

DAYBREAK ON THE LAND: THE COMING OF AGE OF THE FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976

Roger Flynn*

Although environmental and natural resource laws such as the Clean Water Act, Clean Air Act, and the Endangered Species Act are the ones that normally gather the headlines (and law review articles), less well known laws play an important role in setting the nation's environmental and public lands agenda. One of the most important of these laws in the western states is the Federal Land Policy and Management Act of 1976, better known as FLPMA.¹ Despite its coverage of almost all aspects of western resource development and protection, little attention has been given to FLPMA compared to other prominent public land and environmental statutes. That is changing.

In recent years, FLPMA has been at the forefront of some of the West's major public land and resource litigation disputes. Significant federal court decisions have asserted FLPMA's environmental protection provisions over mining, water development, and property rights.² On the other hand, the Supreme Court recently held that some of FLPMA's general provisions are not judicially enforceable in all instances.³ These developments, and the resulting new look at long-established legal regimes in the West, could fundamentally alter the way westerners and resource managing agencies view public lands and waters in the region.

This article will focus on these developments and give an overview of the growing importance of FLPMA in the management of the West's resources.

* Director and Managing Attorney, Western Mining Action Project, a non-profit law firm specializing in hardrock mining issues in the West, located in Lyons, Colorado. Adjunct Professor of Law, University of Colorado School of Law; Adjunct Professor of Law, University of Wyoming College of Law; J.D. 1991, University of Colorado School of Law; B.S. 1984, Lehigh University.

1. Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701–1785 (2000).

2. *See* Mineral Policy Ctr. v. Norton, 292 F. Supp. 2d 30, 42 (D.D.C. 2003) (concluding that the FLPMA requires the Secretary of Interior to disapprove of a mining operation that unduly harms or degrades public land); *County of Okanogan v. Nat'l Marine Fisheries Serv.*, 347 F.3d 1081, 1086 (9th Cir. 2003) (stating that FLPMA allows the Forest Service to restrict water rights-of-way to protect fish and wildlife); *Trout Unlimited v. United States Dep't of Agric.*, 320 F. Supp. 2d 1090, 1110 (D. Colo. 2004) (determining that the alternative chosen by the Forest Supervisor was arbitrary and capricious because it did not minimize harm to fish and wildlife).

3. *Norton v. S. Utah Wilderness Alliance*, 124 S. Ct. 2372, 2379–80 (2004) (stating “that the only agency action that can be compelled under the APA is action legally required”).

I. HISTORICAL BASIS FOR FLPMA—THE BLM'S ORGANIC ACT

FLPMA, considered the organic act of the Bureau of Land Management (BLM), is the primary public land management statute governing the BLM, an agency of the Department of the Interior.⁴ In addition, numerous other provisions of FLPMA direct the activities of both the BLM and the U.S. Forest Service, an agency of the Department of Agriculture. In 1976, Congress passed FLPMA to provide the BLM with a framework for managing its lands.⁵ In the introductory letter of transmittal of the comprehensive congressional committee document published after FLPMA's passage, the chairman of the Senate Committee on Energy and Natural Resources outlined the importance of FLPMA to the management of the western public lands:

The Federal Land Policy and Management Act of 1976 represents a landmark achievement in the management of the public lands of the United States. For the first time in the long history of the public lands, one law provides comprehensive authority and guidelines for the administration and protection of the Federal lands and their resources under the jurisdiction of the Bureau of Land Management. This law enunciates a Federal policy of retention of these lands for multiple use management and repeals many obsolete public land laws which heretofore hindered effective land use planning for and management of public lands. The policies contained in the Federal Land Policy and Management Act will shape the future development and conservation of a valuable national asset, our public lands.⁶

In addition to establishing policy and statutory direction to the federal agencies, FLPMA also directs the Secretary of the Interior to “promulgate rules and regulations to carry out the purposes of [FLPMA] and of other laws applicable to the public lands.”⁷

4. Frank Gregg, *Symposium of the Federal Land Policy and Management Act: Introduction*, 21 ARIZ. L. REV. 271, 271 (1979); see Roger Flynn & Jeffrey C. Parsons, *The Right to Say No: Federal Authority over Hardrock Mining on Public Lands*, 16 J. ENVTL. L. & LITIG. 249, 256 (stating BLM lands are “generally governed by FLPMA”).

5. *Mineral Policy Ctr.*, 292 F. Supp. 2d at 33. “BLM is responsible for 260 million acres of land in the western states.” *Id.* at 33 n.6.

6. SENATE COMM. ON ENERGY & NATURAL RES., 95TH CONG., LEGISLATIVE HISTORY OF THE FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976, at vi (Comm. Print 1978).

7. 43 U.S.C. § 1740 (2000). “[P]ublic lands” are defined in FLPMA as any land and interest in land owned by the United States within the several States and administered by the Secretary of the Interior through the Bureau of Land Management, without regard to how the United States acquired ownership,

Prior to FLPMA, a myriad of laws covering a variety of issues governed the management of BLM lands.⁸ In a case dealing with just one of these issues, the public's right to enter and obtain title to the public domain and the Executive's authority to withdraw land from such entry, the Supreme Court correctly noted that, prior to FLPMA, "[m]anagement of the public lands under these various laws became chaotic."⁹

Perhaps most critically, prior to FLPMA, the BLM did not really have a guiding statutory mandate for management of its public lands. Unlike the other two major public land management agencies, the Forest Service and the National Park Service, the BLM did not have an "organic act" that coalesced its management authority in one centralized statute.¹⁰

Congress was aware of these deficiencies and in 1964 established the Public Land Law Review Commission to study the overall issues regarding management of the public lands.¹¹ The Commission issued its seminal report, entitled "One Third of the Nation's Land," in 1970.¹² The Report contained a number of recommendations that eventually became the cornerstone of FLPMA. The Report focused attention on the need for comprehensive legislation to govern BLM lands and related issues.¹³

In light of the Report's findings, Congress recognized that this statutory void was leading to widespread degradation of BLM lands, and therefore, sought to fill that gap.¹⁴ FLPMA required the BLM to manage its

except—

- (1) lands located on the Outer Continental Shelf; and
- (2) lands held for the benefit of Indians, Aleuts, and Eskimos.

§ 1702(e).

8. Rocky Mountain Oil & Gas Ass'n v. Watt, 696 F.2d 734, 737 (10th Cir. 1982).

9. Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 876 (1990).

10. Although other laws certainly apply to the Forest Service (such as the National Forest Management Act of 1976, Pub. L. No. 94-588, 90 Stat. 2949 (codified in scattered sections of 16 U.S.C.)), the Forest Service has been guided by the Organic Administration Act of 1897, 16 U.S.C. §§ 473-478, 479, 480-482, 551 (2000) (originally enacted as part of the Act of June 4, 1897, ch. 2, 30 Stat. 11, 34-36). The National Park Service Organic Act, 16 U.S.C. §§ 1-4 (2000), governs the National Park Service.

11. Pub. L. No. 88-606, 78 Stat. 982 (1964) (establishing the Public Land Law Review Commission); see also Bureau of Land Mgmt., The Federal Land Policy and Management Act (FLPMA) of 1976: How the Stage was Set for BLM's "Organic Act," at <http://www.blm.gov/flpma/organic.htm> (last visited Apr. 7, 2005).

12. See Bureau of Land Mgmt., *supra* note 11 (stating that Congress established the Commission in order for them "to make recommendations on how the public lands should be managed").

13. See *id.* (declaring that the Report went to Congress and after three deliberative sessions, FLPMA was passed in 1976).

14. Upon the introduction of S. 507—a predecessor bill to FLPMA—Colorado Senator Haskell explained that:

In the vacuum created by the absence of this authority, the unnecessary waste and destruction of our country's most valuable resource—its land—is almost

lands for multiple use and sustained yield and to balance competing resource interests, including in part, historical, ecological, environmental, and archaeological values.¹⁵ FLPMA fundamentally shifted the country's historical preference for "disposal" of the public lands—a practice that governed federal land policy since the country's inception. "In 1976, Congress passed the FLPMA, which repealed many of the miscellaneous laws governing disposal of public land, and established a policy in favor of

awesome in its dimensions.

. . . [E]xamples of the degradation of our public domain land due to the fact that the BLM lacks an adequate statutory base to protect them make our continuing failure to enact necessary legislation an embarrassment and, worse, a dereliction [sic] of duty.

121 CONG. REC. S1232 (daily ed. Jan. 30, 1975) (statement of Sen. Haskell), *reprinted in* LEGISLATIVE HISTORY OF THE FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976, *supra* note 6, at 54. As the Senate Report accompanying S. 507 stated, the need for environmental protection is at the core of FLPMA: "Among the principal goals and objectives are retention of the national resource lands in Federal ownership and management of these lands under principles of multiple use and sustained yield in a manner which will assure the quality of their environment for present and future generations." S. REP. NO. 94-583, at 35 (1975), *reprinted in* LEGISLATIVE HISTORY OF THE FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976, *supra* note 6, at 66, 100.

15. 43 U.S.C. § 1701(a)(8) (2000). The Interior Department's letter to the Senate on S. 507 explained that:

The national resource lands were for many years used as a means of stimulating the growth and development of the West. Consequently, little attention was given to preserving the irreplaceable [sic] values of those lands.

. . . the bill declares a national policy that these lands be managed under the principles of multiple use and sustained yield in a manner which will, using all practicable means and measures, protect the quality of [the] environment

S. REP. NO. 94-583, at 66, 90 (1975), *reprinted in* LEGISLATIVE HISTORY OF THE FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976, *supra* note 6, at 155. In the enacted bill that became FLPMA, Congress declared that

the public lands be managed in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archaeological values; that, where appropriate, will preserve and protect certain public lands in their natural condition; that will provide food and habitat for fish and wildlife and domestic animals; and that will provide for outdoor recreation and human occupancy and use[.]

