

1997

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Recommended Citation

Wilcox, William A. Jr. and Vliet, Andrew J. III (1997) "The Engle Act and Military Land Withdrawals: A Blueprint for Inter-Agency Cooperation," *Land & Water Law Review*: Vol. 32 : Iss. 2 , pp. 461 - 475. Available at: https://scholarship.law.uwyo.edu/land_water/vol32/iss2/14

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University of Wyoming
College of Law

LAND AND WATER LAW REVIEW

VOLUME XXXII

1997

NUMBER 2

THE ENGLE ACT AND MILITARY LAND WITHDRAWALS: A BLUEPRINT FOR INTER-AGENCY COOPERATION*

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I. INTRODUCTION

Management of McGregor Range, New Mexico, which consists of over 608,000 acres of withdrawn public domain land, has been shared by the Army's Fort Bliss, Texas and the Bureau of Land Management (BLM) since 1957.¹ The withdrawal of public domain land for military use, under which the BLM and Fort Bliss share management of the Range, was renewed most recently by Congress in the Military Lands Withdrawal Act of 1986 (MLWA).² Since 1990, the two very different

*. The views expressed in this article are those of the authors and do not reflect the official policy or position of the Department of Defense or of the United States Government.

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1. Public Land Order No. 1470. The 1957 order was for an initial period of ten years, with an additional term of ten years at the option of the Army. The Army exercised its option and also submitted an application for renewal of the withdrawal on December 31, 1976, which Congress did not act upon until 1986.

2. Pub. L. No. 99-606, 100 Stat. 3457 (1986) [hereinafter MLWA].

Federal agencies have managed the land in accordance with a Memorandum of Understanding (MOU) between them.³ Under the MOU Fort Bliss has priority use of the range for military purposes. The BLM, however, manages nonmilitary activities on the Range, such as cattle grazing and recreation, subject to the Army's concurrence.⁴

Nationwide, the Department of Defense (DOD) manages millions of acres in conjunction with the BLM pursuant to various temporary land withdrawals. The most significant of the land withdrawals were created under the MLWA,⁵ which established six major military training and testing areas including the Navy's 21,000-acre Bravo-20 Bombing Range in Nevada, the Air Force's 2.9 million-acre Nellis Range in Nevada, its 2.6 million-acre Barry M. Goldwater Range in Arizona, and about 900,000 acres in Army training areas in Alaska.⁶ In addition, the Department of Defense has benefited from numerous smaller withdrawals, which are considered "administrative withdrawals" and do not require congressional approval for renewal.⁷ Under the Engle Act of 1958,⁸ land withdrawals of more than 5,000 acres require congressional approval.⁹

By November 6, 1998, the Army, Navy and Air Force can be expected to submit applications to the BLM for continued withdrawal of these large areas of withdrawn lands beyond the year 2001.¹⁰ Under the MLWA, BLM must then process the applications for renewal in light of its own regulations, but only Congress can extend or renew the withdrawals.¹¹ As part of their applications for renewal, the services must provide a Draft Environmental Impact Statement (DEIS) for each withdrawal the services intend to renew.¹²

3. Memorandum of Understanding Between U.S. Department of the Interior - Bureau of Land Management, New Mexico and U.S. Department of the Army, Headquarters, U.S. Army Air Defense Artillery Center and Fort Bliss, Fort Bliss, Texas, Concerning Policies, Procedures, and Responsibilities Related to Land Use Planning and Resource Management of McGregor Range, March 1, 1990 [hereinafter MOU] (on file with *The Land and Water Law Review*).

4. *Id.* at III(A).

5. MLWA, *supra* note 2.

6. *Id.*

7. SHELLY J. SMITH ET AL., MAINTAINING ARMY READINESS: THE STATUS OF NEPA DOCUMENTATION FOR RENEWAL OF WITHDRAWN MILITARY LANDS (prepared for the American Defense Preparedness Association's 22nd Environmental Symposium and Exhibition, Mar. 18-21, 1996) (on file with *The Land and Water Law Review*).

8. 43 U.S.C. §§ 155-158 (1994).

9. 43 U.S.C. § 156.

10. MLWA, *supra* note 2, § 8(a).

11. *Id.* § 5(c).

