Managing the Public Lands: The Authority of the Executive to Withdraw Lands

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INTRODUCTION

Historically the executive branch of the federal government—primarily the President and the Secretary of the Interior—has protected public lands by withdrawing them from availability for private acquisition and use allowed under public land laws. Homesteading, mining and other uses ordinarily considered proper on the public domain were prevented in order to preserve resources or to dedicate them to a public purpose. Beginning soon after the nation's founding, numerous military bases and Indian reservations were set aside by executive orders withdrawing lands from the public domain. Other lands were set aside for wide ranging purposes dictated by the national interest. Although it is not widely appreciated, the use of withdrawals has been a major force in conservation law and history, especially during those eras when statutory law was not nearly as broad and diverse as it is today.

Withdrawal remains an important device in federal land use planning and management. Significant fragile wildlife habitat may need protection from mining pending consideration of legislation to designate it as a park or wildlife refuge. Lands rich in petroleum or oil shale may be removed from operation by statutes that would allow private uses and development because they can be developed most efficiently under a coordinated national program. Wild areas may be protected from commercial uses so that they may remain in their pristine state. Today, public land managers may have several ways to accomplish their desired results. Yet one of the most effective means is withdrawal.

Although Congress has plenary power over the public lands, in the past most withdrawals were made by the executive on the assumption that no statutory delegation of authority was needed. Congress's failure to repudiate the executive's withdrawals led the courts to infer acquies-
cence. The inference may have been unjustified but became a well-entrenched justification. While Congress made some specific delegations of withdrawal authority over the years, the executive’s implied nonstatutory authority was construed to fill all the interstices around express delegations.

In the 1976 Federal Land Policy Management Act (FLPMA)\(^2\) all nonstatutory authority and most earlier statutory authority were extinguished and replaced with new procedures for making withdrawals.\(^3\) The revolutionary impact of the 1976 Act touches only withdrawals made after its enactment.\(^4\) Consequently, the effectiveness of earlier non-statutory withdrawals of millions of acres throughout the country is governed by legal principles as they existed before the Act. Recent exercises of authority under both the FLPMA and the vestigial statutory withdrawal authority have drawn fire from private development interests and state governments. Multimillion acre withdrawals in Alaska have provoked litigation,\(^5\) and the “lock-up” by federal officials of resource-rich lands elsewhere has spurred on the “Sagebrush Rebellion”—a movement seeking greater state control of federal lands.\(^6\)

This article reviews and analyzes judicial interpretations of executive withdrawal authority in the past and makes suggestions for the construction and application of statutorily based withdrawal authority. The legal basis for executive withdrawal authority was tenuous, at least at the time the early withdrawals were made. Nevertheless, the Supreme Court has upheld non-statutory executive authority in one major case. Based on the reasoning in that case most withdrawals should withstand judicial challenge because of the passage of time and the Court’s pragmatic desire not to disturb an established allocation of power that has been accommodated by both the executive branch and Congress. There is likely to be considerable deference to the executive’s own interpretations of its authority and to its decisions to exercise the statutory authority that now must be invoked to support new withdrawals. Reviewing courts might have curtailed executive withdrawals in an earlier era had they acted consistently with apparent federal policy and congressional intent. But today the same considerations in a milieu of resource conservation demand

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\(^3\) Id. § 1714. See text section IV B, infra.
\(^4\) Id. § 1701 and § 1714(j). Although withdrawal provisions of the FLPMA are prospective, the Act requires a study to be made of all existing withdrawals followed by a report to Congress. See also notes 211-12, infra.
\(^5\) See notes 118–23, 245–54 infra and accompanying text.
great latitude for officials who act to protect lands by withdrawals. Challenges to decisions to withdraw areas are likely to fail, except to the extent they demonstrate a departure from explicit statutory procedures.

I. PUBLIC LAND WITHDRAWALS BEFORE THE 1910 PICKETT ACT

A. Public Land Policy: A Shift from Disposal to Conservation

From the close of the Revolutionary War until the mid-nineteenth century the United States amassed more than two billion acres under its sovereignty and ownership—a land area more than seven times the size of the original thirteen states. The principal asset of the fledgling nation was the real property it obtained in bargains with foreign nations, the original states and Indian tribes. No sooner was the vast public domain

7. PUBLIC LAND LAW REVIEW COMM’N, ONE THIRD OF THE NATION’S LAND 327 (1970) [hereinafter PLLRC REPORT]. Acquisition of sovereignty and ownership was generally perfected in separate transactions, first a cession from a foreign nation or a state, followed by a treaty or agreement with an Indian tribe. In Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543 (1823) a settler who had received a patent from the United States prevailed over a settler who traced his title to a grant from the Indians. The result was based on tacit understandings among European discoverers of the New World that title would vest in the discovering nation, subject to limited Indian occupancy rights. Assertion of sovereignty by the Europeans deprived Indians of the ability to dispose of their lands to anyone but the sovereign. See note 11 infra.

8. The territory of the 13 original states (including what is now the District of Columbia, then within Maryland and Virginia; Kentucky and West Virginia, then within Virginia; Maine, then within Massachusetts; and Vermont, then within New York) after they ceded their western land to the United States (see note 10 infra) amounted to some 266 million acres. Figures taken from PLLRC REPORT, supra note 7, Appendix F at 327.

9. Major examples are: Louisianna Territory, 523 million acres west of the Mississippi River, purchased from France in 1803 for three cents an acre (8 Stat. 200, 206, 208, T.S. No. 86, 86-A, 86-B); Florida, acquired by treaty with Spain in 1819 (8 Stat. 252, T.S. No. 327); the border with Canada from Minnesota west, fixed at the 49th parallel by treaties with Great Britain in 1818, adding the Red River Basin (8 Stat. 248, T.S. No. 112) and in 1846 adding the Oregon Territory—180 million acres (9 Stat. 869, T.S. No. 207); California and the Southwest, acquired by the Treaty of Guadalupe Hidalgo with Mexico in 1848 (9 Stat. 922, T.S. No. 207) and the Gadsden Purchase in 1853 (10 Stat. 1031, T.S. No. 207); and Alaska, purchased from Russia in 1867 for $7.2 million (15 Stat. 539, T.S. No. 301).

10. Seven of the original states ceded lands, generally those lying west of their present boundaries, after the Constitution was ratified: New York, 1780; Virginia, 1783; Massachusetts, 1785; Connecticut, 1786; South Carolina, 1787; North Carolina, 1790; and Georgia, 1802. See P. GATES, HISTORY OF PUBLIC LAND LAW DEVELOPMENT 51-55 (1968) [hereinafter GATES]. Texas sold 78.8 million acres to the United States in 1850. Id. at 82.

11. The European nations asserted rights to the territory they claimed in America exclusive of other European countries, but recognized Indian rights of occupancy. Thus, they acquired a right to govern the area, but not title to real estate. This interest passed intact to the United States on its acquisition of the area by treaty or purchase. The new nation generally chose to extinguish Indian land claims by treaty and purchase from Indian tribes rather than by bitter and difficult conquest. See Johnson v. McIntosh, 21 U.S. (8 Wheat.) 503 (1823); Joint Tribal Council of Passamaquoddy Tribe v. Morton, 528 F.2d 370 (1st Cir. 1975); Mohegan Tribe v. Connecticut, 483 F.Supp. 597 (D. Conn. 1980); Cohen, Original Indian Title, 32 MINN. L. REV. 28 (1947). See generally, F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW, Chs. 2A and 3A (2d ed. 1982); D. GETCHES, D. ROSENFELT, AND C. WILKINSON, FEDERAL INDIAN LAW: CASES AND MATERIALS 143–152 (1979).
acquired by the United States than the government began a purposeful effort to dispose of it. This was to produce income from land sales. More significantly, in private hands the land became a vehicle for development at the frontier and beyond.

"Public land law" historically referred to legislation providing for disposal of the public domain. Homestead laws and government sales dispensed cheap land; mining laws opened the west's mineral wealth, free to the first to claim it; gifts of free land to railroads secured the rapid development of commerce linking the industrial east with the agricultural and resource rich west; and land grants to new states aided education and local economics.

12. Perhaps the primary motivation for disposal was the desperate need for revenues to discharge the public debt, much of which consisted of foreign obligations. Encouraging migration and promoting population were other goals. The Land Ordinance of 1785 was the first legislative attempt to provide for orderly disposal of the public lands, by sale after completion of surveys. See generally, GATES, supra note 10.

13. The term "public land law" is generally understood to mean statutes and regulations governing the retention, management, and disposition of the public lands. See Act of Sept. 19, 1964, Pub. L. No. 88-606, § 3, 78 Stat. 982, 983, creating a Public Land Law Review Commission to study such laws. But see Udall v. Tallman, 380 U.S. 1 (1965) (The Court stated that the term "public-land laws" does not include the mining or mineral leasing laws. The particular withdrawal orders had been construed as not preventing oil and gas leases. The court did not consider the use of the term generally or even under the statute authorizing the orders. Thus, the dictum is an aberration from the usual construction of the term. See also Mecham v. Udall, 369 F.2d 1 (10th Cir. 1966) (rejecting contention that executive order did not validly withdraw lands from mineral leasing). Cf. Mason v. United States, 260 U.S. 545 (1923) (executive order withdrawing lands "from settlement and entry, or other form of appropriation" removed the lands from the mining and mineral leasing laws). The term "withdrawal" as used in the Federal Land Policy and Management Act, 43 U.S.C. §§ 1701-1782 (1976), has been held to include removal from oil and gas leasing. Pacific Legal Foundation v. Watt, No. CV-81-141-BLE (D. Mont., Memorandum Decision, Dec. 16, 1981); Mountain States Legal Foundation v. Andrus, 499 F.Supp. 383 (D. Wyo. 1980).

14. The focus on public land law as a body of private law involving rights of private individuals to federal land, minerals and other resources is demonstrated by the early treatises. E.g., M. COPP, PUBLIC LAND LAWS (1875); G. SPAULDING, A TREATISE ON THE PUBLIC LAND SYSTEM OF THE UNITED STATES (1884); J. ZABRISKIE, THE PUBLIC LAND LAWS OF THE UNITED STATES (1870). Although Congress's power under the Property Clause is framed in terms of disposal, see note 1, supra, the property power has been much more broadly construed in recent years. See, e.g., Kleppe v. New Mexico, 426 U.S. 529 (1976).


17. See GATES, supra note 10, at 357. E.g., Act of September 20, 1850, ch. 61, 9 Stat. 466 (1850). See also Act of Apr. 4, 1852, ch. 80, § 2, 10 Stat. 28 (1852). Some ninety million acres were given to the railroads, most of which were sold by them to private parties to raise capital. See G. COGGINS AND C. WILKINSON, FEDERAL PUBLIC LAND AND RESOURCES LAW 88-89 (1981) [hereinafter COGGINS AND WILKINSON].

A few early withdrawals of lands from availability under the disposal laws were made to preserve some sites for military or Indian reservations and for other public uses. The device of "withdrawing" specific parcels of land from entry eventually was to become an important means of accomplishing federal purposes or policies when disposal laws threatened to sweep with too broad a brush.

As the west was settled and frontiers vanished, much land remained in federal ownership. By the end of the nineteenth century 67 per cent of the original public domain outside Alaska had been transferred to private ownership, but 473,836,402 acres were still owned by the United States. Much of it was poor land that could not be used economically for the purposes for which it was available. Other land had been exploited for its resources and once used was left behind. Yet some good land survived. In a few instances land had been overlooked because of its inaccessibility or because the value of its resources was not apparent. Withdrawals and other legal impediments to availability for distribution also had saved valuable land.

Fulfillment of many of the national goals that had inspired the disposal policy and a changing vision of the future role of public lands prompted a policy shift. The conservation movement was born in a wake of reaction against the excesses—lawful and unlawful—of land barons and lesser exploiters of the public lands. "Conservation" has always had diverse adherents, some favoring policies that enable perpetual use of resources, others insisting on preservation of lands in a pristine state. In the late nineteenth century disciples of both philosophies agreed that action was needed to protect the public domain from total dissipation. Lands that once were considered only to be temporarily warehoused for later dis-

19. For example, ch. 22, 3 Stat. 347 (1817) authorized withdrawals of timber land to supply the Navy; the Oregon Enabling Act, ch. 76, 9 Stat. 496, 500 (1850), preserved authority for the President to make necessary withdrawals for military installations and other needful public uses; ch. 148, 4 Stat. 411 (1830) authorized the President to make reservations of western land for Indians. See also note 67, infra. Other early statutes authorized withdrawals of town sites, salt springs, mineral deposits, or lighthouses in specified places. See WHEATLEY, STUDY OF WITHDRAWALS AND RESERVATIONS OF PUBLIC DOMAIN LANDS 55 (rev. 1969) [hereinafter WHEATLEY REPORT]. The report, prepared for the Public Land Law Review Commission is the most comprehensive source on withdrawals.

20. The amount of land remaining the the public domain was reported as of June 30, 1904 by the Public Lands Commission in S.Doc.No. 189, 58th Cong., 3d Sess. 13 (1905).

21. For example, homesteads were limited in size to an area that was too small for profitable cultivation or grazing in the arid West. COGGINS AND WILKINSON, supra note 17 at 71.

22. For example, huge amounts of timber were harvested from the public lands, particularly in Minnesota, Wisconsin, and Michigan, by loggers who cut the trees and then moved on, successfully resisting regulation. See Huffman, A History of Forest Policy in the United States, 8 ENVTL L. 239 (1978) [hereinafter Huffman].

tribution to the private sector were now perceived as national resources to be protected. A trend developed toward more scientific management of forests with the goal of protecting timber supply and watersheds that were important both for flood prevention and for preserving a supply of water. Management, rather than disposal of resources, became the mission of agencies administering federal lands.

In 1891 Congress passed the General Revision Act. The contents of the Act reflect the mix of views about the appropriate use of the public lands which was prevalent on the cusp between the eras of disposal and retention of public lands. On one hand, the 1891 act dealt gently with persons whose depredations upon the public timber lands could have been prosecuted but, on the other hand, it gave the executive authority to reserve forest lands that it had sought for several years. Six years later, Congress passed the Forest Service Organic Act authorizing the establishment of an agency to manage forests.

As concern for conservation grew within the government and among the general public there were occasional flurries of congressional interest in protecting areas that were distinguished for their aesthetic or recreational value. In 1872 a two million acre parcel, which later became known as Yellowstone National Park, was established by Congress “as a public park or pleasuring ground for the benefit and enjoyment of the people. . . .” Before the end of the century several other national parks were established.

The most remarkable development under the nation’s new land policy was passage of the Taylor Grazing Act which, as amended, allowed the Secretary of Interior to classify and limit entry upon public lands. This is generally considered the cardinal event in closing the public domain.

A series of other congressional acts in the early 20th century further

25. Id. § 24. This section is often referred to as the Forest Reserve Act.
27. 16 U.S.C. § 21 (1976). Parcels which had earlier been withheld from disposal to private hands later became portions of national parks. Lands in what would become Hot Springs National Park in Arkansas were set aside for “future disposal” in 1832. Ch. 70, 4 Stat. 505 (1832). Parcels in California were granted to the State of California in 1864 to be held in trust by that state for public use, resort, and recreation. Ch. 184, 13 Stat. 325 (1864). In 1905 the California land was ceded back to the United States and became part of Yosemite National Park. J. Res. 27, 34 Stat. 831 (1906).
28. Mackinac Island, Michigan was set aside as a national park in 1875. Ch. 191, 18 Stat. 517 (1875). It was disestablished in 1895. Ch. 189, 28 Stat. 946 (1895). In 1890 the mountain area surrounding Yosemite Valley in California was “set aside as reserved forest lands,” ch. 926, 26 Stat. 478 (1890), and lands which became part of Sequoia National Park in California were set aside as a park. Ch. 1263, 26 Stat. 650 (1890). Some of these lands are now part of Kings Canyon National Park. Mount Rainier in Washington became a park in 1899. 16 U.S.C. § 91 (1976).
evinced a developing policy of conservation. At times, the executive moved more swiftly and extensively than pleased many members of Congress. But generally the conservation policy which conceded broad managerial authority to the executive enjoyed majority support. Of these developments, the leading historian of public land law has written:

For a country whose policy from the outset had been to pass the public lands into private ownership as speedily as possible, this series of acts to preserve areas of considerable size in public ownership was a remarkable change in attitude. Together with the adoption of the Forest Reservation Act, they mark a turning point in public land policy.30

B. Withdrawal as a Conservation Tool

Congress and the executive responded to growing concerns for the protection of the remaining public domain by making massive “withdrawals” of public lands—preventing certain uses on them, and by establishing “reservations”—dedicating lands to particular uses.31 The scope and purposes of withdrawals have differed, as have the methods and authority by which they were created.32 Withdrawals and reservations usually are made by a congressional or an executive act that designates specific land and the uses from which it is withdrawn or the purposes for which it is reserved. Withdrawals may be made with or without a reservation.33 Virtually all of the present public land—about one-third the land area in the United States—has been withdrawn from some uses.34 As such

30. GATES, supra note 10, at 567.
31. Congress withdrew Yellowstone National Park in 1872, ch. 24, 17 Stat. 32 (1872); President Roosevelt withdrew 150 million acres as forest reserves under the General Revision Act of 1891 and 66 million acres of coal lands; President Taft withdrew three million acres of petroleum lands in 1909. See notes 23–29 supra and accompanying text.
32. Withdrawal of public lands occurs in one of four ways. Congress may make withdrawals by statute (e.g., create a national park). Or it may authorize withdrawals by the executive branch, either at the executive’s discretion, but for a specific purpose designated by Congress (e.g., the Antiquities Act. 16 U.S.C. §§ 431–433 (1976)), or for a general public purpose, with both selection and purpose left to executive discretion (e.g., the Pickett Act, ch. 421 §§ 1–3, 36 Stat. 847 (1910) (§§ 1 & 3 repealed 1976; § 2 codified as amended at 43 U.S.C. § 142 (1976)). Finally, the executive in the past has made withdrawals pursuant to authority delegated by congressional acquiescence. E.g., United States v. Midwest Oil Co, 236 U.S. 459 (1915). See WHEATLEY REPORT, supra note 19, at A4.
33. In a few situations Congress has withdrawn certain resources without specifying the particular lands on which they are located. E.g., Mineral Leasing Act, 30 U.S.C. §§ 181–287 (1976 & Supp. II 1978) (withdrawing all oil, gas, coal and other fuel minerals from operation of the mining laws); 43 U.S.C. § 300 (repealed by Act of Oct. 21, 1976, Pub. L. No. 94-579, § 704(a), 90 Stat. 2744, 2792) (withdrawing lands which contain a spring or waterhole); Exec. Order No. 5327, April 15, 1930 (withdrawing oil shale deposits and lands containing them from disposal under Mineral Leasing Act); Exec. Order No. 5389, July 30, 1930 (withdrawing lands containing hot springs).
34. WHEATLEY REPORT, supra note 19, at 1. Shortly after the enactment of the Taylor Grazing Act (43 U.S.C. §§ 315 et seq.; see note 29 and accompanying text), the President withdrew all unreserved public lands in all states from entry for purposes other than mining and mineral
there is no more "pure" public domain, open to unrestricted private appropriation under the panoply of public land laws, yet most public land remains open to the public for more limited purposes, subject to authorization by the executive.

