

February 13, 1979

## INTERPRETATION OF SECTION 603 OF THE FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976 - BUREAU OF LAND MANAGEMENT (BLM) WILDERNESS STUDY

## Federal Land Policy and Management Act of 1976: Wilderness

Section 603 requires the Secretary to study all roadless areas of 5,000 acres or more and roadless islands with wilderness characteristics, and report his recommendations to the President as to the suitability or unsuitability for preservation as wilderness of each such area. The Secretary may not make multiple-use trade-offs in determining which public land areas qualify for wilderness study status.

For the purpose of BLM wilderness review, the term "roadless" means the absence of roads which have been improved and maintained by mechanical means to insure relatively regular and continuous use. A way maintained solely by the passage of vehicles does not constitute a road.

Section 603(a) requires that the Secretary report to the President by July 1, 1980, his recommendations as to the suitability for wilderness preservation of all formally identified natural or primitive areas designated prior to November 1, 1975. Only those areas for which a notice of designation was published in the Federal Register are subject to this accelerated review and reporting requirement.

Section 603 of FLPMA does not apply to those areas of the Oregon and California and Coos Bay Wagon Road lands which are being managed for commercial timber production. Section 603 does apply to those areas not being managed for commercial timber production.

Prior to completion of the initial wilderness inventory and identification of the wilderness study areas, wilderness characteristics must be evaluated before the Secretary authorizes any new activities which would destroy wilderness qualities. Discretionary activities must be conditioned to prevent impairment of an area's potential for wilderness designation.

During the review of wilderness study areas, and until Congress acts on the President's recommendations, the Secretary must manage study areas to prevent impairment of their suitability for wilderness designation, with certain limited exceptions.

Management of Section 603 study areas should be guided by the principle that developmental activity must be carefully regulated to insure it is compatible with wilderness, or that its imprint on wilderness is temporary.

Section 603 provides that mining, grazing, and mineral leasing may continue in wilderness study areas in the same manner and degree as on October 21, 1976, even if impairment of an area's suitability for wilderness results.

The words "existing" and "manner and degree" in section 603(c) should be read in conjunction with the words "mining and grazing uses" to establish as a benchmark the physical and aesthetic impact a mining or grazing activity was having on an identified or potential wilderness study area on October 21, 1976.

The existing mining use exception for mining and mineral leasing is limited geographically by the area of active development, and the logical adjacent continuation of the existing activity, not necessarily the boundary of the particular mining claim or mineral lease on which the operation is located.

When the impact from mining and grazing activities on a wilderness study area differs in manner and degree from the impact from such activity on October 21, 1976, the Secretary must regulate the activity to prevent impairment of the area's suitability for preservation as wilderness.

The word "existing" in section 603(c) modifies "mineral leasing" in the same manner as it modifies "mining and grazing uses."

The Secretary is vested with the authority and responsibility to regulate all activities in wilderness study areas to prevent unnecessary and undue degradation and to afford environmental protection.

Areas under review for designation as wilderness remain available for appropriation under the mining laws, unless withdrawn for reasons other than protection of wilderness.



UNITED STATES  
DEPARTMENT OF THE INTERIOR  
OFFICE OF THE SOLICITOR  
WASHINGTON, D.C. 20240

SEP 05 1978

Memorandum

To: Secretary

From: Solicitor

Subject: BLM Wilderness Review — Section 603, Federal Land Policy and Management Act

I. INTRODUCTION

The Federal Land Policy and Management Act (FLPMA), 90 Stat. 2743, 43 U.S.C. § 1701 et seq., (1977 Supp.) was enacted on October 21, 1976. Beginning in March 1977, several opinions interpreting section 603 of the Act, 43 U.S.C. § 1782, have been written in the Office of the Solicitor. This formal Solicitor's Opinion supersedes our previous interpretations of this provision.1/

1. The original opinions were contained in the following memoranda:

- Memorandum to the Director, BLM from the Associate Solicitor, DER on "Formally Identified Natural or Primitive Areas," March 22, 1977.
- Memorandum to the Director, BLM from the Assistant Solicitor, Lands on "Applicability of Wilderness Act, Section 4(d)(3) to BLM wilderness areas," May 4, 1977.
- Memorandum to the Director, BLM from the Solicitor on "FLPMA—Interpretation of Section 603—Wilderness," May 23, 1977.
- Memorandum to the Director, BLM from the Deputy Solicitor on "Applicability of Section 603 of FLPMA to O&C and Coos Bay Wagon Road Lands," June 1, 1977.
- Memorandum to the Assistant Secretary, Land & Water Resources from the Deputy Solicitor on "Interim Management of Potential Wilderness Areas," July 19, 1977.
- Memorandum to the Assistant Secretary, Land & Water Resources from the Solicitor on "Definition of 'road' for purposes of identifying roadless areas under Section 603 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C.A. § 1782 (Supp. 1977)," October 17, 1977.
- Memorandum to the Director, BLM from the Deputy Solicitor on "Application of Mining and Grazing Laws to Areas under Review for Inclusion into the Wilderness System: Section 603, FLPMA," January 9, 1978.



It does not, of course, answer all the legal questions that are likely to be raised about section 603. In particular, we will prepare a separate opinion on the relationship between section 603 and state in lieu or statehood selections of public land, and between section 603 and Native selections under the Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601 et seq. (1970 Supp. V). But it does chart a general course for interpreting this section.2/

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2. For convenient reference, the following is an outline and table of the contents of this opinion:

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Section 603 of the FLPMA states:

(a) Within fifteen years after the date of approval of this Act, the Secretary shall review those roadless areas of five thousand acres or more and roadless islands of the public lands, identified during the inventory required by [section 201(a)] of this Act as having wilderness characteristics described in the Wilderness Act of September 3, 1964 (78 Stat. 890; 16 U.S.C. 1131 et seq.) and shall from time to time report to the President his recommendation as to the suitability or nonsuitability of each such area or island for preservation as wilderness: Provided, That prior to any recommendations for the designation of an area as wilderness the Secretary shall cause mineral surveys to be conducted by the Geological Survey and the Bureau of Mines to determine the mineral values, if any, that may be present in such areas: Provided further, That the Secretary shall report to the President by July 1, 1980, his recommendations on those areas which the Secretary has prior to November 1, 1975, formally identified as natural or primitive areas. The review required by this subsection shall be conducted in accordance with the procedure specified in section 3(d) of the Wilderness Act.

(b) The President shall advise the President of the Senate and the Speaker of the House of Representatives of his recommendations with respect to designation as wilderness of each such area, together with a map thereof and a definition of its boundaries. Such advice by the President shall be given within two years of the receipt of each report from the Secretary. A recommendation of the President for designation as wilderness shall become effective only if so provided by an act of Congress.

(c) During the period of review of such areas and until Congress has determined otherwise, the Secretary shall continue to manage such lands according to his authority under this Act and other applicable law in a manner so as not to impair the suitability of such areas for preservation as wilderness, subject, however, to the continuation of existing mining and grazing uses and mineral leasing in the manner and degree in which the same

was being conducted on the date of approval of this Act: Provided, That, in managing the public lands the Secretary shall by regulation or otherwise take any action required to prevent unnecessary or undue degradation of the lands and their resources or to afford environmental protection. Unless previously withdrawn from appropriation under the mining laws, such lands shall continue to be subject to such appropriation during the period of review unless withdrawn by the Secretary under the procedures of section 204 of this Act for reasons other than preservation of their wilderness character. Once an area has been designated for preservation as wilderness, the provisions of the Wilderness Act which apply to national forest wilderness areas shall apply with respect to the administration and use of such designated areas, including mineral surveys required by section 4(d)(2) of the Wilderness Act, and mineral development, access, exchange of lands, and ingress and egress for mining claimants and occupants.

The legislative history reveals that the wilderness review provision was included in FLPMA to further the purpose underlying the Wilderness Act, 16 U.S.C. § 1131 et seq. (1970), by mandating a review of the public lands for wilderness values and giving Congress an opportunity to act to protect appropriate areas of the public lands.

The Wilderness Act itself specifically directed the Forest Service to review only those areas previously classified as primitive areas or contiguous to existing primitive areas.<sup>3/</sup> It was silent on review of Forest Service roadless areas outside of primitive areas. The Secretary of Agriculture thereafter directed the Forest Service to institute an inventory of all its lands to identify other areas suitable for inclusion in the National Wilderness Preservation System.<sup>4/</sup> The first Forest Service roadless area review (RARE I) began in 1967 and ended in 1973. This review generated considerable controversy and some litigation about appropriate wilderness review criteria and procedures.<sup>5/</sup> A second review (RARE II)

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3. See Parker v. United States, 309 F.Supp. 593 (D. Colo. 1970), aff'd, 448 F.2d 793 (10th Cir. 1971), cert. den. sub nom Kaibab Industries v. Parker, 405 U.S. 989 (1972).

4. See McCloskey, "The Wilderness Act of 1964: Its Background and Meaning," 45 Oregon L. Rev. 288 (1966).

5. Sierra Club v. Butz, Civil No. C-72-1455; 3 Env. L.Rep. 20071, (N.D. Cal. 1972); Wyoming Outdoor Council v. Butz, 484 F.2d 1244 (10th Cir. 1973). See Robinson, "Wilderness: The Last Frontier," 59 Minn. L. Rev. 1 (1974).

was instituted in 1977 and is nearing completion. Although the Forest Service's RARE provides a backdrop for the wilderness review provision of FLPMA, it is plain from Section 603 that Congress intended to vest BLM with a distinct review obligation of its own.

The introductory language of the Wilderness Act refers to all federal lands. The Act itself, however, establishes wilderness review requirements only for Department of the Interior-managed lands within National Parks, Wildlife Refuges, and Game Ranges.<sup>6/</sup> Despite the lack of express statutory authority, the Secretary set aside by administrative action certain public lands as "primitive areas," and management of these areas was virtually the same as for lands formally a part of the National Wilderness Preservation System.<sup>7/</sup> At least one such primitive area designation was challenged as invalid because of the lack of an affirmative statutory base, but the court never reached the merits.<sup>8/</sup>

Congress' response to the recognized need for a comprehensive public lands wilderness review is FLPMA's section 603. It supplies the affirmative statutory base for review and protection of BLM-managed lands suitable for designation as wilderness, in accordance with the provisions of the Wilderness Act.<sup>9/</sup> The review it mandates is designed to further the objectives of the Wilderness Act itself, 16 U.S.C. § 1311 *et seq.* Yet there is neither a substantial overlap, nor a substantial inconsistency, between the review mandated by section 603 and the Wilderness Act. Specifically, although the latter contains a limited review provision, it is principally concerned with the management of wilderness areas once they have been designated by Congress. It does not deal directly with the obligations addressed in section 603 — the review of BLM lands for wilderness values. And its own limited review provisions do not spell out in nearly the detail that section 603 does the review procedures to be followed, and the management protections BLM must provide for areas being inventoried and studied for possible Congressional protection as wilderness. Therefore, while we are aided by the Wilderness Act and the history of its implementation in our search for the proper interpretation of section 603, it goes without saying that it is the language and legislative history of section 603 itself, enacted 12 years after the Wilderness Act, which must ultimately control.

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6. 16 U.S.C. §§ 1132(b) and (c).

7. See 43 CFR Part 2070 and Subpart 6221; Foster, "Bureau of Land Management Primitive Areas—Are They Counterfeit Wilderness," 16 Natural Resources J. 621 (1976).

8. F. H. Stoltze Land & Lumber Co. v. Kleppe, Civ. No. 75-136-M (D. Mont., June 10, 1977).

9. See S. Rep. No. 583, 94th Cong., 1st Sess., 44 (1976)).

## II. REVIEW PROCEDURES

The wilderness review mandated by section 603 of FLPMA is basically a two-step process. The first step is an identification of roadless areas of 5,000 acres or more and roadless islands having wilderness characteristics through the inventory process mandated by section 201 of the Act. The Act envisions a professional review of all BLM lands to determine which areas meet the three threshold criteria for wilderness areas — roadlessness, wilderness characteristics, and size. This review is to be based solely on the roadlessness and wilderness characteristics of the land, not on multiple-use trade-offs and variables. Full formal wilderness studies are required only on inventoried areas of the required size identified as roadless and of wilderness character; that is, the Department does not have to report to Congress on areas which do not meet the basic criteria.

