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A Primer on Public Land Law

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A PRIMER OF PUBLIC LAND LAW

Marla E. Mansfield*

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Views contained herein are those of the author and do not necessarily reflect those of the Institute.

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I. INTRODUCTION

Many current clashes between resource development and environmental protection involve the approximately one-third of our nation owned by the federal government.¹ Should the Alaska National Wildlife Refuge be opened to oil and gas leasing? Can the federal government site a nuclear waste repository in Nevada over the objections of state officials? Resolving these questions requires that peculiarities of "public land law" be brought into the equation. This demands an understanding of the constitutional contours and statutory framework of the field.

When first approaching the task, the uninitiated may take comfort in the label "public land law," believing that such nomenclature indicates a unified field of law amenable to simple outline. In reality, however, the term is mere shorthand. Modern "public land law" covers a myriad of individual agency mandates to manage particular lands and particular resources. Overlaying all such mandates are general environmental statutes.² To add to the complexity, even the term "public land" requires explanation.

Common understanding may equate "public lands" with all property owned by various governmental agencies. The more sophisticated layperson may exclude forts or prisons, and apply the designation only to lands to which the public has access. As a legal term, however, "public lands" has had different meanings at various times. The classic definition of "public lands" included lands of the United States subject to disposition under the general land laws, which would exclude lands in National Parks.³ The current technical definition of "public lands" is lands and interests in lands the Bureau of Land Management ("BLM") manages.⁴ In contrast to these two legal definitions, the land within the statutory mandate of the Public Land Law Review Commission included not only BLM-managed lands, but National Park Service, Forest Service,

1. See PUB. LAND LAW REVIEW COMM'N, ONE THIRD OF THE NATION'S LAND (1970). As of 1990, 29.153 percent of the nation was federally owned. BUREAU OF LAND MANAGEMENT, U.S. DEP'T OF INTERIOR, PUBLIC LAND STATISTICS 5 (1990).

2. See, e.g., National Environmental Policy Act, 42 U.S.C.A. §§ 4321-4370(c) (West 1977 & Supp. 1993); Endangered Species Act, 16 U.S.C.A. §§ 1531-1544 (West 1985 & Supp. 1993).

3. *Kindred v. Union Pac. R.R.*, 225 U.S. 582 (1912); *Columbia Basin Land Protection Ass'n v. Schlesinger*, 643 F.2d 585 (9th Cir. 1981). See also *infra* notes 121-22 and accompanying text.

4. 43 U.S.C.A. § 1702(e) (West 1986). Public lands exclude lands located on the Outer Continental Shelf and lands held for the benefit of Indians, Aleuts and Eskimos. *Id.*

and Fish and Wildlife Service lands.⁵ This definition approximates the one the sophisticated layperson might use. It will also define the scope of this article.

This article will examine the major missions and jurisdictions of the main federal land management systems, namely the public domain, the national forests, national parks, wildlife refuges, and wilderness areas. To introduce this examination, the constitutional provisions which justify the governing statutes will be explored. Additionally, as a prelude to the specific statutory mandates, this Article will review the system of reservations, withdrawals, and classifications. Preemption doctrine also will be addressed because states often desire to regulate activities on federal lands. Finally, the Article will distinguish between multiple use and dominant use.

II. CONSTITUTIONAL AUTHORITY FOR PUBLIC LAND LAW

Three provisions of the Constitution provide authority for Congress to legislate in regard to public lands. Two are specific: the so-called Enclave Clause⁶ and the Property Clause.⁷ The third is the more generic Commerce Clause.⁸ The provisions peculiar to public land legislation will be considered first.

A. *The Enclave Clause*

The Enclave Clause of Article I provides one source of authority for public land administration. Most “public lands,” however, are not

5. Pub. L. No. 88-607 §§ 1-8, 78 Stat. 986-88 (1964) (codified at 43 U.S.C.A. §§ 1411-1418 (West 1986 & Supp. 1993), expired in 1970 pursuant to 43 U.S.C.A. § 1418 (West 1986)). For general background, see Perry R. Hagenstein, *Commissions and Public Land Policies: Setting the Stage for Change*, 54 DENV. L.J. 619 (1977).

6. U.S. CONST. art. I, § 8, cl. 17. This clause is also referred to as the “Jurisdiction Clause.”

7. U.S. CONST. art. I, § 3, cl. 2.

8. U.S. CONST. art. I, § 8, cl. 3. Two other authorities exist. One, the Treaty Clause, is currently employed for wildlife management laws but is potentially broader. U.S. CONST. art. II, § 2, cl. 2. *See Missouri v. Holland*, 252 U.S. 416 (1920) (holding the Migratory Bird Treaty Act, allowing bird protection both on and off federal lands, a valid exercise of treaty power); *Alaska Fish & Wildlife Fed’n & Outdoor Council, Inc. v. Dunkle*, 829 F.2d 933 (9th Cir. 1987) (ruling that a treaty may limit the discretion of a federal agency), *cert. denied sub nom. Alaska Fed’n of Natives v. Alaska Fish & Wildlife Fed’n & Outdoor Council, Inc.*, 485 U.S. 988 (1988). *See generally* George C. Coggins & Sebastian T. Patti, *The Resurrection and Expansion of the Migratory Bird Treaty Act*, 50 U. COLO. L. REV. 165 (1979). The second additional authority is the spending for general welfare power. U.S. CONST. art. I, § 8, cl. 1. It has been used to justify federal water projects that promote the general welfare. *United States v. Gerlach Live Stock Co.*, 339 U.S. 725 (1950).

“enclaves.” For example, only three parcels managed by the BLM are “enclaves,”⁹ although some National Parks and other lands such as post offices and forts fall into this category. The Enclave Clause states that Congress may

exercise exclusive Legislation in all Cases whatsoever over [the District of Columbia] and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the same shall be, for the Erection of Forts, Magazines, Arsenals, Dock-Yards, and other needful Buildings.¹⁰

The Clause’s “exclusive Legislation” is equivalent to exclusive jurisdiction.¹¹ Under this authority, a state must cede jurisdiction over the “place” for it to be an enclave. Once a state has ceded jurisdiction, the federal government acquires some jurisdiction. Authority under the Enclave Clause, however, is both broader and narrower than a first reading reveals.

The Enclave Clause power is broader than its wording indicates in two ways. First, Congress may exercise it over more than just purchased property. The Enclave Clause is also triggered when land owned by the federal government is reserved for a specified purpose and a state cedes jurisdiction.¹² Second, the catch-all “needful Buildings” in the Clause’s list of places subject to the power has been interpreted to include more than edifices with four walls. The word “building” may include structures such as dams,¹³ or it may apply to lands used for a National Park.¹⁴ In other words, the purposes to which enclaves may be put are not limited, but expand to meet Congress’s view of the public good.

The broadening of Congress’s power under the clause is balanced by a practical contraction of the exclusivity of its jurisdiction. Although the Clause refers to “exclusive” federal jurisdiction, usually the state’s consent reserves some jurisdiction to it and, so long as the state’s action does not interfere with the federal purpose, custom-made jurisdictional arrangements are possible.¹⁵ For example, to prevent the federal enclaves

9. An important one is the Navy Petroleum Reserve Number 4 on the North Slope of Alaska, where the BLM has concurrent jurisdiction with Alaska. GEORGE C. COGGINS ET AL., *FEDERAL PUBLIC LAND AND RESOURCES LAW* 180 (3d ed. 1993).

10. U.S. CONST. art. I, § 8, cl. 17.

11. *United States v. Bevens*, 16 U.S. (3 Wheat.) 336, 387 (1818).

12. *Fort Leavenworth R.R. v. Lowe*, 114 U.S. 525 (1885).

13. *James v. Dravo Contracting Co.*, 302 U.S. 134 (1937).

14. *Collins v. Yosemite Park & Curry Co.*, 304 U.S. 518 (1938).

15. *Lowe*, 114 U.S. at 531, 540.

from becoming refuges for the lawless, one common jurisdictional reservation is for service of process in state criminal and civil matters.¹⁶ Another common reservation is the right to tax private property within the enclave.¹⁷ Therefore, the first step in ascertaining what law applies in an enclave requires review of the terms of the particular cessation agreement between the state and federal government.

A second practical matter brings state law into enclaves. State law often applies to solving problems on enclaves even if the state did not expressly reserve such jurisdiction because federal law does not generally cover the minutiae of civil and criminal law. The Federal Assimilated Crimes Act¹⁸ makes some substantive state criminal law applicable in the enclave, but federal magistrates and judges apply it. Civil law is also “assimilated” in two ways. State law on wrongful death and personal injury actions is applicable in enclaves pursuant to federal statute.¹⁹ Other state law, if not preempted by federal law,²⁰ is assimilated under the common law of sovereignty transfers.²¹ This civil law, however, is frozen in the form in which it existed on the date the state ceded jurisdiction.²²

The Enclave Clause obviously authorizes significant legislative activities. It applies, however, to only about 9 percent of the land owned by the federal government.²³ Therefore, the Property Clause has a greater impact.

B. *The Property Clause*

The most important constitutional grant of power for public land law is the Property Clause: “The Congress shall have Power to dispose of and

16. *Id.* at 528.

17. *Id.* at 542.

18. 18 U.S.C.A. §§ 7, 13 (West 1969 & Supp. 1993). The law that is assimilated is the law current at the time it must be applied because the Act assimilated criminal law prospectively. *United States v. Sharpnack*, 355 U.S. 286 (1958).

19. 16 U.S.C.A. § 457 (West 1993) (applying state wrongful death and personal injury law in enclaves and National Parks).

20. For example, federal law would govern contracts with concessionaires in a National Park. See *infra* notes 278–79 and accompanying text.

21. *Chicago, Rock Island & Pac. Ry. v. McGlinn*, 114 U.S. 542, 546 (1885).

22. *Arlington Hotel Co. v. Fant*, 278 U.S. 439 (1929) (delineating innkeeper liability by assimilation as frozen).

23. These include lands subject to exclusive federal jurisdiction or some blend of federal and state jurisdiction. *COGGINS ET AL.*, *supra* note 11, at 179; *GEORGE C. COGGINS, PUBLIC NATURAL RESOURCES LAW* § 3.03[2] (1990).

make all needful Rules and Regulations respecting the Territory or other property belonging to the United States.”²⁴ Because the Property Clause is liberally interpreted, the federal government may not need a state to cede jurisdiction to it under the Enclave Clause as a precondition to its exercise of significant regulatory power.²⁵ The Property Clause, however, must be analyzed to determine the scope of the power it grants to Congress in two geographic settings. The first is the power’s extent when public lands are directly involved. The second is whether the power extends to legislation affecting private lands.

1. *Extent of Power Over Public Lands*

When public lands were in territorial status, Congress’s authority to legislate was clearly plenary. When states were created out of territories, the status of Congress in relation to the federally owned lands within state boundaries required more consideration. Two competing models of the Property Clause exist to define this status, which may be labeled the “proprietor” and the “sovereign.” The Supreme Court ultimately adopted the latter, more expansive, sovereignty model.

Some early Supreme Court cases, however, did refer to the United States as being analogous to a “proprietor” when the public lands were at issue.²⁶ In this role, the United States could protect its lands from trespass and other dangers. It could also stipulate the conditions under which it would dispose of the lands. Commentators have referred to this model as the “moderate classical” view.²⁷ A more extreme “classical” view, expressed in one Supreme Court opinion, states that the government merely holds these lands as a trustee for eventual

24. U.S. CONST. art. IV, § 3, cl. 2.

25. Contrary to this position, one commentator has vigorously argued that the federal government may only exercise sovereign powers under the Enclave Clause. David E. Engdahl, *State and Federal Power Over Federal Property*, 18 ARIZ. L. REV. 283, 296–97 (1976). This view has been criticized both theoretically and practically. See, e.g., Roger M. Sullivan, Jr., *The Power of Congress Under the Property Clause: A Potential Check on the Effect of the Chadha Decision on Public Land Legislation*, 6 PUB. LAND L. REV. 65, 82 (1985); Charles F. Wilkinson, *The Field of Public Land Law: Some Connecting Threads and Future Directions*, 1 PUB. LAND L. REV. 1, 9–12 (1980) (noting that Engdahl’s model of sovereignty may have been the original intent of the Constitution, but was never implemented by the courts).

26. *Fort Leavenworth R.R. v. Lowe*, 114 U.S. 525, 526 (1885). *Lowe*, however, dealt with the Enclave Power. See *Kleppe v. New Mexico*, 426 U.S. 529, 539 (1976).

27. For an espousal of the view, see Engdahl, *supra* note 25, at 296–97. See generally COGGINS, *supra* note 23, § 3.03[3][a]; Eugene R. Gaetke, *Refuting the “Classic” Property Clause Theory*, 63 N.C.L. REV. 617 (1985).

disposition.²⁸ Other early Supreme Court cases, however, refer to the Property Clause power as being “without limit.”²⁹

It is this second or “sovereign” model that resonates in two important early public land law cases, *Camfield v. United States*³⁰ and *Light v. United States*.³¹ In *Camfield*, the United States sought to remove a fence that interfered with access to public lands. The Supreme Court opined that the federal government of necessity has “a power over its own property analogous to the police power of the several states.”³² In *Light*, there were two issues: whether the United States could create a National Forest without the consent of the state in which it was located, and whether the Forest Service could prohibit grazing without a permit despite state law requiring a landowner to maintain a fence to keep out livestock as a prerequisite to a trespass action. The Supreme Court upheld both the forest reserve and the permit requirement. It referred to the United States as holding the public lands in “trust.” However, the “trust” did not act to dictate terms to Congress:

[I]t is not for the courts to say how that trust shall be administered. That is for Congress to determine . . . [Rights to establish and disestablish reserves] are rights incident to proprietorship, to say nothing of the power of the United States as a sovereign over the property belonging to it.³³

Clearly, congressional powers exceed those of a mere proprietor. The Property Clause enables Congress to determine the public good and forward it by legislation.

The Supreme Court confirmed this view of the Clause’s reach in the 1976 case, *Kleppe v. New Mexico*.³⁴ Congress had passed the Wild Free-Roaming Horses and Burros Act³⁵ (the “Wild Horse Act”) to protect “all unbranded and unclaimed horses and burros on public lands of the

28. See *Pollard v. Hagan*, 44 U.S. (3 How.) 212 (1845).

29. *United States v. Gratiot*, 39 U.S. (14 Pet.) 526 (1840). For a refutation of the historical underpinnings of the “classic” theory see David D. Goble, *The Myth of the Classic Property Clause Doctrine*, 63 DENV. U. L. REV. 495 (1986).

30. 167 U.S. 518 (1897).

31. 220 U.S. 523 (1911).

32. *Camfield*, 167 U.S. at 525.

33. 220 U.S. at 536–37. See Marla E. Mansfield, *On the Cusp of Property Rights: Lessons from Public Land Law*, 18 ECOLOGY L.Q. 43, 84–88 (1991) (asserting that the public trust doctrine does not create a separate substantive duty for Congress but provides an interpretive guide to courts when Congress is less than clear).

34. 426 U.S. 529 (1976).

35. 16 U.S.C.A. §§ 1331–1340 (West 1985).

United States”³⁶ from “capture, branding, harassment, or death.”³⁷ Congress deemed the animals “an integral part of the natural system of the public lands.”³⁸ The BLM was to have jurisdiction over the horses and burros on public lands.³⁹ The facts of the case are crucial to an understanding of what the case did and did not hold. A grazing permittee reported some wild burros at a well on public lands.⁴⁰ The burros met the definition of “wild” under the Wild Horse Act;⁴¹ they also met the definition of an estray under New Mexico livestock statutes.⁴² State law allowed burros classified as estray to be rounded up and held.⁴³ Therefore, the situation revealed a direct conflict between federal and state law. The burros could not be both rounded up and protected from being captured. Moreover, the controversy arose on public lands. Despite this federal nexus, New Mexico maintained that the Wild Horse Act exceeded the authority of Congress.

According to New Mexico, the Property Clause gave the United States the rights of a proprietor. Under its reading, the federal government could dispose of and make incidental rules about use of its lands and protect them.⁴⁴ The Wild Horse Act, therefore, did not fit within these powers because it was designed to protect horses and burros, over which the federal government did not claim ownership. New Mexico additionally argued the Wild Horse Act impermissibly interfered with primary state jurisdiction over wildlife.

The Supreme Court rejected these arguments. It found the Wild Horse Act to be a valid exercise of the Property Clause power for two reasons.⁴⁵ First, Congress treated the animals as an integral part of the federal lands. Because of the relationship of the horses and burros to the land, it was possible that the Act was designed to protect federal lands. The Supreme Court therefore recognized an argument that the Act could come within the power of a proprietor to protect its land, but it found the Wild Horse Act constitutional for a second reason. The Supreme Court avowed that

36. *Id.* § 1332(b).

37. *Id.* § 1331.

38. *Kleppe*, 426 U.S. at 531.

39. *Id.*

40. *Id.* at 533.

41. *Id.* at 534.

42. *Id.* at 532, n.2.

43. *Id.* at 533.

44. *Id.* at 536.

45. *Id.* at 537.

it had never adopted New Mexico's restrictive view of the Property Clause: "In short, Congress exercises the powers both of a proprietor and of a legislature over the public domain. . . . In our view, the 'complete power' that Congress has over public lands necessarily includes the power to regulate and protect the wildlife living there."⁴⁶ The plenary authority granted under the Clause authorized the Act without the need to find that the Wild Horse Act was designed to protect lands.

The state fared no better with its argument that the Act impermissibly interfered with state jurisdiction. The Supreme Court stated that jurisdiction under the Property Clause might be broader than that under the Enclave Clause.⁴⁷ Enclave Clause jurisdiction is derivative because it is dependent on the cession or consent of a state. The Property Clause, however, is a direct grant of power to Congress. Therefore, its exercise could preempt state law if that was the intent of Congress.

The result of *Kleppe* is that Congress may legislate freely in "respect" to public property. Subsequent cases confirmed the breadth of the Property Clause.⁴⁸ Nevertheless, the holding in *Kleppe* does have limitations. The case involved wild burros on public lands, not on private lands. Therefore, it does not answer whether the Property Clause authorizes regulation of actions on private lands. As the Supreme Court noted: "While it is clear that regulations under the Property Clause may have some effect on private lands not otherwise under federal control . . . , we do not think it appropriate . . . to determine the extent, if any, to which the Property Clause empowers Congress to protect animals on private lands"⁴⁹ Additionally, the preemption of state law was clear in *Kleppe* because of the direct conflict with federal law. The case does not, therefore, delineate the full dimensions of preemption. The next section addresses one question *Kleppe* left open.

