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Withdrawal of Federal Lands: Analysis of a Common Legislated Withdrawal Provision

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SUMMARY

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Carol Hardy Vincent
Specialist in Natural Resources Policy

Erin H. Ward
Legislative Attorney

Withdrawal of Federal Lands: Analysis of a Common Legislated Withdrawal Provision

Lands and interest in lands owned by the United States (i.e., federal lands) have been withdrawn from agency management under various public land laws. Federal land withdrawals typically seek to preclude lands from being used for certain purposes (i.e., *withdraw* them) in order to dedicate them to other purposes or to maintain other public values. For example, some laws established or expanded federal land designations, such as wilderness areas or units of the National Park System, and withdrew the lands apparently to foster the primary purposes of these designations. Withdrawals affect lands managed by agencies including the four major land management agencies: the Bureau of Land Management (BLM), U.S. Fish and Wildlife Service (FWS), and National Park Service (NPS), all in the Department of the Interior, and the U.S. Forest Service (FS), in the Department of Agriculture.

Federal lands have been withdrawn under various authorities. Congress has enacted particular withdrawal provisions in similar form in many individual laws, referred to herein as *legislated withdrawals*. An analysis of the meaning of these provisions could aid congressional development and consideration of withdrawal legislation. In general, legislated withdrawals typically withdraw the land from one or more of three general categories of laws: (1) public land laws, (2) mining laws, and (3) mineral leasing laws. For analysis purposes, this report uses the following example provision that appears in some legislated withdrawals: *subject to valid existing rights, [the federal land] is withdrawn from (1) all forms of entry, appropriation, and disposal under the public land laws; (2) location, entry, and patent under the mining laws; and (3) operation of the mineral leasing, mineral materials, and geothermal leasing laws*. Legislated withdrawals may include variations on this language depending on Congress's objectives for the parcels. A more complete understanding of the meaning of a specific legislated withdrawal might require examination of its legislative history and the laws, policies, and management plans governing the affected parcels.

The first component of the example provision generally would bar third parties from applying to take ownership and obtaining possession of the lands or resources on the lands under *public land laws*. However, the lack of a comprehensive list of public land laws—and the lack of a single, consistent definition of the term *public land laws* itself over time—makes it challenging to determine the precise meaning and applicability. The second component generally would prevent the withdrawn lands from being available for new mining (e.g., under the General Mining Law of 1872). The third component generally would prevent the withdrawn lands from being available for new mineral leasing, sale of mineral materials, and geothermal leasing (e.g., under the Mineral Leasing Act of 1920, Materials Act of 1947, and Geothermal Steam Act of 1970). Together, the three components primarily would affect BLM and FS, because laws governing lands managed by those agencies generally allow for energy and mineral development and provide broader authority to convey lands out of federal ownership than laws governing NPS and FWS lands. Typically, the three components would not bar various surface uses that otherwise might be allowed, possibly including recreation, hunting, and livestock grazing. However, some uses might be limited by Congress or by subsequent agency actions, such as amendments to land management plans, if the uses are inconsistent with the withdrawal's purposes.

Legislated withdrawals generally are made "subject to valid existing rights." Including this phrase appears to protect third-party (i.e., nonfederal) interests in withdrawn federal land from being terminated or limited by the withdrawal. Though commonly used, there is no universal definition or interpretation of which interests qualify as *valid existing rights*. The *validity* of the interest generally depends on whether the third party has met the requirements of the law under which it alleges to have secured the interest. In addition, the interest claimed by the third party generally must have *existed* at the time of withdrawal. Finally, the third party generally must have obtained a property interest in the land (e.g., ownership) to have a *right*—mere use of the land is insufficient. The "valid existing rights" that a particular withdrawal is "subject to" could arise under any number of current or former laws that allowed third parties to obtain interests in federal land. Accordingly, courts and agencies have interpreted the phrase on a case-by-case basis, considering the purpose and structure of the relevant law.

Where legislated withdrawals are enacted "subject to valid existing rights," the existing rights remain in effect after the withdrawal. In some cases, acquiring or "taking" those rights may serve the purpose of the withdrawal. The federal government may acquire such rights by taking the property through the power of eminent domain, which would require "just compensation" under the Takings Clause of the U.S. Constitution, or through voluntary transactions such as purchase, exchange, or donation. Congress may consider appropriating funds for any such acquisitions.

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Introduction

Lands and interest in lands owned by the United States (i.e., federal lands) have been withdrawn from agency management under various public land laws. Federal land withdrawals typically seek to preclude lands from being used for certain purposes in order to dedicate the lands to other particular purposes or maintain them consistent with certain public values. Congress may effectuate withdrawals through new laws or the executive branch may withdraw land under differing authorities (as noted below in this section).[1] This report focuses on one type of withdrawal provision that Congress has enacted in individual laws, hereinafter typically referred to as *legislated withdrawals*.

Though legislated withdrawals seek to withdraw the designated land from a specified set of laws, which set of laws and the exact terms used vary. The variation depends in large part on Congress's intent for how the lands should be managed by federal agencies and used by the public following the withdrawal. In general, legislated withdrawals typically withdraw the land from one or more of three general categories of laws: (1) public land laws, (2) mining laws, and (3) mineral leasing laws. This report bases its analysis on the following example provision, used in some legislated withdrawals, that includes all three categories of laws:

> Subject to valid existing rights, [the federal land] is withdrawn from:
>
> (1) all forms of entry, appropriation, and disposal under the public land laws;
>
> (2) location, entry, and patent under the mining laws; and
>
> (3) operation of the mineral leasing, mineral materials, and geothermal leasing laws.[2]

In this report, each of these three components of a withdrawal provision is referenced by its adjacent number above. This exact provision appears in some withdrawal laws, but components thereof or variants on this language have been used in many other legislated withdrawals.[3] Many of the terms in this provision have historical roots and are interpreted differently by the courts and agencies in the public land context than in common parlance.[4]

To aid in the congressional development and consideration of withdrawal legislation, this report discusses the meaning of each of these three components, as well as the limitation that the withdrawal be "subject to valid existing rights." This analysis could aid Congress in drafting and enacting withdrawal measures with the particular components (or variations) desired for the land parcels at issue. Enhanced precision and clarity of withdrawal measures might augment agency understanding of how Congress intends the lands to be managed following enactment of a legislated withdrawal. It could also foster public understanding of allowable uses of federal lands that have been withdrawn legislatively.

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[1] The authority for Congress to make land withdrawals derives from the Property Clause of the U.S. Constitution, Article IV, Section 3, Clause 2. This provision gives Congress authority over the lands, territories, or other property of the United States, thus providing Congress broad authority over lands owned by the federal government.

[2] See, for example: P.L. 116-9, 133 Stat. 580, 629 (116th Cong.); P.L. 109-94, 119 Stat. 2106 (109th Cong.); P.L. 109-385, 120 Stat. 2681 (109th Cong.) (providing for valid existing rights in a separate subsection but otherwise identical).

[3] This provision or variants thereof appeared in 116th Congress bills and laws. See, for example, P.L. 116-9, 133 Stat. 580 (116th Cong.).

[4] See U.S. Department of the Interior, Bureau of Land Management (BLM), *Glossaries of BLM Surveying and Mapping Terms*, 2003 (searchable PDF), at https://www.blm.gov/or/gis/geoscience/files/BLMglossary.pdf; and Mansfield, Maria E. "A Primer of Public Land Law." Washington Law Review, vol. 68, no. 4, October, 1993. Hereinafter referred to as Mansfield, A Primer of Public Land Law.

Legislated withdrawals may affect lands managed by different federal agencies. This report focuses on withdrawals affecting lands of the four major federal land management agencies. These agencies are the Bureau of Land Management (BLM), the U.S. Fish and Wildlife Service (FWS), and the National Park Service (NPS), all in the Department of the Interior, and the U.S. Forest Service (FS), in the Department of Agriculture.

