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COMMENTS

CHADHA AND THE PUBLIC LANDS: IS FLPMA AFFECTED?

Timothy R. Baker

I. INTRODUCTION

The federal government owns approximately fifty percent of the land in the eleven contiguous western states, ranging from twenty-nine percent in the State of Washington, to more than eighty-five percent in the State of Nevada.¹

Despite the significant environmental, recreational, and economic considerations inherent in the federal ownership of public lands,² a comprehensive framework for the management of these lands was not developed until the Federal Land Policy Management Act (FLPMA) was enacted in 1976.³

In part, FLPMA was a response to the realization that the public lands were not being managed in an orderly and efficient fashion. This mismanagement was partially the result of an apparent lack of coordination between the executive branch agencies administering these lands.⁴

With the enactment of FLPMA, Congress attempted to reassert its control over the public lands. In FLPMA, Congress delegated much of its

1. Phipps, *The Public Land Law Review Commission—A Challenge to the West*, 1 LAND & WATER REV. 355 (1966). The federal government owns approximately 761 million acres of land, of which 725 million acres are designated as public lands. U.S. PUBLIC LAND LAW REVIEW COMMISSION, ONE THIRD OF THE NATION'S LAND 19 (1970) [hereinafter cited as PLLRC].

2. The economic aspects of the federal ownership of public lands are significant. In 1973, gross receipts from the sale of public land resources exceeded 788 million dollars. The public lands produced approximately 11 million board feet of lumber, 176 million barrels of petroleum, one trillion cubic feet of natural gas, 594 million gallons of gasoline and liquid petroleum gas, 14 million short tons of coal, 13 million short tons of potash, and 19 million animal unit-months of livestock forage. See U.S. BUREAU OF LAND MANAGEMENT, PUBLIC LAND STATISTICS, at 73-109, 168 (1973); U.S. FOREST SERVICE, REPORT OF THE CHIEF, at 33-37, 53 (1973); Note, *Proprietary Duties of the Federal Government Under the Public Land Trust*, 75 MICH. L. REV. 586 (1977).

3. 43 U.S.C. §§ 1701-1782 (1976 & Supp. IV 1980).

4. This fact was brought to the attention of Congress by the report of the Public Land Law Review Commission, which stated that “[the Commission experiences] great difficulty in trying to determine with any precision the extent of existing Executive withdrawals and the degree to which withdrawals overlap each other. We have found that the agencies do not have accurate records that show the purposes for which specific areas have been withdrawn and the uses that can be made of such areas under the public land laws.” PLLRC, *supra* note 1, at 52.

constitutional authority⁵ to various agencies within the executive branch, but reserved the power of review over the use of these delegated powers through the implementation of several legislative veto provisions within the Act.⁶ This power of review ensured executive branch compliance with the congressional policy directives of FLPMA.

In *Immigration and Naturalization Service v. Chadha*,⁷ the United States Supreme Court held that the legislative veto provision within the Immigration and Nationality Act⁸ was unconstitutional as a violation of the bicameral and presentment requirements contained in Article I of the Constitution.⁹ This comment focuses on the effects of the *Chadha* decision upon FLPMA.

II. PUBLIC LAND MANAGEMENT BEFORE FLPMA

The Constitution expressly grants to Congress the authority to "dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."¹⁰ In the past however, the executive branch exercised some of this power under implied authority, first recognized in *United States v. Midwest Oil*.¹¹

The holding in *Midwest Oil* resulted from decades of congressional acquiescence in the withdrawal of public lands by the executive branch.¹² Throughout the first one hundred years of our nation's history, Congress enacted many statutes authorizing the executive branch to make certain withdrawals of public lands for specific purposes. The executive withdrawal of public lands became such a frequent occurrence that its validity was never challenged.¹³

5. U.S. CONST. art. IV, § 3, cl. 2.

6. Congress retained the power to veto certain sales and withdrawals of public land proposed by the Secretary of the Interior. 43 U.S.C. §§ 1713(c), 1714 (1976).

7. ___ U.S. ___, 103 S. Ct. 2764 (1983).

8. 8 U.S.C. §§ 1101-1525 (1982).

9. U.S. CONST. art. I, § 1 provides that "[A]ll legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." U.S. CONST. art. I, § 7, cl. 2 provides that "[E]very Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; . . ."