2. *Extent of Power over Private Lands*

Federal control of activity on private property may qualify as "needful Rules and Regulations respecting . . . Property belonging to the United

46. *Id.* at 540–41.

47. *Id.* at 541–42.

48. *See, e.g., Nevada v. Watkins*, 914 F.2d 1545 (9th Cir. 1990) (ruling that Congress may use the Property Clause to designate Yucca Mountain as a permanent nuclear waste depository without state consent under the Enclave Clause); *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 581 (1987) (holding that Congress has "plenary power" under the Property Clause).

49. *Kleppe*, 426 U.S. at 546.

States”⁵⁰ when required to protect federal lands in one of two ways: from either physical harm or so that the lands will remain intact for congressional purposes. As an example of the first type of controls, a statute that prohibited leaving an unextinguished fire “in or near” a public forest was interpreted to be clearly designed to protect the forest from the physical threat of fires.⁵¹ Under the Property Clause, the government could constitutionally prosecute someone who left a fire on private property. As the Supreme Court succinctly put it in *United States v. Alford*:⁵² “The danger depends upon the nearness of the fire, not upon the ownership of the land where it is built. . . . Congress may prohibit the doing of acts upon privately owned lands that imperil the publicly owned forests.”⁵³

The *Alford* affirmation of the Property Clause power involved direct physical peril to federal property. The courts have also extended the concept of “harm” to include interference with congressional policy as well as the physical integrity of the public lands. For example, *Camfield v. United States*⁵⁴ affirmed the conviction of an individual who had erected fences on private land, thereby preventing access to public land.⁵⁵ Because a fence is generally lawful, *Camfield* has been read as allowing preclusion of activities that would frustrate federal policy, even if they are not otherwise objectionable.⁵⁶ The leading modern case on this issue, *Minnesota v. Block*, arose when Congress barred the use of motorized vehicles in portions of the Boundary Waters Canoe Area Wilderness that

50. U.S. CONST. art. IV, § 3, cl. 2.

51. *United States v. Alford*, 274 U.S. 264 (1927) (discussing the Act of June 25, 1910, 36 Stat. 855).

52. *Id.*

53. *Id.* at 267. Complete refusal to allow beneficial use of private land on the grounds of preventing damage to public lands may exceed the authority. See *Curtin v. Benson*, 222 U.S. 78, 86 (1911). The *Curtin* Court, however, emphasized the absence of proof that the private use at issue would cause any damage to the public land. *Id.* at 85.

54. 167 U.S. 518 (1897).

55. *Id.* at 527. See also *McKelvey v. United States*, 260 U.S. 353, 357 (1922) (protecting congressional policy of free passage over public lands); *Robbins v. United States*, 284 F. 39, 46 (8th Cir. 1922) (protecting congressional control of highways in national parks). More recently, the Unlawful Enclosure Act at issue in *Camfield* was used to prevent a rancher from erecting a fence that would interfere with antelope migration. *United States ex rel. Bergen v. Lawrence*, 848 F.2d 1502 (10th Cir.), cert. denied, 488 U.S. 980 (1988).

56. Eugene R. Gaetke, *The Boundary Waters Canoe Area Wilderness Act of 1978: Regulating Nonfederal Property Under the Property Clause*, 60 OR. L. REV. 157, 169–74 (1981). See also, Joseph L. Sax, *Helpless Giants: The National Parks and the Regulation of Private Land*, 75 MICH. L. REV. 239, 250–55 (1976). But see *Leo Sheep Co. v. United States*, 440 U.S. 668, 685 (1979) (referring to *Camfield* as a nuisance case).

included state-owned land.⁵⁷ The court in that case took the broad view of *Camfield*:⁵⁸ “Under this authority to protect public land, Congress’s power must extend to regulation of conduct on or off the public land that would threaten the designated purpose of federal lands.”⁵⁹ Because the motorized vehicles would interfere with wilderness aesthetics, they could be banned.⁶⁰

Most of the cases affirming federal power to regulate activities on private land have dealt with inholdings, private interests that are within the geographic boundaries of a public reserve.⁶¹ The federal government has its strongest argument, therefore, when it attempts to regulate activities undertaken on private land if those lands are surrounded by public land and the activities directly interfere with the management of public resources.⁶² Although there is no clear ruling on how far the Property Clause extends beyond the borders of public property, existing case law allows regulation of inholdings to prevent conflicts with congressionally declared purposes.⁶³

57. *Minnesota v. Block*, 660 F.2d 1240 (8th Cir. 1981), cert. denied, 488 U.S. 1007 (1982).

58. *Id.* at 1249.

59. *Id.* But see *United States v. County Bd. of Arlington*, 487 F. Supp. 137, 143–44 (E.D. Va. 1979) (finding no public nuisance in high-rise construction that would intrude on Washington’s “monumental core,” therefore finding no federal power to regulate). Justice Scalia has taken a similar view on when the government may regulate without compensation if the regulation completely diminishes the value of private property. *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2981–02 (1992) (permitting uncompensated regulation that diminishes property’s total value only if the regulation addresses common law nuisance). Whether this reasoning may be imported to the Property Clause setting is not yet clear. Justice Scalia dissented in *California Coastal Comm’n v. Granite Rock*, 480 U.S. 572, 607 (1987), strongly arguing that the state regulation would greatly reduce federal Property Clause power. See *infra* notes 114–15 and accompanying text.

60. The Boundary Waters Canoe Area Wilderness Act of 1978 revisited some of these issues. See *Friends of the Boundary Waters Wilderness v. Robertson*, 978 F.2d 1484 (8th Cir. 1992) (disallowing motorized portages because portaging boats between certain waters was “feasible” without motorized equipment).

61. See also *United States v. Vogler*, 859 F.2d 638, 640 (9th Cir. 1988); *United States v. Lindsey*, 595 F.2d 5, 6 (9th Cir. 1979); *United States v. Brown*, 552 F.2d 817 (8th Cir.), cert. denied, 431 U.S. 949 (1977); *Wilkenson v. Department of Interior*, 634 F. Supp. 1265, 1279 (D. Colo. 1986).

62. See George C. Coggins, *Protecting the Wildlife Resources of National Parks from External Threats*, 22 LAND & WATER L. REV. 1, 17–18 (1987); Robert B. Keiter, *Taking Account of the Ecosystem on the Public Domain: Law and Ecology in the Greater Yellowstone Region*, 60 U. COLO. L. REV. 923, 952 (1989); H. Barry Holt, *Property Clause Regulation Off Federal Lands: An Analysis, and Possible Application to Indian Treaty Rights*, 19 ENVTL. L. 295, 303–08 (1988). But see Daniel Rohlf & Douglas L. Honnold, *Managing the Balances of Nature: The Legal Framework of Wilderness Management*, 15 ECOLOGY L.Q. 249, 273–75 (1988) (questioning whether the Wilderness Act requires agency to control surrounding areas).

63. A second way to regulate such activities may be to condition ancillary permits needed for access or development. See *Mansfield*, *supra* note 33, at 53–54.

Nevertheless, if the “plenary” power of the Property Clause is interpreted literally, Congress and federal agencies could regulate any activity that could conceivably impact public lands. This interpretation would extend beyond existing precedents. Although not all cases have involved inholdings, the Property Clause has not been used to regulate activities far from the federal lands.⁶⁴ Moreover, political ramifications are likely to prevent courts from stretching the Property Clause to the extreme.⁶⁵

C. *The Commerce Clause*

An additional constitutional provision may justify regulations regarding public lands, whether they are directed to activities on or off the public lands. The Commerce Clause gives Congress authority over matters in, or affecting, interstate commerce.⁶⁶ For example, the Commerce Clause has supported federal hydropower licenses issued in contravention of state law.⁶⁷ Therefore, if a court finds that a regulation is not “needful” or sufficiently “respecting” federal property to come within the Property Clause, the court may use the wide-ranging Commerce Clause to bolster congressional authority.⁶⁸

The Commerce Clause has been used directly for legislation that protects public lands or impacts development of publicly owned resources, without a court first finding that the Property Clause was insufficient to justify the statute. The Commerce Clause is the authority for the Clean Air Act.⁶⁹ This act regulates in respect to public lands

64. Mansfield, *supra* note 33, at 54–56. *But see infra* notes 71–72 and accompanying text (discussing use of the Commerce Power).

65. Wilkinson, *supra* note 25, at 15; Sally K. Fairfax, *Old Recipes for New Federalism*, 12 ENVTL. L. 945, 973–78 (1982).

66. U.S. CONST. art. I, § 8, cl. 3. Congress has the power “to regulate Commerce . . . among the several States . . .” *Id.*

67. First Iowa Hydro-Electric Coop. v. FPC, 328 U.S. 152, 182 (1946).

68. COGGINS, *supra* note 23, §3.03[4][b][i] at 3-23 (claiming it is “futile” to challenge legislation affecting federal lands and resources based on lack of congressional power because of the force of the Commerce Clause together with the broad Property Clause). Examples of the Commerce Clause’s practically unbounded breadth abound. *See, e.g.*, Hodel v. Indiana, 452 U.S. 314, 324 (1981) (stating the pertinent inquiry as not the amount of commerce involved but whether Congress could rationally conclude the activity affected interstate commerce); Wickard v. Filburn, 317 U.S. 111 (1942); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964). *See also* Donald N. Zillman, *Natural Resources Federalism*, 35 ROCKY MTN. MIN. L. INST. § 1.01, § 1.02(1)(2) at 1-7 to 1-9 (1989) (describing the Rehnquist position that requires serious review of congressional assertion of authority as a distinct minority).

69. 42 U.S.C.A. §§ 7401–7671q (West 1983 & Supp. 1993).

because it requires greater controls for sources of air pollution, regardless of their location, if those sources have emissions that interfere with visibility on certain types of federal lands.⁷⁰ Similarly, the Surface Mining Control and Reclamation Act⁷¹ is authorized under the Commerce Clause,⁷² and dictates measures for the development of federal coal.⁷³ Therefore, the Commerce Clause is not only a potential, but an existing, source for public land regulation.

III. THE DOCTRINE OF PREEMPTION

The sources of federal authority for regulating activities on or affecting public lands have been detailed above. Unlike the federal government, which is one of enumerated powers, states have a general police power, which enables them to legislate for the general welfare and safety of their citizens. State and federal spheres of influence sometimes overlap, making choice of law an issue. Within enclaves, the search for applicable law begins with the presumption that federal law is exclusive; state law will operate only if there is a reservation of jurisdiction, assimilation by statute, or sovereignty transfer. On non-enclave public lands, the interpretive process is reversed. State law operates unless federal usurpation exists. In that case, federal law may preempt generally applicable state law.

A. *Framework for Preemption Analysis*

The doctrine of preemption is based in the Supremacy Clause, which requires state law to yield to federal.⁷⁴ Preemptive federal law may be either statutes or agency regulations promulgated pursuant to valid statutory authority.⁷⁵ Whether or not a particular law or regulation preempts state law is ultimately a question of congressional intent, which may be expressed in several ways.

70. *Id.* § 7491.

71. 30 U.S.C.A. § 1201–1328 (West 1986 & Supp. 1993).

72. *Hodel*, 452 U.S. at 324.

73. *See, e.g.*, 30 U.S.C.A. §§ 1272(b), 1273, 1304.

74. U.S. CONST. art. VI, cl. 2.

75. *See City of New York v. FCC*, 486 U.S. 57, 63–64 (1988). For example, National Park Service regulations forbidding firearms could be enforced against a hunter complying with state law despite the fact that Congress was silent about hunting in the park. *United States v. Brown*, 552 F.2d 817 (8th Cir.), *cert. denied*, 431 U.S. 949 (1977).

The first and easiest example of preemption arises when Congress expressly states that it intends to preempt state law. Congress has done this occasionally, such as in the Endangered Species Act.⁷⁶ The Act expressly voids state laws that prohibit what it allows or which permit what the Act prohibits.⁷⁷ Other acts, such as the Surface Mining Control and Reclamation Act,⁷⁸ declare inconsistent state laws and regulations void, but exclude more stringent land use and environmental regulations and laws from the definition of “inconsistent.”⁷⁹ This type of preemption provides a federal “floor” for regulation.

If Congress does not express its wishes as to preemption, there are two other ways to determine whether state law is preempted:

First, when Congress intends federal law occupy a given field, state law in that field is pre-empted. Second, even if Congress has not occupied the field, state law is nevertheless pre-empted to the extent it actually conflicts with federal law, that is, when compliance with both state and federal law is impossible, or when the state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”⁸⁰

It is these latter manners of preemption, sometimes referred to as implied preemption, that create the greatest controversy.⁸¹

B. *Preemption in Public Land Cases*

At one point, some scholars and lawyers questioned whether law enacted under the Property Clause could be preemptive. *Kleppe v. New Mexico*,⁸² however, laid that argument to rest: “A different rule [i.e., one which gave preeminence to state law] would place the public domain at

76. 16 U.S.C.A. §§ 1531–1544 (West 1985 & Supp. 1993).

77. *Id.* § 1535(f).

78. 30 U.S.C.A. §§ 1201–1328 (West 1986 & Supp. 1993).

79. *Id.* § 1255.

80. *California v. ARC America Corp.*, 490 U.S. 93, 100–01 (1989) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)) (citations omitted).

81. The related issue of governmental immunities no longer has much force in public land law because, although states cannot directly tax federal facilities, the Supreme Court has allowed indirect taxation. *See United States v. County of Fresno*, 429 U.S. 452 (1977); *see also COGGINS*, *supra* note 23, § 402.4. Recently, the Tenth Amendment shows signs of being a limit on congressional ingenuity. *See New York v. United States*, 112 S. Ct. 2408 (1992) (ruling that “take title” provisions of federal low-level radioactive waste law violate the Tenth Amendment by coercing states to regulate in a certain manner).

82. 426 U.S. 529 (1976). *See supra* notes 34–43 and accompanying text.

the mercy of state legislation.”⁸³ The question, therefore, is whether Congress intends to preempt state law when it acts pursuant to any of its powers.

Direct language, one method of expressing such intent, is infrequently encountered in public land legislation. Congress does address preemption or federal-state relationships, but it often creates more questions than it answers. The Federal Land Policy and Management Act (“FLPMA”),⁸⁴ the organic act for the BLM, provides several examples. In Section 701, it states that “[n]othing in this Act shall be construed as . . . expanding . . . or diminishing . . . Federal or State jurisdiction . . . in water resources development or control.”⁸⁵ This provision does not clarify the respective spheres of the two jurisdictions. In another section, Congress directs the BLM to specify conditions for rights-of-way, but also requires compliance with two sets of state standards: “applicable air and water quality standards established by or pursuant to applicable . . . State law”⁸⁶ and state standards on environmental and safety matters “if those standards are more stringent than applicable Federal standards.”⁸⁷ Obviously, these formulations create new questions, namely what laws are “applicable” and what standards are more stringent.⁸⁸ At another point in FLPMA, Congress requires BLM planning to be consistent with state and local land use plans, but only to the extent that federal purposes are not thwarted.⁸⁹ These last two express provisions on federal-state relationships only give guidance on congressional priorities, whereas express preemption would clearly mandate that federal law prevail.

83. *Kleppe*, 426 U.S. at 543 (quoting *Camfield v. United States*, 167 U.S. 518, 526 (1897)).

84. 43 U.S.C.A. §§ 1701–1784 (West 1986 & Supp. 1993).

85. Pub. L. No. 94-579, § 701(g), 90 Stat. 2743 (1976) (codified as amended at 43 U.S.C.A. § 1701 note (West 1986)) (Savings Provisions (g)(2)). See also *Taylor Grazing Act*, 43 U.S.C.A. § 315n (West 1986) (stating that nothing in it should restrict a state’s police regulation or police power, but also stating that “nothing in this section shall be construed as limiting or restricting the power and authority of the United States”).

86. 43 U.S.C.A. § 1765(a)(iii).

87. 43 U.S.C.A. § 1765(a)(iv).

88. See *Montana v. Johnson*, 738 F.2d 1074, 1077 (9th Cir. 1984) (ruling that a state requirement of “minimum adverse environmental impact” is too vague to be an “applicable standard” under FLPMA); *Columbia Basin Land Protection Ass’n v. Schlesinger*, 643 F.2d 585, 603–05 (9th Cir. 1981) (noting that a federal agency must comply with substance of state law, not procedure).

89. “Land use plans of the Secretary . . . shall be consistent with State and local plans to the maximum extent he finds consistent with Federal Law and the purposes of this Act.” 43 U.S.C.A. § 1712(9) (West 1986).

Implied preemption does arise in the public lands sphere. The first type of implied preemption occurs when state law directly conflicts with federal law on federal land, making compliance with both impossible. In some early cases, state law authorized what the federal law prohibited. For example, in *Light v. United States*,⁹⁰ the federal government prohibited grazing without a federal permit, but state law impliedly allowed such grazing because it required a landowner to “fence-out” cattle if the landowner wanted to prevent grazing. Similarly, in *Kleppe v. New Mexico*,⁹¹ wild horses and burros were to be rounded up and slaughtered pursuant to New Mexico law while the federal law protected the animals from harassment and killing.⁹² Occasionally, the flip-side of this type of preemption exists; pursuant to federal law, the United States will be able to do something in contravention of state law.⁹³ Implied preemption by direct conflict, therefore, does affect who may regulate public lands.

Another type of implied preemption takes place when state law becomes an obstacle to federal purposes. This situation had not been frequently litigated in the past, partly because the states did not heavily regulate private activities on federal lands before the environmental decade of the 1970s.⁹⁴ As states began to assert jurisdiction over mining and oil and gas drilling, conflicts arose. Central to these state court cases was the question of whether the state regulation interfered with federal purposes. Additionally, the cases addressed another implied preemption issue, whether Congress had “occupied the field” so as to preclude state regulation.

The first of these state court cases involved Idaho’s regulation of mining activities on unpatented mining claims. Idaho demanded a permit for dredging activities and the miners responded that federal law preempted the state requirement. In *State ex rel. Anarus v. Click*,⁹⁵ the

90. 220 U.S. 523 (1911).

91. 426 U.S. 529 (1976).

