SECTION 603 OF THE FEDERAL LAND POLICY AND MANAGEMENT ACT: AN ANALYSIS OF THE BLM'S WILDERNESS STUDY PROCESS

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Although the Federal Land Policy and Management Act [FLPMA][1] was signed into law late in the Ford administration, its implementation, through issuance of legal opinions, rules, regulations and instruction memoranda, has been a responsibility of President Carter and Secretary Andrus. The Andrus administration has exhibited a bias for environmental protection and wilderness preservation, and has interpreted FLPMA in that direction, at variance with what we believe Congress intended.

This change in policy by the Secretary of the Interior is coincidental with equivalent developments elsewhere, such as the Forest Service's RARE II program and the President's action creating a national monument of the Alaskan lands studied under the Alaskan Native Claims Settlement Act,[2] the so-called "d-2" lands. The heart of each of these policy changes is the wilderness issue.

Prior to the enactment of FLPMA, the Bureau of Land Management [BLM] had no authority to designate lands for "wilderness" management equivalent to that of the Forest Service and the Park Service. FLPMA was a ratification of administrative actions taken under less than explicit authority in the case of two areas in California,[3] but be-

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1. Pub. L. No. 94-579, 90 Stat. 2743 (1976) (codified at 43 U.S.C. §§ 1701-1782 (1976)).
2. Pub. L. No. 92-203, 85 Stat. 688 (1971) (codified at 43 U.S.C. §§ 1601-1627 (1976).
3. *See* 43 U.S.C. § 1781 (1976).

yond that FLPMA itself is Congress' charter for the BLM to nominate lands under its management for ultimate congressional action to designate them for additions to the wilderness system.

Section 603[4] of FLPMA is the applicable section, the only one to deal with wilderness study and wilderness designation of BLM lands. Our focus is on what has been done under the purported authority of this section.

On September 5, 1978, Leo Krulitz, the Interior Department's Solicitor, issued a formal opinion dealing with section 603 and wilderness review [Solicitor's Opinion].[5] This thirty-nine page document supersedes at least seven prior interpretations of the issues raised by section 603. It partakes of the nature of rulemaking, and to the extent that it conforms with the statute, has the force of law. Within the Department, certainly, all policies, rules and regulations devised by the BLM are required to comply with it.

This article asserts that the underlying premises of the Solicitor's Opinion are contrary to law and based upon a less than impartial interpretation of FLPMA, supportive of a policy determination that prefers wilderness uses to all other possible uses within certain regions. Administration or Interior Department commitment to wilderness values may be praiseworthy, but the actions of the Solicitor in attempting to rewrite the FLPMA are not. It is up to the courts, ultimately, to curb this violation of the principles of separation of powers.

A history of the public land laws is beyond the scope of this article, but a brief outline of two interrelated issues within that history will be presented to demonstrate the conflict between the Solicitor's Opinion and FLPMA. One issue is the century-old withdrawal controversy, and the second is congressional policy covering mineral development on the public lands since passage of the General Mining Law of 1872,[6] and the predecessor 1866 Act.[7]

The accepted philosophy of public land administration, at least after the demise of the leasing laws in 1837, was disposal of non-mineral lands, and, after 1866, of minerals and lands. Congress in 1866 declared "the mineral lands of the public domain . . . are hereby declared to be free and open to exploration and occupation."[8] This declaration largely was confirmatory in nature, since there had been extensive mining with governmental acquiescence in California and the

4. *Id.* § 1782.

5. Memorandum from Solicitor to Secretary, BLM Wilderness Review—Section 603 Federal Land Policy and Management Act (Sept. 5, 1978) [hereinafter cited as Solicitor's Opinion].

6. General Mining Law of 1872, ch. 152, 17 Stat. 91 (current version at 30 U.S.C. §§ 21-54 (1976)).

7. Act of July 26, 1866, ch. 262, 14 Stat. 251.

8. *Id.*

West generally since 1849. The miner, in this regard, was merely put on the same footing with the homesteader[9] and other authorized entrymen who had been granted rights to acquire the public domain for timber, stone, or other values for private ownership.[10] The mechanisms for patenting lands and minerals under the General Mining Laws did not differ philosophically from those governing the homesteader and others allowed entry privileges. All were entitled to appropriate the public domain on a permanent basis, for nominal cost, but only if the general good was served by actual application of the land to the use intended.[11] Many of the acts sought to restrict speculation by acreage or other limitations and by the concept of requiring a discovery in the case of minerals.

The coherence of philosophical approach became strained comparatively early. The provisions of the Coal Lands Act of 1873,[12] restricting entry and purchase rights to 160 acres[13] soon became unworkable. The Secretary of the Interior, at the request of President Theodore Roosevelt, responded to the widespread fraud by issuing orders between July 26 and November 12, 1906, which withdrew from all forms of entry approximately sixty-six million acres of land where "workable coal is known to occur."[14] This executive withdrawal was modified on December 17, 1906, to provide that entry upon these lands should be precluded solely with respect to coal mining.[15]

On January 15, 1907, the withdrawal orders were modified to avoid impairment of rights acquired in good faith under coal land leases as of the date of the withdrawals.[16] This concern with pre-existing rights, which is constitutional in its origin, is an integral part of FLPMA, as it has been of most public land laws.[17] As we discuss later, it is continued in FLPMA, but cast aside in the Solicitor's Opinion.

Congressional interests, always jealous of the special prerogatives of Congress under article IV, section 3, clause 2, of the United States Constitution, voiced displeasure with these executive withdrawals as

9. *See* Act of May 20, 1862, ch. 75, 12 Stat. 392.

10. *See* Desert Land Act of 1877, ch. 107, 19 Stat. 377, (current version at 43 U.S.C. §§ 321-329 (1976)); Timber and Stone Act of June 3, 1878, ch. 151, 20 Stat. 89 (repealed 1955, 69 Stat. 434); Timber Culture Act of June 3, 1873, ch. 9, 39 Stat. 862, (repealed by FLPMA).

