Boundary Line Foundation

"Helping Administrative Government Understand and Respect Its Limits"

Survey and Application of Delegated Congressional Authorities for Land and Mineral Withdrawals By The Secretary of The Interior

A Historical, Statutory Distinction between Congressional and Agency Prerogatives

In Response to:
Notice of Application for Withdrawal and Segregation
of Federal Lands
Cook, Lake, and Saint Louis Counties, Minnesota
Bureau of Land Management MNES–059784

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January 14, 2021

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"The Boundary Line Foundation is a national, Section 501(c)(3) Corporation that seeks to restore the national balance of power by bringing education and resources to County governments and local citizens during administrative decision-making. By applying foundational authorities to the initiatives of Federal executive agencies, elected officials of state geopolitical subdivisions are well positioned to meaningfully assess, participate, and potentially affect federal programs using government-to-government authority, restoring self-determinism, and bringing power closer to the people."

This work is dedicated to Eleanor R. Schwartz, a long serving BLM employee whose dedicated service brought much to public lands policy and the people of the United States.

EXECUTIVE SUMMARY

When enacting the Federal Land Policy and Management Act of 1976 (FLPMA), the United States Congress invoked its Article IV, Section 3 prerogative, reserving to itself near exclusive authority over Federal land and mineral withdrawals.[1] During the same action, the Congress severely constrained the authority of the President to make land and mineral withdrawals by repealing the *implied-delegation-due-to-Congressional-acquiescence* doctrine, and delegated strict prescriptive mandates for administration of the land withdrawal process to the Secretary of the Interior.

As part of FLPMA administration, Congress delegated to the Secretary of the Interior specific procedural, technical and informational responsibilities to be carried out when considering land and mineral withdrawals of greater than 5,000 acres; for withdrawals that would eliminate a FLPMA Principal Use; or for those actions that could administratively modify acts of Congress on adjacent reserved public lands.

The authorities at FLPMA Title II, Section 204[2] and Bureau of Land Management Regulations at 43 CFR § 2300.0-3(a)(1) delegate procedures, pre-decisional informational requirements, and administrative sequencing requirements to the Secretary, as well as points of order to be used by the US Senate Committee on Energy and Natural Resources and the House Natural Resources Committee when deciding land and mineral withdrawals of greater than two years in duration.

For this work, the Boundary Line Foundation (BLF) reviewed the history and public record for two mineral withdrawal proposals by the United States Forest Service (USFS) located in the same footprint of the Superior National Forest that would administratively eliminate the FLPMA Principal Use of Minerals Extraction and affect vast areas of public and private interests in at least three Minnesota counties.

Using the current USFS application as an example, BLF demonstrates that by neglecting to submit withdrawal applications and pre-decisional information and analyses to the Congress, the Secretary of the Interior and Director of BLM have illegitimately conferred upon themselves legislative powers that are the sole prerogative of the United States Congress, departing far from the longstanding Public Land laws[3] of the United States.

The public record unambiguously indicates that neglect to complete and submit the required studies for congressional action as required by 43 U.S.C. § 1714 (c)(1) and 43 U.S.C. § 1714 (c)(2) 1-12 is a chronic pattern across multiple administrations, and that the current USFS withdrawal application must be rejected by the Secretary of the Interior until the required studies are performed, and Congress has been engaged to decide the land and mineral withdrawal process.

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1 **Declaration of Policy.** 43 U.S.C. § 1701(a), (a)(4) - "The Congress declares that it is the Policy of the United States that - the Congress exercise its constitutional authority to withdraw or otherwise designate or dedicate Federal lands for specified purposes and that Congress delineate the extent to which the Executive may withdraw lands without legislative action."

2 **Withdrawals.** 43 U.S.C. § 1714(a)-(j).

3 Public Land Law has historically been understood to mean those statutes and regulations governing the retention, management, and disposition of public lands. See Act of September 19, 1964, Pub. L. No. 88-606 § 3, Stat 982, 982 creating the Public Land Law Review Commission.

No public or government funds were used in the research or preparation of this report.

1.0 SITUATION APPRAISAL

1.1 *Summary of Issues*

In the Federal Land Policy and Management Act of 1976 (FLPMA), the Congress of the United States invoked the property clause of the US Constitution and reserved to itself in statute the authority to decide withdrawals of public lands and minerals in the lower 48 States and Alaska.[4]

As part of the FLPMA legislative actions, the Congress delegated to the Secretary of Interior limited, prescriptive, and pre-decisional administrative procedures to be carried out at the beginning of the two-year land and mineral segregation process. Agency applications that would withdraw greater than 5,000 acres in area;[5] eliminate one or more Principal Use;[6] or that could foreseeably modify - through land use planning - Acts of Congress for lands in the same region must, by statute, be submitted to Congress.[7]

The FLPMA is the controlling statutory mandate through which the Secretary of the Interior must process land and mineral withdrawal applications, and the USFS application for land and mineral withdrawal currently before the Bureau of Land Management[8] is required to be submitted to the Congress along with the required studies, information, and analyses. (Appendix A, Table 1)

The public record from previous land and mineral withdrawal proposals indicates that the illegitimate bypassing of Congress for large set asides of land and mineral withdrawals is both a historic practice and a current agency pattern.

1.1.1 Statutory Questions Raised -

This work demonstrates that over time Secretaries of the Interior have conferred upon themselves the Congressional authority to decide public land and mineral withdrawal applications greater than two years in duration through administrative processes, bypassing Congress.

The specific issues being raised in this work address the question of whether the Secretary of the Interior is required to prepare and submit to Congress the statutorily required studies, information, and analyses within three months of notification in the *Federal Register*. A broader issue is whether the Congress, when enacting FLPMA, intended to retain for itself the authority to decide the scope, size, and impact of most land and mineral withdrawals, primarily specifying and delegating only *administrative* responsibilities to the Secretary of the Interior.

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4 43 USC § 1701(a)(4). Declaration of policy

5 43 U.S.C. § 1714(c)(1) and (c)(2)(1)-(12).

6 43 U.S.C. § 1712(e)(2).

7 43 U.S.C. § 1714(j).

8 FR Vol. 86, No. 2011, Thursday October 21, 2021. Application for Withdrawal and segregation of Federal Lands; Cook, Lake, and Saint Louis Counties, MN.

The specific issues for evaluation include:

1) Does the Secretary of Interior have the delegated statutory authority to approve land withdrawal applications for greater than two years -

   a. that are greater than 5,000 acres in area;

   b. that administratively exclude the FLMPA Principal Use of minerals exploration on tracts of land greater than 100,000 acres;

   c. that propose to administratively modify the Boundary Waters Canoe Wilderness and Mining Protection Act Reservation areas through subsequent land use planning processes;

   d. that will affect approximately 190,321 acres of State, County, and private surface and subsurface inholdings identified by the Land Commissioners of Cook, Lake, and St. Louis Counties as being present in the withdrawal area.

2) When enacting the FLPMA, did the Congress delegate to the Secretary of the Interior its Article IV, section 3, clause 2 property clause authority to withdraw from the public - without detailed pre-inventory and analysis - subsurface mineral interests, private residential properties, gravel pits, access routes, or Minnesota state mineral trust lands?

3) Does the USFS have the statutory responsibility and agency mission to protect the water *quality* of adjacent, Federally-reserved lands that would expand its administrative responsibility beyond ensuring the national forest system is managed according to the doctrines of multiple use, sustained yield, and timber production?

1.1.2 Administrative History of Federal Actions in the SNF -

On December 14, 2016,[9,10] and again on September 20, 2021,[11] the USFS submitted applications to the BLM for withdrawal of the same 235,328 [225,378] acre parcel from the Superior National Forest (SNF) in Cook, Lake, and Saint Louis Counties, Minnesota.

The broader administrative record of agency activities in the SNF demonstrates an alternating and controversial pattern of Major Federal Actions that are hostile to legitimate Principal Uses, primarily mineral exploration and extraction activities. Appendix C details the chronological history of Federal, state, and activist activities in the SNF between the years of 2006 and 2021.

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[9] Application for Withdrawal, Superior National Forest. Cook, Lake and Saint Louis Counties, Minnesota. Kathleen Atkinson, Regional Forester. December 14, 2016.

[10] Citations in the USFS Application include: The Mineral Leasing Act of 1920 (30 U.S.C. 181); the Mineral Leasing Act for Acquired Lands of 1947 (30 U.S.C. 351): Section 402 of the President's Reorganization Plan No. 3 of 1946, (16 U.S.C. 520, and 16 U.S.C. 508b); the Materials Act (43 U.S.C. 601 et seq.); and 36 CFR Part 228, Subpart C.

[11] *Application for Withdrawal, Superior National Forest, Cook, Lake, and Saint Louis Counties, Minnesota*

Between the years of 2006 and 2021, key Federal administrative actions in the SNF include:

- A Notice of Intent to Prepare an Environmental Impact Statement (EIS) for mineral exploration;[13]
- A 2012 Record of Decision (ROD) by USFS approving 29 mineral exploration permits;[14]
- A 2016 Memorandum by BLM Solicitor Tompkins rejecting renewal of Twin Metals Minnesota's (Franconia Metals) preference right mineral leases;[15]
- A December 22, 2017 Memorandum by BLM solicitor Jorjani rejecting Solicitor Tompkins' Opinion, and reinstating the Twin Metals Minnesota's (Franconia Metals) preference right mineral leases;
- Multiple, failed legislative attempts by Minnesota Congresswoman McCollum to withdraw the working lands of the SNF;
- Correspondence from Minnesota Governor Dayton to the Chief Operating Officer of Twin Metals Minnesota withdrawing 95,000 acres of revenue-producing school trust lands and referencing conversations with BLM Director Kornze;[16]
- A December 14, 2016 correspondence from Chief Tidwell to BLM Director Kornze withholding USFS consent for renewal of the mineral leases;[17]
- A January 2018 decision by USFS SNF Supervisor Connie Cummins to forgo an EIS because significant environmental impacts were unlikely to result from the proposed withdrawal; and,
- A September 06, 2018 directive from USFS Regional Forester Atkinson to BLM Eastern States Director Mitchell Leverette **cancelling the withdrawal application** because USFS had determined, after extensive public input, the Federal record contained:

"*enough information to determine a withdrawal is not needed,*"

And,

"*laws that govern mineral development within the Rainy River Watershed provide considerable discretion as to whether to allow new mineral leases,*"

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[13] *Federal Register Vol. 73, No. 245, Friday, Dec. 19, 2008*

[14] *Federal Hardrock Minerals Prospecting Permits Project Record of Decision, ROD-4 through ROD-11*

[15] Solicitor Hilary Tompkins memo to the BLM Director, March 8, 2016

[16] Correspondence. Minnesota Governor Mark Dayton to Ian Duckworth, Twin Metals Minnesota and DNR Commissioner Tom Landwehr. March 6, 2016.

[17] Correspondence. Tomas L. Tidwell of USDA to Neil Kornze, BLM. File Code 2670. December 14, 2016.

And,

> *"Future lease offerings can adequately be evaluated and regulated on a case-by-case basis without invocation of a 20-year withdrawal."*[18]

In its October 21, 2021 land and mineral withdrawal application,[19] USFS is effectively proposing to extinguish a statutorily permitted FLPMA Principal Use[20] of mineral exploration and extraction from the working lands of the SNF.[21] In justifying the mineral withdrawal, USFS relies upon a speculative record of projected impacts to water quality in the Boundary Waters Canoe Area Wilderness; vague potential impacts to the cultures of tribal governments; and unquantifiable, theoretical climatic impacts.

The information in the current USFS mineral withdrawal application falls well short of the Federal decision-making standards of *Quality, Utility, Objectivity,* and *Integrity* required by the Data Quality Act,[22,23] and the application is silent as to the results of the pre-consultation activities with county governments as required by the land use planning *"consistency"* mandate of 43 U.S.C. § 1712(c)(9).[24]

In the Purpose of Withdrawal section of its October 21, 2021 application, USFS indicates that the minerals withdrawal would be part of an ecosystem-wide approach that purports to integrate management of the BWCAW and Mining Protection Area (MPA) with protection of water quality transmitted from the working lands of the SNF:

> *"...seeks to pursue a holistic approach to ensure resource protection of this delicate ecosystem. This application is submitted to advance a comprehensive approach to protection of the fragile and vital social and natural resources, ecological integrity, and wilderness values that are threatened by potential future sulfide mining."*

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[18] Correspondence: Kathleen Atkinson, U.S. Forest Service Regional Forester, Eastern Region to Mitchell Leverette, BLM State Director, Eastern States Office, September 6, 2018.

[19] APPLICATION FOR WITHDRAWAL Superior National Forest Cook, Lake, and Saint Louis Counties, Minnesota September 20, 2021.

[20] 43 USC § 1702(l).

[21] Citations in the USFS Application include: The Mineral Leasing Act of 1920 (30 U.S.C. § 181); The Mineral Leasing Act for Acquired Lands of 1947 (30 U.S.C. § 351); Section 402 of the President's Reorganization Plan No. 3 of 1946, (16 U.S.C. § 520 and 16 U.S.C. § 508(b)); The Materials Act (43 U.S.C. § 601); and 36 CFR Part 228, Subpart C.

[22] Section 515(a) US Treasury and General Government Appropriations Act. Pub.L. 106-554.

[23] H.R. 5658; 66 FR 49718 September 28, 2001.

[24] The BLM regulations at 43 CFR § 2310.1-1 do not include the statutory requirement for pre-consultation with tribal and local governments. This omission could result in disenfranchisement of tribal or county governments.

1.2 *Application of Controlling Federal Authorities* -

1.2.1 USFS Organic Act; The Doctrine of Multiple Use and Sustained Yield -

The General Revision Act of 1891[25] marked a fundamental shift in the philosophy of public lands policy of the United States from land disposition to land and natural resource retention and management. Since then, acquisition of lands by the Federal government has increasingly transitioned into top-down, Federal decision-making that removes voice and participation from county governments and local citizenry.

In June 1898, Congress passed the Forest Service Organic Act,[26] legislation that created the USFS. The core statutory mission of USFS is to manage the national forests for a continuous supply of merchantable timber for the United States, and to ensure the forests are managed to ensure "*favorable conditions of water flow.*" The congressional intent behind the "*favorable conditions of water flow*" mandate is to assure that the National Forest System is managed to maintain a sufficient *quantity* of runoff necessary to maintain forest health; to mitigate erosion; and to ensure an ongoing supply of merchantable timber for domestic markets.

It was neither the intent of the 55th Congress nor part of USFS's mission to eliminate Principal Uses on working lands for the purported protection of water *quality* on adjacent Federal lands reserved as wilderness areas.

In enacting the Multiple Use and Sustained Yield Act of 1960 (MUSYA), the 86th Congress directed the Secretary of Agriculture to administer the five primary uses of the national forests to assure a balanced, multiple use and sustained yield of forest resources. When enacting MUSYA, Congress "*declared* [MUSYA] *to be supplemental to, but not in derogation of, the purposes for which the national forests were established as set forth in the Act of June 4, 1897.*" This action clarified and reiterated that the purpose of USFS is to manage the national forests for multiple, productive uses of timber harvesting, livestock grazing, water quantity management, wildlife, and recreation. Again, offsite protection of water **quality** is not contemplated as part of USFS's statutory responsibility.

With respect to the higher value mineral estate known to occur throughout the United States National Forest system and the SNF, MUSYA mandated that in carrying out its agency mandate, USFS was not to:

> *"affect the use of administration of mineral resources of national forest lands or to affect the use or administration of Federal lands not within national forests."*

[25] Ch. 561, § 24, 26 Stat. 1095 (1891).

[26] *16 USC §475. Purposes for which forests may be established and administered.* June 4, 1897.

In the Organic Forest Service Act, MUSYA, and the Mining and Minerals Policy Act of 1970, Congress specifically intends for the National Forest System to be accessible for productive uses, including "*to foster and encourage private enterprise in the development of domestic mineral resources and the reclamation of mined land.*"[27]

1.2.2 The Federal Land Policy and Management Act of 1976

In October 1976, following a decade of study, intense legislative debate, and publication of a comprehensive report on public lands by the *Public Land Law Review Commission* (PLLRC),[28,29] the 94th Congress enacted the Federal Land Policy Management Act (FLPMA). FLPMA adopted nearly all the 137 recommendations from the PLLRC and other Reports.[30] For its part, the PLLRC report is regarded as the most comprehensive policy and public land law document in the nations history.

When enacting FLPMA, Congress asserted its Article IV property clause prerogative and used the PLLRC and Wheatley reports as the basis to nullify the expansive Midwest Oil decision, repudiate the Supreme Court, and at the same time repeal and limit the authority of the President to withdraw domestic land and minerals.

With extraordinary precision, Congress extinguished 29 statutory provisions of the *implied-delegation-due-to-congressional-acquiescence* doctrine, and reserved to itself the statutory authority to withdraw public lands and minerals across the United States:[31]

> "IV. *Withdrawal Authority Under FLPMA.*
>
> A. ***Most (29) statutory provisions for Executive withdrawal authority were expressly repealed.*** *FLPMA §704(e). Pub. L. No. 94-579. 90 Stat. 2744. 2792 (1976).*
>
> 1. *All withdrawals in effect at the time of enactment were preserved. 43 USC §1701(c).*
>
> 2. *Some statutes* ***were not repealed****, including the Antiquities Act, 16 USC §431 et seq.; the Defense Withdrawals Act, 43 USC §155 et seq.; the Fish and Game Sanctuaries Act. 16 USC §694; the Taylor Grazing Act, 43 USC §315 et seq.; and the Alaska Native Claims Settlement Act. 43 USC §§161000(3), 1615(d)(1), 1616(d)(1).*

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[27] Mining in National Forests - Protection of Surface Resources

[28] Public Law 88-607, 78 Stat 986, September 19, 1964 (repealed).

[29] *One Third of the Nation's Land — A Report to the President and to the Congress by the Public Land Law Review Commission*.

[30] See: Wheatley. *Study of Withdrawals and Reservations of Public Domain Lands 55.* (Rev. 1969).

[31] United States v. Midwest Oil, 236 U.S. 459 (1915).

> *3. The President's **'implied authority' under Midwest Oil was also repealed.**"* [32,33]

And,

> *"All withdrawals, reservations, classifications, and designations in effect as of the date of approval of this Act shall remain in full force and effect until modified under the provisions of this Act or other applicable law."* [34]

The congressional action in FLPMA significantly limited and constrained the authority of the President to make legitimate land withdrawals, leaving intact an exclusive presidential prerogative under four acts of Congress:

- Defense Withdrawals Act, 43 U.S.C. (up to 5,000 acres); § 155 et seq.
- Fish and Game Sanctuaries Act. 16 U.S.C. § 694;
- Taylor Grazing Act, 43 U.S.C. § 315 et seq.; and,
- Alaska Native Claims Settlement Act.

In a comprehensive review of the authority of the President to make land and mineral withdrawals, researcher David H. Getches reports:

> *"In 1906 Congress enacted the Antiquities Act which permitted the President to proclaim national monuments where landmarks, structures, and "other objects of historic or scientific interest" are located." Subsequently,* [to FLPMA] *the executive has been authorized by Congress to withdraw lands for other special purposes such as inclusion in proposed water power projects,' fish and game sanctuaries in national forests, inclusion in grazing districts pursuant to the Taylor Grazing Act, and national defense needs.*
>
> *There is no question that Congress has constitutional authority to make or to authorize withdrawals by legislative act. But arguments that the executive has some inherent constitutional authority to make withdrawals of public lands are without merit."*

In FLPMA Title I, Congress revisited the MUSYA designation of "multiple use" and "sustained yield," and identified only seven "Principal Use" categories to be applied during administration of public lands by the secretaries of the Interior and Agriculture, of which Mineral Exploration and Extraction is regarded as a Principal Use. This statutory action by the Congress, for purposes of land use and management, subordinates all other land use values.

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[32] Getches, David H. *Managing the Public Lands: The Authority of the Executive to Withdraw Lands.* Nat. Resources J. Vol. 22 April 1982. pps 279-289. http://scholar.law.colorado.edu/federal-land-policy-and-management-act/12.

[33] Getches, David H., "*Withdrawals of Public Lands Under the Federal Land Policy and Management Act*" Summer Conference (June 6-8 1984) http://scholar.law.colorado.edu/federal-land-policy-and-management-act/12.

[34] 43 USC §1701 note. 701(c). Pub. L. 94-579. Effect on existing rights.

The preeminent position of mineral exploration over subordinate, non-principal land use values also reflects the priority of mineral exploration as a central policy of the United States. Moreover, FLPMA codified into the controlling statutes of the United States a longstanding congressional priority for mineral exploration to remain a Principal Use on Federal lands:

> *"The term "principal or major uses" includes, and is limited to, domestic livestock grazing, fish and wildlife development and utilization, mineral exploration and production, rights-of-way, outdoor recreation, and timber production.*[35]

1.2.3 The Mining and Minerals Policy Act of 1970 -

The Mining and Minerals Policy Act of 1970 (MMPA)[36] established the national policy of the United States to foster and encourage private enterprise in development of sound and economically stable practices in the minerals exploration, mining, and reclamation industries. In enacting FLMPA, Congress expressly identified the need for domestic sources of *minerals, food, timber, and fiber*, and codified the principals of MMPA in FLPMA.[37]

The FLPMA and MMPA policies remain applicable to lands in the National Forest System to the extent that USFS has maintained mineral program policies consistent with MMPA. This requires the Secretary of Agriculture to administer the surface estate of the National Forest System in a manner that recognizes the critical nature of domestic mineral resources from National Forest System lands, and to encourage private enterprise in the development and reclamation of lands associated with mineral resources.

