FLPMA § 204(e): A CONSTITUTIONAL INFIRMITY

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I. INTRODUCTION

Since World War II, over twenty nuclear weapons production facilities[1] have generated and temporarily stored on-site more than 300 million cubic feet of radioactive waste.[2] These temporary storage tanks are leaking radioactive and hazardous substances into the environment,[3]

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1. Robert Alvarez & Arjun Makhijani, *OUTPOSTS-Nuclear Waste: The $100-Billion Mess*, WASH. POST, Sept. 4, 1988, at C3.

2. Mark N. Trahant, *Route Paced with Nuclear Controversy*, ARIZ. REPUBLIC, Jan. 21, 1990, at 1.

3. Jerry Ackerman, *Congress Pushes N-Waste Plan: House Keeps N.M. Project Alive Despite Carter's Opposition*, BOSTON GLOBE, July 27, 1980. As of 1980, some 80 million gallons of radioactive waste were stored in temporary tanks at nuclear weapons production sites located in Idaho, Washington, Tennessee, South Carolina, New Mexico, Nevada, Illinois, Ohio, and Colorado, and some of the older tanks had sprung leaks. *Id.*; Keith Schneider, *Project Salt Vault Becomes Elaborate and Expensive Tomb, Brine Reservoirs Surround Nuclear-Waste Repository,*

but the stored substances cannot be moved because no permanent storage facility is available.[4] Even after nearly forty-years of deliberation,[5] Congress and the Department of Energy (DOE)[6] are still at the point of conducting only operational tests on the nation's first permanent nuclear weapons waste disposal facility.[7]

In 1979, Congress enacted legislation approving the Waste Isolation Pilot Plant (WIPP) project "for the express purpose of providing a research and development facility to demonstrate the safe disposal of radioactive wastes from defense activities."[8] The WIPP facility is sited on 10,240 acres of federal public land twenty-six miles east of Carlsbad, New Mexico,[9] and is a complex maze of corridors and storage chambers constructed 2,150 feet underground in New Mexico's Delaware/Permian salt basin.[10] DOE completed construction of the WIPP facility in 1988,[11]

Posing Threat of Pushing Contaminants to Surface, N.Y. TIMES, Aug. 30, 1992, (Magazine), at 4. Twenty other states, as well as Puerto Rico and several Pacific Islands, have stretches of radioactive contaminated land that need to be cleaned up and the waste stored in a permanent repository. *Id.* Matthew L. Wald, *Stored Plutonium Is Liable To Leak, Government Says*, N.Y. TIMES, Dec. 7, 1994, at A1. Dr. Tara J. O'Toole, Assistant Secretary of Energy for Environment, Safety and Health stated that "[t]he containers were really only intended to hold the stuff until we got around to recycling it in the next weapons campaign." *Id.* Also, she stated that "[a]t nearly all major sites, this assessment (DOE plutonium inventory) identified conditions which pose hazards to workers, and several sites have vulnerabilities that could affect the public and environment." *Id.*

4. 138 CONG. REC. S17,955 (daily ed. Oct. 8, 1992).

5. *See* Mary L. Walker, *A New Approach to Plutonium Bomb Waste*, CHRISTIAN SCI. MONITOR, Apr. 20, 1992, at 19 (Ms. Walker was Assistant Secretary for Environment, Safety, and Health at the DOE from 1985 to 1988).

6. The Department of Energy (DOE) was established in 1977 to secure effective management and to assure a coordinated national energy policy. Department of Energy Organization Act of 1977, Pub. L. No. 95-91, 91 Stat. 565 (current version at 42 U.S.C. § 7101 (1988)).

7. Walker, *supra* note 5, at 19; Thomas W. Lippman, *Hill Gives Go-Ahead to Plutonium Burial Ground in New Mexico*, WASH. POST, Oct. 10, 1992, at A6. Assistant Secretary of Energy Dr. Tara J. O'Toole stated that "[o]ver all, the department's inventory of plutonium presents significant hazards to workers, the public and environment, and little progress has been made to aggressively address the problem." Wald, *supra* note 3, at A1.

8. Department of Energy National Security and Military Applications of Nuclear Energy Authorization Act of 1980, Pub. L. No. 96-164, 93 Stat. 1259 § 213(a), (current version at 42 U.S.C. §§ 7272, 7273 (1988)) [hereinafter NEAA]; *see also*, 138 CONG. REC. S17,955 (daily ed. Oct. 8, 1992).

9. 138 CONG. REC. S17,955 (daily ed. Oct. 8, 1992).

10. *Id.*

11. Charles H. Montange, *Federal Nuclear Waste Disposal*, 27 NAT. RESOURCES J. 309, 391, 394 (1987). The facility was designed as a possible permanent repository for approximately 900,000 55-gallon drums of plutonium-contaminated radioactive waste generated during nuclear weapons production. Cass Peterson, *Restrictions on Nuclear Site Urged*, WASH. POST, Mar. 12, 1988, at A17. The WIPP capacity is about one-fifth of the existing radioactive debris generated by

and announced that it was ready to conduct a five-year operational test to determine the safety of the WIPP's disposal capability by using drums containing radioactive waste.[12] However, to conduct the test, the DOE had to either administratively or legislatively withdraw[13] the federally owned public lands[14] in New Mexico pursuant to the Federal Land Policy and Management Act (FLPMA).[15]

In 1989, DOE applied for an administrative land withdrawal, and in 1991, the Department of the Interior (DOI) granted DOE's request to extend and modify a previously issued 1983 Public Land Order pursuant to FLPMA.[16] The approval extended the 1983 withdrawal, which expired in 1991, to 1997, and changed the purpose of the 1983 withdrawal to allow the DOE to test a radioactive waste facility using drums of radioactive waste.[17]

However, congressional action delayed the administrative transfer, and federal court decisions held that the transfer was a violation

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DOE nuclear weapons complexes since World War II, however, the facility capacity could be expanded. *Id.* (WIPP capacity contains 100 acres of space for TRU waste and 7.5 acres for high-level waste research, but could be expanded to 2000 acres). Montange, at n.576.

12. Montange, *supra* note 11, at 391 (citing DOE, SECRETARY'S ANNUAL REPORT TO CONGRESS 173-74 (Dec. 1985)). As of April, 1993, DOE has not placed a single drum of radioactive waste for testing in the $1 billion WIPP facility. 138 CONG. REC. S17,955 (daily ed. Oct. 8, 1992) (statement of Sen. Johnston, Chairman of the Energy and Natural Resources Committee). Yet, while awaiting approval for testing, the DOE continues to spend $14 million a month of taxpayers' money simply to keep the facility in a standby mode even though temporary storage tanks are leaking radioactive waste. *Id.* at S17,956.

13. The Federal Land Policy and Management Act of 1976 (FLPMA) defines the term "withdrawal" as:

> [W]ithholding 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, other than 'property' governed by the Federal Property and Administrative Services Act, *as amended* (current version at 40 U.S.C. § 472 (1988)) from one department, bureau or agency to another department, bureau or agency.