10. U.S. CONST. art IV, § 3, cl. 2.

11. 236 U.S. 459 (1915).

12. Essentially, a withdrawal of land serves to preclude the operating effect of an existing statute which provides for a different disposal or use of that land. See *infra* note 14, and discussion relating thereto.

13. The Supreme Court noted in *Midwest Oil* that "prior to the year 1910 there had been issued:

99 Executive Orders establishing or enlarging Indian Reservations;

109 Executive Orders establishing or enlarging Military Reservations and setting apart land for water, timber, fuel, hay, signal stations, target ranges and rights of way for use in connection with Military Reservations;

44 Executive Orders establishing Bird Reserves"

In 1909, President Taft withdrew approximately three million acres of western lands believed to contain oil. The validity of this order was challenged and upheld in *Midwest Oil*. The United States Supreme Court reasoned that "the long-continued practice [of executive withdrawals of land], known to and acquiesced in by Congress, [raised] a presumption that the withdrawals had been made in pursuance of its consent or of a recognized administrative power of the Executive in the management of the public lands."¹⁴

Prior to this opinion, Congress had attempted to clarify some of these executive withdrawal powers by enacting the General Withdrawal [Pickett] Act of 1910.¹⁵ This was the only instance prior to FLPMA that such a general delegation of withdrawal and reservation powers had been made by Congress to the Executive.

In 1940, the authority of the executive branch to make withdrawals of public lands was again challenged. The Attorney General, Robert Jackson, was asked to issue an opinion in regard to this matter. Jackson's first opinion, written in 1940, concluded that outside of the Pickett Act of 1910, the Executive had no withdrawal authority.¹⁶ This opinion, however, was never officially published. In 1941, Attorney General Jackson published a second opinion concluding that the restrictions of the Pickett Act applied only to temporary withdrawals of land by the executive, and that under the authority of *Midwest Oil*, the Executive had the implied power to make permanent withdrawals.¹⁷

In 1952, the President delegated all of his withdrawal authority, express and implied, to the Secretary of the Interior.¹⁸ Until the enactment of FLPMA in 1976, the Secretary of the Interior often relied upon the nonstatutory, implied authority of the Executive in making withdrawals of public lands.

In 1964, Congress initiated an in-depth review of public land management policies. The Public Land Law Review Commission (PL-LRC) was created to help fulfill this purpose.¹⁹

United States v. *Midwest Oil*, 236 U.S. 459, 470 (1915).

14. *Id.* at 474.

15. Act of June 25, 1910, ch. 421, § 1, 36 Stat. 847 (*repealed* Pub. L. No. 94-579, § 704(a), 90 Stat. 2792 (1976)).

16. Wheatley, *Withdrawals Under the Federal Land Policy Management Act of 1976*, 21 ARIZ. L. REV. 310, 315 (1979) (*citing* Unpublished Op. of Att'y Gen., June 25, 1940 (withdrawn) *reprinted in* C. WHEATLEY, *STUDY OF WITHDRAWALS AND RESERVATIONS OF PUBLIC DOMAIN LANDS* at app. B-6 to B-11 app. (1969)).

17. 40 Op. Att'y Gen. 73 (1941).

18. Exec. Order No. 10,355, 17 Fed. Reg. 4831 (1952).

19. *See* Public Land Law Review Commission Act, 43 U.S.C. §§ 1391-1400 (1970).

III. THE FEDERAL LAND POLICY AND MANAGEMENT ACT (FLPMA) OF 1976

The PLLRC was formed to serve as an expert advisory board and to assist Congress in reorganizing the existing structure of public land management. Congress recognized the need for a comprehensive system of public land management, and acknowledged its own failure to provide such a program.²⁰

In 1970, the PLLRC filed its final report. This report called for Congress to "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."²¹ The report advised Congress to restrict the power of the Executive by "delineating [a] specific delegation of authority to the Executive as to the types of withdrawals and set asides that may be effected without legislative action."²² The PLLRC recommended that the government's long-standing policy of disposal of the public lands be changed to one of retention and management.²³ Congressional control and review was the underlying philosophy of the PLLRC report. According to the Commission, the large scale management of the public lands should be controlled by Congress through legislation. The executive branch, in its administrative discretion, should conduct the daily management activities, subject to congressional review.