### A. "Roadless"

The House Report on the Act 10/ states: "The word 'roadless' refers to the absence of roads which have been improved and maintained by mechanical means to insure relatively regular and continuous use. A way maintained solely by the passage of vehicles does not constitute a road." This is the principal recorded guidance in the legislative history about the meaning of roadless.11/ Congress clearly did not want to preclude consideration of an area for wilderness solely because of tracks created by the repeated passage of vehicles alone, and this expression must guide BLM's determination of roadlessness as part of the inventory.

### B. "Wilderness Characteristics"

The meaning of "wilderness characteristics" is not discussed in the legislative history, but the text of section 603 itself refers to "having

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10. H.R. Rep. No. 1163, 94th Cong., 2d Sess. 17 (1976).

11. The transcript of the House Committee markup session reveals that Congressman Steiger of Arizona suggested the definition of "road" which appears in the House Report. Arizona is an arid state where "ways" can be created and used as roads merely by the passage of vehicles, and Congressman Steiger took some pains to draw the distinction between a "way" and a "road" for wilderness purposes. The latter, he insisted, was any access route improved or maintained in any way, such as by grading, placing of culverts, making of bar ditches, etc. His express intent was to draw a distinction between what the BLM should do and what the Forest Service had done under the Wilderness Act of 1964, and Congressman (now Senator) Melcher of Montana invited him to submit language for the Committee Report to make the Committee's intent clear. See Transcript of Proceedings, Subcommittee on Public Lands of House Committee on Interior and Insular Affairs, Sept. 22, 1975, pp. 329-33.

wilderness characteristics described in the Wilderness Act . . . ."12/  
Section 2(c) of that Act 13/ defines a wilderness as follows:

A wilderness, in contrast with those areas where man and his own works dominate the landscape, is hereby recognized as an area where the earth and its community of life are untrammeled by man, where man himself is a visitor who does not remain. An area of wilderness is further defined to mean in this Act 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 and which (1) generally appears to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable; (2) has outstanding opportunities for solitude or a primitive and unconfined type of recreation; (3) has at least five thousand acres of land or is of sufficient size as to make practicable its preservation and use in an unimpaired condition; and (4) may also contain ecological, geological or other features of scientific, educational, scenic, or historical values.

C. "Suitability"

Following completion of the inventory, section 603(a) next requires the Secretary to study the suitability of the inventoried roadless areas for inclusion in the Wilderness System. At this point, multiple-use trade-offs addressed by the BLM planning system come into play. Congress envisioned that an area with all of the necessary wilderness characteristics might not be suitable for inclusion in the Wilderness System because of its higher value for some other use, such as commercial forest management or mineral development. In fact, before the Secretary can recommend that an area be included in the Wilderness System, Congress directed the Secretary to "cause mineral surveys to be conducted by the Geological Survey and the Bureau of Mines to determine the mineral values, if any, that may be present in such areas . . . ."14/ The formal wilderness suitability study must also be conducted in accordance with section 3(d) of the Wilderness Act, 16 U.S.C. § 1132(d) (1970), regarding public participation.15/

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12. 43 U.S.C. § 1702(1), which defines "wilderness" as it is used in § 603 as having "the same meaning as it does in section 2(c) of the Wilderness Act . . . ."

13. 16 U.S.C. § 1131(c) (1970).

14. § 603(a), first proviso.

15. § 603(a), last sentence.

D. Report to Congress

After studying each area, the Secretary reports to the President his recommendation as to the "suitability or nonsuitability of each such area . . . for preservation as wilderness."<sup>16/</sup> The President in turn must advise Congress of his recommendation on each such area, within two years of receipt of the recommendation of the Secretary.<sup>17/</sup> Essentially, the Secretary and the President merely advise Congress, since only Congress can designate wilderness areas.<sup>18/</sup> Reports must be made to Congress both on areas recommended for inclusion in the wilderness system and on areas viewed as unsuitable and therefore not recommended for inclusion.

E. "Instant" Study Areas

Section 603(a) requires that the Secretary report to the President by July 1, 1980 his recommendations on areas which were formally identified as natural or primitive areas prior to November 1, 1975. This accelerated review provision is derived from the House version of FLPMA. The House Report <sup>19/</sup> lists 13 formally designated primitive and natural areas. In fact, the Bureau has, through withdrawals, classifications and other means, created approximately 147 natural areas. Fifty-six of these areas were created by publishing a final notice in the Federal Register with natural area management as the stated purpose, objective or title.

According to BLM procedures for designation of primitive and natural areas, publication of notice in the Federal Register completes the process of formal designation. (BLM Manual, Part 2070) Therefore, only natural and primitive areas for which a Federal Register notice was published will be considered "formally identified" for the purpose of accelerated wilderness review.<sup>20/</sup>

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16. § 603(a).

17. § 603(b).

18. The last sentence of § 603(b) states: "A recommendation of the President for designation as wilderness shall become effective only if so provided by an act of Congress."

19. H.R.Rep. No. 1163, 94th Cong., 2d Sess. 17-18 (1976).

20. Applying this standard, the natural and primitive areas subject to the accelerated review requirement are listed in Appendix A to this opinion.

## F. Special Exemptions and Exceptions

The wilderness review requirements of section 603 do not or may not uniformly apply to all BLM-managed lands.

1. Islands. Although section 603(a) generally requires that only roadless areas 5,000 acres or larger be studied, it also requires that all roadless islands, no matter what their size, must be studied. Even though there are over 5,000 public land islands in the East and Midwest, most of which average only an acre in size, each one which is roadless must be evaluated to determine whether it has wilderness characteristics.

2. O&C Lands. Section 603 has limited application to the Oregon and California Railroad and Coos Bay Wagon Road revested lands (the so-called "O&C lands"). This exception is created by section 701(b) of FLPMA, which provides as follows:

(b) Notwithstanding any provision of this Act, in the event of conflict with or inconsistency between this Act and the Acts of August 28, 1937 (50 Stat. 874; 43 U.S.C. 1181a-1181j), and May 24, 1939 (53 Stat. 753), insofar as they relate to management of timber resources, and disposition of revenues from lands and resources, the latter Acts shall prevail.

The legislative history of FLPMA sheds little light on the reason for the inclusion of this specific reference to the O&C Act of August 28, 1937, in this section.21/

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21. The language first appeared in Committee Print No. 5 of H.R. 5441 (93d Cong., 2d Sess. 1975), but was not discussed during the Committee mark-up of the print. The language was retained in H.R. 13777 when it was introduced in the 94th Congress. S. 507, the Senate bill which ultimately became FLPMA, made no reference to resolution of inconsistencies between FLPMA and the O&C Act. Although the House provision was included in the Conference Committee print, it was not discussed during meetings of the Conference Committee, nor mentioned in its report. H. Rep. No. 1724, 94th Cong., 2d Sess. (1976).

The effect of this provision was discussed by members of Congress and the Department during consideration of earlier proposals. The Department of the Interior, in both letters and testimony at Subcommittee hearings, sought to assure the Oregon delegation that the BLM Organic Act would not affect the funding formula or management of the O&C lands. See Hearings on S. 424 before the Subcommittee on Public Lands of the Senate Committee on Interior and Insular Affairs, 93d Cong., 1st Sess. at 44-45 (1973) and letter from Assistant Secretary Loesch to Senator Hatfield, Sept. 15, 1972. It is not clear, however, whether the language first included in the 1975 version of the House bill derived from this earlier testimony and correspondence.

But the terms of section 701(b) are clear; wilderness review and identification under section 603 of the Act are applicable to the O&C lands only to the extent that wilderness review and management of O&C lands for wilderness is consistent with the O&C Act of August 28, 1937. Section 1 of the O&C Act provides as follows (43 U.S.C. § 1181a (1970), emphasis added):

Notwithstanding any provisions in the Acts of June 9, 1916 (39 Stat. 218), and February 26, 1919 (40 Stat. 1179), as amended, such portions of the revested Oregon and California Railroad and reconveyed Coos Bay Wagon Road grant lands as are or may hereafter come under the jurisdiction of the Department of the Interior, which have heretofore or may hereafter be classified as timber lands, and power-site lands valuable for timber, shall be managed, except as provided in section 1181c of this title, for permanent forest production, and the timber thereon shall be sold, cut, and removed in conformity with the principal [sic] of sustained yield for the purpose of providing a permanent source of timber supply, protecting watersheds, regulating stream-flow, and contributing to the economic stability of local communities and industries, and providing recreational facilities [sic].

This Act mandates dominant use management of the O&C lands for commercial forestry.<sup>22/</sup> Rather than allowing equal consideration of all land uses, the O&C Act requires that the lands suitable for commercial forestry be managed principally for that purpose. Other uses, such as recreation, are allowed only when subordinated to commercial forest management.

In order to determine whether wilderness review and management is consistent with the O&C Act, we must determine whether dominant commercial forest management is consistent with the mandatory wilderness review required by section 603 of FLPMA. It is settled that timber may not be harvested on lands under review for wilderness designation except in very limited circumstances. Parker v. United States, 448 F.2d 793 (10th Cir. 1971); see also 36 CFR 293.6 (1976). If section 603 applied to the O&C lands, timber could not be harvested until the wilderness review of qualifying roadless areas was completed. Wilderness review of areas

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22. See, e.g., Solicitor's Opinion M-30506, March 9, 1940 (holding that O&C lands could not be withdrawn for inclusion in Oregon Caves National Monument); see also Instruction of the Assistant Secretary, August 25, 1941 (holding that the Mining Law of 1872 did not apply to O&C lands).

on the O&C lands which are managed for commercial timber production is inconsistent with the O&C Act and, therefore, the O&C Act must prevail where the mandatory wilderness review provision of section 603 would prevent commercial timber management on the O&C lands.

Congress has recognized, however, that some O&C lands might be unsuitable for timber production. Section 701(b) of FLPMA requires the wilderness review provisions of FLPMA to yield only to the extent they are inconsistent with the management for permanent forest production provided for in the O&C Act. This means that the Bureau is not authorized to take an action which would destroy the wilderness quality of an area in advance of reviewing the area's wilderness potential, if the action contemplated -- for example, constructing a fish hatchery, campground, or road for recreational purposes -- is not in an area managed for commercial timber production. If roadless areas unsuitable for commercial forest management are identified on O&C lands, they must be reviewed pursuant to section 603.

3. OCS Lands. Lands on the Outer Continental Shelf are not considered public lands under FLPMA, and thus the wilderness review provision does not apply to them. 43 U.S.C. § 1702(e)(1).

### III. INTERIM MANAGEMENT OF POTENTIAL WILDERNESS AREAS

One of the more difficult judgments required in the wilderness review process is deciding what activities are authorized on lands being evaluated under section 603 prior to final Congressional action either adding them to the National Wilderness Preservation System or returning them to ordinary multiple use management. Congress addressed this problem in section 603(c) of FLPMA quoted on pages 2-3 above.

The language of section 603(c) reflects Congress' concern that wilderness review interfere with ongoing multiple use management activities only to the extent necessary to prevent impairment of suitability for preservation as wilderness. It allows all management activities to continue, subject only to those constraints necessary to prevent impairment until potential areas are determined not to be roadless or not to have wilderness characteristics, or, for roadless areas with wilderness characteristics, until Congress provides otherwise.<sup>23/</sup>

It is worth emphasizing that section 603(c) provides only interim management direction to the Secretary. Once the review of BLM-administered lands is complete and Congress determines the ultimate management objectives

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23. See H. Rep. No. 94-1165, 94th Cong., 2d Sess. at 17-18 (1976).

for the lands which are roadless with wilderness characteristics, section 603(c) does not restrain the Secretary's general authority to manage BLM lands, except to the extent BLM lands are included in a statutory wilderness area. Thus, any regulation required by section 603 is only temporary, pending further Congressional action. An appreciation of the interim nature of section 603 is important to a proper understanding of the provision.

