THE FEDERAL LAND POLICY AND MANAGEMENT ACT AND THE STATE OF ALASKA

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Some five years ago an author, closing an article on mineral rights acquisition and land status in Alaska, concluded:

> It appears that, rather than seeing Alaska as the "Last Frontier" in the sense that archaic laws remained in effect long after they had passed away elsewhere, the Department of the Interior now views Alaska as a frontier on which it may, with broad national interest and support, experiment with the land management concepts it has so long urged.[1]

These words have proven prophetic with respect to the 1976 enactment of the Federal Land Policy and Management Act [FLPMA],[2] and its impact on the social and political makeup of the State of Alaska.

Although facially FLPMA applies equally to all lands in the United States administered by the Bureau of Land Management [BLM], FLPMA is of unique concern to Alaska, in part because of the disproportionate level of federal land ownership in the State,[3] and in part because of a perceived federal policy of using the preservation of large tracts of Alaska wilderness to compensate for environmental failings elsewhere in the country. FLPMA's implementation has brought an increased awareness of federal land policies to a population already philosophically adverse to governmental controls and thus has polarized much of the State natives, State government, environmentalists,

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1. Rudd, *Who Owns Alaska?—Mineral Rights Acquisition Amid Rapidly Changing Land Ownership*, 20 ROCKY MTN. MIN. L. INST. 109, 161 (1975).

2. PUB. L. NO. 94-579, 90 Stat. 2743 (1976) (codified at 43 U.S.C. §§ 1701-1782 (1976)).

3. See discussion in Foss & DeStefano, Federal Lands in Alaska, Alaska Mineral Development Institute in Anchorage, Paper 5 (Sept. 21-22, 1978).

subsistence and sport hunters, homesteaders, and miners variously aligned in court and Congress, hoping to secure their respective interests in the ongoing battle over Alaska's lands.

Two sections of FLPMA have been particularly important in feeding this furor: Section 204,[4] which replaced existing authority for executive withdrawals under the Pickett Act[5] and so-called "implied-consent" theory;[6] and section 603,[7] the wilderness study provision, which could be used to severely restrict commercial development of the vast roadless areas which make up most of the state, pending completion of the wilderness inventory and review. The following discussion focuses on these sections and outlines the nature and status of the controversies which presently involve title to lands with acreage totaling almost twice the area of the State of California.

WITHDRAWALS UNDER § 204

Background

Faced with state selections and private demands for federal lands in Alaska, as well as aboriginal claims that threatened to cloud private land title throughout the state, Congress in 1971 enacted the Alaska Native Claims Settlement Act[8] [ANCSA].

Beginning in March of 1972, a series of public land orders withdrew millions of acres of federal land in the state, both under section 17(d)(2)[9] [d-2 withdrawals] and section 17(d)(1)[10] [d-1 withdrawals] of ANCSA. The d-2 withdrawals expired on December 17, 1978; the d-1 withdrawals which, as a rule, left lands open to location and entry for metalliferous minerals, have no expiration date.[11]

In December of 1973, the Secretary of the Interior first submitted recommendations for legislative classification of the approximately eighty-three million acres withdrawn under Section 17(d)(2). Pursuant to the National Environmental Policy Act,[12] a draft environmental impact statement [EIS] was released and, after public comment, a twenty-eight volume final EIS was promulgated.[13] This EIS detailed a variety of management or preservation tools available for the so-called Alaska

4. 43 U.S.C. § 1714 (1976).
5. *Id.* § 142.
6. See Wheatly, *Withdrawals Under the FLPMA of 1976*, within this Symposium.
7. 43 U.S.C. § 1782 (1976).
8. PUB. L. No. 92-203, 85 Stat. 688 (1976) (codified at 43 U.S.C. §§ 1601-1628).
9. 43 U.S.C. § 1616(d)(2)(1976).
10. *Id.* § 1616(d)(1).
11. *Id.* § 1616(d)(1).
12. 42 U.S.C. §§ 4321-4361 (1976).
13. UNITED STATES DEPARTMENT OF THE INTERIOR, ENVIRONMENTAL IMPACT STATEMENT, ALTERNATIVE ACTIONS, ALASKA NATIONAL INTEREST LANDS (1974).

national interest lands, including the creation of new Alaska units of the National Park, Refuge, Forest and Wild and Scenic River Systems and the widespread use of the Antiquities Act[14] to create new national monuments.

After almost four years of congressional inaction, Alaska lands bill H.R. 39 passed the House of Representatives in May of 1978.[15] H.R. 39, strongly supported by environmentalists, would have put 101.4 million acres into "conservation units" and designated an additional 65.5 million acres as wilderness.[16] Unable to obtain the support of Alaska Senators Gravel and Stevens, however, the Senate adjourned in October of 1978 without enacting any Alaska lands legislation, and without extending the authority for the d-2 withdrawals beyond December 17.