43 U.S.C. § 1701(a)(8) (2000). The Tenth Circuit summarized the fundamental justification for FLPMA:

Congress had not established a comprehensive statutory base for the management of [BLM] lands, as it had for the smaller national park, forest, and wildlife refuge systems. Instead, the BLM was charged with administering the lands and their resources under a myriad of public land laws serving a variety of competing and often conflicting interests. Recognizing the need to provide guidance and a comprehensive statement of Congressional policies concerning the management of the public lands, Congress enacted the Federal Land Policy and Management Act of 1976.

Rocky Mountain Oil & Gas Ass'n v. Watt, 696 F.2d 734, 737–38 (10th Cir. 1982) (citations omitted) (footnote omitted).

retaining public lands for multiple use management.”¹⁶ Along with these policies to manage and protect the environment, however, Congress also stated its policy that “the public lands be managed in a manner which recognizes the Nation’s need for domestic sources of minerals, food, timber, and fiber from the public lands.”¹⁷

Thus, by its own language, FLPMA set up an inherent conflict between the need for environmental protection and stewardship and long-standing national policies for resource use and extraction on public lands. In an attempt to manage this conflict, FLPMA established a statutory framework for governing the uses of BLM land (and related Forest Service decision-making).

II. BASIC FRAMEWORK OF FLPMA

FLPMA “established a policy in favor of retaining public lands for multiple use management.”¹⁸ However, as the Supreme Court recently noted: “‘Multiple use management’ is a deceptively simple term that describes the enormously complicated task of striking a balance among the many competing uses to which land can be put”¹⁹ The other overarching FLPMA mandate is to manage the land for “sustained yield,” which “requires BLM to control depleting uses over time, so as to ensure a high level of valuable uses in the future.”²⁰

These directives are implemented on the ground in a number of ways, often depending upon the particular resource at issue.²¹ Overall, Congress directed that “[t]he Secretary [of the Interior] shall manage the public lands under principles of multiple use and sustained yield, in accordance with the land use plans developed by him.”²² “To these ends, FLPMA establishes a dual regime of inventory and planning. Sections 1711 and 1712, respectively, provide for a comprehensive, ongoing inventory of federal lands, and for a land use planning process that ‘project[s]’ ‘present and

16. *Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. 871, 877 (1990) (citation omitted). “The Congress declares that it is the policy of the United States that—[] the public lands be retained in Federal ownership” 43 U.S.C. § 1701(a)(1).

17. 43 U.S.C. § 1701(a)(12).

18. *Norton v. S. Utah Wilderness Alliance*, 124 S. Ct. 2373, 2376 (2004) (quoting *Lujan*, 497 U.S. at 877).

19. *Id.* (citing FLPMA, 43 U.S.C. § 1702(c)).

20. *Id.* (citing FLPMA, 43 U.S.C. § 1702(h)).

21. For a comprehensive and early look at FLPMA’s various provisions, see the special volume of the *Arizona Law Review* published in 1979 dedicated to FLPMA, Symposium, *The Federal Land Policy and Management Act*, 21 ARIZ. L. REV. 267 (1979).

22. 43 U.S.C. § 1732(a).

future use,' given the lands' inventoried characteristics."²³ FLPMA, along with certain regulatory provisions, "prevent[s] BLM from taking actions inconsistent with the provisions of a land use plan."²⁴ Under the BLM's regulations implementing FLPMA, "[a]ll future resource management authorizations and actions . . . and subsequent more detailed or specific planning, shall conform to the approved plan."²⁵

In addition to compliance with land use plans (called "resource management plans," or RMPs), FLPMA also mandates specific resource management standards.²⁶ These standards apply either across the board to all BLM decision-making, or to specific management decisions.²⁷ The basic FLPMA management standard, applicable to all BLM decisions, is that: "In managing the public lands the Secretary [of the Interior] shall, by regulation or otherwise, take any action necessary to prevent unnecessary or undue degradation of the lands."²⁸ This is known as the "UD standard." Despite its overarching reach, this mandate has received little federal court attention over the years. However, a recent case discussed in detail below has shed important light on the UD standard and how it should be implemented across the West.²⁹

Other management standards apply depending on the resource and the specific FLPMA section. For example, regarding FLPMA's grant of authority to the Secretaries of Interior and Agriculture to grant rights-of-way across federal land, the agencies are obligated to "minimize damage to scenic and esthetic values and fish and wildlife habitat and otherwise protect the environment."³⁰ Concerning the goal of "multiple use," FLPMA requires that the public lands be managed "so that they are utilized in the combination that will best meet the present and future needs of the American people."³¹ In managing Wilderness Study Areas (WSA's), FLPMA provides that "the Secretary [of Interior] shall continue to manage such lands . . . in a manner so as not to impair the suitability of such areas for preservation as wilderness."³² Many of these standards have received increasing judicial scrutiny in recent years.³³

23. *Norton*, 124 S. Ct. at 2376 (alteration in original) (citation omitted) (quoting 43 U.S.C. § 1701(a)(2)).

24. *Id.* at 2382.

25. 43 C.F.R. § 1610.5-3(a) (2003).

26. *See* 43 U.S.C. § 1732(a) (stating the requirements for multiple use and sustained yield).

27. *Id.*

28. 43 U.S.C. § 1732(b) (2000).

29. *Mineral Policy Ctr. v. Norton*, 292 F. Supp. 2d 30 (D.D.C. 2003); *see infra* Part III.B.2.

30. 43 U.S.C. § 1765(a)(ii).

31. § 1702(c).

32. § 1782(c).

33. *See infra* Part III (discussing interpretations of FLPMA's impact on water, mining, and

In addition to establishing these management standards for specific resource decision-making, FLPMA also established broad directives for a number of primary resource issues.³⁴ Many of these provisions have been subject to recent judicial and administrative decisions that have focused the public's attention on FLPMA, in some instances for the first time.³⁵ Further, a number of important federal court decisions have dealt with the overall place of FLPMA within western resource management and administrative law—expanding FLPMA's reach in some areas (over water rights, water flows, and mining) and limiting it in others (under the Administrative Procedure Act).³⁶

III. FLPMA'S PREDOMINANCE OVER WESTERN WATER, MINING, AND PROPERTY RIGHTS

Recent federal court decisions have established the predominance of FLPMA's resource protection mandates. This has occurred where it might have been least expected—in cases challenging the preeminence of two of the West's great resource policies: the prior appropriation doctrine of western water law and the “right to mine” under the General Mining Law of 1872.³⁷ These two policies, along with the underlying claims of private property rights in public resources, have been the foundation for resource use, development, and settlement of the West since the Civil War.

A. *FLPMA's Mandate to Protect Water and Fisheries Trumps State-Issued Water Rights*

In two major decisions, the federal courts have recently upheld the federal agencies' duty under FLPMA to protect fisheries and wildlife, even to the extent such protection overrides the exercise of vested state-issued

property rights).

34. See, e.g., FLPMA, Pub. L. No. 94-579, § 201 (Land Inventories); § 202 (Land Use Plans); § 204 (Land Withdrawals); § 206 (Land Exchanges); § 302 (Use and Occupancy); § 314 (Mining Claim Recordation); §§ 401–403 (Range Management); §§ 501–511 (Rights-of-Way); § 601 (California Desert Conservation Area); § 603 (Wilderness Study Areas).

35. See *infra* Part III (reviewing recent judicial and administrative interpretations of FLPMA's resource management provisions).

36. *Id.*

37. *Mineral Policy Ctr. v. Norton*, 292 F. Supp. 2d 30, 33 (D.D.C. 2003) (explaining that Congress enacted FLPMA in order to amend the General Mining Law of 1872 and “reflect the nation's changed view toward land and minerals”); *County of Okanogan v. Nat'l Marine Fisheries Serv.*, 347 F.3d 1081, 1086 (9th Cir. 2003) (finding that the Forest Service has the power to restrict rights-of-way to protect fish and wildlife without having to defer to state law).

water rights.³⁸ In the arid western states, water law is primarily governed by the “prior appropriation doctrine.”³⁹ “Under the appropriation doctrine prevailing in most of the Western States, the mere fact that a person controls land adjacent to a body of water means relatively little; instead, water rights belong to ‘[t]he first appropriator of water for a beneficial use,’ but only ‘to the extent of his actual use’”⁴⁰

From the beginning of the post-Civil War era of opening the western lands to settlement and development, Congress recognized the importance of the prior appropriation doctrine of western state water laws. For example, in the first major legislation dealing with hardrock mining, the Mining Act of 1866, Congress specifically “recognized and acknowledged” the vested rights to divert and appropriate waters.⁴¹ “Congress intended ‘to recognize as valid the customary law with respect to the use of water which had grown up among the occupants of the public land under the peculiar necessities of their condition.’”⁴² The Mining Act of 1866 and other early public land statutes confirmed the preeminence of western water rights.⁴³

In 1877, Congress specifically severed non-navigable waters from the public lands and further recognized that such waters were to be appropriated and used pursuant to state prior appropriation laws.⁴⁴ As the Supreme Court stated:

38. *County of Okanogan*, 347 F.3d 1081, *cert. denied*, 124 S. Ct. 2094 (2004); *Trout Unlimited v. U.S. Dep’t of Agric.*, 320 F. Supp. 2d 1090 (D. Colo. 2004).

39. For differing views regarding the prior appropriation doctrine, compare Charles F. Wilkinson, *In Memorium, Prior Appropriation 1848–1991*, 21 ENVTL. L. i, v (1991), with A. Dan Tarlock, *The Future of Prior Appropriation in the New West*, 41 NAT. RESOURCES J. 769 (2001).

40. *Andrus v. Charlestone Stone Prod. Co.*, 436 U.S. 604, 615 (1978) (alteration in original) (quoting *Cal. Or. Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 154 (1935)).

41. Mining Act of 1866, ch. 262, § 9, 14 Stat. 251, 253. Senator Stewart, a strong supporter of federal mining laws stated during debate on section 9 that the law “confirms the rights to the use of water . . . as established by local law and the decisions of the courts. In short, it proposes no new system, but sanctions, regulates, and confirms a system to which the people are devotedly attached” CONG. GLOBE, 39th Cong., 1st Sess. 3225, 3227 (1866).