This report does not address standing authorities in statutes that have delegated withdrawal authority to the President or agencies. Among other examples, these laws allow the President to withdraw federal lands for national monument purposes under the Antiquities Act of 1906 and lands in the outer continental shelf from disposition under the Outer Continental Shelf Lands Act,[5] and allow the Secretary of the Interior to issue public land orders withdrawing land under the Federal Land Policy and Management Act of 1976 (FLPMA).[6] In addition, throughout U.S. history, many land withdrawals were made under authorities that have since been repealed by FLPMA and other laws.[7] This report does not address withdrawal authorities that are no longer in effect.

Purposes of Legislated Withdrawals

In general, legislated withdrawals often seek to preclude specified lands from being used for certain purposes so as to maintain other public values in the area or reserve the land for a particular public purpose or program. For example, some laws established or expanded federal land designations—such as wilderness areas, national conservation areas, national monuments, national recreation areas, and units of the National Park System—and withdrew the lands apparently to foster the primary purposes of these designations.[8] Another purpose of legislated withdrawals has been to facilitate the subsequent conveyance of federal lands to individuals or entities under specified terms and conditions.[9] Other withdrawal laws have reserved lands for use by the military for national defense purposes.[10] The purpose of other legislated withdrawals is not readily apparent from the enacted text,[11] though other congressional, federal agency, or public sources may have addressed the purposes.

[5] The Antiquities Act is codified at 54 U.S.C. §§320301-320303. The Outer Continental Shelf Lands Act is codified at 43 U.S.C. §1341(a).

[6] 43 U.S.C. §1714.

[7] Some repealed authorities allowed for withdrawals by executive orders, secretarial orders, and presidential proclamations.

[8] Examples of provisions of law that established or expanded land designations and contained withdrawals of the affected lands—primarily BLM and U.S. Forest Service (FS) lands—include the following: P.L. 111-11, §§1202, 1503, and 1803, among others, for designation of Wilderness Areas; §1974 and §§2202-2203, among others, for establishment of National Conservation Areas; §1204 for establishment of the Mount Hood National Recreation Area; §1205 for establishment of the Crystal Springs Watershed Special Resources Management Unit; §1808, to designate the Ancient Bristlecone Pine Forest; and §§2103-2104, to establish the Prehistoric Trackways National Monument. Other provisions were included in P.L. 113-291 (e.g., §3043 and §3092, designating or establishing units of the National Park System, and §3062, establishing the Hermosa Creek Special Management Area on FS lands).

[9] Examples include P.L. 113-107 and P.L. 113-291, §§3002(c), 3009(b), and 3009(d).

[10] Examples include P.L. 113-66, §§2931, 2941, and 2951.

[11] Examples include P.L. 109-385 and P.L. 106-113, in a proviso for the Forest Service Land Acquisition account.

Legislated Withdrawal Variations

Many laws have included the three components of legislated withdrawals essentially in the form set out in the "Introduction" to this report. However, legislated withdrawals might include variations on those components, as Congress determines what is appropriate to its objectives for the parcels at issue, which have varying legal effects. Such variations may include omitting one or more components, limiting the scope in some way, or specifying future application, as described below.

Omissions

Some legislated withdrawals have omitted one or more of the three components. For instance, in designating national scenic areas under FS management, one law omitted the first of the three components (*all forms of entry, appropriation, and disposal under the public land laws*),[12] as did provisions of law conveying specified BLM land.[13] Legislated withdrawals also have omitted specific terms or activities from the three components. For example, provisions of law authorizing and governing disposal of BLM land parcels under specified terms omitted "disposal" from the first component of the withdrawal language and specified that the withdrawal did not apply to "sales made consistent with this subsection."[14] Other laws have briefer withdrawal provisions that omit multiple parts of the three components. For example, some provisions of law authorizing land withdrawals for military purposes omitted both "entry" and "disposal" under the first component and "mineral materials" under the third component, among other differences.[15]

Limitations

In some cases, legislated withdrawals have included all three components of the withdrawal provision but expressly limited their scope. For instance, some provisions of law that withdrew lands from all forms of entry, appropriation, and disposal under the public land laws specified exceptions that allowed for particular disposals.[16] Other provisions of law that generally withdrew lands from mineral leasing authorized the Secretary of the Interior to lease oil and gas resources that were within a mile of the boundary of the withdrawal area, under specified terms and conditions.[17] Another law specified that the withdrawal would not pertain to particular parcels in the area.[18]

Future Applicability

Some legislated withdrawals have specified that provisions applicable to lands currently in federal ownership also apply to future federal acquisition of lands in the area. For instance,

[12] P.L. 111-11, §1104(l).

[13] P.L. 113-291, §3092(i).

[14] P.L. 111-11, §2601(d).

[15] P.L. 113-66, §§2931(a) and 2941(a). The text of the withdrawal provisions is similar, in providing that, subject to valid existing rights and except as otherwise provided, specified public land (including interests in land) and any lands within the boundary that become subject to the public land laws are "withdrawn from all forms of appropriation under the public land laws, including the mining laws, the mineral leasing laws, and the geothermal leasing laws."

[16] P.L. 111-11, §2606(c); P.L. 113-291, §3062(d); P.L. 113-291, §3092(f).

[17] P.L. 111-11, §3202(f).

[18] P.L. 113-291, §3062(b).

provisions of one law required that any lands acquired by the federal government within certain boundaries would be withdrawn as set out for lands already in federal ownership.[19] Similarly, a law establishing a national monument as a unit of the National Park System provided that lands acquired after enactment for inclusion in the monument would be subject to the withdrawal provisions set out for federal land within the monument at its establishment.[20] As another example, provisions of a law required that if any rights on the land were relinquished or otherwise acquired by the federal government after enactment, the land subject to those rights would be withdrawn under the terms specified for lands in federal ownership as of enactment.[21]

General Considerations in Determining Meaning

In some cases, it may not be readily apparent what, if any, difference in meaning Congress intends by variation in the terms and components of legislated withdrawals. For example, it may be unclear to what extent laws that bar "entry" only in the second component provide for a more limited withdrawal than laws that also bar entry in the first component.[22] Also, for laws that omit "mineral materials" from the third component,[23] it may be unclear whether the terms of the first and third components of the withdrawal nevertheless would preclude the sale of materials.[24]

The reasons for omitting particular terms from legislated withdrawals may not be clear from the text. Some laws might omit terms to protect continued or future land use for these activities; other laws might omit the same language because certain activities are not occurring or are unlikely to occur in the future on the withdrawn land. As an example, for parcels with no history of mineral development or findings or no evidence of mineral potential, Congress might not see a need to specify a withdrawal under the mining laws. In these cases, although the parcels might remain legally open to mineral development, in practice they might never be used for that purpose based on the resources on the lands. It is also possible that the omissions were inadvertent. Contrarily, the omissions may have been intentional because other sources, such as explanatory materials accompanying the laws, provide specificity and clarity as to the intent of the legislation.

A more complete understanding of a particular legislated withdrawal's meaning may require examining sources of information beyond the text of the law. Accordingly, agencies and courts determine the meaning and legal effect of legislated withdrawals on a case-by-case basis by examining existing authorities, legislative history, and agency documents.

Existing agency authorities governing the affected parcels could inform the meaning of a legislated withdrawal. For example, under general agency authorities, BLM and FS lands generally are open to energy and mineral development, and both agencies have authorities to convey lands out of federal ownership under certain conditions, as described in the section entitled "Entry, Appropriation, and Disposal." In contrast, lands managed by NPS generally are not open to such development or conveyance out of federal ownership. Thus, a legislated withdrawal of NPS lands might omit specifying that the parcels are withdrawn from these activities because other NPS authorities already preclude them. Similarly, it could be useful to

[19] P.L. 111-11, §2601(f).