Faced with the imminent expiration of the d-2 withdrawals and reopening of those lands to mineral entry and state selection, the Department of the Interior began to consider alternative administrative actions to preserve the status quo until the next congressional session. The Department released a draft supplement to its earlier EIS[17] that discussed various legislative alternatives available for the protection and classification of some ninety-nine million acres of Alaska lands, all of which had previously been withdrawn under section 17(d)(2) of ANSCA. Included in the alternatives set out in this supplement were the possible use of the various provisions of section 204 of FLPMA.

On October 30, 1978, *Alaska v. Carter*[18] was filed, charging that the various alternatives considered in the draft EIS supplement, insofar as they served to restrict lands available for state selection, were in violation of the covenant between Alaska and United States created by the Alaska Statehood Act.[19] On November 14, Alaska, despite the apparent bar of existing withdrawals, selected some forty-one million acres previously designated for direct conveyance to it in H.R. 39, including nine million acres within the national interest lands included in the Department's draft EIS.[20]

Emergency Withdrawals Under Section 204(e)

On November 16, 1978, the Secretary of the Interior issued Public

14. 16 U.S.C. § 431 (1976).
15. H.R. 39, 95th Cong., 2d Sess., 124 CONG. REC. H4329 (daily ed. 1978).
16. *Id.* at H4312-27.
17. UNITED STATES DEPARTMENT OF THE INTERIOR, DRAFT ENVIRONMENTAL SUPPLEMENT, ALTERNATIVE ADMINISTRATIVE ACTIONS, ALASKA NATIONAL INTEREST LANDS (1978).
18. No. A-78-291 (D. Alaska, filed Oct. 30, 1978).
19. 48 U.S.C. preceding § 21 (1976).
20. These lands were opened to selection by Public Land Order [PLO] 5657, 44 Fed. Reg. 5433 (1979). The author is advised that the State's selection of these lands was reasserted by letter to BLM subsequent to the issuance of PLO 5657. *See* Kalerak v. Udall, 396 F.2d 746 (9th Cir. 1968).

Land Order [PLO] 5653[21] which, as amended,[22] closed to state selection and mineral entry over 100 million acres of federal public domain in the state. These withdrawals were based on section 204(e)[23] of FLPMA which gives the Secretary authority to make withdrawals when either the Secretary or the Committee on Interior and Insular Affairs of the House or Senate determines "that an emergency situation exists and that extraordinary measures must be taken to preserve values that would otherwise be lost."[24] Such withdrawals cannot exceed three years.[25] Included within the lands withdrawn by PLO 5653 were those lands withdrawn under section 17(d)(2) of ANCSA[26] and those lands selected by the State.[27]

The perceived emergency which provided the basis for PLO 5653 was the imminent expiration of the d-2 withdrawals and the resulting availability of withdrawn lands for entry and location of metalliferous minerals. Chairman Udall of the House Committee on Interior and Insular Affairs informed Secretary Andrus of the emergency situation on November 15, 1978.[28] Chairman Udall's letter to the Secretary provides, in part:

> [I]n view of the most recent selections filed by the State of Alaska, its new lawsuit and its threat to seek immediate judicial remedies to prevent administrative actions to protect these lands, I must emphasize to you, on behalf of the Committee on Interior and Insular Affairs of the U.S. House of Representatives, that an emergency situation exists with respect to the national interest lands. Extraordinary measures must be taken now to assure the preservation of the important values in these lands, which will be lost if such measures are not promptly effected. We urge you to exercise your authority under section 204(e) of the Federal Land Policy and Management Act of 1976 immediately, to assure that these significant values are saved.[29]

The letter, however, gave no indication of the specific nature of the emergency.[30]

In amending its complaint in *Alaska v. Carter* subsequent to the section 204(e) withdrawals, the State has charged that the Committee erred in its determination that an emergency existed and that the Secre-

21. 43 Fed. Reg. 59756 (1978).
22. Public Land Order 5654, 43 Fed. Reg. 59756 (1978).
23. 43 U.S.C. § 1714(e) (1976).
24. *Id.*
25. *Id.*
26. See text & notes 9-14 *supra.*
27. See text & note 20 *supra.*
28. Letter from the Hon. Morris K. Udall, Chairman, Comm. on Interior and Insular Affairs to Hon. Cecil D. Andrus, Secretary of Interior, November 15, 1978 on file at the University of Arizona Law Review offices.
29. *Id.* at 2.
30. Also, it was not made clear by what delegation of authority Chairman Udall purported to speak on behalf of his Committee.

tary, in his own findings of an emergency in PLO 5654, abused or exceeded the authority delegated by Congress in FLPMA.[31] Since section 204(e) sets out no express limitations on the discretion granted to the Secretary or the two named congressional committees, the willingness of the courts to review a finding of emergency becomes critical.