In drafting the final version of FLPMA, Congress attempted to adhere to the recommendations of the PLLRC. The members of Congress recognized that the actions of the executive branch in public land management were not always consistent with the best interests of the people.²⁴ Further, concern was expressed over what the public perceived as "excessive disposals of public lands on the one hand and excessive restrictions on the other. . . ."²⁵ FLPMA was designed to both promote

20. See S. REP. NO. 1444, 88th Cong., 2d Sess. 3-4, *reprinted in* 1964 U.S. CODE CONG. & AD. NEWS 3741, 3743-3744. See also Public Land Law Review Commission Act § 2, 43 U.S.C. § 1392 (1970) which states:

[T]he 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 . . . those laws, . . . , may be inadequate to meet the . . . needs of the American people. . . .

21. PLLRC; *supra* note 1, at 2.

22. *Id.*

23. *Id.* at 1. This policy of retention underlying FLPMA "burdens the western public land states with the prospect of significant federal land holdings within their boundaries in perpetuity. . . [and] is often cited as a major cause of the [Sagebrush] Rebellion." Clayton, *The Sagebrush Rebellion: Who Should Control the Public Lands?*, 12 LAND USE & ENV'T L. REV. 3 (1981).

24. H.R. REP. NO. 94-1163, 94th Cong., 2d Sess. 1 *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 6175.

25. H.R. REP. NO. 94-1163, *supra* note 24, at 3, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 6175, 6177.

consistency in public land management and “[e]stablish procedures to facilitate Congressional oversight of public land operations entrusted to the Secretary of the Interior.”²⁶

The final draft of FLPMA was severely criticized by the heads of various agencies within the executive branch. In their opinion, the Act was far too restrictive. They asserted that the provisions calling for congressional review were unconstitutional, and represented “a serious infringement on the power of the Executive in the day to day administration of the public lands.”²⁷ The reasons underlying this strong opposition on the part of the executive branch are readily apparent from a review of some of the provisions of FLPMA.

That Congress intended through FLPMA to maintain a tight reign upon the administrative discretion of the executive branch is best demonstrated by the provisions of the Act governing the sale and withdrawal of public lands by the Secretary of the Interior. As evidenced in *Midwest Oil* and by subsequent events, this area of public lands management is a source of conflict between Congress and the Executive, and these provisions are some of the tightest restrictions upon the executive branch in FLPMA. The Act provides that sales or withdrawals of public lands by the Secretary of the Interior in excess of certain acreages are subject to annulment by concurrent resolution of Congress.²⁸ At the same time, FLPMA expressly repeals the implied authority of the Executive to withdraw lands under *Midwest Oil*.²⁹ Further, the Act provides that upon receiving notification from certain committees within either house of Congress, the Secretary of the Interior shall immediately make an “emergency withdrawal” of those public lands designated in such notification.³⁰

These provisions clearly illustrate that by enacting FLPMA, Congress intended to reassert control over the use and disposition of the public

26. H.R. REP. NO. 94-1163, *supra* note 24, at 2, reprinted in 1976 U.S. CODE CONG. & AD. NEWS 6175, 6176.

27. Letter from Thomas S. Kleppe, U.S. Department of the Interior, Office of the Secretary, to Hon. James A. Haley, Chairman, Committee on Interior and Insular Affairs (April 28, 1976). H.R. REP. NO. 94-1163, *supra* note 24, at 53, reprinted in 1976 U.S. CODE CONG. & AD. NEWS 6175, 6227.

28. Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, § 203(c), (*codified at 43 U.S.C. § 1713(c) (1976)*), provides that sales of public lands proposed by the Secretary of the Interior in excess of two thousand five hundred acres may be vetoed by concurrent resolution of Congress.

Withdrawals of public lands proposed by the Secretary of the Interior aggregating five thousand acres or more may be disapproved by concurrent resolution of Congress. *Id.* at § 204(c) (*codified at 43 U.S.C. § 1714(c)*).

29. *Id.* at § 704(a), 90 Stat. at 2792. In addition to repealing the implied authority of the Executive to withdraw public lands, this section also repealed all of the statutes granting the Executive express authority to withdraw public lands.