11. It is noteworthy, in this connection, that in 1855, in Irwin v. Phillips, 5 Cal. 140 (1855), the Supreme Court of California articulated the prior appropriation doctrine of water rights which adopts the same philosophy.

12. Coal Lands Act of 1873, ch. 279, 17 Stat. 607.

13. The limit was expanded to 640 acres in the case of an association which expends at least $5,000 in work and improvements.

14. P. GATES & R. SWENSON, HISTORY OF PUBLIC LAND LAW 726 (1968).

15. *Id.* at 727.

16. *Id.*

17. *See* 30 U.S.C. §§ 33, 227, 241, 613(c), 615, 624 (1976).

they had with President Cleveland's forest withdrawals in 1896[18] and with President Taft's Temporary Petroleum Withdrawal Order No. 5, withdrawing over three million acres of oil land in California and Wyoming,[19] on September 27, 1909. President Taft, however, requested Congress to confirm his authority. This resulted in the introduction and passage of the Pickett Act.[20] As the Act was introduced by Representative Pickett, the President would have been empowered to withdraw lands from location, settlement, filing, and entry only for examination and classification purposes, and for the purpose of recommending new legislation to Congress respecting withdrawn lands.[21] It also would have provided for withdrawn lands to be made available for disposition under applicable public land acts as soon as classified.[22] As passed, however, the Act authorized only temporary withdrawals with the lands to continue to be open for "exploration, discovery, occupation and purchase under the mining laws of the United States so far as the same apply to metalliferous minerals."[23]

Congress thus recognized that despite the President's legitimate concerns about the abuses surrounding coal and petroleum development, such problems should not alter the system of citizen-initiated entry and location under the general mining law, a principle still the keystone of congressional mineral policy.

In 1915 the Supreme Court, in *United States v. Midwest Oil Company*,[24] upheld the 1909 withdrawals, but in such a way as to leave open the question of whether the Pickett Act was the exclusive statement of executive withdrawal power or whether the Pickett Act and the implied powers of the President approved in the *Midwest* decision existed co-extensively.[25] This issue became important in determining whether mineral location could be prevented by executive withdrawal, and presumably was resolved in FLPMA. The Solicitor's Opinion seems to render FLPMA's seemingly express language ineffectual.

In the second decade of this century, the wholesale executive withdrawals of oil, gas, and coal lands exerted successful pressure upon Congress to enact in 1920 a leasing provision for all minerals.[26] The

18. *See* Presidential Proclamations 19-31, 29 Stat. 893-912 (February 22, 1897).
19. *See* United States v. Midwest Oil Co., 236 U.S. 459, 467 (1915).
20. Act of June 25, 1910, ch. 421, 36 Stat. 847 (codified at 43 U.S.C. §§ 141-143 (1976)).
21. C. WHEATLEY, STUDY OF WITHDRAWALS AND RESERVATIONS OF PUBLIC DOMAIN LANDS 89 (1969) (a study for the Public Land Law Review Commission).
22. *Id.*
23. 43 U.S.C. § 142 (1976). *See* Wheatly, *Withdrawals under FLPMA*, within this Symposium.
24. 236 U.S. 459 (1915).
25. C. WHEATLEY, *supra* note 21, at 100.
26. Mineral Lands Leasing Act of 1920, ch. 85, 41 Stat. 437 (current version in scattered sections of 30 U.S.C.).

location-leasing dichotomy thus created continues to this day.

In the 1940's and 1950's, the pressures to accommodate the public's demand for recreational opportunities on the public lands, including the national forests and national parks, led to competition between the Departments of Interior and Agriculture as to which could respond better. Recreation use as then understood was only minimally encroaching upon mineral, grazing, or logging activities and was not regarded as a threat to resource development. Wilderness, however, was another matter. At first it was associated with outdoor recreation, but the two uses have since come to be seen as conflicting with each other. The concepts of multiple use and dominant and single use management were on a collision course even though the report of the Outdoor Recreation Resources Review Commission [ORRRC], created in 1958[27] did not perceive the extent of the conflict. The ORRRC Report led to creation of a Bureau of Outdoor Recreation in Interior and helped toward passage of wilderness legislation in 1964.

The conflicts between mineral development and the purposes of the Wilderness Act[28] were clearly perceived. Congress, resistant to pressures, determined to live with the conflict until 1984. Section 4(d)(3),[29] which allowed continued mineral development in Congressionally designated wilderness areas until 1984, was the key to House agreement to a Wilderness Bill, versions of which had passed the Senate several times. The Congress reiterated the underlying idea of section 4(d)(3) in 1970, in passing the Mining and Minerals Policy Act of 1970,[30] wherein it declared that it was in the national interest

> [t]o foster and encourage private enterprise in (1) the development of economically sound and stable domestic mining, minerals, metal and mineral reclamation industries, (2) the orderly and economic development of domestic mineral resources, reserves and reclamation of metals and minerals to help assure satisfaction of industrial, security and environmental needs . . . .[31]

General conflict existed among members of Congress as to how public lands were to be used and managed, but on two points there was agreement in FLPMA and in prior acts. The power to control the use of public lands should rest in the Congress, and the executive authority to withdraw lands must be limited.

In recommending to President Kennedy the establishment of a

27. Pub. L. No. 85-470, § 3, 72 Stat. 238 (1958). *See* 30 U.S.C. §§ 21-54 (1976).
28. Pub. L. No. 88-577, 78 Stat. 890 (1964) (codified at 16 U.S.C. §§ 1131-1136 (1976)).
29. 16 U.S.C. § 1133(d)(3) (1976).
30. Pub. L. No. 91-631, 84 Stat. 1876 (1970) (codified at 30 U.S.C. § 21a (1976)).
31. 30 U.S.C. § 21a (1976).

