THE IMPACT OF THE FEDERAL LAND POLICY MANAGEMENT ACT UPON STATEHOOD GRANTS AND INDEMNITY LAND SELECTIONS

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The passage of the Federal Land Policy Management Act [FLPMA][1] in 1976 marked the close of the philosophy of disposal of the public domain to states and private individuals and the institution of a public policy of federal retention and maintenance.[2] Pursuant to FLPMA, the Department of the Interior is responsible for the inventory and classification of the public domain. Although FLPMA has established the first comprehensive policy for management of the public lands, it has also created conflicts with prior congressional dispositions of the public domain for the support of the states.

One of the earliest land policies of this nation was that federal lands should be granted to each state upon entry to the Union as a base for the development of various state institutions. Since the inception of this policy, the states have received a total of 328,424,871 acres of federal land for the support of a variety of public institutions and functions.[3] In addition to those grant lands that have passed title to the

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1. Pub. L. No. 94-579, 90 Stat. 2743 (codified at 43 U.S.C. §§ 1701-1782 (1976)).

2. The legislative history of the law is outlined in SENATE COMMITTEE ON ENERGY AND NATURAL RESOURCES, 95TH CONG., 2D SESS. LEGISLATIVE HISTORY OF THE FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976 (Public Law 94-579) (Comm. Print 1978) [hereinafter cited as LEGISLATIVE HISTORY].

3. LEGISLATIVE HISTORY *supra* note 2, at 94. These allotments have been allocated as follows: common schools (72 million acres); other schools, such as land grant colleges (17 million acres); other institutions, such as mental health facilities (5 million acres); railroads (37 million acres); wagon roads (3 million acres); canals and rivers (6 million acres); miscellaneous improvements (8 million acres); swamp and overflow lands for the purpose of reclamation (64 million acres); and other uses (110 million acres). *Id.*

states, large acreages of public domain are still outstanding to several states. Many of the state entitlements still owing are in lieu selections to replace lands which were never received by the states due to federal withdrawal or third party withdrawal pursuant to public land laws in effect at the time of statehood grant.[4]

These outstanding statehood selections, as well as the grant lands which have vested in the states will be affected by FLPMA. Particularly significant is section 603 of FLPMA which requires the study of certain roadless tracts of the public domain for possible designation as wilderness.[5] Classification of these public domain lands as study areas with potential wilderness characteristics, and the eventual congressional designation of wilderness areas, will delay the selection of such tracts in satisfaction of statehood entitlements. Congressional designation of wilderness areas will essentially withdraw these lands from the possibility of state selection. Due to the stringent land use restrictions placed upon wilderness areas and wilderness study areas, access to and development of vested state grant lands in the vicinity of such areas may be rendered impossible.

Two of the states most heavily affected by this possible chain of events are Arizona and Utah. In 1970, the Public Land Law Review Commission reported that a major portion of the outstanding "in place" statehood selections were owing to these two public lands states.[6] As of 1975, 380,000 acres were still owing to these states; 180,000 acres outstanding to Arizona and 200,000 acres owing to Utah.[7] These lands must be replaced by state selections from the public domain within the boundaries of these states. Due to the large stakes involved, it is not surprising that Utah has spurred litigation in pursuit of their indemnity land selections. While the dispute in *Utah v. Kleppe*[8] was commenced prior to the enactment of FLPMA, this case is the most recent culmination of litigation involving statehood grants of public domain lands. As such, it sets important precedent upon which public lands states may rely in settling the perceived conflict of statehood selections with FLPMA. The significance of *Kleppe* to FLPMA is emphasized in the draft wilderness guidelines of January 12, 1979,

4. *See* 43 U.S.C. §§ 851-852(b) (1976).

5. 43 U.S.C. § 1782 (1976). Recent administrative guidelines concerning section 603 include: BLM, DEPARTMENT OF INTERIOR, WILDERNESS INVENTORY HANDBOOK (1978); BLM, DEPARTMENT OF INTERIOR, INTERIM MANAGEMENT POLICY AND GUIDELINES FOR WILDERNESS STUDY AREAS (Draft - January 12, 1979) [hereinafter cited as INTERIM MANAGEMENT GUIDELINES].

6. PUBLIC LAND LAW REVIEW COMMISSION, ONE-THIRD OF THE NATION'S LAND 246 (1970) [hereinafter cited as PLLRC].

7. Eliason, *Land Exchanges and State In-Lieu Selections as They Affect Mineral Development*, 21 ROCKY MTN. MIN. L. INST. 617, 640-41 (1975).

8. 586 F.2d 756 (10th Cir. 1978).

which indicate that state selections "[m]ust be suspended pending further instructions from the Director [of the Bureau of Land Management] as a result of the *Utah v. Kleppe* litigation."[9]

This article will center upon the conflict of congressional policy created by the wilderness provisions of FLPMA and the selection and use of lands granted to the states upon admission to the Union. The recent *Utah v. Kleppe* decision as well as the legislative history of FLPMA will be investigated to determine the strength of the states' position that statehood entitlements should be given consideration over wilderness demands on the federal public domain. Finally, the article will consider alternative resolutions which would reconcile conflicting state and federal claims to use of the public domain.

BACKGROUND

Statehood Land Grants and Indemnity Selections

The Public Land Law Review Commission reduced the more than 300 million acres of state land grants into four generic classifications.[10] These categories are grants in place, quantity grants, land grants of an undetermined extent, and indemnity or in-lieu selection grants.[11] Of these types of grants, the most seriously threatened by restrictive classification or withdrawal of the public domain pursuant to FLPMA are quantity grants and in-lieu land grants. These statehood entitlements differ from other grants in that they require state selection from the remaining federal lands within the boundaries of the state. The largest outstanding quantity grant is comprised of 104.5[12] million acres granted to Alaska in its Statehood Act of 1958.[13] In the western public land States, the largest outstanding grants are state in-lieu land selections. This discussion will focus on the indemnity selection of school grant lands which are of the most immediate concern to the states of Utah and Arizona.

