53, at 9, the Public Lands

and settlement" in 1900.[57] As a result, more recently, the debate has changed from "land disposal" to "land management" and even "land stewardship."[58]

A. 1800s through 1970s

Prior to the enactment of PILT, the primary source of revenue sharing funds between federal and local governments came "from the sale of commodities from public lands."[59] State and local governments in areas with high concentrations of federal lands were encouraged to depend almost exclusively on the extraction of natural resources for local revenues, to the detriment or neglect of other development possibilities.[60] This early program had two major side effects on contemporary land management.[61] First, there was widespread instability in payments as the market prices for the commodities extracted—such as timber and minerals—rose and fell, raising concerns arose over the viability of federal programs as a dependable revenue source for local governments.[62] Second, and perhaps more importantly, the variability in federal payments had the effect of encouraging local communities to take an active role in setting the goals of land management policies.[63]

In large part, the mission of the PLLRC in 1964 was to investigate and suggest changes to the prevailing public land policy that produced these perverse incentives.[64] The situation on the ground, after over a hundred years of attempting to dispose of federal lands, left the federal government unprepared to manage vast tracts of land.[65] Although the PLLRC was advisory, the principles that it suggested were powerful and have had a lasting impact on land management, including the shift towards management for conservation and recreation rather than disposal and

Law Review Commission recommended that these lands be retained indefinitely by the federal government, PUBLIC LAND LAW REVIEW COMM'N, *supra* note 33, at 1.

[57] PEFFER, *supra* note 3, at 3. This land was of such a quality that "[w]ithout water, most of what remained could never be expected to furnish arable farms." *Id.*

[58] Hardt, *supra* note 54, at 345 ("Historically, the debate over federal land management policy has often focused on whether the federal government should retain ownership and management responsibilities over its vast land holdings.")

[59] Ervin G. Schuster, *PILT: Its Purpose and Performance*, 93 J. FORESTRY 31, 31 (1995).

[60] For example, the Public Land Law Review Commission found that "any attempt to tie payments to states and local governments to receipts generated from the sale or use of public lands or their resources causes an undue emphasis to be given in program planning to the receipts that may be generated." PUBLIC LAND LAW REVIEW COMM'N, *supra* note 33, at 4.

[61] Schuster, *supra* note 59, at 31-32.

[62] *Id.*

[63] In effect, these governments heavily pushed extraction based development as they "had a vested interest in the outcome[]." *Id.* For example, "[a] county's commissioners[] . . . would understandably be concerned about allocating lands to wilderness rather than revenue-generating timber production." *Id.*

[64] The review carried out by the Commission discovered a number of inadequacies in the existing public lands laws, among them "the emphasis on disposition." PUBLIC LAND LAW REVIEW COMM'N, *supra* note 33, at 4. Other inadequacies included "the absence of statutory guidelines for administration . . . . [and that] the disposition laws themselves were obsolete and not geared to the present and future requirements of the Nation." *Id.*

[65] The Commission "urge[d] reversal of the policy that the United States should dispose of the so-called unappropriated public domain lands." *Id.* at 1. Essentially, it called for a sea change in thought concerning these lands: "While there may be some modest disposals, we conclude that at this time most public lands would not serve the maximum public interest in private ownership." *Id.*

development.[66] Public opinion and administrative policy provided an additional impetus for the shift, having together rendered the disposal program "ineffective."[67] As a result, the underlying policy objectives of federal land managements, as it stood, both produced "no predictable administrative policy"[68] and undermined the basic assumptions of the program.[69]

B. Post-1976

As noted above, since 1976 land policy sharply shifted toward retention of public lands and management for environmental purposes and recreation.[70] The Federal Land Policy and Management Act (FLPMA), which created the Bureau of Land Management (BLM) and assigned to it the duty to manage most federal land, embodied this shift.[71] As a result of BLM's sweeping responsibilities, the Secretary of Interior initially chose BLM to administer PILT.[72]

Under the old system, it was assumed that all lands would pass into private or local government hands at some point; therefore, a comprehensive revenue sharing program appeared to be unnecessary.[73] With the shift in policy,[74] embodied by FLPMA,[75] came the need to compensate local governments for the costs and burdens placed on them by having large

[66] For example, it proposed that "[t]he United States need not seek to obtain the greatest monetary return, but should recognize . . . that the land will be dedicated . . . to services for the public as elements of value received." PUBLIC LAND LAW REVIEW COMM'N, *supra* note 33, at 4.

[67] *Id.* at 1.

[68] *Id.*

[69] For example,

> a report prepared for the PLLRC investigated the relationship between federal lands and state and local taxes . . . . [T]he total state and local tax burden of public land states and counties was compared to the burden in non-public land states of similar population size and urban-rural composition and found [the burden] to be significantly larger in public land intensive areas. . . . [The report] suggest[ed] that tax immunity was logically suspect as a contributing cause.

Seastone, *supra* note 9, at 376.

[70] Arguably, this shift began as early as the early 1870s with the creation of Yellowstone National Park in 1872. *Federal Land Policy and Management Act (FLPMA) of 1976: How the Stage Was Set for BLM's "Organic Act*, U.S. BUREAU LAND MGMT., http://www.blm.gov/flpma/organic.htm (last visited Oct. 17, 2013). However, it was not until the passage of FLPMA in 1976 that "Congress expressly declared as policy that the remaining public domain lands would be retained in Federal ownership unless disposal of a particular parcel served the national interest." *Id.*

[71] *See* 43 U.S.C. § 1701 (2006) ("Congressional Declaration of Policy"); § 1731(a)-(b) (creating Bureau of Land Management and assigning it the duty to administer FLPMA).

[72] Financial Assistance, Local Governments, 42 Fed. Reg. 51,580 (Sept. 29, 1977).

[73] PUBLIC LAND LAW REVIEW COMM'N, *supra* note 33, at 4 ("The continuation of the general United States policy of providing for transfer to private ownership of virtually all of the public lands would not have required consideration of a comprehensive program to compensate state and local governments for the burdens imposed by Federal ownership of public lands since such ownership was then transitory. . . . The potential retention of additional millions of acres of public domain lands . . . requires that we reexamine the obligations and responsibilities of the United States as a landowner in relation to state and local governments upon which continuing burdens will be placed.").

[74] Seastone, *supra* note 9, at 373 (noting that PLLRC specifically rejected an "assertion that state and local governments enjoy unique benefits from federal land ownership" and thus do not need to be compensated for federal tax immunity).

[75] *See, e.g.*, § 1701(a)(1) ("The Congress declares that it is policy of the United States that the public lands be retained in Federal ownership . . . .").

amounts of nontaxable land in their jurisdictions,[76] as well as providing a more regular revenue stream for communities with heavy concentration of federal lands.[77] This is because the new policy essentially foreclosed the possibility that the majority of federal lands would ever pass into state or local hands.[78] Rather than act as a comprehensive revenue sharing scheme, the PILT Act kept the old laws in place, but deducted payments-in-lieu-of-taxes by the amount received under those other programs.[79] Today the states receiving the greatest amount of PILT are California ($41.5 million), Utah ($35.4 million), New Mexico ($34.7 million), Arizona ($ 32.2 million), Colorado ($32 million), Montana ($26.5 million), Alaska ($26.4 million), Wyoming ($25.3 million), Nevada ($23.3 million), and Washington ($17.2 million). [80]

III. THE PAYMENT IN LIEU OF TAXES ACT: PURPOSE AND INTERPRETATION

Section 6903 of the PILT Act makes clear that payments must be reduced if the unit of government received money falls under another "payment law" during the prior fiscal year.[81] However, DOI allows local governments to avoid deductions if these payments are not "received by" the local governments because the monies are not under their direct control.[82] That is, if the monies are diverted to independent entities for which the local government is not "responsible," the county is deemed to have not received this money, and thus their total amount of PILT is not

[76] The costs and burdens are not simply the loss of taxes, but also the maintenance of roads through federal lands as well as policing*; see* Seastone, *supra* note 9, at 376*; see also* PUBLIC LAND LAW REVIEW COMM'N, *supra* note 33, at 4 ("[W]e find that [revenue sharing] programs actually have no relationship to the burdens imposed on state and local governments by the retention of public lands in Federal ownership.").

[77] *See, e.g.*, Schuster, *supra* note 59, at 31.

[78] *See, e.g.*, *Secure Rural Schools and Payment in Lieu of Taxes: Hearing Before S. Comm. on Energy & Natural Res.*, 113th Cong. 50 (2013) (statement of Ryan R. Yates, Associate Legislative Director, National Association of Counties) ("In lieu of a future in which lands could continue to pass from Federal ownership to private ownership, Congress opted to reimburse local governments for land that would remain [with the] Federal Government in lieu of paying direct property taxes."). PILT only covers certain federal land holdings, however, such as those lands "held by the DOI including Bureau of Land Management lands, Wildlife and Fisheries lands, and National Park service lands, and lands held by other agencies like the Army Corps of Engineers and Department of Agriculture as National Forest and National Wilderness lands." Frank Pommersheim, *Land Into Trust: An Inquiry Into Law, Policy, and History*, 49 IDAHO L. REV. 519, 543 (2013) (noting that tribal trust lands are excluded from this formula).

[79] *See* Seastone, *supra* note 9, at 375-76; Michael C. Blumm & Tim Wigington, *The Oregon & California Railroad Grant Lands' Sordid Past, Contentious Present, and Uncertain Future: A century of Conflict*, 40 B.C. ENVTL. AFF. L. REV. 1, 50 (2013) ("Under PILT . . . counties receive payments per acre of land managed by either the Bureau of Land Management (BLM) or U.S. Forest Service (USFS) to compensate them for revenues lost due to the tax-exempt status of federal lands; however, this payment is reduced for counties that receive money through . . . revenue sharing programs."); *see also* discussion, *infra* Subsection II.A.1.

[80] Oregon falls closely behind with $15.6 million. U.S. DEP'T OF INTERIOR, *supra* note 12. After Oregon, the next highest payment drops to $5.7 million to South Dakota. *Id.*

[81] *See* 31 U.S.C. § 6903(b)(1) (2006) (requiring that payments be reduced by the amount that the unit "received in the prior fiscal year under a payment law"); § 6903(a) (defining "payment law").

[82] *See generally* Memorandum from Thomas L. Sansonetti, Associate Solicitor, Energy and Resources, United States Department of Interior, to Director, Bureau of Land Management on PILT Payments to Special Service Districts (Oct. 3, 1988) [hereinafter Sansonetti Memo] (on file with author).

affected.[83] On the other hand, if the county—or other local unit of government—retains control, theoretically, the entity is not independent and the monies received must be deducted from PILT.[84] Because DOI has been lax in the enforcement of this condition, many states have created quasi-independent bodies to funnel "payment law" funds and thus prevent deductions.[85] As enforced, states and local governments are able to "double-dip"[86] because they can, and generally do, receive the benefits of both PILT and payments under other federal revenue sharing laws.[87] This is wrong because (1) it is contrary to the intent of Congress, which added the provision reducing PILT payments specifically to prevent this from occurring; and (2) it allows resource-rich counties to receive a disproportionate amount of federal funds.[88] Furthermore, if enforced as enacted, PILT would disincentivize extractive resource development by making this means of development more costly as compared to alternatives.[89]

[83] This it does in accordance with a Comptroller General Opinion requested by the Solicitor General of DOI. U.S. GEN. ACCOUNTING OFFICE, *supra* note 18, at 20.

[84] *See* discussion, *infra* Subsection II.A.2.

[85] In fact, in 1998, a lawyer working for the Congressional Research Service noted that "[i]t would be in the interest of every state to enact pass through laws; those lacking them may be unaware of this portion of PILT." M. LYNNE CORN, ENV'T & NATURAL RES. DIV., CONG. RESEARCH SERV., RL98574, PILT (PAYMENTS IN LIEU OF TAXES): SOMEWHAT SIMPLIFIED (1998), *available at* http://www.cnie.org/NLE/CRSreports/risk/rsk-20.cfm.

[86] Webster's Dictionary defines "double dip" as "to obtain money from two sources at the same time or by two separate accounting methods." *Double Dip Definition*, MERRIAM-WEBSTER DICTIONARY, http://www.merriam-webster.com/dictionary/double%20dip (last visited Oct. 29, 2013). Much of the complication of the tax code can be explained by the desire to prevent "double-dipping" and close loopholes that allow it*; see, e.g.*, Dual Consolidated Loss Restrictions, 72 Fed. Reg. 12,902, 12,906 (Mar. 19, 2007) (to be codified at Treas. Reg. pts. 1 & 602) ("In general, these rules are intended to target structured transactions that designed to achieve a double dip . . . ."); I.R.S. Chief Couns. Advice 2008-22-027 (May 30, 2008) ("Congress sought to prevent this practice of 'double-dipping,' because it provided an undue tax advantage . . . ."); Press Release, U.S. Dep't of the Treasury, Treasury and IRS Issue Ruling to Halt Abusive Employment Tax Arrangements Involving Employee Parking (Oct. 1, 2004), *available at* http://www.treasury.gov/press-center/press-releases/Pages/js1974.aspx ("This is a classic 'double-dip arrangement . . . . Treasury and IRS have acted promptly to shut it down, enabling responsible taxpayers and their advisors to stay away from such double-dip arrangements in the future.").

Congress is frequently concerned that some persons are able to use the tax code to gain unfair benefits via double-dipping practices. For example, a recent search of the Congressional Record turned up over thirty references to "double dip" during the 112th and 113th Congresses alone. CONGRESS.GOV, http://beta.congress.gov/congressional-record/ (last visited Mar. 3, 2014) (search for "double dip"). Occasionally these concerns, as in the case of PILT, relate to the possibility that States are misusing federal monies. 122 Cong. Rec. 25,743, 25,747 (1976); 127 Cong. Rec. 16690 (1981). For other examples, unrelated to PILT, see, *e.g.*, 134 Cong. Rec. H4181-03 (daily ed. June 14, 1988) (statement Rep. Jack Buechner) (describing how "double-dipping" by some States impacts others negatively).

[87] *See* discussion *infra* Subsection II.A.3.

[88] The "payment law" deduction requirement was added specifically to prevent counties and other units of local government from receiving double payments of federal aid. CORN, *supra* note 85 (noting that deductions were designed to "even out" payments between counties); 127 Cong. Rec. 16,690 (1981) (declaring that "we . . . [have] very carefully deducted any [other federal] revenues . . . from the moneys paid in lieu of taxes . . . so the county [does] not get a double revenue").

[89] Widespread abuse also disincentivizes counties and local governments from pursuing conservation. "Some [resource managers] believe that PILT has completely overridden the revenue sharing consequences of other legislation . . . . [while o]thers continue to focus exclusively on revenues provided by earlier revenue-generating legislation, as if PILT did not exist." Schuster *supra* note 59, at 32. Presumably this is because those areas are able to receive the monetary benefits of PILT without deducting revenue sharing payments.

A. Legal Issues

A specific formula is used to calculate PILT payments including the population of the county, total amount of federally owned land in that county, and monies paid to the county from other federal programs.[90] Congress provided that the previous year's payments from other specific federal programs to counties from eligible federal lands would be subtracted from the PILT payment of the following year.[91] The DOI relies on self-reporting by the states themselves to determine the appropriate level of PILT.[92]

1. *Legislative History*

Although the legislative history of 31 U.S.C. § 6903 is relatively sparse, what there is indicates that Congress was preoccupied with the idea that counties or local governments might "double-dip" from both PILT and other payment laws.[93] In response, Representative James Weaver (D-OR) argued that local government would not receive a double payment because other federal payments were "deducted from the payments in lieu of taxes."[94] The House Committee on Interior and Insular Affairs declared that "payments under [the Act were to] go directly to units of local government since it is the local governments that assume the burden . . . . The Committee does not believe [PILT] payments should be restricted or earmarked for use for specific purposes."[95] The Senate Report on the passage of the Act in 1976 further qualifies that "payments actually received by the local government under other statutes" were to be deducted.[96] Five years later, Representative Weaver reiterated this point when discussing an amendment to

[90] 31 U.S.C. § 6903(b)(1)(A)-(B) (2006). In this regard, PILT is somewhat unique because it "is not, itself, dependent upon resource revenue and provides for a minimum payment to counties based on a formula of acreage and population." James R. Rasband, *The Rise of Urban Archipelagoes in the American West: A New Reservation Policy?*, 31 ENVTL. L. 1, 65 n.311 (2001).

[91] *Id.* Under subsection (A), "a unit of general local government" receives $1.65 per acre of "entitlement land" located within its jurisdiction reduced "by amounts the unit received in the prior year under a payment law." § 6903(b)(1)(A). Under subsection (B), that payment is twenty cents per acre, but is not reduced by monies received under another payment law. § 6903(b)(1)(B). The payment is "equal to the greater of" either calculation. § 6903(b)(1). A payment under either (A) or (B) is subject to limitation based on population*; see generally* § 6903(c)(2).

[92] § 6903(b)(2) ("The chief executive officer of a State shall submit to the Secretary of the Interior a statement on the amounts of payments the State transfers to each unit of general local government in the State out of amounts received under a payment law."). Among other problems, this creates an obvious conflict of interest wherein the state has the incentive to manipulate its allocation of revenue sharing payments to maximize the payment of PILT.

[93] *See* 122 Cong. Rec. 25,743, 25,747 (1976).

[94] *Id.* at 25,747.

[95] H. R. Rep. No. 94-1106, at 11-12 (1976).

[96] S. Rep. 94-1262, at 11; *see also id.* at 15 ("[The Act] requires that any payments received under [a payment law] . . . which are *actually received* by a unit of local government are . . . deducted. [Because i]n most cases only a small percentage of mineral leasing revenues produced within a county are returned to that county by the State . . . . to preclude penalizing these counties, [the Act] provides only those monies actually received by the local government should be deducted.") (emphasis added).

PILT.[97] Despite his assurances and those of other congressmen, however, double payments commenced because states discovered a work-around to avoid deductions.[98]

2. *Implementation and Agency Interpretation*

As issued in 1977, the original definition of "money transfers" was limited to "payments by or through the State government to units of local government."[99] During the notice-and-comment process, BLM received a number of comments suggesting "money transfers" should exclude "funds received by qualified units of local government under [other payments laws] and passed through to single purpose units of government."[100] After initially rejecting this suggestion,[101] BLM reconsidered and issued an amended rule in 1980.[102] This provision

[97] "[W]e . . . [have] very carefully deducted any revenues from timber sales, or minerals, mineral royalties, from the moneys paid in lieu of taxes under this bill so the county [does] not get a double revenue from the federal government." 127 Cong. Rec. 16,690 (1981).

