the application of the "rule of reason," namely, that impacts need only be considered (1) which can reasonably be anticipated to occur prior to the completion of the project, or (2) which will definitely occur before or after completion of the project under consultation.

I am not persuaded that these limitations should be placed on the "rule of reason" test. If other activities (both private and governmental) can be reasonably anticipated to impact the endangered species or its critical habitat, those impacts should be included within the scope of the consultation. To exclude consideration of activities and projects which will occur after the completion of the project under consultation could result in our ignoring impacts which are likely to occur and otherwise cognizable under the "rule of reason." Likewise, projects and activities for which administrative discretion remains should also be considered. The degree of administrative discretion, and the likelihood of that discretion being exercised in a manner to diminish impact on the subject species, are matters which should be included under the "rule of reason" test.

In conclusion, the opinion of May 25, 1978 is reissued with the removal of the two limitations in the first full paragraph on the last page. The "rule of reason" test should be used to evaluate impacts which can reasonably be anticipated to occur from projects and activities before or after the completion of the project under consultation or on which administrative discretion remains. These projects and activities, along with their impacts, should be considered and given an appropriate weight in the application of the "rule of reason."

The reissued opinion, modified as indicated in this memorandum, is attached.

LEO M. KRULTZ
Solicitor

THE BUREAU OF LAND MANAGEMENT WILDERNESS REVIEW AND VALID EXISTING RIGHTS

M–36910 (Supp.)

October 5, 1981

Federal Land Policy and Management Act of 1976: Wilderness

Valid existing rights are limitations upon the Secretary's authority to manage activities occurring within wilderness study area under the nonimpairment standard. In general, the nonimpairment standard remains the management norm unless it would preclude enjoyment of the rights. When it is determined that the rights can be enjoyed only through activities that will permanently impair an area's suitability, the Secretary must manage the lands to prevent unnecessary and undue degradation and to afford environmental protection.

Solicitor's Opinion M–36910, 86 I.D. 89 (1979), modified.

OPINION BY OFFICE OF THE SOLICITOR

To: SECRETARY
FROM: SOLICITOR
SUBJECT: THE BLM WILDERNESS REVIEW AND VALID EXISTING RIGHTS

I. INTRODUCTION

On Sept. 5, 1978, the Solicitor issued opinion M–36910, 86 I.D. 89 (1979), interpreting sec. 603 of the Federal Land Policy and Management Act (FLPMA), 43 U.S.C. § 1782. In addition, two supplementary memoranda have been issued. The first, the memorandum of Aug.

7, 1979 ("Palmer Oil/Prairie Canyon"), reviewed the "grandfather clause" of sec. 603. The second, the memorandum of Feb. 12, 1980 ("Further Guidance on FLPMA's section 603"), discussed the Bureau of Land Management's Interim Management Plan and valid existing rights in the context of mining claims located pursuant to the general mining laws.

This opinion addresses the relationship between valid existing rights and the wilderness review requirements of sec. 603.[1] It modifies Solicitor's Opinion No. M-36910 and incorporates the memorandum of Feb. 12, 1980.

II. *THE NONIMPAIRMENT STANDARD AND ITS EXCEPTIONS AND LIMITATIONS*

Congress has delegated to the Secretary general and comprehensive authority to manage the public lands. As the Supreme Court has noted, the Secretary "has been granted plenary authority over the administration of public lands * * * and * * * has been given broad authority to issue regulations concerning them." *Best v. Humboldt Placer Mining Co.*, 371 U.S. 334, 336 (1963). *See also Cameron* v. *United States*, 252 U.S. 450, 459–60 (1920); *Boesche* v. *Udall*, 373 U.S. 472, 477–78 (1963). *See generally* 30 U.S.C. §§ 22, 189; 43 U.S.C. §§ 2, 1712. With the enactment of FLPMA, Congress has restricted the Secretary's discretion in managing the public lands by imposing two standards to guide management decisions. The first is a general standard applicable to all management activities: "In managing the public lands the Secretary shall, by regulation or otherwise, take any action necessary to prevent unnecessary and undue degradation of the lands." 43 U.S.C. § 1732(b). The second and more stringent limitation is part of the wilderness review mandated by sec. 603 of FLPMA. 43 U.S.C. § 1782.

Under sec. 603 of FLPMA, the Secretary is directed to review the public lands and identify those areas that meet the wilderness criteria contained in sec. 2(c) of the Wilderness Act, 16 U.S.C. § 1131 (c). Those areas that have wilderness characteristics are then to be studied to determine their suitability for inclusion in the National Wilderness Preservation System. The Secretary is required to make recommendations on their suitability or nonsuitability to the President by Oct. 21, 1991. In turn, the President makes recommendations to the Congress which decides which areas will be designated wilderness.