#### A. Management of Areas Prior to Inventory

A threshold question which must be addressed regarding section 603(c) is what kind of interim management restrictions should apply to areas which could possess, but have not yet been determined to have, roadlessness or wilderness characteristics. That is, to qualify for formal study, an area must (a) be an island or contain 5,000 acres or more; (b) be roadless; and (c) have "wilderness characteristics."<sup>24/</sup> The question is whether development which would impair the suitability of an area for preservation as wilderness can be permitted in an area before it is determined to be roadless and to have or not have wilderness characteristics.

To state the issue somewhat differently, there is no question that the section 603(c) restrictions apply to the identified wilderness review areas. It is also clear that once roadless areas with wilderness characteristics are identified, those areas which lack such characteristics are not subject to the interim management restrictions. The remaining question is how to manage public lands prior to the completion of the initial inventory.<sup>25/</sup>

The first sentence of section 603(a) says that the review applies to roadless areas "identified during the inventory required by section 201(a) of this Act as having wilderness characteristics . . ." The inventory required by section 201(a) is a continuous process, in the words of the Act, to be "kept current so as to reflect changes in conditions and to identify new and emerging resources and other values."<sup>26/</sup> The question

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24. These determinations need not be made separately and discretely; that is, the presence of "wilderness characteristics" connotes the absence of "roads." Of course, a determination that roads exist in the area will eliminate the need for further inquiry into the presence or absence of wilderness characteristics.

25. The inventory process itself is to have no effect on BLM policies. Section 201(a) states, in pertinent part: "The preparation and maintenance of such inventory or the identification of such areas shall not, of itself, change or prevent change of the management or use of public lands."

26. § 201(a); 43 U.S.C. § 1711. Congress recognized that the BLM had for years been conducting inventories of the public lands and their resources, and the § 201(a) inventory requirement was designed to be folded into the existing BLM land use planning system. See, e.g., § 202(d), 43 U.S.C. § 1712(d), referring to land use plans in effect at enactment.

thus becomes how to merge this continuing inventory requirement with section 603's requirement to study potential wilderness areas for possible congressional protection as wilderness. How, in other words, is the inventory process to be carried out in connection with section 603?

If the area covered by the proposed action has already been identified in the inventory process as having (or not having) roads or wilderness characteristic, then there is no problem in applying section 603. If the area has not been inventoried for roads and wilderness characteristics, then the question is how to mesh the inventory process with section 603.

If the BLM contemplates taking or allowing actions which could impair the suitability of an area for preservation as wilderness without having previously determined whether the area is roadless or has wilderness characteristics, it is obvious that the whole purpose of the wilderness review could be defeated. The agency must make those threshold determinations before taking actions which could make subsequent inventory meaningless. In short, the agency cannot permit the possible wilderness characteristics to be destroyed before those characteristics have been determined to exist. Otherwise, the objective of section 603 would be defeated.

This conclusion finds strong support in a decision involving the Wilderness Act itself. In Parker v. United States, 309 F. Supp. 593 (D. Colo. 1970); aff'd, 448 F.2d 793 (10th Cir. 1971), cert. den. sub nom Kaibab Industries v. Parker, 405 US. 989 (1972), the land at issue adjoined the Gore Range-Eagles Nest Primitive Area in Colorado. The Forest Service had by contract sold the timber on this adjacent land to a private company for harvesting.<sup>27/</sup> As noted earlier in this opinion, the Wilderness Act did not expressly mandate a wilderness study of this land; the Act required the Forest Service to study only the primitive area itself and make a report to the President. But the Act also stated that:

Nothing herein contained shall limit the President in proposing . . . the alteration of existing boundaries of primitive areas or recommending the addition of any contiguous area of national forest lands predominantly of wilderness value. 16 U.S.C. § 1132(b).

The Court of Appeals began by emphasizing that the general purpose of the Wilderness Act was to acknowledge "the necessity of preserving one factor of our natural environment from the progressive, destructive and hasty incursions of man, usually commercial in nature . . . ." 448 F.2d at 795. The Court went on to hold that because the intent of the Wilderness

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27. The original decision by the Forest Service to harvest the timber in this area was made prior to enactment of the Wilderness Act of 1964. See 309 F. Supp. at 596.

Act was that the President and Congress should have a "meaningful opportunity to add contiguous areas predominantly of wilderness value to existing primitive areas," performance of the timber sale contract should be enjoined to preserve the area for Executive and Congressional consideration for wilderness preservation.28/

Whenever the BLM contemplates taking or allowing actions which could impair an area's suitability for preservation as wilderness, then, it must first determine whether that area is roadless and has wilderness characteristics. If it does, then the action should be evaluated to determine whether it will necessarily impair the area's suitability for preservation as wilderness, or whether it can be modified or conditioned so as to avoid such impairment. (See discussion at pp. 15-37 below.) If impairment cannot be avoided, then the action cannot proceed until the 603 study is complete and Congress has acted on the President's recommendation.

I should emphasize that no delay in decisionmaking should result from this conclusion. In most cases BLM would have to prepare an environmental analysis record (EAR) and an environmental impact statement (EIS), if required, on the proposed action.29/ The section 201(a) inventory of roadless areas with wilderness characteristics referred to in section 603 can simply be integrated into those NEPA processes. The EAR/EIS should specifically consider whether the area affected by the proposed action lacks roads and has wilderness characteristics and therefore should be formally studied for protection as wilderness. If that determination is made, the Secretary must study and make recommendations to the President on the suitability or nonsuitability of the area for preservation as required, and the interim management guidelines of section 603(c) then come into play.

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28. Id., at 797. The Court noted that the language and legislative history of the Wilderness Act reflect a "constant reassurance to lumber, grazing and other such interests" that the Act does not affect their legitimate interests. But the Court pointed out that these assurances were directed to statutorily designated wilderness areas rather than to the study of other areas for possible inclusion in the system. Id., at 796.

29. See, e.g., Minnesota Public Interest Research Group v. Butz, 498 F.2d 1314 (9th Cir. 1974); Wyoming Outdoor Coordinating Council v. Butz, 484 F.2d 1244 (10th Cir. 1973); West Virginia Highlands Conservancy v. Island Creek Coal Co., 441 F.2d 232 (4th Cir. 1971). In each of these cases, the Courts of Appeal enjoined on-the-ground activities which threatened to impair or destroy wilderness characteristics, prior to the preparation of an EIS.

If the inventory process shows that the area in question has roads or does not have wilderness characteristics, then no formal wilderness study is required and the area is free for ordinary multiple use management. Section 603 ceases to have any meaning for these areas from the moment that the BLM makes a determination that the area is not roadless or lacks wilderness characteristics.

B. Grazing, Mining and Mineral Leasing in Areas Under Review.

1. Interim Management — FLEMA and the Wilderness Act

Congress provided in section 603(c) that, during the wilderness review process, and until Congress has provided otherwise:

The Secretary shall continue to manage such lands according to his authority under this Act and other applicable law in a manner so as not to impair the suitability of such areas for preservation as wilderness, subject, however, to the continuation of existing mining and grazing uses and mineral leasing in the manner and degree in which the same was being conducted on the date of approval of this Act . . .30/

Congress also provided, in the last sentence of section 603(c), that:

Once an area has been designated for preservation as wilderness, the provisions of the Wilderness Act which apply to national forest wilderness areas shall apply with respect to the administration and use of such designated areas, including mineral surveys required by section 4(d)(2) of the Wilderness Act, and mineral development, access, exchange of lands, and ingress and egress for mining claimants and occupants.

The initial question is how to interpret and integrate these two standards — the first of which governs management of areas while they are being studied for possible preservation as wilderness, and the second of which governs management of areas after they have been designated as wilderness.

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30. 43 U.S.C. § 1782(c), 90 Stat. 2743 at 2785 (emphasis added). The subsection continues: "Provided, that in managing the public lands the Secretary shall by regulation or otherwise take any action required to prevent unnecessary or undue degradation of the lands and their resources or to afford environmental protection."

a. Legislative History. The "no impairment" language and the grandfather clause which permits impairment for "existing uses" being conducted in the same "manner and degree," subject to the Secretary's other regulatory authorities, were inserted into the Act by the Subcommittee on Public Lands of the House Committee on Interior and Insular Affairs in 1975, during the second session of the 93rd Congress. At the time, the Subcommittee was reviewing both H.R. 5441 (the Administration's bill) and a draft bill prepared by the Subcommittee. Neither H.R. 5441 nor the seventh version of the draft Subcommittee bill contained the "manner and degree" language.<sup>31/</sup> Section 312 of the seventh draft bill, captioned "Bureau of Land Management Wilderness Study" simply stated that, "[d]uring the period of review of such areas, the Secretary shall continue to administer such lands according to his existing authority."<sup>32/</sup> Section 312 of the eighth version of the draft bill (September 1974) contained the wilderness management language basically as it appeared in the subsequent law. The additional language was inserted at the instigation of Congressman Dellenback, who explained:

. . . the gentleman from Alaska had raised the question what could be done on lands set aside for wilderness purposes. I would propose . . . this additional phrase: During the period of review of such areas, the Secretary shall continue to administer such lands in a manner so as to preserve the wilderness character of each such area; subject only to the continuation of existing mining and grazing uses in the manner and degree in which the same had been conducted. We are trying to keep the static, [sic] trying to keep the Secretary from changing anything. That is what I had in mind with this particular language.<sup>33/</sup>

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31. The previous six versions of the Subcommittee bill had been amended, revised and incorporated into the seventh version of the draft Subcommittee bill.

32. The draft bill continues: "Once an area has been designated for preservation as wilderness, the provisions of the Wilderness Act shall apply with respect to the administration and use of such designated area, including mineral development, in the manner as they apply to national forest wilderness areas."

33. Hearings on H.R. 5441 before the Subcommittee on Public Lands of the Committee on Interior and Insular Affairs, U.S. House of Representatives, 93rd Cong., 2d Sess., Sept. 12, 1975 at 1324.

The language was expanded to read "existing mining and grazing uses and mineral leasing in the manner and degree in which the same was being conducted on the date of the approval of this Act . . ." (emphasis added) on September 22, 1975 by an amendment to section 312 of the draft Subcommittee Print No. 2. There was no discussion concerning the addition of the term "mineral leasing."<sup>34/</sup>

The language of section 603(c) adopted by the House was described in a later House Committee Report as follows:

While tracts are under review they are to be managed in a manner to preserve their wilderness character, subject to continuation of existing grazing and mineral uses and appropriation under the mining laws. The Secretary will continue to have authority to prevent unnecessary and undue degradation of the lands, including installation of minimum improvements, such as wildlife habitat and livestock control improvements, where needed for protection or maintenance of the lands and their resources and for continuation of authorized uses.<sup>35/</sup>

The Senate bill, S. 507, as reported from the Senate Committee on Interior and Insular Affairs one year previously was markedly different from the House bill with respect to the direction and authority given to the Secretary to manage BLM lands under review for inclusion into the Wilderness System. Unlike the House bill, S. 507 contained no separate BLM wilderness review section. Instead, S. 507 did not require the Secretary to change his management of BLM administered lands under study for possible wilderness designation:

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34. It should be noted that when "mineral leasing" was added, the remainder of that phrase was changed from the plural "had been conducted" to the singular "was being conducted." One could infer from this that Congress meant the "manner and degree" limitation to apply only to mineral leasing, and not to existing mining and grazing uses, so that the latter arguably could still be allowed even if they changed in "manner" or "degree." This inference is not, however, consistent with the legislative history of section 603(c), since "mineral leasing" was added after the "manner and degree" language was inserted in the section, and there was no suggestion that a severe limitation on the "manner and degree" formula was intended. The better reading is to attribute it to inadvertent grammatical error.

