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IN FOCUS

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Secretary of the Interior's Federal Land Withdrawal Authority Under the Federal Land Policy and Management Act (FLPMA)

Introduction

Withdrawals preclude specified uses of federal land and are made for a variety of purposes. For example, some withdrawals prevent particular federal lands from being used for certain development purposes (e.g., energy development) to foster resource protection. Withdrawals also might preclude lands from use under generally applicable authorities, so as to prepare the lands for conveyance to individuals or entities or to reserve the lands for military use.

Federal land may be withdrawn from the applicability of one or more laws in various ways. Congress may enact laws to make specific land withdrawals, or the executive branch may withdraw land under various statutory authorities. Through these different authorities, many tracts of federal lands have been withdrawn from the operation of various federal land laws for differing reasons and lengths of time. The Federal Land Policy and Management Act (FLPMA; 43 U.S.C. §§1701 et seq.) contains a principal statutory authority for the Secretary of the Interior (hereinafter the Secretary) to make land withdrawals (43 U.S.C. §1714).

This In Focus pertains to the Secretary's withdrawal authority under FLPMA. Perennial issues for Congress include the effect of withdrawals on land uses; the types of withdrawal authority and circumstances of their use; revocation of withdrawals; and a congressional disapproval mechanism for certain withdrawals, among others.

Overview of FLPMA Authority

FLPMA 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 ... from one department, bureau or agency to another department, bureau or agency (43 U.S.C. §1702(j)).

FLPMA provides the Secretary with authority to make, modify, extend, or revoke withdrawals of land in federal ownership (43 U.S.C. §1714(a)). The Secretary's authority applies to lands managed by the Department of the Interior (DOI), as well as non-DOI lands with the consent of the administering agency (43 U.S.C. §1714(i)). An exception to the "consent" provision pertains to emergency withdrawals.

The statute specifies procedures and limitations for such actions. The Secretary makes and changes withdrawals by issuing public land orders (PLOs) that are published in the *Federal Register*. In practice, the Secretary's authority is delegated to and exercised by the Bureau of Land Management (BLM).

Interior Secretaries have used the FLPMA withdrawal authority for decades. Withdrawals have varied in size, depending on the needs of the area as determined by the Secretary. PLOs, from June 1942 through October 2020, that make, modify, extend, or revoke withdrawals are identified on the BLM website.

Effect of Withdrawal on Land Uses

Secretarial withdrawals typically seek to remove the designated land from operation under a specified set of laws. Withdrawals vary as to the laws invoked and the exact terms used, based on the goals for the land. Generally, subject to valid existing rights, FLPMA withdrawals might remove the federal land from one or more of three general categories of laws: (1) public land laws, (2) mining laws, and (3) mineral leasing laws. The first withdrawal category typically would bar third parties from obtaining possession of the resources on the lands and bar the lands from being conveyed out of federal ownership. The second category generally would prevent the lands from being available for new mining (e.g., under the General Mining Law of 1872). The third category generally would prevent the lands from being available for new mineral leasing, sale of mineral materials, and geothermal leasing.

Types of Withdrawals

FLPMA authorizes and sets out procedures for three types of Secretarial withdrawals—5,000 acres or more (43 U.S.C. §1714(c)), less than 5,000 acres (43 U.S.C. §1714(d)), and "emergency" situations (43 U.S.C. §1714(e)).

Non-Emergency Withdrawals

For non-emergency withdrawals, regardless of size, the Secretary must publish a notice of the proposed withdrawal in the *Federal Register*. This publication segregates the lands from operation under the public land laws, to the extent specified in the notice, for up to two years while the Secretary determines whether to withdraw the lands. During this period, the Secretary typically holds public hearings, receives public comments, and conducts environmental reviews and other analyses before determining whether to approve a withdrawal (43 U.S.C. §1714 and 43 C.F.R. Subpart 2310).

Under FLPMA, the Secretary can make withdrawals of 5,000 acres or more (for purposes other than military) for

no more than 20 years, subject to renewal. FLPMA requires the Secretary to notify Congress of such a withdrawal. In addition, FLPMA requires the Secretary to provide the committees of jurisdiction (in practice, typically the House Committee on Natural Resources and the Senate Committee on Energy and Natural Resources) with extensive information on the withdrawal. Topics include proposed and current land uses; effect of the withdrawal on state and local government interests, the regional economy, and the environment; and consultation with governmental and nongovernmental entities (43 U.S.C. §1714(c)).

For withdrawals aggregating less than 5,000 acres, the Secretary need not provide such notice to Congress and the duration depends on the intended use. For a "resource use," the withdrawal may be however long the Secretary "deems desirable." For any other use (e.g., administrative sites), the withdrawal may not be more than 20 years, except that if the land is withdrawn to preserve it for a specific use that Congress is considering, the limit is 5 years.