Federal Land Policy and Management Act § 103(j), 43 U.S.C. § 1702(j) (1988).

14. FLPMA defines "public lands" as "any land and interest in land owned by the United States within the several States and administered by the Secretary of the Interior through the Bureau of Land Management, without regard to how the United States acquired ownership . . . ." *Id.* § 1702(e).

15. FLPMA, 43 U.S.C. § 1701 (1988).

16. 56 Fed. Reg. 3038 (1991).

17. *Id.*

of FLPMA without legislative approval.[18] The House Committee on Interior and Insular Affairs passed a resolution blocking the administrative land withdrawal pursuant to FLPMA § 204(e).[19] DOI disregarded the House Committee resolution and issued the administrative land withdrawal to DOE anyway.[20]

Thereafter, legal battles ensued, and the courts held that the 1991 administrative land withdrawal extension and modification was a violation of FLPMA, and granted injunctive relief.[21] Congress addressed the land transfer problem expeditiously by legislatively withdrawing the land under the Waste Isolation Pilot Plant Land Withdrawal Act in October, 1992.[22]

Predictably, a plethora of complex issues surround the WIPP controversy.[23] The particular issue addressed in this article considers the constitutionality of FLPMA § 204(e). The precise question is whether Congress possesses power under the Property Clause of Article IV to perform a one-House legislative veto, pursuant to FLPMA § 204(e), that has otherwise been declared by the U.S. Supreme Court as an unconstitutional violation of the Article I Bicameralism and Presentment Clauses.

This Article first sets out a brief history of the development of the WIPP, followed by statutory information concerning relevant portions of FLPMA. Part IV discusses the WIPP administrative land withdrawal history, highlights the House Committee on Interior and Insular Affairs' one-House legislative veto of the DOI administrative land withdrawal

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18. *See infra* notes 61-63, 71, 72, 76-78, 85-93 and accompanying text.
19. *See infra* notes 61-63 and accompanying text.
20. *See infra* notes 64-69 and accompanying text.
21. *See infra* notes 71, 72, 76-78, 85-93 and accompanying text.
22. *See infra* notes 98-102 and accompanying text.
23. For example, did the WIPP violate RCRA interim status provisions? New Mexico v. Watkins, 969 F.2d 1122, 1131 (D.C. Cir. 1992) [hereinafter *Watkins III*]; New Mexico *ex rel*. Udall v. Watkins, 783 F. Supp. 633, 636-37 (D.D.C. 1992) [hereinafter *Watkins II*]. What constitutes a regulatory change? *Watkins III*, 969 F.2d at 1133; 51 Fed. Reg. 24,504 (1986). Is the balance of power between the executive and legislative branches proper to govern our public lands? *See generally* Charles F. Wheatley, Jr., *Withdrawals Under The Federal Land Policy Management Act of 1976*, 21 ARIZ. L. REV. 311 (1979). Should the Resource Conservation and Recovery Act or the Atomic Energy Act or both regulate radioactive-hazardous mixed waste? Who should dictate scientific parameters and facility construction requirements for radioactive mixed waste? Can public education ever overcome the Not In My Back Yard Syndrome? Is it scientifically possible to guarantee a disposal facilities' containment capabilities for 10,000 years? What is the cost-benefit analysis of not establishing a radioactive waste repository? Is nuclear waste disposal a national security issue? Will nuclear waste disposal ever be politically correct?

pursuant to FLPMA § 204(e), briefs the recent legal battles between the State of New Mexico and environmental groups, and the DOE and DOI, and provides an overview of the Waste Isolation Pilot Plant Land Withdrawal Act of 1992,[24] which legislatively withdrew the public lands. Part V analyzes the constitutionality of FLPMA § 204(e)'s one-House legislative veto provision. Finally, Part VI concludes that FLPMA § 204(e) is unconstitutional and should be amended.

II. HISTORICAL BACKGROUND

The United States and the Soviet Union never dropped nuclear bombs on each other, but both sides are reeling from the massive quantities of transuranic (TRU) radioactive waste[25] generated during four decades of nuclear weapons production. In World War II, Manhattan Project architects stored radioactive waste from nuclear weapons production in temporary tanks as an interim emergency method until long-term storage solutions could be developed.[26] The lack of a permanent repository has left these temporary on-site storage tanks still in use today,[27] and the tanks are leaking hazardous substances into the

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24. Pub. L. No. 102-579, 106 Stat. 4777 (Oct. 30, 1992).

25. In general terms, "TRU" waste refers to tools, clothes, laboratory instruments, absorbent papers, scrap materials and solidified wastewater sludges contaminated with plutonium during the nuclear weapons production and storage process. 138 CONG. REC. S17,955 (daily ed. Oct. 8, 1992); *see also* Thomas W. Lippman, *U.S. Preparing to Truck Plutonium Waste to Desert Salt Caverns*, WASH. POST, July 28, 1991, at A3 [hereinafter *Salt Caverns*].

Up to 60% of the DOE generated TRU-waste is classified as "TRU-mixed waste." 138 CONG. REC. S17,955 (daily ed. Oct. 8, 1992); *see also* Thomas W. Lippman, *Temporary Nuclear Waste Sites Sought; Plutonium Piles Up During Delays at New Mexico Storage Facility*, WASH. POST, Mar. 17, 1990, at A12 [hereinafter *Plutonium Piles Up*]. TRU mixed waste is a mixture of radioactive material and hazardous substances. 138 CONG. REC. S17,955 (daily ed. Oct. 8, 1992). The majority of the hazardous components are metallic lead and traces of organic cleaning solvents such as methylene chloride and carbon tetrachloride. *Id.* The radioactive material is regulated under the Atomic Energy Act of 1954, *as amended* (current version at 42 U.S.C. § 2011 (1988)), and is exempt from the Resource Conservation and Recovery Act (RCRA). RCRA § 1004(27), 42 U.S.C. § 6903(27) (1988). However, to properly dispose of the TRU mixed waste, repositories must obtain a RCRA facility permit. RCRA § 3005 42 U.S.C. § 6925. Several environmental groups alleged that the WIPP facility violated RCRA interim status permitting requirements. *Watkins I*, 783 F. Supp. at 634. The RCRA issue is beyond the scope of this paper.

26. Alvarez & Makhijani, *supra* note 1, at C3. These interim emergency storage methods included the use of carbon-steel tanks, dilution, and seepage basins. *Id.* (In the 1950s, some tanks were upgraded with concrete shells and partial steel liners.)

