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Public Lands - Oil and Gas Leasing in Proposed Wilderness Areas - The Wyoming District Court's Interpretation of Section 603 of the Federal Land Policy Management Act of 1976 - Rocky Mountain Oil and Gas Association v. Andrus

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PUBLIC LANDS — Oil and Gas Leasing in Proposed Wilderness Areas — The Wyoming District Court's Interpretation of Section 603 of the Federal Land Policy Management Act of 1976 — Rocky Mountain Oil and Gas Association v. Andrus, 500 F. Supp. 1338 (D. Wyo. 1980), appeal docketed, No. 81-1040 (10th Cir. Jan. 5, 1981).

INTRODUCTION

Plaintiff Rocky Mountain Oil and Gas Association (RMOGA), a non-profit trade association, brought suit against the Secretary of the Interior, challenging land management policies of the Department of the Interior which plaintiff contended have effectively prohibited oil and gas exploration in areas proposed as wilderness[1] under the Federal Land Policy Management Act of 1976 (FLPMA).[2] The principal issue at trial was Interior's interpretation of the wilderness study provisions contained in Section 603 of the Act,[3] which directed that activities on oil and gas leases in proposed wilderness areas be managed so as to prevent impairment of wilderness values.

The United States Court for the District of Wyoming, Kerr, J., held that strict application of the non-impairment standard of Section 603, FLPMA, by the Department of the Interior virtually halted oil and gas exploration in proposed wilderness areas, and is therefore statutorily erroneous, clearly contrary to Congressional intent, and counter-productive to public interest.[4] The Trial Court's decision is presently being appealed to the Tenth Circuit Court of Appeals under the title *Rocky Mountain Oil and Gas Association v. Watt.*

HISTORY

The Federal Land Policy Management Act, signed into law on October 21, 1976, was intended to provide the Secretary of the Interior, acting through the Bureau of Land Management (BLM), with the first comprehensive statutory statement of purposes, goals and authority for the use and management of about 448 million acres of federally

1. Rocky Mountain Oil and Gas Association v. Andrus, 500 F. Supp. 1338 (D. Wyo. 1980) [hereinafter cited as RMOGA v. Andrus].
2. 43 U.S.C. §§ 1701-1782 (1976).
3. Federal Land Policy and Management Act § 603, 43 U.S.C. § 1782 (1976) [hereinafter cited as FLPMA].
4. RMOGA v. Andrus, *supra* note 1, at 1344, 1346.

owned public lands.[5] For the first time, Congress stated its intent that the public lands should be retained in federal ownership, unless disposal of particular lands was in the federal interest,[6] in contrast to more than a century of social policy which mandated the transfer of public lands into private ownership.

Because FLPMA was intended to strike a balance between such competing interests as mineral development, timber, grazing, and the preservation of wilderness, the language of the Act is, to some extent, inconsistent, and therefore requires close interpretation. For example, the policy directives of the Act declare that the public lands shall be managed in a manner that will "preserve and protect certain public lands in their natural condition"[7] and yet, at the same time, recognize "the Nation's need for domestic sources of minerals, food, timber, and fiber."[8]

Consistent with Congressional intent to balance competing interests in the public lands, FLPMA requires the Secretary to conduct an inventory of all the public lands and their resource values.[9] The Secretary is further directed to examine all roadless areas of 5000 or more acres identified during the inventory process as having wilderness characteristics, and within 15 years from the effective date of FLPMA, to recommend to the President which of these roadless islands should be preserved as wilderness[10] according to the provisions of the Wilderness Act of 1964.[11]

Section 603 of FLPMA, requiring the review of all areas with wilderness characteristics and directing the interim management of proposed wilderness areas by BLM, is the most controversial of the Act's provisions, and is the section which presents the most troublesome interpretive difficulties. Section 603 states, in pertinent part:

> During the period of review . . . the Secretary shall continue to manage such lands . . . so as not to im-

5. S. REP. No. 583, 94th Cong., 1st Sess. 24 (1976).
6. 43 U.S.C. § 1701(a)(1) (1976).
7. *Id.* § 1701(a)(8).
8. *Id.* § 1701(a)(12).
9. *Id.* § 1711(a).
10. *Id.* § 1782.
11. 16 U.S.C. §§ 1131-1136 (1976).

> pair the suitability of such areas for preservation of wilderness, subject, however, to the continuation of existing mining and grazing uses and mineral leasing in the same manner and degree in which the same was being conducted [on the date of approval of this Act]: *Provided*, that, in managing the public lands, the Secretary shall by regulation or otherwise take any action required to prevent unnecessary or undue degradation of the lands and their resources or to afford environmental protection.[12]

