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United States Senate

COMMITTEE ON
ENERGY AND NATURAL RESOURCES

WASHINGTON, DC 20510-6150

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October 21, 2008

The Honorable Dirk Kempthorne
Secretary of the Interior
1849 C Street, NW
Washington, D.C. 20240

Re: Proposed Rule Removing Regulations on
Emergency Withdrawals of Public Lands

Dear Mr. Secretary:

I am writing to state my strong opposition to the Department's proposal to repeal its rule on emergency withdrawals of public lands. The rule was adopted in 1981 to implement section 204(e) of the Federal Land Policy and Management Act. Both the rule and the underlying statutory provision require you, as Secretary, to withdraw land from disposition under the public land, mining, and mineral leasing laws whenever you determine, or whenever either the House Committee on Natural Resources or the Senate Committee on Energy and Natural Resources notifies you, "that an emergency situation exists and that extraordinary measures must be taken to preserve values that would otherwise be lost...." 43 U.S.C. 1714(e); 43 C.F.R. 2310.5.

The Department offers two reasons for repealing this important rule. First, it says that the emergency withdrawal procedure is "redundant, since public lands can be protected" using "conventional withdrawal procedures"; and second, it says that "constitutional issues may arise whenever" the committee notification procedure is used. 73 *Fed. Reg.* 60212 (Oct. 10, 2008). I find neither argument persuasive, but before addressing either, it may be useful to consider why the emergency withdrawal procedure was adopted in the first place and how it has been used over the years.

The origins of section 204(e)

The public land withdrawal provisions of the Federal Land Policy and Management Act grew out of the recommendations of the Public Land Law Review Commission, which was established in 1964 and published its recommendations in One Third of the Nation's Land in 1970. The Commission was made up of six Senators (including Clinton P. Anderson and Henry M. Jackson), seven House members (including Morris K. Udall), and six members of the public appointed by the President.

The Commission believed that public land management required “a cooperative effort between Congress” and the Executive Branch, but found the relationship between the two to be badly out of balance. One Third of the Nation’s Land at 41. It found that Congress had neglected its constitutional responsibility to set legislative goals and policies for public land withdrawals, and had, through statutory delegations or “acquiescence equivalent to an implied grant of power,” largely ceded control over withdrawals to the President. The Commission found that the President, in attempting “to meet public land management needs for which existing public land laws were either inadequate or nonexistent,” had made “excessive use” of withdrawals “in an uncontrolled and haphazard manner.” Id. at 43-44.

The Commission recommended that Congress reassert its authority over land withdrawals and repeal “all existing authority expressly or impliedly delegated” to the President. It recommended that Congress alone should have the power to make permanent, large-scale withdrawals, and that Congress should delegate to the Secretary the authority to make only temporary withdrawals, subject to defined criteria and procedures. Id. at 54-55. It recommended that the Secretary’s authority be confined to three specific areas, one of which was “emergency situations to preserve values that would otherwise be lost pending administrative or legislative action.” Id. at 55.

Congress embraced the Commission’s recommendations on withdrawals, which were largely incorporated into section 204 of the bill (H.R. 13777) reported by the House Committee on Interior and Insular Affairs in May 1976. The Committee went beyond the Commission’s recommendations, however, in requiring the Secretary to make an emergency withdrawal upon notification by either the House or Senate Interior Committee. The Department of the Interior objected to this “one committee withdrawal authority,” H. Rept. 94-1163 at 42, based on the advice of the Department of Justice that it was “of questionable constitutionality,” H. Rept. 94-1163 at 47, but it did not object to granting emergency withdrawal authority to the Secretary.

Most of the ensuing debate over the withdrawal provisions focused on the provisions for congressional review of large-scale, non-emergency executive withdrawals in section 204(c), which provided a one-House legislative veto of executive withdrawals of 5,000 acres or more, rather than on the emergency withdrawal provisions in 204(e). Rep. Udall thought these “new procedures for Congressional review of Executive withdrawals,” went too far. He saw executive withdrawals as “the only defense we have against mining activity on the public domain,” and feared that the limits on executive withdrawals “tilt[ed] the balance ... in favor of certain special interests.” H. Rept. 94-1163 at 221. Rep. Seiberling also defended the Secretary’s authority to act promptly, “without waiting for the lengthy process of legislation, ... to set aside lands that have higher values for other public uses.” 122 Cong. Rec. 23453 (July 22, 1976). But their concerns appear to have focused on the size of the acreage limitation, the duration of executive withdrawals, and the practicality of congressional review, rather than on the constitutionality of the legislative veto. The conferees ultimately changed the one-House veto to a two-House veto, and extended the duration of emergency withdrawals from one to three years, H. Rept. 94-1724 at 11 and 58, but kept the congressional notification provision.