35. H.Rep. No. 94-1163, 94th Cong., 2d Sess. (1976), p. 17.

Areas containing wilderness characteristics as described shall be identified within five years of enactment of this Act . . . the identification of such areas shall not, of itself, change or prevent change in the management or use of national resources lands.36/

Section 103 of S. 507, captioned "Land Use Plans," discussed the Secretary's management authority during the review process in identical terms:

Areas identified pursuant to section 102 as having wilderness characteristics shall be reviewed within fifteen years of enactment of this Act pursuant to the procedures set forth in [the Wilderness Act, 78 Stat. 890, 892-893]: Provided, however, that such review shall not, of itself, either change or prevent change in the management of use of the national resource lands.37/

The discussion of these sections in the Senate Committee Report indicated a concern with avoiding arbitrary termination of existing activities and allowing new uses, as well as a desire to prevent the foreclosure of wilderness designation by uses prior to completion of the inventory and identification process:

: Equity demands that activities of users not be arbitrarily terminated or that the Secretary not be barred from considering and permitting new uses during the lengthy inventory and identification processes . . . . The Committee fully expects that the Secretary, wherever possible, will make management decisions which will insure that no future use or combination of uses which might be discovered as appropriate in the inventory and identification processes--be they wilderness, grazing, recreation, timbering, etc. --will be foreclosed by any use or combination of uses conducted after enactment of S. 507, but prior to the completion of those processes.38/

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36. § 102 of S. 507, entitled "Inventory," (94th Cong., 1st Sess.) (emphasis added).

37. § 103(d), S. 507 (94th Cong., 1st Sess.) (emphasis added).

38. S. Rep. No. 94-583, 94th Cong., 1st Sess. pp. 44-45 (1975) (emphasis added).

The Senate version's general grant of ordinary discretionary interim management authority to the Secretary is in sharp contrast to the more specific proscriptions supported by the House.<sup>39/</sup> The Conference Committee discussed the conflict between the House and Senate bills at some length.<sup>40/</sup> The Conference Committee ultimately adopted the wilderness language contained in section 311 of the House bill. The Conference Report does not explain why the conferees selected the House language and no debate on the provision occurred after the Conference in either House.

b. Discussion

The Wilderness Act continues the mining and mineral leasing laws in statutorily designated wilderness areas through December 31, 1983. Such mining activities are, however, subject to "such reasonable regulations governing ingress and egress . . . consistent with the use of the land for mineral location and development and exploration . . . and restoration as near as practicable of the surface of the lands . . . as soon as they have served their purpose." Moreover, the mineral leases, permits and licenses must contain "such reasonable stipulations . . . for the protection of the wilderness character of the land consistent with the use of the land for the purpose for which they were leased, permitted or licensed." Starting January 1, 1984, all such lands are withdrawn from the mining and mineral leasing laws, subject to valid existing rights.<sup>41/</sup>

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39. As noted above (see Note 25, supra), language similar to that in section 103 of S. 507 stating that the review "shall not, of itself, either change or prevent change in the management" of the public lands, eventually found its way into FLPMA's section 201(a). The language in 201(a), however, refers to the inventory process for all public lands rather than to the review of wilderness study areas, which is how it was used in section 103 of S. 507. The general reference in section 201(a) to the entire inventory must be read as modified by the specific guidance Congress gave the Secretary regarding wilderness review in section 603(c). Otherwise, the first sentence of section 603(c) has no meaning. See also pp. 19-25, infra.

40. For example, Senator Haskell noted, "We don't want people going in [to areas under review for wilderness classification] and increasing the activity during the study period, do we?" Transcript of Proceedings, United States Senate Conference Committee on S. 507 at 65 (Sept. 20, 1976). And later during the meeting, Senator Haskell set forth his preference for the House version: "I am in favor of protecting all existing uses [on federal lands under review for wilderness classification], but not expanding them or adding new ones . . ." Id. at 68. For a discussion in the Conference Committee on what became section 603(c), see pp. 48-71 of the Transcript of Proceedings, United States Senate Conference Committee on S. 507 (Sept. 20, 1976).

41. 16 U.S.C. § 1133(d)(3).

It should be noted that, if BLM lands are added to the National Wilderness Preservation System by Congress, the 1984 withdrawal in the Wilderness Act will apply to them as well,<sup>42/</sup> although Congress can decide to apply a different cut-off date for each area, or even ban all mining in them from the outset.

Because mining claims may be located and mineral leasing may continue for a limited period after land has been designated as wilderness, can we reasonably infer that Congress in section 603(c) intended to regulate mining and mineral leasing differently during the review period prior to Congressional action? The answer to this question is not a simple one although, as will be discussed in more detail below (pp. 23-25), there may be no significant differences in fact between standards to be applied during the two periods in question.

The leading judicial guidance on the subject, the Parker case, discussed above at pages 13-14, stands for the proposition that an agency's obligation to protect lands during the review process must be viewed separately from the agency's obligation to manage lands which are already part of the National Wilderness Preservation System.

Moreover, where Congress in 1976 has established a different standard for allowing control during the interim period, its directions must be carried out even if subsequent Congressional designation of an area as wilderness may actually change the restrictions.

It is worth noting that Congress has twice recently created "wilderness study areas" on the National Forests, in the eastern United States and in Montana.<sup>43/</sup> These Acts directed the Secretary of Agriculture to review particular designated areas to determine their "suitability or nonsuitability for preservation as wilderness . . ." and make recommendations to the President who forwards his or her own recommendations to the Congress. Congress provided, as in FLPMA, that the wilderness areas created by that Act would be managed in accordance with the provisions of the Wilderness Act.

In creating these wilderness study areas, however, Congress also provided that they were to be managed "so as to maintain their presently existing wilderness character and potential for inclusion in the National Wilderness

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42. The last sentence of § 603(c) provides: "Once an area has been designated for preservation as wilderness, the provisions of the Wilderness Act . . . shall apply . . ., including . . . mineral development, access, exchange of lands, and ingress and egress for mining claimants and occupants."

43. See Pub. L. No. 93-622, 88 Stat. 2096, 16 U.S.C. § 1132 Note (January 3, 1975), designating wilderness areas and creating seventeen wilderness study areas in the eastern half of the country; and Pub. L. No. 95-150, 91 Stat. 1243, 16 U.S.C. § 1132 Note (Nov. 1, 1977) § 3.

Preservation System until Congress has determined otherwise . . ." Unlike FLPMA, Congress made no exception for existing uses, but simply flatly commanded that the areas' present character be preserved.<sup>44/</sup>

When compared to these Acts passed the year before and the year after, FLPMA embodies a less restrictive approach to interim management, expressly protecting existing mining and grazing uses and mineral leasing. Yet all three statutes could be contrasted with the Wilderness Act, which says nothing of interim protection and allows new mining and mineral leasing to occur, subject to appropriate regulation, until 1984 in statutory wilderness areas.

The legislative history of section 603 shows that Congress had the clear opportunity to incorporate the minerals management language of the Wilderness Act into section 603(c). The Senate-passed version of interim management restrictions accorded wide discretion to the Secretary to allow mining, grazing, and other uses, possibly incompatible with wilderness, during the review process. The Conference Committee, and ultimately the Congress, rejected this approach, and instead adopted the wholly-new interim wilderness protection proposed by the House. This should be compared with section 603(a), which expressly incorporates the review procedure of section 3(d) of the Wilderness Act regarding public participation.

Another persuasive indicator of Congress' intent is FLPMA's section 302(b), the last sentence of which provides, in pertinent part:

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

The plain import of this partial disclaimer is that section 603 might to some degree "amend" the Mining Law or "impair" the rights of claimants under that Act.<sup>45/</sup> Section 302(b) thus underscores the meaning of section

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44. The Montana Act went on to provide that this interim wilderness protection mandate was "subject to valid existing rights."

45. The reference to "impairment" of claimants' rights, of course, must be read against § 701(h), which makes all actions of the Secretary under the Act "subject to valid existing rights." 43 U.S.C. § 1701, Note.

603 by expressly recognizing that mining claimants are subject to regulation to carry out the purposes of section 603, apart from whatever operations may be allowed once an area becomes a statutory wilderness area.<sup>46/</sup>

It should also be noted that in a little more than five years (December 31, 1983), no new mining claim may be located or mineral lease issued in statutory wilderness areas. Because BLM has until 1991 to complete the section 603 review, we must be careful in comparing the effect of the two Acts. Specifically, Congressional action on the Executive's recommendations for BLM wilderness may not come in many, if not most cases until after the cutoff date under the Wilderness Act. Thus Congress' directive in the last sentence of section 603(c) to manage statutorily designated BLM wilderness areas under the Wilderness Act will probably not mean that new mineral leasing or location of mining claims will be allowed in BLM wilderness areas. Finally, it must be remembered that Congress can, in creating new wilderness areas by statute, require more or less stringent restrictions for any particular wilderness area than exist in the Wilderness Act itself.<sup>47/</sup>

It has been suggested that Congress must have intended mineral exploration to continue in wilderness study areas unrestricted by section 603 because Congress needs to know whether an area is valuable for minerals in deciding whether to create a wilderness area. This ignores the plain requirement of section 603(a) that, "prior to any recommendations for the designation of an area as wilderness," the Secretary must have the USGS and Bureau of Mines make mineral surveys "to determine the mineral values, if any,

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46. It should also be observed that Congress expressly recognized that the last sentence of § 302(b) — referring to prevention of unnecessary and undue degradation — also may work an amendment to the Mining Law or an impairment of claimants' rights under that law. That sentence is very similar, although not identical, to the proviso in the first sentence of § 603(c), discussed at pp. 32-34, infra.

47. For example, the Eastern Wilderness Act specifically authorizes the Secretary of Agriculture to purchase or consider "such lands, waters, or interests therein as he determines are necessary or desirable" to further the management of the areas as wilderness. See Pub. L. No. 93-622, § 6(b); 16 U.S.C. § 1131, Note.

that may be present in such areas."<sup>48/</sup> The Congress has in effect demanded that it be informed through these surveys about the mineral character of every study area before it makes a decision whether to protect the area as wilderness. If the surveys show mineral potential exists, for example, Congress can order more study to gather more information about mineral potential, or reject the area as wilderness. And mineral surveys must be made on a "planned, recurring basis" once an area is designated as wilderness. Congress retains the opportunity to withdraw statutory protection for wilderness if substantial mineral potential is subsequently determined to exist. (Of course, minerals information gathered through minerals exploration activity carried out consistent with interim management regulation will also be considered by Congress in making decisions on each area.)

Given these explicit mechanisms in sections 603(a) and 603(c) for gathering minerals information, it is obvious that the grandfather clause in 603(c)'s interim protection provision has nothing to do with encouraging mineral exploration so Congress can be better informed when it decides whether to protect an area. Rather, as we shall see below, the grandfather clause in section 603(c) has only to do with fairness to those who are currently active in drilling or other forms of mining development (as well as grazing).

The conclusion is inescapable that Congress deliberately chose in section 603(c) to direct the Secretary to conform to a specific standard in deciding whether and on what basis to allow development of mining claims and mineral leases in areas being considered for possible protection as wilderness. The treatment of minerals activities in statutory wilderness areas under the Wilderness Act itself provides only limited guidance to the Secretary for interim management. As we shall see in the next section, however, there may not be much difference between interim management of a study area and management of a statutorily designated area.

## 2. "Impairment" of the "Suitability" of an Area for Preservation as Wilderness

The general guidance given to the Secretary for interim management is found in the first sentence of section 603(c); namely, that the study areas are to be managed "so as not to impair the suitability of such areas for preservation as wilderness . . . ."

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48. This requirement in § 603(a) follows the requirement of § 4(d)(2) of the Wilderness Act, that statutory wilderness areas be "surveyed on a planned, recurring basis consistent with the concept of wilderness preservation by the Geological Survey and the Bureau of Mines to determine the mineral values, if any, that may be present; and the results of such surveys shall be made available to the public and submitted to the President and Congress." 16 U.S.C. § 1133(d)(2). This § 4(d) requirement is itself expressly incorporated into § 603(c), which provides that the Wilderness Act shall govern once BLM areas are designated as wilderness, "including mineral surveys required by § 4(d)(2) of the Wilderness Act . . . ."