[20] P.L. 113-291, §3092(a).

[21] P.L. 111-11, §3202(b).

[22] As an example of a law with entry only in the second component, see P.L. 111-11, §3202(a).

[23] See, for example, P.L. 111-11, §§1204(g) and 3202(a).

[24] In conversations with the Congressional Research Service (CRS), BLM staff have indicated that it is clearer to the agency when laws specifically address mineral materials.

consult any laws specific to the particular parcels at issue, such as laws establishing affected land units, which might contain requirements that differ from the authorities generally applicable to an agency's lands.

In addition, the legislative history of a legislated withdrawal, including committee report language, could provide insight as to congressional intent. For example, report language might contain more specificity than bill text as to the intended meaning of terms and components; the laws that apply to management of the parcels; and the activities that are continued, limited, or banned. Though such information is not itself part of the law, it can inform agencies' and courts' interpretations of the statutory text.[25]

Another potential source of information about how certain withdrawals may be interpreted is a land management plan. Management plans developed by agencies for land units and areas typically contain details on the types and locations of allowed activities and thus could be helpful in assessing the meaning of legislated withdrawal provisions. In some cases, an examination of agency guidance on withdrawals also could be useful, though the extent to which such guidance applies to legislated withdrawals is not readily apparent, as discussed in the following section ("Analysis of Legislated Withdrawal Components").

Analysis of Legislated Withdrawal Components

This section provides an analysis of the three components of the following example legislated withdrawal language:

> Subject to valid existing rights, [the federal land] is withdrawn from:
>
> (1) all forms of entry, appropriation, and disposal under the public land laws;
>
> (2) location, entry, and patent under the mining laws; and
>
> (3) operation of the mineral leasing, mineral materials, and geothermal leasing laws.[26]

Information in this section is based on several sources. First, the Congressional Research Service (CRS) searched laws since the 106th Congress in Congress.gov to identify legislated withdrawals. Through this search, CRS identified a variety of legislated withdrawals as an illustrative, rather than a comprehensive, set of withdrawal laws. Information herein also draws on CRS conversations with realty experts and other staff of the four major land management agencies in December 2019 and January 2020, as well as on earlier conversations with BLM staff.[27]

In addition, CRS consulted some general authorities governing administrative withdrawals (e.g., provisions of FLPMA) and selected agency guidance. However, the extent to which agency guidance applies to legislated withdrawals is not readily apparent; the guidance may pertain

[25] For more information about how courts may use legislative history when interpreting statutes, see CRS Report R45153, *Statutory Interpretation: Theories, Tools, and Trends*, by Valerie C. Brannon.

[26] See, for example: P.L. 116-9, 133 Stat. 580, 629 (116th Cong.); P.L. 109-94, 119 Stat. 2106 (109th Cong.); P.L. 109-385, 120 Stat. 2681 (109th Cong.) (providing for valid existing rights in a separate subsection but otherwise identical).

[27] CRS conversations with agency staff were held on the following dates: BLM, December 18, 2019; FS, January 13, 2020; National Park Service (NPS), January 22, 2020; and U.S. Fish and Wildlife Service (FWS), January 31, 2020. Earlier CRS conversations with BLM staff were conducted on various dates during 2018 and 2019. This report does not explicitly note each instance in which information presented was derived from consultations with agency staff, though this is sometimes noted for emphasis. For brevity, text references to agency consultations do not typically denote the agency or agencies that provided the information.

primarily or exclusively to administrative withdrawals.[28] For instance, regulations applicable to withdrawals by the Secretary of the Interior under FLPMA note that they "do not apply to withdrawals that are made by the Secretary of the Interior pursuant to an act of Congress which directs the issuance of an order by the Secretary."[29] Similarly, FWS withdrawal policies cite provisions of FLPMA and related regulations on procedures for agencies to submit withdrawal requests under that law.[30] FS guidance on withdrawals appears to focus on withdrawals under FLPMA and other broad laws.[31] NPS policy indicates that when acquisition within a park boundary is necessary, the agency will consider various methods, including withdrawal from the public domain; it does not elaborate on withdrawal policies or processes.[32]

As noted in the "Introduction," the legislated withdrawal example language at issue specifies, "Subject to valid existing rights," the identified federal land is withdrawn from the specified components. Thus, the three withdrawal components discussed below this clause all are "Subject to valid existing rights," though this is not consistently restated throughout the discussions. An analysis of the meaning of this terminology is provided in the section of this report entitled "Interpreting 'Subject to Valid Existing Rights.'"

Entry, Appropriation, and Disposal Under the Public Land Laws

The first component of the legislated withdrawal language at issue, as set out in the "Introduction," specifies that the federal land is withdrawn from (1) *all forms of entry, appropriation, and disposal under the public land laws*. This component is analyzed in two parts: first, the *public land laws*, and then the *entry, appropriation, and disposal.*

Public Land Laws

This language generally would bar activities authorized under various public land laws (subject to valid existing rights). There are numerous public land laws, but no land management agency maintains a comprehensive list of such laws and the lands to which each law applies, according to agency staff consulted for this report. Further, it is likely impossible to develop such a list, because currently there does not appear to be a single definition in law of the term *public lands* or a single definition in use by agencies of the term *public land law.* Moreover, different meanings may have been used over time, as discussed in this section.[33] The absence of a comprehensive list of public land laws and the lack of a single, consistent definition of *public lands* over time make

[28] As noted, legislated withdrawals are made under the Property Clause of the U.S. Constitution, Article IV, Section 3, Clause 2. Administrative withdrawals are made under various statutes, e.g., provisions of the Federal Land Policy and Management Act of 1976 at 43 U.S.C. §1714.

[29] 43 C.F.R. §2300.0-1(b).

[30] FWS, *Service Manual, 342 FW 5, Non-Purchase Acquisition*, Section 5.9—Withdrawal, at https://www.fws.gov/policy/342fw5.html.

[31] See, for instance, FS, *Forest Service Manual 2700*, Chapter 2760-Withdrawals, at https://www.fs.fed.us/im/directives/dughtml/fsm2000.html.

[32] NPS, *Management Policies 2006*, p. 32, at https://www.nps.gov/policy/MP_2006.pdf, and Director's Order #25: Land Protection, Section 10.0—Property Acquisition/Relocation Assistance and Section 11.0—Acquisition Methods, at https://www.nps.gov/policy/DOrders/DOrder25.htm#Acquisition_Assistance.

[33] For instance, one scholar observed that "When first approaching the task, the uninitiated may take comfort in the label 'public land law,' believing that such nomenclature indicates a unified field of law amenable to simple outline. In reality, however, the term is mere shorthand. Modern 'public land law' covers a myriad of individual agency mandates to manage particular lands and particular resources." The scholar further observed that "as a legal term, however, 'public lands' has had different meanings at various times." See Mansfield, A Primer of Public Land Law, p. 802.

it challenging to determine the precise meaning or applicability of this component of legislated withdrawals.

Public Domain Lands

Historically, the term *public land laws* referred to laws providing for disposal of the *public domain*, according to some scholars.[34] The public domain label was used for those lands that never left federal ownership. Typically, these lands were ceded by the original states or obtained from a foreign sovereign (e.g., by purchase or treaty).[35] In contrast, the federal government usually obtained *acquired lands* from a state or individual through exchange, purchase, condemnation, or gift. Roughly 90% of all federal lands were public domain, with roughly 10% acquired.[36] The distinction in types of lands based on their manner of acquisition has lost some of its underlying significance today, though different laws still may apply depending on whether the lands involved were public domain or acquired.

