

**SECRETARIAL POWERS UNDER THE FEDERAL
LAND POLICY AND MANAGEMENT ACT OF
1976: EXCESSIVE USE OF SECTION 204 WITH-
DRAWAL AUTHORITY BY THE CLINTON ADMIN-
ISTRATION**

JOINT OVERSIGHT HEARING

BEFORE THE

SUBCOMMITTEE ON NATIONAL PARKS
AND PUBLIC LANDS

AND

SUBCOMMITTEE ON ENERGY
AND MINERAL RESOURCES

OF THE

COMMITTEE ON RESOURCES
HOUSE OF REPRESENTATIVES

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JOINT OVERSIGHT HEARING ON SECRETARIAL POWERS UNDER THE FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976: EXCESSIVE USE OF SECTION 204 WITHDRAWAL AUTHORITY BY THE CLINTON ADMINISTRATION

TUESDAY, MARCH 23, 1999

HOUSE OF REPRESENTATIVES,
COMMITTEE ON RESOURCES,
SUBCOMMITTEE ON ENERGY AND MINERAL RESOURCES,
SUBCOMMITTEE ON NATIONAL PARKS AND PUBLIC LANDS,
Washington, DC.

The Subcommittees met, pursuant to call, at 10 a.m., in Room 1324, Longworth House Office Building, Hon. Barbara Cubin and Hon. James V. Hansen, Co-Chairmen, presiding.

**STATEMENT OF HON. JAMES V. HANSEN, A REPRESENTATIVE
IN CONGRESS FROM THE STATE OF UTAH**

Mr. HANSEN. The meeting will come to order. Good morning. Today, we commence this joint hearing of the Subcommittee on National Parks and Public Lands and the Subcommittee on Energy and Mineral Resources to discuss withdrawals under the Federal Land Policy and Management Act. We thank our witnesses for joining us today. We look forward to hearing from you.

Executive withdrawals have a long history. During the past hundred years or so, much of the public domain was open to entry under various public land laws, including the Homestead Act, the Desert Lands Act, the General Mining Law, the Stock Raising Act, et cetera. Withdrawals have been used many times to remove areas of the public domain from entry under these laws.

I will not go into the extensive history of pre-FLPMA withdrawals, except to say that one of the main reasons cited by supporters for the passage of FLPMA was to rein in Executive withdrawals. Congress felt that the Executive was usurping Congressional power over the public lands and they intended to take it back.

FLPMA intended to significantly limit Executive withdrawal authority and, in particular, withdrawals of over 5,000 acres. The Secretary of the Interior could still make a withdrawal of over 5,000 acres, but the withdrawal would be of limited duration, the Secretary would be subject to strict reporting requirements, and the withdrawal would cease if Congress passed a resolution of disapproval.

This was a pretty good compromise. It allowed the Secretary to continue to make withdrawals as needed, but Congress maintained significant power to restrict the Secretary.

Unfortunately, there were a couple of problems that Congress did not anticipate. First, Section 204 of FLPMA had a provision that allowed the Secretary to “segregate” land for two years while the Secretary decided whether or not to go through with a full-blown withdrawal. The reporting requirements, size limitations, and Congressional veto provisions did not apply to these segregations. This allowed the Secretary to completely avoid the withdrawal criteria. All he had to do was publish a notice in the Federal Register every two years stating that he was considering a withdrawal, and he could effect a de-facto withdrawal while avoiding any Congressional oversight.

Second, the Supreme Court, in the case of *INS v. Chadha*, decided that legislative vetoes were unconstitutional. Thus, the provision of FLPMA that allows the Congress to override a withdrawal with a joint resolution is useless. Now the only effective way Congress has to exercise oversight over withdrawals is to pass legislation and then get the necessary two-thirds vote to override a potential Presidential veto.

The Shivwits Plateau maneuver is a good example of how FLPMA is not working to prevent Executive abuse of withdrawal powers. The FLPMA and Antiquities Act withdrawal powers are being used to force Congress' hand. We have been told that the Administration will wait for Congress to create the National Monument on the Shivwits Plateau through legislation; however, the threat of a Presidential Proclamation gives Congress limited bargaining room. The idea behind the Antiquities law and the FLPMA withdrawal language was to provide emergency protections only until Congress had the ability to act. These provisions were not to be used as a hammer over the heads of local citizens, state delegations, or Congress as a whole.

We are not here, though, to talk about whether National Monuments are good or bad, although I might point out that the evidence does suggest that making a pristine and untrammled area into a national monument is probably counterproductive. Nor are we here today to talk about the mining law. That debate has been going on ad nauseam for the last 50 years, and we do not have the time to get into that here.

What we are here to talk about is the balance of power between Congress and the Executive Branch. Has Congress delegated too much of its constitutionally granted powers over the public lands? Has the Executive Branch overstepped its authority? In light of the *Chadha* decision, is there a way to restore the original intent of FLPMA to rein in Executive withdrawal powers?

The Constitution gives the Congress the power over the public lands. Maybe it is time that we take some of that power back. FLPMA tried one way and we found out that it would not work. Now we have to find another way. Overall, FLPMA is a very good law. But no legislation that we pass around here is perfect, and almost all of it needs some fine-tuning every once in a while. It is time to fine-tune FLPMA to restore the original Congressional intent to retain power over our public lands.

I appreciate Secretary Babbitt being with us today, and we look forward to hearing from him. I thank Chairwoman Cubin for her willingness to be here and conduct part of this hearing.

[The prepared statement of Mr. Hansen follows:]

STATEMENT OF HON. JAMES V. HANSEN, A REPRESENTATIVE IN CONGRESS FROM THE
STATE OF UTAH

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FLPMA intended to significantly limit executive withdrawal authority and in particular, withdrawals of over 5,000 acres. The Secretary of the Interior could still make a withdrawal of over 5,000 acres, but the withdrawal would be of limited duration, the Secretary would be subject to strict reporting requirements, and the withdrawal would cease if Congress passed a resolution of disapproval.

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First, section 204 of FLPMA had a provision that allowed the Secretary to “segregate” land for 2 years while the Secretary decided whether or not to go through with a full blown withdrawal. The reporting requirements, size limitations, and Congressional veto provisions did not apply to these “segregations.” This allowed the Secretary to completely avoid the withdrawal criteria. All he had to do was publish a notice in the Federal Register every two years stating that he was considering a withdrawal, and he could effect a de-facto withdrawal while avoiding any Congressional oversight.

Second, the Supreme Court, in the case *INS v. Chadha*, decided that legislative vetoes were unconstitutional. Thus the provision of FLPMA that allows the Congress to override a withdrawal with a joint resolution is useless. Now the only effective way Congress has to exercise oversight over withdrawals is to pass legislation and then get the necessary 2/3rds vote to override a presidential veto.

The Shivwits Plateau maneuver is a good example of how FLPMA is not working to prevent executive abuse of withdrawal powers. The FLPMA and Antiquities Act withdrawal powers are being used to force Congress’s hand. We have been told that the Administration will wait for Congress to create the National Monument on the Shivwits Plateau through legislation; however, the threat of a Presidential proclamation gives Congress limited bargaining room. The idea behind the Antiquities law and the FLPMA withdrawal language was to provide emergency protections only until Congress had the ability to act. These provisions were not to be used as a hammer over the heads of local citizens, state delegations, or Congress as a whole.

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all of it needs some fine tuning every once in a while. It is time to fine tune FLPMA to restore the original Congressional intent to retain power over our public lands.

I appreciate the Secretary taking the time to be with us today and I thank Chairwoman Cubin for her willingness to conduct this hearing.

Mr. HANSEN. And now I will turn to Chairman Cubin for whatever opening statement she may have.

**STATEMENT OF HON. BARBARA CUBIN, A REPRESENTATIVE
IN CONGRESS FROM THE STATE OF WYOMING**

Mrs. CUBIN. Thank you, Chairman Hansen, for agreeing to hold this joint oversight hearing today. I view your Subcommittee as the "FLPMA Subcommittee" of the House, but the Energy and Mineral Resources panel is involved and concerned because the general mining laws are within our purview. As your diligent efforts during the 105th Congress to amend the Antiquities Act attest, you and I are believers that Congress must have a greater role in the management of our public lands.

Indeed, a majority of the House so spoke when the question was put to them in the form of a bill to limit the President's authority to withdraw huge tracts of land under that Act.

And why was that measure passed by the House, when only a relatively few Members represent public lands dominated districts? Because Article IV, Section 3, Clause 2 of the Constitution makes quite clear "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the Untied States." I do not know what could be more plain.

Mr. Chairman, perhaps it is time for us to take back our public lands prerogatives which previous Congress have allowed the Executive Branch to slowly, and sometimes not so slowly, usurp. I am quite sure the Secretary is ready and able to make a convincing case for the need for the two latest proposed withdrawals encompassing more than 1 million acres in Arizona and Montana, which have precipitated this oversight.

But, likewise, I am certain the Administration is capable of drafting legislation to effect the same end, and to have it introduced upon request, heard, marked-up, and voted upon in the normal course of business.

In other words, because the Supreme Court has likely undone the provision established by the 94th Congress to rein in Secretarial withdrawals via a Congressional resolution of disapproval, I believe we should examine amending FLPMA to restore the balance lost by the Chadha decision.

Currently, if Members oppose the size, duration or other parameters of a proposed FLPMA withdrawal, it would take a two-thirds majority vote in reality in both chambers to pass a bill of disagreement over the President's veto. But, why not place the burden on the Executive Branch to seek a simple majority in favor of such action in order to formalize a proposed withdrawal in legislation?

Congress could still choose to grant relatively unfettered segregative powers for withdrawal proposals smaller than 5,000 acres or some other threshold size, or for durations less than three years or some other time period, to avoid micro-managing the Secretary in his stewardship of the public lands. By my way of thinking, such

an amendment to would go a long way toward restoring our proper role, especially if other administrative withdrawal authorities were similarly restrained.

The passage of your Antiquities Act amendments by the House in 1997, and also the bill to protect our sovereignty from international designations lacking Congressional sanction, are signs that the Congress is ready to assert our proper role on public lands. The Founding Fathers gave us an important job to do to make all needful rules and regulations respecting the public lands. Perhaps we should continue the task by amending the organic Act for the Nation's biggest landlord, the Bureau of Land Management. Thank you, Mr. Chairman.

[The prepared statement of Ms. Cubin follows:]

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Mr. HANSEN. Thank you.
The gentleman from Puerto Rico.

**STATEMENT OF HON. CARLOS ROMERO-BARCELO, A
DELEGATE IN CONGRESS FROM PUERTO RICO**

Mr. ROMERO-BARCELO. Thank you, Mr. Chairman. I am pleased to join my colleagues in welcoming Secretary of the Interior, Bruce Babbitt, a former governor and colleague of mine when I was also Governor, and two private citizens to testify on Secretarial powers under the Federal Land Policy and Management Act of 1976.

The Majority asserts that Secretary Babbitt has abused his authority to close public lands by segregating more than 1 million acres of public lands in Arizona and Montana during the last four months.

Additionally, the Majority objects to the withdrawal of almost 20,000 acres in the Sweet Grass Hills of north-central Montana. They also dispute the need to withdraw more than 26,000 acres of Gallatin National Forest lands in Montana.

As we consider the Secretary's actions, we should recall that in enacting FLPMA in 1976, Congress specifically provided the withdrawal authority to rectify the President's "implied authority" to close public lands to uses such as mining or grazing. We are fortunate that Professor David Getches, the Raphael J. Moses Professor of Natural Resources Law at the University of Colorado School of Law, was available on short notice to join us today as he is a pre-eminent expert on public land laws.

Congress repealed approximately 29 other statutes allowing for withdrawals, but did not repeal the 1872 Mining Law. Thus, the ability to withdraw public lands has remained necessary in order to preserve the public's interest. A recent example of Secretary Babbitt's use of FLPMA's withdrawal authority, which we will explore during the hearing, can be seen in the situation that arose in the Sweet Grass Hills area of north-central Montana in 1993.

While the Majority may disagree with the Secretary's action, Secretary Babbitt made the withdrawal in response to strong public opposition of the proposed mine. A coalition of ranchers, Native Americans and environmentalists said exploration and eventual development would destroy the range's water quality and Native American religious, cultural and historic values.

The ranchers feared that cyanide used to leach gold would contaminate the water table. Several tribes consider the Sweet Grass Hills area to be a spiritual site. They want the hills protected because they have been a source of visions and sacred ceremonial songs. According to a BLM report based on oral information from the late Art Raining Bird, the Sweet Grass Hills, and specifically Devil's Chimney Cave, "is where the creator decided the future of the earth and of man. The creator will return here at the end of the world and reawaken the spirits of those who have left."

Instead of objecting to the Secretary's legitimate use of the withdrawal authority, this Committee should be engaged in a legislative debate on the specifics of much needed mining law reform. If mining claims staked on public lands did not convey property rights to the claimants, as the patenting provisions of the 1872 Mining Law do, then perhaps the Secretary would not find it as necessary to segregate or withdraw public lands.

There are four bills now pending before the Committee, identical to bills introduced during the last Congress, which have yet to re-

ceive even a hearing in either the 105th or the 106th Congress. We would be remiss in our duties if we continue to avoid the debate and instead question the Secretary for carrying out his legal mandate to protect the public lands.

I would like to add that the right to withdrawal of the lands or authority to withdraw the lands, helps to protect the lands. Once the land has been used for mining, there is nothing that can be done. No remedy whatsoever. The land has already been devastated as far as future use of that land other than for mining.

The environmental effect that it will have on other lands, the leaching that will occur in the mining process, is irreversible. That has happened. By withdrawing the lands, you are saving the lands for future use.

Now, if that withdrawal is objected to, Congress does have the authority to overrule that withdrawal and to set it aside, but if we take that authority away from the Secretary of the Interior, there is no way that that can be prevented, and once it occurs, there is no way of saving the land. So, I just want to say that if we go on to destroy the authority or undermine the authority, we will be allowing land to be devastated for future generations.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Romero-Barcelo follows:]

STATEMENT OF HON. CARLOS ROMERO-BARCELO, A DELEGATE IN CONGRESS FROM
THE TERRITORY OF PUERTO RICO

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Law do, then perhaps the Secretary would not find it as necessary to segregate or withdraw public lands. There are four bills now pending before the Committee, identical to bills introduced during the last Congress, which have yet to receive even a hearing in either the 105th or 106th Congress. We would be remiss in our duties if we continue to avoid that debate and instead harass the Secretary for carrying out his legal mandate to protect the public lands.

Mr. HANSEN. Thank the gentleman from Puerto Rico.

The gentleman from Arizona, Mr. Shadegg, is listed as one of our witnesses. Besides the statement that you will make, do you have an opening statement now, Mr. Shadegg? I turn to you, sir.

**STATEMENT OF HON. JOHN SHADEGG, A REPRESENTATIVE IN
CONGRESS FROM THE STATE OF ARIZONA**

Mr. SHADEGG. Thank you, Mr. Chairman.

First, let me thank you for allowing me to participate in this hearing. No longer being a Member of the Park Subcommittee, I very much appreciate the opportunity to be able to participate today, as this issue is of great concern to me, to my own constituents in Arizona, and to all of the people of Arizona. I also want to, of course, welcome my fellow Arizonan, I believe we are both native Arizonans, and his counsel, Mr. Leshy, with whom I used to work on issues in the Arizona Legislature many, many years ago.

I will keep my opening remarks brief, but I want to touch on the fundamental issue at least as this Subcommittee, which is not just the overall question of withdrawals, but then what would withdrawals lead to. In this particular instance, I have great concern about the Secretary's proposal to declare a national monument in the Arizona Strip area. I think it is very important to have a dialogue on this topic.

I note that I have received input from a number of different people on this topic, including the Arizona Cattlemen's Association, Gail Griffin, the Arizona State Representative, whose legislative district includes this territory, as well as the Carol S. Anderson, Supervisor of the supervisorial district in Mohave County, which includes the area for the proposed monument.

The point I want to make is that in each of these instances, the Cattlemen, the members of the State Legislature, and the members of the County Board of Supervisors, and the Board itself, who are expressing concern about this issue, are not expressing opposition to the creation of the monument. What they are expressing is concern about whether or not there will be adequate local input.

And I think to his credit, the Secretary conducted a hearing a week ago today on this topic in Arizona. Regrettably, the hearing did not have a record, and the specific request of the Arizona Cattlemen's Association is that this issue be looked at and that public hearings be held, and they specifically suggest that before we move forward with such a proposal which they indeed may feel have some merit, they feel that there should be public hearings held in Kingman, Arizona, in Page, Arizona, in Fredonia, and also in St. George, Utah.

It seems to me that these kinds of questions—and I have the same input from the Mohave County Board of Supervisors—again, they see some advantage to this, though they have expressed an interest in a much smaller land mass than is currently being pro-

posed. And I will have questions of the Secretary later as to the actual scope that is being proposed.

I notice in his opening statement, I believe the number of acres that is discussed is 605,000 acres. There has been a proposal that it be expanded to over a million acres. And Mohave County is willing to express its support for some 400,000 acres, with some conditions.

And I think one of the questions before this Committee is, under what conditions and under what policies do we set aside land and put it under further restriction, and with what input from the public, because as Arizona goes through this process at this very moment, what I am hearing from all levels of government and from all citizens in the community, is not that they are unwilling to allow this type of designation to occur, not that they are opposed to the creation of a monument, not that they are opposed to the creation of further parks or other things which set aside land, they are concerned what will happen as a result of that, concerned about whether the land will become further abused by, for example, designation and, indeed, whether there will be an increase in tourism, an increase in damage to the land. But most of all, what they are concerned about, Mr. Chairman, is the right to have input.

In that regard, they are specifically requesting that, if possible, this monument be considered for legislative creation rather than designation by the Secretary of Interior, and are specifically saying they do not want that to go forward without further public input.

With that, Mr. Chairman, I would thank you for the opportunity to participate in this hearing. I would like to make unanimous consent request that the letter from Gail Griffin, State Representative; the letter from the Arizona Cattlemen's Association dated yesterday, and the testimony of Carol S. Anderson, Supervisor, District I, Mohave County Board of Supervisors, all be made a part of the record in this proceeding.

Mr. HANSEN. Without objection, so ordered.

[The attachments to Mr. Shadegg's statement may be found at the end of the hearing.]

Mr. HANSEN. In the interest of time, does any other Member of the Committee have an opening statement? The gentlelady from the Virgin Islands.

**STATEMENT OF HON. DONNA M. CHRISTIAN-CHRISTENSEN, A
DELEGATE IN CONGRESS FROM THE VIRGIN ISLANDS**

Mrs. CHRISTIAN-CHRISTENSEN. Thank you, Mr. Chairman, I will be brief.

I want to welcome also Secretary Babbitt this morning for what I believe is your first visit with us this year, to this joint oversight hearing of the Subcommittees on Energy and Mineral Resources and National Parks and Public Lands on the Secretarial Powers under the Federal Land Policy and Management Act of 1976 as it relates to the use of the withdrawal authority under Section 204 of this Act by the Clinton Administration. I also want to welcome Mr. Lehmann and Mr. Getches.

While I am mindful of the concerns expressed by my friends in the Majority as to the nature and justifications of various withdrawals by the Secretary, as well as any plans for similar with-

drawals in the future, I am nevertheless satisfied that there are sufficient safeguards in FLPMA as well as in the necessity to withdraw public lands in order to preserve the public's interest. Several Congresses and the courts have upheld this authority.

I want to thank Secretary Babbitt for his commitment to working with me and the Governor of the Virgin Islands to develop a legislative strategy for addressing some of the economic concerns of my district in the U.S. Virgin Islands, and also to thank him for his advocacy and his administration in protecting a sensitive natural resources around this country and the public lands of significance.

I want to thank you, Mr. Chairman, Madam Chair, for holding this hearing today, and I look forward to the testimony of our witnesses.

[The prepared statement of Ms. Christian-Christensen follows:]

STATEMENT OF HON. DONNA M. CHRISTIAN-CHRISTENSEN, A DELEGATE IN CONGRESS
FROM THE VIRGIN ISLANDS

Thank you Mr. Chairman. I want to welcome Secretary Babbitt, for what I believe is his first visit with us this year, to this joint oversight hearing of the Subcommittees on Energy and Mineral Resources & National Parks and Public Lands on the Secretarial Powers under the Federal Land Policy & Management Act of 1976 (FLPMA) as it relates to the use of the withdrawal authority, under Sec. 204, of this Act by the Clinton Administration. I also welcome Mr. Lehman and Mr. Getches.

While I am mindful of the concerns expressed by my friends in the Majority as to the nature and justifications of various withdrawals by Secretary Babbitt, as well as any plans for similar withdrawals in the future, I am nevertheless satisfied that there are sufficient safeguards in FLPMA, as well as in the necessity to withdraw public lands in order to preserve the public's interest. Several Congresses and the Courts have upheld this authority.

I want to thank Secretary Babbitt for his commitment to working with me and the Governor of the Virgin Islands to develop a legislative strategy for addressing some of the economic concerns of my district, the U.S. Virgin Islands. Secretary Babbitt, responding to my invitation, traveled to the Virgin Islands in January to meet with Governor Turnbull and other local officials including myself and pledged his support, through the formation of a Federal/Virgin Islands Working Group, to the development of specific legislative proposals that will be designed to assist the islands in turning our struggling economy around. I thank him also for his advocacy and administration in protecting our sensitive natural resources and public lands of significance.

I thank you Mr. Chairman for holding this hearing today and I look forward to hearing the testimony of the witnesses.

Mr. HANSEN. Thank you.

Mr. Secretary, we are honored you could be with us today. We will turn the time to you, sir.

**STATEMENT OF HON. BRUCE BABBITT, UNITED STATES
SECRETARY OF THE INTERIOR**

Secretary BABBITT. Mr. Chairman, thank you. I very much appreciate the chance to join you in this discussion. As you suggested, Mr. Chairman, I guess we are not here to talk about history in great detail, but I want to offer a contrasting view of your characterization of the history of land withdrawals because I do not think there is any question that the use of this power by the President under the Antiquities Act and by the Secretary under other withdrawal powers has really redounded to the extraordinary benefit of the American people time and time and time again.

Theodore Roosevelt, a Republican, began this process and his monuments, both literal and metaphorical, are all over the Amer-

ican West, visited by millions of Americans every year. The Executive power was used to establish Glacier Bay, Muir Woods in California, Solero National Monument in Arizona; Zion National Monument in Utah, to protect some of our finest national forests. It is a splendid, glittering record of protection of resources in the name of the American people.

Now, among the resources that have been protected by the use of withdrawal powers is, of course, the Monument and now National Park, so dear to my own heart, and that is the Grand Canyon in Arizona. That extraordinary place was, in the first instance, reserved in part by a Republican President, Theodore Roosevelt, expanded by another Republican President, Herbert Hoover, expanded in the third instance by yet another President, Lyndon Johnson, adding Marble Canyon, a national monument now part of the park. So much for history. I would be happy to discuss and debate anyone, anywhere, at anytime, about the extraordinary history behind these powers that have been delegated by the United States Congress.

In 1974, the Federal Land Policy and Management Act was passed, and since that time there have been two separate and distinct withdrawal powers. One resides in the President under the Antiquities Act of 1906, the other one that brings us here today is my withdrawal power under the Federal Land Policy and Management Act.

Let me very briefly, Mr. Chairman, see if I can suggest both some of the issues and the extraordinary success that continues under this withdrawal power and, in conclusion, suggest that the balance between Congress, the Executive, and the public is working very well, indeed.

First, a word about my initial experience with this statute. It came in 1993 in the Sweet Grass Hills of Montana, when then Congressman Williams invited me to come and have a look, and I felt that I owed an obligation to the people of Montana to do just that. So, I went out there one June day, and I went to Great Falls, and I flew up to Chester, Montana, and then took a tour of the Sweet Grass Hills, and then came back to a public meeting in Chester, Montana, where there were more people at the meeting than the entire population of Chester, Montana, which is the only community of any size within striking distance of the Sweet Grass Hills.

What I heard that night was overwhelming public support for withdrawing the Sweet Grass Hills under a temporary segregation order for two years, for exactly the reasons summarized by Congressman Romero-Barcelo. The ranchers were all absolutely in favor.

They saw their way of life being destroyed by the possibilities of cyanide in their water system, the disruption of the grazing lands around the Sweet Grass Hills. The Native Americans were there, and the citizens were there. And it was on the basis of that record that I made that withdrawal, which has now been extended into a 20-year withdrawal. It was done in the public interest with the consent of the citizens of Montana. And you are going to hear today, as I read the schedule, from a resident not of Montana, but a resident of Minneapolis, Minnesota, who is saying that this has interfered with his rights under the Mining Law.

Well, I can tell you that this withdrawal does not interfere with his rights, whatever they may be, because these withdrawals are mandated under FLPMA and by our own internal procedures, to protect valid, existing rights.

So, if it is my job to weigh the interests of the citizens of northern Montana, and Chester, Montana, and western Montana versus a mining claimant from Minneapolis, Minnesota, whose rights are in no way affected, I think the conclusion is quite clear.

With respect to the Grand Canyon, I admit a certain deep interest and passion about this issue because I have spent much of my life in that national park, doing graduate work as a scientist in that national park, roaming it from one end to the other. I have always been struck by the fact that the northwestern quadrant of the Grand Canyon, from the rim back, has absolutely no protection of any kind. It was overlooked because not many people are aware that it is there.

Congress came close to laying over some rim protection in 1975, in the Grand Canyon Expansion Act, but for various reasons it was not done. So, there is a history here but, more importantly, this is the Grand Canyon. And I must tell you that the prospect of cheap leach mining being put onto the very rim of the Grand Canyon is something that I do not believe would ever be in the national interest. And that is the reason that I have raised this issue.

Now, people may say, "Well, that is never going to happen. I know you get excited about these things, Bruce Babbitt, but go out there and look. It is in great shape." Well, those were precisely the arguments that were made to Theodore Roosevelt against establishing the Grand Canyon. Prior to the establishment of the park, preceded by the monument at the south rim, as interest grew, the conmen and speculators showed up.

They were led by an Arizonan, subsequently a United States Senator, a crook of the first order named Ralph Cameron. He showed up, and for years asserted state mining claims on and in the Grand Canyon, principally on the south rim, for the express purpose of forcing all of the plans of the National Park Service and the Administration. He was finally ruled out by the Supreme Court of the United States, after litigation that consumed 20 years. It is that kind of fraud, and there is no other word for it, it is fraud, pure and simple, that has happened to the Grand Canyon, that led me to the conclusion that it was most appropriate to enter a segregation order.

People say, "Well, why did you enter the order without a public hearing?" Well, I refer you to a former member of the other body, Mr. Cameron. His spiritual descendants would have been staking claims on the north rim of the Grand Canyon within 24 hours after I had announced my interest.

Now, if you think that is an overstatement, let me refer you to Yucca Mountain where prior to the segregation of Yucca Mountain in recent years for the Department of Energy, the speculators and conmen were in there staking claims under this relic called the Mining Law of 1870. The Department of Energy faced reality. They said, "We cannot delay that proceeding for 20 years while we litigate this kind of fraud." So, they bought those fraudulent claims out for \$250,000.

Now, don't you see what is happening? We are acquiescing in this kind of chicanery and then rewarding it out of necessity because of the failure of the Mining Law of 1872. Those are the facts.

Now, let me remind you that after the two-year segregation from entry, I am required, in further exercise of my power, to go through a full NEPA process. The President is not, and that is his law. Talking today about my law, or your law and my law, how is that? My unilateral ability to withdraw without notice is limited to two years.

Now, lastly, let me respond to Congressman Shadegg because I think his remarks deserve a thoughtful response. Of course we should have as much public process as possible. I began that last November with a well publicized trip across the region. It was followed up by hearings conducted by Chairman Hansen in St. George. I conducted a public meeting in Flagstaff last week. There were some 600 people there.

In the course of that hearing, I made a commitment, which I am going to carry out in the next few weeks, to have a meeting on the Arizona Strip, at the Mt. Trumble Schoolhouse, with the permit holders on the Arizona Strip. We have made tentative plans. We have invited the entire Arizona Delegation to take a tour of the area on May 22nd, is the tentative date, and I am ready and willing to continue the public process.

But the fact is that this is a good law, it works well. These two examples, including the Rocky Mountain Front, I think, illustrate the significance of the way this works for the benefit of the American people.

Mr. Chairman, thank you. I would be happy to answer any questions.

[The prepared statement of Secretary Babbitt may be found at the end of the hearing.]

Mr. HANSEN. Thank you, Mr. Secretary.

I will recognize my colleagues for five minutes at a time, for any questions they may have of Secretary Babbitt, of course, starting with Chairwoman Cubin, from Wyoming.

Mrs. CUBIN. Thank you, Mr. Chairman. I appreciate your testimony, Mr. Secretary.

I want to make the point that I do not think anyone wants to prevent either you as a Secretary, or any Secretary, from having the authority to make withdrawals, nor the President, but whether or not—and you made the point that the law has been used well, and that there have been benefits.

I would say that some people might argue that point when it comes to Escalante and the particular lack of public input and consultation with the elected officials from the State of Utah, but whether or not the set-aside is good and proper, in my opinion, is not necessarily the issue because in our society, the end does not justify the means.

Take vigilantism, for example. What one person would consider a good set-aside, a successful one, might be considered a failure by somebody else.

So, in view of the words in the Constitution that "Congress shall have the power to dispose of and make all needful rules and regulations respecting property belonging to the United States," that is

very simple. I realize that the Congress has given up that authority, and that that has been affirmed by the Supreme Court. I do realize that. But I think that just to respect the Constitution, the Administration ought to go through the proper reasonable processes of dealing with the public before making these set-asides. And in some cases, you mentioned in Montana that has been done; in other cases, it has not been done, like in Utah.

So, what I would like to know is what would be wrong with changing FLPMA to have the Administration put forward a proposal that could be introduced as legislation, that would require only a majority to override if the public decided it was bad policy, because whether you make a set-aside as the Secretary or whether the President does the withdrawal and the set-aside, in reality, it takes two-thirds majority to override that because if the Congress overrode it, the President would veto it. I mean, obviously, you, as Secretary—the generic “you,” if there is such a thing—what would be wrong with amending FLPMA to accomplish that?

Secretary BABBITT. Well, in a word, “if it ain’t broke, don’t fix it.” Now, let me tell you why it “ain’t” broke, if I may.

Mrs. CUBIN. Will you use Escalante as an example of why it ain’t broke?

Secretary BABBITT. That is not a FLPMA issue, that is an Antiquities Act issue.

Mrs. CUBIN. But it is still a withdrawal of land without public input.

Secretary BABBITT. Well, there are two separate issues, and I guess I would be willing to respond to either one. One is FLPMA. That is the stated purpose of this hearing, and I would just say that with respect to FLPMA, there is no lack of process because in order to do a withdrawal beyond an emergency segregation, there must be a full National Environmental Policy Act process. We did it in the Sweet Grass Hills.

Mrs. CUBIN. That is if you make a withdrawal.

Secretary BABBITT. Pardon me?

Mrs. CUBIN. That is a limited withdrawal.

Secretary BABBITT. No, that is for a FLPMA withdrawal, it is a 20-year withdrawal. So, I do not see the purpose of this hearing with respect to FLPMA because I believe the existing law is chock-a-block full of process with plenty of opportunity for the Congress to haul me up here and two years to make a decision as to whether or not a proposal should be amended or otherwise changed.

Mrs. CUBIN. I hate it that my time is about up because I really do have quite a few questions I wanted to ask, but here is one. You cited the abuses of the Mining Law as one of the reasons that this was important and FLPMA did not need to be changed. Well, our full Committee Chairman wrote to you twice in 1997—I have the letters here with me—asking that either you send up revisions of the 1872 Mining Law that you wished to see enacted, or sit down with him and try to negotiate a compromise between the Congress and the Administration of this long contentious issue. And I am not aware of any response to either request.

So, if that is truly what you want to do, when do you intend to respond, or do you intend to respond?

Secretary BABBITT. Madam Chairman, in 1994, we had a debate on the Mining Law in which the Administration laid out its position in enormous detail in a debate that went for nearly a full year, in which both Houses of the Congress debated this issue, in which I was a witness and submitted written testimony, and I would be happy to send all of that back to you because it is a matter of public record. Our position has not changed. And it is laid out in enormous detail.

Mrs. CUBIN. Mr. Secretary, in 1994, Mr. Young was not the Chairman of the Committee and did not have the authority to negotiate with the Administration. So, what I really want to know is, is the Administration intransigent in trying to work out some reformation of the Mining Law of 1872 because certainly the Congress would like to do that.

Secretary BABBITT. I have not seen any indication whatever, in the seven years I have been here, period.

Mrs. CUBIN. How about these two letters, those letters asking for meetings and communications that might indicate it, but my time is up.

Secretary BABBITT. You will have all of our accumulated testimony. I will see if I can hire a trucker to bring it over here by the end of this week.

Mrs. CUBIN. Thank you, Mr. Secretary.

Mr. HANSEN. Thank you. The gentleman from Puerto Rico.

Mr. ROMERO-BARCELO. Thank you, Mr. Chairman. Mr. Secretary, the Majority says that Article IV, Section 3, Clause 2 of the U.S. Constitution relating to Congressional powers to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States overrides or vitiates the authority the Secretary of the Interior has under Section 204 of the FLPMA, to withdraw or segregate public lands, especially in light of the Supreme Court's Chadha decision that, in your words, undermine, if not totally impair, the Congressional opportunity to terminate a Secretarial withdrawal under FLPMA.

How do you respond to this allegation, and do you believe that some sort of legislation action to change this situation is necessary?

Secretary BABBITT. Congressman, I do not believe that there is any reason to have further legislation. It is my judgment that my FLPMA withdrawal power is nicely circumscribed by the existing law because it says you start with a two-year segregation and then you go through the entire NEPA process, which will result in a large withdrawal in the peril of an environmental impact statement, which includes public hearings, comments, and at least two years, a full session of Congress, to send us in another direction, if they choose to. And it seems to me that that is quite a nice balance.

Mr. ROMERO-BARCELO. The minute you initiate this process, you also notify Congress when you initiate the process of withdrawal, is that correct?

Secretary BABBITT. That is correct.

Mr. ROMERO-BARCELO. So, Congress is advised of your intention, and then legislation could be forthcoming.

Secretary BABBITT. And I think in the case, if I may, of the Grand Canyon—this is very nicely illustrated—the withdrawal

order, the temporary withdrawal order, was signed in November and look what we have had. We have had a Congressional hearing prior to today, in Utah. A well attended and somewhat spirited hearing in Flagstaff. This hearing today. And we are only 90 days into the process.

Mr. ROMERO-BARCELO. There has also been some statements made that someone with a proper mining claim, his property rights would be affected, like in the case of Mr. Lehmann. How would his valid existing rights be protected within the context of the Sweet Grass Hills withdrawal?

Secretary BABBITT. Congressman, those rights are protected in FLPMA. They are explicitly recognized in every temporary segregation that I have signed. And they are ultimately enforced by the courts.

Mr. ROMERO-BARCELO. In other words, if they can show that they can expect to find the mineral for which he has a claim, he will get compensated for that, will he not?

Secretary BABBITT. In the first instance, he gets to proceed with his mine until such time as under Congressional authority, there is either directly or by delegation an imminent domain action for which he would be compensated, yes.

Mr. ROMERO-BARCELO. Recently, in U.S.A. Today, they published an editorial on the Federal giveaways entitled Mining Laws Cheat Taxpayers, and they noted that the Interior Department, in the absence of Congressional action to reform the 1872 Mining Law, is attempting to implement new rules to hold mining companies accountable for cleanups after they are through mining the public's mineral wealth. However, those efforts were thwarted last year when the mining industry succeeded in blocking the Interior Department from publishing final rules by requiring the National Academy of Sciences to study the existing rules at a cost of \$800,000 to the public.

The report is due this July 31st, and already we can see that the Senate, in the Emergency Supplemental Appropriations Package, has attached a rider that would extend that period. How do you respond to this editorial?

Secretary BABBITT. I believe that the attempts in the Appropriation Committees and elsewhere to delay regulatory reform of the Mining Law are a transparent attempt by the mining industry and its supporters to wait me out in the hopes, perhaps shared by some of you, that at the end of the year 2000 I will pack my bags and go home, the Mining Law for 140 years will have been successfully stonewalled in terms of attempts to reform it.

Mr. ROMERO-BARCELO. Thank you, Mr. Secretary.

Mr. HANSEN. The gentleman from Arizona, Mr. Shadegg, is recognized for five minutes.

Mr. SHADEGG. Thank you, Mr. Chairman. Mr. Secretary, the reports I got of your meeting in Flagstaff would concur with your characterization of it as having been somewhat spirited, and I applaud you for holding that hearing.

I did, however, note that there was some frustration that the hearing was not "on the record"—that is to say, there was no official transcript kept. As you know, when we hold Congressional hearings—and I anticipate we will hold a Congressional, yet an-

other Congressional hearing, in Arizona or in southern Utah on this issue, on the proposed national monument in the Arizona Strip area—it will be on the record.

I guess my question for you is, are you currently planning to, or are you willing to hold further hearings of your own on the record in some of the communities that would be affected, between now and when any designation would occur?

Secretary BABBITT. Congressman Shadegg, I would very much encourage this Committee to hold some more hearings out there.

Mr. SHADEGG. It is my understanding that the Chairman intends to do so and I intend to participate in those, but I guess my question is, since we are talking about the exercise of your power, is it your plan now, or would you be willing to consider holding hearings on the record in the affected communities between now and when you take any action?

Secretary BABBITT. I am certainly willing to consider it. The reason I hesitate is because I have planned a series of meetings with stakeholder groups who have indicated some preference for stakeholder meetings where we could actually get down into the subtext of the law and see if we could stake out some common ground.

I am going to do that, in the first instance, with, as I said, the permit holders on the Arizona Strip at Mt. Trumble, in a couple of weeks. My first desire is to get that done. And then to the extent that we need more hearings, I am perfectly willing to do it.

Mr. SHADEGG. I would certainly encourage that. I want to go over a point you made because—let me back up one step. It is my understanding that your proposal is intended—and correct me if I am wrong—to preserve the current uses of the land, with the exception of mining, and that it is mining which is your greatest concern, is that correct?

Secretary BABBITT. That is certainly the major concern, yes, but there are other implications under the multiple use concept. I have stressed two issues because they were at the core of Congress' refusal to make this boundary adjustment in 1975.

One was grazing, and I believe we are really within striking distance of accommodation there because it is not my intention to affect that in any way. We have got pretty good stuff going on at the Arizona Strip, it is headed in the right direction. It is not perfect, but the direction is correct.

The other was hunting because extending the park boundary as a national park would have precluded hunting. And the Arizona Game and Fish Commission is quite adamant, and understandably and properly so, that hunting is a very compatible use, and I would certainly advocate that any legislation or any withdrawal or any Antiquities Act withdrawal by the President preserve specifically in language those two uses.

Mr. SHADEGG. I very, very much appreciate that testimony. The key word for me and, quite frankly, the key word for the Arizonans who are talking about this issue is the word "preserve."

I attended yesterday morning at the Arizona State Capital, a meeting of a group called the Natural Resources Discussion Group. There were several members of the Game and Fish Commission there. There were representatives of the cattle industry. There

were representatives of every kind of group that could care about natural resources in Arizona.

And they are gravely concerned about the question of preserve and, quite frankly, there is a question of long-term trust. Preserve for now, but it is the old classic camel's nose under the tent, there is some fear that, well, it may be your intention to preserve grazing in the Arizona Strip and hunting in the Arizona Strip, they want to know how we can guarantee this into the future and that it will not be lost over time.

Speaking of time, my time is about to run out, and I want to talk to you about another point brought out in your testimony, and just to clarify it. You said that there is no protection in the northwest corner of the Grand Canyon, and I understand what you meant by that. I simply want to get a little more precise definition of what your reference to that is.

The northwest corner of the Grand Canyon National Park actually has a segment which is protected by the Lake Mead National Recreation Area, correct?

Secretary BABBITT. That is correct.

Mr. SHADEGG. And that sets back from the rim in most instances, by my calculation, somewhere between 12 and 20 miles, would that be your rough guess?

Secretary BABBITT. Yes, that is about right.

Mr. SHADEGG. And in that area, there is no mining allowed at the present time.

Secretary BABBITT. There are some mining issues there in the Lake Mead National Recreation Area. I am not sure—I believe they are railroad subservice rights. Congressman, I think you are right. I believe that the Lake Mead National Recreation Area included a withdrawal subject to valid existing rights. I am not certain, I think that is correct.

Mr. SHADEGG. We can get clarity on that later. My time has expired. Thank you, Mr. Chairman.

Mr. HANSEN. Thank you. Would there be objection to going out of order and recognizing the gentleman from Colorado, misplaced from Arizona, Mr. Udall. Hearing none, the gentleman is recognized for five minutes.

Mr. UDALL OF COLORADO. Thank you, Mr. Chairman. I do not know if I am misplaced, or I have just found another home, or what it might be, but it is good to see the Secretary here. He and I both grew up in Arizona, and know what a beautiful state that is, but Colorado is also a great place to live.

Mr. Secretary, I had a couple of questions on a subject that may not be apparent to all of us right away, in the area of military withdrawals. I think it is true that there are large areas of public lands that have been withdrawn so they could be used for military purposes, like bombing ranges and training areas. Could you expand a little bit on this and talk to this issue?

Secretary BABBITT. Mr. Udall, it is an important issue for this reason. The military withdrawals across the west principally for training ranges are very extensive, I think, in virtually every state represented here. For example, in Arizona, the Goldwater Training Range is an overlay on probably a million acres of BLM land. There are a bunch of those in Utah. Nellis Air Force Base in Ne-

vada is a really interesting overlay on public lands, in some cases, administered jointly with Fish and Wildlife Service.

The importance of this issue today is that many of those withdrawals are now expiring. Their 25-year term is up, and there is a large discussion going on in the Armed Services Committees about the nature of doing a legislative extension of those withdrawals.

The remarkable thing is that the Resource Committees, so far as I know, are apparently not involved in a very large and important administrative decision involving public lands.

Now, that said, I believe we are making considerable progress with the Armed Services Committees, but I think that is kind of where we are.

Mr. UDALL OF COLORADO. Mr. Secretary, has that legislation been worked on in this Committee, to your understanding?

Secretary BABBITT. On the present course, I have not seen any indication that this Committee has or exercises jurisdiction over those issues.

Mr. UDALL OF COLORADO. Mr. Chairman, it would seem to me we ought to be paying some attention to this in the future, as this proceeds.

Mr. HANSEN. For the gentleman's benefit, we do have joint jurisdiction over these lands, and sitting on both those committees. We are kind of watching to see where it goes.

Mr. UDALL OF COLORADO. I do believe there has to be some legislative action by our Committee in this regard. If I could, let me move to another area of our discussion this morning. It seems to me we are talking about balance, and the Secretary is making the case that there is appropriate balance.

There has been talk about the Supreme Court's decision overturning the part of FLPMA that provided for Congressional veto of withdrawals, but I think at the same time, as I understand it, that decision wiped out the part of the law that required you to make an emergency withdrawal if the Congress called upon you, is that right, as you understand it?

Secretary BABBITT. I believe that is correct, yes, for much the same reason.

Mr. UDALL OF COLORADO. So if we had another case where we wanted to ask for a withdrawal, say, similar to what happened with Secretary Watt, when the Administration opposed this sort of withdrawal, we would be put in a position where we would have to actually have votes to override a veto in that particular case, is that your understanding, Mr. Secretary?

Secretary BABBITT. Yes. If I do not exercise my statutory withdrawal power under FLPMA, Congress would need to do it by legislation.

Mr. UDALL OF COLORADO. Thank you, Mr. Chairman.

Mr. HANSEN. For the gentleman's benefit, the committees of both Armed Services and Resources has asked the Administration to give us a proposal on what the Secretary was talking about regarding test ranges, and we are kind of still waiting for that. Maybe we could get the Administration to move a little on that, we would appreciate it, Mr. Secretary.

Secretary BABBITT. I would be happy to look into it, Mr. Chairman.

Mr. UDALL OF COLORADO. Mr. Chairman, let me just add, I am glad to hear that, and I hope when that does come up, we could have hearings in this Committee.

Mr. HANSEN. This should be something open for discussion. In regard to your question of Mr. Shadegg, Mr. Secretary, this Committee would be happy if you felt it would be appropriate to hold hearings on the issue that Mr. Shadegg has brought up.

I normally go through everybody before I ask a question, but if I may, I would like to exercise the option of the Chair and ask the Secretary a question. I do not mean to beat a dead horse, but on the Grand Staircase-Escalante, when the President made that a national monument, we spent a long time trying to digest the bill as it was from 1906, and as I read it, it has three specific parts to it where the President is supposed to cite the historical, archeological or scientific reason for doing it. And in that, I was somewhat disappointed that the President did not state those, even though I guess you could interpolate it a little bit that that did occur. And then the next sentence says "And he shall use the smallest acreage available to protect that site."

As we look in the area like the Rainbow Bridge, obviously, we have an archeological site, and we have gone back and digested all 73 things that are now monuments, and each one of them, up to the Grand Staircase-Escalante, does have something that fits.

With that said, on the potential of the Arizona Strip, what would be the three things that the President or, Mr. Secretary, that you would suggest to the President that he list, or one of the three in that particular potential national monument?

Secretary BABBITT. Sure. Obviously, I am not speaking for the President, but personally, were I drafting such a proclamation, the first thing that I would do is refer to Presidents Roosevelt, Hoover, Johnson, and the United States Congress, in their unanimous findings over a hundred years, in repeated Executive action and legislation, that the Grand Canyon is a natural phenomenon in terms of geology, paleontology, biology, without equal anywhere in the world, and that the Shivwits Plateau has been recognized as an integral part of that system from the days of John Wesley Powell and Clarence Dutton.

And I might even, just as a flourish, quote from the tertiary history of the Grand Canyon in which Clarence Dutton wrote some of the most remarkable prose of the 19th century.

You probably do not want me to go on from there, but I would be happy to do so. I would refer to Eddie McKey's lifetime work on the stratigraphy of the Grand Canyon. If I were in an expansive mood, I might even refer to my own days as a graduate student, in which the Grand Canyon was the primary site for the North American studies that led to the formulation of these now dogmas, virtually, of continental drift and plate tectonics. It is an extraordinary place.

Mr. HANSEN. Mr. Secretary, I think a lot of us share your feelings about the Grand Canyon and, like you, I have hiked it, gone down the river, flown airplanes up and down it, the whole bit, and, no question, it is a beautiful place.

As I look at the designations that we have given in Congress, I think the strongest designation for protection is wilderness. And I think probably the weakest, if I may put them in some degree—and, of course, we have abandoned primitive areas and—well, we really have not, but we do not look at them quite the same way—would be a monument.

And so as I recall back in the 1980s, Bob Stump came to me and we passed a piece of legislation—it was wilderness in the Arizona Strip, you may recall that. I do not know if you were Governor at the time or not.

Secretary BABBITT. I was.

Mr. HANSEN. But we worked on that rather diligently, and personally a lot of that now is in wilderness and is a very strong protection for the area. So, as I look at it—and if that is what you want to do, and the Arizona folks want to do it, that is fine with me—but as I look at it, I am just trying to objectively say that I honestly think that the FLPMA Act and wilderness probably gives you as much protection in that particular area as you would have, regardless of whether or not we put it into the status of a national monument. Am I wrong there, or do you want to correct me on that?

Secretary BABBITT. Mr. Chairman, I think your legal conclusion is entirely correct. If this area were all encompassed in wilderness areas, I do not think there would be any significant threat to the area, but it is not. If you look within the boundaries that I have discussed publicly, the Mt. Trumble wilderness is a small piece around Mt. Trumble, and then there is a small wilderness piece around Mt. Delanbaugh, but the actual rim through that area is wide open. And of the 600,000 acres that we have been discussing, I would say that there are probably less than 100,000 in wilderness, these little raisins in the pudding, if you will.

Mr. HANSEN. Do you agree that the Stump bill in the 1980s did protect some areas that totally qualified for wilderness in the Arizona Strip area?

Secretary BABBITT. Oh, absolutely.

Mr. HANSEN. Would you be more amenable to adding wilderness rather than a monument in that area, if there were areas that also, in your opinion and the opinion of your experts, qualified as wilderness?

Secretary BABBITT. Well, it is an interesting suggestion. That is a very interesting suggestion. You would have to be a little bit flexible in your definition of wilderness because there are some roaded areas down into Parashant Canyon, but the Congress certainly—well, frankly, Mr. Chairman, that is the problem, I think, because if you did a wilderness bill across this area, you would be excluding motorized travel, and I think the hunters and stockmen would go crazy, and that was not our intention in discussing the monument alternative.

Mr. HANSEN. I see my time is up, too, but I sometimes wonder, in trying to achieve the goal that I guess most people are looking at here, it seems to me a simple mineral withdrawal would almost satisfy the needs. And when you say the flexibility of the Wilderness Act, all you have to do is look at the many wilderness bills that are introduced in this Committee, to see that everyone who in-

roduces one is extremely flexible. I have rarely seen as broad language as comes in here. One in Utah goes over a mountain that has actual structures on it. The next thing, we are going to put one over BYU, which would not hurt my feelings, being a University of Utah person.

The gentleman from Washington.

Mr. INSLEE. I will pass, Mr. Chairman. Thank you.

Mr. HANSEN. The gentleman from Montana.

Mr. HILL. Thank you, Mr. Chairman, and thank you, Secretary Babbitt, for being here. I want to just ask a couple of questions with regard to the Helena National and the Lewis and Clark National withdrawal on the Rocky Mountain Front.

I am not aware of, and are you aware, were there any applications for or any pending mining proposals in the Front area at the time that the decision was made to make this withdrawal?

Secretary BABBITT. Congressman, there were.

Mr. HILL. Where?

Secretary BABBITT. And there are. If I may, basically, the situation is this. When the Forest Service made the decision to suspend mineral leasing—not mineral entry, but mineral leasing—I believe that was 1994 or 1995, there was a flurry of mineral entry claims along Muddy Creek, and there is no significant or apparent evidence that they are anything other than nuisance claims.

Mr. HILL. But there was no pending application to actually mine there. Your concern was that these claims may have been made for purposes other than for legitimate mining purposes.

Secretary BABBITT. There are two concerns. One is the pattern of apparent fraudulent claimstaking, and the other one is that after looking at this for four or five years, and looking at the geological reports, the wildlife values in this area between the Bob Marshall and Glacier National Park, need protection.

Mr. HILL. I do not disagree with you about the importance of the wildlife values there. With respect to the Sweet Grass Hills issue and Mr. Lehmann's testimony, my concern there is whether or not we have selectively used the process to achieve the means and in the process eroded or undermined personal property rights of Mr. Lehmann. I mean, you accept the fact that he has legitimate claims in those areas, I presume?

Secretary BABBITT. Congressman, I have not looked at his claims. I could not possibly tell you.

Mr. HILL. In your earlier testimony, you said that in every withdrawal that you signed, his specific rights were protected, explicitly recognized.

Secretary BABBITT. Congressman, if he has—

Mr. HILL. Are you aware of them, or are you not aware of them?

Secretary BABBITT. I am not aware of them. I am aware that he is claiming rights, and I am saying to him as follows: To the extent that you have legal rights, they are unaffected by the withdrawal.

Mr. HILL. So, Mr. Lehmann's rights were not explicitly recognized in the order that you signed, or were they explicitly recognized?

Secretary BABBITT. Oh, we never do when we make a withdrawal. That would be virtually impossible.

Mr. HILL. They were just generally recognized then.

Secretary BABBITT. No, that is not an accurate statement. To the extent that a person has valid, legal rights, and I voice no opinion, Mr. Lehmann may be a genius or a latter-day descendant of Ralph Cameron, but I cannot make that judgment. Those judgements are made in the administrative and judicial process. The fact is, whatever he has legally is unaffected by the withdrawal.

Mr. HILL. Do you think that it is fair for him to expect that the agency would move forward in a process they were already engaged in to evaluate his environmental impact statement and his application to proceed to mine? Do you think he has a right to expect that?

Secretary BABBITT. I am quite certain that whatever rights he has to process are being respected.

Mr. HILL. You do not think that he has a right to expect that?

Secretary BABBITT. No, I think he does.

Mr. HILL. Mr. Secretary, in instances where the Congress has been explicit with regard to land management, do you think the Administration should enforce the letter and the spirit of the law?

Secretary BABBITT. I believe we are.

Mr. HILL. In the purchase and withdrawal of the Crown Butte property, Congress was very explicit with regard to the transfer of mineral rights and the transfer of Otter Creek Tracts in the State of Montana, and it required you enter negotiation with the Governor of the State of Montana, which you have done. And the Governor has indicated to you that he wants to receive the Otter Creek Tracts. Can we expect that you will transfer those tracts to the State of Montana?

Secretary BABBITT. Congressman, I do not read the law that way. I read the law as the intent of Congress to compensate the State of Montana in the amount of, I believe, either \$5 or \$10 million, and as mandating us to attempt to do that.

Now, the Otter Creek Tract was a fallback position. We have adhered to the law. The conveyance of the Otter Creek Tract is not automatically mandated under that law. It is, in fact, a very vague and confusing provision.

Mr. HILL. So, is it your opinion that if you fail to reach agreement with the Governor on any alternative, that you have the option of not turning over the Otter Creek Tracts, is that your view?

Secretary BABBITT. I think the law is quite vague about exactly what the relationship—

Mr. HILL. I am asking what your interpretation, Mr. Secretary, of the law is. Is it your interpretation—

Secretary BABBITT. And I am giving it to you, Congressman. The word is vague.

Mr. HILL. My question is specific, I think yes or no is sufficient. Is it your view that the Federal Government cannot transfer those tracts in the event that you do not reach an alternative agreement with the Governor of the State of Montana.

Secretary BABBITT. The law is vague, and a court will have the ultimate decision.

Mr. HILL. Thank you, Mr. Chairman. Thank you, Mr. Secretary.

Mr. HANSEN. The gentleman from New Mexico, Mr. Udall.

Mr. UDALL OF NEW MEXICO. Thank you very much, Mr. Chairman, good to have you here, Secretary Babbitt, and also your able counsel, Mr. Leshy. Earlier, the point was made, Secretary Babbitt,

that on the Antiquities Act with regard to discretion, I believe, and the question of the President's discretion. Has that been tested in the courts? My memory is that it very recently, as recently as President Carter, that this has been tested in the courts, and I cannot think of any national monument proclamation that has ever been overturned by the courts. Can you or your counsel enlighten me on that?

Secretary BABBITT. Congressman, you are essentially correct. Various claims have been asserted, I think, in connection with the Cameron episode at the Grand Canyon. I believe when they were trying to throw him off his mining claims, he challenged the Roosevelt withdrawal order, unsuccessfully, in the Supreme Court. I think it was raised again possibly in the Grand Tetons in Wyoming, more recently in the Alaska withdrawals by President Carter. There is considerable case law on this issue.

Mr. UDALL OF NEW MEXICO. Thank you. Secretary Babbitt, when we talk about all of these mining issues that are out there, and you are clearly running a department that is struggling with trying to deal with mining issues with the laws you have right now, but it seems to me the overarching issue is basically doing something about the 1872 Mining Law. And when you took office, I believe a bipartisan group of the Congress passed by over 300 votes—Speaker Gingrich, I think, voted for it—reform of the 1872 Mining Law. Is not the thing that we could do the most about these Mining Law issues and really come to grips with them, is reforming that 1872 Mining Law.