Since the Land Ordinance of May 20, 1785 established the policy of reserving section 16 of every township for the support of public

9. INTERIM MANAGEMENT GUIDELINES, *supra* note 5, at 18.

10. PLLRC, *supra* note 6, at 243.

11. Grants in place are labeled as such because they are specifically designated at the time of the grant (i.e. numbered sections of townships granted for the support of common schools). Quantity grants consist of a specified number of acres to be selected by a state from the public domain within its boundaries (i.e. grants made for the support of certain institutional developments). Lands of undetermined extent are assigned neither a specified acreage nor tract number, but rather are defined by certain qualifying criteria (i.e. critical swamplands or reclamation acreage). Indemnity or in-lieu selection grants compensate states for in place lands which are otherwise unavailable.

12. PLLRC, *supra* note 6, at 244.

13. Alaska Statehood Act, Pub. L. No. 85-508, § 6, 72 Stat. 339 (1958), *as amended by* Pub. L. No. 89-702, 80 Stat. 1098 (1966).

schools, some 78 million acres have been set aside for the maintenance of common schools and another seventeen million have been dedicated to such schools as land grant colleges.[14] This category of in place grants accounts for the greatest amount of acreage which passed title to western public land States. The majority of indemnity selections still outstanding to these states are also lands dedicated to the support of public schools.

The policy initiated in the Land Ordinance of 1785 was first enacted into legislation by Ohio's Statehood Act of 1802.[15] In 1848, section 36 was added to the in place grant by the act organizing the territory of Oregon.[16] Utah's Enabling Act of July 16, 1894, doubled the school land to the states by adding sections 2 and 32 of each township.[17] This policy was continued through the admission of New Mexico and Arizona to the Union in 1912.[18] By the time Alaska was admitted to the Union, the policy of in place grants had declined. Thus, because much of Alaska was an unexplored wilderness, Congress replaced the specific school land grant with a quantity grant for the support of the State's institutions.[19]

For a variety of reasons, many states did not receive clear title to their school land grant entitlement. The withdrawal of public domain by federal reservation or private entry prevented many sections from passing to the states. In addition, until 1958, a federal statute prevented the selection of mineral lands as indemnity lands where original grant lands were mineral in character.[20] In cases such as these, the states were allowed to choose other lands of equal acreage from unappropriated public domain to compensate their losses. The criteria for selection of in-lieu lands are set forth at 43 U.S.C. sections 851 and 852; however, the mechanics of the selection process have developed through administrative practice. A state proposing selection of a tract files its choice of lands with the Bureau of Land Management, accompanied by a legal description of the desired acreage. The legal description is then checked against BLM records to determine if any of the land should be deleted from the selection due to federal reservation or other appropriation. The state publishes a legal description of the proposed selection for several weeks to allow adverse claimants to assert

14. LEGISLATIVE HISTORY, *supra* note 2, at 94.
15. *See* Act of Apr. 30, 1802, ch. 60, § 7, 2 Stat. 173, 175 (1802).
16. Act of Aug. 14, 1848, ch. 177, § 20, 9 Stat. 323, 330 (1848).
17. Act of July 16, 1894, ch. 138, § 6, 28 Stat. 107, 109 (1894).
18. Act of June 20, 1910, ch. 310, §§ 6, 24, 36 Stat. 557, 561-562, 572-573 (1910).
19. Act of July 7, 1958, Pub. L. No. 85-508, § 6(f), 72 Stat. 339, 341 (1958); Act of March 18, 1959, Pub. L. No. 86-3, § 5(f), 73 Stat. 5, 6 (1959). *See* P. GATES & R. SWENSON, HISTORY OF PUBLIC LAND LAW DEVELOPMENT 316 (1968).
20. Act of Aug. 27, 1958, Pub. L. No. 85-771, § 2, 72 Stat. 928, 928-929 (1958); Act of June 24, 1966, Pub. L. No. 89-470, § 3, 80 Stat. 220, 220 (1966).

conflicting rights to the land. If no unresolved objection exists after the state's final publication, a tentative approval of the selection is issued by the regional BLM director. After final review by the Secretary of Interior to insure compliance with 43 U.S.C. sections 851 and 852, the selection is placed upon a clear list. This document effects title to the selected lands in the state.

The Utah v. Kleppe Litigation

Although many states satisfied their in-lieu entitlements soon after federal survey, as of 1970 some 900,000 acres of land in Arizona and Utah were still outstanding, and over eighty-five percent of this acreage was eligible for in-lieu selection by these states.[21] As indicated earlier, Arizona and Utah are entitled to a good portion of these lands as indemnity for the numbered school sections which were not transferred to the states.[22] Of the two states, Utah has been the most aggressive in pursuing its entitlement. Between 1955 and 1972, the State of Utah made 247 indemnity lieu selection applications for a total of 191,914.35 acres.[23] Between 1970 and 1972 the BLM approved a total of 16,623.05 acres as meeting the applicable statutory selection criteria and issued seven clear lists by which title to this acreage was passed to Utah. The remaining 195 applications totaling 157,017.58 acres have been held in abeyance by the BLM. These selections were filed by Utah upon oil shale lands and have been withheld from approval by the Bureau due to an extreme disparity in value between the selected lands and the originally granted base lands. Litigation has ensued concerning the Secretary of Interior's ability to withhold approval of Utah's selection using such equal value criteria rather than the equal acreage test specified in 43 U.S.C. § 851.

The *Utah v. Kleppe* case was initiated by Utah in federal district court to compel the Secretary of the Interior to review and take action upon the oil shale tracts that Utah had selected as indemnity school lands.[24] Utah's position was that equitable title to the tract had passed to the state upon filing the in-lieu land selection lists in accordance with 43 U.S.C. § 852. The state argued further that the Secretary's discretion in reviewing the selection lists was limited to ensuring compliance with the statutory criteria of 43 U.S.C. § 852. The Secretary's position was that section 7 of the Taylor Grazing Act[25] authorized him to clas-

21. PLLRC, *supra* note 6, at 246.
22. See text & notes 6-7 *supra*.
23. Letter from Assistant Secretary of the Interior Jack O. Horton to Congressman Henry S. Reuss, Chairman, Subcommittee on Conservation and Natural Resources (September 20, 1973).
24. 586 F.2d 756, 760-62 (10th Cir. 1978).
25. 43 U.S.C. § 315 (1970) (repealed 1976).

sify these selections because they were located within grazing districts.[26] Such classification, the Secretary argued, would justify application of a public interest criteria which incorporated an equal value test. This test would then be applied by the Secretary in comparing the value of the base lands with the in-lieu lands to determine whether the disposition to the states was appropriate.[27] The district court held for Utah and ordered the Secretary to proceed with the ministerial duty of transferring legal title to Utah if the statutory criteria had been met.[28] The Tenth Circuit Court of Appeals affirmed the decision of the lower court.[29]

The *Kleppe* litigation is instructive in several ways. The case presents a current review of the status of school indemnity selection rights as distinguished from other statehood grants. In addition, the litigation deals with the scope of the Secretary's discretion to classify school indemnity selections under the Taylor Grazing Act. These issues provide some clarification of the extent to which FLPMA may inhibit the selection and use of school land grants and indemnity selections.