12. *Id.* § 5(b).

Military land withdrawals create unique opportunities for inter-agency cooperation. They allow the BLM to manage natural resources against a backdrop of military testing and training. The land withdrawals also present some unique management challenges. Assessing cumulative environmental impacts of very different types of activities managed by two different agencies, for instance, can be difficult. In addition, it is difficult to imagine agencies with more different management styles than the BLM and the Army, Navy or Air Force. Yet in spite of occasional disagreements, the relationship works to the overall benefit of both partners and the public. Although the MLWA forces the BLM to surrender management supremacy to the military services, its role in working with the military in cooperatively managing resources and in processing renewal applications makes the BLM a valuable partner in the country's national defense.

II. THE HISTORICAL FRAMEWORK FOR THE MLWA

Under the Property Clause of the U.S. Constitution, Congress has authority to determine the uses of public lands.¹³ The Constitution provides that Congress may "dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."¹⁴ In addition, the Enclave Clause of the Constitution gives Congress the "power to exercise exclusive Legislation in all Cases whatsoever . . . over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings."¹⁵ Congress' authority has been interpreted broadly, with the U.S. Supreme Court holding more than once that "the power over public lands thus entrusted to Congress is without limitation."¹⁶ This congressional authority applies not only to lands acquired from states, but also to public domain land retained by the federal government upon admission of a state.¹⁷

The President, however, has long enjoyed broad authority to withdraw or reserve land when allowed to do so by Congress. A land withdrawal

13. U.S. CONST. art. IV, § 3, cl. 2.

14. *Id.* A comprehensive explanation of the legal basis for land withdrawals was included in ROBERT J. BOONSTOPPEL & SCOTT M. FARLEY, *MILITARY LAND WITHDRAWALS — A PARADIGM FOR INTEGRATING LAND AND RESOURCE CONSERVATION REQUIREMENTS AND PROCESSES INTO SUCCESSFUL TRAINING LAND MANAGEMENT* (Nov. 30, 1995) (on file with *The Land and Water Law Review*).

15. U.S. CONST. art. I, § 8, cl. 17.

16. *See, e.g.*, *Kleppe v. New Mexico*, 426 U.S. 529, 539 (1976) (quoting *United States v. San Francisco*, 310 U.S. 16, 20 (1949)).

17. *See, e.g.*, *Pollard v. Hagan*, 44 U.S. 212 (1845).

generally exempts public lands from development except in accordance with the terms of the withdrawal. In *United States v. Midwest Oil Co.*,¹⁸ the U.S. Supreme Court in 1915 upheld the long-standing practice of the President, with the acquiescence of Congress, of establishing land withdrawals by executive order.¹⁹ The Court noted the many withdrawals by executive order prior to 1910, including "109 Executive orders establishing or enlarging military reservations and setting apart land for water, timber, fuel, hay, signal stations, target ranges, and rights of way for use in connection with military reservations."²⁰ The Court also noted that Congress had been informed of the withdrawal in controversy, one for Navy oil reserves, and had not objected. "Its silence was acquiescence," the Court concluded. "Its acquiescence was equivalent to consent to continue the practice until the power was revoked by some subsequent action by Congress."²¹

Congress attempted to limit the broad withdrawal power of the President by passing the Pickett Act of 1910.²² Under the Pickett Act, the President was authorized expressly to temporarily withdraw land "from settlement, location, sale, or entry" and to "reserve the same for water-power sites, irrigation, classification of lands, or other public purposes to be specified in the orders of withdrawals."²³ The Pickett Act also limited the President's power, however, by providing that lands withdrawn under the Act "shall at all times be open to exploration, discovery, occupation, and purchase under the mining laws of the United States, so far as the same apply to metalliferous minerals."²⁴ As a practical matter, however, the Pickett Act did not stop the President from making land withdrawals. In 1941, the U.S. Attorney General interpreted the Act as limiting only "temporary" land withdrawals while leaving unlimited the President's nonstatutory authority to make "permanent" withdrawals.²⁵

Unless withdrawn, management of the public lands was historically vested in federal agencies upon the assent of Congress. The Taylor Grazing Act of 1934, for instance, gave the Secretary of the Interior authority to promulgate regulations to administer grazing on the public lands.²⁶ The

18. 236 U.S. 459 (1915).