Secretary BABBITT. Congressman, if I may, I think some facts will elucidate that. There is no question that as Chairman Hansen and I believe Congressman Shadegg said, isn't this mineral withdrawal sort of the dominant issue, and it is the dominant issue, and the reason is that the collection of public land laws over the last 150 years have given us pretty clear guidance and some substantial degree of balance in the administration of nonmetallic mineral leasing, grazing, timber cutting, water administration, and the one area that has never been touched since 1862, and in which there is no balance at all, is the Mining Law. And that is the reason that it keeps getting tangled up in these. It is the root cause of these debates, there is no question about that.

Mr. UDALL OF NEW MEXICO. Thank you, Mr. Secretary. Yield back my time.

Mr. HANSEN. The gentleman from Tennessee, Mr. Duncan.

Mr. DUNCAN. Thank you, Mr. Chairman. First, let me say I am always amazed in this Committee how we talk about a million acres as if it is almost nothing, or very little. In fact, I think the Grand Staircase-Escalante, the monument which you mentioned, was 3.1 million acres. And the Great Smokey Mountains National Park in my area is the total acreage is 565,000 acres, and that is the most heavily visited national park in the country, I think about four times, or almost five times as many visitors as the other national parks. And so a million acres that we are talking about here is an awful lot of land to people like me, and I would like to know, Mr. Secretary, if you have other withdrawals or segregations that are in the works.

And, secondly, many people are concerned about the secrecy with which the Grand Staircase-Escalante Monument was done. In fact, we had introduced in this Committee at one point a letter from a professor at the University of Colorado, who was involved in that designation, and he said in his letter that he could not overemphasize the need for secrecy. And we had the Governor of Utah here one day who expressed the shocked feeling he had when he said he read about that designation on the front page of the Washington Post. And what I am wondering about is if you have other withdrawals or segregations in the works, are they going to be done in secret as that one was, or are they going to be open for public discussion and comment?

Secretary BABBITT. Congressman, I am a process junkie, if I may, and I think that my handling of these two issues that are before us today is a pretty good example of that. As I explained earlier, the initial segregation process is designed to be done without public process, for the reasons I explained earlier, but I have, without exception, tried to be right up front. Two segregation orders that were signed, were done simultaneously with a great deal of public input, and have been preceded by a lot of public participation leading up to a decision about whether or not to extend the two-year segregation into a 20-year withdrawal.

With respect to the Antiquities Act, I do not speak for the President of the United States. My own view is that the appropriate way to deal with the Antiquities Act is up to the President, but I think in most cases that public discussion is very appropriate. I cannot say that it is always appropriate, but I think it is, and once again, the discussion relating to the Grand Canyon is an example of that. I have suggested that the President may choose to use his powers under the Antiquities Act. He has not told me that, but I have certainly suggested that that is a possibility.

Mr. DUNCAN. Are there other withdrawals or segregations in the works that you know of at this time and, if so, could you give us some idea about the number or the extent?

Secretary BABBITT. There are literally hundreds of proposals around for withdrawals. I mean that literally. I have, over the last seven years, looked at a variety of proposals coming from all quarters, and what you see after seven years is what is before us now.

Mr. DUNCAN. So, out of those hundreds then, this is all that you have in the works at this time?

Secretary BABBITT. I have not requested—I would have to go back and look. The small withdrawals, the under 5,000-acre withdrawals, that range, there may be some in the works around specific—

Mr. DUNCAN. Well, let's talk about over 5,000 acres.

Secretary BABBITT. I am not aware of any.

Mr. DUNCAN. Thank you very much.

Mr. HANSEN. The gentleman from Guam, Mr. Underwood.

Mr. UNDERWOOD. No questions.

Mr. HANSEN. The gentleman has no questions. The gentlelady from Wyoming.

Mrs. CUBIN. Thank you, Mr. Chairman. I wanted to set the record straight on one thing, and this was not an error by the Secretary at all, but I just wanted this to be clear, that in the Fiscal

Year 1999 appropriations bill that Congress charged the National Academy of Sciences with the study of whether or not state and Federal laws adequately protect the lands, and we said to use \$800,000 of fees that the miners paid to the BLM, so that was not an appropriation that other taxpayers paid, and I just wanted that to be clear for the record.

I just have one question for the Secretary on this follow-up round. If the only threat, or the major threat, to the area is mining, would you support Congressional legislation to ratify your mineral withdrawal and let FLPMA then work its way on the other uses of the land? And the reason I ask this is because a later witness, Mr. Getches of Colorado, who is a Board member of the Grand Teton Trust, as is your brother, James Babbitt—excuse me, Grand Canyon Trust—you know where I am—your brother as well as Mr. Getches are on that Board. And on the Trust Web Page there is an illustration that one could logically regard as a road map to subsequent withdrawals on the Colorado Plateau, given the super-secret set-aside of the Grand Staircase-Escalante area as a national monument, and now this segregation and proposed withdrawal.

Now, I believe, as you do, that the Grand Canyon is truly one of the crown jewels of our park system, but do you understand that at least the appearance of a conflict of interest exists here, vis-a-vis the Shivwits Plateau proposal in your case and in your family's case.

Secretary BABBITT. If I may—

Mrs. CUBIN. Based on the Web site and the proposed—I cannot say proposed—but what it says on the Web site, that it looks like there are more areas yet to be set aside.

Secretary BABBITT. I am sorry, Congressman, I do not understand the question.

Mrs. CUBIN. Then let me just break it down to two questions. Since you are saying mining is the only—

Secretary BABBITT. Oh, I understand that question.

Mrs. CUBIN. Okay, what is the answer?

Secretary BABBITT. It is the conspiracy involving the Web site that I do not understand, but let me answer the mineral one, and that is a fair—

Mrs. CUBIN. It is not an accusation, Mr. Secretary, at all. So, if you would just go ahead, we will break it down into two questions.

Secretary BABBITT. Okay. The first question is an interesting question. We have now got the Hansen Proposal for Wilderness, which is an interesting idea, and I am—

Mrs. CUBIN. No, I am not talking about that. I am talking about the Congress ratifying your mineral withdrawal.

Secretary BABBITT. I understand. And now we have mineral we are talking about. It is a very interesting idea. He is kind of coming at it from the other side. The withdrawal is more than minerals. The withdrawal, I believe—timber is an example. Mineral withdrawal would not deal with the timber problem.

Mrs. CUBIN. That is correct, but would not FLPMA still be able to be applied to all of the other uses, since they are, according to your earlier testimony, much less threatening?

Secretary BABBITT. Timber is an example of a use that should be excluded. And I do not think you will get any quarrel from any

quarter there. The area has a few upland areas of Ponderosa, on the flanks of Mt. Trumble that are outside the wilderness area, on Mt. Delanbaugh. There is some outside the wilderness area. This is an area that I believe should be permanently withdrawn from commercial forestry.

So, you could construct, I suppose, a piece of legislation saying the area is withdrawn from commercial forestry, minerals. There may be a few other issues there, but you could—

Mrs. CUBIN. So you do not think FLPMA is adequate to deal with the issues other than mining?

Secretary BABBITT. Not all of them. I think it is adequate to deal with grazing. It is adequate to deal with hunting. But you could construct a withdrawal in lieu of a monument legislatively, or in lieu of wilderness. It would be possible.

Mrs. CUBIN. Thank you.

Mr. HANSEN. In the interest of time, is there further questions for Secretary Babbitt on the Minority side? Mr. Udall from Colorado.

Mr. UDALL OF COLORADO. Thank you, Mr. Chairman. Mr. Secretary, you just had a couple of questions from Congressman Duncan about further segregations, and it strikes me that you have to be thoughtful about this in the future because were you to make a great public statement about this, you might drive a lot—this is a very speculative activity that you are very, very concerned about in regards to mining claims, is that—

Secretary BABBITT. Congressman, let me explain why I hesitated in response to the Duncan question, and I appreciate the invitation to clarify. Let me give you an example. In San Diego County, the Congressional Delegation in the city and all of the others have a wilderness bill with bipartisan support, which I believe has passed out of this Committee. I considered a protective withdrawal in advance of that wilderness legislation even though I was quite confident that the wilderness bill is going to pass because nobody opposes it. I considered whether it would be appropriate to do a preemptive withdrawal there. There are other areas in California, as an example, of more than 5,000 acres, where there is legislation ready to move, where it would be appropriate—and I have, in fact, considered preemptive withdrawals in aid of the legislative process—but getting on a rooftop and shouting about that would—if I discuss it publicly, then I have got to do it, that is the dilemma.

Mr. UDALL OF COLORADO. Mr. Chairman, if I could, just one final comment. I just want to again mention that I think we have been talking about two fairly different mechanisms, one is the Antiquities Act and one is FLPMA, and I want to just point out in Colorado that the Antiquities Act has been used to set aside such important areas as the Colorado National Monument, the Great Sand Dunes National Monument and the Black Canyon of Gunnison National Monument. I think it is also very instructive to note that almost every President since the turn of the century has used the Antiquities Act when the moment presented an opportunity. So, I think we ought to take into account the historical overview here that we are discussing today. Thank you, Mr. Chairman.

Secretary BABBITT. Mr. Udall, in aid of the fullest possible disclosure on these issues, let me say that I am planning a visit to Colo-

rado in the next several weeks, to look at the archeological issues in southwestern Colorado. When Hovenweep National Monument was established on the Colorado side, Mr. Chairman, I exclude Utah from this. My trip is not to Utah. I promise you I will stop at the border.

Now, getting back to southwestern Colorado, this area in terms of the density and importance of archeological sites is number one in the United States of America. And there is a big problem out there because they are not being given an adequate level of protection. I am going to be out on the landscape, invite the oil and gas people, and Mr. Hansen, and anyone else who is interested. Interestingly enough, there was a piece of legislation in the 1970s designed to deal with this. This is not something I invented, but it is something that needs to be revisited. So, I hope we can continue this discussion.

Are there any other thoughts that have crossed my mind that merit disclosure?

Mr. HANSEN. We have got a few here, but we will turn to Mr. Shadegg. Mr. Secretary, I must state that a very high ranking member of the Administration said that we have blacked our eyes enough on that Utah issue. I am trying to avoid saying anymore about it.

Secretary BABBITT. I appreciate your tender consideration, Mr. Chairman.

Mr. HANSEN. Mr. Shadegg, from Arizona.

Mr. SHADEGG. Thank you, Mr. Chairman, and thank you, Mr. Secretary, for spending so much time with us. Let me just go back over a couple of points that I would like to clarify. Just a few moments ago, you said that in the northwest corner—and I think this was in response to questioning by Mr. Hansen—the rim itself was wide open, however, it is within the Lake Mead National Recreation area, so you did not mean wide open in that sense.

Secretary BABBITT. Congressman, there is, in fact, a piece of the rim which is absolutely wide open.

Mr. SHADEGG. Which is not within the National Recreation Area? Can you show us that on the map?

Secretary BABBITT. Sure. The Lake Mead Recreation Area is north of the rim where the section township boundaries are, but right through here—this is actually the rim of the Canyon, right through there—the park boundary comes down here approximately to Tuwep and, in fact, curiously, the Lake Mead Recreation Area comes above the rim over here, but for some reason it is at and below the rim right through there.

Mr. SHADEGG. This is actually the Grand Canyon National Park at that point. So, you are saying that the Grand Canyon National Park does not include the rim?

Secretary BABBITT. That is correct.

Mrs. CUBIN. How far is that area?

Secretary BABBITT. Well, these are townships, about six miles, so about 12-15 miles along there. Actually, maybe a little more than that, but it is something like that.

Mr. SHADEGG. I appreciate that clarification, and it appears that in the three previous expansions of the park, somebody omitted a

portion of the rim, and I take it that is where the monument—that is the portion of the area where you are proposing the monument.

Secretary BABBITT. That is correct.

Mr. SHADEGG. That takes me to the next question I want to ask, which is, as I indicated in my opening statement, various groups in Arizona have expressed concern, but virtually all of the concern that I am hearing is about process—that is, wanting input—not abject total opposition to the creation of a monument. Indeed, the letter and the testimony from the Mohave County Board of Supervisors that I have before me specifically says that they do not want it created by Executive Resolution or Executive Order, however, they are not necessarily opposed to the creation of a monument of 400,000 acres.

Interestingly, the Cattlemen's Association also says they are interested and believe it might be appropriate. They would like more input for the local people, both elected officials, landowners in the area, sportsmen, and other interested parties, but their letter uses the figure 550,000 acres. Your testimony today used the figure 605,000 acres. And I believe, Mr. Secretary, that the Grand Canyon Trust and/or others in Arizona are proposing it really ought to be 1 million acres. Obviously, if one does not know what size it is, one can hardly honestly understand and debate its merits or demerits and its effect on the local community and, quite frankly, on the protection of the Canyon.

What is the size that you are currently supporting? Are you still considering the possibility of expanding it? And how do we get resolution for the people in that area on that question?

Secretary BABBITT. The proposal, if you look at the map, it is, I think, quite economical. If you take a line on the map from the northern boundary of the Lake Mead National Recreational Area, and draw it straight across to the northern boundary of the Grand Canyon National Park, that is pretty close.

There are a couple of adjustments to take in Mt. Trumble, which is an integral part of the sort of rim country there, and I think that is both common-sensical and ecologically appropriate.

Grand Canyon Trust, as I understand it, would like it to extend north across the Grand Wash Cliffs, up to the Virgin Mountains, taking in a couple of somewhat larger wilderness areas and the space in between them.

When we have a public hearing, I believe I am obliged to listen thoughtfully to every single proposal, including that one. I, at this point, am not persuaded of the utility of that principally because the logic of this proposal is about the Grand Canyon. Grand Wash Cliffs is fabulous country, but the logic of this one is Grand Canyon.

Mr. SHADEGG. I see my time has expired, but I would like, with the Chairman's indulgence, ask a couple of quick questions. First of all, as you are proposing it, the line you describe, that is the 605,000 acres referred to in your testimony?

Secretary BABBITT. That is correct.

Mr. SHADEGG. The county refers to the limited boundaries agreed upon in the 400,000 acres. Do you know where the county got its figure of 400,000 acres? Was that a proposal you earlier discussed with them?

Secretary BABBITT. I think there was some initial back-and-forth. The 400 may well have come out of the Yaswick article in the Arizona Republic, and the reason for that is we went down together to look, and we did a lot of looking and talking around a campfire, and sort of scratching lines on maps. I think that is where that came from.

Mr. SHADEGG. My last question, going back to your comment earlier that you were interested in protecting grazing rights and protecting hunting in the area, do you have specific thoughts on how you might extend in a way that the people in the area could feel confident about, the preservation, long-term preservation or protection of grazing rights and hunting rights in this area that might give some assurance. And I simply want to make the point that there was perhaps a day and time when, if the government said we are not going to change grazing rights in this area, we are not going to change hunting rights in this area, people would have accepted that. There is now some skepticism about that. And I wonder if you are thinking about creative new ways of providing those assurances, and if you would share them with the Committee now or in more detail in the future?

Secretary BABBITT. I would be happy to share them with you. Indeed, I have, with ranchers out there. Either a Presidential Monument Proclamation or legislation should give a high degree of comfort to both groups for this reason. Legislation speaks for itself. To my knowledge, an Antiquities Act Proclamation has never been amended to change in any way the specification of use protection. I do not think there was a single one in 100 years. So, I think either one of them has a lot of history behind it.

Mr. SHADEGG. For clarification, have there been those proclamations which have then been changed by statute?

Secretary BABBITT. I do not believe so, not as to use. In the 100 year history, sometimes there are small boundary changes when Grand Canyon was drawn up into a national park.

If I may—and you can, Mr. Chairman, cut me off if I am going too long. I would like to make this point. The ranchers and some of the other users are saying a monument is a slippery slope in the Grand Canyon National Park, with the exclusion of grazing and hunting. My argument to them is quite the contrary, for this reason. This is proposed as a BLM monument, and I would argue to the stakeholders that a BLM monument is your most secure assurance for an acceptable status quo, because the BLM—one reason monuments get upgraded in the parks is because they are both run by the Park Service. This is a BLM monument, and there is a reason for that, and it is the same reason that I have explained to Mr. Hansen's constituents in Escalante, and I spent the weekend with the Governor talking about, and that is that we have more flexibility to work these issues and to put them in a protective casing that the stakeholders and the BLM both have a powerful vested interest in keeping.

Mr. SHADEGG. I see my time is expired. Thank you, Mr. Secretary.

Mr. HANSEN. Thank you, Mr. Shadegg. Mr. Secretary, we appreciate your patience and tolerance. You have been with us an hour and a half—

Mr. INSLEE. Mr. Chairman?

Mr. HANSEN. The gentleman from Washington.

Mr. INSLEE. May I have one very brief closing comment?

Mr. HANSEN. Surely.

Mr. INSLEE. Mr. Shadegg referred to Fredonia, Arizona in his opening comments, and I want to say there is a Fredonia community in the State of Washington, and I just want to speak for the Fredonians in the State of Washington. By the way, Fredonia is not the mythical land in Duck Soup, it is actually a couple places.

Secretary BABBITT. Mr. Inslee, I am doing a double-take because it is nice to see you back after all these years.

Mr. INSLEE. Thank you. Deja vu all over again. But, in any event, I just want to tell you that speaking for the Fredonians in the State of Washington, I am glad that since Congress is AWOL on mining reform, that the Executive Branch is on duty, and I just want to tell you we appreciate it up in Fredonia.

Mr. HANSEN. Did you want to respond, Mr. Secretary?

Secretary BABBITT. No.

Mr. HANSEN. That is probably wise.

Secretary BABBITT. I accept the compliment.

Mr. HANSEN. Mr. Secretary, thank you for your patience and your tolerance. You have been on the hot-seat there for an hour and a half, and thank you so very much. We appreciate your being with us, and we will look forward to more interesting things stated on a very important issue in front of us today. Mr. Leshy, we appreciate your being with us.

Our last panel is Mr. Ernest Lehmann, from North Central Mineral Ventures, Minneapolis, Minnesota; Mr. David Getches, University of Colorado Law School, Boulder, Colorado. Gentlemen, we appreciate your patience, and thanks for being with us today on this important issue. Tell me, how long do you need?

Mr. LEHMANN. Approximately ten minutes, sir.

Mr. HANSEN. Mr. Getches?

Mr. GETCHES. The same, Mr. Chairman.

Mr. HANSEN. Mr. Lehmann, the floor is yours.

Secretary BABBITT. Mr. Chairman, thank you.

STATEMENT OF ERNEST K. LEHMANN, NORTH CENTRAL MINERAL VENTURES, MINNEAPOLIS, MINNESOTA

Mr. LEHMANN. My name is Ernest K. Lehmann. I am a resident of Minneapolis, Minnesota. As you can see from the resumes attached to the back of the written testimony, I am a geologist by training, and I have spent nearly 50 years actively engaged in the mining industry.

I began my mining career as a miner in a small gold mine in Bannock, Montana in 1950. I apologize for the lack of eloquence that Mr. Babbitt has, but I welcome the chance to appear before you today relating to you the saga of how after spending about \$1.5 million on successful gold exploration in the Sweet Grass Hills of Montana, how that has resulted—we are a case study in how FLPMA can be, and as we see it, abused and misused.

A summary of the events is in the written testimony, a map showing where the Sweet Grass Hills are, for those of you who are not from Montana, it is shown as Figure 1. The land ownership in

the Sweet Grass Hills is very complicated. It is shown on Figure 2. It is a patchwork of private Federal estate surface and minerals. The total Federal estate mineral totals approximately 19,635 acres, about one-third of the Sweet Grass Hills area.

Between 1983 and 1992, Mount Royal Joint Venture, of which North Central Mineral is a partner and I am the operator, conducted a prospecting and exploration program in the Hills by ourselves and with major company partners. At the same time, BLM was conducting a major land planning effort and drafted the West HiLine Regional Management Plan, RMP, which reviewed the environmental and cultural resources of the Hills and the potential impacts to these resources from activities such as mining. The RMP was approved by the Director of BLM in a Record of Decision signed in January 1992. It established areas of critical environmental concern for the core area of the three main buttes, including East Butte where our activities were then focused, but it specifically left open the Federal lands in the Sweet Grass Hills for mineral entry. It also proposed to eliminate a land withdrawal in effect on public domain in Section 29 adjacent to our property.

By 1992, we had conducted extensive exploration, 15,000 feet of trenches (since reclaimed), over 1,400 systematic rock and trench samples, almost 4,300 feet of drilling and extensive soil sampling. Examples of that are shown in Figures 5 and 6 attached to the packet.

We had discovered a major gold deposit which, in our estimate, is approximately 1.7 million ounces of gold, which should be about 65-70 percent recoverable, and compares very favorably to other then planned or operating properties in the western U.S., which are documented on Table 2. Part of the Tootsie Creek Deposit is on lands we own in fee, part on private minerals we lease, part on public domain on which we hold 20 unpatented mining claims located under the Mining Law. Fourteen of these claims were located prior to 1992, and additional six were located in August 1995, which I will explain in a minute.

In February 1992, 30 days after the Record of Decision leaving the area open for mineral entry, we filed a plan of operations with a new partner to reopen and construct roads, and to drill some 38 in-road drill sites to develop the Tootsie Creek Deposit.

Previously, the exploration plans had gone through two EAs by the BLM, they had gone through two appeals by Indian groups to the IBLA, both appeals were rejected. The EA found no significant impact from our activities. However, instead of adhering to its then adopted plan, the BLM decided to do a full environmental impact statement before approving our new plan. When the draft EIS was published in early 1993, the preferred alternative in the draft was, in fact, to approve our work plan.

I think the Secretary is a bit disingenuous in talking about public support, anti-mining support. To my knowledge, there are resolutions from both Toole and Liberty County Boards supporting continued exploration in accordance with proper laws. But at that time in May of 1993, interestingly enough, coincident with the Secretary's visit which he disclosed earlier today, the BLM made a 180-degree shift in policy and began a strategy calculated to block

our efforts to further develop our discovery and deprive us of the economic benefits of our work.

It appears that there were meetings in Washington in 1993 to find a way to prevent approval of our plan. The substance of those discussions is summarized in a memorandum by one Josh Drew to then Director Jim Baca, which says in reference to our plan, "With careful handling, the approval could be delayed many months or even years." A copy of the memo with Mr. Baca's enthusiastic handwritten response appears as Appendix I to the written testimony. This careful handling resulted in a filing of a petition to segregate the lands, to withdraw the lands, using as a justification for that segregation the same language, almost identical language to that that had been used to keep the area open for mineral entry with certain restrictions and to reopen Section 29.

On August 3, 1993, Federal minerals were segregated and closed to mineral entry for two years. The withdrawal petition triggered three separate processes aimed to keep us from developing the Tootsie Creek Deposit. First, approval of our plan was suspended. BLM refuses to approve our plan. We have appealed this de facto denial of our plan to the IBLA, the Board of Land Appeals, but we have not had a ruling, as yet.

Second, BLM began a validity examination of our unpatented claims to determine whether they constituted valid existing rights. The validity examination report found eight of our original 14 claims valid when it was finally produced in September 1995. The various claims and lands are depicted on Figures 3, 4 and 5. The validity report makes significant technical errors and uses a line of reasoning that bears no relationship to how mineral exploration and development are actually carried out in the real world. It strains to find invalid several claims in the core of the deposit in an obvious effort to undermine the deposit's value.

The hearing on the six invalid claims finally occurred last spring, five years after the segregation order. We do not have a ruling, as yet. We are now 15 years into this project.

During the hearing, we learned that the validity report had been personally overseen by Mr. Roger Haskins, the specialist for mining law adjudication in the Office of the Director of BLM. No doubt, a bit of careful handling.

Third, because the proposed withdrawal represented a complete reversal of the RMP adopted only 20 months previously, the petition triggered the need for an amendment to the RMP and a new EIS on the proposed withdrawal. This new EIS revisited the same issues which had already been exhaustively addressed during the original planning process, during the EIS on our work plan.

For some reason, BLM found itself unable to complete the EIS or the validity examination within the two-year segregation period provided by law. Therefore, in July 1994, the Director sought the advice of the Solicitor on how best to continue to prevent us from developing the Tootsie Creek Deposit. The Solicitor opined that two successive two-year segregations would probably be found illegal. His opinion is attached as Appendix II.

In July 1995, notice was published that the first segregation would expire and that the lands would again be open to mineral entry. A few days later, then Congressman Williams introduced a

bill proposing to withdraw the entire Federal mineral estate in the Sweet Grass Hills, with the obvious purpose of giving BLM a cover for filing an illegal second withdrawal petition to “preserve the status quo” and “in aid of legislation.”

After the first segregation order expired, we staked six additional claims, shown in blue on Figures 3, 4 and 5. BLM declared these claims void “ab initio.” We appealed this decision to IBLA which affirmed the BLM decision, with the unbelievable reasoning that the first withdrawal proposal was “not identical” to the second one because it had a “different stated purpose.” We do not know what that different purpose is.

In May 1996, BLM finally published the Amendment/EIS. The EIS includes an analysis of the mineral potential of the area and our deposit. This analysis was castigated as technically unsound and unrealistic by the U.S. Bureau of Mines. The letter is attached as Appendix III. Using the same justifications used to keep the area open in January 1992, the EIS recommended that the entire mineral estate be withdrawn and that the valid pre-existing rights be bought out, a process that BLM euphemistically refers to as “land tenure adjustment.” Sounds like a chiropractor to me.

The entire Federal mineral estate in the Sweet Grass Hills, 19,685 acres, was permanently withdrawn on April 10, 1997.

My partners and I are determined to go on. As an experienced, prudent geologist and as a businessman with my own money at risk, I do not lightly conclude that the wealth of geologic data we have amassed indicates that we have discovered a world-class gold deposit at Tootsie Creek.

We request that this Committee initiate appropriate legislative action to prevent these kinds of misuses of FLPMA which we do not believe were the intent when the Congress passed FLPMA in 1974. Thank you very much.

Mrs. CUBIN. [presiding] Thank you, Mr. Lehmann. You stated orally, although I do not believe it was in your written testimony, that Congressman Hill introduced legislation to withdraw the Sweet Grass—

Mr. LEHMANN. I said Williams, Congressman Williams.

Mrs. CUBIN. Correct. I just wanted to get that straight for the record.

Mr. LEHMANN. I am sorry.

[The prepared statement of Mr. Lehmann may be found at the end of the hearing.]

Mrs. CUBIN. Thank you for your testimony.

Mr. Getches.

STATEMENT OF DAVID H. GETCHES, RAPHAEL J. MOSES PROFESSOR OF NATURAL RESOURCES LAW, UNIVERSITY OF COLORADO LAW SCHOOL

Mr. GETCHES. Thank you, Madam Chairman, Members of the Committee.

I am David Getches, Professor of Natural Resources Law at the University of Colorado. I thank the Committee for the opportunity to testify today. I have been asked to talk a bit about the history and purposes of the FLPMA withdrawal provisions, and I will ad-

dress that. I have submitted written testimony and I will try not to overlap that too much.

In addition, I make available to the Committee this article in Volume 22 of the *Natural Resources Journal*, which is on the same subject, and provides a much more in-depth view of the subject than I am sure you can get into today.

There indeed is a colorful history of the issue of withdrawals in the Nation's history and the way it has been used to protect the public lands. The history may not be as colorfully told in my *Law Review* article, but it is a key part of our Nation's history that is worth reading.

The withdrawal authority was first exercised by the Executive, acting alone, by the President or the Secretary of Interior setting aside land for particular public uses. And in the early days, when the purpose of our public land laws was to dispose of the public lands, the withdrawal authority was used to facilitate that, to keep lands well integrated and unfragmented as a way to provide for their orderly disposal.

Later, it was used to promote and facilitate programs of the Federal Government that necessitated setting lands aside. At times, it was used to prevent excesses and fraud and, more recently, now that we are in a period of retention and management of the public lands, the primary purpose of withdrawals is to complement the planning mandate that is in FLPMA.

Now, the withdrawal authority of the President was upheld apart from any statutory authority whatsoever, by the United States Supreme Court in 1915, in the *Midwest Oil* case. The Supreme Court found that Congress had acquiesced in the repeated and continued use of the withdrawal authority by the Executive, and upheld it outside any kind of statutory regime.

By that time, Presidents from Cleveland to Roosevelt had set aside through withdrawals almost all the land that is now in our national forests. That is where it came from. All that land was the product of withdrawals. Later, 140 million acres were set aside in grazing lands, subject to withdrawal and later classification with the consent and encouragement of Congress.

Now, there certainly are some notorious stories. The Secretary referred to the former Senator from Arizona, Ralph Cameron. But he is not the most extraordinary example. In fact, probably the most notorious abuser of devices to circumvent withdrawals, was the "old prospector," as they called him, Merle Zwiefel.

Merle Zwiefel had a claimstaking service, and his ads bragged that he could stake 2,000 claims in a day. He succeeded during his time at staking 30 million acres in mining claims. When the Central Arizona Project aqueduct was being acquired to reach central Arizona from the Colorado River, there was the old prospector staking claims ahead of the pipeline. He staked 600,000 acres in claims between Phoenix and Tucson alone. He also staked 465,000 acres of claims in the Piceance Basin in my area. He did these claims so rapidly using an aerial service where they simply dropped the stakes out of an airplane.

Other stories, and other reasons for controversies and challenges and payoffs, are legion. The Secretary mentioned Yucca Mountain where it was necessary to pay for nuisance claims that had been

acquired at the site of the Yucca Mountain waste facility. The conflicts also involve less notorious folks, legitimate miners who want to stake claims but their claims would be in the path of some future government plan or program, and to allow the claim it is actually unfair to them as well. It is not just a question of heading off the swindle artists and the nuisance claimants.

Well, by the time the Public Land Law Review Commission, which was operating during the Nixon Administration, completed its work and submitted its report to Congress, there had been literally hundreds of withdrawals. Public land was kind of a clutter of withdrawals, and this was controversial, and Congress wanted to clean that up. It took this matter in hand with FLPMA. In FLPMA not only do we have this very orderly and simplified process for making withdrawals according to rules that are determined by tract size and length of time for which land is set aside in a withdrawal. It also provided a way that withdrawals can be terminated, something that did not exist before, and so we had this clutter of withdrawals on the books. Congress dealt with that, too.

One thing that also needs to be mentioned is that Congress expanded the definition of withdrawals so that it did not just include setting aside lands for particular public uses, but also included, as stated in 1702(j) of FLPMA, that it enables the Secretary to limit activities under the Public Land Laws in order to maintain other public values. It is kind of a catch-all, not just focusing on particular land uses.

Withdrawal remains an important tool in the tool kit of the Secretary of Interior acting for the people of the United States. If land cannot be withdrawn quickly and efficiently when the Executive or Congress is considering doing something to protect that land or to make it part of a Federal program, we leave them exposed to nuisance claims, and also risk interrupting the expectations of good faith public land users, usually mining claimants that are being set up for disappointment if land is not set aside in this way. And the segregation mechanism that was discussed this morning is an intermediate step to put things on hold, to say "time out" while the matter is studied, so that the Secretary, together with Congress, together with interest groups, can decide whether a withdrawal is called for, whether legislation protecting the land in some other way is called for and, if so, what the terms ought to be.

In short, prudence dictates that the expectations of both the private developer and the public not be disappointed by allowing land to be open under the Public Land Laws for uses that may later turn out to be inconsistent or for these nuisance claims.

Now, the kind of flexibility that exists under the FLPMA withdrawal provisions is flexibility that no private landowner would be without, the ability to respond to changing conditions, to opportunities to use or protect or dedicate the land to uses that emerge. This is important and is something that every landowner wants, but is especially so on the public lands where there is a kind of easement in gross, kind of like a trump card that the miner walks around with capable of being played at anytime on the public lands to disrupt this whole planning process, this land management process that has been created by Congress under FLPMA.

We are in an era of mandated planning under FLPMA. There are land use plans required of every agency. Those land use plans can only go so far. They can be interrupted by land uses that make impossible the carrying out of those plans or changing direction in the future as public demands require.

Now, looking at this from the sweep of history, looking back at the past today, those withdrawals of the past seem like heroic acts. Today, most Americans, I think it is fair to say, take pride in withdrawals—for instance, the Tetons and the Grand Canyon. Who would begrudge an acre of those withdrawals? Those things are now possible in a much more orderly way under the FLPMA procedures. Although there has been some agonizing over every large withdrawal, 10 and 20 and 50 years later, there is no agony at all. Instead of regrets, we celebrate these things as part of our national heritage.

Thank you, Madam Chairman.

[The prepared statement of Mr. Getches may be found at the end of the hearing.]

Mrs. CUBIN. Thank you for your testimony. First of all, I need to ask unanimous consent, more or less *ex post facto*, for Mr. Shadegg to sit with the two Subcommittees and apologize to the Minority. I went to make a quick phone call and, as you can see, we are teaming with Majority Members and had I thought, I certainly would have asked one of you to take the Chair. So, please accept my apology. I will start the questioning.

Mr. Getches, with your legal background, you would be helpful to the Committee in determining the best way to balance the Executive and Legislative Branch's authority to withdraw public lands. Could we call upon you to help us do that and review the FLPMA Amendment? Would you look at that favorably?

Mr. GETCHES. Well, I think that you are exactly right, that the purpose of the FLPMA process of setting up three kinds of withdrawals and having this advance review process that we call "segregation" is to provide balance and transparency. Now the public and Congress can be involved at the start and have notice in advance.

It seems that there is considerable balance in the system as it exists. Large withdrawals, as the Committee knows, requires this almost NEPA-like study to be done, with reporting to Congress as required. Now, of course, there is doubt over whether or not the concurrent resolution process is valid under the *Chadha* case, but Congress retains its authority, its legislative authority, as always, to overturn those withdrawals. Presumably, it will have a factual basis to make the decision to sustain or to override the designation of future FLPMA withdrawals based on what you can get out of that FLPMA study.

Mrs. CUBIN. What I do not understand out of your response to that is how is this in balance when, in reality, it requires a two-thirds majority of both Houses to override the Secretary.

Mr. GETCHES. Well, even if you assume that the President vetoed the legislation, first the process would be the reporting by the Secretary of the facts, the Congress' response to that, any further Secretarial action or lack thereof, a Congressional act disapproving, passing both Houses, and then presentment to the President when

the President vetoes the bill. This is a rather extraordinary path, one which has never, ever occurred.

Mrs. CUBIN. I do not see how it would be extraordinary when the Secretary is an appointee of the President, and it is hard for me to imagine that the Secretary would not have the President's, if not permission, lack of objection, and therefore it would be most likely if the Congress were to override that, to require a two-thirds veto. Do you disagree with that?

Mr. GETCHES. It is entirely possible that that would happen but, first of all, I think the FLPMA process that Congress has designed minimizes the chances you are going to get to that kind of show-down. You do have an opportunity to head that kind of thing off. Secondly, I do not think it is a foregone conclusion that the President will uphold everything that the Secretary does. Furthermore, we have, with changing Administrations and changing Congresses, a very likely scenario that the withdrawal would be considered in a different Administration, in any event.

Mrs. CUBIN. That certainly is a good point. I will just move on. Mr. Lehmann, I know that you have experience in dealing with hard-rock prospecting permits and leases on Federal lands in Minnesota and elsewhere the 1872 Mining Law does not operate. Have you had any success with permitting decisions under that type of discretionary system of mineral tenure?

Mr. LEHMANN. Well, yes, I have had fairly extensive experience on acquired lands. Quite a lot of forest lands in the Eastern U.S. and the non-mining law states are acquired lands that were mostly acquired since the 1920s, and they operate under the leasing system.

The process in theory can work; in the specifics, it is difficult. I think you are referring to the idea of a plan restricting areas. The forest plans are becoming more restrictive. I just see the whole climate changing. I think the problem is not in the theory, as Mr. Getches presents it, the planning process, it is in the actual execution. In our case, in the Sweet Grass Hills, we participated in the planning process in the 1980s. The area was left open for mineral entry. We went through two EAs on operating plans. We went through proceedings before the IBLA. All of a sudden in 1993, with a change of Administration, using the same logic, the whole process reversed. And we can show you, we can document almost the identical language that flows through all these documents as the rationale for the various actions before 1993 and after 1993. It is the way the process is used, and therefore whether it is on acquired lands or lands governed under FLPMA, my own personal feeling is that Congress has to reassert its authority to approve the actual withdrawals. And I think, frankly, that the 5,000-acre threshold is much too high. Our total holdings, including our private holdings, our private minerals that we lease, our private ownership in the Sweet Grass Hills, is only about 300 acres.

Mrs. CUBIN. Between the two systems for assessing Federal mineral rights, to me it is no wonder that you have looked at South America for mineral deposits. And the tragedy of that to me is that while the President did veto the Mining Law Revision that we passed in the 104th Congress, which included a royalty, beyond the royalty and the potential revenue to the Federal Treasury, the jobs

that are created in mining are good paying jobs. They are good for the state economy and the school systems in the state, and so on, and it is not just in mining, it is in oil and gas. Just across-the-board what is happening to our natural resources industry is truly a tragedy in that when we cannot develop wealth and we rely on foreign countries for essential minerals, essential energy, and whatnot, the United States truly is strategically in jeopardy, in my opinion. So, thank both of you for your testimony. Mr. Underwood.

Mr. UNDERWOOD. Thank you, Madam Chairwoman. Mr. Lehmann, the story that you told is a very interesting one, very compelling one. Yet, I cannot help but feel that the kinds of problems that you encountered after the change of Administration is the kind of problems that lots of people encounter when there is a kind of change of philosophy or a change of attitude about—and there is always some latitude, always some leeway given to new administrations to pursue policies in certain ways. How do you respond to that?

Mr. LEHMANN. Well, sir, Madam Chairman, Congressman, I respond to it this way. These activities like mineral exploration, oil and gas exploration, are long-term efforts. I mean, the essential thing is that you have some kind of surety of title, some kind of surety that you can go ahead. And that is essential because in this project, we were into it in 1992 already nine years, now I am into it 16 years, some other projects are as long. These are long-term projects. They are long-term investments. They are fixed to the land. And I think we have a right to expect a reasonably consistent application of the laws and regulations that existed. And we followed them. We were very careful to follow them. And I think the BLM will agree that we followed all the regulations, and the state.

Let me comment further. One of the things that has happened, why exploration is moving to Latin America, is that the Latin Americans have seen the light. I spent three years, from 1995 through 1997, managing an exploration program in Argentina. What made that possible was a change in the attitude, a change that the law was the law, and they were going to apply it. It is not the greatest mining law in the world, I can tell you that, it is very complicated, but we were able to function, and people are able to function, and there is a fairly consistent application. That is the first thing.

Next to geology, the first thing we look at is some ability to deal with the land tenure issues. Otherwise, we cannot explore.

Mr. UNDERWOOD. Mr. Lehmann, are there not legal avenues for compensation for your effort if it does not come to pass?

Mr. LEHMANN. Well, yes, Madam Chair, Congressman, yes, I hope there are. But, again, what has happened to us here is what we feel is a conscious attempt by the BLM and the way they handled the validity determination, to try to lower our value. Yes, we have recourse to the courts. We have probably recourse to the Court of Claims once a final decision has been made. Part of the thing is that it is so hard to get a final decision, and we cannot go to the courts until we do.

Mr. UNDERWOOD. Could I just ask a question of the Professor. Mr. Getches, you made a fairly compelling statement about claims that are nuisance claims, and also some prudence into the process,

you made a pitch for some prudence into the process. It is clear that Mr. Lehmann's claim is not a nuisance claim. I suppose he firmly believes and we would all concede that he was acting within a certain framework of expectations. What would you suggest as a kind of remedy to avoid these kinds of situations to bring closure to his case?

Mr. GETCHES. Well, I think, first of all, it needs to be stated here that these withdrawals are all subject to valid existing rights, and so if he has a valid existing right, the withdrawal will be subject to that.

Now, if it turns out that the withdrawal makes it particularly burdensome to carry out the mining operation because of restrictions that are placed on the land and the like, and it upsets the economics of the operation, then Mr. Lehmann is going to be upset about that. I do not know anything about his claims or the facts of this case, but it occurred to me, listening to this, that the planning process may have been flawed in the past, the planning process for these very lands that he described. And it is conceivable that the company would have been better off if this consideration of a withdrawal had occurred years ago and some of the land had been set aside, or not, and the matter had been cleared up through the kind of study and consideration of public use that apparently is going to go forward now.

Mr. UNDERWOOD. Thank you. Just a question on the Argentina mining law. Is it more recent than 1872?

Mr. LEHMANN. A little bit more.

Mr. UNDERWOOD. You do not need to answer that.

Mr. LEHMANN. No, I can answer that question because I am probably one of the few people who has read it cover-to-cover. It dates back to about the 1880s and has been amended several times, most recently while I was there, to deal with environmental issues, but essentially it is a mining law that was drafted in 1880-something.

Mr. UNDERWOOD. Does the government collect royalties?

Mr. LEHMANN. The system there is, though the law is federal, the provincial governments actually administer it, and the provincial governments can, if they wish, charge a royalty. Some of them have opted to say no, we will not. There is a limit on the royalty they can charge.

Mr. UNDERWOOD. Thank you.

Mrs. CUBIN. I find it interesting that the law that established Yellowstone National Park is actually six months older than the 1872 Mining Law, and yet I have not heard anybody complaining about that and the need to change that, just as a little aside, Mr. Underwood, my dear friend. Mr. Udall. Although I think we need to change it and charge a royalty.

Mr. UDALL OF COLORADO. Thank you, Madam Chair. I did want to express my appreciation for your clarification of the situation with Congressman Shadegg. I can tell you that my cousin, who has slightly more seniority than I do, is very willing and ready to take the chair, so thank you.

I did want to acknowledge Professor Getches, who is from my home district, as a constituent of mine. It is nice to see him here. But I think he even has a more important constituent, who is his

wife, Ann, who is also here today. So, I want to thank them for making the long trip from Colorado to be with us.

Professor Getches, a couple of questions for you. It seems to me, in listening, that I have come to the conclusion that the FLPMA withdrawal authority seems to provide some balance to the Mining Law of 1872. Do you agree or disagree, and would you expand a little bit on that?

Mr. GETCHES. Yes. I think one of the two major reasons that you need some kind of FLPMA withdrawal authority is to provide a counterbalance to the kind of trump-card authority that every citizen has over the public lands under the Mining Law. FLPMA provides fairness and balance. The other reason is to provide for long-range planning. In either case, you are taking the long view. And I think benefits could be characterized in terms of fairness to the locator as well. The self-initiation system is one where people have legitimate expectations that they can use the public lands for mining, and they need to know as soon as possible if that situation is changing.

Mr. UDALL OF COLORADO. Now, my thinking, which may or may not be logical—many of us who serve in this body could be accused of being illogical—but it seems to me if we were to revise FLPMA, then hand-in-glove you might need to taking a look at the Mining Law as well, and revising it. Do you have any further comments on that?

Mr. GETCHES. Well, I think that there is a connection there. Certainly, if you took away any of the countervailing authority of the Secretary to protect lands from entry under the Mining Law, and the other public land laws, you would want to re-examine the self-initiation aspects of the Mining Law. I hasten to add that I think that independent of the Mining Law, you still have sound reasons as a part of the planning scenario to maintain that level of withdrawal authority. It might not have to be used as often, but you need it either way.

Mr. UDALL OF COLORADO. Thank you. Madam Chair, I have two final comments. I would just like to note, as we all know, these withdrawals are not irreversible regardless of the situation we are talking about, the wilderness, for example. If we came to a conclusion as a society, as a country, we had a different need for those lands, Congress could act and we could gather natural resources from those areas.

Contrary to that, if a mine is put into place, that is really an irreversible act. The landscape has been changed forever. So, I think that is important to note.

Also, we were talking earlier about the veto and legislative activity, and so on. It is interesting to remember that there was a Montana Wilderness Bill that was vetoed by President Reagan during his term, and we, as a body, if we would have had to have taken an override vote, would have had to come up with two-thirds of the House to overturn that veto of the President.

So, the point I am trying to make is, there continues to be, I think, appropriate checks-and-balances in the process. I do not know, Professor Getches, if you have any further comment.

Mr. GETCHES. I think checks-and-balances was what it was about. Congress really did carefully consider the FLPMA with-

drawal provisions. Historians looking at this period believe that the single strongest motivating force for FLPMA was an examination of the withdrawal provisions. So these provisions were not cavalierly generated, and there has been surprisingly little controversy over their use.

You mentioned the irreversible aspect of not withdrawing lands, allowing them to be developed, and then looking back on it with regret. The withdrawal mechanism can be seen as something akin to taking a family heirloom and putting it in a museum on display and protecting it for future generations. You have the choice of liquidating at anytime.

Mr. UDALL OF COLORADO. Thank you. Thank you, Madam Chair.

Mrs. CUBIN. I have one question for both of you and, Mr. Getches, if you would answer—actually, two questions, but they are the same subject—if you would answer it first. The first question, FLPMA gives the Secretary the ability to segregate lands for two years while formal withdrawal proceedings are underway.

The first question is, do you interpret FLPMA as allowing the Secretary to use two-year segregations as a stand-alone tool, without an intention to make up a formal withdrawal?

And the second question is, once the two years are up, is the Secretary allowed to publish the exact same segregation for another two years? Do you think that is allowable?

Mr. GETCHES. The Secretary conceivably could use this as a stand-alone. I think Congress had in mind a study process where facts could be gathered and a decision could be made sometime during that two-year period, about what actually goes into the withdrawal. Presumably, a segregation would start out with particular boundaries, and those would be adjusted upward or downward, and the types of uses would be focused on during the two-year period. So, when you get to the withdrawal you have a much more reliable basis for making the withdrawal, and Congress has a much more reliable basis for evaluating it and playing its part.

Mrs. CUBIN. That is not what happened, though, with Sweet Grass Hills. What happened with Sweet Grass Hills is that the Secretary did a two-year segregation and then immediately just put the exact same segregation in for another two years, which seems like, at the very least, a stretch of the intent of the law.

Mr. GETCHES. Well, this is a more modest way of proceeding than to take those boundaries and immediately convert them into a withdrawal because, once they are in the mode of a withdrawal, if this is less than a 5,000-acre withdrawal, it is fixed until it is revoked. And there is a particularly gentle aspect to the segregation mechanism, and that is that it vaporizes after two years. It does take another action to reestablish it.

Mrs. CUBIN. Well, I would say that is true, but the two-year limit was set for a reason and that was that certain things were supposed to occur in that two years, and short of that, just for the Secretary to take the authority to just take another two years certainly seems opposed to legislative intent.

Mr. GETCHES. Well, if, in fact, it was—and I have not examined it with the exact question you are raising in mind—but if it turns out that the legal authority is limited to two years, then the Secretary, in that situation, would be put to the choice of making the

withdrawal at that moment and then we would have a withdrawal that could not be undone without either legislation or following the termination procedures.

Mrs. CUBIN. Mr. Lehmann, could you respond?

Mr. LEHMANN. I have to preface that I am not an attorney, so my understanding is that the two years segregation is to trigger the preparation of an EIS, the NEPA process, to complete that NEPA process, to establish what are valid pre-existing rights.

I am advised by my counsel that the second two years is illegal, that that is not within the authority of the Secretary. And I think that if you read the opinion of the Solicitor that is attached to my testimony, I think he agreed with that, that that was not the preferred way to go, but they did it anyway. I do not know why they did it that way, but that was a way of delaying the process, it was a delay of doing something. I could have written the EIS in three days because they just used the same reasons they used before, anyway.

Mrs. CUBIN. Then you need to be part of UNESCO because they were able to determine in three days that the Crown Butte Mine was a threat to Yellowstone, when the scientists could not do it in three years.

I do not have any further questions. I do thank the panel for their valuable testimony and for the answers to the questions and the time that they were willing to give us, and I thank the Congressman for his questions. The record will stay open for two weeks for any further questions or any revisions that the panel would like to make. So, thank you very much and, with that, the Subcommittee hearing is adjourned.

[Whereupon, at 12:35 p.m., the joint Subcommittee hearing was adjourned.]

[Additional material submitted for the record follows.]

STATEMENT OF HON. BRUCE BABBITT, SECRETARY OF THE INTERIOR

I appreciate the opportunity to testify here today on proposed withdrawals of Federal land from location and entry under general land laws, including the mining laws. Your letter of invitation specifically directed attention to my recent actions to initiate withdrawals of 429,000 acres along the Rocky Mountain Front in the Lewis & Clark and Helena National Forests, and 605,000 acres in the Shivwits/Parashant region north of the Grand Canyon in northwestern Arizona. I welcome a public discussion of the usefulness of the withdrawals in contexts such as these, where other public values may be threatened by indiscriminate application of various public land laws, including the Mining Law. As I will discuss in more detail below, history clearly shows that withdrawals are often the best way to protect values of national interest that might be destroyed by inappropriate uses of public lands and national forests.

First, let me put my recent actions into historical and statutory context. Withdrawals have long been an important tool of public land management. They are a mechanism, exercised by the Executive and Legislative branches for nearly two centuries, to limit the application of certain broadly applicable public land laws—especially those aimed at transferring interests in Federal lands out of Federal ownership.

By the early part of this century, hundreds of executive withdrawals had been made for such disparate purposes as to establish forest reserves, to conserve wildlife, to create Indian reservations, or to make Federal lands available for military use. Many were made without express statutory authority from Congress, their legality was sometimes debated, but the Supreme Court settled the question in its landmark *United States v. Midwest Oil Co.* decision in 1915. It upheld executive power, noting that “when it appeared that the public interest would be served by withdrawing or reserving parts of the public domain, nothing was more natural than to retain what the Government already owned.”

Starting around the same time as the *Midwest Oil* decision, Congress has several times acted to confirm broad executive power to make withdrawals. It did so in the Antiquities Act of 1906, authorizing the President to create national monuments, and it did it again in the Pickett Act of 1910. Most recently, it confirmed the power in the Federal Land Policy and Management Act (FLPMA), enacted in 1976. FLPMA broadly defines a withdrawal to include, in pertinent part:

withholding an area of Federal land from settlement, sale, location, or entry, under some or all of the general land laws, for the purpose of limiting activities under those laws in order to maintain other public values in the area or reserving the area for a particular public purpose or program.

FLPMA also sets out specific procedures by which FLPMA withdrawals can be made. Generally speaking, the FLPMA withdrawal process is initiated when the Secretary of the Interior publishes a notice in the Federal Register in effect proposing a withdrawal of a tract of Federal lands. Upon publication the land identified is segregated from the operation of public land laws to the extent specified in the notice, for a period of up to two years. During that time, for larger proposed withdrawals (over 5,000 acres), the Department gathers information, engages in consultations, and evaluates the effects of the proposed withdrawal, as specified in FLPMA section 204(c). (The process for withdrawals under 5,000 acres is simpler, see section 204(d); and FLPMA also makes provision for emergency withdrawals of up to three years in length, see section 204(e).)

Section 204 (c) provides that a FLPMA withdrawal of 5,000 or more acres may be terminated by Congressional action. The constitutionality of this so-called “legislative veto” provision was undermined, if not fatally impaired, by the Supreme Court’s 1983 decision in *INS v. Chadha*, which struck down legislative vetoes as a violation of separation of powers.

Completing this brief statutory overview, Section 204 (i) of FLPMA also provides that, for Federal lands under the control of a non-Interior agency (such as the Forest Service in the Department of Agriculture), the Secretary of the Interior shall make, modify, or revoke withdrawals only with the consent of the head of the department or agency involved, except in emergency situations. This was the process used to segregate portions of the Lewis & Clark and Helena National Forests in Montana from the Mining Law. Finally, let me emphasize that any withdrawals made are subject to valid existing rights. If the holder of a mining claim, mineral lease or other interest in the area being withdrawn can establish such a right, it is not affected by the withdrawal.

Turning now to our recent actions, the reason we acted is very simply stated: These proposed withdrawals under section 204(c) are aimed at making sure, while more permanent protections for these lands are being considered, that nothing hap-

pens on the ground that could interfere with, or make more costly, those protections of the land. We acted completely within the law, and within the long tradition of executive branch withdrawals. Indeed, considering some unhappy previous episodes, we would have been foolish *not* to have acted.

Let me explain. There have been many incidents in western history of people using the antiquated 1872 Mining Law to file mining claims on Federal lands for purposes that have little or nothing to do with actual mining development. (The same opportunity for abuse existed with many other old public land laws intended to settle the West through Federal land privatization, but almost all of these other laws—unlike the Mining Law—have been repealed.) The presence of these claims can complicate sensible land management. The basic problem is that filing claims under the Mining Law is very easy. Getting rid of fraudulent or nuisance claims through contest proceedings is lengthy and difficult. This can lead the Federal Government to choose to buy out questionable or spurious claims rather than assuming the burden, expense, and delay involved in contesting them.

Let me mention one of the oldest and two of the most recent examples:

- Beginning around 1890, a man named Ralph Cameron staked numerous mining claims on what was then public domain land along the south rim of the Grand Canyon and on the trails leading from the rim to the Colorado River. Rather than looking for minerals, Cameron used his claims to mine the pockets of tourists instead, by controlling access and charging fees for use of the Bright Angel Trail. This was the most popular hiking trail for access to the Canyon, then as now. Numerous legal challenges were eventually filed to these claims, but it took nearly 20 years to remove Cameron's claims so the public could enjoy this world-class area of Federal lands free from such extortion.
- In the modern era, a fast-acting person staked mining claims on public land at Yucca Mountain after Congress selected the area for the national high-level nuclear waste disposal site, but before the Federal Government cranked up the machinery for withdrawing the land from the Mining Law. Rather than going through expense and particularly the time to contest his claims, the Department of Energy elected to pay him a quarter of a million dollars of taxpayer money to relinquish them.
- In 1989 the Department of the Interior determined that it had to issue patents under the Mining Law for 780 acres of land within the Oregon Dunes National Recreation Area, an outstanding scenic and recreational treasure along the Pacific coast. (The mineral "discovery" on the mining claims to be patented was a so-called "uncommon" variety of sand.) Trying to avoid creating such an inholding in the National Recreation Area, the United States pursued a land exchange, intending to offer the patentee other public land of equal value in Oregon for the relinquishment of these claims. But when other public land was identified for such an exchange, and before it could be withdrawn, the holder of the claims in the Oregon Dunes filed mining claims on that other land, making it impossible to use them for the exchange.

Obviously, these situations could have been avoided—with savings to the Nation's taxpayers—by timely withdrawals of the affected land from the Mining Law. It was to avoid a repeat of these situations that we recently acted in the Rocky Mountain Front and north of the Grand Canyon. Let me now provide a little more detail on each.

The Lewis & Clark and Helena National Forests

Last year, the Forest Service settled a controversy of several decades by deciding through its Forest planning process not to allow new mineral leasing in the Rocky Mountain Front of Montana's Lewis & Clark National Forest because of its spectacular environmental, wildlife, recreational, cultural and scenic values. The area nevertheless remained open to location of mining claims under the Mining Law. Although it had never been the scene of any significant hardrock mining activity, the increased attention in the Forest Service plan to the management of the area for conservation could attract the location of "nuisance" mining claims such as has happened elsewhere. Indeed, a number of new mining claims were located in the area in 1996, while the Forest Service was considering the land use plan amendment affecting oil and gas leasing decisions on the Forest.

Therefore, at the request of the Forest Service, on February 4, 1999, the BLM published in the Federal Register notice of the proposal to withdraw this area from location of new mining claims, in order to protect Native American traditional and cultural uses, wildlife (including big game and fish habitats), and scenic resource values while the Forest Service evaluates long-term hard rock mineral management in the area. Publication segregates the land temporarily for up to two years. During the two-year period while a final withdrawal recommendation is developed, Interior

and the Forest Service will conduct an open, public process under the BLM withdrawal regulations and the National Environmental Policy Act to evaluate the long-term future use of the area.

