

SYMPOSIUM ON THE FEDERAL LAND POLICY AND MANAGEMENT ACT: INTRODUCTION

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The Federal Land Policy and Management Act of 1976 [FLPMA],¹ also known as the Organic Act of the Bureau of Land Management, culminated more than a decade of congressional consideration of alternatives for management and disposition of the nation's remaining public domain. The Act reflects a growing national conservation ethic—greater environmental awareness and a consciousness of the need to retain undeveloped open space—while confirming congressional intent to utilize public land resources for the economic requirements of the nation and the economic benefit of the western States. It also reflects much of the philosophy of the report of the Public Land Law Review Commission [PLLRC].² This Introduction will outline several significant policy suggestions in the PLLRC's report, key policy statements in the Act, and the implementation of these policies by the Interior Department's Bureau of Land Management [BLM].

POLICY SUGGESTIONS IN THE PUBLIC LAND LAW REVIEW COMMISSION REPORT

The PLLRC's report was written because Congress needed a comprehensive review of the public land laws to determine whether and to what extent revisions in management concepts and specific statutes were necessary before it enacted comprehensive public domain legisla-

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1. 43 U.S.C. §§ 1701-1782 (1976), *as amended by* Public Rangelands Improvement Act of 1978, Pub. L. No. 95-514, 92 Stat. 1803, *and* Bureau of Land Management Appropriations Authorizations Act of 1978, Pub. L. No. 95-352, 92 Stat. 515.

2. PUBLIC LAND LAW REVIEW COMMISSION, ONE THIRD OF THE NATION'S LAND (1970) [hereinafter cited as PLLRC].

tion.³ The report contains 137 numbered recommendations relating to the lands owned by the federal government and how they should be managed and administered. In addition, there are 267 unnumbered subrecommendations. Finally, in a chapter entitled "A Program for the Future," and described as "an introductory summary of the Commission's basic concepts and recommendations for long-range goals, objectives, and guidelines, underlying the more specific recommendations in the individual chapters of the report,"⁴ there are seventeen additional recommendations and four fundamental premises, or beliefs, underlying the principles set forth in the report.

In making its specific recommendations for policy guidelines for public management, the Commission addressed separately the uses of the lands and the disciplines involved in management. Thus, there are chapters and specific recommendations on timber resources, range resources, mineral resources, water resources, fish and wildlife resources, intensive agriculture, the Outer Continental Shelf, outdoor recreation, and so on. Many of the recommendations in these chapters are mutually exclusive. A first reading of the report generates the impression that this one-by-one approach to recommendations for legislative or administrative actions would be of little value to the Congress in contemplating legislation relating to the management of the public lands because it makes no provision for consistency or compatibility among uses. Yet, on further analysis the report forms a sound and workable basis for public lands legislation and the implementation of that legislation. From the report's fundamental "Premises"⁵ come several principles: A strong federalism with the federal government recognizing the importance and the role of state and local governments in the federal system; protection of the rights of individual citizens; balancing of all major interests to assure maximum benefit for the general public; protection of environmental values as a permanent element of public land policy; availability of public lands to meet a diversity of requirements without degradation of the environment and, where possible, enhancement of the environment; better planning in allocation of resources and investment of funds; guidelines to provide for priorities in reducing conflicts among users; recognition of the possible dependence of regional and local social and economic growth upon public lands and land policy; and consideration of nonpublic land uses when planning uses of public lands. From the report's "Program for the Future"⁶ come other recommendations of basic general philosophy. A

3. See 43 U.S.C. §§ 1391-1392 (1976).

4. PLLRC, *supra* note 2, at 1.

5. *Id.* at 7.

6. *Id.* at 1-7.

few are especially significant: The policy of large-scale disposal of public lands reflected in the statutes should be revised; federal lands basically should be retained in federal ownership, except where their disposal will result in maximum benefit for the general public; the United States should receive full value for the use of public lands and on sales of such lands; consistency, to the extent possible, should be achieved among similar programs for federal lands administered by several federal agencies; and in making decisions relating to the federal lands, recognition must be given to the several publics to be served.