Public Land Law Review Commission [PLLRC], Chairman Wayne N. Aspinall stated:

> The core of the controversy (surrounding passage of wilderness legislation) . . . is the degree of responsibility and authority to be exercised by the legislative and executive branches. This has been the main issue in legislation that has been proposed relative to withdrawal, restriction, and use of public lands as well as in the approach to designating areas to be preserved as wilderness.[32]

The Wilderness Act itself constituted an assertion by Congress that withdrawal was a congressional prerogative. As the House Report stated:

> A statutory framework for the preservation of wilderness would permit long-range planning and assure that no future administrator could arbitrarily or capriciously either abolish wilderness areas that should be retained or make wholesale designations of additional areas in which use would be limited . . . . Furthermore, by establishing explicit legislative authority for wilderness preservation, Congress is fulfilling its responsibility under the U.S. Constitution to exercise jurisdiction over the public lands.[33]

Congress also chafed at the treatment mineral uses had received. Thus Senate Report No. 1444 in recommending the Public Land Law Review Commission Act, recited that "locations and entries under the mining laws were specifically permitted without regard to the classification of the lands. Nonetheless, the Secretary of the Interior has withdrawn from the operation of the mining laws millions of acres of public lands without express statutory authority therefor."[34]

The PLLRC reviewed all of the country's public land laws and came to several broad consensus conclusions. Among these were recommendations that (1) the previously accepted policy of large-scale disposal of public lands, as embodied in many statutes, should be reversed except for special circumstances in which disposal would serve the maximum benefit for the general public;[35] and (2) Congress should assert its constitutional authority by enacting legislation reserving to itself exclusive authority to withdraw or otherwise set aside public lands for specified limited purpose uses but delineating specific delegation of authority to the executive as to the types of withdrawals and set asides that could be effected without legislative action.[36]

32. Letter from Chairman Wayne N. Aspinall to President John F. Kennedy (October 15, 1962).

33. H.R. REP. No. 1538, 88th Cong. 2d Sess. 8 (1964), *reprinted in* [1964] U.S. Code Cong. & Ad. News 3616-17.

34. S. REP. No. 1444, 88th Cong., 2d Sess. 2 (1964), *reprinted in* [1964] U.S. Code Cong. & Ad. News 3741-42.

35. PUBLIC LAND LAW REVIEW COMMISSION, ONE THIRD OF THE NATION'S LAND 1 (1970).

36. *Id.* at 2.

Congress in passing FLPMA, essentially adopted these PLLRC recommendations. Restriction of withdrawal authority of the executive, and reassertion of Congressional power over withdrawal of public lands were adopted with strong language.

Specifically, section 704(a) of FLPMA declares: "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 (United States v. Midwest Oil Co., 236 U.S. 459) and the following statutes . . . are repealed."[37]

To clarify further this statement sections 103(j),[38] 202(e)(2) and (3),[39] and 204[40] of FLPMA all implement the declaration that "[t]he 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]

Congress was well aware that past executive withdrawals had been made for the nominal purpose of preserving Congress' prerogatives, the expressed rationale used in President Taft's withdrawals. A more modern example was before it in the cases of *Parker v. United States*,[42] and *Izaak Walton League of America v. St. Clair*.[43] Even absent cases, Congress was cognizant that the historic withdrawal battles had been fought over the ability to use the public lands for exploration and development of mineral uses.

Thus, how Congress defined "withdrawal" in FLPMA is significant. That term encompassed any attempt to restrict mineral activities, and the Act specifies precisely what the executive branch may and may not do to withdraw lands from leasing and from location and entry, and for what periods of time. The definition of "withdrawal" and declaration of policy were reinforced by section 202(e)(3) which states that "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 § 204 of this Act."[44]

The language of section 603(c) applies to lands studied by BLM for wilderness in the manner of lands already designated as wilderness

37. Pub. L. No. 94-579, § 704a, 90 Stat. 2792 (1976).
38. 43 U.S.C. § 1701(j) (1976).
39. *Id.* §§ 1712(2), 1712(3).
40. *Id.* § 1714.
41. *Id.* § 1701(a)(4).
42. 448 F.2d 793 (10th Cir. 1971), *cert. denied* 405 U.S. 989 (1972).
43. 353 F. Supp. 698 (D. Minn. 1973).
44. 43 U.S.C. § 1712(e)(3) (1976).

by Congress.[45] The last clause of section 603(c) which incorporates sections 4(d)(2) and (3) of the Wilderness Act[46] would be clearly redundant and unnecessary if interpreted only to apply to management of designated BLM wilderness areas after designation by Congress. Congress was seeking by its language to avoid actions by the executive, or interpretations by the judiciary, not in accord with mining and mineral use protections at least as broad as the treatment Congress had deemed appropriate in the Wilderness Act itself.

Despite the FLPMA language, however, the Solicitor's Opinion converts the first clause of section 603(c) into a separate grant of withdrawal authority under which the Secretary can close land areas from location, entry, leasing, development, or exploration, without complying with the procedural requirements of section 204.[47] The interpretation is made in the name of preserving Congress' options.[48]

Section 603(c) is also interpreted as lumping mineral development and related activities with other potential uses of the public lands.[49] This is inconsistent with the express recognition of the special status of mineral development in proposed wilderness areas by Congress.[50] Such an interpretation is not an implementation of congressional intent; it is its subversion.

A Critical Analysis of the Solicitor's Opinion

The Solicitor divides his interpretative rationale into compartmentalized issues, parsing the language piecemeal without ever looking at it whole. The separate issues identified by the Solicitor include (1) the inventory sections, (2) the impairment language of section 603(c), (3) the manner and degree clause of section 603(c), (4) the undue degradation proviso of section 603(c), (5) the relationship between such sections and the withdrawal sections of FLPMA, and (6) valid existing rights.

This interpretative approach creates rather than resolves ambiguities, but the remainder of this article will accept the Solicitor's structure, suggesting other plausible interpretations and referring both to the the specific language of the section involved and to FLPMA as a whole.

