

# FEDERAL LAW ENFORCEMENT ON PUBLIC LANDS: REALITY OR MIRAGE?

Paul B. Smyth \*

## THE PROBLEM OF LAW ENFORCEMENT ON PUBLIC LANDS

Before the enactment of the Federal Land Policy and Management Act of 1976 [FLPMA],<sup>1</sup> the Bureau of Land Management [BLM] had no comprehensive authority to enforce federal law on public lands.<sup>2</sup> In this manner, public lands administered by the BLM differed from those lands administered by the National Park Service, the Fish and Wildlife Service, and the Forest Service which had already obtained a large measure of enforcement authority.<sup>3</sup>

Section 303 of FLPMA,<sup>4</sup> which generally puts BLM on a par with these other agencies, was seen as a solution to growing problems of enforcement on public lands.<sup>5</sup> These problems are documented in the report on Senate bill 507,<sup>6</sup> which became FLPMA, citing a submission by the Interior Department:

While the majority of users may follow the rules, an ever increasing number seem to delight in such "past-times" as tearing out toilet shelves and deodorizers, wrecking toilet doors and roofs, polluting springs and campground waters, cutting livestock fences, breaking guzzlers which supply water to wildlife, defacing archeological sites, painting rocks, cutting plastic water pipe, dynamiting petroglyphs,

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\* Staff Attorney, Division of Energy and Resources, Office of the Solicitor, United States Department of the Interior. J.D. 1974, Boston College Law School. Member, Connecticut and District of Columbia Bars.

1. PUB. L. No. 94-579, 90 Stat. 2743 (codified at 43 U.S.C. §§ 1701-1782 (1976)).

2. S. Rep. No. 583, 94th Cong., 1st Sess. 57-58 (1975).

3. See 16 U.S.C. §§ 1a-6, 3 (1976) (National Park Service); 16 U.S.C. §§ 551, 551a, 552d, 559, 559a (1976) (Forest Service); 16 U.S.C. §§ 706, 707, 727, 742j-1 (1976) (Fish and Wildlife Service).

4. 43 U.S.C. § 1733 (1976).

5. S. Rep. No. 583, 94th Cong., 1st Sess. 57-58 (1975).

6. *Id.*

pulling out survey stakes and markers, burning signs, defacing trees, shooting water tanks, windmills, signs, garbage cans, livestock and wildlife, harassing other people, and similar acts of rowdyism. These problems are increasing at a faster rate than the even rapidly increasing use of the national resource lands.<sup>7</sup>

These problems were seen as being particularly acute in the California Desert, which is an extremely delicate resource. Desert vegetation once destroyed can take decades to restore.<sup>8</sup> In fact, the deep scars from General Patton's tank maneuvers are still visible on the desert surface, although created over thirty years ago.<sup>9</sup> Americans have been placing untold pressure on this land. The California Desert, which is within a four-hour drive of over twelve million people living in Southern California,<sup>10</sup> was used an estimated eleven million visitor days in 1973 alone.<sup>11</sup> Such use can only aid in its deterioration.

The Senate Report also documents the damage which has occurred to the various cultural and archeological resources of the area:

In addition to the environmental damage, the public's added mobility in the Desert has enabled greater numbers of people to visit important archeological and historic sites. Unfortunately, as a result of the added mobility, vandals have stolen, destroyed or defaced many of the petroglyphs, pictographs and intaglios.

Examples of this destruction include the following: the Giant Intaglio, a huge prehistoric land drawing in the Yuha Desert, is being destroyed by indiscriminate vehicle use; the old plank road across the Imperial Dunes is being hauled away, piece by piece, or being burned for firewood; and the fascinatingly beautiful Indian petroglyphs at Inscription Canyon are literally being quarried.<sup>12</sup>

Traditionally, basic law enforcement has been considered a function of state and local governments and, generally speaking, most major categories of public and private offenses are adequately covered by state law.<sup>13</sup> Nevertheless, the situation on public lands tended to avoid state or local solution since such laws do not apply to the enforcement of special rules and regulation on BLM administered lands.<sup>14</sup> There were also few federal laws to enforce on public lands, and state and local laws were generally not aimed at resource protection.<sup>15</sup> Furthermore, many counties were, for political reasons, indisposed to protect

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7. *Id.* at 58.

8. *Id.*

9. *Id.*

10. *Id.* at 61.

11. *M.*

12. *Id.* at 61-62.

13. *Id.* at 58.

14. *Id.*

15. *Id.* at 58. *Contra* CAL. PENAL CODE §§ [384a-384d (West Supp. 1978) (providing for criminal penalties for destruction of trees and shrubs).]

the abundance of resources on public lands. These resources have often been viewed historically as the lawful property of the first person to appropriate them. There is also a strong western tradition of individual freedom and fear of government encroachment on individual lifestyles.<sup>16</sup> Moreover, public lands not being on local tax rolls, created a strong disincentive for local officials to expend their limited enforcement funds on protection of such lands.<sup>17</sup> As a result, BLM's only effective tools in preserving the resources on public lands were jawboning<sup>18</sup> and civil trespass actions.<sup>19</sup>