Congress has authorized a number of executive withdrawals. The first major example was the Forest Reserve provision in the General Revision Act.\(^{35}\) It led to massive withdrawals of land as soon as it became law, and by 1909 the Act had been used to set aside more than 194 million acres.\(^{36}\) The efforts of some congressmen to repeal the President's authority to withdraw forest lands were fruitless.\(^{37}\) However, they were successful in revoking presidential authority to proclaim reserves in six states.\(^{38}\) President Theodore Roosevelt signed the law, but not before proclaiming 32 new reserves and extending existing forest reserves in the six states where new reserves would be prohibited.\(^{39}\)

In 1906 Congress enacted the Antiquities Act which permitted the President to proclaim national monuments where landmarks, structures, and "other objects of historic or scientific interest" are located.\(^{40}\) Subsequently, the executive has been authorized by Congress to withdraw lands for other special purposes such as inclusion in proposed water power projects,\(^{41}\) fish and game sanctuaries in national forests,\(^{42}\) inclusion in grazing districts pursuant to the Taylor Grazing Act,\(^{43}\) and national defense needs.\(^{44}\)

There is no question that Congress has constitutional authority to make or to authorize withdrawals by legislative act.\(^{45}\) But arguments that the executive has some inherent constitutional authority to make withdrawals of public lands are without merit.\(^{46}\) Yet it is well-known that federal leasing. Exec. Order No. 6910, November 26, 1934; Exec. Order No. 6964, February 5, 1935. Lands may be separately withdrawn for more than one purpose. A prior withdrawal is not affected by a subsequent one for a different purpose. Haley v. Seaton, 281 F.2d 620 (D.C. Cir. 1960); William H. Ward, 51 INTERIOR DEC. 158 (1925); Utah v. Lichliter, 50 INTERIOR DEC. 231 (1924).

36. GATES, supra note 10, at 580. See also Huffman, supra note 22.
37. Huffman, supra note 22, at 259.
38. Ch. 2907, 34 Stat. 1271 (1907).
39. GATES, supra note 10, at 582; Huffman, supra note 22, at 269.
45. A coalition of western states led by Nevada and Utah have raised constitutional questions about federal authority to retain ownership and management of large amounts of land within their borders. Their objections are based largely on the 10th Amendment guarantee of state sovereignty and the alleged violation of the equal footing doctrine. See [1979] 10 ENVIR. REP. (BNA) 530. See also note 6, supra.
46. The courts have recognized some inherent presidential authority in foreign affairs. This authority is not extensive enough to permit the President to exercise general powers delegated to
officials charged with managing public lands regularly make decisions to allow or deny private uses. To allow uses without some delegation of authority from Congress arguably usurps the authority of the legislative branch under the Property Clause. To deny private uses, on the other hand, preserves congressional prerogatives and flexibility. Conflicts have arisen, however, when private interests have sought to use public lands under some legislatively created program but were denied that use because an administrative official had withdrawn land from availability. Under these circumstances the action may be challenged as in excess of the official's authority. In absence of a statute permitting a withdrawal or some other protective classification of the land, it is argued that a restriction of congressionally authorized uses is invalid. In some instances courts have implied a delegation of authority from the failure of Congress to curtail executive actions; in others authority has been derived from the executive's interpretation of a general withdrawal statute.

Congress by the Constitution, such as disposing of public property. The power is not exclusive in Congress, however, as the President may dispose of property through his constitutional power to make treaties. Edwards v. Carter, 445 F.Supp. 1279 (D.D.C. 1978).


Given the sweeping grant to Congress of authority over public property, U.S. CONST., art. IV, § 3, cl. 2; Kleppe v. New Mexico, 426 U.S. 529 (1976), inherent executive authority to withdraw public lands cannot be sustained. The issue is discussed in the WHEATLEY REPORT, supra note 19, at 131-51. The executive nevertheless has occasionally maintained that it has some "inherent" authority under the Constitution (article 2, sec. 1) to make withdrawals. This has been done in recitations found in orders withdrawing lands, e.g., Exec. Order No. 7373, May 20, 1936; in administrative decisions, e.g., Denver R. Williams, 67 INTERIOR DEC. 315 (1960); P & G Mining Co., 67 INTERIOR DEC. 212 (1960); Noel Leuscher, 62 INTERIOR DEC. 210 (1955); in litigation, e.g., Brief for Appellant, United States v. Midwest Oil Co., 236 U.S. 459 (1915); Defendant's Memorandum in Opposition to Plaintiff's Motion for Summary Judgment, at 2-3, Portland General Electric Co. v. Kleppe, 441 F.Supp. 859 (D. Wyo. 1977); and in congressional hearings, e.g., Hearings Before a Subcomm. of the S. Comm. on Public Lands and Surveys on the Administration and Use of Public Lands, 79th Cong., 1st Sess., part 14, 4360, 4366, 4368 (1945).

In Midwest Oil the Supreme Court did not reach the government's contention that the President had inherent withdrawal authority, but rested its decision upholding a withdrawal solely on a delegated power implied from the acquiescence of Congress. 236 U.S. at 468-69. Nevertheless the decision has been cited for the proposition that "the power of withdrawal is inherent in the President. . . ." Shaw v. Work, 9 F.2d 1014, 1015 (D.C. Cir. 1925). See also P & G Mining Co., 67 INTERIOR DEC. 212 (1960). Administrative decisions relying on Midwest Oil were cited as grounds for inherent withdrawal authority in Portland General Electric Co. v. Kleppe, 441 F.Supp. 859 (D. Wyo. 1977). This reliance is misplaced. These and other references to "inherent authority" confuse it with impliedly delegated authority. No judicial decision was found: (1) where there was neither an authorizing statute nor a contention of impliedly delegated authority, and (2) in which the court or administrative agency relied entirely upon inherent executive authority.
Challenges to executive withdrawal authority have been frequent in the history of the public domain. The challengers include those who would develop or use the land for purposes fostered by the public land laws but who are precluded by the land’s withdrawal. Thus, a mining company or a state interested in economic development may oppose restricting productive use of land by a withdrawal. The few judicial decisions on the executive’s withdrawal authority fail to prescribe any limits on its exercise. The courts have been unmoved by private attacks on executive assertions of the public interest. The usual deference to the government in disputes asserting private interests in public lands has combined with growing notions of federal stewardship of the public domain to persuade courts not to confine executive authority to make withdrawals.

Critics of withdrawal practices cite the importance to the country’s well-being of having ready access to the resources contained in the public domain, especially minerals. They argue that “locking up” about two-thirds the public lands from entry under the mining laws seriously hampers the country’s ability to cope with pressures for economic development and the demand for energy. Dependence on foreign nations for energy resources and minerals is exacerbated by limiting access to publicly owned domestic resources.

Congress has responded to concerns about the extent of withdrawals in the past. In a few instances, such as when President Theodore Roosevelt withdrew 150 million acres for forest reserves under delegated authority to reserve timber lands, Congress has returned withdrawn land to the public domain. On other occasions Congress has acted to exert control over the withdrawal process by defining methods by which certain kinds of withdrawals could be made by the executive and the purposes for which they could be withdrawn.

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47. See note 274 infra.
48. E.g., Bennethum & Lee, Is Our Account Overdrawn?, MINING CONGRESS J. 33 (Sept. 1975). The authors cite a U.S. Geological Survey report forecasting “that within the next 25 years the United States shall be 100 percent dependent on imports for 12 essential mineral commodities, more than 75 percent for 15 and more than 50 percent for 26 commodities.” Id. at 36, 48. That two-thirds of the total land area is closed is doubtful. No accurate figures are available; there are multiple, overlapping withdrawals that distort most calculations. Furthermore, many withdrawn public lands would not be useful for mining in any event.
51. E.g., General Revision Act, ch. 561, 26 Stat. 1095 (1891) (authorized executive reservation of lands wholly or in part covered by timber); Antiquities Act, 16 U.S.C. § 431 (1976) (authorized withdrawal of lands of historic and scientific value; limited size to the smallest area compatible with management for these values); General Withdrawal Act [Pickett Act], ch. 421, 36 Stat. 847 (1910), §§ 1 & 3 repealed (1976) (granted temporary withdrawal authority to executive but allowed contin-
The executive's use of withdrawals not authorized by statute and its expansive reading of statutes delegating withdrawal authority have often been questioned in litigation. Presidential action setting aside the Teton and Grand Canyon were attacked in the past. More recently, withdrawals in Alaska of 56 million acres under the Antiquities Act of 1906 and 105 million acres under the Federal Land Policy and Management Act of 1976 were challenged as inconsistent with the letter and the purpose of the acts.

The courts generally sustain an implied delegation of authority to withdraw lands based on congressional deference to longstanding administrative practice, thus effectively rewarding the executive's otherwise unjustified perseverance in the practice. Similarly, the executive branch is given wide discretion to interpret its own statutory authority for withdrawals. The common thread is an apparent recognition that the obligation to protect public resources demands that the land management agencies be relatively unfettered in carrying out their duty. It is not practical for Congress, charged by the Constitution with ultimate responsibility for management and disposal of extensive public lands, to do any more than to set broad policies. Consequently, Congress must entrust the executive with responsibility for implementing those policies. In turn, reviewing courts regularly defer to an administrative official's plausible interpretation of how legislation should be implemented, including the official's view of the scope of his delegated authority. If an official acts outside the authority granted, of course, the action may be set aside.

Modern policy, expressed in a host of federal laws, favors protection and preservation of publicly owned natural resources. Although some vestiges of the disposal policy of an earlier era remain law, today's goals
outweigh the interests expressed in early statutes which were designed
to expedite private exploitation and ownership of the public lands. Thus,
the once noble schemes for bestowing gifts of public assets on those
willing to develop them have become aberrations today when a conflict
arises over how to manage a resource. Policies promoting transfers of
public lands are subordinated to overriding policies of conservation and
intensive management. There have been recent suggestions that Con-
gress's policy should be revised, even to the extent of selling off public
lands to pay the national debt, but there have been no indications that
Congress is inclined to accept these novel ideas.

C. The Midwest Oil Case.

Until 1910 Congress did not deal comprehensively with the authority
of the President to make withdrawals. In that year the General Withdrawal
Act of 1910 (Pickett Act)\textsuperscript{58} was passed in response to President Taft's
request for clarification of his authority to make withdrawals.\textsuperscript{59} He had
withdrawn 3,621,062 acres of oil and gas lands in 1909\textsuperscript{60} to prevent an
imminent loss of the government's oil and gas resources. Officials had
warned that continuing to allow the mining laws to operate unchecked
would lead to a complete transfer of all oil lands in California from
government control within "a few months."\textsuperscript{51} Oil and gas were then
becoming essential as fuel for the Navy. Furthermore, intense competition
for oil claims, then under the mining laws, was causing unwise and
wasteful exploration and development practices, and was sacrificing other
possible uses of the public lands.

The withdrawal made by Taft averted the threatened dissipation of
public resources but brought a challenge from private interests whose
claims to oil lands were affected. Saving language in the Pickett Act

\textsuperscript{58} Ch. 421, §§ 1–3, 36 Stat. 847 (1910) (§§ 1 & 3 repealed 1976) (§ 2 codified as amended at
43 U.S.C. § 142 (1976)).

\textsuperscript{59} The present statutes, except so far as they dispose of the precious metals and the
purely agricultural lands, are not adapted to carry out the modern view of the best
disposition of public lands to private ownership, under conditions offering on the
one hand sufficient inducement to private capital to take them over for proper
development, with restrictive conditions on the other which shall secure to the public
that character of control which will prevent a monopoly or misuse of the lands or
their products. The power of the Secretary of the Interior to withdraw from the
operation of existing statutes tracts of land, the disposition of which under such
statutes would be detrimental to the public interest, is not clear or satisfactory.

SPECIAL MESSAGE OF PRESIDENT TAFT TO CONGRESS, CONSERVATION OF NATIONAL
RESOURCES, H.R. DOC. NO. 533, 61st Cong., 2d Sess. 4 (1910). The legislative history of the
Pickett Act is fully discussed and analyzed in WHEATLEY REPORT, supra note 19, at 88–101.

\textsuperscript{60} Temporary Petroleum Withdrawal No. 5, by order of the Secretary of the Interior, dated
September 27, 1909. See Record on Appeal, United States v. Midwest Oil Co., 236 U.S. 459 (1915).

\textsuperscript{61} United States v. Midwest Oil Co., 236 U.S. 456, 466 (1915).
stated that it should not be "construed as a recognition, abridgment, or enlargement of any asserted rights or claims initiated upon any oil- or gas-bearing lands after any withdrawal of such lands made prior to June 25, 1910." Thus, Congress left the courts with the task of deciding whether the 1909 withdrawals challenged in Midwest Oil were lawful.

In United States v. Midwest Oil Co. the Supreme Court upheld President Taft's withdrawal. It found that the executive possessed impliedly delegated authority to make withdrawals of public lands. The withdrawal in question had the effect of preventing entry pursuant to the Mining Act—legislation that was intended to distribute the bounties of the public lands for the national benefit by allowing mineral development. The Court declined to accept the government's broad assertion that the Constitution grants the President authority to withdraw public land. But it sustained the President's withdrawal of land from mineral entry even though it was not based on any statute. The Court emphasized that Congress had apparently recognized the President's power and had acquiesced in its exercise. The Supreme Court relied on a "long continued practice" of making orders like the one in the case which withdrew all the public lands in an area over 3 million acres from the operation of the public land laws. In support, the Court noted that there were "scores and hundreds" of orders establishing or enlarging Indian reservations, military reservations and oil reserves that had not been based on any statutory authority.

It was true that many withdrawals had been made by the executive without direct statutory authorization, but in most cases they were compatible with an existing policy reflected in statute. The dissent in Midwest Oil argued that for each of the examples of apparent exercises of implied authority cited by the majority there existed a statute which directly or indirectly furnished authority for the withdrawal. By contrast, the 1909

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63. 236 U.S. at 459.
64. See note 46 supra.
65. 236 U.S. 456 (1915).
66. Id. at 469-71.
67. Id. at 492-504. The dissent's point may be overstated, but it is true that most then existing executive withdrawals could be seen as carrying out some congressionally accepted policy. In many situations the executive's authority was not expressed by Congress but could be based on vague directives. In Wilcox v. Jackson, 38 U.S. (13 Pet.) 266 (1839), the executive was held entitled to possession of a military post under a law authorizing the establishment of trading houses with the Indians and the erection of fortifications by the President. The law [Act of June 19, 1834, ch. 54, 4 Stat. 678] left the choice of location to the President's discretion. Other Indian reservations were established by executive order pursuant to a national policy of locating Indians on defined lands. The policy had been generally reflected in treaties and statutes, although particular reservations were not always for tribes covered by specific legislation. The Supreme Court held that the General Allotment Act, Act of Feb. 8, 1887, ch. 119, § 1, 24 Stat. 388, confirmed the validity of executive orders setting aside Indian reservations. In re Wilson, 140 U.S. 575 (1891).
withdrawal at issue in Midwest Oil was stated to be "in aid of proposed legislation affecting the use and disposition of the petroleum deposits," but it was many years before Congress considered a proposal to deal comprehensively with such matters. In the meantime, the will of Congress had been established: statutes declared all mineral lands open and available to the public. While the wisdom of literally giving away the nation's mineral wealth might be questioned, it did comport with a forthright congressional pronouncement of policy in the mining laws and it did accelerate expansion and development as Congress intended. Yet the Court sustained an overriding power to defeat these statutory objectives by implying acquiescence of Congress in several earlier withdrawals of public lands from entry.

