CASEY E. FOLKS, JR. *ET AL.*

183 IBLA 24 Decided September 20, 2012

United States Department of the Interior
Office of Hearings and Appeals
Interior Board of Land Appeals
801 N. Quincy St., Suite 300
Arlington, VA 22203

CASEY E. FOLKS, JR. *ET AL.*

IBLA 2011-216, *et al.* Decided September 20, 2012

Appeal from decisions of the Nevada State Office, Bureau of Land Management, declaring certain mining claims null and void *ab initio.* NMC 1038350, *et al*.

Reversed.

1. Federal Land Policy and Management Act of 1976: Withdrawals--Mining Claims: Lands Subject to--Mining Claims: Withdrawn Lands--Withdrawals and Reservations: Authority to Make--Withdrawals and Reservations: Effect of--Withdrawals and Reservations: Revocation and Restoration

   Although 43 C.F.R. § 2091.6 states that land within a withdrawal that expires does not automatically become open but is opened by publication in the *Federal Register* of an opening order, the Board has long recognized that there are withdrawals for which this statement is *not* true. Whether land automatically becomes open upon the expiration of a withdrawal or must be restored by an opening order depends on the provisions of the statute under which the withdrawal occurred.

2. Federal Land Policy and Management Act of 1976: Withdrawals--Mining Claims: Lands Subject to--Mining Claims: Withdrawn Lands--Notice: Generally--Public Records--Withdrawals and Reservations: Authority to Make--Withdrawals and Reservations: Effect of--Withdrawals and Reservations: Revocation and Restoration

   Under 44 U.S.C. § 1507 (2006), publication in the *Federal Register* imparts constructive notice of the contents and requirements in documents so published. Because the

withdrawal and opening of lands are matters that must be published in the *Federal Register*, the notice imparted by documents so published cannot be negated by notations on land office records. In cases where no opening order is required, the fact that BLM has not corrected its records to reflect the expiration of a withdrawal cannot negate the notice imparted by earlier publication of the expiration date in the *Federal Register* and does not effectively extend the withdrawal.

3. Federal Land Policy and Management Act of 1976: Withdrawals--Mining Claims: Lands Subject to--Mining Claims: Withdrawn Lands--Withdrawals and Reservations: Authority to Make--Withdrawals and Reservations: Effect of--Withdrawals and Reservations: Revocation and Restoration

   Congress provided in 43 U.S.C. § 1712(e)(3) (2006) that public lands shall be removed from or restored to the operation of the mining law only by withdrawal action pursuant to 43 U.S.C. § 1714 (2006) or other action pursuant to applicable law. Congress then significantly narrowed the scope of applicable law by repealing 29 statutes that authorized the Executive to create, modify, or terminate withdrawals, and by expressly repealing the "implied authority of the President to make withdrawals and reservations resulting from acquiescence of the Congress." Instead, Congress authorized the Secretary to "make, modify, extend or revoke withdrawals but only in accordance with the provisions and limitations" of § 1714. Thus, BLM can no longer withhold land from location pursuant to administrative practices that are based solely on the implied authority that Congress repealed.

4. Federal Land Policy and Management Act of 1976: Withdrawals--Mining Claims: Lands Subject to--Mining Claims: Withdrawn Lands--Withdrawals and Reservations: Authority to Make--Withdrawals and Reservations: Effect of--Withdrawals and Reservations: Revocation and Restoration

> In enacting the withdrawal provisions of FLPMA, Congress sought to avoid the problem of "interminable 'temporary' withdrawals" by requiring that withdrawals have a specific duration and by establishing specific requirements in 43 U.S.C. § 1714(f) that must be met before a withdrawal may be extended. To hold that BLM may continue to withhold land from location after a withdrawal made pursuant to FLPMA has expired simply by failing to issue an opening order would thwart the very purpose of these provisions by enabling the interminable temporary withdrawals that Congress sought to eliminate.

APPEARANCES: Gregory J. Walch, Esq., Las Vegas, Nevada, for appellant; Nancy S. Zahedi, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Sacramento, California, for the Bureau of Land Management.

OPINION BY CHIEF ADMINISTRATIVE JUDGE HOLT

These are consolidated appeals[1] from decisions dated August 8, 2011, October 4, 2011, October 17, 2011, and October 21, 2011, issued by the Nevada State Office, Bureau of Land Management (BLM), declaring certain mining claims null and void *ab initio*. Appellants[2] located their claims on land previously

---

[1] IBLA 2011-216, *Casey E. Folks, Jr.* (NMC 1038350 - 53); IBLA 2011-217, *Resource Management Group, Inc.* (NMC 1027038 - 43); IBLA 2011-222, *Eric Brannstrom* (NMC 1038772); IBLA 2011-223, *Diane Lee DeLauer* (NMC 1038349); IBLA 2011-224, *James Gardiner* (NMC 1034924 - 26); IBLA 2011-225, *Casey E. Folks, Jr.* (NMC 1038901); IBLA 2011-226, *G. Wayne Perry* (NMC 1038956); IBLA 2011-227, *Gary Vosburg* (NMC 1036663 - 65); IBLA 2011-228, *Gary Vosburg* (NMC 1027109 - 115); IBLA 2011-229, *Everett Merz* (NMC 1038917); IBLA 2011-230, *Everett Merz* (NMC 1040709 - 11); IBLA 2011-232, *Kevin J. Vosburg* (NMC 1038938); IBLA 2011-241, *Resource Management Group, Inc.* (NMC 1036253 - 54); IBLA 2012-15, *Kevin Bunderson* (NMC 1038306, 1038936); IBLA 2012-23, *James Gardiner* (NMC 1046376 - 78); IBLA 2012-24, *Matthew Harber* (NMC 1049732 - 33); and IBLA 2012-28, *Cody Ehlers* (NMC 1049660). A related appeal, IBLA 2012-16, *Kevin Bunderson* (NMC 1049364 - 66), originally was consolidated under IBLA 2011-216, but has been resolved by the Board in a separate Order.

[2] We note that the Notice of Appeal (NOA) for IBLA 2011-222, *Eric Brannstrom* (NMC 1038772), identifies the appellant as Casey E. Folks, Jr., even though the listed mining claim is owned by Eric Brannstrom and the NOA caption identifies

(continued...)

withdrawn under section 204 of the Federal Land Policy and Management Act (FLPMA), 43 U.S.C. § 1714 (2006), for the Yucca Mountain nuclear waste repository in Nevada. Although the claims were located after the withdrawal expired on January 31, 2010, BLM's decisions hold that under 43 C.F.R. § 2091.6, the land remains closed to mineral location until an opening order is published.

Appellants disagree, asserting that the land at issue was open to locating their mining claims because the withdrawal was not extended in accordance with section 204(f) of FLPMA. Their appeal questions whether BLM can continue "withholding an area of Federal land from settlement, sale, location, or entry," *see* 43 U.S.C. § 1702(j) (2006), after a withdrawal issued under section 204 of FLPMA has expired and has not been extended in accordance with that provision.

BACKGROUND

The development of nuclear energy and its application to civilian uses began decades ago, but the controversy over the disposition of nuclear waste continues to this day. In 1982, Congress enacted the Nuclear Waste Policy Act (NWPA) that assigned the Department of Energy (DOE) responsibility for selecting a test site and designing and operating a repository for permanently disposing of nuclear waste. 42 U.S.C. §§ 10101-10270 (2006). In 1987, Congress amended the NWPA and directed that the nuclear waste program focus exclusively on the Yucca Mountain site. 42 U.S.C. §§ 10133(a), 10172(a) (2006). If studying the site required an authorization such as a right-of-way (ROW) from BLM, BLM was required to issue the ROW "at the earliest practicable date." 42 U.S.C. § 10140 (2006); *see Nevada v. Burford*, 918 F.2d 854, 855 (9th Cir. 1990). On January 6, 1988, the Bureau granted DOE an ROW for 51,632 acres near Yucca Mountain.[3] 918 F.2d at 855.

---

[2] (...continued)
Brannstrom as the appellant. Although the appeal is subject to dismissal for failure to correctly identify the appellant, the misidentification of the appellant appears to be an inadvertent clerical error resulting from the multitude of consolidated cases, and the proper appellant is otherwise clear from the NOA. Accordingly, we decline to dismiss the appeal. *See, e.g., Simo v. Union of Needletrades, Indus. & Textile Employees, Southwest Dist. Council*, 322 F.3d 602, 610 (9th Cir.), *cert. denied,* 540 U.S. 873 (2003).

