WITHDRAWALS UNDER THE FEDERAL LAND POLICY MANAGEMENT ACT OF 1976

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The Federal Land Policy Management Act of 1976 [FLPMA][1] enacted major changes in the existing body of law governing withdrawals of public lands. The Act repealed twenty-nine withdrawal statutes enacted between 1888 and 1952,[2] expressly reversed *United States v. Midwest Oil Co.*,[3] a Supreme Court decision authorizing withdrawals by the Executive without express congressional authorization,[4] and substituted a comprehensive new system for the withdrawal of public lands. As such, FLPMA is clearly the most significant exercise of congressional legislative powers over public land withdrawals in the nation's history.

The power to withdraw lands from the operation of the myriad of public land laws enacted by Congress providing for the sale, lease, and use of disposal of public lands, has been subject to long standing controversy. The extensive use of withdrawals, which preclude the operative effect of an existing statute providing for a different disposal or use, made it clearly foreseeable that such conflicts and disputes would arise.[5] The problems caused by Congress' extensive use of its with-

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1. 43 U.S.C. §§ 1701-1782 (1976).
2. Pub. L. No. 94-579, § 704(a), 90 Stat. 2744 (1976).
3. 236 U.S. 459 (1915).
4. Pub. L. No. 94-579, § 704(a), 90 Stat. 2744 (1976).
5. In 1970 the Public Land Law Review Commission reported to the President that:

> At present virtually all of the public domain in all 50 states has been withdrawn from entry under one or more of the public land laws. Approximately 264 million acres are withdrawn under specific orders for particular purposes. Some 163 million acres were withdrawn in 1934 and 1935 in the 11 contiguous western states to implement the Taylor Grazing Act. Early in 1969 entries and state selection of the public lands in Alaska were suspended for a period of two years to enable Congress to consider legislation to resolve the problem of native claims.

drawal power was augmented by the Executive withdrawal power which helped lead to the creation of the Public Land Law Review Commission [PLLRC].[6] Based on its extensive analysis of the problems involved in the withdrawal and reservation of public lands, the PLLRC made a number of recommendations for changes in the withdrawal system—recommendations which were acted upon by Congress in FLPMA.

Congress' enactment of FLPMA was designed to come to grips with a number of the problems dealing with the existing system of withdrawals that had been outlined by the PLLRC. As such, review of the new legislative provisions can best be undertaken in the context of three major problem areas: (a) whether the Executive should continue to make withdrawals without express authorization by Congress; (b) whether withdrawals should be subject to detailed procedures and guidelines established by Congress; and (c) how and when existing withdrawals should be reviewed to determine whether they meet the established overall national policy for the best use of public lands in the public interest.

CONGRESSIONAL EXERCISE OF CONSTITUTIONAL AUTHORITY TO WITHDRAW FEDERAL LANDS AND TO DELINEATE THE EXTENT TO WHICH THE EXECUTIVE MAY WITHDRAW LANDS WITHOUT LEGISLATIVE ACTION

Withdrawals and reservation of public lands since the founding of the United States have been accomplished by three means: (1) express withdrawals by Congress in legislation, for example, national parks and military reservations; (2) withdrawals by the Executive pursuant to delegations of authority from Congress; and (3) withdrawals by the Executive without statutory authority.[7]

Direct express withdrawals by Congress have posed few problems

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> We experience great difficulty in trying to determine with any precision the extent of existing Executive withdrawals and the degree to which withdrawals overlap each other. We have found that the agencies do not have accurate records that show the purposes for which specific areas have been withdrawn and the uses that can be made of such areas under the public land laws.

PUBLIC LAND LAW REVIEW COMMISSION, ONE THIRD OF THE NATION'S LAND 52 (1970) [hereinafter cited as PLLRC].

6. Concern about problems associated with the "withdrawal" and "reservation" of public domain lands was strongly voiced in the deliberations which led to the creation of the Commission, and was a recurring subject of complaint in the Commission's public meetings. The contractor study of withdrawals indicates that they have been used by the Executive in an uncontrolled and haphazard manner.

Id. at 43.

7. C. WHEATLY, STUDY OF WITHDRAWALS AND RESERVATIONS OF PUBLIC DOMAIN LANDS 1 (1969).

because they are carefully scrutinized by the executive branch before being recommended.[8] Further, while withdrawals by the Executive pursuant to congressional delegation have incurred the problems of application of proper procedures and guidelines to assure consistency with the overall public interest, they have not raised the issue of a basic conflict between the legislative and executive branches as to which possesses the authority and responsibility for withdrawals of public lands. It is the third category, withdrawals by the Executive without statutory authority, that poses the threshold question of the respective roles of the legislative and executive branches in the withdrawal process.

A review of the relative roles of the Congress and President in the history of withdrawals provides the necessary background to the problem. The Constitution gives Congress the power to "dispose of and make all needful Rules and Regulations respecting Territory or Property belonging to the United States."[9] During the early days of the Republic, Congress enacted specific statutes authorizing the President to establish military reservations, Indian trading posts, lighthouses, and townsites.[10] Many of these withdrawals by the Executive became so commonplace that the original statutory authority was never questioned or determined. Subsequently, during the later part of the nineteenth century, Congress adopted the practice of making direct withdrawals of land for certain purposes, or of authorizing the Executive to make withdrawals for certain specified objectives.[11] For example, in 1872 Congress directly withdrew lands creating the Yellowstone National Park,[12] and until the present time, all additions and modifications to the national park system have been by express legislation.[13] In 1888, Congress authorized the Geological Survey to recommend lands to be

8. *See* PLLRC, *supra* note 5, at 2.