19. *Id.* at 483.

20. *Id.* at 470.

21. *Id.* at 481.

22. Pickett Act of June 25, 1910, ch. 421, §§ 1-2, 36 Stat. 847, *repealed by* Federal Land Policy and Management Act of 1976, § 704(a), 90 Stat. 2744, 2792.

23. *Id.* § 1.

24. *Id.* § 2.

25. CHARLES F. WHEATLEY, JR., *STUDY OF WITHDRAWALS AND RESERVATIONS OF PUBLIC DOMAIN LANDS* 5 (1969).

26. Taylor Grazing Act of 1934, ch. 865, § 1, 48 Stat. 1269, codified as amended at 43 U.S.C. § 315 (1988).

public domain lands subject to the Taylor Grazing Act were administered by the Department of the Interior's Grazing Service until 1946, when the BLM was formed from the Grazing Service and the General Land Office. Withdrawn lands, however, were not subject to management by the BLM unless otherwise noted in the instrument for withdrawal.

Prior to 1958, land withdrawals, including military land withdrawals, could be unlimited in duration and size. Under the Engle Act, however, Congress reserved for itself the ability to create withdrawals greater than 5,000 acres.²⁷ In 1976, Congress adopted the Federal Land Policy and Management Act (FLPMA), which delegated the ability to create withdrawals of 5,000 acres or less.²⁸

FLPMA granted to the Department of the Interior the authority to "make, modify, extend or revoke withdrawals" of federal land.²⁹ FLPMA thus authorized an administrative process for handling these smaller land withdrawals.³⁰ It also mandated that the Secretary of the Interior review all existing withdrawals of public lands within Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington, and Wyoming within fifteen years if the withdrawals closed the lands to appropriation under the Mining Law of 1872 or to leasing under the Mineral Leasing Act of 1920.³¹ The review was to determine whether the withdrawals were still required for their intended purposes.³² Department of Interior regulations provide a process to consider applications for withdrawals and make no clear distinction between the application and renewal of administrative withdrawals under FLPMA and congressional withdrawals.³³

III. THE MLWA

The MLWA of 1986, with respect to McGregor Range, New Mexico, rectified a ten-year absence of congressional action. While Congress considered the Army's request to continue the 1957 withdrawal of the McGregor Range, which was filed on December 31, 1976, Congress provided no guidance with respect to the use of McGregor Range.³⁴ Other Army installations and facilities of the other military services had been

27. 43 U.S.C. § 156.

28. 43 U.S.C. § 1714 (1994).

29. 43 U.S.C. § 1714(a).

30. According to the BLM, there are currently 15 administrative withdrawals with specific termination dates, seven concerning military installations and the rest concerning U.S. Army Corps of Engineers civil works. SMITH ET. AL., *supra* note 7, at 2.

31. 43 U.S.C. § 1714(1)(1).

32. 43 U.S.C. § 1714(1)(2).

33. 43 C.F.R. pt. 2300 (1981).

34. BOONSTOPPEL & FARLEY, *supra* note 14, at 2.

operating with a similar lack of guidance.³⁵ Congress finally filled the informational void with passage of the MLWA, which is in effect for fifteen years.³⁶ The MLWA made military use of the withdrawn public domain lands consistent with both the Engle Act and FLPMA's withdrawal provision.³⁷

The MLWA provides that each of the six major military withdrawals³⁸ are "withdrawn from all forms of appropriation under the public land laws (including the mining laws and the mineral leasing and the geothermal leasing laws)."³⁹ Each of the withdrawals identifies specific purposes for which the lands are to be used. The Navy's Bravo-20 Bombing Range in Nevada, for instance, is reserved for "testing and training for aerial bombing, missile firing, and tactical maneuvering and air support."⁴⁰ The Nellis Air Force Range in Nevada is reserved for use as "an armament and high-hazard testing area" as well as for "training for aerial gunnery, rocketry, electronic warfare, and tactical maneuvering and air support."⁴¹ The McGregor Range in New Mexico is reserved for "training and weapons testing."⁴²