42. *California v. United States*, 438 U.S. 645, 656 (1978) (quoting *Basey v. Gallagher*, 87 U.S. (20 Wall.) 670, 684 (1874)).

43. *Cal. Or. Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 155 (1935)
 [These statutes] reach[ed] into the future as well, and approve[d] and confirm[ed] the policy of appropriation for a beneficial use, as recognized by local rules and customs, and the legislation and judicial decisions of the arid-land states, as the test and measure of private rights in and to the non-navigable waters on the public domain.

Id.

44. Desert Lands Act of 1877, ch. 107, 19 Stat. 377, *construed in Cal. Or. Power Co.*, 295 U.S. at 155–65; *see also California*, 438 U.S. at 657–58 (reviewing the Court’s discussion of the Desert Lands Act in *Cal. Or. Power Co.*).

[A]ll non-navigable waters then a part of the public domain became *publici juris*, subject to the plenary control of the designated states, including those since created out of the territories named, with the right in each to determine for itself to what extent the rule of appropriation or the common-law rule in respect of riparian rights should obtain.⁴⁵

Thus, ever since that time it was generally accepted that, except for the limited reservation of water rights pursuant to federal reservations (“federal reserved rights”), waters on the public lands were subject to private appropriation under state law, with minimal interference by the federal land management agencies.⁴⁶ Although there are numerous types of federal reservations and with them federal reserved water rights, with one major exception, the vast majority of BLM lands do not contain any federal reserved water rights.⁴⁷

45. *Cal. Or. Power*, 295 U.S. at 163–64.

46. The doctrine of federal reserved water rights was first established in *Winters v. United States*, 207 U.S. 564 (1908). The reserved rights doctrine exempts from appropriation enough water to fulfill the purposes of the reservation. Although for many years the doctrine was thought to be limited to just Indian reservations, the case in *Winters*, the Supreme Court later confirmed that the doctrine applied to other federal reservations. *Arizona v. California*, 373 U.S. 546, 600–01 (1963); *see also* *Cappaert v. United States*, 426 U.S. 128, 147 (1976) (upholding federal reservation of water in the establishment of Devil’s Hole as part of Death Valley National Monument). For a comprehensive review of federal reserved water rights in the context of public land management, *see* GEORGE CAMERON COGGINS ET AL., *FEDERAL PUBLIC LAND AND RESOURCES LAW* 510–57 (5th ed. 2002).

47. The exception involves Public Water Reserve # 107 (“PWR 107”), which was created by Executive Order by President Calvin Coolidge in 1926. PWR 107 provides:

[I]t is hereby ordered that every smallest legal subdivision of the public-land surveys which is vacant unappropriated unreserved public land and contains a spring or water hole, and all land within one quarter of a mile of every spring or water hole located on unsurveyed public land be, and the same is hereby, withdrawn from settlement, location, sale, or entry, and reserved for public use in accordance with the provisions of section 10 of the act of December 29, 1916

Exec. Order of Apr. 17, 1926, previously codified at 43 C.F.R. § 292.16 (1938), *quoted in* GENERAL LAND OFFICE, DEPARTMENT OF INTERIOR, CIRCULAR 1066, 51 I.D. 457–58 (1926). “The above order [PWR 107] was designed to preserve for general public use and benefit unreserved public lands containing water holes or other bodies of water needed or used by the public for watering purposes.” *Id.* The 1926 Executive Order and withdrawal were promulgated under the authority of the Stock-Raising Homestead Act of 1916, which provided that withdrawn “lands containing water holes or other bodies of water needed or used by the public for watering purposes . . . shall, while so reserved, be kept and held open to the public use for such purposes” Stock-Raising Homestead Act of 1916, ch. 9, § 10, 39 Stat. 862, 865. According to the Interior Department:

Assuming that the water is a spring and is on public land it would be subject to the Executive order of April 17, 1926, establishing Public Water Reserve No. 107. The Executive order withdrew all springs and water holes on public lands and the surrounding acreage [smallest legal subdivision or all lands within one quarter mile for unsurveyed lands]. It was designed to preserve for the general public lands containing water holes and other bodies of water needed or used by the

With the passage of FLPMA, however, Congress gave the Department of Interior, and to a lesser extent the Department of Agriculture, broad authority over the uses of public land. With that authority came the mandate to condition the use of lands to protect water on public lands. The Ninth Circuit recently confirmed that, even in the absence of federal reserved water rights, the duty to manage and protect public land and waters on public land is not diminished in any way by the need to accommodate state-issued water rights.⁴⁸ In *County of Okanogan v. National Marine Fisheries Service*, the Court rejected a claim by water rights holders that the Forest Service's management duties under FLPMA are subservient to state water rights.⁴⁹

At bottom, appellants argue that the Forest Service does not have the authority to condition the use of the rights-of-way in a national forest on the maintenance of instream flows because such restrictions deny them their vested water rights under state law.

... [T]hey in effect argue that compliance with [federal environmental and public land law] was not authorized because such compliance would deny them their vested water rights under state law. We cannot agree with this argument for several reasons.⁵⁰

The Ninth Circuit went on to discuss several federal statutes that create duties upon federal agencies that cannot be overridden to accommodate state-issued water rights.⁵¹ One of the laws the court focused on was FLPMA.⁵²

The FLPMA provision at issue in *County of Okanogan* dealt with the agency's issuance of rights-of-way across federal land.

[FLPMA] authorizes the Secretaries of the Interior and Agriculture to "grant, issue, or renew rights-of-way over" public

public for water purposes.

Desert Survivors, 80 IBLA 111, 112, 115-16 (1984) (rejecting BLM approval of a mining plan that did not adequately consider and protect water sources under PWR 107). PWR 107 creates a federal reserved water right in water flows that must be maintained to protect public watering uses. *United States v. Idaho*, 959 P.2d 449, 453 (Idaho 1998), *cert. denied*, *Idaho v. United States*, 526 U.S. 1012 (1999).

48. *County of Okanogan v. Nat'l Marine Fisheries Serv.*, 347 F.3d 1081, 1085-86 (9th Cir. 2003), *cert. denied*, 124 S. Ct. 2094 (2004).

49. *Id.* at 1084, 1086.

50. *Id.* at 1084-85.

51. *Id.* at 1085.

52. *Id.* (citations omitted).

lands for “ditches . . . for the . . . transportation . . . of water.” Such rights-of-way “shall contain . . . terms and conditions which will . . . minimize damage to . . . fish and wildlife habitat and otherwise protect the environment” and that will “require compliance with applicable . . . water quality standards established by or pursuant to applicable Federal or State law.”⁵³

The Ninth Circuit held that these provisions “give the Forest Service authority to maintain certain levels of flow in the rivers and streams within the boundaries of the Okanogan National Forest to protect endangered fish species.”⁵⁴

The Ninth Circuit rejected the argument that state-issued water rights overrode the federal land agency’s duties under FLPMA. “FLPMA specifically authorizes the Forest Service to restrict such rights-of-way to protect fish and wildlife and maintain water quality standards under federal law, without any requirement that the Forest Service defer to state water law.”⁵⁵ The court noted that the case “is not a controversy over water rights, but over rights-of-way through lands of the United States, which is a different matter, and is so treated in the right-of-way acts.”⁵⁶

53. *Id.* (quoting 43 U.S.C. § 1765(a) (2000)).

54. *Id.*

55. *Id.* at 1086. Any asserted state “veto” over BLM or Forest Service actions that may implicate state-granted water rights would also violate the Supremacy and Property Clauses of the U.S. Constitution. U.S. CONST. art. VI, cl. 2 (Supremacy), art. IV, § 3, cl. 2 (Property). Under these provisions, federal authority preempts conflicting state law, particularly on federal lands. *Id.* Congress exercises “plenary” power over the federal lands. “[T]he power over public land thus entrusted to Congress [under the Property Clause] is without limitations.” *Kleppe v. New Mexico*, 426 U.S. 529, 539 (1976) (quoting *United States v. San Francisco*, 310 U.S. 16, 29 (1940)); *see also* *Light v. United States*, 220 U.S. 523, 535–36 (1911) (upholding federal regulation of public land despite contrary state law). “No state legislation may interfere with Congress’ power over the public domain . . .” *Nevada v. United States*, 512 F. Supp. 166, 172 (D. Nev. 1981). Under the Supremacy Clause, federal authority cannot be superseded by any “state law [that] stands as an obstacle to the accomplishment of the full purposes and objectives of Congress.” *Cal. Coastal Comm’n v. Granite Rock Co.*, 483 U.S. 572, 581 (1987) (quoting *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984)).