[98] A report prepared by the United States General Accounting Office in 1979—just two years after the initial PILT payments began—indicated that as existing, PILT caused the "[l]oss of congressional budgetary control over actual annual payments for the program." U.S. GEN. ACCOUNTING OFFICE, *supra* note 18, at 18.

[99] Financial Assistance, Local Governments, 42 Fed. Reg. 51,580, 51,582 (Sept. 29, 1977).

[100] *Id.*

[101] BLM determined that it lacked the authority to make this change because "[the Act] specifically requires that payment be reduced by the amount received by units of local government, in aggregate, under [listed payments' laws]. This cannot be changed by regulation." *Id.*

[102] The new rule included additional language, with exceptions that BLM would not consider; see *generally* Financial Assistance, Local Governments Entitlement Lands; Payments in Lieu of Taxes, 45 Fed. Reg. 47,619 (July 15, 1980). Although the rulemaking notice notes changes to the definitions section, no explanation is given for the refinement of the definition of "money transfers" or how the issue with statutory interpretation was resolved. *Id.* This reconsideration came in response to a request by the BLM for an opinion from the Office of the Solicitor of the DOI.

> "[B]efore the second [PILT] payment was made, BLM requested the Department of the Interior Solicitor's opinion on whether the payments to school and special districts should be considered payments received by the county in which the district was located. Instead of issuing an opinion, the Solicitor . . . requested a Comptroller General decision on the matter. . . . [T]he Comptroller General held that payments made directly to independent school and special districts and payments required by State law to be passed through to financially independent school and special districts should not be deducted . . . unless the counties are legally responsible for providing these services and have collected taxes for this purpose."

U.S. GEN. ACCOUNTING OFFICE, *supra* note 18, at 20. This interpretation was reiterated by the Comptroller General in 1982, again, at the request of the Solicitor of DOI. 61 Comp. Gen. 365, 365 (Apr. 26, 1982) ("We conclude that where a county is responsible for providing and supporting public schools and funds them with its own tax revenues, the entire amount of [revenue sharing payments] expended for the schools, regardless of whether such expenditure exceeds the minimum required by state law, must be treated as 'received' for purposes of computing the county's [PILT] payment.").

remained relatively unchanged until 2004.[103] After the regulation was amended in 2004, however, the definition of "money transfers" was deleted without explanation.[104]

Although the DOI uses information gathered and provided by "several sources," it uses data the states themselves supply to calculate deductions from PILT.[105] Currently, "[t]he Governor . . . provides the amount of money transfers (land revenue sharing payments) disbursed by the State during the previous fiscal year to eligible local governments," and the DOI uses this data to compute the appropriate amount of PILT.[106] The PILT Act lists a number of Federal payment programs[107] to be specifically deducted under PILT.[108]

Furthermore, the Comptroller General has, on two separate occasions, offered opinions related to allowable payments of federal revenue sharing payment monies and deductions to PILT payments.[109] The 1978 opinion, issued in response to a request by the Solicitor General of the DOI,[110] addressed whether federal revenue sharing payments made to a state should be deducted from PILT if (1) directly distributed by that state to a school district or (2) distributed by that state to a county, but which state law obligated that county to pass to a school district.[111] In response to the first question, the Comptroller General concluded that revenues passed through a local government unit to a smaller agency or unit are not deductible under PILT.[112] As to the second question, the Comptroller General determined that monies states distributed to

[103] The provision continues on to say that "[t]he term does not include payments made to a State and distributed by the State directly to a school district or other single or special purpose governmental entities, or payments distributed by the State to the unit of local government which the unit of local government is required by State law to pass on to a school district or other independent single or special purpose governmental entity." 43 C.F.R. § 1881.0-5(2)(ii)(d) (1998), *amended by* Payment in Lieu of Taxes, 69 Fed. Reg. 70,557-01 (Dec. 7, 2004) (amending the DOI's regulations on Payment in Lieu of Taxes "to reflect the transfer of responsibility for operating the . . . program from the Bureau of Land Management to the DOI, Office of the Secretary").

[104] Although the current regulation does not define "money transfers" as used in the statute, prior to the 2004 amendments these were defined as "money or cash payments received by units of local government under the statutes in section [(a)(1)] of the Act, 31 U.S.C. [§ 6903]." 43 C.F.R. § 1881.0-5(d) (1998); *see also* § 44.11 ("What are the definitions of terms used in the subpart?"); Payment in Lieu of Taxes, 69 Fed. Reg. 70,557-01 (Dec. 7, 2004). This is interesting particularly because, apart from some minor cosmetic changes, the rest of the definitions sections remained completely unaltered.

[105] § 44.21(a)(2).

[106] *Id.*

[107] *See* 31 U.S.C. § 6903(a)(1)(A)-(J) (2006) (defining "payment law" as including the Bankhead-Jones Farm Tenant Act, the Secure Rural Schools and Community Self-Determination Act of 2000, the Federal Power Act, and the Taylor Grazing Act, among others).

[78] 43 C.F.R. § 44.21(c)(3) (2014).

[109] These opinions are: 61 Comp. Gen. 365 (1982); 58 Comp. Gen. 19 (1978). They are important because the DOI has chosen to defer to the Comptroller General's interpretation of the Act; *see, e.g.*, Sansonetti Memo *supra* note 82. As discussed above, this may also account for the change

[110]

> "[B]efore the second [PILT] payment was made, BLM requested the Department of the Interior Solicitor's opinion on whether the payments to school and special districts should be considered payments received by the county in which the district was located. Instead of issuing an opinion, the Solicitor . . . requested [the] Comptroller General decision on the matter."

U.S. GEN. ACCOUNTING OFFICE, *supra* note 18, at 20.

[111] 58 Comp. Gen. 19, 19 (1978).

[112] *Id.* at 22.

counties, but which state law obligated the counties to pass to another entity, were not "received by" the county for purposes of the PILT Act.[113] This is because, in such cases, "the county is legally obligated to act as a *mere conduit* in passing on the funds."[114]

Almost a decade later, the 1986 opinion addressed slightly different, but very similar issue: "whether state distributions of federal mineral lease monies to a county would lead to a loss of PILT funds if the state prescribes how the county is to use the funds."[115] The Comptroller General replied that if the service district utilizes federal funds[116] to provide services the local government would otherwise carry out and pay for itself, then the funds "must be deducted" from PILT.[117] This applies "regardless of whether or not the state prescribes how the county is to use these funds."[118] The only exception recognized to this rule is where the county is, again, acting merely as a "conduit."[119]

Two years later, Thomas Sansonetti wrote a memorandum for the DOI regarding PILT payments to special service districts.[120] Sansonetti reviewed the two Comptroller General Opinions and concluded that (1) service districts that are financially and politically independent from the counties that create them may receive mineral lease payments without triggering corresponding deductions from PILT money the creating counties otherwise would receive, and (2) PILT payments to counties under 31 U.S.C. § 6903(b)(1)(A)-(J) must be reduced by the amounts received by such counties under a "payment law" in the prior fiscal year.[121] This

[113] Specifically, the Comptroller General noted that there was "no support" for the conclusion that "payments 'received by such units of local government' mean[t] something less than 'actually received by' such units and available to them for obligation and expenditure to carry out their own responsibilities." *Id.* at 24.

[114] *Id.* (emphasis added). However, a county may not abuse this exception by simply delegating a greater portion of its funds than is required. For example, if a county "required by state law to pass a certain portion of its [section 6903(a)] receipts on to politically and financially independent school districts, to chooses to pass on [a] sum which exceeds [the] state mandated minimum, [the] amount by which [the] county's expenditure exceeds [the] minimum must be viewed as 'received' for purposes of computing the Payment in Lieu of Taxes Act payment." 61 Comp. Gen. 365, 368 (1982). On the other hand, "[i]n a state which does not proscribe a minimum payment . . . but instead delegates that function to the county board of supervisors, the county board's actual allocation is the equivalent of a state authorized minimum, and need not be deducted." *Id.* "If it is determined . . . that . . . [service] districts are not politically and financially independent of the counties in which they are located, the payments of [6903(a)] receipts to the [service] districts must be regarded as fulfilling [a] county['s] responsibility." *Id.* at 369.

[115] 65 Comp. Gen. 849, 849 (1986).

[116] "Mineral lease monies" are funds received by the States pursuant to the Mineral Lands Leasing Act of 1920. 30 U.S.C. §§ 181-87, 187a, 187b, 189-93, 195, 201, 202, 202a, 203, 205-08, 208–1, 209, 211-14, 223-26, 226–2, 226–3, 228-29, 229a, 241, 251, 261-63 (2006). Typically, these monies are distributed to the States by the federal government, which then distribute the funds to local governments according to State statutory schemes. For example, in Utah, these funds are deposited into the Mineral Bonus Account, which is then distributed to various local governments and State agencies. UTAH CODE ANN. § 59-21-2(2)(b) (2014). In Colorado, on the other hand, the money is directed to special "federal mineral lease districts." COLO. REV. STAT. § 30-20-1301 (2011). Regardless of the means, however, the result is the same: because the funds are not received "directly" by local governments these funds are not deducted from PILT; see discussion *supra* Subsection II.A.3.b.

[117] 65 Comp. Gen. 849 (emphasis added).

[118] *Id.*

[119] *Id.* at 852.

[120] *See generally* Sansonetti Memo, *supra* note 82.

[121] *Id.* at 4.

memorandum defined service districts as "local government entities separate from county governments."[122]

3. *States Seek to Maximize Available Subsidies*

According to 31 U.S.C. § 6903(a)(1)(H), one of the federal revenue sharing program payments deducted from PILT is the Mineral Lands Leasing Act.[123] The Mineral Lands Leasing Act established a leasing system that allows private parties to obtain leases to federal lands to extract oil and gas.[124] In return, the law requires that the private party, whether an individual or corporation, pay a fee to the government in the form of "rentals and royalties."[125] Fifty percent of these royalties are paid to the state where the mineral extraction activity occurs.[126] These payments are particularly important in the West-Southwest region of the United States where the top four states receiving the greatest amount of federal mineral royalty disbursement received almost two billion dollars in payments in fiscal year 2012 alone.[127]

As a "payment law" under PILT, normally, any monies received under the Mineral Lands Leasing Act should be reported by the state and deducted from the county's PILT payment for the following year.[128] However, § 6903(b)(1)(A) only applies this reduction to "unit[s] of general

[122] A service district might carry out functions as varied as the education of minors and the construction of road projects. *Id.*

[123] § 6903(a)(1)(H) (2006). For examples of other revenue sharing programs whose payments are to be deducted from PILT, see discussion *supra* note 109.

[124] Specifically, these parties are authorized to "search for and develop . . . deposits." James B. Martin, *The Interrelationships of the Mineral Lands Leasing Act, the Wilderness Act, and the Endangered Species Act: A Conflict in Search of Resolution*, 12 ENVTL. L. 363, 367 (1982).

[125] For example, one provision, regarding the extraction of "gold, silver, or quicksilver [mercury] deposits," requires that the lessee pay a royalty of not "less than 5 per centum nor more than 12 ½ per centum of the net value of the output at the mine." 30 U.S.C. § 292.

[126] *See* 30 U.S.C. § 191(a) ("All money received from sales, bonuses, royalties . . . and rentals of the public lands under the provisions of this chapter . . . shall be paid into the Treasury of United States; and . . . 50 per centum thereof shall be paid by the Secretary of the Treasury to the State . . . within the boundaries of which the leased lands or deposits are or were located . . . ."); § 191(c)(1)-(2)(A) ("Notwithstanding the first sentence of subsection (a) of this section, any rentals received from leases in any State . . . on or after August 8, 2005 shall be deposited in the Treasury . . . . 50 percent shall be paid by the Secretary of the Treasury to the State within the boundaries of which the leased land is located or the deposits were derived."). This distribution of royalties is justified based on the fact that these "states must furnish services such as infrastructure and emergency protection from which lease-holders benefit." Elizabeth Malm, *Federal Mineral Royalty Disbursements to States and the Effects of Sequestration*, TAXFOUNDATION.ORG (May 30, 2013), http://taxfoundation.org/article/federal-mineral-royalty-disbursements-states-and-effects-sequestration.

[127] In order, these four states are Wyoming ($995,169,510), New Mexico ($488,155,684), Utah ($164,602,984), and Colorado ($157,819,385). Malm, *supra* note 128. Wyoming's share equaled nearly 47% of the entire disbursement for fiscal year 2012. *Id.* These payments make a significant difference to the fortunes of the affected states: for example, Wyoming's 2011 Mineral Lands Leasing payments, roughly equal to those of 2012, provided enough income "to finance about 12 percent of the state of Wyoming's general-fund budget that year." Samuel Western, *The Mineral Leasing Act of 1920: The Law That Changed Wyoming's Destiny*, WYOMING ST. HIST. SOC'Y (2012), *available at* http://www.wyohistory.org/essays/mineral-leasing-act-1920. Perhaps not coincidentally, three of these four states have taken egregious advantage of the DOI's lax enforcement of PILT to prevent these funds from being deducted under the payment law provision; see *infra* Subsection II.A.3.b.

[128] *See* U.S. GEN. ACCOUNTING OFFICE, *supra* note 18, at iii (noting a weakness of PILT is that it gives States considerable influence over the federal budget because States can influence the amount of payments that get reduced and provide the data from which the payments are calculated).

local government."[129] According to the DOI, a "general local government" is "the principal provider(s) of governmental services within the State,"[130] while service districts are specifically excluded.[131] This distinction is important because many states have created what are known as "pass-through laws" to pass federal monies through local governments to service districts set up to provide subsets of the same services that the local government would otherwise provide.[132] Through the use of pass through legislation, a state effectively neutralizes the deduction.[133]

Responding to their interest in obtaining maximum federal payments,[134] many states have enacted these laws to take advantage of this loophole.[135] These mainly work by bypassing the local government unit. First, where pass through laws exist, the state requires that § 6903(a)(1) payments be made directly to the state before being disbursed to local governments.[136] Next, state law authorizes the disbursement of the collected payments to "single purpose" or "special

[129] *See* 31 U.S.C. § 6903(b)(1)(A) (2006) (reducing payment "by amounts the unit received . . . under a payment law" the previous year).

[130] 43 C.F.R. § 44.11 (2012). Formerly, "[u]nit of general local government mean[t] a unit . . . [which] is the principal provider of governmental services affecting the use of entitled lands." § 1881.0-5(b)(1) (1998).

[131] § 1881.0-5(b)(2).

[132] A report prepared by the Congressional Research Service (CRS), denotes laws designed to prevent deductions as "pass-through laws" and sums up this process as follows:

> [I]f a state requires all counties to pass along some or all of their [payments received under an enumerated payments law] . . . the amount passed along is not deducted from the counties' PILT payments for the following year . . . . It would be in the interest of every state to enact pass-through laws; those lacking them may be unaware of this portion of PILT.

CORN, *supra* note 85 (emphasis added).

[133] In fact, this provision "would not apply [at all] if the state takes advantage of this pass-through feature." *Id.* This is more than a little ironic, given that this provision "was apparently intended to even out payments among counties." *Id.*

[134] *Id.*

[135] *See* U.S. GEN. ACCOUNTING OFFICE, *supra* note 18, at 27 ("For example, [i]n Utah 10 percent of the mineral leasing payments were passed directly to counties until passage of a new State law providing that these payments would be kept at the State level. As a result, Utah was not required to consider potential deductions of over $500,000 . . . . In Wyoming the counties' share of mineral leasing payments was reduced from 3 percent to 2.25 percent . . . [thus] reduc[ing] potential deductions . . . by about $528,000 for fiscal year 1978.").

"Pass-through laws" can be fairly complex and often require analysis through several statutes. For an example, see UTAH CODE ANN. § 59-21-1(1)(a) (2014) (requiring that all payments received "under the Mineral Lands Leasing Act . . . be deposited in the Mineral Lease Account of the General Fund"); § 59-21-2(2)(h)(i)(A)-(C) (allocating 40% of the funds held in the Mineral Lease Account to counties and special service districts created by counties). The monies distributed to special service districts are allocated "as determined by the county legislative body." § 59-21-2(2)(h)(ii)(B). Because these funds are funneled through other agencies rather than directly through local governments, the funds are not deducted. *See generally* U.S. GEN. ACCOUNTING OFFICE *supra* note 18. For additional examples, *see* CAROLE RICHMOND, OFFICE OF THE INTERAGENCY COMM., WASH. STATE RECREATION AND CONSERVATION OFFICE, OVERVIEW OF PAYMENT PROGRAMS RELATED TO FEDERAL AND STATE PUBLIC LANDS IN WASHINGTON, 9 n. 45 (2004), http://www.rco.wa.gov/documents/manuals&forms/TaxPaper.pdf ("Washington has a pass-through law and, therefore, counties receive the maximum PILT payments available."); U.S. GEN. ACCOUNTING OFFICE, LAND MANAGEMENT AGENCIES: REVENUE SHARING PAYMENTS TO STATES AND COUNTIES, 11 (1998) (discussing California law requiring that "all but a small portion of Mineral Leasing funds . . . be deposited in specific state funds or be allocated to specific school districts").