POLICY IN THE FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976

FLPMA was passed five years after the PLLRC report. In FLPMA, Congress expressed its broad policies and its sense of direction for the management, use, and possible disposal of the public lands. As will be seen, the Act reflects many of the policy recommendations in the PLLRC report.

Public lands are defined in FLPMA as any land or interest in land, with certain limited exceptions, "owned by the United States within the several States and administered by the Secretary of the Interior through the Bureau of Land Management."⁷ All provisions of the Act apply to the BLM, except for one section.⁸ Several sections also apply to the Forest Service in its administration of the National Forest System. This paper focuses on the approach to implementation of key provisions of the Act by the BLM. Implementation by the Forest Service will not be addressed.

Retention of Public Lands — Land Use Planning

FLPMA declares the congressional policy that the public lands be retained in federal ownership unless, as a result of land use planning carried out by the BLM in accordance with the Act, a determination is made that disposal of a particular parcel will serve the national interest.⁹ Thus, retention of the land is the basic tenet for management. Land use planning, specifically required and to a degree defined in the Act, is to be the keystone of administration and management. FLPMA is thus congressional recognition that these public lands are a system that constitutes a nationally significant resource. The multiple use planning process establishes the basic steps for management of the diverse lands in the public lands system.

7. 43 U.S.C. § 1702(e) (1976).

8. See 7 U.S.C. § 1012a (1976); 16 U.S.C. § 478a (1976).

9. 43 U.S.C. § 1701 (1976).

The Act contains many specific guidelines for the development and revision of land use plans: It requires a systematic interdisciplinary approach to planning;¹⁰ priority must be given to protection of areas of critical environmental concern;¹¹ present and potential uses must be considered,¹² as well as the relative scarcity of the values involved and availability of alternatives;¹³ long-term benefits are to be weighed against short-term benefits;¹⁴ and provision must be made for compliance with applicable state and federal pollution control laws.¹⁵

Multiple Use

That Congress espoused the principles of multiple use of the public lands, and that the many publics are to be served, is reflected in many parts of the Act. This concept appears in the statement of policy,¹⁶ in the development of land use plans,¹⁷ and in the requirements for management of the public lands.¹⁸

Disposal Criteria

The Act is specific in its provisions for removing public lands from the national system by sale or exchange. Sales can be made only if the Secretary of the Interior determines that the tract is difficult or uneconomic to manage as part of the public lands and is not suitable for management by another federal agency,¹⁹ or that a tract acquired for a specific purpose is no longer required for that or any other federal purpose,²⁰ or that disposal of the tract will serve important public objectives which cannot be achieved prudently or feasibly on nonpublic land and which outweigh other public objectives and values that would be served by maintaining the tract in federal ownership.²¹ Sales of tracts in excess of 2,500 acres are subject to congressional review and veto,²² and all sales must be made at not less than fair market value as determined by the Secretary.²³ Although there is authority to make direct sales to purchasers in some circumstances, sales generally are to be con-

10. *Id.* § 1712(c)(2).

11. *Id.* § 1712(c)(3).

12. *Id.* § 1712(c)(5).

13. *Id.* § 1712(c)(6).

14. *Id.* § 1712(c)(7).

15. *Id.* § 1712(c)(8).

16. *Id.* § 1701(a)(7).

17. *Id.* § 1712(c)(1).

18. *Id.* § 1732(a).

19. *Id.* § 1713(a)(1).

20. *Id.* § 1713(a)(2).

21. *Id.* § 1713(a)(3).

22. *Id.* § 1713(c).