56. *County of Okanogan*, 347 F.3d at 1086 (quoting *Utah Power & Light Co. v. United States*, 243 U.S. 389, 411 (1917)). The Ninth Circuit’s holding in *County of Okanogan* comports with other federal court decisions which have rejected arguments that state-issued water rights override statutory mandates governing federal land. The cases have usually arisen in the context of national forests, not BLM land. *See Adams v. United States*, 3 F.3d 1254, 1260 (9th Cir. 1993) (finding a water right “vested according to local custom or law” but emphasizing that “[t]he Forest Service still has the authority to reasonably regulate” it); *Nev. Land Action Ass’n v. United States Forest Serv.*, 8 F.3d 713, 719 (9th Cir. 1993) (affirming federal regulation of grazing that would adversely impact valid state water rights); *Wright v. Inman*, 923 F. Supp. 1295, 1302 (D. Nev. 1996) (holding that the federal land agency was not under an obligation to protect private water rights in reviewing a proposed mining operation); *Elko County Bd. of Supervisors v. Glickman*, 909 F. Supp. 759, 764 (D. Nev. 1995) (determining that a vested right-of-way for an irrigation ditch “is nevertheless subject to reasonable Forest Service regulation, where ‘reasonable’ regulation is defined as regulation which neither prohibits

The Ninth Circuit also rejected the argument that FLPMA's rights-of-way provision was "subject to valid existing rights."⁵⁷ This is because the subject rights-of-way were not "vested property rights" but were "revocable at the discretion of the federal government."⁵⁸

The plaintiffs/appellants in *County of Okanogan* also argued that the land management agency's imposition of minimum flows was tantamount to the creation of a federal reserved water right.⁵⁹ They argued that, as held by the Supreme Court in *United States v. New Mexico*, "Congress did not, in enacting [various public land management statutes and creating the National Forests], intend the federal government to reserve water rights for [environmental] protection purposes."⁶⁰ The Ninth Circuit rejected this position as well, noting that the imposition of minimum flows under FLPMA and related public land statutes did not create any reserved water rights and that *United States v. New Mexico* "did not address the power of the Forest Service to restrict the use of rights-of-way over federal land."⁶¹

The Ninth Circuit's reasoning was followed in a recent Colorado federal district case, *Trout Unlimited v. United States Department of Agriculture*.⁶² That case also dealt with the federal land agency's imposition of a minimum flow requirement as a condition of a FLPMA right-of-way.⁶³ The Colorado court relied on the Ninth Circuit's decision in *County of Okanogan* and went into further detail regarding the conflict between the assertion of a state water right and the federal agency's duties to protect the environment under FLPMA and other statutes.⁶⁴ The court specifically rejected the argument that the imposition of minimum flows (or "bypass flows") as a condition of renewal of a FLPMA right-of-way did not create any federal water rights.⁶⁵ "The Forest Service's exercise of its regulatory authority to impose bypass flows as a condition on the use of National Forest land does not constitute the assertion of a water right."⁶⁶

Regarding the assertion that requiring minimum flows illegally conflicted with state-issued water rights, the court relied on the Supreme

the ranchers from exercising their vested rights nor limits their exercise of those rights so severely as to amount to a prohibition").

57. *County of Okanogan*, 347 F.3d at 1085 (quoting Pub. L. No. 94-579, § 701(a) & (h), 90 Stat. 2743, 2786-87, reprinted in 43 U.S.C.A. § 1701 historical note).

58. *Id.*

59. *Id.* at 1086.

60. *Id.* (citing *United States v. New Mexico*, 438 U.S. 696 (1978)).

61. *Id.*

62. *Trout Unlimited v. U.S. Dep't of Agric.*, 320 F. Supp. 2d 1090 (D. Colo. 2004).

63. *Id.* at 1102.

64. *Id.* at 1103-06.

65. *Id.* at 1106.

66. *Id.* at 1105.

Court's decision in *P.U.D. No. 1 v. Washington Department of Ecology* as well as *County of Okanogan* and other case law.⁶⁷ In *P.U.D. No. 1*, the water rights holders argued that a minimum flow requirement violated two "savings clauses" in the federal Clean Water Act ("CWA") that supposedly protected water rights from such requirements: 33 U.S.C. §§ 1251(g) and 1370(2) (CWA §§ 101(g) and 510(2)).⁶⁸ The Supreme Court directly rejected this argument, finding that nothing in the CWA supports this proposition:

Petitioners assert that two other provisions of the Clean Water Act, §§ 101(g) and 510(2), 33 U.S.C. §§ 1251(g) and 1370(2), exclude the regulation of water quantity from the coverage of the Act. Section 101(g) provides "that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this chapter." 33 U.S.C. § 1251(g). Similarly, § 510(2) provides that nothing in the Act shall "be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters . . . of such States." 33 U.S.C. § 1370. In petitioners' view, these provisions exclude "water quantity issues from direct regulation under the federally controlled water quality standards authorized in § 303." Brief for Petitioners 39 (emphasis deleted).

This language gives the States authority to allocate water rights; we therefore find it peculiar that petitioners argue that it prevents the State from regulating stream flow. In any event, we read these provisions more narrowly than petitioners. *Sections 101(g) and 510(2) preserve the authority of each State to allocate water quantity as between users; they do not limit the scope of water pollution controls that may be imposed on users who have obtained, pursuant to state law, a water allocation.*⁶⁹

67. *Id.* at 1103–06 (citing *P.U.D. No. 1 v. Wash. Dep't. of Ecology*, 511 U.S. 700 (1994), *County of Okanogan*, 347 F.3d 1081 (9th Cir. 2003), and *City & County of Denver v. Bergland*, 695 F.2d 465 (10th Cir. 1982)).

68. *P.U.D. No. 1 v. Wash. Dep't of Ecology*, 511 U.S. 700, 720 (1994).

69. *Id.* at 720–21 (emphasis added).

Our view is reinforced by the legislative history of the 1977 amendment to the Clean Water Act adding § 101(g). See 3 Legislative History of the Clean Water Act of 1977 (Committee Print compiled for the Committee on Environment and Public Works by the Library of Congress), Ser. No. 95–14, p. 532 (1978) ("The requirements [of the Act] may incidentally affect individual water rights. . . . It is not the purpose of this amendment to prohibit those incidental effects. It is the purpose of this amendment to insure that State allocation systems are not subverted, and that effects on individual rights, if any, are prompted by legitimate and necessary water quality considerations").

Trout Unlimited adopted this analysis since these “disclaimers in the CWA are similar to the savings clauses in § 701(g) of FLPMA.”⁷⁰ The “savings clause” in FLPMA regarding water rights reads in part:

(g) Nothing in this Act shall be construed as limiting or restricting the power and authority of the United States or —
 (1) as affecting in any way any law governing appropriation or use of, or Federal right to, water on public lands;
 (2) as expanding or diminishing Federal or State jurisdiction, responsibility, interests, or rights in water resources development or control[.]⁷¹

The *Trout Unlimited* court’s refusal to read FLPMA’s savings clause as limiting the agency’s land management authority is in line with other federal court decisions. These savings clauses, at most, have been interpreted to mean only that FLPMA does not expressly create any federal reserved water rights.⁷² The *Trout Unlimited* court held that “[l]ike the CWA certification required in *PUD No. 1*, the authorization for the use of federal land required in this case represents a federal action that is a prerequisite to the use of a water right obtained under state law.”⁷³

After affirming the federal agencies’ authority under FLPMA vis-à-vis state water rights, the *Trout Unlimited* court went even further—rejecting the government’s argument that the agency had the discretion to balance the needs of water development interests with environmental protection under FLPMA.⁷⁴ The court focused on FLPMA’s requirement that the grant of rights-of-way “shall contain . . . terms and conditions which will . . . minimize damage to . . . fish and wildlife habitat and otherwise protect the environment.”⁷⁵ The court also highlighted the purpose of FLPMA, that the “public lands [be managed] in a manner ‘that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archaeological values; that, where

Id. at 721.

70. *Trout Unlimited*, 320 F. Supp. 2d at 1105 n.5.

71. 43 U.S.C. § 1701 Savings Provision (2000).

72. *Sierra Club v. Watt*, 659 F.2d 203, 206 (D.C. Cir. 1981). “We are also persuaded that a specific provision of the Land Policy Act [FLPMA] precludes the construction that the Act effects a reservation of water rights. . . . We interpret the [savings clause] to mean that no federal water rights were reserved when Congress passed the Land Policy Act.” *Id.*

73. *Trout Unlimited*, 320 F. Supp. 2d at 1105–06.

74. *Id.* at 1108 (finding that FLPMA does not allow for “interests of private facility owners” to be considered).

75. *Id.* at 1106 (quoting 43 U.S.C. § 1765(a)).

appropriate, will preserve and protect certain public lands in their natural condition; that will provide food and habitat for fish and wildlife and domestic animals; and that will provide for outdoor recreation and human occupancy and use.”⁷⁶

After reviewing these provisions, the court rejected the government’s argument that the agency only had to reduce adverse impacts to fisheries and public land.⁷⁷ Instead, FLPMA required the agency to “minimize” these impacts.⁷⁸ In requiring the agency to implement the most environmentally protective project, the court stated:

FLPMA itself does not authorize [the agency’s] consideration of the interests of private facility owners as weighed against environmental interests such as protection of fish and wildlife habitat. FLPMA *requires* all land-use authorizations to contain terms and conditions which will protect resources and the environment. . . . The Act simply does not allow [the agency] to ignore options that would minimize environmental degradation because of the costs to private parties and difficulty in implementation.⁷⁹

Overall, the implications of *County of Okanogan and Trout Unlimited* are far-reaching. One of the most important property rights in the arid western states are state-issued water rights.⁸⁰ These new FLPMA decisions, coupled with the Supreme Court’s expansive view of the Clean Water Act’s supremacy over water rights in *PUD No.1*, signal a new era in western public land and water policies.

B. FLPMA Authority Over Hardrock Mining

1. Background to FLPMA and Hardrock Mining

In addition to confirming FLPMA’s authority over western water interests and development, the federal courts have also recognized FLPMA’s control over mineral development on federal land managed by the BLM. Hardrock mining on the federal public lands is governed by a

76. *Id.* at 1107 (quoting 43 U.S.C. § 1701(a)(8)).

77. *Id.* at 1110.

78. *Id.* at 1108.