30. *Id.* at § 204(e) (*codified at 43 U.S.C. § 1714(e) (1976)*).

lands.³¹

IV. THE LEGISLATIVE VETO AND THE *Chadha* DECISION

Typically, a legislative veto provision authorizes one or both houses of Congress, or even committees, to annul by resolution an action or rule of the executive branch or an administrative agency. Usually, the President is not given the power to veto the resolution.³²

The legislative veto was first used in 1932, when Congress provided broad authority to President Hoover to reorganize the executive branch. Congress retained the power to review the exercise of this broad authority by providing that any proposed reorganization plan could be vetoed by either house.³³ Despite doubts about the constitutionality of the legislative veto,³⁴ this type of provision has been widely used by Congress in almost every area of federal regulation,³⁵ including public lands management³⁶ and immigration.³⁷

Jagdish Rai Chadha entered the United States on a student visa. After his visa expired, he applied under the Immigration and Nationality Act (INA) for a suspension of his deportation.³⁸ The Attorney General agreed to suspend his deportation. The House of Representatives, pursuant to a legislative veto provision in the INA,³⁹ overruled Chadha's deportation suspension, and in 1975 the Immigration and Naturalization Service (INS) ordered his deportation.

Chadha petitioned the United States Court of Appeals for the Ninth Circuit, arguing that the legislative veto provision contained in the INA was unconstitutional. The INS agreed with Chadha's contentions. Both

31. See *Mountain States Legal Foundation v. Andrus*, 499 F. Supp. 383, 395 (D. Wyo. 1980).

32. Smith & Struve, *Aftershocks of the Fall of the Legislative Veto*, 69 A.B.A.J. 1258 (1983).

33. Act of June 30, 1932, ch. 314, § 407, 47 Stat. 414.

34. Compare Martin, *The Legislative Veto and the Responsible Exercise of Congressional Power*, 68 VA. L. REV. 253 (1982) (opposed to the use of the legislative veto) with Javits & Klein, *Congressional Oversight and the Legislative Veto: A Constitutional Analysis*, 52 N.Y.U.L. REV. 455 (1977) (in favor of the use of the legislative veto).

35. "Since 1932, when the first veto provision was enacted into law, 295 congressional veto-type procedures have been inserted in 196 different statutes . . . [including] at least one hundred sixty-three such provisions . . . in eighty-nine laws [from 1970 through 1975]." Abourezk, *The Congressional Veto: A Contemporary Response to Executive Encroachment on Legislative Prerogatives*, 52 IND. L. REV. 323, 324 (1977).

36. See *supra* notes 26 & 28. In addition to these sections of FLPMA, it appears that §§ 202(e), 204(f), 204(l), and 214(b) also contain legislative veto provisions. Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, §§ 202(e), 204(f), 204(l), 214(b) (*codified at* 43 U.S.C. §§ 1712(e), 1714(f), 1714(l), and 1722(b) (1976)).

37. The Immigration and Nationality Act, § 244(c)(2) (*codified at* 8 U.S.C. § 1254(c)(2) (1982)).

38. *Id.* at § 244(a)(1) (*codified at* 8 U.S.C. § 1254(a)(1)).

39. See *supra* note 37.

the Senate and House of Representatives filed briefs in opposition. The Ninth Circuit found that the legislative veto provision within the INA violated the doctrine of separation of powers, as it infringed upon the powers of both the executive and the judiciary.⁴⁰

The United States Supreme Court affirmed the decision of the Ninth Circuit.⁴¹ The opinion, written by Chief Justice Burger for a six-justice majority, stressed the importance of the bicameral and presentment requirements of the Constitution.⁴² The majority reasoned that congressional action, pursuant to the INA legislative veto provision, was "legislative in character and effect," since it altered "the legal rights, duties, and relations of persons, . . . outside the legislative branch."⁴³ Consequently, this type of congressional action was subject to the bicameral and presentment requirements, which were not satisfied by the legislative veto provision.⁴⁴

As a preliminary concern, the Court examined the severability of the legislative veto provision from the remainder of the INA. Congress contended that the legislative veto provision was inseverable from the INA,⁴⁵ and as a result, the entire act was unconstitutional. This would have stripped the Attorney General of his authority to suspend deportations, and denied relief to Chadha. Justice Rehnquist adopted this view, and it was the basis of his dissent.⁴⁶ The majority however, concluded that the veto provision was severable from the INA. They reasoned that the legislative history of the challenged provisions within the INA made it clear that Congress would have enacted those provisions without a legislative veto. Further, the INA contained a severability clause which allowed severance of any invalid provisions from the Act.⁴⁷ These factors, according to the majority, gave rise to a presumption of severability.⁴⁸

Justice Powell concurred with the result reached by the majority. However, he concluded that by exercising a legislative veto, Congress was

40. *Chadha v. INS*, 634 F.2d 408 (9th Cir. 1980).

