#7.3

...tion 12 would eliminate from FLPMA a number of now-inoperative references to Congressional vetoes, replacing them with references to enactment of joint resolutions (so as to meet the requirements of the Supreme Court's *Chadha* decision). These references are in sections of FLPMA relating to sales and withdrawals.

Section 13 includes two conforming amendments to FLPMA. One is a repeal of Section 215, a section that granted the Secretary temporary authority to take certain actions in order to consummate exchanges. This section was added to FLPMA by the Federal Land Exchange Facilitation Act (P.L. 100-409) in response to then-ongoing litigation which has now ended, and by its own terms has already expired.

The other change in FLPMA covered by this section would be repeal of subsection 401(a). It was that subsection which required the preparation by the Interior and Agriculture Departments of a study to lay the basis for establishment of a grazing fee to apply in years after 1985 (when the formula established by the Public Rangelands Improvement Act of 1978 expired). That study has been completed.

Subcommittee Chairman Vento introduced an amendment on R.S. 2477, Rights-of-way. This amendment, accepted by the full Interior Committee, would require all parties holding R.S. 2477 rights must file with BLM before 1994 their intent to hold and maintain the rights-of-way or state their intent to abandon it. Failure to file within this time period would result in an abandonment or relinquishment of a rights-of-way (see the following background statement).

At the 3/12/91 hearing of the Subcommittee on H.R. 1096, Chairman Vent asked for PLF reaction to the testimony by the Southern Utah Wilderness Alliance regarding R.S. 2477 right of ways. We were happy to provide the Subcommittee with the following:

R.S. 2477

The Act of July 26, 1866, R.S. 2477, repealed October 21, 19765 (formerly codified at 43 U.S.C. 932) provided: "The right of ...y for the construction of highways over public lands, not ...served for public use, is hereby granted." Acceptance of the grant occurred when a public highway was constructed on unreserved public lands. Although R.S. 2477 was repealed nearly 15 years ago with the passage of the Federal Land Policy and Management Act (FLPMA), controversy continues to arise. The decision to repeal R.S. 2477 was correct. However the adding of a "grandfather" clause that recognizes any right of way "established" before 1976 as valid is the source of the continuing problem. Under R.S. 2477, the federal government under federal laws have no authority to approve, adjudicate, or restrict such ROWs. Today, modern laws such as NEPA or the Endangered Species Act have no application to R.S. 2477 ROWs.

From time to time and continuing today, since passage of FLPMA, local authorities, particularly County governments, have used R.S. 2477 ROWs to interfere with the establishment of wilderness areas by making such areas "roaded" or to deny public access to the public lands in grazing allotments by closing "county" R.S. 2477 roads.

Because of the grandfather clause, BLM has had to work cooperatively with the local governments to encourage them to inventory their R.S. 2477 ROWs and to note BLM records of such. In many states BLM has developed good working relationships with the Counties. In other states such as Alaska and Utah local officials have used the preexisting language here to "road potential wilderness areas while in New Mexico, R.S. 2477 authority has been used to claim roads as county ROWs and then close them to public use.

It is obvious that it is necessary for the proper management of the public lands that BLM be able to recognize with certainty the existence or lack thereof, of public ROWs obtained under R.S. 2477

Since each State and/or County have differing definitions of what constitutes a road, trail or public highway and differing definitions of what constitutes "construction," elaborate legal arguments have ensued between BLM, the public, and those local governments using R.S. 2477 authority for purposes not intended by the 1866 law. For example, an old livestock/horse trail could, and have become a ROW for the construction of a modern road. The statement by the Southern Utah Wilderness Alliance before your Subcommittee has other examples of how the 1866 law is being abused and not used for the purpose it was enacted. All these arguments about what is or is not a road or ROW or what has been or has not been constructed are all very interesting but not productive or helpful to modern day public land management or planning.

It has been suggested that local governments be required to inform the public and BLM by a date certain of their inventory of R.S. 2477 ROWs. This is information BLM certainly needs and the public should be aware of but requiring this inventory would not end the problem. As long as the "grandfather" language exists the problem will continue. PLF therefore recommends that a new statute be enacted which ends the preexisting language in the 1976 repeal and ends the use of R.S. 2477 for ROWs after a date certain (1994). PLF would further recommend that BLM be directed to review the submitted ROWs following this cutoff date to determine their validity and that no change in use or construction be permitted during this BLM review period.

Biodiversity. There has been no movement to date on bills introduced on this subject. But the issue received strong support from a report released by the Keystone Center in April. The report signed by 60 participants from all disciplines, recommends a diversity of species be maintained on federal lands. It says existing protections are inadequate. The Bills, H.R. 858 and H.R. 2082, would require a biological diversity assessment in EISs prepared by federal agencies. This issue may also develop into a war and not just in the west. Supporters say the Endangered Species Act is fine for protecting one species at a time but that a broader law is needed to protect all species in a troubled ecosystem. (PLF has not prepared a position on this issue.)

Ancient Forest Legislation (The Spotted Owl, cont.) A decision by the Courts has tied up timber sales in Oregon, Washington and Northern California. New bills to deal with the matter, too numerous to try to analyze at this point, have been introduced as a result. Earlier, responding to a judicial order, the FWS issued habitat descriptions which locked up 11.6 million acres of forest. BLM estimates the FWS action would reduce the usual 1 billion board feet from the Oregon and California lands to 329 million board feet. So while the courts have taken over the issue they have in effect dumped the whole old growth problem in the laps of Congress and thus the numerous Bills. This is a very important issue and we will try to keep you posted, but it gets more convoluted each day.

Oil and Gas Drainage BLM has developed a four-page list of lands that are in National Parks, Wilderness