79. *Id.*

80. See generally CHARLES F. WILKINSON, *CROSSING THE NEXT MERIDIAN: LAND, WATER, AND THE FUTURE OF THE WEST* 219–92 (1992) (reviewing the historical development and modern trends of western water rights).

mixture of environmental and land use statutes overlain on the mining claims location system established by the General Mining Law of 1872 (the Mining Law).⁸¹ Mining claims on federal land are “valid against the United States if there has been a discovery of [a valuable] mineral within the limits of the claim, if the lands are still mineral, and if other statutory requirements have been met.”⁸² Moreover, “[a mining claim] is a possessory interest in land that is ‘mineral in character’ where discovery ‘within the limits of the claim’ have been made.”⁸³

In order for an individual to possess a valid mining claim, the claimant must meet the fundamental requirement of the Mining Law—that there is the discovery of a valuable mineral deposit.⁸⁴ “Discovery . . . means the actual physical disclosure of a valuable mineral deposit.”⁸⁵ The Mining Law further states that any such locators of valuable minerals on the public lands “shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations.”⁸⁶

In addition to affirming the right to enter mineralized federal lands for mineral exploration, the Mining Law grants holders of mining claims the right to claim non-mineral land not contiguous to the vein or lode for use in association with mining claims.⁸⁷ This “millsite” provision of the Mining Law grants the holder of a lode claim the right to use or occupy non-mineral land for mining or milling purposes.⁸⁸

Even if such rights to mining and millsite claims exist, however, they exist only “so long as they comply with the laws of the United States, and

81. General Mining Act of 1872, ch. 152, 17 Stat. 91 (codified as amended at 30 U.S.C. §§ 22–24, 26–28, 29, 30, 33–35, 37, 39–47 (2000)). The Law, although originally covering most minerals, is now limited to what are commonly known as “locatable” minerals. The most important of these types of minerals are “hardrock” minerals such as gold, silver, copper, molybdenum, and uranium, among others. Non-uranium “fuel” minerals such as oil and gas and coal, were removed from operation of the Mining Law by the Mineral Leasing Act of 1920, 30 U.S.C. §§ 201–210 (2000), and are regulated under entirely separate statutory and regulatory regimes. In addition, the Materials Act of 1947, as amended in 1955, removed “common varieties” of sand, stone, gravel, and clay from operation of the 1872 Law. *See* 30 U.S.C. §§ 601–615 (2000).

82. *Best v. Humboldt Placer Mining Co.*, 371 U.S. 334, 336 (1963).

83. *Hafen v. United States*, 30 Fed. Cl. 470, 473 (1994) (quoting *Cameron v. United States*, 252 U.S. 450, 456 (1920)).

84. *Lara v. Sec’y of Interior*, 820 F.2d 1535, 1537 (9th Cir. 1987) (noting that “[a] mining claimant has the right to possession of a claim only if he has made a mineral discovery on the claim”). This same “discovery” requirement applies to both lode and placer claim locations. 30 U.S.C. §§ 23, 35.

85. *United States v. Zweifel*, 508 F.2d 1150, 1154 (10th Cir. 1975).

86. 30 U.S.C. § 26.

87. § 42(a).

88. *Id.* “Where nonmineral land not contiguous to the vein or lode is used or occupied by the proprietor of such vein or lode for mining or milling purposes, such nonadjacent surface ground may be embraced and included in an application for a patent for such vein or lode” *Id.*

with State, territorial, and local regulations.”⁸⁹ Thus, the BLM exerts significant control over whether mining is allowed, and what type of operations can occur on public land.

FLPMA requires that: “In managing the public lands the Secretary [of the Interior] shall, by regulation or otherwise, take any action necessary to prevent unnecessary or undue degradation of the lands.”⁹⁰ This is known as the “UUD standard.” The UUD standard applies across-the-board to the BLM’s management throughout the West and is not limited to mining operations.⁹¹

While FLPMA is the organic act for the BLM, it specifically addresses the interaction between land management policies and the Mining Law. The basic premise of the Mining Law is that “all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, shall be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase.”⁹² FLPMA, however, expressly limited this statutory right by requiring the BLM to review mining proposals and to deny a mining proposal if there would be “unnecessary or undue degradation.”⁹³ In addition, for mining operations proposed in a special class of lands in southeastern California known as the California Desert Conservation Area (CDCA), FLPMA imposes an additional protective requirement that mining operations cannot cause “undue impairment.”⁹⁴

89. § 26.

90. 43 U.S.C. § 1732(b) (2000).

91. *Id.*

92. 30 U.S.C. § 22. This is known as the “free access” provision of the Mining Law. See JOHN D. LESHY, *THE MINING LAW: A STUDY IN PERPETUAL MOTION* 25–48 (1987) (detailing the historical development and decline of free access). Professor Leshy was the Solicitor of the United States Department of the Interior, a position he held from 1993 to 2001.

93. 43 U.S.C. § 1732(b).

Except as provided in section 1744 [Recordation of mining claims], section 1782 [Wilderness Study], and subsection (f) of section 1781 of this title [dealing with the California Desert Conservation Area] and in the last sentence of this paragraph [the unnecessary or undue degradation sentence], no provision of this section or any other section of this Act shall in any way amend the Mining Law of 1872 or impair the rights of any locators or claims under that Act

Id.

94. § 1781(f).

Subject to valid existing rights, nothing in this Act shall affect the applicability of the United States mining laws on the public lands within the [CDCA], except that all mining claims located on public lands within the [CDCA] shall be subject to such reasonable regulations as the Secretary may prescribe to effectuate the purposes of this section. . . . Such regulations shall provide for such measures as may be reasonable to protect the scenic, scientific, and environmental values of the public lands of the [CDCA] against undue impairment, and to assure against

In FLPMA, Congress specifically stated that the general “unnecessary or undue degradation” standard as well as the specific requirements to protect Wilderness Study Areas and CDCA lands from “undue impairment” amended the Mining Law so as to “impair the rights of any locators or claims under that Act, including, but not limited to, rights of ingress and egress.”⁹⁵ If mining claims cannot be utilized without violating FLPMA’s strict environmental requirements, then they cannot be developed. In addition, where there is a likelihood that a mining operation could not comply with environmental regulations in a cost-effective manner, this can call into question the validity of the claim itself.⁹⁶

2. FLPMA and the Duty to Prevent “Undue” as well as “Unnecessary” Degradation

BLM regulations covering hardrock mining are found at 43 C.F.R. subpart 3809, referred to generally as the “3809” regulations.⁹⁷ These regulations implement the “unnecessary or undue degradation” standard in FLPMA. Under these regulations, a Plan of Operations for all mining activities, and all exploration activities over five acres, must be submitted to the BLM for approval prior to entering the land.⁹⁸ The 3809 regulations were revised by Interior Secretary Bruce Babbitt in 2000 and then revised further by Interior Secretary Gale Norton in 2001.⁹⁹ These revisions to the 3809 regulations, and importantly, the differing interpretations of the UUD standard under FLPMA, were the subject of a recent decision from the

pollution of the streams and waters within the [CDCA].

Id.

95. § 1732(b).

96. *See Clouser v. Espy*, 42 F.3d 1522, 1530 (9th Cir. 1994) (confirming the Forest Service’s authority to regulate mining on public lands despite potentially prohibitive costs for miners); *United States v. Pittsburgh Pac. Co.*, 30 IBLA 388, 404–05 (1977) (remanding for additional findings on the cost of environmental compliance in order to determine marketability), *aff’d sub nom.*, *South Dakota v. Andrus*, 614 F.2d 1190 (8th Cir. 1980); *United States v. Kosanke Sand Corp.*, 12 IBLA 282, 298–99, 309 (1973) (finding that the cost of compliance with federal, state, or local environmental controls is a factor in determining the required element of profitability); *see also* Michael Graf, *Application of Takings Law to the Regulation of Unpatented Mining Claims*, 24 *ECOLOGY L.Q.* 57, 61–65, 81–87 (1997) (discussing the federal government’s authority to regulate mining operations on public lands, even if unprofitability results).

97. 43 C.F.R. pt. 3809 (2003).

98. §§ 3809.11, 3809.21.

99. For a detailed discussion of these revisions, *see generally* Flynn & Parsons, *supra* note 4, at 277–304, 326–29. *See also* Thomas F. Darin, *The Bureau of Land Management’s Proposed Surface Management Regulations for Locatable Mineral Operations: Preventing or Allowing Degradation of Public Lands?*, 35 *LAND & WATER L. REV.* 309 (2000) (discussing the then-current 3809 regulations and proposed 2000 revisions).

federal district court for the District of Columbia, *Mineral Policy Center v. Norton*.¹⁰⁰

FLPMA itself does not define what constitutes unnecessary or undue degradation.¹⁰¹ Prior to *Mineral Policy Center*, the federal courts had not had the opportunity to definitively interpret FLPMA and the UUD standard.¹⁰² In *Sierra Club v. Hodel*, the Tenth Circuit addressed, somewhat, the BLM's discretion under the UUD standard in the non-mining context.¹⁰³ The Sierra Club challenged proposed improvements to a road crossing public lands as violating the UUD standard.¹⁰⁴ The BLM countered that the UUD standard "breath[es] discretion at every pore."¹⁰⁵ Given such broad discretion, the BLM contended that the UUD provision was not a "standard capable of judicial application, and thus that its decisions whether to enjoin private activities which affect public lands fall beyond the purview of judicial review."¹⁰⁶ The Tenth Circuit disagreed, finding that the UUD standard provided "law to apply," and "imposes a definite standard on the BLM."¹⁰⁷

In light of this relative scarcity of judicial interpretations of the UUD standard, the primary interpretation had been left up to the Interior Department. In the mining context, that interpretation has focused on the 3809 regulations and Department legal rulings. A key dispute between the competing 3809 regulatory revisions dealt with the twin duties placed on the BLM: the duty to prevent "unnecessary" in addition to "undue" degradation.¹⁰⁸

100. *Mineral Policy Ctr. v. Norton*, 292 F. Supp. 2d 30, 32 (D.D.C. 2003).

101. See 43 U.S.C. § 1702 (2000) (defining relevant statutory terms with no mention of UUD).

102. To the extent that the federal courts *have* addressed FLPMA, they have primarily done so with regard to FLPMA's other provisions, particularly section 603 regarding Wilderness Study Areas. See *Rocky Mountain Oil & Gas Ass'n v. Watt*, 696 F.2d 734, 739, 750 (10th Cir. 1982) (considering FLPMA section 603(c)'s nonimpairment standard and its effect on mineral leasing); *Sierra Club v. Hodel*, 737 F. Supp. 629, 631 (D. Utah 1990) (regarding whether a Finding of No Significant Impact (FONSI) was appropriate for a road going in between two wilderness areas); *Rocky Mountain Oil & Gas Ass'n v. Andrus*, 500 F. Supp. 1338, 1340 (D. Wyo. 1980) (same). However, in *Sierra Club v. Clark*, 774 F.2d 1406 (9th Cir. 1985), the Ninth Circuit upheld a BLM decision to allow an off-road vehicle race in a Wilderness Study Area (WSA). The court rejected the plaintiffs' argument that since the race was not "necessary," it failed the UUD standard. *Id.* at 1410.