Several things can be said about this language. First, clearly any existing or new activity is permissible in a study area if that activity does not impair the suitability of the area for preservation as wilderness. Second, the Wilderness Act itself recognizes that certain activities are incompatible with the preservation of wilderness characteristics, and prohibits these activities in wilderness areas (16 U.S.C. § 1133(c)):

Except as specifically provided for in this chapter, and subject to existing private rights, there shall be no commercial enterprise and no permanent road within any wilderness area designated by this chapter and, except as necessary to meet minimum requirements for the administration of the area for the purpose of this chapter (including measures required in emergencies involving the health and safety of persons within the area), there shall be no temporary road, no use of motor vehicles, motorized equipment or motorboats, no landing of aircraft, no other form of mechanical transport, and no structure or installation within any such area.

Many of the activities described can occur during the study period if they can be effectively terminated without impairment upon a final designation of the area as wilderness; e.g., temporary use of motorized vehicles, landing of aircraft, etc. However, the provision also gives guidance to determining activities which will impair the suitability for wilderness designation because such activity would be inconsistent with ultimate wilderness management, and its effects cannot be eliminated easily upon designation of the area as wilderness; e.g., construction of permanent roads.

Third, it should be noted that the Wilderness Act's definition of wilderness, incorporated into FLPMA by section 603(a), allows some human intrusions into the wilderness landscape, so long as they are not permanent, and the area "generally appears to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable . . . ."49/ The BLM should be guided in part by the kinds of intrusions and activities which occurred in areas before they were placed by the Congress in the National Wilderness Preservation System.

Fourth, as we have seen (see p. 19, supra), in enacting the Wilderness Act in 1964, Congress contemplated that mineral development could take place

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49. 16 U.S.C. § 1131(c).

in some circumstances in statutorily designated wilderness areas.<sup>50/</sup> Almost by definition this activity could adversely affect wilderness character to some degree,<sup>51/</sup> yet Congress has decided that it may be compatible with an area's suitability for preservation as wilderness.

Although Congress has not flatly considered that all developmental activity impairs the suitability of an area for wilderness preservation, it is difficult if not impossible to give meaningful illustrations of types of activities which will or will not impair the suitability of an area for wilderness preservation. For example, commercial timber harvesting has been held to impair <sup>52/</sup> and not necessarily to impair <sup>53/</sup> wilderness. The nature of the area and the extent of the proposed activity are the controlling factors, and a wise exercise of judgment of land management professionals and Departmental decisionmakers will be required.

Management of section 603 wilderness study areas should, therefore, be guided by the principle that developmental activity must be carefully regulated to insure it is compatible with wilderness. Congress has, in section 603 as in the Wilderness Act, provided for the continuation of certain developmental activities within wilderness study areas. Such development proposals must be carefully regulated to prevent impairment,

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50. Although the Wilderness Act contemplates continued mineral leasing and mining claim location in statutory wilderness areas, it is a generally acknowledged fact that mineral development in statutory wilderness areas has been rather limited. One could only speculate about the principal cause of this; possible causes include poor mineral prospects, stringent regulation of proposed mineral operations, and the reluctance of the mining industry to risk adverse public reaction by opening major mining operations in wilderness areas.

51. In Izaak Walton League of America v. St. Clair, 353 F. Supp. 698 (1973), rev'd 497 F.2d 849 (8th Cir. 1974), cert. denied 419 U.S. 1009 (1974), the district court held that mineral development is by definition inimical to wilderness. The Court of Appeals reversed, holding that the district court should not have reached the question until the Forest Service had made a decision on defendants' application for a prospecting permit.

52. See Parker v. U.S., discussed supra, p. 13.

53. See Minnesota Public Interest Research Group v. Butz, 541 F.2d 1292 (8th Cir. 1976). This case involved a special section of the Wilderness Act dealing with the Boundary Waters Canoe Area (BWCA) which provided that "the primitive character of the area" is to be maintained "without unnecessary restrictions on other uses, including that of timber . . ." See 16 U.S.C. § 1133(d)(5). Because of this special provision, the court found that the BWCA occupied a "unique niche" in the National Wilderness System. See 541 F.2d at 1298.

however, and it is possible that in some circumstances development must be prohibited where impairment cannot be prevented or restored. To the extent that activities and their imprint on wilderness are temporary and can be carried on in a manner calculated to minimize interference with wilderness, these activities pose less of a threat to an area's suitability for wilderness preservation than do activities with long-term impact and low rehabilitation potential.

### 3. Existing Uses

The grandfather clause of section 603(c), "for existing mining and grazing uses and mineral leasing,"<sup>54/</sup> will actually have quite limited applicability. Most existing mining uses, for example, already involve roads or such intrusions on the landscape as to destroy an area's wilderness characteristics. Consequently, such areas would not be included in a study area to begin with. Therefore, the grandfather clause will probably apply to a relatively small number of situations.

And it should also be noted again that an activity which does not fall within the ambit of the grandfather clause — e.g., because it is a "new" rather than an "existing" use — may nevertheless be permitted to take place if its intrusions into an area can be mitigated so as not to impair the suitability of the area for preservation as wilderness. Failing to qualify for the grandfather clause does not necessarily spell the end of the activity in a wilderness study area.

In what follows, I set forth what I believe to be the proper interpretation of each key phrase in the clause.

#### a. "Mining and grazing"

I conclude that "existing mining and grazing uses" means only activities actually taking place as of the date of the passage of FLPMA. Indeed, any other reading is difficult given the employment of the word "use" rather than "entitlement to use" or "right to use."<sup>55/</sup> Any other

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54. The term "grandfather" in this context refers to protection of existing uses in the "subject, however, to the continuation of" clause. As will be discussed below, it does not exempt even existing uses from any regulation, because of the proviso immediately following. See pp. 33-34, infra.

55. The dictionary defines "use" in several ways, including "the act or practice of using something, . . . method or manner of using something, . . . a habitual or customary practice, . . . a privilege or benefit of using something, . . . the ability or power to use something (as a limb or a faculty), . . . the legal enjoyment of property that consists in its employment, occupation, exercise, or practice, . . . the quality of being suitable for employment." See Webster's Third New International Dictionary (Unabridged) (G. & C. Merriam Co., 1961).

interpretation would also be inconsistent with the adjective "existing," and the verb "was being conducted," and is also inconsistent with the legislative history of the section.

Also, if there was no "use" actually being made of a lease or claim as of the date of enactment, there is simply no benchmark of comparison of the "manner and degree" of the post-FLPMA use with the use as of enactment. Expressed another way, the "manner and degree" of pre-FLPMA use, if there were none, means that any new use is not of the same "manner and degree" and must be regulated so as not to impair suitability for preservation as wilderness. In this sense, then, "existing use" and "manner and degree" dovetail and point toward actual use.

I conclude, then, that Congress' intent was to grandfather actual uses of a particular area as they existed on the date of passage of the Act, rather than to protect uses initiated or expanded after the Act passed without regard to their impact on wilderness. Expressed another way, its objective was to protect actual, ongoing activities from curtailment solely for wilderness protection purposes, rather than to grant a blanket exemption for particular kinds or categories of uses or legal entitlements.

This means specifically that if a mining claim was previously located in a wilderness study area, but was not being actively worked (except for annual assessment work), work cannot be initiated or resumed after passage of FLPMA without being subject to such regulations as the Secretary deems necessary to protect the area's wilderness characteristics from impairment. Similarly, a mineral lease on which there was no on-the-ground activity could not qualify for the "existing use" grandfather. It is, in other words, the actual use of the area, and not the existence of some presumed entitlement for use, which is controlling.

Following similar reasoning, I believe the existing mining use exception for mining and mineral leasing is limited geographically by the area of active development, and the logical adjacent continuation of the existing activity. This is not necessarily the boundary of the particular mining claim or mineral lease embracing an actual mining operation. More than one mining claim or mineral lease may be included under the umbrella of "existing use" if they are embraced in an actual operation as of the date of the passage of FLPMA. Non-adjacent activities on claims or leases would not qualify as part of the same "existing use."<sup>56/</sup> Any claims or leases not actually being worked or not logically a continuation of an ongoing operation are subject to regulation in order to protect the area's wilderness characteristics.

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56. In determining what is adjacent activity, as in other determinations made in implementing § 603, a "rule of reason" must be followed. For example, an oil or gas well drilled a quarter-mile away from an area impacted by the existing development could be considered "adjacent," while a well drilled five miles from the area impacted by the existing well site would ordinarily not be. Of course, topography and other site-specific characteristics would ultimately control.

I note that this conclusion is somewhat different from the conclusion stated by the Deputy Solicitor in his January 8, 1978 opinion, at p. 9, which stated that the existing use is limited geographically by the boundary of a particular mining claim embraced in an actual mining operation. Upon further reflection, I have determined that the legal boundary of a claim or lease should not control what Congress meant by an "existing use." Instead, I believe Congress intended to allow existing operations to continue across lease or claim boundary lines onto immediately adjacent claims or leases if (a) operations were actually being conducted when FLPMA became law, and (b) the operations continued in the same "manner and degree" as before.

(i) Mineral assessment work

The Mining Law of 1872 requires that a mining claimant perform annual assessment work on his unpatented mining claim.<sup>57/</sup> Failure to perform assessment work causes the claim to be subject to relocation by another.<sup>58/</sup> It also constitutes grounds for an action to cancel by the United States.<sup>59/</sup>

It seems obvious that the necessary assessment work can and should be considered an "existing mining . . . use" entitled to continuation.<sup>60/</sup> It is, of course, subject to regulation both to the extent it differs in "manner and degree" from how it was being conducted on the date of approval of the Act (discussed at pp. 29-30, below) and to the extent it unnecessarily or unduly degrades the lands or resources involved, or the environment (discussed at pp. 32-34, below). The extent of the Secretary's power to regulate in this context will be discussed in more detail below, (pp. 34-37).

b. "Mineral Leasing"

Congress' reference to "mineral leasing" in section 603(c) is ambiguous.

Viewed in one literal way, Congress has provided for the "continuation of . . . mineral leasing in the manner and degree in which [it] was being

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57. R.S. § 2324, 30 U.S.C. § 28.

58. R.S. § 2324, 30 U.S.C. § 28.

59. 43 CFR 3851.3(a). See Hickel v. Oil Shale Corp., 400 U.S. 48 (1970).

60. Of course, where no assessment work has been done in the past (which makes the claim voidable but not void), the "existing use" exception would not apply, since there was no existing use. When a claimant proposes to do assessment work when it had not been done when FLPMA became law, the assessment work itself is subject to regulation so as not to impair the suitability of the area for preservation as wilderness.

conducted" at enactment. Although this is a possible reading of the phrase, its effect would be to repeal the Secretary's traditional statutory discretion to lease minerals,<sup>61/</sup> and instead mandate mineral leasing in wilderness study areas presumably at the rate and on the same terms ("manner and degree") as had been done at enactment. The Secretary would have no authority to refuse to issue or renew such leases either to preserve an area's wilderness suitability or for any other reason -- except where renewals or issuance of new leases differ in "manner and degree" from prior leasing.

There is no indication in the legislative history that this rather extraordinary result was intended.<sup>62/</sup> Furthermore, Congress expressly provided that FLPMA works no "repeals by implication."<sup>63/</sup> Therefore, I conclude that Congress did not intend to strip the Secretary of the discretion it has traditionally accorded him with respect to mineral leasing.

This conclusion does not solve all the ambiguity in the "mineral leasing" reference. Even assuming that Congress was referring to mineral leases rather than a continuing pattern of mineral leasing, the question then is whether Congress meant to grandfather the leases themselves, regardless of whether operations were being conducted on them on October 21, 1976, or only to grandfather those operations actually being conducted on October 21, 1976 on those leases.

On the one hand, the separate reference in section 603(c) to "mineral leasing" as well as to "mining uses" suggests that Congress intended to grandfather the leases themselves -- rather than simply the operations on those leases.