The Proposed Arizona National Monument

The Shivwits Plateau/Parashant Canyon area of Arizona includes many objects of historic and scientific interest, as well as magnificent cliffs, stunning vistas, and a mosaic of pinyon-juniper and ponderosa pine communities. Congress almost included much of it in Grand Canyon National Park when it enlarged the Park in 1975, but took it out in the final stages of the legislative process because of objections from hunting and livestock interests. As you know, late last fall I began to evaluate this area for possible protection under the Antiquities Act, which could be done in a way to allow grazing and hunting to continue. The area has never seen any significant mineral development, and there are only a handful of mining claims there now. Being exceedingly mindful of the unhappy experience with Ralph Cameron on the other side of the Grand Canyon, I determined that it would be foolish to invite a repeat of that experience. Therefore, on December 14, 1998, the BLM published a Federal Register notice of a proposed withdrawal of the area pursuant to section 204 (b) of FLPMA. Publication had the effect of segregating the area temporarily. This will prevent location and entry under the general land and mining laws for up to two years, while further protective actions are contemplated.

You also asked about any future plans for similar withdrawals. For much of its 150 year history, the Department of the Interior has been steadily making, modifying, and revoking withdrawals. The complex business of managing several hundred million acres of Federal land to serve the public interest demands no less. If we face situations elsewhere similar to those we faced in the Rocky Mountain Front and in the Shivwits/Parashant region—where important conservation values were at stake and where the attractive nuisance of mining claim location could have unnecessarily complicated our consideration of protective actions—I will not hesitate to act as I did there. I see nothing of value in allowing people to take advantage of easy entry onto public lands under antiquated relics like the Mining Law to mine the taxpayers' pockets and to thwart or hamper the protection of magnificent areas of Federal lands for future generations.

Finally, you asked about what legislative remedies are available to ensure cooperation between the executive and legislative branches in fashioning public lands policy, in light of the *Chadha* decision. That decision, as I noted earlier, probably eliminated the legislative veto from FLPMA's withdrawal provisions. But its elimination does not meaningfully affect, in my judgment, the many opportunities for the executive and legislative branches to work together. In the specific examples I have discussed today, the temporary segregation of land we have put in place maintains the status quo while we are exploring administrative or legislative mechanisms for best managing these lands in the future.

Furthermore, the lack of a legislative veto leaves it open for Congress as a whole—acting through the normal lawmaking process, involving action by both Houses and presentment to the President—to address withdrawals put in place by the Executive. To take a well-known recent example, the Congress just a few months ago passed and the President signed a law modifying the boundaries of the Grand Staircase-Escalante National Monument, which the President two years earlier had created and withdrawn from entry, location, leasing or other disposition under the public land (including mining and mineral leasing) laws. As this shows, the ordinary give and take of the regular political process has much more influence on the management of Federal lands than whether or not Congress has a formal opportunity to veto a proposed FLPMA withdrawal.

I appreciate the opportunity appear before these Subcommittees and discuss these important issues. I will be glad to answer any questions.

STATEMENT OF ERNEST K. LEHMANN

My name is Ernest K. Lehmann. I am a resident of Minneapolis, Minnesota.

I am a geologist by training and have spent nearly fifty years actively engaged in the mining industry. I majored in geology at Williams College in Massachusetts and attended graduate school at Brown University in Rhode Island. I has also completed an Advanced Management program at the Harvard Business School.

I began my mining career as a miner in a small gold mine in Bannock, Montana in 1950 and, as you will see in a few minutes, attempting to mine gold in Montana may also end my career.

Since 1950, I have worked, first for a large company conducting and managing mineral exploration, and then, for just over forty years, as a consultant. In my consulting career, I have managed exploration programs and joint ventures; been involved in planning and managing mining operations and development; conducted countless evaluations, appraisals and due diligence investigations; and helped write mining environmental regulations. As part of this work, I have had experience not only with the United States Mining Law, but also have been active on Federal acquired lands where minerals are governed by the Leasing Act. In addition, I have a considerable degree of familiarity with mining laws in a number of foreign jurisdictions, including Canada, Peru and Argentina.

In the course of my work I have participated and had an integral role in a number of successful major discoveries, including lead-zinc deposits in Missouri, gold deposits in Montana and Argentina, a platinum-palladium deposit in Minnesota, copper-gold and copper-lead-zinc deposits in Wisconsin and large chemical grade limestone deposits in Kentucky and Ohio.

My clients have ranged from large to small mining companies, international institutions such as the World Bank, foreign governmental agencies, state governments including New Mexico, Arizona, Illinois and Maine, counties, banks, land and mineral rights owners. When ethically and financially appropriate, my companies have created, participated in and managed mineral exploration ventures with corporate and individual partners.

I am a past president of the American Institute of Professional Geologists, a registered geologist in California, Minnesota, Georgia and Delaware; a member of numerous technical and professional organizations; president of an industry trade group—the Minnesota Exploration Association—and have been on a number of special committees at the local, state and national level, including one on strategic minerals which advised the Congressional Office of Technology Assessment.

I welcome the chance to appear before you today to share with you the saga of our technically successful gold exploration in a remote area of Montana known as the Sweet Grass Hills, and the “handling” we have received from the Bureau of Land Management (“BLM”) and the Department of Interior (“DOI”) since 1992 as the reward for our efforts.

As you will see, by using—and abusing—the authority under FLPMA to withdraw public lands, BLM and DOI have conducted a calculated campaign to deny our rights under the Mining Law and to prevent further development of what we believe may be a world class gold deposit.

Exploration and Discovery of the Tootsie Creek Deposit

A brief history is in order¹. In 1983, the Mount Royal Joint Venture, a group of three private investors from Minnesota (of which one of my companies is one and for which we are the operator), undertook a prospecting program in the Sweet Grass Hills. (Figure 1.) We based this program on the known occurrence of gold at West and Middle Buttes, on prior successes we had in the nearby Bear Paw Mountains, and on the then-developing large, low-grade Zortman-Landusky gold deposits in the Little Rocky Mountains. Both these areas are geologic terrain similar to the Sweet Grass Hills.

The Sweet Grass Hills are a group of isolated hills rising from the northern plains that represent volcanic centers. They are generally geologically similar and have a similar mineral potential to other groups of hills in north central Montana shown on Figure I and to other highly productive mineral areas elsewhere in the world.²

The land ownership in the Hills (Figure 2) is a patch work of private fee lands, private surface underlain by Federal public domain minerals, state fee lands, Federal public domain fee lands and a few patches of Federal acquired surface. The Federal mineral estate totals about 19,685 acres, about one-third of the Sweet Grass Hills area. The area has been actively prospected for gold, iron and fluorspar since about 1885 and the areas around the flanks of the Hills have a significant number of producing oil wells. The Hills proper are used for cattle grazing, while the lower elevations support dry land farming. The small towns of Chester and Shelby are the main population centers.

By 1985, our venture had produced sufficiently attractive results and we had established a significant land position of unpatented mining claims and private leases so that we were able to bring in a major partner, Santa Fe Minerals, which funded further mapping, sampling and drilling programs on Middle and East Butte through 1987. BLM conducted an Environmental Assessment (“EA”) prior to approving the

¹ Table I provides a brief history of exploration in the Sweet Grass Hills from 1983 to 1993.

² The West HiLine Amendment/EIS published by BLM in 1996 as the basis for the withdrawal of the area acknowledged that the Hills are an “area of known high mineral potential.”

Santa Fe plan of operations and found no significant impact. Though there were no Indian lands nearer than about sixty miles from East Butte, a challenge to the project was mounted by a Native American group but was rejected by the Interior Board of Land Appeals (“IBLA”). Santa Fe withdrew from the venture at the end of 1987. We then entered into a new arrangement with Cominco American Resources, which conducted additional studies in 1988 and 1989, including additional drilling in the Tootsie Creek area at East Butte. Again, BLM conducted an EA and approved the Cominco plan of operations. Another Native American group lodged a protest with the IBLA, which later ruled the appeal moot. Cominco chose to withdraw from the venture on completion of its work. In late 1991 we entered into yet another joint venture with a company called Manhattan Minerals.

During this time, BLM was conducting a major land planning effort later promulgated as the West HiLine Regional Management Plan (“West HiLine RMP”). We participated in the hearing and made comments. The West HiLine RMP was approved by the Director of BLM who published a Record of Decision in January 1992 adopting the plan and specifically leaving the Federal lands in the Sweet Grass Hills open for mineral entry, location and development. The West HiLine RMP did establish an Area of Critical Environmental Concern (“ACEC”) for the core area of the three main buttes, including East Butte where our activities were then focused. Not only did the BLM leave the area open for mineral entry, but it also proposed to eliminate a Bureau of Reclamation withdrawal in effect on the public domain minerals in Section 29, adjacent to our core private and public domain holdings. This is an area of high mineral potential.

By 1992, we had conducted extensive exploration work in an area of East Butte known as Tootsie Creek with very promising results. (Figures 5 and 6). We had conducted soil sampling across the Tootsie Creek area and had collected over 1,400 samples from rock outcrop and over 15,000 feet of trenches (all now reclaimed) and from 14 drill holes totaling 4,292 feet. The data demonstrates the discovery of an impressive occurrence of gold mineralization over an area about a mile east-west by two-thirds of a mile north-south. The geologic evidence, confirmed by engineering estimates, indicates that we have an asset that may contain as much as 1.7 million ounces of gold, about 70 percent recoverable, in a large, low grade deposit. We believe that Tootsie Creek compares well with other large, low grade gold deposits in the western United States and will be economic is properly designed and operated. (See Table 2.) Part of the Tootsie Creek Deposit is on lands we own, part on private minerals we lease, and part on public domain on which we hold 20 unpatented mining claims located under the Mining Law (fourteen of which were located prior to 1992, and six of which were located in August 1995 as I will explain later).

The Royal East Plan of Operations

In February 1992, about thirty days after the ROD leaving the area open to mineral entry was made, our joint venture filed a new plan of operations to reopen some roads, construct some additional roads, and drill thirty-eight in-road drill holes to develop the Tootsie Creek Deposit (the “Royal East Plan of Operations”). Instead of adhering to its just adopted ROD, the BLM chose to insist that, even after two previous EAs made a finding of no significant impact from our exploration efforts, a full Environmental Impact Statement (“EIS”) was now needed before our plan could be approved. During this process, Manhattan Minerals advised me that if they could not begin operations by mid-summer 1993, they would withdraw from the project. When the draft Royal East EIS was finally published in early 1993, the “preferred alternative” was to approve the plan. In fact, in a conversation with me in May 1993, the BLM District Manager advised me that he would go ahead and approve the plan.

The Josh Drew Memo

Although we were led to believe that we would be able to continue developing the Tootsie Creek Deposit, we now know that during this time BLM made a 180 degree shift in policy with respect to management of the Sweet Grass Hills and began a calculated strategy to block our efforts to further develop our discovery and to deprive us of the economic benefits of our work. From the evidence we have, meetings took place in Washington in June 1993 to find a way to prevent approval of our plan. The substance of some of these discussions is summarized in a memorandum from Josh Drew to then Director Jim Baca which says in reference to our plan, “With careful handling, the approval could be delayed many months or even years.” Mr. Baca’s enthusiastic hand written response—“Josh—Proceed immediately. Do Press. See me. JB”—appears on the front of our copy of the memo. (Appendix 1.)

The First Withdrawal Petition

The first step in this strategy was for BLM to use its authority under FLPMA to petition the Secretary of Interior to withdraw the entire Federal mineral estate (19,685 acres) in the Hills. Strangely, the language used to justify the petition was almost exactly the same language that had been used to justify keeping the area open to mineral entry, with restrictions, and to reopen Section 29. Assistant Secretary Armstrong approved the petition and ordered that the Federal mineral lands be segregated—that is, closed to mineral entry, location and development—for a period of up to two years while the proposed withdrawal was considered. The effective date of the segregation was August 3, 1993.

Approval of the petition triggered three separate processes:

First, completion of the Royal East EIS and approval of our plan of operations was suspended indefinitely. To this day, BLM has never completed the Royal East EIS or approved our plan. We have appealed what is in effect a de facto denial of our plan to the IBLA but no ruling has yet been made.

Second, we were immediately informed that BLM would conduct a validity examination of our unpatented mining claims to determine whether they met the discovery requirements of the Mining Law and were “valid existing rights” which would not be subject to a withdrawal. The validity examination report on our fourteen original claims was finally produced in September 1995. The Mineral Examiner found eight of those fourteen claims valid and six invalid (See Figures 3, 4 and 5). The original report contained some interesting and instructive typographical errors and the report makes significant technical errors and follows a strange line of reasoning that bears no relationship to how mineral exploration and development are actually carried out in the real world. The report strains to find invalid several claims in the core of the deposit in an effort to minimize the economic value of our property.

It was like pulling teeth to get a claim contest on the six “invalid” claims before an administrative law judge. The contest hearing finally occurred last spring, almost a year ago³, but we have not had a ruling yet. During the hearing we learned that preparation of the mineral report had been personally overseen by Roger Haskins, the senior specialist for mining law adjudication in the office of the Director of BLM. Part of the “careful handling” we were receiving throughout this process, no doubt.

Incidentally, even though there were at the time a significant number of other claims in the Hills held by others, as far as we can determine, only our Tootsie Creek claims were the target of a validity examination.

Third, because the proposed withdrawal represented a complete reversal of the West HiLine RMP (adopted only 20 months previously), the withdrawal petition triggered the need to prepare an amendment to the West HiLine RMP, and, of course, an EIS on the proposed withdrawal (the “West HiLine Amendment/EIS”). The West HiLine Amendment EIS revisited the same issues which had already been exhaustively addressed during the original West HiLine RMP planning process.

The Second Withdrawal Petition

For reasons that we don’t understand, the BLM found itself unable to complete either the West HiLine Amendment/EIS or the validity examination of our claims within the two-year segregation period. In July 1994, the Director sought the advice of the Solicitor on how to continue to prevent us from developing the Tootsie Creek deposit. (Appendix II). The Solicitor recommended that before the segregation period expired on August 2, 1995, the Secretary should complete the withdrawal despite the fact that the West HiLine Amendment/EIS would not be completed, or in the alternative, to pursue an emergency withdrawal or a withdrawal “in aid of legislation.” The Solicitor advised against filing a second repetitive withdrawal petition, stating that “It is likely that the courts would treat such an action as a circumvention of the two-year limit” on segregations contained in FLPMA. According to the plain language of FLPMA, emergency withdrawals and withdrawals “in aid of legislation” are limited to 5,000 acres.

In July 1995, notice was published in the Federal Register that the segregation would expire and that the lands would again be open to mineral entry and location. A few days later, then-Congressman Williams introduced a bill proposing to withdraw the entire Federal mineral estate in the Sweet Grass Hills. Needless to say, that bill never saw the light of day in this Committee, but its obvious purpose was to give BLM cover in filing a second withdrawal petition. The purpose of the second

³ It was about 2.5 years from the time of the issuance of the Examiner’s report and the evidentiary hearing.

withdrawal petition was to “preserve the status quo” for the same purposes as the first withdrawal petition and “in aid of legislation” then pending in Congress.

On August 3 and 4, 1995, after the first segregation expired, we staked six additional claims on the west side of our land block to cover ground we felt was immediately prospective based on our prior work. These claims are shown in blue on Figures 3, 4 and 5. We properly filed these claims with the county and the BLM and continue to pay our assessment fees. The BLM declared these claims void “ab initio” based on the segregatory effect of the second withdrawal petition. We appealed this decision to the IBLA which affirmed the BLM decision, reasoning that the first withdrawal proposal was “not identical” to the second one because it had a “different stated purpose.” 144 IBLA 277 (June 11, 1998).

In extending the segregation for an additional two-years, BLM relied on rhetoric over substance, and a “phony” bill introduced in Congress. We do not believe that the withdrawal authority under FLPMA was ever intended to be used in this way.

The West HiLine Amendment/EIS

In May 1996, BLM finally published the West HiLine Amendment/EIS. The EIS purports to include an analysis of the mineral potential of the area, which it admits is an area of “high mineral potential.” The technical geologic and mineral analysis of the EIS was castigated as technically unsound and unrealistic by BLM’s sister agency, the Bureau of Mines (“BOM”). (Appendix III). The preferred alternative was withdrawal of the entire Federal mineral estate, again using much of the same justifications used to keep the area open as an ACEC in January 1992, and to buy out valid existing rights, euphemistically referred to as “land tenure adjustment.”

The entire Federal mineral estate in the Sweet Grass Hills, 19,685 acres, was withdrawn on April 10, 1997.

Conclusion

Where are we now, after sixteen years in the project and about \$1.5 million of highly professional and effective exploration? After over seven years and several hundred thousand dollars of expenditure since filing our 1992 plan of operations?

My partners and I are determined to go on. I have a reputation as a prudent geologist and I do not come lightly to the conclusion that the wealth of geologic data we have amassed indicates that we have discovered a world class gold deposit at Tootsie Creek.

We continue our work, but unfortunately for the last seven years this is work by lawyers and expert witnesses and not by geologists, engineers and miners. This work is not finding or developing an ore body or providing jobs for people in north central Montana. It is not raising tax revenues for the local schools, towns or the state of Montana.

As I indicated, we are awaiting a decision from the IBLA on the refusal to approve our 1992 plan of operations. We are also awaiting a decision from the administrative law judge on our claims contest and are confident we will prevail. And we are weighing our options with respect to the IBLA decision on the six new claims staked after the first segregation period expired in 1995.

We would ask this Committee to initiate appropriate legislative actions to assist us and to prevent this abuse of the Congress’s intent in passing FLPMA to limit the exercise of unconstitutional authority by the Secretary to make decisions respecting the disposition of the public land.

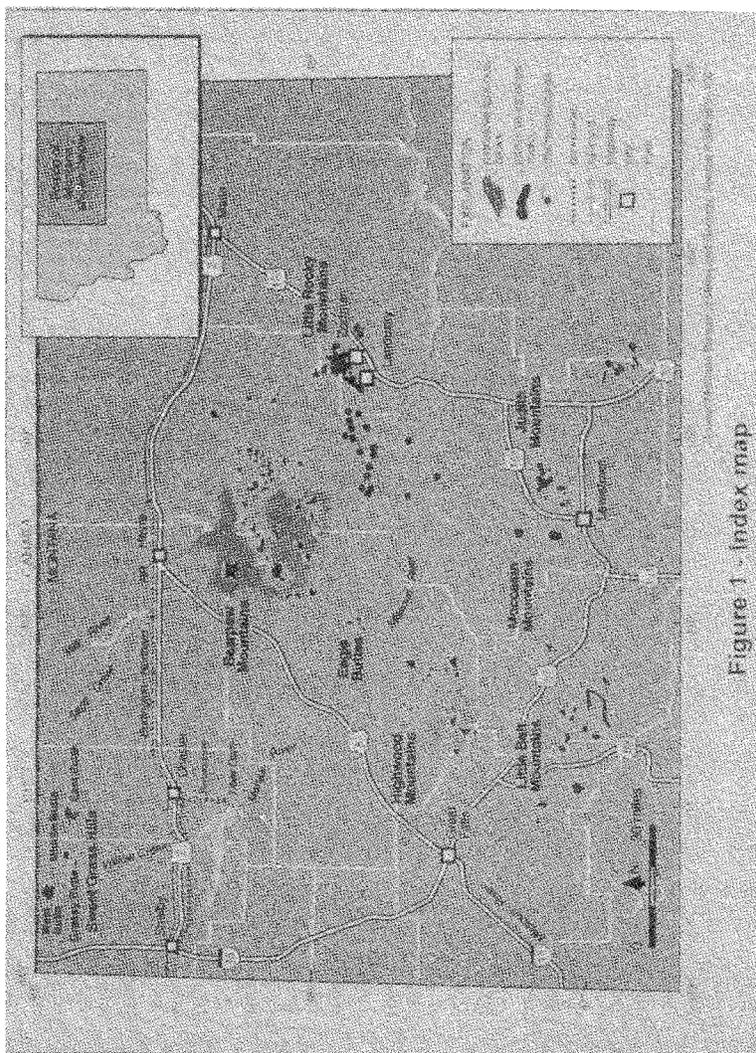
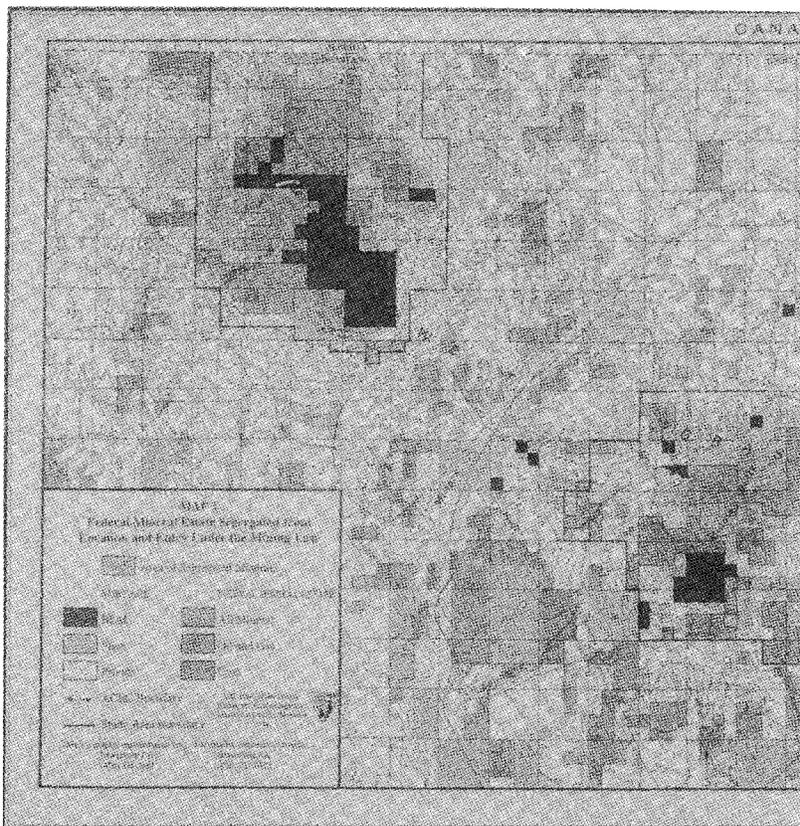


Figure 1 - Index map



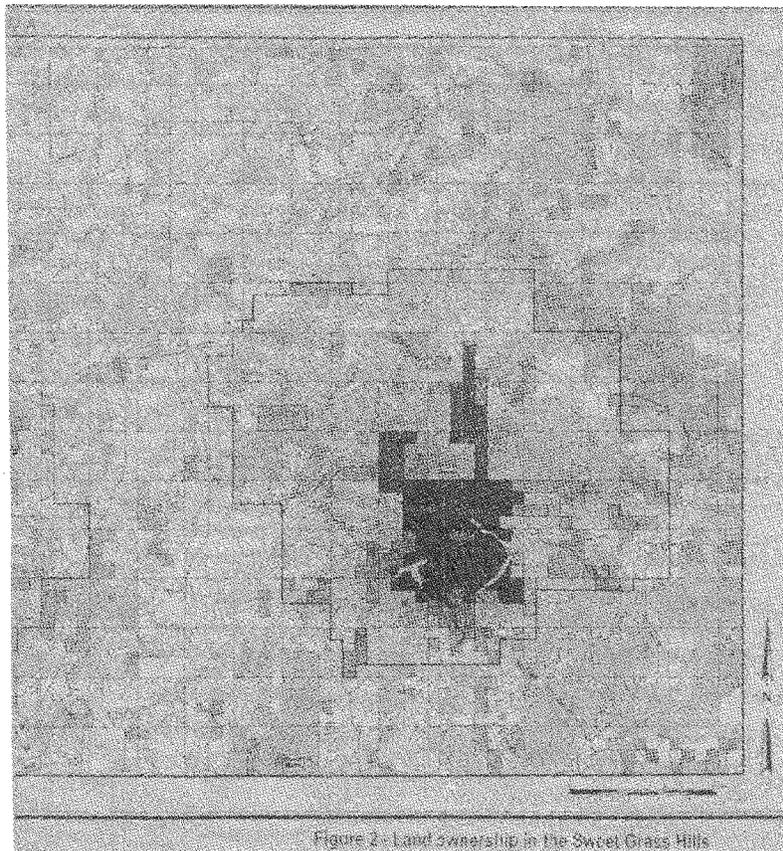
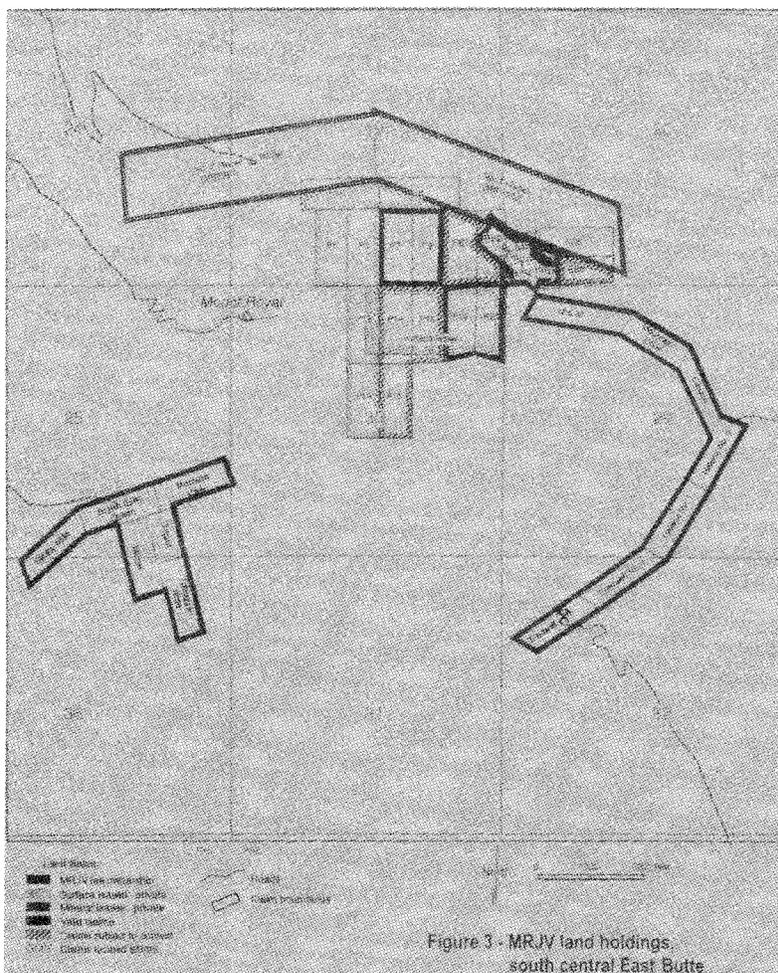
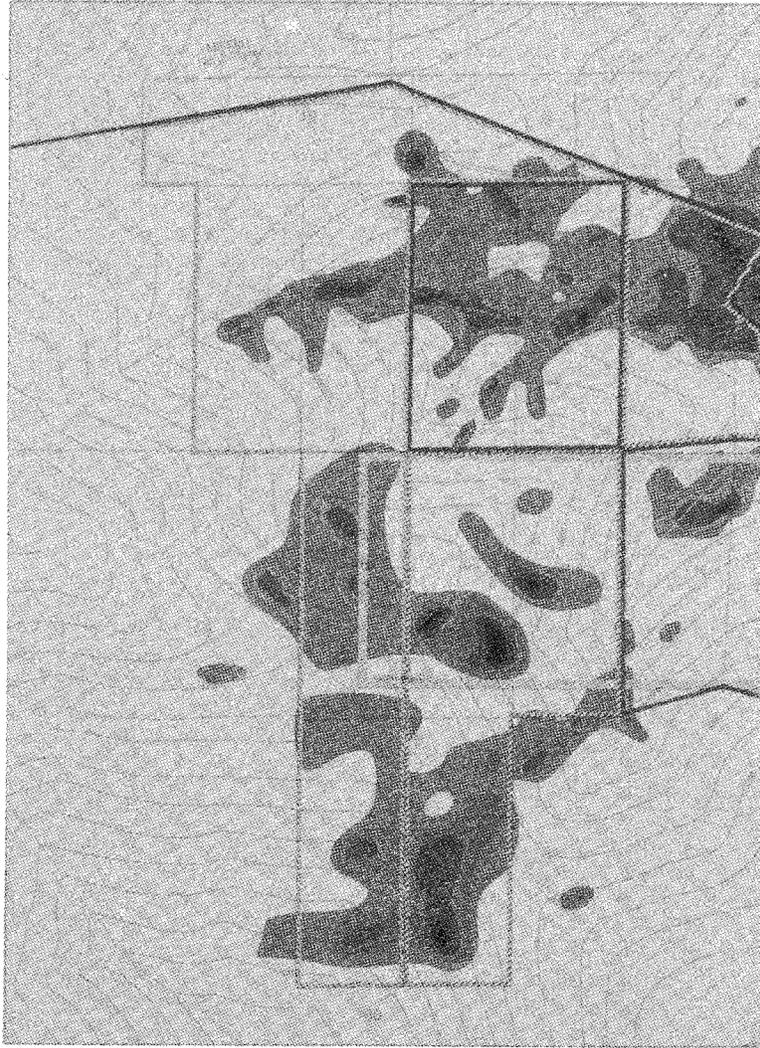
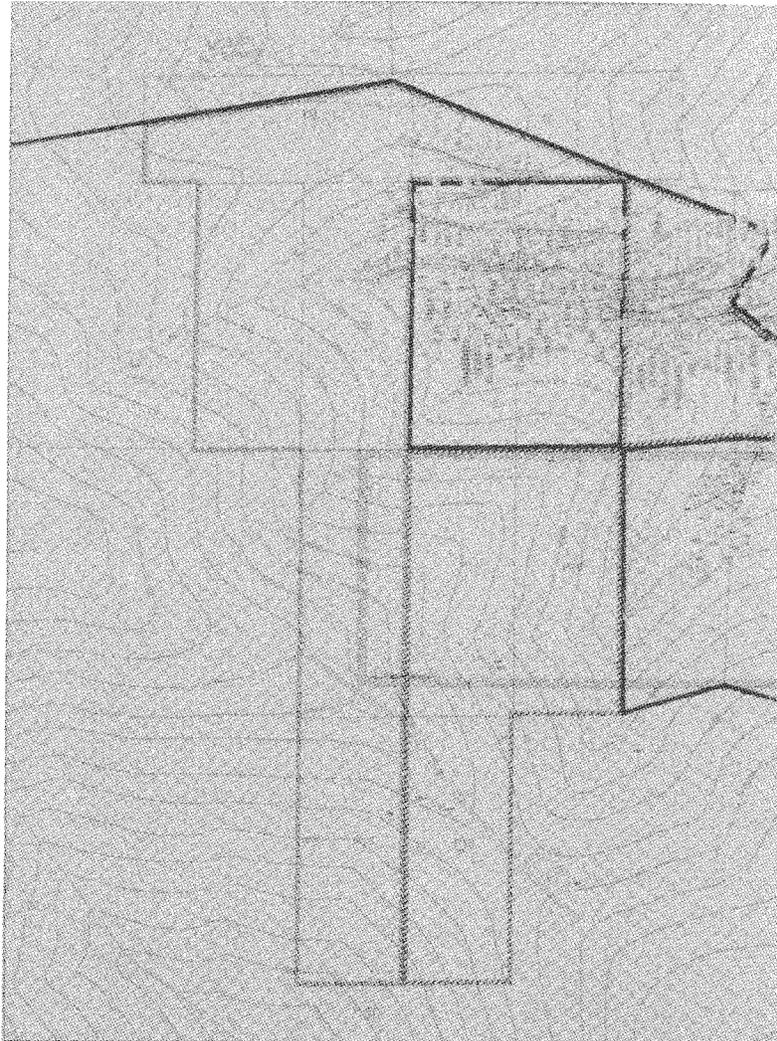


Figure 2. Land ownership in the Sweet Grass Hills.







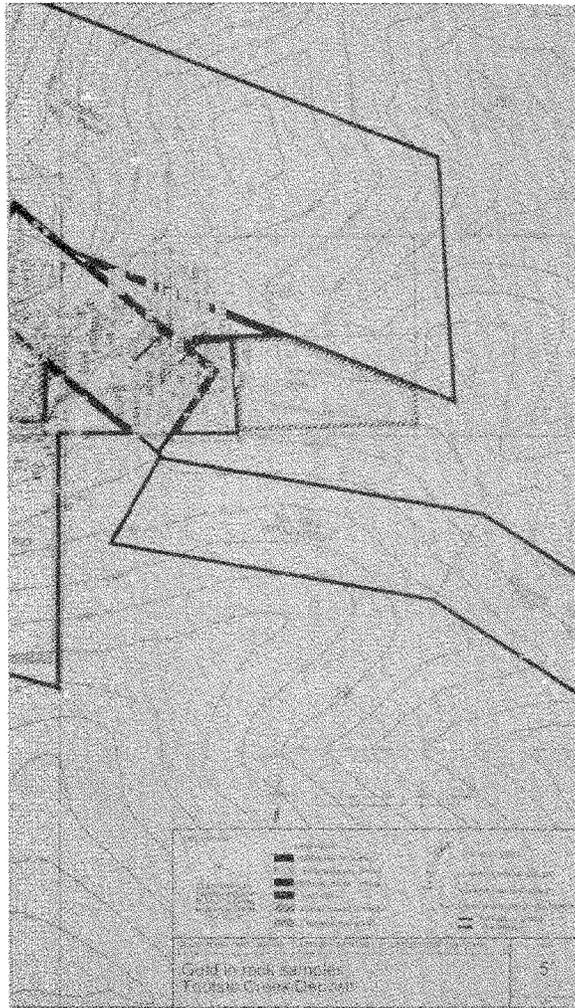


Table 1

**Chronology of Major Exploration in The Sweet Grass Hills
1983-1993**

1983 MRJV conducts stream sediment geochemical reconnaissance at East, Middle and West Buttes; stakes claims, and options and leases private and state property. BHP-Utah explores at West Butte and stakes claims.

1984 Meridian Minerals begins exploration at Grassy Butte. MRJV and BHP-Utah maintain their mineral rights. MRJV seeks a joint venture partner for its program.

1985 MRJV and Santa Fe form Gold Buttes Joint Venture and undertake a geological mapping and geochemical prospecting program at Middle and East Buttes. Meridian and American Copper Nickel (INCO) drill at Grassy Butte. MRJV acquires BHP-Utah's rights at West Butte and conducts mapping and sampling.

1986 MRJV and Santa Fe conduct detailed geochemical soil sampling at East and Middle Buttes and construct 13,772 feet of road and other trenches at Tootsie Creek, all of which are mapped and sampled. At the end of the year, Santa Fe re-conveys its interest in Middle Butte to MRJV.

1987 MRJV and Santa Fe conduct additional mapping and geochemical sampling at East Butte, extending the zone of mineralization up the south fork of Tootsie Creek; drill seven reverse circulation drill holes totaling 2585 feet, and four "Winkie" diamond core drill holes totaling 601.7 feet. At the end of 1987, Santa Fe withdraws from the joint venture with MRJV. MRJV and Placer Dome enter into an agreement respecting Middle Butte and Placer Dome conducts drilling operations at that location.

1988 MRJV enters into a joint venture agreement as to East Butte with Cominco American Resources Inc. (CARI). CARI undertakes a program of limited re-sampling and mapping at East Butte and Induced Polarization (IP) surveys.

1989 The joint venture with CARI constructs an additional 2125 feet of road-trench in the area of the south fork of Tootsie Creek and drills three holes (totaling 1170) feet of a scheduled nine-hole drilling program and then withdraws, citing budget overruns and drilling difficulties.

1990 MRJV re-evaluates the results of previous exploration, does assessment work and continues to maintain selected mineral rights at East Butte.

1991 MRJV and Manhattan Minerals (USA) Ltd. enter into the Royal East Joint Venture. Manhattan conducts check sampling, reconnaissance exploration and extends the geochemical grid at Tootsie Creek.

1992 MRJV and Manhattan file a Plan of Operations with BLM to reopen the previous road constructed by the Santa Fe and CARI joint ventures and to construct an additional approximately 13,000 feet of new road-trenches to permit the drilling of about 39 in-road drill holes. The plan approval is delayed by the decision of the State Director to prepare an EIS on the work plan and is still awaiting BLM action. In 1992, MRJV enters into an agreement with Couer d'Alene Exploration under which claims at West Butte are re-staked and mapping and geochemical sampling is undertaken.

Table 2
Compilation of Data on Some Gold Deposits Comparable to Toolite Creek

| Name | Toolite Creek MDV | Imperial California | Rand California | Zortman Montana | Pegasus Gold Montana | Florida Canyon Gold Novada | Black Pine Gold Idaho | Mesquite Santa Fe Pacific California | McNeal Phelps Canyon Res Montana |
|---------------------------------------|-------------------------|------------------------|--------------------|--------------------|----------------------------|-------------------------------------|--------------------------------|---|--|
| Original Reserves | | | | | | | | | |
| Tons Ore (millions) | 101.7 | 94.0 | | | | | | | 205.1 |
| Grade of Ore | | | | | | | | | |
| C&A Ore (opt) | 0.036 | | | | | | | | 0.034 |
| ROM Ore (opt) | 0.006 | 0.017 | | | | | | | 0.012 |
| Total (opt) | 0.017 | 0.017 | | | | | | | 0.025 |
| Ounces (millions) | 1.75 | 1.60 | | | | | | | 5.20 |
| Stripping Ratio: waste:ore | 1.03:1 | 3.0:1 | | | | | | | |
| Operating Status | Proposed | Developing | Operating | Operating | Operating | Operating | Operating | Operating | Proposed |
| Past Production/Period of Data | | | | | | | | | |
| Tons Ore (millions) | Nil | Nil | | 1991-1995 | 1991-1995 | 1991-1995 | 1992-1995 | 1994-1995 | |
| Grade of Ore (opt) | | | | 64.5 | 41.3 | 20.9 | 20.9 | 24.5 | Nil |
| Recovery (millions) | | | | 0.17 | 0.17 | 0.23 | 0.23 | 0.26 | |
| Recovery Percent | | | | 56% | 65.5% | 62% | 62% | 64% | |
| Stripping Ratio: waste:ore | | 70% | | 0.6:1 | 1.1:1 | 1.3:1 | 1.3:1 | 2.0:1 | 72% |
| Gold Recovery System | Heap Leach | Heap Leach | Heap Leach | Heap Leach | Heap Leach | Heap Leach | Heap Leach | Heap Leach | Heap Leach |
| Remaining Reserves | | | | | | | | | |
| Tons Ore (millions) | 101.7 | 94.0 | 101.7 | 71.4 | 75.3 | 8.0 | 32.8 | 205.1 | |
| Grade of Ore | | | | | | | | | |
| C&A Ore (opt) | 0.036 | 0.017 | 0.021 | 0.021 | 0.023 | 0.015 | 0.026 | 0.034 | |
| ROM Ore (opt) | 0.017 | 0.017 | 0.021 | 0.021 | 0.019 | 0.015 | 0.021 | 0.012 | |
| Total (opt) | 1.75 | 1.60 | 2.12 | 1.30 | 1.43 | 0.12 | 1.13 | 0.025 | |
| Ounces (millions) | 1.03:1 | 3.0:1 | 1.7:1 | 0.9:1 | 2.1:1 | 0.8:1 | | | |
| Stripping Ratio: waste to ore | | | | | | | | | |
| Cost Data - Period | | | | | | | | | |
| Capital Cost (millions \$) | 70.0 | 47.6 | Estimated | 1991-1995 | 1991-1995 | 1991-1995 | 1994-1995 | Estimated | |
| Operating Cost (millions \$) | 2.82 | 2.36 | | 2.55 | 2.99 | 3.66 | 2.96 | 188.0 | |
| Depletion Cost (millions \$) | 230 | 214 | 247 | 263 | 263 | 253 | 211 | 4.22 | |
| D & A & Royalty / Ounces Recovered | 79 | 43 | 95 | 56 | 41 | 62 | 96 | 231 | |
| Total Cost (Ounces Recovered) | 329 | 256 | 342 | 319 | 304 | 314 | 307 | 50 | |
| Source of Data (Note#) | 5 | 1 | 1 | 2 | 2 | 2 | 3 | 4 | |

General Notes: Where there is no history of past production, estimates are used. Where no information is available, cell is left blank.
 Note 1: The Northern Miner, Toronto, Ontario, May 20, 1996, page 1, and Glamis Gold, Report 10-Q for the 1st Quarter, 1996.
 Note 2: Pegasus Gold Inc. Form 10-K for 1995
 Note 3: Santa Fe Pacific Gold Corporation Annual Report for 1995
 Note 4: Canyon Resources Corporation Form 10-K for 1995
 Note 5: Excludes Montana Gold Tax but includes estimated royalties for Toolite Creek

Appendix I

*SOI briefs
1993*

June 8, 1993

GM JJJ

MEMORANDUM

To: Jim Baca
From: Josh Drew *(JD)*
Subject: Sweet Grass Hills Project

*Josh -
Proceed
immediately.
Do Press
Same JB*

On February 25, 1992 Manhattan Minerals Ltd., in conjunction with Mr. Ernest Lehmann, submitted the Royal East Joint Venture proposal to perform mineral exploration, with an eye for gold, in the Sweet Grass Hills, Liberty County, Montana. The Royal East Joint Venture would construct 28,000 feet of access road and trench and drill 38-40 core holes, about half on public and half on private land. The surface parcel is 75% public and 25% private land. There have been two other instances of exploration of a more limited scope on the Hills in 1986 and 1989, both of which were unsuccessfully appealed before the IBLA.

SM/SL

BLM released an Environmental Assessment/Record of Decision (EA/ROD) on July 7, 1992 which identified significant impacts from the proposed exploration on culturally sensitive Native American resources, namely the Sweet Grass Hills. The hills are a place of traditional religious activity and are considered sacred by tribes throughout Montana, including the Blackfeet, Cree, Gros Ventre, Salish, Kootenai, and Assiniboine. The tribes feel that there can be no mitigation of the development of this sacred area; the only acceptable alternative is no action. Based on the EA, the BLM withheld approval of the plan of operations pending the completion and approval of an EIS.

Local residents have also raised concerns regarding the environmental impact of mining in the Sweet Grass Hills. The Hills are the sole source of ground and surface water recharge for the surrounding area. Anticipating mineral discovery and the prospect of full-scale cyanide heap leaching, local residents are concerned about the profound effects seepage in to area aquifers could have on ranching and farming, to say nothing of individual health. The Liberty County Conservation District has just commissioned the Sweetgrass Hills East Butte Groundwater Study. This 24 month, \$100,000 study will identify and map existing wells, springs and streams, collect data on contamination, and develop information for planning and development in the area. Petitions are being circulated throughout the state requesting a stay or withdrawal of mining exploration in the Hills until the study is completed. Lastly, the Sweet Grass Hills are geologically and biologically distinct within this area of north central Montana. If the proposed exploration takes place, the lost scenic beauty and hunting, fishing and other recreational opportunities in this unique ecosystem would be irreplaceable.

A third major component of this issue involves the requirements of the National Historic Preservation Act (NHPA), which regulates actions that affect traditional cultural and religious practices. The Sweet Grass Hills proposal falls within the NHPA mandate, which stipulates that under these circumstances the BLM must consult with the Advisory Council on Historic Preservation (ACHP) regarding adverse impacts on the historic area. However, NHPA is a procedural rather than a substantive law. It requires consultation with the ACHP, but it does not provide a veto to undertakings which may adversely affect culturally or historically sensitive areas. The BLM is currently in consultation with the ACHP, although Lewiston District Manager Dave Mari is anxious to terminate the consultation. Mari feels that BLM has fulfilled its responsibilities under NHPA, and he wishes to preserve the sovereign decision-making authority of BLM (though it does not appear to be threatened).

The BLM issued the DEIS in February, 1993. Although groups such as the Mineral Policy Center have criticized it to the point of ridicule, noting its length and content are nearly identical to that of the EA, the BLM feels the DEIS is adequate. Thus the NEPA timeline is nearly finished. The ACHP requests for additional studies as part of the BLM consultation could take several months to complete. The timeline for resolving this issue is flexible. The earliest the plan of operations could be approved would be September; in fact, State Director Bob Lawton assured the applicants that this would be the case. With careful handling, the approval could be delayed many months or even years.

This mining proposal is uncommon, if not unique, in that it has little or no support from the community. While projects of this sort are usually blessed by the "town fathers," Liberty County Commissioners voted unanimously in favor of delaying the exploration until the East Butte Groundwater Study is completed. Other local elected officials have reservations, at least, and most are opposed outright. Senator Baucus wants the concerns of the tribes taken very seriously, wishes more time to get familiar with the issue, and favors delay. Representative Williams strongly opposes the project, and has written the Secretary urging him to put a halt to it. Senator Burns' office has been quiet on the issue. State and local press have editorialized against the proposal.

There does not appear to be any easy resolution to this issue. FIPMA states that the Secretary must "by regulation or otherwise, take any action necessary to prevent unnecessary or undue degradation of the lands." However, the Department has further defined unnecessary or undue (U and U) degradation as "surface disturbance greater than what would normally result when an activity is being accomplished by a prudent operator." The operation is not likely to be in violation of the U and U standard as defined in this regulation. Our field solicitor did note, in response to a letter from Dave Mari, that the effect of operations on other resources and land uses, namely traditional

Native American cultural uses, might violate the U and U standard. However, the law, while stipulating that BLM may impose reasonable mitigation to prevent unnecessary and undue degradation, does not provide that BLM can deny the project application as mitigation, according to the solicitor.

The Tribes have stated plainly on several occasions that in their view no action is the only acceptable mitigation. Options for achieving this include: strengthen the FLPMA regulations, particularly the U and U standards; withdraw the land from mineral activity, either legislatively or administratively, attempt to buy out the private owners, and either contest or buy out other claims in the Hills, of which there are a few; or, work out some sort of land swap or exchange of mineral rights or trade of leases for tax write-offs, or some other creative alternative. There may be other courses of action, but these are the options which are receiving various degrees of consideration.

Clearly, the idea of a creative solution is most appealing. It may also be the least difficult to accomplish. Strengthening DOI regulations takes months and sometimes years, and an effort of this sort would likely draw considerable industry opposition. Withdrawing the land might be done without a great deal of controversy, but contesting claims and buying out valid claims would be a costly, time consuming process with no guarantee of complete success. On the few occasions that other alternatives have been discussed, Ernest Lehmann and the tribes have shown a definite willingness to consider creative options. These discussions, which are mainly possible because the Hills are not particularly rich in mineral deposits, have not progressed because of the unwillingness of Montana BLM representatives to consider non-mining alternatives.

Given the cultural sensitivity of the Hills, the tremendous opposition from both elected officials and local residents (and the attendant likelihood of litigation), I suggest we actively pursue measures to prevent mineral activity in this area. Mike Penfold has established a working group consisting of Marilyn Nickles from the BLM Cultural Division, BLM Ethnologist Bob Laidlaw, Lewiston District Manager Dave Mari, and a representative from the Minerals Division. The goal of this task force is to study avoidance measures and recommend an alternative to mineral exploration in the Sweet Grass Hills.

Penfold has invited me to sit on this committee, which I would be happy to do, depending on what level of involvement you wish at the Director's level. In any case, the Washington office should give this task force its full backing and support, while monitoring its efforts closely. Also, I see no reason to terminate consultation with the ACHP. The ACHP can provide us with some political cover, and they are attempting to find solutions built on consensus and sensitivity to environmental and cultural concerns, which is our ultimate goal.

Appendix II

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202/012



United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20249

NOV - 1 1994

Memorandum

To: Director, Bureau of Land Management (280)

Through: Assistant Secretary, Land and Minerals Management

From: Assistant Solicitor, Lands and Environmental Compliance
Division of Energy and Resources

Subject: Sweetgrass Hills

Your memorandum of July 27, 1994, addressed to the Solicitor and referred this Division on August 11, 1994, states that the planning and environmental work necessary to reach a decision with regard to the pending Sweetgrass Hills withdrawal application will not be completed within the two-year segregation period initiated by the filing and publication of the application. This memorandum discusses four approaches in dealing with the problem of continuing to protect the lands and resources involved from disposal out of federal ownership, pending completion of the planning process. Of the four approaches, we recommend that before August of 1995 the Secretary act to dispose of the pending 20-year Sweetgrass Hills withdrawal application, without waiting for completion of the planning amendment process. In the alternative, an emergency withdrawal or, if feasible, a withdrawal in aid of legislation should be considered.

BACKGROUND

The Bureau of Land Management (BLM) published a notice of the filing of the pending Sweetgrass Hills withdrawal application on August 3, 1993, in 58 Fed. Reg. 41289-90 (copy attached). You anticipate that the two-year segregative effect period will expire in August, 1995. The notice states that the proposed withdrawal would withdraw approximately 13,684.74 acres within the Sweetgrass Hills Area of Critical Environmental Concern, in Montana, from location and entry under the mining laws for the purpose of protecting high value potential habitat needed for the

The published notice dated July 29, 1993, was filed in the Office of the Federal Register for publication on August 2, 1993, and published in the August 3, 1993, edition of the Federal Register. Thus, the two-year segregative effect of the published notice, at the very least, will not expire before August 2, 1995.

traditional religious importance to Native Americans, aquifers that currently provide the only potable water in the area and seasonally important elk and deer habitat. Although not stated in the published notice, presumably the withdrawal would be made for a period of 20 years, the maximum allowed under applicable law. See, in this regard, section 204(c)(1) of the Federal Land Policy and Management Act of 1976 (FLEMA), 43 U.S.C. § 1714(c)(1).

A second notice published in 58 Fed. Reg. 4517, dated August 26, 1993 (copy attached), states in its heading that the applicable BLM land use plan "will be amended" (notwithstanding the absence of a completed environmental analysis) and that "[a] withdrawal of these lands is not in conformance with the record of decisions for... [the existing plan] and, therefore, "[t]his requires that the land use plan be amended to address the proposed withdrawal and develop management guidelines for other land uses... [for the area proposed to be withdrawn]."

To ensure that after the two-year segregation expires, the acreage included in the 20-year withdrawal application will continue to be protected from "expected numerous speculative claims under the 1972 Mining Law, as well as increased pressure for exploration and development of existing claims, aggravating an already controversial issue in Montana and in the United States Congress," your July 27, 1994, memorandum proposes that the acreage be withdrawn as rapidly as possible "for an appropriate period (probably five years) in order to complete planning...and come to a reasoned decision on the merits of a longer (20 years) withdrawal."

DISCUSSION

1. Interim Withdrawal

The new interim withdrawal you have in mind, if applied for, would be vulnerable to a claim that it is repetitive and thus does not serve any purpose other than to extend unlawfully the period of segregation beyond the two-year limit allowed by Congress in section 204(b)(1) of FLEMA, 43 U.S.C. § 1714(b)(1).² In recommending a similar limit (six months instead of two-years) to the Congress, the Public Land Law Review Commission explained that segregation of unlimited duration frequently led to administrative inertia in completing action on proposed withdrawals "and that safeguards be imposed against multiple

² Section 204(b)(1) states in relevant part: "The segregative effect of the application shall terminate upon (a) rejection of the application by the Secretary, (b) withdrawal of lands by the Secretary, or (c) the expiration of two years from the date of the notice."

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application renewals." Public Land Law Review Commission, One Third of the Nation's Land 56 (1970). Heeding this admonition, the Department has rejected previous efforts to avoid the stricture of the statute. See B.V. Toohay, 92 I.D. 317, 334-35 (1985); David Cavanaugh, 92 I.D. 564, 573 (1985) (The notation rule may not be invoked by BLM in an attempt to extend the segregative effect of a withdrawal application beyond FLPMA's two-year limit).

This office has concluded, however, that the two-year limit does not apply in instances where an initial withdrawal application comes to an end during its two-year segregation period and, contemporaneously, a second withdrawal application, having the same segregative effect but serving a different purpose, is duly filed and published. In that connection, we observed:

It is clear that Congress, [when it enacted FLPMA,] neither expressly nor implicitly, intended to expand Interior's authority in relation to segregation or temporary withdrawals. Each authority served, and still serves, its own discrete purpose. Interior's segregation procedures aid in carrying out its statutory duties to process withdrawal and other applications seeking to appropriate public land areas. Interior's temporary withdrawal authority may be invoked to maintain the status quo of the public lands for any of a number of public purposes, e.g., to await the disposition of legislative proposals affecting the use of the lands, or the development of land use plans or classification actions.

Memorandum Opinion dated August 23, 1984, from Associate Solicitor, Energy and Resources, to Director, BLM, re Segregative Effect of Eagle Act Withdrawal Applications.

We have considered whether the interim withdrawal application you have in mind would, if filed, fall within the rationale of the 1984 opinion. We believe it cannot be so accommodated. The 1984 opinion dealt with an Eagle Act withdrawal application seeking to appropriate land for a military reservation. This office recommended that, when the military's first application expired, a new temporary (i.e., protective) withdrawal application should be filed and published and that by doing so a new two-year segregation period could be initiated. The purpose of the new withdrawal was not to appropriate the use of any public land but, rather, to maintain the status quo pending congressional action on proposed Eagle Act legislation. The existing Sweetgrass

The relevant provisions of the Eagle Act are restated in 43 U.S.C. §§ 155-158. In general, federal military reservations comprised of more than 5,000 acres of public lands of the United States in peace time must be

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Hills withdrawal application and the suggested interim withdrawal application would not be so clearly distinguishable. The only distinguishing feature would be the shorter duration, commensurate with the time needed to complete the planning amendment process, of the interim withdrawal. An application for the interim withdrawal would be filed and published upon cancellation of the pending, 20-year application, thus seeking thereby to establish a new, two-year segregative effect period. As stated above, the 1984 opinion recognized that in some situations the Secretary may use a temporary withdrawal to maintain the status quo while awaiting "the development of land use plans." In offering this observation, however, we did not have in mind a scenario where the purpose of the planning activity would be to evaluate the suitability of the same long term withdrawal as that which was sought in the previously cancelled withdrawal application. That is to say, we did not envision that the two-year segregation limit could be avoided simply by cancelling the application for a long term withdrawal (within its two-year segregation period) and then substituting a new application (with a new, two-year segregative effect) while maintaining the planning process initiated for the long term withdrawal. It is likely that the courts would treat such an action as a circumvention of the two-year limit.

In so reasoning, we have not overlooked the fact that the current planning amendment process for Sweetgrass Hills is not restricted entirely to addressing the need for a long term withdrawal. The published August 26, 1993, notice stated plainly that, in addition to the withdrawal proposal, the amendment process was

established by means of federal legislation submitted by the Secretary of the Interior. But, a withdrawal application first must be filed with, and processed by, the Secretary.

While FLPMA does not preclude a formal land use plan amendment addressing the need for a proposed withdrawal, neither does it require such an action before the Secretary can act to make a withdrawal. See National Wildlife Federation v. Burford, 676 F. Supp. 271, 278 (D.D.C. 1985) (Under FLPMA, BLM land classification termination decisions are linked expressly to land use plans required by the statute, but withdrawal revocation decisions made by the Secretary of the Interior are not). If a BLM land use plan calls for a withdrawal, the Secretary is not bound to honor that element of the plan. This is because only Secretarial level officials appointed by the President and confirmed by the Senate may, at the pleasure of the Secretary, exercise the withdrawal authority conferred upon the Secretary by the statute. 43 U.S.C. § 1714(a).

intended to "develop management guidelines for other land uses." While this no doubt was quite true at the time, it no longer can be considered an accurate statement. As an element of the land use planning amendment process, the "other land uses" are now de minimus. Given the circumstances, BLM should not proceed on the basis of the proposed interim withdrawal. Instead, we suggest that you consider the other alternatives discussed below.