Sec. 603(c) establishes a specific management standard, known as the "nonimpairment standard," appli-

[1] This opinion formalizes and is consistent with the position adopted by the Department on appeal from the decision of *Rocky Mountain Oil & Gas Association v. Andrus*, 500 F. Supp. 1338 (D. Wyo. 1980), *appeal docketed*, No. 81-1040 (10th Cir. Jan. 5, 1981). Although consistent with the result reached by the court in regard to allowing activities on oil and gas leases issued prior to Oct. 21, 1976 (pre-FLPMA leases), this opinion does not adopt the court's rationale.

cable only during this wilderness review:

> *During the period of review* of such [wilderness study] areas and until Congress has determined otherwise, *the Secretary shall continue to manage such lands* according to his authority under this Act and other applicable law *in a manner so as not to impair the suitability of such areas for preservation as wilderness*, subject, however, to the continuation of existing mining and grazing uses and mineral leasing in the manner and degree in which the same was being conducted on the date of approval of this Act: *PROVIDED*, That, in managing the public lands the Secretary shall by regulation or otherwise take any action required to prevent unnecessary or undue degradation of the lands and their resources or to afford environmental protection.

43 U.S.C. § 1782(c) (italics added). *See generally* Solicitor's Opinion M-36910, 86 I.D. 89, 109-11 (1979).

There is, however, an exception to and a limitation on the nonimpairment standard. The exception is the section's grandfather clause which authorizes the continuance of existing mining, grazing, and mineral leasing uses, "in the manner and degree" in which they were occurring on Oct. 21, 1976, the date of enactment of FLPMA. This grandfather clause was analyzed in both the initial Solicitor's Opinion and the supplemental memorandum of Aug. 7, 1979.

The limitation on the nonimpairment standard, and the subject of this opinion, is the savings clause of sec. 701(h) of FLPMA. This section provides:

> All actions by the Secretary concerned under this Act shall be subject to valid existing rights.

43 U.S.C. § 1701 note.

The clause limits the applicability of the nonimpairment standard by specifying that the standard cannot be applied in a manner that would prevent the exercise of any "valid existing rights."

III. *VALID EXISTING RIGHTS*

Although the legislative history is largely silent on the scope of this term,[2] it is not unique to FLPMA. The term has an extensive history both in the Department and the courts.

In defining "valid existing rights," the Department distinguishes three terms: "vested rights," "valid existing rights," and "applications" or "proposals."[3] "Valid existing rights" are distinguished from "applications" because such rights are independent of any secretarial discretion. They are property interests rather than mere expectancies. *Compare Schraier* v. *Hickel*, 419 F.2d 663, 666-67 (D.C. Cir. 1969) *and George J. Propp*, 56 I.D. 347, 351 (1938) *with Udall* v. *Tallman*, 380 U.S. 1, 20 (1965), *United States ex rel. McLennan* v.

[2] *See generally* H.R. Rep. No. 1724, 94th Cong., 2d Sess. 65 (1976), *reprinted in* Senate Comm. on Energy & Natural Resources, 95th Cong., 2d Sess., *Legislative History of the Federal Land Policy and Management Act of 1976* at 871, 935 (Comm. Print 1978).

[3] Each of these terms applies only to third parties. They do not apply to interests of federal agencies, departments, or agents. *See, e.g., Townsite of Liberty*, 40 I.B.L.A. 317, 319 (1979).

Wilbur, 283 U.S. 414, 420 (1931), *and Albert A. Howe*, 26 I.B.L.A. 386, 387 (1976). "Valid existing rights" are distinguished from "vested rights" by degree: they become vested rights when all of the statutory requirements required to pass equitable or legal title have been satisfied.[4] *Compare Stockley* v. *United States*, 260 U.S. 532, 544 (1923) *with Wyoming* v. *United States*, 255 U.S. 489, 501–02 (1921) *and Wirth* v. *Branson*, 98 U.S. 118, 121 (1878). Thus, "valid existing rights" are those rights short of vested rights that are immune from denial or extinguishment by the exercise of secretarial discretion.

Valid existing rights may arise in two situations. First, a statute may prescribe a series of requirements which, if satisfied, create rights in the claimant by the claimant's actions under the statute without an intervening discretionary act. The most obvious example is the 1872 Mining Law: a claimant who has made a discovery and properly located a claim has a valid existing right by his actions under the statute; the Secretary has no discretion in processing any subsequent patent application. Second, a valid existing right may be created as a result of the exercise of secretarial discretion. For example, although the Secretary is not required to approve an application for a right-of-way, if an application is approved the applicant has a valid existing right to the extent of the rights granted. Similarly, the Secretary has discretion to approve, deny, or suspend an application for an oil and gas lease. Once the lease is issued however, the applicant has valid existing rights in the lease.