[3] This ROW expired in Jan. 2001, but was renewed and is now scheduled to expire on Dec. 31, 2014. Government Accountability Office (GAO), *Yucca Mountain: Information on Alternative Uses of the Site and Related Challenges* (GAO Report) at 25 n.25 (2011).

The site includes land under the management of BLM, the Air Force, and the DOE, and most of the land within the ROW had already been withdrawn.[4] GAO Report at 30 n.33. However, it was not until September 1990 that the Department, under section 204 of FLPMA, withdrew an additional 4,255.50 acres of the land that BLM administers "to maintain the physical integrity of the subsurface environment to ensure that scientific studies . . . by the Department of Energy at Yucca Mountain are not invalidated or otherwise adversely impacted." Public Land Order No. (PLO) 6802, 55 Fed. Reg. 39152 (Sept. 25, 1990). This is the land we are concerned with here. The withdrawal was to expire 12 years later, unless extended pursuant to section 204 of FLPMA. *Id*. The Secretary extended the withdrawal, until January 31, 2010. PLO 7534, 67 Fed. Reg. 53359 (Aug. 15, 2002). DOE later proposed to extend the withdrawal for an additional 12-year period until January 31, 2022. 73 Fed. Reg. 53041 (Sept. 12, 2008). However, the notice expressly stated that if the extension was not approved, the withdrawal would expire on January 31, 2010. The withdrawal was not extended.[5] How the entire test site will be used in the future is under review.[6]

The appellants located mining claims in the area of Yucca Mountain after the withdrawal expired, and on November 22, 2010, BLM sent a notice to one of the claimants, Gary Vosberg, seeking clarification of the situs of his claims. Statement of Reasons (SOR), Ex. 1. The notice explicitly stated that the area of the test site withdrawal that expired on January 31, 2010, "would allow mineral location," but other land in DOE's test site remained withdrawn and not subject to location, citing

---

[4] For specific information about these earlier withdrawals, see BLM Master Title Plats (MTPs) for Ts. 12 - 14 S., Rs. 48 - 49 E., Mount Diablo Meridian, Nye County, Nevada.

[5] In February 2010, the President proposed to eliminate funding for the project, and in March 2010, DOE unsuccessfully attempted to withdraw its construction license application it had filed with the Atomic Safety Licensing Board (ASLB) for the Yucca Mountain repository. *See In re U.S. Dep't of Energy (High-Level Waste Repository)*, Docket No. 63-001, ASLBP No. 09-892-HLW-CAB04 (United States Nuclear Regulatory Commission) (June 29, 2010) at 3. Litigation over the propriety of DOE's efforts continues. *See, e.g., In re Aiken County*, 645 F.3d 428 (D.C. Cir. 2011).

[6] On Sept. 16, 2011, the GAO submitted the GAO Report to Senator Harry Reid of Nevada. The Report refers to the mining claims now under appeal and notes that litigation over their validity could adversely affect alternative uses of the site. GAO Report at 25-30. Although BLM initially concluded the land where the claims were located was open to location after the withdrawal had expired, GAO's inquiry prompted BLM to consult with the Office of the Solicitor and later conclude that the lands were still closed to entry because no opening order had been issued. Under those circumstances, the claims would be invalid. *Id.* at 28.

PLO 2568 (Dec. 19, 1961). Vosberg and other appellants continued to locate and amend claims in the area that BLM now asserts was closed to entry. SOR at 2-3.

ARGUMENTS OF THE PARTIES

Appellants contend that the Secretary had no authority under 43 U.S.C. § 1714 (2006) to keep the land closed to the location of mining claims after January 21, 2010. They point to subsection (a) of that provision, "the Secretary is authorized to make, modify, extend, or revoke withdrawals but only in accordance with the provisions and limitations of this section." 43 U.S.C. § 1714(a) (2006). Appellants further argue that the extension order operated as a modification of the original PLO and put the public on notice that the withdrawal expired on January 31, 2010, thereby serving the function of an opening order in providing public notice that the land was open to location. SOR at 5.

To support their arguments, appellants cite two cases in which this Board held that the location of mining claims was not precluded by the absence of an opening order: *Richard Bargen*, 117 IBLA 239 (1991), and *Harry J. Ayala*, 99 IBLA 19 (1987). In *Bargen*, we held that where a statute withdrawing public lands expressly provides that the withdrawal and segregation of the public lands shall terminate on a date certain and further provides that the withdrawal may not be extended or renewed except by Act of Congress, a mining claim located on the lands after expiration of the withdrawal is not properly invalidated on the ground that the land was not opened by an opening order. 117 IBLA at 241-43. In *Ayala*, we held that where a PLO withdrawing lands from location of mining claims is expressly amended by a subsequent PLO deleting certain lands from the withdrawal, a decision declaring mining claims located thereafter for precious metals on lands deleted from the withdrawal to be null and void *ab initio* will be reversed. 99 IBLA at 21.

In response, BLM argues that the expiration of the withdrawal did not have the effect of opening the land to mineral entry.[7] Response I at 4. BLM refers to 43 C.F.R. § 2091.6 which states as follows:

> The term of a withdrawal ends upon expiration under its own terms, or upon revocation or termination by the Secretary by publication in the Federal Register of a Public Land Order. *Lands included in a withdrawal*

[7] As these appeals were being consolidated, BLM filed several pleadings responding to appellants' arguments: a Response to Petitions to Stay dated Oct. 7, 2011 (Response I); a motion to consolidate, response to stay petition and Response to Statement of Reasons dated November 1, 2011 (Response II); and another response dated November 9, 2011 (Response III). Responses II and III are cited only where they differ from Response I.

> *that is revoked, terminates or expires do not automatically become open, but are opened through publication in the Federal Register of an opening order*. An opening order may be incorporated in a Public Land Order that revokes or terminates a withdrawal or may be published in the Federal Register as a separate document. In each case, the opening order specifies the time, date and specific conditions under which the lands are opened. (See Subpart 2310.)

(Emphasis added.) BLM notes that the PLO may have indicated when the Yucca Mountain withdrawal would expire, but there was no order that included "the time, date and specific conditions under which the lands are opened." BLM refers to our decision in *Palen Pass Resources, Inc.*, 135 IBLA 38 (1996), where we held that mining claims located in 1990 within the area of a 1931 reclamation withdrawal were properly found to be null and void *ab initio* even though the 1931 withdrawal was revoked in 1947, because no opening order pursuant to 43 C.F.R. § 2091.6 was ever issued for the land at issue.

BLM contends that our decision in *Bargen* is not applicable because that case involved a Congressional withdrawal where a statute expressly stated the date on which a withdrawal terminates, whereas the instant appeal does not involve a statutory withdrawal that specifies a date. Response at 5 n.4. BLM argues that *Ayala* is not applicable because that case involved a subsequent PLO that removed land from a withdrawal and served the function of an opening order, whereas this appeal involves no subsequently issued PLO. Response at 6.

BLM further contends that its MTP still shows that the land is not open to mineral entry, and that under the "notation rule," the parcel is not available for entry until such time as the notation is removed from BLM records and the land is restored to entry, even if the original notation was made in error. *See Joe R. Young*, 171 IBLA 142, 147 (2007), and cases cited.

ANALYSIS

[1] As noted above, 43 C.F.R. § 2091.6 states that land within a withdrawal that expires does not automatically become open but is opened by publication of an opening order. This statement may be true for *some* withdrawals, but we have long recognized that there are withdrawals for which this statement is *not* true. *See, e.g.*, *Richard Bargen*, 117 IBLA at 241-43. Although BLM points to our decision in *Palen Pass Resources* where we held that an opening order was required before land within a revoked withdrawal was open to location, that case did not involve a FLPMA withdrawal; it involved a reclamation withdrawal for which there is specific statutory authority for the Secretary to establish conditions upon opening the land after the withdrawal. 135 IBLA at 39-40; *see* 43 U.S.C. § 154 (2006); *American Colloid Co. v.*

Babbitt, 145 F.3d 1152, 1155 (10th Cir. 1998), *aff'g American Colloid Co.*, 128 IBLA 257, 258-60 (1994). Although BLM may continue to withhold land from location beyond the expiration of a reclamation withdrawal until an opening order is issued, no provision similar to 43 U.S.C. § 154 appears in 43 U.S.C. § 1714.