The term *public land laws* continues to apply today to public domain lands, according to some agency staff. Some of these staff also used the term *public domain* to refer to land currently managed by BLM. The application to BLM land also is asserted in FWS policy guidance stating

> The term 'public domain land' has been supplanted by the term "public land," 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.[37]

In this sense, public domain is used more narrowly to refer to the lands that continue to be managed by BLM rather than also to lands that have been reserved from the public domain for particular uses or purposes.38 Throughout U.S. history, various laws and administrative authorities were used to withdraw lands from the public domain to establish or enlarge land units, such as national forests (managed by FS) and national wildlife refuges (managed by FWS). Accordingly, such land units sometimes are referred to as having been reserved from the public domain.

Land Management Broadly

Some scholars have asserted a seemingly broader interpretation of the term *public land law*. According to one scholar, in modern usage, public land law does not indicate a "unified field of law amenable to simple outline."[39] It "covers a myriad of individual agency mandates to manage

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[34] David H. Getches, "Managing the Public Lands: The Authority of the Executive to Withdraw Lands," *Natural Resources Journal*, vol. 22, no. 2 (April 1982), p. 282. Hereinafter referred to as Getches, "Managing the Public Lands." See also Mansfield, "Primer of Public Land Law," p. 821.

[35] An apparently broader definition of *public domain lands* is contained in BLM's *Public Land Statistics 2019*, as follows: "Original public domain lands that have never left federal ownership; lands in federal ownership that were obtained in exchange for public domain lands or for timber on public domain lands; one category of public lands." See U.S. Department of the Interior, BLM, *Public Land Statistics 2019*, p. 242.

[36] U.S. General Services Administration, *Overview of the United States Government's Owned and Leased Real Property: Federal Real Property Profile as of September 30, 2003*, p. 16.

[37] FWS, *Service Manual, 342 FW 5, Non-Purchase Acquisition*, Section 5.9—Withdrawal, at https://www.fws.gov/policy/342fw5.html.

[38] Mansfield, "Primer of Public Land Law," p. 832. The definition of *public lands* in the Federal Land Policy and Management Act of 1976 (FLPMA) is codified at 43 U.S.C. §1702(e).

[39] Mansfield, "Primer of Public Land Law," p. 802.

particular lands and particular resources."[40] Under this broader interpretation, the term *public land* encompasses diverse land systems managed by different agencies under varying laws.[41]

Under another broad definition, the term *public land laws* refers to laws (and regulations) governing the retention, management, and disposition of the public lands.[42] This definition derives from the Public Land Law Review Commission, established by law in 1964 to "study existing statutes and regulations governing the retention, management, and disposition of the public lands."[43] In the establishing statute, Congress outlined the purpose of the commission:

> Because the public land laws of the United States have developed over a long period of years through a series of Acts of Congress which are not fully correlated with each other and because ... administration of the public lands and the laws relating thereto has been divided among several agencies of the Federal Government, it is necessary to have a comprehensive review of those laws and the rules and regulations promulgated thereunder and to determine whether and to what extent revisions thereof are necessary.[44]

The land within the statutory mandate of the Public Land Law Review Commission included not only BLM lands but also NPS, FS, and FWS lands.[45]

Entry, Appropriation, and Disposal

A withdrawal from entry,[46] appropriation, and disposal generally would bar third parties from applying to take ownership of the lands or resources on the lands under applicable law and from obtaining possession of the same.[47] It also would preclude the lands from being "appropriated" for (i.e., used for) a primary purpose other than the one intended by the legislated withdrawal (subject to valid existing rights), according to agency staff consulted for this report.[48] Further, such a withdrawal typically would prohibit the transfer of the land to other federal agencies, in cases where such authority otherwise would exist, and action by the Secretary of the Interior to take the lands into trust for Indian tribes.[49]

This language generally would prevent the lands from being conveyed out of (e.g., disposed from) federal ownership by sale or exchange. Currently, the four major federal land management agencies have varying degrees of authority to convey lands out of federal ownership, ranging

[40] Mansfield, "Primer of Public Land Law," p. 802.

[41] Mansfield, "Primer of Public Land Law," p. 831.

[42] Getches, "Managing the Public Lands," p. 282.

[43] P.L. 88-606, §4.

[44] P.L. 88-606, §2.

[45] Mansfield, "Primer of Public Land Law," pp. 802-803.

[46] Some former and current laws specifically refer to authority to "enter" federal lands or make "entry" to federal lands in order to obtain possession of the lands or resources thereon. As an example of a former law, the Homestead Act of 1862 authorized individuals meeting certain qualifications to "enter" and make "entry" to public lands in order to settle on the lands. The applicant, sometimes referred to as the "entryman," received title to the lands after a specified period, providing certain conditions were met. The text of the statute is at https://uscode.house.gov/statviewer.htm?volume=12&page=392. Among current laws, the Desert Land Act (43 U.S.C. §321) and the General Mining Law of 1872 (30 U.S.C. §§22-42) also use the terms.

[47] In this sentence and elsewhere in this report, *third parties* includes individuals, corporations, and certain governmental entities.

[48] As an example, FS lands withdrawn from "appropriation" could not later be administratively reserved or classified as power sites or used for reservoirs under provisions of the Federal Power Act, according to FS staff. Pertinent provisions of the Federal Power Act are at 16 U.S.C. §818.

[49] Information in this paragraph is derived primarily from CRS conversations with BLM and FS staff.

from no general authority to relatively broad authority. This component of legislated withdrawals is less likely to affect NPS and FWS than FS and BLM, because NPS and FWS lack general authority to dispose of lands, though there are exceptions. By contrast, FS has various authorities to dispose of land, although they are somewhat constrained and not used frequently, and BLM has relatively broad authority to dispose of land. BLM disposal authorities include exchanges and sales under FLPMA;[50] transfers to other governmental units or nonprofit entities for public purposes under the Recreation and Public Purposes Act;[51] geographically limited sale authorities, such as the Southern Nevada Public Land Management Act of 1998;[52] and patents under the General Mining Law of 1872.[53] With regard to the latter authority, since FY1995, a series of annual moratoria on funding for issuing mineral patents have been enacted into law.[54] These moratoria, contained in the annual Interior appropriations laws, in effect have prevented this means of federal land disposal. The language in this component generally would also ban the disposal of resources on the lands (such as minerals) and other interests in the lands, which are something less than full ownership (such as conservation easements).

The terms *entry*, *appropriation*, and *disposal* have lost some of their historical import through the repeal of certain disposal laws and infrequent use today of others.[55] For example, authority to dispose of public lands under the Homestead Act of 1862 was repealed in 1976 by FLPMA (with a 10-year extension in Alaska). As another example, desert lands can be disposed under other laws, though these laws are seldom used because the lands must be classified as available, and sufficient water rights for settling on the land must be obtained. The Carey Act authorizes transfer to a state of desert public land for settlement, irrigation, and cultivation, upon application and meeting certain requirements.[56] Relatedly, the Desert Land Act allows citizens to reclaim and patent 320 acres of desert public land.[57] Though the scope of these terms may have changed over time, this component continues to restrict certain actions, such as the transfer of land out of federal ownership where such authority otherwise would exist.

Effect on Surface Uses

Withdrawals from entry, appropriation, and disposal typically would not bar multiple surface uses, possibly including recreation, hunting, grazing, and issuance of rights-of-way, among others. In some cases, the authorities that govern an agency's lands generally prohibit some of these uses, such as livestock grazing on NPS and FWS lands. Where an agency has discretionary

[50] 43 U.S.C. §1716, §1713.

[51] 43 U.S.C. §869.

[52] P.L. 105-263, as amended.

[53] 30 U.S.C. §§22-42. A *patent* is an instrument by which the federal government conveys title to lands.

[54] However, patent applications meeting certain requirements filed on or before September 30, 1994, have been allowed to proceed.

[55] For information on the primary current land disposal authorities of the four major federal land management agencies, see CRS Report RL34273, *Federal Land Ownership: Acquisition and Disposal Authorities*, coordinated by Carol Hardy Vincent.

[56] 43 U.S.C. §641.