II. NON-STATUTORY WITHDRAWALS 1910-1976

Because the withdrawal that was upheld in Midwest Oil occurred before enactment of the Pickett Act of 1910, the Supreme Court did not have occasion to decide the question of the Act's impact on the executive's non-statutory withdrawal authority. The Court acknowledged the existence of an extensive executive withdrawal power before the Pickett Act that had been delegated by congressional acquiescence, but said in dicta that after 1910 the Act would "restrict the greater power already possessed." To the extent Congress has entered the arena, one might infer an intent to limit executive authority. The Act stated that "the President may, at any time in his discretion, temporarily withdraw from settlement, location, sale, or entry any of the public lands . . . and reserve the same for . . . public purposes. . . ." Significantly the Act required withdrawals under its authority to be "open to exploration, discovery, occupation, and purchase under the mining laws. . . ." That Congress was taking the subject of withdrawals under its control and limiting executive authority seems plain on the face of the statute. And that conclusion is supported by legislative history.

69. "[A]ny person authorized to enter lands under the mining laws of the United States may enter and obtain patent to lands containing petroleum or other mineral oils, and chiefly valuable therefor, under the provisions of the laws relating to placer mining claims. . . ." Act of February 11, 1897, ch. 216, 29 Stat. 526 (1897).
70. 236 U.S. at 482-83, citing S.REP.NO. 171, 61st Cong., 2d Sess. (1910). The report supports existence of presidential withdrawal authority but, contrary to the Court's suggestion, purports to change the existing authority only by requiring a report of all withdrawals to Congress. Other contemporary sources support the Court's interpretation. See note 73, infra. As late as 1924 the Interior Department agreed that the Pickett Act was a limitation on the executive's withdrawal authority. Utah v. Lichliter, 50 INTERIOR DEC. 231, 236 (1924).
73. E.g., "To sum up, in my judgment this bill restricts and limits the power of the President as it is to-day rather than enlarges it as interpreted by the courts. . . ."
The executive was undaunted by the plain meaning of the statute, the thrust of the legislative history and a Supreme Court interpretation. Administrative officials have consistently denied that the Pickett Act was meant to be a full explication of its withdrawal authority. Instead of construing the Act as prohibiting any executive withdrawals except those permitted by its terms—temporary withdrawals of lands that remain open under the mining laws—and those permitted under other statutes, the executive still felt that it possessed all the non-statutory authority it had before the Pickett Act. Whenever the executive felt that it needed to do what the Pickett Act would not allow, it would do so unhindered by the statute, on the assumption that it retained the full panoply of withdrawal authority recognized in *Midwest Oil*, virtually unaffected by the legislation. It is upon this "authority" that the United States has relied to succeed against adverse private claimants.

Between 1910 and 1976 millions of acres were withdrawn from the operation of public land laws, including the mining laws, without statutory authority. Remarkably, the government position upon which these withdrawals rest has not yet been fully tested. For the Court in *Midwest Oil* to find that congressional acquiescence was tantamount to a delegation of authority to the executive was a long step. Yet that feat was easy compared to the leap that is necessary in order to find that the legislative definition of authority in the Pickett Act imposed no limitations on executive authority in spite of its apparently narrowing language.

A 1941 opinion of the Attorney General substantially supports the executive's surprising position that the Pickett Act was only a Congressional footprint on the beachhead of withdrawal authority, not an arti-
ulation of the limits of executive authority after the Act. The opinion sustained a withdrawal from the mining laws of lands in Oregon needed for an agricultural research station. The Attorney General found that the Pickett Act dealt only with the Secretary's temporary withdrawal authority. By considering the withdrawal "permanent," the Attorney General found that the Pickett Act's restriction against closures to metalliferous mining could be avoided. The opinion pointed out that the Act had germinated in circumstances that showed a concern mainly for temporary withdrawals for conservation purposes. While admitting that earlier versions of the bill which became the Pickett Act were intended to deal with the entire area of presidential withdrawals, the Attorney General concluded that inclusion of the word "temporarily" in the bill that passed showed an intent not to impact the President's impliedly delegated authority to make permanent withdrawals or reservations.

The history of Congress's deliberations on the Pickett Act reveals no unequivocal understanding by the Senate of the impact of its addition of the word "temporarily." At least two perceptions of the effect of the change were expressed, but there is nothing in the history to indicate

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78. The station was established in connection with the Taylor Grazing Act. 43 U.S.C. § 315-315g, 315h-315m, 315n, 315e-1 (1976). The Act authorized the Secretary of the Interior to withdraw lands "chiefly valuable for grazing and raising forage crops" to be included in grazing districts. Id. § 315. But withdrawals under the Act were left subject to the mining laws. Id. § 315e. Thus, it was necessary to find some other source of authority for withdrawing the site from operation of the mining laws.
80. Id. at 78-80.
81. See 45 CONG. REC. 7538-52, 7555, 8169-70, 8671 (1910). The administration's request was that Congress "authorize the Secretary of the Interior temporarily to withdraw lands pending submission to Congress of recommendations as to legislation to meet conditions or emergencies as they arise." Neither S. 5485 as reported out of the Senate Committee on Public Lands nor H.R. 24070 as reported out of the House Committee on Public Lands used the word "temporary." The Senate, without explanation, changed the language of the House bill somewhat, including the addition of "temporarily" to it. 45 CONG. REC. 8670 (1910).
82. House members concluded that the bill's meaning would not be changed at all. 45 CONG REC. 8667 (1910) (remarks of Rep. Mondell); id. at 8671 (remarks of Rep. Smith). Others suggested that it would refer to withdrawals limited in time. Id. at 7555 (remarks of Sen. Smoot); id. at 8671 (remarks by Sen. Taylor). Cf. id. at 7544 (remarks of Sen. Clark in support of an amendment imposing a definite time limit). It is likely that those senators who were clinging to the latter interpretation were feeling disappointment over their unsuccessful attempt to amend the Act to provide for automatic cessation of a withdrawal upon the expiration of the Congress to which the withdrawal was reported. See S.DOC. NO. 610, 61st Cong., 2d Sess. 14 (1910) (the minority report of the committee). See also 45 CONG. REC. 8170 (1910) where it is reported that on a motion to strike out "temporarily," the committee chair, Sen. Smoot, argued:
I do not take it as a limitation on the power of the President, but I do take it that it means that the withdrawals, many of which will be restored to the public domain, are temporary in their nature. Of necessity it should be so, because if the withdrawals were not temporary in their nature, there would be a permanent withdrawal, with no likelihood or thought of the land ever being restored to the public domain.
that the statute did not deal with all of the President's withdrawal authority as it appears to do on its face.\textsuperscript{83} And "temporary" withdrawals lasting many years have been upheld with no requirement of a fixed expiration date.\textsuperscript{84} Significantly, the Act deals distinctly with two types of authority: first, authority "temporarily [to] withdraw from settlement, location, sale, or entry any of the public lands ..." and second, authority to "reserve the same for . . . public purposes to be specified in the orders of withdrawals."\textsuperscript{85} It is reasonable to conclude that adding "temporarily" to the first type of authority was to make it clear that the Act applied to more than "permanent" withdrawals, \textit{i.e.}, reservations (withdrawals with a designated public purpose). Presumably the statute might have been read before the amendment as authorizing the President only to "withdraw ... public lands ... and reserve the same ... for public purposes ...."\textsuperscript{86} As enacted, the statute authorizes temporary withdrawals alone, or temporary withdrawals plus a reservation. The last sentence's reference to "such withdrawals or reservations" reinforces a construction that finds both types of authority to be included in the Act's compass. It is not surprising that the drafters of the Act would attempt to emphasize the extent of the Pickett Act in light of the rather narrow scope of the President's inquiry and the sharp differences over the proper limits of executive authority.\textsuperscript{87}

In his 1941 opinion, the Attorney General strained to find authority for withdrawals and reservations outside the Pickett Act so that withdrawn lands might be closed to mining. The colorful story behind the opinion,
which only came to light in 1968 as a result of the Public Land Law Review Commission’s hearings, 88 helps explain how the Attorney General reached his conclusion. Attorney General Robert H. Jackson was under intense pressure from several executive departments, including his own, to uphold nonstatutory withdrawal authority. After nearly a year of machinations the Attorney General adopted and published an opinion supporting the continued existence of an implied delegation of withdrawal authority. This necessitated withdrawing an earlier, unpublished opinion that had reached the opposite conclusion 89—that the Act did “define and limit the power of the President to make withdrawals . . .” and that “withdrawals now made must be made in accordance with its terms, unless made under some other act or acts of Congress.” 90

Denial of impliedly delegated authority in the 1941 Attorney General’s opinion not only would have prohibited a proposed withdrawal for the Squaw Butte Experimental Station in Oregon, the subject of the opinion, but also would have cast doubt upon the validity of numerous other executive withdrawals and reservations. Initially the Attorney General responded to entreaties that the first opinion be reconsidered by pointing out that the plain language of the Act contradicted the interpretation being urged, and he adhered to the views he voiced in the first opinion. 91 Yet his views changed within two months and the first opinion was revoked. 92 Shortly after the new opinion was signed, Attorney General Jackson was appointed to the United States Supreme Court. 93

Two grounds that received but passing mention in the final Attorney General’s opinion were strenuously pressed by those seeking reconsideration. The argument that unrestricted executive withdrawal authority is justified by long-standing administrative construction emerges as the enduring rationale for impliedly delegated withdrawal authority. The other argument, that the practical effect of leaving all lands withdrawn since the Act (for example, military reservations) open to mining would be anomalous, provides some support for the reasonableness of the admin-

88. Copies of exchanges of inter- and intra-departmental correspondence were made available to the Public Land Law Review Commission by Assistant Attorney General Clyde O. Martz to supplement his testimony before the Commission. Copies of the documents are collected in the WHEATLEY REPORT, supra note 19, Appendix B.
89. Unpublished opinion of the Attorney General (July 25, 1940) (reprinted in the WHEATLEY REPORT, supra note 19, Appendix B at 6).
90. Id. at 9.
93. Eight days after the opinion (June 12, 1941), Jackson was nominated as a Supreme Court Justice by President Roosevelt. He was confirmed by the Senate on July 7, 1941, and took the oath of office on July 11, 1941. There is no evidence to suggest that Jackson’s appointment was in any way related to the matter of the withdrawal opinions.
istrative interpretation, not its legality. Deference to administrative construction and conduct was, of course, the basis for the Court’s legitimation of pre-Pickett Act withdrawals in *Midwest Oil*.

One might have concluded reasonably that the realm of withdrawal authority had been subjected to plenary congressional control and that any implied authority had been repealed by the Pickett Act, but courts subsequently read the Act so narrowly that it was rendered almost meaningless. After *Midwest Oil* the executive continued to operate on the apparent assumption that whatever it could not do under the express terms of the Pickett Act it could still do under its implied delegation of authority. That assumption may have become a self-fulfilling prophecy. Each withdrawal after the Pickett Act that escaped the Congress’s veto became evidence of a continued congressional acquiescence. Although the 1941 Attorney General’s opinion cited few examples of congressional acquiescence in the practices it validated, the failure of Congress to respond to the opinion by denying the survival of implied authority gave the opinion legitimacy. The executive’s actions based on the assumption that it had authority expressed in the opinion went unchallenged. The longer without challenge or congressional limitation, the less likely it became that a court would find an absence of authority. Indeed, the few instances of congressional termination of executive withdrawals might be cited as indications that Congress would check any exercise of authority with which it disagreed.

The tortured interpretation indulged by the 1941 Attorney General’s opinion cleverly preserved all the non-statutory “permanent” withdrawals made after the Pickett Act. If lands to be withdrawn did not need to be protected from mining activity or were not otherwise excluded by the Act’s terms the executive proceeded comfortably under the Pickett Act. When in doubt, residual implied authority, covering the rest of the field,

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94. Attorney General Jackson did quote from a previous opinion by his predecessor, Homer Cummings, relating to a proposed reservation of public lands for use as a migratory bird refuge: “Numerous Executive orders entirely similar in principle to the proposed order have been issued over a period of years and there has been no repudiation or disaffirmance of such orders by Congress.” 40 Op. Att’y Gen. 73, 83 (1941), quoting from 37 Op. Att’y Gen. 502, 503 (1934). Jackson also cited six executive orders not made under Pickett Act authority, 40 Op. Att’y Gen. at 82, three attorney generals’ opinions and two court of appeals cases. Id. at 84. All of the latter five decisions seem to have been justified as the exercise of some inherent withdrawal authority of the executive—a questionable rationale, see note 46 supra—and congressional acquiescence was not expressly relied upon.


96. Certain lands that were subject to valid settlements under homestead and other public land laws were excepted from operation of the Pickett Act. 43 U.S.C. § 142 (1976). In such cases the burdens on the executive were minor. Ch. 421, § 1, 36 Stat. 847 (1910) (repealed 1976) required only that the public purpose of a reservation under the Act be specified.
was used. Later, even "temporary" withdrawals from mineral entry were
defended as within the executive's impliedly delegated authority.98

The first court test of non-statutory executive authority to make with-
drawals after the Pickett Act finally came in 1977. The court in Portland
General Electric Co. v. Kleppe\textsuperscript{99} found ample impliedly delegated ex-
cecutive authority based on 67 years of apparent congressional acquies-
cence in executive withdrawal authority, unbridled by the many congressional
enactments in the area.\textsuperscript{100} The case was a modern version of Midwest
Oil. The Secretary of the Interior had temporarily withdrawn 3 million
acres of oil shale lands in Wyoming, Colorado, and Utah from appro-
priation under the mining laws. Portland General Electric Co. then located
1,740 uranium claims on some of the withdrawn public lands. When the
government threatened to bring a trespass action against the company in
1975, discovery work was stopped and the company sued Interior De-
partment officials challenging the withdrawal order. At last, judicial at-
tention could be focused on the argument that the Pickett Act comprehended
the executive's withdrawal authority, except as otherwise dealt with by
statute. But apparently the issue had arisen too late.

Without analysis, the court in Portland General Electric held that the
withdrawal power recognized in Midwest Oil was not ended by the Pickett
Act. The court went on to rule that even if "the Pickett Act did supersede
the implied authority of the President to make withdrawals, Congress
has, by its acquiescence restored that power."\textsuperscript{101} In support of this prop-
osition the court cited the 1941 Attorney General's opinion that had
interpreted the Act as leaving permanent withdrawal authority unimpaired
but as limiting the pre-existing authority for temporary withdrawals. Yet
the court's decision upheld a temporary withdrawal, tacitly stating that
"the President's power to make temporary withdrawals of lands from
mineral entry was not destroyed by this Act."\textsuperscript{102}

Recent indications that the understanding of Congress comported with
the acquiescence theory were cited in Portland General Electric. One
example was the legislative history of the Defense Withdrawal Act re-
ognizing the existence of an implied delegation of authority.\textsuperscript{103} Another
was language in a section of the Alaska Native Claims Settlement Act
referring to the Secretary's "existing" authority.\textsuperscript{104}

73 (1941) as authority).
\textsuperscript{100} Id.
\textsuperscript{101} Id. at 862.
\textsuperscript{102} Id. at 861.
In the Alaska Native Claims Settlement Act Congress directed the Secretary to withdraw some 84 million acres of public lands in Alaska for congressional consideration as national parks, forests, wildlife refuges, and wild and scenic river systems.\(^7\) The Act specified that this should be done by the Secretary of Interior "acting under authority provided for in existing law." The directive to withdraw the lands from "all forms of appropriation under the public land laws, including the mining and mineral leasing laws," indicates that Pickett Act authority would be unavailable. The authority under existing law to which Congress referred could only have been the executive's implied authority.

A more forthright expression of Congress's understanding that it has impliedly granted withdrawal power to the executive by acquiescence is found in the legislative history of the Defense Withdrawal Act.\(^6\) The Senate report on the bill indicates that its purpose is "the recapture by the Congress of those powers which the executive branch of the government has acquired over a long period of years with respect to the withdrawal of the public lands from settlement, entry, location, and sale under the public land laws—an Executive power acquired through acquiescence or silence on the part of Congress."\(^7\) The report recognizes that Congress had "since 1941 remained silent, and has therefore indulged in a practice '... equivalent to acquiescence and consent that the practice be continued until the power exercised is revoked.'" Thus, the bill was "specifically aimed at breaking that silence—if silence it be—with respect to the Federal property embraced by its terms."\(^8\) The report confirms that the intent of the Act was to restrict the scope of authority under which the executive had been operating. Without fully admitting "silence," the report rather candidly admits acquiescence.

A further example of congressional acknowledgement that there has been an implied delegation is found in the Federal Land Policy and Management Act (FLPMA).\(^9\) The Act repealed "the implied authority

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\(^8\) Id. at 12, reprinted at 2238.

of the President to make withdrawals and reservations resulting from acquiescence of Congress."\textsuperscript{110}

The Supreme Court's recognition in \textit{Midwest Oil} of a "grant" of authority to the executive based on congressional acquiescence in practices before 1910 would not lead inexorably to the conclusion that there was a "born again" implied delegation of withdrawal authority that authorized withdrawals after the Pickett Act. Yet congressional attempts to take control of withdrawals beginning in 1910 have not deterred the executive from making non-statutory withdrawals. The acquiescence theory is even more plausible than it was at the time of \textit{Midwest Oil} because of the strong policy of retention and management of public lands expressed in many congressional acts and by the accompanying general policy trend favoring conservation of natural resources. The same rationale would favor protective exercises of statutory withdrawal authority.