23. *Id.* § 1713(d).

ducted under competitive bidding procedures.²⁴

The provisions on exchanges in FLPMA require that the Secretary determine that the public interest will be served by making the exchange.²⁵ In making that determination, the Secretary must consider a number of elements and must find "that the values and the objectives which Federal lands or interests to be conveyed may serve if retained in Federal ownership are not more than the values of the non-Federal lands or interests and the public objectives they could serve if acquired."²⁶

Environmental Awareness

As a product of a decade of increasing environmental awareness and more effective conservation efforts, FLPMA places particular emphasis on maintenance of environmental quality. Environmental considerations are woven into the fabric of the Act and made an integral part of it. For example, the declaration of policy includes protection of the quality of the environment and protection of areas of critical environmental concern.²⁷

FLPMA requires preparation and maintenance of an inventory of the public lands and their resources and other values.²⁸ In the inventory process, priority is to be given to areas of critical environmental concern.²⁹ As stated earlier in this Introduction, land use plans must provide for compliance with applicable state and federal pollution control laws relating to air, water, noise, and others.³⁰ Scenic values are elements to be considered in determining public objectives to be served by a sale of land.³¹ Aspects of use that might cause degradation of the environment are to be included by the Secretary in the report he is required to send to Congress on withdrawal of an area of 5,000 acres or more.³² In issuing patents or other documents of conveyance for disposals under the Act, the Secretary is directed to insert such terms, covenants, conditions, and reservations as he deems necessary to insure proper land use and protection of the public interest.³³ Presumably, through this provision, the Secretary could ensure protection of environmental quality even though the land had passed from federal ownership.

24. *Id.* § 1713(f).

25. *Id.* § 1716(a).

26. *Id.*

27. *Id.* § 1701(a)(8), (a)(11).

28. *Id.* § 1711(a).

29. *Id.*

30. *Id.* § 1712(c)(8).

31. *Id.* § 1713(a)(3).

32. *Id.* § 1714(c)(2)(2).

33. *Id.* § 1718.

In managing the public lands, the Secretary is required to take any action necessary to prevent unnecessary or undue degradation of the lands.³⁴ The Secretary is also required to insert in any instrument providing for the use, occupancy, or development of the public lands provisions for revocation or suspension of the instrument on a final administrative finding of noncompliance with state or federal air or water quality standards or implementation plans.³⁵

FLPMA repealed the Public Land Administration Act³⁶ but reenacted most of its provisions.³⁷ These provisions authorize the Secretary to conduct studies and investigations relating to the protection of the public lands and to enter into contracts and cooperative agreements for the same purposes.³⁸ Provisions relating to range management also reflect a general environmental awareness.³⁹ The multiple use connotations of this awareness became more pronounced with the recent enactment of the Public Rangelands Improvement Act of 1978,⁴⁰ which amends and supplements FLPMA in several respects. In addition, FLPMA requires that each right-of-way issued shall contain terms and conditions which will minimize damage to scenic and aesthetic values and otherwise protect the environment, and will require compliance with federal and state standards for air and water quality and state standards for environmental protection.⁴¹

Wilderness Review

One of the major challenges of FLPMA, and one that the BLM is approaching enthusiastically but carefully, is wilderness review. The Act calls for a wilderness study of BLM-administered lands having wilderness characteristics.⁴² During the period of review, and until Congress acts on recommendations made by the Secretary, management of lands within wilderness study areas is to be carried out in a manner "so as not to impair the suitability of the area for preservation as wilderness."⁴³ This interim management of wilderness study areas is subject "to the continuation of existing mining and grazing uses and mineral leasing in the manner and degree in which the same was being con-

34. *Id.* § 1732(b).

35. *Id.* § 1732(c).

36. Pub. L. No. 86-649, § 2, 74 Stat. 506 (1960) (repealed 1976).

37. See Pub. L. No. 94-579, 90 Stat. 2744 (1976) (codified at 43 U.S.C. §§ 1701-1782 (1976)).

38. 43 U.S.C. § 1737(a), (b) (1976).

39. See *id.* § 1751(b)(1).

40. Pub. L. No. 95-514, 92 Stat. 1803 (1978) (codified at 43 U.S.C.A. §§ 1901-1908 (West Supp. 1979)).

41. 43 U.S.C. § 1765(a) (1976).