Inventory

Section 603(a) of FLPMA provides that within fifteen years of the date of approval of the Act (October 21, 1976) the Secretary shall con-

45. *Id.* § 1782(c).
46. *Id.*
47. Solicitor's Opinion, *supra* note 5, at 11.
48. *Id.* at 12.
49. *Id.* at 23.
50. 43 U.S.C. § 1782(c) (1976).

duct a review of certain of the public lands for their possible preservation as wilderness.[51] The Secretary is charged with the duty of reviewing those public lands containing roadless areas of 5,000 acres or more and roadless islands, which, in each case, have been identified by the regular FLPMA inventory process as having wilderness characteristics.[52] The Secretary is required to manage identified "study areas" in accordance with section 603(c) and periodically to report his recommendations to the President as to the suitability or nonsuitability of each area for preservation as wilderness.[53]

Under section 603(a) the inventory required by section 201(a)[54] is to be used to identify those lands which meet these minimum requirements and therefore to be suitable for study. Section 201(a) contemplates a continuing inventory of all public lands, their resources and other values. The section 201(a) inventory process is not a one-time evaluation directed to identifying a single resource. Congress expressly stated that the inventory procedure was to have no effect on the manner in which public lands were managed.[55]

Although the Solicitor's Opinion acknowledges that "[t]he inventory process itself is to have no effect on BLM policies . . .",[56] the Solicitor then reaches a contrary conclusion. He states that the purpose of section 603 would be defeated if actions were permitted on any public lands which would impair their wilderness characteristics even though the lands had not yet been identified as wilderness study lands.[57] By this semantic *tour de force*, the Solicitor's Opinion effectively negates section 201(a), bootstraps all public lands into the study classification, and immediately subjects all lands to his version of the special management scheme of section 603(c).

To support this extreme position, the Solicitor's Opinion cites the Tenth Circuit case of *Parker v. United States*,[58] decided prior to the passage of FLPMA. Congress purposefully changed the administration of public lands with respect to the power of the executive to withdraw lands from mining and mineral uses. The Solicitor's stated reliance upon *Parker* is curious in light of a part of the legislative history of FLPMA. The Senate Committee report explained the language of section 201(a), which was added to S. 424, the Senate's version of the bill which ultimately became the FLPMA, in these terms:

51. *Id.* § 1782(a).
52. *Id.*
53. *Id.*
54. *Id.* § 1711(a).
55. *Id.*
56. Solicitor's Opinion, *supra* note 5, at 12 n.25.
57. *Id.* at 13.
58. 309 F. Supp. 593 (D. Colo. 1970) (cited in Solicitor's Opinion, *supra* note 5, at 13).

> Section 102 also contains a statement that 'the preparation and maintenance of such inventory or the identification of such areas [possessing wilderness characteristics] shall not, of itself, change or prevent change in the management or use of the national resource lands.' The purpose of this statement is to insure that, under no circumstances, will the pattern of uses on the national resource lands be frozen, or will uses be automatically terminated during the preparation of the inventory and the identification of areas possessing wilderness characteristics. Equity demands that activities of users not be arbitrarily terminated or that the Secretary not be barred from considering and permitting new uses during the entire inventory and identification processes. *Furthermore, the Committee intends that this language will serve as a bar to suits similar to that of Parker v. United States.*[59]

Furthermore, since the *Parker* decision did not involve the status of mineral uses and their treatment under the Wilderness Act, the court did not grapple with the impact of section 4(d)(3) of the Wilderness Act. Forest uses were involved, and section 4(d)(3) does not deal with such uses.

Congress in FLPMA sought to avoid a repetition of the *Parker* decision, not only through its section 201 inventory language, but also by its emphasis on specifying the exclusive method of withdrawing lands from operation of the Mining Law of 1872, and its redoubled emphasis on the effect of section 4(d)(3) of the Wilderness Act on section 603(c) of FLPMA. Thus, *Parker* is not a proper foundation upon which to support the Solicitor's contention that "the agency cannot permit the possible wilderness characteristics to be destroyed before those characteristics have been determined to exist."[60]

Impairment Issue

Once the inventory process identifies an area as meeting the preliminary section 603 qualifications, the Secretary must review those wilderness study lands according to the directions of section 603(c), and during this review period manage those lands according to

> his authority under this Act and other applicable law in a manner so as not to impair the suitability of such areas for preservation as wilderness subject, however, to the continuation of existing mining and grazing uses and mineral leasing in the manner and degree in which the same was being conducted on October 21, 1976; *Provided*, 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 environmen-

59. S. REP. No. 873, 93rd Cong., 2d Sess. 36 (1974) (emphasis added).
60. Solicitor's Opinion, *supra* note 5, at 13.

tal protection.[61]

The Solicitor's Opinion and the Department's subsequent Interim Management Policy and Guidelines for Wilderness Study Areas, [WSA Guidelines][62] both emphasize the clause of section 603(c) "so as not to impair the suitability of such areas for preservation as wilderness,"[63] even though the second and third phrases of the first sentence significantly modify the first.

The WSA Guidelines pose the question, "What is impairment?" and respond by reciting the definition of "wilderness" found in section 2(c) of the Wilderness Act.[64] According to the Solicitor, any activity which would change an area so that it no longer met the section 2(c) criteria must be absolutely prohibited.[65]

It seems more logical to look to the Wilderness Act itself for an interpretation of what is compatible with an area's suitability as wilderness. Section 4(d)(3) of the Wilderness Act states:

> [U]ntil midnight December 31, 1983, the United States mining laws and all laws pertaining to mineral leasing shall, to the same extent as applicable prior to September 3, 1964, extend to those national forest lands designated by this chapter as "wilderness areas"; subject, however, to such reasonable regulations governing ingress and egress as may be prescribed by the Secretary of Agriculture consistent with the use of the land for mineral location and development and exploration, drilling, and production, . . . and restoration as near as practicable of the surface of the land disturbed in performing, prospecting, location, and, in oil and gas leasing, discovery work, exploration, drilling, and production, as soon as they have served their purpose.[66]

A further provision of this subsection states:

> Mineral leases, permits, and licenses covering lands within national forest wilderness areas designated by this Chapter shall contain such reasonable stipulations as may be prescribed by the Secretary of Agriculture for the protection of the wilderness character of the lands consistent with the use of the land for the purposes which they are leased, permitted or licensed.[67]

In enacting the Wilderness Act of 1964, Congress thus explicitly provided that mineral development could take place in statutorily designated wilderness areas.