On the other hand, the House Committee Report on the House version, which eventually became section 603(c) in the final bill, describes Congress' intent as to grandfather "existing . . . mineral uses" rather than all activities on existing mineral leases, regardless of whether they were underway by October 21, 1976, when FLPMA became law.<sup>64/</sup> Specifically, the Committee Report's reference to "existing mineral uses," as well

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61. Numerous cases have emphasized the plenary authority of the Secretary to refuse to issue leases when he considers such issuance contrary to the public interest. See, e.g., Udall v. Tallman, 380 U.S. 1, 4 (1965); Duesing v. Udall, 350 F.2d 748 (D.C. Cir. 1965); T.R. Young, Jr., 20 IBLA 333 (1975).

62. See p. 17, supra, esp. Note 33.

63. See § 701(f), 43 U.S.C. § 1701 note.

64. See H. Rep. No. 94-1163, 94th Cong., 2d Sess., P. 17 (1976), discussed at p. 17, supra.

as "appropriation under the mining laws," strongly suggests that the separate reference to "mineral leasing" was added to section 603(c) simply to clarify that "existing mining . . . uses" covered activities carried out under the mineral leasing laws as well as under the mining laws. The mere issuance of a mineral lease has no impact on an area's wilderness characteristics -- it is operations conducted pursuant to a lease which can impair the suitability of an area for preservation as wilderness.

At bottom the question reduces itself to a determination whether Congress used the words "mineral leasing" as a use actually taking place on the public lands, or more broadly as a legal entitlement by which a lessee would be allowed to conduct mining operations on the land irrespective of whether or not the operations would impair the suitability of the area for wilderness designation. I have already concluded that "mining . . . use" refers to actual operations rather than a legal entitlement. I conclude the Congress intended the same result for mineral leasing.

Limiting the grandfather clause's operation to drilling and other operations actually taking place on mineral leases on October 21, 1976, does not mean that additional activity on existing mineral leases is prohibited. Rather, exploration and development operations can continue in the manner and degree that such activity was being conducted on October 21, 1976, including the drilling of new wells within the guidelines discussed above at pp. 23-28, and, of course, increased activity can occur subject to regulation by the Secretary to the extent necessary to preserve the area's suitability for preservation as wilderness.

Similarly, existing leases may be renewed or new ones issued so long as they are made subject to appropriate regulations, lease stipulations and other safeguards designed to prevent operations under the lease from impairing the area's suitability for preservation as wilderness.<sup>65/</sup>

(i) Preference right leases

Preference right leases pose no special problem. A preference right lease applicant who makes the necessary statutory showing <sup>66/</sup> and otherwise

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65. For the Department's view on an analogous issue involving wilderness study areas in National Forests, see Esdras K. Hartley, 23 IBLA 102 (1975), where the Board of Land Appeals held that the BLM must make a case-by-case review of whether and under what conditions mineral leasing is appropriate in such a wilderness study area.

66. "Commercial quantities" of coal, or a "valuable deposit" of phosphate and other leasable minerals. See 43 CFR 3520.1-1 (1977).

67. See 84 I.D.442 (1977) ("unclaimed/undeveloped" opinion).

complies with statutory requirements 67/ is entitled to a preference right lease.68/ Yet the Secretary concededly has wide discretion, and a duty, to include lease terms adequate to protect the environment.69/ The lease terms must include appropriate measures to prevent impairment of the area's suitability for preservation as wilderness. See also Part III(B)(6) at pp. 34-35, below.

4. "Manner and Degree"

The next question is how to interpret the phrase "manner and degree." I believe this is properly read in tandem with the word "existing," to qualify the Secretary's authority to manage the public lands under review in order to preserve their wilderness characteristics. That is, "existing" and "manner and degree" establish as a benchmark the physical (including aesthetic 70/) impact a mining or grazing activity existing on October 21, 1976 was having on the area in question on that date. Any change in use or uses, or any change in the rate of use, which would alter the physical impact on the area is subject to regulation in order to preserve wilderness characteristics. Of course, it is only the physical and aesthetic impact caused by the use and not the use itself which need be measured, for it is the use's impact on the land which could impair the suitability of an area for wilderness.71/ In assessing the physical impact of existing uses, a rule of reason must be followed.72/ It bears reiteration that it is the physical impact on a study area by all uses, including mining or grazing, which section 603 directs the Secretary to regulate.

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68. See NRDC v. Berklund, \_\_\_\_\_ F. Supp. \_\_\_\_\_ (D.D.C. 1978); appeal pending, No. 78-1757 (D.C. Cir.).

69. Ibid.

70. The "manner and degree" language must be read against the backdrop of the definition of wilderness in the Wilderness Act, which Congress specifically incorporated into § 603(a). See pp. 5-6, supra. That definition speaks of the aesthetic of wilderness; e.g., "untrammelled by man," "primeval character or influence," "generally appears to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable."

71. Thus extracting 5 tons of ore by pick, shovel and mule should have far less impact than extracting the same amount by bulldozing, blasting and trucking. Similarly, extracting 5 tons of ore per year has far less impact than extracting 500 tons per year.

72. Thus the difference between 35 and 40 cows grazing, or between 190 and 200 tons of ore being extracted, would ordinarily be insignificant.

Except for the proviso regarding "unnecessary or undue degradation" and "environmental protection," the Secretary is directed under section 603 to regulate only those uses that may impair wilderness characteristics of lands under review. In this regard, the "manner and degree" qualification on the Secretary's authority does not, for example, necessarily fix as an upper limit the exact number of cattle currently grazing in an area. If more cattle could graze there without having any more impact on an area's wilderness suitability, or without unduly or unnecessarily degrading the land or resources, or harming the environment, then section 603 would permit the Secretary to allow the additional cattle to graze. If the physical impact is increased, however, the activity must be regulated to the extent necessary to prevent impairment of the area's wilderness suitability.

##### 5. "Valid Existing Rights"

Section 701(h) of FLPMA, 43 U.S.C. § 1701(h), states that, "All actions by the Secretary concerned under this Act shall be subject to valid existing rights." Mineral leases, mining claims and grazing permits all grant varying rights and privileges and these rights and privileges cannot be taken pursuant to section 603 or any other section of FLPMA. The degree to which section 603 authorizes regulation of valid existing rights to protect wilderness suitability is thus bounded by the fact that these rights must not be condemned or taken.

The degree to which FLPMA allows regulation of the exercise of these rights and privileges without "taking" them in the constitutional sense is a complex one which can be addressed only in concrete cases. We can, however, discuss the pertinent line of inquiry. The first question is the nature of the "right" held by the lessee, permittee, or mining claimant. A lease may contain an absolute right to develop or a qualified right.

An absolute right to develop is not subject to defeasance by section 603(c), or anything else. Yet such absolute rights are rare, if they exist at all. Most permits and mineral leases, especially those issued in recent years, qualify the holder's right to develop in various ways.

Mineral leases typically issued by the Department in modern times, for example, require the lessee to comply with the Department's rules and regulations in effect on the date of the lease, and those which are duly adopted thereafter. This is a major limitation on the right of the lessee, and accordingly, limits the protection provided by section 701(h).

As noted earlier, holders of prospecting permits under the Mineral Leasing Act also have a right to a lease under certain circumstances.<sup>73/</sup> Yet

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73. See p. 29, supra.

that right is subject to compliance with applicable regulations and the Secretary may make the lease itself subject to appropriate terms and conditions to carry out his overall duty to manage public resources in the public interest, as well as his specific duties under such statutes as FLPMA, and particular section 603.

Similarly, the right of the holder of a mining claim is subject to the Secretary's power to issue regulations to govern operations on these claims,<sup>74/</sup> and the Secretary's authority pursuant to section 302(b) of FLPMA to regulate operations on, and access to, mining claims, and to "prevent unnecessary or undue degradation" of the public lands.<sup>75/</sup> And finally, a mining claim is obviously a valid "right" only if it is a valid, properly maintained mining claim.

The rights of grazing permittees are also qualified by the terms of the permit and the Secretary's regulations on the subject.<sup>76/</sup>

It is, then, impossible to generalize about the effect of section 701(h) on regulation to protect wilderness suitability under section 603(c). Each claim, permit or lease must be examined to determine the nature of the rights conveyed by the United States, and the nature of the impairment of that right proposed to protect an area's wilderness suitability.

Finally, it deserves emphasis that the exercise of a right may be regulated without the right being "taken" in a constitutional sense. That is, although property rights may not be taken under the Fifth Amendment to the United States Constitution without compensation, the United States Supreme Court has made clear on many occasions that the exercise of such rights may be regulated and to some extent impaired in furtherance of a proper governmental purpose without effecting a constitutional "taking," requiring compensation.<sup>77/</sup> Section 701(g), then, must be read as prohibiting the Secretary from taking "valid existing rights," but not from regulating the exercise of that right in order to carry out section 603's purposes.

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74. See 30 U.S.C. § 22.

75. See pp. 32-34, infra.

76. See 43 CFR Part 4100.

77. See, e.g., Penn Central Transp. Co. v. City of New York, \_\_\_ U.S. \_\_\_, 98 S. Ct. 2646 (1978); Euclid v. Ambler Realty Co., 272 U.S. 365 (1926); Sax, "Takings and the Police Power," 74 Yale L.J. 36 (1963); Michelman, "Property, Utility and Fairness: Comments on the Ethical Foundation of 'Just Compensation' Law," 80 Harv. L. Rev. 1165 (1967).

6. Preventing "Unnecessary or Undue Degradation" and "Afford(ing) Environmental Protection"

The grandfather clause relating to existing mining and grazing uses and mineral leasing is an exception from the general direction in section 603 to manage wilderness candidate lands "so as not to impair the suitability of such areas for preservation as wilderness."

It is clear, then, that if the level of physical impairment caused to an area by mining and grazing differs in "manner and degree" from the existing level of physical impact, it must be regulated to the extent necessary to prevent impairment of the area's wilderness suitability. Except for that specific qualification imposed on the Secretary's authority by the words "existing" and "manner and degree," section 603 directs the Secretary to regulate existing uses of BLM-administered lands under review in order to preserve their wilderness characteristics. To take a simple example, a miner who was using a pickax and burro on October 21, 1976 to extract one ton of ore a year may not begin using a bulldozer and explosives thereafter to extract 100 tons a year in a wilderness study area unless these activities are subject to appropriate regulation, assuming that the greater activity might impair the suitability of the area for wilderness.

Section 603(c) contains a proviso stating:

That, in managing the public lands the Secretary shall by regulation or otherwise take any action required to prevent unnecessary or undue degradation of the lands and their resources or to afford environmental protection.

This proviso modifies both preceding clauses of the sentence: the new use non-impairment clause, and the existing listed use exemption from non-impairment.<sup>78/</sup>

It should be noted that the proviso does not refer to protection of wilderness characteristics. Rather, it refers to degradation of the lands, resources, and "environmental protection." The proviso is, however, part of the same sentence as, and therefore qualifies, the grandfather clause for existing mining and grazing uses and mineral leasing.

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78. A nearly identical sentence appears earlier in FLEMA, in § 302(b), See 43 U.S.C. § 1732(b): "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." The sentence in 603(c) adds to this the words "or their resources or to afford environmental protection."

The effect of the proviso on the grandfather clause is therefore unclear; i.e., how should the Secretary carry out his mandates of protecting the lands and resources from unnecessary and undue degradation; and protecting the environment, consistent with the grandfather clause?

I believe that the proviso authorizes regulation of activities for reasons other than their impact on wilderness suitability. That is, I conclude that if an existing mining or grazing use is already impairing an area's wilderness qualities, this proviso does not supply the Secretary with authority to regulate it solely to preserve wilderness suitability. It does, however, vest the Secretary with authority to regulate these activities to prevent unnecessary and undue degradation and to protect the environment.

To take a specific example, if on October 21, 1976, a miner was using motorized vehicles, explosives, and drilling equipment to explore for hardrock minerals on a particular mining claim, the Secretary may not now restrict the manner and degree of the miner's activities solely in order to preserve wilderness characteristics. But if the blasting or other activities being conducted are causing undue or unnecessary degradation to the lands, they can be regulated to prevent that kind of degradation. That kind of regulation cannot be undertaken to protect an area's suitability for wilderness preservation, although the effect of the regulation may incidentally help preserve that suitability.