Unfortunately, the task of solving law enforcement problems by jawboning has not been successful<sup>20</sup> and the law of civil trespass has presented unusual procedural and enforcement problems.<sup>21</sup> For example, there is no general federal statute on trespass, and consequently state law applies.<sup>22</sup> Hence, the same act committed in different states could lead to different civil monetary recoveries depending upon state laws concerning the measure of damages and mitigation of damages. These reasons and others led the Public Land Law Review Commission to recommend the following: "Statutes and administrative practices defining unauthorized use of public lands should be clarified and remedies available to the Federal Government should be uniform among land management agencies. Where necessary, statutory authority for policing by Federal agencies should be provided."<sup>23</sup>

It should be made clear that federal law was not totally devoid of provisions protecting resources on public lands.<sup>24</sup> Some protection particularly with respect to timber lands, was provided.<sup>25</sup> But in general, these laws were either antiquate<sup>26</sup> or aimed at very specific problems.<sup>27</sup> Moreover, BLM had no law enforcement personnel to investigate crimes under these statutes. Investigation was dependent upon the cooperation of the Federal Bureau of Investigation (FBI). Unfortunately, FBI personnel were not always available due to the FBI's large workload and the low priority given such investigations.

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16. See S. REP. No. 583, 94th Cong., 1st Sess. 61-62 (1975); see generally PUBLIC LAND LAW REVIEW COMMISSION, ONE THIRD OF THE NATION'S LAND, 105, 124 (1970) [hereinafter cited as PLLRC]; P. GATES, HISTORY OF PUBLIC LAND LAW DEVELOPMENT (1968).

17. See S. REP. No. 583, 94th Cong., 1st Sess. 60 (1975); H.R. REP. No. 1163, 94th Cong., 2nd Sess. 15 (1976).

18. In effect persuasion and education.

19. See S. REP. No. 583, 94th Cong., 1st Sess. 57 (1975); PLLRC, *supra* note 16, at 259-60.

20. See *id.* at 57-58.

21. PLLRC, *supra* note 16, at 259.

22. *Id.* at 260.

23. *Id.* at 259.

24. See 18 U.S.C. §§ 1858-1861 (1976).

25. *Id.* §§ 1852, 1853, 1855, 1856, 1863.

26. *Eg., id.* § 1861 (deception of homesteaders and other entrymen).

27. *Eg., id.* §§ 1858, 1859 (destruction of survey markers and interference with surveys).

Although these problems were instrumental in bringing about section 303, its enactment was not accomplished without a fight.<sup>28</sup> Strong feelings of many western citizens concerning enforcement of laws by BLM personnel created a highly sensitive political issue. This ultimately resulted in a watering down of the law enforcement provisions originally enacted by the Senate which would have encouraged BLM to establish a significant law enforcement presence on public lands using federal personnel.<sup>29</sup> The House-Senate Conference Committee ultimately adopted the House language charging the Secretary with achieving "maximum feasible reliance" upon local law enforcement officials in enforcing federal law.<sup>30</sup> This compromise was seen as a means of providing badly needed law enforcement while minimizing changes to existing methods of law enforcement.

### CONGRESSIONAL POWER TO ENACT THE LAW ENFORCEMENT PROVISION OF FLPMA

Congressional authority for the enactment of section 303 of FLPMA is the property clause of the Constitution which gives Congress the "power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."<sup>31</sup> The property clause has consistently been given an expansive interpretation by the Supreme Court, leaving the determination of what are "needful" rules to the Congress.<sup>32</sup> Congressional power is not limited to the protection of federal property; it includes control over public lands analogous to the police power of the states and is measured only by the exigencies of the case.<sup>33</sup>

How this federal police power may relate to state law depends in some measure upon the status in which the federal government holds its lands.<sup>34</sup> Congress has three major types of legislative jurisdiction over federal lands: Exclusive, concurrent, and proprietary.

Exclusive jurisdiction exists where a state has ceded, or where the United States has reserved, in connection with the admission of a state,

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28. See Harvey, *Support Your Local Sheriff: Federalism and Law Enforcement under the FLPMA* within this Symposium.

29. S.507, 94th Cong., 1st Sess. § 307 (1975).

30. H.R. REP. No. 1724, 94th Cong., 2d Sess. 60 (1976). See H.R. 13777, 94th Cong., 2d Sess. § 302 (1976).

31. U.S. CONST., art. IV, § 3, cl. 2.

32. See, e.g., *Kleppe v. New Mexico*, 426 U.S. 529, 536 (1976); *United States v. San Francisco*, 310 U.S. 16, 29-30 (1940); *Camfield v. United States*, 167 U.S. 518, 525 (1897).