In an attempt to resolve the meaning of this provision, the Solicitor of the Department of the Interior under the Carter administration, Leo Krulitz, issued a legal opinion in September of 1978 interpreting Section 603 of FLPMA.[13] Under this interpretation, Section 603 mandates two standards for the management of proposed wilderness areas. One standard applies to uses of the lands that were existing prior to October 21, 1976; they are to be regulated only to the extent necessary to prevent undue degradation of the environment. Uses coming into existence after that date, however, are subject to a far stricter standard; they must be regulated to the extent necessary to prevent the impairment of wilderness characteristics.[14] It is important to note that according to this interpretation of the statute, mineral leases issued before the passage of FLPMA are not automatically managed under the less strict "undue degradation" standard. There must be some *actual activity* on those leases prior to the passage of the Act for that standard to apply. Moreover, BLM would permit this activity to continue only in the same "manner and degree" that it was being conducted before passage of the Act.[15]

Finally, emphasizing the interim nature of regulation under Section 603, the opinion cites the 1970 case of *Parker v. United States*[16] to justify the position that lands under

12. 43 U.S.C. § 1782(c) (1976).
13. Memorandum from Solicitor to Secretary of Interior, BLM Wilderness Review—Section 603, Federal Land Policy and Management Act (Sept. 5, 1978) [hereinafter cited as Solicitor's Opinion].
14. *Id.* at 14.
15. *Id.* at 18.
16. 309 F. Supp. 593 (D. Colo. 1970), *aff'd*, 448 F.2d 793 (10th Cir. 1971), *cert. denied*, 405 U.S. 989 (1972).

review for inclusion into the Wilderness Preservation System must be managed more restrictively than lands already part of that system, which will not be withdrawn from mineral entry until 1984.[17]

These two management standards—non-impairment of proposed wilderness areas and prevention of undue degradation of the environment—became the policy of the Department of Interior as it proceeded with its inventory of the public lands. Mineral leases on proposed wilderness areas issued before the passage of FLPMA were subject to regulations prohibiting impairment of wilderness values, unless the leases were being actively worked and had created physical impacts on the ground as of October 21, 1976, in which case the leases were "grandfathered" by Section 603 and development was allowed to continue in the same manner and degree, subject only to regulations prohibiting unnecessary or undue degradation. BLM continued to issue oil and gas leases after the passage of FLPMA, but it was the Department's position that there are no "grandfathered" uses inherent in post-FLPMA leases,[18] so activity on all leases issued after October 21, 1976, was subject to the non-impairment standard.

As defined by BLM, a proposed activity would satisfy the non-impairment standard if it met three "non-impairment criteria." First, the use must be temporary; second, any temporary impacts must be capable of being reclaimed by the time the Secretary sends his recommendations to Congress; and third, after reclamation the area's wilderness values must not be degraded so far as to "significantly constrain" the Secretary's recommendation as to its suitability for preservation as wilderness.[19]

Obviously, Departmental enforcement of these regulations significantly inhibited oil and gas development in proposed wilderness areas on both post-FLPMA leases and

17. 16 U.S.C. § 1133(d)(3) (1976).
18. BLM Interim Management Policy and Guidelines for Land Under Wilderness Review, 44 Fed. Reg. 72,013, 72,029 (1979) [hereinafter cited as BLM Interim Management Policy].
19. *Id.* at 72,022.

even on some pre-FLPMA leases. RMOGA, contending that its members had suffered irreparable financial harm because of these regulatory constraints, challenged the Solicitor's Opinion and ensuing BLM regulations as contrary to law, arbitrary, capricious, and completely erroneous. This challenge was upheld by the United States Court for the District of Wyoming, which held that Interior's interpretation of Section 603 was statutorily erroneous, clearly contrary to Congressional intent, and counterproductive to public interest.[20]

DISCUSSION

A. *Background*

The term "wilderness," as used in Section 603 of FLPMA, is defined as having the same meaning as it does in the Wilderness Act.[21] There, with an eloquence rarely found in statutory language, Congress defined the term in this way:

> A wilderness, in contrast with those areas where man and his own works dominate the landscape, is hereby recognized as an area where the earth and its community of life are untrammeled by man, where man himself is a visitor who does not remain. An area of wilderness is further defined to mean in this chapter an area of undeveloped Federal land retaining its primeval character and influence, without permanent improvements or human habitation, which is protected and managed so as to preserve its natural conditions and which (1) generally appears to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable; (2) has outstanding opportunities for solitude or a primitive and unconfined type of recreation. . . .[22]

It can be seen from this definition that some use of wilderness areas is possible; man's work need only be "substantially unnoticeable". The mining claim of a hardrock miner,

20. RMOGA v. Andrus, *supra* note 1, at 1344, 1346.
21. FLPMA § 603, 43 U.S.C. § 1702(i) (1976).
22. 16 U.S.C. § 1131(c) (1976).

using pick, shovel and burro, for example, would be substantially unnoticeable. The effects of portable seismic exploration, using helicopters and proper environmental safeguards would be unnoticeable after the work is completed. Even the site of one exploratory well, serviced by an improved road, could be substantially unnoticeable once the well is completed, provided that the drill pad, mud pits, road and so on are reclaimed. However, full field oil and gas development, with its many wells, roads, pipelines, pumping equipment and personnel would obviously be noticeable, even in a huge tract of wilderness. Furthermore, man's presence on such a scale would, by definition, destroy the wilderness characteristics of an area; man would remain, perhaps not forever, but for many years. It seems obvious, then, that large scale oil and gas development and wilderness are incompatible.[23]