The Solicitor agrees in his opinion that section 4(d)(3) allows de-

61. 43 U.S.C. § 1782(c) (1976).
62. 44 Fed. Reg. 2695 (1979).
63. *Id.* at 2697; Solicitor's Opinion, *supra* note 5, at 23.
64. 44 Fed. Reg. 2697 (1979). *See* 16 U.S.C. § 1133(c) (1976).
65. Solicitor's Opinion, *supra* note 5, at 24-26.
66. 16 U.S.C. § 1133(d)(3) (1976).
67. *Id.*

velopment in designated wilderness areas,[68] and that conclusion is incorporated into the WSA Guidelines in the following language:

> These provisions (4(d) of the Wilderness Act) allow carefully controlled mining and mineral leasing in designated wilderness areas of the national forests. Almost by definition these activities could adversely affect wilderness characteristic to some degree, yet by enacting these provisions Congress decided that mining and mineral leasing may be compatible with an area's suitability for preservation as wilderness.[69]

The WSA Guidelines concede that under the Wilderness Act, mining and mineral leasing are not incompatible with an area's suitability for preservation as wilderness.[70] The logic that interim management during study should not be stricter than management of designated wilderness areas is not accepted by the Solicitor.[71] Under his interpretation a stricter standard must be applied,[72] and it must be assumed that a stricter standard than that in the WSA Guidelines is being enforced. The Solicitor's statement is that "[t]he conclusion is inescapable that Congress deliberately chose in § 603(c) to direct the Secretary to conform to a specific standard in deciding whether and on what basis to allow development of mining claims and mineral leases in areas being considered for possible protection as wilderness."[73]

The WSA Guidelines, in apparent recognition of the problem, attempt to mitigate by suggesting that an impairment which has only a temporary effect will not affect an area's suitability, whereas permanent impairment would render an area unsuitable.[74] An activity would be allowed if the impact were temporary and would be "rehabilitated within five years after Congress designates the area as wilderness."[75] Without conceding the validity of the rationalization, the creation of an exception to the Solicitor's general rule for temporary impairment is itself not warranted by the statute and appears to be a complete invention. There is no indication in FLPMA, the Solicitor's Opinion, or the WSA Guidelines of how a five-year or any period for rehabilitation can be selected. The Wilderness Act does not state that mining and mineral leasing activity, which it specifically permits, shall be limited to those uses which have only a temporary impact. It provides only that the surface of the land shall be restored as nearly as practicable as soon as

68. Solicitor's Opinion, *supra* note 5, at 25.
69. 44 C.F.R. § 2697-8 (1978).
70. *Id.* at 2698.
71. Solicitor's Opinion, *supra* note 5, at 20.
72. *Id.* at 22.
73. *Id.* at 23.
74. 44 Fed. Reg. 2701 (1979).
75. *Id.* at 2698.

the lands have served their mining and oil and gas leasing purposes.[76] FLPMA carries this requirement by incorporating the Wilderness Act reference.

Not only is there no authority in the statute for the temporary impairment exception within the WSA Guidelines, there is substantial authority within FLPMA contrary to the Solicitor's no impairment proposition, which will be discussed in the remainder of this article.

Manner and Degree; Rights of Existing Mining and Mineral Leasing Uses

Even if the integration of the Wilderness Act into FLPMA is ignored and it is assumed that the "impairment" language controls management of study lands so as to prohibit impairment of wilderness potential by commercial uses, the second phrase of section 603(c) creates a strong modification of the first phrase.[77] By its inclusion, Congress again acknowledged the special position of mining and mineral leasing upon the public lands.

The language excepting mineral leasing can be interpreted in two ways. First, the activity of issuing leases upon public lands was to continue unabated and unaltered by this provision of FLPMA. In other words, if leases with the normal stipulations were being freely issued in certain areas, such activity (of issuing leases) was directed to continue. Under this interpretation, section 603(c) specifically alters the Secretary's traditionally claimed discretion to refrain from leasing, and places leasing activities more on a par with location activities allowed on the public lands.

The second interpretation is that mineral leasing refers to physical activity actually occurring upon issued leases consistent with the contract rights evidenced by such leases. Under this interpretation, mineral leasing would be treated as an activity equivalent to mining activity, that is, physical operations. If this interpretation is correct then the phrase "mining . . . and mineral leasing in the manner and degree in which the same was being conducted on October 21, 1976"[78] includes all of the types and degrees of exploration, development and production then being carried on by these uses upon public lands and the entitlement to commence and carry on those activities vested in issued leases and valid mining claims.