92. Wild Free-Roaming Horses and Burros Act, 16 U.S.C.A. §§ 1331–1340 (West 1985).

93. See *Hunt v. United States*, 278 U.S. 96 (1928) (U.S. has the authority to kill deer out of season despite state game laws); *First Iowa Hydro-Electric Coop. v. FPC*, 328 U.S. 152 (1946) (U.S. has the power to build dams despite state permit requirements). See also, *California v. FERC*, 495 U.S. 490 (1990) (holding that federal power laws preempt California requirements for minimum stream flows).

94. An earlier example was whether a state force-pooling statute could impact a federal oil and gas lease. The court found it could, but the district court decision emphasized that the federal agency consented to the pooling proposal. *Texas Oil & Gas Corp. v. Phillips Petroleum Co.*, 277 F. Supp. 366, 370 (W.D. Okla. 1967), *aff’d*, 406 F.2d 1303 (10th Cir.), *cert. denied*, 396 U.S. 829 (1969).

95. 554 P.2d 969 (Idaho 1976).

court found that the Mining Law of 1872⁹⁶ did not preempt the state environmental regulation for several reasons. First, the Mining Law anticipated importing state law for matters such as requirements for locating a valid mining claim. Second, the federal government had not regulated mining pervasively despite the then recent Forest Service regulations; the field was therefore not occupied. Finally, the court noted that environmental regulation was a traditional state function.⁹⁷ Nevertheless, the Idaho Supreme Court acknowledged that there was a boundary: a state could regulate, but not prohibit federally permitted activity.⁹⁸ A similar result was reached in Oregon a year later.⁹⁹

The next major preemption case arose in California. Instead of an unpatented mining claim, *Ventura County v. Gulf Oil Corp.*¹⁰⁰ involved an oil and gas lease in a National Forest. The federal lessee had received permission to drill from the relevant federal authorities, but Ventura County sought to stop the drilling unless the lessee obtained a permit under the county's zoning ordinance. The Ninth Circuit found that the Mineral Leasing Act¹⁰¹ required both lease stipulations and a permitting regime that took into account environmental and technical considerations. These federal regulatory activities, coupled with Forest Service requirements and the fact that local concerns could be communicated through National Environmental Policy Act proceedings, showed that the federal government had occupied the field. Despite a reluctance to find preemption of the state's historic police power, the court found the zoning requirement would interfere with congressional purposes and objectives.¹⁰² The Supreme Court affirmed the Ninth Circuit without opinion.¹⁰³

Ventura County is distinguishable from earlier cases based on the historical distinction between the level of federal regulation under the Mining Law of 1872 and under the Mineral Leasing Act. Under the Mineral Leasing Act, the federal lessee was required to obtain not only a specific lease, but an individualized permit to drill.¹⁰⁴ The venerable

96. 30 U.S.C.A. §§ 21-54 (West 1986).

97. *Andrus*, 554 P.2d at 976.

98. *Id.*

99. *State ex rel. Cox v. Hibbard*, 570 P.2d 1190 (Or. Ct. App. 1977).

100. 601 F.2d 1080 (9th Cir. 1979), *aff'd*, 445 U.S. 947 (1980).

101. 30 U.S.C.A. §§ 181-287 (West 1986 & Supp. 1993).

102. *Ventura County*, 601 F.2d at 1086.

103. 445 U.S. 947 (1980).

104. See generally Marla E. Mansfield, *Through the Forest of the Onshore Oil and Gas Leasing Controversy Toward a Paradigm of Meaningful NEPA Compliance*, 24 LAND & WATER L. REV. 85,

Mining Law makes no mention of environmental concerns and frequently refers to state law. Moreover, not until the 1970s did either the Forest Service¹⁰⁵ or the BLM¹⁰⁶ actively regulate mining on unpatented mining claims.

Ventura County, however, was a very broad ruling: it found state law facially preempted. The court did not inquire into whether the conditions the county put on drilling were unreasonable because the lessee sought no permit and the county drafted no conditions. The Ninth Circuit found the local law objectionable because it was open-ended about what type of conditions could be applied: "The federal Government has authorized a specific use of federal lands, and Ventura cannot prohibit that use, either temporarily or permanently, in an attempt to substitute its judgment for that of Congress."¹⁰⁷ The ruling in *Ventura County* would appear to make any dual regulatory system or permit requirement automatically preempted.

This prohibitory reading has not been adopted in subsequent cases. State court decisions after *Ventura County* continued the earlier dichotomy, allowing states to regulate private activities on federal lands for environmental purposes, but not allowing them to prohibit activity. For example, unpatented mining claims were again at issue in *Brubaker v. Board of County Commissioners*.¹⁰⁸ The Forest Service had approved an exploration plan, but the county denied the miner a permit required by county zoning laws. The Colorado Supreme Court did not find reasonable regulation was foreclosed, but did hold that preemption prevented the county from prohibiting an activity authorized by federal law.¹⁰⁹

The Wyoming Supreme Court also found no preemption of reasonable regulation of environmental impacts of mineral development on federal lands. In *Gulf Oil Corp. v. Wyoming Oil & Gas Commission*,¹¹⁰ a federal oil and gas lessee had been granted permission both to drill and to use a

92-98 (1989) (describing the government's ability to consider the environment both prior to exercising its discretion to grant a lease and after granting the lease).

105. See regulations at 36 C.F.R. § 228 (1992); *United States v. Weiss*, 642 F.2d 296 (9th Cir. 1981) (authorizing regulations).

106. 43 C.F.R. §§ 3802, 3809 (1992).

107. *Ventura County v. Gulf Oil Corp.*, 601 F.2d 1080, 1084, (9th Cir. 1979), *aff'd*, 445 U.S. 947 (1980).

108. 652 P.2d 1050 (Colo. 1982).

109. *Id.* at 1059.

110. 693 P.2d 227 (Wyo. 1985).

specific access route after review by the BLM and Forest Service. The Wyoming Oil and Gas Commission, however, would approve the drilling only if the operator employed one of the alternative access routes the federal agencies had analyzed; the Commission determined that the chosen route would create unacceptable damage that would not be amenable to reclamation.¹¹¹ On review, the court held that the federal approvals and laws did not preempt state action because states traditionally are concerned with environmental impacts and the Mineral Leasing Act preserved state input. Its ruling foreshadowed a new dichotomy for preemption analysis:

In contrast to the zoning ordinances at issue in *Ventura County and Brubaker*, mining permit requirements designed to safeguard the environment have received favorable treatment in the courts. These latter regulations constitute legitimate means of guiding mineral development without prohibiting it.¹¹²

The Wyoming court treated environmental regulations differently than zoning actions.

The Supreme Court embraced the dichotomy between environmental law and zoning only two years later. In 1987, it heard the challenge of the Granite Rock Company to the attempted state regulation of its unpatented mining claims.¹¹³ The Forest Service had approved Granite Rock's mining plan, but the California Coastal Commission demanded that the company seek a permit from it. Granite Rock immediately sued, claiming that federal law would preempt any and all possible permit conditions in light of the Forest Service review. The Supreme Court first rejected the argument that the General Mining Law statute and agency regulations "occupied the field" because the regulations themselves referred to obtaining necessary state permits and complying with state law.¹¹⁴ More importantly, Justice O'Connor, writing for the majority, characterized the Coastal Commission's permit requirement as environmental regulation:

The line between environmental regulation and land use planning will not always be bright; for example, one may hypothesize a state environmental regulation so severe that a particular land use would become commercially impracticable. However, the core activity

111. *Id.* at 231–32.

112. *Id.* at 237.

113. *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572 (1987).

114. *Id.* at 583.

described by each phrase is undoubtedly different. Land use planning in essence chooses particular uses for the land; environmental regulation, at its core, does not mandate particular uses of the land but requires only that, however the land is used, damage to the environment is kept within prescribed limits.¹¹⁵

There was no way to judge if the conditions to be imposed would conflict with any federal purpose, because this was a facial challenge to the Coastal Commission's authority. Under *Granite Rock*, the permitting requirement itself was not preempted, but individual actions under the authority potentially were.

Granite Rock appears to recognize the previous dichotomy that a state may regulate but not prohibit federally permitted activities, but also seems to be adding a distinction between land use planning and environmental regulation.¹¹⁶ However, because the case is based on readings of specific statutes and specific regulations, it is difficult to make generalizations. It also was a 5-4 decision, with strong dissents by Justices Scalia¹¹⁷ and Powell.¹¹⁸ Nevertheless, those desiring to develop public lands may care less about the theory of the law than about what practically happens to their proposals. Most often, federal employees, under principles of comity, seek the input of state and local officials before approving development.¹¹⁹ Only if these officials become overbearing will the federal government join developers in a preemption claim. The problems of regulation by multiple levels of government, however, may negatively impact on development through delay and increased costs.¹²⁰

115. *Id.* at 587.

116. Various commentators have written on the case. See, e.g., Theodore E. Worcester, *Land Use Planning and Regulation after Granite Rock: State and Local Control of Operations on Federal Lands*, 36 ROCKY MOUNTAIN L. INST. 19-1 (1990); John D. Leshy, *Granite Rock and the States' Influence Over Federal Land Use*, 18 ENVTL. L. 99 (1987); Eric T. Freyfogle, *Federal Lands and Local Communities*, 27 ARIZ. L. REV. 653 (1985).

117. *Granite Rock*, 480 U.S. at 607-614 (Scalia, J., dissenting) (arguing that the state regulation was directed to land use control rather than environmental regulation).

118. *Id.* at 604-06. (Powell, J., dissenting) (arguing that the state regulation creates a dual permit system which unacceptably intrudes on federal authority).

119. See Richard H. Cowart & Sally K. Fairfax, *Public Lands Federalism: Judicial Theory and Administrative Reality*, 15 ECOLOGY L.Q. 375, 408-39 (1988).

120. Parallel problems exist in the state system. For example, the Colorado Supreme Court found the state's Oil and Gas Conservation Act did not totally preempt regulation by home-rule cities and counties if such regulation does not conflict in operation with statewide interests. In *Board of Commissioners v. Bowen-Edwards Associates, Inc.*, 630 P.2d 1045, 1059 (Colo. 1992), the Court refused to find that the Oil and Gas Commission had exclusive jurisdiction over all aspects of oil and gas drilling. Under statutes empowering local governments to regulate land use and develop zoning

IV. WITHDRAWALS, RESERVATIONS, AND CLASSIFICATIONS

Initially, the “public domain” label was applied to all federally-owned lands that were acquired by treaty from other nations, including Native Americans, or ceded to the federal government by the thirteen original states.¹²¹ A secondary meaning, however, was that the “public domain” or “public lands” encompassed lands “subject to sale or other disposal under general laws.”¹²² As the Supreme Court phrased it, traditional public land laws were statutes “governing the alienation of public land.”¹²³ If the lands were open to these laws, individuals and states could deprive the federal government of the lands and resources by operation of such laws. As a result, either Congress or the executive periodically either “reserved” or “withdrew” lands.¹²⁴ From these actions came the diverse land management systems of modern public land management.

These two types of actions historically had different meanings. A “withdrawal” merely removed lands or resources from disposition, while a “reservation” committed the federal lands to a specific purpose. Although the difference may seem purely theoretical, “reserved” water rights might attach only to lands that have been “reserved,” and not to those withdrawn.¹²⁵ These rights arise when water is necessary to fulfill

for unincorporated territories, the county could require a permit for drilling, provided the conditions imposed do not conflict with the state’s interest. *Id.* at 1059–60. The case was remanded to create a record of the operational impact of the County’s regulation. *Id.* In a similar case, the Colorado Supreme Court upheld the authority of home-rule cities to consider the land use impacts of oil and gas drilling, but found that an outright ban on drilling within the city limits was preempted by the state’s need to regulate drillsite locations. *Voss v. Lundvall Bros.*, 830 P.2d 1061 (Colo. 1992).

121. *Cf.* *Barker v. Harvey*, 181 U.S. 481 (1900). This would contrast with acquired lands, which had been owned by private parties or the states. Disposition systems may differ for acquired lands. *See, e.g.*, Acquired Lands Act of 1947, 30 U.S.C.A. §§ 351–359 (West 1986 & Supp. 1993). For management under FLPMA, the distinction is abolished; “public lands” means “any land and interest in land owned by the United States . . . and administered by the . . . Bureau of Land Management, without regard to how the United States acquired ownership” except lands held for Native Americans and on the Outer Continental Shelf. 43 U.S.C.A. § 1702(e) (West 1986).

122. *Newhall v. Sanger*, 92 U.S. 761, 763 (1875).

123. *Udall v. Tallman*, 380 U.S. 1, 19 (1965). By 1934, most dispositions of land, as opposed to resources such as minerals, had slowed. *See* discussion *infra* at notes 148–51.

124. *See generally* COGGINS, *supra* note 23, Chapter 9; David H. Getches, *Managing the Public Lands: The Authority of the Executive to Withdraw Lands*, 22 NAT. RESOURCES J. 279 (1982); Charles F. Wheatley, Jr., *Withdrawals Under the Federal Land Policy Management Act of 1976*, 21 ARIZ. L. REV. 311 (1979).

125. *See generally* COGGINS, *supra* note 23, § 4.04.

the purposes for which lands have been set aside.¹²⁶ Because the rights have a priority dating to the time of the reservation even if the waters were not put to beneficial use at that date, they are important in states following the law of appropriation.

In addition to withdrawals and reservations, a third activity provided a final technique to zone the public domain. When an agency "classifies" lands, it assigns a particular tract of land to a specific function. Generally, specific statutes required classifications. The law governing these three tools falls into two eras: before and after the passage of FLPMA.

A. Pre-FLPMA Law: Specialized Areas, Withdrawals, and Classifications

Before the passage of FLPMA, the government made both reservations and withdrawals under various statutory and non-statutory authorities. Reservations, coupled with withdrawals, created some of our nation's diverse land management systems. In addition to Indian reservations¹²⁷ and military forts,¹²⁸ reservation authority created forest reserves and other specialized areas.

The history of most of these land systems show the influence of both congressional and executive action. National Forests were initially set aside under executive authority pursuant to the Forest Reserve Amendment of 1891.¹²⁹ Congress largely repealed this authority in 1907,¹³⁰ but not before the executive had reserved most of the lands currently in the National Forest.¹³¹ The National Wildlife Refuge System also began with executive action. In 1903, President Roosevelt declared

126. See *United States v. New Mexico*, 438 U.S. 696 (1978); *Arizona v. California*, 373 U.S. 546 (1963).

127. See *United States v. Midwest Oil Co.*, 236 U.S. 459, 470 (1915) (noting that prior to 1910, 99 executive orders established or enlarged Indian reservations).

128. Executive reservations were arguably made by the President as Commander in Chief of the military. U.S. CONST. art. II, § 2. In 1958, Congress placed limits on the implied authority of the executive to make withdrawals for military use. 43 U.S.C.A. §§ 155-158 (West 1986) (as amended).

129. The President could reserve "any part of the public lands wholly or in part covered with timber or undergrowth, whether of commercial value or not." Act of March 3, 1891 Ch. 561 § 24, 26 Stat. 1103, *repealed by* FLPMA, Pub. L. No. 94-579, Title VII § 704(a), 90 Stat. 2792 (1976).

130. Act of Mar. 4, 1907, ch. 2907, 34 Stat. 1271 (repealing authority in most of the western states).

131. See generally James L. Huffman, *A History of Forest Policy in the United States*, 8 ENVTL. L. 239 (1978).

that Pelican Island would be a Federal Bird Reservation.¹³² Congress also established refuges, as it did National Forests. In the case of National Parks, however, there was no dual authority. Congress, rather than the executive, made each reservation with special legislation establishing each park.¹³³

The executive could, however, initially reserve one component of the National Park System, specifically, National Monuments, under the Antiquities Act of 1906.¹³⁴ The Antiquities Act of 1906 enables the president:

[T]o declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated upon the lands owned or controlled by the Government . . . to be national monuments, and may reserve as a part thereof parcels of land, *the limits of which in all cases shall be confined to the smallest area compatible with the proper care and management of the objects to be protected.*¹³⁵

The wording of the Act does not accurately reflect its actual application. Although its drafters anticipated it would be used to protect Indian ruins in the southwest from plunder and vandalism, and its first use was to reserve the modest Devil's Tower National Monument in Wyoming, the executive has used the Antiquities Act to withdraw and reserve large areas such as Grand Canyon National Monument¹³⁶ and Jackson Hole National Monument.¹³⁷ Both these areas later became National Parks. Moreover, in 1978, President Carter used the Antiquities Act, which was not repealed by FLPMA, to protect 56 million acres in Alaska pending congressional action.¹³⁸ In interpreting what water rights were reserved for the benefit of monuments, however, some courts have hued more closely to this statute's wording than courts have in examining the appropriate size of monuments.¹³⁹

132. See COGGINS, *supra* note 23, § 2.03[2][c].

133. See, for example, the first such act, the Yellowstone Park Act of 1872, 17 Stat. 32 (codified at 16 U.S.C.A. § 21 (West 1992)).

134. 16 U.S.C.A. §§ 431–433 (West 1993).

135. *Id.* § 431 (emphasis added).

136. See *Cameron v. United States*, 252 U.S. 450, 455 (1920).

137. See *Wyoming v. Franke*, 58 F. Supp. 890, 894 (D. Wyo. 1945).

138. See *Anaconda Copper Co. v. Andrus*, 14 Env't Rep. Cas. (BNA) 1853 (D. Alaska 1980); *Alaska v. Carter*, 462 F. Supp. 1155 (D. Alaska 1978).

139. *United States v. City and County of Denver*, 656 P.2d 1, 27–29 (Colo. 1982) (noting that the Dinosaur National Monument's purpose was to preserve bones; it did not have the same recreational and aesthetic purposes as parks). National Monuments, however, are subject to management

In addition to exercising the express authority to reserve federal lands, the executive also withdrew federal lands. That is, it removed the lands from the operation of public land laws and the mining law. These withdrawals variously were or were not also designed to “reserve” federal lands for specific purposes. Theoretically, many of these withdrawals were to be temporary and the executive justified them as an aid to prospective congressional action. In one of the more celebrated withdrawals, President Taft in 1909 withdrew over three million acres in California and Wyoming classified as valuable for oil from all types of entry; he was concerned the lands would pass into private ownership and the United States would have to buy back the oil for the Navy. In *United States v. Midwest Oil Company*,¹⁴⁰ the Supreme Court upheld the withdrawal as part of the “implied” powers of the President existing when Congress has not acted under the Property Clause.