At this point in the nation's history it is well recognized that development of domestic energy and mineral resources is of vital importance. But it is also recognized by a substantial segment of the population (and by Congress in FLPMA and the Wilderness Act) that it is also vital that we preserve for future generations a few small portions of the wild areas left in this country. To some extent, the frontier defined the character of the nation, and many feel that it is essential that we draw lines around some parts of the remaining frontier and preserve enough wilderness so that future Americans will have the opportunity to face that frontier as their ancestors did. These, then, are the interests and conflicts that Congress has struggled with in both FLPMA and the Wilderness Act: the nation's mineral resources must be developed, and yet its wilderness resources must be preserved. In view of the importance of these issues, some of which are raised directly by this lawsuit, there seems to be a serious question whether the Wyoming District Court has adequately dealt with them.

23. *See, e.g.*, Izaak Walton League v. St. Clair, 353 F. Supp. 698 (D. Minn. 1973), *rev'd on other grounds*, 497 F.2d 849 (8th Cir. 1974), *cert. denied*, 419 U.S. 1009 (1974).

B. *Previous Cases in Point*

The controversy in *RMOGA v. Andrus* centered on the issue of whether mineral development on lands being reviewed for wilderness designation can be restricted to a greater extent than on lands already designated wilderness. In making its decision, the Wyoming court could have looked for guidance to three cases which bear on this issue. Two of these cases support the position of the Solicitor's Opinion, the third case rejects such a policy. The Wyoming court chose to rely upon only the third case.

The leading case, and the only case to directly interpret Section 603 of FLPMA, is *Utah v. Andrus*,[24] which the Wyoming court dismissed rather summarily as distinguishable on its facts. *Utah v. Andrus* concerned the efforts of a mining company to build a road across public lands proposed as a wilderness area in order to gain access to its mining claims on state land. The *Utah* court resolved some of the troublesome inconsistencies in FLPMA by viewing the Act in a "dynamic rather than a static context,"[25] as applying to *all* public lands, rather than individual parcels:

> If one's view is expanded to the complex entirety of land management decisions, then the statute is not necessarily internally inconsistent. Some lands can be preserved, while others, more appropriately, can be mined. BLM is not obliged to, and indeed cannot, reflect all the purposes of FLPMA in each management action.[26]

The court used this analysis to find that BLM could prohibit activity that would permanently impair wilderness characteristics in order to prevent foreclosure of Congressional consideration of an area's potential for wilderness designation.

The *Utah* court considered in detail the Solicitor's interpretation of Section 603, and found ample support for that interpretation in both the legislative history and the statutory construction of FLPMA, a result contrary to that

24. 486 F. Supp. 995 (D. Utah 1979).
25. *Id.* at 1003.
26. *Id.*

of the court in *RMOGA v. Andrus*. Thus, the *Utah* court held that BLM has the authority to manage the public lands so as to prevent impairment of wilderness values, subject to actual uses existing on October 21, 1976, which must be managed only to prevent unnecessary and undue degradation. Finally, the court held that FLPMA does not mandate that BLM allow all potential uses on a particular parcel of land with no regard for wilderness characteristics.[27] Because *Utah v. Andrus* directly addresses the interpretation of Section 603 of FLPMA, the section at issue in *RMOGA v. Andrus*, it would seem that the case merits more consideration than it was given by the Wyoming court.

In *Parker v. United States*,[28] which was cited with approval by the *Utah* court, the Tenth Circuit of Appeals upheld an injunction prohibiting timber harvesting in an area adjoining a wilderness area until Congress made a determination as to whether the area should be declared wilderness. The court refused to concede to the Secretaries of Interior and Agriculture the discretionary authority to destroy the wilderness value of the area, holding that to do so would render meaningless the clear intent of Congress expressed in the Wilderness Act that both Congress and the President shall make wilderness determinations.[29]

Like *Utah v. Andrus*, *Parker v. United States* was also distinguished on its facts by the Wyoming court. Because the court in *Parker* was construing the Wilderness Act and not FLPMA, and because the facts concerned timber harvesting rather than mineral entry, it can be argued that the case is inapposite. Nevertheless, *Parker v. United States* certainly stands for the proposition that an agency's obligation to protect lands during the review process must be viewed separately from its obligation to manage lands already part of the Wilderness System, and therefore lands in the review process may be managed more restrictively

27. *Id.* at 1007.
28. Parker v. United States, *supra* note 16.
29. *Id.* at 795.

than lands already designated wilderness, a position rejected by the *RMOGA* court.