> *"The Forest Service will strive to: Facilitate the orderly exploration, development, and production of mineral and energy resources within the National Forest System on lands open to these activities or on withdrawn lands consistent with valid existing rights."* [38]

Under FLPMA, the Secretaries of the Interior and Agriculture are responsible to implement the policy under the mining law *"when exercising his or her authority under other such programs as may be authorized by law other than the mining act,"* which includes assessment for the presence of Federal critical minerals.[39] The domestic need and importance of Federal critical minerals for national security renders the FLPMA pre-consultation requirements of 43 U.S.C. § 1714(c)(2) even more essential:[40]

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35 43 USC § 1702(l).

36 30 U.S.C. § 21a.

37 43 U.S.C. § 1701(a)(12); 43 U.S.C. § 1702(l).

38 FOREST SERVICE MINERALS PROGRAM POLICY.pdf (fs.fed.us)

39 *Federal Register* Vol 83, No.97, Friday, May 18, 2018, pps. 23295. https://www.gpo.gov/fdsys/pkg/FR-2018-05-18/pdf/2018-10667.pdf

40 84 Stat. 1876, 30 U.S.C. 21(a); 43 U.S.C. § 1701(a)(12).

"*Maintain opportunities to access mineral and energy resources which are important to sustain viable rural economies and to contribute to the national defense and economic growth.*"[41]

[41] FOREST SERVICE MINERALS PROGRAM POLICY.pdf (fs.fed.us)

2.0 FINDINGS OF FACT

I. Within three months of *Federal Register* notification, the Secretary of the Interior is required by FLPMA to submit land and mineral withdrawal applications that propose to segregate greater than 5,000 acres, or that would eliminate a Principal Use, or that could foreseeably modify previous Acts, to the US Congress:

a. FLPMA is the controlling congressional mandate that prescribes administrative practices and procedures that direct the Secretary of the Interior and Director of the Bureau of Land Management during processing of land and mineral withdrawal applications.

b. In enacting FLPMA, the Congress reserved for itself the exclusive prerogative to decide Federal land and mineral withdrawals: 1) of greater than 5,000 acres; 2) for which one or more Principal Uses could effectively be eliminated; 3) or for those land and mineral withdrawals that would affect a preexisting Act of Congress:

1. *"The Congress declares that it is the Policy of the United States that - Congress exercise its constitutional authority to withdraw or otherwise designate or dedicate Federal lands for specified purposes and that Congress delineate the extent to which the Executive may withdraw lands without legislative action."*

And,

2. *"Any management decision or action pursuant to a management decision that excludes (that is, totally eliminates) one or more of the principal or major uses for two or more years with respect to a tract of land of one hundred thousand acres or more shall be reported by the Secretary to the House of Representatives and the Senate."*

And,

3. *"The Secretary shall not make, modify, or revoke any withdrawal created by Act of Congress; make a withdrawal which can be made only by Act of Congress."*

c. The October 21, 2021 USFS application that requests withdrawal of 225,378 acres of lands and minerals from the Superior National Forest exceeds the 5,000 acre FLPMA threshold; is intended to eliminate the FLPMA Principal Use of Minerals Exploration and Extraction; and would, through *holistic and comprehensive land use management*, administratively affect the Boundary Water Canoe Area Wilderness and Mining Protection areas reserved by an Act of Congress.

II. The Secretary of the Interior does not have the discretionary authority to approve land and mineral withdrawal actions for greater than two years and affecting more than 5,000 acres without first furnishing Congress with a current inventory of mineral and ownership interests and a compatibility, conflict and economic analysis of the future effect on state and county governments, the regional economy, and adjacent public and private lands:

a. The proposed USFS land and mineral withdrawal poses significant and foreseeable impacts to the presence of inholdings of Minnesota School Trust Lands, Swamp Trust Lands, and privately held surface and mineral inholdings documented by the Lake, Saint Louis, and Cook County Land Commissioners (Appendices D, E and F).

b. FLPMA requires the Secretary of the Interior to furnish both chambers of Congress, within three months of the Federal Register Notification, a detailed, site-specific inventory and analysis of the effect the withdrawal would have on public and private interests; the economic impact on individuals and local communities; and, a compatibility/conflict impact analysis on the state of Minnesota, Cook, Lake, and St. Louis Counties, and the nation (Table 1, Appendix A).

c. The public record is silent as to if the Secretary of Interior has performed and submitted to Congress the pre-decisional studies for the October 21, 2021 USFS application.

d. The public record indicates that the Secretary of Interior failed to submit to Congress the pre-decisional studies required under 43 U.S.C. § 1714(c)(2)1-12 for the same parcel USFS proposed to withdraw in its January 19, 2017 withdrawal application.

e. The controlling statutory mandates of FLPMA 43 U.S.C. § 1714(c)(2)1-12 impose upon the Secretary an unambiguous requirement that submittal of the pre-consultation studies to Congress must occur in conjunction with - or within three months of - the land and minerals notification process.

f. From the information in the public record, it is impossible to conclude if the Secretary has met her minimum statutory and administrative obligations to protect the approximate 190,321 acres of preexisting Minnesota School Trust Lands, Minnesota Swamp Trust interests, Tax Forfeited lands, or private inholdings identified as being present by the Cook, Lake, and Saint Louis County Land Commissioners.

III. The Secretary of the Interior does not have the discretionary authority to not submit to Congress pre decisional studies, information or analyses that would identify, quantify, and adequately demonstrate the presence and protection of valid existing rights of lands within the footprint of the proposed USFS withdrawal area:

a. Under the property clause of Article IV, Section 3, Clause 3 of the US Constitution and FLPMA, Congress has the sole prerogative to decide the withdrawal and designation of the 225,378 acre footprint proposed by USFS for withdrawal of lands and minerals.

b. Under the property clause of the US Constitution and FLPMA, Congress has the prerogative to decide the purpose and use of approximately 190,321 acres of disaggregated and interspersed private inholdings within the 225,378 acre footprint proposed by USFS for withdrawal of lands and minerals.

c. With enactment of FLPMA, and except for the legislative authority granted to the President to make special purpose withdrawals under the Defense Withdrawals Act, the Fish and Game Sanctuaries Act, the Taylor Grazing Act, and the Alaska Native Claims Settlement Act, the President has only limited - or perhaps no - Article IV, section 3, clause 2 property clause authority delegated from the Congress to make land and mineral withdrawals from domestic public lands;

d. When enacting FLPMA, the Congress retained for itself the prerogative to decide land and mineral withdrawals of greater than two years that would administratively modify the Boundary Waters Canoe Wilderness and Mining Protection Act Reservation areas; that would administratively eliminate the Principal Use of mineral extraction and exploration; or that will materially affect approximately 190,321 acres of State, County, and private surface and subsurface inholdings in Cook, Lake, and St. Louis Counties of Minnesota.

e. The congressional intent behind the pre-decisional studies required by 43 U.S.C. § 1714(c)(2)1-12 is to provide the Congress with an inventory of lands and minerals that are subject to *valid existing rights*,[42] to *"ensure private rights are respected in all resource management decisions."*

IV. By predetermining that commonly available environmental controls and existing statutory and permitting frameworks are inadequate to protect downstream water quality, the USFS demonstrates a remarkable lack of confidence in the effectiveness of governmental regulatory programs:

a. The withdrawal application is replete with undocumented future claims and unsubstantiated potential impacts that environmental

[42] 43 U.S.C. § 1752(g), (h); 43 U.S.C. § 1701(a); 43 U.S.C. § 1701(h); 43 U.S.C. § 1769(a); 42 U.S.C. § 4335; Executive Order 12630; DOI Instruction Memorandum No. 98-164 Judges note #6. Ref. IM No. 98-135.

damage could result from mineral exploration and development, concluding that "*any failure of mitigation measures, containment facilities, or remediation efforts*" could render USFS unable to protect downstream water quality.

b. The USFS application for land and minerals withdrawal is deficient in site specific and peer-reviewed scientific references, data, studies, and other information required by the Data Quality Act for Federal decision-making. Lacking this information, it is impossible for the Congress and the public to objectively assess and conclude if segregation and withdrawal of the SNF working lands would impact the human environment and therefore would advisable.

V. Review, processing, and oversight of the proposed withdrawal application by Mitchell Leverette, Eastern States Director or F. David Radford, Deputy Director of Geospatial Services, BLM Eastern States office is contrary to the statutory mandates in the policy statement of the Federal Land Policy and Management Act and the Department of Interior, Departmental Manual Part 209, Chapter 7:

> *"On and after the effective date of this Act the Secretary is authorized to make, modify, extend, or revoke withdrawals but only in accordance with the provisions and limitations of this section. The Secretary may delegate this withdrawal authority only to individuals in the Office of the Secretary who have been appointed by the President, by and with the advice and consent of the Senate." 43 U.S.C. 1714(a)*

a. The Policy of the United States is unambiguous **that administration of land withdrawals is to reside with the Secretary of the Interior or Assistant Secretary, Lands and Minerals Management**, and both must have been appointed by the President of the United States (POTUS) and confirmed by the US Senate.

b. The Department of the Interior Departmental Manual at 209 DM 7.1 B. **delegates the Secretary's withdrawal or reservation authority only to the Assistant Secretary, Lands and Minerals Management.** At 209 DM 7.2, further delegation of authority to the Assistant Secretary's subordinates is prohibited because redelegation is prohibited by 43 U.S.C. § 1714(a).

c. Because the *Federal Register* is the official publication of major agency actions of the United States Government, notifications of land withdrawals must originate from the appropriate level of signatory authority.

d. The *Congressional Record* and other public documents *do not* indicate that BLM Eastern States Director Leverette or F. David Radford meet the Congressional intent of 43 U.S.C. § 1714(a) or subordinate regulations at 43 CFR § 2300.0-5(b), and as a result, a legitimate and documentable line authority to oversee the USFS application withdrawal process cannot be concluded.

e. Because the administrative record appears deficient with respect to direct oversight from the Secretary of the Interior or the Assistant Secretary, Lands and Minerals Management, or other individuals appointed by the President with consent of the U.S. Senate, the USFS withdrawal application cannot be documented as procedurally complete.

f. The congressional reasoning behind the requirement for mandating that administration of land withdrawals reside with the Secretary of the Interior or the Assistant Secretary, Lands and Minerals Management is to maintain an immediate level of accountability for the administration of FLPMA to the Congress.

VI. USFS and BLM have failed to fulfill pre-application consultation steps and responsibilities to local governments as required in U.S.C. § 1712(c)(9).

a. Neither USFS nor BLM can be documented as having fulfilled the procedural early notification, land-use plan consistency, and land use plan "*keep apprised*" mandates in 43 U.S.C. § 1712(c)(9).

b. The public record is silent as to whether BLM has contacted the *Minnesota Legislative Permanent School Fund Commission*, the state agency responsible for administering trust lands that fund the Minnesota school system, or coordinated with the St. Louis, Cook or Lake Land Commissioners and/or other state and Federal administrative agencies.

VII. In its October 21, 2021 land and mineral withdrawal application, USFS errantly prioritizes withdrawal and sequestration above the FLPMA doctrines of multiple use, sustained yield, and the hierarchy of principal or major uses – all of which prioritize balanced, beneficial, and working use of the SNF as priority over sequestration:

a. Recognizing the intermingled, pre-existing status of easements, mining claims, timber operations, and state and private inholdings, the 94th Congress, in promulgating FLPMA, established a *hierarchal* system that seeks to diversify and maximize productive land use – not sequestration. To that end, the FLPMA doctrine of principal use establishes a first-among-multiple-use hierarchy for land use management within the SNF:

1. *Domestic livestock grazing;*
2. *Fish and wildlife development and utilization;*
3. *Mineral exploration and production;*
4. *Rights-of-way;*
5. *Outdoor recreation; and,*
6. *Timber production.*

b. It is the policy of the United States that working public lands of the SNF be managed first for balanced productivity, not withdrawal and segregation.

c. The USFS application ignores that when enacting the Boundary Waters Canoe Area Wilderness and Mining Protection Area, Congress itself separated the working lands of the SNF from wilderness. According to Congressional mandates, the SNF is to be managed by USFS for timber production, minerals exploration, range access, and other productive pursuits under the longstanding Federal Multiple Use and Sustained Yield doctrine; and, according to FLPMA, changes in the reservation status of the BWCAW or elimination of an SNF Principal Use are to be decided by Congress.

d. The purpose of the site specific pre-decisional requirements, studies, and informational requirements at 43 U.S.C. § 1714(c)(2) is to provide Congress with information necessary to understand the broad range of impacts prior to undertaking its decision-making prerogative over land and mineral withdrawals.

e. The Secretary of the Interior and Director of the Bureau of Land Management are required to verify the inventory provided by **the Cook, Lake, and Saint Louis Land Commissioners** and publish to Congress all relevant analyses within three months of notification in the *Federal Register*.

3.0 CONCLUSIONS OF LAW

- Under the property clause of the United States Constitution, the Congress of the United States has plenary authority to enact statutes that create, direct, or extinguish executive, judicial, or Federal agency activities.
- The Federal Land Policy Management Act of 1976 is the controlling congressional mandate that authorizes the activities of the Secretary of the Interior and Director of the Bureau of Land Management to be carried out during processing of land and mineral withdrawal applications.
- Agency land and mineral withdrawal proposals that are longer than two years in duration; greater than 5,000 acres in area; that would effectively eliminate a Principal Use; or that would affect a preexisting Act of Congress are required by statute to be submitted to Congress for action.
- The October 21, 2021 USFS application that proposes to withdraw 225,378 acres of public lands and minerals from the Superior National Forest exceeds the 5,000 acre FLPMA threshold; is intended to eliminate the FLPMA Principal Use of Minerals Exploration and Extraction; and would administratively affect the Boundary Water Canoe Area Wilderness and Mining Protection areas reserved by an Act of Congress.
- The proposed USFS land and mineral withdrawal poses significant, foreseeable, and presently unquantified impacts to the presence of Minnesota School Trust Land inholdings, Swamp Trust Lands, and privately held surface, mineral and private property inholdings.
- The public record is silent as to how the Secretary of the Interior has verified and acted upon the 190,321 acre inventory of valid, existing, State, County, and private surface and subsurface inholdings identified by the Land Commissioners of Cook, Lake, and St. Louis Counties.
- FLPMA requires the Secretary of the Interior to furnish both chambers of Congress, within three months of notification, a detailed, site-specific inventory and analysis of the effect the withdrawal would have on public and private interests; the economic impact on individuals and local communities; and, a compatibility/conflict impact analysis on the state of Minnesota, Cook, Lake, and St. Louis Counties.
- The public record is silent as to whether the Secretary of the Interior and Director of the Bureau of Land Management have met their minimum, pre-decisional administrative obligations and submitted to Congress the information required by FLPMA.
- The USFS application for withdrawal of land and minerals from the Superior National Forest is procedurally and administratively deficient and cannot be approved by the Secretary of the Interior as submitted.

Appendix A

Table 1
FLPMA Pre-submittal Requirements
for Land Withdrawals

Table 1
FLPMA Required Administrative and Economic Studies
for Land Withdrawals of greater than 5,000 Acres[1]

FLPMA Pre-submission Procedural and Technical Requirements[2]	Comment
(1) A clear explanation of the proposed use of the land involved which led to the withdrawal proposal;	Following segregation and within three months of notification in the *Federal Register* and Congressional consideration, land and mineral withdrawal applications submitted by the Secretary are required to analyze and report the economic impact on residents, property owners, and the tax base. The Land Commissioners from Lake, Cook and St. Louis Counties have provided detailed land and mineral information that is required to be analyzed and incorporated with the USFS withdrawal application for congressional consideration. The **Saint Louis County Land Commissioner** reports 46,288 acres of private inholdings; 5,596 acres of *active* state mineral leases; 12,400 acres of State Mineral Trust holdings; 12,600 acres of State Swamp Trust mineral holdings; 16,963 acres of State Tax Forfeited land; and 38,765 acres of state mineral forfeited interests; 86 miles of county and township roads; 10 publicly owned gravel pits and 9 active recreation Cabin Leases. **See Attachment X** The **Lake County Land Commissioner** reports 63,182 acres of private inholdings; 12,220 acres of *active* state mineral leases; 17,671 acres of State School Trust Mineral Trust holdings; 45,079 acres of State Swamp Trust mineral holdings; 16,169 acres of State Tax Forfeited mineral interest; 16 miles of high voltage utility corridors; 5 gravel pits and 12 recreation cabin leases; and 5 gravel pits. **See Attachment X**
(2) An inventory and evaluation of the current natural resource uses and values of the site and adjacent public and nonpublic land and how it appears they will be affected by the proposed use, including particularly aspects of use that might cause degradation of the environment, and also the economic impact of the change in use on individuals, local communities, and the nation;	
(3) An identification of present users of the land involved, and how they will be affected by the proposed use;	
(4) An analysis of the manner in which existing and potential resource uses are incompatible with or in conflict with the proposed use, together with a statement of the provisions to be made for continuation or termination of existing uses, including an economic analysis of such continuation or termination;	
(5) An analysis of the manner in which such lands will be used in relation to the specific requirements for the proposed use;	
(6) A statement as to whether any suitable alternative sites are available (including cost estimates) for the proposed use or for uses such a withdrawal would displace;	
(7) A statement of the consultation which has been or will be had with other federal departments and agencies, with regional, state, and local government bodies, and with other appropriate individuals and groups;	
(8) A statement indicating the effect of the proposed uses, if any, on state and local government interests and the regional economy;	
(9) A statement of the expected length of time needed for the withdrawal;	
(10) The time and place of hearings and of other public involvement concerning such withdrawal;	
(11) The place where the records on the withdrawal can be examined by interested parties; and,	
(12) A report prepared by a qualified mining engineer, engineering geologist, or geologist which shall include but not be limited to information on: general geology, known mineral deposits, past and present mineral production, mining claims, mineral leases, evaluation of future mineral potential, present and potential market demands.	

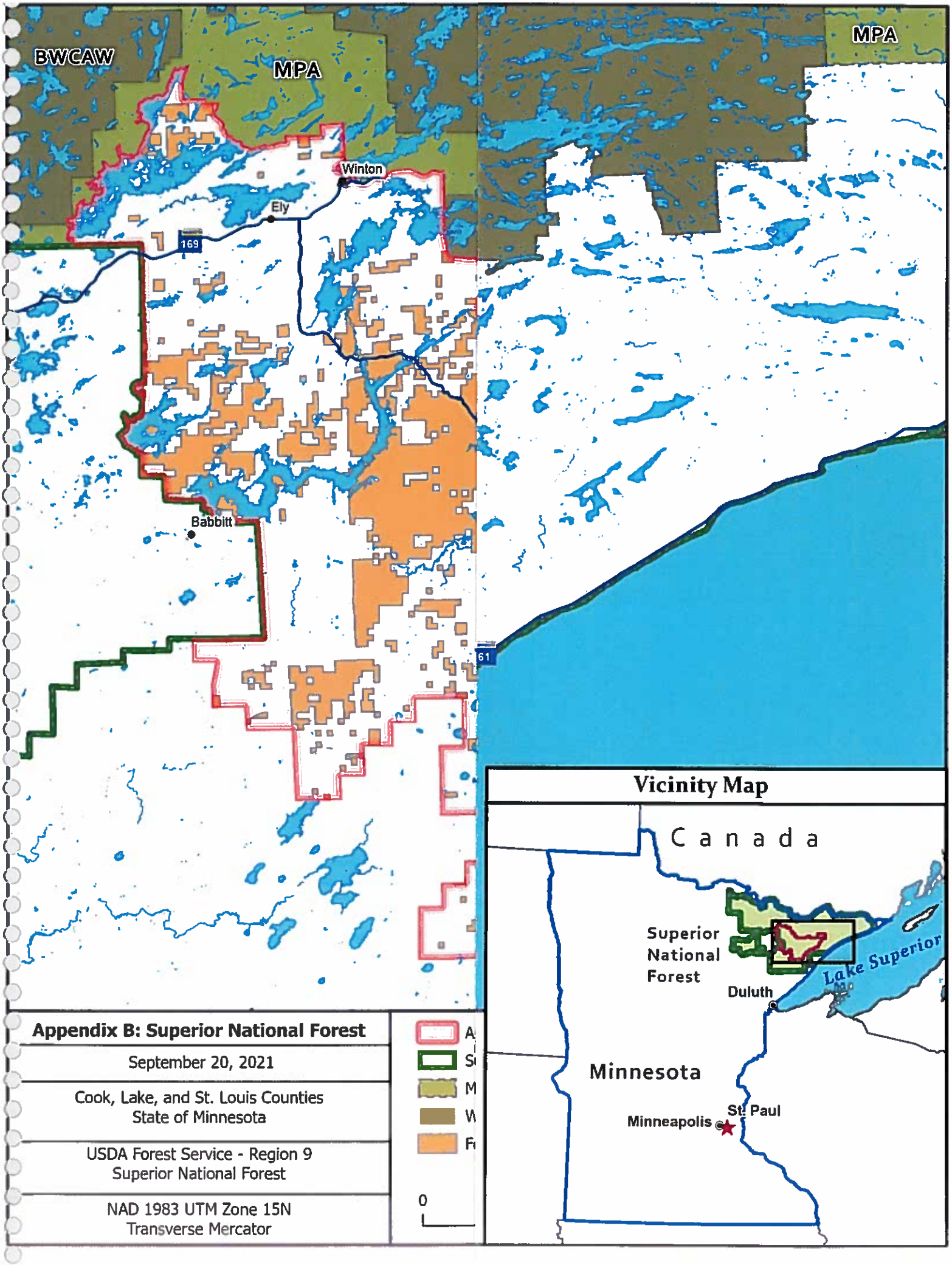
[1] Information required to be submitted to Congress within three months of *Federal Register* notification. 43 U.S.C. § 1714 (c)(1) and 43 U.S.C. § 1714 (c)(2) 1-12.