The Solicitor has had to recognize that Congress made a specific decision in section 603(c) that some sort of mining and mineral leasing

76. 16 U.S.C. § 1133(d)(3) (1976).
77. *See* 43 U.S.C. § 1782(c) (1976).
78. *Id.*

was to be permitted to continue upon study lands even if it did impair an area's wilderness suitability. He has concluded, however, that such activities can be limited in scope to the point of their practical elimination.[79] His interpretation is based upon the novel idea that the second clause of the section is a grandfather clause.[80] By taking this phrase out of its context and analyzing the meaning of each word, he redefines the words "existing uses" to mean activities actually taking place as of October 21, 1976, and that "a mineral lease on which there was no on-the-ground activity could not qualify for the 'existing use' grandfather."[81] The same approach is used to limit the exception "geographically by the area of active development, and the logical adjacent continuation of the existing activity."[82]

"Mineral leasing," according to the Solicitor, means the use actually taking place and not the legal entitlement by which a lessee is allowed to conduct operations: "It is, in other words, the actual use of the area, and not the existence of *some presumed entitlement for use*, which is controlling."[83] The words "manner and degree" are said to mean that any change in uses which would alter the impact on an area would be outside the grandfather clause.[84]

Under the Solicitor's Opinion, unless a specific mining or mineral leasing use was actually being conducted upon the specific piece of land claimed or under lease on October 21, 1976, that activity may not now continue and may not be commenced if it in any way impairs that area's suitability as wilderness.[85] The Solicitor has interpreted section 603(c) as a mandate from Congress to withdraw public lands from all uses except preservation of wilderness potential, with the extremely narrow exception of mining, grazing, and mineral lease uses actually taking place on October 21, 1976.[86] The interpretation would maintain those lands in exactly their present state until Congress has had the opportunity to decide whether any of those lands should be designated as wilderness.[87]

Although the second clause of section 603(c), read in isolation, is capable of two interpretations, the Solicitor has not clearly selected one interpretation or the other, but the most restrictive elements of each. The history of mining and mineral leasing in relation to public land

79. *See* Solicitor's Opinion, *supra* note 5, at 26.
80. *Id.*
81. *Id.* at 27.
82. *Id.*
83. *Id.* (emphasis added).
84. *See id.* at 31.
85. *Id.* at 27.
86. *Id.* at 31.
87. *Id.* at 39.

law and consideration of the whole of FLPMA gives a different answer, one that takes into account that when the Wilderness Act was passed Congress recognized that the public lands were needed to meet public needs for energy and other resources. The honoring of this commitment may not be withdrawn by officials of the executive branch. FLPMA was a culmination and a compromise of the many divergent demands upon public lands. It provides for a study of the wilderness potential of lands identified in section 201 inventories, but it also assures that mining and mineral leasing will continue unchanged provided only that the Secretary manage those activities to protect against unnecessary and undue degradation.

Surely, if Congress had intended a wide reaching withdrawal such as the Solicitor's Opinion requires, it would have made that intent clear. It would also have integrated section 603(c) into its treatment of withdrawals in sections 103, 202, 204, and 704. Especially is this true in light of the fact that the Solicitor's Opinion effectively eliminates the ability of a lessee on study lands to develop his lease—even though such lease gives him specific rights and has cost him significant money in rentals paid to the BLM.

Unnecessary and Undue Degradation

The final subpart of the first sentence of section 603(c) states 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."[88] Read in conjunction with the immediately preceding phrase, this language expresses an understanding that mineral development necessarily involves degradation. Roads, mining operations, wells, and pipelines do disturb pristine nature. The key word is undue.

The WSA Guidelines fairly define "undue degradation" as "[d]etrimental impacts from a proposed or ongoing action resulting in unnecessary damage to lands or their resources. These usually occur when an operator is not using or does not propose to use the best available management or operating practices which are *technically, economically and legally feasible*."[89]

It is unfortunate that the Solicitor's Opinion is not as fair or clear. Even the Guidelines, however, do not integrate their interpretation with the previous clauses of the first sentence of section 603(c). In his opinion, the Solicitor ignores the problem since he sees section 603(c)

88. 43 U.S.C. § 1782(c) (1976).
89. 44 Fed. Reg. 2695, 2700 (1979) (emphasis added).

as granting the Secretary the power absolutely to prohibit use.[90]

The interpretation we suggest gives this final proviso specific meaning. The Secretary is entitled to define what is "undue" but not to rewrite the statute.

Withdrawal

As noted previously, Congress in enacting FLPMA sought to regain control over withdrawal of public lands.[91] In section 704(a), Congress stated that henceforth there would be no executive withdrawals unless authority for such withdrawals was clearly delegated in FLPMA.[92] Thus, any direction to the Secretary that purports to authorize de facto withdrawal at the Secretary's sole discretion must be subject to the closest scrutiny, because it is in derogation of section 704(a).

FLPMA defines the term "withdrawal" as follows:

> [W]ithholding 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 . . .[93]

The Solicitor interprets section 603(c) by focusing exclusively upon the impairment clause. He reads the second clause as a grandfather clause to be narrowly construed, and he does not integrate the proviso clause into the interpretation at all. The Solicitor finds an intent on the part of Congress that all public lands be withdrawn from mining and mineral development until the inventory and study phases are completed and until Congress acts upon the President's action upon the Secretary's wilderness recommendations[94]—a process which could last until 1991.

The net effect of the Solicitor's interpretation should be compared with the withdrawal sections of FLPMA. Section 202(e)(3) provides that, with respect to withdrawing lands from location under the Mining Law of 1872, section 204 is exclusive authority.[95] Section 204 by its terms applies also to other types of withdrawal covered under the broad definition of section 103(j).

Sections 204(b) and 204(c) prescribe the procedures for withdrawals aggregating 5,000 acres or more.[96] The Secretary must make appli-

90. Solicitor's Opinion, *supra* note 5, at 35.
91. See text & notes 31-43 *supra*.
92. Pub. L. No. 94-579, § 704a, 90 Stat. 2793 (1976).
93. 43 U.S.C. § 1702(i) (1976).
94. *See* Solicitor's Opinion, *supra* note 5, at 22.
95. 43 U.S.C. § 1712(e)(3) (1976).
96. *Id.* § 1714.

cation, publish notice in the Federal Register, and give notice to both houses of Congress.[97] It is not contended and could not be that section 204 withdrawal procedures have been followed in the actions taken under section 603.