41. *Immigration and Naturalization Service v. Chadha*, ___ U.S. ___, 103 S. Ct. 2764 (1983).

42. *See supra* note 9.

43. *INS v. Chadha*, 103 S. Ct. at 2784. This test set forth by the Supreme Court is much broader than the test used by the Ninth Circuit. The Ninth Circuit had noted the possible validity of legislative veto provisions other than the one before it. *Chadha v. INS*, 634 F.2d at 432-3.

44. *INS v. Chadha*, 103 S. Ct. at 2787.

45. More specifically, Congress contended that the legislative veto provision, § 244(c)(2) of the INA, was inseverable from the remainder of § 244, which granted to the Attorney General the authority to suspend deportations. *See supra* notes 35 & 36.

46. *INS v. Chadha*, 103 S. Ct. at 2816 (Rehnquist, J., dissenting).

47. 8 U.S.C. § 1101 (1982).

48. *INS v. Chadha*, 103 S. Ct. at 2774.

usurping the judicial function, not the legislative.⁴⁹

Both Justices Rehnquist and White dissented. Justice White criticized the broad, sweeping nature of the court's opinion.⁵⁰ He concluded that only bills or their equivalents were subject to the bicameral and presentment requirements. Congressional action pursuant to a legislative veto provision was not in this category since new law was not created.⁵¹ Justice White also joined in the dissent of Justice Rehnquist.⁵²

V. THE EFFECTS OF *Chadha* UPON FLPMA

Today the Court not only invalidates § 244(c)(2) of the Immigration and Nationality Act, but also sounds the death knell for nearly 200 other statutory provisions in which Congress has reserved a "legislative veto."⁵³

This prophetic excerpt from the dissent of Justice White, noting the probable broad application of the holding in *Chadha*, has been confirmed by subsequent court decisions.⁵⁴ Given the factual background of each of these decisions, it is clear that the *Chadha* ruling was intended to generally invalidate all legislative veto provisions.⁵⁵ However, for a number of reasons, the effects of the *Chadha* decision upon FLPMA are unclear. There is a strong basis for distinguishing the rationale of *Chadha* from its applicability to FLPMA. Clearly, the most viable theory for drawing this distinction is that the *Chadha* ruling and its progeny restrict only the congressional exercise of Article I powers, whereas FLPMA is based upon the proprietary powers vested in Congress under Article IV.⁵⁶ This line of reasoning was recently considered in *National Wildlife Federation v. Watt*⁵⁷ (*NWF*).

In *NWF*, the House Committee on Interior and Insular Affairs,

49. *Id.* at 2789 (Powell, J., concurring).

50. *Id.* at 2796 (White, J., dissenting).

51. *Id.* at 2806.

52. See *supra* note 46, and accompanying text.

53. *INS v. Chadha*, 103 S. Ct. at 2792 (White, J., dissenting).

54. See *Consumers Union v. FTC*, 691 F.2d 575 (D.C. Cir. 1982), *aff'd mem. sub nom. United States Senate v. FTC*, ___ U.S. ___, 103 S. Ct. 3556 (1983); *Consumer Energy Council of America v. FERC*, 673 F.2d 425 (D.C. Cir. 1982), *aff'd mem. sub nom. Process Gas Consumers Group v. Consumers Energy Council of America*, ___ U.S. ___, 103 S. Ct. 3556 (1983).

55. Both *Consumers Union* and *Consumer Energy Council* involved regulatory agencies (as opposed to an executive branch agency such as the INS), and administrative rules (as opposed to an adjudicatory order as in *Chadha*). The *Consumer Energy Council* case involved a two-house veto provision. For additional discussion on the effects of these two decisions, see Strauss, *Was There a Baby in the Bathwater? A Comment on the Supreme Court's Legislative Veto Decision*, 1983 DUKE L.J. 789.