The "other land uses" are not described in the August 26, 1993, notice. Supplemental information furnished to us by BLM states, however, that public scoping meetings held in September of 1993 for the proposed planning amendment identified a number of issues. Thereafter, Congressman Pat Williams asked that the plan amendment be confined to only the withdrawal proposal. The BLM Director refused this request. In January of 1994, a preliminary draft EIS addressed four issues, but based on the public comments offered during the scoping meetings, BLM decided in February, 1994, to address only two management issues in the amendment process: "hard rock mining" (basically the 20-year withdrawal proposal) and "a small land tenure adjustment." Telefax Message dated August 17, 1994, from BLM, Lewiston District, Montana.

You note in your July 27, 1994, memorandum that BLM had processed a temporary withdrawal application, "similar" to your interim withdrawal proposal, in order to segregate and withdraw public land in the Ward Valley of California, pending a decision as to whether the land should be sold. On July 11, 1994 Interior in fact did publish a temporary withdrawal order dated July 1, 1994, with an effective date of July 11, 1994, for the purpose of protecting from mining and agricultural entries a 1,000 acre site in the Ward Valley for possible sale or transfer to the State of California, the site to be used for the disposal of low-level radioactive waste. 59 Fed. Reg. 35267-68. When the application for this withdrawal was filed and published in August of 1992, the Ward Valley lands had not been segregated by a previous withdrawal application or, for that matter, by any published notice of realty action or other conveyancing action. Thus, apart from the fact that the Ward Valley order happened also to be a temporary withdrawal, the circumstances associated with it are not of a like nature to those pertaining to Sweetgrass Hills.

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2. Emergency Withdrawal

Emergency withdrawals are rare. Since 1976, when legislation providing for them was enacted, six such withdrawals have been made and of that number, only three were initiated independently by the Secretary of the Interior.

The establishment of an emergency withdrawal requires that the Secretary first determine on the record that an "emergency situation exists" and that "extraordinary measures must be taken to preserve values that would otherwise be lost...." 43 U.S.C. § 1714(e). The values to be preserved must be "natural resources or resource values." 43 C.F.R. § 2310.5(a). See also 43 C.F.R. § 2300.0-5(g); *Pacific Legal Foundation v. Watt*, 529 F. Supp. 982, 996-97 (D.Mont. 1982). Emergency withdrawals may not exceed three years in duration 43 U.S.C. § 1714(e). All emergency withdrawals must be reported to the appropriate oversight committees of the House and Senate, although submission of the reports may be delayed for up to 90 days after an emergency withdrawal has been made. 43 U.S.C. § 1714(g). Due to their urgency, emergency withdrawals are not subject to the public hearing requirement of ordinary FLEMA withdrawals, nor is it necessary to obtain the consent of an agency head. 43 U.S.C. §§ 1714(h) and (i). Also, for this reason, emergency withdrawals are not subject to the requirements of the National Environmental Policy Act, 42 U.S.C. § 4371 et seq. *Alaska v. Castex*, 462 F. Supp. 1153, 1160-61 (D.Alaska 1978).

There is departmental precedent for the use of an emergency withdrawal to continue the protection of lands that are subject to a withdrawal application after the two-year segregation period associated with the application has expired. On October 13, 1993, Secretary Babbitt signed Public Land Order 7005, published in 58 Fed. Reg. 54049, for the "Emergency Withdrawal of Public Mineral Estate within the Desert National Wildlife Refuge, Nevada." In that case, the segregation period for the underlying 20-year withdrawal application expired on October 18, 1993. The order was filed in the office of the Federal Register on October 19, 1993.

Previously, in connection with an emergency withdrawal request filed by the Department of the Navy, this office raised but did not address directly the question of whether emergency withdrawal relief could be invoked at the end of a two-year segregation period. Rather, we advised that "[t]he statutory criteria ... [had] not been shown to have been met and, hence, the Secretary cannot properly exercise his FLEMA emergency withdrawal authority." Memorandum Opinion dated September 5, 1984, from Associate Solicitor, Energy and Resources to Director, Bureau of Land Management, re Emergency Withdrawal Request; Naval Air Station Fallon, Nevada. In explaining this conclusion, the Associate Solicitor observed that:

Navy's request for an emergency withdrawal is deficient in two, fundamental respects. First, no evidence has been submitted to support: a finding that a bona fide emergency exists; a finding that values (warranting the extraordinary protection of an emergency withdrawal) will be lost; and a finding that on balance the prevailing facts call for extraordinary and immediate action (in the form of an emergency withdrawal) terminating for a justified period of time the operation of the mining and other public land disposal laws.

Secondly, the "values" associated with the potential, air combat training, range lands, that Navy seeks to protect do not qualify as FLPMA § 204(e) "values"....

Agencies or bureaus seeking emergency withdrawals must satisfy these findings and standards.

3. Withdrawal in aid of legislation

Temporary (i.e., protective) withdrawals that are made administratively to preserve public lands in federal ownership while withdrawal legislation is pending before the Congress are said to be "withdrawals in aid of legislation." Temporary withdrawals serving this purpose are well established in the law. See, e.g., Shay v. Work, 9 F.2d 1014 (D.C. Cir. 1925) (National Forest legislation pending before Congress); Solicitor's Opinion, M-35003 (October 8, 1947), II Op. Sol. on Indian Affairs 1474 (U.S.D.I. 1979) (Indian reservation legislation pending before Congress).

In FLPMA, Congress gave to the Secretary of the Interior the authority to make temporary withdrawals in aid of legislation. As to a tract of less than 5,000 acres, the Secretary can make a withdrawal "for a period of not more than five years to preserve such tract for a specific use then under consideration by the Congress." 43 U.S.C. § 1714(d)(3). The statute does not contain a similar provision relative to tracts of 5,000 or more acres, but there is nothing in the statute to prevent the Secretary from exercising his general withdrawal authority under 43 U.S.C. § 1714(a) to provide comparable, if not broader, protection for the larger tracts.

Thus, for example, given the fact that large withdrawals now are limited to no more than 20-year terms under FLPMA, the Secretary might decide to seek a legislative withdrawal in excess of 20-years; and, while a bill for that and any allied purposes is pending, the Secretary might also elect to exercise his general withdrawal authority to make a temporary withdrawal in aid of legislation. To take this example a step further and apply it to Sweetgrass Hills, there would have to be: (1) A decision to introduce the needed legislation (which if initiated by Interior

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would require compliance by the Department with applicable environmental laws); (2) If legislation is introduced, a decision to discontinue processing the land use planning amendment and the 20-year withdrawal application; and (3) A secretarial decision to make a temporary withdrawal in aid of legislation. All of these decisions and the actions flowing from them would have to be completed in less than a year's time, preferably as soon as possible.

4. 20-Year Withdrawal

Given the fact that a draft environmental impact statement has been completed, or is nearing completion, there appears to be no legal reason why the Secretary of the Interior cannot act upon the 20-year withdrawal application before August of 1995.⁷ Previously, we pointed out that the Secretary need not wait for the completion of a planning amendment before disposing of a pending withdrawal application.⁸ If the Secretary decides to withdraw the land, the land use plan would be amended appropriately to reflect that decision. We favor this alternative.

CONCLUSION

As stated, our preference would be to dispose of the 20-year withdrawal application before the relevant segregation period expires in 1995. If that cannot be managed, less certain alternatives come into play, namely, either an emergency withdrawal or, if feasible, a temporary withdrawal in aid of legislation coupled with a suitable legislative package. An interim withdrawal is not a realistic alternative.

In keeping with your request, we have circulated copies of your July 27, 1994, memorandum to the Division of Indian Affairs and the Division of Conservation and Wildlife. More information will be needed before possible options can be considered for preserving the significant resource values of the Sweetgrass Hills. Please advise as to when it would be convenient for RLM to conduct a briefing of personnel within this Division as well

⁷ Indeed, every effort should be made to accomplish this, if for no other reason than to establish a credible foundation for an emergency withdrawal, if such an order should be sought.

⁸ See SUPRA note 4.

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as the other Divisions mentioned above. You may contact Mr. Sam Kalan (208-5757) for this purpose.

Kristina Clark
Kristina Clark

Attachments:

Appendix III

May 17, 1995

Memorandum

To: Richard L. Hopkins, Area Manager, Bureau of Land Management, Great Falls Resource Area, Great Falls, Montana

From: Michael D. Dunn, Physical Scientist, Branch of Engineering and Economic Analysis

Subject: Draft Sweet Grass Hills Amendment and Environmental Impact Statement (EIS)

The Bureau of Mines is concerned about the absence of "good science" in this EIS, and consequently its value as an unbiased decision-making document. The document appears as an attempt to rationalize a change in management position towards precluding mineral exploration and development in the Sweet Grass Hills area. No new data or studies were presented to justify this change of position. Rather, it employs hypothetical models and misleading assumptions and flawed interpretation data to develop and overemphasize unfounded conclusions and, thus, detract from the credibility of the entire document.

Discussions in the EIS related to acid rock drainage (ARD) are prime examples of assessments based on misleading assumptions. The document states that the geologic data collected for the area do not give an indication of ARD potential. ARD is then addressed as if it were a known problem that will occur. Without any data, it even goes so far to suggest that if mining occurs, ARD adverse impacts to the watershed are unavoidable. Without specific ARD data and analyses as indicated, no conclusive arguments should be made. Rather, it should be stated that, because of the known presence of pyrite and the past production of metals typically associated with sulfide minerals, and the local concern for watershed protection, ARD may be a concern. However, since potential ore bodies are in part hosted by limestone and that water from the area is slightly alkaline, ARD may not be a significant problem or is at least preventable through proven mitigation measures. It is, therefore, more reasonable to assume that there is a low likelihood that ARD would occur, given the known geology of the area and effective mine operation methods now used to prevent the problem.

Another example of a presumed "unavoidable" watershed contamination problem based on unreasonable assumptions is that of leaked or spilled processing fluids. The concern centers on a hypothetical processing scenario that uses a heap leach facility located proximal to a mining operation in upper Tootsie Creek. As contamination of this watershed is of major

concern, an optional, but not considered, alternative would be to locate the facility outside of important watersheds. Also, other processing methods such as vat leaching could be evaluated in lieu of heap leaching. As with the ARD discussion, the EIS addresses only the worst case scenario and does not provide any discussion or suggestions that this assumed "unavoidable" problem can, in fact, be avoided or mitigated.

As final water quality concern that needs to be made clear is the actual risk to the potability of water from the watershed if mining should occur. The document plays on the public's perceived fear of cyanide and ARD to rationalize its proposed actions. A creditable document needs to give a good scientific discussion quantifying the extent of any risk to public health.

In the area of mineral resources and mining, more explanation is needed for the EIS's choices in mine/mill models and reasonably foreseeable development (RFD) scenarios. The EIS states that no specific data were submitted to support reports of high gold and silver concentrations in the Breed Creek and Tootsie Creek areas. This statement appears to be in conflict with the fact that company data from thousands of rock and trench samples and hundreds of drill hole samples recently collected in these areas were submitted to BLM. Please explain what was meant by "no specific data was (sic) submitted" and describe the data used, and assumptions made from that data, for determining the RFD scenarios.

The EIS indicates mine/mill models are presented only to illustrate the possible variations in mine operations that could occur and that they are not intended to be definitive as to mine size, type, processing, or economics. The mine/mill models chosen for inclusion in the EIS could become key points in making important decisions and establishing policy based on the document. Although the models and associated values are not intended to be definitive, they are the only ones presented; it is likely they will be viewed as being definitive. Therefore, they must be more than purely hypothetical and should be based on as much information and geologic inference as possible.

It appears that larger mine/mill model scenarios than the ones included in the EIS should have been considered. When companies do mineral exploration, they typically have a minimum sized ore body and mine/mill model in mind. The geologic model of the Sweet Grass Hills is similar to the Little Rockies and the Moccasins. Mineralized targets were likened to Zortman and Kendall. The current holder of mineral rights in the Tootsie Creek area, Ernest K. Lehmann & Associates of Montana, Inc., believes the existing data indicates the potential for a gold deposit of 100 million tons containing up to 1 million troy ounces of recoverable gold. The models included in the EIS show operations that are approximately 20 times smaller than the company's model. At a 10% rate of return, they would not break even for open pit mining and would be marginally economic for underground mining. The EIS states that these models are purely hypothetical and were presented only to illustrate variations in mining. If so, why didn't the EIS give the company's model the benefit of the doubt and use it for the hypothetical scenario? Such a large difference of opinion suggests that these scenarios were chosen for specific reasons. If the EIS's RFD scenarios are more

realistic than the company's RFD scenario, the justification based on information, reasoning, and assumptions should be fully explained.

Another question we have is, under which EIS alternative were the RFD scenarios developed? The basis for our question is that the RFD scenarios show an unusual situation in which an underground mine would produce more gold than an open pit mine on the same site. It was explained to me by BLM staff that more resources could be accessed by underground methods because surface restrictions would place constraints on the physical size of the pit. Are these restrictions related to withdrawals proposed under alternative C (the preferred alternative) or do they exist under alternative A (current management) as established in the Sweet Grass Hills Record of Decision? This is an important point in that it could explain the large difference between the company RFD and that of the EIS. If a larger operation is foreseeable under alternative A, this should be presented as the base model. Models of lesser scale (as the result of the other alternatives) could then be presented for comparison with the base model to show environmental consequences of the alternatives. This also brings to mind an interesting point. How could it have been speculated that surface restrictions would preclude mineral resources from certain forms of mining if no specific data were submitted?

The Bureau of Mines also takes issue over the EISs selection of alternatives. The proposed alternatives for the Sweet Grass Hills amendment do not represent a balanced range of options. There can be no doubt that mineral exploration and development is the primary driving force for the subject EIS and is the issue around which all the alternatives should be based. Of the three proposed alternatives to the current management plan/no action alternative, one withdraws the entire area from mineral location and the other two withdraw only those areas of high potential for mineral occurrence and development. All three will effectively preclude significant economic mineral development. An additional alternative to the current management/no action alternative needs to be developed which does not preclude economic development of as much of the foreseeable resource as possible while still mitigating cultural and watershed resources.

Our final comments center around BLM's mineral resource management practices and policies, and the uncertainties they create, as evidenced by the handling of the Sweet Grass Hills issues. The subject EIS is the result poor mineral resource management planning from early on in the process. It is a perfect example of where case by case management of mineral resources leads to crisis situations. The discussion in the EIS regarding the low probability that a drilling program will find ore-grade mineralization suggests that mineral development is not anticipated and planned for in advance (case by case management) based on high mineral or development potential, claim location activity, or even exploration drilling. All high mineral potential areas should be managed as if being likely future sites for mineral exploration and development, and planned for accordingly during the resource management plan/environmental impact statement process. Advanced resource management planning for mineral exploration and development in the Sweet Grass Hills ACEC could have resolved problems before they became critical.

Perhaps the most significant concern overall to both the Bureau of Mines and the BLM, is the uncertainties in BLM's mineral resource management policies as revealed by the actions taken for the Sweet Grass Hills. Once a best use decision for public lands is made based on good scientific principles, this decision must be honored until new scientific studies show otherwise. Inevitable public descension towards mining can not be the primary basis for sound mineral management decisions. All of the EIS's proposed alternatives to the current management plan represent a 180 degree shift from recently decided policy towards mineral development in the Sweet Grass Hills, despite the fact that there was no significant change in the long-standing public concerns over mineral exploration and development in the area. These public concerns were well documented and considered in the recent West Hill Line Resource Management Plan and EIS, the Record of Decision for the Sweet Grass Hills, and the Royal East Joint Venture Exploration Project EIS, all of which contained favorable policies and support towards mineral-related activities. There appears to be no readily identifiable scientific reason for the change in position since no new data was presented. The decision appears to be more political as the result of the issue becoming volatile against mining.

The actions in this EIS reinforces the mining industry's strong concerns over the uncertainties of mining on federal lands. This concern over investing exploration dollars in the United States is understandable when companies can not be assured that high mineral potential land open for location will be open for development. This EIS clearly suggests a policy that federal mineral estate is open to mineral location as long as mineral development is unlikely. This is not only evidenced by the reversal of the mineral development position for Tootsie Creek when the public expressed serious concerns over the possibility of real development, but also by the offering in alternatives C and D to leave low potential areas open for location as long as the high potential areas remain withdrawn. Again, advanced resource planning and land use decisions based on sound scientific principles is the key to restoring industry's confidence in domestic mining opportunities. It not only prepares the public for reasonably foreseeable development but it also gives companies an advanced sense of the issues it must resolve before mining can proceed.

Thank you for considering these comments. Please give me a call at (509) 353-2700 if you have any questions. Our past offers to assist you with mineral and mining related studies in the Sweet Grass Hills are still in effect.

Michael D. Dunn

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**BIOGRAPHIC SUMMARY
ERNEST K. LEHMANN**

Mr. Lehmann is the founder and CEO of North Central Mineral Ventures Inc. and of Ernest K. Lehmann & Associates, Inc.

Under his leadership, the firms have engaged in the planning, management and execution of mineral exploration programs, mineral deposit development, mine appraisal and mineral economic studies. These activities have spanned most important hard mineral commodities including ferrous, non-ferrous, precious and strategic metals, industrial minerals and fertilizer raw materials. In the course of their activities, he and the firms have been active in staffing and managing exploration and mine development and acquiring private and public mineral lands in both the U.S. and abroad. The latter activities have included claim staking, mineral leasing of private, state and federal lands, and the creation and management of mineral joint ventures.

Mr. Lehmann has also been actively involved in mining related environmental issues. He was instrumental in initiating and executing the Minnesota Mining Permit Simulation Project, a joint state agency, environmental community and industry effort to examine the mine permitting process and problems for non-ferrous metal mining. He helped organize a workshop on financial assurance in the mining industry in cooperation with the Minnesota DNR, MPCA, and the Audubon Society. Mr. Lehmann and the firm were consultants to the state of Maine charged with developing metal mining regulations, spanning activities from exploration through operation and closure. The firms were also involved in mine permitting activities in Wisconsin. Mr. Lehmann also represented an industry trade group in negotiating proposed mining environmental regulations at the federal and provincial level in Argentina.

In the course of his activities, Mr. Lehmann has specialized in exploration management and in mineral deposit appraisal evaluation. He has appeared extensively as an expert witness on mineral property appraisal and taxation and on mining claim related issues. He has served on advisory committees to the Office of Technology Assessment of the U.S. Congress on strategic and critical minerals and to the state of Minnesota on direct reduction of iron ores. On behalf of the American Institute of Professional Geologists, he has testified before Congress on strategic minerals issues and on

the 1872 mining law. He has also testified before state legislative committees on mined property appraisal, mineral taxation, mineral leasing and mine permitting.

In 1985, he was president of the American Institute of Professional Geologists, also serving the Institute in various other capacities on a state and national level. In 1987, he was awarded the Ben H. Parker Medal, the Institute's highest award for service to the geological profession, and has been awarded Honorary Membership in the Institute in 1997. He currently serves as Chairman of the AIPG Foundation and is a member of numerous other technical and professional bodies including the Society of Economic Geologists, The Mining and Metallurgical Society of America, the Society of Mining Engineers, and the Northwest Mining Association. He is a registered geologist in Minnesota, California, Georgia, Delaware and Alaska. He is currently a director and president of the Minnesota Exploration Association and serves on various committees in Minnesota in this capacity.

Prior to founding Ernest K. Lehmann & Associates, Inc. in 1967, Mr. Lehmann was an independent consultant and partner in a Minneapolis based geological consulting firm from 1958 to 1967. From 1951 to 1958, he was employed by Kennecott Copper Corporation and its exploration arm, Bear Creek Mining Company. Mr. Lehmann served on active duty as a Terrain Intelligence Analyst in the U.S. Army Corps of Engineers from 1953 to 1955 and was awarded the Commendation Ribbon for his service.

Mr. Lehmann has also served in various community capacities including as a member and vice chairman of the Plymouth, Minnesota planning commission, as a member and vice chairman of the Minneapolis Housing Appeals Board, board member and president of the Lowry Hill Residents Association, and Chairman of the Calhoun-Isles Planning Committee. In addition, Mr. Lehmann for eighteen years was a Trustee of the Quetico Superior Foundation.

Mr. Lehmann was born in 1929 in Heidelberg, Germany. He was educated in the public schools of New Rochelle, N.Y., attended Williams College, Williamstown, Massachusetts, where he graduated cum laude and with highest honors in geology in 1951. He subsequently attended graduate school in geology at Brown University, Providence, Rhode Island, and completed the Owners and Presidents Management Program of the Harvard Business School in 1985. He is married to Sally Willius Lehmann and resides in Minneapolis, Minnesota.

ERNEST K. LEHMANN
G E O L O G I S T S

522 PLYMOUTH BUILDING
12 SOUTH SIXTH STREET
MINNEAPOLIS, MINNESOTA 55402
Telephone: 612-336-6584
Fax: 612-336-5457
Cellular: 612-859-4158
email: geomine@worldnet.att.net

STATEMENT OF QUALIFICATIONS

Name: Ernest K. Lehmann

Residence: Minneapolis, Minnesota

Occupation: Geologist
President, Ernest K. Lehmann & Associates, Inc. and subsidiaries
President, North Central Mineral Ventures Inc.

Education: Williams College, Williamstown, Massachusetts. BA in geology, cum laude and with highest honors, 1951.
Brown University, graduate study in geology, 1951-52.
Kennecott Copper Corporation Training Course, University of Arizona, 1952.
AIME short course on mine finance, 1971.
AIME short course on project financing, 1977.
Harvard Business School, 9th Smaller Company Management Program, 1982-84.

Experience:

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|----------------------------|---|
| 1950 | Signal Mining Company, Wallace, Idaho. Miner and geologist. Worked on developing gold mine. |
| 1951 1952-53 1955-58 | Kennecott Copper Corporation & Bear Creek Mining Company. Junior geologist, Western U.S.; exploration geologist, Eastern and Central U.S. and assistant to District Geologist for Central U.S. Exploration; managed exploration for lead-zinc, copper, copper-nickel, and other commodities in various terranes in the eastern, midwestern, and western U.S. |
| 1953-55 | U.S. Army. Sergeant. Terrain intelligence analyst, Ft. McPherson Georgia & Ft. Bragg, NC; Senior NCO of Engineer Intelligence Section, Third Army Headquarters, Fort McPherson, Georgia. |
| 1958-59 | Consulting geologist, Minneapolis, Minnesota. Metallic and industrial minerals exploration and minerals management in midwestern U.S. |
| 1959-66 | Lindgren & Lehmann, Inc., Wayzata, Minnesota. Partner and officer of geological consulting firm. Regional and detailed exploration for and evaluation of deposits of ferrous, base, and precious metals, industrial minerals, and coal in the U.S., Canada, Argentina, Peru, and the Congo. |
| 1967 - present | Ernest K. Lehmann & Associates, Inc., Minneapolis, Minnesota. President and CEO of firm of geologists, geophysicists, and engineers. Consulting and project management involving ferrous and base metals, precious metals, industrial minerals and coal, mineral land acquisition, mineral leasing policies, mineral economics, mineral exploration, mineral deposit evaluation, mining geology, environmental studies, and mine permitting and regulation, in the U.S. and abroad (Argentina, Bolivia, Peru, Ecuador, Chile, Colombia, Guinea, French Guiana, Nicaragua, Costa Rica, Guatemala, Mexico, Canada, United Kingdom, France, India, |

ERNEST K. LEHMANN
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- Dominican Republic, St. Lucia, Indonesia, Rwanda, Burundi, Algeria, Zambia, Venezuela, Ireland, Austria, Australia, Saudi Arabia, Nigeria, and the Congo).
- 1982 - present North Central Mineral Ventures Inc., Minneapolis, Minnesota. President and CEO of firm engaged in managing mineral interests and providing consulting geological, engineering, and mine appraisal services in the U.S., Latvia, Russia, and Argentina.
- 1995 - 1997 Minas Argentinas S.A., San Juan, Argentina. Country Manager of gold exploration program for Canadian owners of company, managing \$3 million plus in annual exploration expenditures.

Key Qualifications

Planning, management, and execution of exploration and geologic investigations in a broad range of geographic and geologic environments and of mineral commodities. Exploration for and evaluation of deposits of gold, silver, copper, lead, zinc, iron ore, nickel, molybdenum, tungsten, tin, limestone, fluorspar, kaolin, magnesite, coal, mercury, talc, phosphate, cobalt, manganese, aggregates, and other commodities in the United States, Canada, Mexico, Guatemala, Nicaragua, Costa Rica, Bolivia, Argentina, Colombia, Venezuela, Peru, Chile, Ecuador, West Indies, Guinea, Guyana, French Guiana, France, United Kingdom, Algeria, Burundi, Nigeria, Rwanda, Congo (Brazzaville), Zambia, Guinea, Dominican Republic, St. Lucia, Saudi Arabia, and Indonesia. Mine and mineral deposit evaluations, commodity studies, market analyses, mining cost analyses, mine development studies and analyses, ore-reserve estimates, mine appraisal, land-use planning, land acquisition, mine permitting, and mine management consulting. Drafting environmental regulations, preparing environmental reports. Preparation and presentation of legal testimony for condemnation, property tax valuation, and mining-claim cases and patent proceedings. Experienced in all aspects of geological exploration techniques, including geophysics, geochemistry, photogeology, drilling, and mapping.

**Partial List of Past and Present Clients of
Ernest K. Lehmann & Associates, Inc., and North Central Mineral Ventures Inc.**

A.F. Budge (Mining) Limited
Aluminum Company of America (ALCOA)
Apache Corporation
ASARCO Inc.
Associated Metals & Minerals Corporation
Barton Construction Co.
BHP-Utah International Minerals Inc.
Billiton Metals & Ores
Brady Glacier Trust
Cerro Corporation
Chevron Resources Company
City of Valley Park, Missouri
Dennison Mines
Dow Chemical Company
Dravo Corporation
Federal Land Bank of St. Paul
FMC Gold Corporation
Freeport-McMoRan
Getty Mining Company
INMINEH, Ministry of Mines, Government of Nicaragua
International Bank for Reconstruction and Development (World Bank)
International Finance Corporation
Iron County, Missouri
J.L. Sheily Company
Marblehead Lime Company

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Minnesota Department of Natural Resources
Minnesota Mining and Manufacturing Company (3M)
Minnesota Department of Transportation
NDU Minerals Ltd.
New Mexico Taxation and Revenue Department
Newmont Mining Company
Noranda Exploration Company
Northern States Power Company
Norwest Bank Corporation Trust Department
Oro Belle Resources Corporation
Outokumpu Mining Company
Ralph M. Parsons Company
Reynolds County, Missouri
SONAREM, Ministry of Mines, Government of Algeria
Soo Line Railroad
Ste. Genevieve County, Missouri
State of Arizona, Department of Revenue
Viceroy Resources Corporation
Washington County, Missouri

Memberships, Commissions, Awards:

American Institute of Professional Geologists
President, 1985
Vice President, 1982
Ben H. Parker Medalist, 1987
Honorary Membership, 1997
Chairman, AIPG Foundation, 1985-present
Society of Economic Geologists, life member
Mining and Metallurgical Society of America, member
Society of Mining Engineers, AIME, member
Northwest Mining Association, member
Society for Geology Applied to Mineral Deposits, member
Minnesota Exploration Association, Director and President
Advisory Board of Strategic Minerals Vulnerability, Office of Technology Assessment, U.S. Congress,
member, 1983-85.
Advisory Committee to Minnesota Department of Economic Development on Direct Reduction of Iron Ore
Member of Minnesota Minerals Forum sponsored by the Blandin Foundation
Advisory Board, Natural Resources Research Institute, University of Minnesota, Duluth, 1996 -
Advisory Committee on Geologic Mapping, Minnesota Geologic Survey, 1996 -

Registrations, Certifications:

Certified Professional Geologist by American Institute of Professional Geologists
Registered or Certified Geologist in Minnesota, California, Delaware, Georgia and Alaska

Partial List of Mine Appraisal and Mine Valuation Projects and Prefeasibility and Feasibility Studies of Ernest K. Lehmann & Associates, Inc. and North Central Mineral Ventures Inc.

ASARCO Inc. (1991-92). Management of prefeasibility and permitting project for gold-copper deposit in Wisconsin.

Associated Metals & Minerals Corporation (1962). Evaluation of iron deposits at Ica Peru.

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- Associated Metals & Minerals Corporation (1968). Evaluation of a copper-molybdenum mine in Hermosillo, Mexico.
- Associated Metals & Minerals Corporation (1968-69). Evaluation of fluorspar mine in France and management of its development.
- Associated Metals & Minerals Corporation (1974). Evaluation of rehabilitation of flooded 1500-Tpd underground copper mine.
- Associated Metals & Minerals Corporation (1961-62). Evaluation and monitoring of operations of 300 Tpd gold mine in Peru.
- Barton Construction Company (1966). Appraisal of sand and gravel property in relation to condemnation.
- Brady Glacier Trust (1995-96). Appraisal of Brady Glacier copper-nickel deposit.
- City of Valley park, Missouri (1994). Appraisal of fill deposit for levee project.
- Cleveland family (1988). Evaluation of iron ore leases.
- Connor Forest Industries (1982). Appraisal of mineral rights in Michigan and Wisconsin.
- Dow Chemical Company (1993). Appraisal of dolomite quarry.
- Dravo Corporation (1977). Appraisal of Marietta Coal Company, Ohio, for possible acquisition.
- Federal Land Bank of St. Paul (1980). Appraisal of undeveloped mineral rights in Minnesota.
- FMC Gold Company (1993). Evaluation of potential gold exploration projects in Argentina.
- Freeport Minerals Company (1966). Evaluation of copper-cobalt mine in Idaho for acquisition.
- INMINEH (1981-83). Evaluation of producing and developing gold mines in Nicaragua.
- International Finance Corporation (1969). Evaluation of Sagasca copper project, Chile, to ascertain suitability for IFC loan.
- International Finance Corporation (1978). Evaluation of mining operations of Cia. Minera Buenaventura, Peru, for IFC financing of silver mine expansion program.
- International Finance Corporation (1979). Evaluation of Zambian copper-cobalt deposits of NCCM for IFC-financed expansion of cobalt-mining and processing facilities.
- International Finance Corporation (1983). Evaluation of joint public/private tin mining monopoly in Rwanda for refinancing.
- Iron County and Reynolds County, Missouri (1986). Appraisal of the Buick Mine, Mill, and Smelter.
- Iron County, Missouri (1982-96). Training and consulting to personnel in appraisal of lead-zinc mines and related facilities, roofing granule quarries, and dimension stone quarries. Assistance in preparing assessments.
- Liberty Capital Company (1978). Evaluation of coal operations in Black Warrior Basin, Alabama, for financing.
- Mack Energy Company (1981). Evaluation of coal properties in Ohio.

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- Marblehead Lime Company (1995-96). Evaluation of high-calcium limestone and dolomitic lime operations, U.S. and Canada resulting in purchase of two operating properties.
- Minas Argentinas S.A. (1994-97). Evaluation of gold prospects. Management of ongoing gold exploration program with ± \$3 million annual budget.
- Northern States Power Company (1974). Appraisal of gravel property for condemnation.
- NDU Minerals (1990-1991). Management of prefeasibility study and permitting study, gold-copper deposit, Wisconsin.
- Owens-Illinois Corporation (1980 & 1985). Appraisal of mineral rights in Florida and Virginia.
- Pittsburgh Pacific Company (1967-69). Geologic investigations, ore reserve estimates, and expert witness services with respect to iron ore property.
- Reynolds County, Missouri (1982-96). Training and consulting to assessment personnel in appraisal of lead-zinc mines. Assistance in preparing assessments.
- Reynolds County, Missouri (1986). Appraisal of ASARCO West Fork lead-zinc mine.
- Soo Line Railroad (1959-1960). Negotiation of iron ore leases.
- St. Genevieve County, Missouri (1982-96). Training and consulting to assessment personnel in the appraisal of limestone and lime facilities and aggregate operations. Assistance in preparing assessments.
- State of Arizona (1975). Appraisal of the Cyprus Pima Mine.
- State of Arizona (1983). Appraisal of Inspiration Mining Company.
- State of Arizona (1985, 1986). Testimony at Tax Board hearings on Cyprus Bagdad Mine.
- State of New Mexico (1987). Appraisal of the Tyrone Mine.
- State of New Mexico (1988). Consultation on appraisal of Chino Mines and the Hidalgo Smelter.
- Washington County, Missouri (1980, 1985-87, and 1988-90). Appraisal of the Pea Ridge Iron Mine.
- Washington County, Missouri (1985). Appraisal of iron, lead-zinc, and barite mines.

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ERNEST K. LEHMANN
G E O L O G I S T S

622 PLYMOUTH BUILDING
12 SOUTH SIXTH STREET
MINNEAPOLIS, MINNESOTA 55402
Telephone: 612-338-6564
Fax: 612-338-6457
Cellular: 612-859-4111
email: geomine@worldnet.att.net

STATEMENT OF QUALIFICATIONS

Name: Ernest K. Lehmann

Residence: Minneapolis, Minnesota

Occupation: Geologist
President, Ernest K. Lehmann & Associates, Inc. and subsidiaries
President, North Central Mineral Ventures Inc.

Education: Williams College, Williamstown, Massachusetts. BA in geology, cum laude and with highest honors. 1951.
Brown University, graduate study in geology, 1951-52.
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AIME short course on mine finance, 1971.
AIME short course on project financing, 1977.
Harvard Business School, 9th Smaller Company Management Program, 1982-84.

Experience:

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| 1950 | Signal Mining Company, Wallace, Idaho. Miner and geologist. Worked on developing gold mine. |
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| 1953-55 | U.S. Army. Sergeant. Terrain intelligence analyst, Ft. McPherson Georgia & Ft. Bragg, NC; Senior NCO of Engineer Intelligence Section, Third Army Headquarters, Fort McPherson, Georgia. |
| 1958-59 | Consulting geologist. Minneapolis, Minnesota. Metallic and industrial minerals exploration and minerals management in midwestern U.S. |
| 1959-66 | Lindgren & Lehmann, Inc., Wayzata, Minnesota. Partner and officer of geological consulting firm. Regional and detailed exploration for and evaluation of deposits of ferrous, base, and precious metals, industrial minerals, and coal in the U.S., Canada, Argentina, Peru, and the Congo. |
| 1967 - present | Ernest K. Lehmann & Associates, Inc., Minneapolis, Minnesota. President and CEO of firm of geologists, geophysicists, and engineers. Consulting and project management involving ferrous and base metals, precious metals, industrial minerals and coal, mineral land acquisition, mineral leasing policies, mineral economics, mineral exploration, mineral deposit evaluation, mining geology, environmental studies, and mine permitting and regulation, in the U.S. and abroad (Argentina, Bolivia, Peru, Ecuador, Chile, Colombia, Guinea, French Guiana, Nicaragua, Costa Rica, Guatemala, Mexico, Canada, United Kingdom, France, India). |

ERNEST K. LEHMANN
G E O L O G I S T S

Dominican Republic, St. Lucia, Indonesia, Rwanda, Burundi, Algeria, Zambia, Venezuela, Ireland, Austria, Australia, Saudi Arabia, Nigeria, and the Congo).

- 1982 - present North Central Mineral Ventures Inc., Minneapolis, Minnesota.
President and CEO of firm engaged in managing mineral interests and providing consulting geological, engineering, and mine appraisal services in the U.S., Latvia, Russia, and Argentina.
- 1995 - 1997 Minas Argentinas S.A., San Juan, Argentina. Country Manager of gold exploration program for Canadian owners of company, managing \$3 million plus in annual exploration expenditures.

Key Qualifications

Planning, management, and execution of exploration and geologic investigations in a broad range of geographic and geologic environments and of mineral commodities. Exploration for and evaluation of deposits of gold, silver, copper, lead, zinc, iron ore, nickel, molybdenum, tungsten, tin, limestone, fluor spar, kaolin, magnesite, coal, mercury, talc, phosphate, cobalt, manganese, aggregates, and other commodities in the United States, Canada, Mexico, Guatemala, Nicaragua, Costa Rica, Bolivia, Argentina, Colombia, Venezuela, Peru, Chile, Ecuador, West Indies, Guinea, Guyana, French Guiana, France, United Kingdom, Algeria, Burundi, Nigeria, Rwanda, Congo (Brazzaville), Zambia, Guinea, Dominican Republic, St. Lucia, Saudi Arabia, and Indonesia. Mine and mineral deposit evaluations, commodity studies, market analyses, mining cost analyses, mine development studies and analyses, ore-reserve estimates, mine appraisal, land-use planning, land acquisition, mine permitting, and mine management consulting. Drafting environmental regulations, preparing environmental reports. Preparation and presentation of legal testimony for condemnation, property tax valuation, and mining-claim cases and patent proceedings. Experienced in all aspects of geological exploration techniques, including geophysics, geochemistry, photogeology, drilling, and mapping.

**Partial List of Past and Present Clients of
Ernest K. Lehmann & Associates, Inc., and North Central Mineral Ventures Inc.**

A.F. Budge (Mining) Limited
Aluminum Company of America (ALCOA)
Apache Corporation
ASARCO Inc.
Associated Metals & Minerals Corporation
Barton Construction Co.
BHP-Utah International Minerals Inc.
Billiton Metals & Ores
Brady Glacier Trust
Cerro Corporation
Chevron Resources Company
City of Valley Park, Missouri
Dennison Mines
Dow Chemical Company
Dravo Corporation
Federal Land Bank of St. Paul
FMC Gold Corporation
Freeport-McMoRan
Gelts Mining Company
INMINEH, Ministry of Mines, Government of Nicaragua
International Bank for Reconstruction and Development (World Bank)
International Finance Corporation
Iron County, Missouri
J.L. Sheely Company
Marblehead Line Company

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Minnesota Department of Natural Resources
 Minnesota Mining and Manufacturing Company (3M)
 Minnesota Department of Transportation
 NDU Minerals Ltd.
 New Mexico Taxation and Revenue Department
 Newmont Mining Company
 Noranda Exploration Company
 Northern States Power Company
 Norwest Bank Corporation Trust Department
 Oro Belle Resources Corporation
 Outokumpu Mining Company
 Ralph M. Parsons Company
 Reynolds County, Missouri
 SONAREM, Ministry of Mines, Government of Algeria
 Soo Line Railroad
 Ste. Genevieve County, Missouri
 State of Arizona, Department of Revenue
 Viceroy Resources Corporation
 Washington County, Missouri

Memberships, Commissions, Awards:

American Institute of Professional Geologists
 President, 1985
 Vice President, 1982
 Ben H. Parker Medalist, 1987
 Honorary Membership, 1997
 Chairman, AIPG Foundation, 1985-present
 Society of Economic Geologists, life member
 Mining and Metallurgical Society of America, member
 Society of Mining Engineers, AIME, member
 Northwest Mining Association, member
 Society for Geology Applied to Mineral Deposits, member
 Minnesota Exploration Association, Director and President
 Advisory Board of Strategic Minerals Vulnerability, Office of Technology Assessment, U.S. Congress,
 member, 1983-85.
 Advisory Committee to Minnesota Department of Economic Development on Direct Reduction of Iron Ore
 Member of Minnesota Minerals Forum sponsored by the Blandin Foundation
 Advisory Board, Natural Resources Research Institute, University of Minnesota, Duluth, 1996 -
 Advisory Committee on Geologic Mapping, Minnesota Geologic Survey, 1996 -

Registrations, Certifications:

Certified Professional Geologist by American Institute of Professional Geologists
 Registered or Certified Geologist in Minnesota, California, Delaware, Georgia and Alaska

Partial List of Mine Appraisal and Mine Valuation Projects and Prefeasibility and Feasibility Studies of Ernest K. Lehmann & Associates, Inc., and North Central Mineral Ventures Inc.

ASARCO Inc. (1991-92). Management of prefeasibility and permitting project for gold-copper deposit in Wisconsin.

Associated Metals & Minerals Corporation (1962). Evaluation of iron deposits at Ica Peru.

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- Associated Metals & Minerals Corporation (1968). Evaluation of a copper-molybdenum mine in Hermosillo, Mexico.
- Associated Metals & Minerals Corporation (1968-69). Evaluation of fluorspar mine in France and management of its development.
- Associated Metals & Minerals Corporation (1974). Evaluation of rehabilitation of flooded 1500-Tpd underground copper mine.
- Associated Metals & Minerals Corporation (1961-62). Evaluation and monitoring of operations of 300 Tpd gold mine in Peru.
- Barton Construction Company (1966). Appraisal of sand and gravel property in relation to condemnation.
- Brady Glacier Trust (1995-96). Appraisal of Brady Glacier copper-nickel deposit.
- City of Valley park, Missouri (1994). Appraisal of fill deposit for levee project.
- Cleveland family (1988). Evaluation of iron ore leases.
- Connor Forest Industries (1982). Appraisal of mineral rights in Michigan and Wisconsin.
- Dow Chemical Company (1993). Appraisal of dolomite quarry.
- Dravo Corporation (1977). Appraisal of Marietta Coal Company, Ohio, for possible acquisition.
- Federal Land Bank of St. Paul (1980). Appraisal of undeveloped mineral rights in Minnesota.
- FMC Gold Company (1993). Evaluation of potential gold exploration projects in Argentina.
- Freeport Minerals Company (1966). Evaluation of copper-cobalt mine in Idaho for acquisition.
- INMINEH (1981-83). Evaluation of producing and developing gold mines in Nicaragua.
- International Finance Corporation (1969). Evaluation of Sagasca copper project, Chile, to ascertain suitability for IFC loan.
- International Finance Corporation (1978). Evaluation of mining operations of Cia. Minera Buenaventura, Peru, for IFC financing of silver mine expansion program.
- International Finance Corporation (1979). Evaluation of Zambian copper-cobalt deposits of NCCM for IFC-financed expansion of cobalt-mining and processing facilities.
- International Finance Corporation (1983). Evaluation of joint public/private tin mining monopoly in Rwanda for refinancing.
- Iron County and Reynolds County, Missouri (1986). Appraisal of the Buick Mine, Mill, and Smelter.
- Iron County, Missouri (1982-96). Training and consulting to personnel in appraisal of lead-zinc mines and related facilities, roofing granule quarries, and dimension stone quarries. Assistance in preparing assessments.
- Liberty Capital Company (1978). Evaluation of coal operations in Black Warrior Basin, Alabama, for financing.
- Mack Energy Company (1981). Evaluation of coal properties in Ohio.

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- Marblehead Lime Company (1995-96). Evaluation of high-calcium limestone and dolomitic lime operations, U.S. and Canada resulting in purchase of two operating properties.
- Minas Argentinas S.A. (1994-97). Evaluation of gold prospects. Management of ongoing gold exploration program with \pm \$3 million annual budget.
- Northern States Power Company (1974). Appraisal of gravel property for condemnation.
- NDU Minerals (1990-1991). Management of prefeasibility study and permitting study, gold-copper deposit, Wisconsin.
- Owens-Illinois Corporation (1980 & 1985). Appraisal of mineral rights in Florida and Virginia.
- Pittsburgh Pacific Company (1967-69). Geologic investigations, ore reserve estimates, and expert witness services with respect to iron ore property.
- Reynolds County, Missouri (1982-96). Training and consulting to assessment personnel in appraisal of lead-zinc mines. Assistance in preparing assessments.
- Reynolds County, Missouri (1986). Appraisal of ASARCO West Fork lead-zinc mine.
- Seo Line Railroad (1959-1960). Negotiation of iron ore leases.
- Ste. Genevieve County, Missouri (1982-96). Training and consulting to assessment personnel in the appraisal of limestone and lime facilities and aggregate operations. Assistance in preparing assessments.
- State of Arizona (1975). Appraisal of the Cyprus Pima Mine.
- State of Arizona (1983). Appraisal of Inspiration Mining Company.
- State of Arizona (1985, 1986). Testimony at Tax Board hearings on Cyprus Bagdad Mine.
- State of New Mexico (1987). Appraisal of the Tyrone Mine.
- State of New Mexico (1988). Consultation on appraisal of Chino Mines and the Hidalgo Smelter.
- Washington County, Missouri (1980, 1985-87, and 1988-90). Appraisal of the Pea Ridge Iron Mine.
- Washington County, Missouri (1985). Appraisal of iron, lead-zinc, and barite mines.

STATEMENT OF DAVID H. GETCHES,¹ RAPHAEL J. MOSES PROFESSOR OF NATURAL RESOURCES LAW, UNIVERSITY OF COLORADO SCHOOL OF LAW

The authority of the Executive to withdraw public lands from the operation of the public land laws has a venerable but sometimes contentious history. Often, withdrawal authority has been indispensable in rescuing lands from abuses under those laws. At times, the Executive has encountered the wrath of Congress or an individual state's government when it has acted to reserve or withdraw public lands. But usually the Executive action has been viewed as essential to conserving national assets. Indeed, history has judged virtually every major withdrawal—especially those that were the most controversial in their time—as wise.

The practice of withdrawal was, for many years, an imprecise, even disorderly affair. It does not overstate the matter to say that the President, for most of the nation's history simply withdrew whatever lands he viewed as threatened, or that were needed for a particular public use or purpose, from the operation of whatever land public land laws might be in conflict.²

Over the years, Congress passed laws encouraging some types of withdrawals (e.g., Antiquities Act, 16 U.S.C. § 431; Taylor Grazing Act, 43 U.S.C. § 315), limiting the extent of withdrawals for some purposes (e.g., Defense Withdrawals Act, 43 U.S.C. § 155), and clarifying the nature of the Executive's authority to make withdrawals (Pickett Act of 1910). When those statutes fit the situation, the Executive used them to make withdrawals. When they did not the Executive made the withdrawals anyway.

The Executive's non-statutory withdrawals were regularly upheld by the courts. See *United States v. Midwest Oil*, 236 U.S. 459 (1915). The United States Supreme Court in *Midwest Oil* found that, although Congress has power to manage the public lands under the Property Clause of the Constitution, it had long acquiesced in the President's actions in making withdrawals. Thus, the President had "implied authority" that existed because Congress must have known of the withdrawals but failed to reverse them or to limit the Executive's actions.

The Supreme Court concluded that upholding the President's authority based on continued usage was reasonable because "government is a practical affair intended for practical men." *Midwest Oil*, 236 U.S. at 472. The Court understood how important it was for the Executive to be able to act, often in the face of urgency, in hundreds of cases, and to consider the situation of millions of acres of diverse lands. It understood also how unrealistic it would be for Congress to take up the details of each such case.

Public land withdrawals largely outside a statutory framework perhaps fit an earlier time when there was little coherence or policy direction in management of the public land resources. But regimes of land protection and use that varied so substantially with Administrations did not fit as well in a later era when Congress and the public was demanding greater stewardship and more scientific and efficient use of nationally-owned resources.

The landmark study by the Public Land Law Review Commission (PLLRC) entitled *One Third of the Nation's Land* found that the outmoded land disposal policies of the past were reflected in many old laws still on the books. These laws were not in accord with current policies of conservation and management of the Federal lands. In particular it found that withdrawal practices had been exercised in an "uncontrolled and haphazard manner." So the PLLRC recommended sweeping reform of the public land laws, including procedures of making withdrawals.

Congress carefully considered the PLLRC's recommendations, then enacted revolutionary legislation, most notably the Federal Land Policy Management Act of 1976 (FLPMA). At last, the Bureau of Land Management got an organic act, telling it to take greater stewardship over the lands under its jurisdiction.

In FLPMA, Congress required that land management agencies engage in land use planning for rational programs for use and intensive management of public lands for multiple purposes. It anticipated that planning would dramatically shape and direct the types of uses allowed and would be implemented through exercises of considerable discretion aimed at specific tracts. Therefore, it gave land managers new

¹ Raphael J. Moses Professor of Law, University of Colorado. Courses taught: Public Land Law, Indian Law, Pollution Law, Foundations of Natural Resources Law, and various seminars. Published several books and articles. Formerly Executive Director, State of Colorado Department of Natural Resources; Founding Director, Native American Rights Fund. Chairman, Board of Trustees, Grand Canyon Trust; Board of Directors, Land and Water Fund of the Rockies; Board of Trustees, Rocky Mountain Mineral Law Foundation.

² See generally David H. Getches, Managing the Public Lands: The Authority of the Executive to Withdraw Lands, 22 *Nat. Resources J.* 279 (1982).

authority and responsibilities. In light of these duties and powers, why would the Secretary also need to use the old method removing blocks of land from the operation of the public land laws through withdrawals?

Congress, like the PLLRC, was concerned about how the Executive had used its authority to withdraw public lands in the past and it took matters in hand. In FLPMA, it repealed some 29 statutes allowing for withdrawals and it repealed the President's "implied authority" to make withdrawals. But it knew that the withdrawal tool remained important. This was so because FLPMA left some gaps in public land management.

Compromises were made in drafting and passing FLPMA to preserve some anachronisms in public land law that had continuing support among members of Congress. Notably, the General Mining Law still allowed private parties to stake and develop mineral claims on much of the nation's public lands, and FLPMA specifically restricted the land managers' discretion to regulate or interfere with this time-honored practice. This extraordinary prerogative in the hands of private parties suggested the need for some method of preserving the public's interest in affected lands. Furthermore, Congress saw that, notwithstanding all the planning and management expected under FLPMA and other public land laws, emergencies would arise, public opinion and the government's needs to use particular lands would change, and some public land uses could threaten other uses in ways not foreseeable or controllable under the public land laws. And when these situations arose, the Executive needed to be able to act—and to tip the balance in favor of conservation.

So Congress perpetuated strong, extensive Executive authority to withdraw public lands from the operation from any and all uses under the public land laws. The Secretary of the Interior was given broad powers in § 204 of FLPMA. But the exercise of those powers was surrounded with procedures tailored by Congress to the size and duration of the withdrawal.

Congress remains involved in the process as well. Congress is able to trigger emergency withdrawals and the Secretary must respond. And the Secretary is required to report withdrawals to Congress. Large withdrawals must be carefully studied and a NEPA-like report must be made by Congress on the details of the withdrawal. The Secretary must also hold public hearings regarding FLPMA withdrawals. These procedural requirements are intended to assure that the Secretary does not act cavalierly, and they provide Congress with the information it needs to act quickly to modify or reverse the Secretary's decision if it disapproves³.

Furthermore, Congress provided procedures for revoking or modifying public land withdrawals. Many withdrawals in the past had been made without sufficient care, some were imprecisely defined, and some had been left unmodified even as conditions changed. Consequently, Congress also required the Secretary to undertake a review of the hundreds of old withdrawals on the books in order to "clean up" the public land rolls, attempting to ensure that unnecessary withdrawals were removed and necessary ones were perpetuated or fine-tuned to present demands.

Today, the Secretary has a rule-book to follow in making withdrawals set forth in section 204 of FLPMA. His authority is vitally important in protecting the health of the public lands. Indeed, it is a management tool every landowner must have—the ability to make quick decisions when new conditions arise, different opportunities are presented, or more public values can be fulfilled. A private property owner would not give up the prerogative to be flexible in protecting its land as conditions and or the owner's objectives change, and Congress has ensured in FLPMA that the American public retains that essential attribute of property in the Federal public lands that are so important to our heritage.

STATEMENT OF HON. J.D. HAYWORTH, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ARIZONA

Chairman Hansen, members of the Subcommittee, and distinguished guests, I appreciate the opportunity you have extended to comment on the proposed expansion of Grand Canyon National Park, through incorporation of the Shivwits Plateau. Let me be clear and unequivocal: I strongly oppose the creation of the Shivwits Plateau National Monument or expansion of the Grand Canyon National Park.

The creation of a new national monument by bureaucratic fiat—using the Antiquities Act of 1906—would strip Congress of our legislative powers and would rep-

³ The method prescribed by FLPMA for congressional disapproval of secretarial withdrawals by concurrent resolution has been thrown into doubt by the decision in *INS v. Chadha*, 462 U.S. 919 (1983). But Congress retains the power it always has had to legislate to modify or reverse the Secretary's withdrawal decision.

resent one of the biggest land grabs in American history. Mr. Chairman, you know full well about the devastating and unfortunate effects that the misuse of the Antiquities Act by this administration had on Utah. I agree with your senior senator, Senator Orrin Hatch, who called the creation of the Grand Staircase-Escalante National Monument through the Antiquities Act the "mother of all land grabs." No public hearings were held on the creation of the monument. Every member of the Utah congressional delegation vigorously opposed this proposal, as did the governor and the majority of state legislators. We will face a similar backlash in Arizona if Secretary of the Interior Bruce Babbitt and the Clinton Administration act unilaterally in designating the proposed Shivwits Plateau National Monument through the broad use of this well-intentioned Act. That is why I support your legislation to decrease the amount of acreage that can be taken when designating land through the Antiquities Act.

Last Monday, Secretary Babbitt was in Flagstaff, Arizona to hold an informal, off-the-record town hall about the proposed national monument. There were several interesting revelations made by the Secretary during this hearing, but I would like to focus on just one. Secretary Babbitt admitted that he was "interested in getting [the monument designation] done in the next 18 months . . . on my watch." This presents several problems. First, he would usurp Congress's power to legislate. Although the President has the authority to designate lands through the Antiquities Act, it has been used infrequently and was never intended to designate large tracts of land. In fact, the Act specifically states that the president should use the least amount of acreage possible. The Shivwits proposal contains approximately 500,000 acres. This is certainly not the least amount of acreage possible to protect sensitive lands.

Second, 18 months is not sufficient time to receive input about this potential designation. People that would be affected by the proposal and should be part of the process would inevitably be left out because of the quick timetable involved in this proposed designation. Moreover, this is a very complicated proposal. The proposed monument include Bureau of Land Management (BLM) land, state land, and private land. Among those who would be affected are private land owners, ranchers, farmers, mineral rights holders, and others. Shouldn't we have input from folks who have been living on the land for several generations before moving forward with this proposal?

Finally, the most disturbing aspect of Secretary Babbitt's statement is that he wants it done "on his watch." What Secretary Babbitt is really saying is that he wants to leave his imprint on the West regardless of the views of the Western people. This is wrong and, for this reason alone, the proposal should be heavily scrutinized.

Mr. Chairman, it is my understanding that approximately 500 people attended Babbitt's meeting in Flagstaff. The crowd was overwhelmingly opposed to the creation of this monument. In fact, of the 44 people that spoke at the meeting, 12 favored the monument designation, 30 opposed the proposal, and two stated they had not formed an opinion.

With my statement, I am enclosing an article published in the Arizona Daily Sun about Babbitt's town hall meeting in Flagstaff. Many of the sentiments shared at the meeting and in this article are those shared by me and my constituents. Unfortunately, the administration may act without the consent or support of Congress or the people of Arizona. It is no wonder that the American people are so disenchanted with the Federal Government.

Shortly, the Arizona delegation, with Arizona Governor Jane Dee Hull, will send a letter to Secretary Babbitt expressing in the strongest possible terms our opposition to designating the Shivwits Plateau National Monument. We encourage the Secretary to engage us, and our constituents, in this very complicated and very controversial plan. The public deserves no less. We must stop unilateral action by the administration without involving Congress and the people of Arizona in this important discussion.

Mr. Chairman, thanks again for holding this important hearing and for giving me the opportunity to discuss the proposed Shivwits Plateau National Monument.

AZ DAILY SUN 3-14-99

Shivwits proposal slammed

*Ranchers tell
Babbitt to leave
Arizona Strip alone*

By LUKAS VELUSH
Sun Staff Reporter

Interior Secretary Bruce Babbitt came home and got slammed.