Valid Existing Rights

In his historic development, public land law has always given a special status to the right to explore for, develop and produce the minerals and oil and gas from public lands, and, as we have pointed out, continues to do so by the specific language respecting mining interests and mineral leasing in FLPMA. Parallel to the language of section 603(c) are other specific protections granted in sections 701(a)[98] and (h)[99] of FLPMA, the so-called valid existing rights protections. Section 701(a) curiously, is not discussed in the Solicitor's Opinion. It states that "[n]othing in this Act, or in any amendment made by this Act, shall be construed as terminating any valid lease, permit, patent, right-of-way or other land use right or authorization existing on the date of approval of this Act."[100] The Solicitor refers only to section 701(h) which states that "[a]ll actions by the Secretary concerned under this Act shall be subject to valid existing rights."[101]

As with the Solicitor's Opinion's other sections, a different analytical approach yields a more consistent and defensible interpretation of the whole Act.

As we understand the Solicitor's argument on "valid existing rights," he is saying that lessees and mining claimants and equivalent permittees (he does not refer to patentees) can be subjected to any regulation which falls short of being a taking:

> An absolute right to develop is not subject to defeasance by section 603(c) or anything else. Yet such absolute rights are rare, if they exist at all. . . .
>
> Finally, it deserves emphasis that the exercise of a right may be regulated without the right being "taken" in a constitutional sense. Section 701(g) [sic], then, must be read as prohibiting the Secretary from taking "valid existing rights," but not from regulating the exercise of that right in order to carry out section 603's purposes.[102]

The Solicitor's Opinion begs the question of whether the regulations conform to legislative standards in FLPMA or elsewhere. The matter of authority instead is handled by stating that Congress in sec-

97. *Id.*
98. 43 U.S.C. § 1701 note (1977 Supp.).
99. *Id.*
100. Pub. L. No. 94-579, § 701(a), 90 Stat. 2786 (1976).
101. *Id.* at § 701(h).
102. Solicitor's Opinion, *supra* note 5, at 32-33.

tions 701(a) and 701(h) (the former subsection *sub silentio*) has not prevented the Secretary from managing under section 603 in any way he sees fit, so long as an actual taking is avoided.[103] This is an attempt to explain away any meaning of the sections, rather than to ascertain their meaning and integrate it into an interpretation consistent with section 603. It implies a delegation without standards and charges Congress with responsibility for whatever the Secretary might do, so long only as he does not confiscate in the name of the United States.

We think also that the undiscussed section 701(a) must be given meaning in its reference to the final category of protected interests, namely "other land use right or authorization existing on the date of approval of this Act."[104]

Prior to FLPMA and the Solicitor's Opinion, all lands administered by the BLM not properly withdrawn from operation of the mining laws were "free and open to exploration and purchase . . . by citizens of the United States."[105] The right to enter, locate, patent and develop the mineral resources of the public land is clearly a "land use right or authorization existing on the date of approval of the Act,"[106] which was capable of being defeated prior to FLPMA by any lawful act of withdrawal. The effect of such a withdrawal action could be applied only prospectively. Thus, if an entryman had already located a valuable discovery, withdrawal could not defeat his rights to acquire a patent and develop his property, unless such withdrawal amounted to condemnation and required compensation.

As we have already discussed, FLPMA placed severe restrictions on the ability of the executive to accomplish a withdrawal. By doing so the Act implies that the "valid existing right" to enter, locate, patent and develop the mineral resources of the public land has been strengthened, or at the very least has not been diminished.

The Solicitor's Opinion, by construing section 603 as granting the right to the Secretary to determine whether to allow location, patenting, mining, and mineral leasing activities, asserts that such section is an alternative withdrawal section to section 204. It does even more than that, however. It purports to make the Secretary's withdrawal powers under section 603 even broader than the pre-FLPMA withdrawal powers approved by *Midwest Oil*. It does so by asserting the existence of an extremely broad power to regulate emanating from section 603.

The net effect of the Solicitor's Opinion's two interrelated interpretations is thus to assert that (1) contrary to the express language of sec-

103. *Id.* at 33.
104. Pub. L. No. 94-579, § 701(a), 90 Stat. 2786 (1976).
105. Act of May 10, 1872, ch. 152, 17 Stat. 91.
106. Pub. L. No. 94-579, § 701(a), 90 Stat. 2786 (1976).

tion 202, section 603 is an alternative withdrawal section to section 204, and (2) the power to withdraw under section 603 carries with it associated regulatory powers (not granted by section 204) that may be applied to diminish valid existing rights retroactively, without compensation, so long as such rights are not taken.

The whole purport of FLPMA is to the exact opposite; it delimits and circumscribes the authority of the Secretary with reference to his actions which might alter the accustomed way of doing things under the mineral laws. Section 701(a) refers specifically to leases, permits, patents, and rights-of-way.[107] As to patents, the ability of subsequently promulgated regulations to affect an interest which is private by virtue of a patent has always been found to be nonexistent. As to leases, the ability of subsequently promulgated regulations to modify already executed leases has likewise been eliminated by a body of law culminating in *Union Oil Co. v. Morton*.[108]

Provisions of the Act which were clearly intended to serve as a shield for mineral operators have thus been either negated by the Solicitor's Opinion or turned into a sword upon which their rights have been impaled.

CURRENT BLM MANAGEMENT OF INVENTORY AND WILDERNESS STUDY AREAS

Although final regulations for BLM management of lands subject to sections 201 and 603 of FLPMA have not been issued, the BLM has been instructed to follow the provisions of the draft WSA Guidelines. While there are areas of disagreement between the position of the WSA Guidelines and that of the Solicitor's Opinion,[109] for the most part the management practices prescribed conform to the conclusions reached by the Solicitor.

Despite the contrary language in section 201 and despite the legislative history showing an intent to bar suits such as *Parker*, management of the lands during inventory is premised upon a *Parker* rationale.