[136] *See, e.g.*, COLO. REV. STAT. § 34-63-102(1)(A)(II) (2014) ("[A]ll moneys, including any interest and income derived therefrom, received by the state treasurer pursuant to the provisions of the federal "Mineral Lands Leasing Act" . . . shall be deposited by the state treasurer into the mineral leasing fund, which fund is hereby created, for use by state agencies, public schools, and political subdivisions of the state . . . .").

purpose" districts.[137] Since the county or other "unit of general local government" never directly receives the payments, the DOI does not require that states include these payments in their annual reports.[138] Theoretically, this is proper and legitimate—unless the county retains political and financial control of the district.[139]

a. Criteria of Independence

As an example of this last point, in his memorandum Sansonetti concluded that, although the Utah Special Service District Act (Service District Act) "g[a]ve counties authority to create service districts that meet the Comptroller General's criteria of independence," the Act was "broad enough to permit a variety of arrangements," some which might not be sufficiently independent.[140] According to Sansonetti, the issue of deductions arises when there is a question whether or not a service district is "political[ly] and financial[ly] independent of the governing body of the county."[141] In order for a service district to be considered politically independent, the district must have an independent governing body—even if members of county leadership overlap.[142] Finally, the county or other creating authority should invest enough authority that the district has an area of authority and discretion to make independent decisions.[143]

Financial independence may be indicated by "the power to issue bonds and to borrow money."[144] Although this power is important, a financially independent service district is also responsible for the quality and implementation of the services it is authorized to provide.[145] Where a service district is created to prevent deductions in PILT by funneling other revenue sharing monies, local governments often commingle funds or use service district resources to

[137] § 34-63-102(5.4)(II) ("[F]orty-eight and three-tenths of the moneys shall be paid into the state public school fund to be used for the support of the public schools of the state."); § 34-63-102(5.4)(b)(I) ("[F]orty percent of the moneys shall be credited to the local government mineral impact fund. Fifty percent of the moneys so credited shall be distributed . . . in accordance with the purposes and priorities described in subsection (1) of this section . . . ."). In this way, the State covers functions that would normally be the fiscal responsibility of the local government—such as schools and roads—without actually *passing* the mineral lease moneys to the county, thus avoiding the deduction to PILT. In 1984, the Comptroller General weighed in and concluded that "[a]s long as section 6903(a) funds are given to a county to carry out the county's own responsibilities, they are funds subject to the deduction provision of the PILT payment formulae, even though the County may have no discretion as to the programs for which they must be used." *The Honorable Gene Chappie, House of Representatives*, B-214267, 1984 U.S. Comp. Gen. LEXIS 632, at *7-8 (1984). Of course, this implies that if a "responsibility" is removed from or delegated by the county to another agency or subdivision of government that payments will not be deducted.

[138] U.S. DEP'T OF INTERIOR, FISCAL YEAR 2013: PAYMENTS IN LIEU OF TAXES 11 (2013), *available at* http://www.doi.gov/pilt/upload/2013_PILT_AnnualReport.pdf.

[139] 61 Comp. Gen. 365, 365 (Apr. 26, 1982); see *also* discussion *supra* Subsection II.A.3.a.

[140] Sansonetti Memo *supra* note 82, at 3.

[141] *Id.* at 4.

[142] Therefore, the county should not "be the governing body of the Service District, nor should it be able to either direct the day-to-day actions of the Service District governing board or disband the governing board at will." *Id.* (emphasis added).

[143] *Id.* Sansonetti wrote that one of the clearest signs of dependence was the lack of such an area of independence, indicating that the district is "not truly independent." *Id.*

[144] *Id.*

[145] According to Sansonetti, "[t]he key indicator of financial independence, however, [is] that the county [does] not have the responsibility to undertake the road repairs, education or other functions assigned to the Service District if the Service District itself[] were to fail to execute those functions." *Id.*

accomplish their own responsibilities.[146] This practice would appear to require PILT payment reductions—as such districts are not "politically and financially independent" nor are they "alone responsible for providing the services in question"[147]—and yet, such deductions are rare[148] and abuses are common.[149]

b. Pass through Laws: Theory and Examples

As revised and renumbered in 2008,[150] the State of Utah allows counties to establish so-called 'special' service districts under the Service District Act.[151] This Act sets forth certain guidelines regulating the delegation of powers to and creation of service districts.[152] According to Utah Code Annotated § 17D-1-301(1), special service districts are governed by the county or other local government that creates the district and are limited to those powers delegated to the service district's administrators.[153] The authority to delegate is limited; for example, "an administrative control board . . . [may not] levy a tax on the taxable property within the special service district."[154] On the other hand, the Service District Act allows for financial independence,

[146] *Id.*

[147] *Id.* at 3; see *also id.* at 4, n. 1 ("[T]hese functions would presumably be the responsibility of the counties in the absence of independent special districts. However, implicit in the Comp[troller] Gen[eral] opinions is the notion that these functions are not the responsibility of the county so long as they are assigned to a distinct political unit.").

[148] When they do occur, state and local governments are inclined to take care to avoid future deductions; see discussion, *infra* Subsection II.A.3.b.

[149] For example, in *United States ex rel. Erickson v. Uintah Special Services District*, the qui tam plaintiff alleged that Uintah County, Utah had "remove[d] valuable deposits of tar sands that [the service district] had stockpiled for road repairs . . . for its own uses and without any accountability." United States *ex rel* Erickson v. Uintah Special Servs. Dist., 395 F. Supp. 2d 1088, 1093 (D. Utah 2005). This is only one of a number of similar violations of the service district's independence the plaintiff alleged; see *also id.* (detailing specific actions claimed to be in violation).

This is hardly the only example from Utah. In Washington County, the board of a transportation district openly acknowledged that any budgetary shortfall at the end of the year would "be paid by [the] County," indicating that the district was not financially independent from the county. SPECIALLY FUNDED TRANSPORTATION SPECIAL SERVICE DISTRICT ADMINISTRATIVE CONTROL BOARD MEETING, MINUTES, 2 (2009), http://www.washco.utah.gov/files/minutes/2009/M%202009-12-15%20SPEC.pdf. Furthermore, the minutes of the Board indicate that its constituent members, two of whom were county commissioners, did not differentiate between the responsibilities and power of the district and the Board itself and those of the county; see, *e.g.*, *id.* at 2 (voting to commit county to pay service district budget shortfall); *id.* at 3 (reiterating that county public works would test application of oil to road surface before service district resumed construction of road). At another meeting, the Board allowed Ron Whitehead, the County Public Works Director to establish the prioritization of service district projects; in fact, Whitehead even promised to provide the Board with a priority list of road projects he compiled for the county. SPECIALLY FUNDED TRANSPORTATION SPECIAL SERVICE DISTRICT ADMINISTRATIVE CONTROL BOARD MEETING, MINUTES, *supra* note 21, at 3.

[150] UTAH CODE ANN. § 17D-1 (2014).

[151] *Id.*

[152] § 17D-1-101(2).

[153] § 17D-1-301(1)

[154] § 17D-1-301(3)(c), (f). As further constraints on independence, a county may also not delegate authority to "annex an area to an existing special service district or add a service within the area of an existing special service district . . .; issue special service district bonds payable from taxes; [or] call or hold an election for the authorization of a property tax or the issuance of bonds." § 17D-1-301(3)(a), (d)-(e).

because service districts may incur financial obligations, but these obligations are enforceable against neither the state nor the county.[155]

Under the Service District Act, counties are allowed to delegate certain proscribed responsibilities to a district;[156] they may also, but are not required to, delegate a portion of their entitled mineral lease payment funds.[157] Since DOI does not consider these districts "units of general local government,"[158] the use of service districts allows the county to avoid deduction of the monies the county receives from federal payment programs that would normally be subtracted from the PILT payments for the following year.[159]

At least some local governments have taken advantage of this system, including one in Utah that actually went to trial under the Federal False Claims Act.[160] The plaintiff in the case, a former employee of the Uintah Special Service District (USSD), claimed that the service district was not independent from the County and engaged in a "scheme" to defraud the United States government of PILT funds.[161] Specifically, the plaintiff alleged that the USSD "allow[ed] the County to use [it's] gravel for County purposes without reimbursement to USSD," "allow[ed] the County to take [it's] materials without accounting for them," "pa[id] for gravel crushing that was then used by the County," and "funnel[ed] mineral lease funds to the Uintah Recreation District."[162] The county did this by "commingling" its own funds with the mineral lease funds received by USSD.[163]

In another, more recent example, during the January 19, 2010 Administrative Control Board Meeting for the Specially Funded Transportation Special Service District (Washington County District), Chairman James J. Eardley explained that "it was necessary to creat[e] the District in order to utilize over six hundred thousand dollars ($600,000.00) in federal money that would otherwise be deducted from Washington County's PILT payments."[164] He further disclosed that "[b]ecause Washington County has no direct control over [mineral leasing] money, [according to this plan,] it is not deducted from the County's PILT payments. Without the service district in place to administer the money, the amount would be deducted from the

[155] Nor a "municipality, school district, or other political subdivision of the state." § 17D-1-508(1).

[156] A service district may provide, for example, "any combination of . . . water, sewerage, drainage, flood control, . . . transportation . . . ." § 17D-1-201(1)-(7). The complete list of possible services that a service district may provide is listed at § 17D-1-201(1)-(18).

[157] § 59-21-2(2)(h)(ii)(B) (allocating mineral lease monies to service districts as determined by counties).

[158] *See* discussion *supra* notes 132-33 and accompanying text.

[159] *See generally* U.S. GEN. ACCOUNTING OFFICE, *supra* note 18.

[160] United States *ex rel* Erickson v. Uintah Special Servs. Dist., 395 F. Supp. 2d 1088, 1092 (D. Utah 2005). The False Claims Act will be discussed in some detail in Subsection III.B.2.

[161] *Id.* at 1092-93.

[162] *Id.* at 1093; see *also id.* at 1093-95 (describing a number of specific accusations against the Uintah Special Services District and Uintah County for fraud and misuse, mostly relating to County use of Service District funds, materials, and equipment).

[163] *Id.* at 1094. For further discussion of the False Claims Act and the legal arguments in *Erickson*, see discussion *supra* Subsection II.B.2.

[164] SPECIALLY FUNDED TRANSPORTATION SPECIAL SERVICE DISTRICT ADMINISTRATIVE CONTROL BOARD MEETING, MINUTES, *supra* note 21, at 1-2.

County's PILT payments." [165] Following the creation of the district, Washington County, for the first time, received the full amount of PILT due under the statutory formula.[166]

This example is particularly egregious because, the service district was created to allow the County to receive more PILT[167] during tough economic times.[168] To alleviate voter concerns, the district was not delegated the authority to impose tax obligations.[169] Local attorneys and politicians explained that the service district was the best way to bring in more federal money for Washington County.[170] An attorney for the county told the paper that "the formation of the district would be a win-win situation because [it will] maximize[e] the county's PILT money."[171] The purpose of the district was entirely clear: the creation of a service district prevented the deduction of revenue sharing payments from PILT.[172]

Utah, is hardly the only state that has mucked around with the PILT system. Wyoming, prior to 1993, incorrectly excluded federal lease monies from reports to the BLM concerning revenue sharing.[173] After this was corrected, "there was a large increase of reported revenue sharing in 1993, and a resulting decrease of PILT in 1994."[174] For example, Platte County, Wyoming, reported revenue sharing payments of just $423 in 1990 and $460 in 1992.[175] After mineral lease payments were included, however, this jumped to $60,991 for 1993.[176] As a result, in 1995, the Wyoming Legislature enacted a measure switching the mineral lease payments that counties had been receiving, and that were subject to deduction from PILT, for state mineral severance taxes that were not.[177] By 1996, Platte County was again reporting revenue sharing payments—PILT deductible payments—of less than $300.[178]

---

[165] *Id.*

[166] "This [was] the first year that Washington County received its full PILT funding from the federal government . . . ." *Id.*

[167] *Id.*

[168] "PILT payment[s] [are] important to funding county programs." *Id.* Indeed, the Commissioner noted that "[o]ver the course of [the] four (4) years [of the district's projected existence], the amount Washington County is expected to receive will exceed one million dollars ($1,000,000.00)." *Id.*

[169] *Id.* ("The service district was not created for the purpose of raising new tax money.").

[170] One Washington County newspaper reporting on the creation of the service district quoted a public land attorney, who stated that "the formation of the district . . . maximizes the county's payment in lieu of taxes money and brings in more money for the Washington County School district." Patrice St. Germain, *Rough Road Ahead: Residents Worry About Possible Special Tax District* (Jan. 17, 2009), http://www.thespectrum.com/article/20090117/NEWS01/901170340/Rough-road-ahead.

[171] *Id.*

[172] In fact, County Attorney Patterson argued that "[c]reating the special service district . . . protects future PILT money from being reduced." *Id.*

[173] PINDELL, *supra* note 12, at 3.

[174] *Id.*

[175] *Id.* at 22.

[176] *Id.*

[177] The act itself describes its intent as "to prevent federal mineral royalty distributions to or on behalf of counties . . . being deducted from federal payments to counties in lieu of taxes (PILT)." 1995 Wyo. Legis. Serv. 137 (West) ("This act accomplishes that purpose by substituting state mineral severance tax revenues for federal mineral royalties. Federal mineral royalties that currently are distributed to or on behalf of counties are redirected to the state highway fund. Then, an identical amount of state mineral severance tax distributions are redirected from the highway fund to the counties. The result is that both the counties and state highway fund continue to receive total

Colorado has actually rather openly gone a step further than either Wyoming or Utah. In 2011, the Colorado General Assembly passed H.R. 1218, which explicitly "authorize[es] the creation of federal mineral lease districts as funding and service delivery mechanisms . . . to expedite the distribution of funding."[179] Although this may appear innocuous on its face, H.R. 1218 contained precatory language specifically acknowledging that "[i]t is of statewide concern to maximize the amount of payment in lieu of taxes that counties in Colorado annually receive" and that "counties would not be able to fund important services . . . without maximizing payment in lieu of taxes funding to Colorado."[180] According to this language, H.R. 1218 was passed because Colorado counties stood to lose millions if DOI began deducting mineral lease payments from PILT.[181] Most egregiously, the legislature declared its intent to specifically protect PILT from reduction according to the "new" DOI system.[182] Thus far, the measure appears to be effective: following the passage of this legislation, Colorado's annual PILT payment increased from $27,724,576 to $31,986,266—an increase of over $4 million or about 15%—for fiscal year 2013.[183]

B. Judicial Action

PILT has a relatively limited judicial history.[184] In particular, the specific provisions with which this Note is concerned have only once been interpreted by an Article III court.[185] However, other provisions have been considered and interpreted.[186]

1. *PILT Before the Judiciary: A (Pretty) Limited History*

Because PILT was intended to pass directly to local governments, unlike other revenue sharing monies, state governments may not restrict a local government's expenditure or use of PILT.[187] The Supreme Court noted in *Lawrence County v. Lead-Deadwood School District* that

federal mineral royalties and state mineral severance taxes as they would under current law. *The only difference is that federal PILT payments to counties are not subject to a deduction for federal mineral royalty payments.*"). (emphasis added).

[178] PINDELL, *supra* note 12, at 22.

[179] COLO. REV. STAT. § 30-20-1302(2)-(3) (2014).

[180] 2011 Colo. Sess. Laws 580, 580.

[181] Specifically, H.R. 1218 states that "that as a result of the United States Department of the Interior declaring that Federal mineral lease payments to counties are to be counted as prior-year payments under the payment in lieu of taxes payment formula, as described in 31 U.S.C. § 6902, Colorado counties will lose millions of dollars otherwise dedicated to Colorado public land management." *Id.* at 581.

[182] *Id.*

[183] U.S. DEP'T OF INTERIOR, *supra* note 8. Because PILT reflects the prior year's revenue sharing payments, 2013 was the first year that the law has any practical effect.

[184] Although it is difficult to prove a negative, the author found only two decisions that addressed the payment provision of the PILT Act, 31 U.S.C. § 6903. These are *Greenlee County, Arizona v. United States*, 487 F.3d 871, 878 (Fed. Cir. 2007) and *United States ex rel. Erickson v. Uintah Special Services District*, 395 F. Supp. 2d 1088, 1098 (D. Utah 2005).

[185] *United States* ex rel. *Erickson*, 395 F. Supp. 2d at 1098. In that case, however, the district court did little more than make a cursory mention of the fact that "local governments must reduce any PILT payments they would otherwise be entitled to receive by the amount of all mineral lease funds received in the previous year." *Id.*

[186] *See* discussion *infra* Subsections II.1.-3.

[187] Lawrence Cty. v. Lead-Deadwood School Dist. No. 40-1, 469 U.S. 256, 262 (1985).

state governments benefit peripherally from tourism to federal lands through sales and income taxes, but that those benefits often do not trickle down to the communities wherein federal lands are located.[188] Therefore, because these local governments were generally tasked with providing services to these lands, Congress intentionally gave them "freedom and flexibility to spend the federal money as they saw fit."[189] Only in this manner would the local government receive an approximation of its loss in tax revenues and the discretion in spending that it lost with them.[190]

As in other areas of the law,[191] Congress has acted to "correct" judicial interpretations of PILT by overriding the judiciary.[192] In *Mead Township v. Andrus*, the Sixth Circuit held that the Secretary of the Interior may not subvert "Congress' expressed preference for *smaller* 'units of local government'"[193] by defining local government in such a way as to subvert that preference.[194] This decision has since been superseded by statute,[195] as recognized by the Supreme Court.[196]

More recently, in response to PILT appropriations below the authorized level, the Court of Appeals for the Federal Circuit affirmed that despite the PILT formula, the government is liable only up to the amount Congress appropriates.[197] Responding to complaints from local units

[188] *Id.* ("Prominent among congressional concerns [when PILT was passed] was that, under systems of direct payment to the States, local governments often received funds that were insufficient to cover the full cost of maintaining the federal lands within their jurisdictions . . . .").

[189] *Id; see also id.* at 259 (invalidating South Dakota restriction "requiring local governments to distribute federal payments in lieu of taxes in the same way they distribute general tax revenues"); Laurie Reynolds, *A Role for Local Government in Federal-State-Local Disputes*, 43 URB. LAW. 977, 990 (2011) ("[The] rationale [of the Supreme Court in *Lead-Deadwood*] fell squarely on the strength of the federal government interests evident from the legislative history and circumstances surrounding the adoption of the [PILT] Act."); Douglas A. Wick, *Rethinking Conditional Federal Grants and the Independent Constitutional Bar Test*, 83 S. CAL. L. REV. 1359, 1372 (2010) ("Lawrence County chose not to spend their payment in lieu of taxes in the same manner as general tax revenues, so South Dakota sued to force it into compliance. The Court held that the Supremacy Clause overrules South Dakota's statute and the federal in-lieu-of-tax funds may be spent for any governmental purpose.").

[190] *Id.* at 262 ("Congress was not merely concerned that local governments receive adequate amounts of money . . . .").