[2] The studies, reports and analyses required to be submitted to Congress by the Secretary under 43 U.S.C. § 1714 (c) are in addition to the NEPA and CEQ requirements.

Appendix B

Map

2021 USFS Proposed Land and Mineral Withdrawal Area



Appendix B: Superior National Forest

September 20, 2021

Cook, Lake, and St. Louis Counties
State of Minnesota

USDA Forest Service - Region 9
Superior National Forest

NAD 1983 UTM Zone 15N
Transverse Mercator

Appendix D

County Land Commissioner
Inholding Inventory Data
Saint Louis County, Minnesota

Saint Louis County

Land and Minerals Dept. • www.stlouiscountymn.gov • landdept@stlouiscountymn.gov

Mark Weber
Land Commissioner

August 9, 2017

Mr. Jim Carlson
Stillwater Technical Solutions
PO Box 93
Garden City, KS 67846

Dear Mr. Carlson

This letter is in response to your request to review St. Louis County land records as they relate to the proposed withdrawal of approximately 248,328 acres of federally owned minerals within the Superior National Forest. The following data was compiled from existing county, state and federal GIS databases.

Federal Holdings:

- The total surface area enclosed within the boundary of the proposed federal mineral withdrawal is approximately 589,070 acres. The total enclosed surface area within St. Louis County is approximately 148,759 acres.
- The U.S. Forest Service has surface holdings of approximately 63,039 acres within the boundary in St. Louis County.
- There are approximately 34,295 acres of federally owned minerals within the boundary in St. Louis County.

Tribal Government Holdings within the Federal Mineral Withdrawal Boundary in St. Louis County:

- The Bois Forte Band of Chippewa has surface holdings of approximately 172 acres.

State of Minnesota Holdings within the Federal Mineral Withdrawal Boundary in St. Louis County:

- The State of Minnesota has surface holdings of approximately 21,667 acres.
- The State of Minnesota has School Trust mineral holdings of approximately 12,400 acres, and Swamp Trust mineral holdings of approximately 12,600 acres.

St. Louis County Holdings within the Federal Mineral Withdrawal Boundary:

- St. Louis County manages approximately 16,963 acres of State Tax Forfeited land.
- The State of Minnesota has identified approximately 38,765 acres of mineral ownership that may have a tax forfeited mineral interest.[1]

[1] More research is needed to verify State tax forfeited mineral ownership for many of these parcels.

Sincerely,

Mark Weber
St. Louis County Land Commissioner

Boundary Line Foundation

"Helping Administrative Government Understand and Respect Its Limits"

Chronology and Issues in Federal Administrative Land and Mineral Withdrawals
Superior National Forest
2006 - 2021

Date	Item	Summary, Notes, and Comments	References
November, 2006	Meeting between James Sanders, District Supervisor of Superior National Forest, and David Oliver, H. H. Sandri of Duluth Metals, Harry Noyes of Encampment Resources, and others.	Meeting was convened to review the status of mineral exploration permit requests by various entities filed consistent with the Superior National Forest Management Plans and U.S. Forest Service (USFS) policy. USFS Supervisor Sanders communicates that no prospecting permits would be issued without a new National Environmental Policy Act (NEPA) Environmental Impact Statement (EIS), and that no funding was available to perform the NEPA task. Supervisor Sanders also indicates the decision for an EIS arose from litigation threats by anti-mining interests. No permits were approved or issued for prospecting on federal lands.	Forest Service Manual 2820 2004 Superior National Forest Plan, page 2-9 to2-10
April 29, 2008	Memorandum of Understanding (MOU) was executed between Bureau of Land Management (BLM) and USFS establishing USFS as NEPA Lead Agency and BLM as Cooperating Agency.	When multiple federal agencies are involved in performance of a NEPA EIS, regulations by the Council of Environmental Quality (CEQ) require that a MOU be executed between participating agencies. The appointment of the federal agency who files a withdrawal application to perform the NEPA analysis raises conflict of interest questions.	40 CFR §1501.5(e) 43 USC §1714(a) 43 CFR §2300.0-5(b) DOI Departmental Manual 209 DM 7.1 B
December 19, 2008	USFS publishes *Federal Register* notice of intent to prepare an EIS for mineral exploration in 43,446 acres of the Superior National Forest; 2-year, federal land segregation window begins.	**A *forest-wide* EIS was performed to analyze permit requirements, evaluate environmental impacts, establish operating recommendations, and recommend best management practices** for a 20-year period arising from mineral prospecting on *". . . all Superior National Forest lands available to mineral exploration...."* The EIS scoping process was to be initiated in January 2009, with the final EIS to be complete in June 2010. The EIS was to: 1) Assess effects to the natural environment from prospecting over a 20-year period; 2) Develop best management practices (BMPs) and consent recommendations that would be provided to James Sanders, Regional Forester, USFS; 3) **Analyze the potential impact of 32 prospecting applications** under consideration and any need for stipulations; 4) Identify special use considerations.	*Federal Register Vol. 73, No. 245, Friday, Dec. 19, 2008* 43 USC § 1714(b)(1)
March 25, 2011	USFS publishes the draft FEIS for public comment behind schedule; proposes three public meetings in northeastern Minnesota.	Public meetings for the draft EIS were held on April 12, 2011, April 13, 2011, and April 14, 2011.	

Date	Item	Summary, Notes, and Comments	References
May 18, 2012	**USFS issues a final EIS and agency consent to issue 29 federal hardrock mineral prospecting permits** covering 38,545 acres in Cook, Lake, St. Louis, and Koochiching counties, Minnesota.	The EIS covers a 20-year period, addressing the environmental impacts of mineral prospecting throughout a 38,545-acre area. Prospecting was determined as compliant with the Organic Act of 1897, the Multiple Use and Sustained Yield Act (MUSYA) of 1960, the Mining and Minerals Policy Act (MMPA) of 1970, and the National Forest Management Act (NFMA) of 1976.	*Final Environmental Impact Statement, Federal Hardrock Mineral Prospecting Permits, Superior National Forest, Cook, Lake, St. Louis, Koochiching Counties, Minnesota*
May 2012	**USFS issues its Record of Decision (ROD), approving federal hardrock minerals prospecting permits** for 37,562 acres of federal mineral estate.	Secretary of Agriculture, **USFS is on record as *approving* a 20-year mineral resource exploration program in the Superior National Forest.**	*Federal Hardrock Minerals Prospecting Permits Project Record of Decision, ROD-4 through ROD-11*
September 20, 2012	Bureau of Land Management issues its **Record of Decision,** approving federal hardrock mineral prospecting permits and selects EIS Alternative 4.	BLM Eastern States Director Lyon selects Alternative 4 as *"Best meets the goals of fostering and enlarging mineral exploration in an environmentally sound manner,"* and *"Best responds to issues raised by the public, state, tribal and local governments."* (BLM ROD, page 4). ROD approves 28 of 32 requested prospecting permits over a 38,545-acre area in the Superior National Forest over a 20-year period.	NEPA DOI-BLM-ES-0030-2011 008-ROD, 8 pages. Executed by John G. Lyon, Director, BLM Eastern States Region.
October 21, 2012	Twin Metals Minnesota (TMM) applies for renewal of preference right mineral leases to BLM.	Preference right mineral leases were set to expire on January 1, 2014.	
January 1, 2014	TMM mineral leases expire without BLM action or correspondence to the public record.	430 days transpire between submittal of TMM renewal application to BLM and expiration of preference right TMM mineral leases.	
April 28, 2015	Minnesota Congresswoman Betty McCollum introduces legislation to ban mining on all federal lands within the Rainy River Watershed of the Superior National Forest.	HR 2072 would have permanently withdrawn the Rainy River Watershed from all forms of entry, appropriation, or disposal under public land laws, location, entry, and patent under the mining laws, and operation of the mineral leasing laws. HR 2072 never made it out of committee.	HR 2072, 114th Congress – National Park and Wilderness Waters Protection Forever Act Legislative Tracking for HR 2072
February 2, 2016	Correspondence: Minnesota Congresswoman McCollum to Director of CEQ and Secretary of Agriculture.	Congresswoman McCollum requests denial of TMM's requested lease renewals and promotes administrative withdrawal of Rainy River Watershed lands.	
February 14, 2016	Minnesota Governor Mark Dayton contacts BLM Director Neal Kornze by phone.	Governor Dayton is informed of BLM's pending determination on TMM's mineral lease renewal application.	
February 17, 2016	TMM's Ian Duckworth meets with Governor Dayton and Minnesota Department of Natural Resources (MDNR) Commissioner Tom Landwehr.		
March 6, 2016	Correspondence: Minnesota Governor Dayton to TMM COO Ian Duckworth stating his intent to direct Tom Landwehr, Commissioner of the Minnesota DNR, to not	Governor Dayton informs TMM's COO that he, personally, has *". . . directed the MDNR not to authorize or enter into any new state access agreements or lease agreements for mining operations on [those] state lands."* The decision by Governor Dayton to withdraw 147,600 acres of state lands, including 95,000 acres of revenue-generating, Minnesota Schools Trust lands managed by an independent board, directly impacts funding for K-12 education. The public record is silent as to whether public notification, public hearings, economic	Correspondence Governor Mark Dayton to TMM COO Ian Duckworth with cc to Tom Landwehr, Minnesota DNR Memorandum offered in opposition to the decision of the US Forest Service to

Date	Item	Summary, Notes, and Comments	References
	authorize mineral leases, mineral access or mining agreements on state lands.	studies, impact-analysis to public or private inholdings, or justification of the governor's action was performed.	withdraw 234,328 acres of Federal lands in the Rainy River Watershed from mineral entry and development.
March 8, 2016	Solicitor of Interior Tompkins Memorandum to BLM Director Neal Kornze opining that TMM is not entitled to non-discretionary renewal of its mineral leases.	In her memo, Interior Solicitor Hilary Tompkins opines that TMM was not entitled to a non-discretionary renewal of its preference leases. The memo states that the mineral leases, initially awarded on June 1, 1966, are located on acquired *Weeks Act* lands. The extraordinary value of the mineral estate throughout northeastern Minnesota was well known prior to forest acquisitions during the *Weeks Act* era. Because the value of timber on the acquired lands was low at the time of the land purchases, incorporation of those lands into the Superior National Forest was contrary to 16 U.S.C. § 475, which states: ***"... it is not the purpose or intent of these provisions, or of said section, to authorize the inclusion therein of lands more valuable for the mineral therein, or for agricultural purposes, than for forest purposes."***	Solicitor Hilary Tompkins memo to the BLM Director, March 8, 2016 16 USC § 475
June 03, 2016	Correspondence: Karen Mouritsen, BLM State Director of Eastern States, to Kathleen Atkinson, Brenda Halter, and Richard Periman of USFS.	BLM Eastern States Director Mouritsen informs USFS Regional Forester Atkinson of Solicitor Tompkins' opinion that renewal of TMM leases is not non-discretionary, and she requests a negative consent decision from USFS on renewal of the leases.	Correspondence from Karen Mouritsen to Kathleen Atkinson, dated June 3, 2016
June 13, 2016	USFS issues a 30-day press release announcing public "listening sessions."	Listening sessions scheduled for July 12 and July 19, 2016, in Duluth, Minnesota.	
September 12, 2016	TMM files litigation challenging Department of Interior Solicitor Tompkins' opinion denying renewal of mineral leases.	Plaintiff, TMM, challenges the federal government's unlawful evisceration of property rights in minerals in the Superior National Forest. The rights are memorialized in two leases for hardrock minerals that were executed with the United States in 1966. The initial leases were granted for a period of 20 years with the right of the lessee to renew those leases for successive periods of 10 years. Relying on their rights and assurance provided by federal officials, the plaintiffs and their parent companies invested approximately $400 million to explore and develop hardrock minerals. **In the process, the plaintiffs have identified and defined within the lease boundaries one of the largest unexplored copper and nickel resources in the world,** which they estimate conservatively at more than $40 billion of in-ground mineral value. Plaintiffs contend that the federal government, without assuming financial risk, has reaped significant benefits in rents and royalties and an awareness and understanding of previously unknown mineral deposits on public lands through TMM's exploration. The federal government had twice renewed the leases without any indication that it believed it had discretion to deny renewal. When plaintiffs sought a third renewal, the federal government arbitrarily changed its land use policy. It is noteworthy that the plaintiffs have been involved in prospecting for the minerals, and that developing a mine to extract those minerals would require separate permitting processes and NEPA requirements.	FRANCONIA METALS (US) LLC; and TWIN METALS MINNESOTA LLC, Plaintiffs v. UNITED STATES OF AMERICA; U.S. DEPARTMENT OF THE INTERIOR; SALLY JEWELL, Secretary, U.S. Department of the Interior; HILARY C. TOMPKINS, Solicitor, U.S. Department of Interior; and BUREAU OF LAND MANAGEMENT, Defendants
November 8, 2016	Presidential Election, United States.		
December 6, 2016	USFS issues errant Appendix A land list for mineral withdrawal of fee simple lands.	During review and preparation of agency comments, the St. Louis County, Minnesota Land Commissioner identifies missing Township and Range information and ambiguous legal descriptions on the USFS Appendix A land list published in the Federal Register. NCLUCB goes on record as stating that errors and	Correspondence: St. Louis County Land Commissioner Mark Weber to J.R.

Date	Item	Summary, Notes, and Comments	References
		inconsistencies between county and federal surface and subsurface mineral and land ownership must be resolved as part of the EIS scoping process. The public record is silent as to whether corrections of legal descriptions were made before subsequent withdrawal applications were filed.	Carlson, Stillwater Technical Solutions, August 9, 2017.
December 14, 2016	USFS Chief Tom Tidwell issues non-consent letter to BLM Director Neal Kornze.	In his letter, former USFS Chief Tidwell denied consent for renewal of TMM's preference right leases, summarizing his reasons from USFS and BLM. In taking this action, **he made no mention of the 2012 FEIS and subsequent Records of Decision from both USFS and BLM in the granting of 28 mineral lease applications within the Superior National Forest.** In denying consent, Chief Tidwell's Forest Service elevates public recreation, public opinion, and lower-priority values of land segregation and neglects to mention the higher value of mineral exploration in the organic Forest Service Act and the Multiple Use and Sustained Yield Act. USFS core statutory responsibility is **to manage forests for favorable water flow (quantity) conditions.** However, water *quality*, particularly as it pertains to mineral exploration in the SNF or Mining Protection Wilderness Area remains the responsibility of the Environmental Protection Agency, State of Minnesota, or the US Army Corps of Engineers. None of these agencies were consulted as part of Chief Tidwell's decision.	Correspondence: Thomas L. Tidwell, Chief, USDA Forest Service to Neal Kornze, Director, BLM 16 USC § 475
December 15, 2016	Application for withdrawal of 235,328 acres of the Superior National Forest from minerals exploration from Kathleen Atkinson, Regional Forester to Karen Mouritsen, Eastern States Director of BLM.	The public record makes no reference to the 2012 FEIS or Records of Decision that approve 28 of 29 hardrock prospecting permits. The Forest Service was the lead agency for the project, and the leases were for operations **strikingly similar to those which the Forest Service is now opposing in the Rainy River Watershed.** Regional Forester Atkinson does discuss provisions of the Federal Land Policy and Management Act (FLPMA) at some length. Unfortunately, she incorrectly concludes FLPMA does not apply because of a differentiation between "public lands" and "lands within National Forests:" > Insofar [sic] as 43 U.S.C. §§ 1732(b) and 1737(b), portions of the Federal Land Policy and Management Act of 1976 [FLPMA] are concerned, those provisions are not applicable because they grant the Secretary of the Interior (43 U.S.C. § 1702(g)) authority to manage the public lands. And for purposes of FLPMA, "[t]he term "public lands" means any land and interest in land owned by the United States within the several States and administered by the Secretary of the Interior through the Bureau of Land Management..." In contrast, all national forest lands, including the Superior National Forest, are administered by the United States Department of Agriculture, Forest Service as part of the National Forest System (16 U.S.C. § 1609(a)). Indeed, 43 U.S.C. § 1702(k), a portion of the definitional section of FLPMA, explicitly distinguishes "public lands" from "lands within National Forests." The flaw in reasoning here does not recognize that surface lands are administered by the Forest Service and the subsurface lands are administered by the Bureau of Land Management in split estate. FLPMA does apply to the mineral estate underlying the National Forest lands, a fact recognized by the act of USFS submitting the application in the first place. (The Forest Service did recognize the split estate issue with the lease applications for which the 2012 FEIS was performed.) The public record is silent as to how USFS or BLM has performed its responsibility for assessing impacts under FLPMA 1714(c)(2), and when that information was submitted to the Congress as required under Title II, Section 204 of the Federal Land Management Policy Act. Importantly, those requirements are in addition to the NEPA and CEQ responsibilities.	*Application for Withdrawal, Superior National Forest, Cook, Lake, and Saint Louis Counties, Minnesota* Federal Land Management Policy Act, Section 204 43 USC 1714(c)(2) 1-12

Date	Item	Summary, Notes, and Comments	References
December 15, 2016	**Record of Decision:** Karen Mouritsen, State Director, Eastern States Region, rejects TMM's application for renewal of preference right mineral leases.	The Mouritsen rejection letter, delivered 1,500 days after timely submittal of the TMM application and 1,000 days after expiration of the TMM mineral leases, contains no reference to 2012 FEIS approving exploration or RODs by BLM and USFS.	Record of Decision, United States Department of Interior, to Mr. Ian Duckworth, COO, Twin Metals Minnesota, Lease Renewal Application Rejected
January 13, 2017	*Federal Register* Notification: *Superior National Forest Notice to Prepare an Environmental Impact Statement for Withdrawal of 234,328 Acres of Federal Minerals.*	USFS FR notice includes protection of water *quality*, and withdrawal of a large tract of SNF working lands from the FLPMA principal use of mineral *exploration* and development. The FR notification and public record fail to mention the 2012 FEIS and RODs by USFS and BLM that authorize mineral exploration activities on a smaller scale in same area. The inconsistent determination that exploration is environmentally sound followed by a land withdrawal application raises significant questions.	*Federal Register Vol. 82, No. 9, Friday, January 13, 2017, pp 4282-4283*, Connie Cummins, Forest Supervisor. POCs: Matt Judd, Peter Taylor, Ruth Trudell
January 19, 2017	*Federal Register* notice of application for withdrawal of 234,328 acres and notification of public meeting; Minnesota. Karen E. Mouritsen, Eastern States Director, BLM, Domenica van Koten.	Notice by Department of Interior, BLM initiating a 2-year withdrawal, segregation of public lands, and public meeting on March 16, 2017. Notice offers opportunity for comment during the 90-day period but fails to allow for electronic submission of comments to the public record – hardcopy and fax only. No mention of MUSYA, FLPMA, or the 2012 FEIS. The public record is silent as to whether the studies that are required to be performed by the Secretary of Interior under 43 USC 1714(c)(2) were submitted to Congress and no studies were published in the public record.	*Federal Register Vol 82, No. 12, Thursday, January 19, 2017, pp 6639-6640*, Karen E. Mouritsen, State Director, Eastern States Office
January 20, 2017	President Trump takes office.		
April 17, 2017	The Northern Counties Land Use Coordinating Board (NCLUCB) submits "*Notification of procedural and statutory deficiencies; request for cancellation of the withdrawal application, and immediate termination of land segregation*" report to Department of Interior, Bureau of Land Management.	A group of northern Minnesota counties **requests that the USFS application for withdrawal be canceled for cause, and that the segregation of lands proposed for withdrawal be terminated because of procedural flaws, lack of documentation, non-performance of preapplication consultation with local governments, and lack of statutorily required consistency review of local government land use plans.** Local governments were not provided early notification that USFS was applying for a withdrawal, nor was any information pertinent to local information solicited from them. There was no opportunity for meaningful participation by local governments that would have been interested in participating.	*Notification of Procedural and Statutory Deficiencies; Request for Cancellation of Withdrawal Application and Immediate Termination of Land Segregation*
July 25, 2017	NCLUCB Chairman Sve gives oral and written testimony at a public hearing for the EIS scoping process.	On July 25, 2017, NCLUCB Chairman and Lake County Commissioner Sve provided testimony regarding the application for the proposed withdrawal of a portion of the Superior National Forest. NCLUB is on the record as being opposed to the natural resource withdrawal and proposes to work as units of local government throughout the NEPA scoping and EIS process, in the context of government-to-government coordination with BLM and USFS.	*NCLUCB Public Testimony – Application for Withdrawal, Superior National Forest, Minnesota*
August 11, 2017	NCLUCB submits two alternatives to the EIS scoping process record, with CC to Interior Secretary Zinke and Agriculture Secretary Perdue.	Withdrawal of public lands from general access and FLPMA Principal Use of minerals extraction is an extraordinary action in public land use policy, representing a "last resort" option that should be used only when existing regulatory frameworks are incapable of adequately protecting the environment from harm. **FLPMA, MUSYA, and the organic Forest Service Act place the burden for demonstrating the potential for environmental impacts upon the withdrawal applicant** through a process of rigorous scientific evaluation and technical justification for the proposed withdrawal.	*Superior National Forest, Minnesota Comments and Two Alternatives for NEPA Scoping and EIS Analysis* Correspondence. Saint Louis County, Minnesota Land Commissioner M. Weber to J. Carlson transmitting mineral and land data. August 9, 2017.

