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CHANGES IN ALTERING LAND CLASSIFICATIONS
AND BLM LAND USE PLANNING:
THE NATIONAL WILDLIFE FEDERATION V. BURFORD CASE

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INTRODUCTION

Land management policies, especially by the Bureau of Land Management (BLM), have historically been effected by land classifications and withdrawals. Most of the land classifications are at least 20 years old and the withdrawals are often as old as fifty years. Congress recognized that many of these land orders and actions were no longer needed and directed their review and rescission in 1976 when it passed the Federal Land Policy and Management Act (FLPMA), 43 U.S.C. § 1701-1784.

The momentum for reform was generated by the Public Land Law Review Commission's criticisms in One Third of the Nation's Land, A Report to the President and Congress by the Public Land Law Review Commission (1971) (hereafter One Third of the Nation's Land). The Commission recommended review and revocation of the extensive withdrawals because they closed to

mineral entry and development more than half of the federal land. Id. at 53. The Commission concluded that without revocation of these withdrawals, the efficacy of other public land law reforms would be negated. The Commission was equally critical of land classifications because they were made without adequate information or planning analysis. Id. at 54.

Congress responded by directing withdrawal review and revocation and authorizing the termination of land classifications. The review and revocation of withdrawals is addressed in § 204 of FLPMA, 43 U.S.C. § 1714. Land classification termination is left to the discretion of the Secretary in § 202, so long as termination is consistent with the land use plan. 43 U.S.C. § 1712(d).

The Department of Interior implemented these directives first separately by only reviewing and revoking withdrawals. In May, 1981, Secretary established withdrawal review and also made revocation as a priority and land classification termination a priority. From 1977 to 1980, the Interior Department completed very few withdrawal revocations. The BLM correspondence shows that there was substantial confusion regarding the criteria for and the extent of documentation required, either under the National Environmental Policy Act or public participation objectives in FLPMA, 43 U.S.C. § 1739(e). Each withdrawal revocation required an environmental assessment,

description of the land, and formal order revoking the withdrawal. The order was published in the Federal Register and, in many cases, public notice of the proposed action was also given. In 1981, the BLM made withdrawal revocations subject to a categorical exclusion, meaning that an environmental assessment was generally not necessary. While EAs were occasionally done and the files contain a written record of decision, the use of categorical exclusions contributed significantly to the increased number of withdrawal revocations.

Between January, 1981 and July, 1985, when the National Wildlife Federation filed suit, more than 22 million acres of public land withdrawals had been revoked and 160 million acres of land classification terminations. The National Wildlife Federation challenged all of the previous withdrawal revocations and land classification terminations as violating the Federal Land Policy and Management Act, Administrative Procedure Act, and the National Environmental Policy Act. The Federation seeks reinstatement of all classifications and withdrawals, promulgation of regulations under the Administrative Procedure Act, the preparation of a programmatic environmental impact statement (EIS), and the delay of land status changes until preparation of the resource management plans under FLPMA. While most of the Federation's claims are

procedural, the plaintiff also argues that all of the land status changes required Congressional review.

In light of the extent of the land status changes already completed, this case also raises important public policy questions. First, whether procedural obligations can justify undoing 1,091 separate and independent agency actions spanning four and a half years. Second, whether the subsequent creation of third party rights in reliance on the apparent regularity of agency action mitigates any retrospective relief--especially when those rights may also be set aside.

A preliminary injunction prohibiting any action inconsistent with the previous withdrawal or classification issued February 10, 1986. The federal government and Defendant-Intervenors, Mountain States Legal Foundation appealed the injunction. The Court of Appeals heard argument April 27, 1987. The case in the district court has been fully briefed on motions for summary judgment and is awaiting a decision from the district court.

The following discussion will review the history of public land withdrawals, and land classifications, the reforms introduced in FLPMA, and the implications of any decision in National Wildlife Federation v. Burford.

I. HISTORY OF PUBLIC LAND WITHDRAWALS.

A. Before passage of the Pickett Act of 1910, withdrawals were made pursuant to specific statutes, which made land available for disposal and permitted exceptions.

I C. Wheatley, Study of Withdrawals and Reservations of Public Domain Lands, Public Land Law Review Commission 55-62 (1969)(hereafter Wheatley).