42. See *id.* § 1782.

43. *Id.* § 1782(c).

ducted on the date of the approval of this Act." There is an additional proviso: "That, in managing the public lands, the Secretary shall by regulation or otherwise take any action required to prevent unnecessary or undue degradation of the lands and their resources or to afford environmental protection."⁴⁴

Public Participation

Another major challenge presented by FLPMA is the responsibility to provide meaningful public participation. Public participation appears as a principle in the policy section of the Act.⁴⁵ Provision is made for participation not only by the public but by state and local governments. The Secretary is also empowered to establish citizen advisory councils composed of representatives of citizens' interests in problem areas regarding the use and management of public lands.⁴⁶

Enforcement Authority

FLPMA gives the Secretary of the Interior comprehensive enforcement authority, authorizing him to issue regulations, the violation of which would constitute a crime.⁴⁷ Section 303 provides that where the Secretary determines that assistance is necessary in enforcing federal laws and regulations relating to the public lands, a contract shall be offered to appropriate local law enforcement officials.⁴⁸ The Secretary may also cooperate with law enforcement officials of states or political subdivisions in the enforcement of state or local laws or ordinances on the public lands.⁴⁹

IMPLEMENTING THE POLICY DIRECTIONS OF FLPMA

Congress recognized that implementation of the sweeping changes in public land administration legislated in FLPMA could not take place immediately. Provision is made for a transition from existing regulations to new directives implementing FLPMA.⁵⁰ This has enabled the BLM to effectively modify older regulations through FLPMA policy directives to accommodate the administrative requirements of the Act avoiding a "shutdown" of operations.

FLPMA is complex and inadvertently ambiguous in several respects. It is an attempt to prescribe a policy for arriving at consistency

44. *Id.*

45. *Id.* § 1701(a)(5).

46. *Id.* §§ 1702(a), 1739.

47. *See id.* § 1733.

48. *Id.* § 1733(c)(1).

49. *Id.* § 1733(d).

50. *Id.* § 1740.

or compatibility in a multiple use context among the various uses and users of the public lands. However, because of the complexity of the issues addressed and in some cases the language used, interpretation of the Act and Congress' intent frequently has been difficult. Often, implementation of a provision of the Act has been possible only after the Solicitor has researched and interpreted seemingly simple phrases and relationships.

Developing a viable, coordinated, consistent, logical, and legally defensible multiple use program has been a tremendous and exciting challenge. Despite the complexity of the Act, the BLM proceeded to implement the Act immediately after its effective date. An Organic Act Policy Committee was formed soon after FLPMA's enactment. This Committee is composed of assistant directors and other key BLM personnel and representatives from the Office of the Assistant Secretary, Land and Water Resources, the Office of the Solicitor, the Geological Survey, and the Forest Service. The function of the Committee is to identify issues, establish priorities, and make recommendations to the director regarding implementation of the Act.

The Committee's first action was to establish a system of Organic Act Directives regarding the BLM's operation under the new law until regulations could be issued. The process of developing regulations began promptly because several provisions of FLPMA prescribed deadlines. These deadlines have been met, and significant progress has been made on implementation of other provisions. Implementation has been slowed, but improved, by a new concept in citizen participation introduced in 1977. Under this new procedure, even before *proposed* regulations are published, citizens and organizations are given an opportunity to review and comment on BLM's intent to develop regulations and on the policy to be set by the regulations.