As appellants point out, we held in *Bargen* that BLM could not withhold land from location until an opening order was issued. In that case, the claims were located on land withdrawn and reserved by Congress in 1984 as the Groom Mountain Addition to the Nellis Air Force Range under a statute that expressly stated that the withdrawal terminated on June 15, 1988, and that the withdrawal "may not be extended or renewed except by Act of Congress." Pub. L. No. 98-485, 98 Stat. 2261, 2262 (Oct. 17, 1984). The claims were located on June 16, 1988. Legislation to include the land within the Nellis Air Force Range was not enacted into law until approved by the President on June 17, 1988. We referred to 43 C.F.R. § 2091.5-6(a), which states: "Congressional withdrawals become effective and are terminated as specified in the statute making the withdrawal." 117 IBLA at 242.

Thus, whether land automatically becomes open upon the termination of a withdrawal or must be restored by an opening order depends on the provisions of the statute under which the withdrawal or segregation occurred. *See Buch v. Morton*, 449 F.2d 600 (9th Cir. 1971). In *Buch*, the court reviewed a district court decision holding that land was open to entry under general mining law where 18 months elapsed after classifying land in the Federal public domain for disposition under the Recreation and Public Purposes Act (R&PP), 43 U.S.C. § 869 (2006), where no application to use that land for such purpose had been filed. The applicable section of the R&PP provided that if no application was filed within 18 months for the purpose for which the lands had been classified, "then the Secretary shall restore such lands to appropriation under the applicable public land laws." *Id*. § 869(a) (2006). The appellate court found that this provision was not self-executing, but "contemplate[d] action by the Secretary to terminate the classification." 449 F.2d at 606. The court contrasted the statutory language with that of another statute that provided that "the segregative effect shall cease at the expiration of two years from the date of publication" if land is not offered for sale or other disposal under the Act. *Id*. Citing *Buch*, the court in *Lee v. United States*, 22 Cl. Ct. 457, 466-67 (1991), similarly held that under 16 U.S.C. § 818 (2006), lands classified as power sites did not automatically become open to entry once the Federal Power Commission made a "no injury" determination, but only after the Secretary declared the land to be open.[8]

We recognized in *Bargen* that when Congress has provided that a withdrawal can be extended only under specific conditions, BLM may not continue to withhold

[8] "[T]he Secretary of the Interior, upon notice of such determination, shall declare such lands open to location, entry, or selection . . . ." 16 U.S.C. § 818 (2006).

land from location by failing to publish an opening order; the conditions for extending the withdrawal must be satisfied unless some new and different action segregates the land from location. *See, e.g.*, *Mount Royal Joint Venture v. Kempthorne*, 477 F.3d 745, 754-56 (D.C. Cir. 2007).[9] Although the instant appeal does not involve a statutory withdrawal that specifies a date, the withdrawal was issued pursuant to a statute that requires a statement of the duration of a withdrawal and, like the withdrawal in *Bargen*, provides that a withdrawal cannot be extended unless certain actions are taken.[10] 43 U.S.C. § 1714(d), (f); *see New Mexico v. Watkins*, 969 F.2d 1122, 1135-36 (D.C. Cir. 1991). Subsection 1714(f) makes withdrawals under FLPMA different from withdrawals made pursuant to legislation similar to 43 U.S.C. §§ 154, 869(a), or 16 U.S.C. § 818, which contain provisions that specifically contemplate further action by the Secretary to restore withdrawn land to the operation of the public land laws. Thus, this appeal presents a question of first impression: whether BLM, after a withdrawal under section 204 of FLPMA has expired, may continue to withhold land from location until an opening order is issued, or whether the land automatically becomes open after the FLPMA withdrawal expires.[11]

---

[9] In *Mount Royal*, the segregative effect of a withdrawal application had expired, but immediately before the expiration, BLM published a different withdrawal application beginning a new segregation period. Although Mount Royal argued that BLM unlawfully extended the first segregation period, the court affirmed this Board's conclusion that BLM could continue to withhold land from location by publishing notice of a new withdrawal application for a different purpose. *Mount Royal*, 477 F.3d at 754-56; *see Mount Royal Joint Venture*, 144 IBLA 277, 280-81 (1998). Both the Board's and the Circuit Court's rulings necessarily presuppose that in the absence of the subsequent withdrawal, the lands would have reopened to mineral entry upon the expiration of the initial segregation period.

[10] In this appeal, BLM took no action at the time the Yucca Mountain withdrawal expired that would provide a basis for continuing to withhold the land from location.

[11] We note that BLM does not consider the issue to be one of first impression but argues that "[a]ppellants' interpretation of 43 U.S.C. § 1714 as requiring the automatic opening of all withdrawn lands after twenty years or on the expiration of a withdrawal is contrary to the BLM's interpretation of this statute as set forth in its regulations at 43 C.F.R. § 2091.6, which interpretation is subject to deference" under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984). Response II at 7 n.3. BLM's argument based on *Chevron* fails on several levels.

The issue in *Chevron* was whether "treat[ing] all of the pollution-emitting devices within the same industrial grouping as though they were encased within a single 'bubble' is based on a reasonable construction of the statutory term 'stationary

(continued...)

Although BLM contends that under the "notation rule," the land is not open to location until such time as the notation of the withdrawal is removed from BLM records and the land is restored to entry, the notation rule cannot be applied "where doing so would thwart the will of Congress." *Donald Graydon Jolly*, 173 IBLA 201, 211-12 (2007) (citing *Richard Bargen*, 117 IBLA at 243); *Phelps Dodge Corp.*, 115 IBLA 214, 217 (1990); *John J. Schnabel*, 90 IBLA 147, 150 (1985); *B.J. Toohey*, 88 IBLA 66, 96-97, 92 I.D. 317, 335 (1985), *aff'd sub nom. Cavanagh v. Hodel*, No. 86-041 Civil (D. Alaska Mar. 18, 1988). FLPMA, under which authority the withdrawal that is the subject of this appeal was issued, has been called "the most important enactment by Congress relating to the subject of withdrawals in the over two hundred year history of the nation's public lands." Charles F. Wheatley, Jr., *Withdrawals Under the Federal Land Policy Management Act of 1976*, 21 ARIZ. L. REV. 311, 327 (1979) (hereinafter cited as Wheatley).[12] Ascertaining the "will of Congress" in the withdrawal provisions of FLPMA requires some understanding of the history that led to that statute, which in turn requires an understanding of the role of the Legislative and Executive branches of government in public land administration.

---

[11] (...continued)
source.'" 467 U.S. at 840. Although BLM argues that its regulation contains an interpretation that merits *Chevron* deference, BLM does not identify the statutory term being construed or the interpretation the regulation gives it. The regulation refers to withdrawals generally with no particular reference to a provision of FLPMA. Indeed, a careful review of the text of the final rule and its preamble strongly impels the conclusion that no consideration whatsoever was given to the requirements of section 204(f) of FLPMA when the language of 43 C.F.R. § 2091.6 was drafted. Otherwise, we would have found an explicit discussion of how withholding land from location after a FLPMA withdrawal expired until issuance of an opening order would be consistent with FLPMA's requirements for extending withdrawals. If BLM did consider the issue, it made a deliberate decision not to offer an interpretation. In its section-by-section analysis, the preamble to the final rule states that only three "widely varied" comments were received on § 2091.6, to which BLM responded by referring to withdrawals generally without pointing to the particular provisions of section 204(f) of FLPMA. 52 Fed. Reg. 12171, 12174 (Apr. 15, 1987). Since BLM's regulation does not purport to interpret a provision of FLPMA, we will discuss the applicability of *Chevron* to the interpretation BLM now offers in this appeal later in this opinion.

[12] Wheatley was the contractor with the Public Land Law Review Commission (PLLRC) who prepared its *Study of Withdrawals and Reservations of Public Domain Lands* (1969) (PLLRC Withdrawal Study). Wheatley's study has been called "the most comprehensive source on withdrawals." David H. Getches, *Managing the Public Lands: The Authority of the Executive to Withdraw Lands*, 22 NAT. RESOURCES J. 279, 284 n.19 (1982).