> We find that when proposed land uses are passed on by the Congress, they receive more careful scrutiny in the executive branch before being recommended; furthermore, in connection with congressional action, the general public is given a better opportunity to comment and have its views considered. We conclude that Congress should not delegate broad authority for these types of actions.

Id.

9. U.S. CONST. art. IV, § 3, cl. 2. The Supreme Court has stated:

> Not only does the Constitution (art. IV, § 3, cl. 12) commit to Congress the power "to dispose of and make all needful rules and regulations respecting" the lands of the United States, but the settled course of legislation . . . and repeated decisions of this court, have gone upon the theory that the power of Congress is exclusive and that only through its exercise in some form can rights in lands belonging to the United States be acquired.

Utah Power & Light Co. v. United States, 243 U.S. 389, 404 (1917). *See* United States v. San Francisco, 310 U.S. 16, 29-30 (1940); Gibson v. Chouteau, 80 U.S. (13 Wall.) 92, 99 (1871); United States v. Fitzgerald, 40 U.S. (15 Pet.) 526, 537 (1840).

10. C. WHEATLY, *supra* note 7, at 2.
11. *Id.*
12. 16 U.S.C. § 21 (1976).
13. C. WHEATLY, *supra* note 7, at 2.

reserved for power sites, under certain prescribed criteria.[14] An important act of the era relating to the withdrawal process was the National Forest Act of 1891[15] wherein Congress authorized the President to withdraw public lands for national forests. But while this represented a delegation of the power to withdraw lands from Congress to the Executive, Congress exhibited a continuous supervision of the executive action, vacating various withdrawals from time to time and amending others.[16] In 1902, Congress enacted the Reclamation Act[17] and in 1906 the Antiquities Act,[18] both authorizing withdrawals of land for specified purposes.

The Midwest Oil Co. Case

It was not until the twentieth century that the problem of the executive power to withdraw lands without express congressional authority came into sharp focus. On September 27, 1909, President Taft, by executive order, withdrew approximately three million acres of land believed to contain oil in California and Wyoming from location under the placer mining laws, "in aid of proposed legislation affecting the use and disposition of the petroleum deposits on the public domain." Challenges to the validity of this order reached the Supreme Court in 1915 in the now famous decision of *United States v. Midwest Oil Company*.[19] The Court was presented with elaborate arguments by the United States on the authority of the Executive to withdraw lands under alleged "inherent" authority emanating from the Constitution, but it declined to base its decision on that ground. It affirmed the executive withdrawals "in the light of the legal consequences flowing from a long continued practice to make orders like the one here involved."[20] Referring to some eighty years of practice where withdrawals had been made without express statutory authority, the Court concluded that Congress had affirmed that power by implication. Thus, the Court based its decision on the premise that although the Executive by its action cannot create a power to withdraw lands, such authority can be deemed to have been vested in the Executive by congressional acquiescence in a long established practice of withdrawing lands:

> [The President's practice of withdrawing lands by Executive orders] were known to Congress, as principal, and in not a single instance

14. Act of Oct. 2, 1888, ch. 1069, 25 Stat. 526 (1889) (current version at 43 U.S.C. § 622 (1976)).
15. Act of Mar. 3, 1891, ch. 561, § 24, 26 Stat. 1103 (1891).
16. C. WHEATLY, *supra* note 7, at 278-83.
17. Act of June 17, 1902, ch. 1093, § 3, 32 Stat. 388 (codified at 43 U.S.C. § 416 (1976)).
18. Act of June 8, 1906, ch. 3060, § 2, 34 Stat. 225 (codified at 16 U.S.C. § 431 (1976)).
19. 236 U.S. 459 (1915).
20. *Id.* at 469.

> was the act of the agent [the President] disapproved. Its acquiescence all the more readily operated as an implied grant of power in view of the fact that the exercise was not only useful to the public but did not interfere with any vested right of the citizen.[21]

The General Withdrawal Act of 1910

After the 1909 withdrawals, Congress enacted the General Withdrawal [Pickett] Act of 1910.[22] The Act resulted from the request of President Taft for statutory authority to clarify his withdrawal power,[23] and was the only act, prior to FLPMA, wherein Congress sought to enact general legislation delegating authority to the Executive to withdraw and reserve the public lands of the nation.[24] The Pickett Act provided that all withdrawals thereunder were to be open to mining for metalliferous minerals, and continued earlier restrictions on creation of forest reserves in certain states.[25]

Subsequent to the Pickett Act and through the late 1930's, most withdrawals were made pursuant to the terms of the Act. The broad general withdrawals in 1934 and 1935 of all "vacant unappropriated" public lands in conjunction with the Taylor Grazing Act[26] were made pursuant to the authority delegated to the President by the Pickett Act.[27]

The 1941 Opinion of the Attorney General

In 1940 and 1941, the issue arose as to the authority of the President to make a withdrawal of lands from the operation of the mining law, which the Pickett Act had expressly provided was to be operable as to withdrawals thereunder. Attorney General Jackson, when he first considered the matter in 1940, decided that Congress in enacting the Pickett Act of 1910 had intended to circumscribe the complete authority available to the President to withdraw lands.[28] Indeed, close analy-

21. *Id.* at 475.