[191] *See, e.g.*, Deborah A. Widiss, *Undermining Congressional Overrides: The Hydra Problem in Statutory Interpretation*, 90 TEX. L. REV. 859, 876 ("[E]ach Congress typically overrides about a dozen Supreme Court decisions and about twice as many lower court decisions.").

[192] Act of July 30, 1983, Pub. L. No. 98-63, 97 Stat. 323 (making supplemental appropriations for the fiscal year ending September 30, 1983 and other purposes).

[193] Meade Township v. Andrus, 695 F.2d 1006, 1009 (6th Cir. 1982).

[194] *Id.* at 1007. Although the court's decision in *Meade Township* applied only to the Sixth Circuit, Congress enacted legislation specifically "to incorporate the 'principal provider of services' criterion into the definition of the term 'unit of local government.'" Financial Assistance, Local Governments; Payment in Lieu of Taxes Regulations, 48 Fed. Reg. 42,816-02 (Sept. 20, 1983).

[195] 31 U.S.C. § 6901(2)(A)(i)(I) ("[U]nit of general local government means a county . . . that is within the class or classes of such political subdivision in a State that the Secretary of the Interior determines to be the principal provider or providers of governmental services within the State.").

[196] *Lead-Deadwood School Dist.*, 469 U.S. at 267 n. 21.

[197] Greenlee Cty., Ariz. v. United States, 487 F.3d 871, 878 (Fed. Cir. 2007). The Federal Claims Court had determined that "the Payment in Lieu of Taxes Act is [not] a money-mandating statute." Greenlee Cty., Ariz. v. United States, 68 Fed. Cl. 482, 484 (2005). The statute "authorizes payments to local governments according to a formula, but neither the statute nor applicable regulations suggest or imply remedies for local governments that receive less than their full allotments if Congress does not appropriate sufficient funds." *Id.* Therefore, the court

of government that PILT lagged behind inflation,[198] Congress increased the dollar amount that the DOI was authorized to allocate in payments,[199] but failed to increase the appropriated amount.[200] As a result, the Secretary of the Interior reduced payments proportionate to the appropriated level.[201] In conclusion, although PILT is a contentious issue for many, that contention has only infrequently moved into the courtroom.

2. *Enforcement of PILT Under the False Claims Act?*

The False Claims Act (FCA), first enacted in 1865, "is the United States Government's primary tool for redressing fraud against the government."[202] This law holds liable "any person who knowingly presents, or causes to be presented, a false or fraudulent claim for payment" to the United States a civil penalty of up to three times the amount the United States suffered in damage due to that act.[203] The bar set by the FCA is high because, again, it requires *knowledge* that the claim is false.[204] On the other hand, the act does *not* require "intent to deceive," but only "the knowing presentation" of known misinformation."[205]

The FCA addresses the concern that "[b]ecause fraud is profitable and the chances of being caught are slim, engaging in fraud against the government has traditionally been quite

concluded that it could not "read this statute to mandate compensation or to imply that money damages would be due in these circumstances." *Id.*

[198] During the debate for the 1994 reauthorization of PILT, Senator Kent Conrad stated that "[PILT] is a vital payment to rural communities that are struggling to provide services for their citizens . . . . The costs of these services are going up, but the Federal Government's payment for its share of them is not. PILT was enacted in 1976 in 1976 and the payments have not been increased since that time. Thus, the value of PILT today is less than half of what it originally was." 140 Cong. Rec. S4229-02 (daily ed. Apr. 13, 1994) (statement of Sen. Kent Conrad); see *also* 140 Cong. Rec. H11241-01 (daily ed. Oct. 7,1994) (statement of Rep. Bill Orton). ("The increase in the PILT payments that will occur in this legislation is the only increase in this payment since PILT was first passed by Congress, way back in 1976 . . . . You cannot stretch 1976 dollars very far in 1994.")

[199] Payments in Lieu of Taxes Act, Pub. L. No. 103-397, § 2, 108 Stat. 4156 (1994; see *also* 140 Cong. Rec. H10733-03 (daily ed. Oct. 4, 1994) (statement of Rep. Joe Moakley).

[200] In 1993, before the increased authorization, Congress appropriated $ 103.2 million in PILT. CORN, *supra* note 29, at 17171719. In 1995, one year after the new authorization, Congress actually appropriated less money—$ 101.1 million—when it had authorized up to $ 130.5 million. *Id.* By 1998, the appropriated amount increased to $ 118.8 million, but the shortfall had increased because $260.5 million was authorized. *Id.* Currently, the PILT program is fully funded as mandatory spending. *Id.* at 12-13.

[201] Specifically, the Secretary determined that "[i]f Congress appropriates insufficient monies to provide full payment to each local government during any fiscal year, the Department will reduce proportionally all payments in that fiscal year." 43 C.F.R. § 44.51(b) (2006). At the appellate level, the government "conceded that if sufficient appropriations existed to fully fund the statutory formula and the Secretary of the Interior refused to make the PILT payment to a unit of local government, the government would be breaching a money-mandating duty." Greenlee Cty., Ariz., 487 F.3d at 877.

[202] CLAIRE M. SYLVIA, THE FALSE CLAIMS ACT: FRAUD AGAINST THE GOVERNMENT, § 1:1.

[203] 31 U.S.C. § 3729(a)(1)(A) (2006).

[204] John Martinez, *Getting Back the Public's Money: The Anti-favoritism Norm in American Property Law*, 58 BUFF. L. REV. 619, 629-30 (2010). ("To be actionable . . . [a false claim] must have been made 'knowingly . . . .'").

[205] *See* United States *ex rel.* Hagood v. Sonoma Cnty. Water Agency, 929 F.2d 1416, 1421 (9th Cir. 1991) The FCA defines 'knowingly' as "mean[ing] that a person, with respect to information has actual knowledge with respect to information; acts in deliberate ignorance of the truth or falsity of the information; or acts in reckless disregard of the truth or falsity of the information; and require[s] no proof of specific intent to defraud." § 3729(b)(1)(A)-(B).

lucrative." [206] Under the FCA, the Attorney General is authorized to bring a civil action if he or she determines that a person has violated the FCA.[207] Uniquely, however, the FCA also authorizes private persons to bring an action "in the name of the Government" and offers the individual a portion of the civil fine as an incentive to whistleblowers.[208] Although the Supreme Court has held "that the False Claims Act does not subject a State (or state agency) to liability" when a private individual brings the FCA suit,[209] they are amenable to suit if the United States is the "real party in interest."[210]

Regardless of the status of states under the FCA, the Court has made clear that as "local governments are commonly at the receiving end of all sorts of federal funding schemes, [they are] no less able than individuals or private corporations to impose on the federal fisc[211] and exploit the exercise of the federal spending power."[212] In *Cook County v. United States* ex rel. *Chandler*, the Supreme Court rejected a county's claim that municipalities are not "persons" under the Act and are therefore not liable for false claims.[213] The Court held that liability under the FCA is fair because only taxpayers that presumably have "enjoyed the indirect benefit of the fraud" suffer harm.[214]

[206] SYLVIA, *supra* note 202, § 1:1.

[207] § 3730(a).

[208] § 3730(b). A private party bringing an action under the FCA is subject to limitations on his ability to control the prosecution of the suit; however, the private party may receive up to "25 percent of the proceeds of the action or settlement of the claim." § 3730(d). Such suits are known as "*qui tam actions*." *See* BLACK'S LAW DICTIONARY (9th ed. 2009), *available at* Westlaw BLACKS (defining a "qui tam action" as "[a]n action brought under a statute that allows a private person to sue for a penalty, part of which the government or some specified public institution will receive").

[209] Vt. Agency of Natural Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 787-88 (2000).

[210] Although the Supreme Court has not made clear under what circumstances the United States is "the real party in interest," the fact remains that the Court limited its decision in *Stevens* to *qui tam* suits. *Id.* at 787 (indicating that the term "person" does not include States for the purpose of *qui tam* suits). Some factors that may indicate that the United States is "the real party" include: "where the government has intervened" or has brought the suit itself. United States *ex rel.* Zissler v. Regents of the Univ. of Minn., 154 F.3d 870, 872 (8th Cir. 1999). "As the real party in interest, the federal government's power to sue a State is well within the usual constitutional balance of federal and state powers." *Id.* On the other hand, despite the Court's decision in *Stevens*, an exception appears to have emerged in the lower courts; see, *e.g.*, United States *ex rel.* Berge v. Bd. of Trustees, 104 F.3d 1453, 1458 (4th Cir. 1997) ("The United States is the real party in interest."); United States ex rel. McCready v. Columbia/HCA Healthcare Corp., 251 F. Supp. 2d 114, 120 (D.D.C. 2003) ("[T]he United States is a real party in interest to an FCA suit, regardless of whether it has intervened."); United States *ex rel.* Pogue v. Diabetes Treatment Ctrs. of Am., Inc., 474 F. Supp. 2d 75, 78 n. 2 (D.D.C. 2007) ([T]he United States can be considered a real party in interest in an FCA action in which it does not intervene . . . ."); *accord* United States *ex rel.* Lindsey v. Trend Community Mental Health Servs., 88 F. Supp. 2d 475, 479 (W.D. N.C. 1999).

[211] *See* BLACK'S LAW DICTIONARY (9th ed. 2009), *available at* Westlaw BLACKS (defining "fisc" as "[t]he public treasury").

[212] Cook Cnty. v. United States *ex rel.* Chandler, 538 U.S. 119, 129 (2003).

[213] *Id.*at 133 ("[T]he County urges that . . . Congress made local governments, which today often administer or receive federal funds, immune . . . from any liability whatsoever under the FCA.").

[214] *Id.*at 132. (The Court presumed that such benefit would be "passed along in lower taxes or expanded services.").

The only case interpreting PILT in the FCA context is *United States* ex rel. *Erickson v. Uintah Special Services District*.[215] In *Erickson*, the plaintiff alleged that Uintah County, Utah established a service district to defraud the federal government of Mineral Lease Funds through the "transfer [of] Mineral Lease Funds into the general coffers of Uintah County to be applied to general county budgetary expenses . . . far beyond the single purpose for which [USSD] was created."[216] The failure of the county to disclose the receipt of the "mineral lease money," therefore, violated the FCA.[217]

The district court rejected this theory because the service district did not misrepresent and could not misrepresent its "nature as a service district."[218] The district court further concluded that as a service district, USSD was a "distinct legal entity . . . under the control of the County. USSD [could not] misrepresent its dependence or independence from the County."[219] As Congress placed no conditions upon the disposal or use of federal lease monies, the district court found a False Claims Act claim impossible.[220]

3. *Judicial Deference (or Non-deference) to Administrative Decision Making*

The leading case for judicial deference to an agency's construction of a statute is *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc*.[221] According to *Chevron*, the process of review is divided into two steps.[222] At step one, the court must determine by the use of canons of statutory construction and legislative history, "whether Congress has directly spoken to the precise question at issue."[223] If it has, the issue is resolved "for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."[224] In that case, the court's construction of the statute is binding on the agency and limits the range of permissible interpretations of that statute.[225]

---

[215] United States *ex rel.* Erickson v. Uintah Special Servs. Dist., 395 F. Supp. 2d 1088, 1098 (D. Utah 2005).

[216] *Id.* The plaintiff further urged that if "mineral lease money received by [a service district] is paid to or considered to have been received by [the] County, then the PILT payments that the County receives would necessarily be required to be reduced by the amount of money received from Mineral Lease Funds." *Id.*

[217] *Id.*

[218] *Id.*

[219] *Id.* at 1099.

[220] *Id.* Although the *qui tam* plaintiff lost the case, the County later lost a similar case based on the retaliatory firing of another employee claiming the County misused road funds. Lezlee E. Whiting, *Uintah Road Department In Hot Seat: Suit Says Commission Fired Director For Blowing he 'Whistle,'* DESERET NEWS (Dec. 28, 2004), http://www.deseretnews.com/article/600100729/Uintah-road-department-in-hot-seat.html?pg=all; Lezlee E. Whiting, *Judge Rules For Fired Whistle-Blower: Former Uintah Road Boss Feels 'Justice Was Done*,' DESERET NEWS (Nov. 14, 2005), http://www.deseretnews.com/article/635161047/Judge-rules-for-fired-whistle-blower.html.

[221] Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).

[222] *Id.* at 842-43.

[223] *Id.* at 842.

[224] *Id.*

[225] Note, *How Chevron Step One Limits Permissible Agency Interpretations: Brand X and the FCC's Broadband Reclassification*, 124 HARV. L. REV. 1016, 1016 (2011); *see also* United States v. Mead Corp., 533 U.S. 218, 247 (2001) (Scalia, J., dissenting) (emphasis in original) ("Once the court has spoken, it becomes *unlawful* for the agency to take a contradictory position; the statute now *says* what the court has prescribed.").

However, even assuming Congress has not spoken to the precise question nor that the statute is otherwise ambiguous, at step two the court does not have unbridled discretion to impose the meaning it prefers on the statute.[226] In that case, "the question . . . is whether the agency's answer is based on a *permissible* construction of the statute."[227] If the interpretation is permissible, the reviewing court must uphold the agency's interpretation of the statute, whether that interpretation is the one the court itself would prefer—or not.[228] This is because an agency is justified to make "a binding interpretation of a statute it administers" by virtue of the fact that Congress delegated to it the authority to make law.[229]

Yet not all agency rules or statements merit any level of judicial deference.[230] Pursuant to § 553 of the Administrative Procedure Act (APA), an agency is required to engage in the process of informal notice-and-comment rulemaking when it announces a new rule unless that rule qualifies for an established exception.[231] Excluding emergency situations,[232] an agency may only promulgate a rule without notice-and-comment procedure if it is either an interpretive rule or general statement of policy.[233] Rules made pursuant to this exception are entitled to less deference or no deference at all by a court.[234]

a. *Chevron* Steps One and Two

At step one, the court must first decide whether or not Congress has spoken to the "precise question at issue."[235] If it has, then the court and the agency must faithfully carry out the directly expressed intent of Congress.[236] The reviewing court considers, depending on the judge,

[226] *Chevron*, 467 U.S. at 843 (noting that "the court does not simply impose its own construction of the statute.").

[227] *Id.* (emphasis added).

[228] *See, e.g.*, Claire R. Kelly & Patrick C. Reed, *Once More Unto the Breach: Reconciling Chevron Analysis and De Novo Judicial Review After United States v. Haggar Apparel Company*, 49 AM. U. L. REV. 1167, 1170 (2000) ("Under the second step, the court assesses whether the agency's interpretation is permissible and reasonable. When the agency's interpretation is reasonable, . . . step two requires the court to accept, or 'defer to,' a reasonable interpretation of an ambiguous statutory provision by the agency that administers the statute.").

[229] According to one author, "the justification for allowing an agency to make a binding interpretation of a statute it administers is that Congress delegated a portion of its law-making or legislative authority to the agency, and the agency's resolution of silence or ambiguity through its interpretations represents an exercise of delegated legislative authority. Thus a threshold question under Chevron is whether the statute being interpreted is administered by an agency, as opposed to a statute creating a private right of action enforced by the courts." Kelly, et al., *supra* note 93, at 1189-90.

[230] For example, "[a]n agency's interpretation of a statute . . . is a question of law which is reviewed de novo." Partridge v. Reich, 141 F.3d 920, 923 (9th Cir. 1998).

[231] 5 U.S.C. § 553(b). These exceptions are "narrowly construed and only reluctantly countenanced." N.J. Dep't of Envtl. Protection v. U.S. EPA, 626 F.2d 1038, 1045 (D.C. Cir. 1980).

[232] § 553(b)(B).

[233] § 553(b)(A). One factor that a court considers "is whether a purported policy statement genuinely leaves the agency and its decision-makers free to exercise discretion." Amer. Bus Ass'n v. United States, 627 F.2d 525, 529 (D.C. Cir. 1980).

[234] For example, when an agency "applies the policy [announced in a general statement of policy] in a particular situation, it must be prepared to support the policy just as if the policy statement had never been issued." Pac. Gas & Elec. Co. Fed. Power Comm'n, 506 F.2d 33, 38 (D.C. Cir. 1974).

[235] Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842 (1984).

[236] *Id.* at 842-43.

the plain meaning of the statute, any legislative history,[237] and any other relevant canons or tools that aid judicial construction.[238] After these resources have been exhausted and if the statute remains ambiguous, the court moves on to step two and considers whether the agency's regulation is "permissible" based on the language of the statute.[239]

At step two, the reviewing court gives an agency's decision deference[240] and will likely uphold the agency's decision.[241] Many of the same considerations[242] are at play in step two as at step one because the Supreme Court has not authoritatively outlined the difference between the

[237] *Compare* Succar v. Ashcroft, 394 F.3d 8, 31 (1st Cir. 2005) (use of legislative history may be necessary at *Chevron* step one), *with* United States v. Geiser, 527 F.3d 288, 292 (3d Cir. 2008) (inappropriate to consider legislative history at *Chevron* step one). Although there is no distinct formulation under which the legislative history of a particular enacted statute is considered, the Supreme Court has and does frequently utilize legislative materials to illuminate difficult questions of interpretation. Wis. Pub. Intervenor v. Mortier, 501 U.S. 597, 611 n. 4 (1991) (citing United States v. Fisher, 6 U.S. (2 Cranch) 358, 386 (1805)) ("As Chief Justice Marshall put it, '[w]here the mind labours to discover the design of the legislature, it seizes every thing from which aid can be derived.' Legislative history materials are not generally so misleading that jurists should never employ them in a good-faith effort to discern legislative intent. Our precedents demonstrate that the Court's practice of utilizing legislative history reaches well into its past . . . . [T]he practice will likewise reach well into the future."). (citations omitted)

According to one commonly-cited construction, because "legislation is often the product of conflict and compromise between strongly held and opposed views . . . its proper construction frequently requires consideration of its wording against the background of its legislative history [as seen] in the light of the general objectives Congress sought to achieve." Wirtz v. Bottle Blowers Ass'n, 339 U.S. 463, 468 (1968). For this reason, the Court finds it frequently necessary to consult the legislative history of unclear or unambiguous acts of Congress. For example, one analytical survey of Supreme Court decisions found that "the Justices appear to resort to legislative history partly for reasons having to do with the form and content of the statutes themselves. In particular, they are more likely to consult legislative history when faced with statutes of a certain age, level of complexity, or degree of amendedness." David S. Law & David Zaring, *Law Versus Ideology: The Supreme Court and the Use of Legislative History*, 51 WM. & MARY L. REV. 1653, 1659 (2010).