Given FLPMA's stated purpose to redefine the roles of Congress and the Executive with respect to withholding land from disposition, *see* 43 U.S.C. § 1701(a)(4) (2006), it is important to understand how those roles developed up to the time of FLPMA's enactment. Accordingly, we first describe how withdrawals were made prior to the enactment of FLPMA. We next focus on how opening orders became the means by which land was restored to entry or location, and how the notation rule relates to lands that were previously withdrawn. We then turn to the concerns that resulted in the enactment of the withdrawal provisions of FLPMA, and finally discuss how those provisions affect this appeal.

The Powers of Congress and the Executive over Public Land

Controversies over how a government makes land available for settlement and disposition predate the American Revolution.[13] After the former colonies agreed to cede their western land claims to the new national government, the Continental Congress adopted a policy in the Ordinance of 1785 to dispose of land for settlement and to raise money to pay Revolutionary War debt. *See* 28 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789 at 375-81 (GPO 1933). When the people of the United States established a new Constitution "to form a more perfect Union," they assigned Congress the "Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. Const. Art. IV, § 3, cl. 2 (the Property Clause). The Supreme Court has "repeatedly observed" that "'[t]he power over the public land thus entrusted to Congress 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 United States v. Gratiot*, 39 U.S. (14 Pet.) 526, 527 (1840). That Court has further recognized "that the power of Congress is exclusive and that only through its exercise in some form can rights in lands belonging to the United States be acquired." *Utah Power & Light Co. v. United States*, 243 U.S. 389, 404 (1917).[14]

---

[13] For example, the Royal Proclamation of 1763, issued after the conclusion of the Treaty of Paris that ended the Seven Years War (in Europe) and the French and Indian War (in America), may be said to have effected an early "withdrawal" when it prohibited settlement on land west of the Alleghenies. *See* Paul W. Gates, *History of Public Land Law Development* at 34 (1968).

[14] The opinion in *Utah Power & Light* was authored by Justice Willis Van Devanter, whose expertise in public land matters was acknowledged almost 50 years later in a unanimous Supreme Court decision authored by Justice William O. Douglas: "[A]s Assistant Attorney General for the Interior Department from 1897 to 1903, [he] did more than any other person to give character and distinction to the

(continued...)

Nevertheless, "it has long been recognized that the Secretary of [the] Interior has broad plenary powers over the disposition of public lands." *Ideal Basic Industries v. Morton*, 542 F.2d 1364, 1367 (9th Cir. 1976) (citing *Cameron v. United States*, 252 U.S. 450, 459-64 (1920) and *Knight v. United Land Association*, 142 U.S. 161, 177 (1891)). In *Knight*, the court quoted its decision in *Williams v. United States*, 138 U.S. 514, 524, as follows: "'It is obvious – it is common knowledge – that in the administration of such large and varied interests as are intrusted to the land department, matters not foreseen, equities not anticipated, and which are, therefore, not provided for by express statute, may sometimes arise; and, therefore, that the secretary of the interior is given that superintending and supervising power which will enable him, in the face of these unexpected contingencies, to do justice.'" 142 U.S. at 181.[15]

Withdrawals before FLPMA

From the beginning of the Republic and throughout the nineteenth century, Congress withdrew or reserved land from disposition by statute or by enacted legislation empowering the Executive to do so. *See* Wheatley at 312-14. On numerous occasions, however, the Executive withheld land from disposition without specific Congressional authorization. *Id.*; *see, e.g., Wilcox v. Jackson*, 38 U.S. (13 Pet.) 498, 513 (1839). Events early in the twentieth century led to conflicts over the Executive's exercise of this power.

In 1897, Congress declared all public lands chiefly valuable for petroleum or other mineral oils to be "free and open to occupation, exploration, and purchase by citizens of the United States . . . under regulations prescribed by law." Act of February 11, 1897, 29 Stat. 526, ch. 216. Subsequently, land was so rapidly being conveyed out of Federal ownership and oil being produced at such rate that officials worried that the Government was effectively giving away oil that it would have to repurchase to meet the increasing demands for the fuel by the United States Navy. President Taft began to withdraw lands from all forms of disposal under the public lands laws, including more than 3 million acres of land in California and Wyoming described in Temporary Petroleum Withdrawal No. 5 that was issued on

---

[14] (...continued)
administration of the public lands." *Best v. Humboldt Placer Mining Co.*, 371 U.S. 334, 336-37 (1963).

[15] The *Knight* opinion was authored by a Justice experienced in carrying out the Secretary's responsibilities. Justice Lucius Quintus Cincinnatus Lamar served as Secretary of the Interior from 1885 to 1888, immediately prior to his appointment to the Court.

September 27, 1909. *See* Gates, *supra* note 13, at 732-33. Nevertheless, oil developers continued to stake claims on withdrawn land and produce oil from them.

Taft's own doubt about the legality of such unilateral action by the Executive prompted him to seek specific authority for making withdrawals. *See* PLLRC Withdrawal Study at 88-89 n.142, and authorities cited therein. The Act of June 25, 1910, commonly referred to as the Pickett Act, granted the President authority to temporarily withdraw public lands "for water-power sites, irrigation, classification of lands, or other public purposes." Ch. 421, § 1, 36 Stat. 847 (1910).[16]

Meanwhile, oil producers in 1910 located mining claims on land withdrawn by Temporary Petroleum Withdrawal No. 5 and began extracting oil. The United States sought recovery of the land and an accounting for the oil, and that conflict lead to the Supreme Court's decision in *United States v. Midwest Oil Company*, 236 U.S. 459 (1915). The Court sidestepped the crucial issue of congressional limits on Executive power, explaining:

> We need not consider whether, as an original question, the President could have withdrawn from private acquisition what Congress had made free and open to occupation and purchase. The case can be determined on other grounds and in the light of the legal consequences flowing from a long-continued practice to make orders like the one here involved. For the President's proclamation of September 27, 1909, is by no means the first instance in which the Executive, by a special order, has withdrawn lands which Congress, by general statute, had thrown open to acquisition by citizens.

236 U.S. at 469. Rather, it cast the President as an agent who had repeatedly taken actions in which Congress, the principal, acquiesced:

> The Executive, as agent, was in charge of the public domain; by a multitude of orders extending over a long period of time, and affecting vast bodies of land, in many states and territories, he withdrew large areas in the public interest. These orders were known to Congress, as principal, and in not a single instance was the act of the agent disapproved. Its acquiescence all the more readily operated as an

[16] Originally providing that lands withdrawn under its authority were to remain open under the mining laws for the location of "minerals other than coal, oil, gas, and phosphates," that phrase was later amended to read "metalliferous minerals." Act of Aug. 24, 1912, ch. 369, 37 Stat. 497. The Pickett Act, formerly codified at 43 U.S.C. §§ 141-143 (1970), was repealed by sec. 704(a) of FLPMA, Pub. L. No. 94-579, 90 Stat. 2792 (1976).

> implied grant of power in view of the fact that its exercise was not only useful to the public, but did not interfere with any vested right of the citizen.

236 U.S. at 475.[17]

Even though the Court had sustained the implied authority of the Executive to withdraw land from all forms of appropriation, most subsequent withdrawals were made pursuant to the restricted authority under the Pickett Act that left the land open to location of claims for metalliferous minerals. *See* PLLRC Withdrawal Study at 4. This may have arisen from a view that the Pickett Act was intended to displace the implied authority that had been previously exercised, a view that iterates earlier Executive ambivalence about inherent authority that led to the Pickett Act. *See* Wheatley at 315-16. However, that ambivalence was resolved in 1941. Because the Pickett Act did not authorize the withdrawal of land from location of mining claims for metalliferous minerals, it was not completely effective. When Secretary Ickes proposed an executive order that would withdraw land from appropriation under the mining laws, Attorney General Robert Jackson was eventually persuaded to conclude that "the power of withdrawal and reservation for permanent public uses, properly exercised, remains and is independent of the Withdrawal Act of 1910." 40 Op. Atty. Gen. 73, 83 (1941).