22. Act of June 25, 1910, ch. 421, § 1, 36 Stat. 847 (repealed Pub. L. No. 94-579, § 704(a), 90 Stat. 2792 (1976)).

23. C. WHEATLY, *supra* note 7, at 4.

24. The Act provided that:

> 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 water-power 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 Pub. L. No. 94-579, § 704(a), 90 Stat. 2792 (1976)).

25. 43 U.S.C. § 142 (1970).

26. 43 U.S.C. § 315-315r (1976).

27. *See* C. WHEATLY, *supra* note 7, at 4.

28. Unpublished Op. of Att'y Gen., July 25, 1940 (withdrawn) *reprinted* in C. WHEATLY, *supra* note 7, at app. B-6 to B-11.

sis of the legislative history of that Act supports this conclusion.[29] The opinion, however, was never published. Secretary Ickes and other government agencies sought to have the Attorney General change his opinion. Subsequently, a memorandum was prepared in the Justice Department under the supervision of Assistant Attorney General Fahy, who reported to the Attorney General that the matter was close, but that in Fahy's opinion, the nonstatutory authority of the President should be affirmed.[30] In 1941, Attorney General Jackson issued a new opinion affirming the inherent authority of the President to make "permanent" withdrawals of public lands and limited the Pickett Act to "temporary" withdrawals.[31] The 1941 Opinion was based on the conclusion that Congress in the Pickett Act had intended to limit the inherent authority of the Executive to act only as to "temporary" withdrawals and therefore left untouched the continued implied power of the Executive to withdraw lands with the acquiescence of Congress. Although the 1941 Opinion was not premised on any inherent constitutional power in the Executive to withdraw lands, subsequent decisions within the Department of the Interior developed such a rationale for executive action.[32]

The theory that the Executive possess an inherent authority under the Constitution to withdraw public lands, apart from the acquiescence of Congress, had been argued by the United States in the *Midwest* case,[33] but the Supreme Court's decision that the power of the Executive rested only on the "acquiescence of Congress"[34] would appear to be an indirect rejection of the position. Proponents of the theory urge its continued validity, although no court has yet to confirm it.[35] The implications of the existence of such a power are clear. Even if Congress did act to clearly limit a certain type of withdrawal, the President, acting under his assumed inherent constitutional power, if valid, could disregard the mandate of the legislation.[36]

After the issuance of the 1941 Opinion of the Attorney General, the President in 1952 delegated all of the authority to withdraw lands, whether under specific statute, the Pickett Act, or any other source of authority, to the Secretary of the Interior.[37] The Secretary increasingly

29. *See* C. WHEATLY, *supra* note 7, at 88-103.
30. *Id.* at 5 app. B-14 to B-22.
31. *Id.*
32. See Lyman v. Crunk, 68 Interior Dec. 190 (1961) (Secretary ruled he possessed implied withdrawal authority to make "temporary" withdrawals despite the 1910 Pickett Act).
33. United States v. Midwest Oil Co., 236 U.S. 459, 468 (1915).
34. *Id.* at 483.
35. *See* C. WHEATLY, *supra* note 7, at 5.
36. Attorney General Jackson in his unpublished 1940 Opinion expressly noted such a possibility as a reason for denying the existence of such a power. Unpublished Op. of Att'y Gen., June 25, 1940 (withdrawn), *reprinted in* C. WHEATLY, *supra* note 7, app. B-6 to B-11.
37. Exec. Order No. 10,355, 17 Fed. Reg. 4831 (1952).

relied upon the nonstatutory authority set forth by the Attorney General in the 1941 Opinion. For example on January 27, 1967, the Director of the BLM withdrew 86,000,000 acres of public lands from all entry under the mining and mineral leasing laws for protection of possible geothermal steam resources and other minerals on the lands.[38] After congressional inquiry, this was later reduced to 1,050,900 acres. Similarly, on January 28, 1967, the BLM withdrew all lands containing oil shale deposits in Colorado, Utah, and Wyoming using its asserted inherent authority.[39]

Based on the above development of the law of withdrawals, presenting a confused, unresolved conflict between the authority of the Congress and the President to make withdrawals, the PLLRC recommended that Congress enter the field and set the standards that could expressly govern the Executive in making withdrawals.[40] Congress adopted that recommendation in FLPMA. This Article will now focus upon a discussion of FLPMA's treatment of withdrawals.