Both the court of appeals and the district court characterized school land grants to the states as creating a public trust.[30] The district court explained that the United States as settlor, grants certain sections of land to the state as trustee, for the use of the public school system, as beneficiary of the trust.[31] In the case of Utah, the instrument creating the trust was the Utah Enabling Act,[32] and the terms of the trust were accepted by certain provisions of the Utah Constitution that restrict the use of the school lands and require that such lands and the proceeds derived therefrom remain in a permanent fund to be expended only for the support of state schools.[33] Although the court of appeals confirmed the public trust status of school lands, the court was careful to limit the scope of these strict trust conditions only to school land grants or in-lieu selections of such grants.[34] Unlike most federal land grants, school land grants are made in trust to create a permanent fund for the support of state public schools. Because school land grants serve the unique public purpose of promoting the development of common schools, the court applied a special rule to uphold these public trusts.

26. 586 F.2d at 762.
27. *Id.*
28. *Id.* at 758.
29. *Id.* at 774.
30. *Id.* at 764, 766.
31. *Id.* at 764.
32. Act of July 16, 1894, ch. 138, §§ 3, 6, 10, 28 Stat. 107-10 (1894).
33. UTAH CONST. art. X, § 3.
34. 586 F.2d at 769.

This rule reverses the general presumption that land grant legislation is to be construed in favor of the federal government and slants federal-state land grant disputes in favor of upholding state school land grant provisions.[35]

The legal status of the in-lieu land selections have been analogized to bilateral compacts in both the *Kleppe*[36] litigation and in earlier precedent.[37] In one sense, the bilateral nature of this agreement relates back to negotiations between public land states and the federal government upon the admission of those states to the Union.[38] At that time, the states made certain concessions such as the immunity of federal property from state taxation in exchange for land grants from the federal government. However, the uniqueness of the status assigned to school land indemnity selections, as distinguished from other types of statehood grants, derives from the language of the federal indemnity lands statute, 43 U.S.C. § 852. The language of this statute was specifically compared to a bilateral compact by the federal district court in *Kleppe*.[39] Thus, the terms of school land indemnity selections are made in accordance with a congressional "offer" set forth at 43 U.S.C. § 852. When the state makes its selections, the Secretary of Interior has a ministerial duty to determine whether the selections have complied with the terms of the statute. And, where the state is found to have met the terms of the congressional offer then the state acquires equitable title to the land selected as of the date selection was made.[40] In contrast to other methods of granting interests in public lands, this statute requires the recipient of the grant only to prove attainment of the statutory requirements in order to secure rights in the selected land.[41] For example, although the Secretary retains jurisdiction over the disposition of certain public lands, the Secretary is not delegated the authority to grant or deny statehood entitlements under this indemnity selection statute, but rather has the duty to ensure that the terms of the bilateral compact were met by the state invoking the statute.

Perhaps the most important attribute of the indemnity lands selection statute analyzed in the *Kleppe* litigation is the concept of equitable title. This concept derives from the equitable notion that when everything is done that can be done to perfect title to land, the purchaser of

35. *Id.* at 767.
36. *Id.* at 764.
37. In Cooper v. Roberts, 59 U.S. (18 How.) 173, 176 (1855), a school land grant was characterized as a "compact" between Michigan and the United States.
38. *See* PLLRC, *supra* note 6, at 244.
39. 586 F.2d at 764.
40. *Id.*
41. Willcoxson v. United States, 313 F.2d 883, 888 (D.C. Cir.), *cert. denied*, 373 U.S. 932 (1963).

such property becomes the equitable owner of the property. The application of this principle of equity to the selection of indemnity school lands in *Kleppe* was developed from two United States Supreme Court decisions.[42] The facts in both cases involved a change in status of selected indemnity acreage pending federal processing of state selection lists. In *Payne v. New Mexico*,[43] the Secretary of the Interior attempted to invalidate school land indemnity selections due to the subsequent removal of the selected tract from a federal reservation.[44] The Supreme Court enjoined the Secretary from cancelling New Mexico's selection on the grounds that the selection statute extended an offer to the state, the proper acceptance of which vested rights in the selected land. The Court determined that this right did not arise after the Secretary of the Interior approved the selection. Rather, the equitable title concept allowed New Mexico to claim the entitlement as of the date of filing the state selection list.[45] The case of *Wyoming v. United States*[46] involved the attempted federal withdrawal of a tract which had been selected by the state pursuant to the indemnity school lands statute.[47] In this decision, the Court confirmed the state selection and held that the adequacy of the selection was to be determined under conditions existing at the time the selection list was filed.[48] The equitable title theory was once again relied upon in reaching this decision.[49]

A final issue worthy of note in the litigation involves the status of in-lieu selections with respect to land use classification. The court of appeals affirmed the district court's determination that the Secretary of the Interior lacked authority to classify school land indemnity selections under section 7 of the Taylor Grazing Act.[50] Thus, although section 7 empowered the Secretary to classify lands within grazing districts to protect land uses of higher value than grazing, the court distinguished state selections from such land use determinations. The court indicated that pending school selections were not to be classified as uses of land but were rather, "selections for the transfer of title and subsequent administration by the states under the solemn trust conditions."[51]

42. *See* 586 F.2d at 769. See text & note 43-49 *infra*.
43. 255 U.S. 367 (1921).
44. *Id.* at 369-75.
45. *Id.* at 371.
46. 255 U.S. 489 (1921).
47. *Id.* at 494.
48. *Id.* at 508-509.
49. "Equity then regards the state as the owner of the selected tract, and the United States as owning the other; and this equitable ownership carries with it whatever of advantage or disadvantage may arise from a subsequent change in conditions. . . ."
Id. at 497.
50. 586 F.2d at 172-73.
51. *Id.* at 172.