103. *Sierra Club v. Hodel*, 848 F.2d 1068 (10th Cir. 1988), *overruled on other grounds*, *Village of Los Ranchos of Albuquerque v. Marsh*, 956 F.2d 970 (10th Cir. 1992).

104. *Hodel*, 848 F.2d at 1074.

105. *Id.* (alteration in original) (quotations omitted).

106. *Id.*

107. *Id.* at 1075.

108. See Flynn & Parsons, *supra* note 4, at 278–87 (examining the UUD standard under the 2000 "3809" revision).

The 3809 regulatory revisions from 2000 interpreted UUD to mean “conditions, activities, or practices that . . . result in substantial irreparable harm to significant scientific, cultural, or environmental resource values of the public lands that cannot be effectively mitigated.”¹⁰⁹ This was known as the “substantial irreparable harm” or “SIH” standard. The previous definition focused mostly on the needs of the mining company and whether the proposed mine operated in a “usual [and] customary” manner.¹¹⁰ The 2000 definition focused on the actual impacts from the proposed operation on public land resources.

The BLM promulgated its revised 3809 regulations on October 30, 2001, and they became effective on December 31st of that year.¹¹¹ With few exceptions, the 2001 regulations reverted back to the regulatory framework that existed from 1981 to 2000 (which was originally established in 1980).¹¹² The 2001 regulations eliminated a number of environmental performance standards as well as the SIH definition of UUD.

These revisions were largely based on a new Solicitor’s Memorandum issued in October 2001 that substantially altered Interior Department hardrock mining policy and determined that the BLM’s interpretation of its duty to “prevent unnecessary or undue degradation” in the 2000 regulations was illegal.¹¹³ The new Solicitor’s Memorandum specifically superseded the “Regulation of Hardrock Mining” Solicitor’s Memorandum dated December 27, 1999.¹¹⁴ In promulgating the 2000 regulations, the BLM had conceded that the 1980 regulations did “not adequately address the ‘undue’ degradation Congress was concerned about in FLPMA section 302(b).”¹¹⁵ “Clarifying that the definition specifically addresses situations of ‘undue’ as well as ‘unnecessary’ degradation will more completely and faithfully implement the statutory standard, by protecting significant resource values of the public lands without presuming that impacts necessary to mining must be allowed to occur.”¹¹⁶

109. 43 C.F.R. § 3809.5 (2001).

110. 43 C.F.R. § 3809.0-5(k) (2000).

111. Mining Claims Under the General Mining Laws; Surface Management, 66 Fed. Reg. 54,834, 51,834 (Oct. 30, 2001) (to be codified at 43 C.F.R. pt. 3800).

112. *Id.*

113. Memorandum from William G. Myers III, Solicitor, U.S. Dept. of the Interior, to Gale Norton, Secretary, U.S. Dept. of the Interior 1, 3, 20 (Oct. 23, 2001) [hereinafter Surface Management Memorandum].

114. Memorandum from John Leshy, Solicitor, U.S. Dept. of Interior, to Acting Director, BLM, (Dec. 27, 1999).

115. Mining Claims Under the General Mining Laws, 65 Fed. Reg. 69,998, 70,017 (Nov. 21, 2000) (to be codified at 43 C.F.R. pts. 2090, 2200, 2710, 2740, 3800, 9260).

116. *Id.* at 70,001.

In contrast, the new Solicitor's Memorandum took a markedly different interpretation of this critical FLPMA language. In the new Memorandum, the Solicitor argued that the grant of authority to prevent "undue degradation" on its own in the 2000 regulations violates FLPMA and the "rights" of holders of valid mining claims.¹¹⁷ Specifically, in criticizing the 2000 regulations' SIH standard, Solicitor William Myers stated:

A definition that is more restrictive [i.e., the SIH standard]—that prevents degradation that would be caused by an operator who is using accepted and proper procedures in accordance with applicable federal and state laws and regulations when such degradation is required to develop a valuable mineral deposit—would inappropriately amend the Mining Law and impair the rights of the locator.¹¹⁸

Thus, according to the Bush Administration Interior Department, any "accepted and proper procedures" causing "degradation . . . required to develop a valuable mineral deposit" must be allowed.¹¹⁹ In adopting this new "UUD" definition, the 2001 regulations eliminate BLM's authority to prevent "undue degradation" in excess of what is "necessary to mining" as long as it is not already prohibited by existing federal law.¹²⁰ This "necessary to mining" standard essentially reinstates the "prudent operator" concept from the 1980 regulations.¹²¹ Thus, like the 1980 regulations, the 2001 regulations essentially ignore the value of the resource to be impacted from mining. Instead, the BLM limits its authority to only "prevent[ing] surface disturbance greater than necessary."¹²²

The Department interpreted its UUD authority on the premise that, as long as a certain activity is "necessary to mining," the agency cannot prevent "undue degradation" of the public's lands.¹²³ In effect, this legal interpretation eliminated the "or undue" portion of the UUD standard.

This new definition of UUD was challenged in *Mineral Policy Center*. The court discussed the differing interpretations of UUD and held that the

117. Surface Management Memorandum, *supra* note 113, at 12.

118. *Id.*

119. *Id.*

120. See 43 C.F.R. § 3809.5 (listing the "conditions, activities or practices" that constitute unnecessary or undue degradation).

121. See 66 Fed. Reg. 54,838 (explaining that while BLM decided not to "completely reinstate[e] the 1980 rule" and that the new definition "does not use the term 'prudent operator,'" the new definition does "[i]n effect . . . set[] forth how a prudent operator would conduct operations").

122. *Id.*

123. *Mineral Policy Ctr. v. Norton*, 292 F. Supp. 2d 30, 41 (D.D.C. 2003) (citing the Surface Management Memorandum, *supra* note 113).

Solicitor's focus on "unnecessary" to the exclusion of what was "undue" violated FLPMA:

Plaintiffs challenge the Solicitor's interpretation and argue that, based upon FLPMA's statutory language, it is clear that Congress intended to prevent "unnecessary degradation" *as well as* "undue degradation." Thus, according to plaintiffs, under FLPMA "BLM must prevent undue degradation, even though the cause of the degradation may be necessary for mining."

Upon careful consideration, the court agrees with plaintiffs' view. The court finds that the Solicitor misconstrued the clear mandate of FLPMA. FLPMA, by its plain terms, vests the Secretary of the Interior with the authority-and indeed the obligation-to disapprove of an otherwise permissible mining operation because the operation, though necessary for mining, would unduly harm or degrade the public land.¹²⁴

The court summarized its rationale regarding construction of UUD by stating that:

(1) the disjunctive is used[;] (2) the disjunctive interpretation is neither "at odds" with the intention of the FLPMA's drafters, nor contrary to the statute's legislative history; and (3) the "or" separates two terms that have different meanings. Consequently, the court finds that in enacting FLPMA, Congress's intent was clear: Interior is to prevent, not only unnecessary degradation, but also degradation that, while necessary to mining, is undue or excessive.¹²⁵

This is the first federal court decision establishing the parameters of the UUD standard. As such, its importance to BLM management of resource uses across the West is far-reaching. If the 2001 definition of UUD as interpreted by Solicitor Myers and Secretary Norton had been upheld, since the UUD standard applies to all BLM decision-making, the BLM could have attempted to apply it to other resource application reviews.

Indeed, prior to *Mineral Policy Center*, the BLM had begun to adopt this line of reasoning in the oil and gas development context.

[U]nnecessary or undue degradation occurs when the adverse environmental consequences of an activity exceeds that which

124. *Id.* at 42 (citation omitted).

125. *Id.* at 43 (citations omitted) (footnotes omitted).

would occur when the same or similar activity is being accomplished by a prudent operator in a usual, customary, and proficient manner taking into account the impacts on other resources and uses. This reading of FLPMA's unnecessary or undue degradation language is consistent with Solicitor William G. Myer's [sic] analysis regarding this language in an October 23, 2001, memorandum to the Secretary, entitled "Surface Management Provisions for Hardrock Mining" and serialized as M-37007.¹²⁶

Further, the BLM has recently argued that it could not apply wildlife protection conditions to approvals of applications for permits to drill (APDs) for oil and gas, unless there was "clear and convincing evidence showing that undue and unnecessary degradation would result if the [conditions of approval] were not applied."¹²⁷ This ignores the *Mineral Policy Center* court's clear ruling on the disjunctive nature of the UUD standard.

Despite overruling the Solicitor's UUD interpretation, however, the court in *Mineral Policy Center* did not overturn the revised 3809 regulations' elimination of the "substantial irreparable harm" standard that was contained in the 2000 version of the regulations.¹²⁸ This was because, based on Interior's argument to the court, the agency would essentially implement the new 3809 regulations to prevent such impacts.¹²⁹

126. BLM's Answer to Appellants' Statement of Reasons at 47, *S. Utah Wilderness Alliance v. Bureau of Land Mgmt.*, IBLA 2002-177 (Apr. 12, 2002) (citation omitted) (footnote omitted) (on file with author).

127. Final Environmental Impact Statement, Jack Morrow Hills Coordinated Activity Plan (Wyoming), at A4-1 (on file with author).

128. *Mineral Policy Ctr.*, 292 F. Supp. 2d at 46.

129. *Id.* at 44.