Date	Item	Summary, Notes, and Comments	References
		NCLUCB provided a 130-year overview of the Superior National Forest, including a detailed summary of public and private land and mineral ownership for the three affected Minnesota counties, prepared in the context of controlling statutes. Two alternatives, consistent with FLPMA and NEPA authorities, were presented: 1. The EIS needs to explore the technical basis for the application in detail, with full scientific justification for the proposed withdrawal, demonstrating the inability for existing regulatory frameworks to adequately protect the environment. a. Discuss how the proposed withdrawal would incorporate the existing, congressionally mandated Mining Protection Area (MPA.) b. Describe how the USFS determines its **jurisdiction over water quality when statutes and case law point only to jurisdiction over water quantity** on working National Forest lands. 2. The EIS needs to incorporate consistency review with the local land use plans of the three affected counties; perform FLPMA-required land and mineral inventories; quantify impacts to local economies from mineral and land inholding losses; recommend Congressional appropriations to offset revenue losses to Minnesota schools; and establish in-perpetuity easements to ensure access to all valid existing rights.	Correspondence. Cook County, Minnesota Land Commissioner L. Kerr transmitting mineral and land data. July 31, 2017. Correspondence, Lake County, Minnesota Land Commissioner N. Eide transmitting mineral and land data. August 4, 2017.
December 22, 2017	Memorandum. Solicitor of Interior Jorjani to Director, Bureau of Land Management **reversing Solicitor Tompkins' Memorandum M-37036 opining that the 1966 TMM mineral leases do not have a discretionary right of renewal.**	Legal opinion by the Solicitor of Interiors Office reviewing and reversing Solicitor of Interior Tompkins Memorandum M-37036 regarding the Twin Metals Minnesota Preference Right Leases MNES-01352 and MNES-01353 in the Superior National Forest. Solicitor Jorjani determined that the terms and provisions governing renewal of the original 1966 mineral leases on public lands provided Twin Metals with predecessor-in-interest rights **and that BLM did not have the discretionary authority to deny the 2012 mineral renewal application.**	Memorandum. Solicitor of Interior Jorjani reversing Solicitor Tompkins' Memorandum M-37036. Weeks Act; Section 402 of Reorganization Plan No. 3 of 1946; 16 U.S.C. § 520; 16 U.S.C. § 508b.
January 26, 2018 **May 11, 2018**	Press release. Federal Register Notification.	In a highly unusual move for a Federal Agency carrying out its responsibilities under the National Environmental Policy Act, Superior National Forest Connie Cummins cancels the Environmental Impact Statement and proposes an Environmental Assessment and issues a Federal Register Notification.	US Forest service Press Release. Cancellation of Environmental Impact Statement in lieu of an Environmental Assessment. January 26, 2018. FR Vol. 83, No. 92 USFS EIS Cancellation 051118
September 6, 2018	US Forest Service Agency Action; **Cancellation of 234,328-acre land and mineral withdrawal application.**	USDA directive to BLM to cancel mineral withdrawal application for 234,328 acres in Superior National Forest. In rendering her decision to cancel the minerals withdrawal application, Regional Forester Atkinson reasons that *"USDA Forest Service has enough information to determine a withdrawal is not needed,"* and that *"future lease offerings can adequately be evaluated and regulated on a case-by-case bases without invocation of a 20-year withdrawal."*	USFS Application Cancellation Atkinson 090618.
October 21, 2021	Application for withdrawal of 225,378 acres of the Superior National Forest from minerals exploration. BLM Eastern States Director Mitchell Leverette	USFS application for mineral withdrawal proposes to *"advance a comprehensive approach to preserve the fragile and vital social and natural resources, ecological integrity, and wilderness values in the Rainy River Watershed, the Boundary Waters Canoe Area Wilderness and the Boundary Waters Canoe Area Wilderness Mining Protection Area which is threatened by potential future sulfide mining."*	FR Vol. 86, No. 201, Thursday October 21, 2021. Application for Mineral Withdrawal. Cook, Lake, and Saint Louis Counties, MN. USFS APPLICATION FOR WITHDRAWAL Superior National Forest, MN 102121.

Appendix E

County Land Commissioner
Inholding Inventory Data
Lake County, Minnesota

Nate Eide
Land Commissioner
Forestry/Land Dept.
Mailing Address
Lake County Courthouse
601 3rd Ave
Two Harbors, MN 55616

Office Phone: 218-834-8340
Email: nate.eide@co.lake.mn.us

August 4, 2017

Mr. Jim Carlson
Stillwater Technical Solutions
PO Box 93
Garden City, KS 67846

Dear Mr. Carlson

This report is in response to your request to review Lake County land records as they relate to the proposed withdrawal of approximately 248,328 acres of federally owned minerals within the Superior National Forest.

Federal Holdings:

- The total surface area enclosed within the boundary of the proposed federal mineral withdrawal is approximately 589,070 acres. The total enclosed surface area within Lake County is approximately 421,146 acres.
- The U.S. Forest Service has surface holdings of approximately 279,883 acres within the boundary in Lake County.
- The Bureau of Land Management has mineral holdings of approximately 188,858 acres within the boundary in Lake County.

Tribal Government Holdings within the Federal Mineral Withdrawal Boundary in Lake County:

- None

State of Minnesota Holdings within the Federal Mineral Withdrawal Boundary in Lake County:

- The State of Minnesota has surface holdings of approximately 55,979 acres.
- The State of Minnesota has School Trust mineral holdings of approximately 17,671 acres, and Swamp Trust mineral holdings of approximately 45,079 acres.

Lake County Holdings within the Federal Mineral Withdrawal Boundary in Lake County:

- Lake County manages approximately 3,075 acres of State Tax Forfeited land.
- The State of Minnesota has identified approximately 16,169 acres of mineral ownership that may have a tax forfeited mineral interest.[1]

[1] More research is needed to verify State Tax Forfeited mineral ownership.

Tax Revenue within the Federal Mineral Withdrawal Boundary in Lake County:

- The annual tax revenue from the parcels within the Withdrawal Boundary in Lake County in 2017 is $2,621,051

Please note that this report was compiled from existing spatial data located in various county, state and federal offices, and Lake County is not responsible for any incorrectness herein. Please let me know if you have any questions or if further actions are needed to fulfill Lake County's data request.

Sincerely,

Nate Eide
Lake County Land Commissioner

David H. Getches*

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

INTRODUCTION

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

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

Although Congress has plenary power over the public lands,[1] in the past most withdrawals were made by the executive on the assumption that no statutory delegation of authority was needed. Congress's failure to repudiate the executive's withdrawals led the courts to infer acquies-

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*Associate Professor of Law, University of Colorado School of Law. The author appreciates the thoughtful review of an earlier draft of this article by Charles F. Wilkinson and Lee Laitala. The research assistance of Julia Ormes Robinson was extremely helpful. The Rocky Mountain Mineral Law Foundation kindly provided a grant to aid in the research.

1. U.S. CONST., art. IV, § 3, cl. 2 (the Property Clause) states: "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." *See generally* Kleppe v. New Mexico, 426 U.S. 529 (1976).

great latitude for officials who act to protect lands by withdrawals. Challenges to decisions to withdraw areas are likely to fail, except to the extent they demonstrate a departure from explicit statutory procedures.

I. PUBLIC LAND WITHDRAWALS BEFORE THE 1910 PICKETT ACT

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

From the close of the Revolutionary War until the mid-nineteenth century the United States amassed more than two billion acres under its sovereignty and ownership[7]—a land area more than seven times the size of the original thirteen states.[8] The principal asset of the fledgling nation was the real property it obtained in bargains with foreign nations,[9] the original states[10] and Indian tribes.[11] No sooner was the vast public domain

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

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

9. Major examples are: Louisianna Territory, 523 million acres west of the Mississippi River, purchased from France in 1803 for three cents an acre (8 Stat. 200, 206, 208, T.S. No. 86, 86-A, 86-B); Florida, acquired by treaty with Spain in 1819 (8 Stat. 252, T.S. No. 327); the border with Canada from Minnesota west, fixed at the 49th parallel by treaties with Great Britain in 1818, adding the Red River Basin (8 Stat. 248, T.S. No. 112) and in 1846 adding the Oregon Territory—180 million acres (9 Stat. 869, T.S. No. 120); California and the Southwest, acquired by the Treaty of Guadaloupe Hidalgo with Mexico in 1848 (9 Stat. 922, T.S. No. 207) and the Gadsden Purchase in 1853 (10 Stat. 1031, T.S. No. 208); and Alaska, purchased from Russia in 1867 for $7.2 million (15 Stat. 539, T.S. No. 301).

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

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

A few early withdrawals of lands from availability under the disposal laws were made to preserve some sites for military or Indian reservations and for other public uses.[19] The device of "withdrawing" specific parcels of land from entry eventually was to become an important means of accomplishing federal purposes or policies when disposal laws threatened to sweep with too broad a brush.

As the west was settled and frontiers vanished, much land remained in federal ownership. By the end of the nineteenth century 67 per cent of the original public domain outside Alaska had been transferred to private ownership, but 473,836,402 acres were still owned by the United States.[20] Much of it was poor land that could not be used economically for the purposes for which it was available.[21] Other land had been exploited for its resources and once used was left behind.[22] Yet some good land survived. In a few instances land had been overlooked because of its inaccessibility or because the value of its resources was not apparent. Withdrawals and other legal impediments to availability for distribution also had saved valuable land.

Fulfillment of many of the national goals that had inspired the disposal policy and a changing vision of the future role of public lands prompted a policy shift. The conservation movement was born in a wake of reaction against the excesses—lawful and unlawful—of land barons and lesser exploiters of the public lands.[23] "Conservation" has always had diverse adherents, some favoring policies that enable perpetual use of resources, others insisting on preservation of lands in a pristine state. In the late nineteenth century disciples of both philosophies agreed that action was needed to protect the public domain from total dissipation. Lands that once were considered only to be temporarily warehoused for later dis-

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

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

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

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

23. *See* S. DANA & S. FAIRFAX, FOREST AND RANGE POLICY 69–119 (1980). *See generally*, M. NICHOLSON, THE ENVIRONMENTAL REVOLUTION: A GUIDE FOR THE NEW MASTERS OF THE WORLD 1970; S. UDALL, THE QUIET CRISIS (1963); L. PEFFER, THE CLOSING OF THE PUBLIC DOMAIN (1951).

evinced a developing policy of conservation. At times, the executive moved more swiftly and extensively than pleased many members of Congress. But generally the conservation policy which conceded broad managerial authority to the executive enjoyed majority support. Of these developments, the leading historian of public land law has written:

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

B. Withdrawal as a Conservation Tool

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

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30. GATES, *supra* note 10, at 567.

31. Congress withdrew Yellowstone National Park in 1872. ch. 24, 17 Stat. 32 1872); President Roosevelt withdrew 150 million acres as forest reserves under the General Revision Act of 1891 and 66 million acres of coal lands; President Taft withdrew three million acres of petroleum lands in 1909. *See* notes 23–29 *supra* and accompanying text.

32. Withdrawal of public lands occurs in one of four ways. Congress may make withdrawals by statute (*e.g.*, create a national park). Or it may authorize withdrawals by the executive branch, either at the executive's discretion, but for a specific purpose designated by Congress (*e.g.*, the Antiquities Act. 16 U.S.C. §§ 431–433 (1976)), or for a general public purpose, with both selection and purpose left to executive discretion (*e.g.*, the Pickett Act, ch. 421 §§ 1–3, 36 Stat. 847 (1910) (§§ 1 & 3 repealed 1976; § 2 codified *as amended* at 43 U.S.C. § 142 (1976)). Finally, the executive in the past has made withdrawals pursuant to authority delegated by congressional acquiescence. *E.g.*, United States v. Midwest Oil Co, 236 U.S. 459 (1915). *See* WHEATLEY REPORT, *supra* note 19, at A4.

33. In a few situations Congress has withdrawn certain resources without specifying the particular lands on which they are located. *E.g.*, Mineral Leasing Act, 30 U.S.C. §§ 181–287 (1976 & Supp. II 1978) (withdrawing all oil, gas, coal and other fuel minerals from operation of the mining laws); 43 U.S.C. § 300 (repealed by Act of Oct. 21, 1976, Pub. L. No. 94-579, § 704(a), 90 Stat. 2744, 2792) (withdrawing lands which contain a spring or waterhole); Exec. Order No. 5327, April 15, 1930 (withdrawing oil shale deposits and lands containing them from disposal under Mineral Leasing Act); Exec. Order No. 5389, July 30, 1930 (withdrawing lands containing hot springs).

34. WHEATLEY REPORT, *supra* note 19, at 1. Shortly after the enactment of the Taylor Grazing Act (43 U.S.C. §§ 315 et seq.; *see* note 29 and accompanying text), the President withdrew all unreserved public lands in all states from entry for purposes other than mining and mineral

officials charged with managing public lands regularly make decisions to allow or deny private uses. To allow uses without some delegation of authority from Congress arguably usurps the authority of the legislative branch under the Property Clause. To deny private uses, on the other hand, preserves congressional prerogatives and flexibility. Conflicts have arisen, however, when private interests have sought to use public lands under some legislatively created program but were denied that use because an administrative official had withdrawn land from availability. Under these circumstances the action may be challenged as in excess of the official's authority. In absence of a statute permitting a withdrawal or some other protective classification of the land, it is argued that a restriction of congressionally authorized uses is invalid. In some instances courts have implied a delegation of authority from the failure of Congress to curtail executive actions; in others authority has been derived from the executive's interpretation of a general withdrawal statute.

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

While the executive enjoys only limited inherent power over foreign relations, it has still less inherent power in domestic affairs. The modern cases in this area leave virtually no room for a finding of inherent authority. *See* United States v. United States District Court, 407 U.S. 297 (1977) (rejecting inherent executive authority to engage in warrantless electronic surveillance in domestic security cases). *Cf.* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (rejecting executive authority to seize steel mills to avert strikes during wartime as usurpation of Congress's asserted legislative authority in labor matters). *See generally*, L. TRIBE, AMERICAN CONSTITUTIONAL LAW 181–84 (1978).

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

In *Midwest Oil* the Supreme Court did not reach the government's contention that the President had inherent withdrawal authority, but rested its decision upholding a withdrawal solely on a delegated power implied from the acquiescence of Congress. 236 U.S. at 468–69. Nevertheless the decision has been cited for the proposition that "the power of withdrawal is inherent in the President. . . ." Shaw v. Work, 9 F.2d 1014, 1015 (D.C. Cir. 1925). *See also* P & G Mining Co., 67 INTERIOR DEC. 212 (1960). Administrative decisions relying on *Midwest Oil* were cited as grounds for inherent withdrawal authority in Portland General Electric Co. v. Kleppe, 441 F.Supp. 859 (D. Wyo. 1977). This reliance is misplaced. These and other references to "inherent authority" confuse it with impliedly delegated authority. No judicial decision was found: (1) where there was neither an authorizing statute nor a contention of impliedly delegated authority, and (2) in which the court or administrative agency relied entirely upon inherent executive authority.

The executive's use of withdrawals not authorized by statute and its expansive reading of statutes delegating withdrawal authority have often been questioned in litigation. Presidential action setting aside the Tetons and Grand Canyon were attacked in the past.[52] More recently, withdrawals in Alaska of 56 million acres under the Antiquities Act of 1906 and 105 million acres under the Federal Land Policy and Management Act of 1976[53] were challenged as inconsistent with the letter and the purpose of the acts.[54]

The courts generally sustain an implied delegation of authority to withdraw lands based on congressional deference to longstanding administrative practice, thus effectively rewarding the executive's otherwise unjustified perseverance in the practice. Similarly, the executive branch is given wide discretion to interpret its own statutory authority for withdrawals. The common thread is an apparent recognition that the obligation to protect public resources demands that the land management agencies be relatively unfettered in carrying out their duty. It is not practical for Congress, charged by the Constitution with ultimate responsibility for management and disposal of extensive public lands,[55] to do any more than to set broad policies. Consequently, Congress must entrust the executive with responsibility for implementing those policies. In turn, reviewing courts regularly defer to an administrative official's plausible interpretation of how legislation should be implemented, including the official's view of the scope of his delegated authority.[56] If an official acts outside the authority granted, of course, the action may be set aside.[57]

Modern policy, expressed in a host of federal laws, favors protection and preservation of publicly owned natural resources. Although some vestiges of the disposal policy of an earlier era remain law, today's goals

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uation of hard-rock mineral entry on withdrawn lands); Taylor Grazing Act, 43 U.S.C. § 315 (1976) (authorized withdrawal of all public lands in 12 states pending classification and creation of districts of land chiefly valuable for grazing, which could be used by ranchers who paid a fee and obtained a license); Defense Withdrawal Act, 43 U.S.C. § 155 (1976) (required express act of Congress for defense withdrawals in excess of 5,000 acres); Federal Land Policy and Management Act, 43 U.S.C. § 1701 (1976) (repealed all implied withdrawal authority and numerous existing withdrawal statutes and set up statutory withdrawal scheme; *see* text at notes 207–235 *infra*).

52. *See* notes 128–132, 136–141 *infra* and accompanying text.

53. *See* 8 E.L.R. CURRENT DEVELOPMENTS 10245 (Dec. 1978).

54. Alaska v. Carter, 462 F.Supp. 1155 (D. Alaska 1978). *See* notes 118–123 *infra* and accompanying text.

55. *See* note 1 *supra*.

56. *E.g.*, Udall v. Tallman, 380 U.S. 1, 16–18 (1965), citing United States v. Midwest Oil, 236 U.S. 459, 472–473 (1915) for the proposition "that unauthorized acts [of the executive] would not have been allowed [by Congress] to be so often repeated as to crystallize into a regular practice." *Midwest Oil* is discussed in part IC of the text. *See also* Bowles v. Seminole Rock & Sand Co., 325 U.S. 410 (1945).

57. Administrative Procedure Act, 5 U.S.C. § 706(2)(A),(B),(C). *E.g.*, Wilderness Society v. Morton, 479 F.2d 842 (D.C. Cir.), *cert. denied*, 411 U.S. 917 (1973).

stated that it should not be "construed as a recognition, abridgment, or enlargement of any asserted rights or claims initiated upon any oil- or gas-bearing lands after any withdrawal of such lands made prior to June 25, 1910."[62] Thus, Congress left the courts with the task of deciding whether the 1909 withdrawals challenged in *Midwest Oil* were lawful.

In *United States v. Midwest Oil Co.*[63] the Supreme Court upheld President Taft's withdrawal. It found that the executive possessed impliedly delegated authority to make withdrawals of public lands. The withdrawal in question had the effect of preventing entry pursuant to the Mining Act—legislation that was intended to distribute the bounties of the public lands for the national benefit by allowing mineral development. The Court declined to accept the government's broad assertion that the Constitution grants the President authority to withdraw public land.[64] But it sustained the President's withdrawal of land from mineral entry even though it was not based on any statute. The Court emphasized that Congress had apparently recognized the President's power and had acquiesced in its exercise. The Supreme Court relied on a "long continued practice" of making orders like the one in the case which withdrew all the public lands in an area over 3 million acres from the operation of the public land laws.[65] In support, the Court noted that there were "scores and hundreds" of orders establishing or enlarging Indian reservations, military reservations and oil reserves that had not been based on any statutory authority.[66]

It was true that many withdrawals had been made by the executive without direct statutory authorization, but in most cases they were compatible with an existing policy reflected in statute. The dissent in *Midwest Oil* argued that for each of the examples of apparent exercises of implied authority cited by the majority there existed a statute which directly or indirectly furnished authority for the withdrawal.[67] By contrast, the 1909

62. 43 U.S.C. § 142 (1976).

63. 236 U.S. at 459.

64. *See* note 46 *supra*.

65. 236 U.S. 456 (1915).

66. *Id.* at 469–71.

67. *Id.* at 492–504. The dissent's point may be overstated, but it is true that most then existing executive withdrawals could be seen as carrying out some congressionally accepted policy. In many situations the executive's authority was not expressed by Congress but could be based on vague directives. In Wilcox v. Jackson, 38 U.S. (13 Pet.) 266 (1839), the executive was held entitled to possession of a military post under a law authorizing the establishment of trading houses with the Indians and the erection of fortifications by the President. The law [Act of June 19, 1834, ch. 54, 4 Stat. 678] left the choice of location to the President's discretion. Other Indian reservations were established by executive order pursuant to a national policy of locating Indians on defined lands. The policy had been generally reflected in treaties and statutes, although particular reservations were not always for tribes covered by specific legislation. The Supreme Court held that the General Allotment Act, Act of Feb. 8, 1887, ch. 119, § 1, 24 Stat. 388, confirmed the validity of executive orders setting aside Indian reservations. In re Wilson, 140 U.S. 575 (1891).

The executive was undaunted by the plain meaning of the statute, the thrust of the legislative history and a Supreme Court interpretation. Administrative officials have consistently denied that the Pickett Act was meant to be a full explication of its withdrawal authority. Instead of construing the Act as prohibiting any executive withdrawals except those permitted by its terms—temporary withdrawals of lands that remain open under the mining laws[74]—and those permitted under other statutes, the executive still felt that it possessed all the non-statutory authority it had before the Pickett Act. Whenever the executive felt that it needed to do what the Pickett Act would not allow, it would do so unhindered by the statute, on the assumption that it retained the full panoply of withdrawal authority recognized in *Midwest Oil*, virtually unaffected by the legislation. It is upon this "authority" that the United States has relied to succeed against adverse private claimants.

