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WITHDRAWALS OF PUBLIC LANDS
UNDER THE FEDERAL
LAND POLICY AND
MANAGEMENT ACT

David H. Getches, Executive Director
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THE FEDERAL LAND POLICY
AND MANAGEMENT ACT

A Short Course Sponsored by the
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Withdrawals of Public Lands Under FLPMA

- I. History of Withdrawals.
 - A. Early public land policy was to dispose of the vast public domain under a variety of laws benefiting individuals, states, railroads and others.
 - B. The Executive Branch created exceptions to the general availability of public land by withdrawing the land from entry.
 1. The first uses were for Indian and military reservations.
 2. Later uses were to protect public lands from wasteful or inappropriate uses or to make possible sound management.
 - C. Early laws allowing the Executive to withdraw and reserve lands for specific purposes supplanted much of the need for withdrawals, authorizing the practice that has been established for particular purposes.
 1. General Revision Act, Ch. 561, Section 24, 26 Stat 1095 (1891) (authority to reserve forest lands).
 2. Antiquities Act, 16 U.S.C. §§431-433 allowed President to proclaim national monuments.

3. Many other special purpose authorizations were passed.
 - D. Congress has enacted many statutes withdrawing lands directly for parks, military bases, Indian reservations, and other uses.
 - E. Where no statutory authority existed, the Executive nevertheless acted to withdraw public land.
- II. Validity of Non-statutory Withdrawals.
- A. Executive withdrawals may conflict directly with congressionally authorized uses of public lands.
 - B. Challenges to Executive withdrawal authority have been consistently rejected by the courts. (E.g., United States v. Midwest Oil Co., 236 U.S. 459 (1915).)
 1. Congress's failure to check the Executive's withdrawals of public lands has been viewed as an implied delegation of authority.
 2. Some administrative decisions mistakenly have assumed that the President has inherent withdrawal authority. (See also, Portland General Electric Co. v. Kleppe, 441 F. Supp. 859 (D. Wyo. 1977).)

- C. Congress passed numerous laws defining Executive withdrawal authority (see Section III), but the Executive continued to assume it had an implied delegation authority to do whatever Congress had not specifically delegated to it. (See 40 Op. Atty. Gen. 73 (1941) opining that the Pickett Act's general restrictions on withdrawals should be narrowly construed although the Act appeared to address all withdrawals; Portland General Electric Co. v Kleppe, supra.).

III. Pre-FLPMA Statutory Withdrawal Authority.

- A. The first general authority to withdraw public lands was in the Pickett Act of 1910, Ch. 421, Sec. 1, 36 Stat. 847, which said "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. . . ." Withdrawals were to leave the land open to exploration, discovery, occupation, and purchase under the mining laws. . .," however.
- B. Withdrawals of almost all public land occurred under the Taylor Grazing Act, 43 U.S.C. §315, which allowed the Secretary of the Interior to

withdraw all lands in twelve states so that lands could be classified and those "chiefly valuable for grazing and raising forage crops" included in grazing districts.

C. Other important withdrawal statutes included:

1. General Revision Act, Ch. 561, 26 Stat. 1095 (1891), (timber lands);
2. Antiquities Act, 16 U.S.C. §§ 431-433 (objects of historic and scientific interest);
3. Defense Withdrawal Act, 43 U.S.C. §§ 155-158.

D. The courts have upheld broad Executive discretion in interpreting and applying withdrawal statutes.

1. Withdrawals of millions of acres for national monuments under the Antiquities Act have been sustained although the Act was intended only to preserve specific sites such as Indian ruins and limited withdrawals to the "smallest area compatible with the proper care and management of the objects to be protected." (Cameron v United States, 252 U.S. 450 (1920))

(Grand Canyon National Monument); Wyoming v Franke, 58 F. Supp. 890 (D. Wyo. 1945)

(Grand Tetons National Monument);

Anaconda Copper Co. v Andrus, 14 E.R.C. 1853 (D. Alas. 1980) (17 Alaska National monuments comprising 56 million acres).

2. The Midwest Oil implied delegation rationale could be used to support the Executive's continued liberal interpretation of withdrawal statutes which has been undisturbed by Congress.
3. The Executive's protective role is supported by the dominant federal policy of stewardship and protection that has prevailed since early in the century.

IV. Withdrawal Authority Under FLPMA.

A. Most (29) statutory provisions for Executive withdrawal authority were expressly repealed. FLPMA §704(a), Pub. L. No. 94-579, 90 Stat. 2744, 2792 (1976).