[57] 43 U.S.C. §321. For information on obtaining desert lands under the Desert Land Act, see the "Q&A on Desert Land Entries" under the "Desert Land Act" section of the BLM website at https://www.blm.gov/programs/lands-and-realty/land-tenure/sales-and-exchanges. The "Q&A on Desert Land Entries" indicates that the authority applies to desert public lands in 12 states: Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, North Dakota, South Dakota, Utah, Washington, and Wyoming.

authority to permit surface uses, as in the case of BLM and FS for livestock grazing, such discretionary activities typically could continue on withdrawn lands, unless otherwise specified.

In other cases, the first component of the text could preclude particular surface issues. The withdrawal from "entry" in this component of the text, together with the withdrawal from "entry" under the second component, typically would prohibit location and entry under the mining laws, as discussed below. Further, some legislated withdrawals may affect authorized land uses that Congress considers inconsistent with the purposes of the withdrawal. For instance, a withdrawal to reserve lands for military use and to transfer administrative jurisdiction to the military could affect public access for recreation due to public safety reasons. Surface uses also could be affected by subsequent agency actions. For example, an agency might amend the relevant land management plan to restrict land uses in order to achieve a broad resource-protection goal of a particular legislated withdrawal.[58]

Location, Entry, and Patent Under the Mining Laws

The second component of the legislated withdrawal language at issue, as set out in the "Introduction," specifies that the federal land is withdrawn from (2) *location, entry, and patent under the mining laws*.

This component of legislated withdrawals generally would prevent the withdrawn lands from being available for new mining operations (subject to valid existing rights). It primarily would affect BLM and FS lands, because general laws governing these lands allow for mineral development, in contrast with the general laws governing NPS and FWS lands.

Mining of hard-rock minerals on federal lands is governed primarily by the General Mining Law of 1872 (the Mining Law). The original purposes of the Mining Law were to promote mineral exploration and development on federal lands in the western United States, offer an opportunity to obtain title to mines already being worked, and help settle the West. The Mining Law grants free access ("open to mineral entry") to third parties to prospect for minerals on open public domain lands and allows third parties, upon making a discovery, to stake (or *locate*) a claim on the deposit.[59] A valid claim entitles the holder to develop the minerals. The Mining Law continues to provide the structure for much of the western mineral development on public domain lands.[60]

With evidence of valuable minerals and sufficient developmental effort, the Mining Law allows mining claims to be patented, with full title (of surface and mineral rights) transferred to the claimant upon payment of the appropriate fee. Nonmineral lands used for associated milling or other processing operations also can be patented.[61] Patented lands may be used for purposes other than mineral development.[62]

The Mining Law is considered a nondiscretionary agency authority. That is, BLM lacks general discretion to reject a claim to valuable minerals where the claimant complies with the terms of

[58] Information in this section is derived from conversations between CRS and BLM staff in 2018 and 2019.

[59] The terms *open to mineral entry* and *locate* typically are used by BLM.

[60] 30 U.S.C. §§22-42.

[61] 30 U.S.C. §42.

[62] However, as noted above, since FY1995, appropriations laws have contained annual moratoria on funding for issuing mineral patents under the general mining laws. Patent applications meeting certain requirements filed on or before September 30, 1994, have been allowed to proceed. The most recent annual mining patent moratorium is contained in the Further Consolidated Appropriations Act, 2020 (P.L. 116-94), Division D, §404.

law. In this way, the Mining Law differs from major laws affected by components one and three of legislated withdrawals.[63]

Withdrawals from location and entry under the mining laws typically would not affect various surface uses of the lands, which might include recreation, hunting, and grazing, among others, depending on the general authorities that govern the surface lands. However, subsequent agency actions, such as amendments to land management plans, could affect surface uses, as noted above.

Operation of the Mineral Leasing, Mineral Materials, and Geothermal Leasing Laws

The third component of the legislated withdrawal language, as set out in the "Introduction," specifies that the federal land is withdrawn from (3) *operation of the mineral leasing, mineral materials, and geothermal leasing laws*.

This component generally would prevent the withdrawn lands from being available for new mineral leasing, sale of mineral materials, and geothermal leasing (all subject to valid existing rights). It would affect mainly BLM and FS lands because the main laws governing these activities primarily apply to these agencies. These laws—the Mineral Leasing Act of 1920 (MLA), the Materials Act of 1947, and the Geothermal Steam Act of 1970—are discussed below. Moreover, general laws governing BLM and FS allow for multiple uses, including energy development, in contrast to the general laws governing NPS and FWS lands.[64]

As in the case of withdrawals under the Mining Law, withdrawals from mineral leasing, sale of mineral materials, and geothermal leasing typically would not affect multiple uses of the surface lands. However, subsequent agency actions, such as amendments to land management plans, could affect surface uses, as noted above.

Mineral Leasing Act of 1920

The third component of legislated withdrawals generally would prevent the withdrawn lands from being available for new mineral leasing (subject to valid existing rights). The MLA primarily governs the development of leasable minerals (e.g., oil, gas, coal, and certain agricultural minerals) on federal lands.[65] Under the MLA, the Secretary of the Interior, through the BLM, leases subsurface rights on federal lands (generally those under the jurisdiction of BLM and FS) that contain fossil fuel deposits, with the federal government retaining title to the lands. The MLA authorizes both competitive and noncompetitive bidding processes for oil and gas exploration and production leases.

The Materials Act of 1947

The third component of legislated withdrawals generally would prevent the withdrawn lands from being available for new disposal of materials on public lands (subject to valid existing rights).

[63] For instance, agencies with land disposal authority have general discretion as to whether to exercise their conveyance authority upon application by a prospective purchaser.

[64] Although energy development is not a general use of NPS and FWS lands, there are exceptions. For instance, for information on oil and gas activities on FWS lands, see CRS Report R45192, *Oil and Gas Activities Within the National Wildlife Refuge System*, by R. Eliot Crafton, Laura B. Comay, and Marc Humphries.

[65] 30 U.S.C. §181.

The primary law at issue, the Materials Act of 1947 (as amended),[66] gave the Secretary of the Interior and the Secretary of Agriculture authority to dispose of mineral materials including—but not limited to—sand, stone, gravel, pumice, and clay, and vegetative materials including—but not limited to—yucca, manzanita, mesquite, cactus, timber, and other forest products.[67] The law pertains to lands where the disposal of such mineral and vegetative materials otherwise is not expressly authorized by law, including the mining laws; is not expressly prohibited by law; and would not be detrimental to the public interest.[68] The law generally requires payment of "adequate compensation" for the materials, and it requires the pertinent Secretary to dispose of materials to the highest qualified bidder after advertising and other public notices. The law contains exceptions, including authorization for the pertinent Secretary to permit federal, state, and local governmental entities and not-for-profit entities to remove materials without charge under certain circumstances.

Geothermal Steam Act of 1970

The third component of legislated withdrawals also generally would prevent the withdrawn lands from being available for new geothermal leasing (subject to valid existing rights). The primary law governing geothermal energy development on federal lands is the Geothermal Steam Act of 1970.[69] The law sets out provisions governing the issuance and administration of geothermal steam leases. Under the law, the Secretary of the Interior, through BLM, authorizes leases on federal lands (generally lands under BLM and FS jurisdiction) for geothermal exploration and development. This law (and related regulations) governing geothermal steam leasing and administration provide for principles and processes that are similar to those for oil and natural gas leasing on federal lands under the MLA. For instance, the Geothermal Steam Act, like the MLA, authorizes both competitive and noncompetitive leasing processes.