The Supreme Court in *Midwest Oil* reviewed prior presidential reservations for wildlife refuges and military forts, which were done without express congressional authority, as well as repeated withdrawals of lands. To the Court, the power to make reservations must include the lesser power to make a withdrawal.¹⁴¹ More importantly, Congress was aware of both types of actions and this knowledge bolstered executive authority: “[Congress’s] silence was acquiescence. Its acquiescence was equivalent to consent to continue the practice until the power was revoked by some subsequent action by Congress.”¹⁴²

Congress did directly respond to some of the concerns unrestrained access to the public domain engendered. For example, it addressed the problem that provoked President Taft’s withdrawal, namely the fear that oil could be the basis of a mining claim under the Mining Law of 1872 and pass into private ownership. Congress passed the Mineral Leasing Act of 1920,¹⁴³ which created a withdrawal of another sort. The Act “withdrew” oil, gas, and certain other minerals from disposition under the Mining Law and put them under the control of the executive through the leasing system.¹⁴⁴ Before passing the Mineral Leasing Act, Congress

pursuant to the Park Service Organic Act, which emphasizes recreation and preservation. See *infra* notes 271–74 and accompanying text.

140. 236 U.S. 459 (1915).

141. *Id.* at 476.

142. *Id.* at 481. Congress did act in FLPMA to repeal the inherent authority.

143. Mineral Leasing Act of 1920, ch. 86, 41 Stat. 451.

144. 30 U.S.C.A. § 193 (West 1986 & Supp. 1993).

also increased administrative control by giving the executive express authority for withdrawals in the 1910 Pickett Act,¹⁴⁵ which broadly referred to withdrawals and reservations of public lands for any “public purposes.”¹⁴⁶ Nevertheless, the Act had an important limitation: “All lands withdrawn under the provisions of this Act shall at all times be open to exploration, discovery, occupation, and purchase under, the mining laws of the United States, so far as the same apply to minerals other than coal, oil, gas, and phosphates”¹⁴⁷ Withdrawals under this act could not impact availability of land for hard rock mining for metalliferous minerals.

The Pickett Act, therefore, provided express authority for withdrawals. It also placed limits on such activities, however, which gave rise to the question of whether any implied authority remained under the *Midwest Oil* analysis. In 1941, after first concluding the opposite, the Attorney General issued an opinion stating that the President did retain implied authority in addition to the express statutory authority. Under the implied authority, withdrawals from the operation of the mining law were possible.¹⁴⁸ A federal district court agreed, relying not only on the Attorney General’s opinion but also on two additional factors.¹⁴⁹ First, Congress mentioned implied authority in the legislative history of an act dealing with military reservations. Additionally, Congress was aware of the withdrawal in question and thus “acquiesced” in the action.¹⁵⁰ Therefore, when FLPMA was passed, the President had both express and implied authority to reserve and withdraw public lands.¹⁵¹ Although the Pickett Act expressly authorized “temporary” withdrawals and was subsequently repealed, its terms are still important because withdrawals under it are still in existence.

145. Pickett Act of 1910, ch. 421, 36 Stat. 847–48, *repealed by* FLPMA, Pub. L. No. 94-579, Title VII § 704(a), 90 Stat. 2792 (1976).

146. *Id.* § 1.

147. *Id.* § 2.

148. 40 Op. Att’y Gen. 73 (1941).

149. *Portland Gen. Elec. Co. v. Kleppe*, 441 F. Supp. 859, 862 (D. Wyo. 1977).

150. *Id.*

151. Procedurally, the President delegated this authority to the Secretary of Interior in 1952. Withdrawals were then made by formal “Public Land Order” published in the Federal Register. *See* COGGINS, *supra* note 23, § 9.03[2][a]. This procedure distinguishes a withdrawal from less formal management decisions to refrain from engaging in certain resource activities. *Burglin v. Morton*, 527 F.2d 486, 488 (9th Cir. 1975), *cert. denied*, 425 U.S. 973 (1976) (withholding lands from mineral leasing is not a withdrawal but an exercise of discretion under the Mineral Leasing Act); *see also infra* note 163 (discussing cases considering whether a refusal to lease for oil and gas was a withdrawal of lands from the operation of the Mineral Leasing Act).

Withdrawals under the Pickett Act were to remain effective until revoked by the President or Congress.¹⁵²

In addition to land management through withdrawals and reservations, classifications had long been a part of public land law. The first classifications made determined whether lands were or were not “mineral in character;” nineteenth century land disposition acts often specified that only non-mineral land could be granted.¹⁵³ Therefore, the classifications affected land use.

Two twentieth century laws also granted classification powers. The Taylor Grazing Act of 1934¹⁵⁴ modified the prior focus of traditional public land law on dispositions. At one point the Act stated that its directions were to last “pending disposal” of the lands, but the Act nevertheless authorized withdrawal of the remaining unclaimed federal land. In managing the withdrawn lands,¹⁵⁵ the Secretary of Interior was to:

examine and classify lands . . . which are more valuable or suitable for the production of agricultural crops than for the production of native grasses and forage plants, or more valuable or suitable for any other use than for the use provided for under this subchapter, or proper for acquisition in satisfaction of any outstanding lieu, exchange or script [sic] rights or land grant, and to open such lands to entry, selection, or location for disposal in accordance with such classification under applicable public-land laws. . . .¹⁵⁶

These classifications did not impact the availability of land under the mineral laws, but the Secretary had broad authority to classify land for specific types of dispositions or to leave land unclassified. If the Secretary remained true to congressional purposes, courts would uphold discretionary calls.¹⁵⁷

152. Pickett Act of 1910, ch. 421, § 1, 37 Stat. 847, *repealed by* FLPMA, Pub. L. No. 94-579, Title VII § 702, 89 Stat. 2792 (1976).

153. *See, e.g.*, Act of June 21, 1866, ch. 227 § 1, 14 Stat. 67 (“Mineral lands shall not be liable to entry and settlement under the provisions of [the Homestead Acts].”), *repealed by* FLPMA, Pub. L. No. 94-579, Title VII § 702, 90 Stat. 2792 (1976). *See also* United States v. Sweet, 245 U.S. 563 (1918) (interpreting early state land grant laws to exclude mineral lands even if no express limitation exists).

154. 43 U.S.C.A. §§ 315–315o, 485, 1171 (West 1986) (as amended).

155. For ease of reference, these lands may be thought of as BLM lands, although the BLM was not actually in existence until 1946. *See infra* notes 190–96 and accompanying text.

156. 43 U.S.C.A. § 315f (West 1986).

157. *Andrus v. Utah*, 446 U.S. 500, 520 (1980) (upholding a regulation requiring lands not to be of “grossly disparate value” for classification as state in lieu land).

In 1964, Congress passed another act with broad impact, the Classification and Multiple Use Act.¹⁵⁸ Under it, the BLM lands were to be classified as suitable for several purposes. Although the BLM merely classified most lands as suitable for multiple use with no restrictions, many of the classification orders segregated lands from the operation of the mineral laws. FLPMA provides that all existing withdrawals, reservations, and classifications would remain in effect until modified under FLPMA procedures.¹⁵⁹ These orders have lingering effects as the BLM reviews and considers revoking them.

B. FLPMA Authorities: Consolidation and Review

In 1976, Congress passed organic legislation for the BLM that greatly modified the prior law of withdrawals, reservations, and classifications. First, it repealed prior law, including the implied powers granted by the *Midwest Oil* case.¹⁶⁰ Second, it removed the distinction between a withdrawal and a reservation by including both in the statutory definition of a “withdrawal.”¹⁶¹ Third, it mandated specific procedures for future withdrawals and required a review of existing withdrawals and classifications.

FLPMA delegates prospective withdrawal authority directly to the Secretary of Interior. Section 204¹⁶² provides detailed procedures, including public participation, to govern exercise of this authority.¹⁶³

158. 43 U.S.C.A. §§ 1411–1418 (West 1986) (expired 1970). The Act was to expire automatically when the Public Land Law Review Commission completed its report to Congress. See PUB. LAND LAW REVIEW COMM’N, *supra* note 1.

159. Pub. L. No. 94-579, Title VII § 701(c), 90 Stat. 2786 (1976). See *National Wildlife Fed’n v. Burford*, 835 F.2d 305, 308 (D.C. Cir. 1987), *dismissed for lack of standing, sub nom. Lujan v. National Wildlife Fed’n*, 497 U.S. 871 (1990).

160. Pub. L. No. 94-579, Title VII. § 704(a), 90 Stat. 2792 (1976) (“[T]he implied authority of the President to make withdrawals and reservations resulting from the acquiescence of the Congress (U.S. v. *Midwest Oil Co.* . . .) [is] repealed.”).

161. FLPMA states:

The term ‘withdrawal’ means withholding an area of Federal land from settlement, sale, location, or entry, under some or all of the general land laws, for the purpose of limiting activities under those laws in order to maintain other public values in the area or reserving the area for a particular public purpose or program; or transferring jurisdiction over an area of federal land . . . from one department, bureau, or agency to another department, bureau or agency.

43 U.S.C.A. § 1702(f) (West 1988).

162. Codified as 43 U.S.C.A. § 1714 (West 1986).

163. See generally COGGINS, *supra* note 23, § 9.03; Getches, *supra* note 124; Wheatley, *supra* note 124. Given this detail, a question then arises as to whether the BLM by inaction may make the

Congress has no oversight role for withdrawals of less than 5,000 acres. For withdrawals of more than this acreage, however, FLPMA requires the Secretary to submit the withdrawal to Congress, providing an opportunity for either house to veto the proposal.¹⁶⁴ The Supreme Court has found one-house vetoes violative of bicameralism and the Presentment Clause in other settings.¹⁶⁵ It is unclear whether or not this provision of FLPMA is subject to the same infirmity. Further, even if the submission provision is unconstitutional, it is a separate question whether the congressional veto provisions are severable from secretarial authority to make withdrawals of more than 5,000 acres. If the provisions are severable, the Secretary can make withdrawals without supervision; if not, the Secretary could make no withdrawals over 5,000 acres.¹⁶⁶

Another provision in FLPMA allows a congressional committee to direct the Secretary to make an emergency withdrawal.¹⁶⁷ This power may similarly run afoul of bicameralism, although a directive differs from a veto. Cases to date have not definitively answered whether the one committee power is unconstitutional.¹⁶⁸ Regardless of this issue, the Secretary does have independent power to make a withdrawal for up to three years of any amount of land in cases of emergency.¹⁶⁹ The

functional equivalent of a withdrawal. Two Wyoming district court cases said the failure to process oil and gas lease applications was a de facto withdrawal and invalid because it did not follow the FLPMA procedures. *Mountain States Legal Found. v. Andrus*, 499 F. Supp. 383 (D. Wyo. 1980); *Mountain States Legal Found. v. Hodel*, 668 F. Supp. 1466 (D. Wyo. 1987). This analysis has been rejected by the Ninth Circuit and commentators because the Secretary traditionally has great discretion on whether or not to lease. *Bob Marshall Alliance v. Hodel*, 852 F.2d 1223 (9th Cir. 1988), cert. denied, 489 U.S. 1066 (1989); see *Getches, supra* note 124, at 296; *COGGINS, supra* note 23, § 9.03[3][e][iii].

164. 43 U.S.C.A. § 1714(c)(1) (West 1986).

165. *Immigration and Naturalization Serv. v. Chadha*, 462 U.S. 919 (1983).

166. Compare Robert L. Glicksman, *Severability and Realignment of the Balance of Power Over Public Lands: The Federal Land Policy and Management Act of 1976 After the Legislative Veto Decisions*, 36 HASTINGS L.J. 4, 51 (1984) (arguing that the provision is severable if unconstitutional, but it may not be unconstitutional because of plenary power under the Property Clause) with *COGGINS, supra* note 23, § 9.03[3][e] (arguing that the veto provision is not severable because Congress in FLPMA intended to reassert control).

167. 43 U.S.C.A. § 1714(e) (West 1986).

168. *Pacific Legal Found. v. Watt*, 529 F. Supp. 982, 1004 (D. Mont. 1981) (holding congressional withdrawal directive not infirm because Secretary determines length of withdrawal); *National Wildlife Fed'n v. Watt*, 571 F. Supp. 1145 (D.D.C. 1983) (holding the withdrawal provision unconstitutional, but the Secretary is bound by the duly promulgated regulation stating that withdrawal would be made).

169. 43 U.S.C.A. § 1714(e).

Secretary has used this authority to withdraw millions of acres in Alaska.¹⁷⁰

In addition to delineating procedures for future withdrawals, Congress also required the BLM to review existing withdrawals in the western states that affected the availability of lands for mineral development.¹⁷¹ This review was to be completed by 1991.¹⁷² The statute envisioned “termination” of withdrawals and other orders that were no longer serving their purposes, and recommendations to continue others. Both were to be proceeded by reports to the President and Congress.¹⁷³ In order to avoid these lengthy procedures when existing restrictions thwarted management decisions, the BLM utilized another section of FLPMA, which provided for authority to “make, modify, extend or revoke withdrawals.”¹⁷⁴ If the examination of the current need for a withdrawal arose in the ordinary course of business and not as part of the general review, the BLM purported to “revoke” it rather than using the detailed procedures for “terminations.”¹⁷⁵ The National Wildlife Federation challenged this habit, as well as other aspects of the BLM’s opening of previously closed lands. In *National Wildlife Federation v. Burford*,¹⁷⁶ the court of appeals found that the BLM substantively violated the complex commands of FLPMA. Although the case was dismissed by the Supreme Court because the plaintiffs lacked standing, the lower court decision illuminates acceptable FLPMA process. The court considered the public participation and planning requirements to be serious limitations on agency action.

FLPMA does contain extensive provisions on withdrawals, but, in contrast, it does not give the BLM any authority to “classify” lands per se. The only reference to the term “classifications” is in the section dealing with land use planning:

170. See *Alaska v. Carter*, 462 F. Supp. 1155 (D. Alaska 1978).

171. 43 U.S.C.A. § 1714(l) (West 1986) (excepting congressional withdrawals and reservations).

172. Current estimates are for completion by 1998. PUBLIC LAND NEWS, April 16, 1992 at 5.

173. The statute also allows for congressional disapproval of a recommendation by concurrent resolution. 43 U.S.C.A. § 1714(l)(2).

174. 43 U.S.C.A. § 1714(a) (West 1986).

175. To a certain extent, Congress confirmed that the BLM should have some day-to-day ability to modify and revoke classifications as well as withdrawals. During the pendency of the litigation that culminated in *Lujan v. National Wildlife Federation*, Congress gave temporary authority for the BLM to modify, terminate, or revoke withdrawals and classifications that interfered with exchanges of lands. 43 U.S.C.A. § 1723 (West 1986 & Supp. 1993) (expired December 31, 1990).

176. 835 F.2d 305 (D.C. Cir. 1987), *dismissed for lack of standing, sub nom. Lujan v. National Wildlife Fed'n*, 497 U.S. 871 (1990).

Any classification of public lands or any land use plan in effect on October 21, 1976, is subject to review in the land use planning process . . . and all public lands, regardless of classification, are subject to inclusion in any land use plan developed pursuant to this section. The Secretary may modify or terminate any such classification consistent with such land use plans.¹⁷⁷

The BLM has modified and terminated classifications, however, outside the formal land use planning process.¹⁷⁸

Although the above excerpt is the only reference to classifications, FLPMA does address "management decisions."¹⁷⁹ Management decisions may implement land use plans and may exclude "principal or major uses" from BLM-managed public lands.¹⁸⁰ The BLM cannot close an area to the Mining Law of 1872 or transfer land to another agency, however, without a formal withdrawal.¹⁸¹ Moreover, exclusions of one or more of the "principal or major uses" for more than two years on a tract exceeding 100,000 acres must be reported to Congress.¹⁸² In practice, therefore, management decisions and land-use planning under FLPMA apparently supplant the formal classifications of prior laws.

In summary, FLPMA greatly consolidated prior withdrawal and reservation practice. Additionally, it required openness in the process. Further, FLPMA attempted to provide congressional oversight for major decisions, including both extensive withdrawals and exclusionary management decisions, which affect the availability of public lands for different purposes.

177. 43 U.S.C.A. § 1712(d) (West 1986).

178. See *National Wildlife Fed'n v. Burford*, 835 F.2d 305 (D.C. Cir. 1987), *dismissed for lack of standing, sub nom. Lujan v. National Wildlife Fed'n*, 497 U.S. 871 (1990); 43 U.S.C.A. § 1723 (West 1986 & Supp. 1993) (expired December 31, 1990).

179. 43 U.S.C.A. § 1712(e) (West 1986).

180. Principal or major uses are "domestic livestock grazing, fish and wildlife development and utilization, mineral exploration and production, rights-of-way, outdoor recreation, and timber production." 43 U.S.C.A. § 1702(l) (West 1986); compare this with the six purposes for which Forest Service lands are to be managed: outdoor recreation, range, timber, watershed, wildlife and fish, and wilderness. 16 U.S.C.A. § 1604(e)(1) (West 1985).

181. 43 U.S.C.A. § 1712(e)(3).

182. The familiar, and questionable, procedure for congressional disapproval by concurrent resolutions also appears. See *id.* § 1712(e)(2).

V. STATUTORY MANDATES FOR THE MAJOR LAND MANAGEMENT SYSTEMS

Diverse land systems are included in the broader definition of “public lands” with which this article began. Statutory guidance for management of these lands varies. Three types of governing statutes are possible. The first type is a single purpose statute that clearly points to one management result. For example, the Endangered Species Act, which applies to all land-managing agencies, forbids actions that are “likely to jeopardize” the continued existence of threatened or endangered species or to adversely modify their critical habitat.¹⁸³ The second type is a statute that lists various goals, and either imbues the agency with free discretion to choose among them or provides so many considerations that no effective guidance is given.¹⁸⁴ These statutes are often referred to as “thematic” statutes.¹⁸⁵ The final type is a statute that moderates between these two extremes. This type grants an agency discretion, but provides specific direction in case of conflict. When faced with competing values, the agency is to give one value greater consideration than other conflicting values. Congress has used all these types of statutes in the public land arena. As Section VI discusses, the dialogue in the public lands arena generally contrasts “multiple use” with “dominant use” mandates.