56. U.S. CONST. art. IV, § 3, cl. 2.

57. 571 F. Supp. 1145 (D.D.C. 1983).

pursuant to § 204(e) of FLPMA,⁵⁸ requested Interior Secretary Watt to make an emergency withdrawal of certain federal lands from a region designated for future coal leasing. Nevertheless, Secretary Watt proceeded to sell coal leases for the lands requested by the House Committee to be withdrawn.⁵⁹ The plaintiffs filed suit seeking to enjoin the enforcement of the leases that were sold.⁶⁰

The plaintiffs contended that § 204(e) of FLPMA was not a legislative veto, and cited *Pacific Legal Foundation v. Watt*⁶¹ as authority for this contention. The plaintiffs also classified § 204(e) as a "report and wait" statute, approved by the Supreme Court in *Chadha* as a valid exercise of power.⁶² In addition, the plaintiffs reasoned that § 204(e) [and FLPMA in general] was not an exercise of legislative power as restricted in *Chadha*, but instead arose from the proprietary power of Congress over the public lands. Finally, the plaintiffs urged that the defendant was bound by his own regulations that called for compliance with emergency withdrawal requests of the House Committee on Interior and Insular Affairs.⁶³

Secretary Watt responded by arguing that the decision in *Pacific Legal Foundation* was based upon the Ninth Circuit's opinion of *Chadha*,⁶⁴ and did not survive as viable precedent under the subsequent Supreme Court decision. The Secretary also contended that the application of the *Chadha* decision extended to the congressional exercise of Article IV powers, and cited *United States v. California*⁶⁵ as authority for

58. 43 U.S.C. § 1714(e) (1976).

59. At this point, the Plaintiffs sought a temporary restraining order to prevent the proposed lease sale. This request was denied, and the sale of the coal leases was completed.

60. The Wilderness Society was also a plaintiff to this action. The Honorable Morris K. Udall, U.S. Rep., Ariz., Chairman of the House Committee on Interior and Insular Affairs, intervened as a plaintiff. The four coal companies which were successful bidders at the lease sale intervened as defendants.

61. 529 F. Supp. 982 (D. Mont. 1982). This case involves the "emergency withdrawal" of certain public lands from proposed leasing, pursuant to § 204(e) of FLPMA. The district court concluded that this provision only allows Congress to temporarily prevent the Secretary of the Interior from leasing the designated public lands. The scope and duration of the requested "emergency withdrawal" was left to the discretion of the Secretary. On this basis, the court determined that § 204(e) of FLPMA was sufficiently similar to traditional Congressional committee powers to pass Constitutional muster.

62. A "report and wait" statute requires an administrative agency to report its proposed activities or rules to Congress. However, Congress cannot unilaterally veto such proposed activities or rules. Rather, a "report and wait" statute gives Congress the opportunity to review these proposed activities or rules before they become effective, and to pass legislation barring their effectiveness if they are found objectionable. *INS v. Chadha*, 103 S. Ct. at 2776 n. 9.

63. 43 C.F.R. § 2310.5 (1982).

64. The decision reached by the Honorable Judge Jameson in *Pacific Legal Foundation* was based upon the Ninth Circuit's opinion of *Chadha*. *Pacific Legal Foundation*, 529 F. Supp. at 1002.

65. *United States v. California*, 332 U.S. 19 (1947). The defendant relied upon dictum from this case which stated that only a formal Act of Congress pursuant to Article IV could divest the Attorney General of his authority to bring suit on behalf of the government in an action regarding public lands.

that position. Finally, the Secretary insisted that he was not bound by his own regulations since they were derived from § 204(e), which was unconstitutional.

The district court granted a preliminary injunction to the plaintiffs, primarily on the grounds that the defendant was required to comply with his own regulations. In the opinion, the court considered the various contentions of the parties.

The court reasoned that the application of *Pacific Legal Foundation* as precedent was questionable in light of "the Supreme Court's reasoning [in *Chadha*]." ⁶⁶ Further, the court refused to classify § 204(e) as a "report and wait" provision similar to the type approved in *Chadha*. ⁶⁷ The opinion of the district court did, however, place a great deal of emphasis upon the distinction between the congressional powers under Article I and Article IV. ⁶⁸ The court noted the more dominant and unrestricted role of Congress in exercising its proprietary powers over the public lands, as opposed to its purely legislative role under Article I. ⁶⁹ In addition, the opinion referred to both the intent of the framers of the Constitution in giving these proprietary powers to Congress, and the imposition of a settlor-trustee relationship between Congress and the Executive in regard to the management of the public lands. ⁷⁰ Most importantly, the court reasoned that *United States v. California*, as relied upon by the Secretary, ⁷¹ did not support his position. In quoting from the *California* opinion, the district court described the Article IV powers as being "without limitation. . . . [and that] neither the courts nor the executive agencies could proceed contrary to an Act of Congress in this congressional area of national power." ⁷²

The district court concluded that this language from *United States v. California* "may well presage a decision that neither the defendant nor the

66. *National Wildlife Federation*, 571 F. Supp. at 1155, n.14.