Mountain States Legal Foundation v. Andrus,[30] decided a month before *RMOGA* by the same court, bears on the issue of oil and gas leasing in proposed wilderness areas, and can be viewed as part of the same effort by developmental interests to open these areas for exploration that inspired *RMOGA v. Andrus*. There, the court held, contrary to *Utah v. Andrus*, that it was the intent of Congress to *limit* the ability of the Secretary of the Interior to remove large tracts of the public lands from mineral entry. On motion for summary judgment by the plaintiff, the court held that inaction by the Departments of Interior and Agriculture with respect to oil and gas lease applications amounted to a "withdrawal", which without the approval of Congress, was in violation of FLPMA. The court also decided that to manage lands in the review process more restrictively than lands already declared wilderness would be inconsistent with the intent of Congress,[31] and was cited with approval on this point by the *RMOGA* court.[32]

C. *The Wyoming District Court's Interpretation of Section 603.*

At the heart of the controversy in *RMOGA v. Andrus* is the issue of the previous administration's interpretation of Section 603 of FLPMA, and in particular, the clause which reads:

> subject, however, to the continuation of existing mining and grazing uses and mineral leasing in the manner and degree in which the same was being conducted [on the date of approval of this Act]. . . .[33]

The Solicitor's Opinion construed this phrase to be a "grandfather" clause, limiting the application of the non-impairment standard to uses coming into existence *after* the pas-

30. 499 F. Supp. 383 (D. Wyo. 1980).
31. *Id.* at 393.
32. RMOGA v. Andrus, *supra* note 1, at 1346.
33. FLPMA § 603, 43 U.S.C. § 1782(c) (1976).

sage of FLPMA.[34] In other words, proposed wilderness areas are to be managed so as not to impair their suitability for inclusion into the Wilderness Preservation System. However, if actual mining and grazing uses, including oil and gas leases, existed on the land on or prior to October 21, 1976, these uses are "grandfathered" and thus subject only to the less restrictive standard of prevention of unnecessary or undue degradation of the environment. This interpretation was upheld by the court in *Utah v. Andrus*.[35] The Wyoming court, on the other hand, held that Section 603 is clear and unequivocal on its face, that this clause requires that oil and gas leasing and development on proposed wilderness areas be conducted as they had been prior to the passage of FLPMA, and that, therefore, the Solicitor's Opinion was "clearly erroneous."[36]

Because of the juxtaposition of the noun "uses" with the verb "leasing," this clause obviously presents interpretive difficulties. The Wyoming court notes that because the verb "leasing" equates with action, Congress must have intended that mineral leasing continue after October 21, 1976, in the same manner as before that date, and therefore that such leases should not be subject to the non-impairment clause.[37] However, there are serious problems with this construction of the statutory language; such an interpretation ignores the word "existing". In Section 603, "existing" can be read to qualify both "mining and grazing use" *and* "mineral leasing". "Existing mineral leasing" must refer to activities taking place under existing leases: it is difficult to construe the phrase to mean leases issued in the future (after October 21, 1976) as well.

The Wyoming court states that the term "manner and degree" lends credence to its construction of the meaning of the clause.[38] However, as discussed by the court in *Utah v. Andrus*,[39] when the statute refers to existing mining and

34. Solicitor's Opinion, *supra* note 13, at 13.
35. Utah v. Andrus, *supra* note 24, at 1005.
36. RMOGA v. Andrus, *supra* note 1, at 1344.
37. *Id.*
38. *Id.*
39. Utah v. Andrus, *supra* note 24, at 1006.

grazing uses being carried out in the same manner and degree, it must refer to *actual* uses and activities, not merely a statutory right to use. Unless the same construction is given to the term "mineral leasing", the anomalous result is that oil and gas leasing is given preferential treatment over mining and grazing uses. The Wyoming court's interpretation produces just this result; mining and grazing uses can be regulated so as to prevent impairment of wilderness values, but mineral leasing, and exploration activities on those leases may only be regulated so as to prevent undue degradation of the environment. Such a result seems extremely unlikely; there is no language in FLPMA expressing Congressional intent to confer broader immunity to oil and gas leasing than to mining. In fact, several sections of the Act point to a contrary result.

Section 603 of FLPMA contains the proviso that "unless previously withdrawn from appropriation under the mining laws, such lands shall continue to be subject to such appropriation during the period of review unless withdrawn by the Secretary . . . for reasons other than preservation of their wilderness character."[40] This provision should be compared to Section 302(b), which provides, in part, "*Except as provided in* . . . section 1782 (Section 603) . . . no section of this Act shall in any way amend the Mining Law of 1872 or impair the rights of any locators of claims under that Act. . . ."[41] These two provisions demonstrate several things; first, the "except as provided" clause indicates that Section 603 *does* amend the Mining Law of 1872, and second, Congress has shown great solicitude for that mining act.

Section 701(f) of FLPMA provides that ". . . nothing in this Act shall repeal any existing law. . .",[42] and yet the effect of the Wyoming court's interpretation would be to repeal the Secretary's traditional discretion to lease minerals, given him by statute[43] and affirmed by case law.[44]

40. FLPMA § 603, 43 U.S.C. § 1782(c) (1976).
41. *Id.* § 302(b), 43 U.S.C. § 1732(b) (emphasis added).
42. *Id.* § 701(f), 43 U.S.C. § 1701(f).
43. Mineral Lands Leasing Act of 1920, 30 U.S.C. §§ 187, 189 (1976).
44. *See, e.g.*, Udall v. Tallman, 380 U.S. 1, 4 (1965); McTiernan v. Franklin, 508 F.2d 885, 887 (10th Cir. 1975).