27. Since World War II, over 20 nuclear weapons production facilities have generated, and temporarily stored on-site, more than 300 million cubic feet of radioactive waste. *Id.*

environment.[28] The DOE estimates the bill for cleanup could total over one-hundred billion dollars.[29]

In the mid-1950s, the federal government began researching the development of a permanent repository to demonstrate the safe disposal of nuclear waste.[30] In 1957, the National Academy of Sciences (NAS) recommended that disposal in deep geologic rock formations with salt was feasible and achievable, based on extensive research and studies.[31] By 1971, government research efforts were concentrated on a salt basin contained in New Mexico's public lands.[32]

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

In 1976, Congress enacted FLPMA,[33] and incorporated specific legislative guidelines governing executive withdrawal of public lands for restrictive use.[34] Title II of FLPMA vests the Secretary of the Department of the Interior (DOI) with the authority to administer and manage federally owned lands through the Bureau of Land Management (BLM).[35] Subject to existing rights,[36] the BLM, under the direction of the DOI, may administratively withdraw public lands from all forms of entry, appropriation, and disposal under public land laws.[37]

FLPMA authorizes the Secretary of the Interior to "make, modify, extend, or revoke" administrative land withdrawals, "but only in

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28. Ackerman, *supra* note 3.

29. Alvarez & Makhijani, *supra* note 1, at C3 (statement by then-DOE undersecretary Joseph Salgoda to congressional subcommittee).

30. Schneider, *supra* note 3, at 4. "Project Salt Vault" was a research program initiated in 1955 when the Atomic Energy Commission, DOE's predecessor, requested the National Academy of Science (NAS) to seek out geological structures suitable for radioactive waste disposal. *Id.*

31. 131 CONG. REC. E1597-01 (1985); Schneider, *supra* note 3, at 4. The natural "creep" of the salt bed would slowly entomb the waste placed in cavern vaults in 80 to 100 years, and keep the waste isolated for thousands of years until the radioactivity was reduced. *See* Alvarez & Makhijani, *supra* note 1, at C3; *Salt Caverns*, *supra* note 25, at A3.

32. Schneider, *supra* note 3, at 4. An NAS report also identified salt bed formations in New York, Michigan, the Gulf Coast, and the Great Plains from Kansas to New Mexico as suitable sites. *Id.*

33. *See generally* 43 U.S.C. § 1701 (1988).

34. *Id.* § 1714.

35. *Id.* § 1712(a).

36. Existing rights include "any valid lease, permit, patent, right-of-way, or other land use right or authorization existing on the date" of enactment. *Id.* § 1701.

37. *Id.* § 1714; *see also* Waste Isolation Pilot Plant Land Withdrawal Act, Pub. L. No. 102-579, § 3(a)(1), 106 Stat. 4777 (1992).

accordance with the [Act's] provisions and limitations."[38] An administrative land withdrawal of public land may be extended "only if the Secretary determines that the purpose for which the withdrawal was first made requires the extension, and then only for a period no longer than the length of the original withdrawal."[39]

Under the Constitution, Congress retains the right to dispose permanently of federal public lands.[40] The main goal of enacting FLPMA was to reassert congressional control over public lands by providing for congressional nullification of administrative land withdrawals.[41] The BLM, which administers federal public lands for the DOI, may issue administrative land withdrawals of 5000 acres or more "only for a period of not more than twenty years," subject to specified advanced reporting by the Secretary of the Interior to Congress, publication for notice and comment, and, for new withdrawals, opportunity for public hearing.[42]

The pertinent section for this paper is FLPMA § 204(e). A legislative veto provision authorizes one or both houses of Congress to annul by resolution an action or rule of the executive branch or an administrative agency.[43] Pursuant to § 204(e),[44] when an "emergency situation" arises as determined by the Secretary, or by *either* the House of Representatives or the Senate's Committee on Interior and Insular Affairs, and "extraordinary measures" are required to preserve potentially lost values, Congress retains the power to order the Secretary to administratively withdraw the land immediately and notify the Committees on Interior and Insular Affairs of both Houses of the emergency withdrawal.[45]

The constitutionality of FLPMA § 204(e)'s one-House legislative veto provision to nullify a DOI administrative land withdrawal has been questioned in court, but the cases have been decided on other technical grounds.[46]

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38. 43 U.S.C. § 1714(a) (1988).
39. *Id.* § 1714(f).
40. *See* U.S. CONST. art. IV, § 3, cl. 2.
41. 43 U.S.C. § 1714(c)(1) (1988).
42. *Id.* § 1714(b), (c), (h).
43. *See generally id.* § 1714(e).
44. *Id.*
45. *Id.*
46. *See infra* notes 123-138 and accompanying text.

IV. WIPP ADMINISTRATIVE LAND WITHDRAWALS, LEGAL BATTLES AND LEGISLATIVE ACTION

A. The WIPP Administrative Land Withdrawals

In 1976, BLM approved the administrative land withdrawal application filed by the Energy Research and Development Administration (ERDA)[47] to segregate from public entry 17,200 acres of southeastern New Mexico's public land for two years to conduct geological studies.[48] The study results were promising, and in 1978 BLM granted DOE's second land withdrawal request for a two-year extension.[49] In 1981, DOE applied for a third land withdrawal on the WIPP site of 10,200 acres for the purpose of site preliminary design and validation (SPDV) studies, and BLM granted the request in early 1982 under Public Land Order (PLO) 6232.[50]

In 1983, BLM issued PLO 6403, which approved DOE's fourth WIPP land withdrawal request for eight years, for the purpose of commencing the construction phase of the facility and protecting the lands pending a legislative land withdrawal, if necessary.[51] However, the purpose did not include "the use or occupancy of the lands hereby withdrawn for the transportation, storage, or burial of any radioactive material."[52] DOE commenced construction of the WIPP in mid-1983.[53] In 1985, DOE reported that the WIPP facility was near completion and on schedule to receive the first shipment of transuranic waste drums for the five-year testing phase starting in 1988.[54]

In 1989, DOE petitioned BLM to modify the purpose of the 1983 withdrawal to allow the use of retrievable radioactive waste for the five-year test.[55] The request sought to delete the provision of the 1981 withdrawal that prohibited the transportation, storage, or burial of

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47. The DOE replaced the ERDA in 1977. *See generally* Department of Energy Organization Act of 1977, Pub. L. No. 95-91, 91 Stat. 565 (current version at 42 U.S.C. § 7101 (1988)).

48. 41 Fed. Reg. 54,994 (1976).

49. 43 Fed. Reg. 53,063 (1978).

50. 47 Fed. Reg. 13,340 (1982).

51. 48 Fed. Reg. 31,038 (1983).

52. *Id.*

53. Brief for Department of Justice at 8, New Mexico v. Watkins, 783 F. Supp. 628 (D.D.C. 1991) [hereinafter *Watkins I*].

54. *See also* Montange, *supra* note 11, at 391 (citing DOE, SECRETARY'S ANNUAL REPORT TO CONGRESS 173-74 (Dec. 1985)).