33. See *Kleppe v. New Mexico*, 426 U.S. 529, 540 (1976); *Camfield v. United States*, 167 U.S. 518, 525 (1897).

34. Compare *Pacific Coast Dairy v. Dep't of Agriculture*, 318 U.S. 285, 294 (1943) with *Kleppe v. New Mexico*, 426 U.S. 529, 542 (1976). However, the existence of police power under the property clause has nothing to do with the status in which federal lands are held. See *id.* at 542-43.

all the authority of the state. The only reservation is that the state may serve criminal and civil process in such an area for activities occurring elsewhere.<sup>35</sup> Concurrent jurisdiction exists when a state grants to the United States what would otherwise be exclusive jurisdiction, but has reserved to itself the right to exercise concurrently the same authority.<sup>36</sup> Finally, proprietary jurisdiction exists where the United States has acquired some right or title or to an area within a state, but has not obtained any measure of the state's authority over the area.<sup>37</sup>

Public lands administered by the BLM are held in the proprietary status since no cession of state authority over these lands has occurred. Nevertheless, in applying the definition of proprietary jurisdiction, it must be recognized that the United States, by virtue of the property clause and the supremacy clause,<sup>38</sup> has many powers and immunities with respect to such lands not enjoyed by ordinary landholders.<sup>39</sup> The result is that even though state law does apply to public lands, Congress may exercise its police power authority over public lands without interference from the state.<sup>40</sup>

### SECTION 303(a)

Section 303(a) delegates to the Secretary of the Interior authority to define criminal offenses on public lands:

The Secretary shall issue regulations necessary to implement the provisions of this Act with respect to the management, use, and protection of the public lands, including the property located thereon. Any person who knowingly and willfully violates such regulation which is lawfully issued pursuant to this Act shall be fined no more than \$1,000 or imprisoned no more than twelve months, or both . . . .<sup>41</sup>

This section is very similar to the authority delegated to the Secretary of the Interior concerning National Parks<sup>42</sup> and the Secretary of Agriculture for National Forests.<sup>43</sup> These grants of authority have been attacked on various grounds, but have been upheld by the courts.

35. REPORT OF THE INTERDEPARTMENTAL COMMITTEE FOR THE STUDY OF JURISDICTION OVER FEDERAL AREAS WITHIN THE STATES, JURISDICTION OVER FEDERAL AREAS WITHIN THE STATES 10 (Part 11 1957); [hereinafter cited as JURISDICTION REPORT]. U.S. CONST. art. I, § 8, cl. 17.

36. JURISDICTION REPORT, *supra* note 35, at 11.

37. *Id.*

38. U.S. CONST. art. 6, cl. 2.

39. JURISDICTION REPORT, *supra* note 35, at 12. *See* Alabama v. Texas, 347 U.S. 272, 273 (1954). *But cf.*, Fort Leavenworth R. Co. v. Lowe, 114 U.S. 525, 527 (1885) (The United States "retained upon the admission of the state, only the rights of an ordinary proprietor.").

40. *See, eg.*, Hunt v. United States, 278 U.S. 96, 100 (1928); McKelvey v. United States, 260 U.S. 353, 359 (1922); New Mexico State Game Comm'n v. Udall, 410 F.2d 1197, 1201 (10th Cir. 1969), *cert. denied*, 396 U.S. 961 (1969).

41. 43 U.S.C. § 1733(a) (1976).

42. 16 U.S.C. § 3 (1976).

43. *Id.* § 551.

For example, in *United States v. Grimaud*,<sup>44</sup> defendants, who were charged with grazing sheep contrary to regulations in a National Forest Reserve,<sup>45</sup> challenged the constitutionality of the Forest Reserve Act of 1897. The defendants argued that authorizing the Secretary of Agriculture to prescribe such regulations was an unlawful delegation of legislative power.<sup>46</sup> In finding the delegation of authority to be constitutional, the Supreme Court stated:

In the nature of things it was impracticable for Congress to provide general regulations for these various and varying details of management. Each reservation had its peculiar and special features; and in authorizing the Secretary of Agriculture to meet these local conditions, Congress was merely conferring administrative functions upon an agent, and not delegating to him legislative power.<sup>47</sup>

Regulations that were issued by the Secretary of the Interior concerning National Park Service lands and which imposed criminal sanctions were upheld in *United States v. Brown*.<sup>48</sup> In *Brown*, the defendant was convicted of possessing a firearm and hunting in a National Park contrary to regulations of the Secretary.<sup>49</sup> The Eighth Circuit rebuffed defendant's constitutional challenge and upheld the Secretary's power by citing the power of Congress under the property clause of the Constitution.<sup>50</sup>

In a constitutional sense, the authority granted to the Secretary under section 303(a) is identical to the authority upheld in *Grimaud* and *Brown*.<sup>51</sup>

The language of section 303(a) is fairly broad, and an argument could be made that the Secretary in regulating the use of the public lands could make such crimes as theft, robbery, rape, and murder punishable under FLPMA. As a policy matter, it is unlikely that regulations relating to the protection of users of public lands will be written by this administration. State and local enforcement officers have traditionally policed these crimes, and despite the problems with state and local enforcement which preceded FLPMA, the Interior Department

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44. 220 U.S. 506 (1911).

45. Ch. 2, 30 Stat. 35 (1897) (current version at 16 U.S.C. § 551 (1976)).

46. 220 U.S. at 514.

47. *Id.* at 515-16.

48. 552 F.2d 817 (8th Cir. 1977), *cert. denied*, 431 U.S. 949 (1977).

49. Promulgated under 16 U.S.C. § 3 (1976).

50. 552 F.2d at 822. "The crucial question is whether federal regulations can be deemed needful prescriptions respecting the public lands. This determination is primarily entrusted to the judgment of Congress, and courts exercising judicial review have supported an expansive reading of the Property Clause." *Id.* See *Kleppe v. New Mexico*, 426 U.S. 529, 536 (1976).