Furthermore, a literal interpretation of the Wyoming court's decision is that Secretarial discretion is abolished *only* in wilderness study areas. Mining claims are in the nature of property interests; the Mining Law of 1872 gives broad rights to miners.[45] Grazing permits and mineral leases, on the other hand, are contractual privileges, and issuance is discretionary with the Secretary.[46] It seems extraordinary to hold, as did the Wyoming court, that Congress intended that FLPMA would give broader immunity from regulation to oil and gas leases than to mining and grazing uses. Although a literal reading of the statute might possibly lead to the interpretation that mineral leasing should continue in the same manner and degree as before the passage of FLPMA, surely such a result was not the intent of Congress.[47]

If a statute is ambiguous on its face, as Section 603 appears to be, interpreters of that statute should look to legislative history to properly construe the meaning of the law. After noting that the legislative history of FLPMA can be selectively read to support the viewpoint of plaintiff or defendant, the Wyoming court held that because the statute is clear on its face, resort to legislative history is unnecessary.[48] Thus the court has nicely avoided the problems of interpreting Section 603 by holding it to be clear on its face, and then the court has relied on that holding to cut off critical enquiry into the legislative history of the Act which suggests that the statute is *not* clear. For example, the only occasion where the court resorts to legislative history is to condemn the Solicitor's reliance on *Parker v. United States*. The court cites a Senate Committee Report which states that the language of Section 201(a) of FLPMA was specifically designed to bar suits similar to *Parker*.[49]

45. *See, e.g.*, 30 U.S.C. § 29 (1976).
46. *See, e.g., id.*, 43 C.F.R. Part 4100 (1980).
47 Ray and Carver have suggested that the Section 603 "grandfather" clause imposes a *duty* on the Secretary to issue mineral leases. *See* Ray & Carver, *Section 603 of FLPMA: An Analysis of the BLM's Wilderness Study Provisions*, 21 ARIZ. L. REV. 373, 385 (1979). This was almost surely not the intent of Congress. Ray and Carver, incidentally, were the plaintiff's attorneys in *RMOGA v. Andrus*.
48. RMOGA v. Andrus, *supra* note 1, at 1347.
49. *Id.* at 1342 (citing S. REP. No. 873, 93d Cong., 2d Sess. 36 (1974)).

Yet the court in *Utah v. Andrus* notes that the statement is from a Senate Committee Report on a bill debated some two years prior to the passage of FLPMA, and finds persuasive the fact that the final statement of Senate intent contains almost identical language, but includes no reference to the *Parker* case, thus holding that Congress did not intend to overrule *Parker*.[50]

The Solicitor's interpretation finds additional support in the legislative history. In the report accompanying House Resolution 13777, which eventually became FLPMA, the purpose of Section 311 (later Section 603) was described by the House Committee on Interior and Insular Affairs as follows:

> While tracts are under review, they are to be managed in a manner to preserve their wilderness character, *subject to the continuation of existing grazing and mineral uses* and appropriation under the mining laws. The Secretary *will continue* to have authority to prevent unnecessary and undue degradation of the lands. . . .[51]

It can be seen that the committee report made no mention of mineral leasing in its statement of the purpose of Section 603, which would indicate that Congress did not intend that oil and gas leasing be exempt from the non-impairment standard.[52]

Finally, a report accompanying the Senate version of FLPMA had this to say about the purpose behind Section 201 of FLPMA:[53]

> The Committee fully expects that the Secretary, whenever possible, will make management decisions which will insure that no future use or combination of uses which might be discovered as appro-

50. Utah v. Andrus, *supra* note 24, at 1007 n. 16.
51. H.R. REP. No. 1163, 94th Cong., 2d Sess. 17 (1976) (emphasis added).
52. The court in *Utah v. Andrus* found that the report persuasively indicated that the Secretary's authority to prevent impairment of wilderness characteristics was meant to be a *new addition* to his continuing authority to regulate all uses so as to prevent undue degradation. Utah v. Andrus, *supra* note 24, at 1006.
53. Section 201 provides, in pertinent part: "The preparation and maintenance of such inventory or the identification of such areas shall not, of itself, change or prevent change of the management or use of the public lands." FLPMA § 201, 43 U.S.C. § 1711(a) (1976).

> priate in the inventory processes—be they wilderness, grazing, recreation, timbering, etc.,—will be foreclosed by any use or combination of uses conducted after the enactment of S.507, but prior to the completion of those processes.[54]

This passage is strong evidence that Congress intended that the Secretary should use his discretionary authority to prevent impairment of wilderness characteristics during the inventory process. It certainly does not indicate any intent that oil and gas leasing should be exempt from the non-impairment standard, particularly if the Secretary should decide that a particular oil and gas project *would* impair an area's wilderness suitability.[55]

Because lands already declared wilderness are open to mineral leasing until December 31, 1983,[56] the *RMOGA* court, citing its earlier decision in *Mountain States Legal Foundation v. Andrus*, declined to "condone the anomalous position" that FLPMA mandates imposing a stricter duty on lessees in proposed wilderness areas than the Wilderness Act imposes on land already declared wilderness.[57] However, there is strong evidence that this was, in fact, the intent of Congress. Section 603 states: *"Once an area has been designated for preservation as wilderness,* the provisions of the Wilderness Act . . . shall apply. . . ."[58] This language indicates that there are two separate managment standards; one standard for lands under review as wilderness, and one for lands already designated wilderness. If the provisions of the Wilderness Act do not apply until an area has been designated wilderness, there is necessarily another standard for lands under review.