In 1952, the President delegated to the Secretary of the Interior his authority under the Pickett Act "and the authority otherwise vested in him to withdraw or reserve lands of the public domain and other lands owned or controlled by the United States in the continental United States or Alaska for public purposes, including the authority to modify or revoke withdrawals and reservations of such lands heretofore or hereafter made." Executive Order (EO) 10355, 17 Fed. Reg. 4831 (May 28, 1952). The EO also gave the Secretary authority to issue rules and regulations for the exercise of this delegated authority.[18]

---

[17] The *Midwest Oil* decision was not unanimous. The three dissenters found "that the sole authority to dispose of the public lands was vested in the Congress, and in no other branch of the Federal government." 236 U.S. at 490-91. They acknowledged that the Court had sustained Executive withdrawals that had served to carry out Congressional legislation or were implemented in the face of conflicting Congressional grants, but refused to sustain Executive withdrawals "when in contravention of the policy for the disposition of the lands declared in acts of Congress." *Id.* at 505-06.

[18] The EO also required that all orders withdrawing lands or revoking a previous withdrawal be published in the *Federal Register*.

At the middle of the twentieth century, Executive implied authority to withhold land from location notwithstanding enactment of the Pickett Act was endorsed by the District Court in *Portland General Electric Co. v. Kleppe*, 441 F. Supp. 859, 862 (D. Wyo. 1977). That court also recognized the Executive's continued claim to an *inherent* power to withdraw land. *Id.* at 861 (citing *P & G Mining Co.*, 67 I.D. 217 (1960)).[19] It was during this period when it was presumed that the Executive could withhold land from location or make it available on the basis of inherent or implied authority that administrative practices involving opening orders and the notation rule developed. We now turn to the evolution of those practices.

Opening Orders before FLPMA

BLM's use of "opening orders" can be traced to the earliest days of public land administration, when the process of selling public land necessarily entailed providing notice of what land was available and the conditions under which it would be sold. The General Land Office (GLO) in the Treasury Department administered that land. After land was surveyed, the Secretary of the Treasury would publish a notice of public sale where land could be purchased by the highest bidder. Act of May 18, 1796, ch. 29, 1 Stat. 464-69. Land that was not sold after a specified period would then be open to private sale. *See, e.g.,* Act of April 24, 1820, ch. 51, 3 Stat. 566.[20] However, there were times when the GLO improperly withheld such land from private sale. In 1836, the GLO issued a regulation that required local offices to publish a notice 30 days in advance specifying the date and hour when applications for entries on the improperly withheld land would be received. A year later, Attorney General Benjamin F. Butler was asked whether such a procedure could be followed when lands had been intentionally withheld or suspended from private entry. The legal basis for opening orders may be found in the Attorney General's response.

Acknowledging that no act of Congress gave the GLO Commissioner power to make such a regulation, the Attorney General nevertheless found "it is well warranted

---

[19] The *Portland General Electric* case has been criticized for its "misplaced" reliance on administrative decisions purportedly supporting inherent Executive withdrawal authority. "These and other references to 'inherent authority' confuse it with impliedly delegated authority. No judicial decision was found: (1) where there was neither an authorizing statute nor a contention of impliedly delegated authority, and (2) in which the court or administrative agency relied entirely upon inherent executive authority." Getches, *supra* note 12, at 286-87 n.46 (1982); *see generally* PLLRC Withdrawal Study at 131-51.

[20] Settlers often would occupy such land in advance and then seek a preference right to purchase their occupied land at a modest price, a practice dating from the colonial period called "pre-emption." *See generally* Gates, *supra* note 13, at 219-47.

by the nature of the case and the general powers of the Executive under the constitution." 3 Op. Atty. Gen. 274, 275 (1837). After noting that the applicable statute required that land unsold at the close of a public sale "shall be subject to be sold at private sale by entry at the land office" and that the Executive had the duty "to take care that this law is faithfully executed," he reasoned:

> One of the most important points to be observed in the execution of the law, is the securing to all persons a fair and equal opportunity to become purchasers of the public lands. Such an opportunity will always be secured to the community when the regular course is pursued; the President's proclamation designating the general tract, and the law providing that all the offered lands which shall remain unsold at the close of the public sale shall be subject to private entry.
>
> Where lands subject by law to private entry have been improperly withheld therefrom, it is no doubt the duty of the proper executive officers, whenever they become acquainted with the fact, to take measures for complying with the law.
>
> It is obvious, however, that to bring such lands into market, especially if considerable time has elapsed since the close of the public sale, and to allow them to be entered by any particular individual, before public notice has been given that they are subject to private entry, would, in most cases, give to such individual a preference over the rest of the community. Such a course would not be a faithful execution of the law; and I think, therefore, that the regulation above quoted is a reasonable and legal exercise of the general supervisory powers possessed by the department.

Id. at 275-76. More than 50 years later, Secretary Vilas noted that the regulation approved by Attorney General Butler had "been uniformly followed by the Department . . . since that time" and that "[i]t is a matter of history that millions of acres of offered lands withdrawn in anticipation of railroad grants have been restored to private entry in accordance with said regulation." *Irwin Eveleth*, 8 L.D. 87, 93 (1889).

Prior to the enactment of FLPMA, very few statutes provided for the review, modification, or termination of withdrawals. *See* PLLRC Withdrawal Study at 415-16. Accordingly, withdrawals or reservations did not generally terminate or automatically expire but remained in effect until they were revoked and the land restored to the operation of the public land laws. The process of revocation (cancellation of a withdrawal) and restoration (opening land to various uses) could involve a number of steps. *See id.* at 438-49. The Secretary exercised this authority

pursuant to executive powers claimed under Article II of the Constitution as well as under regulations promulgated under his general supervisory authority provided by 43 U.S.C. § 1201 (2006) or its statutory antecedents.[21]

At the end of the nineteenth century, Congress began to enact statutes for withdrawal of land for specific purposes, such as water projects, that contained provisions for revocation of the withdrawal and restoration of the withdrawn lands. *See, e.g.*, Act of March 15, 1910, ch. 96, 36 Stat. 237.[22] In 1913, the Department sought specific authority to use different methods in opening the land subject to other withdrawals. Simply opening the land to general disposition at a given date and time created some problems:

> Speculators, through telegraphic advice from agents in Washington, might place dummy representatives on the land before the general public had information as to the restoration; or they might place dummy applicants in line before the land office with scrip or other paper by which large areas of public land may be acquired; or in any event, even if neither of the foregoing objections exist, it would result in a general rush both to the lands and to the local land offices, with the result that one might settle upon a tract of land while another was in the act of entering same at the local land office. It would unquestionably result in conflict and controversy.

Memorandum in support of H.R. 8364, H.R. Rep. No. 68-78 at 4. In the past, Congress had authorized various practices in restoring land from particular withdrawals. These practices included presenting applications at land offices, restoration to settlement at a given hour, opening to settlement for a specified period in advance of entry, and restoration through registration or drawing. *Id.* at 3-4.

Congress responded by enacting the Restoration Act of September 30, 1913, 43 U.S.C. § 151 (2006), which provides as follows:

---

[21] That statute provides: "The Secretary of the Interior, or such officer as he may designate, is authorized to enforce and carry into execution, by appropriate regulations, every part of the provisions of title [43, Public Lands] not otherwise specially provided for."

[22] Formerly codified as 43 U.S.C. § 643 (1970), that statute was repealed by section 704(a) of FLPMA, Pub. L. No. 94-579, 90 Stat. 2792 (1976). The statute provided for temporary withdrawal of land for which a state or territory intended to apply under the Carey Act, 43 U.S.C. §§ 641-648 (2006), but provided that if no application had been filed within a year of the withdrawal, "the lands so withdrawn shall be restored to entry as though such withdrawal had not been made."

> When public lands are excluded from national forests or released from withdrawals the President may, whenever in his judgment it is proper or necessary, provide for the opening of the lands by settlement in advance of entry, by drawing, or by such other method as he may deem advisable in the interest of equal opportunity and good administration, and in doing so may provide that lands so opened shall be subject only to homestead entry by actual settlers only or to entry under the desert-land laws for a period not exceeding ninety days, the unentered lands to be thereafter subject to disposition under the public-land laws applicable thereto.