[238] *See* Lisa Schultz Bressman, *Chevron's Mistake*, 58 DUKE L.J. 549, 551 (2009) ("In applying Chevron, courts rely heavily on the dominant theories of statutory interpretation: intentionalism, purposivism, or textualism. Those theories, despite their differences, all invite courts to construct a meaning for statutory text as if Congress intended the text to carry a relatively specific meaning."); William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083, 1122-23 (2008) ("The clearest effect of *Chevron* at the Supreme Court level is that it has created an increasingly complicated set of doctrinal debates about . . . the approach the Court should take and the evidence it ought to consider to determine whether Congress has directly addressed an issue . . . .").

[239] *Chevron, U.S.A. Inc.*, 467 U.S. at 843. "[A] court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." *Id.* at 844.

[240] Assuming of course that it is based on a "permissible construction" of the statute in question. *Chevron, U.S.A. Inc.*, 467 U.S. at 843.

[241] The purpose of Step Two analysis is "limited to oversight of agency decisionmaking." Kenneth A. Bamberger & Peter L. Straus, *Chevron's Two Steps*, 95 VA. L. REV. 611, 611 (2009). Because this step is rather deferential, relatively less has been written about what court's do after reaching Step Two; *see* Ronald M. Levin, *The Anatomy of Chevron: Step Two Reconsidered*, 72 CHI.-KENT L. REV. 1253, 1254 n. 4 (1997) (describing a number of prominent authors in administrative law who failed to discuss *Chevron* Step Two in depth).

[242] For example, the reviewing court may again examine legislative history, only this time, rather than determining "whether Congress wanted to delegate lawmaking power to [the agency]," the court must decide "whether Congress would approve of the agency's use of this authority" that the court, at Step One, has already determined that the agency possesses. Danieli Evans, *What Would Congress Want? If We Want to Know, Why Not Ask?*, 81 U. CIN. L. REV. 1191, 1207 (2013).

two steps for the lower courts.[243] Because the court is only reviewing the "reasonableness" of the agency's decision, an agency is free to reverse itself under step two analysis.[244]

b. Decisions Entitled to Persuade, but Not Control (*Chevron* 'Step Zero')

Not all administrative agency decisions are entitled to deference.[245] Where the decision was not reached through notice-and-comment proceedings or formal adjudication, the likelihood that the decision will be accorded deference is much lower.[246] Furthermore, opinion letters, such as that issued by the Solicitor General, merit little deference.[247] Comptroller General Opinions are also entitled to little deference.[248] Alternatively, the Court has noted that if such decisions and opinions do not have power to command deference, they are "'entitled to respect' . . . to the extent that those interpretations have the 'power to persuade.'"[249] What precisely the "power to persuade" is remains ambiguous.[250]

[243] "[I]f it is to be meaningful, the step two inquiry has to involve qualitatively different considerations from those implicated during step one. Yet the Court's opinion [in *Chevron*] left the very meaning of the second step ill-defined . . . . [and t]o date . . . the Supreme Court's subsequent case law has offered little illumination on this score, because in the thirteen years since *Chevron*, the Court has never once struck down an agency's interpretation by relying squarely on the second *Chevron* step." Levin, *supra* note 241, at 1261.

[244] For example, in *Chevron* itself, the Supreme Court upheld the EPA's decision that "stationary source" under the Clean Air Act referred to "all of the pollution emitting devices within the same industrial grouping," i.e., plant, rather than to single devices. *Chevron, U.S.A. Inc.*, 467 U.S. at 840; *see also id.* at 858 (rejecting "dual definition of 'source'" promulgated under former administration). The Court further held that, "[w]hile agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for the political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with administration of the statute in light of everyday realities." *Id.* at 865-66. In essence, this decision allows an agency flexibility to change regulations within the boundaries of the underlying statute according to changing political circumstances. *Id.* at 866.

[245] 5 U.S.C. § 553(b)(B) (2006).

[246] *Id.*

[247] Christensen v. Harris Cty., 529 U.S. 576, 587 (2000) ("Interpretations such as those in opinion letters . . . do not merit Chevron-style deference.").

[248] One commentator has suggested that "[a] more useful approach is for the court to treat a GAO opinion as akin to an amicus brief or an expert opinion filed to aid the court in deciding the issues." Robert S. Metzger & Daniel A. Lyons, *A Critical Reassessment of the GAO Bid-Protest Mechanism*, 2007 WIS. L. REV. 1225, 1261 (2007). According to this model, "the GAO opinion is helpful only to the extent that it is persuasive . . . . before the court accepts the GAO recommendation in a case, it should look behind the decision with a critical eye to the validity of the recommendation." *Id.* at 1263. This articles also includes "a partial list of factors the court should consider in deciding the weight to be afforded the GAO [opinion]."*Id.* at 1263-65 (listing "Consistency with Prior Precedent," "Based Upon Proper Evidence," "Standard of Review," "Choice of Remedy," and "public interest" as factors to be considered by the courts); *see also* United States v. Mead Corp., 533 U.S. 218, 230 (2001) (citing, as "very good indicator[s] of delegation meriting *Chevron* treatment," "express congressional authorizations to engage in the process of rulemaking or adjudication that produces regulations or rulings . . . . [such as] when [Congress] provides for a relatively formal administrative procedure"); *id.* at 233-34 (holding that Customs classifications do not merit *Chevron* deference because there is no required notice-and-comment rulemaking procedure and because Customs classifications are not binding except between the parties in the letter, but determining that "an agency's interpretation may merit some deference whatever its form, given the 'specialized experience and broader investigations and information' available to the agency").

[249] *Christensen*, 529 U.S. at 587 (citing Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)) (internal citations omitted).

[250] Justice Scalia has written that "the practical effects of [this]. . . rule . . . will be protracted confusion." United States v. Mead Corp., 533 U.S. 218, 245, 247 (2001) (Scalia, J., dissenting).

After *Christensen v. Harris County*, the Supreme Court made clear, in *United States v. Mead Corp.*, that "[t]he fair measure of deference to an agency administering its own statute has been understood to vary with circumstances."[251] In looking to those 'varying circumstances,' the Court will look to a number of factors including the formality and consistency of the agency's decision.[252] To whatever extent present, agency decisions also carry weight by virtue of the author's logic and persuasiveness.[253] *Mead* utilizes on the reasoning of *Skidmore v. Swift & Co.* to set out a number of factors that lend an agency decision 'power to persuade.'[254] Presumably, the "factors which give it power to persuade" are those circumstances identified in *Mead*.[255]

Most recently, the Supreme Court returned to the question of administrative deference in *City of Arlington, Texas v. FCC*.[256] According to the Court in *City of Arlington*, *Chevron* applies if the agency received authority to decide the issue from Congress in the manner that it chose to decide the issue.[257] What the decision further makes clear are that ambiguities are for the agencies—and not the courts—to resolve.[258] At this time, *Skidmore* deference may have functionally ceased to exist.[259]

Moreover, the Comptroller General is the head of GAO[260] which is considered part of the legislative branch of the United States.[261] The Comptroller General, therefore, "may not be entrusted with executive powers."[262] Although the Supreme Court has not spoken to the issue as

[251] *Id.* at 228 (majority); *see also id.* at 230 (limiting *Chevron* where agency decisions are not "the fruits of notice-and-comment rulemaking or formal adjudication").

[252] *Id.* at 228 (considering "the degree of the agency's care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency's position.").

[253] *Id.* at 235 ("Such a ruling may surely claim the merit of its writer's thoroughness, logic and expertness, its fit with prior interpretations, and any other sources of weight.").

[254] These are "[t]he thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) ("Good administration of the Act and good judicial administration alike require that the standards of public enforcement and those for determining prior rights shall be at variance only where justified by good reason . . . . This Court has long given considerable and in some cases decisive weight to Treasury Decisions and to interpretative regulations of the Treasury and of other bodies . . . . We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.").

[255] *Mead*, 533 U.S. at 228.

[256] City of Arlington, Tex. v. FCC, 133 S. Ct. 1863, 1868 (2013) ("The question here is whether a court must defer under *Chevron* to an agency's interpretation of a statutory ambiguity that concerns the scope of the agency's statutory authority . . . .").

[257] *Id.* at 1874 ("[F]or *Chevron* deference to apply, the agency must have received congressional authority to determine the particular matter at issue in the particular manner adopted."). For interpretation of this decision, the effects of which are yet to be seen or realized in full, see Andrew M. Grossman, *City of Arlington v. FCC: Justice Scalia's Triumph*, 2013 CATO SUP. CT. REV. 331, 350 (2013).

[258] *City of Arlington*, 133 S. Ct. at 1868.

[259] Grossman, *supra* note 257, at 350-51 (noting the lack of any discussion of *Skidmore* by eight justices—including the majority opinion and the dissent).

[260] The GAO is an agency "independent of the executive departments." 31 U.S.C. **§** 702(a) (2006).

[261] Bowsher v. Synar, 478 U.S. 714, 731 (1986) (stating that both Congress and Comptrollers General have "viewed [the office] as part of the Legislative Branch").

[262] *Id.* at 732.

a majority, as a member of the D.C. Circuit, Judge now-Justice Scalia wrote that "the assessment of the GAO [is] an expert opinion which we should prudently consider but to which we have no obligation to defer."[263] In a more recent concurrence, Justice Scalia reiterated that Comptroller General Opinions are not entitled to *Chevron* deference.[264] This is significant because DOI relied upon the Comptroller General's interpretation to set its policy on PILT.[265]

IV. FIXING PILT: ENFORCEMENT AND AMENDMENT

The law makes clear that "payments received by" local governments under a payment law must be deducted from PILT; however, DOI has allowed local governments to avoid deductions for payments not "received by" the local governments if the payments are actually received by entities not under their direct control.[266] If the county—or local unit of government—retains control, theoretically, the entity is not independent, and the monies received must be deducted from PILT.[267] Because this has not happened, creative solutions to fix the problem are necessary.[268]

A. Possible Solutions

The regulatory "enforcement solution," as well as its various positive and negative features, is discussed first. [269] This discussion is followed by a section concerning administrative rulemaking[270] and finally a section addressing the possibility of legislative amendment of PILT.[271]

---

[263] Delta Data Systems Corp. v. Webster, 744 F.2d 197, 201 (D.C. Cir. 1984); *see also* Ass'n of Civilian Technicians v. FLRA, 269 F.3d 1112, 1116 (D.C. Cir. 2001) (noting that Comptroller General's opinions are not binding on the court).[doesn't "hold" that CG's opinions aren't binding on court, just repeats it, quoting Delta]

[264] "[T]he vast body of administrative interpretation that exists—innumerable advisory opinions. . . [such as that] of the Comptroller General and the general counsels for various agencies—is not an administrative interpretation that is entitled to deference under Chevron." Crandon v. United States, 494 U.S. 152, 177 (1990) (Scalia, J., concurring) (suggesting, however, that administrative interpretation might have persuasive effect).

[265] Considering that this opinion is likely of little to no precedential value, DOI may freely repudiate this interpretation and return to its original understanding of PILT. *See supra* Subsection III.A.2.

[266] 31 U.S.C. § 6903(b)(1)(A) (payments reduced by amount unit received in prior year); *see also* Sansonetti Memo *supra* note 82, at 3-4.

[267] *Id.* at 4; see *also* 61 Comp. Gen. 365, 365 (Apr. 26, 1982) ("[W]here a county is responsible for providing and supporting public schools and funds them with its own tax revenues, the entire amount of [revenue sharing payments] expended for the schools . . . must be treated as 'received' for purposes of computing the county's [PILT] payment.").

[268] *See* discussion, *supra* Subsection II.A.3.b.

[269] The action on behalf of counties and states to create quasi-independent entities for the purpose of maximizing PILT may be wrongful and amount to fraud, meaning that the county and possibly the state may be civilly or criminally liable under the FCA. *See* discussion, *supra* Subsection II.B.2.

[270] The Secretary of the Interior should institute informal rulemaking procedures pursuant to 5 U.S.C. § 553 in order to clarify and formalize its own regulations, administrative decisions, and legislative mandate. 5 U.S.C. § 553(b) (2006). This would also have the benefit of ensuring that its decision was entitled to *Chevron* deference, at least to the extent that Congress has not spoken to the issue in question. City of Arlington, Tex. v. FCC, 133 S. Ct. 1863, 1874 (2013); Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984).

[271] Regardless of the outcome on agency rulemaking, Congress can and should change PILT to clarify whether this activity is allowed because, in the end, whether it is or not, it makes little sense to either encourage

1. *Enforcement*

The apparently simplest option of all would be for the DOI to get serious about enforcing the standards outlined by the Comptroller General.[272] Such a decision might, however, prove problematic and even unworkable, considering the difficulty in assessing the various levels of "independence" entities creating service and other districts grant to such districts.[273] For example, would an assessment of fiscal and political independence require a case-by-case analysis? [274] If so, the financial and administrative means to carry out such a program are probably beyond the resources allotted to the PILT program.[275]

More fundamentally, however, the agency would likely find that its primary source of authority, the Comptroller General Opinion, held very little weight in court.[276] Even Justice Scalia, the Supreme Court Justice most inclined to defer to administrative agencies,[277] has held that Comptroller General Opinions are merely persuasive authority.[278] The Sansonetti opinion would receive even less deference because, at best, it might qualify as a policy statement or

counties to make an end run around the law or make them believe it is in their best interest to do so. *See* CORN, *supra* note 85.

[272] *See generally* 61 Comp. Gen. 365 (Apr. 26, 1982); 58 Comp. Gen. 19 (1978).

[273] *See generally* Sansonetti Memo *supra* note 82.

[274] To a large extent, the administration of PILT relies on data submitted to the DOI from a number of sources including State governments, land management agencies, the United States Census Bureau, and the Consumer Price Index. U.S. DEP'T OF INTERIOR, *supra* note 138, at 4. The inherent difficulty in evaluating all federal land claims would run into the problems that prevented Congress from establishing a tax equivalency program in the 1970's: "the process of trying to identify and quantify burdens is complex and inconclusive." SALLY K. FAIRFAX & CAROLYN E. YALE, FEDERAL LANDS: A GUIDE TO PLANNING, MANAGEMENT, AND STATE REVENUES 155 (1987); SEE *also* U.S. GEN. ACCOUNTING OFFICE, *supra* note 18, at 50 ("[I]t would entail a great Federal administrative effort to assess the . . . Federal lands . . . ."); *Id.* at 51 ("If the Congress does not want to establish a payment program based on tax equivalency because of the administrative and legislative complications, it may wish to choose a flat-payment-per-acre option . . . .[W]e favor this option . . . because it would be easy to administer and control.").

[275] For example, in 2013, the administrative resources to calculate and distribute PILT payments of $399.8 million were about $400,000. Press Release, Department of the Interior, Interior Announces Nearly $400 Million in PILT Payments to Rural Communities for Police, Fire and Schools: Underscores President's Initiative to Strengthen Rural Communities, Calls on Congress to Extend PILT Program (June 13, 2013), *available at* http://www.doi.gov/news/pressreleases/interior-announces-nearly-400-million-in-pilt-payments-to-rural-communities-for-police-fire-and-schools.cfm). The administrative cost came from the monies appropriated for PILT. *Id.*

[276] Ass'n of Civilian Technicians v. FLRA, 269 F.3d 1112, 1116 (D.C. Cir. 2001) (holding that Comptroller General's opinions are not binding on the court).

[277] United States v. Mead Corp., 533 U.S. 218, 239 (2001) (Scalia, J., dissenting); see *also* Hon. Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 517 (1998) ("Congress now knows that the ambiguities it creates, whether intentionally or unintentionally, will be resolved, within the bounds of permissible interpretation, not by the courts but by a particular agency, whose policy biases will ordinarily be known. . . . The theory that judicial acquiescence in reasonable agency determinations of law rests upon real or presumed legislative intent to confer discretion has certain consequences which the courts do not yet seem to have grasped. . . . [T]here is no apparent justification for holding the agency to its first answer, or penalizing it for a change of mind.").

[278] Crandon v. United States, 494 U.S. 152, 177 (1990) (Scalia, J., concurring).

interpretive rule.[279] Even in that case, the agency would be forced to defend the policy as though the letter did not exist.[280]

Another enforcement alternative would be for DOI to discard the Comptroller General's interpretation entirely as not binding upon the agency.[281] When BLM issued the first PILT disbursement rule in 1977, the rule provided no exception for payments passed through counties or other local governments to special or single purpose districts.[282] Because this rule caused some concern,[283] the Solicitor General of the Interior requested an interpretive opinion of the Act by the Comptroller General.[284] As a result of this opinion, BLM found that it had incorrectly withheld more than $60 million from local governments.[285] This is important because the most recent reformulation and revision of PILT removed the section added at the behest of the Comptroller General, a possible repudiation of the Comptroller General's limitation.[286]

This provision had indicated that the BLM considered "received by" to "not include payments made to a State and . . . distributed by the State to the unit of local government which the unit of local government is required by State law to pass on to a school district or other independent single or special purpose governmental entity."[287] This may have implied that indirect payments to local governments in the form of payments to non-independent special

[279] 5 U.S.C. § 553(b)(A) (2006). DOI has said in its annual report on PILT that "[o]nly the amount of Federal land payments actually received by units of government in the prior fiscal year is deducted. If a unit receives a Federal land payment, but is required by State law to pass all or part of it to financially and politically independent school districts, or any other single or special purpose district, payments are considered to have not been received by the unit of local government and are not deducted from the Section 6902 payment." U.S. DEP'T OF INTERIOR, *supra* note 138, at 11. Again, as a policy statement, the agency would receive little deference. Pac. Gas & Elec. Co. Fed. Power Comm'n, 506 F.2d 33, 38 (D.C. Cir. 1974).

[280] *Id.*

[281] Arguably, as the Comptroller General's Opinion is not binding on the courts, neither is it on the agency. "We regard the assessment of the GAO as an expert opinion, which we should prudently consider but to which we have no obligation to defer." Delta Data Sys. Corp. v. Webster, 744 F.2d 197, 201 (D.C. Cir. 1984). To a certain extent, the Author believes that DOI's actions since 2004 have acted as a partial repudiation of this letter and the policy that it enunciated.