Interpreting "Subject to Valid Existing Rights"

As noted in the "Introduction," Congress generally makes legislated withdrawals "subject to valid existing rights."[70] Congress generally withdraws public lands "to prevent the initiation of new claims" rather than to destroy "rights theretofore fairly earned."[71] By including the phrase "subject to valid existing rights," Congress protects third-party property interests (e.g., ownership) in withdrawn federal land.[72] Though commonly used, the phrase has no universal definition or agreed-upon interpretation.[73] Instead, as discussed in more detail in this section, courts and agencies have interpreted the phrase on a case-by-case basis in light of the purpose and

[66] 30 U.S.C. §§601-604.

[67] In this context, the authority to "dispose of" mineral materials means authorization for the "removal of" mineral materials from the land.

[68] 30 U.S.C. §601.

[69] 30 U.S.C. §§1001 et seq.

[70] See, for example: P.L. 116-9, 133 Stat. 580, 629 (116th Cong.); P.L. 109-94, 119 Stat. 2106 (109th Cong.); P.L. 109-385, 120 Stat. 2681 (109th Cong.) (providing for valid existing rights in a separate subsection but otherwise identical).

[71] Executive Withdrawal Order of November 26, 1934, as Affecting Taylor Grazing Act and Other Prior Legislation, 55 Interior Dec. 205, 210 (1935) [hereinafter 1935 Solicitor Opinion] (citing Williams v. Brening, 51 Pub. Lands Dec. 225 (1925) (on reh'g)).

[72] See, for example, Jan G. Laitos & Richard A. Westfall, *Government Interference with Private Interests in Public Resources*, 11 HARV. ENVTL. L. REV. 1, 6-9 (1987).

[73] 1935 Solicitor Opinion, *supra* note 71, at 210-11; see also Laitos & Westfall, *supra* note 71, at 19-22.

structure of the law in which it appears.[74] Furthermore, third parties may have obtained their "valid existing rights" under any number of current or former laws that created avenues for obtaining interests in federal land.[75] As such, the examples of "existing rights" this report provides are illustrative rather than comprehensive.[76]

When Congress enacts legislated withdrawals "subject to valid existing rights," any existing rights remain in effect after the withdrawal. In some cases, the government may acquire or "take" certain rights to serve the purpose of the withdrawal. The federal government has authority to take private property for public uses through its eminent domain powers.[77] The Takings Clause of the U.S. Constitution limits this power by providing that private property cannot "be taken for public use, without just compensation."[78] As described further below in "Rights," however, some valid existing rights may not qualify as property interests that require compensation under the Takings Clause.[79]

Alternatively, legislated withdrawals may allow federal agencies to acquire valid existing rights through voluntary transactions, such as purchase or exchange.[80] The relevant federal agency may have preexisting statutory authority to acquire such rights.[81] If the agency does not have that authority or the authority is limited, Congress may consider providing such authority in the legislated withdrawal. Congress also may consider appropriating funds for any such acquisitions.

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[74] See, for example, Laitos & Westfall, *supra* note 71, at 19-22.

[75] See, for example, 1935 Solicitor Opinion, *supra* note 71, at 210-11("It is hardly practicable to give a precise or general definition of the meaning of 'existing valid rights,' as used in the savings clause of the said Executive Order. The circumstances of each particular case will have to be considered in applying that provision.").

[76] While some examples discussed in this report involve laws that are no longer in effect, rights obtained under those laws still could be "valid existing rights" even after the law's expiration or repeal. Additionally, those examples show the historical understanding of "valid existing rights" and demonstrate legal principles that apply to similar laws that currently are in effect.

[77] United States v. Jones, 109 U.S. 513, 518-19 (1883).

[78] U.S. Const. amend. V; *Jones*, 109 U.S. at 518-19. See also, for example, Horne v. Dep't of Ag., 576 U.S. 350, 357-58 (2015) ("There is no dispute that the 'classic taking [is one] in which the government directly appropriates private property for its own use. Nor is there any dispute that, in the case of real property, such an appropriation is a *per se* taking that requires just compensation." (citations omitted) (emphasis in original)); Meridian Land & Mineral Co. v. Hodel, 843 F.2d 340, 346-47 (9th Cir. 1988) (noting that during congressional debate, Congressman Udall objected to an amendment "because it takes from the bill a statement that valid legal rights should be preserved," which he did not think Congress "should do without paying compensation under the fifth amendment").

[79] The various constitutional considerations under the Takings Clause for "valid existing rights" are beyond the scope of this report. For more information on the Takings Clause, see CRS, Amdt5.5 Taking Private Property for Public Use, Constitution Annotated (2020), https://constitution.congress.gov/browse/amendment-5/.

[80] See, for example, P.L. 96-290, 94 Stat. 607 (1980) (amending an act establishing a wildlife refuge to include that the Secretary of the Interior "may acquire lands and waters or interests therein ... within the boundaries of the refuge by donation, purchase with donated or appropriated funds, or exchange"); P.L. 93-402, 88 Stat. 801 (1974) ("The Secretary may acquire by donation, purchase with donated or appropriated funds, or exchange, such lands and waters and interests therein (including in-holdings) that are adjacent to the [lands and waters reserved for the Great Dismal Swamp National Wildlife Refuge] and are within the area known as the Great Dismal Swamp ... as he determines to be suitable to carry out the purposes of this Act.").

[81] For instance, the Secretary of the Interior has authority to acquire interests in lands under FLPMA, 43 U.S.C. §1715, (acting through BLM), the National Wildlife Refuge System Administration Act, 16 U.S.C. §668dd(b), (acting through FWS), and the Migratory Bird Treaty Act, 16 U.S.C. § 715d (acting through FWS).

Defining "Valid Existing Rights"

As used in legislated withdrawals, a "valid existing right" is a third-party (i.e., nonfederal) interest in federal land that the relevant federal agency cannot terminate or unduly limit.[82] To have a valid existing right, the third party must

- have met the requirements under the relevant law to obtain a property interest in the land (i.e., the property interest must be *valid*);
- have had a protectable interest before the United States withdraws the land (i.e., the property interest was *existing* at the time of withdrawal);[83] and
- possess a property interest (or in some cases a possessory interest) in the land that constitutes a right for purposes of withdrawals (i.e., it must be a *right*).[84]

Valid

The validity of the interest depends on whether the third party has met the requirements of the law under which it alleges to have secured the property interest. First, the interest itself must be legitimate (i.e., supported by evidence of the factual basis required by the relevant statute). For example, to secure a mining claim as a valid right under the mining laws, a claimant must demonstrate that they have made a "valid discovery" of a valuable mineral deposit that can be extracted and marketed.[85]

Second, the third party must have complied with any procedural requirements set out in statute.[86] The "steps required to secure the right" similarly depend on the law on which the interest is based. For example, under the General Mining Law of 1872, to be eligible for exclusive possession and enjoyment (i.e., development) of a mineral deposit, a claimant must (1) make a discovery of a mineral vein, lode, or ledge and (2) properly stake (or *locate)* the claim.[87] To receive a land patent (i.e., title to the land) from the Secretary of the Interior for the land on which a valuable mineral discovery is located, the claimant must perform a requisite amount of work developing the claim and pay a fee.[88] Similarly, before purchasing up to 80 acres of public land as

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[82] See, for example, The Bureau of Land Management Wilderness Review and Valid Existing Rights, M-36910 (Supp.), 88 Interior Dec. 909, 912 (1981) [hereinafter 1981 Solicitor Opinion]("'[V]alid existing rights' are those rights short of vested rights that are immune from denial or extinguishment by the exercise of secretarial discretion."); Laitos & Westfall, *supra* note 71, at 26.

[83] As described below in "Existing," certain property interests may be allowed to relate back to the date the claimant first occupied the land before a withdrawal and be considered "existing" even if the right is not secured (i.e., the process for obtaining the right is not complete) until after the withdrawal.

[84] See, generally, Laitos & Westfall, *supra* note 71. Property interests versus possessory interests are discussed below in "Rights."