FLPMA

Congress undertook to legislate clearly and directly on the subject of withdrawal authority in the Federal Land Policy Management Act of 1976. In unequivocal terms, Congress provided that it was setting statutory guidelines for all withdrawals of public lands, which in its view would govern all executive action. In section 102(a) Congress declared it is the policy of the United States that "the Congress exercise its constitutional authority to withdraw or otherwise designate or dedicate Federal lands for specified purposes and that Congress delineate the extent to which the Executive may withdraw lands without legislative action."[41] Section 204(a) of the Act provides that "the Secretary is authorized to make, modify, extend, or revoke withdrawals but only in accordance with the provisions and limitations of this section."[42] These provisions, coupled with the expansive definition of "withdrawals,"[43]

38. 32 Fed. Reg. 1001-02 (1967).
39. *Id.* at 1058.
40. PLLRC, *supra* note 5, at 2. In its report the Commission recommended that:
Congress assert its constitutional authority by enacting legislation reserving unto itself exclusive authority to withdraw or otherwise set aside public lands for specified limited purpose uses and delineating specific delegation of authority to the Executive as to the types of withdrawals and set asides that may be effected without legislative action.
Id.
41. 43 U.S.C. § 1701(a)(4) (1976).
42. *Id.* § 1714(a).
43. The act defined withdrawal as follows:
The term "withdrawal" means 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

clearly cover any implied or inherent executive withdrawal authority. But the most important provision covering executive withdrawal power is section 704(a) which expressly revoked the implied authority of the Executive to make withdrawals.[44] Since there may be some confusion in this result a brief discussion might be in order.

The House Conference Report's[45] comment on section 704(a) stated that the section provided "for the repeal of *practically all* existing executive withdrawal authority."[46] While use of the words "practically all" might imply that some inherent executive withdrawal authority was left outstanding, another more plausible explanation is that the Act expressly repealed twenty-nine prior statutes leaving some small miscellaneous statutes authorizing particular withdrawals still on the books.

The Secretary of the Interior, in commenting to Congress adversely on the proposed express repeal of the *Midwest Oil* decision, stated that this would raise the issue of the President's inherent authority under the Constitution to withdraw lands.[47] The legislative history of FLPMA,[48] however, confirms the clear language Congress used in

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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 (40 U.S.C. 472 (1976)) from one department, bureau or agency to another department, bureau or agency.

Id. at § 1702(j).

44. Section 704(a) provides in pertinent part: "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 and the following statutes and parts of statutes are repealed. . . ." Pub. L. No. 94-579, 90 Stat. 2743, 2792 (1976).

45. H.R. REP. No. 94-1724, 94th Cong., 1st Sess. 66 (1976). The House Conference Report stated: "The House Amendments (but not the Senate bill) provided for repeal of practically all existing executive withdrawal authority. The conferees agreed to this repeal to the extent provided for by the House." *Id.*

46. *Id.* (emphasis added).

47. H.R. REP. No. 94-1163, 94th Cong., 2d Sess. 52 (1976). The Secretary stated:

> The draft would repeal the Pickett Act, 43 U.S.C. §§ 141-142 (1970), and eliminate any implied Presidential withdrawal power, see United States v. Midwest Oil Co., 236 U.S. 459 (1915). Thus, the proposed Organic Act would be the only basis for withdrawal authority. A cursory analysis discloses that the proposed repealer would effectively resurrect the very issue underlying the *Midwest Oil* case: how much inherent withdrawal power does the Executive possess constitutionally?

Id.

48. *Id.* at 9 provides in pertinent part:

> *With certain exceptions, H.R. 13777 will repeal all existing law relating to executive authority to create, modify, and terminate withdrawals and reservations.* It would reserve to the Congress, the authority to create, modify, and terminate withdrawals for national parks, national forests, the Wilderness System, Indian reservations, certain defense withdrawals, and withdrawals for National Wild and Scenic Rivers, National Trails, and for other "national" recreation units, such as National Recreation Areas and National Seashores. It would also specifically reserve to the Congress the authority to modify and revoke withdrawals for national monuments created under the Antiquities Act and for modification and revocation of withdrawals adding lands to the National Wildlife Refuge System. These provisions will insure that the integrity of the great national resource management systems will remain under the control of the Congress.
>
> For the protection of statutory programs for the public lands and other statutory management programs, the bill grants to the Secretary of the Interior, subject to certain

the repealer section leaving to Congress exclusive control over withdrawals.[49] The delineation by the Act of the specific terms and conditions upon which the Secretary of the Interior can exercise withdrawal power and the persons to whom it may be delegated, make clear that Congress intended to occupy the entire field permitted under its constitutional authority over the public lands and to control and direct the executive use of withdrawal power.

It thus appears clear that FLPMA bars all claims of implied authority in the Executive as far as Congress is concerned. The only avenue left to support such a claim would be to attack the constitutionality of the Act itself. Such an approach would have to be based on the contention that if the authority of the President to withdraw lands rests on an independent grant from the Constitution, Congress' clear action in FLPMA to repeal and bar such inherent withdrawal activity is unconstitutional. In view of the language of article IV, section 3, clause 2 of the Constitution and the cases construing Congress' authority thereunder over the public lands,[50] the possibility of such a ruling appears remote.

Should such a contention be made, however, the escape route of the 1941 Attorney General Opinion ruling that the 1910 Pickett Act only intended to apply to "temporary" not "permanent" withdrawals could not be followed. Congress in the 1976 Act has expressly closed any such loophole by expressly providing that "the implied authority of the President to make withdrawals . . . resulting from the acquiescence of the Congress is repealed."[51]

THE DETAILED PROCEDURES AND GUIDELINES ESTABLISHED BY CONGRESS FOR WITHDRAWALS

The second major problem area FLPMA dealt with was to establish uniform procedures and standards to govern withdrawals delegated to the Executive. Of course, to the extent that Congress expressly withdrew lands for a particular purpose, the detailed consideration given in the legislative process, including input from the Executive in the form of reports and recommendations, assured thorough evaluation of the public interest. Accordingly, the problem arose only with respect to withdrawals undertaken by the Executive.