183. 16 U.S.C.A. § 1536(a)(2) (West 1985 & Supp. 1993). See *Tennessee Valley Auth. v. Hill*, 437 U.S. 153 (1978) (noting that Congress found species preservation outweighed other agency objectives). Exemptions are possible in limited circumstances. 16 U.S.C.A. § 1536(h) (West 1985 & Supp. 1993).

184. As Professor Stewart put it, there are two sources of discretion: Congress could freely “endow an agency with plenary responsibilities” and allow the agency full discretion, or it could “issue directives that are intended to control the agency’s choice among alternatives but that, because of their generality, ambiguity, or vagueness, do not clearly determine choices in particular cases.” Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1676 n.25 (1975).

185. Martin Shapiro, *Administrative Discretion: The Next Stage*, 92 YALE L.J. 1487, 1505–07 (1983) (describing such statutes as listing “considerations” but giving no weighing factors). See also James H. Henderson & Richard N. Pearson, *Implementing Federal Environmental Policies: The Limits of Aspirational Commands*, 78 COLUM. L. REV. 1429, 1430 (1978) (calling such statutes “aspirational”). These statutes differ from “agency-forcing” statutes, which direct policy in a certain direction but require an agency to use its expertise in a careful policy appraisal before the congressional initiative becomes a regulation and thus law. Bruce A. Ackerman & William T. Hassler, *Beyond the New Deal: Coal and the Clean Air Act*, 89 YALE L.J. 1466, 1556–66 (1980). An example of such a statute would be the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C.A. §§ 1201–1328 (West 1986 & Supp. 1993) (especially §§ 1258, 1260, and 1265).

A. BLM and the "Public Lands"

As noted above,¹⁸⁶ the BLM, an agency of the Department of Interior, manages that portion of the "public domain" which has not been reserved for other purposes.¹⁸⁷ Despite a general definition of ELM lands as those not reserved, the BLM or its predecessor may have withdrawn or reserved portions of these lands for specific management purposes. For example, the Stock-Raising Homestead Act of 1916 directed the Secretary to withdraw stock water holes and driveways under the Pickett Act.¹⁸⁸ Since 1976, the term "public lands" has been statutorily applied to all land and interests in lands the BLM manages.¹⁸⁹ The new terminology reflects the change in the BLM's duties over time, a change that corresponds with a revised appraisal of the resources it controls.

BLM's initial role arose from a merger between the General Land Office and the Grazing Service in 1946.¹⁹⁰ The BLM inherited these agencies' preexisting focuses. The General Land Office had been responsible for disposal of lands and resources under various homestead laws, state land grants, and mineral laws.¹⁹¹ The Grazing Service managed grazing districts under the Taylor Grazing Act of 1934 "pending disposal."¹⁹² The public often perceived the resulting agency as an implement for private enterprise to receive its "rightful share" of the public resources or lands.¹⁹³ Congress moderated this emphasis by

186. See *supra* note 4 and accompanying text.

187. See *Sierra Club v. Watt*, 659 F.2d 203 (D.C. Cir. 1981) (finding no implied water rights for BLM lands because they are the public domain and not reservations).

188. Stock-Raising Homestead Act, Pub. L. No. 290, ch. 9, § 10, 39 Stat. 865 (1916), *repealed by* FLPMA, Pub. L. No. 94-579, Title VII § 704(a), 90 Stat. 2792 (1976).

189. 43 U.S.C.A. § 1702(e) (West 1986). An earlier attempt to name the BLM-managed lands employed the title "national resource lands."

190. See George C. Coggins & Margaret Lindeberg-Johnson, *The Law of Public Rangeland Management II: The Commons and The Taylor Act*, 13 ENVTL. L. 1, 54-68 (1982).

191. The General Land Office did not always meet the congressional goals of these acts. See Sheldon L. Greene, *Promised Land: A Contemporary Critique of Distribution of Public Land by the United States*, 5 ECOLOGY L.Q. 707, 750-51 (1976) (arguing that predatory economic interests of large landholders and railroads perverted nineteenth century land laws from equitable distributive goals and distorted 20th century reclamation law).

192. 43 U.S.C.A. §§ 315-315r (West 1986). For a general review and indictment of the act as "an anachronistic subsidy," see Coggins & Lindeberg-Johnson, *supra* note 190; see also *NRDC v. Hodel*, 618 F. Supp. 848 (E.D. Cal. 1985).

193. For a summary of the major trends in statutory enactments, see George C. Coggins, *The Public Interest in Public Land Law: A Commentary on the Policies of Secretary Watt*, 4 PUB. LAND L. REV. 1, 9-10 (1983) (noting accurately that a stage existed between land disposal and land retention).

passing the Multiple Use and Surface Protection Act of 1955,¹⁹⁴ which addressed the impacts of mining, and the Classification and Multiple Use Act of 1964,¹⁹⁵ which directed the agency to manage and classify lands for different purposes. Nevertheless, the tenor of the BLM's mandate needed fundamental and not piecemeal revision for it to respond as a changing population made varying recreational and aesthetic demands on resources.¹⁹⁶

In 1976, FLPMA was Congress's attempt to establish the new status of the agency. Although grazing and mineral functions remain strong elements of its role,¹⁹⁷ the Act for the first time acknowledges that the BLM should do what its non-acronym title implies: it should be a land manager.¹⁹⁸ Planning became a central function. The first policy enunciated in the act emphasized this:

[T]he public lands [should] be retained in Federal ownership, unless as a result of land use planning procedure provided for in this Act, it is determined that the disposal of a particular parcel will serve the national interest.¹⁹⁹

Public lands were perhaps no longer being held "pending disposal," despite the fact that the Taylor Grazing Act provision remains on the books.

194. 30 U.S.C.A. §§ 611–615 (West 1986). See *infra*, notes 209–11 and accompanying text. For a general discussion of the increasing control of mining, see also California Coastal Commission v. Granite Rock, 480 U.S. 572 (1987) and James N. Barkeley and Lawrence V. Albert, *A Survey of Case Law Interpreting "Valid Existing Rights" - Implications for Unpatented Mining Claims*, 34 ROCKY MTN. MIN. L. INST. 9–13 to 9–20 (1988) (noting that statutes caused a change in property status of mining claims).

195. Pub. L. No. 88–607, §§ 1–8, 78 Stat. 986–88 (1964) (codified at 43 U.S.C.A. §§ 1411–1418 (West 1986 & Supp. 1993), expired in 1970 pursuant to 43 U.S.C.A. § 1418 (West 1986)).

196. Marion Clawson, *The Federal Land Policy and Management Act of 1976 in a Broad Historical Perspective*, 21 ARIZ. L. REV. 585, 595 (1979) (describing FLPMA's origins in demographic, economic, social, and political trends that brought a "larger total population, including more older persons in retirement and more younger persons physically and ideologically active . . ."). For criticisms identifying past and present problems as underfunding, political pressure, and conflicting demands, see George C. Coggins et al., *The Law of Public Rangeland Management I: The Extent and Distribution of Federal Power*, 12 ENVTL. L. 535, 564 (1982), and Fairfax, *supra* note 65, at 973.

197. See, e.g., Title IV codified at 43 U.S.C.A. §§ 1751–1753, 315b and 315j (West 1986) (grazing amendments); 43 U.S.C.A. § 1701(a)(12) (West 1986) (manage to promote food and mineral production); 43 U.S.C.A. § 1702(l) (West 1986) (major or principal uses include domestic livestock grazing and mineral exploration and production). See also Public Rangelands Improvement Act, 43 U.S.C.A. §§ 1901–1908 (West 1986).

198. Cf. NRDC v. Hodel, 618 F. Supp. 848 (E.D. Cal. 1985) (ruling that BLM may not abdicate responsibility to set permit terms).

199. 43 U.S.C.A. § 1701(a)(1) (West 1988).

FLPMA embodies a truce in the battle to control the public lands.²⁰⁰ The truce was possible because FLPMA directed the BLM to consider disparate values in furthering the “national interest” without demanding a specific result. Congress did not order the BLM to favor resource use or non-use.²⁰¹ Some, however, have identified a spirit of environmental protection throughout the Act.²⁰² Others argue the Act should not be viewed as placing environmental protection over other aims.²⁰³

The diversity of views is fueled by both FLPMA’s lack of an overriding management goal, and the fact that other acts are operative upon the public lands. FLPMA identifies the principal or major uses of the BLM lands as “domestic livestock grazing, fish and wildlife development and utilization, mineral exploration and production, rights-of-way, outdoor recreation, and timber production.”²⁰⁴ While some of these uses are regulated under FLPMA,²⁰⁵ some are also subject to independent statutes.

200. Clawson, *supra* note 196 (temporary lull in debates); Raymond A. Peck, Jr., “*And Then There Were None*” *Evolving Federal Restraints on the Availability of Public Lands for Mineral Development*, 25 ROCKY MTN. MIN. L. INST. 3-2, 3-14 (1979) (noting the debate between developing or preserving and who should decide pre-dated Constitution).

201. See Marla E. Mansfield, *The “Public” in Public Land Appeals: A Case Study in “Reformed” Administrative Law and Proposal for Orderly Participation*, 12 HARV. ENVTL. L. REV. 465, 490–94 (1988); John A. Carver, *Federal Land Policy and Management Act of 1976: Fruition or Frustration*, 54 DENV. L.J. 387, 408–09 (1977) (arguing that FLPMA’s vagueness in land use planning procedures does not carry out goal of increasing congressional control of land management); Jerome C. Muys, *The Public Land Law Review Commission’s Impact on the Federal Land Policy and Management Act of 1976*, 21 ARIZ. L. REV. 301, 306–07 (1979) (concluding that FLPMA conferred more discretion than recommended and did not adopt dominant use principles of PLLRC).

202. *Sierra Club v. Andrus*, 487 F. Supp. 443 (D.D.C. 1980) *aff’d on other grounds sub nom. Sierra Club v. Watt*, 659 F.2d 203 (D.C. Cir. 1981) (explaining that environmental goals in policy section provide direction and duty to agency but means to goal discretionary); *NRDC v. Hodel*, 618 F. Supp. at 857–58 (implying that FLPMA gives environmental tinge to range duties). For commentators emphasizing environmental mandate, see, e.g., Perry L. Hagenstein, *Public Lands and Environmental Concerns*, 21 ARIZ. L. REV. 449, 451 (1979), and George C. Coggins, *The Law of Public Rangeland Management IV: FLPMA, PRIA, and The Multiple Use Mandate*, 14 ENVTL. L. 1, 26–32 (1983).

203. Peck, *supra* note 200, at 3-13 (arguing that limiting development is counter to “national policies and statutory mandates”); William R. Marsh & Don H. Sherwood, *Metamorphosis in Mining Law: Federal Legislative and Regulatory Amendment and Supplementation of the General Mining Law Since 1955*, 26 ROCKY MTN. MIN. L. INST. 209, 250–72 (1980) (concluding that despite some conflicts, Congress required mineral independence).

204. 43 U.S.C.A. § 1702(l) (West 1986). Under the concept of multiple use management, however, other uses may be considered. See *infra* notes 356–57 and accompanying text.

205. See, e.g., Title V of FLPMA, which governs rights-of-way, 43 U.S.C.A. § 1761–1771 (West 1986). FLPMA also governs sales and exchanges of public lands and planning and administration.

Several laws govern mineral development and exploration. Hardrock minerals are obtained under the Mining Law of 1872.²⁰⁶ Rights under this Act are primarily self-initiated: Lands are “free and open to exploration and purchase.”²⁰⁷ If a private person “discovered” a “valuable mineral deposit,” a claim could be “located” and worked without further ado or, at the claimant’s option, “patent” or fee title sought.²⁰⁸ Despite this statutory regime, the Multiple Surface Use Act of 1955²⁰⁹ directs the BLM to manage non-mineral resources within the boundaries of an unpatented mining claim. Although mining would still be the primary use of the claim, the claimant’s exclusive rights of possession ended.²¹⁰ Additionally, the miner must use reasonable means of production or face an injunction; unnecessary destruction of surface resources impedes the BLM’s directive to manage the same.²¹¹ FLPMA directly amended the Mining Law by expressly subjecting mining claims to its command that “[i]n managing the public lands, the Secretary shall, by regulation or otherwise, take any action necessary to prevent

206. 30 U.S.C.A. §§ 21–42 (West 1986).

207. *Id.* § 22. Acquired lands, however, are not open for mineral entry unless expressly made so. See generally David P. Kimball III, *Impact of BLM Surface Management Regulations on Exploration and Mining Operations*, 28 ROCKY MTN. MIN. L. INST. 509, 510–12 (1983). See also H. Byron Mock, *Mining Law Trends*, 54 DENV. L.J. 567, 577 (1977) (arguing that self-initiation is necessary to protect the public interest). For criticisms, see JOHN D. LESHY, *THE MINING LAW: A STUDY IN PERPETUAL MOTION* (1987).

208. 30 U.S.C.A. §§ 29, 35–38 (West 1986). To be valid, minerals must be found in sufficient kind and quantity so that a reasonably prudent person would be justified in expending time and money with the reasonable prospect of developing a paying mine. *Castle v. Womble*, 19 Pub. Lands Dec. 455 (1896). A refinement of this test requires the minerals be marketable at a profit. *U.S. v. Coleman*, 390 U.S. 599 (1968).

209. 30 U.S.C.A. §§ 611–615 (West 1986). See also 30 U.S.C.A. § 601 (West 1986). One court applied the Act to pre-existing claims because the Mining Law of 1872 impliedly limited uses to those reasonably necessary to mining. *United States v. Langley*, 587 F. Supp. 1258, 1262–63 (E.D. Cal. 1984). See generally Kimball, *supra* note 207, at 512–13; John C. Miller, *Surface Use Rights Under the General Mining Law: Good Faith and Common Sense*, 28 ROCKY MTN. MIN. L. INST. 761, 781–88 (1988).

210. *Silbrico Corp. v. Ortiz*, 878 F.2d 333, 337 (10th Cir. 1989) (concluding miner could not complain if other uses do not interfere with mining); *United States v. Fahey*, 769 F.2d 829, 837 (1st Cir. 1985) (holding miner has no expectation of privacy on mining claim); *United States v. Curtis-Nevada Mines, Inc.*, 611 F.2d 1277 (9th Cir. 1980) (finding uses must accommodate each other if possible).

211. *United States v. Richardson*, 599 F.2d 290 (9th Cir. 1979), *cert. denied*, 444 U.S. 1014 (1980); *Converse v. Udall*, 399 F.2d 616 (9th Cir. 1968), *cert. denied*, 393 U.S. 1025 (1969). *But see* Marsh & Sherwood, *supra* note 203, at 224–29 (arguing that the right to manage vegetative and other resources does not include the right to manage mineral deposits nor transform rights of miner and BLM into correlative ones); Miller, *supra* note 209, at 787 (claiming that *Richardson* wrongly cited “abuse” cases concerned with non-mining uses of lands).

unnecessary or undue degradation of the public lands.”²¹² This provision delegates express authority to the BLM to regulate mining that occurs under the auspices of the Mining Law of 1972.²¹³

Statutes other than the Mining Law of 1872 apply to minerals other than hardrock. Congress removed common varieties of minerals from the operation of the mining law²¹⁴ and subjected them to sale provisions.²¹⁵ Earlier, the Mineral Lands Leasing Act of 1920 modified the Mining Law of 1872 so that patents would not be available for certain minerals, commonly referred to as the fuel and fertilizer minerals.²¹⁶ A leasing regime gave the Secretary greater control and discretion over development of these minerals. Although some of the impetus for the 1920 Act was a desire to protect producers and prevent overproduction, the Secretary’s discretion included the right to protect non-mineral, as well as mineral, values of the lands.²¹⁷ Recent amendments to the Act underscore this concern: “[T]he Secretary of the Interior, or for National Forest lands, the Secretary of Agriculture, shall regulate all surface-disturbing activities conducted pursuant to any lease . . . and shall determine reclamation and other actions as required in the interest of conservation of surface resources.”²¹⁸

212. 43 U.S.C.A. § 1732(c) (West 1986). The other three amendments to the Mining Law were: 1) section 314, requiring registration of claims with the BLM; 2) section 603, directing wilderness reviews; and 3) subsection (f) of section 601, creating the California Desert Conservation Area. *Id.*

213. This ended debate on whether prior law authorized active management. See provisions that arguably grant authority, 30 U.S.C.A. § 22 (West 1986) (minerals and lands containing them are “open to exploration, occupation and purchase” “under regulations prescribed by law”); 43 U.S.C.A. § 1201 (West 1986) (granting the Secretary power to enforce management of public lands by “appropriate regulations”). Compare *Bales v. Ruch*, 522 F. Supp. 150 (E.D. Cal. 1981) (concluding that the Mining Law authorized regulation) with *Miller*, *supra* note 209, at 789–90 (arguing that the Mining Law only invited future statutes to authorize regulation). Regulations for unpatented mining claims currently are found at 43 C.F.R. § 3802 (1992) (applying to claims within Wilderness Study Areas) and 43 C.F.R. § 3809 (1992) (applying claims outside of Wilderness Study Areas).

214. 30 U.S.C.A. § 611 (West 1986).

215. 30 U.S.C.A. §§ 601–604 (West 1986).

216. 30 U.S.C.A. §§ 181–287 (West 1986 & Supp. 1993). Leasing replaced patenting for the nonmetalliferous fuel minerals (oil, gas, oil shale, coal, native asphalt and bituminous rock) and the fertilizer and chemical minerals (phosphate, potash, and sodium). To coordinate leasing and patenting authorities required the Multiple Mineral Development Act of 1954, 30 U.S.C.A. §§ 521–531 (West 1986 & Supp. 1993).

217. *Boesche v. Udall*, 373 U.S. 472, 480–83 (1963). See generally *Mansfield*, *supra* note 104, at 92–98 (discussing the government’s ability to consider environmental concerns both before and after exercising its discretion to grant leases).

218. 30 U.S.C.A. § 226(g) (West 1986 & Supp. 1993), as amended by the Federal Onshore Oil and Gas Leasing Reform Act of 1987, Title V of Pub. L. No. 100-203.