Use of the committee notification provision

Section 204(e) has been invoked only six times since it was enacted 32 years ago.

(1) Alaska lands. On November 15, 1978, Chairman Udall, on behalf of the House Committee on Interior and Insular Affairs, “urge[d]” Secretary Andrus to exercise his authority under section 204(e) to withdraw over 100 million acres of public land in Alaska. Secretary Andrus did so the following day. Alaska v. Carter, 462 F. Supp. 1155, 1158 n.5 (D. Alaska 1978).

(2) Casitas Reservoir. On May 4, 1979, Chairman Udall “request[ed]” Secretary Andrus to “take appropriate action for the withdrawal” of public lands in the Casitas Reservoir Watershed in California in order to prevent uranium mining in the watershed from endangering public water supplies. Again, Secretary Andrus made the requested withdrawal. See Pacific Legal Foundation v. Watt, 529 F. Supp. 982, 999-1000 (D. Mont. 1981).

(3) Bob Marshall Wilderness. On May 21, 1981, Chairman Udall notified Secretary Watt that the House Interior Committee had found an emergency situation existed requiring the withdrawal of the Bob Marshall, Scapegoat, and Great Bear Wilderness Areas. Pacific Legal Foundation v. Watt, 529 F. Supp. 982, 986 (D. Mont. 1981), clarified, 539 F. Supp. 1194 (D. Mont. 1982). Secretary Watt questioned the constitutionality of the Committee’s action, but, “in the interest of maintaining harmony between Congress and the Executive,” withdrew the land “in keeping with the directive of the ... Committee.” 529 F. Supp. at 987.

(4) Fort Union coal lands. On August 3, 1981, Chairman Udall notified Secretary Watt that the House Interior Committee had found an emergency situation existed requiring the withdrawal of the Fort Union coal lands in eastern Montana and western North Dakota from coal leasing. This time, Secretary Watt declined to comply, citing the Supreme Court’s decision holding unconstitutional the one-House legislative veto in Immigration and Naturalization Service v. Chadha, 462 U.S. 919 (1983). The United States District Court for the District of Columbia enjoined Secretary Watt and Secretary Clark from issuing any coal leases in the affected area. National Wildlife Federation v. Watt, 571 F. Supp. 1145, 1152-1153 (D. D.C. 1983) (preliminary injunction); National Wildlife Federation v. Clark, 577 F. Supp. 825 (D. D.C. 1984).

(5) WIPP. On March 6, 1991, Vice Chairman Miller notified Secretary Lujan that the House Interior Committee had found that an emergency situation existed requiring the withdrawal “from any location or emplacement” of nuclear waste on public lands already withdrawn for the Waste Isolation Pilot Project in New Mexico. Secretary Lujan agreed to “accommodate” the Committee’s concerns by delaying shipment of nuclear waste to the site, but emphasized that the resolution “may well be unenforceable on constitutional and other grounds.”

(6) Grand Canyon. On June 25, 2008, Chairman Rahall notified you that the House Natural Resources Committee had found an emergency situation to exist regarding uranium mining near the Grand Canyon and directed you to immediately withdraw specified lands from all forms of location and entry. Your staff dismissed the Committee's resolution on the grounds that a quorum had not been present when the Committee acted. The Center for Biological Diversity has challenged your refusal to withdraw the land and the matter is now pending before the United States District Court for the District of Arizona.

The constitutionality of the committee notification procedure

While serious "constitutional issues may arise whenever a Congressional committee directs the Secretary of the Interior ... to withdraw lands," 73 Fed. Reg. 60212, it does not necessarily follow, as the Department has long asserted, that section 204(e) is "patently unconstitutional." National Wildlife Federation v. Watt, 571 F. Supp. at 1154.