The Public Lands Law Review Commission, created by Congress in 1964 to study the land laws and recommend a more coherent course for the management of the public lands, and from whose recommendations FLPMA eventually materialized, also recognized the need to manage study areas

54. S. REP. NO. 583, 94th Cong., 2d Sess. 44 (1976).
55. *See, e.g.*, Utah v. Andrus, *supra* note 24, at 1004.
56. 16 U.S.C. § 1133(d)(3) (1976).
57. RMOGA v. Andrus, *supra* note 1, at 1346.
58. FLPMA § 603, 43 U.S.C. § 1782(c) (1976) (emphasis added).

so as to prevent foreclosure of Congressional discretion in the designation of wilderness areas: "Because, in most cases, the procedure involves statutory designations, withdrawals for limited periods will be necessary to protect values while awaiting formal designation."[59] If BLM were to allow new actions which would impair the suitability of a particular area for wilderness designation, the whole purpose of the wilderness review would be defeated.[60] *Parker v. United States* held that allowing agency decisions to destroy wilderness values would violate the clear intent of Congress as stated in Section 1132(b) of the Wilderness Act, that both the President and Congress should have a meaningful opportunity to add areas to the wilderness system.[61] The legislative history of FLPMA supports the same conclusion.[62]

D. *The Taking Issue*

The court in *RMOGA v. Andrus* held that BLM's policy of subjecting oil and gas leases in proposed wilderness areas to the restrictions of the non-impairment standard had the effect of creating "shell" leases with no development rights. Such a system, according to the court, "is clearly an unconstitutional taking and is blatantly unfair to lessees."[63] To arrive at this result, the court looked to Section 701(h) of FLPMA, which states: "All actions by the Secretary under this Act shall be subject to valid existing rights."[64] The court, however, failed to make a distinction between leases issued before the passage of FLPMA and leases issued thereafter. This distinction is crucial to a determination of whether the lease carries an "existing" right, the deprivation of which is an unconstitutional taking.

It is quite evident that the Secretary of the Interior has no obligation to issue any lease on public lands.[65] It is also clear that the mere application for a lease vests no

59. PUBLIC LANDS LAW REVIEW COMMISSION, ONE THIRD OF THE NATION'S LAND 198-99 (1970).
60. *See* Utah v. Andrus, *supra* note 24, at 1007.
61. Parker v. United States, *supra* note 16, at 797.
62. *See supra* text accompanying note 54.
63. RMOGA v. Andrus, *supra* note 1, at 1345.
64. FLPMA § 701(h), 43 U.S.C. § 1701(h) (1976).
65. Arnold v. Morton, 529 F.2d 1101, 1105 (9th Cir. 1976).

rights in the applicant.[66] If a lease is issued, the Secretary has broad authority to promulgate reasonable regulations regarding the federal lands involved.[67] Furthermore, in order to gain a right conferred by the United States, a petitioner must accept those rights upon such terms as the Congress has determined should be imposed in the public interest.[68] Therefore, it follows that leases issued after the passage of FLPMA, even if they were applied for before passage of the Act, carry with them a duty to comply with such regulations as the Secretary or Congress determines are in the public interest. It would not be an unconstitutional taking for the Secretary to refuse to issue a lease, nor would it be a taking if the Secretary chose to issue a lease with stipulations which would cause additional expense to the developer of the leasehold: "It is not a taking for the Government to withhold a benefit it is not contractually or constitutionally obliged to confer. Nor is it a taking for the Government to impose financial obligations upon the recipient of a benefit if, as here, the benefit may be declined."[69]

In *Union Oil of California v. Morton*,[70] the Ninth Circuit held that an oil and gas lease may be terminated by its own terms, provided that stated conditions subsequent occur.[71] This holding seems to run counter to the Wyoming court's decision that application of the non-impairment standard to leases issued *after* the passage of FLPMA constitutes a taking. For example, should the Secretary issue a lease subject to the possibility that the area may be declared wilderness, the lessee must develop that lease according to the non-impairment standard until a wilderness determination is made. Should the area be found unsuitable for wilderness designation, the lessee is free to develop that leasehold according to the undue degradation standard. On the other hand, should the land be declared a wilderness area

66. *Id.* at 1106.
67. Topaz Beryllium Co. v. United States, 649 F.2d 775, 779 (10th Cir. 1981).
68. Portland General Electric Co. v. Federal Power Commission, 328 F.2d 165, 173 (9th Cir. 1964).
69. *Id.*
70. 512 F.2d 743 (9th Cir. 1975).
71. *Id.*

after the deadline for mineral entry,[72] his lease will be terminated by the occurrence of a condition subsequent, of which he was well aware when he bargained for the lease. This termination would therefore not be a taking.