Between 1910 and 1976 millions of acres were withdrawn from the operation of public land laws, including the mining laws, without statutory authority. Remarkably, the government position upon which these withdrawals rest has not yet been fully tested.[75] For the Court in *Midwest Oil* to find that congressional acquiescence was tantamount to a delegation of authority to the executive was a long step. Yet that feat was easy compared to the leap that is necessary in order to find that the legislative definition of authority in the Pickett Act imposed no limitations on executive authority in spite of its apparently narrowing language.[76]

A 1941 opinion of the Attorney General substantially supports the executive's surprising position that the Pickett Act was only a Congressional footprint on the beachhead of withdrawal authority, not an artic-

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> I think it is a good plan, in view of the experiences we have had in recent years, that we put this power in direct and express statutory form rather than the common law of the courts, and limit it, as we propose to do in the bill.

45 CONG. REC. 7475 (1910) (remarks of Sen. Nelson, chairman of Senate Committee on Public Lands). One historian has argued that the legislative history is "inconclusive." L. PEFFER, THE CLOSING OF THE PUBLIC DOMAIN 117 (1951). *See* notes 81–82 *infra* and accompanying text.

74. *But see* Portland General Electric Co. v. Andrus, 441 F. 859 (D. Wyo. 1980) (upholding *temporary* withdrawal from mineral entry under "implied authority").

75. *See infra* notes 99–110 and accompanying text.

76. Justice Frankfurter's concurring opinion in a Supreme Court decision rejecting implied executive authority to seize steel mills is apt. In it he stated:

> It is one thing to draw an intention of Congress from general language and to say that Congress would have explicitly written what is inferred, where Congress has not addressed itself to a specific situation. It is quite impossible, however, when Congress did specifically address itself to a problem, as Congress did to that of seizure, to find secreted in the interstices of legislation the very grant of power which Congress consciously withheld. To find authority so explicitly withheld is not merely to disregard in a particular instance the clear will of Congress. It is to disrespect the whole legislative process and the constitutional division of authority between President and Congress.

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 609 (1952).

that the statute did not deal with all of the President's withdrawal authority as it appears to do on its face.[83] And "temporary" withdrawals lasting many years have been upheld with no requirement of a fixed expiration date.[84] Significantly, the Act deals distinctly with two types of authority: first, authority "temporarily [to] withdraw from settlement, location, sale, or entry any of the public lands . . ." and second, authority to "reserve the same for . . . public purposes to be specified in the orders of withdrawals."[85] It is reasonable to conclude that adding "temporarily" to the first type of authority was to make it clear that the Act applied to more than "permanent" withdrawals, *i.e.*, reservations (withdrawals with a designated public purpose). Presumably the statute might have been read before the amendment as authorizing the President only to "withdraw . . . public lands . . . *and* reserve the same . . . for public purposes . . ."[86] As enacted, the statute authorizes temporary withdrawals alone, or temporary withdrawals plus a reservation. The last sentence's reference to "such withdrawals or reservations" reinforces a construction that finds both types of authority to be included in the Act's compass. It is not surprising that the drafters of the Act would attempt to emphasize the extent of the Pickett Act in light of the rather narrow scope of the President's inquiry and the sharp differences over the proper limits of executive authority.[87]

In his 1941 opinion, the Attorney General strained to find authority for withdrawals and reservations outside the Pickett Act so that withdrawn lands might be closed to mining. The colorful story behind the opinion,

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83. The President may, at any time in his discretion, temporarily withdraw from settlement, location, sale, or entry any of the public lands of the United States, including Alaska, and reserve the same for waterpower sites, irrigation, classification of lands, or other public purposes to be specified in the orders of withdrawals, and such withdrawals or reservations shall remain in force until revoked by him or by an Act of Congress.

Act of June 25, 1910, ch. 421, § 1, 36 Stat. 847 (1910) (repealed 1976).

84. *E.g.*, Mecham v. Udall, 369 F.2d 1 (10th Cir. 1966) (temporary withdrawal of 36 years' duration); Clinton D. Ray, 59 INTERIOR DEC. 466 (1947) (withdrawal in aid of legislation lasting 13½ years). *See also*, WHEATLEY REPORT, *supra* note 19, Appendix F at 51–54.

The authorities agree that the distinction between temporary and permanent withdrawals is not the duration but rather the nature of the withdrawal. Permanent withdrawals are dedicated to a particular use, while temporary withdrawals generally remove public land from most uses. Lowe, *Withdrawals and Similar Matters Affecting Public Lands*, 4 ROCKY MT. MIN. L. INST. 55 (1958). *See also* United States v. Midwest Oil Co., 236 U.S. 456, 478 (1915); Utah v. Lichliter, 50 INTERIOR DEC. 231 (1924); WHEATLEY REPORT, *supra* note 19, at 50–51. The somewhat artificial distinction was removed legislatively with the enactment of an all-inclusive definition for withdrawals in the Federal Land Policy and Management Act of 1976. *See* note 219 *infra*.

85. Act of June 25, 1910, ch. 421, § 1, 36 Stat. 847 (1910) (repealed 1976).

86. *Id.* (emphasis added).

87. *Compare* S. REP. NO. 171, 61st Cong., 2d Sess. (1910) (Committee on Public Lands majority report stating that the authority expressly given in the bill already existed in the President) *with* S. DOC. NO. 610, 61st Cong. 2d Sess. (1910) (committee minority report urging strict limitations on presidential withdrawal authority).

istrative interpretation, not its legality. Deference to administrative construction and conduct was, of course, the basis for the Court's legitimation of pre-Pickett Act withdrawals in *Midwest Oil*.

One might have concluded reasonably that the realm of withdrawal authority had been subjected to plenary congressional control and that any implied authority had been repealed by the Pickett Act, but courts subsequently read the Act so narrowly that it was rendered almost meaningless. After *Midwest Oil* the executive continued to operate on the apparent assumption that whatever it could not do under the express terms of the Pickett Act it could still do under its implied delegation of authority. That assumption may have become a self-fulfilling prophecy. Each withdrawal after the Pickett Act that escaped the Congress's veto became evidence of a continued congressional acquiescence. Although the 1941 Attorney General's opinion cited few examples of congressional acquiescence in the practices it validated,[94] the failure of Congress to respond to the opinion by denying the survival of implied authority gave the opinion legitimacy. The executive's actions based on the assumption that it had authority expressed in the opinion went unchallenged. The longer without challenge or congressional limitation, the less likely it became that a court would find an absence of authority. Indeed, the few instances of congressional termination of executive withdrawals[95] might be cited as indications that Congress would check any exercise of authority with which it disagreed.

The tortured interpretation indulged by the 1941 Attorney General's opinion cleverly preserved all the non-statutory "permanent" withdrawals made after the Pickett Act. If lands to be withdrawn did not need to be protected from mining activity or were not otherwise excluded by the Act's terms[96] the executive proceeded comfortably under the Pickett Act.[97] When in doubt, residual implied authority, covering the rest of the field,

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

95. *See, e.g.*, discussion of Wyoming v. Franke, text accompanying notes 135–149 *infra;* 43 U.S.C. § 1616(d)(1) (1976) (repealing Exec. Order No. 4582 which withdrew lands in Alaska under Pickett Act authority).

96. Certain lands that were subject to valid settlements under homestead and other public land laws were excepted from operation of the Pickett Act. 43 U.S.C. § 142 (1976).

97. In such cases the burdens on the executive were minor. Ch. 421, § 1, 36 Stat. 847 (1910) (repealed 1976) required only that the public purpose of a reservation under the Act be specified.

In the Alaska Native Claims Settlement Act Congress directed the Secretary to withdraw some 84 million acres of public lands in Alaska for congressional consideration as national parks, forests, wildlife refuges, and wild and scenic river systems.[105] The Act specified that this should be done by the Secretary of Interior "acting under authority provided for in existing law." The directive to withdraw the lands from "all forms of appropriation under the public land laws, including the mining and mineral leasing laws," indicates that Pickett Act authority would be unavailable. The authority under existing law to which Congress referred could only have been the executive's implied authority.

A more forthright expression of Congress's understanding that it has impliedly granted withdrawal power to the executive by acquiescence is found in the legislative history of the Defense Withdrawal Act.[106] The Senate report on the bill indicates that its purpose is "the recapture by the Congress of those powers which the executive branch of the government has acquired over a long period of years with respect to the withdrawal of the public lands from settlement, entry, location, and sale under the public land laws—an Executive power acquired through acquiescence or silence on the part of Congress."[107] The report recognizes that Congress had "since 1941 remained silent, and has therefore indulged in a practice '. . . equivalent to acquiescence and consent that the practice be continued until the power exercised is revoked.' " Thus, the bill was "specifically aimed at breaking that silence—if silence it be—with respect to the Federal property embraced by its terms."[108] The report confirms that the intent of the Act was to restrict the scope of authority under which the executive had been operating. Without fully admitting "silence," the report rather candidly admits acquiescence.

A further example of congressional acknowledgement that there has been an implied delegation is found in the Federal Land Policy and Management Act (FLPMA).[109] The Act repealed "the implied authority

105. 43 U.S.C. § 1616(d)(2)(A) (1976). In addition, § 1616 (d)(1) withdrew all unreserved public lands in Alaska for 90 days during which the Secretary of Interior was to review them "and determine whether any portion of these lands should be withdrawn under authority provided for in existing law to insure that the public interest in these lands is properly protected." It added that "[a]ny further withdrawal shall require an affirmative act by the Secretary under his existing authority." Other references to secretarial withdrawal authority are found in the Act's legislative history. *E.g.*, the conference committee determined that "all Native interests in subsistence resource lands can and will be protected by the Secretary through the exercise of his existing withdrawal authority." H. REP. NO. 92-746, 92d Cong., 1st Sess. 37 (1971).

106. S. REP. NO. 857, 85th Cong., 1st Sess. (1957); CONF. REP. NO. 1347, 85th Cong., 2d Sess. (1958), *reprinted in* [1958] U.S. CODE CONG. & AD. NEWS 2227, 2238.

107. S. REP. NO. 857, 85th Cong., 1st Sess. 10 (1957), *reprinted in* [1958] U.S. CODE CONG. & AD. NEWS 2227, 2235.

108. *Id.* at 12, *reprinted* at 2238.

109. Pub. L. No. 94-579, 90 Stat. 2744 (codified at 43 U.S.C. § 1701-1782 (1976).

Act. The purpose was to set aside minimal areas to protect ruins of archaeological interest in the American Southwest.[124] The intent of Congress is captured in the statute's reference to "historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest" and in its limitation of withdrawn lands to the minimum size required to care for protected objects.[125] During the floor discussion of the bill which became the Antiquities Act, some members of Congress were apprehensive about the potential for using the Act to withdraw large land areas. Assurances were given by the floor manager that nothing of the kind was intended.[126] It appears that congressional understanding was that large, permanent areas would become national parks through congressional action rather than monuments withdrawn under the Antiquities Act.[127]

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

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

125. 16 U.S.C. §431 (1976).

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

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

127. *See* H. R. REP. NO. 2224, 59th Cong., 1st Sess. 3, 7–8 (1905). *See also* S. DOC. NO. 314, 58th Cong., 2d Sess., 9–10 (1904).

Monument was set aside in Arizona because it was "an object of unusual scientific interest, being the greatest eroded canyon within the United States."[128] The United States later attempted to remove an enterprising mining claimant from a claim on the trailhead to the popular Bright Angel Trail on the south rim of the Grand Canyon where he sought to charge fees for access. When the claimant challenged the legality of the withdrawal, the Supreme Court in *Cameron v. United States*[129] upheld the designation of Grand Canyon as a national monument. The Court found that the canyon was of scientific interest, a purpose mentioned in the statute. The one paragraph the court devoted to the issue did not deal with the question of congressional intent or the language which seems to limit the land area to be withdrawn,[130] nor were these matters fully developed in the briefs of the parties.[131] By the time of the *Cameron* decision, at least nine other large national monuments had been set aside under the Act to preserve various geological phenomena, not for protecting ruins as contemplated by Congress.[132]

The Supreme Court considered another challenge to the President's authority under the Antiquities Act in *Cappaert v. United States*.[133] A rancher's pumping of groundwater had the effect of lowering the level of water pooled in a nearby limestone cavern known as Devil's Hole, a part of Death Valley National Monument. The federal government at-

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128. Proc. No. 2022, 47 Stat. 2547 (1932).

129. 252 U.S. 450 (1920).

130. *Id.* at 455–56.

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

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

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

132. *E.g.*, Proc. No. 658, 34 Stat. 3236 (Devil's Tower; 1152.91 acres); 36 Stat. 2498 (Mukuntuweap); Proc. No. 1126, 37 Stat. 1681 (Colorado; 13,883 acres); Proc. No. 1166, 37 Stat. 1715 (Devil's Postpile; 800 acres); 34 Stat. 3266 (Petrified Forest; 60,776.02 acres); Proc. No. 1340, 39 Stat. 1792 (Capulin Mountain; 680 acres); Proc. No. 1313, 39 Stat. 1752 (Dinosaur); Proc. No. 1487, 40 Stat. 1855 (Katmai; 1700 square miles); Proc. No. 1547, 41 Stat. 1779 (Scott's Bluff; 2053 acres). Approximately 5 to 15 national monuments were set aside yearly, many of them quite small in size.

133. 426 U.S. 128 (1976).

The State of Wyoming brought suit in federal district court charging that the President had no authority to set aside the Grand Teton lands as a national monument. Wyoming alleged that the area contained no object of historic or scientific interest and that it had not been confined to the smallest area compatible with the proper care and management of a monument. The court upheld the President's creation of Jackson Hole National Monument.[141] Although the terse proclamation cast little light on the purposes of the monument,[142] the government was allowed to introduce evidence supportive of the President's action, such as the existence of trails and camps used in connection with early trapping and hunting, glacial formations, mineral deposits, and indigenous plant life.[143] The court determined that there was enough evidence of historic and scientific value to support a conclusion that the President had not acted beyond his discretion.

The court in *Wyoming v. Franke*[144] recognized that the President's action resulted in hardship and injustice to the state and seemed unpersuaded as to the wisdom of his action.[145] Nevertheless the court concluded that the Antiquities Act had given the President authority to determine what "objects" fall within the ambit of the legislation and to define the area that is compatible with proper care and management of those objects:

> [I]f the Congress presumes to delegate its inherent authority to Executive Departments which exercise acquisitive proclivities not actually intended, the burden is on the Congress to pass such remedial legislation as may obviate any injustice brought about as the power and control over and disposition of government lands inherently rests in the Legislative branch.[146]

Eventually Congress did restore some of the monument lands to Teton National Forest, placing some in an elk refuge, and merging the rest with Grand Teton National Park.[147] The Act also included provision for federal payments in lieu of taxes and for federal cooperation in the state's fish and game management.[148] As if to note congressional displeasure with Roosevelt's action and to assuage state fears of its repetition, the new legislation prohibited any future use of the Antiquities Act in Wyoming.[149]

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141. Wyoming v. Franke, 58 F.Supp. 890 (D. Wyo. 1945).
142. The proclamation addressed the statutory criteria briefly: "the Jackson Hole country . . . contains historic landmarks and other objects of historic and scientific interest. . . ." Proc. No. 2578, 57 Stat. 731 (1943).
143. Wyoming v. Franke, 58 F.Supp. 890, 895 (D. Wyo. 1945).
144. *Id.*
145. *Id.* at 896–897.
146. *Id.* at 896.
147. Act of September 14, 1950, ch. 950, §§ 1–3, 64 Stat. 849 (1950).
148. *Id.* §§ 5–6.
149. *Id.* § 1.

the withdrawals was to preserve fragile land areas intact for future legislation that would establish national parks, wildlife refuges, and wilderness areas. Yet the correctness of the actions must be judged not by the purity of their motives but by their conformity with statute. While the proclamations and the President's statements accompanying them included much general language that more appropriately describes parks, wildlife refuges, and other land management systems,[156] there are plenty of references to extraordinary features that qualify for the historic and scientific rubrics of the Act.[157]

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

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156. *E.g.*,

> there are hereby set apart and reserved as the Admiralty Island National Monument all lands, including submerged lands, and waters owned or controlled by the United States within the boundaries of the area described . . . The area reserved consists of approximately 1,100,000 acres, and is the smallest area compatible with the proper care and management of the objects to be protected.

Proc. No. 4611, 3 C.F.R. § 69 (1979);

> The Secretary of the Interior shall promulgate such regulations as are appropriate, including regulation of the opportunity to engage in a subsistence life-style by local residents. The Secretary may close the national monument, or any portion thereof, to subsistence uses of a particular fish, wildlife or plant population if necessary for reasons of public safety, administration, or to ensure the natural stability or continued viability of such population.

Proc. No. 4612, 3 C.F.R. § 72 (1979). In addition, each of the Alaskan national monument withdrawals contain this provision:

> All lands, including submerged lands, and all waters within the boundaries of this monument are hereby appropriated and withdrawn from entry, location, selection, sale or other disposition under the public lands laws, other than exchange.

Proc. Nos. 4611–27, 3 C.F.R. §§ 69–103 (1979).

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

A similar variety of qualities is cited in the other 1978 Alaska withdrawals.

IV. WITHDRAWALS IN AN ERA OF PUBLIC LAND STEWARDSHIP

A. Modern Land Policy

A rather abrupt shift of public land policy accompanied the closing of the frontier around the turn of the century. As discussed above,[163] the focus on disposal of public lands to achieve national goals—expansion, economic development, settlement of the continent—was changed as manifest destiny was accomplished. Certain lands were to be preserved to protect resources that might be needed by the nation—oil and gas, other minerals, timber, water, wilderness and recreational areas. Instead of wholesale repeals of the earlier laws allowing unrestrained private exploitation of the public domain, antidotal laws were enacted to salvage lands and resources that might be needed. A near crisis had prodded the Taft administration to withdraw millions of acres of oil lands from appropriation under the public land laws. This in turn moved Congress to enact the Pickett Act to facilitate future withdrawals, although the Court's contemporary decision in *Midwest Oil* indicated that the President had the necessary authority to make the withdrawal in that case without a statute. In the same period Congress acted to protect other resources by defining authority for administrative officials to make withdrawals and to take other protective actions.[164]

It became clear early in the twentieth century that the public lands were to be used and developed in a manner that ultimately would satisfy long range national purposes. As the federal government's role changed from a temporary guardian of lands and resources for eventual disposal, to a trustee holding and managing property for the best interests of the citizenry, it became necessary to provide authority and direction to the officials who were in charge of the lands. Legislation supplied the framework for administering public lands professionally and responsibly in apparent recognition of the long term interests of the country in protecting and utilizing particular resources. Public land management policy evolved into a system of classification and management for particular uses. Management commands were included in the Forest Service Organic Act of 1897 that set up the Forest Service to manage the national forests.[165] But the most sweeping advance toward a system of federal land use planning was enactment of the Taylor Grazing Act in 1934.[166] This led to the

163. *See* notes 7–30 *supra*, and accompanying text.

164. *See* notes 31–44 *supra*, and accompanying text.

165. Act of June 4, 1897, 30 Stat. 34 (codified as amended at 16 U.S.C. §§ 473–481).

166. Act of June 18, 1934, ch. 865, 48 Stat. 1269 (codified as amended at 16 U.S.C. §§ 315–315r).

targeted for preservation but by those which govern use of lands that are to remain available for resource development. The national forests and the lands administered by the Bureau of Land Management comprise most of the public lands[174] and continue to be available for grazing, timber harvesting, and mineral exploration and development as well as for wildlife habitat and recreation. Yet today administration of lands for these purposes is controlled by statutes[175] and is markedly different from management during the period of disposal of the public lands. The most comprehensive statutes are the Federal Land Policy and Management Act[176] and the National Forest Management Act.[177]

Public land managers are now required by statutes to consider all of the "multiple uses" to which an area might be adapted,[178] to impose fees for uses permitted to private parties, to engage in land use planning,[179] and to involve the public in decisionmaking.[180] These mandates evidence a congressional purpose to impose guidelines and limits on federal agencies in order to prevent unwise use or dissipation of public resources. Without necessarily removing federal lands from availability for private uses, Congress has required prudence in management, the kind of prudence that is exercised by a manager who must consider the public resources not merely as commodities to be expended for today's needs but as assets to be retained indefinitely and used for the benefit of future, as well as of present, generations.

In addition to statutes dealing with general management of the public lands, Congress has, through the National Environmental Policy Act (NEPA),[181] superimposed upon the statutory mission of every federal

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174. In 1970 BLM and Forest Service land included over 85% of all public lands. PLLRC REPORT, *supra* note 7, Appendix F at 327–328. Since the enactment of the Alaska National Interest Lands Conservation Act, Act of Dec. 2, 1980, Pub. L. No. 96-487, 94 Stat. 2371, much land formerly managed by BLM will be under the management of other agencies.

175. *See* 16 U.S.C. §§ 528–531, 1600, 1601, 1602, 1604; 43 U.S.C. §§ 1701, 1712, 1713, 1714.

176. Act of October 21, 1976, Pub. L. No. 94-579, 90 Stat. 2743 (codified at 43 U.S.C. §§ 1701–1782 and scattered sections of Titles 7, 10, 16, 22, 25, 30, 40, 48 and 49 U.S.C.). *See* section IV B *infra*.