1. Forest Reservations were made by the President to preclude disposal under the various public land laws, including the Homestead Act of 1862, Timber & Culture Act, etc. These forest reserves were also intended to protect the government's revenue interests in timber being harvested from federal land. Forest reserves were created to maintain favorable conditions of flow and to provide a continuous supply of timber for the nation.

a. Creative Act of 1891, 26 Stat. 1101-1103 c. 561 § 24.

b. Organic Act of 1897, 16 U.S.C. § 475 § 30
Stat. 34, c. 2, § 1.

2. Public purpose or use - many general statutes were enacted to permit President to "set aside [land] for public uses" near towns and cities in specific territories or states. e.g. Act of March 1, 1847 ch.32, § 2, 9 Stat. 146.
3. Military purposes - general grants for military to build forts and harbors.
4. Indian trading posts and reservations Act of April 18, 1796, ch. 13, § 1. (trading posts). Act of May 28, 1830, ch. 148, § 1, 4 Stat. 411, 412 (1830).
5. Salt Springs minerals, Act of March 26, 1804 ch. 35, § 6
6. Townsites
7. Lighthouses
8. Railroad grants - authority to withdraw the designated right of way.

B. Implied Authority of the President to withdraw public land.

1. Withdrawal Power of the President implied from specific statutes. Wood v. Beach, 156 U.S. 548 (1895)(authority to reserve lands from sale that were identified for grant.) See also Railroad Grant cases. Southern Pac. R.R. Co. v. Bell, 183 U.S. 675, 679 (1902).

a. Also upheld such withdrawal revocations. Oregon & C.R.R. v. Bales, 28 L.D. 231 (1899) (indemnity lands);

b. rejected by federal court in Southern Pac. R.R. Co. v. Groeck, 87 F. 970 (9th Cir. 1898). I Wheatley, at 62-69.

2. Supervisory powers as a second source of implied withdrawal authority. Abandoned Military Reservation Forest Reserve, 35 L.D. 277 (1906).

C. The Supreme Court upheld the President's frequently exercised authority to withdraw land as an exercise of implied power to which Congress acquiesced.

1. United States v. Midwest Oil Co., 236 U.S. 459 (1915).
 2. Courts had previously upheld practice. Grisar v. McDowell, 11 U.S. (6 Wall) 363 (1891).
- D. Congress passed the Pickett Act of 1910, 43 U.S.C. § 157 (repealed in 1976) to limit the President's power to close land to mineral entry and development.
1. Withdrawals were to be temporary or in aid of legislation and could not foreclose mineral entry.
 - a. "Temporary" in fact stretched to decades and, as a result, substantial segments of federal land were closed to some form of disposal.
 2. Land that was permanently withdrawn for administrative site could be closed to mineral entry.
 3. Two different interpretations of the Pickett Act evolved. Initially the language was read

literally and temporary withdrawals did not close the land to location under the 1872 Mining Laws. However, in 1944, the Attorney General concluded that the Pickett Act merely supplemented the President's implied withdrawal powers affirmed in United States v. Midwest Oil Co. Using this latter interpretation of the President's authority the Secretary could preclude mineral entry.

I Wheatley, at 106-121; III Wheatley App. B.

4. This interpretation manifested itself in an increase in lands closed to mineral entry.

E. Extent of withdrawal problem was first recognized in the 1950's when the BLM initiated withdrawal review and revocation. This program continued with different levels of success and productivity until the 1960s. II Wheatley at 420-435.

F. Scope of issue is also illustrated by the various statutes and purposes for which BLM and, Forest Service land to a lesser extent, has been withdrawn during the twentieth century.

1. For other federal agencies:
 - a. Department of Defense;
 - b. Federal Power Commission, now the Federal Regulatory Commission, under § 24 of the Federal Water Power Act, 16 U.S.C. § 818.
 - c. Bureau of Reclamation under the Reclamation Act of 1902, 43 U.S.C. § 391.
 - d. Forest Service administrative and recreation sites;
 - e. Department of Justice border patrol training facility.
2. For the Interior Department:
 - a. Stock driveways;
 - b. Executive Order 107, reserving springs and water holes;
 - c. Administrative sites.

II. HISTORY OF LAND CLASSIFICATIONS.

A. Before 1934, the General Land Office administered the disposal of public domain under the Homestead Act, the Desert Land Entry Act, Carey Act, and various state land selection statutes. Local and Regional Land Use Planning, Herman D. North and Associates Berkeley, California, Vol. II, IV-14, (revised 1970)(hereafter North).