Such a categorization may have a negative impact upon the Secretary's ability to classify in-lieu selections under any federal land use scheme.

RESTRICTIVE MANAGEMENT UNDER FLPMA AND THE STATEHOOD SELECTION PROCESS

Management of the public domain pursuant to the provisions of FLPMA may inhibit the process of selecting lands in satisfaction of statehood grants. Restrictive land use classification and withdrawal of the public domain will affect the selection process in two major ways: through delay and possible invalidation of pending statehood selections, and by the reduction of acreage available for selection. The provisions of FLPMA which challenge the grant lands selection process are section 204 withdrawals,[52] section 202 land use classifications,[53] and section 603 wilderness study and management requirements.[54] Section 204 of FLPMA provides for withdrawals exceeding 5,000 acres and those of less than 5,000 acres.[55] The larger withdrawals require congressional notification and opportunity for disapproval. Withdrawals of less than 5,000 acres may be made without congressional approval where the Secretary determines a proprietary need or the capacity for resource development. Section 202 requires the review of all public lands through a process of land use planning. Restrictive land use classification of the federal domain pursuant to section 202 may hinder state selections.[56] For instance, in developing land use plans, priority is given to designation of areas of critical environmental concern. A tract classified as an area of critical environmental concern would be managed by the federal government to protect this resource and would probably not be available for selection by the states.[57] However, the provision which may provide the most immediate concern to statehood selection is that of wilderness review and management pursuant to section 603 of FLPMA.[58]

The wilderness provisions of FLPMA contain elements of both restrictive land use management and withdrawal with respect to the statehood selection process. Initially, section 603 calls for the review of roadless areas of 5,000 acres or more and roadless islands to determine those areas with potential wilderness characteristics.[59] The Secretary of the Interior will have fifteen years from the date of enactment to com-

52. 43 U.S.C. § 1714 (1976).
53. *Id.* § 1712.
54. *Id.* § 1782.
55. *Id.* §§ 1714(c), 1714(d).
56. *Id.* § 1712 (1976).
57. *See id.* 1711(a).
58. *Id.* § 1782.
59. *Id.* § 1782(a).

plete review of most of the public domain, but will have only until July 1, 1980, to conduct the wilderness review of natural and primitive areas. During this review process, areas either under review or with the potential for being reviewed must be managed in "a manner so as not to impact the suitability of such areas for preservation as wilderness."[60] This restrictive land use classification will at least temporarily delay many state selections because permanent disposition of areas under consideration for review would contravene the intent of section 603. Once Congress has finally designated an area as wilderness, the management of the tract will proceed according to the requirement of the federal Wilderness Act.[61] Such a designation will withdraw these areas from public domain lands available for satisfaction of statehood selections.

The most immediate impact of section 603 wilderness provisions is the potential federal withdrawal or restrictive classification of lands currently pending approval on state selection lists. The draft BLM wilderness guidelines of January 12, 1979 have realized this threat by suspending state selections within wilderness study areas.[62] However, this suspension has been conditioned upon further consideration of the *Kleppe* litigation by the Director of the BLM:

If the rationale of *Kleppe* influences the Director of the BLM, it seems clear that the policy of suspending pending statehood selections will be reversed, at least with regard to school land indemnity selections. Pursuant to the "equitable title" theory relied upon in *Kleppe*,[63] once the state has filed indemnity selection lists which meet the criteria of 43 U.S.C. § 852, the state has equitable title to the selection. Furthermore, the statutory criteria for indemnity selections must be applied to the conditions existing at the time the selection lists were filed. It would seem that selection lists filed in accordance with statutory criteria upon lands available as of the date of filing could not be invalidated at a later date by classification as a wilderness study area or designation as a wilderness area.

The issue of conflicting state and federal claims to public domain lands on state selection lists has been squarely treated by the United States Supreme Court in *Payne v. New Mexico*[64] and *Wyoming v. United States*.[65] The issues in *Wyoming v. United States* are analogous to the issue of the effect of section 603 on statehood entitlements now

60. *Id.* § 1782(c).
61. 16 U.S.C. §§ 1131-1136 (1976).
62. INTERIM MANAGEMENT GUIDELINES, *supra* note 5, at 18.
63. 586 F.2d at 762, 765, 767-68. See discussion text & notes 40-49 *supra*.
64. 255 U.S. 367 (1921).
65. 255 U.S. 489 (1921).

facing the Director of the BLM. In that case, the BLM refused to approve pending in-lieu selections because the selected lands were included in a temporary executive withdrawal made *after* the state had filed for the acreage.[66] The Court invalidated the withdrawal with respect to the selected acreage on the ground that equitable title to the acreage had vested in Wyoming on the date of the state's filing of selection lists in accordance with 43 U.S.C. § 852.

The equitable title theory established in *Wyoming v. United States* may not be distinguished on the grounds that section 603 calls for restrictive classification but not withdrawal of public domain lands. The *Kleppe* litigation extended the force of the state's equitable title claim as against secretarial land use classification under the Taylor Grazing Act. Land use classification under FLPMA then, would not divest the state of its equitable title claim to state selection acreage. Indeed, dicta in *Kleppe* seemed to establish that the in-lieu selection process was not a use in the nature of a land use classification and thus was not subject to criteria applicable to such classifications under the Taylor Grazing Act.[67] Applying this rationale, if a selection is not a use of land but is rather a land transaction, pending state selections may be exempt from the classification process of section 202 of FLPMA.

