



THE LARCH COMPANY

ANDY KERR, CZAR

OFFICES IN ASHLAND, OREGON AND WASHINGTON, DC,

503.701.6298 CELL/TEXT

ANDYKERR@ANDYKERR.NET • WWW.ANDYKERR.NET

TO: Interested parties
FROM: Andy Kerr
RE: Establishing national wildlife refuges out of BLM holdings
DATE: November 19, 2021

National wildlife refuges (NWRs) are administered by the Fish and Wildlife Service (FWS). There is interest in establishing new or expanding existing NWRs by transferring Bureau of Land Management (BLM) holdings to the FWS. Since enactment of the Federal Land Policy and Management Act (FLPMA) of 1976, there are two ways to establish a national wildlife refuge from BLM holdings: an Act of Congress or an FLPMA “withdrawal” by the secretary of the interior.

In general, FLPMA withdrawals are limited to a maximum of twenty years but can be renewed. However, the question has arisen as to whether an FLPMA withdrawal would have to be renewed every twenty years to keep an NWR in the National Wildlife Refuge System (NWRS). For the reasons set forth below, I believe the answer is no. The question remains as to whether a public lands withdrawal *for* an NWR that also withdraws the new refuge lands *from* mining lasts only twenty years or is permanent. In this case, a twenty-year mineral withdrawal renewal may be required, but the secretary of the interior may not have the discretion to *not* renew such a withdrawal.

National Wildlife Refuges Reserved from the Public Domain

More than 81 million acres (56 percent) of the nearly 145 million acres in 568 national wildlife refuges have been “reserved from the public domain” (Table 1). This means from public lands that have been in federal ownership since the United States obtained title to them through treaty, purchase, or annexation. In the modern context, “public domain” means almost all lands administered by the BLM.

President Theodore Roosevelt [established the first NWR](#) in 1903 by reserving Pelican Island in Florida from the public domain. That was before the BLM existed. The BLM’s roots date back to 1812, when Congress established the [General Land Office](#) (GLO) as an independent agency. The GLO was merged into the Department of the Interior when the department was established in 1849. In 1946, the GLO was merged with the US Grazing Service to become the Bureau of Land Management.

Table 1. National Wildlife Refuge Acreage Reserved from the Public Domain

State	Acreage	State	Acreage	State	Acreage
Alabama	0.00	Maryland	0.00	Rhode Island	0.00
Alaska	76,048,652.93	Massachusetts	0.00	South Carolina	0.00
Arizona	1,553,464.52	Michigan	2,999.51	South Dakota	1,848.76
Arkansas	8,881.60	Minnesota	405.90	Tennessee	0.00
California	81,617.27	Mississippi	40.08	Texas	0.00
Colorado	45,000.19	Missouri	0.00	Utah	65,780.81
Connecticut	0.00	Montana	433,694.99	Vermont	0.00
Delaware	0.00	Nebraska	15,786.88	Virginia	0.00
Florida	4,860.00	Nevada	2,254,707.55	Washington	42,087.05
Georgia	0.00	New Hampshire	0.00	West Virginia	0.00
Hawaii	254,418.10	New Jersey	0.00	Wisconsin	1,076.63
Idaho	25,661.04	New Mexico	15,766.26	Wyoming	23,201.58
Illinois	65.15	New York	0.00	American Samoa	0.00
Indiana	0.00	North Carolina	0.00	Guam	0.00
Iowa	333.66	North Dakota	18,537.86	Puerto Rico	0.00
Kansas	0.00	Oklahoma	77,996.20	US MOIs (Atlantic)	0.00
Kentucky	0.00	Ohio	77.13	US MOIs (Pacific)	0.00
Louisiana	10,462.65	Oregon	267,383.11	Virgin Islands	46.07
Maine	0.00	Pennsylvania	0.00	TOTAL	81,254,853.48

Source: Fish and Wildlife Service. 2020. [Statistical Data Tables for Fish and Wildlife Service Lands \(as of 9/30/2020\)](#).

Since the enactment of FLPMA in 1976, there have been only a few FLPMA withdrawals to establish national wildlife refuges from BLM lands. In 1978, Secretary of the Interior Cecil Andrus issued public land orders establishing thirteen new national wildlife refuges in Alaska, totaling ~37.6 million acres. In the official notice that accompanied those public lands orders, the Interior Department stated: “The term of each withdrawal is 20 years from its effective date, though under existing law the Department is compelled to renew Wildlife Refuge withdrawals.” Mandatory renewal of withdrawals for these particular NWRs became a moot matter with the enactment by Congress of the Alaska National Interest Lands Act of 1980 (16 USC 3102(4)).