B. Taylor Grazing Act of 1934, 43 U.S.C. § 315, authorized the Secretary to determine whether land was suitable for disposal. North at IV - 14.

1. Interior Secretary Harold Ickes withdrew 80 million acres for grazing, as not suitable for disposal.

2. While an entryman could petition the Secretary to classify the land for disposal, the Secretary's decision not to reclassify was invariably upheld. Id. at IV-15.

C. By Executive Order in 1961, President Kennedy directed a review of public land resource

management. The results of that review and Congressional response led to the creation of the Public Land Law Review Commission and passage of the Classification and Multiple Use Act of 1964, 43 U.S.C. §§ 1114-1115 (expired in 1971). North at IV-16.

D. Classification and Multiple Use Act of 1964, 43 U.S.C. §§ 1114-1115 (CMUA) (expired in 1971) directed the classification of all public domain as to retention (multiple use management) or disposal. The Act established 10 multiple uses including livestock grazing, timber, mineral development, recreation, watershed, fish and wildlife, industrial development, wilderness, occupancy, and the protection of other public values.

1. Criteria for retention reflected the ten multiple uses, plus administration needs. North at IV - 17, 20.

a. All BLM lands occurring in blocks were classified for retention;

b. Land was closed to mineral entry to protect scenic or other public values; otherwise only closed to disposal statutes.

2. Criteria for disposal:

a. required for the orderly growth of communities, or

b. land was determined to be chiefly valuable for residential, commercial, agricultural, industrial uses.

c. The BLM added by regulation that there was adequate local land use planning and zoning. This final criteria never was defined.

d. Applied to urban inholdings but often no transfer because of the local zoning criteria.

e. Applicant could petition for disposal classification but Secretary had virtually unreviewable discretion to deny. North at IV-18.

E. PLLRC criticism as articulated in North report and One Third of the Nations Land:

1. Inadequate information used to make classification decisions and

failed to apply planning criteria. North at I-21-23, IV-38.

The Commission noted: "To date it has been used primarily in a defensive manner to segregate large blocks of land from the operation of specified public land laws, usually without adequate information and planning. . . ." One Third of the Nation's Land, at 54.

2. Public participation generally existed.
3. Inadequate coordination of land use and development programs with local or regional government. North at IV 91.
 - a. Difficult to get necessary inventory data from local government. North at 93.

4. Little forecasting and no mechanism to analyze tradeoffs and costs. North at IV-95.

III. CONGRESS RESPONDED TO THE ABOVE PROBLEMS IN THE FEDERAL LAND POLICY AND MANAGEMENT ACT (FLPMA) IN 1976.

A. Withdrawal Review and Revocation.

1. Section 204(a) states: "[T]he Secretary is authorized to make, modify, extend, or revoke withdrawals but only in accordance with the provisions and limitations of this section."
43 U.S.C. § 1714(a).

2. Restrictions on New Withdrawals.

- a. Repealed the implied withdrawal authority recognized in United States v. Midwest Oil Co., 236 U.S. 459 (1914).

H. Rep. No. 94-1163. 94th Cong., 2d Sess. 29, reprinted in Legislative History of Federal Land Policy and Management Act of 1976 (hereafter Legislative History) at 459, 924.

b. New withdrawals require publication of notice of segregation, 43 U.S.C. § 1714(b); Congressional veto and time limit of 20 years for withdrawals exceeding 5,000 acres, 43 U.S.C. § 1714(c); and a public hearing, 43 U.S.C. § 1714(h).

3. Role of Congress in Review of Withdrawal

Revocations: Congressional review for withdrawal revocations was added in § 204(1), which states:

The Secretary shall, within fifteen years of the date of enactment of this Act, review withdrawals existing on the date of approval of this Act,of (1) all Federal lands other than withdrawals of the public lands administered by the Bureau of Land Management and of lands which, on date of approval of this Act, were part of Indian reservations and other Indian holdings, the National Forest System, the National Park System, the National Wildlife Refuge System, other lands administered by the Fish and Wildlife Service or the Secretary through the Fish and Wildlife Service, the National Wild and Scenic Rivers System, and the National System of Trails; and (2) all public lands administered by the Bureau of Land Management and of lands in the National Forest System (except those in wilderness areas,) and those areas formally identified as primitive or natural areas or designated as national recreation areas) which closed the lands to appropriation under the Mining Law of 1872 (17 Stat. 91, as amended; 30 U.S.C. § 22, et seq.) or to leasing under the Mineral Leasing Act of 1920 (41 Stat. 437, as amended; 30 U.S.C. § 181 et seq.).