In *Wyoming v. Franke*,[32] the breadth of the President's discretion to designate areas of historic or scientific significance under the Antiquities Act[33] was challenged. In upholding the challenged withdrawals, the court observed that it should be assumed that a person acting under statutorily vested discretionary power was intended to be the sole and exclusive judge of the facts upon which he acts.[34] "For the judiciary to probe the reasoning which underlies [the President's decision] would amount to a clear invasion of the legislative and executive domains."[35] In effect anticipating Alaska's contention that the withdrawals made under section 204(e) would cause extreme economic hardship, the *Franke* court further observed that any economic hardship caused by the official's action that was not intended by Congress in its delegation of authority can be remedied only by Congress.[36]

In the context of section 204(e), the *Franke* decision would confirm the concentration of tremendous power to control the use of federal lands in Congress and its executive designees. Although congressional primacy over the disposition of public lands is clearly mandated by the second clause of article IV, section 3 of the United States Constitution (and by Congress in using FLPMA to revoke previously liberally construed Presidential withdrawal powers),[37] Alaska has argued that the statehood compact between the two sovereigns provides a limitation on Congress. Rather than the total deference suggested by the language from *Franke* quoted above, the State suggests the use of a rational basis test by courts asked to review FLPMA withdrawals. Thus, a decision which is arbitrary and capricious and outside the scope of the authority delegated the Secretary could be invalidated by a reviewing court. Such a position finds support in the *Franke* decision itself as well as in a number of other decisions upholding the right of judicial review of Executive action.[38] It is arguable then that the Secretary's withdrawal of the Alaskan lands would not meet this standard, since, as mentioned

31. Amended Complaint, Alaska v. Carter, No. 78-29 (D. Alaska, filed January 31, 1979).
32. 58 F. Supp. 890 (D. Wyo. 1945).
33. 16 U.S.C. §§ 431-450qq-4 (1976).
34. Wyoming v. Franke, 58 F. Supp. 890, 896 (D. Wyo. 1945).
35. *Id.*
36. *Id.*
37. See Wheatly, *supra* note 6, *passim*.
38. *See id.* at 895; Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 420 (1971); People v. Dep't of Agriculture, 427 F.2d 561, 567 (D.C. Cir. 1970).

above, there was no finding of the specific nature of the emergency.[39] Nor is it apparent whether Chairman Udall's letter represented the sentiments of the Interior Committee, as is apparently required by section 204(e).[40]

Insofar as section 204(e) at present offers the sole basis for short notice interim withdrawal of the federal public domain, it is likely to remain of particular significance to Alaska and the other western States in the immediate future—barring an unlikely narrow construction of that section by the court in *Alaska v. Carter*. Considering the extent to which section 204(e) withdrawals, either real or threatened, have been recently used as a political tool in the battle over Alaska national interest lands, the potential is great for a distant sovereign's abuse of its discretion, caused or condoned by a Congress aware of Alaska's physical and political isolation. While recognizing the broad leeway accorded Congress in dealing with public lands, the courts, as a logical check on this potential, must be willing to exercise a level of review which will assure at least a reasonable use of section 204(e) power.

NEPA and Section 204(e)

In attempting to enjoin the use of section 204(e) as a way to continue the d-2 type withdrawals which expired in December of 1978, the State, in *Alaska v. Carter*, argued that the National Environmental Policy Act[41] [NEPA] requires the preparation of a detailed environmental impact assessment prior to the implementation of an emergency withdrawal. In denying the State's motion for a preliminary injunction, the court, in an apparent case of first impression, analogized the Secretary's emergency powers under FLMPA to those of the Occupational Safety and Health Administration and other agencies with emergency powers, stating, "When it is not possible to follow the impact statement process without conflicting with a specific statutory mandate, the Court has held that the requirements of NEPA must yield."[42] The court reasoned that since section 204(e) requires that the Secretary's emergency withdrawal be immediate, "[t]o require the Secretary to file an impact statement and impose its prescribed comment period would frustrate the mandate of the statute. . . ."[43]

39. See text & note 30 *supra*.
40. *See* 43 U.S.C. § 1714(e) (1976). See text & notes 23-25 *supra*.
41. 42 U.S.C. §§ 4321-4361 (1976).
42. Alaska v. Carter, No. A78-29, at 8 (D. Alaska, November 27, 1978) (memorandum and order denying motion for preliminary injunction). *See* Flint Ridge Dev. Co. v. Scenic Rivers Ass'n, 426 U.S. 776, 788 (1976); Dry Color Mfrs. Ass'n v. Dep't of Labor, 486 F.2d 98, 107 (3d Cir. 1973).
43. Alaska v. Carter, No. A78-29, at 9 (D. Alaska, November 27, 1978) (memorandum and order denying motion for preliminary injunction). "The need for haste is emphasized by the pro-

Withdrawals Under Sections 204(b) and 204(c)