\section*{III. INTERPRETING STATUTORY WITHDRAWAL AUTHORITY: THE EXAMPLE OF THE ANTIQUITIES ACT.}

One of the earliest statutes vesting the executive with discretion to make withdrawals was the Antiquities Act authorizing the proclamation of national monuments by the President.\textsuperscript{111} The Act was originally designed to protect objects of historic or scientific interest such as Indian ruins, but it has been interpreted expansively by the executive. It is the most important of the few statutes that survived Congress's wholesale repeal of statutes dealing with executive withdrawal authority in 1976.\textsuperscript{112}

The Antiquities Act gave the President authority to withdraw lands with no limits on duration, unhindered by any procedural requirements,\textsuperscript{113} with no provision for congressional review,\textsuperscript{114} and with no fixed acreage limitation.\textsuperscript{115} Attempts to limit executive discretion based on language in the Act that restricts withdrawals to the "smallest area compatible with the proper care and management of the object to be protected"\textsuperscript{116} and on congressional intent to protect specific sites such as Indian ruins, rather than large land areas,\textsuperscript{117} have been unsuccessful.

\begin{itemize}
  \item \textsuperscript{110} \textit{Id.}, § 704(a), 90 Stat. at 2792, quoted in note 208 \textit{infra}. See notes 207–215 \textit{infra}.
  \item \textsuperscript{111} 16 U.S.C. §§ 431–433 (1976).
  \item \textsuperscript{112} \textit{See} notes 209–210 \textit{infra} and accompanying text.
  \item \textsuperscript{113} Authority under the Antiquities Act is given to the President. 16 U.S.C. § 431 (1976). The President has delegated his withdrawal authority to the Secretary of the Interior. Exec. Order No. 10,355, 17 Fed. Reg. 4831 (1952).
  \item \textsuperscript{114} Compare this broad discretion with the more detailed provisions and procedures for withdrawal in the FLPMA. \textit{See} notes 226–241 \textit{infra} and accompanying text.
  \item \textsuperscript{115} By contrast the Defense Withdrawal Act, 43 U.S.C. §§ 155–158 (1976), permits only withdrawals of up to 5,000 acres for defense purposes without an act of Congress. \textit{See} note 231, \textit{infra}. \textit{See also} the FLPMA procedures related to sizes of withdrawals, notes 226–230 \textit{infra} and accompanying text.
  \item \textsuperscript{116} 16 U.S.C. § 431 (1976). \textit{See} notes 124–127 \textit{infra} and accompanying text.
  \item \textsuperscript{117} \textit{Id.} \textit{See} notes 128–134 \textit{infra} and accompanying text.
\end{itemize}
Most recently the scope of the executive’s discretion under the Antiquities Act was called into question as a result of President Carter’s 1978 withdrawal of lands for seventeen national monuments encompassing fifty-six million acres in Alaska. The action was motivated by the imminent expiration of extensive withdrawals under the Alaska Native Claims Settlement Act. The lands were being considered for inclusion in units of land to be managed under one of the federal conservation systems. Challenges came from private interests whose development of minerals under Mining Act claims would be thwarted by national monument designation, and from the State of Alaska whose land selections would be limited. As with every judicial challenge to the exercise of executive discretion under the Act in the past, the court dealing with the Alaska lawsuits upheld creation of the monuments.

Congress did not have in mind authorizing withdrawals of vast areas for designation as national monuments when it passed the Antiquities

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118. In a series of proclamations dated December 1, 1978, President Carter withdrew and reserved the following amounts of Alaska land as national monuments to protect the biological, geological, archaeological and historical value of each area:

- Admiralty Island National Monument: 1,100,000 acres
- Aniakchak National Monument: 350,000 acres
- Becharof National Monument: 1,200,000 acres
- Bering Land Bridge National Monument: 2,590,000 acres
- Cape Krusenstern National Monument: 560,000 acres
- Denali National Monument: 3,890,000 acres
- Gates of the Arctic National Monument: 8,220,000 acres
- Glacier Bay National Monument [Addition]: 550,000 acres
- Katmai National Monument [Addition]: 1,370,000 acres
- Kenai Fjords National Monument: 570,000 acres
- Kobuk Valley National Monument: 1,710,000 acres
- Lake Clark National Monument: 2,500,000 acres
- Misty Fiords National Monument: 2,285,000 acres
- Noatak National Monument: 5,800,000 acres
- Wrangell–St. Elias National Monument: 10,950,000 acres
- Yukon-Charley National Monument: 1,720,000 acres
- Yukon Flats National Monument: 10,600,000 acres


119. See notes 245–255 infra and accompanying text.


122. See notes 249–250 infra and accompanying text.

123. Anaconda Copper Co. v. Andrus, 14 E.R.C. 1853 (D. Alas. 1980). See authorities cited in notes 129–146 infra. If pending or subsequent challenges to President Carter’s Antiquities Act withdrawals of Alaska lands by persons who attempted to establish rights (e.g., mining claims) on those lands should succeed, private rights may be sustained even if the land was withdrawn later under the 1980 Alaska National Interest Lands Conservation Act. Act of Dec. 2, 1980, Pub. L. No. 96-487, §§ 201–708, 94 Stat. 2371, 2377–2422. However, if the same lands were validly withdrawn, at the time of private entry under other authority as contemplated by § 17(d)(1) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1616(d)(1) (1976) (see note 105 supra), it is likely that private interests would be defeated.

All of President Carter’s withdrawals were rescinded and superseded by the 1980 legislation that placed the affected land in a variety of classifications (to be codified at 16 U.S.C. § 3209). This led the parties in Alaska v. Carter, 462 F.Supp. 1155 (D. Alas. 1978), involving challenges to the withdrawals, to dismiss the pending action. Stipulation of Dismissal dated Aug. 14, 1981.
Act. The purpose was to set aside minimal areas to protect ruins of archaeological interest in the American Southwest. The intent of Congress is captured in the statute’s reference to “historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest” and in its limitation of withdrawn lands to the minimum size required to care for protected objects. During the floor discussion of the bill which became the Antiquities Act, some members of Congress were apprehensive about the potential for using the Act to withdraw large land areas. Assurances were given by the floor manager that nothing of the kind was intended. It appears that congressional understanding was that large, permanent areas would become national parks through congressional action rather than monuments withdrawn under the Antiquities Act.

Whatever Congress thought it was doing in the Antiquities Act, the executive began using, and has since used, the Act’s authority to withdraw large land areas for a variety of purposes, far removed from simply protecting Indian relics. President Theodore Roosevelt made more than a dozen withdrawals under the Act in the two years that followed its enactment. Although most were of small areas where ruins or some natural formation was located, some were of huge areas withdrawn for more general preservation purposes. Most notably, Grand Canyon National

124. H. R. REP. NO. 2224, 59th Cong., 1st Sess. 1 (1905) states:
There are scattered throughout the Southwest quite a large number of very interesting ruins. Many of these ruins are upon the public lands, and the most of them are upon lands of but little present value. The bill proposes to create small reservations reserving only so much land as may be absolutely necessary for the preservation of these interesting relics of prehistoric times.


126. The following dialogue is illustrative:
Mr. STEPHENS of Texas. Will that take this land off the market, or can they still be settled as part of the public domain?
Mr. LACEY. It will take that portion of the reservation out of the market. It is meant to cover the cave dwellers and cliff dwellers.
Mr. STEPHENS of Texas. How much land will be taken off the market in the Western States by the passage of the bill?
Mr. LACEY. Not very much. The bill provides that it shall be the smallest area necessary [sic] for the care and maintenance of the objects to be preserved.
Mr. STEPHENS of Texas. Would it be anything like the forest-reserve bill, by which seventy or eighty million acres of land in the United States have been tied up?
Mr. LACEY. Certainly not. The object is entirely different. It is to preserve these old objects of special interest and the Indian remains in the pueblos of the Southwest, whilst the other reserves the forests and the water courses.

40 CONG. REC. 7888 (1906). The bill passed in 1906 was nearly identical to a bill passed in 1904 by the Senate (S. 5603) but omitted an amendment that appeared in the earlier bill limiting withdrawals to one section (640 acres) of land in one place. See 30 CONG. REC. 5627 (1904).

Monument was set aside in Arizona because it was "an object of unusual scientific interest, being the greatest eroded canyon within the United States." The United States later attempted to remove an enterprising mining claimant from a claim on the trailhead to the popular Bright Angel Trail on the south rim of the Grand Canyon where he sought to charge fees for access. When the claimant challenged the legality of the withdrawal, the Supreme Court in *Cameron v. United States* upheld the designation of Grand Canyon as a national monument. The Court found that the canyon was of scientific interest, a purpose mentioned in the statute. The one paragraph the court devoted to the issue did not deal with the question of congressional intent or the language which seems to limit the land area to be withdrawn, nor were these matters fully developed in the briefs of the parties. By the time of the *Cameron* decision, at least nine other large national monuments had been set aside under the Act to preserve various geological phenomena, not for protecting ruins as contemplated by Congress.

The Supreme Court considered another challenge to the President's authority under the Antiquities Act in *Cappaert v. United States*. A rancher's pumping of groundwater had the effect of lowering the level of water pooled in a nearby limestone cavern known as Devil's Hole, a part of Death Valley National Monument. The federal government at-

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129. 252 U.S. 450 (1920).
130. Id. at 455-56.
131. Appellants argued in their brief that the Grand Canyon National Monument was encompassed within a prior forest reserve and that §1 of the Antiquities Act protected objects of historic and scientific interest on land already reserved. 16 U.S.C. §433. Therefore, withdrawal under §2 of the Act (16 U.S.C. §431) was unnecessary to insure protection of objects of historic and scientific interest. Appellants also argued that the Grand Canyon was not a landmark, structure, or object of historic or scientific interest but merely an enormous canyon and that the President's attempt to set it apart as an object of unusual scientific interest merely because of its size was improper. Brief for Appellant at 44–48, *Cameron v. United States*, 252 U.S. 450 (1920).

The government responded that appellants' contentions about national monument status were not raised in the Court of Appeals nor by the assignment of error to the Supreme Court, and thus were not properly before the Court. It also argued that, in any event, the proclamation creating the Grand Canyon National Monument stated that the canyon was an object of unusual scientific interest, bringing it within the authority Congress granted to the President. Brief for Appellee at 23–24, *id*.

The question of whether the statute authorized such a large withdrawal was at issue in the case; see *United States v. Cameron*, E. No. 10 (D. Ariz., answer filed March 23, 1917). The Court did not address this question.

132. *E.g.*, Proc. No. 658, 34 Stat. 3236 (Devil's Tower; 1152.91 acres); 36 Stat. 2498 (Mukuntuweap); Proc. No. 1126, 37 Stat. 1681 (Colorado; 13,883 acres); Proc. No. 1166, 37 Stat. 1715 (Devil's Postpile; 800 acres); 34 Stat. 3266 (Petrified Forest; 60,776.02 acres); Proc. No. 1340, 39 Stat. 1792 (Capulin Mountain; 680 acres); Proc. No. 1313, 39 Stat. 1752 (Dinosaur); Proc. No. 1487, 40 Stat. 1855 (Katmai; 1700 square miles); Proc. No. 1547, 41 Stat. 1779 (Scott's Bluff; 2053 acres). Approximately 5 to 15 national monuments were set aside yearly, many of them quite small in size.
tempted to curtail the pumping to protect the Devil's Hole Pupfish, a rare species living in the pool. The rancher and the State of Nevada resisted on several grounds, including a contention that the Antiquities Act permitted the President to withdraw lands only to protect archaeological sites. In a paragraph the Court dismissed the argument, pointing out that the pool and the fish for which the monument was set aside were "objects of historic or scientific interest." Although no reference was made to administrative practice to support the government's interpretation of the Act, it might have been pointed out that by 1976 use of the Antiquities Act for preservation of geological formations had become well established.

The most comprehensive treatment of the scope of executive authority under the Antiquities Act was in a district court case arising in Wyoming. When John D. Rockefeller, Jr. offered to give the United States over 33,000 acres in the majestic Grand Tetons in Wyoming, it was upon the understanding that the area would be preserved and cared for by the United States as a park. Historically parks have been created only by an act of Congress. Consequently efforts to extend Grand Teton National Park to include the Rockefeller lands were begun. Proposals for increasing the park were defeated by strong local resistance to further reduction of a tax base already thinned by a heavy concentration of nontaxable public lands. The state also objected that its control of fish and game, especially revenue producing management of the elk herd, was frustrated by the presence of large blocks of federal land. President Franklin D. Roosevelt responded to an eighteen-year impasse in Congress by declaring 221,610 acres to be the Jackson Hole National Monument. Reacting strenuously, Congress attached a provision to Interior Department appropriations bills for several years following the proclamation which prohibited expenditures of the appropriations for administration of Jackson Hole National Monument.

134. Id. at 141–42. The Presidential Proclamation setting aside the monument recited that its purpose was "for the preservation of the unusual features of scenic, scientific, and educational interest" and mentioned the fact that it was the habitat of "a peculiar race of desert fish . . . which is found nowhere else in the world." Proc. No. 2961, 3 C.F.R. § 147 (1979).
138. Less than 5% of the land in Teton County was taxable. H. R. REP. NO. 2910, 81st Cong., 2d Sess. 2 (1950).
139. Proc. No. 2578, 57 Stat. 731 (1943). A large area that had been within the Teton National Forest was also included in the monument.
140. E.g., ch. 219, § 8, 57 Stat. 493 (1943); ch. 298, § 10, 58 Stat. 508 (1944); ch. 262, § 10, 59 Stat. 360 (1945); ch. 529, § 9, 60 Stat. 386 (1946); ch. 337, § 6, 61 Stat. 492 (1947); ch. 754, § 6, 62 Stat. 1149 (1948); and ch. 680, § 110, 63 Stat. 801 (1949).
The State of Wyoming brought suit in federal district court charging
that the President had no authority to set aside the Grand Teton lands as
a national monument. Wyoming alleged that the area contained no object
of historic or scientific interest and that it had not been confined to the
smallest area compatible with the proper care and management of a
monument. The court upheld the President’s creation of Jackson Hole
National Monument. Although the terse proclamation cast little light
on the purposes of the monument, the government was allowed to
introduce evidence supportive of the President’s action, such as the ex-
istence of trails and camps used in connection with early trapping and
hunting, glacial formations, mineral deposits, and indigenous plant life.
The court determined that there was enough evidence of historic and
scientific value to support a conclusion that the President had not acted
beyond his discretion.

The court in Wyoming v. Franke recognized that the President’s action
resulted in hardship and injustice to the state and seemed unpersuaded
as to the wisdom of his action. Nevertheless the court concluded that
the Antiquities Act had given the President authority to determine what
“objects” fall within the ambit of the legislation and to define the area
that is compatible with proper care and management of those objects;

[I]f the Congress presumes to delegate its inherent authority to Ex-
ecutive Departments which exercise acquisitive proclivities not ac-
tually intended, the burden is on the Congress to pass such remedial
legislation as may obviate any injustice brought about as the power
and control over and disposition of government lands inherently rests
in the Legislative branch.

Eventually Congress did restore some of the monument lands to Teton
National Forest, placing some in an elk refuge, and merging the rest with
Grand Teton National Park. The Act also included provision for federal
payments in lieu of taxes and for federal cooperation in the state’s fish
and game management. As if to note congressional displeasure with
Roosevelt’s action and to assuage state fears of its repetition, the new
legislation prohibited any future use of the Antiquities Act in Wyoming.

142. The proclamation addressed the statutory criteria briefly: “the Jackson Hole country . . .
contains historic landmarks and other objects of historic and scientific interest . . .” Proc. No.
144. Id.
145. Id. at 896–897.
146. Id. at 896.
148. Id. §§ 5–6.
149. Id. § 1.
Congressional correction remains the most potent check on excesses under the Antiquities Act. Short of a clear abuse of discretion, it appears that the courts will not be lured into disputes that demand neat interpretations of the Act. Cameron's early, almost contemporaneous conclusion that a behemoth geologic feature (Grand Canyon) could qualify as a "monument" under the Act's language set the stage for an unrestrained application of the Act by the executive. The Cameron court might have insisted on reading the Act to be limited to small land areas required for protection of archaeological objects. The decision instead concentrated on other issues, perhaps reflecting the relative importance attached to them by litigants. Deference to the administrative officials charged with applying the statute is generally appropriate. But in Cameron the statute was so new, its language sufficiently ambiguous, and administrative interpretations far enough from the clear intent of Congress that such easy deference was unjustified. Nevertheless the Cameron decision seemed to license a liberal use of the Antiquities Act to withdraw large blocks of public land in the name of preserving "objects of historic or scientific interest." Of course it is difficult to imagine lands that would not feed some historic or scientific interest.