55. 54 Fed. Reg. 15,815 (1989).

radioactive material in association with the WIPP, and to extend the withdrawal until 1997.[56] On January 22, 1991, BLM granted DOE's request to modify PLO 6403 and issued PLO 6826 with certain prerequisites.[57]

PLO 6826 stipulated that no radioactive waste could be transported to or placed in the WIPP until DOE obtained all required environmental permits and a notice to proceed from the DOI.[58] The order also required that the amount of radioactive waste[59] placed at the WIPP not exceed an amount that could be easily retrieved should the site not be selected as a permanent repository for radioactive material.[60]

However, on March 6, 1991, the House Committee on Interior and Insular Affairs passed a resolution blocking PLO 6826, pursuant to FLPMA § 204(e).[61] Section 204(e) authorizes Congress to nullify administrative land withdrawals in "emergency situations."[62] The committee declared that such a situation existed because public safety and environmental issues at WIPP had not been adequately addressed, and retrievability of the waste, if the WIPP tested unsafe, was in question.[63]

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56. *Id.*

57. 56 Fed. Reg. 3038 (1991). Public Land Order 6826 modified Public Land Order 6403 to:

> (1) expand the stated purpose of the order to include conducting the test phase of the project using retrievable, transuranic radioactive nuclear waste at the site; (2) increase . . . [DOE's] exclusive use area . . .; (3) extend the term of the withdrawal through June 29, 1997 . . . so as to provide sufficient time to conduct the experimental test phase; and (4) delete paragraph 5 of Public Land Order No. 6403 which prohibits the use of the land for the transportation, storage, or burial of radioactive materials.

Id.; *see also BLM Grants Administrative Land Withdrawal for WIPP*, 11 NUCLEAR WASTE NEWS 33-34 (1991).

58. 56 Fed. Reg. 3038 (1991).

59. *Id.*

60. *Id.* Retrievability of the waste was essential because DOI can administratively withdraw public lands for a maximum of only twenty years. 43 U.S.C. § 1714(c)(1) (1988). Design containment levels for the WIPP were 10,000 years pursuant to EPA's 1985 "no migration" rules. New Mexico ex rel. Udall v. Watkins, 969 F.2d 1122, 1125 (D.C. Cir. 1992).

61. *Interior Committee Blocks Land Withdrawal For Waste Isolation Pilot Plant*, 11 NUCLEAR WASTE NEWS 93 (1991) [hereinafter *Interior Committee*]. The block does not prohibit a land withdrawal in the future, but requires a legislative process rather than administrative. *Id. See also* 43 U.S.C. § 1714(e).

62. 43 U.S.C. § 1714(e).

63. Phyllis Rieger, *One Company's Approach to Dispatcher Accountability*, FORTUNE, Apr. 15, 1991, at 55. The committee members were not satisfied with the safeguards against possible

In July, 1991, DOE announced: "We'll be ready in two weeks."[64] Watkins had stated repeatedly that he preferred the legislative withdrawal route, but on September 19, 1991, he told the New Mexico congressional delegation that he could wait no longer, and that unless he was convinced that legislation for the land transfer was near enactment by the end of September, he would press on.[65] After Senators Pete V. Domenici and Jeff Bingaman, both from New Mexico, were unable in a proposed Senate Bill (S. 1671)[66] to agree on the amount of waste to permit, Watkins made good on his promise to proceed without congressional approval.[67]

On October 3, 1991, DOI signed over control of the WIPP site to the DOE through the administrative land withdrawal granted by BLM in

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environmental hazards at the WIPP, and wanted the opportunity to investigate the plant and its environmental impacts. *Id.* The measure was approved with loud protests from Republican members and strong opposition from DOE and DOI who claimed no emergency situation existed, and called the block a delay tactic by WIPP opponents. *Interior Committee*, *supra* note 61, at 93. Committee Vice-chairman George Miller (D-Calif.) insisted the measure was necessary, charging the administration had "run roughshod over the Interior Committee, Congress and the people of New Mexico" in an attempt "to force nuclear waste into the WIPP facility through an improper back-door process." *Id.* Stuart Nagurka, press secretary for Rep. Bill Richardson (D-N.M.), added that the committee's resolution, initiated by Richardson, was "not a delaying tactic on WIPP." *Id.* The only purpose of this is "[to give] a green light to Congress to proceed with a legislative land withdrawal." *Id.*

64. *Salt Caverns*, *supra* note 25, at A3 (statement by Leo Duffy, director of the Energy Department's Office of Waste Management and Environmental Restoration). Watkins had September 27, 1991 as a target date for the first shipment. *Id.*

65. Thomas W. Lippman, *Energy Dept. Set to Ship A-Waste to New Mexico, Congress Is Bypassed, Lawsuits Expected.*, WASH. POST, Oct. 4, 1991, at A3 [hereinafter *Ship A-Waste*]. Watkins, tired of waiting, asked Lujan to make the transfer administratively, in a move that Energy Department officials acknowledged was an attempt to force Congress to act. Thomas W. Lippman, *Court Bars Nuclear Waste Plan*, WASH. POST, Nov. 27, 1991, at A7.

66. *See infra* note 74.

67. *DOE Takes Control of WIPP Site; Plans to Start Test Next Month*, 11 NUCLEAR WASTE NEWS 393-94 (1991) [hereinafter *DOE Takes Control*]. Negotiations between DOE, members of New Mexico's congressional delegation and the Senate Energy and Natural Resources Committee failed because of a disagreement over the percentage of transuranic waste to be placed in the WIPP during the test program. *Id.* DOE planned to use 0.5% of the WIPP's total waste capacity for the test, but wanted the "flexibility" to store up to 1%, if necessary, to demonstrate that Environmental Protection Agency standards for the facility could be met. *Id.* New Mexico wanted the total capped at 0.5%. *Id.*

In an October 4, 1991, letter to New Mexico Governor Bruce King, Watkins said he requested the administrative withdrawal after House negotiations over the Senate bill to withdraw the land broke down. *Id.* Watkins closed by saying he would "continue to work closely with Congress toward enactment of a land withdrawal bill," which he acknowledged was needed "to permanently address the situation and assure appropriate assistance to the State of New Mexico." *Id.*

January, 1991 under PLO 6286,[68] despite the House Committee on Interior and Insular Affairs' resolution in March, 1991 to block such action.[69] Senator Domenici predicted that the State of New Mexico and environmental groups would sue to block the DOE shipments.[70]

B. The Legal Battles

The State of New Mexico, the Natural Resources Defense Council (NRDC), and the Environmental Defense Fund (EDF) moved quickly to file motions for preliminary injunctions in the United States District Court for the District of Columbia on October 9, 1991.[71] In *New Mexico v. Watkins*, petitioners claimed that DOE and DOI had failed to observe the constraints Congress had placed on administrative land withdrawals, thus violating FLPMA, and moved to block DOE from shipping any waste to the WIPP.[72]

Also, on October 9, DOE agreed not to begin shipments until November 8, 1991, to avoid confrontation with Congress and New Mexico, and later promised to delay shipments until after a scheduled November 15th hearing.[73] The following week, the Senate Energy