[282] Specifically, "'[m]oney transfers' mean[t] those money or cash payments made by or through the State government to units of local government pursuant to the laws set forth in section 4 of the Act.." Financial Assistance, Local Governments, 42 Fed. Reg. 51,580, 51,582 (Sept. 29, 1977).

[283] BLM noted at the time that some interested parties were concerned that "the definition of 'money transfers' be changed to provide that funds received by qualified units of local government under [other payments laws] and passed through to single purpose units of government . . . not be counted as a deduction." *Id.* at 51,581. However, At the time, BLM refused to change the rule, indicating that it did not have authority to count deductions in another manner. *Id.*

[284] U.S. GEN. ACCOUNTING OFFICE, *supra* note 18, at 20; see *generally* Financial Assistance, Local Governments Entitlement Lands; Payments in Lieu of Taxes, 45 Fed. Reg. 47,619 (July 15, 1980). This interpretation was reiterated by the Comptroller General in 1982, again, at the request of the Solicitor of DOI. 61 Comp. Gen. 365, 365 (Apr. 26, 1982) ("We conclude that where a county is responsible for providing and supporting public schools and funds them with its own tax revenues, the entire amount of [revenue sharing payments] expended for the schools, regardless of whether such expenditure exceeds the minimum required by state law, must be treated as 'received' for purposes of computing the county's [PILT] payment.").

[285] 43 C.F.R. § 1881.0-5(2)(ii)(d) (1998).

[286] *See* 43 C.F.R. § 44.11 (2012) ("What are the definitions of terms used in this subpart?").

[287] *Id.*

purpose entities should be deducted from PILT because state law does not require such payments.[288] However, the DOI did not include this provision in the 2004 update;[289] otherwise, the relevant section of the rule remained completely unaltered.[290] Therefore, the fact that this provision was removed, thereby changing the meaning of the rule, albeit subtly, should be considered a 'rulemaking' entitled to some form of deference under the constitutional schema established by current Supreme Court jurisprudence.[291]

Currently, the only references to "money transfers" now read that State Governors provide to DOI records of the amount of State "money transfers" to local governments[292] and that payments will not be certified until after DOI receives a similar record of "land revenue payments" to local governments from the State.[293] The substitution of the clause "payments that each local government received from the State" in place of "money or cash payments received by units of local government" at least implies a change in meaning.[294]

Arguably, the original "received by" language was ambiguous because it implied that the county or other unit of local government directly received the money or cash payments, but did not identify from whom those payments were received.[295] "Received from," on the other hand, clarifies that state payments to counties are deducted from PILT.[296] Furthermore, there is no longer a specific exception for payments that go to a State and that are directly distributed to service districts.[297] Thus, money local governments "received from States" properly includes all land payments listed under § 6903 that are given to special purpose districts through local government units.[298]

[288] *See, e.g.*, COLO. REV. STAT. § 30-20-1302(2)-(3) (authorizing counties to create special "mining districts" to "expedite funding"); UTAH CODE ANN. § 59-21-2(2)(h)(ii)(B) (2014) (allowing counties to pass funds on to county created special service districts).

[289] 43 C.F.R. § 44.11 (2012) ("What are the definitions of terms used in this subpart?").

[290] *Id.* This perhaps implies an implicit rejection of the Comptroller General's construction of § 6903's mandatory deductions as not applying to direct payments or state-mandated payments under federal revenue sharing acts; see discussion, *supra* notes 99-104 and accompanying text.

[291] Never addressed by BLM after issuing the rule narrowing the definition of "money transfer," nor, for that matter, the DOI after deleting the rule, was the objection raised by BLM after the first rulemaking period in 1977: "[the Act] specifically requires that payment be reduced by the amount received by units of local government, in aggregate, under [listed payments' laws]. This cannot be changed by regulation." Financial Assistance, Local Governments, 42 Fed. Reg. 51,580 (Sept. 29, 1977). Clearly some pressure was exerted to encourage BLM to insert this language in the first place, because it makes its first appearance in 1980 and in direct contradiction of the BLM's 1977 construction. Financial Assistance, Local Governments Entitlement Lands; Payments in Lieu of Taxes, 45 Fed. Reg. 47,618, 47,619 (July 15, 1980).

[292] "The Governor . . . provides the amount of money transfers . . . disbursed by the State during the previous fiscal year to eligible local governments." § 44.21(a)(2).

[293] § 44.23(a).

[294] For a discussion of what change in meaning might be implied, *see* discussion, *supra* note 260.

[295] 43 C.F.R. § 1881.0-5(2)(ii)(d) (1998).

[296] § 44.23(a).

[297] *Compare* § 1881.0-5 (Definitions), *to* § 44.11 (What are the definitions used in this subpart?). This change is significant, because it implies that this exception is no longer available.

[298] *See* Financial Assistance, Local Governments, 42 Fed. Reg. 51,580, 51,581 (Sept. 29, 1977).

On the other hand, the stated purpose of the 2004 rule amendment was to "streamline[] the budget process"—not to make substantive changes to PILT.[299] Because the change was considered entirely administrative, full notice-and-comment procedure was not followed in the promulgation of the rule.[300] Therefore, as this change was perhaps procedurally inadequate,[301] a reviewing court might be less likely to defer to the agency's decision were there a challenge to DOI's new policy.[302]

A third enforcement option potentially exists through the Department of Justice. Although the DOI has not shown interest in enforcing its own policy,[303] the Department of Justice could attempt to enforce the deduction provision through the FCA.[304] Under this theory, if the district created by a county is not truly independent, the county "knowingly submit[s] false claims" when it neglects to report the receipt of a § 6903(a) payment.[305] This theory has several drawbacks, however, including the fact that there is no clear rule prohibiting this conduct.[306] The states and local governments taking advantage of this loophole may be guilty of opportunism,[307]

[299] Payment in Lieu of Taxes, 69 Fed. Reg. 70,557, 70,557 (Dec. 7, 2004) (to be codified at 43 C.F.R. pt. 44).

[300] *Id.* ("The changes in the regulations pursuant to the notice consist of moving the implementing regulations from one CFR part to another . . . . Therefore, DOI has determined that it has no substantive impact on the public and for good cause finds . . . that notice and public procedure are unnecessary and that this rule may take effect upon publication.").

[301] *Id.*

[302] Such as if a county or other "unit of local government" were to challenge its reduced payment. Even *Arlington*, which signals a possibly reduced burden for agencies seeking deference, recognized that only agency decisions made in the manner that Congress intended for the agency to decide the issue. City of Arlington, Tex. v. FCC, 133 S. Ct. 1863, 1874 (2013).

Finally, the court might also question the agency's thirty-year disavowal of authority—at the behest of the Comptroller General—to deduct from PILT all payments received through local governments. FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 146 (2000) (recognizing the FDA's repeated disavowal of authority to regulate cigarettes between 1964 and early 1990s as evidence that FDA lacked authority to do so).

[303] Official DOI policy indicates that "[o]nly the amount of Federal land payments actually received by units of government in the prior fiscal year is deducted. If a unit receives a Federal land payment, but is required by State law to pass all or part of it to financially and politically independent school districts, or any other single or special purpose district, payments are considered to have not been received by the unit of local government and are not deducted from the Section 6902 payment." U.S. DEP'T OF INTERIOR, *supra* note 138, at 11. However, DOI has done nothing to stop the practices identified in this paper, which violate, if not the letter, at least the spirit of PILT; see discussion *supra* Subsection II.A.3.b. This is particularly true in the case of Utah which allows counties to create service districts with varying degrees of independence, UTAH CODE ANN. § 17D-1-508(1) (2014)., and Colorado, which authorizes counties to create "Federal Mining Districts" for the sole purpose of avoiding PILT deductions, COLO. REV. STAT. § 30-20-1302(2)-(3) (2011).

[304] *See* discussion, *supra* Subsection II.B.2.

[305] United States *ex rel.* Erickson v. Uintah Special Servs. Dist., 395 F. Supp. 2d 1088, 1098 (D. Utah 2005).

[306] *Id.* at 1099 ("[T]he Comptroller General [Opinion] is neither controlling nor on point.").

[307] Nor are they the only Americans guilty of opportunistically abusing federal payment programs for their own benefit; see, *e.g.*, Jennifer Calonia, *3 Sneaky Ways Americans Take Advantage of Government Assistance*, GOBANKINGRATES.COM (Oct. 16, 2013), http://www.gobankingrates.com/economy/3-sneaky-way-people-take-advantage-government-assistance/ (detailing a number of ways Americans take advantage of federal programs for personal benefit); MICHAEL D. TANNER & CHARLES HUGHES, THE WORK VERSUS WELFARE TRADE-OFF: 2013, CATO INST. (2013), *available at* http://www.cato.org/publications/white-paper/work-versus-welfare-trade ("The current welfare system provides such a high level of benefits that it acts as a disincentive for work."). Nor even is

but that does not mean they are necessarily guilty of any crime.[308] Second, the complexities of such an action are many, as highlighted in *Erickson*.[309] There the district court noted that neither the county nor the service district submitted any claims to the federal government; rather the service district submitted an annual report to the State of Utah, which the state then used to compile a list of deductible payments for the DOI.[310]

A final option for enforcement could be a citizen-suit brought challenging the agency's interpretation of the statutory language and thus its failure to act.[311] Assuming that such a plaintiff could establish standing under PILT,[312] that plaintiff could argue that the DOI's interpretation of "amounts the unit received" [313] is contrary to Congressional intent.[314] Because

---

the problem of opportunistic local government officials limited to the United States. Timothy Besley, Rohini Pande, & Vijayendra Rao, *Just Rewards? Local Politics and Public Resource Allocation in South India*, 26 WORLD BANK ECON. REV. 191, 191 (2011).

Moreover, states began taking advantage of this opportunity early: by 1979—two years after the PILT program began—two states had already passed "new laws . . . that decrease[d] deductions and thereby increase[d] the total payment counties receive[d] under [PILT]." U.S. GEN. ACCOUNTING OFFICE, *supra* note 18, at 27. In effect, the current system of PILT is one of "perverse regulation" in that "the rules on monitoring local governments inadvertently lead to dysfunctional behavior and 'gaming the system.'" SALVATORE SCHIAVO-CAMPO & HAZEL M. MCFERSON, PUBLIC MANAGEMENT IN GLOBAL PERSPECTIVE 107 (2008).

[308] Pass through laws are almost as old as PILT and have been an acknowledged defect of the program, almost from its inception. U.S. GEN. ACCOUNTING OFFICE, *supra* note 18, at 27 (explaining that within two years of the first distribution of PILT, some states had passed laws to prevent deductions in PILT); *Id.* at 56-57 (showing number of states not passing revenue sharing to counties and thus avoiding deductions); see *also* CORN, *supra* note 85 ("It would be in the interest of every state to enact pass-through laws. . . ."). The fact that several reports to Congress have noted this feature and that Congress has failed to act upon it suggests Congressional acquiescence, if nothing else. *Id.*

[309] Essentially, the government must establish that the county intentionally deceived the federal government through the use of a service district, a fact made difficult because most of the deducted revenue sharing payments are made directly to the *State* which then distributes them according to *State* law. *Erickson*, F. Supp. 2d at 1097. As the court noted, "[i]f there are state regulations regarding the use of the funds and [a service district] was making unauthorized and improper transfers of Mineral Lease Funds to other entities, it would be a breach of a state regulation, not a violation of the federal False Claims Act." *Id.*

[310] "Mineral Lease Funds received by [the service district] are disbursed from the State, at the State's determination, without any involvement from the federal government. Accordingly, [the service district] does not submit any claim—true or false—for Mineral Lease Funds to the federal government." *Id.*

[311] Section 702 of the APA entitles "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of the relevant statute . . . to judicial review thereof." 5 U.S.C. § 702 (2006). Under PILT, it is clear that a local government has standing to sue the government for the failure to pay PILT benefits, *Greenlee County, Ariz. v. United States*, 487 F.3d 871, 878 (Fed. Cir. 2007), or for defining the beneficiaries of PILT in such a way as to deny them benefits, Meade Township v. Andrus, 695 F.2d 1006, 1009 (6th Cir. 1982) , but the statute does not make clear whether other parties may have standing to do so.

[312] This specific topic is beyond the scope of this Note. For relevant cases discussing standing in environmental suits, *see generally Massachusetts v. EPA*, 549 U.S. 497 (2007); and *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). *Compare* United States v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669, 684 (1973) (holding that a group of law students alleging use of the outdoor resources of the Washington D.C. metro area would be disturbed by agency action discouraging recycling had standing to sue),

For an example of the difficulties face by environmental plaintiffs generally, see Katherine B. Steuer & Robin L. Juni, *Court Access for Environmental Plaintiffs: Standing Doctrine in Lujan v. National Wildlife Federation*, 15 HARV. ENVTL. L. REV. 187, 188 (1991) (explaining that heightened injury-in-fact requirements make "standing more difficult to achieve" for environmental plaintiffs.").

[313] 18 U.S.C. § 6903(b)(1)(A) (2006).

PILT was explicitly intended not to allow local governments to receive multiple revenue sharing payments,[315] the agency's interpretation is contrary to the unambiguous direction of Congress.[316] Therefore, the plaintiff would argue DOI's interpretation of "received" is faulty because the legislative history is clear and would ask the court to direct DOI to evaluate the independence of districts created to "maximize PILT."[317] This argument, however, is likely to fail because this particular problem with PILT was raised as early as 1979, but has never been addressed by Congress.[318] The limited legislative history could also be read as favoring DOI's interpretation because the Senate Report explicitly disclaimed any intent to penalize counties that did not actually receive revenue sharing payments.[319]

2. *Rulemaking*

The best way forward for the agency, or at least the means most likely to hold up in court,[320] would be to conduct a full notice-and-comment proceeding, with all the procedure provided under 5 U.S.C. § 553.[321] In this scenario, the agency could take the relatively ambiguous language of PILT—requiring payments be "reduced . . . by amounts the unit

[314] Although there is no formal interpretation of this language, see 43 C.F.R. § 44.11, at least informally, the agency has determined that "[o]nly the amount of Federal land payments actually received by units of government in the prior fiscal year is deducted. If a unit receives a Federal land payment, but is required by State law to pass all or part of it to financially and politically independent school districts, or any other single or special purpose district, payments are considered to have not been received by the unit of local government and are not deducted from the Section 6902 payment," U.S. DEP'T OF INTERIOR, *supra* note 138, at 11.

[315] *See* 122 Cong. Rec. 25,743, 25,747 (1976) (statement of Rep. Weaver) (noting that receipts local governments received from the federal government were to be "deducted from the payments in lieu of taxes . . . [therefore] [t]here is not a double payment"); S. Rep. 94-1262, at 15 (1976) ("[The Act] requires that any payments received under [a payment law] . . . which are *actually received* by a unit of local government are . . . deducted.") (emphasis added). Five years later, when amending PILT, Representative Weaver reiterated that "we . . . [have] very carefully deducted any revenues from timber sales, or minerals, mineral royalties, from the moneys paid in lieu of taxes under this bill so the county [does] not get a double revenue from the federal government." 127 Cong. Rec. 16690 (1981) (statement of Rep. Weaver).

[316] Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842 (1984).

Furthermore, as enforced and interpreted, the deduction provision is superfluous because states and local governments often avoid PILT reductions by simply diverting revenue sharing payments through service districts; see CORN, *supra* note 85 ("It would be in the interest of every state to enact pass-through laws. . . .").

[317] Such an example might be that of Washington County, which openly stated that "the formation of the district . . . maximizes the county's payment in lieu of taxes money." SPECIALLY FUNDED TRANSPORTATION SPECIAL SERVICE DISTRICT ADMINISTRATIVE CONTROL BOARD, *supra* note 165, at 1-2.

[318] U.S. GEN. ACCOUNTING OFFICE, *supra* note 18, at 27 (explaining that within two years of the first distribution of PILT, some states had passed laws to prevent deductions in PILT); *Id.* at 56-57 (showing number of states not passing revenue sharing to counties and thus avoiding deductions).

[319] S. Rep. 94-1262, at 15 ("[Because i]n most cases only a small percentage of mineral leasing revenues produced within a county are returned to that county by the State . . . . to preclude penalizing these counties, [the Act] provides only those monies actually received by the local government should be deducted.").

[320] This is because this procedure would fall within the "safe harbors" identified by the Supreme Court in *Mead* and *City of Arlington*; see, *e.g.*, United States. v. Mead Corp., 533 U.S. 218, 228 (2001); City of Arlington, Tex. v. FCC, 133 S. Ct. 1863, 1868 (2013).

[321] This would include, for example, notice in the federal register at least thirty days before it took effect, "an opportunity [for interested persons] to participate in the rule making through submission of written data, views, or arguments," and would "incorporate in the rules adopted a concise general statement of their basis and purpose." 5 U.S.C. § 553(b), (c) (2006).

received"[322]—and interpret it as meaning that land payments are "received" if made to financially and politically dependent service districts and that the use of a service district's funds to cover local government responsibilities creates a rebuttable presumption of dependence.[323] Alternatively, the agency could act to strengthen its current policy that payments passed through to service districts only be deducted as the local government is mandated to do so by state law.[324] Only this option would guarantee the agency receive deference under *Chevron* and *City of Arlington*.[325] Although at one point informal or notice-and-comment rulemaking were perceived to be relatively less costly and more efficient,[326] the opposite is true today as it has become a very costly[327] and time-consuming process.[328]

In this particular instance, some 1,850 counties,[329] some of which receive a substantial portion of their funding for basic services from PILT,[330] would have an immediate interest in opposing a rule change by the agency.[331] As would Congress, because many Western legislators hail from states heavy in communities receiving large amounts of PILT.[332] Again, however,

[322] 31 U.S.C. § 6903(b)(1)(A) (2006).

[323] For example, in a case like *Erickson*, where the county repeatedly made use of materials, money, and equipment ostensibly owned and controlled by the service district, the local government would likely fail to carry its burden of rebutting the presumption and thus face the PILT deduction. United States *ex rel.* Erickson v. Uintah Special Servs. Dist., 395 F. Supp. 2d. 1088, 1093 (D. Utah 2005).