In addition to the specific purposes identified for the withdrawals, each withdrawal provides that the lands may be used for "other defense-related purposes consistent with the purposes specified in this [withdrawal]."⁴³ To use withdrawn lands for such "additional military uses," however, the military service concerned must notify the BLM.⁴⁴ The notification must "indicate the additional use or uses involved, the proposed duration of such uses," as well as the extent to which the additional military uses will call for "additional or more stringent conditions or restrictions" to be "imposed on otherwise-permitted nonmilitary uses of the withdrawn land or portions thereof."⁴⁵

The MLWA also provides that existing rights on the withdrawn lands be left intact.⁴⁶ It also identifies two specific instances in which existing legal status was not altered by the withdrawals. First, it specified

35. *Id.*

36. MLWA, *supra* note 2, § 5(a).

37. *See*, 43 U.S.C. § 156; 43 U.S.C. § 1714.

38. *See supra* note 6 and accompanying text.

39. MLWA, *supra* note 2, § 1.

40. *Id.* § 1(a)(1)(A).

41. *Id.* § 1(b)(1)(A) & (B).

42. *Id.* § 1(d)(1)(A).

43. *Id.* § 1.

44. *Id.* § 3(f).

45. *Id.*

46. *Id.* § 1.

that lands within the Bravo-20 Bombing Range controlled by the Bureau of Reclamation for “flooding, overflow, and seepage purposes” were not affected by the withdrawal.⁴⁷ Second, the Act provided that lands on the McGregor Range managed under section 603 of FLPMA “shall continue to be managed under that section until Congress determines otherwise.”⁴⁸ Section 603 outlines the BLM’s Wilderness Study Area requirements.⁴⁹ Currently, an area on McGregor Range known as Culp Canyon is designated as a Wilderness Study Area. As such, BLM and the Army must maintain the area in a state “where the earth and its community of life are untrammelled by man, where man himself is a visitor who does not remain.”⁵⁰ The New Mexico BLM’s statewide wilderness study, however, recommended that Culp Canyon be removed from consideration as a wilderness area.⁵¹

The MLWA also requires the BLM to manage the non-military uses of the withdrawn lands pursuant to FLPMA and other applicable law, including the Recreation Use of Wildlife Areas Act of 1962.⁵² The Act provides that the BLM may manage the lands in such a way that permits the continuation of grazing, protection of wildlife and wildlife habitat, control of predatory and other animals, recreation and suppression of brush and range fires.⁵³ The MLWA specifies that all such nonmilitary activities are subject to conditions and restrictions “as may be necessary to permit the military use of such lands for the purposes specified in or authorized pursuant to this act.”⁵⁴ The BLM may authorize use of the withdrawn land “only with the concurrence” of the military service concerned.⁵⁵ Also, each of the military services may close areas within the withdrawals when “military operations, public safety, or national security” require it, although such closures are limited to the “minimum areas and peri-

47. *Id.* § 1(a)(3).

48. *Id.* § 1(d)(3).

49. 43 U.S.C. § 1782 (1986 & West Supp. 1994).

50. *See*, 16 U.S.C. § 1131(c)(1994). McGregor Range has other unexpected environmental treasures as well. An abandoned Army shed on the range, for instance, is home to the world’s largest colony of pallid bats. While the bats are not a listed species, biologists are concerned about their disappearing habitat. Fort Bliss, therefore, dedicated the shed to the preservation of the bat colony. Juan A. Lozano, *Bat House: McGregor Range is Home to Large Colony of Pallid Bats*, EL PASO HERALD-POST, Sept. 14, 1995, at B-1.

51. U.S. DEPARTMENT OF INTERIOR, BLM NEW MEXICO STATE OFFICE, NEW MEXICO STATEWIDE WILDERNESS STUDY, VOL. 4: APPENDICES, WILDERNESS ANALYSIS REPORT 43 (1986).

52. MLWA, *supra* note 2, § 3(a)(1). The Act further specifies, however, that lands located in the Desert National Wildlife Range in Nevada and the Cabeza Prieta National Wildlife Refuge in Arizona are to be managed under the National Wildlife Refuge System Administration Act of 1966. *Id.*

53. *Id.* § 3(a)(2).

54. *Id.* § 3(a)(3)(A).