The precedent established in *Kleppe* clearly establishes that school indemnity selections filed in accordance with the criteria of 43 U.S.C. § 852 are exempt from restrictive federal classification or withdrawal after the date of filing. However, the extention of this policy to other types of statehood grants or to state selections which fail to meet statutory prerequisites for filing seems less clear. The court in *Utah v. Kleppe* suggested rules of construction favorable to school indemnity selections. However, the court of appeals limited this favorable treatment to school land grants due to special trust obligations which, "clearly set these enactments aside as *special acts* completely separate and apart from all other public land grant enactments."[68]

An example of pending statehood selections which were not given the favorable construction of school land grants is presented in the case of *Alaska v. Udall.*[69] In this case, Alaska brought suit to compel the Secretary of the Interior to approve the state's selections made in satisfaction of Alaska's statehood quantity grant of lands to support various institutions of the state.[70] The Native Village of Nenana intervened to

66. *Id.* at 494-95.
67. 586 F.2d at 772.
68. *Id.* at 769 (emphasis in original).
69. 420 F.2d 938 (9th Cir. 1969), *cert. denied*, 397 U.S. 1076 (1970).
70. The litigation was initiated when the Secretary instituted a land freeze policy which suspended federal approval of Alaska's statehood selections pending settlement of the native claims controversy. Public Land Order No. 4582 (January 12, 1969). Alaska v. Udall, 420 F.2d at 939.

block the Secretary's approval asserting its possession of the disputed land.[71] The Ninth Circuit reversed the district court's grant of the state's motion for summary judgment and determined that the claims of native Indians to lands selected by Alaska raised a material issue of fact as to whether the land was "vacant, unappropriated and unreserved" and therefore available to satisfy the quantity grant under the Alaska Statehood Act.[72] Clearly, the pending statehood "quantity" selections in Alaska were not accorded the favorable construction which school land grants merited in the *Kleppe* case.

The *Alaska v. Udall* case can be distinguished from *Utah v. Kleppe* and *Wyoming v. United States* in that the latter cases involved school land selections subject to strict public trust conditions not imposed by the terms of quantity land grants involved in *Alaska v. Udall*. Furthermore, a difference may be drawn in regard to the validity of Alaska's title in the first instance, because native claims clouded the state's claim to otherwise "vacant, unappropriated, unreserved" lands. In the *Kleppe* case as well as in *Payne v. New Mexico* and *Wyoming* v. *United States*, the favorable construction of school land selections did not arise until the state had met all the conditions imposed by 43 U.S.C. § 852, including the requirement that the selected tract be unappropriated as of the date of filing.

However, the subsequent action of Congress cannot be so easily distinguished or explained away. After the Supreme Court denied certiorari in the *Alaska v. Udall* case, the issue went before Congress and was resolved through the Native Claims Settlement Act.[73] This Act expressly abrogated Alaska's claim to both selected lands pending approval and to certain selections which had passed in legal title to the state.[74] These state entitlements were then in part transferred to the Alaskan Native Indians. This action leaves little doubt as to the power of Congress to expressly abrogate certain statehood entitlements to settle conflicting claims to such lands. Even the favorable rules of construction discussed in *Kleppe* would not withstand express abrogation of state school land entitlements. The legislative history of FLPMA, however, reveals no such express intent with regards to statehood entitlements. To the contrary, as the following discussion will show, FLPMA expressly indicates that grants of lands to the states were in no way to be impaired by the Act.[75]

The state indemnity selection process is protected from the opera-

71. 420 F.2d at 939.
72. *Id.* at 940.
73. 43 U.S.C. §§ 1601-1628 (1976).
74. *See id.* §§ 1603, 1605.
75. See text & notes 76-81 *infra*.

tion of section 603 and other provisions of FLPMA by a safety clause added to the Act to insure against such conflicts. Section 701(a)(6) of the Act modifies the impact of withdrawal or restrictive land use classification pursuant to FLPMA as follows: "Nothing in this Act shall be construed as limiting or restricting the power and authority of the United States . . . *[o]r as amending, limiting, or infringing the existing laws providing grants of lands to the states.*"[76] The legislative history of this provision indicates that Senator Stevens of Alaska introduced it to prevent the recurrence of the situation which had deprived Alaska of its statehood selection rights.[77]

The scope of the protection extended by section 701(g)(6) is further discussed in the legislative history. It is interesting to note that when Senator Stevens first raised this provision for discussion, it was intended to modify section 202 of the Act concerning disposal of national resource lands pursuant to certain land use planning criteria. Stevens was concerned that "the Secretary could develop, maintain, or revise a land use plan in a manner so as to prohibit or restrict the selection by the State of Alaska of lands otherwise available to it prior to the enactment of this act."[78] Though the provision was finally placed in the broad "savings clause" section of the Act, the legislative intent that it operate to prevent the operation of restrictive land use classification to block the selection of state grant lands remains clear. The legislative history of this provision further indicates that section 701(g)(6) was not only intended to protect pending statehood selections and grant lands that had passed into state ownership, but was also meant to prevent the reduction of the public domain within any state from which statehood selections or in lieu selections could be made.[79]

If the scope of section 701(g)(6) is interpreted to protect both lands on pending statehood selection lists and public domain lands which may potentially be chosen by a state, the implementation of the FLPMA will be changed dramatically. From the legislative history of section 701(g)(6), it appears that Senator Stevens intended that the

76. *Id.* § 1701(g)(6) (emphasis added).

77. At the time I helped prepare the Alaska Statehood Act, it said that we could select vacant, unreserved, and unappropriated Federal land. We thought that meant the lands that had not been reserved as of the date of Statehood. Since Statehood, the Secretary has, in fact, reserved new lands; and those reservations did, in fact, prevent us from selecting many of the lands reserved after the enactment of the statehood bill, and that has been upheld in the courts.

Here we have a new act, and it gives him new and broader powers to deal with public lands.

We do not want to be frustrated any further in the rights granted us by the Federal Government.

LEGISLATIVE HISTORY, *supra* note 2, at 1729.

78. *Id.* at 1731.

79. *Id.* at 1729.

states satisfy their statehood entitlements prior to the Secretary's instigation of any activity under FLPMA which would impair the selection of available public domain. Although this position seems rather extreme, it represents one solution to the federal-state conflict over remaining public domain lands. This position will be explored along with other possible resolutions at the conclusion of this article.

Another provision which may provide some protection for statehood entitlements is section 701(h), which protects all "valid existing rights" from impairment by the Act. The Department of the Interior has interpreted this section as protecting all valid property rights from a taking in contravention of the fifth and fourteenth amendments.[80] The legislative history concerning this provision supports the notion that the statehood entitlement may be a "valid existing right" subject to protection from impairment by FLPMA.[81] Even if the scope of section 701(h) is not interpreted as broadly as Senator Haskell would have construed it, the provision would seemingly protect those equitable title claims discussed in *Utah v. Kleppe*. Thus, it would seem that those states who have filed school land indemnity selections in accordance with 43 U.S.C. § 852 would have "valid existing rights" which may not be impaired by FLPMA.