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68. *Salt Caverns*, *supra* note 25, at A3. Interior Secretary Manuel Lujan, Jr. told key congressional committees that if a bill was not passed authorizing a legislative land withdrawal of the WIPP site by August 2, 1991, he would "have no choice but to go forward" with the administrative land transfer granted pursuant to Public Land Order 6826. *Id.*

The House Interior and Insular Affairs Committee had approved a land transfer bill that would restrict DOE use of the site to 10 years, only allow for 4250 test drums, prohibit moving any waste without EPA approval, and require the Bureau of Mines to certify the cavern vaults to be stable, i.e., that reinforcement was soundly engineered. *Id.* DOE opposed all these restrictions. *Id.* Two other House committees, the Armed Services and Energy and Commerce, also had jurisdiction over the bill, so final wording was far from certain. *Id.*

69. *Ship A-Waste*, *supra* note 65, at A3. The administrative transfer was a gamble for Watkins that could have jeopardized his already strained relationship with Congress. *Id.*

70. *Id.* Senator Domenici said: "It doesn't do any good. It sets the wrong precedent; it sends the wrong signals." *Id.* He stated that a legislative withdrawal was necessary "because it will include, by statute, a certifying role for the Environmental Protection Agency; a limit on the amount of waste that can be moved to the WIPP site; important health and safety protections, particularly with regard to transportation issues; a prohibition on the shipments of high-level waste; and funding for road improvements and other impact aid." *DOE Takes Control*, *supra* note 67, at 393-94.

71. *See Watkins II,* 783 F. Supp. 628. The hearing was held on November 15, 1991, in Washington, D.C. by U.S. District Judge John Garrett Penn, who stated that it would take him a week to issue a decision. *DOE Takes Control*, *supra* note 67, at 393-94.

72. *Watkins II*, 783 F. Supp. at 630. New Mexico Attorney General Tom Udall was seeking a temporary restraining order "to stay the threatened shipment of the first of 8,500 barrels of transuranic waste from the nuclear weapons complex." *DOE Takes Control*, *supra* note 67, at 393-94.

73. *DOE Takes Control*, *supra* note 67, at 393-94.

Committee approved a bill (S. 1671)[74] that would give DOE approval to take title to the WIPP site.[75]

By mid-November the House had not acted, and on November 26, 1991, a federal judge issued a preliminary injunction ordering the DOE to halt plans to ship transuranic waste to the WIPP.[76] District Judge John Garret Penn held that Interior Secretary Manuel Lujan, Jr., exceeded his authority when he transferred the WIPP site in October to DOE without congressional approval of the modification to the WIPP's purpose, and thus violated federal land management law.[77] On February

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74. Under S. 1671, DOE would pay New Mexico $20 million per year in operating costs from the time waste shipments begin until facility decommissioning begins. S. Rep. No. 196, 102d Cong., 1st Sess. (1991). During the decommissioning period, the state would receive $13 million per year. *Id.* DOE also would reimburse the state for the lost taxes otherwise available from conventional development of the site. *Id.*

The Senate bill would allow up to 1% of the facility's final TRU waste capacity to be used during a five-year test period. *Id.* The EPA administrator, however, must approve all waste placement in excess of 0.5% of the WIPP's final capacity. *Id.* In an 11-to-9 vote, the committee defeated an amendment by Senator Jeff Bingaman to place a firm ceiling of 0.5% on waste emplacement during the tests. *Id.* If New Mexico disagrees with the decision to exceed 0.5% it can invoke conflict resolution provisions included in its original 1981 agreement with DOE. *Id.*

Under S. 1671, the Secretary of Energy would have responsibility for management of the WIPP site, and would consult and cooperate with the WIPP Environmental Evaluation Group (EEG)(an independent state technical oversight board) in an independent technical review and evaluation of the WIPP. *Id.* The bill also gives the secretary one year to prepare a WIPP management plan. *Id.*

Within 90 days of enactment of the bill, DOE would propose an experimental program. *Id.* The provisions of the experimental plan would include: published annual performance reports; proposed and final regulations for criteria and compliance requirements; allowance for judicial review; dose limits; EPA certification before remote-handled transuranic waste (RH-TRU) is sent to the WIPP; requirements for a waste retrieval plan plus annual demonstrations of retrievability; use of NRC certified TRU waste shipping packages; and a requirement for a decommissioning plan. *Id.*

75. *Id.*; *Senate Energy Panel Passes WIPP Land Withdrawal Bill*, 11 NUCLEAR WASTE NEWS 413, 413-14 (1991). Energy Department officials had expressed satisfaction with the Senate bill and their timely response, but remained displeased with pending House legislation and the House's lack of timely action. *Id.* It appeared that November 15, 1991, the date set for a hearing in the U.S. District Court in Washington, D.C. on New Mexico's and EDF's lawsuit challenging the administrative land withdrawal through a modification of the purpose of public land order, was shaping up as the deadline for legislative action before judicial intervention. *Id.*

76. *Watkins I*, 783 F. Supp. at 628, 633.

77. *Id.* at 630. Judge Penn wrote, "[d]efendants have presented no convincing evidence that the hazardous waste materials they seek to introduce in the WIPP site can be retrieved," thus constituting a permanent withdrawal that is beyond the scope of the Secretary of Interior's authority. *Id.* at 632. He also ruled that Congress had not authorized radioactive waste storage at the WIPP. *Id.* at 630. FLPMA § 204(f), 43 U.S.C. § 1714(f) (The Secretary can extend a land withdrawal only if the extension is within the scope of the original purpose).

3, 1992, in a development hailed as a major victory by opponents of the WIPP, the court issued a permanent injunction.[78]

Environmental lawyers described the ruling as a stinging setback for the DOE.[79] DOE General Counsel John Easton insisted that the ruling was not a setback, and stated that the decision "advances the timetable" for DOE's appeal.[80] In a letter to Governor King, Secretary Watkins wrote that the court ruling "continues the unconscionable delay" in beginning the five-year test.[81] Judge Penn and key members of Congress did not agree that the House was reponsible but, rather, blamed the delays on Watkin's policies with the Senate for the legislative delays.[82] The oddity of this legislative stalemate was that hardly anyone involved was against the WIPP in principle.[83] The issues were what standards the DOE would have to meet, and what restrictions would be imposed on the amount and type of waste.[84]

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78. New Mexico ex rel. Udall v. Watkins, 783 F. Supp. 633 (D.D.C. 1992). Because the November preliminary injunction had blocked the scheduled shipments of waste to the WIPP, the permanent injunction did not actually change anything. *See Judge Orders DOE to Halt All Effort to Open WIPP*, 12 NUCLEAR WASTE NEWS 46 (1992). *New Mexico v. Watkins* was consolidated with an Environmental Defense Fund claim that shipping mixed waste to the WIPP would violate RCRA because the WIPP did not have RCRA interim status or a permit to store mixed waste and proceed with the testing phase. *Watkins II*, 783 F. Supp. at 634. EDF and the intervenors brought a citizen action suit under RCRA, 42 U.S.C. § 6972(a)(1)(A) (1988). *Id.* Besides the FLPMA violation ruling, the court also ruled that the WIPP did not have RCRA interim status, and that DOE was required to obtain a RCRA permit for the facility from the State of New Mexico pursuant to RCRA, 42 U.S.C. § 6925(a), (e); 40 C.F.R. 270 (1992). *Id.* at 637, 639. The RCRA issue is beyond the scope of this paper.