Babbitt, a former Arizona governor who grew up in Flagstaff, was in town Monday to tout his proposal to create a new national monument north of the Grand Canyon.

Some in the crowd of about 500 people who squeezed into the Cline Library auditorium used the occasion to call Babbitt a liar and a disgrace, and they demanded his resignation.

Others who live and work on the Arizona Strip near where the monument is proposed made heartfelt pleas simply to be left alone.

"Please don't make us lose our heritage, Mr. Babbitt, so you can put a feather in your cap," said Clay Bundy, a fifth-generation rancher on the strip. "This land is us. We love it. We'll take care of it."

Tony Heaton said his family used to run cattle on what is now part of the Grand Canyon National Park. At first, his family was allowed to continue grazing after the park was expanded, but later park officials pulled the plug. He fears the same will happen on the Shivwits Plateau if Babbitt gets his way.

"I have a vested interest in this propos-

BABBITT

From Page 1

al," said Heaton, his voice cracking. "I live right in the heart of it. I raised six kids there. There's something about the Arizona Strip that makes good kids. I'd like to keep it that way."

Babbitt took the criticism in stoic fashion, reacting only when he was asked to do the "honorable thing" and step down: "I'm sorry, not a chance."

And despite the attacks, Babbitt said the meeting was productive.

"I still believe we can find some common ground. I know it's not easy," he said. "I have a simple, stubborn view of this. We're going to keep talking. I think we're going to find something good out of it."

The proposed monument, located north of the Grand Canyon's western end, is tentatively called the Shivwits Plateau National Monument after the rolling plateau that dominates the landscape. Most of the 550,000 acres in the proposal are managed by the U.S. Bureau of Land Management and the Lake Mead National Recreation Area. There are a few pockets of state and private land.

The Flagstaff-based Grand Canyon Trust wants to double the size of Babbitt's plan to better protect the shrinking habitat of animals like bighorn sheep, desert tortoise and pronghorn antelope.

"We support this wholeheartedly," said Geoff Barnard, the Trust's president. "We would like to see it bigger."

At nearly 1 million acres, the Trust proposal would push the boundaries north all the way to the Utah border and westward into Nevada.

See BABBITT, Page 7

- CONTINUED -

Babbitt's proposal would ban mining except where there are existing claims, and it would end logging. It would allow ranching, hunting and off-road vehicle use on existing roads only. Hedging on whether a very limited, mostly dirt road system would be expanded, obliterated or left alone, Babbitt said roads would be managed in accordance with a management plan that public input would help shape.

Babbitt could put his monument proposal before Congress, but he fears he wouldn't make much headway with a body that hasn't looked favorably on similar preservation proposals in recent years.

"I think we need to look at the Antiquities Act," Babbitt said, referring to the act that enabled President Bill Clinton to create the Grand Staircase-Escalante National Monument in southern Utah during the height of the 1996 presidential campaign without going through Congress.

Babbitt said he has no inside line on whether Clinton would approve his proposal, but he is optimistic that he can get the monument approved before his term ends in January 2001.

"I am interested in getting this done in the next 18 months," he said. "I admit that I would like to get it done on my watch. This is my hometown. This is my state."

Babbitt, whose background includes two geology degrees, also wants to protect the Shivwits Plateau because, during many visits

there over his lifetime, he has dug in the dirt and appreciated the land in ways that other geologists do.

But others in the audience said they weren't interested in being used for Babbitt's legacy.

"I think this is ill thought-out," said Tony Williams, a Fredonia resident who believes monument designation will bring hordes of people. "I think the rationales that you have given seem empty. I think the only thing you can get out of this is your own legacy and I'm not interested in that."

Williams offered the Grand Staircase-Escalante as an example, a 1.7-million-acre land mass where visitation has increased dramatically since Clinton named it a monument.

Babbitt said BLM managers and

ranchers have made great strides to improve the landscape in the last few decades, upgrading the quality of grasslands, restoring streambeds and helping wildlife thrive.

In saying that, Babbitt asked himself the rhetorical, "Why do it, then?" question.

"It's a landscape that is in good shape and getting better," Babbitt said. "So how come Bruce Babbitt is parachuting in here and stirring this all up?"

The answer, says the two-term secretary, is that the land must be protected for future generations. Monument status will protect the land from 40-acre ranch splits that promote sprawl, as well as from mining and from timber extraction.

"I'm thinking about 50 years from now," Babbitt said.

Testimony for
PARKS SUB COMMITTEE HEARING
March 23, 1999
By
Congressman John Shadegg, Arizona, District IV
Testimony on behalf of Carol S. Anderson, Supervisor, District 1
Mohave County Board of Supervisors
Mohave County, Arizona
Proposal on the Shivwits Plateau National Monument

Mohave County is located in Arizona's northwest corner. It is the nation's fifth largest county, with 13,227 square miles, with only 12 % held in private ownership. The remaining land ownership belongs to the federal and state governments and Native American Tribes. The proposed Shivwits Plateau National Monument lies entirely within Mohave County and Supervisory District # 1. This District is the largest in the continental United States, contains more than one-half of Mohave County's land, the western part of the Grand Canyon and has less than 10 % private land.

Mohave County must provide services to this area, using the limited tax base and whatever amount of "Payment In Lieu of Taxes", (PILT), the County receives from the federal government. The formula for PILT, even if it was fully funded, does not begin to cover the costs of providing the funds for search and rescue operations, road maintenance, fire or medical response, and other services necessary for that area and its citizens. The PILT now is not fully funded, according to the formula, making that revenue source even less reliable. The County is therefore, dependent upon its limited tax base to pay for these essential services which it provides for the benefit of all the users of "public lands" as well as the private lands. The jobs provided by the historic uses of the land, those family owned businesses and industries are essential to the County's economic welfare.

Mohave County feels very strongly that the historic uses of these "public lands" that lie within the proposed national monument must be allowed to continue. The landscape is in good and healthy condition, proving that the users, the ranchers in partnership with the BLM, are practicing good stewardship. They are taking care of the land by managing those resources for biodiversity for both the wildlife, the plant communities, the limited water resources and water shed, along with the domestic livestock. Secretary Bruce Babbitt stated many times at the recent meetings in Flagstaff, Arizona, that this landscape was in good condition. This partnership, stewardship, ownership and those operations and practices must not be jeopardized in any way.

Mohave County must be included in all discussions and decisions involving this vital part of the County, affecting its families, economic base and resources. Mohave County is offering and willing to work with the U. S. Department of the Interior and our Congressional Delegation, as long as the proposal does not exceed 400,000 acres, as we have discussed with Secretary Bruce Babbitt. The historic uses of the land must be allowed to continue under the partnership with the BLM, the range management planning process, as agreed upon with the BLM and the permittee.

Mohave County has gone on record in support of furthering educational opportunities for historical, cultural, and natural resource management purposes. The County also recognizes the need for expanding the economic base, to include limited tourism activities. For the record, since the announcement of the proposed monument by Secretary Babbitt, the County has been inundated with calls from all over the country, requesting information. To address this problem, the Mohave Economic Development Authority has put the information on a "Web page". The adjacent Arizona communities of Colorado City and Fredonia have had increased calls for search and rescue assistance. This increase in tourists will continue and will have a serious impact on our limited resources, unless we are allowed to plan with all our neighboring states, cities, federal and state agencies and the affected private property owners and their businesses.

Mohave County feels that the large majority of this proposed monument should continue its existing uses, with a very small portion of it to be planned for tourism and the increasing impacts and needs of tourists. The existing roads must be guaranteed to continue their current uses. The County must be given the authority to improve the area's County roads that are or may be necessary for County needs. The existing waters and related improvements must be guaranteed to continue with current and future uses, allowing the users to maintain and improve them as needed.

Mohave County is also concerned about the impact to aircraft and the flight patterns that could be affected by such a proposal. The County must be guaranteed that those flight patterns and flight altitudes will not be changed or affected by this proposal.

Mohave County is willing to work on this proposal, through the "legislative process" as long as it remains limited to the boundaries we have agreed upon and the 400,000 acres. The County does not support the "resolution by Executive Order." The County does not and will not agree to any expansion of these boundaries as proposed by several environmental groups. The County does not support this proposed monument being designated as a part of the national park system, such as the North Rim of the Grand Canyon.

This testimony I am offering reflects the discussions that have been had by various Mohave County groups and individuals. I have put it together to reflect the County's position and concerns. It is not a formal statement made by the Mohave County Board of Supervisors but does reinforce the resolution adopted by that body. (Copy attached for your reference and inclusion in this testimony).

In summary, please keep the historical uses and businesses, protect the cultural and historical heritage this land enjoys. We all appreciate the magnificence and beauty of this part of the Grand Canyon and proposed monument area. We must work together to protect it, but not isolate it. Please work with Mohave County to develop a plan that will be multiple use and beneficial to all concerned.

Please review the attached proposal by Mohave County Economic Development, for more details. This plan is being presented to the Mohave County Board of Supervisors at its meeting, March 22, 1999.

Thank you for allowing me, as Supervisor for Mohave County, District 1, to present this testimony to you. I regret that I am not able to be here today to answer your questions. I am willing to do so. Please do not hesitate to contact me.

Attachments: Mohave County Board of Supervisors Resolution, 99-34
Mohave County Economic Development Authority (MCEDA) Proposal,
dated March 22, 1999

**BOARD OF SUPERVISORS
COUNTY OF MOHAVE**

Resolution No. 99-34

**A Resolution Setting Forth a Resolution for Consideration by the
Public Lands Steering Committee of the National Associations of
Counties**

WHEREAS, on November 27, 1998, the Arizona Republic announced that the creation of a National Monument at the Shivwits Plateau is under consideration by Secretary of the Interior Bruce Babbitt, and

WHEREAS, 100% of the proposed National Monument at the Shivwits Plateau is located within the boundaries of Mohave County, Arizona, and

WHEREAS, it is in Mohave County's best interest to ensure that the designation and management of any national monument benefits the citizens of Mohave County, and

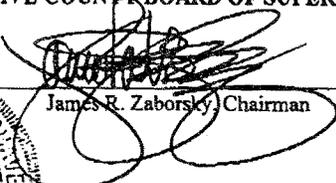
WHEREAS, to ensure those benefits, it is vital that Mohave County have a significant role in the decision to designate the national monument and in the development of the management plan for the monument area, and

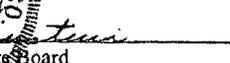
WHEREAS, support from the Public Lands Steering Committee of the National Association of Counties is important to Mohave County in its endeavor to work with the United States Department of the Interior.

NOW THEREFORE BE IT RESOLVED, that the Mohave County Board of Supervisors hereby approves the submittal of the attached resolution to the Public Lands Steering Committee of the National Associations of Counties and urges adoption of the resolution by the Committee.

PASSED, APPROVED AND ADOPTED this 5th day of January, 1999.

MOHAVE COUNTY BOARD OF SUPERVISORS


James R. Zaborsky, Chairman


Paul Chapman, Clerk of the Board



Board of Supervisor: Item 37 3-22-99

MCEDA Proposal For Arizona Strip Resource Development Program

- Changes in Federal Land and Forestry policy, which the government has taken, have eliminated the forest industry. Federal policy changes have threatened the mining industry. Due to these and other federal management policies the region is being forced to move from a resource and agricultural based to a tourism economy for the region. Our proposal for the Shivwits is a critical component to the conversion to a tourism destination, especially in the winter months when there is virtually none. Visitors to the region could visit Zion National Park, Grand Staircase-Escalante National Monument, Coral Pink Sand Dunes State Park and the Shivwits National Monument (Toroweap). This is not to say that efforts will not continue for industrial development in the area; but the reality is there is no railroad and no interstate highway needed for general industrial development.
- We recommend that a task force be proposed by the Board of Supervisors to be known as "Arizona Strip Regional Developments Task Force " having representation from Mohave, Coconino, Arizona-Washington, Kane and Garfield County's, Utah and Clark County Nevada, as well as each of the communities involved within those County's.
- MCEDA is willing to do the legwork required to bring about such a task force and to participate in its efforts for regional development once formed.
- It has been brought to our attention that Secretary Babbitt may have chosen even a more aggressive program for Shivwits area. It is our understanding that he has instructed staff to look at expanding it to 1 million-acres. This was in response to the several ecology groups that appeared at the Town Hall meeting in Flagstaff. (It should be noticed that no record was made of either meeting held). It is therefore up to him (Bruce Babbitt) to decide how or what the majority opinion was. BLM has informally advised us that Secretary Babbitt has directed them study the proposal of the Grand Canyon Trust and other ecological organizations requested at the Flagstaff meeting.
- BLM has requested a letter from Mohave County setting forth our specific requests. We have also received a request through Carol Anderson for a letter to go through Congressman Shadegg to the National Parks Sub-Committee next Tuesday, March 23, 1999.
-

**THE POSITION OF THE MOHAVE COUNTY ECONOMIC DEVELOPMENT
AUTHORITY, INC. REGARDING THE PROPOSED SHIVWITS NATIONAL
MONUMENT**

The Mohave County Economic Development Authority (MCEDA) offers the following position concerning the establishment of a proposed 400,000 acre national monument on the Arizona Strip and north of the Grand Canyon known as the Shivwits National Monument.

STATEMENT OF OUR POSITION: The Mohave County Economic Development Authority supports the concept of the Shivwits National Monument if its establishment will provide the people of the United States with improved access as a gateway to the Grand Canyon National Park at Toroweap, a largely hidden national treasure. The monument must be administered by the Bureau of Land Management and limited to 400,000 acres. The monument must provide support to the development of a year round visitors and educational center to accommodate guests and afford long term economic stability to neighboring communities. An "open air" university to promote the study of the environment and culture of the region while increasing public awareness of these sensitive areas is of critical importance to the overall mission of the plan.

We all agree that the public lands which are the subject of Secretary Babbitt's proposal contain national treasures which must be preserved for future generations to experience.

- We are supportive of the proposal as we now understand it, if the monument is limited to 400,000 acres.
- To be acceptable any proposal must provide enhanced economic opportunities for the people of the Arizona "strip", southern Nevada, and southern Utah.
- Our proposal addresses the needs of the people of the United States of America as far as improved access to the Grand Canyon one of their greatest treasures.
- The national interest is served by furthering educational study and public awareness of the environment in general and the high desert and Grand Canyon ecosystems in particular.
- Our proposal will also guarantee that the Grand Canyon and surrounding areas are preserved.
- Our proposal goes beyond that of Secretary Babbitt's in that the culture, customs, and economic viability of our citizens who reside in the Arizona "strip", southern Nevada, and southern Utah will also be preserved.
- Our proposal guarantees the American people, both current and future generations, from infant to elderly and without regard to physical disability access to one of the most spectacular areas of this national treasure.

As a part of the discussion related to the establishment of the proposed Shivwits National Monument, the Mohave County Economic Development Authority has identified several issues of concern to us. To be acceptable to us and the citizens of the multi-state region the following issues must be addressed to our satisfaction.

ISSUE: Development of a visitor center at Tuweep with year round all weather access to the rim of the Grand Canyon at Toroweap.

GOALS: To provide the public with all weather year round access to one of the most unique visual experiences in the Grand Canyon National Park while preserving the pristine nature of the area.
To preserve the pristine nature of the Arizona strip by limiting vehicular access to existing roads and sites. To use mass transit to move visitors about the area.
To provide the public with a facility on the North rim that is open to the public year round.
To provide an economic engine for the communities of Northern Arizona and Southern Utah.
Links the Grand Canyon National Park with Zion and Bryce Canyon National Parks for visitors to the region.
To improve access from Las Vegas, NV and Salt Lake, UT.

ACTIONS:

Establish a year round visitor center at Tuweep to support visits to the rim of the Canyon at Toroweap. Improve approximately 50 miles of existing roads from Colorado City, AZ, Hildale, UT to a site to be determined at or near Tuweep Ranger Station.
Improve existing road from Tuweep to Toroweap overlook on the rim of the Grand Canyon approximately 6.5 miles to accommodate a transit system of Shuttle buses or trams required to transport visitors to and from the visitors Center to the rim.

ISSUE: Establishment of an interactive cultural and environmental educational center
To accommodate students from around the world.

GOALS: To develop a world class cultural and environmental education program operated by Northern Arizona University in cooperation with the western United States.
To utilize the "natural laboratory" for the study of plants and animals of this diverse region.
To facilitate the study the culture and history of the high desert and the Grand Canyon area.

ACTIONS:

Establish a Cultural and Educational Center as a part of the Visitors Center at or near Tuweep.
Provide access to wilderness areas and Grand Canyon Park for interactive study.
Promote and advance environmental education.
Promote and advance the study of the Grand Canyon.
Increase the public's knowledge of the Grand Canyon and the Arizona Strip and its many treasures.

ISSUE:

Compensation to the State of Arizona for the taking of 16 sections and 7 parcels of state land.

GOALS:

Compensation to the citizens of the State of Arizona for the loss of state land.
Compensate Mohave County for increased local governmental services this monument will create.

ACTION:

Establish a perpetual heritage, tourism, and economic development block grant fund to be administered by Mohave County for the benefit of the people northern Mohave County.

ISSUE:

The Shivwits National Monument and its relationship with adjacent private land and nearby communities.

GOALS:

Preserve the right of existing private landowners and their private property rights.
Preserve existing mineral and water.

ACTIONS:

The proposed Shivwits National Monument itself shall not be considered a part of the Grand Canyon or wilderness area.
Private landowners shall be guaranteed the continued and uncontrolled use of their land.
Any fencing necessitated by the establishment of this monument shall be at the expense of the federal government.
Private landowners shall be guaranteed ingress and egress to and from their property.
Existing mineral and water rights shall be preserved.
Development of existing mining claims shall not be precluded.
All existing roads within the monument shall be maintained by the federal Government.

ISSUE:

Aircraft over flights

GOALS:

Maintain airspace for private and commercial use.
Ensure unrestricted and uninterrupted flight between northern and southern Mohave County.
Maintain access by air to the Tuweap area.

ACTIONS:

There shall be no limitation on aerial flights over the monument area.
No limit or restriction shall be place on aircraft takeoff or landing within the monument area that does not disturb the land.
Expand and maintain existing air strip at Tuweap for public use.
Assist with any expansion needed to handle increased traffic at the Colorado City Airport due to new visitors to the region created by the establishment of The national monument, visitor center, and educational center at Tuweap.

ISSUE:

Local voice into operation of the monument.

GOAL:

Provide a mechanism to solicit citizen and local government input into the operation of the monument.

ACTIONS:

A management board shall be established as a mechanism to solicit local government and citizen input into operation of the monument.
The management board shall include but limited to representatives from Economic Development, Mohave County, AZ; Washington County, UT; Kane County, UT; Clark County, NV; Colorado City, AZ; Fredonia; Hildale, UT; Kanab, UT; Beaver Dami-Littlefield; Wuiapa Tribe; Paiute Indians; the Administrator of the Grand Canyon National Park, and the District Manager of the BLM Strip District.

SUMMARY:

The protection of plant life, animal life and cultural and historical resources of this ecologically sensitive area bordering the Grand canyon National Park is of great concern to us.

Equal consideration must be given the interests of the local stakeholders who must be allowed to continue their culture and customs. Because of the overwhelming volumes of federally controlled land in the region concern must be given to afford residents of an economic means of survival.

Our proposal mitigates, to some extent, impacts of vast amounts of public lands on the economy of the region. To reach these goals the Park Service and BLM should establish a visitors center at or near Tuweap which include educational facilities as a support facility to accommodate the interactive study of the region. This should be accomplished in cooperation with a major university such as Northern Arizona University. The existing road from Colorado City – Hildale to Tuweap must be improved to a hard surfaced all weather road capable of handling visitors. Road improvement from Tuweap to the rim at Torweap must be capable of accommodating a mass transit system of buses or trams year round to lessen congestion at the rim. Roads and visitors center complex should be designed to be as compatible with the environment as possible. Existing roadways should be used to minimize impact on the area. Only the road from Colorado City to Tuweap-Toroweap should be improved.

Records indicate that we could expect that millions of visitors would come to seek the Grand Canyon experience from Toroweap. It is essential that the pristine nature of the area be preserved. These visitors must be accommodated with minimal impact to the natural environment. Visitors to Toroweap will mitigate the growing problem of over crowded conditions at the south rim, which has long needed such a solution.

While we feel the proposed Shivwits National Monument could be beneficial to the citizens of the United States both present and future, if they have the opportunity to experience this national treasure. If the motives of Secretary Babbitt are to put this area in a vault away from the public to enjoy, we are opposed. This region is far too valuable to "lock up" and deny citizens their right to have convenient access and enjoyment of it.

GAIL GRIFFIN
 1700 WEST WASHINGTON
 PHOENIX, ARIZONA 85007-2848
 CAPITOL PHONE: (602) 542-5761
 TOLL FREE: 1-800-352-8404



COMMITTEES:
 NATURAL RESOURCES, CHAIRMAN
 FEDERAL MANDATES & STATES' RIGHTS,
 VICE CHAIRMAN
 APPROPRIATIONS

DISTRICT 8

Arizona House of Representatives
 Phoenix, Arizona 85007

March 22, 1999

The Honorable John Shadegg
 430 Cannon House Office Building
 Washington, D.C. 20515-3034

Dear Congressman Shadegg:

The Tenth Amendment of the Constitution of the United States provides that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

The federal government, by designating lands as national monuments, national parks, reserves or other designations or uses or by entering into international treaties restricting the use of lands in this and other states, is exceeding its authority under the Constitution.

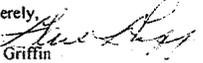
The Supreme Court of the United States has limited the authority of the federal government to preempt states' rights for the use of their land under the Constitution and federal laws of the United States.

The administration of the current President of the United States and the Secretary of the Interior have expressed their intention to appropriate the use of the "Arizona Strip" as a monument, and other areas in this state as additional National Parks or other designations.

These onerous proposals would strip states and individuals of their constitutionally granted authority and would result in the wielding of more authority over citizens of the United States by the federal government. These actions and similar recent takings of land in Utah adversely affect the rights of states and the people as delegated by the United States Constitution.

We request the Congress of the United States and the Secretary of the Interior delay consideration of any further designations or actions depriving states of the right for the use of lands within their boundaries until their impact on the states and people can be determined by economic analysis by each state, county and city.

We request that if any such action is determined to adversely impact a city, county or state, the subject area should be excluded from further consideration by the Congress or the Secretary without express written approval and consent of the counties, and cities, and without state legislative authorization.

Sincerely,

 Gail Griffin
 State Representative

MAR-22-1999 MON 02:17 PM CONGRESSMAN JOHN SHADEGG FAX NO. 6022487733 P. 02
 AZ CATTLEMENS ASSN. Fax:6022209833 Mar 22 '99 14:10 P. 02/11



ARIZONA CATTLEMEN'S ASSOCIATION
 March 21, 1999

The Honorable John Shadegg
 430 Cannon Office Building
 Washington, DC 20515

RE: Designation of a National Monument on the Arizona Strip

Dear Congressman Shadegg:

The Arizona Cattlemen's Association respectfully requests that you oppose the designation of 350,000 acres of the Shivwits Plateau on the Arizona Strip in Northwestern Arizona as a National Monument until field hearings, regarding the proposed designation, are held in the local communities surrounding the proposed site. We are requesting these hearings be held in the Arizona communities of Kingman, Williams, Page, Fredonia and in St. George, Utah.

Until such time as these field hearings are conducted and local landowners, ranch families, businesses, elected officials, sportsmen and other interested parties have the opportunity to review and respond to the proposal, it is premature to accept its designation. After the full scope of the proposal is reviewed and these hearings are held it would be prudent to reconsider your position. We believe it is important for the Secretary of Interior to clearly outline to Arizona's citizens, in the communities surrounding the proposed site, the full scope of his proposal to designate the area a National Monument.

Until a few years ago, you did not hear anything negative about protected areas — the parks, forests, wildlife refuges, wilderness areas and monuments that are scattered across Arizona's landscape. But times have changed, and the monument that was once seen as a friendly destination spot is now just as likely to be viewed by ranch families and rural Americans as a threat to hearth and home.

This change in attitude is largely attributable to the impact of radical environmentalism on protected area policies. Through litigation, international trade agreements and legislation, radical environmentalists have dramatically increased the number of protected areas in America, the acreage protected, restrictions on management, and restrictions on private property located anywhere near these areas. It is through this process they have converted what was once a relatively benign system of protected areas into a large network of increasingly linked sites that can threaten property ownership, restrict property use, degrade property resources and lower property values.

1401 N. 24th Street
 Suite 4
 Phoenix, AZ 85008
 602-987-1129
 902-978-7614

Arizona's organization of
 cattle growers and
 cattle feeders



Proposed National Monument
 March 21, 1999
 Page Two

According to research conducted by JW Goodson Associates, Inc., the federal government already owns approximately 29% of all land in America. Incredibly, over half of this — nearly 15.5 % of the country, or more than one in every seven acres — is designated as a federal park or protected area. Nationwide there are over 3,000 federal protected areas designated in just seven major categories:

- National Parks (376 sites) 80 million acres.
- National Wildlife Refuges (509 sites) 92 million acres.
- National Forests and Grasslands (175 sites) 191 million acres.
- Wilderness Areas (497 sites) 90 million acres.
- National Natural Landmarks (587 sites) 90 million acres.
- National Wild and Scenic Rivers (159 sites) 100,000 linear miles.
- National Trails (820+) 29,000 miles.

These nearly 600 million acres of protected areas are significant enough, to such an extent that no new lands should be considered without extensive hearings in the local areas affected, to warrant a more revealing approach to any new designations. Issues such as: national defense, national security, access to critical natural resources and economic analyses of the impact on local communities and landowners should receive a thorough review. We understand a thorough review of this proposal may not fit the Secretary of Interior's schedule, however, anything less would be insufficient.

Therefore, in conjunction with an extensive process of field hearings we request that your office work with the rest of Arizona's Congressional Delegation to require the Secretary of Interior to consider and insert the following concepts: 1) Administer and manage the entire proposed monument area by the Bureau of Land Management (BLM); 2) Let the State of Arizona continue to manage the State Lands within the proposed boundary; 3) No future enlargement of the monument boundary; 4) Continue grazing the BLM and Lake Mead Natural Resource Area (NRA) lands within the proposed monument at current levels with the opportunity for increases if conditions improve; 5) Grazing fees shall be the same within the proposed monument as they are on other BLM lands; 6) Allow for the sale, transfer, gifting of permits water rights, assets or improvements to whomever, by permittees or private land owners; 7) Protect existing water rights; 8) Compensate permittees fairly for any condemnation of private land or private water rights by the government; 9) Continue any current access to private or public lands across public

Proposed National Monument
March 21, 1999
Page Three

land for the maintenance and management of improvements for corrals, land treatments, water sources, roads, fences, etc.; 10) Continued ability for landowners to limit access to private property such as gates and roads leading to private land; 11) Continue to allow for treatments for the improvement and maintenance of permits, forage conditions, springs, roads and water sources; 12) Provide for needed improvements such as cattle guards to address the issue of cattle/visitor interface; 13) Protect, provide for and respect historic customs, culture and the heritage of local people in the area; 14) Foster respect for people, property and buildings in the area for those who will visit — educate visitors that the public lands are multiple use lands— they belong to all — old and new; 15) Continue hunting and firearm carrying rights, according to state law; and 16) Restore the rights that were taken when Tuweep was included into the Grand Canyon National Park.

Once again, we respectfully request you oppose the designation until official field hearings are held and all of these issues can be debated in an open public forum.

Sincerely,



Jed Flake
Vice President

JF/bfa

The Problem with Parks...

The Impact of Protected Areas on Private Property

by

Jeff Goodson

JW Goodson Associates, Inc.

Until a few years ago, you had a better chance of getting hit by a meteorite than you did of hearing anything negative about protected areas—the parks, forests, wildlife refuges, wilderness areas and public trails that are scattered across the American landscape. Times have changed, though, and the park that was once seen as a friendly vacation spot is now just as likely to be viewed by ranchers and rural Americans as a threat to hearth and home.

This change in attitude is largely attributable to the impact of environmentalism on protected area policies. Through litigation and legislation, environmentalists have dramatically increased the number of parks in America, the acreage protected, restrictions on park management, and restrictions on private property located anywhere near those areas. In the process, they have converted what was once a small and relatively benign system of protected areas into a large network of increasingly linked sites that can threaten property ownership, restrict property use, degrade property resources, increase property management and development costs, and lower property value.

KINDS OF PROTECTED AREAS

There are about two dozen major federal, state, global and non-governmental protected area programs in America. Each has its own legislative, regulatory and policy framework, and each represents a unique challenge to rural landowners.

Global Protected Areas. Three major global protected area programs affect private property. One focuses on wetlands (Ramsar Wetlands), one on special ecological areas (World Biosphere Reserves), and one on both natural and cultural sites (World Heritage Areas). Over 80 global protected areas, covering some 50 million acres, are designated under these three categories in the United States. Texas sites include Big Bend National Park and the Big Thicket—both of which are World Biosphere Reserves—and Caddo Lake, a Ramsar wetland.

Federal Protected Areas. The federal government owns about 29% of all land in America. Incredibly, over half of this—some 15.5% of the country, or more than one in every seven

THE PROBLEM WITH PARKS

Page 2 of 7

acres—is designated as a federal park or protected area. Nationwide, there are over 3,000 federal protected areas designated in just seven major categories:

National Parks (376 sites) 80 million acres

National Wildlife Refuges (509) 62 million acres

National Forests and Grasslands (175) 191 million acres

Wilderness Areas (497) 90 million acres

National Natural Landmarks (567) 90 million acres

National Wild and Scenic Rivers (159) 100,000 linear miles

National Trails (820+) 29,000 miles

The national parks are managed by the National Park Service (NPS), forests and grasslands by the US Forest Service (USFS), and wildlife refuges by the US Fish and Wildlife Service (USFWS). Wilderness areas, landmarks, wild and scenic rivers and national trails for the most part occur within—and are managed as part of—these national protected areas, but they also may occur on private property.

State Protected Areas. In Texas, there are also over 200 state-protected sites covering over 1.3 million acres. These are managed as parks, natural areas, forests, wildlife management areas, coastal preserves, wildlife research and demonstration areas, nongame areas, historic areas and state natural landmarks. A significant additional amount of land is protected by river authorities, counties and municipalities.

Non-governmental Protected Areas. Texas also has a number of areas set aside by non-governmental organizations such as the environmental land trusts. There are about 30 land trusts in Texas, but most of the area protected is controlled by The Nature Conservancy, the Trust for Public Land, or the Conservation Foundation.

LANDOWNERS AT RISK

Adjacent and Nearby Landowners. Protected areas affect rural landowners all across America. Adjacent and nearby landowners are the most directly affected, because of simple proximity. From the spread of endangered species, to the loss of property value, to targeting of private property for acquisition, landowners closest to a park boundary can expect the most significant impacts from protected area management.

Watershed Landowners. Property owners located at great distances from parks, however,

are also at increasing risk of impact from protected area programs. Landowners in the upper watershed of a park, for example, can anticipate significantly greater scrutiny of land use or management practices that may affect downstream water quality—from concentrated animal feeding operations (or "CAFOs"), to just allowing livestock to drink from rivers or use streamside vegetation. This scrutiny can be expected to intensify as federal environmental agencies shift to a watershed-based approach to property control.

Viewshed Landowners. Just being located within sight of a park can also place a landowner at risk. Development anywhere within sight of a designated wild and scenic river, for example, can be refused a federal permit, delayed by advocacy group harassment, or prohibited through litigation simply because it offends aesthetic sensibilities. Other major environmental, scenic and historic preservation programs with viewshed implications include the National Scenic Byways, National Trails, National Heritage Areas and National Historic Landmarks programs. Because of the areal extent of the impact—hundreds and sometimes thousands of square miles of private property—viewshed programs are widely considered by landowners as among the most threatening of all environmental programs.

Linkage and Same-County Landowners. Owners of property geographically situated between two or more protected areas can also be at risk of impact, especially of being targeted for acquisition. The risk is compounded if the property is located along a stream connecting the two parks, or along a rail line that can become a candidate for conversion to a public use trail through the Rails-to-Trails Program. Every landowner who pays property taxes in the county of occurrence may also be affected, because of the impact of park establishment on property taxes.

THE IMPACT OF PARKS ON PRIVATE PROPERTY

Property Targeting for Acquisition. Some park programs, such as the Wild and Scenic Rivers Program, authorize condemnation of private property. More common, though, is simple targeting of private property for acquisition. On top of owning more than 25% of the country, for example, the Big 4 land management agencies—the National Park Service, Fish and Wildlife Service, Forest Service and Bureau of Land Management—have plans to acquire another 11 million acres (17,000 square miles) of land in the future to establish new protected areas, expand existing areas and buy out inholders.

Landowners most at risk of being targeted for acquisition are inholders, those who own land adjacent or in immediate proximity to a park, those who own land along "linkage lines" between existing protected areas, and those who own property with perennial surface water, older "climax" vegetation, rare biological habitats, unusual geological formations or scenic vistas—in short, places that environmentalists want to "save" by adding them to the government's collection of parks and preserves. All of these are landowners at high or very high risk of being targeted for acquisition.

Endangered Species. National parks, wildlife refuges, forests and wilderness areas, as

well as land controlled by the Bureau of Land Management, are all subject to policies that require them to be managed for the protection, reproduction and/or spread of endangered species. The National Wildlife Refuge system includes habitat for some 249 federally listed species, for example; 56 refuges were acquired specifically to protect those species, and 37 refuges include critical habitat designated under the Endangered Species Act.

Any land management policy that favors endangered species is of special concern to private property owners. This is because the spread of endangered species from protected areas to private property can mean the coercive imposition of federal land use controls. In practice these controls can affect virtually all productive use of a property, from traditional farming, ranching and timber operations to suburban home construction. Property value can decline by over 90% in such cases, and the number of willing buyers— even at steeply discounted prices— can evaporate. Even when total use of the property is not prohibited, property management and development costs can skyrocket. Unless vegetation is carefully managed, property located adjacent to or near a park can be at significantly greater risk of impact from endangered species than property located further from these sites.

Pests and Disease. Some kinds of protected areas can increase the threat of pest outbreaks on adjacent and nearby property. This is especially true of wilderness areas, where "leave it alone" management policies and dense, overmature forests can combine to produce frequent and destructive pest eruptions. In a 1983 outbreak of southern pine beetle in east Texas, for example, litigation by environmental advocacy groups and Forest Service wilderness policies resulted in severe economic losses when the outbreak spread to nearby private lands. The spread of forest diseases from wilderness areas can also threaten adjacent lands, but they seldom cause problems as catastrophic as those associated with the spread of insect pests.

Wildlife Damage. Wildlife damage is also increasingly associated with protected areas. Attacks on humans from mountain lions, bears and even alligators appear to be increasing, but the biggest problem in most rural areas is predator damage. An estimated 30% of sheep losses and 2.4% of cattle losses are now attributable to predators, but lethal control methods have become sharply curtailed with the rise of environmentalism.

Another concern of ranchers is the fear that brucellosis will spread from infected bison to disease-free stock. Although this issue has so far focused on the bison in Yellowstone National Park, concern may spread south as environmentalists promote the reintroduction of bison in parts of its historic range now occupied by cattle operations.

Fire. Private land located in and adjacent to protected areas may also suffer from higher than average frequency and severity of fire. An average of over 10,000 fires a year occur on land protected by the Forest Service, for example, and nearly half a million acres burn annually. While the number of wildfires declined from 1970-1990, the number of acres burned during that time nearly doubled. In one relatively moderate year (1990) at least 87 homes were destroyed, over 2100 other houses were threatened, and thousands of acres of private land were burned by fires starting on land protected by the Forest Service.

Tens of thousands of fires also start on land owned by the Bureau of Land Management,

National Park Service, and Fish and Wildlife Service. In 1996, for example, over 70,000 wildfires burned three million acres of land by mid-July. Nearly 400 homes and structures were destroyed only halfway through the fire season, and the situation became so severe at one point that the Secretary of Interior advised homeowners to remove all trees within ten feet of their houses.

The threat of fire damage to private property may have been exacerbated in the last 20 years because of ecosystem management policies that emphasize a "let it burn" approach to wildfire control. Ironically, the popularity of these policies has risen at the same time that fire has become increasingly used by park managers to manipulate nature for the creation of "desirable" wildlife habitat.

Natural Resource Damage. Other kinds of natural resource damage on private property can result from protected area management policies. Twentieth century management policies in Yellowstone National Park, for example, now appear to have caused severe overgrazing by elk. The resulting soil erosion is believed in turn to have caused significant water quality and hydrological impacts, including higher turbidity, increased deposition of silt, changes in stream profiles and some shifting of streambeds. Similarly, protection of wild horses is believed to have led to significant overgrazing of some western rangelands. Private property owners located downstream of protected areas are best advised to closely monitor park management policies to identify management actions—or, just as likely, non-actions—potentially affecting the natural resources of their own property.

Advocacy Group Harassment and Litigation. There is probably no greater focus for advocacy group harassment and litigation than park management policies. Indeed, protected areas constitute the entire justification for some environmental groups. National examples include the Wilderness Society, National Parks and Conservation Association and National Wildlife Refuge Association, but there are hundreds of local groups that focus entirely on influencing how specific parks are managed. Other organizations, like the Sierra Club Legal Defense Fund and the National Trust for Historic Preservation, pride themselves in suing over park management policies and even ballyhoo their lawsuits in fund-raising literature.

Not surprisingly, advocacy group harassment and litigation can have a major impact on property owners located adjacent to, near, between, upstream of, or even just within sight of a park. All three of the global protected area programs, for example—Biosphere Reserves, World Heritage Sites and Ramsar Wetlands—are used by environmental advocacy groups to control property use in the upper watersheds of the protected areas, in vast buffer zones around the protected areas, and virtually anywhere else that can be construed as necessary for site protection.

Environmental Espionage. Landowners located adjacent to protected areas are at especially high risk of what has come to be known as "environmental espionage"—the intentional and covert collection of environmental data on private property without the landowner's knowledge or consent. Few environmental issues infuriate rural landowners more than this one. In some cases, the information is used to target private property for acquisition. Under the National Natural Landmarks Program, for example, some 363 Texas properties were studied for inclusion in the landmark system; most of them were private, and many were evaluated covertly. More commonly, covertly collected data is used by

advocacy groups and government agencies to fight property management or development in buffer zones around the protected areas.

Tax Revenues. When productive land is converted to a protected area, the financial streamflow of property taxes generated from the use of that land dries up. And because property taxes are usually a zero sum game, loss of property taxes on some land means higher property taxes for all other landowners in the county. This loss of tax revenue is widely recognized, and both the state and federal government in some cases make annual payments to the host county to reimburse for the loss. The state of Texas pays for land converted to state wildlife management areas, for example, and the federal government for land converted to national wildlife refuges. These payments may or may not, however, be equivalent to the revenue lost. The loss from conversion of productive land to other kinds of protected areas, moreover—including to environmental easements and to property owned in fee simple by the tax-free environmental land trusts—is *not* reimbursed.

Property Value. Parks can be an asset to adjacent property owners in urban and suburban areas, increasing property value because of the privacy they provide and the assurance they afford against some kinds of property-devaluing development. In rural areas, conversely, parks can lower property value by increasing property management and development costs, or by reducing the "highest and best use" of the property at appraisal. Historic parks are notorious for this, but any protected area that leads to property use or management restrictions in buffer zones around the park can threaten property value.

Restriction of Public Works Projects. A final impact of protected areas is their use as a reason to kill or modify public works projects—including many projects that benefit rural Americans. A key provision of the Wild and Scenic Rivers System, for example, is that "federal agencies cannot assist by loan, grant, license, or otherwise in the construction of any water resources project (such as dams, water diversions and channelization) that would have a direct and adverse effect on river values." National Natural Landmarks are another example: Dinosaur State Park has been used to argue against a proposed reservoir on the Paluxy River in east Texas, and Santa Ana National Wildlife Refuge in south Texas has been used to argue in favor of changing how Falcon Dam is operated.

CONCLUSION

Everyone loves a park. From the rancher tracking spoor on his annual elk hunt in the Rockies, to the family on a trip to Palo Duro Canyon, to the solo canoeist on a ten-day run down the lower canyons of the Rio Grande...Everyone loves a park. With the rise of environmentalism, though, this love for parks has been tempered by the realization that protected areas can also have a significant adverse impact on ranchers and rural landowners. They can threaten property ownership, restrict property use, degrade property resources, increase property management and development costs, and reduce property value. And for those rural landowners located adjacent to, near, between, upstream of, or just within sight of a park, the need to closely monitor protected area management policies is an increasingly important part of rural property management.

The author is a Texas landowner and president of JW Goodson Associates, Inc., a Texas property consulting company. He can be reached at: Phone: (800) 998-8481; fax: (301) 946-4016; e-mail: jwgoodson@aol.com.

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David H. Getches*

Managing the Public Lands: The Authority of the Executive to Withdraw Lands

INTRODUCTION

Historically the executive branch of the federal government—primarily the President and the Secretary of the Interior—has protected public lands by withdrawing them from availability for private acquisition and use allowed under public land laws. Homesteading, mining and other uses ordinarily considered proper on the public domain were prevented in order to preserve resources or to dedicate them to a public purpose. Beginning soon after the nation's founding, numerous military bases and Indian reservations were set aside by executive orders withdrawing lands from the public domain. Other lands were set aside for wide ranging purposes dictated by the national interest. Although it is not widely appreciated, the use of withdrawals has been a major force in conservation law and history, especially during those eras when statutory law was not nearly as broad and diverse as it is today.

Withdrawal remains an important device in federal land use planning and management. Significant fragile wildlife habitat may need protection from mining pending consideration of legislation to designate it as a park or wildlife refuge. Lands rich in petroleum or oil shale may be removed from operation by statutes that would allow private uses and development because they can be developed most efficiently under a coordinated national program. Wild areas may be protected from commercial uses so that they may remain in their pristine state. Today, public land managers may have several ways to accomplish their desired results. Yet one of the most effective means is withdrawal.

Although Congress has plenary power over the public lands,¹ in the past most withdrawals were made by the executive on the assumption that no statutory delegation of authority was needed. Congress's failure to repudiate the executive's withdrawals led the courts to infer acquies-

*Associate Professor of Law, University of Colorado School of Law. The author appreciates the thoughtful review of an earlier draft of this article by Charles F. Wilkinson and Lee Laitala. The research assistance of Julia Ornes Robinson was extremely helpful. The Rocky Mountain Mineral Law Foundation kindly provided a grant to aid in the research.

1. U.S. CONST., art. IV, §3, cl. 2 (the Property Clause) states: "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." See generally *Kleppe v. New Mexico*, 426 U.S. 529 (1976).

cence. The inference may have been unjustified but became a well entrenched justification. While Congress made some specific delegations of withdrawal authority over the years, the executive's implied nonstatutory authority was construed to fill all the interstices around express delegations.

In the 1976 Federal Land Policy Management Act (FLPMA)² all non-statutory authority and most earlier statutory authority were extinguished and replaced with new procedures for making withdrawals.³ The revolutionary impact of the 1976 Act touches only withdrawals made after its enactment.⁴ Consequently, the effectiveness of earlier non-statutory withdrawals of millions of acres throughout the country is governed by legal principles as they existed before the Act. Recent exercises of authority under both the FLPMA and the vestigial statutory withdrawal authority have drawn fire from private development interests and state governments. Multimillion acre withdrawals in Alaska have provoked litigation,⁵ and the "lock-up" by federal officials of resource-rich lands elsewhere has spurred on the "Sagebrush Rebellion"—a movement seeking greater state control of federal lands.⁶

This article reviews and analyzes judicial interpretations of executive withdrawal authority in the past and makes suggestions for the construction and application of statutorily based withdrawal authority. The legal basis for executive withdrawal authority was tenuous, at least at the time the early withdrawals were made. Nevertheless, the Supreme Court has upheld non-statutory executive authority in one major case. Based on the reasoning in that case most withdrawals should withstand judicial challenge because of the passage of time and the Court's pragmatic desire not to disturb an established allocation of power that has been accommodated by both the executive branch and Congress. There is likely to be considerable deference to the executive's own interpretations of its authority and to its decisions to exercise the statutory authority that now must be invoked to support new withdrawals. Reviewing courts might have curtailed executive withdrawals in an earlier era had they acted consistently with apparent federal policy and congressional intent. But today the same considerations in a milieu of resource conservation demand

2. 43 U.S.C. §§ 1701-1782 (1976).

3. *Id.* § 1714. See text section IV B, *infra*.

4. *Id.* § 1701 and § 1714(j). Although withdrawal provisions of the FLPMA are prospective, the Act requires a study to be made of all existing withdrawals followed by a report to Congress. See also notes 211-12, *infra*.

5. See notes 118-23, 245-54 *infra* and accompanying text.

6. The Sagebrush Rebellion and related legal arguments are discussed in Touton, *The Property Power, Federalism, and the Equal Footing Doctrine*, 80 COLUM. L. REV. 817 (1980); Note, *The Sagebrush Rebellion: Who Should Control the Public Lands?*, 1980 UTAH L. REV. 505; Leshy, *Unravelling the Sagebrush Rebellion: Law, Politics and Federal Lands*, 14 U. CAL. DAVIS L. REV. 317 (1980).

great latitude for officials who act to protect lands by withdrawals. Challenges to decisions to withdraw areas are likely to fail, except to the extent they demonstrate a departure from explicit statutory procedures.

I. PUBLIC LAND WITHDRAWALS BEFORE THE 1910 PICKETT ACT

A. *Public Land Policy: A Shift from Disposal to Conservation*

From the close of the Revolutionary War until the mid-nineteenth century the United States amassed more than two billion acres under its sovereignty and ownership⁷—a land area more than seven times the size of the original thirteen states.⁸ The principal asset of the fledgling nation was the real property it obtained in bargains with foreign nations,⁹ the original states¹⁰ and Indian tribes.¹¹ No sooner was the vast public domain

7. PUBLIC LAND LAW REVIEW COMM'N, ONE THIRD OF THE NATION'S LAND 327 (1970) [hereinafter PLLRC REPORT]. Acquisition of sovereignty and ownership was generally perfected in separate transactions, first a cession from a foreign nation or a state, followed by a treaty or agreement with an Indian tribe. In *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823) a settler who had received a patent from the United States prevailed over a settler who traced his title to a grant from the Indians. The result was based on tacit understandings among European discoverers of the New World that title would vest in the discovering nation, subject to limited Indian occupancy rights. Assertion of sovereignty by the Europeans deprived Indians of the ability to dispose of their lands to anyone but the sovereign. See note 11 *infra*.

8. The territory of the 13 original states (including what is now the District of Columbia, then within Maryland and Virginia; Kentucky and West Virginia, then within Virginia; Maine, then within Massachusetts; and Vermont, then within New York) after they ceded their western land to the United States (see note 10 *infra*) amounted to some 266 million acres. Figures taken from PLLRC REPORT, *supra* note 7, Appendix F at 327.

9. Major examples are: Louisiana Territory, 523 million acres west of the Mississippi River, purchased from France in 1803 for three cents an acre (8 Stat. 200, 206, 208, T.S. No. 86, 86-A, 86-B); Florida, acquired by treaty with Spain in 1819 (8 Stat. 252, T.S. No. 327); the border with Canada from Minnesota west, fixed at the 49th parallel by treaties with Great Britain in 1818, adding the Red River Basin (8 Stat. 248, T.S. No. 112) and in 1846 adding the Oregon Territory—180 million acres (9 Stat. 869, T.S. No. 120); California and the Southwest, acquired by the Treaty of Guadalupe Hidalgo with Mexico in 1848 (9 Stat. 922, T.S. No. 207) and the Gadsden Purchase in 1853 (10 Stat. 1031, T.S. No. 208); and Alaska, purchased from Russia in 1867 for \$7.2 million (15 Stat. 539, T.S. No. 301).

10. Seven of the original states ceded lands, generally those lying west of their present boundaries, after the Constitution was ratified: New York, 1780; Virginia, 1783; Massachusetts, 1785; Connecticut, 1786; South Carolina, 1787; North Carolina, 1790; Georgia, 1802. See P. GATES, HISTORY OF PUBLIC LAND LAW DEVELOPMENT 51-55 (1968) [hereinafter GATES]. Texas sold 78.8 million acres to the United States in 1850. *Id.* at 82.

11. The European nations asserted rights to the territory they claimed in America exclusive of other European countries, but recognized Indian rights of occupancy. Thus, they acquired a right to govern the area, but not title to real estate. This interest passed intact to the United States on its acquisition of the area by treaty or purchase. The new nation generally chose to extinguish Indian land claims by treaty and purchase from Indian tribes rather than by bitter and difficult conquest. See *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 503 (1823); Joint Tribal Council of Passamaquoddy Tribe v. Morton, 528 F.2d 370 (1st Cir. 1975); *Mohegan Tribe v. Connecticut*, 483 F.Supp. 597 (D. Conn. 1980); Cohen, *Original Indian Title*, 32 MINN. L. REV. 28 (1947). See generally, F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW, Chs. 2A and 3A (2d ed. 1982); D. GETCHES, D. ROSENFELT, AND C. WILKINSON, FEDERAL INDIAN LAW: CASES AND MATERIALS 143-152 (1979).

acquired by the United States than the government began a purposeful effort to dispose of it.¹² This was to produce income from land sales. More significantly, in private hands the land became a vehicle for development at the frontier and beyond.

"Public land law"¹³ historically referred to legislation providing for disposal of the public domain.¹⁴ Homestead laws and government sales dispensed cheap land;¹⁵ mining laws opened the west's mineral wealth, free to the first to claim it;¹⁶ gifts of free land to railroads secured the rapid development of commerce linking the industrial east with the agricultural and resource rich west;¹⁷ and land grants to new states aided education and local economics.¹⁸

12. Perhaps the primary motivation for disposal was the desperate need for revenues to discharge the public debt, much of which consisted of foreign obligations. Encouraging migration and promoting population were other goals. The Land Ordinance of 1785 was the first legislative attempt to provide for orderly disposal of the public lands, by sale after completion of surveys. *See generally*, GATES, *supra* note 10.

13. The term "public land law" is generally understood to mean statutes and regulations governing the retention, management, and disposition of the public lands. *See* Act of Sept. 19, 1964, Pub. L. No. 88-606, § 3, 78 Stat. 982, 983, creating a Public Land Law Review Commission to study such laws. *But see* Udall v. Tallman, 380 U.S. 1 (1965) (The Court stated that the term "public-land laws" does not include the mining or mineral leasing laws. The particular withdrawal orders had been construed as not preventing oil and gas leases. The court did not consider the use of the term generally or even under the statute authorizing the orders. Thus, the dictum is an aberration from the usual construction of the term. *See also* Mechem v. Udall, 369 F.2d 1 (10th Cir. 1966) (rejecting contention that executive order did not validly withdraw lands from mineral leasing). *Cf.* Mason v. United States, 260 U.S. 545 (1923) (executive order withdrawing lands "from settlement and entry, or other form of appropriation" removed the lands from the mining and mineral leasing laws). The term "withdrawal" as used in the Federal Land Policy and Management Act, 43 U.S.C. §§ 1701-1782 (1976), has been held to include removal from oil and gas leasing. *Pacific Legal Foundation v. Watt*, No. CV-81-141-BLE (D.Mont., Memorandum Decision, Dec. 16, 1981); *Mountain States Legal Foundation v. Andrus*, 499 F.Supp. 383 (D.Wyo. 1980).

14. The focus on public land law as a body of private law involving rights of private individuals to federal land, minerals and other resources is demonstrated by the early treatises. *E.g.*, M. COPP, PUBLIC LAND LAWS (1875); G. SPAULDING, A TREATISE ON THE PUBLIC LAND SYSTEM OF THE UNITED STATES (1884); J. ZABRISKIE, THE PUBLIC LAND LAWS OF THE UNITED STATES (1870). Although Congress's power under the Property Clause is framed in terms of disposal, *see* note 1, *supra*, the property power has been much more broadly construed in recent years. *See, e.g.*, *Kleppe v. New Mexico*, 426 U.S. 529 (1976).

15. *See* Act of May 18, 1796, ch. 29, 1 Stat. 464 (1796); Act of April 24, 1820, ch. 51, 3 Stat. 566 (1820); Act of August 4, 1854, ch. 244, 10 Stat. 574 (1854); Homestead Act of 1862, ch. 75, 12 Stat. 392 (1862), (repealed 1976 by Pub. L. No. 94-579, 90 Stat. 2744); Desert Land Act of 1877, ch. 107, 19 Stat. 377 (1877); Kinkaid Act of 1904, ch. 1801, 33 Stat. 547 (1904); Enlarged Homestead Act of 1909, ch. 160, 35 Stat. 639 (1909); Stockraising Homestead Act of 1916, ch. 9, 39 Stat. 862 (1916).

16. Mining Act of 1866, ch. 262, 14 Stat. 251 (1866); Placer Act of 1870, ch. 235, 16 Stat. 217 (1870); Mining Law of 1872 (codified as amended at 30 U.S.C. §§ 22-24, 26-28, 29, 30, 33-43, 46-48, 50-52, 71-76 (1976)).

17. *See* GATES, *supra* note 10, at 357. *E.g.*, Act of September 20, 1850, ch. 61, 9 Stat. 466 (1850). *See also* Act of Aug. 4, 1852, ch. 80, § 2, 10 Stat. 28 (1852). Some ninety million acres were given to the railroads, most of which were sold by them to private parties to raise capital. *See* G. COGGINS AND C. WILKINSON, FEDERAL PUBLIC LAND AND RESOURCES LAW 88-89 (1981) [hereinafter COGGINS AND WILKINSON].

18. *E.g.*, Act of April 30, 1802, ch. 40, 2 Stat. 173-175 (1802); Agricultural College Act, ch. 130, 12 Stat. 503 (1862). *See generally*, GATES, *supra* note 10, chs. 12, 13.

A few early withdrawals of lands from availability under the disposal laws were made to preserve some sites for military or Indian reservations and for other public uses.¹⁹ The device of "withdrawing" specific parcels of land from entry eventually was to become an important means of accomplishing federal purposes or policies when disposal laws threatened to sweep with too broad a brush.

As the west was settled and frontiers vanished, much land remained in federal ownership. By the end of the nineteenth century 67 per cent of the original public domain outside Alaska had been transferred to private ownership, but 473,836,402 acres were still owned by the United States.²⁰ Much of it was poor land that could not be used economically for the purposes for which it was available.²¹ Other land had been exploited for its resources and once used was left behind.²² Yet some good land survived. In a few instances land had been overlooked because of its inaccessibility or because the value of its resources was not apparent. Withdrawals and other legal impediments to availability for distribution also had saved valuable land.

Fulfillment of many of the national goals that had inspired the disposal policy and a changing vision of the future role of public lands prompted a policy shift. The conservation movement was born in a wake of reaction against the excesses—lawful and unlawful—of land barons and lesser exploiters of the public lands.²³ "Conservation" has always had diverse adherents, some favoring policies that enable perpetual use of resources, others insisting on preservation of lands in a pristine state. In the late nineteenth century disciples of both philosophies agreed that action was needed to protect the public domain from total dissipation. Lands that once were considered only to be temporarily warehoused for later dis-

19. For example, ch. 22, 3 Stat. 347 (1817) authorized withdrawals of timber land to supply the Navy; the Oregon Enabling Act, ch. 76, 9 Stat. 496, 500 (1850), preserved authority for the President to make necessary withdrawals for military installations and other needful public uses; ch. 148, 4 Stat. 411 (1830) authorized the President to make reservations of western land for Indians. See also note 67, *infra*. Other early statutes authorized withdrawals of town sites, salt springs, mineral deposits, or lighthouses in specified places. See WHEATLEY, STUDY OF WITHDRAWALS AND RESERVATIONS OF PUBLIC DOMAIN LANDS 55 (rev. 1969) [hereinafter WHEATLEY REPORT]. The report, prepared for the Public Land Law Review Commission is the most comprehensive source on withdrawals.