67. *Id.* at 1155.

68. The court noted that "[I]n interpreting Article IV, the Supreme Court has stated that: 'Congress not only has a legislative power over the public domain, but it also exercises the powers of the proprietor therein . . . like any other owner it may provide when, how and to whom its lands can be sold.'" *Id.* at 1156. [citing *United States v. Midwest Oil Co.*, 236 U.S. 459, 474 (1915); *Kleppe v. New Mexico*, 426 U.S. 529, 536-43 (1976)].

69. The district court cited *United States v. California*, the case relied upon by the Defendant, as authority for that position. *National Wildlife Federation*, 571 F. Supp. at 1157. See *supra* note 65.

70. *National Wildlife Federation*, 571 F. Supp. at 1157. This reasoning makes sense in view of the imposition of the public trust doctrine upon Congress. Hence, the Secretary of the Interior becomes subject to the review of Congress, who in turn is accountable to the public under the doctrine. *Light v. United States*, 220 U.S. 523, 537 (1911); *Alabama v. Texas*, 347 U.S. 272, 273 (1954).

71. See *supra* note 65.

72. *National Wildlife Federation*, 571 F. Supp. at 1157 [citing *United States v. California*, 332 U.S. at 27].

courts may 'proceed contrary' to [FLPMA]."⁷³

Even if this line of reasoning is not followed, and *Chadha* is applicable to FLPMA, there remains the issue of severability. Under the test set forth in *Chadha*, if Congress would have made the same delegation of power to the agency without the use of a legislative veto provision, then the legislative veto provision itself would be severable from the remainder of the Act.⁷⁴ Clearly, the circumstances surrounding the enactment of FLPMA, and the legislative history of that Act suggest that Congress would not have given the Interior Secretary such broad discretion without reserving for itself the power of review.⁷⁵ However, FLPMA also contains a severability clause, similar to the provision of the INA that the Supreme Court found to be partially determinative of the severability issue in *Chadha*.⁷⁶ Consequently, the severability question is not easily resolved.

Assuming that the legislative veto provisions within FLPMA are inseverable, it is not clear how much of FLPMA should be invalidated. Under *Chadha*, it seems that only the immediate corresponding section of FLPMA would be affected.⁷⁷ If this is the case, then it is possible that any implied authority of the Interior Secretary to manage the public lands still will be restricted under FLPMA.⁷⁸ As a result, Congress would have to enact new legislation to provide for the future administration of the public lands.⁷⁹ Further, inseverability could also lead to the invalidation of all past

73. Hence, the district court was concluding that Congress had, through a formal Act (FLPMA), acted in a "congressional area of national power" to limit the authority of the Secretary of the Interior to manage the public lands. *National Wildlife Federation*, 571 F. Supp. at 1157. Much to the defendant's dismay, the *California* decision was being used against him. It is possible however, that even under the rationale of *National Wildlife Federation*, the bicameralism requirements of the constitution must still be complied with. This may lead to the invalidation of § 204(e) of FLPMA, providing for "emergency withdrawals" of federal land. See *Pacific Legal Foundation v. Watt*, 529 F. Supp. at 1003.

74. *INS v. Chadha*, 103 S. Ct. at 2774.

75. See *supra* notes 22-31, & accompanying text.

76. See *supra* notes 47 & 48, & accompanying text. Section 707 of FLPMA, found as a note to 43 U.S.C. § 1701 (1976), is the standard severability clause used by Congress, and is very similar to the severability provision within the INA.

77. In *Chadha*, only the severability of § 244(c)(2) from § 244 was at issue. The Supreme Court did not consider, or even mention the severability of § 244(c)(2) from the Immigration and Nationality Act as a whole. In the context of FLPMA, this means that only §§ 202, 203, 204, and 214 would be invalidated if the legislative veto provisions within those sections are found to be inseverable.