Emergency Withdrawals

With regard to emergency withdrawals, FLPMA authorizes the Secretary to "immediately make a withdrawal" when the Secretary determines that (1) an emergency exists and (2) "extraordinary measures must be taken to preserve values that would otherwise be lost" (43 U.S.C. §1714(e)). An emergency withdrawal is effective when made and has a maximum duration of three years. The withdrawal may be extended only under other provisions of FLPMA governing non-emergency withdrawals.

Revocation of a Withdrawal

Withdrawals may expire under their own terms or be revoked by the Secretary. BLM regulations define *revocation* as "the cancellation of a Public Land Order" (43 C.F.R. §2091.0-5). BLM regulations state that withdrawals are revoked "by publication in the *Federal Register* of a Public Land Order" (43 C.F.R. §2091.6). Other BLM regulations outline procedures for revoking a withdrawal and restoring the lands to a suitable condition (if needed) when the administering agency "no longer need[s]" the withdrawn land (43 C.F.R. Part 2370).

Land included in a withdrawal "that is revoked, terminates or expires" does not automatically become open for use under the general land laws (43 C.F.R. §2091.6). Instead, the land is "opened" through publication in the *Federal Register* of an opening order, which may be included in the PLO revoking the withdrawal or may be published separately (43 C.F.R. §2091.6). (These procedures also apply to withdrawals that expire.) In either case, the opening order specifies the date of opening, which agency will manage the lands, and the terms and conditions of management. For instance, the opening order may allow the lands to be open under the public land laws generally or open under some but not all of these laws (e.g., open to mineral leasing but not mining). In some cases, the order specifies that the lands will be closed generally under the public land laws (e.g., to allow for a specific conveyance of the lands out of federal ownership). In practice, the Secretary's PLOs often include the opening orders.

The authority and process for revoking emergency withdrawals differ in some respects from those for other types of withdrawals. FLPMA is silent on revoking emergency withdrawals, providing only that such withdrawals cannot exceed three years or be extended (43 U.S.C. §1714(e)). BLM regulations provide that lands covered by an emergency withdrawal are automatically opened on the expiration date in the emergency order, unless the withdrawal is extended under other provisions of FLPMA (43 C.F.R. §2091.5-3). The regulations do not address whether or how the Secretary might revoke an emergency withdrawal before the expiration date.

Whether the Secretary may revoke an emergency withdrawal remains untested; no Secretary has voluntarily revoked an emergency withdrawal. One court concluded in a court-directed revocation that the Secretary has an implied power to revoke an emergency withdrawal initiated by a congressional committee "after a reasonable time" (Pacific Legal Foundation v. Watt, 529 F. Supp. 982, 1000 (D. Mont. 1981)). Assuming BLM may revoke emergency withdrawals, whether BLM must obtain consent from a non-DOI administering agency would depend on how, and under what authority, it accomplished the revocation.

Congressional Resolution of Disapproval

FLPMA establishes an expedited procedure for Congress to disapprove by concurrent resolution certain land withdrawals by the Secretary aggregating 5,000 acres or more (43 U.S.C. §1714(c)). The Secretary is to notify both the House and the Senate of a qualifying land withdrawal no later than its effective date. Such a withdrawal terminates at the end of a period of 90 days of continuous session, which begins on the day of such notice, if Congress adopts a concurrent resolution indicating that it does not approve the withdrawal. Concurrent resolutions are non-lawmaking forms of legislation that must be agreed to by both chambers in identical form in order to go into force.

The concurrent disapproval resolution qualifies for special expedited parliamentary procedures at the committee level and at the point of calling up the resolution on the floor of each chamber (43 U.S.C. §1714(c)). CRS has been unable to identify from readily available sources any instance in which a land withdrawal aggregating 5,000 acres or more has been disapproved by this FLPMA mechanism.

In a 2017 case, the U.S. Court of Appeals for the Ninth Circuit ruled that the concurrent resolution disapproval mechanism in FLPMA constituted an unconstitutional legislative veto due to the omission in the statutory provision of a requirement to present the resolution to the President (National Mining Association v. Zinke, 877 F.3d 845, 861-866 (9th Cir. 2017)). (This ruling was based on the Supreme Court's ruling in *Immigration and Naturalization Service v. Chadha* (462 U.S. 919 (1983)). The U.S. Court of Appeals for the Ninth Circuit concluded that the legislative veto component of the FLPMA provision was severable from the remainder of the authority, leaving the Secretary's withdrawal authority under FLPMA otherwise intact.

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