Land Use Planning

Land use planning is not a new concept for the BLM. A multiple planning system was initiated by the BLM in 1969 and has been refined periodically over the years to meet needs generated by changing policy and legislation and increasing resource use pressures. In effect, FLPMA adopted BLM's planning system. The Act is really an affirmation of the viability of the system. Simply stated, before FLPMA the process involved inventorying the public lands, doing a comprehensive resource analysis, and finally, developing management framework plans that formed the basis of BLM actions. After the enactment of FLPMA, the BLM began to develop regulations for inventory and

planning as required by the law,⁵¹ seeking public comment and evaluation in the process.⁵² It was decided that the planning process needed further additions and changes to comply with the new legislation and to improve the quality of resource management planning to match current and anticipated resource demands. Significant changes will include better national policy communication to the local BLM planners. There will be a modification of the planning process, in coordination with the Forest Service, to make the planning process used by both agencies as similar as possible to maximize efficiency and minimize public confusion. Other changes include improved coordination with state and local governments; improved development, display, and assessment of alternatives in the selection of a standard area for which resource management plans are normally prepared; preparation of a reproducible planning document for each planning area showing how alternatives were assessed and how the planning decision was reached; assessment of environmental and other effects of the proposed plans in a combined final draft plan and environmental impact statement; and provision for expeditious amendment of resource management plans to meet emerging needs.

Multiple Use

Enactment of FLPMA ended a long history of fuzzy, diverse, and sometimes contradictory statutory responsibility and authority for the management of public lands. It also began an era of congressional commitment to a management ethic that had been developing in the BLM — particularly since 1969 with the implementation of comprehensive land use planning. The BLM had been practicing multiple use management with increasing intensity for a number of years. Now it will be done not only because it is good land management and in the greatest public interest but because it has congressional sanction. The refinement of the land use planning regulations provides strong policy direction. Direct involvement of the general public, the scientific community, interested groups and associations, and the multiple use advisory councils — now mandated by law⁵³ — will assure adherence to the multiple use philosophy.

Disposal of Public Lands

The policy statements in the Act set very specific guidelines for developing regulations relating to sales and exchanges of public

51. *Id.* § 1711(a).

52. *Id.* § 1712(f).

53. *Id.* § 1739.

lands.⁵⁴ Regulations are still being developed. However, the absence of new regulations has not caused a halt to all sales of public lands that meet FLPMA's very strict criteria for disposal. The law allows actions to be taken under existing regulations to the extent practical, and the BLM is doing this on a case-by-case basis. Specific modifying instructions are given in each case where it is found that the criteria of the Act have been met and a sale would serve public objectives.

Environmental Awareness

Concern for the environment has long been an element reflected in the BLM's actions and programs. This concern has been sharpened as a result of additional requirements in FLPMA for consideration and protection of the environment. An excellent example of added concern for the environment and the resources on the public lands is the prospective issuance of regulations relating to surface management of mining operations under the Mining Law of 1872. Although there is authority in the old law to regulate mining activities to prevent unnecessary or undue degradation of the lands, FLPMA supplied the additional impetus and requirement to issue the regulations and control the activity.

Wilderness Review

The policies expressed in the wilderness review section of FLPMA present the perfect dilemma. On the one hand, the Act directs the Secretary to manage the public lands according to his authority under this Act and other applicable authority.⁵⁵ This means management under principles of multiple use. The section also specifically authorizes the continuation of existing mining and grazing uses and mineral leasing in the manner and degree in which the same was being conducted on the date of approval of the Act.⁵⁶ On the other hand, the same section requires that these activities be carried on in a manner so as not to impair the suitability of such areas for preservation as wilderness, and that the Secretary take any action necessary to prevent unnecessary or undue degradation of the lands and their resources and to afford environmental protection.⁵⁷

The wilderness review provisions of the Act have raised some crucial and difficult questions: What constitutes impairment? How can a land manager allow a wide variety of uses to continue and still protect

54. *Id.* §§ 1713-1722.

55. *Id.* § 1782(c).