The Antiquities Act has had a profound impact in Alaska. There is a long history of setting aside large national monuments there in areas needing special protection. President Carter's 1978 action setting aside millions of acres in Alaska as national monuments was in response to Congress's failure to take action to protect national interest lands in Alaska which, absent executive action, would have opened them to disposal and development. Carter noted that the lands "contain resources of unequaled scientific, historic, and cultural value, and include some of the most spectacular scenery and wildlife in the world." The purpose of

150. See note 131 supra.

151. In Wyoming v. Franke, 58 F.Supp. 890, 895 (D. Wyo. 1945), the court had suggested that: if a monument were to be created on a bare stretch of sage-brush prairie in regard to which there was no substantial evidence that it contained objects of historic or scientific interest, the action in attempting to establish it by proclamation as a monument, would undoubtedly be outside the scope and purpose of the Monument Act.


153. See note 118 supra.


the withdrawals was to preserve fragile land areas intact for future legislation that would establish national parks, wildlife refuges, and wilderness areas. Yet the correctness of the actions must be judged not by the purity of their motives but by their conformity with statute. While the proclamations and the President's statements accompanying them included much general language that more appropriately describes parks, wildlife refuges, and other land management systems, there are plenty of references to extraordinary features that qualify for the historic and scientific rubrics of the Act.55

Like the criterion in the Antiquities Act that requires areas proclaimed as monuments to include "objects of historic or scientific interest," the restriction on reserving lands in the monument "to the smallest area compatible with the proper care and management of the objects to be protected" calls for an exercise of executive discretion. In Alaska immense land areas had to be withdrawn in part because of the extent of the "objects" being protected. As the President stated, among the areas to be protected:

156. E.g.,

there are hereby set apart and reserved as the Admiralty Island National Monument all lands, including submerged lands, and waters owned or controlled by the United States within the boundaries of the area described. . . . The area reserved consists of approximately 1,100,000 acres, and is the smallest area compatible with the proper care and management of the objects to be protected. Proc. No. 4611, 3 C.F.R. § 69 (1979);
The Secretary of the Interior shall promulgate such regulations as are appropriate, including regulation of the opportunity to engage in a subsistence life-style by local residents. The Secretary may close the national monument, or any portion thereof, to subsistence uses of a particular fish, wildlife or plant population if necessary for reasons of public safety, administration, or to ensure the natural stability or continued viability of such population. Proc. No. 4612, 3 C.F.R. § 72 (1979). In addition, each of the Alaskan national monument withdrawals contain this provision:

All lands, including submerged lands, and all waters within the boundaries of this monument are hereby appropriated and withdrawn from entry, location, selection, sale or other disposition under the public lands laws, other than exchange. Proc. Nos. 4611-27, 3 C.F.R. §§ 69–103 (1979).

157. E.g., Proc. No. 4611, 3 C.F.R. 69 (1979) states that Admiralty Island is "outstanding for its superlative combination of scientific and historic objects," listing archaeological sites, cultural history, and an ecology that includes a large population of nesting bald eagles, brown bears, and an unspoiled coastal island ecosystem. Proc. No. 4612, 3 C.F.R. § 72 (1979), states that the Aniakchak National Monument is valuable for its unique volcanic features, including one of the world's largest calderas with a unique lake, examples of geological sequences and biological succession of plant and animal species, and a unique, largely self-contained climate. Interacting with the caldera system is a unique subsistence culture of local residents. Proc. No. 4617, 3 C.F.R. § 82 (1979) describes Gates of the Arctic National Monument as both the site of "human habitation for approximately 7,000 years," and as an area that affords an excellent opportunity to study undisturbed communities of animals and plants. Proc. No. 4627, 3 C.F.R. § 102 (1979) depicts Yukon Flats National Monument as the largest Alaskan solar basin and as one of the continent's most productive habitats for wildlife due to the pristine ecology of its lush wetlands.

A similar variety of qualities is cited in the other 1978 Alaska withdrawals.
are the Nation's largest pristine river valley, the place where man may first have come into the New World, a glacier as large as the State of Rhode Island, and the largest group of peaks over 15,000 feet in North America.\textsuperscript{158}

So long as the historic or scientific nature of the area can be justified, a decision to include a reasonable amount of surrounding territory would seem to be within the scope of executive discretion that is shielded from judicial disturbance. Indeed, once the executive determines that the Grand Canyon or the Malaspina Glacier is worthy of protection, a decision to include less than all of it within a national monument might be questioned as an abuse of discretion.

The continued practice of making huge withdrawals under the Antiquities Act, like the executive's use of implied authority, has become its own greatest vindication. By arrogation, authority to go well beyond the Antiquities Act's original intent has become vested in the executive. Congress has been aware of the executive's unfettered use of the Act. In a few instances Congress's disapproval has resulted in a reversal of executive action.\textsuperscript{159} Although a sharp congressional response to the creation of Jackson Hole National Monument led to the curtailment of the executive's authority in Wyoming under the Act,\textsuperscript{160} the statute has not otherwise been modified by Congress.\textsuperscript{161} Indeed, when Congress enacted FLPMA in 1976 it left the Antiquities Act intact while repealing almost all other sources of executive withdrawal authority.\textsuperscript{162} This leads to a conclusion, as in Midwest Oil, that Congress has impliedly approved, and thereby effectively granted, the broad authority under the Act that the executive has regularly exercised. Just as an implication of nonstatutory withdrawal authority was built on undisturbed executive practice, a history of expansive interpretation of authority under the Antiquities Act has legitimated a broad construction.

\textsuperscript{158} 14 WEEKLY COMP. OF PRES. DOC. 2111, 2112 (Dec. 4, 1978).

\textsuperscript{159} E.g., Jackson Hole National Monument was legislatively abolished and the lands merged into other systems. See notes 147–149 supra and accompanying text. Grand Canyon National Monument was included in a National Park by an act of Congress. Act of Jan. 3, 1975, § 3, 88 Stat. 2090, Pub. L. No. 93-620 (codified at 16 U.S.C. §228b (1976)).

\textsuperscript{160} See note 149 supra.


\textsuperscript{162} See notes 208–210 infra. It has been argued that the Antiquities Act is out of keeping with the purposes of FLPMA and should be repealed. Comment, Public Land Withdrawal Policy and the Antiquities Act, 56 WASH. L. REV. 439 (1981).
IV. WITHDRAWALS IN AN ERA OF PUBLIC LAND STEWARDSHIP

A. Modern Land Policy

A rather abrupt shift of public land policy accompanied the closing of the frontier around the turn of the century. As discussed above, the focus on disposal of public lands to achieve national goals—expansion, economic development, settlement of the continent—was changed as manifest destiny was accomplished. Certain lands were to be preserved to protect resources that might be needed by the nation—oil and gas, other minerals, timber, water, wilderness and recreational areas. Instead of wholesale repeals of the earlier laws allowing unrestrained private exploitation of the public domain, antidotal laws were enacted to salvage lands and resources that might be needed. A near crisis had prodded the Taft administration to withdraw millions of acres of oil lands from appropriation under the public land laws. This in turn moved Congress to enact the Pickett Act to facilitate future withdrawals, although the Court’s contemporary decision in Midwest Oil indicated that the President had the necessary authority to make the withdrawal in that case without a statute. In the same period Congress acted to protect other resources by defining authority for administrative officials to make withdrawals and to take other protective actions.

It became clear early in the twentieth century that the public lands were to be used and developed in a manner that ultimately would satisfy long range national purposes. As the federal government’s role changed from a temporary guardian of lands and resources for eventual disposal, to a trustee holding and managing property for the best interests of the citizenry, it became necessary to provide authority and direction to the officials who were in charge of the lands. Legislation supplied the framework for administering public lands professionally and responsibly in apparent recognition of the long term interests of the country in protecting and utilizing particular resources. Public land management policy evolved into a system of classification and management for particular uses. Management commands were included in the Forest Service Organic Act of 1897 that set up the Forest Service to manage the national forests. But the most sweeping advance toward a system of federal land use planning was enactment of the Taylor Grazing Act in 1934. This led to the

163. See notes 7–30 supra, and accompanying text.
164. See notes 31–44 supra, and accompanying text.
withdrawal of all public lands for classification. No uses, except mining and mineral leasing, were allowed without the permission of the Bureau of Land Management. Although budgets and skills were so limited that the agency’s authority to plan for and control land use could not be exercised fully, significant deprivations that were rampant in the past could be prevented.

The modern trend in public land management is reflected in a host of statutes requiring intensive management of federal resources by government officials. The statutes include mandates to protect certain land from resource development. The earliest example is found in the mandate of the National Park Organic Act of 1916. Officials were directed to manage the national parks “to conserve the scenery and the natural and historic objects and the wildlife therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.” Wilderness areas, and to some extent national monuments, are classified and managed not to promote any conventional “use” but rather to preserve them in a pristine state. This is done in the interests of science and history. It also satisfies national psychological needs to commune with past and future generations and pursues important aesthetic and emotional values. Thus Congress has now made care of non-development resources such as recreation, wildlife, and wilderness an objective of public land management.

Perhaps the general policy of demanding care and protection of federal lands is best illustrated not by statutes dealing with lands specifically

167. A few months after the Act became law the President withdrew from “settlement, location, sale or entry” all public lands in 12 western states. Exec. Order No. 6910, November 26, 1934. This covered more than the 80 million acres of lands chiefly valuable for grazing that the statute authorized to be included in grazing districts. Furthermore, the President also acted to withdraw all public lands not otherwise reserved or withdrawn. Exec. Order No. 6964, February 5, 1935. These executive orders may have been prudent, in that they prevented a land rush for the remaining public lands. But even if the actions were legally authorized, the classification authority of the Secretary was in doubt as to lands not covered by the 1934 Act. To remedy the situation Congress amended the Act to grant the Secretary discretionary authority “to examine and classify any lands withdrawn or reserved” under the two executive orders. Act of June 26, 1936, ch. 842, Title I, § 2, 49 Stat. 1976. This amendment provided the authority for the secretary to determine what uses were proper on the previously “wide open” public domain. See Utah v. Andrus, 446 U.S. 500 (1980).
169. Id.
170. E.g., the Wilderness Act of 1964 defines a federal land area characterized as “wilderness” as “an area of undeveloped Federal land retaining its primeval character and influence, without permanent improvements or human habitation, which is protected and managed so as to preserve its natural conditions. . . .” 16 U.S.C. § 1131(c).
171. See notes 111–117 supra and accompanying text.
targeted for preservation but by those which govern use of lands that are to remain available for resource development. The national forests and the lands administered by the Bureau of Land Management comprise most of the public lands and continue to be available for grazing, timber harvesting, and mineral exploration and development as well as for wildlife habitat and recreation. Yet today administration of lands for these purposes is controlled by statutes and is markedly different from management during the period of disposal of the public lands. The most comprehensive statutes are the Federal Land Policy and Management Act and the National Forest Management Act.

Public land managers are now required by statutes to consider all of the "multiple uses" to which an area might be adapted, to impose fees for uses permitted to private parties, to engage in land use planning, and to involve the public in decisionmaking. These mandates evidence a congressional purpose to impose guidelines and limits on federal agencies in order to prevent unwise use or dissipation of public resources. Without necessarily removing federal lands from availability for private uses, Congress has required prudence in management, the kind of prudence that is exercised by a manager who must consider the public resources not merely as commodities to be expended for today's needs but as assets to be retained indefinitely and used for the benefit of future, as well as of present, generations.

In addition to statutes dealing with general management of the public lands, Congress has, through the National Environmental Policy Act (NEPA), superimposed upon the statutory mission of every federal

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177. 16 U.S.C. §§ 1604(d), (f), (g), (i); 43 U.S.C. § 1712. See also Forest and Rangelands Renewable Resources Planning Act of 1974, which requires long range planning and research programs for the management, use and protection of Forest Service lands. 16 U.S.C. § 1601, amending Pub. L. No. 93-378, 88 Stat. 476.

178. 16 U.S.C. §§ 1603, 1604(c), 1604(d), 1612, 1643(c); 43 U.S.C. § 1712(f). See note 200 infra.

agency an obligation to assess the environmental impacts of any "proposals for . . . major Federal actions significantly affecting the quality of the human environment." The stated purpose of the Act is "to create and maintain conditions under which man and nature can exist in productive harmony and fulfill the social, economic, and other requirements of present and future generations of Americans." Enforceable obligations under NEPA seem to be limited to those concerning the preparation of environmental impact statements consistent with the Act's standards. The prerequisite of an impact statement may be avoided only if it would pose a clear and unavoidable conflict with other statutory obligations or if the agency involved exercises no discretion in the matter. Consequently land management agencies have adopted appropriate regulations and regularly must prepare environmental impact statements.

182. Id. at § 4332(2)(c). It has been held that NEPA "makes environmental protection part of the mandate of every federal agency and department." Calvert Cliffs Coordinating Committee, Inc. v. Atomic Energy Commission, 419 F.2d 1109 (D.C. Cir. 1971). Accord, Natural Resources Defense Council v. Morton, 388 F.Supp. 829 (D.D.C. 1974) (NEPA supplements Secretary of Interior's powers under Taylor Grazing Act). See also 42 U.S.C. §§ 4333 (all agencies required to bring their regulations, policies and procedures into conformity with NEPA's purposes), and § 4334 (NEPA's policies and goals are to supplement existing authorizations of federal agencies). Among NEPA's other requirements, agencies must: use "a systematic, interdisciplinary approach . . . in planning and in decisionmaking;" "identify and develop methods and procedures . . . which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;" "study, develop, and describe appropriate alternatives to recommended courses of action in any proposal that involves unresolved conflicts concerning alternative uses of available resources;" and "initiate and utilize ecological information in the planning and development of resource-oriented projects." 42 U.S.C. § 4332(2)(A), (B), (E), and (H) (1976).


185. E.g., Flint Ridge Dev. Co. v. Scenic Rivers Ass'n, 426 U.S. 776 (1976) (statutory time limit for federal action too short to allow for EIS preparation); Texas Comm. on Natural Resources v. Bergland, 573 F.2d 201 (5th Cir.), cert. denied, 439 U.S. 966 (1978) (legislative history of National Forest Management Act set forth standards for clear-cutting in national forests during period while permanent regulations were being developed).


The conservation trend—insistence upon sound management of public lands and selective preservation—grew throughout the first three quarters of the 20th century. Public land laws were exhaustively reviewed by the Public Land Law Review Commission and the commission’s conclusions were reported in 1970.\(^{189}\) The report contained 137 principal recommendations and hundreds of other, lesser recommendations. Much commentary, discussion, and criticism followed issuance of the report,\(^{190}\) but Congress took no action to implement the recommendations for five years. Finally, with the enactment of the Federal Land Policy and Management Act (FLPMA)\(^ {191}\) many of the recommendations in the report, or variations upon them, were adopted.\(^ {192}\)

A dominant theme in the Public Land Law Review Commission’s report was the assertion of the public’s interest in public resources. Although the 19th century motif of distributing public lands to private individuals and encouraging their private development had become largely outmoded, the vast majority of lands owned by the public were being managed with little direction from Congress. Congress expressly repudiated the old policy, declaring it to be federal policy that “the public lands be retained in Federal ownership” unless it is found through the FLPMA land planning procedures that disposal of certain parcels “will serve the national interest.”\(^ {193}\)

Before the FLPMA was enacted, the Bureau of Land Management (BLM), steward of about 60% of the public domain, was confined to antiquated management systems by limited budgets and lack of congres-
sional direction. Other land management agencies had the benefit of somewhat better resources and guidelines. Until the enactment of the FLPMA, BLM had no organic act and had to grope through a maze of congressional enactments, resolving contradictions and filling gaps in its agency mission by divining the congressional will as expressed through the most recent legislation.

The FLPMA attempted to bring federal land management into the 20th century by insisting upon greater responsibility and managerial regularity. Better land use planning and management were sought by providing for inventories and for comprehensive land use plans. Congress directed the use of criteria that show an overriding concern for better protection of federal resources. Procedures were set out for acquisitions, sales, and exchanges of public lands. Detailed provisions specified how the Bureau of Land Management is to be administered, and public participation was built into many of the bureau's activities. The Act affirmed a national interest in maintaining a supply of domestic resources and stated that the public lands should be managed consistently with that goal and with the goals of the Mining and Minerals Policy Act of 1970. But there were scant practical directives in the Act to carry out

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197. E.g., 43 U.S.C. § 1712(c)(3) provides that the Secretary shall "give priority to the designation and protection of areas of critical environmental concern," and § 1712(c)(6) requires him to "consider the relative scarcity of the values involved and the availability of alternative means (including recycling) and sites for realization of those values."

198. 43 U.S.C. § 1715 (acquisitions), § 1713 (sales), and § 1716 (exchanges).


201. 43 U.S.C. § 1701(a)(12). Another section of the Act states that "except as provided in [specified sections] and in the last sentence of this paragraph, no provision of this section or any other section of this Act shall in any way amend the Mining Law of 1872 or impair the rights of any locators of claims under that Act..." 43 U.S.C. § 1732(b). The exceptions seem to have a potential for swallowing much of the saving language. This is especially true of the "last sentence" referred to, which reads: "In managing the public lands the Secretary shall, by regulation or otherwise, take any action necessary to prevent unnecessary or undue degradation of the lands." Id.

202. 30 U.S.C. § 21a. The Act declares it to be in the national interest to foster private enterprise in developing an "economically sound and stable" mining industry, in mining research, in development of domestic minerals, and in disposal and reclamation of mineral waste.
these purposes; the dominant theme was prudent, conservative manage-
ment. Indeed, in a number of respects practices under the 1872 General
Mining Law were restricted or modified, and the Act included among
its most extensive and specific provisions measures for the preservation
of environmental values which often conflict with resource develop-
ment. It is in this context that the Act’s provisions concerning executive
withdrawals must be considered.