Valid existing rights are not, however, absolute. The nature and extent of the rights are defined either by the statute creating the rights or by the manner in which the Secretary chose to exercise his discretion.[5] *See, e.g.*, *Best* v. *Humboldt Placer Mining Co.*, 371 U.S. 334 (1963); *Continental Oil Co.* v. *United States*, 184 F. 2d 802, 807 (9th Cir. 1950). Thus, it is not possible to identify in the abstract every interest that is a valid existing right; the question turns upon the interpretation of the applicable statute and the nature of the rights conveyed by approval of an application. Because of the importance of the individual approval and its stipulations, a review of each ap-

[4] "Vested rights" has a narrower meaning within public land law terminology than in other areas of the law. In public land law, "vested rights" typically applies to legal or equitable rights to a fee title. *See e.g., Wyoming v. United States, supra* at 501–02. Oil and gas leases, which do not convey fee title, have not been couched in terms of the traditional "vested right" usage.

[5] For example, there are interests less than leaseholds that are "valid existing rights." These include noncompetitive (preference right) coal lease applications that were preserved by the "valid existing rights" clause of sec. 4 of the Federal Coal Leasing Act Amendments of 1976, 90 Stat. 1085, *amending* 30 U.S.C. § 201(b) (1970). The Secretary does not have the discretion to reject these applications if the applicant can meet the statutory test for lease issuance. Nevertheless, the right to a lease does not accrue until that determination has been made. *NRDC* v. *Berklund*, 609 F.2d 553 (D.C. Cir. 1979); *Utah International, Inc.* v. *Andrus*, 488 F. Supp. 962, 969 (D. Utah 1979). The right preserved is to an adjudication and, if that adjudication is favorable, to a lease.

proval document will be required to determine the precise scope of an applicant's valid existing rights where such rights are created by an act of Secretarial discretion.

IV. *REGULATION OF VALID EXISTING RIGHTS UNDER SEC. 603 OF FLPMA*

The determination that a particular interest is a "valid existing right" is a limitation on the congressionally mandated management standard applicable to activities occurring within wilderness study areas. Although the nonimpairment standard remains the norm, this standard cannot be enforced if to do so would preclude recognition of the right or, in the case of an issued lease, would preclude development under the right. In general, restrictions on the right designed to protect wilderness values may not be so onerous that they unreasonably interfere with enjoyment of the benefit of the right. In other words, regulations may not be "so prohibitively restrictive as to render the land incapable of full economic development." *Utah* v. *Andrus*, 486 F. Supp. 995, 1010 (D. Utah 1979).

The resolution of specific cases under these general guidelines is dependent upon an analysis of two variables. The first is the scope of developmental rights actually conveyed by the person's actions under the statute or by the Department's issuance of the lease or other document. The second variable is the site-specific conditions confronting the right holder. In general, however, the nonimpairment standard governs activities unless this would unreasonably interfere with enjoyment of the valid existing rights. When the nonimpairment standard would unreasonably interfere with the use of the rights conveyed, the holder of the rights may exercise the rights although it impairs the area's suitability for preservation as wilderness. For example, under such circumstances a claimant with a valid mining claim under the Mining Law of 1872 may develop the claim even if this impairs the area's suitability for wilderness preservation. Similarly, the holder of an oil and gas lease or a right-of-way authorization issued prior to the enactment of FLPMA may develop the leasehold or right-of-way to the extent authorized by the issuance or approval document.

It is important to note the distinction between pre- and post-FLPMA leases and authorizations. With the enactment of FLPMA on Oct. 21, 1976, the Secretary was required to manage the public lands under wilderness review "so as not to impair the suitability of such areas for preservation as wilderness." 43 U.S.C. § 1782(c). Thus applicants who received a lease or other use authorization after Oct. 21, 1976, for lands within an area under wilderness review did not receive an unlimited right to develop since after that date the Secretary had author-

ity only to issue those leases, permits, and licenses that would not impair an area's suitability for preservation as wilderness. *See generally Utah* v. *Andrus*, 486 F. Supp. 995, 1006 (D. Utah 1979).