79. Thomas W. Lippman, *U.S. Told to Halt Efforts to Open Atom-Waste Site*, WASH. POST, Feb. 4, 1992, at A8.

80. *Judge Orders DOE to Halt All Effort to Open WIPP*, *supra* note 78, at 46. "The case is probably in a better posture when we go up on appeal now," Easton said. *Id.* Easton added that although DOE was confident its appeal would succeed, "we are hopeful that Congress will act expeditiously on WIPP-related legislation so that we can proceed with this important research project in a timely fashion. Each month this program is delayed costs the taxpayers $14 million just for maintenance of the facility." *Id.*

81. Thomas W. Lippmann, *Nuclear Waste Still Aborning a Decade Later, Storage Facility in Salt Caverns of New Mexico Desert Faces Perhaps Years More of Delays*, WASH. POST, Feb. 9, 1992, at A8. In a news conference, Secretary Watkins said that the lawsuits were filed "for no good reason." *Id.* Watkins said it would not be "prudent" to continue spending $14 million per month on staff and maintenance for a facility that could not operate. *Id.*

82. *Id.* The House had not followed the Senate's lead in passing the required land-transfer legislation because "[t]he House is seething over the DOE's tactics," said Representative Bill Richardson. *Id.* "They have negotiated with the Senate and totally ignored the House. We are going to wait until DOE comes in to talk, and they aren't doing it." *Id.*

83. *Id.*

84. *Id.*

The DOE filed its appeal on March 17, 1992, in the U.S. Court of Appeals for the District of Columbia Circuit, challenging the lower court ruling that barred transuranic waste shipments to the WIPP.[85] In its appeal, DOE argued that the lower court erred in concluding that DOI did not have authority to extend and modify the land withdrawal for the WIPP.[86]

On July 10, 1992, in a unanimous ruling, the U.S. Circuit Court of Appeals for the District of Columbia affirmed the district court's permanent injunction issued February 3, 1992, enjoining the DOE and DOI from implementing a public land order that authorized the introduction of transuranic waste into the WIPP for testing.[87] In addressing the claim that the DOI exceeded its authority under FLPMA, the court held that in modifying and extending a land withdrawal order to allow the transportation and implantation of radioactive waste into the WIPP site until 1997 as part of the WIPP's testing phase,[88] the DOI violated FLPMA § 204(f)'s requirement that an extension is authorized only if "the purpose for which the withdrawal was first made require[s] the extension."[89] In a strict interpretation of the original 1983 land order to construct the WIPP, the panel of judges said, "[T]hat purpose cannot be stretched to include the temporary or permanent deposit of radioactive waste at the WIPP site."[90] The purpose of the original withdrawal was to construct the facility, and the original withdrawal order specified that it did not authorize transportation or storage of radioactive materials.[91] The panel of judges noted that Congress retained for itself control over the use and disposition of federal land.[92] The judges declared that the confinement of withdrawal order extensions to the purpose for which the withdrawal was first made "is a prime means of securing that control."[93]

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85. *Watkins III,* 969 F.2d at 1123.

86. *Id.* at 1133. Also, DOE maintained that the district court judge, in his preliminary injunction, erroneously concluded that waste would not be retrievable during the test period. *Id.*

87. *Id.* at 1124, 1138.

88. 56 Fed. Reg. 3038 (1991).

89. *Watkins III*, 969 F.2d at 1136 (quoting FLPMA § 204(f), 43 U.S.C. § 1714(f)).

90. *Id.*

91. *Id.* at 1134; 48 Fed. Reg. 31,038 (1983).

92. *Watkins III*, 969 F.2d at 1133; *see* FLPMA §§ 204(a), (c)(1), (c)(2), 43 U.S.C. §§ 1714(a), (c)(1), (c)(2).

93. *Watkins III*, 969 F.2d at 1137.

In a press release, DOE said it was "gratified"[94] that "the court acted promptly,"[95] but stressed that the decision "underscore[d] the need for prompt completion of pending congressional action on a legislative land withdrawal for the WIPP facility."[96] A DOE spokesperson noted that the department was waiting to see what Congress did with the land withdrawal issue before taking further legal action.[97]

C. The Waste Isolation Pilot Plant Land Withdrawal Act

In October, 1992, just before adjournment, Congress passed the Waste Isolation Pilot Plant Land Withdrawal Act,[98] authorizing the legislative land withdrawal of the WIPP site,[99] and allowing the DOE to possibly open the WIPP within 10 months.[100] Section 3 provides legislative public land withdrawal of the WIPP site and transfer to the DOE for "construction, experimentation, operation, repair and maintenance, disposal, shutdown, monitoring, decommissioning and

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94. *Federal Appeals Court Upholds Order Barring Waste From WIPP*, 12 NUCLEAR WASTE NEWS 258 (1992). The appellate court reversed the district court and held that the WIPP did qualify for RCRA interim status because the WIPP existed prior to the effective date of an EPA regulatory change that established RCRA regulatory authority over radioactive mixed waste. *Watkins III*, 969 F.2d at 1133. *See* 42 U.S.C. § 6925(e)(1); 40 C.F.R. § 270.70 (1992); State Authorization to Regulate the Hazardous Components of Radioactive Mixed Waste Under the Resource Conservation and Recovery Act, 51 Fed. Reg. 24,504 (1986).

95. *Federal Appeals Court Upholds Order Barring Waste From WIPP*, *supra* note 94, at 258.

96. *Id.*

97. *Id.*

98. Waste Isolation Pilot Plant Land Withdrawal Act, Pub. L. No. 102-579, 106 Stat. 4777 (1992) [hereinafter *WIPP LWA*].

99. *Id.* § 3.

100. Lippman, *supra* note 7, at A6. Before the WIPP can receive the first shipments of radioactive waste, the act "requires [consultation, review and] approval from an alphabet soup of federal agencies, [the State of New Mexico, the National Academy of Sciences, and the Environmental Evaluation Group]," including the Department of Interior for development of a land management plan, the Environmental Protection Agency for environmental permits, radiation safety standards, test plans, and retrieval plans, the Occupational Safety and Health Administration for certification of emergency response training programs, and the Department of Labor, acting through the Mine Safety and Health Administration, for storage room stability and durability. *Id. See generally WIPP LWA* §§ 3-11, 13, 16, 17.