It may be a fine and perhaps impossible line to draw between preventing environmental damage or undue or unnecessary degradation of the public lands and resources on the one hand, and allowing ongoing activities to continue despite wilderness impairment on the other. In some cases, in fact, the purposes may overlap. In such cases, FLPMA as a whole stands foursquare for the notion that uses of the public lands and resources should be regulated to protect the environment and prevent undue or unnecessary damage. A miner, for example, does not have the right to continue to engage in poor mining or reclamation practices which cause, for example, unnecessary degradation or pollution if that's what he was doing on October 21, 1976. The grandfather clause cannot be construed to extend that far.

#### 7. Appropriation of Lands Under the Mining Laws

As I pointed out earlier, elsewhere in FLPMA Congress in effect amended the Mining Law so that the Secretary could discharge his obligations under section 603. That section states, in appropriate part:

Except as provided in . . . section 603 . . .  
no . . . section of this Act shall in any way  
amend the Mining Law of 1872 or impair the

rights of any locators or claims under the Act, including, but not limited to, rights of ingress and egress.<sup>79/</sup>

Under the Mining Law, the Secretary has the authority to regulate the conduct of operations on mining claims, but the specific authorization in the portions of 302(b) quoted above and 603(c) of FLPMA makes it clear that he can regulate activities carried out pursuant to those claims for the sole purpose of protecting wilderness characteristics (except for existing uses).

But, while directing the Secretary to regulate mining uses, Congress at the same time prohibited the Secretary from withdrawing any of the wilderness study lands from appropriation under the Mining Law of 1872, solely to preserve wilderness characteristics. Section 603(c) states:

Unless previously withdrawn from appropriation under the mining laws, such lands shall continue to be subject to such appropriation during the period of review unless withdrawn by the Secretary under the procedures of section 204 of this Act for reasons other than preservation of their wilderness character.

Although this sentence deprives the Secretary of authority to withdraw wilderness review lands from appropriation under the mining laws in order to protect their wilderness characteristics, section 603(c) clearly directs the Secretary to regulate how activities undertaken pursuant to the mining laws are carried out.<sup>80/</sup>

In order to consider in more detail the impact of section 603 on mineral assessment work, we must examine more closely the phrase "appropriation under the mining laws" as it is used in section 603(c). Prior administrative decisions of this Department suggest that appropriation includes more than location of a mining claim by staking and monumenting. The filing of a location notice

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79. 43 U.S.C. § 1732(b) (emphasis added).

80. Unlike the specific prohibition in section 603 precluding the Secretary from withdrawing wilderness review lands from appropriation under the mining laws, no provision in section 603 prevents the Secretary from prohibiting new grazing uses if such a use would impair an area's wilderness characteristics. Section 603 therefore directs the Secretary to regulate and, if necessary, prohibit new grazing uses if required in order to preserve the wilderness characteristics of the land. Issuing grazing permits and mineral leases is discretionary with the Secretary; thus, they are easier to regulate under 603(c) than mining claims.

under other public land law statutes without actual settlement or occupancy initiates no rights in the location, Donald R. Glittenberg, 15 IBLA 165 (1974), Peter Pan Seafood, Inc. v. Shimmel, 72 I.D. 242 (1965). Conversely, use and occupancy without a filing of a notice of location gives the locator no right to purchase. Kennecott Copper Corp., 8 IBLA 21 (1972). If land is open, settlement and improvement establish rights which the Department will recognize if proper notice is timely filed. Vernard E. Jones, 76 I.D. 133 (1969).

The term "appropriation" as it has been used under these other public land law statutes envisions not only the creation of a right but the maintenance of the right as well. See, generally, Margaret Klatt, 23 IBLA 59 at 70-76 (dissent) (1975). To create a right to a mining claim, the claimant must comply with Rev. Stat. sec. 2324, 30 U.S.C. § 28, with regard to location. To maintain that right, the claimant must also, among other things, perform annual assessment work.<sup>81/</sup> Failure to perform such work causes the ground to be in effect, "unappropriated" public domain and subject to relocation by another, Rev. Stat. sec. 2324, 30 U.S.C. § 28, as well as subject to an action to cancel by the United States, 43 C.F.R. § 3851.3(a).

As we have seen above (p. 24), the Secretary's wilderness protection responsibilities extend to the regulation of assessment work. Where assessment work on mining claims located in wilderness study areas is causing impacts which do not exceed the manner and degree in which those impacts were occurring on October 21, 1976, then the Secretary may regulate under section 603(c) only to insure that assessment work will not cause unnecessary and undue degradation of the involved lands and their resources or to protect the environment. Impacts exceeding the manner and degree of impacts on October 21, 1976, will be regulated in accord with a stricter standard, i.e., to guarantee that the area's suitability for inclusion within the wilderness system will not be impaired.<sup>82/</sup>

Interim wilderness study area regulations are currently in preparation in the Department. They probably will require that a mining claimant submit a plan of operations to BLM in advance of engaging in new work. The authorized officer will scrutinize the claimant's proposed activities on the mining claim (including assessment work) to determine their compatibility with the Secretary's duty to protect the area from impairment.

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81. Rev. Stat. § 2324, 30 U.S.C. § 28. A mining claimant must also record a notice of location and file an affidavit of assessment work or notice of intent to hold under § 314 of FLEMA; otherwise the claim is deemed abandoned. See 43 U.S.C. § 1744(a)(1).

82. I believe this standard is at least theoretically more strict because it is possible to conceive of a situation where, in order to perform assessment work and maintain his or her claim, a mining claimant could cause "necessary and due" degradation which would constitute an impairment of wilderness characteristics.

of its wilderness suitability, from unnecessary and undue degradation. If the proposed activities are incompatible, the authorized BLM officer will disapprove the plan of operations and require the claimant to provide a plan outlining alternative methods to conduct operations. I expect that most, if not all, of the conflicts between the need to perform assessment work and management under FLPMA section 603 can be resolved at this stage. For example, the authorized officer could require use of existing roads or ways or other forms of access, and could require mitigating measures along with revegetation and other restoration requirements.

#### 8. Assignment

The identity of the person carrying out the use is not important. Congress focused on the impact rather than the use. An individual, therefore, who was mining a claim on October 21, 1976 can, assuming the assignment is otherwise valid, assign his claim to another person and the assignee may continue to mine under section 603, if his operations are conducted in the same "manner and degree" as those of the assignor on October 21, 1976. The same result would obtain with a mineral lease or grazing permit assignment.

#### 9. Other Authority

The Secretary under section 603 is not prevented from acting pursuant to other parts of FLPMA and other statutory authority in order to regulate existing mining and grazing activities so that a land use management objective other than the preservation of an area's wilderness characteristics can be met. For example, under the Taylor Grazing Act, 43 U.S.C. § 315(b), the Secretary may revoke a grazing permit if he determines that a particular range can no longer support a certain number of animals due to drought. Section 603 should not be read to prohibit such a revocation in a wilderness study area if justified for reasons other than wilderness protection. Section 603 does not, in other words, freeze uses at their existing levels if, for reasons unrelated to wilderness protection, the Secretary determines they must be curtailed in order to carry out his other statutory responsibilities. And one of these statutory responsibilities is, as noted above, the direction in section 603(c) (which is also repeated in section 302(b)) to "prevent unnecessary or undue degradation of the lands."<sup>83/</sup>

#### C. Section 603(c)'s Effect on Access to Private Lands.

In general, access across public lands can only be granted under Title V of FLPMA, and the granting of any right-of-way is discretionary with the Secretary. Section 603 limits the discretionary authority of the

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83. As noted above, § 603(c) goes on to refer to "resources" as well as lands, and expands the Secretary's authority to "afford environmental protection."

Secretary by allowing him to grant access only if it will not impair the suitability of the area under review for wilderness designation.<sup>84/</sup>

Currently, the Solicitor's Office is preparing a memorandum involving the Secretary's authority to regulate access to and from mining claims. Regarding existing access across wilderness study lands to private property, any legal opinion is best given after reviewing each separate factual situation in light of the criteria in section 603.

D. General Effect of Section 603(c).

It should be emphasized that section 603(c) does not limit mining and grazing activities to the precise level at which they were occurring on October 21, 1976. It allows for expansion or curtailment of these activities so long as the wilderness characteristics of the land under review are not impaired.

It should also be reemphasized that section 603's restrictions are interim only, until a roadless area has been determined not to have wilderness characteristics, or until Congress has provided otherwise.

In summary, Congress intended mining and grazing activities to continue on BLM-administered lands under review for wilderness suitability, but subject (except for existing mining and grazing activities conducted in the same manner and degree as were occurring on the date of passage of FLEMA) to regulation so that they would not impair an area's wilderness characteristics.

This opinion was prepared with the assistance of Frederick N. Ferguson, Deputy Solicitor, John D. Leshy, Associate Solicitor for Energy and Resources, David Grayson, Assistant Solicitor for Land Use, Larry McBride, and Carolyn Osolinik of the Division of Energy and Resources. Gail Achterman and Robert Crotty, formerly attorneys in the Division of Energy and Resources, also worked on this opinion during their period of employment with the Department.



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Attachment

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84. See also § 302(b), 43 U.S.C. § 1732(b), discussed at pp. 21, 31, supra.



M-36910 (Supp)

October 5, 1981

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THE BUREAU OF LAND MANAGEMENT WILDERNESS REVIEW AND VALID EXISTING RIGHTS

Federal Land Policy and Management Act of 1976: Wilderness

Valid existing rights are limitations upon the Secretary's authority to manage activities occurring within wilderness study area under the nonimpairment standard. In general, the nonimpairment standard remains the management norm unless it would preclude enjoyment of the rights. When it is determined that the rights can be enjoyed only through activities that will permanently impair an area's suitability, the Secretary must manage the lands to prevent unnecessary and undue degradation and to afford environmental protection.

Solicitor's Opinion M-36910, 86 I.D. 89 (1978), modified.





UNITED STATES  
DEPARTMENT OF THE INTERIOR  
OFFICE OF THE SOLICITOR  
WASHINGTON, D.C. 20240

OCTOBER 5, 1981

Memorandum

To: Secretary  
From: Solicitor *William H. Colclough*  
Subject: The BLM Wilderness Review and Valid Existing Rights

I. INTRODUCTION

On September 5, 1978, the Solicitor issued opinion M-36910, 86 I.D. 89 (1978), interpreting section 603 of the Federal Land Policy and Management Act (FLPMA), 43 U.S.C. § 1782. In addition, two supplementary memoranda have been issued. The first, the memorandum of August 7, 1979 ("Palmer Oil/Prairie Canyon"), reviewed the "grandfather clause" of section 603. The second, the memorandum of February 12, 1980 ("Further Guidance on FLPMA's section 603"), discussed the Bureau of Land Management's Interim Management Plan and valid existing rights in the context of mining claims located pursuant to the general mining laws.

This opinion addresses the relationship between valid existing rights and the wilderness review requirements of section 603. <sup>1/</sup> It modifies Solicitor's Opinion No. M-36910 and incorporates the memorandum of February 12, 1980.

II. THE NONIMPAIRMENT STANDARD AND ITS EXCEPTIONS AND LIMITATIONS

Congress has delegated to the Secretary general and comprehensive authority to manage the public lands. As the Supreme Court has noted, the Secretary "has been granted plenary authority over the administration of public lands . . . and . . . has been given broad authority to issue regulations concerning them." Best v. Humboldt Placer Mining Co., 371 U.S. 334, 336 (1963). See also Cameron v. United States, 252 U.S. 450, 459-60 (1920); Boesche v. Udall, 373 U.S. 472, 477-78 (1963). See generally 30 U.S.C. §§

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<sup>1/</sup> This opinion formalizes and is consistent with the position adopted by the Department on appeal from the decision of Rocky Mountain Oil & Gas Association v. Andrus, 500 F. Supp. 1338 (D. Wyo. 1980), appeal docketed, No. 81-1040 (10th Cir. Jan. 5, 1981). Although consistent with the result reached by the court in regard to allowing activities on oil and gas leases issued prior to October 21, 1976 (pre-FLPMA leases), this opinion does not adopt the court's rationale.