Special statutes also address renewable resources directly. The Taylor Grazing Act²¹⁹ and the Public Rangelands Improvement Act²²⁰ provide authority additional to FLPMA's for forage management.²²¹ The Common Varieties Act²²² governs not only mineral material sales, but applies to vegetative materials, including "yucca, manzanita, mesquite, cactus, and timber or other forest products."²²³ Additionally, certain lands managed by the BLM, the Coos Bay lands and the revested "O & C" lands, which returned to federal ownership under the terms of the grant to the Oregon and California Railroad, are especially managed for timber production and the secondary goal of recreation.²²⁴

As this recitation of authorities shows, the BLM is not a single purpose agency, although courts have occasionally declared a particular land management statute to have a singular purpose.²²⁵ The BLM's organic statute, FLPMA, itself appears "internally inconsistent, reflecting different concerns of environmentalists, miners, and ranchers."²²⁶ Among Congress's commands in FLPMA are schizophrenic directives to both encourage mining and preserve land in its natural condition. To some extent, the psychological trauma may fade by taking a broader view. As one judge put it: "Some lands can be preserved, while others, more appropriately, can be mined."²²⁷ Nevertheless, BLM decisions regarding public lands are polycentric and made with multiple criteria and no overriding substantive guide post.²²⁸ Only in areas dedicated to particular management regimes is this dilemma lessened.²²⁹

219. 43 U.S.C.A. §§ 315–315r (West 1986).

220. 43 U.S.C.A. §§ 1901–1908 (West 1986).

221. 43 U.S.C.A. §§ 1751–1753 (West 1986). *See generally* COGGINS, *supra* note 23, § 19.03.

222. Pub. L. No. 167, ch. 375, 69 Stat. 367-73 (1955).

223. 30 U.S.C.A. § 601 (West 1986).

224. O & C Act of 1937, 43 U.S.C.A. §§ 1181a–1181j (West 1986). *See* *Headwaters Inc. v. Bureau of Land Management*, 914 F.2d 1174, 1183–84 (9th Cir. 1990); 43 C.F.R. § 3821 (1992) (listing special rules for mining claims).

225. *See, e.g., Fallini v. Hodel*, 725 F. Supp. 1113, 1117–18 (D. Nev. 1989) (primary intent of grazing statutes is to protect livestock).

226. *Utah v. Andrus*, 486 F. Supp. 995, 1002 (D. Utah 1979).

227. *Id.* at 1003. *See* *Coggins*, *supra* note 202, at 10 (noting that courts ignore proviso about policies needing statutory enactment and treat them as binding).

228. *See* *Mansfield*, *supra* note 201, at 498–499. FLPMA does require "consideration" of diverse values and other procedural steps, which may indirectly moderate BLM activity. *Id.* at 494–95.

229. *See infra* part V.E.

B. The National Forests

The Forest Service, an agency of the Department of Agriculture, manages National Forests. National Forests were created primarily by being “reserved” from the public domain.²³⁰ Initially, the functions of National Forests were clear; they were for “improv[ing] and protect[ing] the forest within the boundaries, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber.”²³¹ The Supreme Court in *United States v. New Mexico*²³² interpreted these words from the Organic Administration Act of 1897²³³ to establish only two purposes: watershed protection and timber production. “Protection” of the forests, arguably a distinct third function, was only operative in regard to the watershed and timber purposes.²³⁴ Nevertheless, legislation since the original Organic Administration Act of 1897 has increased the management mandates for the National Forests,²³⁵ and many of the mineral laws applicable on BLM lands also operate in National Forests. Therefore, despite the original limits of the Organic Act, the National Forests do not necessarily have a more regimented purpose than the BLM public lands.

The National Forests have always supported more uses than just timber production and watershed protection. The forests are open to location under the Mining Law of 1872, with regulatory authority split between the Department of Interior and the Forest Service. The BLM administers the Mining Law itself,²³⁶ but the Forest Service regulates the surface impacts of mining. Forest Service regulations reveal a

230. See *supra* notes 129–130 and accompanying text. Under the Weeks Forestry Act of 1911, as amended, land could also be acquired for forests, which explains the presence of National Forests in the eastern states. 16 U.S.C.A. § 515 (West 1985). Because the act allowed grantors to reserve minerals in conveyances to the United States, litigation on who owns what resources is fairly common. See, e.g., *Downstate Stone Co. v. United States*, 712 F.2d 121 (7th Cir. 1983) (holding that the right to quarry limestone is not reserved in mineral rights reservation).

231. 16 U.S.C.A. § 475 (West 1985).

232. 438 U.S. 696 (1978).

233. 16 U.S.C.A. §§ 473–482 (West 1985 & Supp. 1993).

234. *United States v. New Mexico*, 438 U.S. 696, 707 n.14 (1978). National Forests therefore have water rights commensurate with the purposes of the initial reservations and not for recreation or wildlife protection. *Id.* See also, *United States v. Jesse*, 744 P.2d 491 (Colo. 1987) (recognizing water rights for watershed protection). For general information on reserved water rights, see COGGINS, *supra* note 23, § 4.04[4].

235. The Supreme Court noted that no one argued that the later enactments created new reserved rights with later priority dates. *United States v. New Mexico*, 438 U.S. at 713 n.21.

236. The 1905 Act transferring jurisdiction of National Forests to the Department of Agriculture specified that Interior would retain this authority. 16 U.S.C.A. § 472 (West 1985).

fundamental compromise: miners have “a statutory right to enter upon the public lands to search for minerals, [but operations] shall be conducted so as to minimize adverse environmental impacts on National Forest System surface resources.”²³⁷ These regulations do not allow the government to forbid mining, but simply to tailor it.²³⁸ This comports with the Forest Service Organic Act, which forbids action that “would prohibit any person from entering upon such national forests for all proper and lawful purposes, including that of prospecting, locating, and developing the mineral resources thereof.”²³⁹ National Forests are also open to leasing under the Mineral Leasing Act, which requires the Forest Service’s consent to a lease, and gives the Forest Service control over surface disturbing activities.²⁴⁰

The Forest Service authorized other uses in National Forests with less formal congressional authority than that contained in the mineral statutes. The 1897 Organic Act gave the Forest Service general authority to make rules and regulations governing occupancy and use of the forests.²⁴¹ Pursuant to this grant, the Forest Service regulated grazing through a permit system.²⁴² Another use, outdoor recreation, was fostered pursuant to permits for recreational facilities²⁴³ and by administrative action. An example of the latter was the Forest Service’s designation of certain areas as “wild,” “canoe,” or “wilderness,” for which the Forest Service

237. 36 C.F.R. § 228.1 (1991). The regulation further states that its purposes do not include management of mineral resources.

238. *Skaw v. United States*, 740 F.2d 932, 941 (Fed. Cir. 1984) (holding that the Forest Service may not “prohibit . . . possession and enjoyment of . . . claims, or to encroach impermissibly upon those rights by circumscribing their use” too strictly); *United States v. Weiss*, 642 F.2d 296 (9th Cir. 1981) (holding that the regulations are authorized to minimize harm, not to interfere with mining). See generally Charles F. Wilkinson & H. Michael Anderson, *Land and Resource Planning in the National Forests*, 64 OR L. REV. 1, 254–61 (1985).

239. 16 U.S.C.A. § 478 (1985); see also *Weiss*, 642 F.2d at 299 (finding mining to be a favored use of forests but miners must attempt to coexist with other uses of forests).

240. 30 U.S.C.A. § 226(h) (West 1986 & Supp. 1993) (containing requirement for lands reserved from the public domain). See also 30 U.S.C.A. § 352 (West 1986) (generally requiring consent for leases on acquired lands). For the division of authority prior to the Federal Onshore Oil and Gas Leasing Reform Act of 1987, see Mansfield, *supra* note 101, at 91.

241. 16 U.S.C.A. § 551 (West 1985 & Supp. 1993).

242. *Light v. United States*, 220 U.S. 523 (1911). The first statute in the area was passed in 1950. 16 U.S.C.A. §§ 580k–580l (West 1985) (setting up advisory boards and authorizing permitting). See generally COGGINS, *supra* note 23, § 19.04.

243. 16 U.S.C.A. § 497 (West 1985 & Supp. 1993).

required special management.²⁴⁴ Congress, however, did not formally change the general statutory mandate of the National Forests until 1960.

In that year, the Multiple-Use, Sustained-Yield Act of 1960 was enacted.²⁴⁵ This Act supplemented the purposes for which National Forests would be managed:

[T]he national forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes. The purposes of . . . this title are declared to be supplemental to, but not in derogation of, the purposes for which the national forests were established as set out in . . . [the Organic Administration Act of 1897].²⁴⁶

Some courts have read the act as giving range, recreation, and wildlife "equal footing" with timber and watershed protection.²⁴⁷ The Supreme Court, however, inferred that these additional purposes were "secondary"²⁴⁸ and other courts have adopted this interpretation.²⁴⁹

The significance attached to timber production is reflected in Congress's reaction to the so-called *Monongahela* decision,²⁵⁰ which involved clear-cutting.²⁵¹ Environmentalists alleged, and the court agreed, that implementing clear-cutting exceeded the power granted by the Organic Administration Act of 1897, which authorized the Forest Service to sell only "dead, matured or large growth of trees,"²⁵² and,

244. See Section 3 of the Wilderness Act of 1964, 16 U.S.C.A. § 1132 (1988) (designating areas so classified as wilderness).

245. 16 U.S.C.A. §§ 528-531 (West 1985).

246. *Id.* § 528.

247. *Intermountain Forest Industry Ass'n v. Lyng*, 683 F. Supp. 1330 (D. Wyo. 1988). The Forest Service supposedly prefixed "outdoor" to "recreation" to show its importance despite the fact that the listing order was substantively unimportant; listing was in alphabetical order. *COGGINS ET AL.*, *supra* note 11, at 610.

248. *United States v. New Mexico*, 438 U.S. 696, 715 (1978).

249. *Sierra Club v. Hardin*, 325 F. Supp. 99 (D. Alaska 1971), *reversed on other grounds sub nom. Sierra Club v. Butz*, 3 Env'tl. L. Rep. (Env'tl. L. Inst.) 20293 (9th Cir. 1973) (holding that the Forest Service must give "due," but not "equal" consideration to each resource); *National Wildlife Fed'n v. United States Forest Service*, 592 F. Supp. 931 (D. Or. 1984) (concluding that equal consideration is not required), *appeal dismissed*, 801 F.2d 360 (9th Cir. 1986); *O'Neal v. United States*, 814 F.2d 1285 (9th Cir. 1987) (timber is primary purpose and recreation is secondary).

250. *West Virginia Division of Izaak Walton League v. Butz*, 522 F.2d 945 (4th Cir. 1975) [hereinafter *Izaak Walton League*].

251. For background on the pros and cons of clearcutting, see *COGGINS ET AL.*, *supra* note 11, at 620-24.

252. 16 U.S.C.A. § 476 (West 1985) (before amendment and repeal by the National Forest Management Act of 1976); *Izaak Walton League*, 522 F.2d at 947-48.

further, violated the requirement that timber be “marked and designated” before being sold.²⁵³ One year later, in the National Forest Management Act of 1976 (NFMA),²⁵⁴ Congress removed these restrictions. The NFMA, however, was not totally skewed towards timber development. It mandated various silviculture standards²⁵⁵ and extensive planning for the forests.²⁵⁶ Additionally, most federal timber contracts, either by express contract terms or extant regulations, allow the Forest Service to cancel or modify such contracts to prevent environmental harm.²⁵⁷

One additional and highly visible use of National Forests is for ski areas. Initially, two authorities licensed this use. The Forest Service granted permits for the base facilities pursuant to a 1915 act governing recreational permits, amended in 1956,²⁵⁸ which limited grants to eighty acres. The runs and other areas were authorized by revocable permits under the authority of the basic Organic Act.²⁵⁹ The National Forest Ski Area Act of 1986²⁶⁰ increased the acreage available for such permits, but directed an increased supervisory role for the Forest Service, and required operators to pay fair market fees for the right to use the land. These provisions recognized that the intensive use which results from ski areas often creates conflicts with wildlife and other forest values.²⁶¹

The National Forests are subject to disparate uses and competing interests. Statutes seemingly limit the uses to seven,²⁶² and of those, the

253. 16 U.S.C.A. § 476 (West 1985); *Izaak Walton League*, 522 F.2d at 947–48.

254. 16 U.S.C.A. §§ 1600–1614 (West 1985 & Supp. 1993).

255. *E.g.*, *id.* §§ 1604(g)(3)(E)–(F). See *National Wildlife Fed’n v. United States Forest Service*, 592 F. Supp. 931, 937 (D. Or. 1984), *appeal dismissed*, 801 F.2d 360 (9th Cir. 1986) (holding that NFMA standards are binding).

256. See generally *Symposium on Federal Forest Law and Policy*, 17 ENVTL. L. 429 (1987). An earlier planning statute, which also considered budgeting problems, was the Forest and Rangeland Renewable Resources Planning Act of 1974. 16 U.S.C.A. §§ 1601–1613 (West 1985 & Supp. 1993). See *National Wildlife Fed’n v. United States*, 626 F.2d 917 (D.C. Cir. 1980). Other problems of the timber industry, such as the impact of falling prices on existing contracts, were separately addressed. Federal Timber Contract Payment Modification Act of 1984, 16 U.S.C.A. § 618 (West 1985) (authorizing buy-outs of contracts bid before January 1, 1982).

257. *Stone Forest Indus., Inc. v. United States*, 22 Cl. Ct. 489 (1991); *Louisiana Pac. Corp. v. United States*, 15 Cl. Ct. 413 (1988).

258. 16 U.S.C.A. § 497 (West 1985).

259. See *Sierra Club v. Hickel*, 433 F.2d 24, 34–35 (9th Cir. 1970).

260. 16 U.S.C.A. § 497b (West 1985 & Supp. 1993).

261. For examples of these conflicts see *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332 (1989).

262. Outdoor recreation, range, timber, watershed, and wildlife and fish purposes. 16 U.S.C.A. § 528 (West 1985). NFMA adds wilderness to the list. *Id.* § 1604(e)(1) (West 1985). Mineral uses are the responsibility of the Department of Interior.

Forest Service has traditionally favored timber management.²⁶³ Nevertheless, Forest Service statutory mandates do not dictate specific uses for any particular tracts of Forest Service land unless a tract is included in a specialized management regime.²⁶⁴

C. *The National Parks*

The National Parks are managed by the National Park Service, which is an agency of the Department of Interior. The Park Service also administers National Monuments,²⁶⁵ National Recreation Areas,²⁶⁶ and other types of properties.²⁶⁷ Each National Park, as is true with most components of the National Park system,²⁶⁸ has its own authorizing statute that determines the resource uses permitted in that area. Therefore, the sources of law applicable to National Parks are varied. Nevertheless, there is a general organic statute for the National Park Service and other generic environmental legislation may be applicable.²⁶⁹ Both forms of authority will apply in all units in the system unless a specific governing statute conflicts.

The National Park Service Organic Act was passed in 1916.²⁷⁰ Unlike the BLM and Forest Service mandates, this legislation gives the Park Service a more focused vision:

[T]he fundamental purpose of the said parks . . . is to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and

263. See Randal O'Toole, *Recreation Fees and the Yellowstone Forests*, in *THE GREATER YELLOWSTONE ECOSYSTEM: REDEFINING AMERICA'S WILDERNESS HERITAGE* 41, 42 (Robert B. Keiter & Mark S. Boyce eds., 1991) (arguing that economic incentives skewed toward timber production because Forest Service retains some timber revenues).

264. See *infra* part V.E.

265. See *supra* notes 134–39 and accompanying text.

266. See 16 U.S.C.A. §§ 460n–460ss (West 1993 & Supp. 1993).

267. These include national seashores and urban parks. The National Park System encompasses 80 million acres in 338 areas in 49 states. There are 49 National Parks. See COGGINS, *supra* note 23, § 2.03[2][a].

268. "National Park System" is defined as "any area of land and water now or hereafter administered by the Secretary of Interior through the National Park Service for park, monument, historic, parkway, recreational or other purposes." 16 U.S.C.A. § 1c(a) (West 1992).

269. See National Environmental Policy Act, 42 U.S.C.A. §§ 4321–4370(c) (West 1977 & Supp. 1993); Endangered Species Act, 16 U.S.C.A. §§ 1531–1544 (West 1985 & Supp. 1993).

270. 16 U.S.C.A. §§ 1–4, 22, 43 (West 1992 & Supp. 1993).

by such means as will leave them unimpaired for the enjoyment of future generations.²⁷¹

These purposes justify reserving water for wildlife, aesthetic, and recreational purposes, in contrast to the scope of the functions of the National Forests.²⁷² Nevertheless, disagreements and tensions may arise in interpreting management prerogatives because the Organic Act apparently requires the Park Service to both “preserve” parks unimpaired and to provide for their use and enjoyment by the public.²⁷³

This conflict manifests itself in several settings. One is the controversy over fire control policies. While fire is a natural component of the ecosystem, it may threaten established facilities and therefore require control. Such control runs counter to the non-intervention perspective.²⁷⁴ Conflicts less dramatic, but equally important, may occur between people’s desire to visit National Parks that provide amenities and the desire for pure preservation in the National Parks.²⁷⁵

Often, conveniences are provided. In order to do so, the National Park Service may itself develop facilities such as campgrounds²⁷⁶ and roads.²⁷⁷ It also contracts with “concessionaires” to provide additional services.²⁷⁸ Standards for concession contracts reflect the fundamental Park Service

271. *Id.* § 1.

272. Compare *United States v. City and County of Denver*, 656 P.2d 1, 30 (Colo. 1982) (holding that National Parks have recreational and aesthetic purposes beyond those of National Forests) with *United States v. New Mexico*, 438 U.S. 696, 708–10 (1978) (holding that National Forests have no reserved water rights for such purposes).

273. See generally John Lemons & Dean Stout, *A Reinterpretation of National Park Legislation*, 15 ENVTL. L. 41 (1984) (arguing that the traditional view emphasizes conflict but concludes that basic fiduciary duty is preservation); William A. Shutkin, Note, *The National Park Act Revisited*, 10 VA. ENVTL. L.J. 345 (1991) (arguing that the intent was to subordinate utilitarian uses to preservation).

274. See generally Dennis H. Knight, *The Yellowstone Fire Controversy*, in *THE GREATER YELLOWSTONE ECOSYSTEM: REDEFINING AMERICA’S WILDERNESS HERITAGE* 87 (Robert B. Keiter & Mark S. Boyce, eds., 1991).

275. See generally JOSEPH L. SAX, *MOUNTAINS WITHOUT HANDRAILS: REFLECTIONS ON THE NATIONAL PARKS* (1980); Joseph L. Sax, *Fashioning a Recreation Policy for Our National Parklands: The Philosophy of Choice and the Choice of Philosophy*, 12 CREIGHTON L. REV. 973 (1979).