[85] *See, e.g.*, Vane Minerals v. United States, 116 Fed. Cl. 48, 55-59 (2014); Skaw v. United States, 13 Cl. Ct. 7, 28 (1987), *aff'd* 847 F.2d 842 (Fed. Cir. 1988); *see also* 43 C.F.R. § 3809.00(a). A valid discovery "occurs when the claimant demonstrates that a reasonably prudent person would be justified in expending further effort to develop the claim." *Vane Minerals*, 116 Fed. Cl. at 55. The claimant also must "establish that 'the mineral can be extracted, removed, and marketed at a profit.'" *Id.* at 56 (quoting United States v. Coleman, 390 U.S. 599, 602 (1968)).

[86] Russian-American Packing Co. v. United States, 199 U.S. 570, 575 (1905) ("[T]he mere settlement upon public lands without taking some steps required by law to initiate the settler's right thereto, is wholly inoperative as against the United States.").

[87] 30 U.S.C. §26.

[88] 30 U.S.C. §§28-29. However, since FY1995, a series of annual moratoria on funding for issuing mineral patents has been enacted into law. *See, e.g.*, P.L. 116-94, Div. D, tit. IV, § 404, 133 Stat. 3013 (2019). Patent applications filed on or before September 30, 1994, that met certain requirements have been allowed to proceed.

a trade and manufacturing site, the Trade Manufacturing and Site Act required the claimant to file a notice of location to claim of "unoccupied, unimproved, and unappropriated" land and apply to purchase the claim within five years of the notice.[89] Generally, a third party must complete the steps required by law to secure a *valid* "valid existing right" in federal land.

Existing

The second requirement for a third party to have a "valid existing right" is that the property interest existed at the time of withdrawal.[90] Depending on the legal basis for the right, a third party obtains an interest in federal land either (1) once they meet the statutory requirements, without the federal agency having to act, or (2) when the federal agency exercises its discretion to grant the property interest after the third party meets the relevant statutory requirements.[91] Third parties claiming property interests under laws that do not require the federal agency to grant the interest have an existing property interest as soon as they meet the law's requirements.[92] For example, a claimant under federal mining laws is entitled to the claim once they complete the statutory steps described above (discovery and location).[93] Whether the Secretary of the Interior has issued a land patent to transfer title to the claimant does not affect the claimant's right to the land; once federal mining law requirements are met, the property right "vests" (i.e., ownership is transferred to the claimant) and the right *exists*.[94] In some cases, the claimant need not complete all of the required steps before the withdrawal to obtain an existing right. If the law allows claims to relate back to occupancy (i.e., be back-dated to when the claimant first occupied the land), claimants may have *existing* rights if they occupied the land before withdrawal and ultimately complete the remaining steps required by law.[95]

Other laws provide that a claimant's interest in federal land only becomes a valid existing right once the Secretary has acted to make it valid.[96] For example, third parties acquire oil and gas leases when the Secretary of the Interior approves their application.[97] Although courts and agencies have recognized these leases as valid existing rights in various contexts, they have not recognized *applications* for oil and gas leases or other leasehold interests in federal land.[98]

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[89] 43 U.S.C. §687a-1, *repealed* effective Oct. 21, 1986, P.L. 94-579, title VII, § 703(a) (1976); 43 C.F.R. §2562.1 (1983).

[90] 1981 Solicitor Opinion, *supra* note 82 at 911 ("They are property interests rather than mere expectancies.").

[91] *Id*. at 912; Laitos & Westfall, *supra* note 71, at 25-36.

[92] Laitos & Westfall, *supra* note 71, at 12-13, 16-17.

[93] 30 U.S.C. §§26; *see also* 1981 Solicitor Opinion, *supra* note 82, at 912.

[94] Black's Law Dictionary (11th ed. 2019) (defining vest to mean "to confer ownership (of property) on a person). See, for example, Wyoming v. United States, 255 U.S. 489, 501, 508-09 (1921); Kern Oil Co. v. Clarke, 30 Pub. Lands Dec. 550, 550 (1901). During this time, the United States merely holds the title to the land in trust on behalf of the claimant until the land patent (i.e., the official document granting title) issues. See, for example, *Wyoming*, 255 U.S. at 501-02. Note, however, that since FY1995, a series of annual moratoria on funding for issuing mineral patents has been enacted into law. *See, e.g.*, P.L. 116-94, Div. D, tit. IV, § 404, 133 Stat. 3013 (2019). Patent applications filed on or before September 30, 1994, that met certain requirements have been allowed to proceed.

[95] James Milton Cann, 16 IBLA 374 (1974); *cf.* Ramstad v. Hodel, 756 F.2d 1379, 1382-86 (9th Cir. 1985).

[96] See, for example, James v. Canon, 84 Interior Dec. 176, 181 (1977) (affirming that lease offerors have no right to a lease).

[97] 30 U.S.C. §226.

[98] Compare Union Oil Co. of Cal. v. Morton, 512 F.2d 743, 750-51 (9th Cir. 1975) (recognizing that an oil and gas lease is a property right) with James v. Canon, 84 Interior Dec. 176, 181 (1977) (affirming that lease offerors have no right to a lease). See also Miller v. Udall, 317 F.2d 573, 576 (D.C. Cir. 1963) ("[A]lthough filing an offer is a necessary condition or prerequisite to the issuance of a lease, it does not give the applicant a valid existing right to a lease.");

Courts and agencies have at times concluded that a third party has a valid existing right despite not having established an interest by law before the land is withdrawn.[99] The Solicitor of the Department of the Interior has offered "an expansive interpretation of 'existing valid rights' in the context of withdrawal"[100] that includes "all prior valid applications for entry, selection, or location, which were substantially complete at the date of the withdrawal" and "[c]laims under the Color of Title Act of December 22, 1928."[101] A court or agency also may recognize a valid existing right, even if the claimant is not legally entitled to it, because it would be equitable (i.e., consistent with the principles of justice).[102]

Rights

Not all uses of or interests in federal land qualify as valid existing "rights." The third party usually must have obtained a *property interest* in the land to have a right; merely using the land generally is insufficient to establish a valid existing right.[103] To determine whether the asserted interest qualifies as a right, courts and agencies examine the law authorizing the interest and the withdrawal law.[104] Courts and agencies have recognized a number of property interests as protected rights, such as entitlements to land patents under mining laws and entry-based laws such as the Homestead Acts and the Trade and Manufacturing Site Act;[105] land grants to states;[106] rights-of-way;[107] and mineral leases.[108]

Courts and agencies also have deemed certain *possessory* interests protected, the most common example being perfected but unpatented mining claims.[109] However, they have declined to recognize other possessory interests as valid existing rights.[110] Courts and agencies have generally

1981 Solicitor Opinion, *supra* note 82, at 912 (describing when valid existing rights arise); Laitos & Westfall, *supra* note 71, at 12-19 (describing how courts and agencies have treated different types of interests in property).

[99] 1935 Solicitor Opinion, *supra* note 71, at 210.

[100] *Ramstad*, 756 F.2d at 1385.

[101] 1935 Solicitor Opinion, *supra* note 71, at 210. The Color of Title Act provides a means for BLM to resolve certain private party claims on public lands through conveyance of patents. *See* 43 U.S.C. §1068.

[102] See, for example, *Ramstad*, 756 F.2d at 1383-86; 1935 Solicitor Opinion, *supra* note 71, at 210-11; Black's Law Dictionary (11th ed. 2019) (defining equitable as "Just; consistent with principles of justice and right").

[103] 1981 Solicitor Opinion, *supra* note 82, at 911.

[104] *Id*. at 912.

[105] See, for example, Stockley v. United States, 260 U.S. 532, 536-42 (1922); Ramstad v. Hodel, 756 F.2d 1379, 1380-81 (9th Cir. 1985).

[106] Wyoming v. United States, 255 U.S. 489, 501-02 (1921).