Despite the fact that DOE cleared the land withdrawal hurdle, other hurdles remain before the WIPP can open, including EPA completion of nuclear waste disposal standards within six months, EPA approval of DOE's test and retrieval plans, state approval of RCRA permits, and potential citizen suits. Lippmann, *supra* note 7, at A6.

other authorized activities . . . ."[101] Also, the section revoked Public Land Orders 6403 and 6826.[102]

V. ANALYSIS

Despite the courts' holdings in the WIPP litigation that the DOI's administrative land transfer to the DOE was in violation of FLPMA § 204(f),[103] and the subsequent congressional action providing a proper legislative public land withdrawal for the WIPP project,[104] several issues remain. The first issue is whether the FLPMA § 204(e) one-House legislative veto provision is a violation of the constitutional separation of powers doctrine. The second issue is whether the provision is excluded from constitutional review because the Property Clause expressly delegates to Congress proprietary power over federal lands.

First, under the principle of the separation of powers, Congress may not empower itself, its members, or its agents with executive power.[105] When Congress exercises legislative power, it must follow "single, finely wrought and exhaustively considered procedures" specified in Article I of the United States Constitution, namely the Bicameralism[106] and Presentment[107] Clauses.[108]

Immigration and Nationalization Service v. Chadha,[109] a landmark decision, involved a constitutional challenge under the Bicameralism and the Presentment Clauses of Article I, to the one-House legislative veto provision in the Immigration and Nationality Act (INA).[110] Pursuant to INA,[111] the House of Representatives had vetoed an executive branch decision to suspend deportation hearings against

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101. *WIPP LWA* § 3(a), (c).

102. *Id.* § 3(b).

103. *See supra* notes 71, 72, 76-78, 85-93 and accompanying text.

104. *See generally WIPP LWA*, Pub. L. No. 102-579.

105. U.S. CONST. art. I, § 1; *see* Springer v. Philippine Islands, 277 U.S. 189, 201-202 (1928); Buckley v. Valeo, 424 U.S. 1, 120-22 (1976); Immigration & Naturalization Serv. v. Chadha, 462 U.S. 919, 951, 955 (1983).

106. U.S. CONST. art. I, §§ 1, 7, cl. 2 (that legislation be enacted by both houses of Congress).

107. U.S. CONST. art I, § 7, cls. 2, 3 (that legislation be presented to the President for signature approval).

108. *Chadha*, 462 U.S. at 951, 955.

109. *Chadha*, 462 U.S. 919.

110. 8 U.S.C. §§ 1101-1503 (1988).

111. *Id.* § 1254(c).

Jagdish Rai Chadha, an alien whose visa had expired.[112] Emphasizing Article I as a check on the legislative body, the Court construed the Framers' intent to be that "legislation should not be enacted unless it has been carefully and fully considered by the Nation's elected officials."[113]

Using fairly expansive language, the Court held that the one-House legislative veto exercised pursuant to a provision of the INA was a legislative act.[114] The Court stated that determination of a legislative act was not dependent on the form of an action, but rather on its character and effect.[115] Therefore, the Court concluded that the exercise of a one-House legislative veto was essentially a legislative act because it "had the purpose and effect of altering the legal rights, duties and relations of persons, including the Attorney General, Executive Branch officials and Chadha, all outside the legislative branch."[116] Since the legislative act in *Chadha* did not fulfill the Article I bicameralism[117] and presentment requirements,[118] the Court declared the act unconstitutional.[119]

In the WIPP case, the House Committee on Interior and Insular Affairs exercised a one-House legislative veto pursuant to FLPMA § 204(e) that nullified the DOI's administrative land withdrawal and transfer to the DOE.[120] The one-House legislative veto constituted a legislative act because it had the "purpose and effect of altering the legal rights, duties and relations"[121] of the DOI and DOE, both of which are outside the legislative branch. Given that *Chadha* generally invalidates all one-House legislative veto provisions,[122] the one-House legislative veto provision in FLPMA § 204(e) should be unconstitutional.

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112. Pursuant to INA § 244(c), the Attorney General of the United States may halt deportation of any alien who applies for suspension and who meets certain other statutory criteria. *Id.*; 8 U.S.C. § 1254(c).

113. *Chadha*, 462 U.S. at 949.

114. *Id.* at 956-57.

115. *Id.* at 951.

116. *Id.* at 952.

117. U.S. CONST. art. I, §§ 1, 7, cl. 2.; *Chadha*, 462 U.S. at 946-48.

118. U.S. CONST. art I, § 7, cls. 2, 3; *Chadha*, 462 U.S. at 948-51.

119. *Chadha*, 462 U.S. at 956-57.

120. *See supra* notes 61-63 and accompanying text.

121. *Chadha*, 462 U.S. at 952.

122. *See id.* at 967 (White, J., dissenting) (stating that the majority decision "sounds the death knell for nearly 200 other statutory provisions in which Congress has reserved a 'legislative veto'"); Peter L. Strauss, *Was There a Baby in the Bathwater?: A Comment on the Supreme Court's Legislative Veto Decision*, 1983 DUKE L.J. 789 (1983).

Nonetheless, a second issue remains as to whether *Chadha*, an Article I case involving a legislative act, should be applied to FLPMA § 204(e), an Article IV proprietary act. Article IV 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 . . . ."[123] Two reported cases[124] involved FLPMA § 204(e) one-House legislative veto action. Although decided on other grounds, these cases raised the issue of *Chadha*'s application to FLPMA § 204(e).[125]

In the first case, *Pacific Legal Foundation v. Watt*,[126] the House Committee of Interior and Insular Affairs' passed a land withdrawal resolution, pursuant to FLPMA § 204(e), that directed the Secretary of Interior to cease mineral leasing efforts, and to withdraw the public lands within a wilderness complex from mineral leasing operations.[127] The Secretary reluctantly complied with the House Committee resolution, and withdrew the lands from mineral leasing.[128] In response, the plaintiffs, oil and gas lease applicants, brought suit against the Secretary.[129]

Although the court decided the case on technical grounds, it used a strained interpretation of § 204(e) to distinguish the case from *Chadha*.[130] The court construed § 204(e) as delegating to the Secretary the power to determine the scope and duration of any withdrawal requested by Congress.[131] Thus, the court analogized the § 204(e) mechanism to traditional congressional committee powers, and found § 204(e) constitutional.[132] However, in dictum, the *Pacific Legal*

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123. U.S. CONST. art. IV, § 3, cl. 2.

124. Pacific Legal Found. v. Watt, 529 F. Supp. 982 (D. Mont. 1982); National Wildlife Fed. v. Watt, 571 F. Supp. 1145 (D.D.C. 1983).

125. *Pacific Legal Found.*, 529 F. Supp. at 984-85; *National Wildlife Fed.*, 571 F. Supp. at 1155.

126. *Pacific Legal Found.* (heard after the Ninth Circuit's 1980 decision in Chadha v. Immigration & Naturalization Serv., 634 F.2d 408 (9th Cir. 1980), but before the Supreme Court's 1983 ruling in INS v. Chadha, 462 U.S. 919 (1983)).

127. *Pacific Legal Found.*, 529 F. Supp. at 984-85 (the committee action effectively precluded any further exploration or leasing activity in designated wilderness areas although authorized to do so until midnight December 31, 1983, pursuant to The Wilderness Act, 16 U.S.C. § 1133(d)(3) (1988)).