> While the inventory is in progress, the Bureau has an obligation to protect the wilderness suitability of any lands that may be identified as WSA's [Wilderness Study Areas] by the final inventory decisions . . . during the inventory period, BLM-administered lands that have not yet been dropped from the inventory will be regarded as poten-

107. *Id.*
108. 512 F.2d 743 (9th Cir. 1975).
109. See text & notes 64-65 *supra*, regarding the temporary impairment criterion of the WSA Guidelines.

tial WSA's, and will be governed by the Interim Management Policy.[110]

In general terms, management of these actual or potential Wilderness Study Areas [WSA's] is governed by the premise that "[t]he Department of the Interior's management policy is to continue resource uses in wilderness study areas in a manner that preserves the areas' suitability for designation as wilderness. . . . No permanent roads, permanent structures or permanent installations will be built in WSA's."[111]

With respect to the specific treatment of mining and mineral leasing activities, the WSA Guidelines confirm that section 603 is being interpreted as a basis for exercising withdrawal authority: "All new mining and mineral leasing operations that began after October 21, 1976, and any change in existing operations that exceed the manner and degree occurring on that date, will not be allowed to impair the areas' wilderness suitability."[112] This policy is to be followed regardless of the valid existing rights granted by a lease or by the Mining Law of 1872.

With respect to old leases, issued without any restrictive stipulations, and for which operators may have paid substantial sums in purchase price and rentals, the Guidelines conclude that some limited operations may be allowed if no impairment or only temporary impairment of wilderness suitability occurs.[113] Any operations, however, which are economically attractive will be prohibited: "Extensive production activities (major field development) will probably be substantially noticeable and not be capable of practical rehabilitation within five years after designation and will not, therefore, be allowed."[114]

With respect to new leases within the inventory and WSA lands, the Guidelines mandate:

> Leasing may continue in WSA's with the addition of the enclosed wilderness protection stipulation which will be attached to all oil and gas leases. During the wilderness inventory, it will also be attached to leases in potential WSA's . . . The stipulation becomes inoperative if the intensive inventory determines that the land in the lease does not meet the criteria for a WSA; it remains in effect if the area is identified as a WSA. The protection stipulation remains in effect in WSA's unless Congress acts to declare an area nonsuitable for preservation as wilderness.[115]

110. 44 Fed. Reg. 2695, 2699 (1979).
111. *Id.* at 2700, 2701.
112. *Id.* at 2705.
113. *Id.*
114. *Id.* at 2706.
115. *Id.* at 2705.

The net effect of the wilderness protection stipulation is to deny any leasehold right to beneficial enjoyment of the interest conveyed. The conditions of the stipulation which deny any right to develop or enter onto the lease "override every other provision of this lease which could be considered as inconsistent with them and which deal with operations and rights of the lessee."[116]

CONCLUSION

Both the Solicitor's Opinion and the actual managment policies instituted by the current administration display no real effort to ascertain some sort of objective truth as to the intent of Congress underlying the terms of FLPMA. Rather, a conscious policy of preferring wilderness use has been adopted by the Interior Department, and the Solicitor has issued an opinion interpreting FLPMA which resembles an advocate's brief more than a dispassionate, unbiased evaluation.

Historically, withdrawals have been used by the executive to alter the mining and mineral leasing laws for the alleged purpose of preserving Congress' future options. The Solicitor's Opinion contains the most far-reaching decisionmaking example of this policy to date.

The net effect of the Opinion has been to draw a clear line between the policy priorities of the Department and the interest of mining and mineral leasing operators. No matter how the Department attempts to sugar-coat its administration of section 603 in its WSA Guidelines, it has been locked into defense of the uncompromising legal position enunciated by its solicitor. That position sacrifices all uses of the public

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116. *Id.* at 2721.

An internal memorandum from John Leshy, Associate Solicitor, Energy and Resources to the Solicitor dated September 20, 1978, reveals that the Solicitor's office is not entirely comfortable with its authority to manage in this fashion:

> You have expressed considerable misgivings about the policy of issuing oil and gas leases subject to a "no surface occupancy" stipulation, or any other stipulation which could prevent development of the lease. . . . While this may be defensible from the standpoint of administration, it creates two major problems. *First*, we may be subject to a lawsuit challenging our failure to do these environmental analyses prior to leasing. (The Sierra Club has hinted at such a suit.) *Second*, and more important, our current policy is only as good as our legal right to lease without development rights.
>
> Industry as a whole has shown a reluctance to challenge the legality of issuing a lease without an absolute right to develop, probably because it faces a Hobson's choice: if it loses, it gains nothing, and if it wins, the Secretary still has discretion to halt all new oil and gas leasing, at least until environmental assessments are prepared prior to resuming leasing. Although the legality of the current policy has not been tested in court, there are hundreds or thousands of leases being issued with these stipulations. I suspect eventually some company will contest the lawfulness of these stipulations if we refuse to allow development in order, for example, to protect wilderness. If *we* lose, we can solve the problem *for the future* by not leasing unless we are satisfied development is environmentally sound. Our losing might, however, render the stipulations in the hundreds or thousands of leases already issued unenforceable.

Memorandum from John Leshy, Associate Solicitor, Energy and Resources, to Leo Krulitz, Solicitor, Dep't. of Interior (Sept. 20, 1978) (emphasis in original).

lands to the goal of preserving suitability for wilderness designation, at least until such time as specific areas are designated by the inventory process as being unsuitable for wilderness. Because so much land is involved, and because large potential reserves of minerals are believed to lie within such lands (particularly in the case of oil and gas in the Overthrust Belt), the conflict will not be subject to deferral or avoidance on an administrative level.

The gauntlet has been thrown and enough is at stake to insure that it will be taken up. Although Congress stated in FLPMA its express disapproval of the *Midwest Oil Company* decision, the Solicitor's Opinion has revitalized the doctrine confirmed by that case. A case similar to *Midwest Oil Company* will undoubtedly result. Its outcome will determine whether Congress was at last successful in FLPMA in accomplishing its expressed purpose to "exercise its constitutional authority to withdraw or otherwise designate or dedicate Federal Lands for specified purposes."[117]

117. 43 U.S.C. § 1701(4) (1976).