

Land Sta.

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

86 JUN -9 P1:02 NO. _____

* * *

STATE OF NEVADA, RICHARD H. BRYAN, GOVERNOR OF NEVADA, PAUL LAXALT, UNITED STATES SENATOR, CHIC HECHT, UNITED STATES SENATOR, BARBARA VUCANOVICH, UNITED STATES REPRESENTATIVE IN CONGRESS, AND HARRY REID UNITED STATES REPRESENTATIVE IN CONGRESS,

Petitioners,

vs.

JOHN HERRINGTON, SECRETARY OF THE UNITED STATES DEPARTMENT OF ENERGY,

Respondent.

WM Record File

102.3

WM Project 11

Docket No. _____

PDR ✓

LPDR ✓

Distribution:

REB MJB

DEM Still

JB ROM

Linehan

(Return to WM, 623-SS)

Stablein

TO: REB

GWKorr

Dkumhiro, EG-V

PETITION
FOR
JUDICIAL REVIEW

I.

1.1 Petitioners State of Nevada, Richard H. Bryan, Governor, Paul Laxalt, United State Senator, Chic Hect, United State Senator, Barbara Vucanovich, United States Representative, and Harry Reid, United States Representative, by and through their undersigned attorneys, petition the Court for judicial review of a final decision and action of John Herrington, Secretary of Energy, Respondent herein, and the failure of Respondent Herrington to take an action required by the Nuclear Waste Policy Act, P.L. 97-425, 96 Stat. 2201, 42 U.S.C. 10101 et seq. as is set forth hereinafter.

1.2 The original and exclusive jurisdiction of the Court is set forth in Sec. 119(a)(1)A and B of the Nuclear Waste Policy Act, 42 U.S.C. 10139 (hereinafter the "Act").

1.3 The Petitioner State of Nevada is a member state of the United States. On February 2, 1983, the Governor and Legislature of the State of Nevada were notified pursuant to Section 116(a) of the Act that a repository for the disposal and storage of high-level radioactive waste and spent nuclear fuel may be located in a tuff medium at Yucca Mountain in southeastern Nevada. Petitioner Richard H. Bryan is the Governor and chief executive officer of the State of Nevada and is charged with certain duties under the Act.

1.4 Petitioners Paul Laxalt, Chic Hecht, Barbara Vucanovich and Harry Reid are members of Nevada's delegation of senators and representatives in Congress. They have a special interest in assuring the integrity of the Act and an equitable and valid application of the Act's provisions to states with candidate sites.

1.5 John Herrington, Respondent herein, is the qualified and acting United States Secretary of Energy. John Herrington is charged with certain responsibilities and duties by the Act, which include among other things, the duty to make nominations and recommendations for the characterization of three sites for the President's approval for the purpose of selecting a single site for the nation's first high-level nuclear waste repository. See Section 112(b)(1)(B) of the Act, 42 U.S.C. 10132.

II.

2.1 Secretary Herrington has submitted documents to the President which include the nomination of five (5) sites he deems suitable for site characterization and the recommendation of three (3) sites for actual site characterization for selection of the nation's first nuclear waste repository site. The Secretary of Energy intends to issue final environmental assessments for each nominated site subsequent to the President's approval of the three (3) sites.

2.2 On or about December 20, 1984, the Department of Energy issued a draft Environmental Assessment on Yucca Mountain which, among other things, discussed the requirement of the Nuclear Regulatory Commission contained in 10 CFR 60.121:

"The geologic repository operations area shall be located in or on lands that are either acquired lands under the jurisdiction and control of DOE or lands permanently withdrawn and reserved for its use."

The draft Environmental Assessment recognized the NRC requirement in Section 6.2.1.1.2 and identified a DOE report, NVO-281, by R. Richards and D. Vieth entitled "Land Use and Withdrawal Actions Necessary for and in Support of the NNWSI Project" issued June 1984 addressing this requirement. According to the draft EA and Richards and Vieth, (1984, p. 7), the plan for land acquisition to meet the requirements of 10 CFR 60.121 is as follows:

The plan to withdraw Federal land for a repository will be implemented if, and only if, the Yucca Mountain site is recommended to the Congress by the President for a repository and the recommendation is supported by the Congress. It is expected that the initial FLPMA land withdrawal request (with its 20-year limit) will be forwarded to BLM at the same time as the license application is sent to NRC. It is anticipated that

permanent withdrawal via special legislation will not be requested until NRC approves the decommissioning and sealing of the repository. Until the requirement for retrievability of waste from the repository is no longer necessary, there is no reason (based on NRC regulations) to request Congress to effect a permanent withdrawal.