177. Act of October 22, 1976, Pub. L. No. 94-588, 90 Stat. 2949 (codified at 16 U.S.C. §§ 1600–1610 and scattered sections of Title 16 U.S.C.).

178. 16 U.S.C. §§ 528, 529, 531(a), 1600(3), 1601(d), 1604(e)(1), 1607; 43 U.S.C. §§ 1701(a)(7), 1712(c)(1), 1732(a). *See* Whaley, *Multiple Use Decision Making—Where Do We Go From Here?* 10 NAT. RES. J. 557 (1970); Strand, *Statutory Authority Governing Management of the National Forest System—Time for a Change?* 7 NAT. RES. J. 479 (1974); Dunsky, *Improved Policymaking for the Multiple Use of Public Lands*, 5 U. MICH. J. L. REF. 485 (1972); Comment, *Managing the Federal Lands: Replacing the Multiple Use System*, 82 YALE L. J. 787 (1973).

179. 16 U.S.C. § 1604(d), (f), (g), (i); 43 U.S.C. § 1712. *See also* Forest and Rangelands Renewable Resources Planning Act of 1974, which requires long range planning and research programs for the management, use and protection of Forest Service lands. 16 U.S.C. § 1601, amending Pub. L. No. 93-378, 88 Stat. 476.

180. 16 U.S.C. §§ 1600(3), 1601(c), 1604(d), 1612, 1643(c); 43 U.S.C. § 1712(f). *See* note 200 *infra*.

181. 42 U.S.C. §§ 4331–4361.

B. The Federal Land Policy and Management Act.

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

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

Before the FLPMA was enacted, the Bureau of Land Management (BLM), steward of about 60% of the public domain, was confined to antiquated management systems by limited budgets and lack of congres-

189. PLLRC REPORT, *supra* note 7.

190. *See, Symposium Presenting an Analysis of the Public Land Law Review Commission Report*, 6 LAND & WATER L. REV. 1–457 (1970); 54 DEN. L. J. 383–664 (1977); Hagerstein, *One Third of the Nation's Land—Evolution of a Policy Recommendation*, 12 NAT. RESOURCES J. 56 (1972); Hillhouse, *Public Land Law Review Commission Report: Ice-Breaking in Reserved Waters*, 4 NAT. RESOURCES L. 368 (1971); Muys, *Environmental Recommendations of the Public Land Law Review Commission and Their Implementation*, 5 NAT. RESOURCES L. 271 (1972).

191. Act of October 21, 1976, Pub. L. No. 94-579, 90 Stat. 2743 (codified at 43 U.S.C. §§ 1701–1782 and scattered sections of Titles 7, 10, 16, 22, 25, 30, 40, 48 and 49 U.S.C.).

192. *See* Carver, *Federal Land Policy and Management Act of 1976: Fruition or Frustration*, 54 DEN. L. J. 387 (1977); Muys, *The Public Land Law Review Commission Impact on the Federal Land Policy and Management Act of 1976*, 21 ARIZ. L. REV. 301 (1979). Muys (at 307) points out that many commission recommendations not addressed by FLPMA were addressed in other legislation around the same time. *E.g.*, Public Rangelands Improvement Act, Act of October 25, 1978, Pub. L. No. 95-514, 92 Stat. 1803; Outer Continental Shelf Lands Act Amendments, Act of September 18, 1978, Pub. L. No. 95-372, 92 Stat. 629; National Forest Management Act, Act of October 22, 1976, Pub. L. No. 94-588, 90 Stat. 2949; Act of October 20, 1976, Pub. L. No. 94-565, 90 Stat. 2662 (codified at 31 U.S.C. §§ 1601–1607) (providing for federal payments in lieu of local taxes); Federal Coal Leasing Amendments Act of 1975, Act of August 4, 1976, Pub. L. No. 94-377, 90 Stat. 1083.

193. 43 U.S.C. § 1701(a)(1).

these purposes; the dominant theme was prudent, conservative management.[203] Indeed, in a number of respects practices under the 1872 General Mining Law[204] were restricted or modified,[205] and the Act included among its most extensive and specific provisions measures for the preservation of environmental values which often conflict with resource development.[206] It is in this context that the Act's provisions concerning executive withdrawals must be considered.

Taking a cue from the Public Land Law Review Commission's report,[207] Congress sought to deal with some of the mysteries of executive withdrawal authority. With extraordinary precision, Congress expressly repealed the President's implied delegation of authority, specifically citing *Midwest Oil* in the statute,[208] and repealed 29 statutory provisions for executive withdrawal authority.[209] Consequently only a few statutes granting executive withdrawal authority remained intact.[210]

As discussed above, *Midwest Oil* did not decide the validity of post-Pickett Act withdrawals. The FLPMA preserves all withdrawals "in effect" at the time of its enactment but does not purport to validate or cure defects in attempted withdrawals that suffered from a legal defect.[211] It

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

204. *See* note 16 *supra*.

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

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

207. PLLRC REPORT, *supra* note 7 at 54–57. The Commission's Recommendation 8 stated:

> Large scale limited or single use withdrawals of a permanent or indefinite term should be accomplished only by act of Congress. All other withdrawal authority should be expressly delegated with statutory guidelines to insure proper justification for proposed withdrawals, provide for public participation in their consideration, and establish criteria for Executive action.

At 54.

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

Pub. L. No. 94-579, § 704(a), 90 Stat. 2744, 2792 (1976).

209. *Id.*

210. *I.e.*, the Antiquities Act, 16 U.S.C. §§ 431 *et seq.*; the Fish and Game Sanctuaries Act, 16 U.S.C. § 694; the Taylor Grazing Act, 43 U.S.C. §§ 315 *et seq.*; the Defense Withdrawal Act, 43 U.S.C. §§ 155 *et seq.*; and the Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1610(a)(3), 1615(d)(1), 1616(d) (the authority of each, with the possible exception of § 1616(d)(1), has expired. *See* 43 U.S.C. § 1621(h)).

211. 43 U.S.C. § 1701(c) states:

> All withdrawals, reservations, classifications, and designations in effect as of the date of approval of this Act shall remain in full force and effect until modified under the provisions of this Act or other applicable law.

If an invalid withdrawal is discovered, the land can be withdrawn anew under the FLPMA procedures.

dent's earlier implied delegation of authority, it could be argued that Congress has since acquiesced in post-Pickett Act withdrawals, giving rise to a new grant of authority. It might be urged that this authority was not extinguished by the repealer. The argument is not untenable, but it seems inconsistent with Congress's apparent intent. The most plausible interpretation of the repealer, supported by the legislative history,[214] is that it extinguished all implied authority that existed in 1976 and that the citation to *Midwest Oil* was not intended to limit it to pre-Pickett Act authority. By the time FLPMA was passed, many assumed that the Pickett Act did not limit executive withdrawal authority.[215] In any event, in the FLPMA Congress may simply have been rejecting all impliedly delegated withdrawal authority and used the citation to *Midwest Oil* to illustrate rather than to limit the type of authority being repealed.[216]

Having repealed most of the authority of the executive to make withdrawals, the Federal Land Policy and Management Act vested the executive with broad new withdrawal authority, subject to certain procedural requirements.[217] The authority was delegated not to the President, but directly to the Secretary of Interior.[218] The purposes for withdrawals were articulated for the first time in a new, functional definition,[219] and statutory procedures were engaged for a wide range of administrative actions that fall within the definition of a "withdrawal" and which are not undertaken in the exercise of independent authority to control the public lands.[220]

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214. *See, e.g.*, H. R. REP. NO. 94-1163, 94th Cong., 2d Sess. 9 (1976), *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 6175, 6183 (indicating the Act would, "with certain exceptions . . . repeal all existing law relating to executive authority to create, modify, and terminate withdrawals and reservations"). Charles L. Wheatley, Jr., the leading authority on public land withdrawals, reaches the conclusion "that FLPMA bars all claims of implied authority in the Executive as far as Congress is concerned." Wheatley, *Withdrawals Under the Federal Land Policy Management Act of 1976*, 21 ARIZ. L. REV. 311, 319 (1979).

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

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

217. 43 U.S.C. §§ 1714(a)–1714(l) (1976). Final regulations implementing the provisions have been published. 46 Fed. Reg. 22,585 (1981) (to be codified in 43 C.F.R. §§ 2200, 2300, 2920).

218. Presidential authority had long been delegated to and exercised by the Secretary of the Interior. Exec. Order No. 10,355, 17 Fed. Reg. 4831 (1952); Exec. Order No. 9337, 8 Fed. Reg. 5516 (1943); Exec. Order No. 9146, 7 Fed. Reg. 3067 (1942).

219. 43 U.S.C. § 1702(j) defines "withdrawal" as:

> withholding an area of Federal land from settlement, sale, location, or entry, under some or all of the general land laws, for the purpose of limiting activities under those laws in order to maintain other public values in the area or reserving the area for a particular public purpose or program; or transferring jurisdiction over an area of Federal land, other than "property" governed by the Federal Property and Administrative Services Act, as amended from one department, bureau or agency to another department, bureau or agency.

220. The Secretary often may choose from several sources of authority in deciding to restrict activities on the public land. *See* notes 261–267 *infra* and accompanying text.

withdrawals—those aggregating less than 5,000 acres—may be set aside without restriction so long as they are for a "resource use."[226] Withdrawals for proprietary purposes, such as sites for administrative buildings or facilities, may be made for up to twenty years.[227] Small withdrawals may also be made to preserve the lands for a use being considered by Congress,

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congressional review of presidential recommendations with regard to existing withdrawals; *see* note 212 *supra*.

Congressional vetoes have been employed increasingly in recent legislation. Their propriety can be questioned as a violation of the separation of powers doctrine in that it may allow usurpation of the constitutional allocation of decisionmaking authority. *E.g.*, Schwartz, *The Legislative Veto and the Constitution—A Reexamination*, 46 GEO. WASH. L. REV. 351 (1978); McGowan, *Congress, Court and Control of Delegated Power*, 77 COLUM. L. REV. 1119 (1977); Bruff and Gellhorn, *Congressional Control of Administrative Regulation: A Study of Legislative Vetoes*, 90 HARV. L. REV. 1369 (1977).

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

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

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

227. 43 U.S.C. § 1714(d)(2) (1976).

of substantive direction in the statute makes unlikely any judicial reversal of an agency decision that may seem unwise in light of the information produced.[238] So long as the procedural requirements in the FLPMA are followed[239] and the information furnished to Congress is adequate, it is predictable that a court would refuse to set aside the action.[240] Only if the withdrawal decision is so unreasonable as to be arbitrary and capricious is a judicial challenge likely to succeed.[241]

The procedures and limitations for significant withdrawals may be avoided regardless of the size of a proposed withdrawal in an "emergency." Any time the Secretary of Interior determines that "extraordinary measures must be taken to preserve values that would otherwise be lost,"

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v. United States Atomic Energy Comm'n, 449 F.2d 1109, 1112 (D.C. Cir. 1971), the court said:

> Thus the general substantive policy of the Act . . . leaves room for a responsible exercise of discretion and may not require particular substantive results in particular problematic instances. However, the Act also contains very important 'procedural' provisions—provisions which are designed to see that all federal agencies do in fact exercise the substantive discretion given them.

In Strycker's Bay Neighborhood Council v. Karlen, 444 U.S. 223, 227–28 (1980), the Court said "the only role for a court is to insure that the agency has considered the environmental consequences; it cannot 'interject itself within the area of discretion of the executive as to the choice of the action to be taken,' " citing Kleppe v. Sierra Club, 427 U.S. 390, 410 n. 21 (1976).

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

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

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

241. The Administrative Procedure Act, 5 U.S.C. §§ 701–706 (1976), provides for judicial review of agency action unless such review is prohibited by statute or committed to agency discretion by law (§ 701). The scope of review is described in § 706, which allows the reviewing court, among other things, to set aside agency actions that are arbitrary, capricious, an abuse of discretion, or not in accordance with law. 5 U.S.C. § 706(2)(A). These standards are discussed in Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971). *See also* Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519, 549–555 (1978).

such lands were recommended for inclusion in one of the land management systems, the Secretary's withdrawals were to expire on December 18, 1978, if Congress did not act on the recommendations.[247] As the expiration date grew near, congressional efforts to enact an Alaska lands bill were blocked by the senators from that state.[248]

With the termination of the Alaska withdrawals under ANCSA, millions of acres would be available for selection by the State of Alaska and by Native corporations formed under the Act. Alaska had been waiting for twenty years for the fulfillment of the promise made in its Statehood Act that it would be able to select and receive patents to 103,553,000 acres of public land[249]—about 28% of the state's total land area. At the time of statehood, almost all of the land in the state was federally owned and it was understood that the land would be needed for the state's economic growth and self sufficiency.[250]

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

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would depend on the Pickett Act which did not authorize withdrawals from the mining laws. Thus, mining claims on public lands in Alaska made in an otherwise valid manner after the § 17(d)(2) withdrawals expired but before Congress withdrew the same lands in 1980 (Act of Dec. 2, 1980, Pub. L. No. 96-487, §§ 201–708, 94 Stat. 2371–2422) may still be valid if it is found that there was no impliedly delegated authority at the time the withdrawals were made. *See generally*, DeStefano, *The Federal Land Policy and Management Act and the State of Alaska*, 21 ARIZ. L. REV. 417 (1979) [hereinafter cited as DeStefano]. Valid withdrawals under FLPMA before expiration of § 17(d)(2) withdrawals would also protect the land from mineral entry. *See* notes 252–255 *infra* and accompanying text.

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

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

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

250. *See* H .R. REP. NO. 624, 85th Cong., 1st Sess. 2 (1957), *reprinted in* [1958] U.S. CODE CONG. & AD. NEWS 2939, 2940.

Congress has always had the authority to terminate an executive withdrawal[256] but has rarely done so in the past.[257] Now, under the FLPMA, Congress's disapproval can be manifested in a concurrent resolution which may avoid some of the procedures encumbering ordinary legislation, although the action is subject to special procedural rules. Disapproval must be effected within 90 days after a notice of the withdrawal is given to Congress.[258] It would seem that most members of Congress would be uncomfortable overruling the executive's conservation decision on such short notice except in an outrageous case. Most congressional disapprovals of executive withdrawals are likely to be by legislation after full committee consideration as they were in the past.

The detailed FLPMA provisions for making withdrawals are not the only means of accomplishing results that are within the Act's definition of a "withdrawal." One method provided for in the Act itself is through "management decisions."[259] These decisions may be made to implement land use plans required by the FLPMA for all public lands.[260] The land use planning authority of officials under the Act is "fully as restrictive as traditional withdrawal."[261] Presumably, comprehensive planning was intended by Congress to supplant single-purpose land use and withdrawal decisions. Withdrawals may be used to carry out management decisions, but a formal withdrawal is necessary only if lands are removed from, or restored to, the operation of the 1872 Mining Act or lands are transferred to another department.[262] There are special procedures for notifying Congress if a management decision totally eliminates one or more uses on a tract of 100,000 acres or more of public lands.[263]

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

256. Under any credible theory, executive authority to withdraw public lands is ultimately derived from Congress. *See* note 46 *supra*. An understanding of preexisting congressional oversight authority is reflected in the legislative history of the FLPMA. *See* 122 CONG. REC. 23438 (remarks of Rep. Mink), 23440 (remarks of Rep. Forsythe), 23453 (remarks of Rep. Seiberling).

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

258. 43 U.S.C. § 1714(c)(1) (1976). *See* note 225 *supra*.

259. *See* 43 U.S.C. § 1712(e) (1976).

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

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

261. Peck, *"And Then There Were None": Evolving Federal Restraints on the Availability of Public Lands for Mineral Development*, 25 ROCKY MTN. MIN. L. INST. 3-1, 3–87 (1979).

262. 43 U.S.C. § 1712(e)(3) (1976).

263. 43 U.S.C. § 1712(e)(2) (1976). The procedures for notice and congressional oversight are nearly identical to those for formal withdrawals. *See* 43 U.S.C. § 1714(c)(1), discussed in note 225 *supra*.

1975), *cert. denied*, 425 U.S. 973 (1976) (failure to make decision on lease application for several years is not an action contrary to law); Rowe v. United States, 464 F.Supp. 1060, 1070 (D. Alas. 1979) (inaction on lease application for ten years is not unlawful). A lease applicant could only challenge the Secretary's failure to act if it were "unreasonably delayed." 5 U.S.C. § 706(1).

The *Mountain States* court seemed to recognize that inaction on a single lease could not constitute a "withdrawal," but found that the cumulative effect of inaction on pending applications amounted to a withdrawal. In light of the existence of discretion to withhold lands from leasing for a variety of reasons as discussed below, and the fact that the Secretary had obviously chosen not to use the option of withdrawal, the court should have deferred to the decision not to withdraw the lands. *Cf.* Kleppe v. Sierra Club, 427 U.S. 390 (1976) (whether series of proposed actions leading to coal leasing in large geographic areas are so related as to amount to a "proposal" requiring an environmental impact statement is a question for the agency to decide).

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

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

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

Even in absence of wilderness planning authority under land management statutes such as the FLPMA and the NFMA, the Secretary had authority under the Mineral Leasing Act to refuse leases for the protection of the public lands. The *Mountain States* court did acknowledge the well-established principle that the Secretary has discretion under the Mineral Leasing Act to decide what lands will be leased, Burglin v. Morton, 527 F.2d 486 (9th Cir. 1976); Pease v. Udall, 332 F.2d 62 (9th Cir. 1964), and to refuse any lease of particular lands, Udall v. Tallman, 380 U.S. 1 (1965). But it attempted to distinguish the case law as not supporting an exercise of discretion to withhold land from leasing "based on environmental concerns." 499 F.Supp. at 391–92. This distinction is ill-founded. In Udall v. Tallman the Supreme Court upheld the exercise of secretarial discretion to refuse leases where the purpose was to protect wildlife. An attempt to limit *Tallman* as permitting a refusal to lease only on a particular tract but not a closure of hundreds of square miles of public lands was rebuffed in Duesing v. Udall, 350 F.2d 748 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 912 (1966). *Mountain States* incorrectly relied on "the proposition that the focus of [the Mineral Leasing] Act was mineral development despite the primitive nature of much of the public lands." 499 F.Supp. at 392. In Duesing v. Udall the court rejected an argument that "the Secretary can only exercise his discretion under the Mineral Leasing Act by taking action in furtherance of the objective of that act to promote mineral development in the public domain." 350 F.2d at 751. Because there are other

when they are used the FLPMA surrounds the process with new procedures and ultimate congressional checks that can undo executive actions swiftly in egregious cases.[269] The sobering effect of the procedural requisites and the specter of congressional oversight may assure greater responsibility in using the authority. However, the broadened definition of "withdrawal" in the Act[270] and explicit authority to use withdrawals as a means of implementing the land use planning requirements of FLPMA[271] suggest that the withdrawal device may have even greater importance as a land management device in the future than it had in the past.

C. Judicial Review

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

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269. *See* notes 221–235 *supra* and accompanying text.

270. 43 U.S.C. § 1702(j). *See* note 219 *supra*.

271. 43 U.S.C. § 1712(e)(3).

272. *See generally*, G. COGGINS AND C. WILKINSON, FEDERAL PUBLIC LAND AND RESOURCES LAW 226–227 (1981).

273. *See* Wilkinson, *Public Land Law: Some Connecting Threads and Future Directions*, 1 PUB. LAND L. REV. 1, 2–3 (1980). *See also* note 14 *supra*.

274. United States v. Union Pac. R.R., 353 U.S. 112, 116 (1957); Caldwell v. United States, 250 U.S. 14, 20 (1919), United States v. Oregon and California R.R., 164 U.S. 526, 541 (1896); Sioux City & St. Paul R.R. v. United States, 159 U.S. 349, 360 (1895); Leavenworth, Lawrence, and Galveston R.R. v. United States, 92 U.S. 733, 740 (1895); Dubuque and Pac. R.R. v. Litchfield, 64 U.S. (23 How.) 457, 462 (1859). The Court applied the principle recently in Andrus v. Charlestone Stone Products, Inc., 436 U.S. 604 (1978). *But see* Leo Sheep Co. v. United States, 440 U.S. 668 (1979).

275. *E.g.*, United States v. Grimaud, 220 U.S. 506 (1911) (Forest Service Organic Act's delegation of authority to make rules and regulations concerning use of forest reserves).

276. *E.g.*, Light v. United States, 220 U.S. 523 (1911) (Forest Reserve grazing regulations).

they are aggrieved within the scope of statutes which arguably protect the public's interest in management of publicly owned natural resources. The inference is supported by statutory provisions encouraging public involvement in decisionmaking,[286] expressing the policy that there should be judicial review,[287] and requiring more intensive land management.[288]

The increased activity in judicial review of land management agency decisions contrasts with the traditional approach of denying review to such matters. The approaches of courts in reviewing administrative decisions varies with the agency whose decision is being reviewed and the type of decision that is being challenged.[289] Courts have viewed public land management as being encumbered by vague mandates, broad discretion, and a need for expertise, so there has been little room for judicial oversight until recently.[290] The criterion is whether there is "law to apply" which would enable the court to decide the case without substituting its judgment for that of the agency.[291] Some statutes enabling agencies to manage public lands remain remarkably nondirective and without obvious standards.[292] When these non-directive laws are involved, courts will

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286. *See* note 180 *supra*. *Cf.* Citizens for a Better Environment v. Environmental Protection Agency, 649 F.2d 522 (7th Cir. 1979) (requiring regulations providing for citizen participation in enforcement as condition of federal approval of state plan under Clean Water Act).