It was understood that the land affected by the order would not be open to the location of mining claims until after the period provided for homestead or desert land entry. Shortly after enactment of the Restoration Act, the President and the Secretary issued proclamations or orders to open certain withdrawn lands. *See, e.g.*, Disposition of Lands Excluded from Nebraska National Forest by Proclamation of September 30, 1913, *in* Opening of Excluded Nebraska National Forest Lands, 42 L.D. 277 (1913); *see also* Regulations, 42 L.D. 288 (1913); Opening of Lands in Former Fort Niobrara Military Reservation, 42 L.D. 282 (1913).

Even though the 1913 Restoration Act has not been repealed, we have found no citation to it in any published Departmental opinion or decision since 1929.[23] Its purpose in authorizing methods for opening land to settlement and agricultural entry was overtaken by the classification system established under section 7 of the Taylor Grazing Act, 43 U.S.C. § 315f (2006). To implement this system, President Roosevelt withdrew under the Pickett Act all unreserved public land from disposal for classification. EO 6910 (Nov. 26, 1934); EO 6964 (Feb. 5, 1935). Section 315f provided that the withdrawn land "shall not be subject to disposition, settlement, or occupation until after the same have been classified and opened to entry," but the land remained open to location and entry under the mining laws without regard to classification.[24]

Thus, before the enactment of FLPMA, BLM could withhold land from location until publication of an opening order under a variety of authorities. Because very few statutes provided for the review, modification, or termination of withdrawals, land

---

[23] The most recent citation appears to be a Solicitor's Opinion, *Status of Certain Lands Withdrawn for Addition to the Sequoia National Park*, 52 L.D. 675, 676 (1929).

[24] The PLLRC Withdrawal Study at 211-22 contains an analysis relating the withdrawal process to the classification process, a subject that it characterizes as "[o]ne of the most complex questions regarding the established system for the withdrawal and reservation of public lands."

did not become open until revocation and restoration orders were issued by officials with authority to take such action. The few statutes that provided for termination of withdrawals upon specified events generally still required further action from an official before the land would become open. *E.g.*, 43 U.S.C. § 154 (2006); *see Buch v. Morton*, 449 F.2d at 606; *Lee v. United States*, 22 Cl. Ct. at 466-67. Otherwise, withholding land from location until publication of an opening order could be based on the implied authority delegated to the Secretary under EO 10355, 17 Fed. Reg. 4831 (May 28, 1952), or general rulemaking authority under 43 U.S..C. § 1201 (2006). The Restoration Act of 1913, 43 U.S.C. § 151 (2006), was not invoked; it was not invoked by BLM in this instance, either. Whether it could provide a basis for BLM's decision is discussed later in this opinion.

The Notation Rule

The "notation rule" is an administrative practice that operates to withhold land from disposition as long as a withdrawal, application, or entry remains on BLM's public records, even if invalid.[25] "The notation or tract book rule is not a creature of regulation; . . . rather, it has evolved through adjudication, dating from the early days of the General Land Office to the present." *B.J. Toohey*, 88 IBLA at 77, 92 I.D. at 324. Under this rule, "land segregated from the public domain, whether by patent, reservation, entry, selection, or otherwise, is not subject to settlement or any other form of appropriation until its restoration to the public domain is noted upon the records of the local land office." *California and Oregon Land Co. v. Hulen and Hunnicutt*, 46 L.D. 55, 57 (1917).

In *Toohey*, we recognized that the notation rule has been perceived as providing fairness to the public at large:

> The notation rule . . . presupposes that the item noted on the records . . . segregates the land from further conflicting appropriations. It assumes that the entry noted is valid and protects a later would-be applicant who does not go behind it. That is, a notation of a patent on the records segregates the land it describes from a later application, even though the patent is invalid. . . . The record itself constitutes a bar to any other filing whatever the situation may be on the land itself. Thus, everyone may rely on the record to give him an equal opportunity to file when the land again becomes available.

[25] In *Kosanke v. United States Dep't of the Interior*, 144 F.3d 873 (9th Cir. 1998), a regulation provided for a 5-year segregation for an exchange application and the court agreed that claims filed within that period were null and void under the notation rule, even if the segregation itself were invalid. The court did not, however, hold that the segregative effect could extend beyond the 5-year period.

88 IBLA at 78, 92 I.D. at 324 (quoting *Margaret L. Klatt*, 23 IBLA 59, 63-64 (1975)).[26]

However, fairness has not always accompanied the use of the notation rule. As one author commented in the context of oil and gas leasing:

> As lands under lease become available again as a result of the cancellation or relinquishment of the prior lease, BLM's "notation rule," which originated in the context of the homestead laws, prohibits filing a new application until the fact of termination of the prior lease was noted on the tract book. This rule resulted in all kinds of mischief in areas where leases might have great speculative value even though the lands were not within a K[nown]G[eologic]S[tructure]. Tract books were damaged in tugs-of-war between the "watch-dogs of the tract books," Malone, Oil and Gas Leases on United States Gov't Lands, 2 INST. ON OIL & GAS L. & TAXATION 309 (1951), fisticuffs were not uncommon, and there were even rumors that certain land office employees could be bribed to tell a lease broker when a particular tract would be noted as available in the tract book.

Laura Lindley, *Of Teapot Dome, Wind River and Fort Chaffee: Federal Oil and Gas Resources*, 10 NAT. RESOURCES & ENV'T 21, 26 (1995).[27] It has also been observed that when BLM is tardy in updating the public land records, the notation rule has "treated all citizens equally unfairly. It has functioned [here] to create a de facto closure of the public lands to all entry for forty-three years, based upon egregious agency inaction. Surely there is a better way to ensure fair entry onto the public lands." *Joe R. Young*, 171 IBLA 142, 147-48 (2007) (Holt, C.A.J., concurring).

The goals of equity and fairness may lie near the heart of the notation rule, but the adequacy of notice to the public is its essence. However, little attention has been given to how the rule was affected by the Federal Register Act enacted by Congress in

---

[26] This "equal opportunity" rationale echoes the reasoning of the Attorney General in 1837 to support the use of opening orders. *See* 3 Op. Atty. Gen. 274 (1837).

[27] We also note that opening orders do not always eliminate chaos when land is reopened. When on October 10, 1981, at 10 a.m., BLM reopened to mineral location almost 2,400 acres of land withdrawn for reclamation in Big Horn County, Wyoming, many "locators were on hand aggressively staking claims in a scene reminiscent of the Oklahoma Rush. . . . Not surprisingly, the flurry of activity created an air of confusion which spawned litigation as locators hurriedly marked the boundaries of their respective claims." *American Colloid Co. v. Hodel*, 701 F. Supp. 1537, 1539 (D. Wyo. 1988).

1935, which requires publication in the *Federal Register* of "such documents or classes of documents as the President shall determine from time to time to have general applicability and legal effect." 44 U.S.C. § 1505(a)(2) (2006). Although publication in the *Federal Register* imparts constructive notice of the contents and requirements in such documents, *see* 44 U.S.C. § 1507 (2006), some Departmental decisions nevertheless inappropriately continued to reference the notation rule with approval in the context of the revocation of a withdrawal and the availability of the restored lands. *See, e.g., A. Hartwell Bradford*, A-25730 (Sept. 30, 1949); *Conrad A. Ritschard*, A-25303 (Sept. 10, 1948); and *Richard R. Crandall*, A-24444 (Nov. 12, 1946). In response, after setting forth the provisions of the Federal Register Act, Solicitor Mastin G. White stated: "In so far as the dicta in those cases or any other cases imply that such a restoration is not effective until it is noted on the plat and tract books of the local land office, the dicta are unsound and should be disregarded." *Edwards v. Brockbank*, A-25960, at 3-4 (Apr. 3, 1951). Thus, the *Edwards* decision makes clear that the notation rule cannot override the notice provided by publication in the *Federal Register*. Similarly, this Board has also held: "[T]he notation rule [cannot] be applied where doing so would thwart the will of Congress. . . . The notice Congress imparts by the enactment of legislation is not negated by a notation on a BLM public record." *Donald Graydon Jolly*, 173 IBLA at 211-12.