2.3 In its comments on the draft Environmental Assessment, the State of Nevada advised the DOE that the DOE is not in compliance with 10 CFR 60.121 requiring the establishment of DOE jurisdiction over Yucca Mountain sufficient to support activities preliminary to licensure, particularly site characterization. The State identified Article 1, Section 8, Clause 17, as requiring State consent before federal activities contemplating exclusive legislative jurisdiction over lands within the State's borders may be conducted. See an excerpt of the State of Nevada Comments, Exhibit "A," attached hereto.

2.4 The Secretary of Energy has failed to take any action sufficient to withdraw lands from Bureau of Land Management jurisdiction for repository purposes or to set the stage for a withdrawal. These public lands are presently classified pursuant to the Act of September 19, 1964 (43 U.S.C. 1411-18) and the regulations in 43 CFR 2410 and 2411 for multiple use management. See BLM Notice of Classification of Public Lands, Serial Number N-1574, dated February 27, 1970 attached hereto as Exhibit "B." The Bureau of Land Management is presently enjoined from:

(a) modifying, terminating or revoking, in full or in part, under the Federal Land Policy and Management Act (FLPMA), any withdrawal or classification that was in effect on January 1, 1981; or

(b) taking any action inconsistent with the specific restrictions of a withdrawal or classification in effect on January 1, 1981, including, but not limited to, the issuance of

leases, the sale, exchange or disposal of land or interests in land, the granting of rights-of-way, or the approval of any plan of operations;

by the United States District Court For The District of Columbia in an action styled National Wildlife Federation v. Robert F. Burford, et al., Civil Action No. 85-2238. See copy of Memorandum Opinion of Judge John H. Pratt attached herein as Exhibit "C."

2.5 Petitioners are informed that Secretary Herrington has submitted his recommendation to the President of the United States of three (3) sites for detailed site characterization and Yucca Mountain is one of the recommended sites. Site characterization is an extensive investigative process involving mining operations and geological and hydrological explorations which physically put people and equipment a thousand to four thousand feet below the surface of the geologic formation to evaluate the site to determine its potential capability for meeting the requirements for a repository. It will occur over a period of several years and depending on the site, will cost from \$600 million to perhaps as much a billion dollars.

2.6 The Secretary is proceeding in reckless disregard of the statutory and constitutional rights of the State of Nevada by failing to recognize the substantive and procedural requirements of 10 CFR 60.121, the Federal Land Policy and Management Act, particularly Section 204 of the Act, 43 U.S.C. 1714; Article 1, Section 8, Clause 17 of the United States Constitution; the equal footing doctrine and the public trust by which the United States administers the public lands.

2.7 The Secretary and his subordinates in the Department of Energy have not followed the intent of the Nuclear Waste Policy Act in recognizing and accommodating the concerns of the State of Nevada and its officials and according them the degree of participation contemplated by the Act. Proceeding to characterize Yucca Mountain without having acquired the requisite jurisdiction and consent of the State is only one example. See also State of Nevada v. Herrington, 777 F.2d 529, (9th Cir. Ct. 1985). Petitioners are displeased and complain of severe deficiencies in consultation and cooperation required by the Act.

2.8 Proceeding to expend \$600 million to \$1 billion of the Nuclear Waste Fund generated by the nuclear utility ratepayers without any assurance that the requisite control and jurisdiction may ever be acquired over Yucca Mountain, is arbitrary, capricious, an abuse of discretion and unlawful.

PRAYER FOR RELIEF

WHEREFORE, Nevada prays that relief will be granted by the Court as follows:

1. That the Secretary's documents submitted to the President for approval of the Yucca Mountain site for characterization be declared unlawful, void and of no effect whatsoever;

2. That the process of nominating, recommending and approving Yucca Mountain as one of the sites for characterization, including the issuance of the environmental assessments be enjoined until the Secretary of Energy satisfies the legal requirements to secure the requisite jurisdiction over the Yucca Mountain site.

3. That Secretary Herrington be directed by mandate of this Court to seek a withdrawal pursuant to Section 204 of FLPMA and acquire the State of Nevada Legislature's consent pursuant to Nevada Revised Statutes, Chapter 328 as required by Article 1, Section 8, Clause 17 before pursuing the approval of Yucca Mountain for site characterization and any and all efforts directed toward actual characterization of Yucca Mountain.

DATED: This 28th day of May, 1986.