287. *See* Federal Land Policy and Management Act, 43 U.S.C. § 1701(a)(6) (1976). The policy expressed in that act is apparently limited to adjudicatory decisions. Landstrom, *An Operational View of the BLM Organic Act*, 54 DEN. L. J. 455, 458 (1977). *See also* provisions for citizen suits and awards of attorney's fees in environmental statutes (16 U.S.C. § 1540(g) (1974) (Endangered Species Act); 33 U.S.C. § 1365 (1978) (Clean Water Act); 33 U.S.C. § 1415(g) (1976) (Ocean Dumping Act); 42 U.S.C. § 300j-8 (1980 Supp.) (Safe Drinking Water Act); 42 U.S.C. §§ 7604, 7607(f) (1980 Supp.) (Clean Air Act); 42 U.S.C. § 4911 (1977) (Noise Control Act)).

288. *See* notes 175–180 *supra* and accompanying text; S. Rep. No. 93-686, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 4072; House Report No. 94-1163, 94th Cong., 2d Sess., *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 6175, 6179–6181. *See also* Culham and Friesma, *Land Use Planning for the Public Lands*, 19 NAT. RES. J. 43 (1979) and Greenfield, *The National Forest Service and the Forest and Rangeland Renewable Resources Planning Act of 1974*, 15 NAT. RES. J. 603 (1975).

289. For an illuminating discussion of approaches to judicial review in public land law *see* Wilkinson, *Public Land Law: Some Connecting Threads and Future Directions*, 1 PUB. LAND L. REV. 1, 23–29 (1980). *Cf.* Environmental Defense Fund v. Ruckelshaus, 439 F.2d 584 (D.C. Cir. 1971) (suggesting an increased role for the judiciary in the administration of environmental laws).

290. *See* Comment, *The Conservationists and the Public Lands: Administrative and Judicial Remedies Relating to the Use and Disposition of the Public Lands Administered by the Department of the Interior*, 68 MICH. L. REV. 1200, 1236–42 (1970). Until enactment of the FLPMA, there was often an additional problem for reviewing courts because agency rulemaking concerning public land management was not subject to the Administrative Procedure Act, 5 U.S.C. § 553(a)(2). 43 U.S.C. § 1740; *see* note 267 *supra*.

291. Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 410 (1971). In a case challenging denial of homestead applications based on classification of land for retention in public ownership, the Ninth Circuit of Appeals said of the Classification and Multiple Use Act, 43 U.S.C. §§ 1411–1418 (expired Dec. 23, 1970): "The provisions of this statute breathe discretion at every pore. . . ." *Id.* at 469. The court declined to assert jurisdiction, finding no law to apply:

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

Id. at 470 n.3.

with statutory language or purpose will not receive the same deference; statutory interpretation ultimately remains a judicial function.[299] In public land law, resort to the purpose of statutory schemes has often guided judicial construction.[300] On occasion the Supreme Court has strained to find an intent to preserve public resources and to deny private interests in them, although the statutes under which the private interests were asserted were passed in an age when disposal of public lands was in vogue.[301]

So long as the volume and thrust of statutory law is directed at protection and judicious use of public lands, it is reasonable to expect more deferential treatment of interpretations that deny development, demand caution in use, or prefer non-damaging uses than of interpretations that err on the side of facilitating development. Thus, it is predictable that an agency's broad interpretation of its own withdrawal authority under the FLPMA is more likely to be upheld if challenged than one that encourages development by restricting the ability of the Secretary to withdraw lands beyond the requirements of the Act.[302]

The only significant possibilities for judicial intrusion into the realm of administrative decisions to withdraw public lands will arise when an agency fails to adhere scrupulously to procedural mandates. FLPMA is quite specific as to the procedure for making withdrawals[303] and any party

299. *E.g.*, Wilderness Society v. Morton, 479 F.2d 842 (D.C. Cir.), *cert. denied*, 411 U.S. 917 (1973).

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

See also Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971); Citizens for a Better Environment v. Environmental Protection Agency, 649 F.2d 522 (7th Cir., 1979); Buck v. Morton, 449 F.2d 600 (9th Cir. 1971); Sierra Club v. Department of the Interior, 398 F.Supp. 284 (N.D. Cal. 1975); Sierra Club v. Department of Interior, 376 F.Supp. 90 (N.D. Cal. 1974); Sierra Club v. Ruckelshaus, 344 F.Supp. 253 (D.D.C. 1972), *aff'd*, 412 U.S. 541 (1973).

301. *E.g.*, United States v. Union Pacific R.R. Co., 353 U.S. 112 (1957) (finding a mineral reservation in a right of way granted to railroad, though that section of act was silent and express reservations were in other sections and acts). *See also*, United States v. Union Oil Co., 549 F.2d 1271 (9th Cir. 1977), *cert. denied*, 435 U.S. 911 (1977); Western Nuclear, Inc. v. Andrus, 475 F.Supp. 654 (D. Wyo. 1979). *But cf.* Leo Sheep Co. v. United States, 440 U.S. 668 (1979) (U.S. did not impliedly reserve an easement allowing a road to be built across railroad grant lands without compensation). *See* discussion in Wilkinson, *Public Land Law: Some Connecting Threads and Future Directions*, 1 PUB. LAND L. REV. 1, 29–34 (1980).

302. *But cf.* Peck, *"And Then There Were None" Evolving Federal Restraints on the Availability of Public Lands for Mineral Development*, 25 ROCKY MTN. MIN. L. INST. 3–1, 3–13 (1976) (arguing that "national policies and statutory mandates" are contrary to executive decisions denying development).

303. *See* notes 226–244 *supra* and accompanying text.

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

Appendix F

County Land Commissioner
Inholding Inventory Data
Cook County, Minnesota

Cook County
MINNESOTA

COOK COUNTY LAND SERVICES
TIM NELSON ~ DIRECTOR
LISA KERR ~ LAND COMMISSIONER/ PARKS & TRAILS DIRECTOR
411 W. 2ND ST GRAND MARAIS, MN 55604
Phone (218) 387-3654 Fax (218) 387-3042
e-mail: lisa.kerr@co.cook.mn.us

July 31, 2017

Jim Carlson
Stillwater Technical Solutions
PO Box 93
6505 South Highway 83
Garden City, KS 67846
(620) 260-9169
jcarlson@wbsnet.org

Re: County Land-Data Request

Dear Mr. Carlson

As Cook County Land Commissioner I have worked through your information request with the following results. The area of the USFS Withdrawal Application in Cook County is all owned by the Federal Government under the name of United States of America or USFS Superior National Forest with a total acreage of 11, 457.27. Within the USFS Withdrawal area there is 5 miles of Perent Lake Rd, which is a County Rd with an Public Road Easement dated 4-1-1993 with verbiage that the covenant shall attach to and run with the land. There is an old Federal Gravel Pit, labeled on the map, no longer in operation. There are two Severed Mineral Interests within the USFS Withdrawal area with each being 80 Acres. One Severed Mineral Interest is in private ownership, RGGS Lands & Minerals LTD LP, and the other is Cook County Tax Forfeit, also labeled on the map.

Cook County contains roughly 92% publicly owned lands encompassing Federal, State, County and City ownerships. The area directly surrounding the USFS Withdrawal Area is Federally owned, with nearby State land holdings as well. These ownerships are designated on the map using numeric coding. The map identifies the boundary of the USFS Withdrawal Area, between Lake and Cook Counties as well as the boundary of the BWCAW(Boundary Waters Canoe Area Wilderness) that starts just north of the USFS Withdrawal Area.

Any information not provided does not exist or pertain to Cook County for this data request. I hope the information provided here is sufficient to fulfill your data request. Please let me know if there are questions or further actions needed to fulfill Cook County's data request.

Regards,

Lisa Kerr

Cook County Land Commissioner/Parks & Trails Director

Appendix G

Excerpt from David H. Getches
Managing the Public Lands: The Authority of the Executive to Withdraw Lands

public workshops were held in Eureka, Willow Creek, and Mad River, CA to inform the public about the Travel Management Rule. In October 2007 and April, May, and June 2008, public workshops were held in those same locations to gather information from the public about which routes they use and their concerns. Additionally, maps of inventoried routes were available on the Forest's Web site and Forest Service offices. The public used these maps to provide input into the process.

The comment period on the proposed action will extend 45 days from the date this Notice of Intent is published in the **Federal Register.**

The draft environmental impact statement is expected to be filed with the Environmental Protection Agency (EPA) and to be available for public review by spring 2009. EPA will publish a notice of availability of the draft EIS in the **Federal Register**. The comment period on the draft EIS will extend 45 days from the date the EPA notice appears in the **Federal Register.** At that time, copies of the draft EIS will be distributed to interested and affected agencies, organizations, and members of the public for their review and comment. It is very important that those interested in the management of the Six Rivers NF participate at that time.

The final EIS is scheduled to be completed in summer 2009. In the final EIS, the Forest Service will respond to comments received during the comment period that are: within the scope of the proposed action; specific to the proposed action; have a direct relationship with the proposed action; and include supporting reasons for the responsible official to consider. Submission of comments to the draft EIS is a prerequisite for eligibility to appeal under the 36 CFR part 215 regulations.

Comment Requested

This Notice of Intent initiates the scoping process which guides the development of the environmental impact statement.

Early Notice of Importance of Public Participation in Subsequent Environmental Review: A draft EIS will be prepared for comment. The comment period on the draft EIS will be 45 days from the date the EPA publishes the notice of availability in the **Federal Register.**

At this early stage, it is important to give reviewers notice of several court rulings related to public participation in the environmental review process. First, reviewers of draft EISs must structure their participation in the environmental review of the proposal so that it is meaningful and alerts an agency to the reviewer's position and contentions. *Vermont Yankee Nuclear Power Corp.* v. *NRDC,* 435 U.S. 519, 553 (1978). Also, environmental objections that could be raised at the draft EIS stage but that are not raised until after completion of the final EIS may be waived or dismissed by the courts. *City of Angoon* v. *Hodel,* 803 F.2d 1016, 1022 (9th Cir. 1986) and *Wisconsin Heritages, Inc.* v. *Harris,* 490 F. Supp. 1334, 1338 (E.D. Wis. 1980). Because of these court rulings, it is very important that those interested in this proposed action participate by the close of the 45 day comment period so that comments and objections are made available to the Forest Service at a time when it can meaningfully consider them and respond to them in the final EIS.

To assist the Forest Service in identifying and considering issues and concerns on the proposed action, comments on the draft EIS should be as specific as possible. It is also helpful if comments refer to specific pages or chapters of the draft EIS. Comments may also address the adequacy of the draft EIS or the merits of the alternatives formulated and discussed in the statement. Reviewers may wish to refer to the Council on Environmental Quality Regulations for implementing the procedural provisions of the National Environmental Policy Act at 40 CFR 1503.3 in addressing these points.

Comments received, including the names and addresses of those who comment, will be considered part of the public record on this proposal and will be available for public inspection.

(Authority: 40 CFR 1501.7 and 1508.22; Forest Service Handbook 1909.15, Section 21)

Dated: December 12, 2008.

Tyrone Kelley,

Forest Supervisor.

[FR Doc. E8–30047 Filed 12–18–08; 8:45 am]

BILLING CODE 3410–11–P

DEPARTMENT OF AGRICULTURE

Forest Service

Superior National Forest Federal Hardrock Mineral Prospecting Permits Project.

AGENCY: Forest Service, USDA.

ACTION: Notice of intent to prepare an environmental impact statement (EIS).

SUMMARY: This analysis would address federal hardrock mineral exploration in terms of 32 current permit applications, future permit applications, current and future operating plans, and future use and occupancy authorizations (Special Use Permits) on the Superior National Forest (SNF) over the next 20 years. The project area covers all SNF managed lands available to mineral exploration. In accordance with the SNF Land and Resource Mangement Plan, the Boundary Waters Canoe Area Wilderness, Mining Protection Area, and Eligible Wild River Segments are not available to mineral exploration. The Forest Service is the lead agency for this EIS and the United States Department of the Interior (USDI), Bureau of Land Management (BLM) is a cooperating agency. As a cooperating agency, the BLM will adopt the EIS to support their own Record of Decision. Federal laws and policies will be outlined in the EIS that will require the SNF, as the agency managing the surface, and the BLM, as the agency responsible for managing sub-surface minerals resources, to consider the Prospecting Permit applications. Based on the Forest Service's recommendations and consent, the BLM will review those recommendations and decide whether to authorize the prospecting permits and operating plans.

DATES: Scoping for this project is planned for January 2009. When the scoping package is completed, it will be sent out for public review and comment. At that time, it will also be available for review, along with supplemental large scale maps, on the Internet at the following Web site: *http://www.fs.fed.us/r9/forests/superior/projects/.* The draft environmental impact statement is expected February 2010 and the final environmental impact statement is expected June 2010.

ADDRESSES: Send written comments to James W. Sanders, Forest Supervisor, 8901 Grand Avenue Place, Duluth, MN 55808.

FOR FURTHER INFORMATION CONTACT: If you would like additional information or have questions regarding this action, contact Patty Beyer, Project Coordinator at 906–226–1499 or Michael Jimenez, Forest Planner at 218–626–4383.

SUPPLEMENTARY INFORMATION:

Purpose and Need for Action

The purpose and need for this project is three-fold.

First: Analyze the effects to the environment from 32 permit applications and any future prospecting permit applications for hardrock mineral prospecting, and, determine: (a) If the lands requested under the 32 permit applications are available for mineral prospecting and what lands are available for future prospecting permit applications; (b) If activities carried out

DEPARTMENT OF AGRICULTURE

Forest Service

Notice of Initiating the Assessment Phase of the Forest Plan Revision for the Salmon-Challis National Forest

AGENCY: Forest Service, USDA.

ACTION: Notice.

SUMMARY: The Salmon-Challis National Forest, located in east central Idaho, is initiating the first phase of the forest planning process pursuant to the 2012 National Forest System Land Management Planning rule. This process will result in a revised forest land management plan (Forest Plan) which describes the strategic direction for management of forest resources on the Salmon-Challis National Forest for the next ten to fifteen years. The planning process encompasses three-stages: assessment, plan revision, and monitoring. The first stage of the planning process involves assessing ecological, social, and economic conditions of the planning area, which is documented in an assessment report.

The Forest is inviting the public to contribute in the development of the Assessment. The Forest will be hosting public forums near the end of February into early March 2017 with a second set of meetings forthcoming in June 2017. We will invite the public to share information relevant to the assessment including existing information, current trends, and local knowledge. Public engagement opportunities associated with the development of the Assessment will be announced on the Web site cited below.

DATES: From January 2017 through August 2017, the public is invited to participate in the development of the Assessment. The draft assessment report for the Salmon-Challis National Forest is being initiated and is expected to be available in August 2017 on the Forest Web site at: *http://www.fs.usda.gov/scnf/*.

Following completion of the assessment, the Forest will initiate procedures pursuant to the National Environmental Policy Act (NEPA) to prepare and evaluate a revised forest plan.

ADDRESSES: Written correspondence can be sent to Salmon-Challis National Forest, 1206 S. Challis Street, Salmon, ID 83467, or sent via email to *jmilligan@fs.fed.us*. All correspondence, including names and addresses when provided, are placed in the record and are available for public inspection and copying.

FOR FURTHER INFORMATION CONTACT: Josh Milligan, Forest Plan Revision Team Leader at 208–756–5560. Individuals who use telecommunication devices for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8:00 a.m. and 8:00 p.m. (Eastern time), Monday through Friday.

More information on the planning process can also be found on the Salmon-Challis National Forest Planning Web site at *http://www.fs.usda.gov/detail/scnf/home/?cid=FSEPRD522039*.

SUPPLEMENTARY INFORMATION: The National Forest Management Act (NFMA) of 1976 requires that every National Forest System (NFS) unit develop a land management plan (LMP). On April 9, 2012, the Forest Service finalized its land management planning rule (2012 Planning Rule, 36 CFR part 291), which describes requirements for the planning process and the content of the land management plans. Forest plans describe the strategic direction for management of forest resources for ten to fifteen years, and are adaptive and amendable as conditions change over time. Pursuant to the 2012 Forest Planning Rule (36 CFR part 219), the planning process encompasses three-stages: assessment, plan revision, and monitoring. The first stage of the planning process involves assessing social, economic, and ecological conditions of the planning area, which is documented in an assessment report. This notice announces the start of the initial stage of the planning process, which is the development of the assessment report.

The second stage, formal plan revision, involves the development of our Forest Plan in conjunction with the preparation of an Environmental Impact Statement under the NEPA. Once the plan revision is completed, it will be subject to the objection procedures of 36 CFR part 219, subpart B, before it can be approved. The third stage of the planning process is the monitoring and evaluation of the revised plan, which is ongoing over the life of the revised plan.

The assessment rapidly evaluates existing information about relevant ecological, economic, cultural and social conditions, trends, and sustainability and their relationship to land management plans within the context of the broader landscape. This information builds a common understanding prior to entering formal plan revision. The development of the assessment will include public engagement.

With this notice, the Salmon-Challis National Forest invites other governments, non-governmental parties, and the public to contribute in assessment development. The intent of public engagement during development of the assessment is to identify as much relevant information as possible to inform the upcoming plan revision process. We encourage contributors to share material about existing conditions, trends, and perceptions of social, economic, and ecological systems relevant to the planning process. The assessment also supports the development of relationships with key stakeholders that will be used throughout the plan revision process

As public meetings, other opportunities for public engagement, and public review and comment opportunities are identified to assist with the development of the forest plan revision, public announcements will be made, notifications will be posted on the Forest's Web site at: *http://www.fs.usda.gov/scnf/* and information will be sent out to the Forest's mailing list. If anyone is interested in being on the Forest's mailing list to receive these notifications, please contact Josh Milligan at the address identified above, or by sending an email *jmilligan@fs.fed.us*.

Responsible Official

The responsible official for the revision of the land management plan for the Salmon-Challis National Forest is Charles Mark, Forest Supervisor, Salmon-Challis National Forest.

Dated: January 4, 2017.

Charles A. Mark,

Forest Supervisor.

[FR Doc. 2017–00684 Filed 1–12–17; 8:45 am]

BILLING CODE 3411–15–P

DEPARTMENT OF AGRICULTURE

Forest Service

Superior National Forest; Minnesota; Application for Withdrawal

AGENCY: Forest Service, USDA.

ACTION: Notice of intent to prepare an environmental impact statement.

SUMMARY: The United States Forest Service (USFS) has submitted an application to the Secretary of Interior proposing a withdrawal of approximately 234,328 acres of National Forest System (NFS) lands, for a 20-year term, within the Rainy River Watershed on the Superior National Forest from disposition under United States mineral and geothermal leasing laws, subject to

of waste storage facilities along with the perpetual treatment of water discharge emanating from the waste storage facilities and the mines themselves would likely be required to ameliorate these adverse effects. Yet, it is not at all certain that such maintenance and treatment can be assured over many decades.

Proposed Action

The United States Forest Service (USFS) has submitted an application to the Secretary of Interior proposing a withdrawal, for a 20-year term, of approximately 234,328 acres of NFS lands within the Rainy River Watershed on the Superior National Forest from disposition under United States mineral and geothermal leasing laws, subject to valid existing rights. This proposal will also include an amendment to the Superior National Forest Land and Resource Management Plan to reflect this withdrawal.

Possible Alternatives

In addition to the USFS proposal, a "no action" alternative will be analyzed, and no additional alternatives have been identified at this time. No alternative sites are feasible because the lands subject to the withdrawal application are the lands for which protection is sought from the impacts of exploration and development under the United States mineral and geothermal leasing laws.

Lead and Cooperating Agencies

The USFS will be the lead agency. The USFS will designate the BLM as a cooperating agency. The BLM shall independently evaluate and review the draft and final environmental impact statements and any other documents needed for the Secretary of Interior to make a decision on the proposed withdrawal.

Responsible Official

Forest Supervisor, Superior National Forest.

Nature of Decision To Be Made

The Responsible Official will complete an environmental impact statement, documenting the information and analysis necessary to support a decision on withdrawal, and to support an amendment to the Superior National Forest Land and Resource Management Plan.

The Secretary of Interior is the authorized official to approve a proposal for withdrawal.

The Responsible Official is the authorized official to approve an amendment to the Superior National Forest Land and Resource Management Plan to reflect the proposed withdrawal.

Scoping Process

This notice of intent initiates the scoping process, which guides the development of the environmental impact statement. The USFS and Bureau of Land Management (BLM) will hold a public meeting within the initial 90-day comment period to gather public input on the proposed request for withdrawal. This meeting will be held at the Duluth Entertainment and Convention Center on March 16, 2017 from 5:00 to 7:30 p.m. CT (350 Harbor Drive, Duluth, MN 55802). Further opportunities for public particpation will be provided upon publication of the Draft EIS, including a minimum 45-day public comment period. A plan amendment is subject to pre-decisional objection procedures at 36 CFR 219, Subpart B.

It is important that reviewers provide their comments at such times and in such manner that they are useful to the agency's preparation of the environmental impact statement. Therefore, comments should be provided prior to the close of the comment period and should clearly articulate the reviewer's concerns and contentions.

Comments received in response to this solicitation, including names and addresses of those who comment, will be part of the public record for this proposed action. Comments submitted anonymously will be accepted and considered, however.

Dated: January 6, 2017.

Richard Periman,

Deputy Forest Supervisor.

[FR Doc. 2017–00506 Filed 1–12–17; 8:45 am]

BILLING CODE 3410–11–P

DEPARTMENT OF COMMERCE

Census Bureau

Generic Clearance for Proposed Information Collection; Comment Request; Generic Clearance for Internet Nonprobability Panel Pretesting and Qualitative Survey Methods Testing

AGENCY: U.S. Census Bureau, Commerce.