1. All withdrawals in effect at the time of enactment were preserved. 43 U.S.C. §1701(c).
2. Some statutes were not repealed, including the Antiquities Act, 16 U.S.C. §431

et seq.; the Defense Withdrawals Act, 43 U.S.C. §155 et seq.; the Fish and Game Sanctuaries Act, 16 U.S.C. §694; the Taylor Grazing Act, 43 U.S.C. §315 et seq.; and the Alaska Native Claims Settlement Act, 43 U.S.C. §§1610(a)(3), 1615(d)(1), 1616(d).

3. The President's "implied authority" under Midwest Oil was also repealed.
 4. Issue: Are pre-FLPMA non-statutory Executive withdrawals made after the Pickett Act valid?
- B. Most withdrawals are to be reviewed within 15 years after 1976. 43 U.S.C. §1714(e)(1).
1. Recommendations concerning continuation of withdrawals go from the Secretary to the President to Congress. The Secretary can terminate withdrawals not made by Congress unless Congress objects within 90 days by a joint resolution. 43 U.S.C. §1714(1)(2).
 2. Hundreds of acres covering tens of millions of acres have been revoked by the Department of the Interior. The Secretary has taken the position that the

review provisions of FLPMA are not mandatory and that § 204(a) of FLPMA provides independent revocation authority.

3. Issue: May the Secretary validly withdraw revocations of withdrawals without following the review provisions of § 204(1)?

- C. Withdrawals were statutorily defined 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.

43 U.S.C. §1702(j).

- D. Authority was delegated to the Secretary of the Interior to make withdrawals, subject to detailed procedural requirements. 43 U.S.C. §§1714(a)-1714(1). There were few substantive restrictions; authority is as broad as it was under the implied authority of Midwest Oil.

- V. Withdrawal Procedures Under FLPMA.

- A. Congress prescribed detailed procedures in order to regularize administrative practice

and achieve better balance between "public concern on the one hand and excessive restrictions on the other." H.R. Rep. No. 1163, 94th Cong., 2d Sess. 1 (1976), reprinted in 1976 U.S. Code Cong. and Ad. News 6177.

- B. The Secretary may segregate land from operation of some or all of the public land laws for up to two years while it is being considered for withdrawal. 43 U.S.C. § 1714(b)(1).
- C. Public hearings must be held prior to withdrawals. 43 U.S.C. § 1714(h).
- D. "Small" withdrawals are those less than 5,000 acres.
 - 1. Small withdrawals may be made for a "resource use" without restriction. 43 U.S.C. §1714(d)(1). Resource uses probably include the uses listed in 1702(c):
"recreation, range, timber, minerals, watershed, wildlife and fish, and natural scenic, scientific and historical values."
 - 2. Withdrawals for proprietary purposes (e.g., administrative buildings and

facilities) may be made for up to twenty years. 43 U.S.C. §1714(d)(2).

3. Small withdrawals may be made to preserve lands being considered for preservation by Congress for up to five years. 43 U.S.C. §1714(d)(3).

E. Large withdrawals are 5,000 acres or larger.

1. Withdrawals for any purpose are limited to twenty years. 43 U.S.C. §1714(c)(1).
2. Detailed factual information must be developed and assessed including environmental and economic factors, impacts on existing and potential uses, intergovernmental effects, and opportunities for public participation 43 U.S.C. §1714(c)(2).
3. Information developed is to be submitted to the relevant committee of Congress.
4. Issue: Can the informational requirements of FLPMA's withdrawal procedures satisfy NEPA's environmental impact statement requirements and vice versa?
5. Congress may veto withdrawals within 90 days by a concurrent resolution which is

to be handled under special, expediting rules. 43 U.S.C. §1714(c)(1).

6. Issue: Is the provision for legislative veto of Executive withdrawals valid?
- a. The Supreme Court held that a legislative veto provision in the Immigration and Naturalization Act was invalid under the presentment clause and bicameralism clause of Article I of the Constitution. (Chadha v Immigration and Naturalization Service, 103 S. Ct. 2764 (1983). See also Consumers Union v Federal Trade Commission, 691 F.2d 575 (D.C. Cir. 1982), aff'd. sub nom United States Senate v Federal Trade Commission, 103 S. Ct. 3556 (1983) (used car rule under FTC Act) and Consumer Energy Council of America v Federal Energy Regulatory Commission, 673 F.2d 425 (1982), aff'd sub nom Petrochemical Energy Group v Consumer Energy Council of America, 103 S. Ct. 3556 (1983) (Natural Gas Policy Act).)