55. *Id.* § 3(a)(3)(B).

ods . . . required to carry out” the operation requiring the closure.⁵⁶ The BLM is required to develop a management plan, with the cooperation of the military services, for the lands withdrawn under the MLWA.⁵⁷ In addition, the MLWA directed the BLM and the military services to enter into a memorandum of understanding to implement the management plan.⁵⁸

The MLWA also specifies that its withdrawals did not carry with them any reserved water rights⁵⁹ and that hunting, fishing and trapping would be conducted in accordance with Title 10, section 2671.⁶⁰ These provisions of the MLWA ensure, in effect, that the withdrawn lands would be managed under state water and game laws. The MLWA also requires that the BLM and the military services determine, at least every five years, which, if any, of the withdrawn lands may be “suitable” for opening under the Mining Law of 1872, the Mineral Leasing Act of 1920, the Mineral Leasing Act for Acquired Lands of 1947, or the Geothermal Steam Act of 1970.⁶¹ The Act further specifies that mining claims are subject to the terms of FLPMA and that any patent issued as a result of mineral development would convey title only to the minerals—that the United States would retain title to the surface.⁶² These provisions in the MLWA ensure that the withdrawals caused the minimum impact possible to development of private interests while maintaining military priority over the withdrawn lands.

IV. INTER-AGENCY COOPERATION UNDER THE MLWA

The MLWA requires considerable teamwork between the military services and the BLM. It is hard to imagine any two federal agencies as fundamentally different, however, as a military service, such as the Army, and the BLM. The Army, despite its far-flung enterprises, is centralized, with the entire agency focusing on one mission — to be prepared to fight a war. To be prepared for war, all parts of the whole must work in concert with all others. Therefore, major decisions are centralized in Washington, D.C.

The BLM, on the other hand, is decentralized, with state and local offices carrying considerable independence within the agency because of

56. *Id.* § 3(b).

57. *Id.* § 3(c).

58. *Id.* § 3(e).

59. *Id.* § 10.

60. *Id.* § 11.

61. *Id.* § 12(a).

62. *Id.* §§ 12(f) & (g).

the diversity of the BLM's customer base. The BLM must constantly balance fiercely competing interests for any particular resource, which is exactly the opposite of the military's singleness of purpose. BLM officials, more so than the Army, cultivate local followings as well. Ranchers who graze their cattle on BLM administered lands become, in effect, clients of the BLM. On the few occasions when the BLM and the Army have disagreed over management of McGregor Range withdrawal lands, the Fort Bliss Commanding General has been flooded with mail from BLM supporters.⁶³

The military and the BLM have nevertheless found a way to work together to jointly manage withdrawn land on McGregor Range.⁶⁴ The Army and the BLM were able to hammer out a Memorandum of Understanding (MOU) regarding management of McGregor Range, for example, that closely defines the responsibilities of both parties regarding range management.⁶⁵ As a result, McGregor Range is a true example of multiple-use management. It provides training space for air defense artillery units, including Patriot missile units, and maneuver area for ground troops. At the same time, the range provides lucrative grazing leases for the BLM, which have reached as high as \$15 per animal unit month.⁶⁶ In addition, the range provides recreation opportunities for hunters and hikers.

The MOU between Fort Bliss and the BLM involves 71,083 acres of Army fee-owned land in addition to the 608,385 acres withdrawn under the MLWA. Under the MOU, the BLM serves as the lead agency for supervising public use of the withdrawn lands.⁶⁷ The Army is entitled to ten percent, based on the approximate proportion of its fee-owned lands to the entire range, of any income derived from public use of the range.⁶⁸

63. Unfortunately, these disagreements have occasionally surfaced in local newspapers. See, e.g., *BLM, Army at Odds Over Grazing*, LAS CRUCES (N.M.) SUN-NEWS, Sept. 7, 1995, at A1. BLM planned to issue three-year grazing leases on an area covering about 33,000 acres of McGregor Range. The Army disagreed, however, preferring to keep the land available for possible military use, because Army-wide realignment was making it difficult to gauge future space needs and approximately 117,000 acres of the range were already cleared for grazing. The two agencies eventually agreed to allow 18-month leases.

64. Because of mission requirements, the degree to which the military services and the BLM must cooperate at other withdrawal locations varies.