[107] Sierra Club v. Hodel, 848 F.2d 1068, 1085-86 (10th Cir. 1988), overruled on other grounds by Village of Los Ranchos de Albuquerque v. Marsh, 956 F.2d 970 (10th Cir. 1992). See also FLPMA §701(a) & (h), P.L. 94-579, Title I, §102, 90 Stat. 2744 (1976) (codified at 43 U.S.C. 1701 note).

[108] See, for example, Skaw v. United States, 740 F.2d 932, 935-36 (Fed. Cir. 1984).

[109] United States v. Locke, 471 U.S. 84, 88 (1985); Best v. Humboldt Placer Mining Co., 371 U.S. 334, 335-37 (1963); Wilbur v. United States *ex rel.* Krushnic, 280 U.S. 306, 316-17 (1930); Laitos & Westfall, *supra* note 71, at 15-16. A mining claim is perfected but unpatented when the claimant has complied with all the requirements of the law but the United States has not issued a land patent to transfer title. See, for example, *Wilbur*, 280 U.S. at 316-17; Belk v. Meagher, 104 U.S. 279, 283-84 (1881).

[110] Wisenak, Inc. v. Andrus, 471 F. Supp. 1004, 1009 (D. Alaska 1979) (declining to recognize the doctrine of *pedis possessio*, which protects prospectors from encroachment by other explorers, as creating valid existing rights); Laitos & Westfall, *supra* note 71, at 18.

not recognized permits, such as grazing permits, as protected property rights for purposes of interpreting withdrawals, absent a specific provision in the withdrawal law or order.[111]

"Subject to" Valid Existing Rights

Once a third party establishes a "valid existing right" in withdrawn federal land, the relevant federal agency must determine how to manage the land "subject to" that right.[112] Valid existing rights limit the federal agency's ability to manage withdrawn land pursuant to the directives in the withdrawal legislation.[113] For example, under FLPMA, the Secretary of the Interior must manage any areas being considered for wilderness designation "so as not to impair the suitability of such areas for preservation as wilderness."[114] However, FLPMA's savings clause requires the Secretary to carry out actions under FLPMA—including wilderness management—"subject to valid existing rights."[115] As the Solicitor for the Department of the Interior recognized in a 1981 opinion, this savings clause limits prevents the Secretary from applying the nonimpairment standard in a way that "would prevent the exercise of any 'valid existing rights.'"[116]

Valid existing rights are not absolute rights that cannot be managed or limited.[117] The nature of the right depends on the law that created the right, the terms of any agreement involved (e.g., an oil and gas lease), and how the relevant federal agency exercises its discretion.[118] The Secretary of the Interior has taken the position that federal agencies may regulate valid existing rights provided that they do not regulate "to the point where the regulation unreasonably interferes with enjoyment of the benefit of the right."[119]

Identifying Valid Existing Rights

Due to the large number of public land laws and natural resource laws under which parties may have obtained rights to federal land, and the variability in how parties obtain a "valid existing" right under each law, federal agencies or courts necessarily must analyze "valid existing rights" on a case-by-case basis.[120] The particular right retained by a party also may depend on various

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[111] *Cf.* United States v. Fuller, 409 U.S. 488, 494 (1973) ("The provisions of the Taylor Grazing Act ... make clear the congressional intent that no compensable property might be created in the permit lands themselves as a result of the issuance of the permit."); LaRue v. Udall, 324 F.2d 428, 431 (D.C. Cir. 1963) ("By no means should [a grazing permit provision of the Taylor Grazing Act] be construed as providing that, by maintaining a lien on his grazing unit, a permitee may also create and maintain a vested interest therein which will prevent the United States from exchange [the land]."); Bradshaw v. United States, 47 Fed. Cl. 549, 553 (Fed. Cl. 2000) ("[N]either the grazing permit, nor the historical grazing preference is a compensable interest.... "); see also Leigh Raymond, *Viewpoint: Are Grazing Rights on Public Lands a Form of Private Property?*, 50 J. RANGE MGMT. 431, 431-36 (1997).

[112] 1981 Solicitor Opinion, *supra* note 82, at 912-13.

[113] *Id*. at 913.

[114] 43 U.S.C. §1782(c).

[115] 43 U.S.C. 1701 note.

[116] 1981 Solicitor Opinion, *supra* note 82, at 911.

[117] *Id*. at 912 (citing Best v. Humboldt Placer Mining Co., 371 U.S. 334 (1963); Continental Oil Co. v. United States, 184 F.2d 802 (9th Cir. 1950)).

[118] *See id*.

[119] *Id*. at 913-14.

[120] See, for example, *id*. at 912 ("Thus, it is not possible to identify in the abstract every interest that is a valid existing right; the question turns upon the interpretation of the applicable statute and the nature of the rights conveyed by approval of an application."). Conversations with staff at BLM, FS, FWS, and NPS confirmed that the agencies generally determine the valid existing rights that apply to a particular withdrawal on a case-by-case basis. CRS held conversations with agency staff specifically to obtain information for this report on the following dates: BLM,

other factors, including the site-specific conditions of the property.[121] The agencies rely primarily on master plats of public domain land units that BLM maintains, which track awarded leases, locations, entries, rights-of-way, easements, and other property interests. The agencies also may conduct independent title searches. Some agency regulations provide procedures for parties to obtain valid existing rights determinations under certain statutes.[122] Claimants may challenge "valid existing rights" determinations in administrative proceedings before the agency with jurisdiction over the land, if the agency so provides, or in court.[123]

Summary of Analysis

In exercise of its authority over federal lands, Congress considers and enacts legislation to withdraw lands from management under various laws. *Legislated withdrawals* often have common goals, components, and protections. A common goal is to preclude the lands from being used for certain purposes to foster other particular purposes or values. Common components include the removal of the affected parcels from operation under one or more categories of law, namely public land laws, mining laws, and/or mineral leasing laws. Common protections pertain to valid existing rights, to prevent termination or limitation of third-party property interests following the withdrawal. Though legislated withdrawals have much in common, Congress has enacted variations in their components and terms. These variations enable Congress to determine the appropriate management for the lands to reach its desired objectives.

Determining the meaning and effect of legislated withdrawals can be challenging. For example, there are numerous public land laws, but no single, consistent definition of this term or comprehensive list of such laws and the lands to which each law applies. Further, there are a large number of laws under which third parties may have obtained rights to federal land. Accordingly, agencies and courts determine the meaning and effect of legislated withdrawals on a case-by-case basis. To enhance clarity of intent, Congress can provide specifications in the text of the withdrawal laws and in accompanying explanatory documents.

Though legislated withdrawals are generally made subject to valid existing rights, Congress may provide for any such rights—or other property interests within the withdrawal boundaries—to be acquired through the power of eminent domain (with just compensation) or voluntary transactions such as purchases, donations, or exchanges. When enacting a legislated withdrawal, Congress may consider whether the purposes of the withdrawal may be served by allowing the relevant federal agency to pursue such acquisitions.

December 18, 2019; FS, January 13, 2020; NPS, January 22, 2020; and FWS, January 31, 2020. For brevity, text references to agency consultations do not typically denote the agency or agencies that provided the information.

[121] See, for example, 1981 Solicitor Opinion, *supra* note 82, at 913.

[122] See, for example, 30 C.F.R. §761.16 (providing for valid existing rights determinations under surface mining laws); 36 C.F.R. §§292.63, 292.64 (providing for valid existing rights determinations for the Smith River National Recreation Area); Vane Minerals v. United States, 116 Fed. Cl. 48, 57-59 (2014) (describing agency valid existing rights determination procedures for mining claims).

[123] See, for example, Shepley v. Cowan, 91 U.S. 330, 338 (1876); Kern Oil Co. v. Clarke, 30 Pub. Lands Dec. 550, 550 (1901).

Author Information

Carol Hardy Vincent
Specialist in Natural Resources Policy

Erin H. Ward
Legislative Attorney

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