Few of the prior statutes delegating authority to the Executive to

procedural controls, authority to create, modify, and terminate all withdrawals and reservations for all public purposes and departmental agency programs, existing and proposed, other than those reserved by the bill to the Congress. . . . (emphasis added).

49. Pub. L. No. 94-579, § 704(a), 90 Stat. 2743, 2792 (1976).

50. *See* cases cited *supra* note 9; C. WHEATLY, *supra* note 7, at 47-50.

51. *See* Pub. L. No. 94-579, § 704(a), 90 Stat. 2743, 2792 (1976).

withdraw public lands prescribed any procedures or standards to govern the process.[52] While the Pickett Act contained a number of express limitations upon the Executive in use of the withdrawal powers delegated thereunder, such as permitting metalliferous mining,[53] and prohibiting the withdrawal of lands for forest reserves in certain states,[54] the Act did not contain any specified procedures or criteria for the withdrawal or revocation of withdrawals of lands. Most of the other statutes delegating withdrawal authority to the Executive did not detail the procedures and standards for exercising this power.[55]

Another subsidiary problem arose from the use of the classification powers by the Secretary of the Interior under section 7 of the Taylor Grazing Act as amended in 1936[56] or the Classification and Multiple Use Act of 1964[57] to avoid conforming to existing statutory limitations governing withdrawals.[58] These resulted in *de facto* withdrawals by use of the classification process which undercut the integrity of the then existing laws and orders for withdrawals.

Congress expressly dealt with the problem areas caused by the lack of procedures and standards, and the subsidiary issue of the *de facto* withdrawals in FLPMA, by providing detailed procedures the Secretary must follow before a withdrawal can become effective, as well as providing for congressional and judicial review of his withdrawal decisions. The remaining sections of this Article will focus on those procedures and the congressional and judicial review provided in the Act.

Procedures

Notice and Hearing

Section 204(a)[59] of FLPMA requires that all withdrawals be accomplished only through certain prescribed procedures applicable to

52. *See, e.g.*, Act of March 3, 1807, ch. 34, § 2, 2 Stat. 437 (1807); Act of March 1, 1847, ch. 32, § 2, 9 Stat. 146 (1847); Act of March 1, 1817, ch. 22, 3 Stat. 347 (1817). For a discussion of congressional withdrawals, *see generally* C. WHEATLY, *supra* note 7, at 50-130.

53. 43 U.S.C. § 142 (1976) (repealed by Pub. L. No. 94-579, § 704a, 90 Stat. 2792 (1976)).

54. *Id.* (repealed by Pub. L. No. 94-579, § 704a, 90 Stat. 2792 (1976)).

55. In recent years, Congress was becoming increasingly concerned with the matter. In the Defense Withdrawal Act of 1958, Congress prohibited executive withdrawals of land in excess of 5,000 acres and set forth a list of specifications for all applications for withdrawals requiring approval by a specific act of Congress. 43 U.S.C. §§ 155-158 (1976).

56. 43 U.S.C. § 315 (1976) (originally enacted as Act of June 28, 1934, ch. 865, 48 Stat. 1269 (1934)).

57. *Id.* § 1421.

58. Under both section 7 of the Taylor Act and section 1 of the 1964 Classification Act, it is clear that the Secretary of Interior may, by means of a classification, determine to retain particular public lands in Federal ownership. *See* Carl v. Udall, 309 F.2d 653, 657-58 (D.C. Cir. 1962); Linn Land Company v. Udall, 255 F. Supp. 382 (D. Ore. 1966); Richardson v. Udall, 253 F. Supp. 72, 79 (D. Idaho, 1966). In Calvin B. Neely, A 30235, Interior Dec. Oct. 12, 1964, the Secretary held that lands could be classified under section 7 of the Taylor Act without the necessity for a formal withdrawal of the lands.

59. 43 U.S.C. § 1714(a) (1976).

all authorized executive withdrawals.[60] Under these procedures, when the Secretary of the Interior receives an application for withdrawal, or decides to initiate one himself, he must publish a notice of the proposed withdrawal in the Federal Register within thirty days of the request.[61] The publication of the notice has the effect of temporarily withdrawing or "segregating" the lands from entry under the public land laws to the extent set forth in the notice.[62] This initial segregative effect of the notice terminates 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.[63]

This provision imposes a beneficial change on the prior practice. While publication of notice in the Federal Register had been followed by the Secretary, there had been no specified limit to the segregative effect of such publication. Accordingly, it was not uncommon for lands to be segregated and thus effectively withdrawn by the publication of such notice and to remain as such for a number of years. Under FLPMA, the Secretary is required to act on the proposed withdrawal within a maximum period of two years after publication of notices.

The one exception to the notice provision of section 204(a) is found in section 204(e)[64] for emergency situations. If the Secretary determines that such an emergency exists, or if so notified by either the Committee on Interior and Insular Affairs of either the House of Representatives or the Senate, and finds that "extraordinary measures must be taken to preserve values that would otherwise be lost,"[65] the Secretary may make any emergency withdrawal which shall last for a period not to exceed three years. Such an emergency withdrawal would also be exempt from the provisions of section 204(c) governing proposed withdrawals.