Taking a cue from the Public Land Law Review Commission’s report, Congress sought to deal with some of the mysteries of executive with-
drawal authority. With extraordinary precision, Congress expressly re-
pealed the President’s implied delegation of authority, specifically citing Midwest Oil in the statute, and repealed 29 statutory provisions for executive withdrawal authority. Consequently only a few statutes grant-
ing executive withdrawal authority remained intact.

As discussed above, Midwest Oil did not decide the validity of post-
Pickett Act withdrawals. The FLPMA preserves all withdrawals “in ef-
fect” at the time of its enactment but does not purport to validate or cure defects in attempted withdrawals that suffered from a legal defect. It

203. One court has said that the Secretary’s rulemaking authority contained in the Act is extensive enough to authorize any regulations upon the use of the public lands so long as they are “reasonably related to the broad concerns for the management of public lands set forth in FLPMA.” Topaz Beryllium Co. v. United States, 649 F.2d 775, 779 (10th Cir. 1981).

204. See note 16 supra.

205. 43 U.S.C. §§ 1732(b), 1744, 1781(f), 1782. See note 201 supra.

206. E.g., 43 U.S.C. §§ 1701(a)(8), 1702(c), 1712(c)(2), 1712(c)(3), 1712(c)(6), 1712(c)(8), 1732.

207. PLLRC REPORT, supra note 7 at 54–57. The Commission’s Recommendation 8 stated: Large scale limited or single use withdrawals of a permanent or indefinite term should be accomplished only by act of Congress. All other withdrawal authority should be expressly delegated with statutory guidelines to insure proper justification for proposed withdrawals, provide for public participation in their consideration, and establish criteria for Executive action.

At 54.

208. Effective on and after the date of approval of this Act, the implied authority of the President to make withdrawals and reservations resulting from acquiescence of the Congress (U.S. v. Midwest Oil Co., 236 U.S. 459) and the following statutes and parts of statutes are repealed. . . .


209. Id.


211. 43 U.S.C. § 1701(c) states: All withdrawals, reservations, classifications, and designations in effect as of the date of approval of this Act shall remain in full force and effect until modified under the provisions of this Act or other applicable law.

If an invalid withdrawal is discovered, the land can be withdrawn anew under the FLPMA procedures.
does require a substantial number of withdrawals to be reviewed by the Secretary and either revoked or continued.212

Most of the millions of acres that have been withdrawn are subject to the law as it existed before October 21, 1976, the FLPMA effective date. Therefore future challenges to withdrawals made after the Pickett Act and before the enactment of FLPMA may be expected.213 While challengers may argue that the Pickett Act itself extinguished the authority found in Midwest Oil, the fact that Congress saw fit to repeal the President's "implied authority" under Midwest Oil suggests that the authority had not been extinguished by the Pickett Act. There would have been no reason for the repealer unless Congress assumed that implied authority survived the Pickett Act; Midwest Oil had dealt with the issue only in a pre-Pickett Act context. Even if the Pickett Act extinguished the Presi-

See notes 226–235 infra and accompanying text. But this would not be effective to defeat established rights, e.g., claims perfected under the mining law. Exercises of secretarial authority under the Act are to be "subject to valid existing rights." Act of Oct. 21, 1976, Pub. L. No. 94-579, § 701(h) (reprinted in note following 43 U.S.C. § 1701). Although "claims" are something less than "rights," Stockley v. United States, 200 U.S. 532, 544 (1923) (dictum), it has been held that dedication of public land to uses inconsistent with a mining claim can result in government liability for damages. United States v. North American Transp. v. Trading Co., 253 U.S. 330 (1920).

212. The Act directs the Secretary of the Interior to review within fifteen years existing withdrawals from mining or mineral leasing of Bureau of Land Management and Forest Service lands, and all withdrawals of certain lands administered by other agencies, in the eleven Western states. 43 U.S.C. § 1714(e)(1). The Secretary then is to report to the President recommendations concerning continuation of the withdrawals. The President in turn reports his recommendations to Congress. The Secretary then can terminate any withdrawals that were not made by Congress unless Congress objects by a concurrent resolution within 90 days. 43 U.S.C. § 1714(l)(2).

As of the end of fiscal year 1981, 233 withdrawals covering about 20.4 million acres had been revoked. Most of the lands had been closed to mineral leasing, mining location or both. U.S. Department of the Interior, Bureau of Land Management, Division of Land Resources and Realty, Withdrawal Review Year End Report. October 16, 1981. Some withdrawals not required to be reviewed by § 204(l) of FLPMA (43 U.S.C. § 1714 (l)) were revoked. Apparently none of the revocations were made according to the prescribed procedures for referral of the Secretary's recommendations for continuation or termination of withdrawals. The office of the Solicitor for the Department of the Interior has taken the position that FLPMA in § 204(a) provides the Secretary with independent revocation authority. See Memorandum from Associate Solicitor, Energy and Resources to Assistant Secretary, Land and Water Resources, Oct. 30, 1980. Section 204(a) states that "[T]he Secretary is authorized to make, modify, extend or revoke withdrawals but only in accordance with the provisions and limitations of this section." The memorandum points out that the provision of § 204(l) had its origin in a section of a predecessor bill separate from § 204(a). Furthermore, § 204(l) says that "the Secretary may act to terminate withdrawals other than those made by Act of Congress in accordance with the recommendations of the President . . . ." (emphasis added). The Associate Solicitor's memorandum attaches great significance to the difference in terminology. Having treated the authority in §§ 204(a) and 204(l) distinctly, the memorandum argues that a withdrawal reviewed under § 204(l) can be revoked under either section. The argument is plausible with respect to withdrawals that were outside the required review process of § 204(l) (even if they are, in fact, reviewed), but for those that are within the purview of § 204(l) the most reasonable construction is that § 204(a) authority to revoke is not available. By its terms § 204(a) authority is restricted by "the provisions and limitations of this section [204]."

213. Portland General Electric Co. v. Kleppe, 441 F.Supp. 859 (D. Wyo. 1977) is the only such challenge brought so far. It was unsuccessful. See notes 99–104 supra and accompanying text.
dent's earlier implied delegation of authority, it could be argued that Congress has since acquiesced in post-Pickett Act withdrawals, giving rise to a new grant of authority. It might be urged that this authority was not extinguished by the repealer. The argument is not untenable, but it seems inconsistent with Congress's apparent intent. The most plausible interpretation of the repealer, supported by the legislative history, is that it extinguished all implied authority that existed in 1976 and that the citation to Midwest Oil was not intended to limit it to pre-Pickett Act authority. By the time FLPMA was passed, many assumed that the Pickett Act did not limit executive withdrawal authority. In any event, in the FLPMA Congress may simply have been rejecting all impliedly delegated withdrawal authority and used the citation to Midwest Oil to illustrate rather than to limit the type of authority being repealed.

Having repealed most of the authority of the executive to make withdrawals, the Federal Land Policy and Management Act vested the executive with broad new withdrawal authority, subject to certain procedural requirements. The authority was delegated not to the President, but directly to the Secretary of Interior. The purposes for withdrawals were articulated for the first time in a new, functional definition, and statutory procedures were engaged for a wide range of administrative actions that fall within the definition of a "withdrawal" and which are not undertaken in the exercise of independent authority to control the public lands.

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215. E.g., 40 Op. Att'y Gen. 73 (1941) discussed at notes 77-98 supra.

216. Arguments that there is some non-statutory authority for withdrawals outside the FLPMA may be raised again. Should the executive embark on a program of non-FLPMA withdrawals that is not checked by Congress, the Midwest Oil rationale could be regenerated.


219. 43 U.S.C. §1702(j) defines "withdrawal" as: 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, other than "property" governed by the Federal Property and Administrative Services Act, as amended from one department, bureau or agency to another department, bureau or agency.

220. The Secretary often may choose from several sources of authority in deciding to restrict activities on the public land. See notes 261-267 infra and accompanying text.
Few substantive restrictions were imposed. For instance, there was no restriction on removing lands from entry under the mining laws as in the Pickett Act. Indeed, the Secretary was expressly granted all of the authority that the executive possessed under its formerly implied delegation of authority. But Congress prescribed procedures and considerations to regulate the exercise of the Secretary's authority.\(^\text{221}\) This was intended to regularize administrative practice that had in the past been used to effect withdrawals which were "not always in the best interest of all the people."\(^\text{222}\)

The FLPMA withdrawal procedures were expected to achieve better "balance" between "public concern over the possibility of excessive disposals of public lands on the one hand and excessive restrictions on the other."\(^\text{223}\) First, the Secretary was directed to take certain factors into account and follow specified procedures in effecting a withdrawal.\(^\text{224}\) Second, the Secretary was required to report withdrawals to the Congress which may then reverse his decisions by following a simplified procedure.\(^\text{225}\)

The applicable procedures under FLPMA depend on the amount of land withdrawn and the urgency of the need for protective action. Small

\(^{221}\) The administrative practices and regulations that applied to withdrawals before enactment of the FLPMA were found at 43 C.F.R. part 2351. They are described in Strauss, Rules, Adjudications, and Other Sources of Law in an Executive Department: Reflections on the Interior Department's Administration of the Mining Law, 74 COLUM. L. REV. 1231, 1249–53 (1974) and Moran, Withdrawals and the Mineral Landman, 16 ROCKY MT. MIN. L. INST. 757, 773–83 (1971).


\(^{223}\) Id. at 3, reprinted in [1976] U.S. CODE CONG. & AD. NEWS 6177.

\(^{224}\) See notes 226–235 infra and accompanying text. The Secretary may segregate land from the operation of any or all of the public land laws for up to two years while it is being considered for withdrawal. Segregation may be made by publishing a notice in the Federal Register indicating that a withdrawal is being considered. 43 U.S.C. § 1714(b)(1).

\(^{225}\) 43 U.S.C. § 1714(c)(1). The procedure for congressional veto is designed to avoid roadblocks that can normally inhibit or prevent legislation. Congress has only 90 days to act, and after 30 days a motion may be made to discharge a resolution from a committee that has not acted on it. It is then in order to move to introduce the resolution on the floor. Floor debate is limited to one hour, and the motion may not be amended.

The language of the provision is fraught with interpretive problems. For instance, § 1714(c)(1) states that the withdrawal will be ineffective "if the Congress has adopted a concurrent resolution stating that such House does not approve the withdrawal" (emphasis added). This inconsistency within the section is probably owing to haste in preparing the final version of the bill. The device of a veto by concurrent resolution was adopted by the Conference Committee in lieu of the House bill's provision for veto by either house of Congress. Another internal inconsistency arises from the section's reference to "the Presidential recommendation" while the power to make recommendations was given expressly to the Secretary of Interior. This probably arises from the fact that the entire section with regard to expediting the consideration of a resolution by Congress was added by the Conference Committee's adoption of the language of what is now § 1714(l) (providing for expedited
withdrawals—those aggregating less than 5,000 acres—may be set aside without restriction so long as they are for a "resource use." Withdrawals for proprietary purposes, such as sites for administrative buildings or facilities, may be made for up to twenty years.

Specific objections to the legislative veto include: 1. It may deprive the executive of its constitutional power faithfully to execute the laws provided for in art. II, section 3; 2. It may deprive the executive of the ability to consider and approve or veto legislation provided for in Art. I, section 7; 3. It may deprive the judiciary of the authority to determine cases and controversies provided by Art. III, section 2 which, as implemented by Congress, allows review of agency decisions (e.g., Administrative Procedure Act, 5 U.S.C. §§ 701–706); 4. If only one house can override a particular action, the principle of bicameralism expressed in Art. I, section 1 may be offended. See Chadha v. Immigration and Naturalization Service, 634 F.2d 408 (9th Cir. 1980), prob. juris noted, 50 U.S.L.W. 3244 (Oct. 6, 1981) (holding unconstitutional 8 U.S.C. § 1254(c)(2) which allows a one house resolution to disapprove an agency suspension of a deportation order) and Consumer Energy Council of America v. Federal Energy Regulatory Comm'n, No. 80-2184 (D.C. Cir. Jan. 29, 1982) (holding unconstitutional § 202(c) of the Natural Gas Policy Act, 15 U.S.C. § 3342(c) which provides for one house veto resolution of rules for incremental pricing in natural gas deregulation).

Whether a court upholds or rejects specific legislative veto provisions may depend upon the extent to which the legislative branch has attempted to involve itself in enforcement or interpretation of laws, as opposed to its constitutional function of making laws. Thus, a delegated legislative function may be susceptible to a greater degree of retained authority to manipulate agency decisions than a function that is essentially judicial or administrative. As discussed earlier, authority to withdraw public lands is rooted in Congress's power under the Property Clause, Art. IV, section 3, clause 2. In the past, the power has been impliedly delegated to the executive, but the FLPMA dealt specifically with the terms on which such authority would be delegated and exercised in the future. Assuming the Courts of Appeals' decisions in Chadha and Consumer Energy Council supra, are upheld, the device in 43 U.S.C. § 1714(c)(1) for congressional disapproval of executive withdrawals by concurrent resolution nevertheless may be constitutional. Congress may have broader authority to oversee the exercise of legislative power it has delegated to the executive than it has to oversee executive enforcement of the laws made by Congress. Thus, decisions to withdraw public lands, encompassed within the authority of the Property Clause, are more appropriately reserved for legislative oversight than are decisions involving individual deportations that have been made in the course of administering the Immigration and Naturalization Act (enacted under Congress's power "To establish an uniform Rule of Naturalization" in Art. I, section 8, cl. 4). Decisions setting particular rate structures under the Natural Gas Policy Act (enacted under the commerce power, Art. I, section 8, cl. 3) present a closer question in that they may establish a nationally applicable legislative policy, a function less likely to offend separation of powers principles. See also note 243 infra, discussing 43 U.S.C. § 1714(e), a provision of the FLPMA under which the Secretary of the Interior is directed to withdraw lands upon a determination of emergency by a committee of either house.

226. 43 U.S.C. § 1714(d)(1) (1976). Given the coverage of other subsections of § 1714(d), "resource uses" must refer to those uses listed in § 1702(c), namely "recreation, range, timber, minerals, watershed, wildlife and fish, and natural scenic, scientific and historical values."

but they are limited to five years duration. As with larger withdrawals, the FLPMA requires that public hearings be held prior to a small withdrawal order.

Withdrawals of significant size—those 5,000 acres and larger—may be made for up to 20 years for any purpose. Whenever acting under this provision the Secretary must notify both houses of Congress that a withdrawal is being made and furnish extensive information to the relevant committee of each house. The required information includes the essential facts concerning the withdrawal, environmental and economic factors, consideration of impacts on other existing and potential uses, intergovernmental effects, and opportunities for public participation.

The Acts' requirement of a thorough assessment of the matters listed in Section 204(a)(2) of the FLPMA is reminiscent of the requirement in NEPA that an environmental impact statement accompany proposals of a federal agency that would have a significant effect on the human environment. Presumably, an agency forced to identify and consider certain factors will not ignore them in formulating a decision. Yet, as under NEPA, the agency need not reach a particular decision flowing from the information it considers. And, as with NEPA decisionmaking, the lack

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230. 43 USE § 1714(c)(1) (1976). Five thousand acres was the limit of executive withdrawal authority under the Defense Withdrawal Act, 43 U.S.C. § 156 (1976). The legislative history of that Act indicates that this size was selected because "[t]estimony of witnesses for the Department of the Interior made it clear that the great majority of individual applications for any one project or facility in fact involve lands of less than 5,000 acres, . . . and the Department of Defense in its report does not object to this section of the act." S. REP. NO. 857, 85th Cong., 2d Sess. 69 (1957), reprinted in [1958] U.S. CODE CONG. & AD. NEWS 2227, 2240.
236. 42 U.S.C. § 4332(2)(c) (1976). See notes 181–188 supra and accompanying text. Satisfying this provision does not render compliance with NEPA's requirement of an environmental impact statement (EIS) unnecessary. A withdrawal constituting a major federal action that will have a significant effect on the environment must still be accompanied by an EIS. But cf. Alaska v. Carter, 462 F.Supp. 1155 (D. Alas. 1978) (NEPA's requirements may be avoided to the extent that time constraints of an emergency withdrawal would prevent full compliance.) See also Forest and Range Land Renewable Resources Planning Act, 16 U.S.C. §§ 1600–1676 (1976). (Secretary of Agriculture to consider physical, biological, economic and other factors in developing resource management plans for the National Forests).
237. Under NEPA, an agency must show that it had information on the relevant factors listed in § 102(2)(c) (42 U.S.C. § 4332(2)(c) (1976)), but if the record shows that the factors were considered, the courts will not overturn an agency's decision. E.g., in Calvert Cliffs Coordinating Comm., Inc. v. Nuclear Regulatory Comm., 535 F.2d 1227 (D.C. Cir. 1976).
of substantive direction in the statute makes unlikely any judicial reversal of an agency decision that may seem unwise in light of the information produced. So long as the procedural requirements in the FLPMA are followed and the information furnished to Congress is adequate, it is predictable that a court would refuse to set aside the action. Only if the withdrawal decision is so unreasonable as to be arbitrary and capricious is a judicial challenge likely to succeed. The procedures and limitations for significant withdrawals may be avoided regardless of the size of a proposed withdrawal in an “emergency.” Any time the Secretary of Interior determines that “extraordinary measures must be taken to preserve values that would otherwise be lost,”

v. United States Atomic Energy Comm’n, 449 F.2d 1109, 1112 (D.C. Cir. 1971), the court said: Thus the general substantive policy of the Act . . . leaves room for a responsible exercise of discretion and may not require particular substantive results in particular problematic instances. However, the Act also contains very important ‘procedural’ provisions—provisions which are designed to see that all federal agencies do in fact exercise the substantive discretion given them. In Strycker’s Bay Neighborhood Council v. Karlen, 444 U.S. 223, 227–28 (1980), the Court said “the only role for a court is to insure that the agency has considered the environmental consequences; it cannot ‘interject itself within the area of discretion of the executive as to the choice of the action to be taken,’ ” citing Kleppe v. Sierra Club, 427 U.S. 390, 410 n. 21 (1976).