[2] BLM recognized the importance of the *Federal Register* in providing notice of land status when it promulgated the regulations that include 43 C.F.R. § 2091.6, the provision on which its decision in this case was based. The preamble to the final rule makes the following reference to the notation rule:

> One comment expressed the view that the existing notation rule used by the Bureau of Land Management needed to be revised. The changes contained in the proposed rulemaking, and continued by the final rulemaking, are designed to limit the use of the notation rule as the official procedure for disclosing the availability of the public lands for public use. The new procedures will, to the extent possible, eliminate the notation rule and provide greater public notice, through publication of opening and closing orders, of the status of the public lands. Publication of opening and closing orders should provide greater accessibility to information about the public lands for the public.

52 Fed. Reg. 12171 (Apr. 15, 1987).[28] Thus, because the withdrawal and opening of lands are matters that must be published in the *Federal Register*, the notice imparted by documents so published cannot be negated by notations on land office records. In cases where no opening order is required, the fact that BLM has not corrected its records to reflect the expiration or termination of a withdrawal cannot negate the notice provided by publication of the expiration date in the *Federal Register*. Therefore, considering notice was published on two separate occasions in the *Federal Register* that, unless extended, the withdrawal here under review would expire on January 31, 2010, *see* 73 Fed. Reg. 53041, 53042 (Sept. 12, 2008) (Notice of Proposed Withdrawal Extension); 67 Fed. Reg. 53359, 53360 (Aug. 15, 2002) (PLO 7534; Extension of PLO No. 6802), the notation rule has no relevance to the disposition of this appeal.

FLPMA and Withdrawals

As discussed above, by the middle of the twentieth century the Department was withholding land from disposition under a variety of actual and perceived authorities. This hodgepodge impelled Congress to direct "a comprehensive review of those laws and rules and regulations promulgated thereunder and to determine whether and to what extent revisions thereof are necessary." Act of September 19, 1964, § 2, Pub. L. No. 88-606, 78 Stat. 982 (1964). Congress created the PLLRC to undertake this task. *Id.* §§ 3, 4. In 1970, the PLLRC submitted its findings to the Congress in a report entitled *One Third of the Nation's Land* (PLLRC Report).

The many aspects of public land administration considered by the PLLRC included withdrawals. The PLLRC found:

> Concern about problems associated with the 'withdrawal' and 'reservation' of public domain lands was strongly voiced in the deliberations which led to the creation of the Commission, and was a recurring subject of complaint in the Commission's public meetings. The contractor study of withdrawals indicates that they have been used by the Executive in an uncontrolled and haphazard manner.

PLLRC Report, 43 (citing PLLRC Withdrawal Study, Ch. IX). Finding that the use of Executive withdrawals had "become a source of increasing controversy," the PLLRC

[28] Nevertheless, as Administrative Judge Burski noted in his concurring opinion in *Toohey*, "[t]his source of information was not, unfortunately, all-inclusive, and therefore, the existence of the Federal Register did not obviate the need for recourse to the records of the Department in order to determine the status of public land." 88 IBLA at 99, 92 I.D. at 336.

found the problem to be "rooted in shortcomings of both branches." *Id.* at 44. The Executive was using withdrawal authority to meet management necessities not covered by legislation, a circumstance which Congress "did relatively little to remedy." *Id.* The PLLRC found that "virtually all" of the country's public domain had been withdrawn or classified for retention; that it was difficult to determine the extent of existing withdrawals, their purposes and permissible uses. *Id.* at 52. Accordingly, it recommended that Congress provide for a careful review of all Executive withdrawals and reservations and for periodic review thereafter. *Id.* at 2, 52-53, 56.

Focusing on the role of Congress and the Executive in making withdrawals, the PLLRC recommended that:

> Congress assert its constitutional authority by enacting legislation reserving unto itself exclusive authority to withdraw or otherwise set aside public lands for specified limited-purpose uses and delineating specific delegation of authority to the Executive as to the types of withdrawals and set asides that may be effected without legislative action.

Id. at 2. The PLLRC believed that large scale withdrawals should only be made by Congress and that other withdrawal authority should be delegated to the Executive with specific guidelines. *Id.* at 54-55. Executive withdrawals should have a specified duration to avoid the problem of "interminable 'temporary' withdrawals." *Id.* at 55-56.

Six years after the PLLRC issued its report, Congress enacted FLPMA, declaring a policy of retaining lands in Federal ownership unless it is determined in the national interest to do otherwise as a result of land use planning. 43 U.S.C. § 1701(a)(1) (2006).[30] Congress repealed a myriad of existing laws providing for

---

[29] The Senate Committee on Interior and Insular Affairs stated that S. 507, the Senate version of FLPMA, "is in accordance with over one hundred recommendations of the Public Land Law Review Commission report." S. Rep. No. 583, 94th Cong., 1st Sess. 35 (1975), *reprinted in* Senate Comm. on Energy and Natural Resources, 95th Cong., 2d Sess., Legislative History of the Federal Land Policy and Management Act of 1976, 100 (Comm. Print 1978); *see Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 876-77 (1990) (outlining history of public land management and describing PLLRC and subsequent enactment of FLPMA). A former BLM Director called the PLLRC Report "the 'proximate' origin of the 1976 Act." Marion Clawson, *The Federal Land Policy and Management Act of 1976 in a Broad Historical Perspective*, 21 U. ARIZ. L. REV. 585, 594 (1979). A former Assistant and Under Secretary of this Department (continued...)

the disposition and administration of public land[30] and established new authority for sales, exchanges, permits, rights-of-way, and other uses. It directed the Secretary to "prepare and maintain on a continuing basis an inventory of all public lands and their resource and other values," *id.* § 1711(a), required land use planning for public lands, and established criteria to be used for that purpose, *id.* § 1712. Existing classifications of public lands were subject to review in the land use planning process. *Id.*

[3] Echoing PLLRC's recommendations concerning the roles of Congress and the Executive in making withdrawals, FLPMA declared a policy that "the Congress exercise its constitutional authority to withdraw or otherwise designate or dedicate Federal lands for specified purposes and *that Congress delineate the extent to which the Executive may withdraw lands without legislative action*." 43 U.S.C. § 1701(a)(4) (2006) (emphasis added). Although Congress provided the Secretary with authority to dedicate land to certain uses in exercising his land use planning authority, Congress expressed its concern about withdrawing land from mining by providing that "public lands shall be removed from or restored to the operation of the Mining Law of 1872 . . . only by withdrawal action pursuant to section 1714 of this title or other action pursuant to applicable law." 43 U.S.C. § 1712(e)(3) (2006). Congress then significantly narrowed the scope of "applicable law" by repealing 29 statutes that authorized the Executive to create, modify, or terminate withdrawals and by expressly repealing the "implied authority of the President to make withdrawals and reservations resulting from acquiescence of the Congress" recognized in the *Midwest Oil* case. FLPMA, sec. 704(a), Pub. L. No. 94-579, 90 Stat. 2743, 2792 (1976). Instead, Congress authorized the Secretary to "make, modify, extend or revoke withdrawals *but only in accordance with the provisions and limitations of this section*. 43 U.S.C. § 1714(a)[31] (emphasis added). Congress directed the Secretary to review within 15 years existing withdrawals in 11 western states. *Id.* § 1714(*l*)(1). Because Congress broadly defined the term "withdrawal" to mean "withholding an area of Federal land from settlement, sale, location, or entry," *see* 43 U.S.C. § 1702(j)

---

[29] (...continued)
who also served on the Federal Power Commission and the PLLRC Advisory Council has identified the extent to which FLPMA implemented each of PLLRC's recommendations. John A. Carver, *Federal Land Policy and Management Act of 1976: Fruition or Frustration*, 54 DENVER L. J. 387 (1977).

[30] *See* FLPMA, secs. 702-706, 90 Stat. 2787-94.

[31] The Secretary's withdrawal authority may be delegated "only to individuals in the Office of the Secretary appointed by the President, by and with the advice and consent of the Senate." 43 U.S.C. § 1714(a) (2006).

(2006), BLM can no longer withhold land from location pursuant to administrative practices that are based solely on the implied authority that Congress repealed.[32]

FLPMA also implements PLLRC's recommendation that executive withdrawals have a specified duration to avoid the problem of "interminable 'temporary' withdrawals." *See* PLLRC Report at 55-56. Under section 204(c)(1) of FLPMA, withdrawals of 5,000 acres or more can be no longer than 20 years. *See* 43 U.S.C. § 1714(c)(1) (2006). Under section 204(d), the Secretary may make withdrawals of less than 5,000 acres: (1) without restriction when he deems the acreage "desirable for a resource use"; (2) for a period of 20 years for an administrative site or other Federal facility; and (3) for not more than 5 years to preserve a tract then under consideration for withdrawal by Congress. *See* 43 U.S.C. § 1714(d) (2006).