276. See *National Wildlife Fed’n v. National Park Service*, 669 F. Supp. 384 (D. Wyo. 1987) (upholding the National Park Service decision to keep campground open despite conflict with grizzly bear habitat).

277. Roads, trails, and bridges are expressly authorized. 16 U.S.C.A. § 8 (West 1992).

278. Such an option is subject to the National Environmental Policy Act of 1969. 42 U.S.C.A. §§ 4321–4347 (West 1977 & Supp. 1993). *Sierra Club v. Lujan*, 716 F. Supp. 1289 (D. Ariz. 1989) (enjoining construction of hotel for insufficient compliance). On litigation over concession contracts generally, see COGGINS, *supra* note 23, § 17.04[2].

dilemma: the development must be “necessary and appropriate for public use and enjoyment” of a park and “consistent to the highest practicable degree with the preservation and conservation of the areas.”²⁷⁹

One tool for synthesizing these concerns is through planning, which Congress has emphasized in its mandate to the Park Service, as it has with the other land management agencies. The National Park Service must produce “master plans” for each unit. These plans must address measures to preserve the areas, consider visitor carrying capacity, and discuss needed developments.²⁸⁰ Popular recreational uses sometimes must be limited and regulated by permit because “enjoyment” may destroy resources.²⁸¹ The Park Service exercises significant discretion in making such allocations.²⁸²

Uses of the National Parks for other than preservation and recreation are limited. Hunting, although recreation to some, generally is not allowed.²⁸³ The Mineral Leasing Act and Mining Law of 1872 do not apply in National Parks as they do in National Forests and BLM public lands.²⁸⁴ Mining claims that pre-date the establishment of a National Park, however, are valid existing rights, but they are regulated to protect park values.²⁸⁵ The Park Service may grant rights-of-way through the National Park for utility purposes, but only if the Park Service finds them to be “in the public interest.”²⁸⁶ Timber may be disposed of only when its removal is needed “to control the attacks of insects or diseases or otherwise conserve the scenery or the natural or historic objects.”²⁸⁷ Similarly, livestock may graze within a National Park only if “such use is

279. 16 U.S.C.A. § 20, part of the Concessions Policy Act of 1965, 16 U.S.C.A. §§ 20–20g (West 1992). For criticisms of the act, see Michael Mantell, *Preservation and Use: Concessions in the National Parks*, 8 *ECOLOGY L.Q.* 1 (1979).

280. 16 U.S.C.A. §§ 1a–7(b) (West 1992).

281. See *Wilderness Public Rights Fund v. Kleppe*, 608 F.2d 1250 (9th Cir. 1979), *cert. denied*, 446 U.S. 982 (1980) (upholding permits for boating in the Grand Canyon); see also *Friends of Yosemite v. Frizzell*, 420 F. Supp. 390 (N.D. Cal. 1976) (claiming unsuccessfully that advertising would result in tourist numbers that would damage the environment of the park).

282. *Conservation Law Found. v. Secretary of the Interior*, 864 F.2d 954 (1st Cir. 1989) (finding the allocation of eight miles of seashore to off-road vehicles not “arbitrary or capricious”).

283. See *National Rifle Ass’n v. Potter*, 628 F. Supp. 903 (D.D.C. 1986).

284. There can be exceptions in specific units of the National Park System. This is more common for units other than parks. For example, leasing of minerals is allowed in the Lake Mead National Recreation Area under special regulations. See 43 C.F.R. § 3811.2-2 (1991); *Sierra Club v. Watt*, 566 F. Supp. 380 (D. Utah 1983) (holding that defendant may lease locatable minerals).

285. 43 C.F.R. §§ 3833.2-1, 3826 (1991); 36 C.F.R. §§ 9.1–9.8 (1991). See 16 U.S.C.A. §§ 1901–1911 (West 1985).

286. 16 U.S.C.A. § 5 (West 1992).

287. 16 U.S.C.A. § 3 (West 1992).

not detrimental to the primary purpose for which such park . . . was created.”²⁸⁸ Thus, the fundamental goals of the parks are kept in sight.

The National Parks are governed by statutes that provide some discretion, but arguably seek to guide management into particular areas. In accord with the preservation directive, there was a movement in the late seventies to impose a public trust requirement on the Park Service, one which would protect the National Parks from external threats. The movement, however, was abortive. In litigation over management of redwood forests in California, the district court initially ruled that the National Park Service had an enforceable public trust duty to protect the Redwood National Park from adjacent logging. The Park Service’s duty was derived from both the statute creating the park and common law.²⁸⁹ In later stages of the litigation, however, the statute’s commands overshadowed any trust duty.²⁹⁰ The court finally deemed the public trust doctrine irrelevant because Congress had amended the National Park Organic Act to specify greater management priorities.²⁹¹ The National Parks, therefore, are governed solely by the statutes of general applicability and the specific legislation establishing individual parks.

288. *Id.* This provision does not apply to Yellowstone National Park.

289. *Sierra Club v. Department of Interior*, 376 F. Supp. 90, 93–95 (N.D. Cal. 1974). See generally Robert B. Keiter, *On Protecting the National Parks from the External Threats Dilemma*, 20 LAND & WATER L. REV. 355 (1984). See also *County of Trinity v. Andrus*, 438 F. Supp. 1368, 1377–78 (E.D. Cal. 1977) (holding that statutory and general trust duties forbid the Park Service to use discretion to avoid preservation).

290. *Sierra Club v. Department of Interior*, 398 F. Supp. 284 (N.D. Cal. 1975); *Sierra Club v. Department of Interior*, 424 F. Supp. 172 (N.D. Cal. 1976); Charles F. Wilkinson, *The Headwaters of the Public Trust: Some Thoughts on the Source and Scope of the Traditional Doctrine*, 19 ENVTL. L. 425, 276–77 (1989) (questioning whether the doctrine applies to public lands; redwood cases dealt with “strong” commanding statutes unlike most governing the BLM). See also *Friends of Yosemite v. Frizzell*, 420 F. Supp. 390 (N.D. Cal. 1976) (brushing aside public trust doctrine claim).

291. *Sierra Club v. Andrus*, 487 F. Supp. 443 (D.D.C. 1980) *aff’d on other grounds sub nom. Sierra Club v. Watt*, 659 F.2d 203 (D.C. Cir. 1981) (concluding that the statute is the exclusive source of duties, but its “highest principles of management” resemble public trust duty). The 1978 amendments to the National Parks Organic Act, Pub. L. No. 95-250, 92 Stat. 166 (codified at 16 U.S.C.A. § 1a(1) (West 1992)), discussed in these cases sparked debate as to whether a strong “public trust” responsibility emerged. Compare Keiter, *supra* note 289, at 369–75 (finding an affirmative duty to combat external threats to park resources) with Coggins, *supra* note 62, at 16–17 (claiming that statutory evidence requiring such action is tenuous and counterbalanced by language concentrating on protection of wildlife within parks) and Keiter, *supra* note 62, at 949 (acknowledging that courts hesitate to impose duties to combat external threats).

D. National Wildlife Refuge System

The Fish and Wildlife Service, an agency of the Department of Interior, manages the National Wildlife Refuge System. As noted above, presidents began making withdrawals for wildlife purposes pursuant to their implied authority.²⁹² Congress provided additional impetus for such wildlife areas with the passage of the Migratory Bird Treaty Act of 1918.²⁹³ Administration of the refuges often depended, and continues to depend, on the terms of specific public land orders and statutes creating them.²⁹⁴ Like statutes that create National Parks, any statute creating a specific refuge must be consulted to determine what uses are allowed in that refuge. In the 1960s, however, three acts were passed as generic authority to manage the refuges: the Refuge Recreation Act of 1962,²⁹⁵ the Refuge Revenue Sharing Act of 1964,²⁹⁶ and the National Wildlife Refuge System Administration Act of 1966.²⁹⁷ Therefore, some generalizations are possible.

Wildlife refuges, despite their name, are not “inviolable sanctuaries” for animals. The Fish and Wildlife Service does, however, manage them for the primary purpose of protecting and promoting wildlife values. Nevertheless, other activities may take place in refuges. For example, the Mineral Leasing Act and the Mining Law of 1872 can continue to operate if they were applicable to the areas in question when Congress passed the National Wildlife Refuge System Administration Act of 1966.²⁹⁸ Special regulations apply, however, and the Secretary may always decline to lease particular refuge lands.²⁹⁹ Refuges may also be used for purposes other than wildlife and mineral development.

Sometimes Congress provides direct authorization for these additional uses. The Refuge Recreation Act, as its name indicates, authorizes recreational use of refuges but only as an “appropriate incidental or secondary use” and “only to the extent that is practicable and not

292. See *supra* note 129. See generally MICHAEL J. BEAN, *THE EVOLUTION OF NATIONAL WILDLIFE LAW* 125–34 (1983).

293. 16 U.S.C.A. §§ 703–712 (West 1985 & Supp. 1993).

294. See *Schwenke v. Secretary of the Interior*, 720 F.2d 571 (9th Cir. 1983) (interpreting the requirements for administration of the Russell Range).

295. 16 U.S.C.A. §§ 460k-460k-4 (West 1993).

296. 16 U.S.C.A. § 715s (West 1985).

297. 16 U.S.C.A. §§ 668dd–668ee (West 1985 & Supp. 1993).

298. *Id.*

299. *Id.* § 668dd(d)(1); Dana J. Stotsky, Note, *Taking Refuge: Policy Changes Affecting Oil and Gas Leasing on National Wildlife Refuges*, 64 OR. L. REV. 739 (1986).

inconsistent with . . . the primary objectives for which each particular area is established.”³⁰⁰ These preconditions significantly limit the agency’s discretion to allow recreational use. The *Ruby Lake* litigation³⁰¹ involved regulations that allowed the use of motor boats, both generally and for water skiing, in a refuge in Nevada. The district court found the initial regulations invalid because the Fish and Wildlife Service made no finding that the recreational uses would not interfere with the purposes of the refuge. The agency had an affirmative duty to make this finding. The Secretary could not simply balance competing interests or justify continuing harmful recreational uses merely because the same abuses had occurred in the past.³⁰² After remand and redrafting, the district court found the second set of regulations infirm because the permitted use would negatively impact on the ability of the migratory birds to use the lake.³⁰³

The standard explicated in *Ruby Lake* governs recreational use, but the Refuge Administration Act allows uses other than recreation under a second standard. This standard requires such uses be “compatible with the major purposes for which such areas were established.”³⁰⁴ The Act generally allows the Fish and Wildlife Service to authorize use for “any purpose, including but not limited to hunting, fishing, public recreation and accommodations, and access.”³⁰⁵ Hunting and fishing, when allowed, must be consistent “to the extent practicable” with State fish and wildlife regulations.³⁰⁶ Federal regulations, however, may preempt state law if necessary to preserve the refuge, and the initial presumption is that refuges are closed to hunting and fishing.³⁰⁷ Generally, courts have upheld the Secretary’s discretion to allow hunting, especially of

300. 16 U.S.C.A. § 460k (West 1993). The later Refuge Administration Act expressly states that the Recreation Act will govern recreational uses. *Id.* § 668dd(h).

301. *Defenders of Wildlife v. Andrus*, 11 E.R.C. 2098 (D.D.C. 1978); *Defenders of Wildlife v. Andrus*, 455 F. Supp. 446 (D.D.C. 1978).

302. *Defenders of Wildlife v. Andrus*, 11 Env’t Rep. Cas. (BNA) 2098, 2101 (D.D.C. 1978).

303. *Defenders of Wildlife v. Andrus*, 455 F. Supp. 446 (D.D.C. 1978).

304. 16 U.S.C.A. § 668dd(d)(1)(A). See Jerry R. Fish, Comment, *Preservation and Strategic Mineral Development in Alaska: Congress Writes a New Equation*, 12 ENVTL. L. 137, 166–73 (1981).

305. 16 U.S.C.A. § 668dd(d)(1)(A). Easements may also be granted for utilities, pipelines, roads, and other developments. *Id.* § 668dd(d)(1)(B).

306. *Id.* § 668dd(e).

307. *Id.* § 668dd(e) (stating that no one may take or possess any animals, birds, or fish or enter for such purposes unless permitted by regulation or statute).

large herbivores, partially because reduction of herd size arguably aids habitat maintenance.³⁰⁸

National Wildlife Refuges, therefore, have numerous potential uses, but existing law clearly requires the Fish and Wildlife Service to give priority to wildlife management and treat it as the primary or dominant use of refuges. For example, a court overturned a proposed land exchange, which would have removed land from the St. Matthew's Island National Wildlife Refuge, because the Secretary's "public interest" determination was flawed. The Secretary characterized damage to wildlife values as "temporary," and thus inappropriately downgraded the harm.³⁰⁹ The strict review of the Secretary's action in this case was unusual because the Secretary does have considerable discretion under the various management acts. Therefore, unlike this case, most of the cases underscoring the priority of wildlife values are ones that affirm secretarial action restricting activities in Wildlife Refuges.³¹⁰

E. Wilderness Areas

Wilderness Areas differ from the previous systems examined because they, like Wild and Scenic Rivers³¹¹ and National Trails,³¹² are not managed by a single agency. If Congress designates land as part of one of these systems, the agency with jurisdiction over that land before designation manages it consistent with the purposes contained in the relevant statute.³¹³ In other words, the Wilderness Act of 1964 provides management authority to administer wilderness areas to the BLM, the Forest Service, the National Park Service, and the Fish and Wildlife Service.³¹⁴

Lands enter the system through a lengthy process. The Wilderness Act initially designated certain areas of the National Forests as

308. *Humane Society v. Lujan*, 768 F. Supp. 360 (D.D.C. 1991).

309. *National Audubon Society v. Clark*, 606 F. Supp. 825, 846 (D. Alaska 1984).

310. See, e.g., *New England Naturalist Ass'n v. Larsen*, 692 F. Supp. 75 (D.R.I. 1988) (upholding closing refuge entirely to protect endangered species); *National Rifle Ass'n v. Kleppe*, 425 F. Supp. 1101 (D.D.C. 1976), *aff'd sub nom. National Rifle Ass'n v. Andrus* 571 F.2d 674 (D.C. Cir. 1978). The problems of selenium poisoning in Kesterson Natural Wildlife Refuge are explored in Charles T. DuMars, *What in the World is Kesterson: Agricultural Return Flows Degrading Water Quality*, 35 ROCKY MTN. MIN. L. INST. 24-1 (1989).

311. See 16 U.S.C.A. § 1281 (West 1985 & Supp. 1993).

312. See *id.* § 1246 (West 1985 & Supp. 1993).

313. See, e.g., *id.* § 1131(b) (West 1985) (Wilderness Act provision on jurisdiction).

314. *Id.* §§ 1131-1136 (West 1985).

wilderness,³¹⁵ and mandated reviews of additional areas in National Forests,³¹⁶ and of roadless areas of more than 5,000 acres in units of the National Park and National Wildlife Refuge Systems.³¹⁷ The Act also required review of roadless refuge islands and FLPMA added BLM lands to the review process.³¹⁸ The agency with jurisdiction over the particular land performs the review. At the end of the agency review, the President recommends to Congress areas to include in the system. Lands only become wilderness if designated by Congress.³¹⁹

During the review process, however, interim management may require the relevant agency to forego some activities in order to preserve congressional options.³²⁰ This is necessary to ensure an area can continue to meet the definition of a wilderness. A “wilderness” is “an area of undeveloped Federal land retaining its primeval character and influence, . . . which . . . generally appears to have been affected primarily by the forces of nature”³²¹ Wildernesses additionally must contain at least 5,000 acres,³²² be “without permanent improvements,” and have “outstanding opportunities for solitude or a primitive and unconfined type of recreation.”³²³

If Congress designates an area as wilderness, the statute specifically creating the wilderness area may specify management criteria.³²⁴ Although potentially overridden by such particular legislation, the

315. *Id.* § 1132(a). These 54 “instant wilderness areas” were the Forest Service’s “wilderness,” “wild,” and “canoe” areas, and totaled 9.1 million acres. See COGGINS ET AL., *supra* note 11, at 1014.

316. 16 U.S.C.A. § 1132(b). The Act required review of 5.4 million acres of designated “primitive” areas. The Forest Service voluntarily reviewed roadless areas of 5,000 or more acres. See *California v. Block*, 690 F.2d 753, 757 (9th Cir. 1982).

317. 16 U.S.C.A. § 1132(c).

318. 43 U.S.C.A. § 1782 (West 1986 & Supp. 1993).

319. 16 U.S.C.A. § 1131(a) (West 1985).

320. See generally COGGINS, *supra* note 23, § 14.04[3]. For BLM lands, see Mansfield, *supra* note 33, at 56–59.

321. 16 U.S.C.A. § 1131(c) (West 1985).

322. Or the wilderness must be of a sufficient size to be managed effectively for preservation. *Id.*

323. *Id.* See also *id.* § 1132(c); 43 U.S.C.A. § 1782(a) (West 1986 & Supp. 1993) (requiring future National Park and BLM wildernesses to be “roadless”).

324. See, e.g., “special management zone” in River of No Return Wilderness that allows for mining of cobalt. Central Idaho Wilderness Act, Pub. L. No. 96-312, § 4(d)(1), 94 Stat. 948, 949 (1980) (codified at 16 U.S.C.A. § 1133 note (1988)). See also *Minnesota Pub. Interest Research Group v. Butz*, 541 F.2d 1292 (8th Cir. 1976) (discussing the statutory exception to prohibition of logging in wilderness areas). Congress in 1978 removed the exception at issue in *Butz*. Boundary Waters Canoe Area Wilderness, Pub. L. No. 95-495 § 695(a), 92 Stat. 1649 (1978) (noted at 16 U.S.C.A. § 1133 (West 1988)).

Wilderness Act itself does provide general management guidance. An agency's mandate under the Act is as follows:

[to] preserv[e] the wilderness character of the area and . . . administer such area for such other purposes for which it may have been established. . . . Except as otherwise provided . . . , wilderness areas shall be devoted to the public purposes of recreational, scenic, scientific, educational, conservation, and historical use.³²⁵

The Act's initial policy declaration elaborates:

[Wilderness areas] shall be administered for the use and enjoyment of the American people in such manner as will leave them unimpaired for future uses and enjoyment as wilderness, and so as to provide for the protection of the areas, the preservation of their wilderness character, and for the gathering and dissemination of information regarding their use and enjoyment as wilderness.³²⁶

The "use and enjoyment" versus preservation paradox, found here as in the National Park Service mandate,³²⁷ is weighted toward preservation in this setting, as evidenced by the definition of wilderness.