National Wildlife Refuge Withdrawals: A One-Way Street

A plain reading of both the FLPMA withdrawal provision and the National Wildlife Refuge System Administration Act (NWRSA) of 1966 as amended results in the conclusion that (1) a FLPMA withdrawal is required to establish a national wildlife refuge from lands administered by the BLM, but (2) once a national wildlife refuge has been established, NWRSA controls the refuge, and the general twenty-year limitation of FLPMA withdrawals no longer applies to such refuges.

Statutorily—in this case by both FLPMA and NWRSA—establishing an NWR via an FLPMA withdrawal is a one-way street. Once accomplished by a public land order from the secretary of the interior, it can only be undone by an Act of Congress. No renewal of the original FLPMA withdrawal is necessary.

The FLPMA withdrawal provision

Since congressional enactment of FLPMA ([43 USC Chapter 35](#)) on October 21, 1976, national wildlife refuges can be carved out of BLM holdings administratively pursuant to an FLPMA “withdrawal.”

*On and after the effective date of this Act the Secretary is authorized to **make, modify, extend, or revoke withdrawals but only in accordance with the provisions and limitations of this section** [section 1714 of Title 43 of the United States Code]. ([43 USC 1714\(a\)](#)) [emphasis added]*

FLPMA defines *withdrawal* as follows:

The term “withdrawal” means withholding an area of Federal land from settlement, sale, location, or entry, under some or all of the general land laws, for the purpose of limiting activities under those laws in order to maintain other public values in the area or reserving the area for a particular public purpose or program; or transferring jurisdiction over an area of Federal land . . . from one department, bureau or agency to another department, bureau or agency. (43 USC 1702(j)) [emphasis added]

An FLPMA withdrawal can

- exclude lands from certain uses (for example, *location* in the definition above refers to hardrock mining),
- dedicate lands to certain uses (for example, to “protect water resources in the Grand Canyon watershed and the Colorado River from possible water contamination”), and/or
- transfer control of lands from one federal agency to another.

A “normal” FLPMA withdrawal can only be for a maximum length of twenty years ([43 USC 1714\(d\)\(2\)](#)), but it can be extended for another twenty years indefinitely. This would suggest that a withdrawal that transfers BLM lands to the FWS for an NWR expires in twenty years. Such is not the case, due to another provision in FLPMA section 1714, specifically subsection (j).

The Secretary shall not make, modify, or revoke any withdrawal created by Act of Congress; make a withdrawal which can be made only by Act of Congress; modify or revoke any withdrawal creating national monuments under chapter 3203 of title 54; or modify, or revoke any withdrawal which added lands to the National Wildlife Refuge System prior to October 21, 1976, or which thereafter adds lands to that System under the terms of this Act. Nothing in this Act is intended to modify or change any provision of the Act of February 27, 1976 (90 Stat. 199; 16 U.S.C. 668dd(a)). (43 USC 1714(j)) [emphasis and double-emphasis added]

NWRSAA, as amended

Let us then look at the Act of February 27, 1976, referred to in FLPMA, since *nothing* in the FLPMA is “intended to modify or change any provision” of this act. This is the National Wildlife Refuge System Administration Act (NWRSAA) of 1966, as amended in 1976 prior to the enactment of FLPMA later that same year. Once an NWR is established via FLPMA, it becomes subject to NWRSAA. This act says that an NWR “shall continue to be a part of the [National Wildlife Refuge] System until otherwise specified by Act of Congress.” The relevant portion is as follows:

Each area which is included within the [National Wildlife Refuge] System on January 1, 1975, or thereafter, and which was or is—
(A) designated as an area within such System by law, Executive order, or secretarial order; or
(B) so included by public land withdrawal, donation, purchase, exchange, or pursuant to a cooperative agreement with any State or local government, any Federal department or agency, or any other governmental entity,

shall continue to be a part of the System until otherwise specified by Act of Congress . . . ([16 USC 668dd\(a\)\(6\)](#)) [emphasis added]

So “Nothing” in FLPMA section 1714, subsection (j), means *nothing*, including the otherwise twenty-year maximum for an FLPMA withdrawal mentioned in [43 USC 1714\(d\)\(2\)](#). The secretary cannot “modify or revoke” a withdrawal that established a national wildlife refuge during the term of that withdrawal (twenty years), and neither does the secretary need to renew a withdrawal establishing an NWR.