51. The constitutionality of section 303(a) was challenged in *Western Mining Council v. Andrus*, Civil No. S77-579-PCW (E.D. Calif, filed November 2, 1977). The suit was dismissed on April 19, 1978, under Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a justiciable claim.

has been inclined to continue the traditional approach.<sup>52</sup> Consequently, the Interior Department, as the federal government's leading conservation agency, will probably emphasize only the enforcement of laws protecting the resources of the public lands.

There are, however, a few stumbling blocks in section 303(a) that may impeded effective enforcement. For example, section 303(a) requires that a regulation be knowingly and willfully violated before criminal penalties attach.<sup>53</sup> As a result, in prosecutions brought under section 303(a) the intent of the defendant to commit the prohibited act will be an element of the offense.<sup>54</sup> This element was absent in Senate bill 507.<sup>55</sup> It originally appeared in House bill 13777<sup>56</sup> and was retained by the Conference Committee out of the fear that persons making inadvertent mistakes in applications for use of public lands or negligently committing minor violations would be subject to fine and imprisonment.<sup>57</sup> Unfortunately, this language adds another impediment to enforcement not envisioned by the Conference Committee. The knowing and willful requirement arguably necessitates proof that the defendant knew he committed an unlawful act on public lands.<sup>58</sup> Lack of surveys and marked boundaries in certain areas and the checkerboard nature of many tracts of intermingled private and public lands may make this requirement impossible to meet in many areas.<sup>59</sup> It is interesting to note that there is no such element of proof for violation of the National Park Service or Forest Service regulations.<sup>60</sup>

Another stumbling block in the language of section 303(a) is the amount of the penalty provided. Violation of a regulation issued under section 303(a) is punishable by not more than a \$1,000 fine, or not more than twelve months imprisonment, or both.<sup>61</sup> This makes the violation a minor offense.<sup>62</sup> Under the Federal Rules of Procedure for the Trial

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52. See Memorandum from the Assistant Secretary, Land and Water Resources to the Director, BLM (January 10, 1978); Memorandum from the Secretary of the Interior to the Director, BLM (October 4, 1978).

53. 43 U.S.C. § 1733(a) (1976).

54. *Cf.* *Morissette v. United States*, 342 U.S. 246, 264-65 (1952) (intent to convert government property).

55. S. 507, 94th Cong., 1st Sess. (1975) reprinted in 121 CONG. REC. S.1232-41 (daily ed. 1975), and in LEGISLATIVE HISTORY OF THE FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976 at 54-63 (1978) [hereinafter cited as LEGISLATIVE HISTORY].

56. H.R. 13777, 94th Cong., 2d Sess. § 302 (1976) (as introduced) reprinted in LEGISLATIVE HISTORY, *supra* note 55, at 223, 275.

57. *Senate-House Conference Committee on S. 507 Transcript*, 94th Cong., 2d Sess., 17-18 (September 15, 1976); *id.* at 12-13 (September 20, 1976).

58. See H.R. REP. No. 1163, 94th Cong., 2d Sess. 14-15 (1976). See also *Morissette v. United States*, 342 U.S. 246, 264-66 (1952).

59. See PLLRC, *supra* note 16, at 260; H.R. REP. No. 1163, 94th Cong., 2d Sess. 14 (1976).

60. See *United States v. Wilson*, 438 F.2d 525, 525 (9th Cir. 1971); *United States v. Pardee*, 368 F.2d 368, 373 (4th Cir. 1966); 16 U.S.C. §§ 3, 551 (1976).

61. 43 U.S.C. § 1733(a) (1976).

62. 18 U.S.C. § 3401(f) (1976). A petty offense is defined as a crime punishable by not more than a \$500 fine, or not more than six months imprisonment, or both. *Id.* § 1(3).

of Minor Offenses Before United States Magistrates, only criminal actions involving petty offenses may be commenced by the issuance of a citation or violation notice and only petty offenses may be disposed of by payment of a fixed sum in lieu of appearance at trial.<sup>63</sup> Thus citations<sup>64</sup> cannot be issued for violations<sup>64</sup> of section 303(a) making the physical arrest of a violator followed by arraignment and trial before a magistrate or judge the only effective means to bring about a conviction under section 303(a).<sup>65</sup>

The disadvantages of this system are immense. Law enforcement officers observing a regulation violation under section 303(a) have limited options. They can arrest the violator and bring him before a magistrate or judge (who may be hundreds of miles away), jawbone the violator into ceasing the illegal activity, or simply ignore the activity.

The National Park Service and the Forest Service do not have this problem since any violation of their general criminal regulations is a petty offense.<sup>66</sup> In fact, in 1962 the Forest Service sought and obtained an amendment to the stated penalties in its enforcement authority specifically to bring them within the petty offense category.<sup>67</sup>

It has been incorrectly suggested that the Secretary could prescribe penalties meeting the petty offense definition in regulations promulgated under section 303(a). However, that option is not available to the Secretary because Congress fixed the penalty.<sup>68</sup> Furthermore, since it is the maximum penalty, not the sentence actually imposed, which determines the classification of an offense<sup>69</sup> it does not matter that a person may be sentenced to less than the maximum penalty. Thus, the Secretary could not reclassify the offense by varying the sentence.