On November 28, 1978, the Secretary of Agriculture applied to the Secretary of the Interior for the withdrawal of approximately eleven million acres of public lands in and adjacent to the Chugach and Tongass National Forests in Alaska under the authority of section 204(b)(1) of FLPMA.[44] That section provides for publication of notice of the application in the *Federal Register*: "On publication of such notice the land shall be segregated from the operation of the public land laws to the extent specified in the notice."[45] The segregative effect of the application terminates with the Secretary's determination of the application or after two years from the date of notice.[46]

The National Forest land marked for withdrawal by this application under section 204(b) would be closed to location and entry under the federal public land laws and to selection by Alaska. Specifically, the withdrawal would restrict, for a period of two years, rights under section 6(a) of the Alaska Statehood Act which allows the State to select a maximum of 400,000 acres of vacant and unappropriated national forest land.[47] At the time of this application, the State retained the right to approximately 200,000 acres of unused selections in the two national forests in question.[48]

With respect to withdrawals in excess of 5,000 acres not falling within the limited exception of section 204(b), section 204(c) interposes a right of congressional veto not present prior to the enactment of FLPMA.[49] Although freedom from this congressional involvement exists under section 204(b) for withdrawals up to two years in duration

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vision in FLPMA which exempts these emergency withdrawals from the requirement of a public hearing. . . ." *Id.*

44. 43 U.S.C. § 1714(b)(1) (1976). The two national forests in Alaska, Chugach and Tongass provide the pool from which the State is entitled to select 400,000 acres under §6(a) of the Alaska Statehood Act. 48 U.S.C. preceding § 21 (1976).

45. 43 U.S.C. § 1714(b) (1976).

46. *Id.*

47. *See id.* § 1714; 48 U.S.C. preceding § 21 (1976).

48. From records available in the Anchorage office of the Bureau of Land Management. *See* BUREAU OF LAND MANAGEMENT, DEP'T OF THE INTERIOR, THE LAND 22 (1978).

49. 43 U.S.C. § 1714(c)(1) (1976).

On December 1, 1978 the Secretary of the Interior announced his intention to withdraw, for a period of 20 years, approximately thirty-three million acres of federal public lands in Alaska pursuant to section 204(c), for the purpose of establishing federal wildlife refuges. These lands were to come from lands earlier withdrawn under § 204(b) of FLPMA not included in the fifteen new national monuments designated by the President under the Antiquities Act on that same day. Section 204 provides:

> A withdrawal aggregating [5,000] acres or more may be made . . . only for a period of not more than [20] years by the Secretary on his own motion or upon request by a department or agency head. The Secretary shall notify both Houses of Congress of such a withdrawal no later than its effective date and the withdrawal shall terminate and become ineffective at the end of [90] days . . . if the Congress has adopted a concurrent resolution stating that such House does not approve the withdrawal.

Id.

and section 204(d) as to withdrawals under 5,000 acres, these sections should be of limited significance in Alaska. The vast areas of federal land remaining and the strong pressures to close large blocks of those lands to selection by the State and private entry virtually assures that section 204(c) will provide the procedural basis for most future Secretarial withdrawals of consequence in Alaska.

In addition to the possibility of congressional veto established by section 204(c)(1), section 204(c)(2) requires the Secretary to provide Congress with an unprecedented quantity of information on which Congress may rely in considering a proposed withdrawal.[50] The nature of the information required includes: A survey of the site's natural resource values and how they might be affected by the withdrawal; an analysis of the potential environmental and economic impact of the changed status; identification of the impact on present users; an analysis of the compatibility of existing and potential resource uses with the proposed use; an examination of the availability of alternative sites; and a geological study of the mineral resources and uses of the site.[51]

This list demonstrates the congressional intent that significant withdrawals are not to be lightly undertaken. In Alaska, the demands of literal compliance with the apparent requirements of this section, particularly as to evaluation of natural resources potential, are awesome. While it may be assumed that this task will become easier as the public lands inventory required and funded under section 201 of FLPMA progresses,[52] a present lack of funding and the simple immensity of the task indicates that the section 201 inventory will not provide the Secretary with a very practicable solution.[53]

The impact assessment requirements of section 204(c)(2) duplicate existing statutory requirements to a certain extent. First, the requirements of NEPA with respect to environmental impact reporting of "major federal sections" have been construed to require the preparation of an environmental impact statement for withdrawals under sections 204(b) and 204(c).[54] Second, with respect to federal activity in national forests, the Forest and Range Land Renewable Resource

50. 43 U.S.C. § 1714(c)(2) (1976).

51. *Id.*

52. *See id.* at § 1711.

53. Resource evaluation for selected areas within the state are on-going. For example, a 1973 report to the then Secretary of the Interior estimated the resource potential of some 31 tracts of d-2 lands at $12.4 billion or about $511,000 per square mile. Other reports have estimated the resource value of smaller withdrawn tracts at up to $1.8 million per square mile. A more recent article stated that "[t]he American economy will probably lose between $180 billion and $9.2 trillion over the next few decades as a result of the withdrawal of Alaskan lands from mineral entry." *See generally* Swainbank, *Effects of Alaskan Land Withdrawals*, THE ALASKA MINER, August 1978, at 11.