Section 204(h)[66] provides that all new withdrawals, except emergency withdrawals, made by the Secretary shall be promulgated after an "opportunity for a public hearing."[67] Congress clearly desired full

60. 43 U.S.C. § 1714(j) (1976), prohibits the Secretary from making, modifying or revoking any withdrawals created by act of Congress and bars any withdrawal which can be made by act of Congress, including those relating to national monuments under the Antiquities Act of June 8, 1906, 16 U.S.C. §§ 431-433 (1976) or the National Wildlife Refuge System.

61. 43 U.S.C. § 1714(b)(1) (1976).

62. *Id.* The Act, as amended in conference, permitted the Secretary of the Interior to publish notice of a proposed withdrawal prior to his noting his records of the proposal. *See* H.R. REP. No. 94-1724, 94th Cong. 2d Sess. 10 (1976).

63. *See id.* at 11.

64. 43 U.S.C. § 1714(e) (1976).

65. *Id.*

66. *Id.* § 1714(h).

67. *Id.*

public participation and input into the withdrawal process.[68]

Review by Congress

Section 204(c)[69] of FLPMA provides a mechanism for review of proposed withdrawals in excess of 5,000 acres by the Congress, with a veto power in the Congress by enactment of a concurrent resolution. Section 204(c)(1)[70] provides that proposed withdrawals in excess of 5,000 acres, can be made only for a period of not in excess of twenty years, and the Secretary is required to notify both Houses of Congress no later than its effective date. The withdrawal shall terminate and become ineffective if Congress enacts a concurrent resolution disapproving it within ninety days.[71] The Act sets forth detailed provisions for the expedited resolution of the matter within the ninety-day period in the House and Senate.[72]

There appears to be some ambiguity in the language of Section 204(c)(1) as to whether one or both Houses of Congress can veto a proposed withdrawal. The language states:

> [T]he withdrawal shall terminate and become ineffective at the end of ninety days (not counting days on which the Senate or the House of Representatives has adjourned for more than three consecutive days) beginning on the day notice of such withdrawal has been submitted to the Senate and the House of Representatives, *if the Congress has adopted a concurrent resolution stating that such House does not approve the withdrawal.*[73]

Normally, a concurrent resolution adopted by Congress implies a resolution adopted by both Houses. But the remainder of the statutory language says that the resolution would state "that such House" does not approve the withdrawal. The House Report on the legislation provided that a proposed resolution may be vetoed separately by each House.[74] The Joint Conference Report, however, noted that the House version had been changed in conference to require a concurrent resolution by both Houses.[75] Thus, the ambiguity may be resolved by the Confer-

68. *See* Achterman & Fairfax, *The Public Participation Requirements of the Federal Land Policy and Management Act*, within this Symposium.

69. 43 U.S.C. § 1714(c) (1976).

70. *Id.* § 1714(c)(1).

71. *Id.*

72. *Id.*

73. *Id.* (emphasis added).

74. H.R. REP. No. 94-1163, 94th Cong., 2d Sess. 9 (1976). The Report states:

> Upon receipt of notice, each House will have, for a period of 90 days, the opportunity to terminate all such withdrawals, except emergency withdrawals, by a resolution of that House. Absent such timely action, it will take an Act of Congress to terminate the withdrawal if the Secretary does not do so.

Id. at 9.

75. H.R. Rep. No. 94-1724, 94th Cong., 1st Sess. 58 (1976). The House Conference Report stated:

> (d) The conferees adopted the House provisions for referral to Congress and possible veto of certain management decisions excluding public lands from one or more principal

ence Report as requiring a concurrent resolution adopted by *both* Houses of Congress. Section 204(c)(2) sets forth detailed information that must be provided in the notice required to be given to the Senate and House of proposed withdrawals in excess of 5,000 acres.[76] These provisions are designed to develop factual information to assure that lands proposed to be withdrawn for a specified purpose do not have some superior overriding use or purpose antithetical to that to be furthered by the proposed withdrawal. As such, the information required by Congress is designed to enable it to evaluate the basic policy objectives of the Act set forth in section 102(a),[77] and the land use planning criteria of section 202.[78]

For withdrawals under 5,000 acres, section 204(d)[79] of the Act permits the Secretary to undertake such withdrawals subject to certain limitations. If the withdrawal is for a "resource use" it may be made for

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uses. As to this and other veto provisions of the House amendments, the conferees revised the House amendments to require adverse actions by concurrent resolution. . . . *Id.*

76. 43 U.S.C. § 1714(c)(2) (1976). Section 204(c)(2) provides:

With the notices required by subsection (c)(1) of this section and within three months after filing the notice under subsection (e) of this section, the Secretary shall furnish to the committees—

(1) a clear explanation of the proposed use of the land involved which led to the withdrawal;

(2) an inventory and evaluation of the current natural resource uses and values of the site and adjacent public and nonpublic land and how it appears they will be affected by the proposed use, including particularly aspects of use that might cause degradation of the environment, and also the economic impact of the change in use on individuals, local communities, and the Nation;

(3) an identification of present users of the land involved, and how they will be affected by the proposed use;

(4) an analysis of the manner in which existing and potential resource uses are incompatible with or in conflict with the proposed use, together with a statement of the provisions to be made for continuation or termination of existing uses, including an economic analysis of such continuation or termination;