78. Since the remainder of FLPMA would be intact, it seems that the Act would still serve to repeal the implied authority of the Executive to withdraw lands under *Midwest Oil*. See *supra* note 29. However, if the withdrawal provisions of FLPMA are unconstitutional, it is possible that the repealing effect of FLPMA would also be invalid. See 73 AM. JUR. 2d *Statutes* § 382 (1974).

79. This does not seem to be a desirable alternative. In part, FLPMA was enacted to avoid piecemeal legislation, which had disrupted public land management in the past. It took Congress six years to enact FLPMA. Should Congress now be forced to pass new legislation to replace invalidated sections of the Act, the benefits of FLPMA may be lost in the political and bureaucratic shuffle that would result. Of course, this is assuming that there are benefits of FLPMA to be lost, which is beyond

actions taken by the Interior Secretary under FLPMA, since his authority to so act was provided by an unconstitutional statute. Clearly, the possibilities are endless.⁸⁰

VI. CONCLUSION

With the enactment of FLPMA, Congress has attempted to end the confusion surrounding the management of the public lands by reasserting its proprietary powers granted under Article IV of the Constitution. Through FLPMA, the Interior Department has been given the authority to manage the public lands on a daily basis. Major decisions in public land management are to be made by the Secretary of the Interior within the congressional policy directives of FLPMA, subject to congressional review and "nonapproval." This power of review and "nonapproval" is provided for by several legislative veto provisions within FLPMA.

In *INS v. Chadha*, the United States Supreme Court held that a legislative veto provision under the Article I powers of Congress was unconstitutional as a violation of the separation of powers doctrine. This holding has been broadly applied.

The effects of *Chadha* upon FLPMA are, however, unclear. The recent decision of *National Wildlife Federation v. Watt* seems to provide one answer. Upon examination of the scope and nature of the Article IV proprietary powers of Congress over the public lands, the court concluded that FLPMA may well be a valid exercise of those powers, and should not be restricted by the *Chadha* decision.

But even if this reasoning is not accepted, and *Chadha* is applicable to FLPMA, it is not clear how much of FLPMA should be invalidated. It is arguable that the FLPMA legislative veto provisions are inseverable from the remainder of the Act. This may lead to the invalidation of all of FLPMA, in which case public land management would be set back ten years, or to the invalidation of the Executive's authority to manage the public lands. Either could lead to the revocation of every decision made by the Interior Department under FLPMA.

If on the other hand, the legislative veto provisions are severable from the remainder of FLPMA, then clearly Congress would have to either amend the Act, or enact new legislation. In the meantime, the Interior

the scope of this article. In this regard, see Carver, *BLM Organic Act, Federal Land Policy and Management Act of 1976: Fruition or Frustration*, 54 DEN. L.J. 387 (1977). Even if the benefits of FLPMA are minimal, and a new federal land management act is required, the best alternative still seems to be to keep FLPMA intact, until a new act is passed.

80. While the possibilities are endless, the results are the same. Clearly, the invalidation of any or all of FLPMA could have disastrous effects upon the future of public land management. See *supra* note 79.

Department would be restricted only by the broad policy directives currently contained within FLPMA. Needless to say, these broad directives are subject to vastly different interpretations. This problem is further compounded when there exists a sharp contrast in the philosophies of the Executive and Congress toward public land management.

From a legal standpoint, the reasoning of *National Wildlife Federation v. Watt* provides the best answer. The proprietary powers of Congress under Article IV do provide constitutional prerogatives transcending those powers enjoyed by Congress in its purely legislative role under Article I. Clearly, FLPMA is a valid exercise of those proprietary powers.⁸¹

From a practical standpoint, the same reasoning provides the best alternative. Given both the confusion surrounding the severability issue and possible alternatives, keeping FLPMA intact is best for the public lands. To do otherwise only promotes the inconsistency and mismanagement that existed prior to the enactment of FLPMA.

81. See P. Baldwin, *The Effects of Immigration and Naturalization Service v. Chadha on certain provisions in the Federal Land Policy and Management Act*, Cong. Research Serv., Libr. of Cong. (August 19, 1983, rev. September 14, 1983). Pamela Baldwin, a legislative attorney, at the request of Congress, prepared a study of the possible effects of the *Chadha* decision upon FLPMA. In her report, she concluded that the legislative veto provisions within FLPMA would be invalidated. Accordingly, she advised Congress to prepare new legislation.