43 U.S.C. § 1714(1).

- a. Legislative history. § 204(1) first appeared as § 404 in early drafts bills that preceded FLPMA in the 92d and 93rd Congresses. § 404 reappeared in the 94th Congress. The explanation in H.R. Rep. 94-1163, 94th Cong., 2d Sess. (May 15, 1976), states that:

Recent studies have shown not only the increase of administrative restrictions on multiple use but also failure to examine past actions to determine their continuing value. The withdrawal provisions of section 204 and the land use provisions of section 202 of this bill, together with this section [404], are designed to encourage correction of this situation.

Legislative History at 449.

- b. § 404 was moved to Title II of FLPMA by the Conference Committee, becoming § 204(1).
Legislative History at 883-885.

- c. § 204(1) is susceptible of at least two different interpretations:

that § 204(a) and § 204(1) created two different classes of withdrawal revocations and that Congressional oversight is not required for

withdrawal revocations made under § 204 (A) in the ordinary course of business.

Memorandum of Associate Solicitor John R. Little (October 30, 1980) at 5.

Alternatively, that § 204(1) modifies § 204(a) and that all withdrawal revocations opening federal land to mineral uses must have congressional oversight.

B. Congress also directed classification review.

§ 202(d) provides:

Any classification of public lands or any land use plan in effect on the date of enactment of this Act is subject to review in the land use planning process conducted under this section, and all public lands, regardless of classification, are subject to inclusion in any land use plan developed pursuant to this section. The Secretary may modify or terminate any such classification consistent with such land use plans.

43 U.S.C. § 1712(d).

1. The legislative origin of classification review is parallel to that of withdrawal review.

- a. Classification review first appeared in S. 424, 93d Cong., 2d Sess. as section 101(c), which is very similar to § 202(d) of FLPMA, 43 U.S.C. § 1712(d). The only difference is the addition of permissive language that the Secretary "may" modify or terminate a classification, which was added in 1976.
- b. The explanation states that classifications are to be reviewed in the planning process and that "[t]his provision is to insure that existing classifications are not frozen and that indepth planning may be conducted on any lands already classified." S. Rep. 93-873, 93d Cong., 2d Sess. (May 23, 1974)

IV. LAND USE PLANNING --

- A. First directed in the CMUA, land use plans were written for BLM land between 1964-1972, and were called Management Framework Plans (MFP). They were functional, addressing grazing, timber, and wildlife habitat.

1. MFPs were criticized for failure to integrate planning functions into one document; failure to coordinate plans with land use activities of state and local government, and lack of interdisciplinary analysis. North at 91.
2. Despite criticisms, PLLRC generally concluded that the BLM plans were a good first effort. One Third of the Nations Land at 46.

B. Congress adopted this conclusion and did not adopt the PLLRC's recommendation for dominant use. Legislative History at 103.

The Senate Committee Report stated:

[t]hese policies (multiple use and sustained yield) are not radically new. For some time, the Department of Interior has administered the national resource lands in a manner which is substantially in accord with these policies; and they were among the major policy recommendations of the Public Land Law Review Commission.

Legislative History at 104.

Congress' retention of the directive that BLM land be managed under the principles of multiple use and sustained yield, suggests that Congress had reviewed and endorsed the BLM's land use planning efforts.

- C. Management Framework Plans upheld NRDC v. Hodel, 624 F. Supp. 1045 (D. Nev. 1985)(appeal pending 9th Cir.)
- D. Resource Management Plans (RMP) --
1. Planning Regulations, 43 C.F.R. §§ 1601 - 1610.8 (1986) for RMPs.
 - a. defined as a land use plan described in FLPMA establishing areas for exclusive use, allowable resource uses, goals and objectives, program constraints and needed management practices, any need for more specific plans, steps to support action's implementation, and monitoring. 43 C.F.R. § 1601.5 (k)(1986).
 - b. Public participation. 43 CFR 1610.2 (1986)
 - c. Coordination with state and local government. 43 CFR 1610.3-1 (1986).
 2. Number pf RMPs that are final or have been issued for comment. 52 Fed. Reg. 11129 (1987).