54. *See* Alaska v. Carter, No. 78-291, at 9 (D. Alaska, filed November 27, 1978) (memorandum and order denying motion for preliminary injunction).

Planning Act[55] requires the Secretary of Agriculture to develop and monitor resource management plans based upon consideration of physical, biological, economic, and other factors.[56] Such a management plan requires the Forest Service to make land allocations to various land use designations created by departmental regulation.

These combined assessment requirements have been addressed to the Alaska withdrawals in two forms. An extensive and controversial resource analysis for the Tongass National Forest has been undertaken by the Department of Agriculture, with the final environmental impact statement due in December of 1978 but still unavailable.[57] Second, various alternatives for the classification and use of federal lands in Alaska were considered in the twenty-eight volume environmental impact statement prepared by the Department of the Interior in 1973 and 1974, supplemented in November of 1978. Although the possibility of withdrawals under FLPMA was not considered in the major portion of this study, the Department has taken the position that the information set forth therein, as supplemented, is sufficient to satisfy NEPA. The sufficiency and accuracy of both the Tongass Draft Environmental Impact Statement and the Department of the Interior's EIS regarding national interest lands in Alaska are also raised for judicial review in *Alaska v. Carter*.

State Selections and Section 204

The widespread use of withdrawals under FLPMA and the Antiquities Act to close lands to selection by Alaska has significantly decreased the amount of land available to the State to satisfy its entitlements under sections 6(a) and 6(b) of the Alaska Statehood Act.[58] In addition, the failure of those withdrawals to guarantee access across withdrawn lands to existing state selected lands will impact the commercial and recreational utility of those lands to an as yet uncertain degree.[59] The lack of desirable land with reasonable access has been exacerbated by selections under ANCSA which take precedence over state selections until adjudicated by the Secretary of the Interior.[60]

55. 16 U.S.C. §§ 1600-1676 (1976).

56. *Id.* § 1604.

57. Counsel in *Alaska v. Carter* have been advised by John Sandor, Regional Forester for Region X of the U.S. Forest Service, that the final EIS is due shortly.

58. *See* Dragoo, *The Impact of the FLPMA Upon Statehood Grants and Indemnity Land Selections* within this Symposium.

59. The failure of the Senate to consider a hard fought compromise "d-2 bill" in the closing days of its 1978 session is almost universally attributed to the fervent opposition of Senator Gravel (D-Alaska), opposition that was based in substantial part on the lack of guarantees of adequate access.

60. 43 U.S.C. §§ 1610(a)(1)-(2), 1611(a) & 1613(h) (1976). For a discussion of this problem in detail see Saxon, Exploration Agreements Involving Native Lands, Alaska Mineral Development Institute in Anchorage, Paper 14 (Sept. 21-22, 1978). These selections may exceed actual native

Alaska's opposition to the use of section 204 withdrawals to restrict selection rights is based on section 701(g) of FLPMA which provides that "[n]othing in this Act shall be construed as limiting or restricting the power and authority of the United States or . . . as amending, limiting or infringing the existing laws providing grants of lands to the States."[61] This section provides strong evidence for the notion that FLPMA is to be interpreted as consistent with and not amendatory to the Alaska Statehood Act. Federal actions under section 204 of FLPMA, should not violate the policy behind the Statehood Act of guaranteeing land of sufficient quantity and value to provide a viable economic base for the new State.[62]

Future Withdrawals Under FLPMA

Following the controversial use of the Antiquities Act in 1943 to create Jackson Hole National Monument,[63] Congress offered Wyoming a significant political concession by barring further use of that Act in that state without express Congressional authorization.[64] In the wake of the controversy over the withdrawal of vast tracts of Alaska lands for possible wilderness preservation a similar concession has been offered to Alaska.

This compromise bill was introduced in the House in 1979.[65] Although much has been made of environmentalist threats to kill this compromise bill, the apparent commitment of the Alaskan congressional delegation to no more withdrawals, combined with the fact that most if not all of the lands in Alaska sought for preservation have already been so designated, makes it likely that whatever legislation Congress ultimately enacts regarding Alaska national interest lands will include language not allowing federal withdrawals.

WILDERNESS REVIEW AND PRESERVATION UNDER SECTION 603

Section 603 of the FLPMA essentially requires the review of all BLM lands with a recognized or presumed potential for wilderness preservation and maintenance of these lands free from changes in type and intensity of land use that would preclude ultimate inclusion of such

entitlements. Until adjudicated by the BLM, however, they will be treated as valid and preclude state selection. *See* 43 U.S.C. § 1610(a) (1976); 43 C.F.R. § 2651.2(a)(7) (1978).

61. 43 U.S.C. § 1701(g) (1976).