[4] Congress further avoids the problem of "interminable 'temporary' withdrawals" by providing that withdrawals "may be extended or further extended only upon compliance with the provisions of subsection (c)(1) or (d) of this section [204], whichever is applicable, and only if the Secretary determines that the purpose for which the withdrawal was first made requires the extension, and then only for a period no longer than the length of the original withdrawal period." 43 U.S.C. § 1714(f) (2006). The Secretary is required to report any extensions to the appropriate Congressional committees.[33] *Id.* To hold in this case that BLM may continue to withhold land from location simply by failing to issue an opening order, or by neglecting to update a notation on the public land records, would thwart the very purpose of these provisions by enabling the "interminable 'temporary' withdrawals" that Congress sought to eliminate.[34]

---

[32] We need not consider further the issue of possible inherent Executive constitutional authority after enactment of FLPMA, as that authority has not been asserted here. Whatever authority may exist in the President, Congress has limited the Secretary's authority to that provided in section 204 of FLPMA. And, the withdrawal in this case explicitly stated that it was issued under section 204 of FLPMA, so BLM could continue withholding land from location only if the Secretary had extended the withdrawal as provided in section 204(f) or had taken some other action having a segregative effect.

[33] There is no evidence in the record that the Secretary made such a report in the instant case, which presumably would have been required if the land continued to be closed to location by BLM's failure to issue an opening order or to remove the notation from the public land records.

[34] Although BLM suggests we should give *Chevron* deference to its "interpretation" that BLM can continue to withhold land after a FLPMA withdrawal expires until an opening order is issued, Response II at 7 n.3, *Chevron* addresses the deference courts

(continued...)

Other Applicable Law

Finally, we do not find that BLM's decision withholding land from location in this case is supported by other "applicable law" as provided in 43 U.S.C. § 1712 (2006). Like most of BLM's regulations, those at 43 C.F.R. Part 2090 refer to the Secretary's general authority over public land provided by 43 U.S.C. § 1201 (2006), which authorizes the Secretary "to enforce and carry into execution, by appropriate regulations, every part of the provisions of title [43, Public Lands] *not otherwise specially provided for*." (Emphasis added.) Because FLPMA made special provision for withholding land from location, it necessarily affected administrative practices that had developed under the authority of 43 U.S.C. § 1201. In *Wilderness Society v. Morton*, 479 F.2d 842, 868 (D.C. Cir.), *cert. denied*, 411 U.S. 917 (1973), the court recognized that the general authority granted by that provision did not provide a basis for circumventing limitations established in more specific legislation. "An administrative practice which is plainly contrary to the legislative will[,] may be overturned no matter how well settled and how long standing." 479 F.2d at 865 (citing *Baltimore & Ohio R. Co. v. Jackson*, 353 U.S. 325 (1957) (overruling administrative practice of 60 years' duration)); *United States v. E. I. duPont de Nemours & Co.*, 353 U.S. 586 (1957) (overruling administrative practice of 40 years' duration). Thus, this statutory authority and longstanding administrative practice

---

[34] (...continued)
are to give to an administrative agency's interpretation of a statute it administers on judicial review of final agency action under the Administrative Procedure Act, 5 U.S.C. § 704 (2006). *Chevron* does not govern an agency's internal *de novo* review process that produces a final Departmental interpretation for which deference may be claimed before a court. *See generally Statoil Gulf of Mexico LLC*, 42 OHA 261, 286-90, 305 n.48 (2011), and authorities cited therein.

Nevertheless, we note that the application of *Chevron* involves a two-step analysis. The *Chevron* test first asks whether Congress has "directly addressed the precise question at issue." 467 U.S. at 842-43. Then, "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* Because a principal purpose in enacting section 204 of FLPMA was to avoid the practice of withholding land for indefinite periods, BLM's argument does not survive the first step of a *Chevron* analysis. In *New Mexico v. Watkins*, 969 F.2d at 1135, the court rejected an agency's *Chevron*-based argument in support a broad interpretation of the Secretary's authority under section 204 to extend withdrawals, finding that under such an interpretation "Congress' restrictive prescription in subsection 204(f) would be reduced to insignificance." The time limitations on withdrawals and specific conditions for extending withdraws established in section 204 would be meaningless if BLM could simply continue to withhold land from location by failing to issue an opening order.

cannot be invoked to circumvent limitations on withdrawal authority established by FLPMA.

Although Congress has not repealed the Restoration Act of 1913, 43 U.S.C. § 151 (2006), that statute provides no support for BLM's decision in this case.[35] While it provides the President with authority to establish certain conditions "[w]hen public lands are . . . released from withdrawals," it was enacted at a time when withdrawals and reservations did not automatically expire and it was inspired by legislation similar to 43 U.S.C. § 154 (2006), that contemplated further action by the Secretary to restore the land to disposition. Thus, the Restoration Act does not address the situation where there is no longer a withdrawal in effect from which land may be released.

Furthermore, the regulation relied on by BLM, 43 C.F.R. § 2091.6, was not intended to implement the President's authority under the Restoration Act. The Administrative Procedure Act requires that the notice of proposed rulemaking include "reference to the legal authority under which the rule is proposed." 5 U.S.C. § 553(b)(2) (2006); *see Global Van Lines v. Interstate Commerce Comm'n*, 714 F.2d 1290, 1298 (5th Cir. 1983); *National Tour Brokers Ass'n v. United States*, 591 F.2d 896, 900 (D.C. Cir. 1978). The Restoration Act is not cited in either notices of proposed or final rulemaking for the regulations at 43 C.F.R. Part 2090. *See* 52 Fed. Reg. 12171, 12174-75 (Apr. 15, 1987); 50 Fed. Reg. 24124 (June 7, 1985).

CONCLUSION

Although 43 C.F.R. § 2091.6 states that land within a withdrawal that expires does not automatically become open but is opened by publication of an opening order, we have previously held that this statement is not true for all withdrawals. *See, e.g.*, *Richard Bargen*, 117 IBLA at 243. Whether land automatically becomes open to entry upon the termination of a withdrawal or must be restored by an opening order depends on the provisions of the statute under which the withdrawal occurred. *See Buch v. Morton*, 449 F.2d at 606. When a withdrawal issued pursuant to section 204 of FLPMA expires, the lands within the withdrawal automatically become open to entry unless certain specific actions are taken. *See New Mexico v. Watkins*, 969 F.2d at 1135-36. BLM may not continue to withhold that land from location unless the conditions for extending the withdrawal are satisfied or some new and different action segregates the land from location. *See, e.g.*, *Mount Royal Joint Venture v. Kempthorne*, 477 F.3d at 754-56.

[35] We note that section 701(f) of FLPMA provides: "Nothing in this Act shall be deemed to repeal any existing law by implication." 90 Stat. 2786.

Although BLM erred in concluding that appellants' claims were null and void because no opening order had been issued, our reversal of BLM's decision does not mean that the claims are necessarily valid. A mining claim is not valid unless the claimant has discovered a valuable mineral deposit. *See* 30 U.S.C. § 22 (2006). Such a discovery exists where "minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a profitable mine." *Castle v. Womble*, 19 L.D. 455, 457 (1894), *approved*, *Chrisman v. Miller*, 197 U.S. 313 (1905). As stated in *Thomas v. Morton*, 408 F. Supp. 1361, 1371 (D. Ariz. 1976), *aff'd*, 552 F.2d 871 (9th Cir. 1977): "There must be physically exposed within the limits of [each] claim the vein or lode bearing mineral of such quality and quantity as to justify the expenditure of money for the development of a mine and the extraction of the mineral." *Accord*, *Ernest K. Lehmann & Assoc. of Montana v. Salazar*, 602 F. Supp.2d 146, 157 (D.D.C. 2009), *aff'd*, 377 Fed. Appx. 28 (D.C. Cir. 2010). That issue, however, is not before us here.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the decisions appealed from are reversed.

/s/
H. Barry Holt
Chief Administrative Judge

I concur:

/s/
James F. Roberts
Administrative Judge