65. See MOU, *supra* note 3. For discussion of the respective responsibilities of BLM and Fort Bliss, see *infra* notes 67-79 and accompanying text.

66. Leases on McGregor Range are awarded by competitive bid, which is unique among BLM administered lands in the west. This system is a result of the original withdrawal in 1957, under which the Army discontinued grazing. The Army reinstated grazing in the late 1960s, and BLM assumed management of the program. By agreement between the agencies, leases on McGregor Range are awarded competitively for short periods of time, usually 9 or 18 months.

67. MOU, *supra* note 3, at 2.

68. *Id.* at 3.

BLM is also responsible for managing salable and leasable mineral programs, vegetation management and livestock grazing.⁶⁹ Livestock grazing is "based on the principles of multiple use and sustained yield."⁷⁰ In addition, BLM is designated in the MOU as the lead agency for recreational use of the range, including hunting.⁷¹ Under the MOU, Fort Bliss must concur with any nonmilitary use of the range.⁷² This requirement is consistent with Congress's language in the MLWA, which allows nonmilitary uses of military withdrawn lands only with the concurrence of the appropriate military service.⁷³

The MOU between Fort Bliss and BLM also identifies the parties' relative responsibilities for compliance with the National Environmental Policy Act (NEPA),⁷⁴ the Endangered Species Act (ESA),⁷⁵ and the National Historic Preservation Act (NHPA).⁷⁶ It also defines each agency's role in fire suppression⁷⁷ and law enforcement.⁷⁸ Additionally, the MOU provides for periodic meetings between the agencies and a process for resolving disputes between the parties.⁷⁹ The MOU has so far provided a successful framework for the BLM-Army relationship on McGregor Range.

To carry out its training mission, the Army uses its own military training plans and operating procedures, while the BLM follows its Resource Management Plan to pursue its multiple use objectives.⁸⁰ In practice, military operations are primarily focused in a low elevation portion of the range known as the Tularosa Basin, which covers approximately 450,000 acres. The BLM's operations are mainly centered on the Otero Mesa, a higher elevation grassland on the eastern half of the range, and the foothill region of the Sacramento mountains on the north end of the range. Nevertheless, military activities cover the entire range. These activities include training exercises for special operations forces, flight

69. *Id.* at 4-7.

70. *Id.* at 6.

71. *Id.* at 14-15.

72. *Id.* at 1-2.

73. MLWA, *supra* note 2, § 3(a)(3)(B).

74. MOU, *supra* note 3, at 2.

75. *Id.* at 10.

76. *Id.* at 11-13.

77. *Id.* at 16-17.

78. *Id.* at 18.

79. *Id.* at 20-21. The dispute resolution process requires, in general, that disputes are to be resolved at the lowest possible level and, if necessary, elevated to higher levels of management within the agencies. *Id.* at 21.

80. U.S. DEPARTMENT OF INTERIOR, BLM LAS CRUCES DISTRICT OFFICE, CABALLO RESOURCE AREA, RESOURCE MANAGEMENT PLAN AMENDMENT: MCGREGOR RANGE (1990).

training, limited maneuver⁸¹ and a sufficient area to protect public safety during missile firings.

V. RENEWAL OF MLWA WITHDRAWALS

Another way in which the military withdrawals will demand close cooperation between the military services and the BLM will be in processing renewal requests for the withdrawals. The Engle Act gave Congress the sole authority to continue renewals of withdrawals such as those created under the MLWA.⁸² The Engle Act requires the following basic information for applications for withdrawal: 1) the name of the agency; 2) a detailed description of the location of the property; 3) the physical characteristics of the property, including gross land and water acreage; 4) the proposed use of the withdrawn land; 5) whether the planned use "will result in contamination of any or all of the requested withdrawal," and "whether such contamination will be permanent or temporary;" 6) the period during which the proposed withdrawal would be in effect; 7) whether the proposed use would compromise use of natural resources on the land such as timber, mineral, grazing, fish and wildlife, etc.; 8) whether water rights will be required to support the proposed use of the withdrawn land.⁸³ While the Engle Act contains no specific conditions for renewal, both the BLM and the military have inferred that requirements for renewal are similar to those of an initial withdrawal.⁸⁴