62. 48 U.S.C. preceding § 21 (1976). The social costs of these withdrawals has been identified at up to $2 trillion for Alaska alone. See Swainbeck, *supra* note 53, at 11.

63. Proclamation No. 2578, 3 C.F.R. 1327-29 (1943), *reprinted in* 16 U.S.C. § 431 (1976) *and in* 57 Stat. 731. *See generally* Wyoming v. Franke, 58 F. Supp. 890 *passim* (D. Wyo. 1945).

64. 16 U.S.C. § 431(a) (1976).

65. H.R. 3651, 96th Cong., Ist Sess., 125 CONG. REC. H2264 (daily ed. April 23, 1979).

lands in the National Wilderness Preservation System.[66] Section 603 has caused tremendous concern in Alaska because of the high wilderness potential of most of the federal public domain even though the section is expressly designed to permit existing uses of BLM lands to continue pending a more detailed review of a particular tract's multiple use characteristics.[67] The economic viability of most, if not all, of the on-going and proposed mineral and timbercutting activity in the State is dependent upon short-term expansion, whether it be through the construction of additional access roads or the opening of adjacent public lands for smelting, storage, or similar purposes. Under present construction of section 603, this necessary expansion cannot be assured.

Requirements of the Act

Section 603 requires the interim management of lands to be inventoried "in a manner so as not to impair the suitability of such areas for preservation as wilderness."[68] Any management program, however, is subject to mining and grazing uses existing at the time of FLPMA's passage.[69]

The Secretary may not withdraw lands from appropriation under the mining laws, pursuant to section 204[70] to preserve their wilderness character.[71]

Although roadlessness is the jurisdictional basis for wilderness review under section 603,[72] the term is left undefined by FLPMA, as it was by the Wilderness Act. In Alaska, where there are extensive systems of private roads and snow-machine trails, the definition becomes problematic.[73]

Despite the decision not to include this definition in the text of the Act, the BLM, with the Solicitor's support, has proposed the adoption of a definition of road for purposes of identifying inventoried lands for wilderness study.[74] The draft definition provides: "An access route

66. 43 U.S.C. § 1782 (1976). *See* National Wilderness Preservation Act of 1964, 16 U.S.C. §§ 1131-1136 (1976).

67. *See* 43 U.S.C. § 1782 (1976).

68. *Id.* § 1782(c).

69. *Id.*

70. *Id.* § 1714.

71. *Id.* § 1782(c).

72. *Id.* § 1782(a).

73. Addressing this question the House Interior Committee Report on FLPMA stated:

> The word "roadlessness" refers to the absence of roads which have been improved and maintained by mechanical means to insure relatively regular and continuous use. A way maintained solely by the passage of vehicles does not constitute a road.

H.R. REP. NO. 1163, 94th Cong., 2d Sess. 17 (1976), *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 6191. This definition, however, was not included in the version of the Act reported out of committee.

74. *See* United States Department of the Interior, Organic Act Directive No. 77-71, Change 1 (December 28, 1977).

which has been improved and maintained by using hand or power machinery or tools to insure relatively regular and continuous use. A way maintained solely by the passage of vehicles does not constitute a road. . . ."[75] The BLM further proposes that a roadless area be defined as "[t]hat area bounded by a road using the edge of the physical change that creates the road or the inside edge of the right-of-way as a boundary."[76]

The proposed BLM definitions are somewhat inappropriate with respect to Alaska for several reasons. First, the definitions are most appropriate for a Rocky Mountain State where large tracts of undeveloped land will be typically bounded by a paved highway. Applying the proposed definitions to Alaska may result in the initial wilderness study of vast land areas—at great cost and delay—that ultimately will be found unsuitable for preservation because traditional access patterns, not recognized by the proposed definition, render the land unsuitable for wilderness designation.

Second, the proposed definitions are potentially inconsistent with those existing under the Wilderness Act. Regulations implementing the Wilderness Act define roadless area as "a reasonably compact area of undeveloped Federal land which possesses the general characteristics of a wilderness and within which there is no improved road that is suitable for public travel by means of four-wheeled, motorized vehicles intended primarily for highway use."[77] This definition is also imperfectly adapted to the nature of travel in Alaska where snow-machines and other off-the-road vehicles have been the historic means of transportation. The BLM must recognize, however, that the Wilderness Act will ultimately control the management of lands designated for wilderness study under section 603.[78] This fact makes consistent definitions critical and the permanent definition of the Wilderness Act regulations is likely to prevail over the interim guidelines of section 603.