Concurrent Mineral Withdrawals: Renewal Required

Alas, an NWR in the NWRS is not automatically protected against mineral exploitation. NWRSAA says:

Provided, That the United States **mining and mineral leasing laws shall continue to apply to any lands within the System** to the same extent they apply prior to October 15, 1966, **unless subsequently withdrawn under other authority of law.** ([16 USC 668dd\(c\)](#)) [emphasis added]

If the lands were withdrawn from mining prior to October 15, 1966, they are still withdrawn. If the lands were “subsequently withdrawn” pursuant to an FLPMA withdrawal, the FLPMA twenty-year maximum time period applies. Thus, a concurrent mineral withdrawal associated with the establishment or expansion of a national wildlife refuge must be renewed every twenty years.

An FLPMA withdrawal from “location” (locating mining claims) directly withdraws the lands only from “hardrock” mining under the Mining Law of 1872. This [includes](#) “metallic minerals (gold, silver, lead, copper, zinc, nickel, etc.) and nonmetallic minerals (fluorspar, mica, certain limestones and gypsum, tantalum, heavy minerals in placer form, and gemstones).”

A public land order under the FLPMA withdrawal provision can *explicitly* apply to other kinds of mining as well, including

- Mineral Leasing Act of 1920, as amended ([30 USC Chapter 3A](#)), “leasing” of high-value minerals (oil and gas, oil shale, geothermal resources, potash, sodium, native asphalt, solid and semisolid bitumen, bituminous rock, phosphate, and coal [and, in some states, sulfur]);
- Materials Act of 1947, as amended ([30 USC 601 et seq.](#)), “sale” of common minerals (sand, gravel, stone, pumice, pumicite, and cinders); or
- Geothermal Steam Act of 1970, as amended ([30 USC Chapter 23](#)), “leasing” of geothermal resources.

An FLPMA withdrawal can also *implicitly* withdraw some areas from mining. If the area is withdrawn for the purpose of “reserving the area for a particular public purpose or program” ([43 USC 1702\(j\)](#))—such as an NWR—the BLM, which administers minerals under NWRs, should deny such leasing or sale of minerals as incompatible with the purpose of the withdrawal.

Whatever the case may be, the secretary of the interior must renew the mineral withdrawal of refuge lands every twenty years. The question arises as to whether the secretary has the discretion under law to *not* renew the withdrawal. I believe the answer is no. Through NWRSAA, as amended, Congress has imposed on the secretary the duty to protect refuges and refuge resources from harm:

In administering the [National Wildlife Refuge] System, the Secretary shall—
(A) provide for the conservation of fish, wildlife, and plants, and their habitats within the System;
(B) ensure that the biological integrity, diversity, and environmental health of the System are maintained for the benefit of present and future generations of Americans;
(C) plan and direct the continued growth of the System in a manner that is best designed to accomplish the mission of the System, to contribute to the conservation of the ecosystems of the United States, to complement efforts of States and other Federal agencies to conserve fish and wildlife and their habitats, and to increase support for the System and participation from conservation partners and the public;
(D) ensure that the mission of the System described in paragraph (2) and the purposes of each refuge are carried out, except that if a conflict exists between the purposes of a refuge and the mission of the System, the conflict shall be resolved in a manner that first protects the purposes of the refuge, and, to the extent practicable, that also achieves the mission of the System; . . .
(F) assist in the maintenance of adequate water quantity and water quality to fulfill the mission of the System and the purposes of each refuge; . . . (16 USC 668dd(a)(4) [emphasis added]

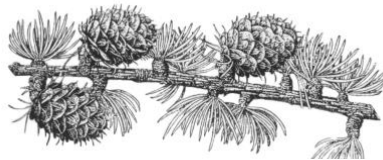
The “mission of the System described in paragraph (2)” is

to administer a national network of lands and waters for the conservation, management, and where appropriate, restoration of the fish, wildlife, and plant resources and their habitats within the United States for the benefit of present and future generations of Americans. (16 USC 668dd(a)(2) [emphasis added]

Allowing mining in NWRs does *not*

- ensure the “conservation of fish, wildlife, and plants, and their habitats”;
- “ensure that the biological integrity, diversity, and environmental health of the System are maintained for the benefit of present and future generations of Americans”;
- “contribute to the conservation of the ecosystems of the United States”;
- “assist in the maintenance of adequate water quantity and water quality to fulfill the mission of the System and the purposes of each refuge”; or
- “ensure that the mission of the System described in paragraph (2) and the purposes of each refuge are carried out.”

• *Acknowledgment:* My thanks to Jenny Keatinge for her astute review and critique of a draft of this memorandum.



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