The result of this is to place emphasis on enforcement of state and local laws where authority to issue citations does exist. As noted earlier, however, state and local laws might not cover the offense.<sup>70</sup> To the extent that this occurs, one questions whether BLM has really gained anything by enactment of section 303(a).

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63. FED. R. OF P. FOR THE TRIAL OF MINOR OFFENSES BEFORE UNITED STATES MAGISTRATES 3(a) and 9; 18 U.S.C. § 3402 (1976).

64. A citation is similar to a parking ticket.

65. FED. R. OF PROC. FOR THE TRIAL OF MINOR OFFENSES BEFORE UNITED STATES MAGISTRATES 2.

66. See 16 U.S.C. §§ 3, 551 (1976).

67. H.R. REP. No. 2377, 87th Cong., 2nd Sess. §§ 6, 7, *reprinted in* [1962] U.S. CODE CONG. & AD. NEWS 3985.

68. See *Grimaud v. United States*, 220 U.S. 506, 521-22 (1911).

69. See, *eg.*, *Duke v. United States*, 301 U.S. 492, 494-95 (1937) (crime punishable by up to \$1,000 fine, or six months imprisonment, or both, held not be petty offense); *Barde v. United States*, 224 F.2d 959, 959 (6th Cir. 1955); *cf.* *Patel v. Immigration and Naturalization Service*, 542 F.2d 796, 798 (9th Cir. 1976) (for purposes of determining whether state offense meets federal definition of felony, actual sentence imposed rather than time actually served applied).

70. See text & note 14 *supra*.

BLM should follow the example of the Forest Service and seek an amendment to section 303(a) which would allow for the issuance of citations and notices of violation. It is still important, however, to retain the economic and physical deterrents of a \$1,000 fine and twelve months imprisonment due to the often extremely valuable nature of the resources being despoiled or carried off by violators. I recommend a two-tiered approach which would allow the existing penalty when a violation is knowingly and willfully committed, but when the knowing and willful element is absent the penalty would consist of a maximum fine of \$500 and six months imprisonment.<sup>71</sup> In this fashion, persons enforcing regulations issued under section 303(a) would have the appropriate power to make an arrest or issue a citation.

### SECTIONS 303(b) AND 303(g)

Sections 303(b) and 303(g) interrelate to provide the Secretary with additional authority to seek injunctive relief to prevent threatened or continuing violations of the regulations:

(b) At the request of the Secretary, the Attorney General may institute a civil action in any United States district court for an injunction or other appropriate order to prevent any person from utilizing public lands in violation of regulations issued by the Secretary under this Act.

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(g) The use, occupancy, or development of any portion of the public lands contrary to any regulation of the Secretary or other responsible authority, or contrary to any order issued pursuant to any such regulation, is unlawful and prohibited.<sup>72</sup>

The purpose of these sections is evident when one recognizes that an injunction is an extraordinary remedy and is granted sparingly.<sup>73</sup> Courts generally will not enjoin an act prohibited by the criminal law.<sup>74</sup> They view the existence of a criminal penalty as an effective deterrent. Thus, it is argued that the issuance of an injunction would be superfluous since an adequate remedy at law is available. Given the vast nature of the public

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71. The second tier of this approach adopts the Forest Services approach. 16 U.S.C. § 551 (1976) which does not impose an intentional or willful mens rea element for regulation violations instead imposes only a penalty of \$500 or six months imprisonment. *Id.* See *United States v. Wilson*, 438 F.2d 525, 525 (9th Cir. 1971). If such an approach were adopted the federal land status would be of little consequence to the prosecution of minor crimes.

72. 43 U.S.C. §§ 1733(b), 1733(g) (1976); see H.R. REP. No. 1724, 94th Cong., 2d Sess. 61 (1976).

73. See *Reliable Transfer Co. v. Blanchard*, 145 F.2d 551, 552 (5th Cir. 1944); *Bass Angler Sportsman Society v. United States Steel Corp.*, 324 F. Supp. 412, 416 (S.D. Ala.), *aff'd*, 447 F.2d 1304 (5th Cir. 1971).

74. D. DOBBS, *HANDBOOK ON THE LAW OF REMEDIES* § 2.11, at 115-16 (1973); see *Bass Angler Sportsman Society v. United States Steel Corp.*, 324 F. Supp. 412, 416 (S.D. Ala.), *aff'd*, 447 F.2d 1304 (5th Cir. 1971).

domain, limited moneys for law enforcement, and other problems such as proving a knowing and willful violation and the lack of citation authority, the foregoing assumption is not appropriate here.

An exception to this rule against injunctions exists where there is a specific statutory grant of power for an injunction.<sup>75</sup> Such an exception exists in sections 303(b) and 303(g), and in certain situations it is an effective deterrent to regulation violations. For example, use of an injunction to prevent an unauthorized rally involving off-road vehicles is more effective in preserving the resource than criminal prosecution could be.<sup>76</sup> Waiting until the rally has begun or is completed before taking action could result in permanent damage to vegetative and archeological resources. Similarly, an injunction prohibiting a rendering plant from slaughtering wild horses is more effective than criminal penalties.