ACTION: Notice.

SUMMARY: The Department of Commerce, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995.

DATES: To ensure consideration, written comments must be submitted on or before March 14, 2017.

ADDRESSES: Direct all written comments to Jennifer Jessup, Departmental Paperwork Clearance Officer, Department of Commerce, Room 6616, 14th and Constitution Avenue NW., Washington, DC 20230 (or via the Internet at *jjessup@doc.gov*).

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument(s) and instructions should be directed to Jennifer Hunter Childs, U.S. Census Bureau, 4600 Silver Hill Road, Center for Survey Measurement, Washington, DC 20233 or (202)603–4827.

SUPPLEMENTARY INFORMATION:

I. Abstract

The Census Bureau is committed to conducting research in a cost efficient manner. Prior to this generic clearance, several stages of testing occurred in research projects at the Census Bureau. As a first stage of research, the Census Bureau pretests questions on surveys or censuses and evaluates the usability and ease of use of Web sites using a small number of subjects during focus groups, usability and cognitive testing. These projects are in-person and labor-intensive, but typically only target samples of 20 to 30 respondents. This small-scale work is done through another existing OMB generic clearance. Often the second stage is a larger-scale field test with a split-panel design of a survey or a release of a Census Bureau data dissemination product with a feedback mechanism. The field tests often involve a lot of preparatory work and often are limited in the number of panels tested due to the cost considerations. They are often targeted at very large sample sizes with over 10,000 respondents per panel. These are typically done using stand-alone OMB clearances.

Cost efficiencies can occur by testing some research questions in a medium-scale test, using a smaller number of participants than what we typically use in a field test, yet a larger and more diverse set of participants than who we recruit for cognitive and usability tests. Using Internet panel pretesting, we can answer some research questions more thoroughly than in the small-scale testing, but less expensively than in the large-scale field test. This clearance established a medium-scale (defined as having sample sizes from 100–2000 per study), cost-efficient method of testing

Grand Ave. Pl, Duluth, Minnesota, 55808.

National Forest System Lands

Superior National Forest

4th Principal Meridian, Minnesota

Tps. 61 and 62 N., Rs. 5 W.
Tps. 60 to 62 N., Rs. 6 W.
Tps. 59 and 61 N., Rs. 7 W.
Tps. 59 to 61 N., Rs. 8 W.
Tps. 58 to 61 N., Rs. 9 W.
Tps. 57 to 62 N., Rs. 10 W.
Tps. 57 to 63 N., Rs. 11 W.
Tp. 59 N., R. 12 W.
Tps. 61 to 63 N., Rs. 12 W.
Tps. 61 to 63 N., Rs. 13 W.
Tp. 63 N., R. 15 W.
Tp. 63 N., R. 16 W.
Tps. 65 to 67 N., Rs. 16 W.
Tp. 64 N., R. 17 W.

The areas described contain approximately 234,328 acres of National Forest System lands in Cook, Lake, and Saint Louis Counties, Minnesota, located adjacent to the BWCAW and the MPA.

Non-Federal lands within the area proposed for withdrawal total approximately 190,321 acres in Cook, Lake and Saint Louis Counties. As non-Federal lands, these parcels would not be affected by the temporary segregation or proposed withdrawal unless they are subsequently acquired by the Federal Government. The temporary segregation and proposed withdrawal are subject to valid existing rights, which would be unaffected by these actions.

As stated in the application, the purpose of the requested withdrawal is to protect and preserve the natural resources and waters within the Rainy River Watershed that flow into the BWCAW and the MPA from the effects of mining and mineral exploration. Congress designated the BWCAW and established the MPA to protect and preserve the ecological richness of the lakes, waterways, and forested wilderness along the Canadian border. The protection of the Rainy River Watershed would extend the preservation of the BWCAW and MPA as well as Voyageurs National Park and Canada's Quetico Provincial Park, which are all interconnected through the unique hydrology of this region.

The application further states that the use of a right-of-way, interagency agreement, or cooperative agreement would not adequately constrain mineral and geothermal leasing to provide adequate protection throughout this pristine natural area.

According to the application, no alternative sites are feasible because the lands subject to the withdrawal application are the lands for which protection is sought from the impacts of exploration and development under the United States mineral and geothermal leasing laws. No water will be needed to fulfill the purpose of the requested withdrawal.

The USFS will serve as the lead agency for the EIS analyzing the impacts of the proposed withdrawal. The USFS will designate the BLM as a cooperating agency. The BLM will independently evaluate and review the draft and final EISs and any other documents needed for the Secretary of the Interior to make a decision on the proposed withdrawal.

Records related to the application may be examined by contacting the individual listed in the **FOR FURTHER INFORMATION CONTACT** section above.

For a period until April 19, 2017, all persons who wish to submit comments, suggestions, or objections in connection with the withdrawal application may present their views in writing to the BLM Deputy State Director of Geospatial Services at the BLM Eastern States Office address noted in the **ADDRESSES** section above. Comments, including the names and street addresses of respondents, will be available for public review at that address during regular business hours.

Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Notice is hereby given that a public meeting in connection with the application for withdrawal will be held at Duluth Entertainment and Convention Center, 350 Harbor Drive, Duluth, Minnesota 55802 on March 16, 2017, from 5 p.m. to 7:30 p.m. CT. The USFS will publish a notice of the time and place in a local newspaper at least 30 days before the scheduled date of the meeting. During this 90-day comment period, the BLM and USFS will hold additional meetings in other areas of the State, notices of which will be provided in local newspapers or on agency Web sites.

For a period until January 21, 2017, subject to valid existing rights, the National Forest System lands described in this notice will be temporarily segregated from the United States mineral and geothermal leasing laws, unless the application is denied or canceled or the withdrawal is approved prior to that date. All other activities currently consistent with the Superior National Forest Land and Resource Management Plan could continue, including public recreation, mineral materials disposition and other activities compatible with preservation of the character of the area, subject to USFS discretionary approval, during the segregation period.

The application will be processed in accordance with the regulations set forth in 43 CFR 2300.

Karen E. Mouritsen,

State Director, Eastern States Office.

[FR Doc. 2017–01202 Filed 1–18–17; 8:45 am]

BILLING CODE 3411–15–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLNM004000 L91450000.EJ000 16X.LVDIG16ZGK00]

Notice of Application for a Recordable Disclaimer of Interest: Dimmit County, Texas

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice.

SUMMARY: The Bureau of Land Management (BLM) received an application for a Recordable Disclaimer of Interest (Disclaimer of Interest) from Gringita, Ltd. pursuant to the Federal Land Policy and Management Act of 1976 (FLPMA), as amended, and the regulations in 43 CFR subpart 1864, for certain mineral estate in Dimmit County, Texas. This notice is intended to inform the public of the pending application, give notice of BLM's intention to grant the requested Disclaimer of Interest, and provide a public comment period for the proposed Disclaimer of Interest.

DATES: Comments on this action should be received by April 19, 2017.

ADDRESSES: Written comments must be sent to the Deputy State Director, Lands and Resources, BLM, New Mexico State Office, P.O. Box 27115, Santa Fe, NM 87502–0115.

FOR FURTHER INFORMATION CONTACT: John Ledbetter, Realty Specialist, BLM Oklahoma Field Office, (405) 579–7172. Additional information pertaining to this application can be reviewed in case file TXNM114510 located in the Oklahoma Field Office, 201 Stephenson Parkway, Room 1200, Norman, Oklahoma 73072–2037. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Relay Service (FRS) at 1–800–877–8339 to contact the above individual during normal business hours. The Service is available 24 hours a day, 7 days a week, to leave a message or question with the

FOREST SERVICE MOVING FORWARD WITH ENVIRONMENTAL ANALYSIS FOR PROPOSED MINERAL WITHDRAWAL ON SUPERIOR NATIONAL FOREST

Release Date: Jan 26, 2018

DULUTH, MN (January 26, 2018) – After receiving more than 90,000 comments during a 210-day public scoping period, the United States Department of Agriculture Forest Service, with the United States Department of the Interior Bureau of Land Management (BLM) as a cooperating agency, will prepare an Environmental Assessment (EA) to study the effects of a proposed withdrawal on the Superior National Forest. The Forest Service will cancel the Notice of Intent published in January 2017, which originally announced the agency's intent to prepare an Environmental Impact Statement (EIS). Based on comments received, and Council on Environmental Quality guidance, the Forest Service will conduct an EA due to the absence of significant environmental impacts identified during the scoping period. If the EA analysis reveals significant environmental impacts, the Forest Service will prepare an Environmental Impact Statement (EIS) and the public will be invited to participate in that process.

"While the science indicates significant environmental impacts are unlikely to result from the proposed withdrawal, I am deeply aware of the controversy regarding socio-economic implications," said Superior National Forest Supervisor Connie Cummins. "Our specialists are working hard to ensure the EA accurately describes all the facts of the proposal, to aid the Secretary of the Interior in his decision."

Although the official comment period for scoping is complete, in an effort to ensure substantial opportunities for interested members of the public to share their views on the proposed withdrawal, the Forest Service will accept additional public comment until February 28, 2018. Comments received will be considered in development of the EA, and included in the project record delivered to the BLM once the EA is complete. To ensure timely receipt and consideration in the environmental assessment, comments must be received no later than midnight, February 28, 2018 and should be submitted via the project's website at http://go.usa.gov/xnfQh, by selecting "Comment/Object to Project" link on the right hand side of the page.

Previous comments submitted during project scoping represented the full range of public sentiment, from strong support to strong opposition. The Forest Service is using the information received in comments along with a review of environmental, social and economic information to prepare the EA. The BLM is responsible for ensuring the analysis and documentation address DOI regulations. The BLM will determine if there is a Finding of No Significant Impact. The Forest Service expects to complete the EA by late 2018 ensuring enough time for consideration by the BLM and Secretary of the Interior before the current mineral segregation expires in January 2019.

Once complete, the EA will be used by the BLM to develop a recommendation on the withdrawal to the Secretary of the Interior. Announced by the Forest Service in January 2017, the proposal seeks to withdraw approximately 234,000 acres of the Superior National Forest from mineral leasing actions for 20 years. Authority to approve the proposal lies solely with the Secretary of the Interior.

The proposed withdrawal is based on the January 5, 2017 Forest Service application to the BLM proposing a 20-year mineral withdrawal of 234,328 acres of national forest system lands from disposition under United States mineral and geothermal leasing laws. The proposed withdrawal does

7. The new total royalty fee the business or organization must pay after deductions.

8. The running total amount of royalties accrued in that fiscal year.

9. The typed name and signature of the business or organizational employee certifying the truth of the report.

Data gathered in this information collection are not available from other sources.

Type of Respondents: Individuals, for profit businesses and non-profit organizations.

Estimated Annual Number of Respondents: 21 licensees, of which an average of 10 respond per year.

Estimated Annual Number of Responses per Respondent: 4.

Estimated Total Annual Burden on Respondents: 20 hours.

Comment is Invited:

Comment is invited on: (1) Whether this collection of information is necessary for the stated purposes and the proper performance of the functions of the Agency, including whether the information will have practical or scientific utility; (2) the accuracy of the Agency's estimate of the burden of the collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including the use of automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

All comments received in response to this notice, including names and addresses when provided, will be a matter of public record. Comments will be summarized and included in the submission request toward Office of Management and Budget approval.

Dated: April 24, 2018.

Patricia Hirimi,

Acting Deputy Chief, State and Private Forestry.

[FR Doc. 2018–10028 Filed 5–10–18; 8:45 am]

BILLING CODE 3411–15–P

DEPARTMENT OF AGRICULTURE

Forest Service

Superior National Forest; Minnesota; Application for Withdrawal

AGENCY: Forest Service, USDA.

ACTION: Notice of cancellation of preparation of an environmental impact statement.

SUMMARY: The Superior National Forest is issuing this notice to advise the public that an environmental impact statement (EIS) will no longer be prepared for the Application for Withdrawal Project. The notice of intent to prepare an EIS was published in the **Federal Register** on January 13, 2017 (82 FR 4282). An environmental asessment (EA) will be prepared in lieu of an EIS. At this time, a Forest Plan Amendment is not being prepared.

FOR FURTHER INFORMATION CONTACT: Questions concerning this notice should be directed to Matthew Judd, Superior National Forest Minerals Project Coordinator, via mail at 8901 Grand Ave. Pl., Duluth, MN 55808, telephone at (218) 626–4300, or email at *mjudd@fs.fed.us.*

SUPPLEMENTARY INFORMATION: The United States Department of Agriculture, Forest Service (USFS) submitted an application on January 5, 2017 to the Secretary of the Interior proposing to withdraw lands from disposition under United States mineral and geothermal leasing laws (subject to valid existing rights) for a period of 20 years.

All the National Forest System (NFS) lands identified in this application are described in Appendix A and displayed on a map in Appendix B of the withdrawal application. This application is available upon request at the Superior National Forest office at 8901 Grand Ave. Place, Duluth, MN 55808 or online at *http://go.usa.gov/xnfQh.*

The areas described contain approximately 234,328 acres of NFS lands that overlay Federally-owned minerals in Cook, Lake, and Saint Louis Counties, Minnesota located adjacent to the Boundary Waters Canoe Area Wilderness (BWCAW) and the Boundary Waters Canoe Area Wilderness Mining Protection Area (MPA). The Forest Service will prepare an EA in lieu of an EIS because no significant environmental impacts are anticipated with the proposed action.

Lead and Cooperating Agencies

The USFS is the lead agency in preparation of the EA. The USFS has designated the Department of the Interior, Bureau of Land Management (BLM) as a cooperating agency. The BLM will independently evaluate and review the EA and any other documents needed for the Secretary of Interior to make a decision on the proposed withdrawal.

Nature of Decision To Be Made

Public scoping was conducted following the original publication of the notice of intent to prepare an EIS, and included three public listening sessions held in Duluth, Minnesota on March 16, 2017, St. Paul, Minnesota on July 17, 2017, and Virgina, Minnesota on July 25, 2017. Over 80,000 comment letters submitted during scoping represented the full range of public sentiment, from strong support to strong opposition. The Forest Service is using the information received in public comments along with a review of environmental, social and economic information to prepare the EA. The BLM is responsible for ensuring the analysis and documentation address Department of the Interior regulations. The BLM will determine if there is a Finding of No Significant Impact. The USFS expects to complete the EA in late 2018 before the mineral segregation expires in January 2019. The Secretary of Interior is the authorized official to approve a proposal for withdrawal.

Dated: March 28, 2018.

Glenn P. Casamassa,

Associate Deputy Chief, National Forest System.

[FR Doc. 2018–10030 Filed 5–10–18; 8:45 am]

BILLING CODE 3411–15–P

COMMISSION ON CIVIL RIGHTS

Agenda and Notice of Public Meeting of the Rhode Island Advisory Committee

AGENCY: Commission on Civil Rights.

ACTION: Announcement of meetings.

SUMMARY: Notice is hereby given, pursuant to the provisions of the rules and regulations of the U.S. Commission on Civil Rights (Commission), and the Federal Advisory Committee Act (FACA), that a planning meeting of the Rhode Island State Advisory Committee to the Commission will convene by conference call, on Tuesday, June 5, 2018 at 11:00 a.m. (EDT). The purpose of the meeting is to continue working on the payday loan project and if applicable vote on a work product produced for the project.

DATES: Tuesday, June 5, 2018, at 11:00 a.m. (EDT).

Public Call-In Information:

Conference call number: 1–888–334–3020 and conference call ID: 8405258.

FOR FURTHER INFORMATION CONTACT: Evelyn Bohor, at *ero@usccr.gov* or by phone at 202–376–7533.

SUPPLEMENTARY INFORMATION: Interested members of the public may listen to the discussion by calling the following toll-free conference call number: 1–888–334–3020 and conference call ID: 8405258. Please be advised that before

F. David Radford, Deputy State Director of Geospatial Services, BLM Eastern States Office, RE: Superior National Forest Withdrawal Application, 5275 Leesburg Pike, Falls Church, Virginia 22041; or by email to *BLM_ES_Lands@blm.gov* (please include Superior National Forest Withdrawal Application in the subject line).

FOR FURTHER INFORMATION CONTACT: F. David Radford, BLM Eastern States Office, telephone: 703–558–7759, email: *fradford@blm.gov* during regular business hours, 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Relay Service at 1–800–877–8339 to contact the above individual. The Service is available 24 hours a day, 7 days a week, to leave a message or question. You will receive a reply during normal business hours.

A map and other information related to the withdrawal application are available at the USFS Superior National Forest, 8901 Grand Avenue Place, Duluth, Minnesota 55808.

SUPPLEMENTARY INFORMATION: The USFS has filed an application with the BLM requesting the Secretary of the Interior to withdraw all federal lands and interests in lands (excluding lands with federally owned fractional mineral interests) situated within the exterior boundaries of the area depicted on the map submitted with the application, entitled Appendix B: Superior National Forest, dated September 20, 2021, from disposition under the United States mineral and geothermal leasing laws for a period of 20 years, subject to valid existing rights. The above-referenced map is available from BLM or USFS by sending a request to the physical address in the **ADDRESSES** and **FOR FURTHER INFORMATION CONTACT** sections above, as well as online via *https://www.blm.gov/sites/blm.gov/files/docs/2021-10/AppendixB_WithdrawalMap_20210916.pdf.* The purpose of the proposed withdrawal is to advance a comprehensive approach to protect and preserve the fragile and vital social and natural resources, ecological integrity, and wilderness values in the Rainy River Watershed, the Boundary Waters Canoe Area Wilderness (BWCAW) and the Boundary Waters Canoe Area Wilderness Mining Protection Area (MPA) in northeastern Minnesota, which are threatened by potential future sulfide mining. Development of sulfide-bearing mineral resources present in the withdrawal area could lead to permanently stored waste materials and other conditions upstream of the BWCAW and the MPA with the potential to generate and release effluent with elevated levels of acidity, metals, and other potential contaminants. Failure of required mitigation measures, containment facilities, or remediation efforts at mine sites and their related facilities could lead to irreversible degradation of this key water-based wilderness resource. The purpose of the proposed withdrawal is also to prevent the effects of climate change on precipitation regimes and protect the health, traditional cultural values, and subsistence-based lifestyle of the Tribes, which rely on resources in the region such as wild rice that are particularly susceptible to adverse impacts associated with mining. The lands will remain open to other forms of use and disposition as may be allowed by law on National Forest System lands, including the sale of mineral materials.

All the National Forest System lands identified in the townships below and any lands acquired by the Federal government within the exterior boundaries shown on the above referenced map are included in the withdrawal application. This area excludes the BWCAW and the MPA, as depicted on the above referenced map.

National Forest System Lands

Superior National Forest

4th Principal Meridian, Minnesota

Tps. 61 and 62 N., Rs. 5 W.
Tps. 60 to 62 N., Rs. 6 W.
Tps. 59 and 61 N., Rs. 7 W.
Tps. 59 to 61 N., Rs. 8 W.,
Tps. 58 to 61 N., Rs. 9 W.
Tps. 57 to 62 N., Rs. 10 W.
Tps. 57 to 63 N., Rs. 11 W.1Tp. 59 N., R. 12 W.
Tps. 61 to 63 N., Rs. 12 W.
Tps. 61 to 63 N., Rs. 13 W.

The areas described contain approximately 225,378 acres of National Forest System lands in Cook, Lake, and Saint Louis Counties.

Non-Federal lands within the area proposed for withdrawal total approximately 223,000 acres in Cook, Lake, and Saint Louis Counties. As non-Federal lands, these parcels would not be affected by the temporary segregation or proposed withdrawal, unless they are subsequently acquired by the Federal government.

Congress designated the BWCAW and established the MPA to protect and preserve the ecological richness of the lakes, waterways, and forested wilderness along the Canadian border. The protection of the Rainy River Watershed would help the preservation of the BWCAW and MPA, as well as Canada's Quetico Provincial Park, which are all interconnected through the unique hydrology in the region.

The use of a right-of-way, interagency agreement, or cooperative agreement would not meet the purpose of this proposed withdrawal because such an action would not adequately constrain mineral and geothermal leasing to provide adequate protection throughout this pristine natural area.

No alternative sites are feasible as the lands subject to the withdrawal application are the lands for which protection is sought from the impacts of potential future exploration and development under the United States mineral and geothermal leasing laws. No water will be needed to fulfill the purpose of the requested withdrawal.

The USFS will serve as the lead agency for analyzing the impacts of the proposed withdrawal under the National Environmental Policy Act. The USFS will designate the BLM as a cooperating agency. The BLM will independently evaluate and review the draft and final analysis and any other documents needed for the Secretary of the Interior to make a decision on the proposed withdrawal.

Records related to the withdrawal application may be examined by contacting the individual listed in the **FOR FURTHER INFORMATION CONTACT** section above.

For a period until January 19, 2022, all persons who wish to submit comments, suggestions, or objections related to the withdrawal application may present their views in writing to the BLM Deputy State Director of Geospatial Services at the BLM Eastern States Office address or the email listed in the **ADDRESSES** section above. Comments, including the names and street addresses of respondents, will be available for public review by appointment at the BLM Eastern States Office during regular business hours.

Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Notice is hereby given that a public meeting in connection with the application for withdrawal will be scheduled within the 90-day comment period. The BLM will publish a notice of the time and place in the **Federal Register**, at least one local newspaper, and on agency websites at least 30-days before the scheduled date of the

Appendix H

Federal Register Notifications