(5) an analysis of the manner in which such lands will be used in relation to the specific requirements for the proposed use;

(6) a statement as to whether any suitable alternative sites are available (including cost estimates) for the proposed use or for uses such a withdrawal would displace;

(7) a statement of the consultation which has been or will be had with other Federal departments and agencies, with regional, State, and local government bodies, and with other appropriate individuals and groups;

(8) a statement indicating the effect of the proposed uses, if any, on State and local government interests and the regional economy;

(9) a statement of the expected length of time needed for the withdrawal;

(10) the time and place of hearings and of other public involvement concerning such withdrawal;

(11) the place where the records on the withdrawal can be examined by interested parties; and

(12) a report prepared by a qualified mining engineer, engineering geologist, or geologist which shall include but not be limited to information on: general geology, known mineral deposits, past and present mineral production, mining claims, mineral leases, evaluation of future mineral potential, present and potential market demands.

77. *See id.*

78. *Id.* § 1702.

79. *Id.* § 1714(d).

such period as the Secretary "deems desirable."[80] A "resource use" is not directly defined in the Act, but the use of the word resource in the definition of "multiple use" indicates that it relates to the use of a particular resource with periodic adjustments to conform to changing needs and conditions, and may involve the use of land for "less than all of the resources."[81] Withdrawals of less than 5,000 acres may be made by the Secretary for a period of not more than twenty years for uses other than a resource use, including use for administrative sites, location of facilities, and other proprietary uses.[82] If a withdrawal is deemed desirable to preserve a tract for a specific use, then under consideration by the Congress, a withdrawal cannot exceed five years.[83]

In summary, the detailed notice and public hearing procedures set forth in FLPMA together with review and veto power by Congress, provide a completely new system for the promulgation of withdrawals. Obviously the data specified by the Act and required of the Secretary to meet these new procedural requirements will have the beneficial effect of subjecting withdrawals to a closer public and congressional scrutiny than hereto afforded. This, coupled with adherence to the planning goals of section 202[84] should result in a more judicious use of the withdrawal power in the public interest.

Guidelines for Public Land Use as Affecting Withdrawals

Although section 204 of FLPMA prescribes new procedures for notice, hearings, and congressional review of proposed executive withdrawals, it does not specifically set forth the criteria governing withdrawals. However, the data required to be presented to Congress for withdrawals of over 5,000 acres[85] suggests the information Congress

80. *Id.* § 1714(d)(1).

81. "Multiple use" is defined in Section 103(c) as,

> the management of the public lands and their various resource values so that they are utilized in the combination that will best meet the present and future needs of the American people; making the most judicious use of the land for some or all of the American people; making the most judicious use of the land for some or all of these resources or related services over areas large enough to provide sufficient latitude for periodic adjustments in use to conform to changing needs and conditions; the use of some land for less than all of the resources; a combination of balanced and diverse resource uses that takes into account the long-term needs of future generations for renewable recreation, range, timber, minerals, watershed, wildlife and fish, and natural scenic, scientific and historical values; and harmonious and coordinated management of the various resources without permanent impairment of the productivity of the land and the quality of the environment with consideration being given to the relative values of the resources and not necessarily to the combination of uses that will give the greatest economic return or the greatest unit output.

43 U.S.C. § 1702(c) (1976).

82. *Id.* § 1714(c)(2).

83. *See id.* § 1714(d)(3).

84. *Id.* § 1712.

85. *See id.* § 1714(c)(2).

deems important for review of such withdrawals. It appears that in making withdrawals, the Secretary might be bound by the guidelines set forth in section 202[86] of the Act for "land use planning." Section 202(e)(3),[87] for example, provides that withdrawals are a permissible tool that *may be* used by the Secretary in land use planning required under section 202.[88] Yet, section 202(a) provides in mandatory language that the Secretary:

> Shall . . . develop, maintain, and, when appropriate, revise land use plans which provide by tracts or areas for the use of the public lands. *Land Use plans shall be developed for the public lands regardless of whether such lands previously have been* classified, *withdrawn*, set aside, or otherwise designated for one or more uses.[89]

Section 212, as well as section 204 governing withdrawals, are part of Title II governing "land use planning and land acquisition and disposition." Arguably, the entire statutory scheme requires that in making a withdrawal under section 204, the Secretary be governed by the mandatory criteria for land use planning set forth in section 202. Otherwise a withdrawal under section 204 could be used for purposes contrary to the maintenance of the land use planning criteria mandated by Congress in section 202 for the proper management of public lands.

The criteria for land use plans are set forth in section 202(c) in mandatory language.[90] To the extent that the Secretary undertakes a withdrawal that contravenes these criteria, it would appear that the withdrawal would be subject to challenge.[91]

Judicial Review

An interesting unresolved question is the extent to which private parties would have standing to challenge a proposed withdrawal in the courts. Since this issue is discussed in another Article in this Sympo-

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86. *Id.* § 1712.

87. *Id.* § 1712(e)(3). Section 202(e)(3) provides in pertinent part:

> Withdrawals made pursuant to section 204 of this Act may be used in carrying out management decisions, but public lands shall be removed from or restored to the operation of the Mining Law of 1872, as amended, or transferred to another department, bureau, or agency only by withdrawal action pursuant to section 204 or other action pursuant to applicable law. . . .