THE CONFLICT BETWEEN BLM WILDERNESS PROGRAMS AND THE DEVELOPMENT OF STATEHOOD GRANT LANDS

The present distribution of school land sections takes on the randomness of a shotgun pattern across the maps of many public land states. In states such as Utah and Arizona, in which the federal government retains title to a large percentage of the public domain, state-owned school lands are very likely to be surrounded by federal lands. Where such a land use pattern occurs, a large portion of school lands may be affected by roadless area review and wilderness withdrawals. Thus, development, lease, or other use of school lands may be impossible due to isolation by non-access federal lands. Seemingly, congressional intent has come to loggerheads in the policy of development of state lands for the benefit of schools versus that of preservation of pristine areas with wilderness characteristics.

The BLM has been unable to reconcile these two contrasting policies during the wilderness inventory program. To date, the BLM has been proceeding on a case by case basis where state-federal conflicts

80. *See* Memorandum from the Solicitor to Secretary, BLM Wilderness Review - Section 603, Federal Land Policy Management Act (September 5, 1978) at 32 [hereinafter cited as Solicitor's Opinion].

81. LEGISLATIVE HISTORY, *supra* note 2, at 1728.

arise. In Utah, this conflict has resulted in litigation over the development of state school lands. The incident arose during April of 1978 when Utah granted an oil and gas company permission to drill a well upon a state school land grant section. Because the tract was surrounded by federal public domain, the company sought access from the BLM in accordance with Title V of FLPMA which deals with rights-of-way over public lands.[82] Initially, the BLM refused to grant access to the state land due to the area's pending evaluation as a wilderness study area. Finally, due to the intervention of Utah, access was permitted in this one case. This incident, however, provoked concern that the development of other state trust lands would be inhibited by wilderness inventory and designation. The Utah Attorney General requested a policy determination of the rights of states to access across federal lands to make reasonable economic use of school trust lands.[83] Upon refusal of the Solicitor's office to deliver such a determination, Utah filed suit in federal district court.[84] The complaint joins not only the Secretary of the Interior and the Director of the BLM but also the Park Service, the Department of Agriculture, and the Forest Service. Utah alleged that these federal agencies wrongfully denied access to state school lands. This denial of access allegedly deprives the school trust fund of income, and violates the implied terms of the bilateral compact between the state and federal governments and the purpose of the school land grant program, in addition to violating an implied grant of easement across the federal domain to develop land-locked school trust lands. Utah seeks a declaratory judgment against the named federal agencies to the effect that the state's rights have been violated by denial of access to state school lands.

The outcome of Utah's challenge of wilderness study and designation programs is in part dependent upon the interpretation of the federal-state trust created by statehood grant lands. The obligation of the federal government to fulfill the terms of the statehood enabling acts may continue in some instances beyond the granting of lands into state ownership. In this case, the State will argue that a continuing responsibility on the part of the federal government is created by the public trust nature of school land grants, a concept which was relied upon in the *Kleppe* litigation. FLPMA wilderness inventory and designation, to the extent that it inhibits access to or development of state school lands and other trust properties, may be in contravention of such federal-

82. *See* 43 U.S.C. §§ 1761-1771 (1976).

83. Letters of Utah Attorney General Robert B. Hansen to Leo Krulitz, Solicitor of the United States Department of Interior (July 28, 1978, September 18, 1978).

84. State of Utah v. Andrus, No. C77-9-0037 (D. Ut. filed January 16, 1979).

state trust obligations.[85]

Kleppe restates the established precedent that school lands passing to the state at statehood are to be held in trust for the development and support of these institutions:

> The school land grant and its acceptance by the state constitutes a solemn compact between the United States and the state for the benefit of the state's public school system. . . . A state accepting the school land grant must abide by its duty as trustee for the benefit of the state's public school system. This duty applies with equal force to those specific school lands granted or those lands selected by the state as indemnity or lieu lands.[86]

The decision also reiterates the bilateral nature of the federal land grant program. This bilateral grant has been interpreted as imposing duties upon both the United States and the state to enforce the terms of the trust and uphold the purpose of generating financial aid to support the public school system of the states. In *Lassen v. Arizona Highway Department*,[87] the Supreme Court determined that there was a federal responsibility to aid in protecting the purpose of school land grants. In that case, the United States intervened in transactions involving the disposition of Arizona school lands to insure that such transactions were executed in a manner consistent with the terms of the congressional grant. The Court explained this intervention as follows:

> The lands at issue here are among some 10,700,000 acres granted by the United States to Arizona in trust for the use and benefit of designated public activities within the State. The Federal Government since the Northwest Ordinance of 1787 has made such grants to States newly admitted to the Union. Although the terms of these grants differ, at least the most recent commonly make clear that *the United States has a continuing interest in the administration of both the lands and the funds which derive from them.* The grant involved here thus expressly requires the Attorney General of the United States to maintain whatever proceedings may be necessary to enforce its terms. We brought this case here because of the importance of the issues presented both to the United States and to the States which have received such lands.[88]

In light of the fiduciary duties imposed upon both the state and federal

85. In the recent decision of this case, United States v. Cotter Corp., C-79-0307 (D. Ut. June 16, 1979), Judge Alban J. Anderson relied upon the bilateral compact created by school land grant legislation to uphold the claimed right of access to school grant sections of both the state and its mineral lessee. The court conditioned such access rights across federal lands on reasonable regulation under FLPMA to prevent impairment of wilderness characteristics subject to the following proviso: "The regulation may not, however, prevent the state or its lessees from gaining access to its land, nor may it be so prohibitively restrictive as to render the land incapable of full economic development." Slip op. at 22.

86. 586 F.2d at 758-59.

87. 385 U.S. 458 (1967).

88. *Id.* at 460-461 (emphasis added). The federal government became likewise involved in

governments to ensure the development of grant lands for the furtherance of the common schools, the wilderness study provisions of section 603 which inhibit access to or development of state school lands may constitute a violation of this fiduciary responsibility.