Pre-Act Appropriations

Section 603(c) bars regulation of activities conducted on pre-FLPMA claims and mineral leases insomuch as such activities do not differ in "manner of degree" from those prevailing on the effective date of the Act, regardless of the impact of those activities on the wilderness characteristics of the surrounding area.[79] This apparently moderate ex-

75. *Id.*
76. *Id.*
77. 43 C.F.R. § 19.2(e) (1978).
78. *See generally* U.S. Department of Interior, Draft BLM Proposed Wilderness Policy and Review Procedure (February 27, 1978) [hereinafter cited as Draft BLM Procedures].
79. 43 U.S.C. § 1782(c) (1976). *See* Memorandum from Solicitor to Secretary BLM Wilder-

emption for activities predating the Act, however, contains a possible qualification that may bring virtually every appropriator's activities within the scope of regulation by the Secretary.

The only excepted activities are those that existed as of the date of the Act, October 21, 1976, and that have been carried out on a regular basis since that date.[80] One possible interpretation of this requirement is that a mineral appropriator is literally fixed to uses of mineral lands, as of October 21, 1976. Such an interpretation, if strictly imposed, would permit regulation of virtually all pre-FLPMA mineral activity in Alaska since, as a rule, active site work is performed during a summer session which may end as early as the beginning of September.[81]

Interim Management

Section 603(c) of FLPMA requires the Secretary to manage inventoried lands "in a manner so as not to impair the suitability of such area for preservation as wilderness." One recent commentator notes that the Solicitor has interpreted this interim management requirement to apply to all lands inventoried under section 201 rather than just those lands marked for wilderness study on the basis of roadlessness and wilderness characteristics.[82] This interpretation will result in management of all public lands as *de facto* wilderness at least until the projected completion of the inventory process in mid-1980.[83] Since Alaska is presently exempted from the inventory,[84] the absence of an exemption such as that proposed in pending Alaska national interest lands legislation could result in this date being pushed back much further with respect to Alaska. Once this inventory is complete, BLM interim management restrictions will not apply to lands that fail to meet threshhold wilderness and/or roadlessness criteria.

Effects of Interim Management on Mining

Notably, upon BLM determination that interim management constraints apply to all roadless areas that could qualify for formal review until they are excluded from wilderness study or rejected by Congress, mining activities could be subject to regulation by the Secretary until 1991, the year the fifteen year period for wilderness review ends.[85] Fur-

ness Review—Section 603, Federal Land Policy and Management Act 26, 31 (September 5, 1978) [hereinafter cited as Solicitor's Opinion].

80. *See* 43 U.S.C. § 1782(c) (1976).

81. *See* Solicitor's Opinion, *supra* note 79, at 26-27.

82. Ferguson, *Forest Service and BLM Wilderness Review Programs and Their Effect on Mining Law Activities*, 24 ROCKY MTN. MIN. L. INST. 717, 740 (1978).

83. *See* Draft BLM Procedures, *supra* note 78, at 1.

84. *See* discussion at text & notes 95-97, *infra*.

85. *See* 43 U.S.C. § 1782(a) (1976); Draft BLM Procedures, *supra* note 76, at 1.

thermore, since there are no time limits within which Congress must act with respect to a Presidential wilderness recommendation, interim management constraints could extend indefinitely with respect to the identified tracts.[86] The form and permissible extent of this regulation is unclear.

The Solicitor has taken the position that during this lengthy interim period, mining activity can be barred outright where it would impair the wilderness suitability of study area.[87] Arguably, however, there is an additional limitation upon the Secretary's power in this context. Section 603 requires the Secretary to manage BLM lands "according to his authority under this Act and other applicable law"[88] and section 302(b) of FLPMA provides:

> Except as provided in . . . section 603, . . . and in the last sentence of this paragraph, no provision of this section or any other section of this Act shall in any way amend the Mining Law of 1872 or impair the rights of any locators or claims under that Act, including, but not limited to, rights of ingress and egress.[89]

The last sentence referred to by this passage requires the Secretary by regulation or otherwise, to take any action "necessary to prevent unnecessary or undue degradation of the lands."[90]

Construing the words of sections 302(b) and 603 together, the Secretary may regulate mining activities in wilderness study areas only in so far as they unduly or unnecessarily threaten degradation of wilderness characteristics. Thus stated, the Secretary arguably could not bar any activity which threatened wilderness degradation where there was no economically reasonable mitigating alternative available to the locator.[91] Nothing in existing law mandates a conclusion to the contrary.

Applicability to Alaska

As written, the inventory and review requirements of FLPMA are clearly applicable to Alaska. The Act defines public lands as "any land and interest in land owned by the United States within the several states and administered by the Secretary of the Interior through the Bureau of Land Management, without regard to how the United States acquired ownership."[92] Pending, however, are several political attempts to exclude Alaska from the wilderness review.