[324] U.S. DEP'T OF INTERIOR, *supra* note 138, at 11.

[325] Assuming, of course, that the reviewing court found the agency's construction "permissible." Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 (1984).

[326] "[I]n the early 1970s, the courts, commentators, and most federal agencies agreed that informal rulemaking under section 553 of the Administrative Procedure Act (APA) offered an ideal vehicle for making regulatory policy." Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385, 1385 (1992).

[327] In at least some cases, even "generic rulemaking [is] too resource intensive for the agency to consider." Thomas McGarity, *The Human Cost of Regulatory Ossification*, CTR. FOR PROGRESSIVE REFORM, Nov. 6, 2013, http://www.progressivereform.org/CPRBlog.cfm?idBlog=2DA7670B-99C2-8713-C4336D867BFF3C64.

[328] "In the last few decades, the courts, Congress, and the executive branch have placed a number of analytical hurdles in the way of informal rulemaking. As a result, notice-and-comment rulemaking has become more formal and cumbersome, and agencies increasingly shy away from using this formerly efficient method for formulating and announcing their rules and enforcement policies." Noah, *supra* note 43, at 403; SEE *also*, McGarity, *supra* note 326, at 1385 ("An assortment of analytical requirements have been imposed on the simple rulemaking model, and evolving judicial doctrines have obliged agencies to take greater pains to ensure that the technical bases for rules are capable of withstanding judicial scrutiny."). Even assuming, however, that an agency chooses to engage in the process, a court might still reject the agency's rule; see, *e.g.*, Corrosion Proof Fittings v. EPA, 947 F.2d 1201, 1229 (rejecting decision by EPA to impose a ban on asbestos products following a ten year period of public comment as "unreasonable"); see *also* Mark Seidenfeld, *Demystifying Ossification: Rethinking Recent Proposals to Modify Judicial Review*, 75 TEX. L. REV. 483, 484 (1997) (arguing that a major source of this increasing difficulty is that "courts remain free to demand exacting explanations for agency action").

[329] CORN, *supra* note 29, at 15.

[330] *See* Hancock, *supra* note 44 (discussing projects funded through PILT monies around the State of Idaho).

[331] CORN, *supra* note 29, at 12-13.

[332] For example, Senator Orrin Hatch of Utah, the senior Republican Senator in Congress represents a state that received some $35.4 million in PILT in 2013. U.S. DEP'T OF INTERIOR, *supra* note 12. Senator Harry Reid, the Majority Leader in the United States Senate, represents Nevada, which received $23.3 million in PILT the same year. *Id.*

because notice-and-comment procedure allows parties to participate in the rulemaking process[333] and requires the agency to respond to relevant comments in a substantive way,[334] such a procedure is much more likely to be viewed as legitimate and democratic than an otherwise arbitrary decision by the agency.[335] Furthermore, the use of notice-and-comment rulemaking may help the agency to preserve its discretion in the event of a judicial decision on the matter.[336]

3. *Statutory Change*

As enacted, PILT is incredibly complicated[337] and easily misread and misapplied.[338] The statute, therefore, should be changed either to end the possibility of abuse by the states[339] or to eliminate the payment law deduction provision.[340] The law could also be restructured to promote community development, perhaps by requiring that the money be spent in a particular manner[341] or that it be distributed in such a way as to encourage conservation of resources rather than consumption.[342]

---

[333] 5 U.S.C. § 553(c) (2014). Furthermore, the APA guarantees the right of "an interested person . . . to petition for the . . . amendment, or repeal of the rule." § 553(e).

[334] The statement of basis and purpose must address "vital questions, raised by comments which are of cogent materiality" and ensure that "major issues of policy are ventilated by the informal proceedings." United States. v. Nova Scotia Food Prods. Corp., 568 F. 2d 240, 252 (2d Cir. 1977) (quoting Auto. Parts & Accessories Ass'n v. Boyd, 470 F.2d 330, 338 (D.C. Cir. 1968).

[335] This is because, despite the hurdles, "informal rulemaking is still an exceedingly effective tool for eliciting public participation in administrative policymaking." McGarity, *supra* note 326, at 1385.

[336] *See* discussion *supra* note 225.

[337] *See, e.g.*, 31 § U.S.C. 6903 ("Payments") (2014).

[338] For example, a confusion as to the reporting requirements under the law, led several States to misreport the required data. U.S. GEN. ACCOUNTING OFFICE, *supra* note 18, at 21.

[339] *Id*. at 18 (indicating that process as existing in late 1970s caused the "[l]oss of congressional budgetary control over actual annual payments for the program").

[340] *Secure Rural Schools and Payment in Lieu of Taxes: Hearing Before S. Comm. on Energy & Natural Res.*, 113th Cong. 50 (2013) (statement of Ryan R. Yates, Associate Legislative Director, National Association of Counties) (suggesting that deduction of other revenue sharing payments is unfair and should be eliminated in any reform of PILT). Although this is not the preferred solution of the Author, this proposal has, at least, the benefit of not encouraging States and local governments to engage in dishonest "shell games." A "shell game" is defined by Webster's Dictionary as "a dishonest . . . game in which someone hides a ball under one of three cups or shells, moves the cups or shells around quickly, and asks an observer to guess which one the ball is under." *Shell Game Definition*, MERRIAM-WEBSTER DICTIONARY, http://www.merriam-webster.com/dictionary/shell%20game (last visited Apr. 22, 2014). The Author believes this is a fair characterization of current practices.

[341] For example, the Secure Rural Schools and Community Self Determination Act specifically requires payments "be expended . . . for the benefit of the public schools and public roads of the county or counties." 16 U.S.C. § 500 (2014) (incorporated by reference from 16 U.S.C. § 7112(c)(1)(A)-(B)).

[342] For example, rather than hand out a blanket subsidy with no strings attached, Congress could require that communities receiving PILT funds use a portion of those funds in environmental remediation efforts or, alternatively, impose a reduction in PILT for those counties that rely most heavily upon natural resource extraction for local income. These programs could be modeled on existing pollution reduction schemes. NATIONAL CTR. FOR ENVTL. ECON., ECONOMIC INCENTIVES: SUBSIDIES FOR POLLUTION CONTROL, U.S. ENVTL. PROTECTION AGENCY (2001), *available at* http://yosemite.epa.gov/ee/epa/eed.nsf/pages/EconomicIncentives.html#3. Indeed, subsidies "are [already] used at all levels of government to help manage environmental pollution . . . . [and] support private-sector pollution prevention and control activities, the cleanup of contaminated industrial sites, farming and land preservation, consumer product waste management, alternative automobile fuels, clean-running cars, and municipal wastewater treatment." NATIONAL CTR. FOR ENVTL. ECON., THE UNITED STATES EXPERIENCE WITH ECONOMIC

A single payment system for federal revenue sharing and land payments was proposed as early as the PLLRC report,[343] but was implicitly rejected by the Congress that enacted PILT.[344] Such a system would have several benefits, including likely increased administrative efficiency.[345] Currently, PILT is simply another layer on top of what was already an incredibly complicated system.[346] For example, payments to local governments under ten different payment laws are deducted from PILT[347] and the acreage of federal land managed by the Departments of Agriculture, Defense and Interior—through no less than seven distinct agencies—is used to calculate the federal acreage in the jurisdiction of the local county.[348] DOI then relies on the states themselves to accurately pass on data indicating the precise levels of revenue sharing payments distributed to local governments.[349] Moreover, considering that the basic purpose of all federal land payment schemes has been to provide adequate compensation for lost taxes, a single system could also be designed to pay true tax equivalency for un-taxable federal land.[350]

INCENTIVES FOR PROTECTING THE ENVIRONMENT, at vi (2001), *available at* http://yosemite.epa.gov/ee/epa/eerm.nsf/vwAN/EE-0216B-13.pdf/$file/EE-0216B-13.pdf.

[343] In fact, the PILT program was proposed as an alternative to the existing system of revenue sharing payments because "the system of revenue sharing [bore] no relationship to the direct or indirect burdens placed on state and local governments . . . . Although [these programs] were originally designed to offset the tax immunity of Federal lands, the existing revenue sharing programs [did] not meet a standard of equity and fair treatment either to state and local governments or to the federal taxpayers." PUBLIC LAND LAW REVIEW COMM'N, *supra* note 33, at 237. One major critique was that revenue sharing payments tended to undercompensate some communities and overcompensate others. *Id.* Furthermore, "pressures [could] be generated to institute programs that will produce revenue, though such programs might be in conflict good conservation management practices." *Id; see also* U.S. GEN. ACCOUNTING OFFICE, *supra* note 18, at 51 (noting that a single payment system "would be easy to administer and control.").

[344] FAIRFAX, *supra* note 274, at 155.

[345] "Concerning the administrative problems computing acreage payments . . . officials responsible for administering [the PILT] program agreed [in 1979] that the act should be amended so that the payment program can be administered more effectively, efficiently, and equitably. They stated that even though they [we]re aware of the unreliability of State-provided data on which payments are based, they do not have the legal authority, staff, or funding to audit State reports." U.S. GEN. ACCOUNTING OFFICE, *supra* note 18, at iv; *id.* at 51.

[346] The land payment system in the United States is incredibly arbitrary and inequitable. For example, currently existing revenue sharing programs variously pay between five and ninety percent of revenues, some are allotted for schools and roads and others are open-ended, and some are paid directly to the States and others to local governments. *Id.* at 33.

[347] 31 U.S.C. § 6903(a)(1)(A)-(J) (2006).

[348] These are the BLM, the Bureau of Reclamation, United States Fish & Wildlife Service (FWS), and National Park Service (DOI); the United States Army Corps of Engineers and United States Department of the Army (Department of Defense); and United States Forest Service (Department of Agriculture). 31 U.S.C. § 6901(1)(A)-(H). The inclusion of even these lands is rather arbitrary: originally wildlife refuges managed by FWS were excluded "due to a power struggle between congressional committees, not because they ought not to have been included." FAIRFAX, *supra* note 274, at 156-57.

[349] This is another potential source of abuse. For example, in Wyoming in the mid-1970s, federal revenue sharing payments for 1976 were not distributed until 1977 resulting in a $1 million windfall to counties whose payments were not deducted. U.S. GEN. ACCOUNTING OFFICE, *supra* note 18, at 29. In fact, that year at least six states manipulated the distribution of revenue sharing payments to coincide with the transition quarter in the fiscal year to prevent all deductions "because the transition quarter was not considered a part of the fiscal year." *Id.* at 28.

[350] *Id.* at 37.

Such a system is not, however, without serious defects, likely those which led the enacting Congress of PILT to create PILT instead.[351] The complex bureaucratic operation of the current regime engenders special interests, which would not likely give up their favored position without a fight.[352] Presumably the losers under the mandate would be incentivized to adopt alternate revenue streams or exploit existing streams to their benefit in new ways, while those unable to do so would simply suffer the loss of revenue.[353]

Congress could also decide, rather than reauthorize PILT or even continue the program, to discontinue PILT entirely. This seemingly drastic option is not without its proponents; however, this is perhaps the least likely to occur given the complex history and interests involved in PILT.[354] Although the program may be, in effect, a Western subsidy,[355] it is a *bipartisan* Western subsidy[356] that supports that most basic unit of Western consciousness: the small-town, rural community.[357] An attack on PILT is, despite the contradiction in terms, an attack on the very idea of the "Western Ideal" and "Western Independence."[358] Furthermore, although abuse is

[351] FAIRFAX, *supra* note 274, at 155-56 ("Any tax-equivalence based program for the public domain lands imposes vast problems in terms of assessing for tax purposes enormous areas never previously taxed. Moreover, the process of trying to identify and quantify benefits and burdens is complex and inclusive . . . . Therefore, Congress bypassed the costly and potentially disruptive calculations and simply put together another layer of payments over the existing revenue sharing scheme.").

[352] As early as 1979, the United States General Accounting Office recognized this as a major pitfall to reform of PILT: "[i]n many cases various units of government have come to depend upon funds they currently receive from the various revenue sharing programs. If a new program is adopted which eliminates these funds, careful attention must be paid to the way the plan is implemented to lessen the undesirable consequences." U.S. GEN. ACCOUNTING OFFICE, *supra* note 18, at 36-37.

[353] For example, those counties with sufficient property bases might raise their property taxes. *Id.* at 36. Others "might raise the yield or severance taxes on minerals or timber, which would raise the price of these goods for consumers." *Id.* Furthermore, in at least some states, existing revenue sharing payments are distributed to all counties, regardless of whether or not those counties are public-lands counties. *Id.* Presumably, any reform of the revenue sharing system that moves toward a PILT-like single payment system based on the acreage of federal land would harm these counties the most. *Id.*

[354] *See* discussion, *supra* note 44.

[355] Webb, *supra* note 13.

[356] For example, on January 15, 2014 Senators Michael Bennet and Mike Crapo (Republicans) and Mark Udall and James Risch (Democrats) "sent a bipartisan letter signed by a coalition of senators . . . requesting that funding for the Payment in Lieu of Taxes (PILT) Program be included in the final Farm Bill conference report." *PILT Funds on the Chopping Block*, SALIDA DAILY NEWS, Jan. 16, 2014, http://www.salidadailypost.com/news/24864/PILT_Funds_on_the_Chopping_Block/ (noting that "[a]t this point, the letter has been signed by Michael Bennet, Mike Crapo, Mark Udall, Jim Risch, Tom Udall, Jon Tester, Mark Begich, Martin Heinrich, Ron Wyden, Jay Rockefeller, Mark Warner, Joe Manchin, Patty Murray, Mark Pryor, Tim Kaine, and Dianne Feinstein."). Leia Larsen, *Colorado Counties Face Federal-Funding Loss Tied to Public Lands*, SKY-HI NEWS, Jan. 16, 2014, http://www.skyhidailynews.com/news/9776047-113/pilt-county-million-counties (indicating that support for PILT is a bipartisan issue in Congress).

[357] These payments are made directly to local, primarily rural governments mainly in the Western United States. *Rural Counties Get Reprieve on Federal PILT Revenues*, WET MOUNTAIN TRIB., Jan. 30, 2014, http://www.wetmountaintribune.com/home.asp?i=775&p=6; Jeff Horseman, *INLAND: Different Fates For Funding to Help Counties*, PRESS ENTER. (Jan. 31, 2014), http://www.pe.com/local-news/politics/politics-headlines-index/20140131-inland-different-fates-for-funding-to-help-counties.ece; *See also* Hancock, *supra* note 44; Larsen, *supra* note 356.

[358] For example, however ridiculous it may sound, some local governments, and legislators, like to pretend that PILT is the only thing that keeps them from exploiting the public domain. *See Pass PILT Bill*, *supra* note 7; see

rampant,[359] the mere existence of such abuse should not suggest that the program does no good nor has a genuine positive impact on at least some communities.[360]

B. The Future

At the moment, there is no reason to believe that PILT will come before the courts any time soon. Moreover, even if PILT were to become a larger issue, there is even less reason to believe that the focus of any reform efforts would be on fixing existing problems with the statutory structure of the payment program rather than on the payments themselves.[361] Before 2008, "[t]he mandates under PILT [were] notoriously underfunded." [362] The most recent measures impacting PILT merely authorized PILT as a "mandatory program," [363] ensuring full rather than partial payments.[364] In fact, many of the problems identified in this Note were identified as early as the 1970s[365] or were discussed during the 1994 amendment process, but have since received little attention.[366]

also, DEVOTO, *supra* note 5, at 61-62 (pointing out that the Western dream of "independence" relies "upon continuous, continually increasing federal subsidies").

[359] *See* CORN, *supra* note 85 ("[T]hose [states] lacking [pass through legislation] may be unaware of this portion of PILT.").

[360] "[F]or the 14 communities that received over $3 million in 2013, the government services provided by the county would be adversely affected in the near term [if payments were abruptly ended] . . . . [S]maller payments would also be important in low-property value, low-populations counties with relatively greater shares of federally owned land." CORN, *supra* note 29, at 15; see *also* Tamara Sone, *Lapse in 'Payment in Lieu of Taxes' could mean loss of millions to Yavapai County*, THE DAILY COURIER (Jan. 2, 2014), *available at* http://www.dcourier.com/main.asp?SectionID=1&SubSectionID=1086&ArticleID=128058 ("If PILT is not approved it will be approximately a $3 million loss of annual revenue in Yavapai County's general fund budget beginning this current fiscal year, resulting in an immediate need to address the loss in revenue . . . . With 49 percent of the county's general fund going toward courts and law enforcement budgets, the loss of PILT payments could result in a "substantial and immediate" impact to public safety and courts,").

[361] Ryan R. Yates, *NACo Testifies Before Senate on Payment in Lieu of Taxes*, COUNTY NEWS, Mar. 25, 2013, www.naco.org/newsroom/countynews/CurrentIssue/3-25-2013/Pages/NACo-testifies-before-Senate-on-payment-in-lieu-of-taxes.aspx ("Counties look forward to working with members of the committee and staff to develop and pass legislation that will continue the historic partnership between federal and county governments by extending continued mandatory funding for the PILT program for FY14 and beyond . . . .").

[362] Pommersheim, *supra* note 78, at 544 ("For example, in 2003, Congress allocated slightly more than $200 million for PILT payments when the Act authorized (and States should have received) payments totaling roughly $325 million.").

[363] Emergency Economic Stabilization Act of 2008 (Bailout Bill), Pub. L. No. 110-343, 122 Stat. 3765 (2008) ("For each of fiscal years 2008 through 2012 (1) each county or other eligible unit of local government shall be entitled to payment under this chapter; and (2) sums shall be made available to the Secretary of the Interior for obligation or expenditure in accordance with this chapter.").

[364] Since 2008, "counties have received the full PILT entitlement level." *Secure Rural Schools and Payment in Lieu of Taxes: Hearing Before S. Comm. on Energy & Natural Res.*, 113th Cong. 17 (2013) (statement of Pamela K. Haze, Deputy Assistant Secretary for Budget, Finance, Performance & Acquisition, Dep't of the Interior). With the expiration of the most recent extension in 2013, overall allocation for PILT will be reduced by about $20.3 million in 2014. *Id.*

[365] U.S. GEN. ACCOUNTING OFFICE, *supra* note 18, at 7.

[366] CORN, *supra* note 29, at 12 n.24.