V. IMPLICATIONS OF THE LITIGATION.

- A. National Wildlife Federation v. Burford (Civ. No. 85-2338 filed July 15, 1985 in United States District Court for the District of Columbia)

Issues Raised

1. Whether the Federal Land Policy and Management Act (FLPMA) requires that the withdrawal review and revocation and land classification termination occur as part of or after completion of most FLPMA land use plans?
2. Whether all BLM withdrawal revocations should be set aside for failure to promulgate regulations in accordance with the Administrative Procedure Act (APA), 5 U.S.C. § 553 and § 310 of FLPMA, 43 U.S.C. § 1740?
3. Whether all BLM withdrawal revocations and classification terminations should be set aside because the BLM's failure to prepare a programmatic environmental impact statement violates § 102(2)(C) of the National

Environmental Policy Act (NEPA), 42 U.S.C.
§ 4332(2)(C)?

4. Whether all BLM withdrawal revocations should be set aside for failure to report them to Congress under § 204(1) of FLPMA, 43 U.S.C. § 1714(1)?

Relief Requested.

In its prayer for relief in the amended complaint, the NWF asks the district court

- a. to declare that the federal defendants' land withdrawal review program violates applicable laws and regulations,
- b. enjoin any action inconsistent with the withdrawals, classifications, or other designations that are the subject of the lawsuit,
- c. order the federal defendants to reinstate all land classifications and withdrawals that were in existence on January 1, 1981, and
- d. order the rescission of all directives, instruction memoranda, manuals, or other documents regarding the land withdrawal and classification review program.

Amended Complaint at 16-17.

B. Before the preliminary injunction issued, on February 10, 1986, the Interior Department estimated that it had revoked withdrawals for 22 million acres of public land and terminated land classifications for 160 million acres of land involving 1091 separate agency actions.

1. The overwhelming majority of the land was not closed to mining or mineral leasing.

a. 17 million acres were closed both to mining and mineral leasing 5.7 million of which were in Alaska;

b. 34 million acres remained in a protective classification and closed to entry;

c. 29.8 million acres remained in a protective classification open to mineral leasing but closed to mining;

d. 5.1 million acres open to all forms of mineral development except non-metalliferous mining;

e. 130 million acres open to mining and mineral leasing.

2. Case involves 7,000 mining claims and 1,000 mineral leases. All land exchanges have been on hold, except those released by Congress in December, 1986. Also at issue are agriculture land entries and state land selections.

C. Under previous agreement with the respective Congressional committees another 53 million acres of land are being reviewed under S 204 (1). These withdrawals were either closed to mining or mineral leasing.

D. Rights of Absent Third Parties.

1. If land was never available for entry under Mining Laws or for leasing under the Mineral Leasing Act, those intervening rights may be held void ab initio. United States ex rel. Hardin v. Fall, 276 F.622 (D.C.Cir. 1921).

2. Fed. R. Civ. P. 19(b) requires joinder of all indispensable parties or the dismissal of the suit, if it is not possible to modify the relief

requested to protect the rights of absent third parties not subject to the jurisdiction of the court.

3. "Public rights" doctrine in National Licorice Co. v. NLRB, 309 U.S. 350 (1940) preceded 1964 amendments to Fed. R. Civ. P. 19(b) but creates an equitable exception to the doctrine of joinder. See also NRDC v. Tennessee Valley Authority, 340 F. Supp 400 (D.D.C. 1971) rev'd on other grounds, 459 F. 2d 255 (2d Cir. 1972), NRDC v. Berkland, 458 F. Supp 925 (D.D.C. 1978) aff'd, 609 F.2d 533 (D.C. Cir. 1980);

E. Scope of judicial relief for procedural violations.

1. Violations of National Environmental Policy Act do not support undoing government action already taken. Ogunquit Village Corp. v. Davis, 553 F.2d 243 (1st Cir. 1977); Park County Resource Council v. Department of Agriculture, No. 85-2000 (10th Cir. April 17, 1987).

2. Actions taken without required rulemaking under the Administrative Procedure Act can be set aside as void. State of South Carolina v. Block, 558 F. Supp. 1004 (D. S.C. 1983).

F. Status of case before District Court and Court of Appeals.

CONCLUSION