20. The amount of land remaining in the public domain was reported as of June 30, 1904 by the Public Lands Commission in S.Doc.No. 189, 58th Cong., 3d Sess. 13 (1905).

21. For example, homesteads were limited in size to an area that was too small for profitable cultivation or grazing in the arid West. COGGINS AND WILKINSON, *supra* note 17 at 71.

22. For example, huge amounts of timber were harvested from the public lands, particularly in Minnesota, Wisconsin, and Michigan, by loggers who cut the trees and then moved on, successfully resisting regulation. See Huffman, *A History of Forest Policy in the United States*, 8 ENV'T L. 239 (1978) [hereinafter Huffman].

23. See S. DANA & S. FAIRFAX, FOREST AND RANGE POLICY 69-119 (1980). See generally, M. NICHOLSON, THE ENVIRONMENTAL REVOLUTION: A GUIDE FOR THE NEW MASTERS OF THE WORLD 1970; S. UDALL, THE QUIET CRISIS (1963); L. PEPPER, THE CLOSING OF THE PUBLIC DOMAIN (1951).

tribution to the private sector were now perceived as national resources to be protected. A trend developed toward more scientific management of forests with the goal of protecting timber supply and watersheds that were important both for flood prevention and for preserving a supply of water. Management, rather than disposal of resources, became the mission of agencies administering federal lands.

In 1891 Congress passed the General Revision Act.²⁴ The contents of the Act reflect the mix of views about the appropriate use of the public lands which was prevalent on the cusp between the eras of disposal and retention of public lands. On one hand, the 1891 act dealt gently with persons whose depredations upon the public timber lands could have been prosecuted but, on the other hand, it gave the executive authority to reserve forest lands that it had sought for several years.²⁵ Six years later, Congress passed the Forest Service Organic Act authorizing the establishment of an agency to manage forests.²⁶

As concern for conservation grew within the government and among the general public there were occasional flurries of congressional interest in protecting areas that were distinguished for their aesthetic or recreational value. In 1872 a two million acre parcel, which later became known as Yellowstone National Park, was established by Congress "as a public park or pleasuring ground for the benefit and enjoyment of the people. . . ."²⁷ Before the end of the century several other national parks were established.²⁸

The most remarkable development under the nation's new land policy was passage of the Taylor Grazing Act which, as amended, allowed the Secretary of Interior to classify and limit entry upon public lands.²⁹ This is generally considered the cardinal event in closing the public domain.

A series of other congressional acts in the early 20th century further

24. Ch. 561, 26 Stat. 1095 (1891).

25. *Id.* § 24. This section is often referred to as the Forest Reserve Act.

26. Act of June 4, 1897, 30 Stat. 34 (codified as amended at 16 U.S.C. §§ 473-81 (1976)).

27. 16 U.S.C. § 21 (1976). Parcels which had earlier been withheld from disposal to private hands later became portions of national parks. Lands in what would become Hot Springs National Park in Arkansas were set aside for "future disposal" in 1832. Ch. 70, 4 Stat. 505 (1832). Parcels in California were granted to the State of California in 1864 to be held in trust by that state for public use, resort, and recreation. Ch. 184, 13 Stat. 325 (1864). In 1905 the California land was ceded back to the United States and became part of Yosemite National Park. J. Res. 27, 34 Stat. 831 (1906).

28. Mackinac Island, Michigan was set aside as a national park in 1875. Ch. 191, 18 Stat. 517 (1875). It was disestablished in 1895. Ch. 189, 28 Stat. 946 (1895). In 1890 the mountain area surrounding Yosemite Valley in California was "set aside as reserved forest lands," ch. 926, 26 Stat. 478 (1890), and lands which became part of Sequoia National Park in California were set aside as a park. Ch. 1263, 26 Stat. 650 (1890). Some of these lands are now part of Kings Canyon National Park. Mount Rainier in Washington became a park in 1899. 16 U.S.C. § 91 (1976).

29. Act of June 18, 1934, ch. 865, § 7, 48 Stat. 1269, amended, Act of June 26, 1936, ch. 842, title I, § 2, 49 Stat. 1976 (codified at 43 U.S.C. § 315f).

evinced a developing policy of conservation. At times, the executive moved more swiftly and extensively than pleased many members of Congress. But generally the conservation policy which conceded broad managerial authority to the executive enjoyed majority support. Of these developments, the leading historian of public land law has written:

For a country whose policy from the outset had been to pass the public lands into private ownership as speedily as possible, this series of acts to preserve areas of considerable size in public ownership was a remarkable change in attitude. Together with the adoption of the Forest Reservation Act, they mark a turning point in public land policy.³⁰

B. *Withdrawal as a Conservation Tool*

Congress and the executive responded to growing concerns for the protection of the remaining public domain by making massive "withdrawals" of public lands—preventing certain uses on them, and by establishing "reservations"—dedicating lands to particular uses.³¹ The scope and purposes of withdrawals have differed, as have the methods and authority by which they were created.³² Withdrawals and reservations usually are made by a congressional or an executive act that designates specific land and the uses from which it is withdrawn or the purposes for which it is reserved. Withdrawals may be made with or without a reservation.³³ Virtually all of the present public land—about one-third the land area in the United States—has been withdrawn from some uses.³⁴ As such

30. GATES, *supra* note 10, at 567.

31. Congress withdrew Yellowstone National Park in 1872, ch. 24, 17 Stat. 32 (1872); President Roosevelt withdrew 150 million acres as forest reserves under the General Revision Act of 1891 and 66 million acres of coal lands; President Taft withdrew three million acres of petroleum lands in 1909. See notes 23–29 *supra* and accompanying text.

32. Withdrawal of public lands occurs in one of four ways. Congress may make withdrawals by statute (*e.g.*, create a national park). Or it may authorize withdrawals by the executive branch, either at the executive's discretion, but for a specific purpose designated by Congress (*e.g.*, the Antiquities Act, 16 U.S.C. §§ 431–433 (1976)), or for a general public purpose, with both selection and purpose left to executive discretion (*e.g.*, the Pickett Act, ch. 421 §§ 1–3, 36 Stat. 847 (1910) (§§ 1 & 3 repealed 1976; § 2 codified *as amended* at 43 U.S.C. § 142 (1976)). Finally, the executive in the past has made withdrawals pursuant to authority delegated by congressional acquiescence. *E.g.*, *United States v. Midwest Oil Co.*, 236 U.S. 459 (1915). See WHEATLEY REPORT, *supra* note 19, at A4.

33. In a few situations Congress has withdrawn certain resources without specifying the particular lands on which they are located. *E.g.*, Mineral Leasing Act, 30 U.S.C. §§ 181–287 (1976 & Supp. II 1978) (withdrawing all oil, gas, coal and other fuel minerals from operation of the mining laws); 43 U.S.C. § 300 (repealed by Act of Oct. 21, 1976, Pub. L. No. 94-579, § 704(a), 90 Stat. 2744, 2792) (withdrawing lands which contain a spring or waterhole); Exec. Order No. 5327, April 15, 1930 (withdrawing oil shale deposits and lands containing them from disposal under Mineral Leasing Act); Exec. Order No. 5389, July 30, 1930 (withdrawing lands containing hot springs).

34. WHEATLEY REPORT, *supra* note 19, at 1. Shortly after the enactment of the Taylor Grazing Act (43 U.S.C. §§ 315 et seq.; see note 29 and accompanying text), the President withdrew all unreserved public lands in all states from entry for purposes other than mining and mineral

there is no more "pure" public domain, open to unrestricted private appropriation under the panoply of public land laws, yet most public land remains open to the public for more limited purposes, subject to authorization by the executive.

Congress has authorized a number of executive withdrawals. The first major example was the Forest Reserve provision in the General Revision Act.³⁵ It led to massive withdrawals of land as soon as it became law, and by 1909 the Act had been used to set aside more than 194 million acres.³⁶ The efforts of some congressmen to repeal the President's authority to withdraw forest lands were fruitless.³⁷ However, they were successful in revoking presidential authority to proclaim reserves in six states.³⁸ President Theodore Roosevelt signed the law, but not before proclaiming 32 new reserves and extending existing forest reserves in the six states where new reserves would be prohibited.³⁹

In 1906 Congress enacted the Antiquities Act which permitted the President to proclaim national monuments where landmarks, structures, and "other objects of historic or scientific interest" are located.⁴⁰ Subsequently, the executive has been authorized by Congress to withdraw lands for other special purposes such as inclusion in proposed water power projects,⁴¹ fish and game sanctuaries in national forests,⁴² inclusion in grazing districts pursuant to the Taylor Grazing Act,⁴³ and national defense needs.⁴⁴

There is no question that Congress has constitutional authority to make or to authorize withdrawals by legislative act.⁴⁵ But arguments that the executive has some inherent constitutional authority to make withdrawals of public lands are without merit.⁴⁶ Yet it is well-known that federal

leasing. Exec. Order No. 6910, November 26, 1934; Exec. Order No. 6964, February 5, 1935. Lands may be separately withdrawn for more than one purpose. A prior withdrawal is not affected by a subsequent one for a different purpose. *Haley v. Seaton*, 281 F.2d 620 (D.C. Cir. 1960); *William H. Ward*, 51 INTERIOR DEC. 158 (1925); *Utah v. Lichliter*, 50 INTERIOR DEC. 231 (1924).

35. Ch. 561, § 24, 26 Stat. 1095 (1891). See text accompanying notes 24-25, *supra*.

36. GATES, *supra* note 10, at 580. See also Huffman, *supra* note 22.

37. Huffman, *supra* note 22, at 259.

38. Ch. 2907, 34 Stat. 1271 (1907).

39. GATES, *supra* note 10, at 582; Huffman, *supra* note 22, at 269.

40. 16 U.S.C. §§ 431-433 (1976).

41. 16 U.S.C. § 818 (1976) (Federal Power Act).

42. 16 U.S.C. § 694 (1976).

43. 43 U.S.C. § 315 (1976).

44. 43 U.S.C. §§ 155-58 (1976).

45. A coalition of western states led by Nevada and Utah have raised constitutional questions about federal authority to retain ownership and management of large amounts of land within their borders. Their objections are based largely on the 10th Amendment guarantee of state sovereignty and the alleged violation of the equal footing doctrine. See [1979] 10 ENVIR. REP. (BNA) 530. See also note 6, *supra*.

46. The courts have recognized some inherent presidential authority in foreign affairs. This authority is not extensive enough to permit the President to exercise general powers delegated to

officials charged with managing public lands regularly make decisions to allow or deny private uses. To allow uses without some delegation of authority from Congress arguably usurps the authority of the legislative branch under the Property Clause. To deny private uses, on the other hand, preserves congressional prerogatives and flexibility. Conflicts have arisen, however, when private interests have sought to use public lands under some legislatively created program but were denied that use because an administrative official had withdrawn land from availability. Under these circumstances the action may be challenged as in excess of the official's authority. In absence of a statute permitting a withdrawal or some other protective classification of the land, it is argued that a restriction of congressionally authorized uses is invalid. In some instances courts have implied a delegation of authority from the failure of Congress to curtail executive actions; in others authority has been derived from the executive's interpretation of a general withdrawal statute.

Congress by the Constitution, such as disposing of public property. The power is not exclusive in Congress, however, as the President may dispose of property through his constitutional power to make treaties. *Edwards v. Carter*, 445 F.Supp. 1279 (D.D.C. 1978).

While the executive enjoys only limited inherent power over foreign relations, it has still less inherent power in domestic affairs. The modern cases in this area leave virtually no room for a finding of inherent authority. *See United States v. United States District Court*, 407 U.S. 297 (1977) (rejecting inherent executive authority to engage in warrantless electronic surveillance in domestic security cases). *Cf. Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (rejecting executive authority to seize steel mills to avert strikes during wartime as usurpation of Congress's asserted legislative authority in labor matters). *See generally*, L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 181-84 (1978).

Given the sweeping grant to Congress of authority over public property, U.S. CONST. art. IV, § 3, cl. 2; *Kleppe v. New Mexico*, 426 U.S. 529 (1976), inherent executive authority to withdraw public lands cannot be sustained. The issue is discussed in the WHEATLEY REPORT, *supra* note 19, at 131-51. The executive nevertheless has occasionally maintained that it has some "inherent" authority under the Constitution (article 2, sec. 1) to make withdrawals. This has been done in recitations found in orders withdrawing lands, *e.g.*, Exec. Order No. 7373, May 20, 1936; in administrative decisions, *e.g.*, *Denver R. Williams*, 67 INTERIOR DEC. 315 (1960); *P & G Mining Co.*, 67 INTERIOR DEC. 212 (1960); *Noel Leuscher*, 62 INTERIOR DEC. 210 (1955); in litigation, *e.g.*, Brief for Appellant, *United States v. Midwest Oil Co.*, 236 U.S. 459 (1915); Defendant's Memorandum in Opposition to Plaintiff's Motion for Summary Judgment, at 2-3, *Portland General Electric Co. v. Kleppe*, 441 F.Supp. 859 (D. Wyo. 1977); and in congressional hearings, *e.g.*, *Hearings Before a Subcomm. of the S. Comm. on Public Lands and Surveys on the Administration and Use of Public Lands*, 79th Cong., 1st Sess., part 14, 4360, 4366, 4368 (1945).

In *Midwest Oil* the Supreme Court did not reach the government's contention that the President had inherent withdrawal authority, but rested its decision upholding a withdrawal solely on a delegated power implied from the acquiescence of Congress. 236 U.S. at 468-69. Nevertheless the decision has been cited for the proposition that "the power of withdrawal is inherent in the President. . . ." *Shaw v. Work*, 9 F.2d 1014, 1015 (D.C. Cir. 1925). *See also P & G Mining Co.*, 67 INTERIOR DEC. 212 (1960). Administrative decisions relying on *Midwest Oil* were cited as grounds for inherent withdrawal authority in *Portland General Electric Co. v. Kleppe*, 441 F.Supp. 859 (D. Wyo. 1977). This reliance is misplaced. These and other references to "inherent authority" confuse it with impliedly delegated authority. No judicial decision was found: (1) where there was neither an authorizing statute nor a contention of impliedly delegated authority, and (2) in which the court or administrative agency relied entirely upon inherent executive authority.

Challenges to executive withdrawal authority have been frequent in the history of the public domain. The challengers include those who would develop or use the land for purposes fostered by the public land laws but who are precluded by the land's withdrawal. Thus, a mining company or a state interested in economic development may oppose restricting productive use of land by a withdrawal. The few judicial decisions on the executive's withdrawal authority fail to prescribe any limits on its exercise. The courts have been unmoved by private attacks on executive assertions of the public interest. The usual deference to the government in disputes asserting private interests in public lands⁴⁷ has combined with growing notions of federal stewardship of the public domain to persuade courts not to confine executive authority to make withdrawals.

Critics of withdrawal practices cite the importance to the country's well-being of having ready access to the resources contained in the public domain, especially minerals. They argue that "locking up" about two-thirds the public lands from entry under the mining laws seriously hampers the country's ability to cope with pressures for economic development and the demand for energy.⁴⁸ Dependence on foreign nations for energy resources and minerals is exacerbated by limiting access to publicly owned domestic resources.⁴⁹

Congress has responded to concerns about the extent of withdrawals in the past. In a few instances, such as when President Theodore Roosevelt withdrew 150 million acres for forest reserves under delegated authority to reserve timber lands, Congress has returned withdrawn land to the public domain.⁵⁰ On other occasions Congress has acted to exert control over the withdrawal process by defining methods by which certain kinds of withdrawals could be made by the executive and the purposes for which they could be withdrawn.⁵¹

47. See note 274 *infra*.

48. *E.g.*, Bennethum & Lee, *Is Our Account Overdrawn?*, MINING CONGRESS J. 33 (Sept. 1975). The authors cite a U.S. Geological Survey report forecasting "that within the next 25 years the United States shall be 100 percent dependent on imports for 12 essential mineral commodities, more than 75 percent for 15 and more than 50 percent for 26 commodities." *Id.* at 36, 48. That two-thirds of the total land area is closed is doubtful. No accurate figures are available; there are multiple, overlapping withdrawals that distort most calculations. Furthermore, many withdrawn public lands would not be useful for mining in any event.

49. See Peck, "And Then There Were None" *Evolving Federal Restraints on the Availability of Public Lands for Mineral Development*, 25 ROCKY MT. MIN. L. INST. 3-1, 3-12, 3-13 (1979).

50. Ch. 2907, 34 Stat. 1269 (1970). The 150 million acres were withdrawn by more than 250 presidential proclamations between 1902 and 1909. See, *e.g.*, Presidential Proclamations, 32 Stat. 1988-2036, 33 Stat. 2307-88, 34 Stat. 2991-3310, 35 Stat. 2120-250.

51. *E.g.*, General Revision Act, ch. 561, 26 Stat. 1095 (1891) (authorized executive reservation of lands wholly or in part covered by timber); Antiquities Act, 16 U.S.C. § 431 (1976) (authorized withdrawal of lands of historic and scientific value; limited size to the smallest area compatible with management for these values); General Withdrawal Act [Pickett Act], ch. 421, 36 Stat. 847 (1910), §§ 1 & 3 repealed (1976) (granted temporary withdrawal authority to executive but allowed contin-

The executive's use of withdrawals not authorized by statute and its expansive reading of statutes delegating withdrawal authority have often been questioned in litigation. Presidential action setting aside the Tetons and Grand Canyon were attacked in the past.⁵² More recently, withdrawals in Alaska of 56 million acres under the Antiquities Act of 1906 and 105 million acres under the Federal Land Policy and Management Act of 1976⁵³ were challenged as inconsistent with the letter and the purpose of the acts.⁵⁴

The courts generally sustain an implied delegation of authority to withdraw lands based on congressional deference to longstanding administrative practice, thus effectively rewarding the executive's otherwise unjustified perseverance in the practice. Similarly, the executive branch is given wide discretion to interpret its own statutory authority for withdrawals. The common thread is an apparent recognition that the obligation to protect public resources demands that the land management agencies be relatively unfettered in carrying out their duty. It is not practical for Congress, charged by the Constitution with ultimate responsibility for management and disposal of extensive public lands,⁵⁵ to do any more than to set broad policies. Consequently, Congress must entrust the executive with responsibility for implementing those policies. In turn, reviewing courts regularly defer to an administrative official's plausible interpretation of how legislation should be implemented, including the official's view of the scope of his delegated authority.⁵⁶ If an official acts outside the authority granted, of course, the action may be set aside.⁵⁷

Modern policy, expressed in a host of federal laws, favors protection and preservation of publicly owned natural resources. Although some vestiges of the disposal policy of an earlier era remain law, today's goals

uation of hard-rock mineral entry on withdrawn lands): Taylor Grazing Act, 43 U.S.C. § 315 (1976) (authorized withdrawal of all public lands in 12 states pending classification and creation of districts of land chiefly valuable for grazing, which could be used by ranchers who paid a fee and obtained a license); Defense Withdrawal Act, 43 U.S.C. § 155 (1976) (required express act of Congress for defense withdrawals in excess of 5,000 acres); Federal Land Policy and Management Act, 43 U.S.C. § 1701 (1976) (repealed all implied withdrawal authority and numerous existing withdrawal statutes and set up statutory withdrawal scheme: see text at notes 207-235 *infra*).

52. See notes 128-132, 136-141 *infra* and accompanying text.

53. See 8 E.L.R. CURRENT DEVELOPMENTS 10245 (Dec. 1978).

54. *Alaska v. Carter*, 462 F.Supp. 1155 (D. Alaska 1978). See notes 118-123 *infra* and accompanying text.

55. See note 1 *supra*.

56. *E.g.*, *Udall v. Tallman*, 380 U.S. 1, 16-18 (1965), citing *United States v. Midwest Oil*, 236 U.S. 459, 472-473 (1915) for the proposition "that unauthorized acts [of the executive] would not have been allowed [by Congress] to be so often repeated as to crystallize into a regular practice." *Midwest Oil* is discussed in part IC of the text. See also *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945).

57. *Administrative Procedure Act*, 5 U.S.C. § 706(2)(A),(B),(C). *E.g.*, *Wilderness Society v. Morton*, 479 F.2d 842 (D.C. Cir.), *cert. denied*, 411 U.S. 917 (1973).

outweigh the interests expressed in early statutes which were designed to expedite private exploitation and ownership of the public lands. Thus, the once noble schemes for bestowing gifts of public assets on those willing to develop them have become aberrations today when a conflict arises over how to manage a resource. Policies promoting transfers of public lands are subordinated to overriding policies of conservation and intensive management. There have been recent suggestions that Congress's policy should be revised, even to the extent of selling off public lands to pay the national debt, but there have been no indications that Congress is inclined to accept these novel ideas.

C. *The Midwest Oil Case.*

Until 1910 Congress did not deal comprehensively with the authority of the President to make withdrawals. In that year the General Withdrawal Act of 1910 (Pickett Act)⁵⁸ was passed in response to President Taft's request for clarification of his authority to make withdrawals.⁵⁹ He had withdrawn 3,621,062 acres of oil and gas lands in 1909⁶⁰ to prevent an imminent loss of the government's oil and gas resources. Officials had warned that continuing to allow the mining laws to operate unchecked would lead to a complete transfer of all oil lands in California from government control within "a few months."⁶¹ Oil and gas were then becoming essential as fuel for the Navy. Furthermore, intense competition for oil claims, then under the mining laws, was causing unwise and wasteful exploration and development practices, and was sacrificing other possible uses of the public lands.

The withdrawal made by Taft averted the threatened dissipation of public resources but brought a challenge from private interests whose claims to oil lands were affected. Saving language in the Pickett Act

58. Ch. 421, §§ 1-3, 36 Stat. 847 (1910) (§§ 1 & 3 repealed 1976) (§ 2 codified *as amended* at 43 U.S.C. § 142 (1976)).

59. The present statutes, except so far as they dispose of the precious metals and the purely agricultural lands, are not adapted to carry out the modern view of the best disposition of public lands to private ownership, under conditions offering on the one hand sufficient inducement to private capital to take them over for proper development, with restrictive conditions on the other which shall secure to the public that character of control which will prevent a monopoly or misuse of the lands or their products. The power of the Secretary of the Interior to withdraw from the operation of existing statutes tracts of land, the disposition of which under such statutes would be detrimental to the public interest, is not clear or satisfactory.

SPECIAL MESSAGE OF PRESIDENT TAFT TO CONGRESS. CONSERVATION OF NATIONAL RESOURCES. H.R. DOC. NO. 533, 61st Cong., 2d Sess. 4 (1910). The legislative history of the Pickett Act is fully discussed and analyzed in WHEATLEY REPORT, *supra* note 19, at 88-101.

60. Temporary Petroleum Withdrawal No. 5, by order of the Secretary of the Interior, dated September 27, 1909. See Record on Appeal, *United States v. Midwest Oil Co.*, 236 U.S. 459 (1915).

61. *United States v. Midwest Oil Co.*, 236 U.S. 456, 466 (1915).

stated that it should not be "construed as a recognition, abridgment, or enlargement of any asserted rights or claims initiated upon any oil- or gas-bearing lands after any withdrawal of such lands made prior to June 25, 1910."⁶² Thus, Congress left the courts with the task of deciding whether the 1909 withdrawals challenged in *Midwest Oil* were lawful.

In *United States v. Midwest Oil Co.*⁶³ the Supreme Court upheld President Taft's withdrawal. It found that the executive possessed impliedly delegated authority to make withdrawals of public lands. The withdrawal in question had the effect of preventing entry pursuant to the Mining Act—legislation that was intended to distribute the bounties of the public lands for the national benefit by allowing mineral development. The Court declined to accept the government's broad assertion that the Constitution grants the President authority to withdraw public land.⁶⁴ But it sustained the President's withdrawal of land from mineral entry even though it was not based on any statute. The Court emphasized that Congress had apparently recognized the President's power and had acquiesced in its exercise. The Supreme Court relied on a "long continued practice" of making orders like the one in the case which withdrew all the public lands in an area over 3 million acres from the operation of the public land laws.⁶⁵ In support, the Court noted that there were "scores and hundreds" of orders establishing or enlarging Indian reservations, military reservations and oil reserves that had not been based on any statutory authority.⁶⁶

It was true that many withdrawals had been made by the executive without direct statutory authorization, but in most cases they were compatible with an existing policy reflected in statute. The dissent in *Midwest Oil* argued that for each of the examples of apparent exercises of implied authority cited by the majority there existed a statute which directly or indirectly furnished authority for the withdrawal.⁶⁷ By contrast, the 1909

62. 43 U.S.C. § 142 (1976).

63. 236 U.S. at 459.

64. See note 46 *supra*.

65. 236 U.S. 456 (1915).

66. *Id.* at 469-71.

67. *Id.* at 492-504. The dissent's point may be overstated, but it is true that most then existing executive withdrawals could be seen as carrying out some congressionally accepted policy. In many situations the executive's authority was not expressed by Congress but could be based on vague directives. In *Wilcox v. Jackson*, 38 U.S. (13 Pet.) 266 (1839), the executive was held entitled to possession of a military post under a law authorizing the establishment of trading houses with the Indians and the erection of fortifications by the President. The law [Act of June 19, 1834, ch. 54, 4 Stat. 678] left the choice of location to the President's discretion. Other Indian reservations were established by executive order pursuant to a national policy of locating Indians on defined lands. The policy had been generally reflected in treaties and statutes, although particular reservations were not always for tribes covered by specific legislation. The Supreme Court held that the General Allotment Act, Act of Feb. 8, 1887, ch. 119, § 1, 24 Stat. 388, confirmed the validity of executive orders setting aside Indian reservations. In *re Wilson*, 140 U.S. 575 (1891).

withdrawal at issue in *Midwest Oil* was stated to be "in aid of proposed legislation affecting the use and disposition of the petroleum deposits," but it was many years before Congress considered a proposal to deal comprehensively with such matters.⁶⁸ In the meantime, the will of Congress had been established: statutes declared all mineral lands open and available to the public.⁶⁹ While the wisdom of literally giving away the nation's mineral wealth might be questioned, it did comport with a forthright congressional pronouncement of policy in the mining laws and it did accelerate expansion and development as Congress intended. Yet the Court sustained an overriding power to defeat these statutory objectives by implying acquiescence of Congress in several earlier withdrawals of public lands from entry.

II. NON-STATUTORY WITHDRAWALS 1910-1976

Because the withdrawal that was upheld in *Midwest Oil* occurred before enactment of the Pickett Act of 1910, the Supreme Court did not have occasion to decide the question of the Act's impact on the executive's non-statutory withdrawal authority. The Court acknowledged the existence of an extensive executive withdrawal power before the Pickett Act that had been delegated by congressional acquiescence, but said in dicta that after 1910 the Act would "restrict the greater power already possessed."⁷⁰ To the extent Congress has entered the arena, one might infer an intent to limit executive authority. The Act stated that "the President may, at any time in his discretion, temporarily withdraw from settlement, location, sale, or entry any of the public lands . . . and reserve the same for . . . public purposes. . . ."⁷¹ Significantly the Act required withdrawals under its authority to be "open to exploration, discovery, occupation, and purchase under the mining laws. . . ."⁷² That Congress was taking the subject of withdrawals under its control and limiting executive authority seems plain on the face of the statute. And that conclusion is supported by legislative history.⁷³

68. Mineral Leasing Act of 1920, 30 U.S.C. §§ 22, 48, 181-287 (1976).

69. "[A]ny person authorized to enter lands under the mining laws of the United States may enter and obtain patent to lands containing petroleum or other mineral oils, and chiefly valuable therefor, under the provisions of the laws relating to placer mining claims. . . ." Act of February 11, 1897, ch. 216, 29 Stat. 526 (1897).

70. 236 U.S. at 482-83, citing S.REP.NO. 171, 61st Cong., 2d Sess. (1910). The report supports existence of presidential withdrawal authority but, contrary to the Court's suggestion, purports to change the existing authority only by requiring a report of all withdrawals to Congress. Other contemporary sources support the Court's interpretation. See note 73, *infra*. As late as 1924 the Interior Department agreed that the Pickett Act was a limitation on the executive's withdrawal authority. *Utah v. Lichliter*, 50 INTERIOR DEC. 231, 236 (1924).

71. Act of June 25, 1910, ch. 421, § 1, 36 Stat. 847 (1910) (repealed 1976).

72. 43 U.S.C. § 142 (1976).

73. *E.g.*,

"To sum up, in my judgment this bill restricts and limits the power of the President as it is to-day rather than enlarges it as interpreted by the courts. . . ."

The executive was undaunted by the plain meaning of the statute, the thrust of the legislative history and a Supreme Court interpretation. Administrative officials have consistently denied that the Pickett Act was meant to be a full explication of its withdrawal authority. Instead of construing the Act as prohibiting any executive withdrawals except those permitted by its terms—temporary withdrawals of lands that remain open under the mining laws⁷⁴—and those permitted under other statutes, the executive still felt that it possessed all the non-statutory authority it had before the Pickett Act. Whenever the executive felt that it needed to do what the Pickett Act would not allow, it would do so unhindered by the statute, on the assumption that it retained the full panoply of withdrawal authority recognized in *Midwest Oil*, virtually unaffected by the legislation. It is upon this “authority” that the United States has relied to succeed against adverse private claimants.

Between 1910 and 1976 millions of acres were withdrawn from the operation of public land laws, including the mining laws, without statutory authority. Remarkably, the government position upon which these withdrawals rest has not yet been fully tested.⁷⁵ For the Court in *Midwest Oil* to find that congressional acquiescence was tantamount to a delegation of authority to the executive was a long step. Yet that feat was easy compared to the leap that is necessary in order to find that the legislative definition of authority in the Pickett Act imposed no limitations on executive authority in spite of its apparently narrowing language.⁷⁶

A 1941 opinion of the Attorney General substantially supports the executive's surprising position that the Pickett Act was only a Congressional footprint on the beachhead of withdrawal authority, not an artic-

I think it is a good plan, in view of the experiences we have had in recent years, that we put this power in direct and express statutory form rather than the common law of the courts, and limit it, as we propose to do in the bill.

45 CONG. REC. 7475 (1910) (remarks of Sen. Nelson, chairman of Senate Committee on Public Lands). One historian has argued that the legislative history is “inconclusive.” L. PEPPER, *THE CLOSING OF THE PUBLIC DOMAIN* 117 (1951). See notes 81–82 *infra* and accompanying text.

74. *But see* *Portland General Electric Co. v. Andrus*, 441 F. 859 (D. Wyo. 1980) (upholding temporary withdrawal from mineral entry under “implied authority”).

75. See *infra* notes 99–110 and accompanying text.

76. Justice Frankfurter's concurring opinion in a Supreme Court decision rejecting implied executive authority to seize steel mills is apt. In it he stated:

It is one thing to draw an intention of Congress from general language and to say that Congress would have explicitly written what is inferred, where Congress has not addressed itself to a specific situation. It is quite impossible, however, when Congress did specifically address itself to a problem, as Congress did to that of seizure, to find secreted in the interstices of legislation the very grant of power which Congress consciously withheld. To find authority so explicitly withheld is not merely to disregard in a particular instance the clear will of Congress. It is to disrespect the whole legislative process and the constitutional division of authority between President and Congress.

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 609 (1952).

ulation of the limits of executive authority after the Act.⁷⁷ The opinion sustained a withdrawal from the mining laws of lands in Oregon needed for an agricultural research station.⁷⁸ The Attorney General found that the Pickett Act dealt only with the Secretary's temporary withdrawal authority. By considering the withdrawal "permanent," the Attorney General found that the Pickett Act's restriction against closures to metalliferous mining could be avoided. The opinion pointed out that the Act had germinated in circumstances that showed a concern mainly for temporary withdrawals for conservation purposes.⁷⁹ While admitting that earlier versions of the bill which became the Pickett Act were intended to deal with the entire area of presidential withdrawals, the Attorney General concluded that inclusion of the word "temporarily" in the bill that passed showed an intent not to impact the President's impliedly delegated authority to make permanent withdrawals or reservations.⁸⁰

The history of Congress's deliberations on the Pickett Act reveals no unequivocal understanding by the Senate of the impact of its addition of the word "temporarily."⁸¹ At least two perceptions of the effect of the change were expressed,⁸² but there is nothing in the history to indicate

77. 40 Op. Att'y Gen. 73 (1941). By the time of the opinion other withdrawal statutes had been enacted. Taylor Grazing Act, 43 U.S.C. § 315 (1976); Antiquities Act, 16 U.S.C. § 431-433 (1976); General Revision Act, ch. 561, 26 Stat. 1095 (1891).

78. The station was established in connection with the Taylor Grazing Act, 43 U.S.C. § 315-315g, 315h-315m, 315n, 315o-1 (1976). The Act authorized the Secretary of the Interior to withdraw lands "chiefly valuable for grazing and raising forage crops" to be included in grazing districts. *Id.* § 315. But withdrawals under the Act were left subject to the mining laws. *Id.* § 315e. Thus, it was necessary to find some other source of authority for withdrawing the site from operation of the mining laws.

79. 40 Op. Att'y Gen. at 76-78.

80. *Id.* at 78-80.

81. See 45 CONG. REC. 7538-52, 7555, 8169-70, 8671 (1910). The administration's request was that Congress "authorize the Secretary of the Interior temporarily to withdraw lands pending submission to Congress of recommendations as to legislation to meet conditions or emergencies as they arise." Neither S. 5485 as reported out of the Senate Committee on Public Lands nor H.R. 24070 as reported out of the House Committee on Public Lands used the word "temporary." The Senate, without explanation, changed the language of the House bill somewhat, including the addition of "temporarily" to it. 45 CONG. REC. 8670 (1910).

82. House members concluded that the bill's meaning would not be changed at all. 45 CONG. REC. 8667 (1910) (remarks of Rep. Mondell); *id.* at 8671 (remarks of Rep. Smith). Others suggested that it would refer to withdrawals limited in time. *Id.* at 7555 (remarks of Sen. Smoot); *id.* at 8671 (remarks by Sen. Taylor). *Cf. id.* at 7544 (remarks of Sen. Clark in support of an amendment imposing a definite time limit). It is likely that those senators who were clinging to the latter interpretation were feeling disappointment over their unsuccessful attempt to amend the Act to provide for automatic cessation of a withdrawal upon the expiration of the Congress to which the withdrawal was reported. See S.DOC. NO. 610, 61st Cong., 2d Sess. 14 (1910) (the minority report of the committee). See also 45 CONG. REC. 8170 (1910) where it is reported that on a motion to strike out "temporarily," the committee chair, Sen. Smoot, argued:

I do not take it as a limitation on the power of the President, but I do take it that it means that the withdrawals, many of which will be restored to the public domain, are temporary in their nature. Of necessity it should be so, because if the withdrawals were not temporary in their nature, there would be a permanent withdrawal, with no likelihood or thought of the land ever being restored to the public domain.

that the statute did not deal with all of the President's withdrawal authority as it appears to do on its face.⁸³ And "temporary" withdrawals lasting many years have been upheld with no requirement of a fixed expiration date.⁸⁴ Significantly, the Act deals distinctly with two types of authority: first, authority "temporarily [to] withdraw from settlement, location, sale, or entry any of the public lands . . ." and second, authority to "reserve the same for . . . public purposes to be specified in the orders of withdrawals."⁸⁵ It is reasonable to conclude that adding "temporarily" to the first type of authority was to make it clear that the Act applied to more than "permanent" withdrawals, *i.e.*, reservations (withdrawals with a designated public purpose). Presumably the statute might have been read before the amendment as authorizing the President only to "withdraw . . . public lands . . . and reserve the same . . . for public purposes . . ."⁸⁶ As enacted, the statute authorizes temporary withdrawals alone, or temporary withdrawals plus a reservation. The last sentence's reference to "such withdrawals or reservations" reinforces a construction that finds both types of authority to be included in the Act's compass. It is not surprising that the drafters of the Act would attempt to emphasize the extent of the Pickett Act in light of the rather narrow scope of the President's inquiry and the sharp differences over the proper limits of executive authority.⁸⁷

In his 1941 opinion, the Attorney General strained to find authority for withdrawals and reservations outside the Pickett Act so that withdrawn lands might be closed to mining. The colorful story behind the opinion,

83. The President may, at any time in his discretion, temporarily withdraw from settlement, location, sale, or entry any of the public lands of the United States, including Alaska, and reserve the same for waterpower sites, irrigation, classification of lands, or other public purposes to be specified in the orders of withdrawals, and such withdrawals or reservations shall remain in force until revoked by him or by an Act of Congress.

Act of June 25, 1910, ch. 421, § 1, 36 Stat. 847 (1910) (repealed 1976).

84. *E.g.*, *Mecham v. Udall*, 369 F.2d 1 (10th Cir. 1966) (temporary withdrawal of 36 years' duration); *Clinton D. Ray*, 59 INTERIOR DEC. 466 (1947) (withdrawal in aid of legislation lasting 13½ years). See also, WHEATLEY REPORT, *supra* note 19, Appendix F at 51-54.

The authorities agree that the distinction between temporary and permanent withdrawals is not the duration but rather the nature of the withdrawal. Permanent withdrawals are dedicated to a particular use, while temporary withdrawals generally remove public land from most uses. *Lowe, Withdrawals and Similar Matters Affecting Public Lands*, 4 ROCKY MT. MIN. L. INST. 55 (1958). See also *United States v. Midwest Oil Co.*, 236 U.S. 456, 478 (1915); *Utah v. Lichliter*, 50 INTERIOR DEC. 231 (1924); WHEATLEY REPORT, *supra* note 19, at 50-51. The somewhat artificial distinction was removed legislatively with the enactment of an all-inclusive definition for withdrawals in the Federal Land Policy and Management Act of 1976. See note 219 *infra*.

85. Act of June 25, 1910, ch. 421, § 1, 36 Stat. 847 (1910) (repealed 1976).

86. *Id.* (emphasis added).

87. *Compare* S. REP. NO. 171, 61st Cong., 2d Sess. (1910) (Committee on Public Lands majority report stating that the authority expressly given in the bill already existed in the President) with S. DOC. NO. 610, 61st Cong., 2d Sess. (1910) (committee minority report urging strict limitations on presidential withdrawal authority).

which only came to light in 1968 as a result of the Public Land Law Review Commission's hearings,⁸⁸ helps explain how the Attorney General reached his conclusion. Attorney General Robert H. Jackson was under intense pressure from several executive departments, including his own, to uphold nonstatutory withdrawal authority. After nearly a year of machinations the Attorney General adopted and published an opinion supporting the continued existence of an implied delegation of withdrawal authority. This necessitated withdrawing an earlier, unpublished opinion that had reached the opposite conclusion⁸⁹—that the Act did “define and limit the power of the President to make withdrawals . . .” and that “withdrawals now made must be made in accordance with its terms, unless made under some other act or acts of Congress.”⁹⁰

Denial of impliedly delegated authority in the 1941 Attorney General's opinion not only would have prohibited a proposed withdrawal for the Squaw Butte Experimental Station in Oregon, the subject of the opinion, but also would have cast doubt upon the validity of numerous other executive withdrawals and reservations. Initially the Attorney General responded to entreaties that the first opinion be reconsidered by pointing out that the plain language of the Act contradicted the interpretation being urged, and he adhered to the views he voiced in the first opinion.⁹¹ Yet his views changed within two months and the first opinion was revoked.⁹² Shortly after the new opinion was signed, Attorney General Jackson was appointed to the United States Supreme Court.⁹³

Two grounds that received but passing mention in the final Attorney General's opinion were strenuously pressed by those seeking reconsideration. The argument that unrestricted executive withdrawal authority is justified by long-standing administrative construction emerges as the enduring rationale for impliedly delegated withdrawal authority. The other argument, that the practical effect of leaving all lands withdrawn since the Act (for example, military reservations) open to mining would be anomalous, provides some support for the reasonableness of the admin-

88. Copies of exchanges of inter- and intra-departmental correspondence were made available to the Public Land Law Review Commission by Assistant Attorney General Clyde O. Martz to supplement his testimony before the Commission. Copies of the documents are collected in the WHEATLEY REPORT, *supra* note 19, Appendix B.

89. Unpublished opinion of the Attorney General (July 25, 1940) (*reprinted in the WHEATLEY REPORT, supra* note 19, Appendix B at 6).

90. *Id.* at 9.

91. Letter to Harold L. Ickes, Secretary of the Interior, from Robert H. Jackson, Attorney General (April 11, 1941) (*reprinted in WHEATLEY REPORT, supra* note 19, at 35).

92. 40 Op. Att'y Gen. 73 (1941).

93. Eight days after the opinion (June 12, 1941), Jackson was nominated as a Supreme Court Justice by President Roosevelt. He was confirmed by the Senate on July 7, 1941, and took the oath of office on July 11, 1941. There is no evidence to suggest that Jackson's appointment was in any way related to the matter of the withdrawal opinions.

istrative interpretation, not its legality. Deference to administrative construction and conduct was, of course, the basis for the Court's legitimation of pre-Pickett Act withdrawals in *Midwest Oil*.

One might have concluded reasonably that the realm of withdrawal authority had been subjected to plenary congressional control and that any implied authority had been repealed by the Pickett Act, but courts subsequently read the Act so narrowly that it was rendered almost meaningless. After *Midwest Oil* the executive continued to operate on the apparent assumption that whatever it could not do under the express terms of the Pickett Act it could still do under its implied delegation of authority. That assumption may have become a self-fulfilling prophecy. Each withdrawal after the Pickett Act that escaped the Congress's veto became evidence of a continued congressional acquiescence. Although the 1941 Attorney General's opinion cited few examples of congressional acquiescence in the practices it validated,⁹⁴ the failure of Congress to respond to the opinion by denying the survival of implied authority gave the opinion legitimacy. The executive's actions based on the assumption that it had authority expressed in the opinion went unchallenged. The longer without challenge or congressional limitation, the less likely it became that a court would find an absence of authority. Indeed, the few instances of congressional termination of executive withdrawals⁹⁵ might be cited as indications that Congress would check any exercise of authority with which it disagreed.

The tortured interpretation indulged by the 1941 Attorney General's opinion cleverly preserved all the non-statutory "permanent" withdrawals made after the Pickett Act. If lands to be withdrawn did not need to be protected from mining activity or were not otherwise excluded by the Act's terms⁹⁶ the executive proceeded comfortably under the Pickett Act.⁹⁷ When in doubt, residual implied authority, covering the rest of the field,

94. Attorney General Jackson did quote from a previous opinion by his predecessor, Homer Cummings, relating to a proposed reservation of public lands for use as a migratory bird refuge: "Numerous Executive orders entirely similar in principle to the proposed order have been issued over a period of years and there has been no repudiation or disaffirmance of such orders by Congress." 40 Op. Att'y Gen. 73, 83 (1941), quoting from 37 Op. Att'y Gen. 502, 503 (1934). Jackson also cited six executive orders not made under Pickett Act authority, 40 Op. Att'y Gen. at 82, three attorney generals' opinions and two court of appeals cases. *Id.* at 84. All of the later five decisions seem to have been justified as the exercise of some inherent withdrawal authority of the executive—a questionable rationale, see note 46 *supra*—and congressional acquiescence was not expressly relied upon.

95. See, e.g., discussion of *Wyoming v. Franke*, text accompanying notes 135–149 *infra*; 43 U.S.C. § 1616(d)(1) (1976) (repealing Exec. Order No. 4582 which withdrew lands in Alaska under Pickett Act authority).

96. Certain lands that were subject to valid settlements under homestead and other public land laws were excepted from operation of the Pickett Act. 43 U.S.C. § 142 (1976).

97. In such cases the burdens on the executive were minor. Ch. 421, § 1, 36 Stat. 847 (1910) (repealed 1976) required only that the public purpose of a reservation under the Act be specified.

was used. Later, even "temporary" withdrawals from mineral entry were defended as within the executive's impliedly delegated authority.⁹⁸

The first court test of non-statutory executive authority to make withdrawals after the Pickett Act finally came in 1977. The court in *Portland General Electric Co. v. Kleppe*⁹⁹ found ample impliedly delegated executive authority based on 67 years of apparent congressional acquiescence in executive withdrawal authority, unbridled by the many congressional enactments in the area.¹⁰⁰ The case was a modern version of *Midwest Oil*. The Secretary of the Interior had temporarily withdrawn 3 million acres of oil shale lands in Wyoming, Colorado, and Utah from appropriation under the mining laws. Portland General Electric Co. then located 1,740 uranium claims on some of the withdrawn public lands. When the government threatened to bring a trespass action against the company in 1975, discovery work was stopped and the company sued Interior Department officials challenging the withdrawal order. At last, judicial attention could be focused on the argument that the Pickett Act comprehended the executive's withdrawal authority, except as otherwise dealt with by statute. But apparently the issue had arisen too late.

Without analysis, the court in *Portland General Electric* held that the withdrawal power recognized in *Midwest Oil* was not ended by the Pickett Act. The court went on to rule that even if "the Pickett Act did supersede the implied authority of the President to make withdrawals, Congress has, by its acquiescence restored that power."¹⁰¹ In support of this proposition the court cited the 1941 Attorney General's opinion that had interpreted the Act as leaving permanent withdrawal authority unimpaired but as limiting the pre-existing authority for temporary withdrawals. Yet the court's decision upheld a temporary withdrawal, tacitly stating that "the President's power to make temporary withdrawals of lands from mineral entry was not destroyed by this Act."¹⁰²

Recent indications that the understanding of Congress comported with the acquiescence theory were cited in *Portland General Electric*. One example was the legislative history of the Defense Withdrawal Act recognizing the existence of an implied delegation of authority.¹⁰³ Another was language in a section of the Alaska Native Claims Settlement Act referring to the Secretary's "existing" authority.¹⁰⁴

98. See, e.g., *Portland General Electric Co. v. Kleppe*, 441 F.Supp. 859 (D. Wyo. 1977) (upholding temporary withdrawal of oil shale lands from mineral entry; citing 40 Op. Atty. Gen. 73 (1941) as authority).

99. *Portland General Electric Co. v. Kleppe*, 441 F.Supp. 859 (D. Wyo. 1977).

100. *Id.*

101. *Id.* at 862.

102. *Id.* at 861.

103. 43 U.S.C. §§ 155-158 (1976). See notes 106-108, *infra* and accompanying text.

104. 43 U.S.C. § 1616(d)(2)(A) (1976). See note 105 *infra* and accompanying text.

In the Alaska Native Claims Settlement Act Congress directed the Secretary to withdraw some 84 million acres of public lands in Alaska for congressional consideration as national parks, forests, wildlife refuges, and wild and scenic river systems.¹⁰⁵ The Act specified that this should be done by the Secretary of Interior "acting under authority provided for in existing law." The directive to withdraw the lands from "all forms of appropriation under the public land laws, including the mining and mineral leasing laws," indicates that Pickett Act authority would be unavailable. The authority under existing law to which Congress referred could only have been the executive's implied authority.

A more forthright expression of Congress's understanding that it has impliedly granted withdrawal power to the executive by acquiescence is found in the legislative history of the Defense Withdrawal Act.¹⁰⁶ The Senate report on the bill indicates that its purpose is "the recapture by the Congress of those powers which the executive branch of the government has acquired over a long period of years with respect to the withdrawal of the public lands from settlement, entry, location, and sale under the public land laws—an Executive power acquired through acquiescence or silence on the part of Congress."¹⁰⁷ The report recognizes that Congress had "since 1941 remained silent, and has therefore indulged in a practice . . . equivalent to acquiescence and consent that the practice be continued until the power exercised is revoked." Thus, the bill was "specifically aimed at breaking that silence—if silence it be—with respect to the Federal property embraced by its terms."¹⁰⁸ The report confirms that the intent of the Act was to restrict the scope of authority under which the executive had been operating. Without fully admitting "silence," the report rather candidly admits acquiescence.

A further example of congressional acknowledgement that there has been an implied delegation is found in the Federal Land Policy and Management Act (FLPMA).¹⁰⁹ The Act repealed "the implied authority

105. 43 U.S.C. § 1616(d)(2)(A) (1976). In addition, § 1616 (d)(1) withdrew all unreserved public lands in Alaska for 90 days during which the Secretary of Interior was to review them "and determine whether any portion of these lands should be withdrawn under authority provided for in existing law to insure that the public interest in these lands is properly protected." It added that "[a]ny further withdrawal shall require an affirmative act by the Secretary under his existing authority." Other references to secretarial withdrawal authority are found in the Act's legislative history. *E.g.*, the conference committee determined that "all Native interests in subsistence resource lands can and will be protected by the Secretary through the exercise of his existing withdrawal authority." H. REP. NO. 92-746, 92d Cong., 1st Sess. 37 (1971).

106. S. REP. NO. 857, 85th Cong., 1st Sess. (1957); CONF. REP. NO. 1347, 85th Cong., 2d Sess. (1958). *reprinted in* [1958] U.S. CODE CONG. & AD. NEWS 2227, 2238.

107. S. REP. NO. 857, 85th Cong., 1st Sess. 10 (1957). *reprinted in* [1958] U.S. CODE CONG. & AD. NEWS 2227, 2235.

108. *Id.* at 12, *reprinted at* 2238.

109. Pub. L. No. 94-579, 90 Stat. 2744 (codified at 43 U.S.C. § 1701-1782 (1976)).

of the President to make withdrawals and reservations resulting from acquiescence of Congress."¹¹⁰

The Supreme Court's recognition in *Midwest Oil* of a "grant" of authority to the executive based on congressional acquiescence in practices before 1910 would not lead inexorably to the conclusion that there was a "born again" implied delegation of withdrawal authority that authorized withdrawals after the Pickett Act. Yet congressional attempts to take control of withdrawals beginning in 1910 have not deterred the executive from making non-statutory withdrawals. The acquiescence theory is even more plausible than it was at the time of *Midwest Oil* because of the strong policy of retention and management of public lands expressed in many congressional acts and by the accompanying general policy trend favoring conservation of natural resources. The same rationale would favor protective exercises of statutory withdrawal authority.

III. INTERPRETING STATUTORY WITHDRAWAL AUTHORITY: THE EXAMPLE OF THE ANTIQUITIES ACT.

One of the earliest statutes vesting the executive with discretion to make withdrawals was the Antiquities Act authorizing the proclamation of national monuments by the President.¹¹¹ The Act was originally designed to protect objects of historic or scientific interest such as Indian ruins, but it has been interpreted expansively by the executive. It is the most important of the few statutes that survived Congress's wholesale repeal of statutes dealing with executive withdrawal authority in 1976.¹¹²

The Antiquities Act gave the President authority to withdraw lands with no limits on duration, unhindered by any procedural requirements,¹¹³ with no provision for congressional review,¹¹⁴ and with no fixed acreage limitation.¹¹⁵ Attempts to limit executive discretion based on language in the Act that restricts withdrawals to the "smallest area compatible with the proper care and management of the object to be protected"¹¹⁶ and on congressional intent to protect specific sites such as Indian ruins, rather than large land areas,¹¹⁷ have been unsuccessful.

110. *Id.*, § 704(a), 90 Stat. at 2792, quoted in note 208 *infra*. See notes 207-215 *infra*.

111. 16 U.S.C. §§ 431-433 (1976).

112. See notes 209-210 *infra* and accompanying text.

113. Authority under the Antiquities Act is given to the President. 16 U.S.C. § 431 (1976). The President has delegated his withdrawal authority to the Secretary of the Interior. Exec. Order No. 10,355, 17 Fed. Reg. 4831 (1952).

114. Compare this broad discretion with the more detailed provisions and procedures for withdrawal in the FLPMA. See notes 226-241 *infra* and accompanying text.

115. By contrast the Defense Withdrawal Act, 43 U.S.C. §§ 155-158 (1976), permits only withdrawals of up to 5,000 acres for defense purposes without an act of Congress. See note 231, *infra*. See also the FLPMA procedures related to sizes of withdrawals, notes 226-230 *infra* and accompanying text.

116. 16 U.S.C. § 431 (1976). See notes 124-127 *infra* and accompanying text.

117. *Id.* See notes 128-134 *infra* and accompanying text.

Most recently the scope of the executive's discretion under the Antiquities Act was called into question as a result of President Carter's 1978 withdrawal of lands for seventeen national monuments encompassing fifty-six million acres in Alaska.¹¹⁸ The action was motivated by the imminent expiration of extensive withdrawals under the Alaska Native Claims Settlement Act. The lands were being considered for inclusion in units of land to be managed under one of the federal conservation systems.¹¹⁹ Challenges came from private interests¹²⁰ whose development of minerals under Mining Act claims would be thwarted by national monument designation, and from the State of Alaska¹²¹ whose land selections would be limited.¹²² As with every judicial challenge to the exercise of executive discretion under the Act in the past, the court dealing with the Alaska lawsuits upheld creation of the monuments.¹²³

Congress did not have in mind authorizing withdrawals of vast areas for designation as national monuments when it passed the Antiquities

118. In a series of proclamations dated December 1, 1978, President Carter withdrew and reserved the following amounts of Alaska land as national monuments to protect the biological, geological, archaeological and historical value of each area:

- Admiralty Island National Monument: 1,100,000 acres
- Aniakchak National Monument: 350,000 acres
- Becharof National Monument: 1,200,000 acres
- Bering Land Bridge National Monument: 2,590,000 acres
- Cape Krusenstern National Monument: 560,000 acres
- Denali National Monument: 3,890,000 acres
- Gates of the Arctic National Monument: 8,220,000 acres
- Glacier Bay National Monument [Addition]: 550,000 acres
- Katmai National Monument [Addition]: 1,370,000 acres
- Kenai Fjords National Monument: 570,000 acres
- Kobuk Valley National Monument: 1,710,000 acres
- Lake Clark National Monument: 2,500,000 acres
- Misty Fjords National Monument: 2,285,000 acres
- Noatak National Monument: 5,800,000 acres
- Wrangell-St. Elias National Monument: 10,950,000 acres
- Yukon-Charley National Monument: 1,720,000 acres
- Yukon Flats National Monument: 10,600,000 acres

Proc. Nos. 4611-27, 3 C.F.R. §§ 69-102 (1979) See notes 153-157, *infra*.

119. See notes 245-255 *infra* and accompanying text.

120. *Anaconda Copper Co. v. Andrus*, 14 E.R.C. 1853 (D. Alas. 1980).

121. *Alaska v. Carter*, 462 F.Supp. 1155 (D. Alas. 1978). See note 123 *infra*.

122. See notes 249-250 *infra* and accompanying text.

123. *Anaconda Copper Co. v. Andrus*, 14 E.R.C. 1853 (D. Alas. 1980). See authorities cited in notes 129-146 *infra*. If pending or subsequent challenges to President Carter's Antiquities Act withdrawals of Alaska lands by persons who attempted to establish rights (*e.g.*, mining claims) on those lands should succeed, private rights may be sustained even if the land was withdrawn later under the 1980 Alaska National Interest Lands Conservation Act. Act of Dec. 2, 1980, Pub. L. No. 96-487, §§ 201-708, 94 Stat. 2371, 2377-2422. However, if the same lands were validly withdrawn, at the time of private entry under other authority as contemplated by § 17(d)(1) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1616(d)(1) (1976) (see note 105 *supra*), it is likely that private interests would be defeated.

All of President Carter's withdrawals were rescinded and superseded by the 1980 legislation that placed the affected land in a variety of classifications (to be codified at 16 U.S.C. § 3209). This led the parties in *Alaska v. Carter*, 462 F.Supp. 1155 (D. Alas. 1978), involving challenges to the withdrawals, to dismiss the pending action. Stipulation of Dismissal dated Aug. 14, 1981.