### SECTIONS 303(c) AND 303(d)

Section 303(c)(1) authorizes the Secretary to contract with local officials for law enforcement services where the Secretary considers that assistance is necessary to enforce federal laws and regulations on public lands.<sup>77</sup> The broad nature of this language makes clear that federal laws, in addition to regulations issued under section 303(a), may be enforced by local law, enforcement personnel.<sup>78</sup> The Secretary's authority to contract was intended, in part, as a financial inducement to local officials to provide law enforcement services on public lands.<sup>79</sup> Moreover, section 303(c)(1) reflects a strong congressional preference that public lands be patrolled by local officers rather than federal personnel.<sup>80</sup> The section establishes a policy of "maximum feasible reliance" upon local law enforcement officers in enforcing federal laws and regulations on public lands. Nevertheless, in section 303(c)(2) the Congress does provide the Secretary with power to vest in federal personnel the same responsibilities and authorities as local officers in enforcing federal law on public lands.<sup>81</sup> The Secretary has implemented

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75. See *United States v. J alas*, 409 F.2d 358, 360 (7th Cir. 1969); *United States v. Kentland-Elkhorn Coal Corp.*, 353 F. Supp. 451, 454 (E.D. Ky. 1973); D. DOBBS, *supra* note 74, § 2.11, at 116.

76. See *United States v. McKey*, No. 78-4362 F(PX) (C.D. Calif. November 21, 1978) (enjoining off-road vehicle rally).

77. 43 U.S.C. § 1733(c)(1) (1976). For a more detailed discussion of these sections see Harvey, *supra* note 28, *passim*.

78. See S. REP. No. 583, 94th Cong., 1st Sess. 59-60 (1975).

79. *Id.* at 60.

80. See H.R. REP. No. 1163, 94th Cong., 2d Sess. 15 (1976); H.R. REP. No. 1724, 94th Cong., 2d Sess. 60(1976).

81. 43 U.S.C. § 1733(c)(2) (1976). The only BLM personnel currently empowered to act

the policy of maximum feasible reliance by directing that, with the exception of the California Desert, no BLM law enforcement rangers will be assigned, at least until appropriate local officials have refused an offer to provide contractual services.<sup>82</sup>

Section 303(c)(1) also authorizes local officers enforcing federal law to carry firearms, to make arrests, to serve judicial process, and to conduct search and seizure operations in accordance with federal law.

The Conference Committee was particularly reluctant to authorize the carrying of firearms.<sup>83</sup> Although this authority was granted, strict standards for the use of firearms and strict training requirements were written into the Conference Report.<sup>84</sup> These standards and requirements were taken from the Department of the Interior Manual which controls law enforcement activities by Departmental personnel.<sup>85</sup> Thus, the conferees ensured that local law officers enforcing federal laws on public lands have a minimum of 320 hours of intensive law enforcement training as is required of other departmental enforcement officers, such as National Park Police and Fish and Wildlife Service Agents.<sup>86</sup> In addition, local officers would have the same immunities as federal personnel.<sup>87</sup> Unfortunately, a 1976 survey of western counties conducted by the National Sheriffs Association for BLM reveals that only two states, California and Arizona, average 320 hours or more of training per officer.<sup>88</sup> As a result, it will be necessary for the Secretary to provide much training in order for contracts to be an effective tool in most states. Funding is needed for such training. Hence, Congress will have an effective tool to control the level of enforcement of federal law on public lands<sup>89</sup> by controlling the amount of funds available for law enforcement training.

Section 303(c)(1) also gives authority to "search without warrant or process any person, place, or conveyance according to any Federal law or rule of law; and seize without warrant or process any evidentiary

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solely under this authority are BLM special agents. Approximately one agent has been assigned to each western State.

82. Memorandum from the Secretary of the Interior to the Director, BLM (February 16, 1978).

83. *Senate-House Conference Committee on S. 507 Transcript*, 94th Cong., 2d Sess., 50-54 (September 22, 1976).

84. H.R. REP. No. 1724, 94th Cong., 2nd Sess. 60-61 (1976).

85. DEPARTMENT OF THE INTERIOR MANUAL pt. 446 (December 20, 1974).

86. *Id.* § 446.2.2K. The Consolidated Federal Law Enforcement Training Center provides 320 hours of training.

87. 43 U.S.C. § 1733(c)(1) (1976); *cf.* *Pierson v. Ray*, 386 U.S. 547, 555-57 (1967) (police officers are entitled to certain immunities).

88. Summary of Material, Sheriffs Association Survey, Bureau of Land Management Organic Act Directive No. 77-13 (January 28, 1977).