56. *Id.*

57. *Id.*

wilderness values? What is a road? These and similar questions have been the basis of much research and deliberation by the Solicitor's Office and BLM personnel. Guidelines have been issued by the Solicitor and action plans developed to implement the wilderness review requirements of the Act, and provide for interim management of study areas. The program provides for three phases of wilderness review: inventory, study, and reporting to Congress. The inventory phase involves looking at the public lands to determine and locate those areas which have wilderness characteristics as defined in the Wilderness Act of 1964.⁵⁸ These areas are identified as the wilderness study areas. The study phase involves comparing the wilderness values with other resource values of the wilderness study areas to determine whether the wilderness study area is more suitable for wilderness or for other uses. These determinations, made through the BLM land use planning system, consider all values, resources, and uses of the wilderness study areas. The reporting phase consists of actually forwarding or reporting these suitable and unsuitable recommendations through the Secretary of the Interior and the President to the Congress. Mineral surveys required by the Act, environmental statements, and other data are also submitted with these recommendations. Only Congress can designate lands for preservation as wilderness. Once designated as wilderness, these additions to the National Wilderness Preservation System are to be managed by the BLM according to the provisions of the Wilderness Act which apply to national forest wilderness areas.⁵⁹

The BLM is developing, with a high degree of public participation, an interim management policy designed to ensure that any area satisfying the definition of wilderness in the Wilderness Act will still satisfy the definition when Congress acts on the President's recommendations as to whether the area should be designated permanently as wilderness. The interim management policy of the BLM protects the right of Congress to make that decision by preventing preemptive actions. It should be noted, however, that an exception was legislated. Congressional decision might be preempted by impairment resulting from grandfathered mining, mineral leasing, and grazing acts. To the extent that the BLM is authorized to prevent impairment, it will do so. This policy will guide BLM staff in the specific decisions that arise in the everyday management of land uses of wilderness study areas.

58. 16 U.S.C. §§ 1131-1136 (1976).

59. *Id.* § 1131.

Public Participation

Much has been done to increase the opportunity for public participation in BLM planning and decisionmaking. In most cases, the BLM publishes a notice of intent containing substantial information on new proposals for regulations before work is begun on formal writing. Public comments and suggestions are sought and considered when proposed regulations are written. A public comment period is also provided on proposed regulations—usually sixty days, sometimes more—before final regulations are written. An analysis of the public comments is always included in the preamble to the final regulations. Public meetings and hearings are held on proposed regulations, on environmental statements, and on land use plans. When approved and chartered, the advisory councils will be an excellent source of public input. They will be designed to represent a wide range of interests and will bring together the best minds in the nation capable of clearly seeing and equitably resolving public lands resource issues. These approaches will give the BLM fresh ideas, result in more meaningful discussion of the issues, afford participants a real opportunity to make their views known before an approach or decision has been crystallized, and result in better understanding and public acceptance of a program.

Enforcement Authority

The law enforcement provisions of FLPMA,⁶⁰ although similar to those exercised by other land managing agencies, have proven to be controversial. Rather than being viewed as a device to establish an enormous police force on the public lands, the BLM sees the expanded enforcement authority granted by the Act as an additional opportunity to strengthen its resource management programs. An integral part of the management of any resource value, whether it be range, timber, mineral, watershed, or wildlife, to name but a few, is its use by the public. The enforcement programs of the BLM recognize and provide for public use as well as resource protection. An essential element of any management program is compliance with measures that will protect the people and the resources. It is the BLM's philosophy that its law enforcement activity be structured to support its multiple-use management programs by enforcing the laws and regulations to assure orderly and effective use of the public lands. The law enforcement activity emphasizes public education programs, information and service to users of the public lands, and prevention as a deterrent to violation. It is a supportive service, not a program on its own.

60. 43 U.S.C. § 1733 (1976).

OVERVIEW

The BLM is truly a service agency. The real implications of FLPMA are that the basic purpose of the BLM is to render service and technical assistance regarding the management of rangelands and the protection and proper utilization of the vast resources of the public lands, ranging from economic development of the various resources to maintenance of areas in a manner that will preserve the pristine characteristics of wilderness. For a long time, the BLM was just the custodian of the public lands. It is now the manager of the lands and their resources. As a manager it will utilize advanced management techniques, increased opportunity for public participation, more involvement of scientific and technical knowledge and experience, and the most skillfully developed planning system to achieve maximum benefits from the public lands for the general public.