Two courts have considered the constitutionality of section 204(e), in cases involving the Bob Marshall Wilderness Complex and the Fort Union coal lands, but neither has held it unconstitutional. In the first case, the court read "section 204(e) to authorize the Secretary to establish the scope and duration of an emergency withdrawal," thus avoiding the constitutional infirmities of a legislative veto. Pacific Legal Foundation v. Watt, 529 F. Supp. 982, 1004-1005 (D. Mont. 1981). In the second, the court avoided ruling on the constitutionality of section 204(e), by holding that Secretary Clark was bound by the Department's emergency withdrawal rule, regardless of the constitutionality of section 204(e). National Wildlife Federation v. Clark, 577 F. Supp. 825, 828-829 (D. D.C. 1984). Although there is a great deal of dicta in both cases that casts doubt on the constitutionality of section 204(e), neither case, to paraphrase Judge Oberdorfer, "establishes with the certainty perceived by the [Department's] legal advisers that section 204(e) ... [is] 'patently unconstitutional.'" 571 F. Supp. at 1156.

As the Department has said, "This rulemaking is not a forum for resolving the validity of the Committee-directed withdrawal provision of section 204(e)." 73 Fed. Reg. 60214. That question is now before the federal district court in Arizona, which is a proper forum for resolving it. My concern is that, by repealing the emergency withdrawal rule now, the Department is trying to prejudice the constitutionality of the rule. By adopting the proposed rule, the Department will be, in effect, vacating the rule before the court has had a chance to adjudicate the constitutionality of either the rule or the underlying statute.

Still more troubling, it appears that the Department may be trying to affect the outcome of the pending lawsuit by removing the very ground relied on by Judge Oberdorfer in the National Wildlife Federation case—namely the existence of the rule, which he said remained "effective irrespective of the validity of section 204(e)." 571 F. Supp. at 1158. The Department conceded as much when it said the rule "may be an impediment to resolving [the] question" of section 204(e)'s constitutionality. 73 Fed. Reg. 60214. I do not believe that is an appropriate reason for repealing an otherwise validly prescribed and lawful rule.

Most of the language in the Department's emergency withdrawal rule, like most of the language in section 204(e), is written to give "the Secretary discretionary authority on his own to declare an emergency and withdraw land from leasing." National Wildlife Federation v. Watt, 571 F. Supp. at 1158. The constitutionality of that language, so far as I am aware, has never been questioned. *Id.* Thus, even if the congressional notification procedure is ultimately held unconstitutional, the remainder of the emergency withdrawal provision should still stand. See section 707 of the Federal Land Policy and Management Act, 43 U.S.C. 1701 note ("If any provision of this Act or the application thereof is held invalid, the remainder of the Act and the application thereof shall not be affected thereby."). See also Immigration and Naturalization Service v. Chadha, 462 U.S. 919, 932 (1983) (holding that similar language "gives rise to the presumption that Congress did not intend the validity of the Act as a whole, or any part of the Act, to depend upon whether [a legislative] veto clause ... [is] valid.>").

The need for the emergency withdrawal process

The other reason offered by the Department for repealing the emergency withdrawal rule is that it is "redundant, since public lands can be protected" using "conventional withdrawal procedures, without recourse to the regulations providing for emergency withdrawals." 73 Fed. Reg. 60212. The notice goes on to explain that when a withdrawal application is filed, notice of the filing is published in the Federal Register, and the publication "temporarily segregates the public lands from settlement, sale, location, or entry under the public land laws, including the mining laws...." 73 Fed. Reg. 60214 (citing 43 C.F.R. 2310.2(a)). The Department seems to believe that "the segregative effect provided by the conventional withdrawal process" is just as effective as the emergency withdrawal process, and therefore, "the emergency withdrawal process is unnecessary," and "redundant."

Whether a "segregation" is more, less, or just as effective than an "emergency withdrawal" is not the point. As far as I know, a "segregation" pending a withdrawal might well have the same practical effect as an emergency "withdrawal." A "segregation" has been defined as a "temporary withdrawal," Sagebrush Rebellion v. Hodel, 790 F.2d 760, 764 (9th Cir. 1986); and a "withdrawal" is said to "segregate" lands from the operation of the public land laws. C. Wheatley, Study of Withdrawals and Reservations of Public Domain Lands 1 (1969). Undoubtedly, both operate to protect lands from "settlement, sale, location, or entry" under the public land and mining laws. 43 U.S.C. 1701(j) (definition of "withdrawal"); 43 C.F.R. 2091.0-5(b) (definition of "segregation") and 2310.2(a) (segregative effect of withdrawal application or proposal).