The litigation brought by Utah concerning access to school grant lands was spurred by the BLM roadless area review program. During this wilderness study phase of section 603 implementation, states concerned over isolated lands are left with few remedies. However, once BLM lands are designated as wilderness, the Wilderness Act may possibly be applied to solve the problem of isolated state lands. Section 6 of the Wilderness Act obligates the Secretary of Agriculture to either provide access to isolated state and private lands or to exchange the areas for federal public domain.[89]

If section 6(a) of the Wilderness Act is applicable to BLM wilderness areas, this provision could go far towards resolving the conflict between wilderness preservation and federal fiduciary responsibilities imposed by state school land grants. Since section 603(c) of FLPMA requires that the administration and use of designated BLM wilderness be governed by the provisions of the Wilderness Act which apply to national forest wilderness areas, the remedies presented by section 6 of the Wilderness Act would seem to govern the issues of access and exchange of isolated state lands. "Adequate access" has been defined in Forest Service regulations to include "the combination of routes and modes of travel which will, as determined by the Forest Service, cause the least lasting impact on the primitive character of the land and at the same time will serve the reasonable purposes for which the State and private land is held or used."[90] Where access could not be possible under such conditions, the surrounded land could be exchanged out of the wilderness area. The exchange of isolated state lands for federal public domain would be conducted pursuant to "applicable authorities" by the Secretary of Agriculture on an equal value basis. Presumably, the appropriate authority governing this exchange would be the exchange provisions of section 206 of FLPMA. The requirements of these exchange provisions will be explained next.

POSSIBLE RESOLUTION OF THE CONFLICT OF BLM WILDERNESS WITH STATEHOOD ENTITLEMENTS

This article has reviewed some of the potential conflicts which

Alamo Land and Cattle Inc. v. Arizona, 424 U.S. 295 (1976) where the Supreme Court required that the Arizona lease of common school lands be made at the "true value" of the land.

89. 16 U.S.C. § 1134(a) (1976).

90. 36 C.F.R. § 293.12 (1978).

BLM wilderness study and designation present to the fulfillment of statehood entitlements. It is clear from the foregoing that Congress, in passing FLPMA, failed to give careful consideration to the impact of federal land management decisions upon its obligations to states under statehood enabling acts. It is equally clear that in the absence of express statutory mechanics to deal with state land grants, the Department of the Interior is implementing the provisions of FLPMA with little regard for outstanding statehood entitlements. If the states are going to have these entitlements fulfilled, it is the states which must take some affirmative action to require the federal government to live up to the statutory, and in some cases fiduciary, obligations imposed by statehood enabling acts. This section will review some of the alternatives which the states may pursue to achieve federal recognition of their outstanding obligations to the states.

Delay of Wilderness Designation Until State Selection Has Been Completed

The issue of delaying other land management functions to give preference to the satisfaction of outstanding state land grants has been raised in a number of arenas. The Public Land Law Review Commission made such a recommendation in its 1970 report to Congress.[91] The study proposed that a total of ten years be allotted during which the Secretary of the Interior classify areas suitable for state indemnity selection, allow states to choose lands from this acreage, and report any differences to Congress. If no resolution could be reached, legislatively or otherwise during this period, all outstanding grants would be terminated. Recently, a similar proposal for the delay of wilderness study and designation in preference to the satisfaction of state land grants was set forth in the Western States Land Commissioner's resolution on wilderness which suggested delay of wilderness designation for a period of two years until state selections have been filed and satisfied.[92] A concept similar to these was sought by Senator Stevens through introduction of section 701(g)(6) of FLPMA to prevent the provisions of that Act from amending, limiting, or infringing the existing laws providing grants of lands to the States.[93] Unfortunately, section 701(g)(6) fails to detail the manner in which the Secretary should proceed with other statutory obligations and yet avoid infringing upon statehood entitlements. And, in the absence of express statutory mechanics for granting statehood selections prior to executing other land manage-

91. PLLRC, *supra* note 6, at 245.
92. Western States Land Comm'n Ass'n, Wilderness Resolution (September 28, 1978).
93. LEGISLATIVE HISTORY, *supra* note 2, at 1728.

ment functions, the express statutory time frames imposed by section 603 have commenced without regard to the prior satisfaction of state entitlements and seemingly preclude such a compensation.

As stated earlier, the rationale behind making statehood selections prior to wilderness designation is primarily to allow states the largest selection possible of public domain lands from which to satisfy their entitlements.[94] However, there are counterveiling reasons for the states to make selections after FLPMA wilderness withdrawals have been made. The states may desire to forestall selection so as to avoid possible isolation of selected tracts by future wilderness designation or delay their choice pending future events and unforeseen needs.

Coordinated Federal/State Planning Efforts

In the event that the states fail in efforts to delay the wilderness designation process or determine not to pursue such a course, it is possible that statehood entitlements may be reconciled through cooperative planning efforts. The wilderness guidelines promulgated by the Department of the Interior call for close coordination between local, state, and federal agencies with "the broadest opportunity for input from all concerned."[95] Although the mechanisms providing such coordination are not set forth in the wilderness guidelines, agency officials have indicated that the section 202 planning procedures of FLPMA will be integrated as closely as possible with the wilderness review under section 603.[96] Section 202 planning provisions require the consideration of state and local planning policies and land use plans. Thus, to the extent that statehood selections and in-lieu lands are considered in state planning mechanisms, they should be given some credence. However, it should be noted that in the event of direct conflict between state development plans and section 603 wilderness requirements, the federal government has little discretion to compromise the latter.

Compensation and Exchange Provisions

Since little statutory leeway is allotted the BLM in determining what constitutes wilderness, it is possible that state selections and the development of state grants will have to be held in abeyance until wilderness designations are complete. In the case of primitive or natural areas, such designation may occur within the next two years.[97] Other

94. See text & notes 61 & 62 *supra*.
95. WILDERNESS INVENTORY HANDBOOK, *supra* note 5, at 5.
96. Speech by Carolyn Osolinik, Assistant Solicitor to the Department of the Interior - ABA FLPMA Symposium, Phoenix, Arizona, October, 19 (1978).
97. *See* 43 U.S.C. § 1782(a) (1976).

wilderness determinations may not be made for some twenty years or longer.[98] When designations do occur, they are bound to isolate many of the state grant lands. Such isolation may constitute an impairment of "valid existing rights" within the purview of FLPMA section 701(h) and may also violate the section 701(g)(6) guarantee that FLPMA will not impair the laws affecting state land grants. Wilderness designation will also reduce the area available for satisfaction of outstanding statehood entitlements, which would likewise violate sections 701(g)(6) and (h) of FLPMA.