As previously noted, the policy of the Department of the Interior was to grandfather only those pre-FLPMA leases upon which actual uses had created physical impacts on the ground as of October 21, 1976. Post-FLPMA leases and pre-FLPMA leases upon which no activity had taken place as of that date were subject to the stringent non-impairment standard.[73] Because most oil and gas leases issued by the Department require the lessee to comply with regulations promulgated both before *and* after the issuance of the lease, it was the position of the Interior that this limited the protection given to "valid existing rights" by Section 701(h).[74] There are, however, both interpretive and constitutional difficulties with this approach.[75] Like the Wyoming court, the Solicitor did not sufficiently consider the distinctions between pre- and post-FLPMA leases, and to what extent each carried valid existing rights.

In *Penn Central Transportation Co. v. New York City*,[76] the Supreme Court held that private property rights may be impaired by the Government without becoming a taking that requires compensation, if such impairment is for a substantial public purpose. However, in *Pennsylvania Coal Co. v. Mahon*,[77] the Court has also recognized that restrictions on property rights, even if they further important public interests, may so frustrate "distinct investment-backed expectations" as to constitute a taking.[78]

72. The deadline at present is December 31, 1983. *See* 16 U.S.C. § 1133(d)(3) (1976).
73. BLM Interim Management Policy, *supra* note 18, at 72,013.
74. Solicitor's Opinion, *supra* note 13, at 19.
75. In *Union Oil of California*, the Ninth Circuit also found that, although a lease can be terminated by a condition subsequent, in that case a violation of Interior Department regulations, those regulations must have been in existence *before* the issuance of the lease. Union Oil of California v. Morton, *supra* note 70, at 749. This would seem to undermine the Solicitor's argument that pre-FLPMA leases can be held subject to post-FLPMA regulations. The lessee did not bargain for a lease with such regulations.
76. 438 U.S. 104 (1978). *See also* Goldblatt v. Hempstead, 369 U.S. 590 (1962).
77. 260 U.S. 393 (1922).
78. *Id.* at 415; Penn Central Transportation Co. v. New York City, *supra* note 76, at 127.

The degree to which the Government, by exercise of its regulatory power, may interfere with the enjoyment of private property rights without having to pay compensation is a difficult question.[79] There is a strong argument here that application of the non-impairment standard (and possible wihtdrawal of the area from mineral leasing) to a *pre*-FLPMA lease, as mandated by the Solicitor's Opinion, is sufficient frustration of investment-backed expectations under the *Pennsylvania Coal* standard to constitute a Fifth Amendment taking.[80] The lessee, when he bargained for the lease, had no idea that his lease might be regulated by a standard which could preclude effective development.[81]

E. *The Coldiron Opinion*

On October 5, 1981, the Solicitor for the Department of the Interior under the Reagan Administration, William H. Coldiron, issued an opinion addressing the relationship between the protection of valid existing rights under Section 701(h) and the wilderness review provisions of Section 603.[82] This new opinion modifies the Solicitor's Opinion of September 5, 1978. Although consistent with the result reached by the court in *RMOGA v. Andrus* with regard to pre-FLPMA leases, the Coldiron Opinion explicitly states that it does not adopt that court's rationale for the decision,[83] nor does it adopt the Wyoming court's result with regard to post-FLPMA leases.

The Coldiron Opinion accepts the position of the previous Krulitz Opinion that Section 603 mandates two management standards—non-impairment and no undue degradation—but it goes on to find that the "savings" clause of

79. *See, e.g.*, Union Oil of California v. Morton, *supra* note 70, at 750; Penn Central Transportation Co. v. New York City, *supra* note 76, at 123.
80. This problem is addressed by the opinion of the present Solicitor. *See infra* text accompanying notes 82-90.
81. However, this is only true if the land is finally declared a wilderness and withdrawn from mineral entry, or if the lease expires because the lessee cannot drill within the primary term of the lease because of the non-impairment standard.
82. Memorandum from Solicitor to Secretary of Interior, The BLM Wilderness Review and Valid Existing Rights (Oct. 5, 1981) [hereinafter cited as Coldiron Opinion].
83. *Id.* at 1 n. 1.

Section 701(h)[84] is a *limitation* on the non-impairment standard of Section 603; the standard cannot be applied in a manner that would prevent the exercise of any "valid existing right".[85] The new Solicitor's opinion finds that "valid existing rights" are those rights immune from denial or extinguishment by the Secretary.[86] Such valid rights can be created by the Secretary, but once the Secretary has granted a right, such as an oil and gas lease, the applicant has valid existing rights in that lease. Activities on the lease, therefore, are subject to the non-impairment standard only to the extent that the standard does not unreasonably interefere with the enjoyment of those rights. If non-impairment does interfere with the enjoyment of valid existing rights, only the undue and unnecessary degradation management standard applies.[87] The Coldiron Opinion also makes a careful distinction between pre- and post-FLPMA leases; the opinion cites *Utah v. Andrus* for the proposition that all leases issued after October 21, 1976, are subject to non-impairment, because after that date the Secretary had no authority to issue leases under any other management standard.[88]

The major difference between the Krulitz and the Coldiron interpretations of FLPMA is that while the Krulitz Opinion would grandfather only *uses* that were actually initiated before the passage of FLPMA, and then regulate those uses to the same manner and degree of activity as existed on that date, the Coldiron Opinion would grandfather all leases issued before the passage of the Act, regardless of whether any activity had actually been initiated on that date.