Interior, on the other hand, maintains that, despite the elimination of the 2000 Regulations' SIH standard, and the Solicitor's understanding that the terms "undue" and "unnecessary" "overlap in many ways," the 2001 Regulations nevertheless prevent UUD, as properly defined by this court. Defs.' Mot. for Summ. J. at 22, 29 (arguing that the 2001 Regulations "will prevent all UUD, including UUD occasioning 'irreparable harm to scientific, cultural, or environmental resource values'"); Defs.' Reply at 5 (arguing that "both types of degradation are prevented"); *see also* 66 Fed.Reg. 54,834, 54,838 (Oct. 30, 2001) ("BLM does not need an SIH standard in its rules either to protect against unnecessary degradation or to protect against undue degradation BLM has other statutory and regulatory means of preventing irreparable harm to significant scientific, cultural, or environmental resource values."); *id.* at 54,841 ("We understand it is our responsibility to implement FLPMA and prevent unnecessary or undue degradation.").

Specifically, Interior argues that it will protect the public lands from any UUD by exercising case-by-case discretion to protect the environment through the

Thus, based on Interior's commitments to the court, and the court's ruling itself, *Mineral Policy Center* establishes the BLM's broad powers to "reject[] individual mining plans of operation" if such an operation "would unduly harm or degrade the public land."¹³⁰

3. Full FLPMA Authority Outside of Valid Mining Claims

In addition to ruling on the BLM's authority under the UUD standard, the *Mineral Policy Center* court also confirmed the broad authority under FLPMA to regulate operations that are not covered by valid mining and millsite claims under the Mining law.¹³¹ The 3809 regulations from 2001 applied the UUD standard *alone* to mining operations situated on invalid claims, or even on lands that are not claimed at all under the Mining Law.¹³² However, the court held that where a mining operation takes place on BLM lands not covered by valid claims, the BLM must apply more than the "unnecessary or undue degradation" standard.¹³³ In such cases the BLM must also comply with its duty to manage the public lands in a manner consistent with its "multiple use, sustained yield" directive from FLPMA.¹³⁴ Further, the court held that the BLM must receive fair market value for all lands proposed for such use.¹³⁵

In distinguishing between lands over which the BLM may apply only its UUD powers from those over which all of FLPMA's regulatory provisions apply, the critical question is whether the land in question is subject to a valid claim under the Mining Law.¹³⁶ If it is, the miner is only subject to the UUD standard.¹³⁷ But if the land is not subject to valid mining claims, the land enjoys substantially greater regulatory protection. Perfecting a valid claim under the Mining Law, however, is neither easy nor

process of: (1) approving or rejecting individual mining plans of operations; (2) regulating in response to the requisite Notices that operators must submit before commencing exploration activities not requiring a plan of operations; (3) requiring financial guarantees for costs for mining activities; and (4) linking performance standards to those set forth in existing laws and regulations.

Id.

130. *Id.* at 42, 44.

131. *Id.* at 48.

132. *Id.* at 46.

133. *Id.* at 48 n.24.

134. *Id.* at 49.

135. *Id.* at 51.

136. *See id.* at 47–48 (explaining that, without a valid mining claim, a claimant has no property rights against the United States, barring protections outside the Mining Act).

137. *Id.*

automatic. Miners must meet exacting requirements in order to show that a claim is valid.¹³⁸

FLPMA outlines the BLM's obligations to protect public lands and to minimize adverse environmental impacts to the resources that the federal government holds in trust for the public. Specifically, FLPMA requires that the Secretary "manage the public lands under principles of multiple use and sustained yield."¹³⁹ The multiple use mandate requires the BLM to ensure that authorized activities "best meet the present and future needs of the American people."¹⁴⁰ It also requires "management of the various resources without permanent impairment of the productivity of the land and the quality of the environment with consideration being given to the relative values of the resources."¹⁴¹ FLPMA further requires that, in conducting its "multiple use" analysis, the BLM consider a broad range of resource values, "including, but not limited to, recreation, range, timber, minerals,

138. Mining claims on federal land are "valid against the United States if there has been a discovery of [a valuable] mineral within the limits of the claim, if the lands are still mineral, and if other statutory requirements have been met." *Best v. Humboldt Placer Mining Co.*, 371 U.S. 334, 336 (1963). In order for an individual to possess a valid mining claim, the claimant must meet the fundamental requirement of the Mining Law—that there is the discovery of a valuable mineral deposit within the limits of each claim. *See Lara v. Sec'y of Interior*, 820 F.2d 1535, 1537 (9th Cir. 1987) (noting that "[a] mining claimant has the right to possession of a claim only if he has made a mineral discovery on the claim"). "'Discovery' . . . means the actual physical disclosure of a valuable mineral deposit." *United States v. Zweifel*, 508 F.2d 1150, 1154 (10th Cir. 1975). The Supreme Court has endorsed at least two tests for determining whether a claim qualifies as a "valuable mineral deposit." Under the "marketability test," it must be shown that the mineral can be "extracted, removed and marketed at a profit." *United States v. Coleman*, 390 U.S. 599, 600 (1968) (quoting 30 U.S.C. § 22). According to the "'prudent-man test,' . . . the discovered deposits must be of such a character that 'a person of ordinary prudence would be justified in the further expenditure of his labors and means, with a reasonable prospect of success, in developing a valuable mine.'" *Id.* at 602 (quoting *Castle v. Womble*, 19 Pub. Lands Dec. 455, 457 (1894)). The Court stated that "profitability is an important consideration in applying the prudent-man test, and the marketability test," and noted that "the prudent-man test and the marketability test are not distinct standards, but are complementary in that the latter is a refinement of the former." *Id.* at 602–03. A mining claim location does not give the presumption of a discovery. *Ranchers Exploration & Dev. Co. v. Anaconda Co.*, 248 F. Supp. 708, 714 (D. Utah 1965). As the Supreme Court has held, "[l]ocation is the act or series of acts whereby the boundaries of the claim are marked, etc., but it confers no right in the absence of discovery, both being essential to a valid claim." *Cole v. Ralph*, 252 U.S. 286, 296 (1920).

139. 43 U.S.C. § 1732(a) (2000).

140. § 1702(c).

141. *Id.* FLPMA's legislative history demonstrates the intended meaning of the "permanent impairment" standard. In the bills leading up to the ultimate version of FLPMA, the House of Representatives Committee on Interior and Insular Affairs inserted the word "permanent" before "impairment" in order to show that "[t]he objectives of such a provision should be to prevent permanent impairment rather than minor alterations of a temporary nature." H.R. REP. NO. 94-1163, at 44 (1976), *reprinted in* LEGISLATIVE HISTORY OF THE FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976, *supra* note 6, at 474. Thus, anything greater "than minor alterations of a temporary nature" could not be allowed under FLPMA. *Id.*

watershed, wildlife and fish, and natural scenic, scientific and historical values.”¹⁴² These FLPMA requirements must be applied at the site-specific project level.¹⁴³ In addition, the *Mineral Policy Center* court stated:

While a claimant can explore for valuable mineral deposits before perfecting a valid mining claim, without such a claim, she has no property rights against the United States (although she may establish rights against other potential claimants), and her use of the land may be circumscribed beyond the UUD standard because it is not explicitly protected by the Mining Law.¹⁴⁴

“The court expressly rejects NMA’s [National Mining Association’s] view that only the UUD standard may properly apply to all mining activities performed on public land.”¹⁴⁵ The court cited with approval a comprehensive Interior Solicitor’s Memorandum (with concurrence by the Secretary) that focused on the discretionary nature of BLM authority over operations proposed on lands not covered by valid mining or millsite claims.¹⁴⁶ The court went on to acknowledge the BLM’s authority to impose FLPMA’s multiple use and sustained yield requirements on all lands not covered by valid mining or millsite claims.¹⁴⁷ Most importantly, the court required that the BLM meet FLPMA’s “fair market value requirement.”¹⁴⁸

142. 43 U.S.C. § 1702(c). Recent Department of Interior decisions have shed considerable light on what constitutes a proper multiple use analysis by the BLM. For instance, the Interior Board of Land Appeals (IBLA) has stated that “FLPMA’s multiple-use mandate requires that BLM . . . engage in [a] reasoned or informed decision-making process” to balance “competing resource values . . . [and manage the public lands] in the manner that will best meet the present and future needs of the American people.” *Nat’l Wildlife Fed’n v. BLM*, 140 IBLA 85, 101 (1997).

143. 43 U.S.C. § 1702(c).

144. *Mineral Policy Ctr. v. Norton*, 292 F. Supp. 2d 30, 47–48 (D.D.C. 2003).

145. *Id.* at 48 n.24.

146. *Id.* at 48. For a general discussion of BLM’s authority in the modern mining scheme, see Roger Flynn, *The 1872 Mining Law as an Impediment to Mineral Development on the Public Lands: A 19th Century Law Meets the Realities of Modern Mining*, 34 LAND & WATER L. REV. 301 (1999).

147. *Mineral Policy Ctr.*, 292 F. Supp. 2d. at 49.

148. *Id.* at 49–50 (“FLPMA states that it is the policy of the United States to ‘receive fair market value of the use of the public lands and their resources unless otherwise provided for by statute.’” (quoting 43 U.S.C. § 1701(a)(9)).