To reach the preservation goal, the Wilderness Act does specifically prohibit certain uses, but being born of compromise, the legislation allows other activities to continue. The basic prohibitions forbid commercial enterprises, permanent and temporary roads, use of motorized vehicles or boats, aircraft landings, and structures.³²⁸ The wording of the general ban itself contains two caveats: The ban is subject to valid existing rights and the need to meet "minimum requirements" for administration of the area, including emergency responses.³²⁹ Moreover, the next subsection of the act lists "special provisions" that allow specific activities in certain circumstances.³³⁰

The activities allowed by the "special provisions" include some mineral operations. Wilderness areas are subject to governmental mineral surveys, and National Forest wildernesses are open to

325. 16 U.S.C.A. § 1133(b) (West 1985).

326. *Id.* § 1131(a).

327. *See supra* notes 273–75 and accompanying text.

328. 16 U.S.C.A. § 1133(c) (West 1985).

329. *See generally* Rohlf & Honnold, *supra* note 62, at 261–62 (discussing the "minimum tool" approach in wilderness management).

330. 16 U.S.C.A. § 1133(d) (West 1985). *See generally* COGGINS, *supra* note 23, § 14.04[4][c]; COGGINS ET AL., *supra* note 11, at 1016–18.

prospecting that does not impair the wilderness.³³¹ More controversially, even designated wilderness areas were open to mineral location³³² and mineral leasing until December 31, 1983. However, except during the tenure of Secretary Watt and his successor, the Department of Interior generally did not issue mineral leases and Congress eventually prohibited leasing altogether in BLM wilderness study areas and other areas recommended for wilderness.³³³ Also revealing a compromise, locators may work mining claims subject to regulation, but they will only receive patent to the minerals, not the surface.³³⁴ Although all existing wildernesses are now withdrawn from the operation of the Mining Law of 1872 unless the wilderness's governing statute specifically made it open, valid existing rights could impact wilderness values as they are developed.³³⁵

In addition to mineral uses, other special provisions may override the goal of preservation. Some exceptions detail preexisting uses and allow them to continue. These include motorized boat use³³⁶ and grazing.³³⁷ Additionally, the managing agency must provide reasonable access to inholdings, or must exchange the inholdings for other lands.³³⁸ Despite the ban on commercial enterprises, services conducive to or necessary for wilderness recreational activities may proceed.³³⁹ The managing agency itself may also take actions that seem incongruous with wilderness.

One controversial provision of the Act allows the managing agency to actively manage a wilderness area in ways that could impact its wilderness character. The agency may take "such measures . . . as may be necessary in the control of fire, insects, and diseases."³⁴⁰ The Forest

331. 16 U.S.C.A. § 1133(d)(2).

332. This provision only preserved existing access and did not revoke any pre-existing statutorily authorized withdrawal. *Brown v. U.S. Dep't of Interior*, 679 F.2d 747, 750-51 (8th Cir. 1982).

333. 30 U.S.C.A. § 226-3 (West 1986 & Supp. 1993). Prior to this, limitations appeared in Department of Interior appropriation bills and Congress ordered emergency withdrawals. See Mansfield, *supra* note 104, at 89-90.

334. Analogous provisions have been found constitutional against claims that an act "took" a claimant's right to a patent of both surface and minerals. *Freese v. United States*, 639 F.2d 754 (Ct. Cl.), *cert. denied*, 454 U.S. 827 (1981).

335. See generally Kathryn Toffenetti, *Valid Existing Rights in Wilderness Areas*, 20 LAND & WATER L. REV. 31 (1985).

336. 16 U.S.C.A. § 1133(d)(1) (West 1985). Aircraft use may also continue subject to restrictions deemed desirable. *Id.*

337. *Id.* § 1133(d)(4).

338. *Id.* § 1134.

339. *Id.* § 1133(d)(5).

340. *Id.* § 1133(d)(1).

Service attempted to use this authority to fight an infestation of the Southern Pine Beetle so that it could protect adjacent commercial timber lands.³⁴¹ The initial program would have involved extensive spraying and cutting of trees within the Wilderness Area. The district court first found that the Forest Service had not proven the activity “necessary;” it required “a clear necessity for upsetting the equilibrium of the ecology . . . [to] justify this highly injurious, semi-experimental venture of limited effectiveness.”³⁴² A second, more limited program of spot-clearing and spraying, however, was approved. In considering the second program, the court exercised deference to the Secretary’s judgment, and recognized it should not attempt to resolve scientific controversy.³⁴³ Wilderness areas, as this case and the other provisions demonstrate, are not inviolable.

Nevertheless, the fact that actions taken to protect other property may validly impact on wilderness, and uses other than wilderness preservation may occur in Wilderness Areas, the basic management goal is to preserve the wilderness characteristics of designated areas. Other uses are subordinate to this dominant use.

VI. MULTIPLE USE VERSUS DOMINANT USE

The discussion of the mandates and missions governing the principal land management systems reveals that some agencies have a myriad of duties with no guiding principles, while other agencies have priorities. Wildlife refuges and wilderness areas have specific “dominant” uses. National Parks also have the dual dominant uses of preservation and enjoyment. The National Forests and BLM public lands, however, do not have any clear-cut dominant uses. They are in fact subjected to “multiple uses,” but the term “multiple use” has a legal meaning in addition to its practical one. Four statutes have employed the term, often coupled with the term “sustained yield.”

A. *Statutory Provisions*

Statutes governing both the BLM and the Forest Service refer to the multiple use goal. The Multiple-Use, Sustained-Yield Act of 1960 first

341. *Sierra Club v. Lyng*, 662 F. Supp. 40 (D.D.C. 1987) (*Lyng I*) and *Sierra Club v. Lyng*, 663 F. Supp. 556 (D.D.C. 1987) (*Lyng II*).

342. *Lyng I*, 662 F. Supp. at 43.

343. *Lyng II*, 663 F. Supp. at 560.

employed the term “multiple use.”³⁴⁴ This Act applied only to the Forest Service. It was not until 1964 that the concept was applied to the BLM.³⁴⁵ The instructions to the two agencies have similarities.

The first thing the Multiple-Use, Sustained-Yield Act of 1960 did, however, was specific to the Forest Service. It confirmed, as the agency had previously alleged, that it had authority to manage the National Forests for more than timber and watershed purposes.³⁴⁶ The Forest Service is also required to consider multiple use and sustained yield in the National Forest Management Act of 1976.³⁴⁷ The later Act gives no new definitions. Therefore, the operative definition of multiple use for the Forest Service comes from the 1960 act:

The management of all the *various renewable surface resources of the national forests so that they are utilized in the combination that will best meet the needs of the American people*; making the most judicious use of the land for some or all of these resources or related services over areas large enough to provide sufficient latitude for periodic adjustments in use to conform to changing needs and conditions; *that some land will be used for less than all of the resources*; and harmonious and coordinated management of the various resources, each with the other, without impairment of the productivity of the land, with consideration being given to the relative values of the various resources, and not necessarily the combination of uses that will give the greatest dollar return or the greatest unit output.³⁴⁸

The standard does not necessarily demand a utilitarian result in terms of increasing dollar yields. What it does do, despite the acknowledgment that not every tract of land can be utilized for all resources, is give the impression that committing land to a single use is not preferred.³⁴⁹ The

344. 16 U.S.C.A. §§ 528–531 (West 1985).

345. See 43 U.S.C.A. §§ 1411–1418 (West 1986) (expired 1970).

346. See *supra* notes 244–48 and accompanying text.

347. See 16 U.S.C.A. §§ 1600(3), 1602(5)(A), 1604(e)(1) (West 1985). The resources listed in this act, however, include “wilderness” with outdoor recreation, range, timber, watershed, wildlife and fish. *Id.* § 1604(e)(1).

348. *Id.* § 531(a) (emphasis added).

349. See PAUL CULHANE, PUBLIC LANDS POLITICS: INTEREST GROUP INFLUENCE ON THE FOREST SERVICE AND BUREAU OF LAND MANAGEMENT 327 (1981); Richard Behan, *The Succotash Syndrome, or Multiple Use: A Heartfelt Approach to Forest Land Management*, 7 NAT. RESOURCES J. 473, 478, 481–83 (1967) (arguing that multiple use is an emotionally attractive concept that in practice simply fostered multiplicity for multiplicity’s sake). The Act, however, did expressly state

Forest Service, however, has always been capable of finding uses “compatible” with seemingly single purpose commitments; a clear cut may be compatible with wildlife habitat management because it provides deer forage.³⁵⁰

The second management goal is “sustained yield of the several products and services.” “Sustained yield” is defined as “the achievement and maintenance in perpetuity of a high-level annual or regular periodic output of the various renewable resources of the national forests without impairment of the productivity of the land.”³⁵¹ According to this, the Act requires the Forest Service to consider the future as well as the present.

The second major land managing agency, the BLM, was first required to manage its lands for multiple use under the Classification and Multiple Use Act.³⁵² This was an interim law that expired. FLPMA, however, also expresses the policy that the BLM manage public lands “on the basis of multiple use and sustained yield unless otherwise specified by law.”³⁵³ FLPMA’s definition of sustained yield does not significantly differ from that applicable to the Forest Service.³⁵⁴ Both definitions demand scientific management. The more significant differences occur in the definitions of multiple use applicable to each agency.

A comparison of the two definitions reveals that one part of the FLPMA definition only subtly differs from that of the Forest Service mandate:

the management of the public lands and their various resource values so that they are utilized in the combination that will best meet the present *and future* needs of the American people; making the most judicious use of the land for some or all of these resources or related services over areas large enough to provide sufficient

that the establishment of wilderness areas was consistent with the purposes of it. 16 U.S.C.A. § 529 (West 1985).

350. COGGINS ET AL., *supra* note 11, at 612. See also *Zieske v. Butz*, 406 F. Supp 258, 259 (D. Alaska 1975) (clear-cutting does not violate the Multiple-Use, Sustained-Yield Act).

351. 16 U.S.C.A. § 531(b) (West 1985).

352. 43 U.S.C.A. §§ 1411–1418 (West 1986) (expired 1970). For a critical view of this Act, see *Marsh & Sherwood*, *supra* note 203, at 247–50 (arguing that the multiple use mandate is ominous because it was applied to subsurface resources, forbade relying on highest return, and allowed classifications to preclude mining).

353. 43 U.S.C.A. § 1701(a)(7) (West 1986); see *id.* § 1712(C)(1) (West 1986) (requiring multiple-use principles for land use planning).

354. FLPMA defines it as “the achievement and maintenance in perpetuity of a high-level annual or regular periodic output of the various renewable resources of the public lands consistent with multiple use.” 43 U.S.C.A. § 1702(h) (West 1986).

latitude for periodic adjustments in use to conform to changing needs and conditions; the use of some land for less than all of the resources . . . harmonious and coordinated management of the various resources without *permanent* impairment of the productivity of the land *and the quality of the environment* with consideration being given to the relative values of the various resources, and not necessarily to the combination of uses that will give the greatest *economic* return or the greatest unit output.³⁵⁵

These changes do not greatly impact the thrust of the definition; future needs are more expressly acknowledged, as is environmental quality, but the definition tempers impairment concerns by use of the word “permanent.” The BLM is to prevent “permanent” impairment of both the productivity of the land and quality of the environment.

Another part of the FLPMA definition, however, is not found in the Forest Service definition:

a combination of balanced and diverse resource uses that takes into account the long-term needs of future generations for renewable *and nonrenewable resources*, including, *but not limited to*, recreation, range, timber, *minerals*, water-shed, wildlife and fish, *and natural scenic, scientific, and historical values*.³⁵⁶

The BLM mandate includes additional resources and, importantly, is open-ended. One of the named additional resources, minerals, is not directly within the Forest Service’s purview, but the others could readily be implemented on National Forests. Even without the designation of these uses as within its mandate, it is unlikely that the Forest Service would not take into account scenic, scientific, and historical values.

B. Interpretation of Requirement

The “conventional” wisdom is that “multiple use” provides an ineffectual standard that cannot control the discretion of managers because it is too subjective.³⁵⁷ Courts have reflected this view, finding judicial review narrow under the Multiple-Use, Sustained-Yield Act of

355. 43 U.S.C.A. § 1702(c) (West 1986) (emphasis added).

356. *Id.*

357. See, e.g., Behan, *supra* note 349; Christopher C. Curtis, Comment, *Managing Federal Lands: Replacing the Multiple Use System*, 82 YALE L.J. 787, 788 (1973); Strand, *Statutory Authority Governing Management of the National Forest System - Time for a Change?*, 7 NAT. RESOURCES. J. 479 (1974).

1960.³⁵⁸ Case law, therefore, has provided little guidance to those who must implement “multiple use.”

One case that might have provided a more structured process arose over a Forest Service decision to sell timber in the Tongass National Forest under a fifty year contract. The district court initially said that the multiple use mandate required “due” consideration of competing resources, but this did not mean each should receive equal consideration. A decision would only be invalid if there was no consideration whatsoever of a particular resource value. The court directed the Forest Service to apply its expertise to such considerations.³⁵⁹ The Ninth Circuit remanded on appeal. It implied that while it accepted the district court’s interpretation for purposes of the remand order, it cautioned: “[D]ue consideration’ to us requires that the values in question be informedly and rationally taken into balance. The requirement can hardly be satisfied by a showing of knowledge of the consequences and a decision to ignore them.”³⁶⁰ The remand was an unreported decision and therefore has no precedential value.

Later courts have refused to overturn multiple-use decisions. Examining a decision to clear-cut, the district court for Oregon found that, while a multiple-use decision was not unreviewable, agency discretion was broad.³⁶¹ Clear-cutting itself did not violate the commands of the Multiple-Use, Sustained-Yield Act of 1960, because it was not an action that would impair productivity of the land.³⁶² In another case, the BLM committed lands to a single dominant use after performing a multiple-use review. This was found to be proper.³⁶³ The courts, therefore, have not used the multiple-use sustained-yield commands to hamper agency discretion in any significant way.

Despite the lack of judicial “teeth” to the requirement that the Forest Service and BLM manage their respective lands for “multiple use,” professional foresters and land managers apparently feel that the criterion

358. *Dorothy Thomas Found., Inc. v. Hardin*, 317 F. Supp. 1072, 1076 (W.D.N.C. 1970).

359. *Sierra Club v. Hardin*, 325 F. Supp. 99, 122–24 (D. Alaska 1971), *reversed on other grounds, sub nom. Sierra Club v. Butz*, 3 *Envtl. L. Rep. (Envtl. L. Inst.)* 20292 (9th Cir. 1973).

360. *Sierra Club v. Butz*, 3 *Envtl. L. Rep. (Envtl. L. Inst.)* 20292, 20293 (9th Cir. 1973).

361. *National Wildlife Fed’n v. United States Forest Service*, 592 F. Supp. 931, 938–39 (D. Or. 1984), *appeal dismissed*, 801 F.2d 360 (9th Cir. 1986).

362. *Id. But see, Sierra Club v. Espy*, 822 F. Supp. 356 (E.D. Tex. 1993) (finding that the National Forest Management Act contemplates using even-aged management techniques only in exceptional circumstances).

363. *Headwaters, Inc. v. Bureau of Land Management*, 684 F. Supp. 1053, 1056 (D. Or. 1988), *dismissed as moot*, 893 F.2d 1012 (9th Cir. 1989).

has meaning.³⁶⁴ Additionally, one commentator also believes the commands could create a control mechanism for agency discretion because both the courts and Congress do require consideration of all competing values and some rationality in decisionmaking.³⁶⁵ Nevertheless, one commentator argues that abandoning the multiple-use concept would actually foster greater efficiency and true diversity of uses. This would occur by implementing a series of “dominant” uses for various lands.³⁶⁶

VII. CONCLUSION

Public land law demands the attention of both those who want to preserve and those who want to use our vast national heritage of land and resources. Conflict between these two perspectives is perhaps the one consistent factor in all public land law issues. Reflecting these sometimes competing goals, the law itself is diverse. Different statutes control each of the various land management systems, and specific resources are subject to particular statutory regimes. No one interested in formulating wise policy concerning resource development, however, can ignore this field, which is crucial to resolving conflicting resource demands.³⁶⁷

364. Culhane, *supra* note 347, at 326–27. Harrison Loesch, *Multiple Uses of Public Lands—Accommodation or Choosing Between Conflicting Uses*, 16 ROCKY MTN. MIN. L. INST. 1 (1971) (asserting that reliance on the expertness of the administrator and flexibility of the system is valuable).

365. George C. Coggins, *Of Succotash Syndrome and Vacuous Platitudes: The Meaning of “Multiple Use, Sustainable Yield” for Public Land Management*, 53 U. COLO. L. REV. 229, 243–50 (1981) (concluding that past cases are usually deferential to agencies, but require due consideration and rationality). *See also* Professor Coggins’s argument that these guides become more than platitudes within the context of FLPMA:

Inherent in the concept are detailed and comprehensive commands to force thinking before acting and to mold individual actions into a long-range scheme for the public benefit. FLPMA does not allow the manager to do whatever appears politic or expedient at the time.

Coggins, *supra* note 202, at 65.

366. Steven E. Daniels, *Rethinking Dominant Use Management in the Forest-Planning Era*, 17 ENVTL. L. 483 (1987).

367. Additional assistance in this area may be found in the following general works: GEORGE C. COGGINS, *PUBLIC NATURAL RESOURCES LAW* (1990) (updated); GEORGE C. COGGINS ET AL., *FEDERAL PUBLIC LAND AND RESOURCES LAW* (3d. ed. 1992), although a casebook, it has valuable background material and discussions; ERNST C. BAYARD, *PUBLIC LAND LAW AND PROCEDURE* (1986); PAUL GATES, *HISTORY OF PUBLIC LAND LAW DEVELOPMENT* (1968); JAN G. LAITOS & JOSEPH P. TOMAIN, *ENERGY AND NATURAL RESOURCES LAW IN A NUTSHELL* (1992), due to the breadth of coverage, the public lands sections of the Nutshell are of necessity brief. Nevertheless, the sixty-two page “Table of Cases” may be worth the price of the book and faster than Westlaw or Lexis when you need an exact citation for a case that is hovering in your memory.