This new interpretation of BLM's regulatory authority under FLPMA does not alter the substantive issues in the appeal of *RMOGA v. Andrus*, but it does take a more reas-

84. The statutory language is as follows: "All action by the Secretary concerned under this Act shall be subject to valid existing rights." FLPMA § 701(h), 43 U.S.C. § 1701(h) (1976).
85. Coldiron Opinion, *supra* note 82, at 2.
86. *Id.* at 3.
87. *Id.* at 5.
88. *Id.* The Opinion does not adopt the *Utah* court's decision that only actual *uses* are grandfathered.

oned stand on the taking of private rights than does the Wyoming court's opinion. The Coldiron Opinion directs the Secretary to look to the specific pre-FLPMA lease document to determine the full extent of the lessee's valid existing rights; and although this gives the Secretary much more discretion to foreclose wilderness consideration of an area than did the previous Solicitor's opinion, by allowing uses which might impair wilderness suitability, it avoids the problem of Departmental regulations being held an unconstitutional taking. Because a lessee will not be deprived of rights for which he bargained, and which he was granted in his lease document, it cannot be said that Secretarial regulation would deprive him of investment-backed expectations.

While the Coldiron Opinion does appear to solve the taking problem implicit in the Krulitz Opinion, the language of the "subject to" clause of Section 603 does not lend itself any more readily to the Coldiron interpretation than it does to the Wyoming court's interpretation of the section.[89] The "manner and degree" language, in particular, is far more easily read to support the position of the Krulitz Opinion[90] than either of the other two. Neverthless, the Coldiron interpretation balances the competing interests of wilderness and development explicit in Section 603 of FLPMA more equitably than the opinion of the court in *RMOGA v. Andrus*, and is therefore the best available interpretation of the statutory language.

CONCLUSION

The Federal Land Policy Management Act is a comprehensive and difficult piece of legislation which attempts to balance all the many competing interests in the public lands. The wilderness review provisions of Section 603 are a particularly troublesome source of conflict reflecting, as they do, the public demand for domestic energy development on the one hand, and the preservation of wilderness on the other. Despite the holding of the court in *RMOGA v. Andrus* that the statute is clear on its face, Section 603 presents severe

89. *See supra* text accompanying notes 33-39 & 84.
90. *See supra* text accompanying note 12.

interpretive difficulties, which will be resolved, if ever, as much by prevailing social policy as by "correct" interpretation of the precise words of the statute.[91]

Realizing that FLPMA reflects concern for competing public policies and interests, the court states that one policy should not suffer for the benefit of another, that compromises must be worked out. The court goes on to find that BLM's interpretation of the statute leaves no room for compromise—that mineral development is totally sacrificed to environmental concerns, and yet the court's opinion seems to turn full circle from the Solicitor's opinion, sacrificing environmental concerns for mineral interests. This decision reflects only one side of this complicated problem, and in fact, Congressional intent and the public policy behind FLPMA demand that the competing interests in conflict here must be much more delicately balanced than the Wyoming court was willing to do.

Despite many interpretive difficulties, Section 603 clearly mandates non-impairment of proposed wilderness areas. The opening of all such areas to full oil and gas development is as contrary to Congressional intent as the complete closure of those areas to development. Furthermore, the foreseeable result of this decision, should it be affirmed by the court of appeals, is that by removing the traditional regulatory discretion over oil and gas leasing from the Department of the Interior, the court's decision would in turn remove from the President and Congress the discretion to declare these areas wilderness. The Wyoming court's decision mandates that oil and gas development (although not mining, timbering or grazing) continue without regard to the non-impairment standard. Development under a lesser standard would, by definition, destroy the wilderness character of these areas; they would be neither roadless nor untrammelled by man. The President would then be foreclosed from declaring any such area wilderness. In fact, the dis-

91. To a certain extent, one might argue that the whole concept of "congressional intent" in Section 603 is a fiction. Congress, in its attempt to balance the competing interests in the public lands, left the language of the statute deliberately ambiguous, so that future interpretation would be up to the courts, which would apply contemporary standards of social policy.

cretion to preserve wilderness would then rest in the hands of the oil and gas interests; they would need only cut enough roads through a proposed wilderness area to destroy its statutorily defined wilderness characteristics to insure that the areas could *never* be declared wilderness.

If FLPMA is viewed in the dynamic context suggested by the court in *Utah v. Andrus*, we must look to the overall use of the public lands to determine if Interior is complying with the broad purposes of the Act. Inevitably, some wilderness must give way to developmental interests, but the opposite holds true as well. The opinion of the Wyoming District Court leaves no room for these necessary compromises.

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