238. See Strycker’s Bay Neighborhood Council v. Karlen, 444 U.S. 223 (1980). There the Court reversed a court of appeals’ finding that environmental factors should be given determinative weight, holding that NEPA imposes duties that are essentially procedural. Cf. Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 546 (1978), in which the Court stated that “if courts continually review agency proceedings to determine whether the agency employed procedures which were, in the court’s opinion, perfectly tailored to reach what the court perceives to be the ‘best’ or ‘correct’ result, judicial review would be totally unpredictable.” The Court then observed that “the only procedural requirements imposed by NEPA are those stated in the plain language of the Act.” Id. at 548.

239. Cf. Mountains States Legal Foundation v. Andrus, 499 F.Supp. 383 (D. Wyo. 1980) (prohibition against mineral leasing of lands subject to wilderness classification study was tantamount to “withdrawal” and thus invalid unless FLPMA procedures followed); see discussion in note 267 infra.

240. It may be argued that the requirement of furnishing information to Congress in 43 U.S.C. § 1714(d)(2) is for the benefit of Congress alone, not the public and therefore standing should be denied to a member of the public challenging the adequacy of the information. But informed public participation is a value that pervades the Act. See Achterman and Fairfax, The Public Participation Requirements of the Federal Land Policy and Management Act, 21 ARIZ. L. REV. 501 (1979). Therefore litigants may have a sufficient stake in the process to be within the zone of interests protected by the Act. See Atchison, Topeka, and Santa Fe R. R. v. Callaway, 431 F.Supp. 722, 727 (D.D.C. 1977) (private parties have standing to challenge impact statement prepared under NEPA for a legislative proposal because purpose was not only to inform Congress but also to inform the public and foster meaningful public participation).

a withdrawal is to be made immediately. The chairman of the relevant committee of the House or Senate also can trigger mandatory emergency withdrawals by notifying the Secretary that an appropriate situation exists. Emergency withdrawals may last a maximum of three years and may not be renewed except by following the procedures for withdrawals under other provisions of the FLPMA. The full informational report required when significant withdrawals are made must follow the making of emergency withdrawals within 90 days.

The Federal Land Policy and Management Act’s emergency withdrawal authority was used to set aside over 100 million acres in Alaska in 1978. Congress had anticipated legislation to create several parks, forests, wildlife refuges and wild and scenic rivers, largely out of lands that it had directed the Secretary of Interior to withdraw under section 17(d)(2) of the 1971 Alaska Native Claims Settlement Act (ANCSA).

242. 43 U.S.C. § 1714(e). Notice is to be given to the Committee on Interior and Insular Affairs of the House of Representatives and the Committee on Energy and Natural Resources of the Senate. The Senate Committee on Interior and Insular Affairs (named in the Act) was replaced by the Committee on Energy and Natural Resources effective February 11, 1977.

243. This procedure could be subject to some of the same objections that are made to the congressional veto device employed by the FLPMA in the case of executive withdrawals. See note 225, supra. It substitutes a hybrid decisionmaking procedure for those processes established in the Constitution, potentially disrupting the system of institutional decisionmaking and the checks and balances intended by the framers. But delegation of authority to a congressional committee to prompt emergency withdrawals by an executive official might be sustained on the ground that it is necessary in aid of legislation that may be proposed or subject to investigation. It is well established that Congress may exercise powers normally exercised by other branches when ancillary to its legislative functions. E.g., McGrain v. Daugherty, 273 U.S. 135 (1927) (power to investigate and to subpoena witnesses). Cf. Pacific Legal Foundation v. Watt, 16 E.R.C. 1825 (D. Mont. 1981). In that case the court held that a FLPMA withdrawal under 43 U.S.C. § 1714(e) could be validly forced by a resolution finding an emergency situation passed by the House Committee on Interior and Insular Affairs but that the committee had no power under the statute to prescribe the scope and duration of the withdrawal. Because the disposition set aside the specific order of withdrawal as being based on an invalid direction of the House Committee, it did not reach the constitutional question, but it stated in dicta that the section would pass constitutional muster only if the court’s interpretation of the committee’s authority were correct. If the committee wielded greater authority, it would violate separation of powers principles. The case apparently involves the first attempt by a congressional committee to force a mandatory withdrawal under 43 U.S.C. § 1714(e). But see note 254 infra.

244. 43 U.S.C. § 1714(e).

245. Public Land Orders 5653 and 5654, 43 Fed. Reg. 59756 (1978). Some of the same lands were also withdrawn by the President under the Antiquities Act, which authorized him to proclaim national monuments. 16 U.S.C. § 431 (1976). Later, some 40 million acres were withdrawn as wildlife refuges under the Fish and Game Sanctuaries Act, 16 U.S.C. § 694, another statute authorizing executive withdrawals that was not repealed by the FLPMA.

246. See 43 U.S.C. § 1616(d)(2) and note 204, supra. The same lands were also withdrawn under § 17(d)(1) which authorized the Secretary to withdraw lands needed to protect the public interest under “existing authority” without a time limit. See note 103 supra. This apparently refers to impliedly delegated withdrawal authority and authority under statutes, principally the Pickett Act. If pending litigation challenging the executive’s authority to withdraw lands covered by § 17(d)(2) after the statutory termination date (see notes 121 and 123 supra) results in a rejection of the government’s contention that there was non-statutory authority for such withdrawals, their validity
such lands were recommended for inclusion in one of the land management systems, the Secretary's withdrawals were to expire on December 18, 1978, if Congress did not act on the recommendations. As the expiration date grew near, congressional efforts to enact an Alaska lands bill were blocked by the senators from that state.

With the termination of the Alaska withdrawals under ANCSA, millions of acres would be available for selection by the State of Alaska and by Native corporations formed under the Act. Alaska had been waiting for twenty years for the fulfillment of the promise made in its Statehood Act that it would be able to select and receive patents to 103,553,000 acres of public land—about 28% of the state's total land area. At the time of statehood, almost all of the land in the state was federally owned and it was understood that the land would be needed for the state's economic growth and self sufficiency.

Alaska became so anxious to get control of some of the resource-rich public lands that it purported to select about 41 million acres several

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247. The withdrawals were to expire no later than five years after the date recommendations were made. 43 U.S.C. § 1616(d)(2)(D). Recommendations were to be made within two years of the Act's effective date (December 18, 1971). 43 U.S.C. § 1616(d)(2)(C). The Secretary submitted his final recommendations on December 17, 1973.

248. See DeStefano, supra note 246, at 419. The Senators objected to the amount of land that would be closed to development by inclusion in wilderness areas and other conservation units.

249. Alaska Statehood Act, Pub. L. No. 85-508, 72 Stat. 339 (1958). Congress allowed a period of 25 years for the selections because the vast land area had not been surveyed. See 104 CONG. REC. 9341 (1958) (remarks of Rep. Saylor). Initial state land selections were protested by the Bureau of Land Management on behalf of Native groups and Native claims were filed on about 80% of the state's lands. The Secretary finally instituted a "land freeze" suspending approval of all state selections and other applications. It was formalized in Public Land Order No. 4582, issued January 12, 1969 which withdrew all Alaska public lands. The state unsuccessfully challenged the land freeze in Alaska v. Udall, 420 F.2d 938 (9th Cir. 1969), cert. denied, 397 U.S. 1076 (1970). Approvals were then delayed on nearly all the lands for over eleven years by subsequent orders and withdrawals under the Alaska Native Claims Settlement Act. See notes 250–255 infra and accompanying text. Approvals were made possible by enactment of the Alaska National Interest Lands Conservation Act, which also extended the time limit for state selections to 35 years. Act of Dec. 2, 1980, Pub. L. No. 96-487, § 906(a), 94 Stat. 2371, 2437. As a part of the settlement of a lawsuit brought against the government by Alaska, the United States has agreed to convey at least 13 million acres a year to the state. Alaska v. Reagan, No. A 78-291 CIV (D. Alas. Stipulation of Settlement, Aug. 15, 1981). See note 123 supra.

weeks before the withdrawals under ANCSA expired. \(^\text{251}\) Shortly afterward, the Secretary was moved by a letter from the Chairman of the House Committee on Interior and Insular Affairs to act under the FLPMA to make an emergency withdrawal of the expiring ANCSA withdrawals. \(^\text{252}\) The letter cited the recent state selections and a lawsuit \(^\text{253}\) that Alaska had filed seeking to prevent any government action to save the lands withdrawn under ANCSA from selection once the withdrawals expired. \(^\text{254}\) The Secretary of Interior later withdrew the same lands that had been subject to the emergency withdrawals using his FLPMA authority to make withdrawals for twenty years. \(^\text{255}\)

The facility with which the Secretary was able to withdraw millions of acres of Alaska lands is testimony to the simplicity of the new procedures. The executive has essentially the same substantive power it had under the earlier, impliedly delegated authority, but the twenty year limitation on most withdrawals forces rethinking the wisdom of a withdrawal periodically and it is probably the most important limit on the executive’s withdrawal authority under the FLPMA. Executive authority is otherwise encumbered only by requirements for notice, information reporting, and public participation.

Congress can, of course, terminate a withdrawal of which it disapproves. Theoretically it will have more information on which to base any action it takes when the FLPMA procedures are followed. But unless an especially interested member of one of the key committees chooses to scrutinize all withdrawals, the reporting requirements will be essentially means of forcing the executive to make a closer consideration of any withdrawal decision.

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254. Letter from Morris K. Udall, Chairman, House Committee on Interior and Insular Affairs, to Cecil D. Andrus, Secretary of the Interior, November 15, 1978. A portion of the letter appears in Alaska v. Carter, 462 F.Supp. at 1158 n.5. The letter appears to be advisory only in that it simply “urges” the Secretary to exercise his discretionary emergency withdrawal authority, rather than reflecting a committee determination of an emergency that would trigger a duty to withdraw the lands. A similar letter of request was sent to the Secretary by the committee chairman on May 4, 1979 after the committee found that uranium exploration on public lands in the Cásitas Reservoir watershed would endanger the water supply of Ojai and Ventura, California. Resolution of the Committee on Interior and Insular Affairs, United States House of Representatives, May 2, 1979. While such requests are not mandatory, the Secretary’s failure to respond by making a protective withdrawal would court charges of abuse of discretion.

Congress has always had the authority to terminate an executive withdrawal but has rarely done so in the past. Now, under the FLPMA, Congress’s disapproval can be manifested in a concurrent resolution which may avoid some of the procedures encumbering ordinary legislation, although the action is subject to special procedural rules. Disapproval must be effected within 90 days after a notice of the withdrawal is given to Congress. It would seem that most members of Congress would be uncomfortable overruling the executive’s conservation decision on such short notice except in an outrageous case. Most congressional disapprovals of executive withdrawals are likely to be by legislation after full committee consideration as they were in the past.

The detailed FLPMA provisions for making withdrawals are not the only means of accomplishing results that are within the Act’s definition of a “withdrawal.” One method provided for in the Act itself is through “management decisions.” These decisions may be made to implement land use plans required by the FLPMA for all public lands. The land use planning authority of officials under the Act is “fully as restrictive as traditional withdrawal.” Presumably, comprehensive planning was intended by Congress to supplant single-purpose land use and withdrawal decisions. Withdrawals may be used to carry out management decisions, but a formal withdrawal is necessary only if lands are removed from, or restored to, the operation of the 1872 Mining Act or lands are transferred to another department. There are special procedures for notifying Congress if a management decision totally eliminates one or more uses on a tract of 100,000 acres or more of public lands.

In addition to the ability of land managers to effect land use decisions that are the functional equivalents of withdrawals, other laws governing


257. See notes 37–39, 50, 95, 159–160 supra and accompanying text. Although the possibility of a presidential veto of a congressional termination of a withdrawal (or making of a withdrawal) exists, no such showdown between the executive and legislative branches has occurred over a withdrawal decision.


260. 43 U.S.C. § 1712(a) directs the Secretary to:

develop, maintain, and, when appropriate, revise land use plans which provide by tracts and areas for the use of the public lands regardless of whether such lands previously have been classified, withdrawn, set aside, or otherwise designated for one or more uses.


public land administration may permit the exercise of executive managerial authority that may in practice fit the FLPMA definition of a withdrawal. Officials often take protective action effectively "limiting activities under [laws making public lands available for private uses] in order to maintain other public values in the area...." These actions need not take the form of withdrawals when they are in furtherance of the officer's existing management authority. Thus, the Secretary of Agriculture may administratively determine that an area of a national forest is dedicated to recreation and thereby ban inconsistent uses that are permitted by statute. Similarly, land managers regularly must decide what areas of a forest to withhold from timber cutting, what areas to limit to camping, whether to close a park to fishing, and whether to lease lands for mineral development. Congress did not intend to eliminate or erode existing authority of managers under public land laws except as it expressly stated in the FLPMA. Although many actions might be taken under the withdrawal provisions of the Act, it is unnecessary to do so when the Secretary has managerial discretion under existing statutes to make determinations having the same effect.

266. In enacting the FLPMA Congress overhauled much of the authority to manage public lands as it existed before the Act. Literally hundreds of public land laws were repealed. See Act of Oct. 21, 1976, Pub. L. No. 94-579, § 702, 90 Stat. 2743, 2787-91. However, the legislation assiduously provided that it was not to "repeal any existing law by implication." Id. § 701(f) (reprinted in note following 43 U.S.C. § 1701). See also 43 U.S.C. § 1701(b) (1976) (FLPMA is to be supplemental, and not in derogation of the public land statutes).
267. But see Mountain States Legal Foundation v. Andrus, 499 F.Supp. 383 (D. Wyo. 1980). A federal district court held that the Forest Service's failure to accept offers to lease lands for oil and gas pending a "RARE II" study of whether to include the lands in a wilderness system was tantamount to a "withdrawal" under the FLPMA definition and could only be effective if statutory withdrawal procedures were followed. The court in Mountain States erred in applying the definition mechanically and in a way that failed to comport with the comprehensive statutory framework.
First, it should be pointed out that inaction on lease applications while the Secretary studies the desirability of other uses in an area has never been considered to amount to withdrawal of the lands in question. It is simply not within the common usage of the term. Withdrawals are generally made by some specific public land order or a statute, not by inaction. See Duesing v. Udall, 350 F.2d 748, 751 (D.C. Cir. 1965), cert. denied, 383 U.S. 912 (1966), citing Richard K. Todd, 68 INTERIOR DEC. 291 (1961). Current regulations so provide. 43 C.F.R. § 2310.3-3. This is particularly applicable to the mineral leasing statutes in which there is no right of a lease applicant to expect action issuing or rejecting a lease within a particular time. E.g., Burglin v. Morton, 527 F.2d 486 (9th Cir.}
The Mountain States court seemed to recognize that inaction on a single lease could not constitute a "withdrawal," but found that the cumulative effect of inaction on pending applications amounted to a withdrawal. In light of the existence of discretion to withhold lands from leasing for a variety of reasons as discussed below, and the fact that the Secretary had obviously chosen not to use the option of withdrawal, the court should have deferred to the decision not to withdraw the lands. Cf. Kleppe v. Sierra Club, 427 U.S. 390 (1976) (whether series of proposed actions leading to coal leasing in large geographic areas are so related as to amount to a "proposal" requiring an environmental impact statement is a question for the agency to decide).

Second, the Secretary had ample statutory authority to hold lease applications pending a thorough designation. The legislative history of the FLPMA shows that the Department of the Interior had expressed concern that if FLPMA's broad definition were adopted it would give rise to arguments that the only way to accomplish results within its scope would be by withdrawal. Letter from Assistant Secretary of the Interior to James A. Haley, Chairman, Committee on Interior and Insular Affairs, U.S. House of Representatives, dated November 21, 1975, 1976 U.S. CODE CONG. & AD. NEWS 6215-16. But the concern was unjustified given the existence of alternate means to achieve those results within FLPMA itself and within other statutory programs for land management that were not repealed expressly or by implication (see note 256, supra).

The National Forest Management Act (NFMA), which was enacted almost simultaneously with the FLPMA, imposed planning responsibilities on the Secretary. It required that wilderness be among the "multiple use" considerations of the Secretary in his forest management land use planning. 16 U.S.C. § 1604(e)(1), (g)(3)(A), and 1606(d). See also 16 U.S.C. § 1642(a)(1). The Multiple Use, Sustained Yield Act also declares establishment and maintenance of wilderness to be consistent with its purposes. 16 U.S.C. § 529. The responsibility to consider wilderness options can only be fulfilled if wilderness characteristics are preserved during the planning stages; otherwise wilderness values may be irreversibly lost to development. Neither the NFMA, in the case of national forests, nor the FLPMA provisions, in the case of Bureau of Land Management lands, requires a withdrawal to be made during the planning process. It hardly seems advisable to impose the encumbrance of a withdrawal on an area that may not ultimately be recommended or set aside as wilderness.