First, various versions of pending Alaska national interest lands

86. *See* 43 U.S.C. § 1782(b) (1976).
87. Solicitor's Opinion, *supra* note 79, at 36.
88. 43 U.S.C. § 1782(c) (1976).
89. *Id.* § 1732(b).
90. *Id.*
91. *See* Ferguson, *supra* note 82, at 754-55.
92. 43 U.S.C. § 1702(e) (1976).

legislation specifically exempt public lands in Alaska from the wilderness review requirements of section 603 of FLPMA. Section 1206 of H.R. 39, passed by the House of Representatives in 1979,[93] exempted Alaskan public lands from the operation of section 603, yet allowed the Secretary to identify and recommend particular tracts to Congress for wilderness designation. The Secretary would continue to manage these lands under sections 201 and 202 of FLPMA.[94] Enactment of legislation containing language similar to that in H.R. 39 would eliminate the requirement that BLM lands be managed as wilderness pending completion of the section 201 inventory.

Notwithstanding congressional failure to implement Alaska National Interest Lands legislation it appears, however, that section 603 procedures have been temporarily halted in Alaska. The proposed BLM Wilderness Policy and Review Procedures, designed to ultimately control implementation of section 603, temporarily exempt the following from wilderness review: Pending native selections under the Native Claims Settlement Act; land withdrawn under section 17(d)(2) of ANCSA or other Alaska lands being considered for new parks, wildlife refuges, or forest; and lands tentatively approved for selection by the State of Alaska.[95] These exemptions alone total in excess of 187 million acres of the 279 million acres under BLM management in Alaska.[96] There is further indication that, pending resolution of the broader lands dispute, Alaska as a whole will be exempted from the wilderness review procedures of section 603.[97]

Nevertheless, the temporary exemption of Alaska from wilderness inventory and review does not eliminate the Secretary's interim management responsibilities under FLPMA with respect to BLM lands that may ultimately be designated as wilderness. BLM has indicated that it will consider proposed mineral activities on Alaska lands as they would activities on any lands not yet inventoried, *i.e.* by regulating such activities insofar as they potentially threaten wilderness characteristics.

CONCLUSION

Prior to its enactment, FLPMA was regarded by many as a long-awaited tool for bringing order to the chaotic state of federal lands in Alaska at the time when large mineral ventures were beginning to overcome their aversion to the State created by years of conflicting state and

93. H.R. 39, 96th Cong., 1st Sess., 125 CONG. REC. H3332, H3386 (daily ed. May 16, 1979).
94. *Id.*
95. *See* Draft BLM Procedures, *supra* note 78, at 6.
96. Unofficial report prepared by the Alaska Public Affairs Office of BLM (July 25, 1978).
97. *See* U.S. Dep't of the Interior, Information Memorandum No. AK-78-50 at I (June 22, 1978).

native claims culminating in the freeze and super-freeze of the late 1960's.[98] Regulatory jurisdiction and recordkeeping were to be centralized with the BLM, easing the industry's burdens of compliance while assuring a simple means of obtaining a clear chain of title to federal mineral rights which, ultimately, would guarantee the reopening of abandoned claims to location and entry.[99]

Despite this optimism, however, FLPMA is widely regarded in Alaska as creating more evils than those it was designed to cure. The wilderness inventory of section 603 is perceived as an impediment to the long-term certainty of land status that the industry requires. Moreover, section 204 has closed more federal land in Alaska than remains open for private use.[100]

Resort to the courts has been equally unsatisfying as a means of resolving the ambiguities and inequities of the law as applied. As this article is being written, the federal district court judge hearing *Alaska v. Carter*, the seminal FLPMA case for Alaska, has granted the federal government's motion for a stay of the proceedings, awaiting congressional action regarding the ongoing dispute over Alaskan federal lands in a dispute largely orchestrated by those with no ties or stake in the state.[101] In the eyes of many, the experiment referred to on the first page of this article may render the laboratory unfit for continued habitation.

98. *See* Rudd, *supra* note 1, at 116. The pending resolution of native land claims which culminated in the 1971 passage of ANCSA Public Land Order 4582, 34 F. Reg. 1025 (1969), prevented the initiation of most types of interests in federal lands and continued a ban on conveyances imposed in 1966 by Secretary Udall.

99. *See* 43 U.S.C. § 1744(a) (1976). All pre-FLPMA claims must be registered with the BLM by October 22, 1979 or be held to have been abandoned. *Id. See* 43 C.F.R. 3833.4 (1978).

Harsh and inflexible interpretations of the claim recordation provision have put claimholders in fear of forfeiture and resulted in a widespread conviction that, come October 21, 1979, only commercial claimholders will be sophisticated and wealthy enough to interpret and comply with the myriad and ever-changing regulations which FLPMA has engendered. *See* Roy M. Byram, 39 IBLA 32 (1979) *reprinted in* [1979] Gower Fed. Service (Min.) 11; James F. Giancarlo, 37 IBLA 88 (1978) *reprinted in* [1978] Gower Fed. Service (Min.) 102.

100. *See* Tangen, *With Malice Aforethought (And Justice for None)*, THE ALASKA MINER, August 1978, at 10.

101. Alaska v. Carter, No. A78-29 (D. Alaska, March 5, 1979) (order granting motion for continuance until June 19, 1979).