89. In this regard, Congress cut \$524,000 from BLM's \$1,124,000 request for law enforcement in Fiscal Year 1979, citing as justification the increased payments to state and local governments under the Payments in Lieu of Taxes Act. *See S. REP. No. 1063*, 95th Cong., 2d Sess. 9 (1978).

item as provided by Federal law."<sup>90</sup> This authority has been highly controversial. The phrase "without warrant or process," however, was included in this section to avoid the problems presented in *Aiuppa v. United States*,<sup>91</sup> where the search and seizure authority of federal agents under section 5 of the Migratory Bird Treaty Act<sup>92</sup> was challenged. The court ruled that the Act in granting the agents authority to search any place with a search warrant, impliedly withheld the power to make a warrantless search on probable cause.<sup>93</sup> Thus, use of the term "without warrant or process" does not mean that enforcement officers may violate the fourth amendment, federal statutes, or the Federal Rules of Criminal Procedure.<sup>94</sup> A proper interpretation of the phrase is that in addition to searches conducted with a warrant searches may be conducted without warrant in certain narrowly defined circumstances recognized by the federal courts, such as searches incident to a valid arrest.<sup>95</sup>

Section 303(d) authorizes the Secretary to enter into cooperative agreements with state and local regulatory and law enforcement officials for the enforcement of state and local laws and ordinances.<sup>96</sup> This section was intended to be somewhat of a relief measure for state and local officials:

The Committee expects the Secretary of the Interior to construe this authority broadly, for the purpose is to provide financial assistance to States and their subdivisions where the existence of large areas of public lands deprives the governmental entity of adequate enforcement of laws and ordinances as they apply to the public lands.<sup>97</sup>

While Congress was deliberating on FLPMA, however, it took a broader step to remedy the problems surrounding the tax exempt nature of public lands by enacting the Payments in Lieu of Taxes Act.<sup>98</sup> Accordingly, it appears that the emphasis will be on reimbursing state and local entities only for the extraordinary services of their law enforcement personnel on public lands, rather than for routine

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90. 43 U.S.C. § 1733(c)(1) (1976).

91. 338 F.2d 146 (10th Cir. 1964).

92. 16 U.S.C. § 706 (1976).

93. 338 F.2d at 148.

94. See U.S. CONST. amend. IV; 18 U.S.C. §§ 2236, 3105, 3109, 3112 (1976); FED. R. CRIM. P. 41.

95. See, e.g., *United States v. Robinson*, 414 U.S. 218, 224 (1973) (warrantless search incident to valid arrest); *Chambers v. Maroney*, 399 U.S. 42, 48 (1970) (warrantless search with probable cause of auto); *Warden v. Hayden*, 387 U.S. 294, 298 (1967) (warrantless entry and search with probable cause under exigent circumstances); *United States v. Griffin*, 530 F.2d 739, 742 (7th Cir. 1976) (warrantless search based on valid consent).

96. 43 U.S.C. § 1733(d) (1976).

97. H.R. REP. No. 1163, 94th Cong., 2d Sess. 15 (1976).

98. PUB. L. No. 94-565, 90 Stat. 2662 (1976) (codified at 31 U.S.C. §§ 1601-1607 (1976)). See generally PLLRC, *supra* note 16, at 235-41.

patrol services.<sup>99</sup>

Section 303(d) is much easier to use than section 303(c). There is no training requirement under section 303(d) since the authority of such officers to carry firearms and to make arrests originates in state law rather than under federal statute.<sup>100</sup> Unfortunately, enforcement is limited to state and local laws and ordinances. These laws fully cover person-to-person offenses but are generally weak in resource protection, which is the primary mission of the Interior Department.<sup>101</sup>

There is an ironic contrast between sections 303(c) and 303(d). Under the former, up to 320 hours of training must be provided by the Secretary to authorize a state law enforcement officer to enforce a federal trespass regulation on public lands.<sup>102</sup> Under the latter, no training is required to authorize a state law enforcement officer to arrest a person for murder on public lands.

This brings up the question whether federal personnel observing a violation of state law on public lands can make an arrest.<sup>103</sup> Without some authority under state law, such action would be a citizen's arrest,<sup>104</sup> thus expanding the employee's exposure to liability in the event of a false arrest.<sup>105</sup> Cooperative agreements could be written under section 303(d) to allow deputization of federal personnel under state law. In this manner, enforcement of state laws could be placed within a federal employee's scope of authority, thus giving him a strong measure of immunity from suit for false arrest.<sup>106</sup> Authority to enforce state laws should be limited, however, to those crimes affecting resources on public lands.<sup>107</sup>

On balance, sections 303(c) and 303(d) encourage greater state and local involvement in law enforcement on public lands. Unfortunately, the emphasis is also on the enforcement of state and local laws. The result is that nothing more than a financial inducement for state and local enforcement has been gained by the enactment of these sections.

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99. See Model Cooperative Agreements, Bureau of Land Management Organic Act Directive No. 77-88 (December 15, 1977); S. REP. No. 583, 94th Cong., 1st Sess. 60 (1975); cf. S. REP. No. 1063, 95th Cong., 2d Sess. 9 (1978) (cutting BLM's budget for law enforcement). See generally PLLRC, *supra* note 16, at 238.

100. Compare 43 U.S.C. § 1733(d) (1976) with *id.* § 1733(c).

101. See S. REP. No. 583, 94th Cong., 1st Sess. 58 (1975); see generally COMPTROLLER GENERAL OF THE UNITED STATES, CRIME IN FEDERAL RECREATIONAL AREAS (1977).

102. See text & note 86 *supra*.

103. See *United States v. Reid*, 517 F.2d 953, 960-64 (2d Cir. 1975).

104. See *United States v. Di Re*, 332 U.S. 581, 589-91 (1948); *United States v. Viale*, 312 F.2d 595, 599-600 (2d Cir. 1963), *cert. denied*, 373 U.S. 903 (1963).