Id.

88. *Id.* Under other circumstances it is clear that the Secretary must use a withdrawal under section 204 if he desires to suspend the operation of the Mining Law of 1872 or transfer lands to another Department or agency. *See id.*

89. 43 U.S.C. § 1712 (1976) (emphasis added).

90. *See id.* § 1712(c) (providing that "In the development and revision of land use plans, the Secretary *shall* . . ." (emphasis added)).

91. In reporting on the legislation, the Secretary of the Interior took the position that there was an unwarranted overlapping of responsibility under the management section, section 202, and the withdrawal section, section 204. *See* H.R. REP. No. 94-1163, 94th Cong., 2d Sess. 45-47 (1976). However, it does not appear that the Secretary ever contended that he should not follow the criteria for management studies set forth in section 202(b) when making withdrawals under section 204.

sium,[92] it is sufficient to note here that the provision of section 204(h),[93] providing for public hearings, clearly shows that Congress intended for the withdrawal process to be subjected to public participation at mandatory public hearings. Thus, assuming that Congress itself did not exercise its veto power by enactment of a concurrent resolution within the prescribed ninety-day period, it appears that in the absence of any specific judicial review procedures in the Act, the general provisions of the Administrative Procedure Act [APA],[94] to the extent applicable, should provide a remedy of judicial review. This is buttressed by the declaration of policy in section 102(a) that "judicial review of public land adjudications be provided by law."[95]

REVIEW OF EXISTING WITHDRAWALS

Because of the extensive prior use of withdrawals of public lands embracing hundreds of millions of acres under the varied withdrawal procedures previously in effect, an important consideration is the extent to which such withdrawals are to be reviewed and made subject to the new FLPMA procedures and criteria. FLPMA fails to provide for mandatory review of prior withdrawals except when such withdrawals were made only for a "specific period."[96] Of interest here is whether the extensive "temporary" withdrawals by the executive fall within the scope of section 204(f).[97] It appears that since a "temporary" withdrawal is one for a specific period, in contrast with a permanent withdrawal which has no time period, section 204(f) should apply.

As to prior permanent withdrawals with no "specific period", other sections of the Act require their evaluation in regard to the land use planning requirements of section 202.[98] Section 202(a) requiring the Secretary to develop land use plans for the use of public lands ex-

92. See Frishberg, Hickey & Kleiler, *The Effect of the Federal Land Management and Policy Act on Adjudication Procedures in the Department of the Interior and Judicial Review of the Adjudication Decisions*, within this Symposium.

93. 43 U.S.C. § 1714(h) (1976).

94. 5 U.S.C. §§ 551, 559 (1976). The Secretary of the Interior aceeded that the provisions of the APA, generally apply to the notice and procedures governing withdrawals. *See* H.R. REP. No. 94-1163, 94th Cong., 2d Sess. 47 (1976).

95. 43 U.S.C. § 1701(b) (1976).

96. *Id.* § 1714(f). Section 204(f) provides that all withdrawals and extension thereof, whether made prior to or after the Act, "having a specific period . . . shall be reviewed by the Secretary toward the end of the withdrawal period and may be extended only upon compliance with the provisions" of subsection (c)(1) or (d) "whichever is applicable, and only if the Secretary determines that the purpose for which the withdrawal was first made requires the extension, and then only for a period no longer than the length of the original withdrawal period." It should be noted that in section 701(c) of FLPMA, Congress provided that "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." Pub. L. No. 94-579, § 701(c), 90 Stat. 2744 (1976).

97. 43 U.S.C. § 1714(f) (1976).

98. *See id.* § 1712.

pressly provides that: "Land use plans shall be developed for the public lands regardless of whether such lands previously have been classified, withdrawn, set aside, or otherwise designated for one or more uses."[99] Thus, prior withdrawals with no "definite period" are subject to review under the criteria of section 202 for land use plans, but as noted previously, the Secretary has discretion in promulgating such plans as to whether to utilize the withdrawal authority.[100] The lands previously withdrawn are subject to a new land use plan, but not necessarily to any modification under the section 204 withdrawal procedures.

CONCLUSION

Review of Federal Land Use Policy and Management Act of 1976 clearly marks it as the most important enactment by Congress relating to the subject of withdrawals in the over two hundred year history of the nation's public lands. In the Act, Congress clearly undertook to exercise its full constitutional authority over the public lands. Congress carved out certain types of withdrawals which could be undertaken only by itself with express legislation. As to other withdrawals, to the extent they exceed 5,000 acres, Congress retained the veto power by means of concurrent resolution adopted by both Houses. Any withdrawal by the Executive under an inherent authority from Congress was expressly repealed, thus reversing *United States v. MidWest Oil Co.*, under which the President had long asserted an implied authority based on congressional acquiescence to withdraw lands without statutory authority. The detailed procedures and criteria to apply to the withdrawal process for all withdrawals made by the Secretary of the Interior, either for his department or for other departments and agencies, codify for the first time a single uniform set of guidelines to govern the withdrawal process. As such, FLPMA represents a constructive, long-needed action by Congress to provide a reasonable and necessary program for withdrawal actions relating to the nation's public lands.

99. *Id.* § 1712(a).
100. See text & note 88 *supra*.