- b. Are public land laws different?
- c. Is the veto provision severable?
- d. Is the joint resolution veto procedure constitutional even though a one-house resolution is not?
- e. What other options are open to Congress?

F. Emergency withdrawals may be made, regardless of their size.

- 1. An "emergency" is when the Secretary determines that "extraordinary measures must be taken to preserve values that would otherwise be lost." 43 U.S.C. §1714(e). The Secretary used this authority to withdraw over 100 million acres in Alaska in 1978.
- 2. The full informational report to the congressional committees must be made within 90 days.
- 3. Emergency withdrawals are limited to three years. The lands subject to emergency withdrawals in Alaska were later withdrawn under the procedures for making large withdrawals for twenty years.
- 4. The Secretary can be forced to make an

emergency withdrawal if notified by the chairman of the relevant committee of Congress that an emergency exists.

a. The committee may not determine the scope or duration of the emergency withdrawal. Pacific Legal Foundation v Watt, 16 E.R.C. 1825 (D. Mont. 1981).

b. Issue: Does the statutory requirement for the Secretary to make withdrawals upon notification of a congressional committee violate constitutional principles of separation of powers? (See Wilderness Society v Watt, 571 F. Supp. 1145 (D.D.C. 1983) (court enjoined Secretary to make withdrawal as directed by committee but based decision on Secretary's own regulations implementing FLPMA emergency withdrawal provisions at 43 C.F.R. §2310.5).)

G. Issue: May the Secretary take action tantamount to a withdrawal without following the FLPMA procedures?

1. The Secretary has authority to make "management decisions" pursuant to FLPMA land use planning authority. 43 U.S.C. §1712(e).
 - a. Plans are required by 43 U.S.C. § 1712(a).
 - b. Comprehensive plans are preferable to single purpose withdrawal decisions.
 - c. Formal withdrawals should be required to carry out management decisions only if lands are to be removed from the operation of the 1872 Mining Act or are to be transferred to another federal department. See 43 U.S.C. § 1712(e)(3).
 - d. There are special procedures for notifying Congress if a management decision totally eliminates one or more uses on 100,000 acres or more of public lands. 43 U.S.C. §1712(e)(2).
2. The Secretary has authority to take protective actions "limiting activities under [the public land laws] in order to

maintain other public values in the area. . . ." 43 U.S.C. §1702(j).

3. Executive authority to make administrative decisions and regulations limiting uses and protecting public lands is well established. (United States v Grimaud, 220 U.S. 506 (1911).)
 - a. Regulation prohibiting motorized vehicles in administratively designated "primitive area" has been upheld. (McMichael v United States, 355 F.2d 283 (9th Cir. 1965).)
 - b. Regulations banning aircraft use in wilderness area have been upheld although the Wilderness Act allows such use. (United States v Gregg, 290 F. Supp. 706 (W.D. Wash. 1968); see also United States v Perko, 108 F. Supp. 315, affirmed, 204 F.2d 446 (8th Cir. 1953).)
 - c. The Secretary may withhold land from disposal or use for a variety of environmental reasons. (E.g., United States v Tallman, 380 U.S. 1 (1965); Duesing v Udall, 350 F.2d

- 748 (D.C. Cir. 1965), cert denied, 383 U.S. 912 (1966); Krueger v Morton; 539 F.2d 235, 240 (D.C. Cir. 1976); United States v Cotter Corp., 486 F. Supp. 995 (D. Utah 1979).)
- d. The statutory missions of all Executive agencies have been amended by the National Environmental Policy Act to include environmental concerns. (E.g., Zabel v Tabb, 430 F.2d 199 (10th Cir. 1970), cert. denied, 401 U.S. 910 (1971).)
- e. A misguided decision of one lower court has held that the Forest Service's failure to accept applications for oil and gas leases on lands subject to a "RARE II" study of whether to designate them as wilderness was the functional equivalent of a withdrawal under FLPMA and was unlawful because of the failure to follow FLPMA withdrawal procedures. (Mountain States Legal Foundation v Andrus, 499 F. Supp. 383 (D. Wyo. 1980).)

- f. FLPMA withdrawal provisions provide an extraordinary device to protect public lands.

IV. Judicial Review of Withdrawal Decisions.

- A. The courts should insist on strict compliance with FLPMA withdrawal procedures.
- B. Judicial deference to Executive decisions to withdraw lands and construction of withdrawal powers is appropriate.