128. *Pacific Legal Found.*, 529 F. Supp. at 984-85; *see also* Marc Zafferano, *Legal and Policy Implications of* Pacific Legal Foundation v. James Watt, 3 PUB. LAND L. REV. 51 (1982).

129. *Pacific Legal Found. v. Watt*, 529 F. Supp. 982, 984 (D. Mont. 1982).

130. *Id.* at 999, 1000, 1005.

131. *Id.* at 999, 1000.

132. *Id.*

Foundation court summarily declared that Congress' power under the Article IV Property Clause was subject to the Article I requirements for proper legislative action, but whether the Property Clause provided an exception to *Chadha* remained unclear.[133]

In *National Wildlife Federation v. Watt*,[134] the second case, the House Committee on Interior and Insular Affairs requested that Interior Secretary Watt make an emergency withdrawal of certain federal lands, pursuant to FLPMA § 204(e), from a region designated for future coal leasing.[135] Nevertheless, Secretary Watt proceeded to sell coal leases for those lands requested to be withdrawn.[136] Plaintiffs sought to enjoin the Secretary of Interior from issuing coal leases after the Secretary announced his plans to proceed with the leasing process despite the House Committee resolution.[137]

The issue presented was whether *Chadha* applied to legislative actions under the Article IV Property Clause.[138] The court declared that this type of legislative act, a one-House legislative veto, was the kind of act ruled unconstitutional in *Chadha*.[139] However, the court decided the case on technical grounds, and held that the Secretary of Interior was bound, pursuant to the Administrative Procedure Act,[140] to abide by his own regulation, which incorporated the § 204(e) provision for one-House congressional withdrawals.[141] Thus, the court avoided the constitutional question of whether *Chadha* applied to Article IV.[142]

However, the courts differed as to whether a regulation promulgated in accordance with a statute is unconstitutional when the statute is subsequently held unconstitutional. In *Allen v. Carmen*,[143] a case heard six months after *Chadha*, the court held that the *Chadha* decision invalidated the one-House veto provision of 44 U.S.C. § 2104(b), as well as the regulations dependent upon it.[144] This district

133. *Id.* at 1003.
134. National Wildlife Fed. v. Watt, 571 F. Supp. 1145 (D.D.C. 1983).
135. *Id.* at 1145-49.
136. *Id.*
137. *Id.*
138. *Id.* at 1155.
139. *Id.*
140. *See* Administrative Procedure Act § 6, 5 U.S.C. § 553 (1988).
141. *National Wildlife Fed.*, 571 F. Supp. at 1147; 43 C.F.R. § 2310.5 (1992).
142. *Id.* at 1157.
143. 578 F. Supp. 951 (D.D.C. 1983).
144. *Id.* at 951 (former holders of positions in executive branch of the United States government sued the Administrator, challenging the constitutionality of the Presidential Recordings

court holding contradicts the *National Wildlife Federation* decision to hold an agency to its regulations despite the statute's being ruled unconstitutional.

Following the *National Wildlife Federation* decision, the constitutionality of § 204(e) has faded from judicial scrutiny without resolution. However, an analysis of a recent Supreme Court decision demonstrates that a constitutional review of FLPMA § 204(e) is ripe. In *Metropolitan Wash. Airports Auth. v. Citizens For The Abatement of Aircraft Noise*, the Supreme Court directly addressed the application of *Chadha* to the Article IV Property Clause, and held that any reservation of federal authority is subject to separation of powers constraints, regardless of whether Congress was legislating as sovereign under Article I or proprietor under Article IV.[145]

The Court stated that Congress could not use the Property Clause authority to circumvent functional constraints placed on it by the Constitution.[146] In hammering home the point, the Court ruled that legislative veto power congressionally created is not immune from scrutiny for constitutional defects merely because it was created in the course of Congress' exercising its power to dispose of federal property.[147]

In the WIPP case, the House Committee on Interior and Insular Affairs utilized the one-House legislative veto provision in FLPMA § 204(e) to block the DOI's administrative land transfer of the WIPP site to the DOE.[148] Subsequently, the land withdrawal matter was litigated, and settled with the passage of the WIPP Land Withdrawal Act.[149]

However, the existence of the FLPMA § 204(e) one-House legislative veto provision is enough to raise the constitutional question.[150] Even though FLPMA is a federal land statute, created under the Property Clause authority,[151] FLPMA § 204(e) must comply with the Article I

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and Materials Preservation Act, 44 U.S.C. § 2104(b) (1976), specifically, its one-House veto provision) (§ 2104 was renumbered § 2108 and amended by Pub. L. No. 98-497, 98 Stat. 2280 (1984)).

145. 111 S. Ct. 2298, 2298-2301 (1991).

146. *Id.* at 2300.

147. *Id.*

148. *See supra* notes 61-63 and accompanying text.

149. *See supra* notes 71, 72, 76-78, 85-93, 98-102 and accompanying text.

150. *Metropolitan Wash. Airport Auth.*, 111 S. Ct. at 2306, n.13 (citing Bowsher v. Synar, 478 U.S. 714, 727, n.5 (1986)).

151. *See* U.S. CONST. art. IV, § 3, cl. 2.

separation of powers doctrine requirements. Therefore, FLPMA § 204(e) is ripe for judicial review under *Metropolitan Washington Airport Authority*, and should be found unconstitutional under *Chadha*.

VI. CONCLUSION

In *Chadha*, the Court ruled that one-House legislative veto provisions were unconstitutional.[152] Although the constitutionality of FLPMA § 204(e) was never resolved in the cases litigated soon after *Chadha*, nor raised in the WIPP litigation, the unconstitutional threat of a one-House legislative veto still exists in the FLPMA § 204(e) provision. The Court, in *Metropolitan Washington Airport Authority*, held that the Article I separation of powers doctrine applied to statutes, such as FLPMA, created under Congress' Article IV proprietary power.[153] Therefore, FLPMA § 204(e) is ripe for judicial scrutiny, and should be declared unconstitutional because it provides for a one-House legislative veto provision.

FLPMA § 204(e) should be severed[154] leaving the remainder of the statute intact, and Congress should amend § 204(e) to require both the Houses' and the President's signatures in nullifying undesired agency actions.

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152. *Chadha*, 462 U.S. at 951.

153. *Metropolitan Wash. Airport Auth.*, 111 S. Ct. at 2298-2301.

154. The Supreme Court held in *Chadha* that "invalid portions of a statute are to be severed, [u]nless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not." *Chadha*, 462 U.S. at 931-32, (quoting Buckley v. Valeo, 424 U.S. at 108). The presence of a severability clause in the legislation creates a presumption of severability, and "[a] provision is further presumed severable if what remains after severance 'is fully operative as a law.'" § 934 (quoting *id.* at Champlin Refining Co. v. Corporation Commission, 286 U.S. 210, 234 (1932)).