Operations neither conducted pursuant to valid mining claims nor otherwise explicitly protected by FLPMA or the Mining Law (*i.e.*, exploration activities, ingress and egress, and limited utilization of mill sites) must be evaluated in light of Congress’s expressed policy goal for the United States to “receive fair market value of the use of the public lands and their resources.” 43 U.S.C. § 1701(a)(9). Because, in promulgating 65 Fed.Reg. 70,013, Interior was not cognizant of its statutory obligation to attempt to “receive fair market value of the use of public lands and their resources,” and did not balance its competing priorities with that

Thus, absent a showing that lands are covered by valid mining or millsite claims, the applicant for BLM approval must pay “fair market value” for the use of such lands and resources. This is the first federal court decision implementing FLPMA’s “fair market value” provision. Although the BLM has yet to promulgate its requirements in response to the court’s order, since the Interior Department did not appeal the *Mineral Policy Center* decision, the policy will be forthcoming.¹⁴⁹

C. FLPMA and Fifth Amendment “Takings”

Although these cases establishing, or confirming, FLPMA’s predominant role in western water and mineral development are important in their own right, another recent federal court decision is of no less importance. In *Reeves v. United States*, the U.S. Court of Federal Claims held that the BLM’s application of FLPMA’s environmental protection mandates could not be a “taking” under the Fifth Amendment.¹⁵⁰ In the underlying administrative proceeding, the BLM denied a mining claimant’s application to develop its claims within a BLM Wilderness Study Area in Utah.¹⁵¹ The plaintiff argued that the denial of its proposed mine plan was a “taking” deserving just compensation under the Fifth Amendment.¹⁵²

In a strong endorsement of the BLM’s overarching authority under FLPMA, the court rejected the takings claim. The court decided that since private interests in BLM land are held pursuant to the BLM’s FLPMA authority, the exercise of that authority cannot amount to a taking.¹⁵³ As stated by the court: “The key issue in this case is the threshold question in any takings claim analysis, namely, whether plaintiffs possess the property right which they claim was taken by the United States.”¹⁵⁴ The alleged “property interest” was the claimant’s mining claims located pursuant to the

obligation [in] mind, the court finds that the regulations must be remanded to Interior, so that Congress’s policy goal, as set forth in § 1701(a)(9), may be given proper effect.

Id. at 51.

149. See BUREAU OF LAND MGMT., UNITED STATES DEP’T OF INTERIOR, INSTRUCTION MEMORANDUM NO. 2004-133, MINERAL POLICY CTR. V. NORTON—IMPLEMENTATION GUIDANCE 1, 3 (2004) (setting out BLM’s positions in response to *Mineral Policy Center* and stating that the “BLM intends to engage in a rulemaking proceeding and develop a nationwide policy on the issue”).

150. *Reeves v. United States*, 54 Fed. Cl. 652, 674 (2002). The takings clause of the Fifth Amendment provides in relevant part, “nor shall private property be taken for public use, without just compensation.” U.S. CONST. amend. V.

151. *Reeves*, 54 Fed. Cl. at 673–74.

152. *Id.* at 655.

153. *Id.* at 673.

154. *Id.* at 671.

Mining Law.¹⁵⁵ The claimant argued that the BLM's complete denial of any use of these claims was a regulatory taking.

The real significance of the case deals with the court's analysis of private uses of public land vis-à-vis FLPMA.

The nature of the plaintiffs' property interests, therefore, determines the extent FLPMA can proscribe the use of plaintiffs' mining claims. The government "may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with."¹⁵⁶

The court continued, "in analyzing a governmental action that allegedly interferes with an owner's land use, there can be no compensable interference if such land use was not permitted at the time the owner took title to the property."¹⁵⁷

The court discussed the property rights of mining claimants and FLPMA's public land protection mandates, particularly in this case, the duty to "manage such [WSA] lands . . . in a manner so as not to impair the suitability of such areas for preservation as wilderness."¹⁵⁸ Despite the property interests in the mining claim, the court held that such rights were subservient to the BLM's duties under FLPMA.¹⁵⁹ Here, since the claims were filed after the area was designated as a WSA, "plaintiffs obtained only a limited property interest to hold and use their claims in a manner which would not impair the surface of the public lands."¹⁶⁰

Although the case focused on FLPMA's WSA provisions, the court's ruling has broad implications for public land management. As long as the property rights proposed to be exercised on public land were obtained after FLPMA was enacted in 1976, any denial by the BLM of that proposed use would be immune from a takings challenge.¹⁶¹ For example, the BLM's

155. *Id.*

156. *Id.* at 672 (quoting *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1027 (1992)).

157. *Id.* (quoting *M & J Coal Co. v. United States*, 47 F.3d 1148, 1153 (Fed. Cir. 1995)).

158. 43 U.S.C. § 1782(c) (2000). The plaintiffs also argued that this WSA protection provision did not apply and that the less-restrictive UUD requirement was the proper BLM management standard. *Reeves*, 54 Fed. Cl. at 655. The court rejected this argument and held that the nonimpairment standard of § 1782(c) applied. *Id.* at 673. In any event, this conclusion would not have affected the more fundamental holding that, regardless of which FLPMA standard applied, the BLM would not commit a taking by applying it.

159. *Reeves*, 54 Fed. Cl. at 673 ("Because plaintiffs never acquired a mining claim free of FLPMA restraints, they do not own a property interest that was taken in this case.")

160. *Id.* at 674.

161. This assumes, of course, that the underlying BLM decision would withstand judicial review under the Administrative Procedure Act (APA), 5 U.S.C. §§ 701–706 (2000).

denial of a proposed mining plan under the more general UUD standard would not be a taking. Similarly, the denial of applications for permits to drill (APDs) for oil and gas, if based on post-1976 oil and gas leases, would also not be a taking.¹⁶² Overall, the decision largely frees the Interior Department from the threat of a takings challenge to its public lands decision-making under FLPMA.

IV. NOT SO FAST: THE SUPREME COURT UPHOLDS INACTION UNDER FLPMA

While these recent decisions have confirmed FLPMA's broad reach over public land uses, the Supreme Court recently limited the public's rights to challenge instances where the Interior Department chooses not to exercise its FLPMA authority. In *Norton v. Southern Utah Wilderness Alliance* (SUWA), the Court dismissed a challenge to the BLM's failure to regulate off-road vehicle (ORV) use in WSAs.¹⁶³

The plaintiffs contended that the BLM violated its management duties under FLPMA, and failed to implement provisions of the applicable BLM land use plan that required monitoring of designated areas and to undertake corrective action as necessary.¹⁶⁴ The Court construed these claims as "failure to act" claims, which "are sometimes remediable under the APA, but not always."¹⁶⁵ The Court reasoned that "the only agency action that can be [judicially] compelled under the APA is action legally *required*."¹⁶⁶ Such claims "can proceed only where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required to take*."¹⁶⁷ Courts may compel action that is unreasonably delayed, but for a delay to be unreasonable, the action must be required of the agency.¹⁶⁸

The Court held that § 1782(c), FLPMA's WSA nonimpairment standard, "is mandatory as to the object to be achieved, but it leaves the BLM a great deal of discretion in deciding how to achieve it. It assuredly does not mandate, with the clarity necessary to support judicial action under § 706(1) [of the APA], the total exclusion of ORV use."¹⁶⁹ The Court also

162. See *Wyo. Outdoor Council v. Bosworth*, 284 F. Supp. 2d 81, 91–92 (D.D.C. 2003) (discussing how "nondiscretionary statutes" can be used to deny or place restrictions on oil and gas drilling).

163. *Norton v. S. Utah Wilderness Alliance*, 124 S. Ct. 2373, 2381–82 (2004).

164. *Id.* at 2378.

165. *Id.*

166. *Id.* at 2379.

167. *Id.*

168. *Id.* at 2379 n.1.

169. *Id.* at 2380.

held that the provision in the BLM's applicable land use plan to monitor ORV use was not reviewable under the APA.¹⁷⁰ The Court acknowledged that FLPMA "prevent[s] BLM from taking actions inconsistent with the provisions of a land use plan."¹⁷¹ However, the mere statement in the land use plan that the BLM should monitor ORV use was not a mandatory requirement upon the BLM, absent some affirmative site-specific decision.¹⁷²

Although at first glance, the holding in *Norton v. SUWA* appears to severely restrict opportunities for public challenge to BLM decision-making, the real on-the-ground effects will likely be limited. Most of the traditional resource uses on public lands are done pursuant to some sort of permit or approval application to the BLM. For example, mining, grazing, logging, oil and gas drilling, road building, organized recreation development, rights-of-way, etc., can only be commenced upon issuance of a BLM approval decision.¹⁷³ Such a decision would not fall under *Norton v. SUWA* since in these cases there clearly is a judicially reviewable "action" under the APA.¹⁷⁴

Thus, while the result in *Norton v. SUWA* does not bode well for the public's concerns with rampant unregulated ORV use, the ruling is significantly limited to only those instances where an agency fails to make any decision at all.

CONCLUSION

As the western states' populations continue to grow, conflicts over management of public lands and waters will only increase. The important role of private property rights in public lands and waters, along with the long-standing legal regimes governing water, land, and mineral development in the West, will certainly continue to play a key part in the West's future. Now, however, a relatively junior player has come of age—FLPMA.

170. *Id.* at 2383–84.

171. *Id.* at 2382.

172. *Id.* at 2384. The Court's holding on this issue was limited to the question of whether the land use plan imposed a mandatory monitoring requirement. "We express no view as to whether a court could, under §706(1), enforce a duty to monitor ORV use imposed by a BLM regulation, see 43 C.F.R. § 8342.3 (2003). That question is not before us." *Id.* at 2384 n.5.

173. *See, e.g.*, 43 C.F.R. § 3809.11 (2004) (requiring submission of a plan of operations before the BLM will permit mining on public lands); § 4130.1-1 (providing requirements for grazing permits on public lands).

174. *See* *Natural Res. Def. Council v. Patterson*, 333 F. Supp. 2d 906, 908, 916 (E.D. Cal. 2004) (finding the federal Bureau of Reclamation's failure to release enough water from federally operated dam to protect fisheries was reviewable under the APA, despite *Norton v. SUWA*).

In 1976, Congress enacted FLPMA to reflect the changing needs and desires of western communities and users and lovers of the western public lands.¹⁷⁵ While it has taken some time (over twenty-five years), it appears that FLPMA's goal of balancing these competing uses and needs may finally be realized. FLPMA is certainly no panacea and undoubtedly does not answer all of the pressing questions regarding the management and protection of the western public lands.

At its heart, however, FLPMA represents the nation's recognition that the American West is a place unique in the world—a place that has been and will be used by many competing aspects of American life. Above all, FLPMA's promise is the promise of a West *retained* for future generations—not *disposed* of by the current generation. It is a promise worth keeping.

175. *Mineral Policy Ctr. v. Norton*, 292 F. Supp. 2d 30, 33 (D.D.C. 2003) (“[I]n 1976, Congress enacted FLPMA to amend the Mining Law and reflect the nation's changed view toward land and minerals.”).