V. ANY OBJECTIONS?

Although the deduction rule has been in place since the passage of the PILT Act, neither BLM nor the DOI have enforced it against states utilizing pass through legislation.[367] To do so now would punish counties for activity that is widely practiced and that even the federal government has recognized implicitly, if unofficially, as in the best interest of the counties.[368] However, these new practices are particularly flagrant: for example, the founders of certain service districts blatantly admit that not only are the districts not independent, but that the district exists for the sole purpose of "maximizing" PILT.[369]

On the other hand, states and local governments are only acting in their own economic self-interest: if the money is available, why should they not ensure that they maximize the amount received?[370] The purpose of PILT is to ensure that local governments are compensated for non-taxable federal lands present within their jurisdiction, not to provide windfall payments to local units of government lucky enough to be rich both in natural resources and federal lands.[371] The "payment law" deduction provision was specifically designed to even out payments between local jurisdictions high in natural resources and those without.[372]

Furthermore, PILT does not adequately compensate local governments for the loss of tax revenues,[373] nor the costs associated with federal lands.[374] Retaining other federal revenue

[367] This, though the problem was identified at least as early as 1971; *see, e.g.*, U.S. GEN. ACCOUNTING OFFICE, *supra* note 18, at 18, (noting that the provision intended to prevent overcompensation actually allows States to subvert the Congressional purpose by receiving greater payments than intended); *id.* at 25 ("[U]nder the terms of the act . . . states can increase considerably [PILT] payments by amending their laws so that no receipt-sharing payments are paid directly to counties.").

[368] CORN, *supra* note 29, at 1.

[369] Or, as in Colorado where, "as a result of the United States Department of the Interior declaring that Federal mineral lease payments to counties [were] to be counted as prior-year payments under the payment in lieu of taxes payment formula," the state legislature found it necessary to authorize the creation of special "mineral lease districts" solely to avoid the deduction. 2011 Colo. Sess. Laws 580, 581.

[370] This is perhaps embodied most fully by the example from Washington County, Utah, where a service district was created with a four-year lifespan, because that was the expected duration of the federal funds that the county hoped to receive. SPECIALLY FUNDED TRANSPORTATION SPECIAL SERVICE DISTRICT ADMINISTRATIVE CONTROL BOARD MEETING, MINUTES, *supra* note 21, at 2.

[371] Some legislators question the entire idea of PILT as "pork." *See* 140 Cong. Rec. H11241-01 (daily ed. Oct. 7, 1994) (statement of Rep. George Miller) ("I know that PILT is a highly popular program in Western States that hugely benefit from its largesse . . . . I know that your counties are as hard pressed as mine and could use a little Federal pork."); *Id.* (statement of Rep. Martin Hoke) ("PILT is a wonderful acronym . . . not payment in lieu of taxes but pork in lieu of taxes.").

[372] For example, one supporter of the original Act noted that "receipts vary widely from year to year . . . [meaning that PILT] w[ould] provide a predictable level of payments which does not now exist for these counties." 122 Cong. Rec. 25,742, 25,742 (1976) (statement of Rep. James Quillen). Note that Representative Quillen emphasized that these payments were to be "predictable," *not* windfall. Another supporter noted that "[t]he bill provides these moneys and, at the same time, keeps a lid on total payments to prevent unnecessary windfall profits in large uninhabited areas." *Id.* at 25,748 (statement of Rep. Jim Jeffords).

[373] "PILT payments are by no means acting as an equivalent to property tax payments." CORN, *supra* note 29, at 14. For example, for the 6,959 acres in the District of Columbia owned by the Federal government, only $17,339 were paid out to the District in PILT; this is certainly much less than would be paid in property taxes out if this land were held in private hands. *Id.*

sharing monies comes closer to approximating the correct level of payment.[375] Congress perennially promises greater amounts of PILT, but has failed, until recently, to appropriate sufficient funding.[376] These payments are also limited such that a governmental unit often receives less than "it would receive if actual property taxes were being distributed."[377] Moreover, counties and local governments are unable to enforce the authorized PILT obligation[378] where Congress has failed to appropriate enough money to cover the obligation.[379] Therefore, being able to receive PILT and 6903(a) payments in full more closely approximates the "correct" amount of PILT[380] and is more reliable for local governments planning yearly budgets and expenditures.[381]

[374] Because those counties affected are mainly rural areas with relatively low populations, they generally have a relatively small tax base to begin with. For example, in 1994, Daggett County, Utah with only 690 tax-paying residents was responsible for providing services to "a national recreation area in the county that generate[d] approximately 2 million visitors per year." 140 Cong. Rec. H11241-01 (daily ed. Oct. 7, 1994) (statement of Rep. Bill Orton). On the other hand, this also means that PILT disproportionately benefits those states and communities with small populations. 140 Cong. Rec. H11241-01 (daily ed. Oct. 7, 1994) (statement of Rep. George Miller) ("PILT money is distributed very disproportionately. Three quarters of the money goes to just a handful of States with a small number of Members of [the House].").

[375] Of course, the "correct" level of payment is relative. For example, now that PILT has been funded at the full level as mandatory spending since 2008, "in all likelihood county governments will strongly support continuing mandatory spending for PILT." CORN, *supra* note 29, at 12-13. Representative George Miller, when discussing the 1994 reauthorization, perhaps presciently argued that "the permanent increases will be locked in year after year. Any opportunity for real reform will be eliminated because, as we know, Western senators will block any efforts to modify their uncapped spending." 140 Cong. Rec. H11241-01 (daily ed. Oct. 7, 1994) (statement of Rep. George Miller).

[376] CORN, *supra* note 29, at 1-3. In 1995, Congress responded to concerns from some local governments that PILT had not kept up with inflation by steadily increasing the amounts authorized to be paid under the Act. However, the appropriations level lagged behind, meaning that local governments consistently received less than authorized. *Id.* at 3.

[377] Swain, *supra* note 30, at 460. One such limitation is that based on population. 31 U.S.C. § 6903(c)(2) (2006). Another, some might argue, is the deduction provision itself; see, *e.g.*, *Secure Rural Schools and Payment in Lieu of Taxes: Hearing Before S. Comm. on Energy & Natural Res.*, 113th Cong. 50 (2013) (statement of Ryan R. Yates, Associate Legislative Director, National Association of Counties) (arguing deduction of revenue sharing payments is unfair and should be eliminated).

[378] According to one estimate, "western communities lost out on over one billion dollars in unfunded PILT payments since the program was enacted." *Supporting Full Funding of Payment-in-Lieu-of-Taxes and Secure Rural School Program*, CONGRESSIONAL WESTERN CAUCUS, http://www.westerncaucus.pearce.house.gov/paymentinlieuoftaxes-and-secure-rural-school-programs/.

[379] *See, e.g.*, Greenlee Cty., Ariz. v. United States, 487 F.3d 871, 877-78 (Fed. Cir. 2007) (upholding pro rata deduction of PILT as a result of under-appropriation of funds); Prairie Cty., Mont., 178 Interior Bd. Land Appeals 20 (IBLA 2009) (noting that 2007 appropriation represented approximately "64.700528 percent of the eligible amount"); 43 C.F.R. § 44.51(b) (2006) ("If Congress appropriates insufficient monies to provide full payment to each local government during any fiscal year, the Department will reduce proportionally all payments in that fiscal year.").

[380] 'Correct' defined here as 'closest to the amount lost as a result of tax immune federal holdings.' Because payments in lieu of taxes are not calculated according to land value, or even the cost to the local government, but instead according to acreage of eligible federal land, these payments are unlikely to be the equivalent of property taxes for the same land; see 31 U.S.C. § 6903(b)(1)(A)-(B) (2006) (setting forth the acreage formula for the calculation of PILT); see *also* Swain, *supra* note 30, at 460.

[381] For example, "because [PILT is] self-imposed by the government property owner, the affected jurisdictions cannot rely on them in the same manner in which they can rely on a tax levy. Thus, [PILT does] not

Whatever the truth of this argument, however, it dodges the central question: did Congress intend for resource-rich counties to be able to receive greater amounts of PILT?[382] The answer is a clear no.[383] If local governments want greater payments, more flexibility, or funding that more closely approximates the loss in tax revenues, they should pursue these goals through political means.[384] For example, this could be accomplished by encouraging their national representatives to pass legislation that accomplishes these ends in a straightforward manner rather than attempting to "game the system."[385]

VI. CONCLUSION

Properly run, PILT would provide an incentive to local governments to promote recreation and other less destructive uses of public lands, rather than exploitative natural resource extraction and development.[386] If a county could receive no funds except what would have been

have the same effect as property taxes, especially in connection with long-range fiscal planning and determining local government bonding capacity." *Id.*

Since 2008, however, PILT has been funded at the full level funding as mandatory spending; see Press Release, *supra* note 275 ("This year's PILT program [2013] is the last to be funded under the Moving Ahead for Progress in the 21st Century Act (P.L. 112-141), which reauthorized PILT for 2013 and funded full entitlement levels of the program. From 2008 through 2012, the program was funded under the Emergency Economic Stabilization Act of 2008."). Although at this moment, mandatory funding has not been reauthorized or extended into 2014, the Author believes that, because this is a program with strong bipartisan support, particularly in the West, reauthorization is likely; see, *e.g.*, *Id.* ("President Obama has proposed to fully fund the PILT program in FY 2014, and we encourage Congress to take the required action to make sure this important program continues. . . . The President's fiscal year 2014 budget proposes to extend mandatory full funding for the program for another year while a sustainable long-term funding solution is developed for the PILT program."); see *also* 160 Cong. Rec. S385-01 (daily ed. Jan. 16, 2014) (statement of Sen. Udall, N.M.) ("I realize PILT has not been in the appropriations bill for several years. In fact, it is preferable for it to receive mandatory, long-term funding. But we must find a solution and we must find that solution soon. . . . It is a commonsense solution to this very real problem. PILT is a long-term funding program. Our rural communities across the West need consistency. They need to be able to plan for long-term projects. Mandatory long-term funding is the only real solution."); *Id.* (statement of Sen. Mark Udall, Colo.) ("I introduced a bill that would fully fund PILT . . . . That fully funded PILT approach would give our rural communities certainty when it comes to their budgets and their futures."); *Id.* (statement of Sen. Enzi) ("We need to stop playing games with the Payment in Lieu of Taxes Program and find a way to ensure it is adequately and fairly funded now and for years to come.").

[382] United States v. Ron Pair Enters., Inc., 489 U.S. 235, 242 (citing Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 571 (1982)) ("The plain meaning of legislation should be conclusive, except in the 'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters. . . . [T]he intention of the drafters . . . controls.").

[383] *See* discussion *supra* notes 93-95, 98 and accompanying text.

[384] To be fair, pass through legislation is technically a political solution. However, the creation and passage of such legislation does not fix the fundamental issues and problems with the PILT Act; see, *e.g.*, (NACO)

[385] For example, although this Note does not endorse this position, some believe that it is "unfair" that any "revenue sharing payments" be deducted from PILT. According to Ryan R. Yates of the National Association of Counties, "[t]he Federal Government should not reduce its tax obligation to local governments solely because [of] other land management revenue agreements between . . . governments." *Secure Rural Schools and Payment in Lieu of Taxes: Hearing Before S. Comm. on Energy & Natural Res.*, 113th Cong. 50 (2013) (statement of Ryan R. Yates, Associate Legislative Director, National Association of Counties). As a benefit, at least this approach is honest and upfront about taking both PILT and revenue sharing payments.

[386] For example, "'some of the units of general local government' that receive large payments have other substantial sources of revenue while some of the counties receiving little are relatively poor . . . . [A] few counties

received if development did not occur, but still had to cover the costs that development created, the county would have the incentive to seek alternative forms of development.[387] On the other hand, recreation and tourism have the potential to bring jobs and revitalize communities.[388] For example, tourists and tourism dollars in many cases surpass the economic benefits derived from exploitative use of the same resource.[389]

The DOI should, therefore, administer PILT in a manner that more closely adheres to the original legislative purpose of the Act[390] by not allowing local governments to receive windfall

which receive very large payments from other federal revenue sharing programs (because of valuable timber, mining, recreation, and other land uses) nonetheless are also authorized to receive a minimum payment ($0.34 per acre) from PILT, thus somewhat cancelling out the goal of evening payments across counties. [Finally,] in some counties the PILT payment greatly exceeds the amount that the county would receive if the land were taxed at fair market value, while in others it is much less." CORN, *supra* note 29, at 2-3.

[387] As states are essentially free to receive both Mineral Lands Leasing monies and PILT, in Wyoming, for example, "the provisions of this law have . . . help[ed] to make the mineral industry [Wyoming's] most important, and *to keep it there*." Western, *supra* note 127 (emphasis added). This is particularly so because both PILT and the Mineral Lands Leasing monies are intended to pay for the infrastructure and government services made necessary by the presence of otherwise nontaxable federal holdings; see Malm, *supra* note 126; U.S. DEP'T OF INTERIOR, *supra* note 6.

[388] The benefits that increased tourism and recreation has on communities can be immense and, in many instances, may be greater than is possible through "consumptive exploitation." *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 COLOM. J. ENVTL. L. 57, 82 (2010) (noting that "only five percent of the economic wealth of Western states is derived from natural resource extraction," whereas, in Colorado alone, the visitors to the state's national parks "generated $199.2 million" in 2005); *id.* ("NPS visitors pent $10.4 billion during FY 2005 in the local regions around national parks, supporting 235,000 local jobs."); Neil D. Hamilton, *Rural Lands and Rural Livelihoods: Using Land and Natural Resources to Revitalize Rural America*, 13 DRAKE J. AGRIC. L. 179, 197-98 (2008) ("One value of focusing on natural resource based development is to facilitate a change in attitudes that recognizes all rural communities are surrounded by millions of dollars of investments . . . . The farm fields, forests, grasslands, and rivers of rural America are valuable and productive resources . . . . But what is often missing is the recognition of these values and the willingness to consider new ways to unlock or harness their economic potential."). Professor Hamilton further suggests that such efforts can "reconnect" rural communities with the natural resources and opportunities that surround them. *Id.* at 198.

[389] In 1962, Secretary of the Interior Stewart Udall recognized that "it has become abundantly clear that national parks are not only sound social investments, but sound use of public funds as well. Time and time again citizens adjacent to new parks have bemoaned the loss of revenues from resources 'locked up' inside a new reserve—lost taxes, uncut timber, undiscovered minerals, unharvested game—only to learn later that the income from providing services to visitor-tourists has equaled or surpassed whatever sums might have been gained from exploiting these park resources." Stewart L. Udall, *Nature Islands for the World*, *in* Proceedings of FIRST WORLD CONFERENCE ON NATIONAL PARKS 1, at 5 (Alexander B. Adams, ed. 1962).

More recently, Thomas Tidwell, chief of the United States Forest Service, testified before Congress that "recreation is now the largest economic activity on the national forests . . . contribut[ing] over 200,000 jobs and $13.5 billion to GDP." *Secure Rural Schools and Payment in Lieu of Taxes: Hearing Before the S. Comm. on Energy & Natural Res.*, 113th Cong. 10 (2013) (statement of Thomas Tidwell, Chief, United States Forest Service).

[390] *See* Seastone, *supra* note 9, at 375 ("The public purpose served by . . . requiring payments to state and local governments is the equitable treatment of those entities whose own abilities to raise revenues are limited by the tax immunity of federal lands . . . [and] to offset this tax immunity."). Insofar as communities receive payments beyond this loss, the Congressional purpose is not served; see, *e.g.*, U.S. GEN. ACCOUNTING OFFICE, *supra* note 18, at 18, (noting that the provision intended to prevent overcompensation actually allows states to subvert the Congressional purpose by receiving greater payments than intended); *id.* at 25 ("[U]nder the terms of the act . . . states can increase considerably [PILT] payments by amending their laws so that no receipt-sharing payments are paid directly to counties.").

payments and discouraging states from creating inefficient "subdivisions or districts" for the sole purpose of "maximiz[ing] federal payments."[391] At the same time, as written, the Act is very complicated[392] and provides for inequitable payments[393] that local governments contend are below,[394] and others contend are significantly above,[395] true tax equivalency of the communities receiving them.[396] Congress, therefore, should amend PILT to provide more equitable payments and give states and local communities the incentive to manage, rather than exploit, public lands; in the interim, however, DOI should clarify the PILT rules through notice-and-comment rulemaking. Only then will Congress's true intent toward PILT be established in law.[397]

[391] Dayton L. Hall, Payment in Lieu of Taxes: Congress's Flawed Solution to the Burden of Federal Land Ownership, at 31 (Washburn University College of Law, Working Paper 2013), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2196683.

[392] *See* discussion *supra* notes 91-92 and accompanying text (describing the PILT calculation and payout system); U.S. GEN. ACCOUNTING OFFICE, *supra* note 18, at 21 (describing how faulty data provided by states "resulted in incorrect deductions . . . [partly because] many States are confused on what period of time the data should cover."). Because the DOI relies on these numbers to calculate PILT, this is another major concern with the current law.

[393] *See id.* at 26 (explaining that "the ability of the States to influence payments . . . creates serious inequities to the local governments receiving payments"); see *also* discussion *supra* note 372.

[394] *See, e.g.*, 2011 Colo. Sess. Laws 580, 580-81 (describing need to protect local communities from "losing millions of dollars otherwise dedicated to Colorado public land management")

[395] *See* U.S. GENERAL ACCOUNTING OFFICE, *supra* note 16, at 7 (claiming that "[p]ayments made to compensate States and counties for tax-exempt Federal land are not consistent or equitable" because they pay out significantly more than would be generated by local property taxes); see *also*, CORN, *supra* note 29, at 12 n. 24 ("[I]mportant issues . . . [as to] the equity of the payments and the balance struck in the payment formula [include] (a) between heavily and sparsely populated communities, (b) between those with federal lands generating large revenues and those with lands generating little or no revenue, and (c) between the amounts paid under PILT and the amounts that would be paid if the lands were simply taxed at fair market value.").

[396] Some might debate whether tax equivalency is even the correct goal for Federal revenue sharing and payment in lieu of taxes programs; see *id.* at 16-17; Hall, *supra* note 391, at 19-20. That topic, however, is beyond the scope of this paper.

[397] *See supra* Subsection III.A.1.