Although the Department of the Interior has not yet addressed the impact of section 701(g)(6) upon the wilderness provisions of FLPMA, the Solicitor's Opinion has considered section 701(h) in relation to those provisions.[99] Section 701(h) of FLPMA states that, "all actions by the Secretary concerned under this Act shall be subject to valid existing rights." This provision has been interpreted as restricting actions which would constitute a taking within the meaning of the fifth and fourteenth amendments of the United States Constitution. The Solicitor indicates that "[a]n 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."[100] This constrained view of what would constitute a taking under FLPMA may preclude lessees of state grant lands from succeeding against the Secretary in an inverse condemnation action. However, the right, and indeed the duty, of the state to provide fulfillment of public school land grants and other statehood entitlements may be one of those rare rights to which the Solicitor's Opinion refers. If so, it is possible that statehood entitlements cannot be taken without some form of just compensation. For instance, acquisition of state property pursuant to federal condemnation meets the due process and just compensation requirements of the fifth amendment of the United States Constitution.[101] Where such principles are not followed in the condemnation of state property, an inverse condemnation action may be pursued. Nevertheless, even if such an action is pursued, state governments may find themselves compensated only for the present fair market value of tracts of grant lands. The value of the land as it may potentially develop without the restraint imposed by wilderness designation would probably never be realized due to the speculative nature of such a valuation.

In cases where compensation appears impractical or inadequate,

98. *See id.*
99. *See* Solicitor's Opinion, *supra* note 80, at 32.
100. *Id.*
101. United States v. Carmack, 329 U.S. 230, 242 (1946); United States v. Holmes, 414 F. Supp. 831 (D. Md. 1976).

states may find themselves turning to exchange of isolated state grant lands for unappropriated federal domain. Such exchange could have the benefit of allowing the state to block-up areas of land in more manageable and productive units. Unfortunately, the present exchange procedures under FLPMA present substantial hurdles to the state attempting to invoke them. These procedures have become more onerous than they were under the exchange provisions of the Taylor Grazing Act and are far less favorable to the states than the in-lieu land selection procedures.

Under in-lieu procedures, the Secretary of the Interior is limited to a very narrow degree of discretion in approving state selections.[102] Thus, the *Kleppe* decision establishes that the Secretary's duties are ministerial in nature and restricted to review of state selections to insure compliance with statutory requirements. Selections of indemnity lands are made on an acre for acre exchange basis with base lands otherwise unavailable to satisfy state land grants. In-lieu selection procedures bear some similarity to state land exchange procedures applied before the passage of FLPMA pursuant to section 8 of the Taylor Grazing Act.[103] Thus, section 8 imposed a nondiscretionary duty upon the Secretary of the Interior to proceed with the exchange of state land for federal public domain where the state had successfully complied with certain statutory requirements.[104] In contrast to the in-lieu selection procedure, an equal value test was applied to the exchange of lands by section 8 of the Taylor Grazing Act.

The passage of FLPMA in 1976 effectuated the repeal of the exchange authority of section 8 of the Taylor Grazing Act[105] and replaced that provision with section 206(a) of FLPMA.[106] Pursuant to FLPMA, the public domain may be exchanged for non-federal lands and state lands are classified as "non-federal". State exchanges out of designated wilderness areas are subject to the determination of the Secretary of Agriculture that such an exchange is beneficial to the public interest. Because the exchange is a discretionary determination, it is subject to the requirements of the National Environmental Policy Act of 1969 and must be accompanied by an environmental impact statement where the exchange may significantly affect the environment.[107] The exchange is measured by an equal value test; however, values within

102. *See* 43 U.S.C. §§ 851, 852 (1976).
103. 43 U.S.C. § 315(g) (1970) (repealed 1976).
104. *See* State Applications to Exchange Lands Under Section 8 of the Taylor Grazing Act, 61 Interior Dec. 270, 273 (1954).
105. 43 U.S.C. § 315(g) (1970) (repealed 1976).
106. 43 U.S.C. § 1716(a) (1976).
107. Section 102(2)(c) of the National Environmental Policy Act of 1969. 42 U.S.C. § 4332(2)(c) (1976).

twenty-five percent of each other may be equalized by monetary payments. The land use planning requirements under section 202 are not prerequisite to an exchange under section 206. Thus, it is not imperative that either the Secretaries of the Interior or Agriculture take state land use policy into consideration in making a decision to approve the state proposal for exchange.[108]

CONCLUSION

The remedies suggested here are certainly not the only means of satisfying outstanding statehood entitlements threatened by the wilderness provisions of FLPMA. However, the course of action chosen will be considered tenable by the federal government only if the outstanding statehood entitlements are satisfied by some method which would accomodate the realities of federal wilderness requirements. For those state grant lands which are isolated by wilderness designations, section 6(a) of the Wilderness Act seems to provide an equitable method of balancing states rights with wilderness requirements. The issue of statehood selections presents the more difficult problem and also takes on a sense of urgency to states desiring to make statehood selections before a substantial portion of the federal public domain is withdrawn through wilderness designation. Perhaps this issue may be addressed by close coordination of state and federal land use planning efforts. For instance, the Department of the Interior could accommodate states by accelerating consideration of the wilderness potential of areas currently pending on state selection lists. In this manner, states would be made aware of the status of such lands and could make an informed decision as to whether the indemnity selections should be relocated. If these recources are rejected, the only alternative to a cooperative state-federal effort to the resolution of these issues is litigation. Should the states determine to litigate the issue of statehood entitlements, the *Utah v. Kleppe* case sets a strong precedent upon which the states may proceed to attempt to halt the FLPMA wilderness selection process.

108. Memorandum opinion from the Assistant Solicitor to Director, BLM—Applicability of land use planning provision of FLPMA to exchanges, (March 1, 1977).