22, 189; 43 U.S.C. §§ 2, 1712. With the enactment of FLPMA, Congress has restricted the Secretary's discretion in managing the public lands by imposing two standards to guide management decisions. The first is a general standard applicable to all management activities: "In managing the public lands the Secretary shall, by regulation or otherwise, take any action necessary to prevent unnecessary and undue degradation of the lands." 43 U.S.C. § 1732(b). The second and more stringent limitation is part of the wilderness review mandated by section 603 of FLPMA. 43 U.S.C. § 1782.

Under section 603 of FLPMA, the Secretary is directed to review the public lands and identify those areas that meet the wilderness criteria contained in section 2(c) of the Wilderness Act, 16 U.S.C. § 1131(c). Those areas that have wilderness characteristics are then to be studied to determine their suitability for inclusion in the National Wilderness Preservation System. The Secretary is required to make recommendations on their suitability or nonsuitability to the President by October 21, 1991. In turn, the President makes recommendations to the Congress which decides which areas will be designated wilderness.

Section 603(c) establishes a specific management standard, known as the "nonimpairment standard," applicable only during this wilderness review:

During the period of review of such [wilderness study] areas and until Congress has determined otherwise, the Secretary shall continue to manage such lands according to his authority under this Act and other applicable law in a manner so as not to impair the suitability of such areas for preservation as wilderness, subject, however, to the continuation of existing mining and grazing uses and mineral leasing in the manner and degree in which the same was being conducted on the date of approval of this Act: PROVIDED, That, in managing the public lands the Secretary shall by regulation or otherwise take any action required to prevent unnecessary or undue degradation of the lands and their resources or to afford environmental protection.

43 U.S.C. § 1782(c)(emphasis added). See generally Solicitor's Opinion M-36910, 86 I.D. 89, 109-11 (1978).

There is, however, an exception to and a limitation on the nonimpairment standard. The exception is the section's grandfather clause which authorizes the continuance of existing mining, grazing, and mineral leasing uses, "in the manner and degree" in which they were occurring on October 21, 1976, the date of enactment of FLPMA. This grandfather clause was analyzed in both the initial Solicitor's Opinion and the supplemental memorandum of August 7, 1979.

The limitation on the nonimpairment standard, and the subject of this opinion, is the savings clause of section 701(h) of FLPMA. This section provides:

All actions by the Secretary concerned under this Act shall be subject to valid existing rights.

43 U.S.C. § 1701 note.

The clause limits the applicability of the nonimpairment standard by specifying that the standard cannot be applied in a manner that would prevent the exercise of any "valid existing rights."

### III. VALID EXISTING RIGHTS

Although the legislative history is largely silent on the scope of this term,<sup>2/</sup> it is not unique to FLPMA. The term has an extensive history both in the Department and the courts.

In defining "valid existing rights," the Department distinguishes three terms: "vested rights," "valid existing rights," and "applications" or "proposals."<sup>3/</sup> "Valid existing rights" are distinguished from "applications" because such rights are independent of any secretarial discretion. They are property interests rather than mere expectancies. Compare Schraier v. Hickel, 419 F.2d 663, 666-67 (D.C. Cir. 1969) and George J. Propp, 56 I.D. 347, 351 (1938) with Udall v. Tallman, 380 U.S. 1, 20 (1965), United States ex rel. McLennan v. Wilbur, 283 U.S. 414, 420 (1931), and Albert A. Howe, 26 I.B.L.A. 386, 387 (1976). "Valid existing rights" are distinguished from "vested rights" by degree: they become vested rights when all of the statutory requirements required to pass equitable or legal title have been satisfied.<sup>4/</sup> Compare Stockley v. United States, 260 U.S. 532, 544 (1923) with Wyoming v. United States, 255 U.S. 489, 501-02 (1921) and Wirth v. Branson, 98 U.S. 118, 121 (1878). Thus, "valid existing rights" are those rights short of vested rights that are immune from denial or extinguishment by the exercise of secretarial discretion.

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<sup>2/</sup> See generally H.R. Rep. No. 1724, 94th Cong., 2d Sess. 65 (1976), reprinted in Senate Comm. on Energy & Natural Resources, 95th Cong., 2d Sess., Legislative History of the Federal Land Policy and Management Act of 1976 at 871, 935 (Comm. Print 1978).

<sup>3/</sup> Each of these terms applies only to third parties. They do not apply to interests of federal agencies, departments, or agents. See, e.g., Townsite of Liberty, 40 I.B.L.A. 317, 319 (1979).

<sup>4/</sup> "Vested rights" has a narrower meaning within public land law terminology than in other areas of the law. In public land law, "vested rights" typically applies to legal or equitable rights to a fee title. See e.g. Wyoming v. United States, *supra* at 501-02. Oil and gas leases, which do not convey fee title, have not been couched in terms of the traditional "vested right" usage.

Valid existing rights may arise in two situations. First, a statute may prescribe a series of requirements which, if satisfied, create rights in the claimant by the claimant's actions under the statute without an intervening discretionary act. The most obvious example is the 1872 Mining Law: a claimant who has made a discovery and properly located a claim has a valid existing right by his actions under the statute; the Secretary has no discretion in processing any subsequent patent application. Second, a valid existing right may be created as a result of the exercise of secretarial discretion. For example, although the Secretary is not required to approve an application for a right-of-way, if an application is approved the applicant has a valid existing right to the extent of the rights granted. Similarly, the Secretary has discretion to approve, deny, or suspend an application for an oil and gas lease. Once the lease is issued however, the applicant has valid existing rights in the lease.

Valid existing rights are not, however, absolute. The nature and extent of the rights are defined either by the statute creating the rights or by the manner in which the Secretary chose to exercise his discretion.<sup>5/</sup> See, e.g., Best v. Humboldt Placer Mining Co., 371 U.S. 334 (1963); Continental Oil Co. v. United States, 184 F.2d 802, 807 (9th Cir. 1950). Thus, it is not possible to identify in the abstract every interest that is a valid existing right; the question turns upon the interpretation of the applicable statute and the nature of the rights conveyed by approval of an application. Because of the importance of the individual approval and its stipulations, a review of each approval document will be required to determine the precise scope of an applicant's valid existing rights where such rights are created by an act of Secretarial discretion.

#### IV. REGULATION OF VALID EXISTING RIGHTS UNDER SECTION 603 OF FLEMA

The determination that a particular interest is a "valid existing right" is a limitation on the congressionally mandated management standard applicable to activities occurring within wilderness study areas. Although the nonimpairment standard remains the norm, this standard cannot be enforced if to do so would preclude recognition of the right or, in the case of an issued lease, would preclude development under the right. In general, restrictions on the right

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<sup>5/</sup> For example, there are interests less than leaseholds that are "valid existing rights." These include noncompetitive (preference right) coal lease applications that were preserved by the "valid existing rights" clause of section 4 of the Federal Coal Leasing Act Amendments of 1976, 90 Stat. 1085, amending 30 U.S.C. § 201(b) (1970). The Secretary does not have the discretion to reject these applications if the applicant can meet the statutory test for lease issuance. Nevertheless, the right to a lease does not accrue until that determination has been made. NRDC v. Berklund, 609 F.2d 553 (D.C. Cir. 1979); Utah International, Inc. v. Andrus, 488 F. Supp. 962, 969 (D. Utah 1979). The right preserved is to an adjudication and, if that adjudication is favorable, to a lease.

designed to protect wilderness values may not be so onerous that they unreasonably interfere with enjoyment of the benefit of the right. In other words, regulations may not be "so prohibitively restrictive as to render the land incapable of full economic development." Utah v. Andrus, 486 F. Supp. 995, 1010 (D. Utah 1979).

The resolution of specific cases under these general guidelines is dependent upon an analysis of two variables. The first is the scope of developmental rights actually conveyed by the person's actions under the statute or by the Department's issuance of the lease or other document. The second variable is the site-specific conditions confronting the right holder. In general, however, the nonimpairment standard governs activities unless this would unreasonably interfere with enjoyment of the valid existing rights. When the nonimpairment standard would unreasonably interfere with the use of the rights conveyed, the holder of the rights may exercise the rights although it impairs the area's suitability for preservation as wilderness. For example, under such circumstances a claimant with a valid mining claim under the Mining Law of 1872 may develop the claim even if this impairs the area's suitability for wilderness preservation. Similarly, the holder of an oil and gas lease or a right-of-way authorization issued prior to the enactment of FLPMA may develop the leasehold or right-of-way to the extent authorized by the issuance or approval document.

It is important to note the distinction between pre- and post-FLPMA leases and authorizations. With the enactment of FLPMA on October 21, 1976, the Secretary was required to manage the public lands under wilderness review "so as not to impair the suitability of such areas for preservation as wilderness." 43 U.S.C. § 1782(c). Thus applicants who received a lease or other use authorization after October 21, 1976, for lands within an area under wilderness review did not receive an unlimited right to develop since after that date the Secretary had authority only to issue those leases, permits, and licenses that would not impair an area's suitability for preservation as wilderness. See generally Utah v. Andrus, 486 F. Supp. 995, 1006 (D. Utah 1979).

The right to develop even if it impairs an area's suitability does not, however, mean that the right is unlimited. The Secretary remains under a statutory mandate to manage these areas and their resources: "in managing the public lands the Secretary shall by regulation or otherwise take any action required to prevent unnecessary or undue degradation of the lands and their resources or to afford environmental protection." 43 U.S.C. § 1782(c). <sup>6/</sup> By implication, this standard allows the Secretary to authorize uses or activities necessary to the purposes of the valid existing rights subject to reasonable mitigating measures to protect environmental values. The requirement that the Secretary regulate uses and activities to prevent unnecessary and undue degradation and to afford environmental protection is

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<sup>6/</sup> See also 43 U.S.C. § 1732(b).

consistent with the power of the Federal Government to regulate property interests. Since the regulation extends at a minimum only to prohibiting activities that are not necessary or that are excessive or unwarranted, the taking issue is not implicated.<sup>7/</sup>

#### V. CONCLUSION

Valid existing rights may be created by operation of a statute or an act of secretarial discretion. A valid mining claim, an oil and gas lease, and a right-of-way authorization are examples of valid existing rights. If such rights were created prior to the enactment of FLPMA, they limit the congressionally imposed nonimpairment standard. Although the nonimpairment standard remains the norm, valid existing rights that include the right to develop may not be regulated to the point where the regulation unreasonably interferes with enjoyment of the benefit of the right. Resolution of specific cases will depend upon the nature of the rights conveyed and the physical situation within the area. When it is determined that the rights conveyed can be enjoyed only through activities that will permanently impair an area's suitability for preservation as wilderness, the activities are to be regulated to prevent unnecessary and undue degradation or to afford environmental protection. Nevertheless, even if such activities impair the area's suitability, they must be allowed to proceed.

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<sup>7/</sup> These management requirements are compatible with the concept of valid existing rights. First, such rights may constitutionally be regulated and their value diminished for a proper governmental purpose. See, e.g., Andurs v. Allard, 100 S. Ct. 318 (1979); Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978); Goldblatt v. Hempstead, 369 U.S. 590 (1962). Since the management standard prohibits only "unnecessary and undue degradation," it does not raise constitutional issues. Second, the rights granted by the United States are often explicitly limited by the government's authority to regulate. For example, the 1872 Mining Law provides that "all valuable mineral deposits in lands belonging to the United States . . . shall remain free and open to exploration and purchase . . . under regulations prescribed by law." 30 U.S.C. § 22. See generally 30 U.S.C. § 189; Boesche v. Udall, 373 U.S. 472, 477-78 (1963); United States v. Richardson, 599 F.2d 290 (9th Cir. 1979), cert. denied, 444 U.S. 1014 (1980).