RARE II should be considered a program that carries out land management planning responsibilities and authority of the Secretary of Agriculture. It was part of an ongoing wilderness review process that had begun in 1969. See California v. Bergland, 483 F.Supp. 465 (E.D. Calif. 1980), appeal pending, for a history of the RARE process. It would be reading FLPMA too broadly and out of context to say that it impliedly extinguished an ongoing land use planning process. There is no legislative history showing any such intent. Indeed, Congress seemed to validate the RARE process, which was pending and known to Congress when it enacted the NFMA in which the Secretary was made responsible for wilderness planning.

Even in absence of wilderness planning authority under land management statutes such as the FLPMA and the NFMA, the Secretary had authority under the Mineral Leasing Act to refuse leases for the protection of the public lands. The Mountain States court did acknowledge the well-established principle that the Secretary has discretion under the Mineral Leasing Act to decide what lands will be leased, Burglin v. Morton, 527 F.2d 486 (9th Cir. 1976); Pease v. Udall, 332 F.2d 62 (9th Cir. 1964), and to refuse any lease of particular lands, Udall v. Tallman, 380 U.S. 1 (1965). But it attempted to distinguish the case law as not supporting an exercise of discretion to withhold land from leasing "based on environmental concerns." 499 F.Supp. at 391-92. This distinction is ill-founded. In Udall v. Tallman the Supreme Court upheld the exercise of secretarial discretion to refuse leases where the purpose was to protect wildlife. An attempt to limit Tallman as permitting a refusal to lease only on a particular tract but not a closure of hundreds of square miles of public lands was rebuffed in Duesing v. Udall, 350 F.2d 748 (D.C. Cir. 1965), cert. denied, 383 U.S. 912 (1966). Mountain States incorrectly relied on "the proposition that the focus of [the Mineral Leasing] Act was mineral development despite the primitive nature of much of the public lands." 499 F.Supp. at 392. In Duesing v. Udall the court rejected an argument that "the Secretary can only exercise his discretion under the Mineral Leasing Act by taking action in furtherance of the objective of that act to promote mineral development in the public domain." 350 F.2d at 751. Because there are other
The FLPMA withdrawal provisions allow the Secretary of Interior to take extraordinary actions, required to protect public lands from disposal or particular uses. For example, the Secretary’s withdrawal of much of the Alaska national interest lands pending congressional actions was made in reliance upon the statute. Withdrawals may often be avoided, but purposes for holding and using the land, the court held that decisions whether or not to lease need not consider solely the purpose of the lease, as urged by a disappointed lease applicant. The argument was characterized as a “tail wags dog construction [that] is not put forward as supported by legislative history,” and the court upheld the Secretary’s “reasonable construction” of his powers to determine whether to lease in light of a concern for wildlife protection. *Id.* Cf. *Krueger v. Morton*, 539 F.2d 235, 240 (D.C. Cir. 1976) (no abuse of discretion in Secretary’s suspension of issuance of coal prospecting permits that was based on desire to provide “more ‘orderly’ development of coal resources upon the public lands . . . with a proper regard for the protection of the environment’”); *United States v. Cotter Corp.*, 486 F.Supp. 995 (D. Utah 1979) (BLM has authority to manage public lands to prevent impairment of wilderness characteristics).

A further reason that environmental protection as a goal would seem to fall easily within the scope of discretion allowed to the Secretary in making a leasing decision is that every agency is now required by the National Environmental Policy Act to consider such matters in all its decisions. See note 182 *supra*. Cf. *Zabel v. Tabb*, 430 F.2d 199 (10th Cir. 1970), cert. denied, 401 U.S. 910 (1971) (Under NEPA and the Fish and Wildlife Coordination Act, 16 U.S.C. §§ 601, 602, Corps of Engineers properly denied dredge and fill permit although the project would not interfere with navigation, flood control, or power production). And major federal actions in leasing lands under the Mineral Leasing Act require the preparation of environmental impact statements. See note 188 *supra*. Furthermore, the FLPMA manifests an intention that federal land be managed by the Secretary of the Interior according to multiple use principles, 43 U.S.C. § 1701(a)(7) (1976), and to further a variety of goals besides resource development. 43 U.S.C. § 1701(a)(8), (a)(12) (1976).

A separate ground for the court’s decision in *Mountain States* was the failure of the Secretary to set forth in rules and regulations the procedure that was followed in coordinating applications for leases in national forests with the Department of Agriculture and the grounds for approving, rejecting, or denying them. 499 F.Supp. at 395–96. The court concluded that the absence of regulations violated the FLPMA section bringing public land management within the Administrative Procedure Act and requiring promulgation of rules and regulations to carry out the purposes of the FLPMA and other public land laws. 43 U.S.C. § 1740 (1976). This ignores the fact that administrative decisions and policies may be made by means other than rulemaking without violating the Administrative Procedure Act (APA). E.g., *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974); *SEC v. Chenery Corp.*, 332 U.S. 194 (1947).

The rulemaking provision was included in the FLPMA following a recommendation of the Public Land Law Review Commission that there be greater use of regulations in public land management. See PLLRC REPORT, *supra* note 7 at 251. The “hidden law” of the Department of the Interior has been notorious. E.g., *Strauss, Rules, Adjudications, and Other Sources of Law in an Executive Department: Reflections on the Interior Department’s Administration of the Mining Law*, 74 COLUM. L. REV. 1231 (1974). Matters involving “public property” have always been exempt from the APA, 5 U.S.C. § 553(a)(2) (1976). In the FLPMA Congress removed the exemption for public land management matters. This only meant that public land management was to be treated the same as other agencies’ functions are treated under the APA. A general concern for openness in government, as well as the special concern in public land law found in 43 U.S.C. §§ 1701(a)(5) and 1740 make it desirable for the Secretary of the Interior to explicate formally the process to be followed in dealing with applications for mineral leasing in RARE II wilderness study areas. The APA does not necessarily require that rulemaking under § 553 be followed. But if rulemaking were required, presumably both the mineral leasing program and the RARE II program should be stayed pending appropriate rulemaking. The *Mountain States* court effectively required the leasing program to proceed and the RARE process to cease.

Notwithstanding several errors by the trial court in *Mountain States*, the United States dismissed its appeal of the decision on March 4, 1981 based on a directive of Reagan administration officials. 268. See notes 245–255 *supra* and accompanying text.
when they are used the FLPMA surrounds the process with new procedures and ultimate congressional checks that can undo executive actions swiftly in egregious cases.\footnote{269} The sobering effect of the procedural requisites and the specter of congressional oversight may assure greater responsibility in using the authority. However, the broadened definition of "withdrawal" in the Act\footnote{270} and explicit authority to use withdrawals as a means of implementing the land use planning requirements of FLPMA\footnote{271} suggest that the withdrawal device may have even greater importance as a land management device in the future than it had in the past.

C. Judicial Review

The tide of legislation imposing obligations on managers of public lands to administer resources under careful standards and to consider environmental factors has been accompanied by greater judicial scrutiny of decisionmaking. In recent years there has been an unprecedented number of cases seeking review of agency decisions regarding the public lands.\footnote{272} Several reasons account for the growth in litigation. The most important is that Congress has enacted laws which provide standards to guide courts in their review of agency actions. Understandably, the earliest public lands cases were confined largely to challenges of agency actions refusing to dispense public property to private interests rather than cases asserting the interest of the public.\footnote{273} Even in that age, a rule of construction in public land law required that federal grants be viewed favorably to the United States.\footnote{274} Later, national policy began to prefer continued federal management of most remaining federal lands. Relevant statutes gave managers great discretion and little guidance. Authority was broadly delegated to the executive branch and courts regularly upheld these delegations\footnote{275} and their exercise.\footnote{276} With the exception of parks, which have been subject to rather specific management objectives since

\footnote{269. See notes 221–235 supra and accompanying text.}
\footnote{270. 43 U.S.C. § 1702(j). See note 219 supra.}
\footnote{271. 43 U.S.C. § 1712(e)(3).}
\footnote{272. See generally, G. COGGINS AND C. WILKINSON, FEDERAL PUBLIC LAND AND RESOURCES LAW 226–227 (1981).}
\footnote{273. See Wilkinson, Public Land Law: Some Connecting Threads and Future Directions, 1 PUB. LAND L. REV. 1, 2–3 (1980). See also note 14 supra.}
\footnote{275. E.g., United States v. Grimaud, 220 U.S. 506 (1911) (Forest Service Organic Act's delegation of authority to make rules and regulations concerning use of forest reserves).}
\footnote{276. E.g., Light v. United States, 220 U.S. 523 (1911) (Forest Reserve grazing regulations).}
at least 1916,277 there was little substantive law to curb or define the administrative discretion of public land managers until the 1970s.278 Consequently, challenges to public land management decisions have not fared well in the courts.279

Congressional prescriptions for public land management were responsive to burgeoning conservationist sentiments.280 An aware public insisted on responsible administration of its commonly held resources. The same public became the watchdog of the administrators, pooling their resources and power in organizations to assert the "public interest." These groups turned to the courts where they were generally received hospitably. The Supreme Court has recognized that harm to "aesthetic and environmental well-being" constitutes "injury" for the purpose of standing to sue, requiring only that there be allegations of an adverse effect on group members' "activities and pastimes" on affected public lands.281 The Court has thus disavowed restrictions that would allow access to judicial review only to those suffering economic harm and harm that is not widely shared.282 Once a party has access to court, it may argue the public interest in support of claims that an agency has not lived up to statutory mandates.283 It appears that courts are now more liberal in allowing judicial review in cases against government agencies alleging environmental harm than they are in other contexts, such as constitutional violations resulting in economic harm.284 The Supreme Court has inferred an intent by Congress to allow persons to act as "private attorneys general"285 when asserting

278. See statutes cited in notes 191-192 supra. The Multiple Use, Sustained Yield Act was enacted in 1960 but it appeared to be little more than a statement of policy accompanied by definitions. 16 U.S.C. §§ 528-31. Managers were left to interpret and apply the act according to their best guess as to its meaning. See Loesch, Multiple Uses of Public Lands—Accommodation or Choosing Between Conflicting Uses, 16 ROCKY MTN. MIN. L. INST. 1 (1971); Strand, Statutory Authority Governing Management of the National Forest System—Time for a Change?, 7 NAT. RES. LAW. 479 (1974); Comment, Managing the Federal Lands: Replacing the Multiple Use System, 82 YALE L. J. 787 (1973).
they are aggrieved within the scope of statutes which arguably protect the public's interest in management of publicly owned natural resources. The inference is supported by statutory provisions encouraging public involvement in decisionmaking, express the policy that there should be judicial review, and requiring more intensive land management.

The increased activity in judicial review of land management agency decisions contrasts with the traditional approach of denying review to such matters. The approaches of courts in reviewing administrative decisions varies with the agency whose decision is being reviewed and the type of decision that is being challenged. Courts have viewed public land management as being encumbered by vague mandates, broad discretion, and a need for expertise, so there has been little room for judicial oversight until recently. The criterion is whether there is "law to apply" which would enable the court to decide the case without substituting its judgment for that of the agency. Some statutes enabling agencies to manage public lands remain remarkably nondirective and without obvious standards. When these non-directive laws are involved, courts will


[T]he broader the language of a statute, the less specific it is, and the more nebulous the Congressional intent, the harder it will be for the court to say that an agency acted beyond the bounds of discretion committed to it by law.

Id. at 470 n.3.
usually refuse review, finding that "agency action is committed to agency discretion by law." Thus, rarely applied exceptions to the Administrative Procedure Act's judicial review provisions have been utilized in public lands cases more often than in other fields.

Statutes mandating more intensive land management generally implement modern public lands policy: intensive management for a potpourri of uses and purposes, with a pervasive concern for environmental protection. The federal land manager must choose from an array of objectives and approaches. Formerly unbridled discretion is confined by definition of land management agency missions and specific procedures for accomplishing them. Many decisions remain within an aura of discretion that ordinarily will not be curtailed or invaded by a court unless a congressional directive is violated. Choices among uses will generally be safe from judicial review so long as they do not depart from the procedures, the standards or the purposes of the statutes. But when a party alleges that the manager has forsaken the agency mission by ignoring the care and protection of certain lands, there may be "law to apply" and a court will review. If land use priorities have been set by formal rulemaking, they may be judicially enforceable against the government if it departs from the plan without following procedures. On the other hand, Congress has added little to its broad delegations of discretion for disposal of federal lands, leaving the negative decision—not to develop, to dispose of or to allow entry upon particular lands—relatively free from review.

Once a court grants review, it is likely to defer to an agency practice or decision that comports with the agency's own established interpretation of the governing statute. But agency interpretations that are out of step

297. See generally, COGGINS & WILKINSON, supra note 17 at 231–233.
with statutory language or purpose will not receive the same deference; statutory interpretation ultimately remains a judicial function. In public land law, resort to the purpose of statutory schemes has often guided judicial construction. On occasion the Supreme Court has strained to find an intent to preserve public resources and to deny private interests in them, although the statutes under which the private interests were asserted were passed in an age when disposal of public lands was in vogue.

So long as the volume and thrust of statutory law is directed at protection and judicious use of public lands, it is reasonable to expect more deferential treatment of interpretations that deny development, demand caution in use, or prefer non-damaging uses than of interpretations that err on the side of facilitating development. Thus, it is predictable that an agency’s broad interpretation of its own withdrawal authority under the FLPMA is more likely to be upheld if challenged than one that encourages development by restricting the ability of the Secretary to withdraw lands beyond the requirements of the Act.

The only significant possibilities for judicial intrusion into the realm of administrative decisions to withdraw public lands will arise when an agency fails to adhere scrupulously to procedural mandates. FLPMA is quite specific as to the procedure for making withdrawals and any party


300. In West Virginia Div. of Izaak Walton League of America, Inc. v. Butz, 522 F.2d 945 (4th Cir. 1975) the court construed the Forest Service Organic Act’s authority to sell “the dead, matured or large growth of trees” in national forests (16 U.S.C. §476) as not broad enough to authorize clear-cutting. The Forest Service offered other interpretations of the literal language but the court found that Congress’s primary concern in passing the Act was “preservation of the national forests.” Accord, Zieske v. Butz, 406 F.Supp. 258 (D. Alas. 1975). The ban on clear-cutting was lifted when Congress enacted the National Forest Management Act of 1976, 16 U.S.C. §§1601-1613 in a context of required planning and generally more limited discretion.


303. See notes 226–244 supra and accompanying text.
aggravated by a failure to follow these procedures is assured judicial review.\textsuperscript{304} Not only is it appropriate for a court to insist on exacting compliance with the procedures designed by Congress, but it is consistent with the type of review courts regularly indulge, even when the substantive mandate of a statute is vague.\textsuperscript{305}

The thesis that courts should demand greater justification for an administrative decision opening or allowing development on public lands than for protecting or withdrawing the same lands also finds support in the public trust doctrine. Traditionally, the doctrine has been narrowly applied to restrict major state conveyances of tidelands,\textsuperscript{306} but increasingly a variant of the doctrine is being urged and accepted as a means of construing obligations of federal agencies under the public land laws.\textsuperscript{307} The theory is that public lands are to be held and managed consistently with a trust implied from the high standards set for stewardship of federal lands in modern statutes. Thus, as gaps must be filled and vague statutes interpreted, the context is to be one of protection of the public interest in federal lands and resources.\textsuperscript{308} This inference flows from Congress's statutory scheme for public land management. It compels a broad construction of agency powers over federal property and even can be the basis of judicial mandates to exercise available authority to protect public lands.\textsuperscript{309} To the extent the rationale of the conservation-oriented doctrine is accepted it would support protective exercises of executive withdrawal authority.

\textbf{V. CONCLUSION}

The legal uncertainties concerning withdrawal that dominated the past are largely resolved. The Federal Land Policy and Management Act provides authority and intelligible standards for withdrawals made after its effective date. Compliance with the Act's procedural requirements is readily measurable. The validity of withdrawals made without statutory

\textsuperscript{304} The Administrative Procedure Act, 5 U.S.C. § 706(2)(D), directs a reviewing court to set aside agency decisions that were reached "without observance of procedure required by law."


\textsuperscript{306} Illinois Central R. Co. v. Illinois, 146 U.S. 387 (1892).


\textsuperscript{308} \textit{Id.} at 311–13.

authority after Congress's major entry into the field in 1910 may still be challenged, but the prospects for success are dim. Although the Supreme Court has not considered the question, Congress confirmed that authority to make withdrawals independent of statute had been delegated to the executive by repealing that authority in 1976. The same legislation should seal the fate of attempted non-statutory withdrawals after 1976. But other devices are available to effect the same results as withdrawals. Some are provided in the FLPMA; others are within the discretion of land managers to restrict the uses permitted on public land. Major actions involving timber sales, mineral leases, wildlife protection and recreational values may fall within administrative authority to classify and to manage public lands under the FLPMA or under other statutes not changed by the Act. Defining the reach of authority, as well as the authority under withdrawal statutes, is a task that belongs primarily to the executive itself. Pervasive congressional concern with conservation makes administrative actions that tend to protect publicly owned resources virtually invulnerable to judicial challenge.