The MLWA requires the military services to notify the Department of Interior by November 6, 1998 — three years prior to expiration of the withdrawals — whether the services will seek extensions.⁸⁵ This requirement appears to be consistent with FLPMA's withdrawal provision, which requires the Department of Interior to process withdrawal applications, even in situations in which Congress would make the final determination regarding withdrawal.⁸⁶ The BLM will then process the renewal applications in accordance with its regulatory procedures.⁸⁷ The applications must include information regarding cultural resources, roadless areas,

81. Every Spring, Fort Bliss hosts the Roving Sands exercise, which is the international military training exercise in the United States. It involves White Sands Missile Range, N.M., Holloman Air Force Base, N.M., and large areas of airspace.

82. 43 U.S.C. § 156.

83. 43 U.S.C. § 157.

84. *Id.*

85. MLWA, *supra* note 2, § 8(a).

86. 43 U.S.C. § 1714(c) (establishing procedures and providing for congressional review and approval of all withdrawals over 5,000 acres).

87. 43 C.F.R. pts. 2300-2310 (1981).

mineral resources, a biological assessment, an economic impact analysis, and a summary of public participation.⁸⁸ These materials may be submitted with the EIS or separately and incorporated by reference.⁸⁹ The process will likely take some time, and a smooth process will be essential if the applications are to be considered by Congress prior to the expiration of the current withdrawals.

In case of a disagreement between the applicants (the military services) and the BLM, the BLM's regulations do provide an abbreviated dispute resolution process. Under the regulations, the BLM will prepare preliminary findings and recommendations, which will be submitted to the Secretary of Interior.⁹⁰ The applicants must then have "an opportunity to discuss any objections" to the findings and recommendations.⁹¹ Finally, the BLM is required to prepare a "draft legislative proposal" with the cooperation of the applicants.⁹²

The MLWA also requires that the military services each publish a Draft Environmental Impact Statement (DEIS) for each of the withdrawn areas by November 6, 1998.⁹³ Under the Council on Environmental Quality (CEQ) regulations implementing NEPA, the BLM will likely be a cooperating agency to each of the environmental studies.⁹⁴ The respective roles of lead and cooperating agencies, however, are loosely defined in the CEQ regulations. The regulations require that a cooperating agency will participate in the NEPA process "at the earliest possible time," participating in scoping, providing information and assistance upon request of the lead agency, and using its own funds for analyses it requests.⁹⁵ An agency requested to be a cooperating agency may also decline to participate if other program commitments will not allow it.⁹⁶ In addition, prior to the expiration date of the withdrawals, each of the services are required to conduct a public hearing on the DEIS for each withdrawal.⁹⁷ The BLM will likely participate in each of those public hearings as well.

88. 43 C.F.R. § 2310.3-2(b)(3).

89. *Id.*

90. 43 C.F.R. § 2310.3-2(e).

91. *Id.* If the military services and the BLM continue to disagree, then the services' objections and the BLM Director's decision will be submitted to the Secretary of Interior for consideration. 43 C.F.R. § 2310.3-2(f)(1) & (2).

92. 43 C.F.R. § 2310.3-2(f).

93. MLWA, *supra* note 2, § 5(b). Congress apparently anticipated that the BLM would require some time to process the applications and that Congress itself would need time to act on the proposed withdrawals.

94. 40 C.F.R. § 1501.6 (1978).

95. *Id.* § 1501.6(b).

96. *Id.* § 1501.6(c).

97. MLWA, *supra* note 2, § 5(b).

To better define the roles of the agencies in the renewal process, Fort Bliss and the BLM have entered into a Memorandum of Agreement (MOA).⁹⁸ The MOA outlines the responsibilities of cooperating agencies on the EIS, the BLM's requirements in light of the Interior Department's renewal regulations, and dispute resolution procedures.⁹⁹ Most significantly, the MOA defines the focus of the analysis to be accomplished in the renewal EIS. Specifically, the primary purpose of the EIS will be to provide information to Congress regarding various withdrawal scenarios such as "continued withdrawal, the alternative of no withdrawal, and all other reasonable alternatives which may include boundary and time adjustments to the existing withdrawal."¹⁰⁰ In the MOA, the agencies agreed that a separate EIS being prepared to study Fort Bliss's "Ongoing Missions and Master Plan" would be incorporated into the renewal EIS. The BLM likely will also be a cooperating agency on the Ongoing Missions and Master Plan EIS as well.¹⁰¹ That EIS will discuss and analyze all activities on Fort Bliss.¹⁰² This approach will not only give the public opportunities to comment on proposed and ongoing training activities on Fort Bliss but also allows the public a separate opportunity to provide input to congressional decision-making.