105. Note that 28 U.S.C. § 2680(h) (1976) exempts claims arising out of false arrest from the Federal Tort Claims Act, 28 U.S.C. § 1346(b) (1976). Hence, the United States has sovereign immunity from such suits. See *Sopp v. United States*, 373 F.2d 795, 796 (3d Cir. 1966).

106. See *Norton v. McShane*, 332 F.2d 855 5th Cir. 1964, *cert. denied*, 380 U.S. 981 (1965).

107. See CAL. PENAL CODE §§ 384a-384d (West Supp. 1978).

## SECTION 303(e)

Probably the most significant law enforcement provision in FLPMA is section 303(e). It is the basic authority for the establishment of a uniformed ranger force in the California Desert Conservation Area:

Nothing in this section shall prevent the Secretary from promptly establishing a uniformed desert ranger force in the California Desert Conservation Area established pursuant to section 1781 of this title for the purpose of enforcing Federal laws and regulations relating to the public lands and resources managed by him in such area.<sup>108</sup>

At present nineteen rangers have been assigned to the California Desert.

This section is a clear congressional exception to the policy of maximum feasible reliance upon state and local law enforcement and local law enforcement officials. Ironically, California's state enforcement officers are among the most well trained in the country.<sup>109</sup> No additional training would be needed to authorize them to enforce federal laws under a section 303(c)(1) contract.

These rangers have the same enforcement powers and training requirements as established by section 303(c)(1) and the Conference Report. In this regard, they are equivalent with other Departmental law enforcement officials, such as National Park Police and Fish and Wildlife Service Agents.

Nevertheless, problems remain. Since few law enforcement regulations have been issued under section 303(a), there is the question of what laws they are to enforce. As mentioned earlier, enforcement officers deriving their power from FLPMA are not limited to enforcement of FLPMA.<sup>110</sup> Moreover, section 303(f) makes clear that the Secretary's authority under section 303(a) does not preclude use of his other law enforcement authority.<sup>111</sup> These authorities include the Wild, Free-Roaming Horse and Burro, Act of 1971,<sup>112</sup> the Antiquities Act,<sup>113</sup> the Sikes Act,<sup>114</sup> the Taylor Grazing Act,<sup>115</sup> the National Trails System Act,<sup>116</sup> the Endangered Species Act<sup>117</sup> and those portions of Title 18 of the United States

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108. 43 U.S.C. § 1733(e) (1976).

109. *Cf.* Bureau of Land Management Organic Act Directive No. 77-13 (January 28, 1977) (California officers have the greatest number of training hours).

110. S. REP. NO. 583, 94th Cong., 1st Sess. 59-60 (1975).

111. 43 U.S.C. § 1733(f) (1976).

112. 16 U.S.C. § 1338 (1976).

113. *Id.* § 433.

114. *Id.* § 670j.

115. 43 U.S.C. § 315a (1976).

116. 16 U.S.C. § 1246 (1976).

117. *Id.* §§ 1538, 1540.

Code pertaining to public lands.<sup>118</sup>

Unfortunately, these statutes form only a crude patchwork of authority, which does not address in a comprehensive fashion the problems of the California Desert as set forth in FLPMA's legislative history.<sup>119</sup> Furthermore, some of these authorities have been either placed in question by court decision<sup>120</sup> or not fully implemented through regulation or administrative action.<sup>121</sup> Effective enforcement of federal law is therefore limited. The rangers may, of course, enforce state and local laws and ordinances if deputized in accordance with a cooperative agreement under section 303(d). But this practice changes very little from the situation before FLPMA. As stated earlier, state and local laws are generally not aimed at resource protection, which is the essential mission of law enforcement under FLPMA.

### CONCLUSION

Section 303 of FLPMA is an extremely valuable tool. The extent of congressional power under the property clause of the Constitution and the broad delegation of that power to the Secretary in section 303(a) make possible the full protection of resources on the public lands by federal regulation. Although FLPMA was enacted over three years ago, this has not yet been accomplished. The result is that the public lands have only marginally more protection than they did before passage of FLPMA, yet the problems remain and in many cases have intensified.

With the exception of the California Desert, reliance has been placed almost exclusively upon state and local law enforcement. But without the necessary training these officers cannot enforce even the existing federal laws. The result is the slightly increased enforcement of state laws and local ordinances by state and local officers due to an increased flow of federal money through section 303(d) cooperative agreements and payments in lieu of taxes. Unless and until effective regulations are written to protect public land resources, section 303 might just as well not have been enacted.

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118. 18 U.S.C. §§ 47, 111, 1001, 1361, 1851-1861 (1976).

119. LEGISLATIVE HISTORY, *supra* note 55, at 75, 76, 125-28.

120. *See* United States v. Diaz, 499 F.2d 113, 115 (9th Cir. 1974) (Antiquities Act declared unconstitutional as vague).

121. *See, e.g.*, the Species Act, 16 U.S.C. § 670j (1976) (no regulations applicable to California Desert); the National Trails System Act, *id.* § 1246 (no authority yet applicable to California Desert); the Pacific Crest Trail as administered by the Forest Service, *id.* § 1244(a)(2).