Act. The purpose was to set aside minimal areas to protect ruins of archaeological interest in the American Southwest.¹²⁴ The intent of Congress is captured in the statute's reference to "historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest" and in its limitation of withdrawn lands to the minimum size required to care for protected objects.¹²⁵ During the floor discussion of the bill which became the Antiquities Act, some members of Congress were apprehensive about the potential for using the Act to withdraw large land areas. Assurances were given by the floor manager that nothing of the kind was intended.¹²⁶ It appears that congressional understanding was that large, permanent areas would become national parks through congressional action rather than monuments withdrawn under the Antiquities Act.¹²⁷

Whatever Congress thought it was doing in the Antiquities Act, the executive began using, and has since used, the Act's authority to withdraw large land areas for a variety of purposes, far removed from simply protecting Indian relics. President Theodore Roosevelt made more than a dozen withdrawals under the Act in the two years that followed its enactment. Although most were of small areas where ruins or some natural formation was located, some were of huge areas withdrawn for more general preservation purposes. Most notably, Grand Canyon National

124. H. R. REP. NO. 2224, 59th Cong., 1st Sess. 1 (1905) states:

There are scattered throughout the Southwest quite a large number of very interesting ruins. Many of these ruins are upon the public lands, and the most of them are upon lands of but little present value. The bill proposes to create small reservations reserving only so much land as may be absolutely necessary for the preservation of these interesting relics of prehistoric times.

125. 16 U.S.C. § 431 (1976).

126. The following dialogue is illustrative:

Mr. STEPHENS of Texas. Will that take this land off the market, or can they still be settled as part of the public domain?

Mr. LACEY. It will take that portion of the reservation out of the market. It is meant to cover the cave dwellers and cliff dwellers.

Mr. STEPHENS of Texas. How much land will be taken off the market in the Western States by the passage of the bill?

Mr. LACEY. Not very much. The bill provides that it shall be the smallest area necessary [sic] for the care and maintenance of the objects to be preserved.

Mr. STEPHENS of Texas. Would it be anything like the forest-reserve bill, by which seventy or eighty million acres of land in the United States have been tied up?

Mr. LACEY. Certainly not. The object is entirely different. It is to preserve these old objects of special interest and the Indian remains in the pueblos of the Southwest, whilst the other reserves the forests and the water courses.

40 CONG. REC. 7888 (1906). The bill passed in 1906 was nearly identical to a bill passed in 1904 by the Senate (S. 5603) but omitted an amendment that appeared in the earlier bill limiting withdrawals to one section (640 acres) of land in one place. See 30 CONG. REC. 5627 (1904).

127. See H. R. REP. NO. 2224, 59th Cong., 1st Sess. 3, 7-8 (1905). See also S. DOC. NO. 314, 58th Cong., 2d Sess., 9-10 (1904).

Monument was set aside in Arizona because it was "an object of unusual scientific interest, being the greatest eroded canyon within the United States."¹²⁸ The United States later attempted to remove an enterprising mining claimant from a claim on the trailhead to the popular Bright Angel Trail on the south rim of the Grand Canyon where he sought to charge fees for access. When the claimant challenged the legality of the withdrawal, the Supreme Court in *Cameron v. United States*¹²⁹ upheld the designation of Grand Canyon as a national monument. The Court found that the canyon was of scientific interest, a purpose mentioned in the statute. The one paragraph the court devoted to the issue did not deal with the question of congressional intent or the language which seems to limit the land area to be withdrawn,¹³⁰ nor were these matters fully developed in the briefs of the parties.¹³¹ By the time of the *Cameron* decision, at least nine other large national monuments had been set aside under the Act to preserve various geological phenomena, not for protecting ruins as contemplated by Congress.¹³²

The Supreme Court considered another challenge to the President's authority under the Antiquities Act in *Cappaert v. United States*.¹³³ A rancher's pumping of groundwater had the effect of lowering the level of water pooled in a nearby limestone cavern known as Devil's Hole, a part of Death Valley National Monument. The federal government at-

128. Proc. No. 2022, 47 Stat. 2547 (1932).

129. 252 U.S. 450 (1920).

130. *Id.* at 455-56.

131. Appellants argued in their brief that the Grand Canyon National Monument was encompassed within a prior forest reserve and that § 1 of the Antiquities Act protected objects of historic and scientific interest on land already reserved. 16 U.S.C. § 433. Therefore, withdrawal under § 2 of the Act (16 U.S.C. § 431) was unnecessary to insure protection of objects of historic and scientific interest. Appellants also argued that the Grand Canyon was not a landmark, structure, or object of historic or scientific interest but merely an enormous canyon and that the President's attempt to set it apart as an object of unusual scientific interest merely because of its size was improper. Brief for Appellant at 44-48. *Cameron v. United States*, 252 U.S. 450 (1920).

The government responded that appellants' contentions about national monument status were not raised in the Court of Appeals nor by the assignment of error to the Supreme Court, and thus were not properly before the Court. It also argued that, in any event, the proclamation creating the Grand Canyon National Monument stated that the canyon was an object of unusual scientific interest, bringing it within the authority Congress granted to the President. Brief for Appellee at 23-24, *id.*

The question of whether the statute authorized such a large withdrawal was at issue in the case; see *United States v. Cameron*, E. No. 10 (D. Ariz., answer filed March 23, 1917). The Court did not address this question.

132. *E.g.*, Proc. No. 658, 34 Stat. 3236 (Devil's Tower; 1152.91 acres); 36 Stat. 2498 (Mukuntuweap); Proc. No. 1126, 37 Stat. 1681 (Colorado; 13,883 acres); Proc. No. 1166, 37 Stat. 1715 (Devil's Postpile; 800 acres); 34 Stat. 3266 (Petrified Forest; 60,776.02 acres); Proc. No. 1340, 39 Stat. 1792 (Capulin Mountain; 680 acres); Proc. No. 1313, 39 Stat. 1752 (Dinosaur); Proc. No. 1487, 40 Stat. 1855 (Katmai; 1700 square miles); Proc. No. 1547, 41 Stat. 1779 (Scott's Bluff; 2053 acres). Approximately 5 to 15 national monuments were set aside yearly, many of them quite small in size.

133. 426 U.S. 128 (1976).

tempted to curtail the pumping to protect the Devil's Hole Pupfish, a rare species living in the pool. The rancher and the State of Nevada resisted on several grounds, including a contention that the Antiquities Act permitted the President to withdraw lands only to protect archaeological sites. In a paragraph the Court dismissed the argument, pointing out that the pool and the fish for which the monument was set aside were "objects of historic or scientific interest."¹³⁴ Although no reference was made to administrative practice to support the government's interpretation of the Act, it might have been pointed out that by 1976 use of the Antiquities Act for preservation of geological formations had become well established.

The most comprehensive treatment of the scope of executive authority under the Antiquities Act was in a district court case arising in Wyoming.¹³⁵ When John D. Rockefeller, Jr. offered to give the United States over 33,000 acres in the majestic Grand Tetons in Wyoming, it was upon the understanding that the area would be preserved and cared for by the United States as a park.¹³⁶ Historically parks have been created only by an act of Congress.¹³⁷ Consequently efforts to extend Grand Teton National Park to include the Rockefeller lands were begun. Proposals for increasing the park were defeated by strong local resistance to further reduction of a tax base already thinned by a heavy concentration of nontaxable public lands.¹³⁸ The state also objected that its control of fish and game, especially revenue producing management of the elk herd, was frustrated by the presence of large blocks of federal land. President Franklin D. Roosevelt responded to an eighteen-year impasse in Congress by declaring 221,610 acres to be the Jackson Hole National Monument.¹³⁹ Reacting strenuously, Congress attached a provision to Interior Department appropriations bills for several years following the proclamation which prohibited expenditures of the appropriations for administration of Jackson Hole National Monument.¹⁴⁰

134. *Id.* at 141-42. The Presidential Proclamation setting aside the monument recited that its purpose was "for the preservation of the unusual features of scenic, scientific, and educational interest" and mentioned the fact that it was the habitat of "a peculiar race of desert fish . . . which is found nowhere else in the world." Proc. No. 2961, 3 C.F.R. § 147 (1979).

135. *Wyoming v. Franke*, 58 F.Supp. 890 (D. Wyo. 1945).

136. See H.R. REP. NO. 2910, 81st Cong., 2d Sess. 2 (1950).

137. See 16 U.S.C. §§ 21-410gg-5 (1976). The executive has never attempted to create a national park.

138. Less than 5% of the land in Teton County was taxable. H. R. REP. NO. 2910, 81st Cong., 2d Sess. 2 (1950).

139. Proc. No. 2578, 57 Stat. 731 (1943). A large area that had been within the Teton National Forest was also included in the monument.

140. *E.g.*, ch. 219, § 8, 57 Stat. 493 (1943); ch. 298, § 10, 58 Stat. 508 (1944); ch. 262, § 10, 59 Stat. 360 (1945); ch. 529, § 9, 60 Stat. 386 (1946); ch. 337, § 6, 61 Stat. 492 (1947); ch. 754, § 6, 62 Stat. 1149 (1948); and ch. 680, § 110, 63 Stat. 801 (1949).

The State of Wyoming brought suit in federal district court charging that the President had no authority to set aside the Grand Teton lands as a national monument. Wyoming alleged that the area contained no object of historic or scientific interest and that it had not been confined to the smallest area compatible with the proper care and management of a monument. The court upheld the President's creation of Jackson Hole National Monument.¹⁴¹ Although the terse proclamation cast little light on the purposes of the monument,¹⁴² the government was allowed to introduce evidence supportive of the President's action, such as the existence of trails and camps used in connection with early trapping and hunting, glacial formations, mineral deposits, and indigenous plant life.¹⁴³ The court determined that there was enough evidence of historic and scientific value to support a conclusion that the President had not acted beyond his discretion.

The court in *Wyoming v. Franke*¹⁴⁴ recognized that the President's action resulted in hardship and injustice to the state and seemed unpersuaded as to the wisdom of his action.¹⁴⁵ Nevertheless the court concluded that the Antiquities Act had given the President authority to determine what "objects" fall within the ambit of the legislation and to define the area that is compatible with proper care and management of those objects,

[I]f the Congress presumes to delegate its inherent authority to Executive Departments which exercise acquisitive proclivities not actually intended, the burden is on the Congress to pass such remedial legislation as may obviate any injustice brought about as the power and control over and disposition of government lands inherently rests in the Legislative branch.¹⁴⁶

Eventually Congress did restore some of the monument lands to Teton National Forest, placing some in an elk refuge, and merging the rest with Grand Teton National Park.¹⁴⁷ The Act also included provision for federal payments in lieu of taxes and for federal cooperation in the state's fish and game management.¹⁴⁸ As if to note congressional displeasure with Roosevelt's action and to assuage state fears of its repetition, the new legislation prohibited any future use of the Antiquities Act in Wyoming.¹⁴⁹

141. *Wyoming v. Franke*, 58 F.Supp. 890 (D. Wyo. 1945).

142. The proclamation addressed the statutory criteria briefly: "the Jackson Hole country . . . contains historic landmarks and other objects of historic and scientific interest. . . ." Proc. No. 2578, 57 Stat. 731 (1943).

143. *Wyoming v. Franke*, 58 F.Supp. 890, 895 (D. Wyo. 1945).

144. *Id.*

145. *Id.* at 896-897.

146. *Id.* at 896.

147. Act of September 14, 1950, ch. 950, §§ 1-3, 64 Stat. 849 (1950).

148. *Id.* §§ 5-6.

149. *Id.* § 1.

Congressional correction remains the most potent check on excesses under the Antiquities Act. Short of a clear abuse of discretion, it appears that the courts will not be lured into disputes that demand neat interpretations of the Act. *Cameron's* early, almost contemporaneous conclusion that a behemoth geologic feature (Grand Canyon) could qualify as a "monument" under the Act's language set the stage for an unrestrained application of the Act by the executive. The *Cameron* court might have insisted on reading the Act to be limited to small land areas required for protection of archaeological objects. The decision instead concentrated on other issues, perhaps reflecting the relative importance attached to them by litigants.¹⁵⁰ Deference to the administrative officials charged with applying the statute is generally appropriate. But in *Cameron* the statute was so new, its language sufficiently ambiguous, and administrative interpretations far enough from the clear intent of Congress that such easy deference was unjustified. Nevertheless the *Cameron* decision seemed to license a liberal use of the Antiquities Act to withdraw large blocks of public land in the name of preserving "objects of historic or scientific interest." Of course it is difficult to imagine lands that would not feed some historic or scientific interest.¹⁵¹

The Antiquities Act has had a profound impact in Alaska. There is a long history of setting aside large national monuments there in areas needing special protection.¹⁵² President Carter's 1978 action setting aside millions of acres in Alaska as national monuments¹⁵³ was in response to Congress's failure to take action to protect national interest lands in Alaska which, absent executive action, would have opened them to disposal and development.¹⁵⁴ Carter noted that the lands "contain resources of unequalled scientific, historic, and cultural value, and include some of the most spectacular scenery and wildlife in the world."¹⁵⁵ The purpose of

150. See note 131 *supra*.

151. In *Wyoming v. Franke*, 58 F.Supp. 890, 895 (D. Wyo. 1945), the court had suggested that: if a monument were to be created on a bare stretch of sage-brush prairie in regard to which there was no substantial evidence that it contained objects of historic or scientific interest, the action in attempting to establish it by proclamation as a monument, would undoubtedly be outside the scope and purpose of the Monument Act.

152. E.g., Katmai National Monument, established by Proc. No. 1487, 40 Stat. 1855 (1918) (1700 square miles), enlarged by Proc. No. 1950, 47 Stat. 2453 (1931), Proc. No. 2564, 56 Stat. 1972 (1946), Proc. No. 8890, 83 Stat. 926 (1969), and Proc. No. 4619, 3 C.F.R. § 86 (1979); Glacier Bay National Monument, established by Proc. No. 1733, 43 Stat. 1988 (1925) (1820 square miles), enlarged by Proc. No. 2330, 53 Stat. 2534 (1939) (904,960 acres), modified by Proc. No. 3889, 69 Stat., ch. 27 (1955), and Proc. No. 4618, 3 C.F.R. § 84 (1979).

153. See note 118 *supra*.

154. See discussion of Alaska national interest lands withdrawals at notes 246-255 *infra*. The Alaska National Interest Lands Conservation Act was passed in 1980. It dealt with protection and administration of the lands set aside as monuments by President Carter. Act of Dec. 2, 1980, Pub. L. No. 96-487, 94 Stat. 2371 (1980).

155. 14 WEEKLY COMP OF PRES. DOC. 2111 (Dec. 4, 1978).

the withdrawals was to preserve fragile land areas intact for future legislation that would establish national parks, wildlife refuges, and wilderness areas. Yet the correctness of the actions must be judged not by the purity of their motives but by their conformity with statute. While the proclamations and the President's statements accompanying them included much general language that more appropriately describes parks, wildlife refuges, and other land management systems,¹⁵⁶ there are plenty of references to extraordinary features that qualify for the historic and scientific rubrics of the Act.¹⁵⁷

Like the criterion in the Antiquities Act that requires areas proclaimed as monuments to include "objects of historic or scientific interest," the restriction on reserving lands in the monument "to the smallest area compatible with the proper care and management of the objects to be protected" calls for an exercise of executive discretion. In Alaska immense land areas had to be withdrawn in part because of the extent of the "objects" being protected. As the President stated, among the areas to be protected:

156. *E.g.*,

there are hereby set apart and reserved as the Admiralty Island National Monument all lands, including submerged lands, and waters owned or controlled by the United States within the boundaries of the area described . . . The area reserved consists of approximately 1,100,000 acres, and is the smallest area compatible with the proper care and management of the objects to be protected.

Proc. No. 4611, 3 C.F.R. § 69 (1979);

The Secretary of the Interior shall promulgate such regulations as are appropriate, including regulation of the opportunity to engage in a subsistence life-style by local residents. The Secretary may close the national monument, or any portion thereof, to subsistence uses of a particular fish, wildlife or plant population if necessary for reasons of public safety, administration, or to ensure the natural stability or continued viability of such population.

Proc. No. 4612, 3 C.F.R. § 72 (1979). In addition, each of the Alaskan national monument withdrawals contain this provision:

All lands, including submerged lands, and all waters within the boundaries of this monument are hereby appropriated and withdrawn from entry, location, selection, sale or other disposition under the public lands laws, other than exchange.

Proc. Nos. 4611-27, 3 C.F.R. §§ 69-103 (1979).

157. *E.g.*, Proc. No. 4611, 3 C.F.R. 69 (1979) states that Admiralty Island is "outstanding for its superlative combination of scientific and historic objects," listing archaeological sites, cultural history, and an ecology that includes a large population of nesting bald eagles, brown bears, and an unspoiled coastal island ecosystem. Proc. No. 4612, 3 C.F.R. § 72 (1979), states that the Aniakchak National Monument is valuable for its unique volcanic features, including one of the world's largest calderas with a unique lake, examples of geological sequences and biological succession of plant and animal species, and a unique, largely self-contained climate. Interacting with the caldera system is a unique subsistence culture of local residents. Proc. No. 4617, 3 C.F.R. § 82 (1979) describes Gates of the Arctic National Monument as both the site of "human habitation for approximately 7,000 years," and as an area that affords an excellent opportunity to study undisturbed communities of animals and plants. Proc. No. 4627, 3 C.F.R. § 102 (1979) depicts Yukon Flats National Monument as the largest Alaskan solar basin and as one of the continent's most productive habitats for wildlife due to the pristine ecology of its lush wetlands.

A similar variety of qualities is cited in the other 1978 Alaska withdrawals.

are the Nation's largest pristine river valley, the place where man may first have come into the New World, a glacier as large as the State of Rhode Island, and the largest group of peaks over 15,000 feet in North America.¹⁵⁸

So long as the historic or scientific nature of the area can be justified, a decision to include a reasonable amount of surrounding territory would seem to be within the scope of executive discretion that is shielded from judicial disturbance. Indeed, once the executive determines that the Grand Canyon or the Malaspina Glacier is worthy of protection, a decision to include less than all of it within a national monument might be questioned as an abuse of discretion.

The continued practice of making huge withdrawals under the Antiquities Act, like the executive's use of implied authority, has become its own greatest vindication. By arrogation, authority to go well beyond the Antiquities Act's original intent has become vested in the executive. Congress has been aware of the executive's unfettered use of the Act. In a few instances Congress's disapproval has resulted in a reversal of executive action.¹⁵⁹ Although a sharp congressional response to the creation of Jackson Hole National Monument led to the curtailment of the executive's authority in Wyoming under the Act,¹⁶⁰ the statute has not otherwise been modified by Congress.¹⁶¹ Indeed, when Congress enacted FLPMA in 1976 it left the Antiquities Act intact while repealing almost all other sources of executive withdrawal authority.¹⁶² This leads to a conclusion, as in *Midwest Oil*, that Congress has impliedly approved, and thereby effectively granted, the broad authority under the Act that the executive has regularly exercised. Just as an implication of nonstatutory withdrawal authority was built on undisturbed executive practice, a history of expansive interpretation of authority under the Antiquities Act has legitimated a broad construction.

158. 14 WEEKLY COMP. OF PRES. DOC. 2111, 2112 (Dec. 4, 1978).

159. *E.g.*, Jackson Hole National Monument was legislatively abolished and the lands merged into other systems. See notes 147-149 *supra* and accompanying text. Grand Canyon National Monument was included in a National Park by an act of Congress. Act of Jan. 3, 1975, § 3, 88 Stat. 2090, Pub. L. No. 93-620 (codified at 16 U.S.C. § 228b (1976)).

160. See note 149 *supra*.

161. In reaction to the Alaska withdrawals under the Antiquities Act Congress curtailed executive withdrawal authority in that state by limiting withdrawals of more than 5000 acres to 1 year's duration unless Congress approves by a joint resolution. Alaska National Interest Lands Conservation Act, Act of Dec. 2, 1980, Pub. L. No. 96-487, § 132b, 94 Stat. 2488 (to be codified at 16 U.S.C. § 3213).

162. See notes 208-210 *infra*. It has been argued that the Antiquities Act is out of keeping with the purposes of FLPMA and should be repealed. Comment, *Public Land Withdrawal Policy and the Antiquities Act*, 56 WASH. L. REV. 439 (1981).

IV. WITHDRAWALS IN AN ERA OF PUBLIC LAND STEWARDSHIP

A. *Modern Land Policy*

A rather abrupt shift of public land policy accompanied the closing of the frontier around the turn of the century. As discussed above,¹⁶³ the focus on disposal of public lands to achieve national goals—expansion, economic development, settlement of the continent—was changed as manifest destiny was accomplished. Certain lands were to be preserved to protect resources that might be needed by the nation—oil and gas, other minerals, timber, water, wilderness and recreational areas. Instead of wholesale repeals of the earlier laws allowing unrestrained private exploitation of the public domain, antidotal laws were enacted to salvage lands and resources that might be needed. A near crisis had prodded the Taft administration to withdraw millions of acres of oil lands from appropriation under the public land laws. This in turn moved Congress to enact the Pickett Act to facilitate future withdrawals, although the Court's contemporary decision in *Midwest Oil* indicated that the President had the necessary authority to make the withdrawal in that case without a statute. In the same period Congress acted to protect other resources by defining authority for administrative officials to make withdrawals and to take other protective actions.¹⁶⁴

It became clear early in the twentieth century that the public lands were to be used and developed in a manner that ultimately would satisfy long range national purposes. As the federal government's role changed from a temporary guardian of lands and resources for eventual disposal, to a trustee holding and managing property for the best interests of the citizenry, it became necessary to provide authority and direction to the officials who were in charge of the lands. Legislation supplied the framework for administering public lands professionally and responsibly in apparent recognition of the long term interests of the country in protecting and utilizing particular resources. Public land management policy evolved into a system of classification and management for particular uses. Management commands were included in the Forest Service Organic Act of 1897 that set up the Forest Service to manage the national forests.¹⁶⁵ But the most sweeping advance toward a system of federal land use planning was enactment of the Taylor Grazing Act in 1934.¹⁶⁶ This led to the

163. See notes 7–30 *supra*, and accompanying text.

164. See notes 31–44 *supra*, and accompanying text.

165. Act of June 4, 1897, 30 Stat. 34 (codified as amended at 16 U.S.C. §§ 473–481).

166. Act of June 18, 1934, ch. 865, 48 Stat. 1269 (codified as amended at 16 U.S.C. §§ 315–315e).

withdrawal of all public lands for classification.¹⁶⁷ No uses, except mining and mineral leasing, were allowed without the permission of the Bureau of Land Management. Although budgets and skills were so limited that the agency's authority to plan for and control land use could not be exercised fully, significant depredations that were rampant in the past could be prevented.

The modern trend in public land management is reflected in a host of statutes requiring intensive management of federal resources by government officials. The statutes include mandates to protect certain land from resource development. The earliest example is found in the mandate of the National Park Organic Act of 1916.¹⁶⁸ Officials were directed to manage the national parks "to conserve the scenery and the natural and historic objects and the wildlife therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations."¹⁶⁹ Wilderness areas,¹⁷⁰ and to some extent national monuments,¹⁷¹ are classified and managed not to promote any conventional "use" but rather to preserve them in a pristine state. This is done in the interests of science and history. It also satisfies national psychological needs to commune with past and future generations and pursues important aesthetic and emotional values.¹⁷² Thus Congress has now made care of non-development resources such as recreation, wildlife, and wilderness an objective of public land management.¹⁷³

Perhaps the general policy of demanding care and protection of federal lands is best illustrated not by statutes dealing with lands specifically

167. A few months after the Act became law the President withdrew from "settlement, location, sale or entry" all public lands in 12 western states. Exec. Order No. 6910, November 26, 1934. This covered more than the 80 million acres of lands chiefly valuable for grazing that the statute authorized to be included in grazing districts. Furthermore, the President also acted to withdraw all public lands not otherwise reserved or withdrawn. Exec. Order No. 6964, February 5, 1935. These executive orders may have been prudent, in that they prevented a land rush for the remaining public lands. But even if the actions were legally authorized, the classification authority of the Secretary was in doubt as to lands not covered by the 1934 Act. To remedy the situation Congress amended the Act to grant the Secretary discretionary authority "to examine and classify any lands withdrawn or reserved" under the two executive orders. Act of June 26, 1936, ch. 842, Title I, § 2, 49 Stat. 1976. This amendment provided the authority for the secretary to determine what uses were proper on the previously "wide open" public domain. See *Utah v. Andrus*, 446 U.S. 500 (1980).

168. 16 U.S.C. § 1.

169. *Id.*

170. *E.g.*, the Wilderness Act of 1964 defines a federal land area characterized as "wilderness" as "an area of undeveloped Federal land retaining its primeval character and influence, without permanent improvements or human habitation, which is protected and managed so as to preserve its natural conditions. . . ." 16 U.S.C. § 1131(c).

171. See notes 111-117 *supra* and accompanying text.

172. See *Wilderness Symposium*, 16 IDAHO L. REV. 379-535 (1980); M. McCloskey, *The Wilderness Act of 1964—Its Background and Meaning*, 45 ORE. L. REV. 288 (1966).

173. See Wilkinson, *Public Land Law: Some Connecting Threads and Future Directions*, 1 PUB. LAND L. REV. 1, 36 (1980).

targeted for preservation but by those which govern use of lands that are to remain available for resource development. The national forests and the lands administered by the Bureau of Land Management comprise most of the public lands¹⁷⁴ and continue to be available for grazing, timber harvesting, and mineral exploration and development as well as for wildlife habitat and recreation. Yet today administration of lands for these purposes is controlled by statutes¹⁷⁵ and is markedly different from management during the period of disposal of the public lands. The most comprehensive statutes are the Federal Land Policy and Management Act¹⁷⁶ and the National Forest Management Act.¹⁷⁷

Public land managers are now required by statutes to consider all of the "multiple uses" to which an area might be adapted,¹⁷⁸ to impose fees for uses permitted to private parties, to engage in land use planning,¹⁷⁹ and to involve the public in decisionmaking.¹⁸⁰ These mandates evidence a congressional purpose to impose guidelines and limits on federal agencies in order to prevent unwise use or dissipation of public resources. Without necessarily removing federal lands from availability for private uses, Congress has required prudence in management, the kind of prudence that is exercised by a manager who must consider the public resources not merely as commodities to be expended for today's needs but as assets to be retained indefinitely and used for the benefit of future, as well as of present, generations.

In addition to statutes dealing with general management of the public lands, Congress has, through the National Environmental Policy Act (NEPA),¹⁸¹ superimposed upon the statutory mission of every federal

174. In 1970 BLM and Forest Service land included over 85% of all public lands. PLLRC REPORT, *supra* note 7, Appendix F at 327-328. Since the enactment of the Alaska National Interest Lands Conservation Act, Act of Dec. 2, 1980, Pub. L. No. 96-487, 94 Stat. 2371, much land formerly managed by BLM will be under the management of other agencies.

175. See 16 U.S.C. §§ 528-531, 1600, 1601, 1602, 1604; 43 U.S.C. §§ 1701, 1712, 1713, 1714.

176. Act of October 21, 1976, Pub. L. No. 94-579, 90 Stat. 2743 (codified at 43 U.S.C. §§ 1701-1782 and scattered sections of Titles 7, 10, 16, 22, 25, 30, 40, 48 and 49 U.S.C.). See section IV B *infra*.

177. Act of October 22, 1976, Pub. L. No. 94-588, 90 Stat. 2949 (codified at 16 U.S.C. §§ 1600-1610 and scattered sections of Title 16 U.S.C.).

178. 16 U.S.C. §§ 528, 529, 531(a), 1600(3), 1601(d), 1604(e)(1), 1607; 43 U.S.C. §§ 1701(a)(7), 1712(c)(1), 1732(a). See Whaley, *Multiple Use Decision Making—Where Do We Go From Here?* 10 NAT. RES. J. 557 (1970); Strand, *Statutory Authority Governing Management of the National Forest System—Time for a Change?* 7 NAT. RES. J. 479 (1974); Dunsky, *Improved Policymaking for the Multiple Use of Public Lands*, 5 U. MICH. J. L. REF. 485 (1972); Comment, *Managing the Federal Lands: Replacing the Multiple Use System*, 82 YALE L. J. 787 (1973).

179. 16 U.S.C. § 1604(d), (f), (g), (i); 43 U.S.C. § 1712. See also Forest and Rangelands Renewable Resources Planning Act of 1974, which requires long range planning and research programs for the management, use and protection of Forest Service lands. 16 U.S.C. § 1601, amending Pub. L. No. 93-378, 88 Stat. 476.

180. 16 U.S.C. §§ 1600(3), 1601(c), 1604(d), 1612, 1643(c); 43 U.S.C. § 1712(f). See note 200 *infra*.

181. 42 U.S.C. §§ 4331-4361.

agency an obligation to assess the environmental impacts of any "proposals for . . . major Federal actions significantly affecting the quality of the human environment."¹⁸² The stated purpose of the Act is "to create and maintain conditions under which man and nature can exist in productive harmony and fulfill the social, economic, and other requirements of present and future generations of Americans."¹⁸³ Enforceable obligations under NEPA seem to be limited to those concerning the preparation of environmental impact statements consistent with the Act's standards.¹⁸⁴ The prerequisite of an impact statement may be avoided only if it would pose a clear and unavoidable conflict with other statutory obligations¹⁸⁵ or if the agency involved exercises no discretion in the matter.¹⁸⁶ Consequently land management agencies have adopted appropriate regulations¹⁸⁷ and regularly must prepare environmental impact statements.¹⁸⁸

182. *Id.* at §4332(2)(c). It has been held that NEPA "makes environmental protection part of the mandate of every federal agency and department." Calvert Cliffs Coordinating Committee, Inc. v. Atomic Energy Commission, 419 F.2d 1109 (D.C. Cir. 1971). *Accord*, Natural Resources Defense Council v. Morton, 388 F.Supp. 829 (D.D.C. 1974) (NEPA supplements Secretary of Interior's powers under Taylor Grazing Act). *See also* 42 U.S.C. §§ 4333 (all agencies required to bring their regulations, policies and procedures into conformity with NEPA's purposes), and § 4334 (NEPA's policies and goals are to supplement existing authorizations of federal agencies).

Among NEPA's other requirements, agencies must: use "a systematic, interdisciplinary approach . . . in planning and in decisionmaking;" "identify and develop methods and procedures . . . which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;" "study, develop, and describe appropriate alternatives to recommended courses of action in any proposal that involves unresolved conflicts concerning alternative uses of available resources;" and "initiate and utilize ecological information in the planning and development of resource-oriented projects." 42 U.S.C. § 4332(2)(A), (B), (E), and (H) (1976).

183. 42 U.S.C. § 4331(a) (1976).

184. *See* Stryckers Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 223 (1980).

185. *E.g.*, Flint Ridge Dev. Co. v. Scenic Rivers Ass'n, 426 U.S. 776 (1976) (statutory time limit for federal action too short to allow for EIS preparation); Texas Comm. on Natural Resources v. Bergland, 573 F.2d 201 (5th Cir.), *cert. denied*, 439 U.S. 966 (1978) (legislative history of National Forest Management Act set forth standards for clear-cutting in national forests during period while permanent regulations were being developed).

186. Natural Resources Defense Council, Inc. v. Berklund, 609 F.2d 553 (D.C. Cir., 1979) (preference right coal lease must be granted to holder of prospecting permit if statutory requirements met; it cannot depend on preparation of EIS); South Dakota v. Andrus, 462 F.Supp. 905 (D. S.D. 1978), *affirmed*, 614 F.2d 1190 (1980) (no EIS required for patent to mining claim because issuance is nondiscretionary).

187. 7 C.F.R. § 3100 (Department of Agriculture), 18 C.F.R. § 707 (Water Resources Council), 43 C.F.R. § 3040 (Bureau of Land Management). *See* 40 C.F.R. part 1500 (regulations applying generally to NEPA compliance).

188. Natural Resources Defense Council, Inc. v. Berklund, 609 F.2d 553 (D.C. Cir., 1979) (Mineral Lands Leasing Act); Ventura County v. Gulf Oil Corporation, 601 F.2d 1080 (9th Cir. 1979) (Mineral Lands Leasing Act); Natural Resources Defense Council, Inc. v. Hughes, 437 F.Supp. 981 (D. D.C. 1977) (federal coal leasing program). *But see* Kleppe v. Sierra Club, 427 U.S. 390 (1976) (agency has discretion to determine when a "proposal" exists); Friends of the Earth v. Butz, 406 F.Supp. 742 (D. Mont. 1975) (agency's determination of whether EIS is required is necessarily governed by rule of reason).

B. The Federal Land Policy and Management Act.

The conservation trend—insistence upon sound management of public lands and selective preservation—grew throughout the first three quarters of the 20th century. Public land laws were exhaustively reviewed by the Public Land Law Review Commission and the commission's conclusions were reported in 1970.¹⁸⁹ The report contained 137 principal recommendations and hundreds of other, lesser recommendations. Much commentary, discussion, and criticism followed issuance of the report,¹⁹⁰ but Congress took no action to implement the recommendations for five years. Finally, with the enactment of the Federal Land Policy and Management Act (FLPMA)¹⁹¹ many of the recommendations in the report, or variations upon them, were adopted.¹⁹²

A dominant theme in the Public Land Law Review Commission's report was the assertion of the public's interest in public resources. Although the 19th century motif of distributing public lands to private individuals and encouraging their private development had become largely outmoded, the vast majority of lands owned by the public were being managed with little direction from Congress. Congress expressly repudiated the old policy, declaring it to be federal policy that "the public lands be retained in Federal ownership" unless it is found through the FLPMA land planning procedures that disposal of certain parcels "will serve the national interest."¹⁹³

Before the FLPMA was enacted, the Bureau of Land Management (BLM), steward of about 60% of the public domain, was confined to antiquated management systems by limited budgets and lack of congress-

189. PLLRC REPORT, *supra* note 7.

190. See *Symposium Presenting an Analysis of the Public Land Law Review Commission Report*, 6 LAND & WATER L. REV. 1-457 (1970); 54 DEN. L. J. 383-664 (1977); Hagerstein, *One Third of the Nation's Land—Evolution of a Policy Recommendation*, 12 NAT. RESOURCES J. 56 (1972); Hillhouse, *Public Land Law Review Commission Report: Ice-Breaking in Reserved Waters*, 4 NAT. RESOURCES L. 368 (1971); Muys, *Environmental Recommendations of the Public Land Law Review Commission and Their Implementation*, 5 NAT. RESOURCES L. 271 (1972).

191. Act of October 21, 1976, Pub. L. No. 94-579, 90 Stat. 2743 (codified at 43 U.S.C. §§ 1701-1782 and scattered sections of Titles 7, 10, 16, 22, 25, 30, 40, 48 and 49 U.S.C.).

192. See Carver, *Federal Land Policy and Management Act of 1976: Fruition or Frustration*, 54 DEN. L. J. 387 (1977); Muys, *The Public Land Law Review Commission Impact on the Federal Land Policy and Management Act of 1976*, 21 ARIZ. L. REV. 301 (1979). Muys (at 307) points out that many commission recommendations not addressed by FLPMA were addressed in other legislation around the same time. *E.g.*, Public Rangelands Improvement Act, Act of October 25, 1978, Pub. L. No. 95-514, 92 Stat. 1803; Outer Continental Shelf Lands Act Amendments, Act of September 18, 1978, Pub. L. No. 95-372, 92 Stat. 629; National Forest Management Act, Act of October 22, 1976, Pub. L. No. 94-588, 90 Stat. 2949; Act of October 20, 1976, Pub. L. No. 94-565, 90 Stat. 2662 (codified at 31 U.S.C. §§ 1601-1607) (providing for federal payments in lieu of local taxes); Federal Coal Leasing Amendments Act of 1975, Act of August 4, 1976, Pub. L. No. 94-377, 90 Stat. 1083.

193. 43 U.S.C. § 1701(a)(1).

sional direction. Other land management agencies had the benefit of somewhat better resources and guidelines.¹⁹⁴ Until the enactment of the FLPMA, BLM had no organic act and had to grope through a maze of congressional enactments, resolving contradictions and filling gaps in its agency mission by divining the congressional will as expressed through the most recent legislation.

The FLPMA attempted to bring federal land management into the 20th century by insisting upon greater responsibility and managerial regularity. Better land use planning and management were sought by providing for inventories and for comprehensive land use plans.¹⁹⁵ Congress directed the use of criteria¹⁹⁶ that show an overriding concern for better protection of federal resources.¹⁹⁷ Procedures were set out for acquisitions, sales, and exchanges of public lands.¹⁹⁸ Detailed provisions specified how the Bureau of Land Management is to be administered,¹⁹⁹ and public participation was built into many of the bureau's activities.²⁰⁰ The Act affirmed a national interest in maintaining a supply of domestic resources and stated that the public lands should be managed consistently with that goal,²⁰¹ and with the goals of the Mining and Minerals Policy Act of 1970.²⁰² But there were scant practical directives in the Act to carry out

194. *E.g.*, Forest Service, Act of June 4, 1897, ch. 2, 30 Stat. 34-36 (codified at 16 U.S.C. §§ 473-482, 551 (1976)); Bureau of Reclamation, Act of June 17, 1902, ch. 1093, 32 Stat. 388 (codified at 43 U.S.C. §§ 391, 411, 1457); National Park Service, Act of August 25, 1916, ch. 408, 39 Stat. 535 (codified at 16 U.S.C. §§ 1-3, 22, 43); Fish and Wildlife Service, Act of August 8, 1956, ch. 1036, 70 Stat. 1119 (codified at 16 U.S.C. § 742(a)).

195. 43 U.S.C. §§ 1711, 1712 (1976).

196. 43 U.S.C. § 1712(c) (1976).

197. *E.g.*, 43 U.S.C. § 1712(c)(3) provides that the Secretary shall "give priority to the designation and protection of areas of critical environmental concern," and § 1712(c)(6) requires him to "consider the relative scarcity of the values involved and the availability of alternative means (including recycling) and sites for realization of those values."

198. 43 U.S.C. § 1715 (acquisitions), § 1713 (sales), and § 1716 (exchanges).

199. 43 U.S.C. §§ 1731-1748 (1976).

200. *E.g.*, 43 U.S.C. §§ 1712(f), 1714(h) (1976). Involvement of the public in hearings, debates, reports, etc. was heralded by commentators as the most effective means of furthering the public interest. *E.g.*, Reich, *The Public and the Nation's Forests*, 50 CALIF. L. REV. 381, 403-406 (1962). Greater public participation in public land management was urged in the report of the Public Land Law Review Commission. See PLLRC REPORT, *supra* note 7, at 256. See generally, Achterman and Fairfax, *The Public Participation Requirements of the Federal Land Policy and Management Act*, 21 ARIZ. L. REV. 501 (1979).

201. 43 U.S.C. § 1701(a)(12). Another section of the Act states that "except as provided in [specified sections] and in the last sentence of this paragraph, no provision of this section or any other section of this Act shall in any way amend the Mining Law of 1872 or impair the rights of any locators of claims under that Act. . . ." 43 U.S.C. § 1732(b). The exceptions seem to have a potential for swallowing much of the saving language. This is especially true of the "last sentence" referred to, which reads: "In managing the public lands the Secretary shall, by regulation or otherwise, take any action necessary to prevent unnecessary or undue degradation of the lands." *Id.*

202. 30 U.S.C. § 21a. The Act declares it to be in the national interest to foster private enterprise in developing an "economically sound and stable" mining industry, in mining research, in development of domestic minerals, and in disposal and reclamation of mineral waste.

these purposes; the dominant theme was prudent, conservative management.²⁰³ Indeed, in a number of respects practices under the 1872 General Mining Law²⁰⁴ were restricted or modified,²⁰⁵ and the Act included among its most extensive and specific provisions measures for the preservation of environmental values which often conflict with resource development.²⁰⁶ It is in this context that the Act's provisions concerning executive withdrawals must be considered.

Taking a cue from the Public Land Law Review Commission's report,²⁰⁷ Congress sought to deal with some of the mysteries of executive withdrawal authority. With extraordinary precision, Congress expressly repealed the President's implied delegation of authority, specifically citing *Midwest Oil* in the statute,²⁰⁸ and repealed 29 statutory provisions for executive withdrawal authority.²⁰⁹ Consequently only a few statutes granting executive withdrawal authority remained intact.²¹⁰

As discussed above, *Midwest Oil* did not decide the validity of post-Pickett Act withdrawals. The FLPMA preserves all withdrawals "in effect" at the time of its enactment but does not purport to validate or cure defects in attempted withdrawals that suffered from a legal defect.²¹¹ It

203. One court has said that the Secretary's rulemaking authority contained in the Act is extensive enough to authorize any regulations upon the use of the public lands so long as they are "reasonably related to the broad concerns for the management of public lands set forth in FLPMA." *Topaz Beryllium Co. v. United States*, 649 F.2d 775, 779 (10th Cir. 1981).

204. See note 16 *supra*.

205. 43 U.S.C. §§ 1732(b), 1744, 1781(f), 1782. See note 201 *supra*.

206. *E.g.*, 43 U.S.C. §§ 1701(a)(8), 1702(c), 1712(c)(2), 1712(c)(3), 1712(c)(6), 1712(c)(8), 1732.

207. PLLRC REPORT, *supra* note 7 at 54-57. The Commission's Recommendation 8 stated: Large scale limited or single use withdrawals of a permanent or indefinite term should be accomplished only by act of Congress. All other withdrawal authority should be expressly delegated with statutory guidelines to insure proper justification for proposed withdrawals, provide for public participation in their consideration, and establish criteria for Executive action.

At 54.

208. Effective on and after the date of approval of this Act, the implied authority of the President to make withdrawals and reservations resulting from acquiescence of the Congress (*U.S. v. Midwest Oil Co.*, 236 U.S. 459) and the following statutes and parts of statutes are repealed. . . .

Pub. L. No. 94-579, § 704(a), 90 Stat. 2744, 2792 (1976).

209. *Id.*

210. *I.e.*, the Antiquities Act, 16 U.S.C. §§ 431 *et seq.*; the Fish and Game Sanctuaries Act, 16 U.S.C. § 694; the Taylor Grazing Act, 43 U.S.C. §§ 315 *et seq.*; the Defense Withdrawal Act, 43 U.S.C. §§ 155 *et seq.*; and the Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1610(a)(3), 1615(d)(1), 1616(d) (the authority of each, with the possible exception of § 1616(d)(1), has expired. See 43 U.S.C. § 1621(h)).

211. 43 U.S.C. § 1701(c) states:

All withdrawals, reservations, classifications, and designations in effect as of the date of approval of this Act shall remain in full force and effect until modified under the provisions of this Act or other applicable law.

If an invalid withdrawal is discovered, the land can be withdrawn anew under the FLPMA procedures.

does require a substantial number of withdrawals to be reviewed by the Secretary and either revoked or continued.²¹²

Most of the millions of acres that have been withdrawn are subject to the law as it existed before October 21, 1976, the FLPMA effective date. Therefore future challenges to withdrawals made after the Pickett Act and before the enactment of FLPMA may be expected.²¹³ While challengers may argue that the Pickett Act itself extinguished the authority found in *Midwest Oil*, the fact that Congress saw fit to repeal the President's "implied authority" under *Midwest Oil* suggests that the authority had not been extinguished by the Pickett Act. There would have been no reason for the repealer unless Congress assumed that implied authority survived the Pickett Act; *Midwest Oil* had dealt with the issue only in a pre-Pickett Act context. Even if the Pickett Act extinguished the Presi-

See notes 226-235 *infra* and accompanying text. But this would not be effective to defeat established rights, e.g., claims perfected under the mining law. Exercises of secretarial authority under the Act are to be "subject to valid existing rights." Act of Oct. 21, 1976, Pub. L. No. 94-579, § 701(h) (reprinted in note following 43 U.S.C. § 1701). Although "claims" are something less than "rights," *Stockley v. United States*, 200 U.S. 532, 544 (1923) (dictum), it has been held that dedication of public land to uses inconsistent with a mining claim can result in government liability for damages. *United States v. North American Transp. v. Trading Co.*, 253 U.S. 330 (1920).

212. The Act directs the Secretary of the Interior to review within fifteen years existing withdrawals from mining or mineral leasing of Bureau of Land Management and Forest Service lands, and all withdrawals of certain lands administered by other agencies, in the eleven Western states. 43 U.S.C. § 1714(g)(1). The Secretary then is to report to the President recommendations concerning continuation of the withdrawals. The President in turn reports his recommendations to Congress. The Secretary then can terminate any withdrawals that were not made by Congress unless Congress objects by a concurrent resolution within 90 days. 43 U.S.C. § 1714(i)(2).

As of the end of fiscal year 1981, 233 withdrawals covering about 20.4 million acres had been revoked. Most of the lands had been closed to mineral leasing, mining location or both. U.S. Department of the Interior, Bureau of Land Management, Division of Land Resources and Realty, Withdrawal Review Year End Report, October 16, 1981. Some withdrawals not required to be reviewed by § 204(l) of FLPMA (43 U.S.C. § 1714 (l)) were revoked. Apparently none of the revocations were made according to the prescribed procedures for referral of the Secretary's recommendations for continuation or termination of withdrawals. The office of the Solicitor for the Department of the Interior has taken the position that FLPMA in § 204(a) provides the Secretary with independent revocation authority. See Memorandum from Associate Solicitor, Energy and Resources to Assistant Secretary, Land and Water Resources, Oct. 30, 1980. Section 204(a) states that "[T]he Secretary is authorized to make, modify, extend or revoke withdrawals but only in accordance with the provisions and limitations of this section." The memorandum points out that the provision of § 204(l) had its origin in a section of a predecessor bill separate from § 204(a). Furthermore, § 204(l) says that "the Secretary may act to terminate withdrawals other than those made by Act of Congress in accordance with the recommendations of the President . . ." (emphasis added). The Associate Solicitor's memorandum attaches great significance to the difference in terminology. Having treated the authority in §§ 204(a) and 204(l) distinctly, the memorandum argues that a withdrawal reviewed under § 204(l) can be revoked under either section. The argument is plausible with respect to withdrawals that were outside the required review process of § 204(l) (even if they are, in fact, reviewed), but for those that are within the purview of § 204(l) the most reasonable construction is that § 204(a) authority to revoke is not available. By its terms § 204(a) authority is restricted by "the provisions and limitations of this section [204]."

213. *Portland General Electric Co. v. Kleppe*, 441 F.Supp. 859 (D. Wyo. 1977) is the only such challenge brought so far. It was unsuccessful. See notes 99-104 *supra* and accompanying text.

dent's earlier implied delegation of authority, it could be argued that Congress has since acquiesced in post-Pickett Act withdrawals, giving rise to a new grant of authority. It might be urged that this authority was not extinguished by the repealer. The argument is not untenable, but it seems inconsistent with Congress's apparent intent. The most plausible interpretation of the repealer, supported by the legislative history,²¹⁴ is that it extinguished all implied authority that existed in 1976 and that the citation to *Midwest Oil* was not intended to limit it to pre-Pickett Act authority. By the time FLPMA was passed, many assumed that the Pickett Act did not limit executive withdrawal authority.²¹⁵ In any event, in the FLPMA Congress may simply have been rejecting all impliedly delegated withdrawal authority and used the citation to *Midwest Oil* to illustrate rather than to limit the type of authority being repealed.²¹⁶

Having repealed most of the authority of the executive to make withdrawals, the Federal Land Policy and Management Act vested the executive with broad new withdrawal authority, subject to certain procedural requirements.²¹⁷ The authority was delegated not to the President, but directly to the Secretary of Interior.²¹⁸ The purposes for withdrawals were articulated for the first time in a new, functional definition,²¹⁹ and statutory procedures were engaged for a wide range of administrative actions that fall within the definition of a "withdrawal" and which are not undertaken in the exercise of independent authority to control the public lands.²²⁰

214. See, e.g., H. R. REP. NO. 94-1163, 94th Cong., 2d Sess. 9 (1976), reprinted in [1976] U.S. CODE CONG. & AD. NEWS 6175, 6183 (indicating the Act would, "with certain exceptions . . . repeal all existing law relating to executive authority to create, modify, and terminate withdrawals and reservations"). Charles L. Wheatley, Jr., the leading authority on public land withdrawals, reaches the conclusion "that FLPMA bars all claims of implied authority in the Executive as far as Congress is concerned." Wheatley, *Withdrawals Under the Federal Land Policy Management Act of 1976*, 21 ARIZ. L. REV. 311, 319 (1979).

215. E.g., 40 Op. Att'y Gen. 73 (1941) discussed at notes 77-98 *supra*.

216. Arguments that there is some non-statutory authority for withdrawals outside the FLPMA may be raised again. Should the executive embark on a program of non-FLPMA withdrawals that is not checked by Congress, the *Midwest Oil* rationale could be regenerated.

217. 43 U.S.C. §§ 1714(a)-1714(f) (1976). Final regulations implementing the provisions have been published. 46 Fed. Reg. 22,585 (1981) (to be codified in 43 C.F.R. §§ 2200, 2300, 2920).

218. Presidential authority had long been delegated to and exercised by the Secretary of the Interior. Exec. Order No. 10,355, 17 Fed. Reg. 4831 (1952); Exec. Order No. 9337, 8 Fed. Reg. 5516 (1943); Exec. Order No. 9146, 7 Fed. Reg. 3067 (1942).

219. 43 U.S.C. § 1702(j) defines "withdrawal" as:

withholding an area of Federal land from settlement, sale, location, or entry, under some or all of the general land laws, for the purpose of limiting activities under those laws in order to maintain other public values in the area or reserving the area for a particular public purpose or program; or transferring jurisdiction over an area of Federal land, other than "property" governed by the Federal Property and Administrative Services Act, as amended from one department, bureau or agency to another department, bureau or agency.

220. The Secretary often may choose from several sources of authority in deciding to restrict activities on the public land. See notes 261-267 *infra* and accompanying text.

Few substantive restrictions were imposed. For instance, there was no restriction on removing lands from entry under the mining laws as in the Pickett Act. Indeed, the Secretary was expressly granted all of the authority that the executive possessed under its formerly implied delegation of authority. But Congress prescribed procedures and considerations to regulate the exercise of the Secretary's authority.²²¹ This was intended to regularize administrative practice that had in the past been used to effect withdrawals which were "not always in the best interest of all the people."²²²

The FLPMA withdrawal procedures were expected to achieve better "balance" between "public concern over the possibility of excessive disposals of public lands on the one hand and excessive restrictions on the other."²²³ First, the Secretary was directed to take certain factors into account and follow specified procedures in effecting a withdrawal.²²⁴ Second, the Secretary was required to report withdrawals to the Congress which may then reverse his decisions by following a simplified procedure.²²⁵

The applicable procedures under FLPMA depend on the amount of land withdrawn and the urgency of the need for protective action. Small

221. The administrative practices and regulations that applied to withdrawals before enactment of the FLPMA were found at 43 C.F.R. part 2351. They are described in Strauss, *Rules, Adjudications, and Other Sources of Law in an Executive Department: Reflections on the Interior Department's Administration of the Mining Law*, 74 COLUM. L. REV. 1231, 1249-53 (1974) and Moran, *Withdrawals and the Mineral Landman*, 16 ROCKY MT. MIN. L. INST. 757, 773-83 (1971).

222. H. R. REP. NO. 1163, 94th Cong., 2d Sess. 1 (1976), reprinted in [1976] U.S. CODE CONG. & AD. NEWS 6175.

223. *Id.* at 3, reprinted in [1976] U.S. CODE CONG. & AD. NEWS 6177.

224. See notes 226-235 *infra* and accompanying text. The Secretary may segregate land from the operation of any or all of the public land laws for up to two years while it is being considered for withdrawal. Segregation may be made by publishing a notice in the Federal Register indicating that a withdrawal is being considered. 43 U.S.C. § 1714(b)(1).

The procedures for making withdrawals prior to FLPMA were similar but far less detailed. See 43 C.F.R. part 2351 (1980). The regulations for withdrawals under FLPMA are found at 43 C.F.R. part 2300 (1981).

225. 43 U.S.C. § 1714(c)(1). The procedure for congressional veto is designed to avoid roadblocks that can normally inhibit or prevent legislation. Congress has only 90 days to act, and after 30 days a motion may be made to discharge a resolution from a committee that has not acted on it. It is then in order to move to introduce the resolution on the floor. Floor debate is limited to one hour, and the motion may not be amended.

The language of the provision is fraught with interpretive problems. For instance, § 1714(c)(1) states that the withdrawal will be ineffective "if the Congress has adopted a concurrent resolution stating that *such House* does not approve the withdrawal" (emphasis added). This inconsistency within the section is probably owing to haste in preparing the final version of the bill. The device of a veto by concurrent resolution was adopted by the Conference Committee in lieu of the House bill's provision for veto by either house of Congress. Another internal inconsistency arises from the section's reference to "the Presidential recommendation" while the power to make recommendations was given expressly to the Secretary of Interior. This probably arises from the fact that the entire section with regard to expediting the consideration of a resolution by Congress was added by the Conference Committee's adoption of the language of what is now § 1714(l) (providing for expedited

withdrawals—those aggregating less than 5,000 acres—may be set aside without restriction so long as they are for a “resource use.”²²⁶ Withdrawals for proprietary purposes, such as sites for administrative buildings or facilities, may be made for up to twenty years.²²⁷ Small withdrawals may also be made to preserve the lands for a use being considered by Congress,

congressional review of presidential recommendations with regard to existing withdrawals; see note 212 *supra*.

Congressional vetoes have been employed increasingly in recent legislation. Their propriety can be questioned as a violation of the separation of powers doctrine in that it may allow usurpation of the constitutional allocation of decisionmaking authority. *E.g.*, Schwartz, *The Legislative Veto and the Constitution—A Reexamination*, 46 GEO. WASH. L. REV. 351 (1978); McGowan, *Congress, Court and Control of Delegated Power*, 77 COLUM. L. REV. 1119 (1977); Bruff and Gellhorn, *Congressional Control of Administrative Regulation: A Study of Legislative Vetoes*, 90 HARV. L. REV. 1369 (1977).

Specific objections to the legislative veto include: 1. It may deprive the executive of its constitutional power faithfully to execute the laws provided for in art. II, section 3; 2. It may deprive the executive of the ability to consider and approve or veto legislation provided for in Art. I, section 7; 3. It may deprive the judiciary of the authority to determine cases and controversies provided by Art. III, section 2 which, as implemented by Congress, allows review of agency decisions (*e.g.*, Administrative Procedure Act, 5 U.S.C. §§ 701–706); 4. If only one house can override a particular action, the principle of bicameralism expressed in Art. I, section 1 may be offended. See *Chadha v. Immigration and Naturalization Service*, 634 F.2d 408 (9th Cir. 1980), *prob. juris noted*, 50 U.S.L.W. 3244 (Oct. 6, 1981) (holding unconstitutional 8 U.S.C. § 1254(c)(2) which allows a one house resolution to disapprove an agency suspension of a deportation order) and *Consumer Energy Council of America v. Federal Energy Regulatory Comm'n*, No. 80-2184 (D.C. Cir. Jan. 29, 1982) (holding unconstitutional § 202(c) of the Natural Gas Policy Act, 15 U.S.C. § 3342(c) which provides for one house veto resolution of rules for incremental pricing in natural gas deregulation).