Fort Bliss will also have requirements driven by the NHPA and the ESA. Under section 106 of the NHPA, any federal "undertaking" triggers a requirement to consult with State Historic Preservation Officers (SHPOs) and the federal government's Advisory Council on Historic Preservation (ACHP) regarding the fate of districts, sites, buildings, structures and objects that are in or eligible for the National Register of Historic Places.¹⁰³ Section 7 of the ESA requires Federal agencies to consult with the U.S. Fish and Wildlife Service to determine whether an activity will subject an endangered species or its critical habitat to "jeopardy."¹⁰⁴ Fort Bliss will satisfy the NHPA and ESA requirements concurrently with preparation of the Ongoing Mission and Master Plan EIS.

98. Memorandum of Agreement Between Fort Bliss, U.S. Army and New Mexico State Office, Bureau of Land Management, U.S.D.I. for the Renewal Application for the Withdrawal of McGregor Range, New Mexico (1996) (on file with the *Land and Water Law Review*).

99. *Id.*

100. *Id.* § II(1).

101. *Id.*

102. Fort Bliss includes about 400,000 acres of land in addition to McGregor Range. These other areas include the "main cantonment area" where the post headquarters is located adjacent to the city of El Paso, Texas.

103. 16 U.S.C. § 470f (1994). Fort Bliss archeologists estimate that there are more than 1,200 identified archeological sites on McGregor Range that have not been evaluated for eligibility for the National Register and that many more have not yet been identified.

104. 16 U.S.C. § 1536 (1994).

During the application process, the military branches and the BLM also have to work out some differences which arise because of the agencies' different missions. An early point of departure between the BLM and Fort Bliss, for instance, regarded the status of Otero Mesa and the Sacramento foothills under a possible continued withdrawal. Because of competing interests of the agencies, the BLM early in the process stated publicly that it would oppose continued withdrawal of these areas - that the areas should instead be placed under the BLM's control.¹⁰⁵ Fort Bliss was concerned because the military expects to have a continuing need for these areas. Fort Bliss and the BLM have been working diligently to come to some understanding regarding continued withdrawal that would meet the needs of both agencies and the public.

The Fort Bliss and BLM approach regarding management of the McGregor Range contrasts with the Air Force's approach for renewal of the Nellis Air Force Range in Nevada and the Barry M. Goldwater Range in Arizona. The Air Force has filed notices of intent to proceed with EISs for those two areas.¹⁰⁶ The EISs will each encompass all activities and renewal as well. In addition, the Air Force's proposed action for each of their ranges is permanent withdrawal, but Fort Bliss's proposed action will likely be for a defined period of time.

VI. CONCLUSION

With approximately seven million acres of public domain land being used both for military and nonmilitary purposes, the BLM and the military services have learned to cooperate closely in land management. Despite the sometimes conflicting missions of the agencies, the Engle Act and the MLWA have made it possible for the BLM and the military services to maximize land resources beyond the uses ordinarily seen on public domain lands. The relationship has provided valuable training and testing space for the military while continuing to allow the BLM to apply multiple use, sustained yield principles to nonmilitary land uses. The BLM has established itself as an effective partner to the military in managing the lands. Renewal of the with-

105. See, e.g., Daniel Perez, *Fort Bliss Wants Firing Ranges Intact*, EL PASO TIMES, July 4, 1996, at 1.

106. See, Notice of Intent to Prepare a Legislative Environmental Impact Statement for Barry M. Goldwater Range (BMGR) Renewal, 61 Fed. Reg. 4965-5001 (1996); Notice of Intent to Prepare a Legislative Environmental Impact Statement for Nellis Air Force Range, 61 Fed. Reg. 27,054-27,104 (1996).

drawals will require continued cooperation between the agencies. Through its past and future cooperation, however, the BLM has contributed immeasurably to the defense of the nation.