The right to develop even if it impairs an area's suitability does not, however, mean that the right is unlimited. The Secretary remains under a statutory mandate to manage these areas and their resources: "in managing the public lands the Secretary shall by regulation or otherwise take any action required to prevent unnecessary or undue degradation of the lands and their resources or to afford environmental protection." 43 U.S.C. § 1782(c).[6] By implication, this standard allows the Secretary to authorize uses or activities necessary to the purposes of the valid existing rights subject to reasonable mitigating measures to protect environmental values. The requirement that the Secretary regulate uses and activities to prevent unnecessary and undue degradation and to afford environmental protection is consistent with the power of the Federal Government to regulate property interests. Since the regulation extends at a minimum only to prohibiting activities that are not necessary or that are excessive or unwarranted, the taking issue is not implicated.[7]

V. *CONCLUSION*

Valid existing rights may be created by operation of a statute or an act of secretarial discretion. A valid mining claim, an oil and gas lease, and a right-of-way authorization are examples of valid existing rights. If such rights were created prior to the enactment of FLPMA, they limit the congressionally imposed nonimpairment standard. Although the nonimpairment standard remains the norm, valid existing rights that include the right to develop may not be regulated to the point where the regulation unreasonably interferes with enjoyment of the benefit of the right. Resolution of specific cases will depend upon the nature of the rights conveyed and the physical situation within the area. When it is determined that the rights conveyed can be enjoyed only through activities that will permanently impair an area's suitability for preservation as wilderness, the activities are to be regulated to prevent unnecessary and undue degradation or to afford environmental protection. Nevertheless, even if such activities impair

[6] *See also* 43 U.S.C. § 1732(b).

[7] These management requirements are compatible with the concept of valid existing rights. First, such rights may constitutionally be regulated and their value diminished for a proper governmental purpose. *See, e.g., Andrus* v. *Allard*, 100 S.Ct. 318 (1979); *Penn Central Transp. Co.* v. *City of New York*, 438 U.S. 104 (1978); *Goldblatt* v. *Hempstead*, 369 U.S. 590 (1962). Since the management standard prohibits only "unnecessary and undue degradation," it does not raise constitutional issues. Second, the rights granted by the United States are often explicitly limited by the government's authority to regulate. For example, the 1872 Mining Law provides that "all valuable mineral deposits in lands belonging to the United States * * * shall remain free and open to exploration and purchase * * * *under regulations prescribed by law*." 30 U.S.C. § 22. *See generally* 30 U.S.C. § 189; *Boesche* v. *Udall*, 373 U.S. 472, 477–78 (1963); *United States* v. *Richardson*, 599 F.2d 290 (9th Cir. 1979), *cert. denied*, 444 U.S. 1014 (1980).

the area's suitability, they must be allowed to proceed.

WILLIAM H. COLDIRON
Solicitor

CLYDE K. KOBBEMAN

58 IBLA 268

Decided *October 8, 1981*

Appeal from decision of the Montana State Office, Bureau of Land Management, rejecting simultaneous noncompetitive oil and gas lease application M 49009.

Affirmed.

1. Oil and Gas Leases: Applications: Generally—Oil and Gas Leases: Applications: Attorneys-in-Fact or Agents

An oil and gas lease application, Form 3112–1 (June 1980), is not completed in accordance with regulation 43 CFR 3112.2–1 or the instructions on the application itself where questions (d) through (f) are not answered by checking appropriate boxes in the application as the instructions require.

2. Administrative Authority: Laches—Estoppel—Laches

The authority of the United States to enforce a public right or protect a public interest is not vitiated or lost through lack of enforcement by some of its officers.

APPEARANCES: Bruce A. Budner, Esq., Dallas, Texas, for appellant.

OPINION BY CHIEF ADMINISTRATIVE JUDGE PARRETTE

INTERIOR BOARD OF LAND APPEALS

Clyde K. Kobbeman filed a simultaneous noncompetitive oil and gas lease application for parcel MT 1 in the September 1980 drawing in the Montana State Office, Bureau of Land Management (BLM). This application was drawn with first priority and assigned serial number M 49009.

On Apr. 30, 1981, BLM issued a decision rejecting Kobbeman's application because questions (d), (e), and (f)[1] were not completed on the back of the application by checking appropriate boxes, which violates 43 CFR 3112.2–1(a) (1980). Kobbeman appealed this decision.

[1] We agree that appellant's application was not completed and that BLM therefore properly rejected it. A simultaneous noncompetitive oil and gas lease application must be *completed* (43 CFR 3112.2–1(a)) or it must be rejected as an improper filing. 43 CFR 3112.6–

[1] The portion of the application in question is as follows:

"UNDERSIGNED CERTIFIES AS FOLLOWS (*check appropriate boxes*) [emphasis in original]:

* * * * *

"(d) Does any party, other than the applicant and those identified herein as other parties in interest, own or hold any interest in this application, or the offer or lease which may result? Yes ☐ No ☐.

"(e) Does any agreement, understanding, or arrangement exist which requires the undersigned to assign, or by which the undersigned has assigned or agreed to assign, any interest in this application, or the offer or lease which may result, to anyone other than those identified herein as other parties in interest? Yes ☐ No ☐.

"(f) Does the undersigned have any interest in any other application filed for the same parcel as this application? Yes ☐ No ☐."