Whether a court upholds or rejects specific legislative veto provisions may depend upon the extent to which the legislative branch has attempted to involve itself in enforcement or interpretation of laws, as opposed to its constitutional function of making laws. Thus, a delegated legislative function may be susceptible to a greater degree of retained authority to manipulate agency decisions than a function that is essentially judicial or administrative. As discussed earlier, authority to withdraw public lands is rooted in Congress's power under the Property Clause, Art. IV, section 3, clause 2. In the past, the power has been impliedly delegated to the executive, but the FLPMA dealt specifically with the terms on which such authority would be delegated and exercised in the future. Assuming the Courts of Appeals' decisions in *Chadha* and *Consumer Energy Council supra*, are upheld, the device in 43 U.S.C. § 1714(c)(1) for congressional disapproval of executive withdrawals by concurrent resolution nevertheless may be constitutional. Congress may have broader authority to oversee the exercise of legislative power it has delegated to the executive than it has to oversee executive enforcement of the laws made by Congress. Thus, decisions to withdraw public lands, encompassed within the authority of the Property Clause, are more appropriately reserved for legislative oversight than are decisions involving individual deportations that have been made in the course of administering the Immigration and Naturalization Act (enacted under Congress's power “To establish an uniform Rule of Naturalization” in Art. I, section 8, cl. 4). Decisions setting particular rate structures under the Natural Gas Policy Act (enacted under the commerce power, Art. I, section 8, cl. 3) present a closer question in that they may establish a nationally applicable legislative policy, a function less likely to offend separation of powers principles. See also note 243 *infra*, discussing 43 U.S.C. § 1714(e), a provision of the FLPMA under which the Secretary of the Interior is directed to withdraw lands upon a determination of emergency by a committee of either house.

226. 43 U.S.C. § 1714(d)(1) (1976). Given the coverage of other subsections of § 1714(d), “resource uses” must refer to those uses listed in § 1702(c), namely “recreation, range, timber, minerals, watershed, wildlife and fish, and natural scenic, scientific and historical values.”

227. 43 U.S.C. § 1714(d)(2) (1976).

but they are limited to five years duration.²²⁸ As with larger withdrawals, the FLPMA requires that public hearings be held prior to a small withdrawal order.²²⁹

Withdrawals of significant size—those 5,000 acres and larger—may be made for up to 20 years for any purpose.²³⁰ Whenever acting under this provision the Secretary must notify both houses of Congress that a withdrawal is being made and furnish extensive information to the relevant committee of each house. The required information includes the essential facts concerning the withdrawal,²³¹ environmental and economic factors,²³² consideration of impacts on other existing and potential uses,²³³ intergovernmental effects,²³⁴ and opportunities for public participation.²³⁵

The Acts' requirement of a thorough assessment of the matters listed in Section 204(a)(2) of the FLPMA is reminiscent of the requirement in NEPA that an environmental impact statement accompany proposals of a federal agency that would have a significant effect on the human environment.²³⁶ Presumably, an agency forced to identify and consider certain factors will not ignore them in formulating a decision. Yet, as under NEPA, the agency need not reach a particular decision flowing from the information it considers.²³⁷ And, as with NEPA decisionmaking, the lack

228. 43 U.S.C. § 1714(d)(3) (1976).

229. 43 U.S.C. § 1714(h) (1976).

230. 43 USE § 1714 (c)(1) (1976). Five thousand acres was the limit of executive withdrawal authority under the Defense Withdrawal Act, 43 U.S.C. § 156 (1976). The legislative history of that Act indicates that this size was selected because "[t]estimony of witnesses for the Department of the Interior made it clear that the great majority of individual applications for any one project or facility in fact involve lands of less than 5,000 acres, . . . and the Department of Defense in its report does not object to this section of the act." S. REP. NO. 857, 85th Cong., 2d Sess. 69 (1957), reprinted in [1958] U.S. CODE CONG. & AD. NEWS 2227, 2240.

231. 43 U.S.C. § 1714(c)(2)(1), (9), (12) (1976).

232. 43 U.S.C. § 1714(c)(2)(2) (1976).

233. 43 U.S.C. § 1714(c)(2)(3)-(6) (1976).

234. 43 U.S.C. § 1714(c)(2), (7), (8) (1976).

235. 43 U.S.C. § 1714(c)(2), (10), (11) (1976).

236. 42 U.S.C. § 4332(2)(c) (1976). See notes 181-188 *supra* and accompanying text. Satisfying this provision does not render compliance with NEPA's requirement of an environmental impact statement (EIS) unnecessary. A withdrawal constituting a major federal action that will have a significant effect on the environment must still be accompanied by an EIS. *But cf. Alaska v. Carter*, 462 F.Supp. 1155 (D. Alas. 1978) (NEPA's requirements may be avoided to the extent that time constraints of an emergency withdrawal would prevent full compliance.) See also Forest and Range Land Renewable Resources Planning Act, 16 U.S.C. §§ 1600-1676 (1976). (Secretary of Agriculture to consider physical, biological, economic and other factors in developing resource management plans for the National Forests).

There is a potential for duplication among FLPMA's informational requirements for withdrawals, NEPA's EIS requirement, and requisites of the Renewable Resources Planning Act. Duplication may be minimized by combined reporting, which seems to be contemplated in the Council on Environmental Quality regulations under NEPA, 40 C.F.R. §§ 1500.2(c), 1500.4(k), 1502.25 (1981).

237. Under NEPA, an agency must show that it had information on the relevant factors listed in § 102(2)(c) (42 U.S.C. § 4332(2)(c) (1976)), but if the record shows that the factors were *considered*, the courts will not overturn an agency's decision. *E.g.*, in *Calvert Cliffs Coordinating Comm., Inc.*

of substantive direction in the statute makes unlikely any judicial reversal of an agency decision that may seem unwise in light of the information produced.²³⁸ So long as the procedural requirements in the FLPMA are followed²³⁹ and the information furnished to Congress is adequate, it is predictable that a court would refuse to set aside the action.²⁴⁰ Only if the withdrawal decision is so unreasonable as to be arbitrary and capricious is a judicial challenge likely to succeed.²⁴¹

The procedures and limitations for significant withdrawals may be avoided regardless of the size of a proposed withdrawal in an "emergency." Any time the Secretary of Interior determines that "extraordinary measures must be taken to preserve values that would otherwise be lost,"

v. United States Atomic Energy Comm'n, 449 F.2d 1109, 1112 (D.C. Cir. 1971), the court said:

Thus the general substantive policy of the Act . . . leaves room for a responsible exercise of discretion and may not require particular substantive results in particular problematic instances. However, the Act also contains very important 'procedural' provisions—provisions which are designed to see that all federal agencies do in fact exercise the substantive discretion given them.

In *Strycker's Bay Neighborhood Council v. Karlen*, 444 U.S. 223, 227–28 (1980), the Court said "the only role for a court is to insure that the agency has considered the environmental consequences; it cannot 'interject itself within the area of discretion of the executive as to the choice of the action to be taken.'" citing *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n. 21 (1976).

238. See *Strycker's Bay Neighborhood Council v. Karlen*, 444 U.S. 223 (1980). There the Court reversed a court of appeals' finding that environmental factors should be given determinative weight, holding that NEPA imposes duties that are essentially procedural. Cf. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 546 (1978), in which the Court stated that "if courts continually review agency proceedings to determine whether the agency employed procedures which were, in the court's opinion, perfectly tailored to reach what the court perceives to be the 'best' or 'correct' result, judicial review would be totally unpredictable." The Court then observed that "the only procedural requirements imposed by NEPA are those stated in the plain language of the Act." *Id.* at 548.

239. Cf. *Mountains States Legal Foundation v. Andrus*, 499 F.Supp. 383 (D. Wyo. 1980) (prohibition against mineral leasing of lands subject to wilderness classification study was tantamount to "withdrawal" and thus invalid unless FLPMA procedures followed); see discussion in note 267 *infra*.

240. It may be argued that the requirement of furnishing information to Congress in 43 U.S.C. § 1714(d)(2) is for the benefit of Congress alone, not the public and therefore standing should be denied to a member of the public challenging the adequacy of the information. But informed public participation is a value that pervades the Act. See Achterman and Fairfax, *The Public Participation Requirements of the Federal Land Policy and Management Act*, 21 ARIZ. L. REV. 501 (1979). Therefore litigants may have a sufficient stake in the process to be within the zone of interests protected by the Act. See *Atchison, Topeka, and Santa Fe R.R. v. Callaway*, 431 F.Supp. 722, 727 (D.D.C. 1977) (private parties have standing to challenge impact statement prepared under NEPA for a legislative proposal because purpose was not only to inform Congress but also to inform the public and foster meaningful public participation).

241. The Administrative Procedure Act, 5 U.S.C. §§ 701–706 (1976), provides for judicial review of agency action unless such review is prohibited by statute or committed to agency discretion by law (§ 701). The scope of review is described in § 706, which allows the reviewing court, among other things, to set aside agency actions that are arbitrary, capricious, an abuse of discretion, or not in accordance with law, 5 U.S.C. § 706(2)(A). These standards are discussed in *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971). See also *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 549–555 (1978).

a withdrawal is to be made immediately.²⁴² The chairman of the relevant committee of the House or Senate also can trigger mandatory emergency withdrawals by notifying the Secretary that an appropriate situation exists.²⁴³ Emergency withdrawals may last a maximum of three years and may not be renewed except by following the procedures for withdrawals under other provisions of the FLPMA. The full informational report required when significant withdrawals are made must follow the making of emergency withdrawals within 90 days.²⁴⁴

The Federal Land Policy and Management Act's emergency withdrawal authority was used to set aside over 100 million acres in Alaska in 1978.²⁴⁵ Congress had anticipated legislation to create several parks, forests, wildlife refuges and wild and scenic rivers, largely out of lands that it had directed the Secretary of Interior to withdraw under section 17(d)(2) of the 1971 Alaska Native Claims Settlement Act (ANCSA).²⁴⁶ To the extent

242. 43 U.S.C. § 1714(e). Notice is to be given to the Committee on Interior and Insular Affairs of the House of Representatives and the Committee on Energy and Natural Resources of the Senate. The Senate Committee on Interior and Insular Affairs (named in the Act) was replaced by the Committee on Energy and Natural Resources effective February 11, 1977.

243. This procedure could be subject to some of the same objections that are made to the congressional veto device employed by the FLPMA in the case of executive withdrawals. See note 225, *supra*. It substitutes a hybrid decisionmaking procedure for those processes established in the Constitution, potentially disrupting the system of institutional decisionmaking and the checks and balances intended by the framers. But delegation of authority to a congressional committee to prompt emergency withdrawals by an executive official might be sustained on the ground that it is necessary in aid of legislation that may be proposed or subject to investigation. It is well established that Congress may exercise powers normally exercised by other branches when ancillary to its legislative functions. *E.g.*, *McGrain v. Daugherty*, 273 U.S. 135 (1927) (power to investigate and to subpoena witnesses). *Cf. Pacific Legal Foundation v. Watt*, 16 E.R.C. 1825 (D. Mont. 1981). In that case the court held that a FLPMA withdrawal under 43 U.S.C. § 1714(e) could be validly forced by a resolution finding an emergency situation passed by the House Committee on Interior and Insular Affairs but that the committee had no power under the statute to prescribe the scope and duration of the withdrawal. Because the disposition set aside the specific order of withdrawal as being based on an invalid direction of the House Committee, it did not reach the constitutional question, but it stated in dicta that the section would pass constitutional muster only if the court's interpretation of the committee's authority were correct. If the committee wielded greater authority, it would violate separation of powers principles. The case apparently involves the first attempt by a congressional committee to force a mandatory withdrawal under 43 U.S.C. § 1714(e). *But see* note 254 *infra*.

244. 43 U.S.C. § 1714(e).

245. Public Land Orders 5653 and 5654, 43 Fed. Reg. 59756 (1978). Some of the same lands were also withdrawn by the President under the Antiquities Act, which authorized him to proclaim national monuments. 16 U.S.C. § 431 (1976). Later, some 40 million acres were withdrawn as wildlife refuges under the Fish and Game Sanctuaries Act, 16 U.S.C. § 694, another statute authorizing executive withdrawals that was not repealed by the FLPMA.

246. See 43 U.S.C. § 1616(d)(2) and note 204, *supra*. The same lands were also withdrawn under § 17(d)(1) which authorized the Secretary to withdraw lands needed to protect the public interest under "existing authority" without a time limit. See note 103 *supra*. This apparently refers to impliedly delegated withdrawal authority and authority under statutes, principally the Pickett Act. If pending litigation challenging the executive's authority to withdraw lands covered by § 17(d)(2) after the statutory termination date (see notes 121 and 123 *supra*) results in a rejection of the government's contention that there was non-statutory authority for such withdrawals, their validity

such lands were recommended for inclusion in one of the land management systems, the Secretary's withdrawals were to expire on December 18, 1978, if Congress did not act on the recommendations.²⁴⁷ As the expiration date grew near, congressional efforts to enact an Alaska lands bill were blocked by the senators from that state.²⁴⁸

With the termination of the Alaska withdrawals under ANCSA, millions of acres would be available for selection by the State of Alaska and by Native corporations formed under the Act. Alaska had been waiting for twenty years for the fulfillment of the promise made in its Statehood Act that it would be able to select and receive patents to 103,553,000 acres of public land²⁴⁹—about 28% of the state's total land area. At the time of statehood, almost all of the land in the state was federally owned and it was understood that the land would be needed for the state's economic growth and self sufficiency.²⁵⁰

Alaska became so anxious to get control of some of the resource-rich public lands that it purported to select about 41 million acres several

would depend on the Pickett Act which did not authorize withdrawals from the mining laws. Thus, mining claims on public lands in Alaska made in an otherwise valid manner after the §17(d)(2) withdrawals expired but before Congress withdrew the same lands in 1980 (Act of Dec. 2, 1980, Pub. L. No. 96-487, §§201-708, 94 Stat. 2371-2422) may still be valid if it is found that there was no impliedly delegated authority at the time the withdrawals were made. *See generally*, DeStefano, *The Federal Land Policy and Management Act and the State of Alaska*, 21 ARIZ. L. REV. 417 (1979) [hereinafter cited as DeStefano]. Valid withdrawals under FLPMA before expiration of §17(d)(2) withdrawals would also protect the land from mineral entry. *See* notes 252-255 *infra* and accompanying text.

247. The withdrawals were to expire no later than five years after the date recommendations were made. 43 U.S.C. § 1616(d)(2)(D). Recommendations were to be made within two years of the Act's effective date (December 18, 1971). 43 U.S.C. § 1616(d)(2)(C). The Secretary submitted his final recommendations on December 17, 1973.

248. *See* DeStefano, *supra* note 246, at 419. The Senators objected to the amount of land that would be closed to development by inclusion in wilderness areas and other conservation units.

249. Alaska Statehood Act, Pub. L. No. 85-508, 72 Stat. 339 (1958). Congress allowed a period of 25 years for the selections because the vast land area had not been surveyed. *See* 104 CONG. REC. 9341 (1958) (remarks of Rep. Saylor). Initial state land selections were protested by the Bureau of Land Management on behalf of Native groups and Native claims were filed on about 80% of the state's lands. The Secretary finally instituted a "land freeze" suspending approval of all state selections and other applications. It was formalized in Public Land Order No. 4582, issued January 12, 1969 which withdrew all Alaska public lands. The state unsuccessfully challenged the land freeze in *Alaska v. Udall*, 420 F.2d 938 (9th Cir. 1969), *cert. denied*, 397 U.S. 1076 (1970). Approvals were then delayed on nearly all the lands for over eleven years by subsequent orders and withdrawals under the Alaska Native Claims Settlement Act. *See* notes 250-255 *infra* and accompanying text. Approvals were made possible by enactment of the Alaska National Interest Lands Conservation Act, which also extended the time limit for state selections to 35 years. Act of Dec. 2, 1980, Pub. L. No. 96-487, §906(a), 94 Stat. 2371, 2437. As a part of the settlement of a lawsuit brought against the government by Alaska, the United States has agreed to convey at least 13 million acres a year to the state. *Alaska v. Reagan*, No. A 78-291 CIV (D. Alas. Stipulation of Settlement, Aug. 15, 1981). *See* note 123 *supra*.

250. *See* H. R. REP. NO. 624, 85th Cong., 1st Sess. 2 (1957), *reprinted in* [1958] U.S. CODE CONG. & AD. NEWS 2939, 2940.

weeks before the withdrawals under ANCSA expired.²⁵¹ Shortly afterward, the Secretary was moved by a letter from the Chairman of the House Committee on Interior and Insular Affairs to act under the FLPMA to make an emergency withdrawal of the expiring ANCSA withdrawals.²⁵² The letter cited the recent state selections and a lawsuit²⁵³ that Alaska had filed seeking to prevent any government action to save the lands withdrawn under ANCSA from selection once the withdrawals expired.²⁵⁴ The Secretary of Interior later withdrew the same lands that had been subject to the emergency withdrawals using his FLPMA authority to make withdrawals for twenty years.²⁵⁵

The facility with which the Secretary was able to withdraw millions of acres of Alaska lands is testimony to the simplicity of the new procedures. The executive has essentially the same substantive power it had under the earlier, impliedly delegated authority, but the twenty year limitation on most withdrawals forces rethinking the wisdom of a withdrawal periodically and it is probably the most important limit on the executive's withdrawal authority under the FLPMA. Executive authority is otherwise encumbered only by requirements for notice, information reporting, and public participation.

Congress can, of course, terminate a withdrawal of which it disapproves. Theoretically it will have more information on which to base any action it takes when the FLPMA procedures are followed. But unless an especially interested member of one of the key committees chooses to scrutinize all withdrawals, the reporting requirements will be essentially means of forcing the executive to make a closer consideration of any withdrawal decision.

251. DeStefano, *supra* note 246, at 419. The lands were later made available for selection (Public Land Order No. 5657, 44 Fed. Reg. 5433 (1979)), after which Alaska repeatedly notified the Department of Interior of its selections by letter. *Id.*, n.20. The 1980 Alaska National Interest Lands Conservation Act required the state to relinquish its claims to all selections of lands located within national interest areas as a condition of rescinding administrative withdrawals of lands designated in the Act. Act of Dec. 2, 1980, Pub. L. No. 96-487, § 1322(b), 94 Stat. 2371, 2487.

252. 43 U.S.C. § 1714(e) (1976).

253. *Alaska v. Carter*, 462 F.Supp. 1155 (D. Alas. 1978).

254. Letter from Morris K. Udall, Chairman, House Committee on Interior and Insular Affairs, to Cecil D. Andrus, Secretary of the Interior, November 15, 1978. A portion of the letter appears in *Alaska v. Carter*, 462 F.Supp. at 1158 n.5. The letter appears to be advisory only in that it simply "urges" the Secretary to exercise his discretionary emergency withdrawal authority, rather than reflecting a committee determination of an emergency that would trigger a duty to withdraw the lands. A similar letter of request was sent to the Secretary by the committee chairman on May 4, 1979 after the committee found that uranium exploration on public lands in the Casitas Reservoir watershed would endanger the water supply of Ojai and Ventura, California. Resolution of the Committee on Interior and Insular Affairs, United States House of Representatives, May 2, 1979. While such requests are not mandatory, the Secretary's failure to respond by making a protective withdrawal would court charges of abuse of discretion.

255. Public Land Order Nos. 56-5711, 45 Fed. Reg. 9562 (1980). These orders were superseded when the 96th Congress passed an Alaska lands bill which was signed into law on December 2, 1980. Pub. L. No. 96-487, 94 Stat. 2371.

Congress has always had the authority to terminate an executive withdrawal²⁵⁶ but has rarely done so in the past.²⁵⁷ Now, under the FLPMA, Congress's disapproval can be manifested in a concurrent resolution which may avoid some of the procedures encumbering ordinary legislation, although the action is subject to special procedural rules. Disapproval must be effected within 90 days after a notice of the withdrawal is given to Congress.²⁵⁸ It would seem that most members of Congress would be uncomfortable overruling the executive's conservation decision on such short notice except in an outrageous case. Most congressional disapprovals of executive withdrawals are likely to be by legislation after full committee consideration as they were in the past.

The detailed FLPMA provisions for making withdrawals are not the only means of accomplishing results that are within the Act's definition of a "withdrawal." One method provided for in the Act itself is through "management decisions."²⁵⁹ These decisions may be made to implement land use plans required by the FLPMA for all public lands.²⁶⁰ The land use planning authority of officials under the Act is "fully as restrictive as traditional withdrawal."²⁶¹ Presumably, comprehensive planning was intended by Congress to supplant single-purpose land use and withdrawal decisions. Withdrawals may be used to carry out management decisions, but a formal withdrawal is necessary only if lands are removed from, or restored to, the operation of the 1872 Mining Act or lands are transferred to another department.²⁶² There are special procedures for notifying Congress if a management decision totally eliminates one or more uses on a tract of 100,000 acres or more of public lands.²⁶³

In addition to the ability of land managers to effect land use decisions that are the functional equivalents of withdrawals, other laws governing

256. Under any credible theory, executive authority to withdraw public lands is ultimately derived from Congress. See note 46 *supra*. An understanding of preexisting congressional oversight authority is reflected in the legislative history of the FLPMA. See 122 CONG. REC. 23438 (remarks of Rep. Mink), 23440 (remarks of Rep. Forsythe), 23453 (remarks of Rep. Seiberling).

257. See notes 37-39, 50, 95, 159-160 *supra* and accompanying text. Although the possibility of a presidential veto of a congressional termination of a withdrawal (or making of a withdrawal) exists, no such showdown between the executive and legislative branches has occurred over a withdrawal decision.

258. 43 U.S.C. § 1714(c)(1) (1976). See note 225 *supra*.

259. See 43 U.S.C. § 1712(e) (1976).

260. 43 U.S.C. § 1712(a) directs the Secretary to:

develop, maintain, and, when appropriate, revise land use plans which provide by tracts and areas for the use of the public lands regardless of whether such lands previously have been classified, withdrawn, set aside, or otherwise designated for one or more uses.

261. Peck, "And Then There Were None": *Evolving Federal Restraints on the Availability of Public Lands for Mineral Development*, 25 ROCKY MTN. MIN. L. INST. 3-1, 3-87 (1979).

262. 43 U.S.C. § 1712(e)(3) (1976).

263. 43 U.S.C. § 1712(e)(2) (1976). The procedures for notice and congressional oversight are nearly identical to those for formal withdrawals. See 43 U.S.C. § 1714(c)(1), discussed in note 225 *supra*.

public land administration may permit the exercise of executive managerial authority that may in practice fit the FLPMA definition of a withdrawal. Officials often take protective action effectively "limiting activities under [laws making public lands available for private uses] in order to maintain other public values in the area. . . ." ²⁶⁴ These actions need not take the form of withdrawals when they are in furtherance of the officer's existing management authority. Thus, the Secretary of Agriculture may administratively determine that an area of a national forest is dedicated to recreation and thereby ban inconsistent uses that are permitted by statute. ²⁶⁵ Similarly, land managers regularly must decide what areas of a forest to withhold from timber cutting, what areas to limit to camping, whether to close a park to fishing, and whether to lease lands for mineral development. Congress did not intend to eliminate or erode existing authority of managers under public land laws except as it expressly stated in the FLPMA. ²⁶⁶ Although many actions might be taken under the withdrawal provisions of the Act, it is unnecessary to do so when the Secretary has managerial discretion under existing statutes to make determinations having the same effect. ²⁶⁷

264. 43 U.S.C. § 1702(j) (1976).

265. *McMichael v. United States*, 355 F.2d 283 (9th Cir. 1965) (upholding designation of a "primitive area" in a national forest and the application of regulation prohibiting motorized vehicles); see also Foster, *Bureau of Land Management Primitive Areas—Are They Counterfeit Wilderness?*, 16 NAT. RES. J. 621 (1976) (discussing the practice of designating BLM lands administratively as wilderness beginning in 1969, before Congress directed wilderness studies). Cf. *United States v. Gregg*, 290 F.Supp. 706 (W.D. Wash. 1968) (upholding regulations restricting aircraft use in a wilderness area although the Wilderness Act (16 U.S.C. § 1133(d)(1) (1976)) provided that such uses may continue); *United States v. Perko*, 108 F.Supp. 315, *aff'd*, 204 F.2d 446 (8th Cir. 1953), *cert. denied*, 346 U.S. 832 (1953) (upholding aircraft ban in national forest roadless area designated for recreational purposes). See generally, *United States v. Grimaud*, 220 U.S. 506 (1911).

266. In enacting the FLPMA Congress overhauled much of the authority to manage public lands as it existed before the Act. Literally hundreds of public land laws were repealed. See Act of Oct. 21, 1976, Pub. L. No. 94-579, § 702, 90 Stat. 2743, 2787-91. However, the legislation assiduously provided that it was not to "repeal any existing law by implication." *Id.* § 701(f) (reprinted in note following 43 U.S.C. § 1701). See also 43 U.S.C. § 1701(b) (1976) (FLPMA is to be supplemental, and not in derogation of the public land statutes).

267. *But see* *Mountain States Legal Foundation v. Andrus*, 499 F.Supp. 383 (D. Wyo. 1980). A federal district court held that the Forest Service's failure to accept offers to lease lands for oil and gas pending a "RARE II" study of whether to include the lands in a wilderness system was tantamount to a "withdrawal" under the FLPMA definition and could only be effective if statutory withdrawal procedures were followed. The court in *Mountain States* erred in applying the definition mechanically and in a way that failed to comport with the comprehensive statutory framework.

First, it should be pointed out that inaction on lease applications while the Secretary studies the desirability of other uses in an area has never been considered to amount to withdrawal of the lands in question. It is simply not within the common usage of the term. Withdrawals are generally made by some specific public land order or a statute, not by inaction. See *Duesing v. Udall*, 350 F.2d 748, 751 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 912 (1966), citing *Richard K. Todd*, 68 INTERIOR DEC. 291 (1961). Current regulations so provide. 43 C.F.R. § 2310.3-3. This is particularly applicable to the mineral leasing statutes in which there is no right of a lease applicant to expect action issuing or rejecting a lease within a particular time. *E.g.*, *Burglin v. Morton*, 527 F.2d 486 (9th Cir.

1975), *cert. denied*, 425 U.S. 973 (1976) (failure to make decision on lease application for several years is not an action contrary to law); *Rowe v. United States*, 464 F.Supp. 1060, 1070 (D. Alas. 1979) (inaction on lease application for ten years is not unlawful). A lease applicant could only challenge the Secretary's failure to act if it were "unreasonably delayed." 5 U.S.C. § 706(1).

The *Mountain States* court seemed to recognize that inaction on a single lease could not constitute a "withdrawal," but found that the cumulative effect of inaction on pending applications amounted to a withdrawal. In light of the existence of discretion to withhold lands from leasing for a variety of reasons as discussed below, and the fact that the Secretary had obviously chosen not to use the option of withdrawal, the court should have deferred to the decision not to withdraw the lands. *Cf. Kleppe v. Sierra Club*, 427 U.S. 390 (1976) (whether series of proposed actions leading to coal leasing in large geographic areas are so related as to amount to a "proposal" requiring an environmental impact statement is a question for the agency to decide).

Second, the Secretary had ample statutory authority to hold lease applications pending a thorough designation. The legislative history of the FLPMA shows that the Department of the Interior had expressed concern that if FLPMA's broad definition were adopted it would give rise to arguments that the only way to accomplish results within its scope would be by withdrawal. Letter from Assistant Secretary of the Interior to James A. Haley, Chairman, Committee on Interior and Insular Affairs, U.S. House of Representatives, dated November 21, 1975, 1976 U.S. CODE CONG. & AD. NEWS 6215-16. But the concern was unjustified given the existence of alternate means to achieve those results within FLPMA itself and within other statutory programs for land management that were not repeated expressly or by implication (*see note 256, supra*).

The National Forest Management Act (NFMA), which was enacted almost simultaneously with the FLPMA, imposed planning responsibilities on the Secretary. It required that wilderness be among the "multiple use" considerations of the Secretary in his forest management land use planning. 16 U.S.C. § 1604(e)(1), (g)(3)(A), and 1606(d). *See also* 16 U.S.C. § 1642(a)(1). The Multiple Use, Sustained Yield Act also declares establishment and maintenance of wilderness to be consistent with its purposes. 16 U.S.C. § 529. The responsibility to consider wilderness options can only be fulfilled if wilderness characteristics are preserved during the planning stages; otherwise wilderness values may be irreversibly lost to development. Neither the NFMA, in the case of national forests, nor the FLPMA provisions, in the case of Bureau of Land Management lands, requires a withdrawal to be made during the planning process. It hardly seems advisable to impose the encumbrance of a withdrawal on an area that may not ultimately be recommended or set aside as wilderness.

RARE II should be considered a program that carries out land management planning responsibilities and authority of the Secretary of Agriculture. It was part of an ongoing wilderness review process that had begun in 1969. *See California v. Bergland*, 483 F.Supp. 465 (E.D. Calif. 1980), *appeal pending*, for a history of the RARE process. It would be reading FLPMA too broadly and out of context to say that it impliedly extinguished an ongoing land use planning process. There is no legislative history showing any such intent. Indeed, Congress seemed to validate the RARE process, which was pending and known to Congress when it enacted the NFMA in which the Secretary was made responsible for wilderness planning.

Even in absence of wilderness planning authority under land management statutes such as the FLPMA and the NFMA, the Secretary had authority under the Mineral Leasing Act to refuse leases for the protection of the public lands. The *Mountain States* court did acknowledge the well-established principle that the Secretary has discretion under the Mineral Leasing Act to decide what lands will be leased. *Burglin v. Morton*, 527 F.2d 486 (9th Cir. 1976); *Pease v. Udall*, 332 F.2d 62 (9th Cir. 1964), and to refuse any lease of particular lands. *Udall v. Tallman*, 380 U.S. 1 (1965). But it attempted to distinguish the case law as not supporting an exercise of discretion to withhold land from leasing "based on environmental concerns." 499 F.Supp. at 391-92. This distinction is ill-founded. In *Udall v. Tallman* the Supreme Court upheld the exercise of secretarial discretion to refuse leases where the purpose was to protect wildlife. An attempt to limit *Tallman* as permitting a refusal to lease only on a particular tract but not a closure of hundreds of square miles of public lands was rebuffed in *Duesing v. Udall*, 350 F.2d 748 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 912 (1966). *Mountain States* incorrectly relied on "the proposition that the focus of [the Mineral Leasing] Act was mineral development despite the primitive nature of much of the public lands." 499 F.Supp. at 392. In *Duesing v. Udall* the court rejected an argument that "the Secretary can only exercise his discretion under the Mineral Leasing Act by taking action in furtherance of the objective of that act to promote mineral development in the public domain." 350 F.2d at 751. Because there are other

The FLPMA withdrawal provisions allow the Secretary of Interior to take extraordinary actions, required to protect public lands from disposal or particular uses. For example, the Secretary's withdrawal of much of the Alaska national interest lands pending congressional actions was made in reliance upon the statute.²⁶⁸ Withdrawals may often be avoided, but

purposes for holding and using the land, the court held that decisions whether or not to lease need not consider solely the purpose of the lease, as urged by a disappointed lease applicant. The argument was characterized as a "tail wags dog construction [that] is not put forward as supported by legislative history," and the court upheld the Secretary's "reasonable construction" of his powers to determine whether to lease in light of a concern for wildlife protection. *Id. Cf. Krueger v. Morton*, 539 F.2d 235, 240 (D.C. Cir. 1976) (no abuse of discretion in Secretary's suspension of issuance of coal prospecting permits that was based on desire to provide "more 'orderly' development of coal resources upon the public lands . . . with a proper regard for the protection of the environment"); *United States v. Cotter Corp.*, 486 F.Supp. 995 (D. Utah 1979) (BLM has authority to manage public lands to prevent impairment of wilderness characteristics).

A further reason that environmental protection as a goal would seem to fall easily within the scope of discretion allowed to the Secretary in making a leasing decision is that every agency is now required by the National Environmental Policy Act to consider such matters in all its decisions. See note 182 *supra*. *Cf. Zabel v. Tabb*, 430 F.2d 199 (10th Cir. 1970), *cert. denied*, 401 U.S. 910 (1971) (Under NEPA and the Fish and Wildlife Coordination Act, 16 U.S.L. §§ 601, 602, Corps of Engineers properly denied dredge and fill permit although the project would not interfere with navigation, flood control, or power production). And major federal actions in leasing lands under the Mineral Leasing Act require the preparation of environmental impact statements. See note 188 *supra*. Furthermore, the FLPMA manifests an intention that federal land be managed by the Secretary of the Interior according to multiple use principles, 43 U.S.C. § 1701(a)(7) (1976), and to further a variety of goals besides resource development, 43 U.S.C. § 1701(a)(8), (a)(12) (1976).

A separate ground for the court's decision in *Mountain States* was the failure of the Secretary to set forth in rules and regulations the procedure that was followed in coordinating applications for leases in national forests with the Department of Agriculture and the grounds for approving, rejecting, or denying them. 499 F.Supp. at 395-96. The court concluded that the absence of regulations violated the FLPMA section bringing public land management within the Administrative Procedure Act and requiring promulgation of rules and regulations to carry out the purposes of the FLPMA and other public land laws. 43 U.S.C. § 1740 (1976). This ignores the fact that administrative decisions and policies may be made by means other than rulemaking without violating the Administrative Procedure Act (APA). *E.g.*, *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974); *SEC v. Cheney Corp.*, 332 U.S. 194 (1947).

The rulemaking provision was included in the FLPMA following a recommendation of the Public Land Law Review Commission that there be greater use of regulations in public land management. See PLLRC REPORT, *supra* note 7 at 251. The "hidden law" of the Department of the Interior has been notorious. *E.g.*, Strauss, *Rules, Adjudications, and Other Sources of Law in an Executive Department: Reflections on the Interior Department's Administration of the Mining Law*, 74 COLUM. L. REV. 1231 (1974). Matters involving "public property" have always been exempt from the APA. 5 U.S.C. § 553(a)(2) (1976). In the FLPMA Congress removed the exemption for public land management matters. This only meant that public land management was to be treated the same as other agencies' functions are treated under the APA. A general concern for openness in government, as well as the special concern in public land law found in 43 U.S.C. §§ 1701(a)(5) and 1740 make it desirable for the Secretary of the Interior to explicate formally the process to be followed in dealing with applications for mineral leasing in RARE II wilderness study areas. The APA does not necessarily require that rulemaking under § 553 be followed. But if rulemaking were required, presumably both the mineral leasing program and the RARE II program should be stayed pending appropriate rulemaking. The *Mountain States* court effectively required the leasing program to proceed and the RARE process to cease.

Notwithstanding several errors by the trial court in *Mountain States*, the United States dismissed its appeal of the decision on March 4, 1981 based on a directive of Reagan administration officials.

²⁶⁸. See notes 245-255 *supra* and accompanying text.

when they are used the FLPMA surrounds the process with new procedures and ultimate congressional checks that can undo executive actions swiftly in egregious cases.²⁶⁹ The sobering effect of the procedural requisites and the specter of congressional oversight may assure greater responsibility in using the authority. However, the broadened definition of "withdrawal" in the Act²⁷⁰ and explicit authority to use withdrawals as a means of implementing the land use planning requirements of FLPMA²⁷¹ suggest that the withdrawal device may have even greater importance as a land management device in the future than it had in the past.

C. Judicial Review

The tide of legislation imposing obligations on managers of public lands to administer resources under careful standards and to consider environmental factors has been accompanied by greater judicial scrutiny of decisionmaking. In recent years there has been an unprecedented number of cases seeking review of agency decisions regarding the public lands.²⁷² Several reasons account for the growth in litigation. The most important is that Congress has enacted laws which provide standards to guide courts in their review of agency actions. Understandably, the earliest public lands cases were confined largely to challenges of agency actions refusing to dispense public property to private interests rather than cases asserting the interest of the public.²⁷³ Even in that age, a rule of construction in public land law required that federal grants be viewed favorably to the United States.²⁷⁴ Later, national policy began to prefer continued federal management of most remaining federal lands. Relevant statutes gave managers great discretion and little guidance. Authority was broadly delegated to the executive branch and courts regularly upheld these delegations²⁷⁵ and their exercise.²⁷⁶ With the exception of parks, which have been subject to rather specific management objectives since

269. See notes 221-235 *supra* and accompanying text.

270. 43 U.S.C. § 1702(j). See note 219 *supra*.

271. 43 U.S.C. § 1712(e)(3).

272. See generally, G. COGGINS AND C. WILKINSON, FEDERAL PUBLIC LAND AND RESOURCES LAW 226-227 (1981).

273. See Wilkinson, *Public Land Law: Some Connecting Threads and Future Directions*, 1 PUB. LAND L. REV. 1, 2-3 (1980). See also note 14 *supra*.

274. *United States v. Union Pac. R.R.*, 353 U.S. 112, 116 (1957); *Caldwell v. United States*, 250 U.S. 14, 20 (1919); *United States v. Oregon and California R.R.*, 164 U.S. 526, 541 (1896); *Sioux City & St. Paul R.R. v. United States*, 159 U.S. 349, 360 (1895); *Leavenworth, Lawrence, and Galveston R.R. v. United States*, 92 U.S. 733, 740 (1895); *Dubuque and Pac. R.R. v. Litchfield*, 64 U.S. (23 How.) 457, 462 (1859). The Court applied the principle recently in *Andrus v. Charleston Stone Products, Inc.*, 436 U.S. 604 (1978). *But see* *Leo Sheep Co. v. United States*, 440 U.S. 668 (1979).

275. *E.g.*, *United States v. Grimaud*, 220 U.S. 506 (1911) (Forest Service Organic Act's delegation of authority to make rules and regulations concerning use of forest reserves).

276. *E.g.*, *Light v. United States*, 220 U.S. 523 (1911) (Forest Reserve grazing regulations).

at least 1916,²⁷⁷ there was little substantive law to curb or define the administrative discretion of public land managers until the 1970s.²⁷⁸ Consequently, challenges to public land management decisions have not fared well in the courts.²⁷⁹

Congressional prescriptions for public land management were responsive to burgeoning conservationist sentiments.²⁸⁰ An aware public insisted on responsible administration of its commonly held resources. The same public became the watchdog of the administrators, pooling their resources and power in organizations to assert the "public interest." These groups turned to the courts where they were generally received hospitably. The Supreme Court has recognized that harm to "aesthetic and environmental well-being" constitutes "injury" for the purpose of standing to sue, requiring only that there be allegations of an adverse effect on group members' "activities and pastimes" on affected public lands.²⁸¹ The Court has thus disavowed restrictions that would allow access to judicial review only to those suffering economic harm and harm that is not widely shared.²⁸² Once a party has access to court, it may argue the public interest in support of claims that an agency has not lived up to statutory mandates.²⁸³ It appears that courts are now more liberal in allowing judicial review in cases against government agencies alleging environmental harm than they are in other contexts, such as constitutional violations resulting in economic harm.²⁸⁴ The Supreme Court has inferred an intent by Congress to allow persons to act as "private attorneys general"²⁸⁵ when asserting

277. See Park Service Organic Act, 16 U.S.C. § 1.

278. See statutes cited in notes 191-192 *supra*. The Multiple Use, Sustained Yield Act was enacted in 1960 but it appeared to be little more than a statement of policy accompanied by definitions. 16 U.S.C. §§ 528-31. Managers were left to interpret and apply the act according to their best guess as to its meaning. See Loesch, *Multiple Uses of Public Lands—Accommodation or Choosing Between Conflicting Uses*, 16 ROCKY MTN. MIN. L. INST. 1 (1971); Strand, *Statutory Authority Governing Management of the National Forest System—Time for a Change?*, 7 NAT. RES. LAW. 479 (1974); Comment, *Managing the Federal Lands: Replacing the Multiple Use System*, 82 YALE L. J. 787 (1973).

279. See Reich, *The Public and the Nation's Forests*, 50 CALIF. L. REV. 381, 393 (1962). Some have argued for closer judicial scrutiny. E.g., Miller, *Judicial Control of Forest Service Discretion Under the Multiple Use Act*, 5 ENV'T L. 127 (1974).

280. S. UDALL, *THE QUIET CRISIS* (1963); Martz, *Conservation of the Environment as a Public Resource*, 18 ROCKY MTN. MIN. L. INST. 225 (1973); Muskie, *An Environmental Program for America*, 1 ENV. LAW 2 (1970); Clary, Roe, and Swearingen, *Environmental Priorities of Opinion-Makers*, 6 ENV'T AFFAIRS 33 (1977).

281. E.g., *Sierra Club v. Morton*, 405 U.S. 727 (1972).

282. *Id.* at 734, 738. See Parker and Stone, *Standing and Public Law Remedies*, 78 COLUM. L. REV. 771, 772 (1978).

283. 405 U.S. at 737. See also *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 686-90 (1973); *Association of Data Processing Service Organizations v. Camp*, 397 U.S. 150, 154 (1970).

284. Compare *Warth v. Seldin*, 422 U.S. 490 (1975) and *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976) with *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669 (1973).

285. E.g., *Sierra Club v. Morton*, 405 U.S. 727, 734-41 (1972); *Association of Data Processing Service Organization v. Camp*, 397 U.S. 150, 154 (1970).

they are aggrieved within the scope of statutes which arguably protect the public's interest in management of publicly owned natural resources. The inference is supported by statutory provisions encouraging public involvement in decisionmaking,²⁸⁶ expressing the policy that there should be judicial review,²⁸⁷ and requiring more intensive land management.²⁸⁸

The increased activity in judicial review of land management agency decisions contrasts with the traditional approach of denying review to such matters. The approaches of courts in reviewing administrative decisions varies with the agency whose decision is being reviewed and the type of decision that is being challenged.²⁸⁹ Courts have viewed public land management as being encumbered by vague mandates, broad discretion, and a need for expertise, so there has been little room for judicial oversight until recently.²⁹⁰ The criterion is whether there is "law to apply" which would enable the court to decide the case without substituting its judgment for that of the agency.²⁹¹ Some statutes enabling agencies to manage public lands remain remarkably nondirective and without obvious standards.²⁹² When these non-directive laws are involved, courts will

286. See note 180 *supra*. Cf. *Citizens for a Better Environment v. Environmental Protection Agency*, 649 F.2d 522 (7th Cir. 1979) (requiring regulations providing for citizen participation in enforcement as condition of federal approval of state plan under Clean Water Act).

287. See Federal Land Policy and Management Act, 43 U.S.C. § 1701(a)(6) (1976). The policy expressed in that act is apparently limited to adjudicatory decisions. Landstrom, *An Operational View of the BLM Organic Act*, 54 DEN. L. J. 455, 458 (1977). See also provisions for citizen suits and awards of attorney's fees in environmental statutes (16 U.S.C. § 1540(g) (1974) (Endangered Species Act); 33 U.S.C. § 1365 (1978) (Clean Water Act); 33 U.S.C. § 1415(g) (1976) (Ocean Dumping Act); 42 U.S.C. § 300j-8 (1980 Supp.) (Safe Drinking Water Act); 42 U.S.C. §§ 7604, 7607(f) (1980 Supp.) (Clean Air Act); 42 U.S.C. § 4911 (1977) (Noise Control Act)).

288. See notes 175-180 *supra* and accompanying text; S. Rep. No. 93-686, reprinted in [1974] U.S. CODE CONG. & AD. NEWS 4072; House Report No. 94-1163, 94th Cong., 2d Sess., reprinted in [1976] U.S. CODE CONG. & AD. NEWS 6175, 6179-6181. See also Culham and Friesma, *Land Use Planning for the Public Lands*, 19 NAT. RES. J. 43 (1979) and Greenfield, *The National Forest Service and the Forest and Rangeland Renewable Resources Planning Act of 1974*, 15 NAT. RES. J. 603 (1975).

289. For an illuminating discussion of approaches to judicial review in public land law see Wilkinson, *Public Land Law: Some Connecting Threads and Future Directions*, 1 PUB. LAND L. REV. 1, 23-29 (1980). Cf. *Environmental Defense Fund v. Ruckelshaus*, 439 F.2d 584 (D.C. Cir. 1971) (suggesting an increased role for the judiciary in the administration of environmental laws).

290. See Comment, *The Conservationists and the Public Lands: Administrative and Judicial Remedies Relating to the Use and Disposition of the Public Lands Administered by the Department of the Interior*, 68 MICH. L. REV. 1200, 1236-42 (1970). Until enactment of the FLPMA, there was often an additional problem for reviewing courts because agency rulemaking concerning public land management was not subject to the Administrative Procedure Act, 5 U.S.C. § 553(a)(2), 43 U.S.C. § 1740; see note 267 *supra*.

291. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 410 (1971). In a case challenging denial of homestead applications based on classification of land for retention in public ownership, the Ninth Circuit of Appeals said of the Classification and Multiple Use Act, 43 U.S.C. §§ 1411-1418 (expired Dec. 23, 1970): "The provisions of this statute breathe discretion at every pore. . . ." *Id.* at 469. The court declined to assert jurisdiction, finding no law to apply:

[T]he broader the language of a statute, the less specific it is, and the more nebulous the Congressional intent, the harder it will be for the court to say that an agency acted beyond the bounds of discretion committed to it by law.

Id. at 470 n.3.

usually refuse review, finding that "agency action is committed to agency discretion by law."²⁹³ Thus, rarely applied exceptions to the Administrative Procedure Act's judicial review provisions have been utilized in public lands cases more often than in other fields.

Statutes mandating more intensive land management generally implement modern public lands policy: intensive management for a potpourri of uses and purposes, with a pervasive concern for environmental protection. The federal land manager must choose from an array of objectives and approaches. Formerly unbridled discretion is confined by definition of land management agency missions and specific procedures for accomplishing them.²⁹⁴ Many decisions remain within an aura of discretion that ordinarily will not be curtailed or invaded by a court unless a congressional directive is violated. Choices among uses will generally be safe from judicial review so long as they do not depart from the procedures, the standards or the purposes of the statutes. But when a party alleges that the manager has forsaken the agency mission by ignoring the care and protection of certain lands, there may be "law to apply" and a court will review.²⁹⁵ If land use priorities have been set by formal rulemaking, they may be judicially enforceable against the government if it departs from the plan without following procedures.²⁹⁶ On the other hand, Congress has added little to its broad delegations of discretion for disposal of federal lands,²⁹⁷ leaving the negative decision—not to develop, to dispose of or to allow entry upon particular lands—relatively free from review.

Once a court grants review, it is likely to defer to an agency practice or decision that comports with the agency's own established interpretation of the governing statute.²⁹⁸ But agency interpretations that are out of step

292. *E.g.*, Forest Service Organic Act, 16 U.S.C. §§ 473-478, 479-482, 551 (1976); Multiple Use, Sustained Yield Act, 16 U.S.C. §§ 528-531 (1976); General Mining Act, 30 U.S.C. § 22 (1976); Mineral Leasing Act, 30 U.S.C. §§ 181-287 (1976 & Supp.II 1978); Taylor Grazing Act, 43 U.S.C. § 315 (1976).

293. 5 U.S.C. § 701(a)(2) (1976). *E.g.*, Nelson v. Andrus, 591 F.2d 1265 (9th Cir., 1978); Santa Clara v. Andrus, 572 F.2d 660 (9th Cir., 1978); Strickland v. Morton, 519 F.2d 467 (9th Cir., 1975); Ness Inv. Corp. v. Department of Agriculture, 512 F.2d 706 (9th Cir., 1975).

294. See Wilkinson, *Public Land Law: Some Connecting Threads and Future Directions*, 1 PUB. LAND L. REV. 1, 6 (1980).

295. Parker v. United States, 448 F.2d 793, 795, 796, 797 (1971); Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 410; Sabin v. Butz, 515 F.2d 1061, 1065 (1975); National Forest Preservation Group v. Butz, 485 F.2d 408, 411 (1973). See also Comment, *The Conservationists and the Public Lands: Administrative and Judicial Remedies Relating to the Use and Disposition of the Public Lands Administered by the Department of Interior*, 68 MICH. L. REV. 1260, 1236-42 (1970).

296. Peck, "And Then There Were None"—Evolving Federal Restraints on the Availability of Public Lands for Mineral Development, 25 ROCKY MTN. MIN. L. INST. 3-1, 3-87 (1979). Cf. Kaploski, *Power Plant Siting on Public Lands: A Proposal for Resolving the Environmental-Development Conflict*, 56 DEN. L. J. 179 (1979) (arguing that the FLPMA may impose an environmental mandate on siting questions).

297. See generally: COGGINS & WILKINSON, *supra* note 17 at 231-233.

298. Udall v. Tallman, 380 U.S. 1 (1965).

with statutory language or purpose will not receive the same deference; statutory interpretation ultimately remains a judicial function.²⁹⁹ In public land law, resort to the purpose of statutory schemes has often guided judicial construction.³⁰⁰ On occasion the Supreme Court has strained to find an intent to preserve public resources and to deny private interests in them, although the statutes under which the private interests were asserted were passed in an age when disposal of public lands was in vogue.³⁰¹

So long as the volume and thrust of statutory law is directed at protection and judicious use of public lands, it is reasonable to expect more deferential treatment of interpretations that deny development, demand caution in use, or prefer non-damaging uses than of interpretations that err on the side of facilitating development. Thus, it is predictable that an agency's broad interpretation of its own withdrawal authority under the FLPMA is more likely to be upheld if challenged than one that encourages development by restricting the ability of the Secretary to withdraw lands beyond the requirements of the Act.³⁰²

The only significant possibilities for judicial intrusion into the realm of administrative decisions to withdraw public lands will arise when an agency fails to adhere scrupulously to procedural mandates. FLPMA is quite specific as to the procedure for making withdrawals³⁰³ and any party

299. *E.g.*, *Wilderness Society v. Morton*, 479 F.2d 842 (D.C. Cir.), *cert. denied*, 411 U.S. 917 (1973).

300. In *West Virginia Div. of Izaak Walton League of America, Inc. v. Butz*, 522 F.2d 945 (4th Cir. 1975) the court construed the Forest Service Organic Act's authority to sell "the dead, matured or large growth of trees" in national forests (16 U.S.C. § 476) as not broad enough to authorize clear-cutting. The Forest Service offered other interpretations of the literal language but the court found that Congress's primary concern in passing the Act was "preservation of the national forests." *Accord*, *Zieske v. Butz*, 406 F.Supp. 258 (D. Alas. 1975). The ban on clear-cutting was lifted when Congress enacted the National Forest Management Act of 1976, 16 U.S.C. §§ 1601-1613 in a context of required planning and generally more limited discretion.

See also *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971); *Citizens for a Better Environment v. Environmental Protection Agency*, 649 F.2d 522 (7th Cir., 1979); *Buck v. Morton*, 449 F.2d 600 (9th Cir. 1971); *Sierra Club v. Department of the Interior*, 398 F.Supp. 284 (N.D. Cal. 1975); *Sierra Club v. Department of Interior*, 376 F.Supp. 90 (N.D. Cal. 1974); *Sierra Club v. Ruckelshaus*, 344 F.Supp. 253 (D.D.C. 1972), *aff'd*, 412 U.S. 541 (1973).

301. *E.g.*, *United States v. Union Pacific R.R. Co.*, 353 U.S. 112 (1957) (finding a mineral reservation in a right of way granted to railroad, though that section of act was silent and express reservations were in other sections and acts). *See also*, *United States v. Union Oil Co.*, 549 F.2d 1271 (9th Cir. 1977), *cert. denied*, 435 U.S. 911 (1977); *Western Nuclear, Inc. v. Andrus*, 475 F.Supp. 654 (D. Wyo. 1979). *But cf.* *Leo Sheep Co. v. United States*, 440 U.S. 668 (1979) (U.S. did not impliedly reserve an easement allowing a road to be built across railroad grant lands without compensation). *See* discussion in Wilkinson, *Public Land Law: Some Connecting Threads and Future Directions*, 1 PUB. LAND L. REV. 1, 29-34 (1980).

302. *But cf.* Peck, "And Then There Were None" *Evolving Federal Restraints on the Availability of Public Lands for Mineral Development*, 25 ROCKY MTN. MIN. L. INST. 3-1, 3-13 (1976) (arguing that "national policies and statutory mandates" are contrary to executive decisions denying development).

303. *See* notes 226-244 *supra* and accompanying text.

aggrieved by a failure to follow these procedures is assured judicial review.³⁰⁴ Not only is it appropriate for a court to insist on exacting compliance with the procedures designed by Congress, but it is consistent with the type of review courts regularly indulge, even when the substantive mandate of a statute is vague.³⁰⁵

The thesis that courts should demand greater justification for an administrative decision opening or allowing development on public lands than for protecting or withdrawing the same lands also finds support in the public trust doctrine. Traditionally, the doctrine has been narrowly applied to restrict major state conveyances of tidelands,³⁰⁶ but increasingly a variant of the doctrine is being urged and accepted as a means of construing obligations of federal agencies under the public land laws.³⁰⁷ The theory is that public lands are to be held and managed consistently with a trust implied from the high standards set for stewardship of federal lands in modern statutes. Thus, as gaps must be filled and vague statutes interpreted, the context is to be one of protection of the public interest in federal lands and resources.³⁰⁸ This inference flows from Congress's statutory scheme for public land management. It compels a broad construction of agency powers over federal property and even can be the basis of judicial mandates to exercise available authority to protect public lands.³⁰⁹ To the extent the rationale of the conservation-oriented doctrine is accepted it would support protective exercises of executive withdrawal authority.

V. CONCLUSION

The legal uncertainties concerning withdrawal that dominated the past are largely resolved. The Federal Land Policy and Management Act provides authority and intelligible standards for withdrawals made after its effective date. Compliance with the Act's procedural requirements is readily measurable. The validity of withdrawals made without statutory

304. The Administrative Procedure Act, 5 U.S.C. § 706(2)(D), directs a reviewing court to set aside agency decisions that were reached "without observance of procedure required by law."

305. *E.g.*, *Scenic Hudson Preservation Conference v. Federal Power Commission*, 354 F.2d 608 (2nd Cir., 1965). *See generally* W. RODGERS, *ENERGY AND NATURAL RESOURCES LAW* 104-28 (1979).

306. *Illinois Central R. Co. v. Illinois*, 146 U.S. 387 (1892).

307. An enlightening and analytical explication of this subject is found in Wilkinson, *The Public Trust Doctrine in Public Land Law*, 14 U. CAL. D. L. REV. 269 (1981).

308. *Id.* at 311-13.

309. *E.g.*, *Sierra Club v. Department of Interior*, 424 F.Supp. 172 (N.D. Cal. 1976); *Sierra Club v. Department of Interior*, 398 F.Supp. 284 (N.D. Cal. 1975); *Sierra Club v. Department of Interior*, 376 F.Supp. 90 (N.D. Cal. 1974). *But see* *Sierra Club v. Watt*, 659 F.2d 203 (D.C. Cir. 1981). *See generally*, Comment, *Proprietary Duties of the Federal Government Under the Public Land Trust*, 75 MICH. L. REV. 586 (1977).

authority after Congress's major entry into the field in 1910 may still be challenged, but the prospects for success are dim. Although the Supreme Court has not considered the question, Congress confirmed that authority to make withdrawals independent of statute had been delegated to the executive by repealing that authority in 1976. The same legislation should seal the fate of attempted non-statutory withdrawals after 1976. But other devices are available to effect the same results as withdrawals. Some are provided in the FLPMA; others are within the discretion of land managers to restrict the uses permitted on public land. Major actions involving timber sales, mineral leases, wildlife protection and recreational values may fall within administrative authority to classify and to manage public lands under the FLPMA or under other statutes not changed by the Act. Defining the reach of authority, as well as the authority under withdrawal statutes, is a task that belongs primarily to the executive itself. Pervasive congressional concern with conservation makes administrative actions that tend to protect publicly owned resources virtually invulnerable to judicial challenge.