The point is that the choice between the use of segregation and emergency withdrawal was made by Congress when it enacted the Federal Land Policy and Management Act. The authors of that Act were surely familiar with both terms. They plainly provided that "land is to be segregated while [a withdrawal] application is being considered" in section 204(b), and that you are to "make a withdrawal" in an emergency situation in section 204(e). It is not for the Department, by rule, to substitute its judgment for the judgment Congress made by law.

A better approach

When the Supreme Court upheld executive withdrawals in United States v. Midwest Oil Co., it remarked that “government is a practical affair intended for practical men.” 236 U.S. 459, 472 (1915). The framers of the Federal Land Policy and Management Act were also practical people, who did their best to frame a practical system to manage the public lands. They were guided in that effort by the Public Land Law Review Commission, which felt strongly that public land management required “a cooperative effort between Congress ... and the executive branch,” and that “the withdrawal process involves a complex interrelationship between the legislative and executive branches....” One Third of the Nation’s Land at 41 and 54.

Undoubtedly, the committee notification procedure that the framers of the Federal Land Policy and Management Act devised raises serious constitutional questions. Pressed for a decision, the courts may decide that Congress overstepped the constitutional bounds and that the committee notification procedure is unconstitutional. But as Justice Holmes once observed, “We must remember that the machinery of government would not work if it were not allowed a little play in its joints.” Bain Peanut Co. v. Pinson, 282 U.S. 499, 501 (1931).

As I read the legislative history of section 204 of the Federal Land Policy and Management Act, Congress was trying to give the Secretary enough “flexibility to act to protect threatened areas from private interests.....” 122 Cong. Rec. 23453 (July 22, 1976) (remarks of Rep. Seiberling). The provision should be read and implemented in that spirit. That appears to be how Secretary Andrus viewed it in the Alaska lands and Casitas Reservoir emergency withdrawals.

Unfortunately, use of the congressional notification procedure has grown more contentious since then. Yet even after the tone of the notifications changed from requests to orders, and Secretary Watt first challenged the procedure’s constitutionality in the Bob Marshall Wilderness case, he was willing to comply “in the interest of maintaining harmony between Congress and the Executive.” Pacific Legal Foundation v. Watt, 529 F. Supp. at 987. Similarly, Secretary Lujan agreed to “accommodate” the Interior Committee’s directive in the WIPP case.

Significantly, the courts have declined to hold the congressional notification procedure unconstitutional when the question was presented to them in the Bob Marshall Wilderness and Fort Union coal lands cases. The courts, as “a cardinal principle,” avoid ruling on a constitutional question if another “construction of the statute is fairly possible.” Crowell v. Benson, 285 U.S. 22, 62 (1932). Mindful of this rule of restraint, Judge Jameson managed to read section 204(e) in a way that preserved your discretion, accommodated congressional concerns, and avoided the constitutional question. Pacific Legal Foundation v. Watt, 529 F. Supp. at 1004-1005. Similarly, Judge Oberdorfer preferred to read section 204(e) as giving you “discretionary authority on [your] own to declare an emergency and withdraw land,” and suggested that “The challenged regulation could be viewed as a binding commitment by the Secretary to exercise this discretionary authority to declare an emergency and to effect such a

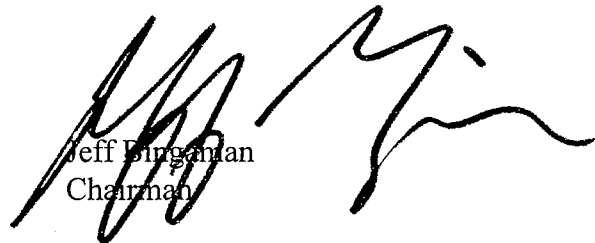
temporary withholding in deference to the formally expressed concerns of a previously designated Committee of Congress.” National Wildlife Federation v. Watt, 571 F. Supp. at 1158.

I think that is the better course. It seems to me that we ought to be looking for a way to make section 204(e) work better, to avoid constitutional confrontations, and to ensure that Department will hear and act on congressional concerns about emergency situations threatening the public lands by a more thoughtful interpretation of section 204(e), rather than by repealing the rule implementing it.

In any event, I urge you to abandon the Department’s proposal to repeal the emergency withdrawal rule and reconsider the resolution of the House Committee on Natural Resources with respect to the lands around the Grand Canyon.

Please include these comments in official record on the proposed rule and consider them in the decision-making process on the proposal.

Sincerely,



Jeff Bingaman
Chairman

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