BRIAN MCKAY
ATTORNEY GENERAL

BY: Harry W. Swainston
Harry W. Swainston
Deputy Attorney General
Capitol Complex
1802 N. Carson St., Suite 252
Carson City, NV 89710
(702) 885-5866

BY: Malachy R. Murphy
Malachy R. Murphy
Special Deputy Attorney General
Evergreen Plaza Bldg.
711 Capitol Way
Olympia, WA 98501
(206) 754-6001

BY: James H. Davenport
James H. Davenport
Special Deputy Attorney General
Evergreen Plaza Bldg.
711 Capitol Way
Olympia, WA 98501
(206) 754-6001

ATTORNEYS FOR PETITIONERS

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT

NEVADA

Serial Number N-1574

NOTICE OF CLASSIFICATION OF PUBLIC LANDS
FOR MULTIPLE USE MANAGEMENT

February 27, 1970

1. Pursuant to the Act of September 19, 1964 (43 USC 1411-1E) and the regulations in 43 CFR Parts 2410 and 2411, the public lands within the area described below are hereby classified for multiple use management. Publication of this notice has the effect of segregating the described lands from appropriation only under the agricultural land laws (43 USC Parts 7 and 9; 25 USC Sec. 334) and the lands shall remain open to all other applicable forms of appropriation, including the mining and mineral leasing or material sale laws, with the exception contained in paragraph 3. As used herein, "public lands" means any lands withdrawn or reserved by Executive Order No. 6910 of November 26, 1934, as amended, or within a grazing district established pursuant to the Act of June 28, 1934 (48 Stat. 1267), as amended, which are not otherwise withdrawn or reserved for Federal use or purpose.

2. The record showing the comments received following publication of a Notice of Proposed Classification (33 FR 251), or at the public hearing at Tonopah, Nevada which was held on

EXHIBIT "A"

February 5, 1969 and other information is on file and can be examined at the Nevada Land Office. The public lands affected by this classification are located within the following described area and are shown on map designated H-1574 in the Battle Mountain District Office, Bureau of Land Management, Battle Mountain, Nevada 89820, and the Nevada Land Office, Bureau of Land Management, Room 3104, Federal Building, 304. Booth Street, Reno, Nevada 89502.

The overall description of the area is:

Nye County

Mount Diablo Meridian, Nevada

The public lands proposed to be classified are wholly located within Nye County, Nevada.

The area described aggregates approximately 6,236,200 acres of public land.

3. The public lands listed below are further segregated from all forms of appropriation under the public land laws, including the general mining laws, but not the Recreation and Public Purposes Act (44 Stat. 741, 68 Stat. 173; 43 USC 869) or the mineral leasing and material sale laws:

Mount Diablo Meridian, Nevada

T. 15 S., R. 18 E.,
sec. 16, All;
sec. 17, All.

Big Dunes

T. 9 N., R. 51 E.,
sec. 21, NE $\frac{1}{4}$ SW $\frac{1}{4}$;
sec. 27, SE $\frac{1}{4}$ SW $\frac{1}{4}$.

Mt. Morey Wildlife-Livestock Enclosure
Morey Bench Forage Improvement Test Plot

T. 6 N., R. 52 E.,
sec. 12, S $\frac{1}{2}$;
sec. 13, All.

Lunar Crater

T. 6 N., R. 53 E.,
sec. 7, SW $\frac{1}{4}$;
sec. 18, W $\frac{1}{2}$.

Lunar Crater

The areas described above aggregate approximately 2,800 acres of public land.

4. For a period of 30 days from date of publication in the Federal Register, this classification shall be subject to the exercise of administrative review and modification by the Secretary of the Interior as provided for in 43 CFR Section 2411.2c. For a period of 30 days, interested parties may submit comments to the Secretary of the Interior, LHM, 320, Washington, D. C. 20240.

Molan F. Keil
State Director, Nevada

LAND AND WATER ISSUES

The manner in which DOE approaches land and water issues in the draft EA is piecemeal at best, blatantly misleading and inadequate at worst. Nowhere in the document are the complexities surrounding these issues addressed in a complete or comprehensive manner. Various aspects of each issue are contained in different parts of the draft EA (i.e., in Chapters 3, 4, 5, 6). However, no attempt is made to deal with the totality of land and water concerns in relation to the proposed repository and the exceedingly long-range implications inherent in such an undertaking.

For the most part, the draft EA deals only with current (i.e., present-day) conditions when describing land and water use in the area of the proposed site. There is no attempt to project long-range land/water needs (i.e., 100, 500, 1,000 years or more) and to examine the impacts of the repository program on area communities. There is, for example, no analysis of the impact that potential ground-water contamination resulting from a repository failure several hundred (or more) years hence could have on water use (and on the people using the water) at that time. Likewise, there is no rationale provided for DOE's proposal to withdraw 50,000 acres of BLM land from the public domain for the repository--nor is there any indication of exactly what land is being considered for such withdrawal or what such a scheme will do to present and future land-use patterns in the area.

Apart from the environmental and socioeconomic effects of the proposed repository stemming from land and water issues, there are also potential impacts to established institutional processes that are generally ignored in the draft EA. Preeminent among such institutional impacts is the implied displacement by DOE of the State's traditional jurisdiction over land and water. The discussion that follows represents an attempt to comment on these issues in an integrated fashion.

(1) Land

The Nuclear Regulatory Commission has promulgated the following repository requirement in 10 CFR 60.121: "The geologic repository operations area shall be located in or on lands that are either acquired lands under the jurisdiction and control of DOE or lands permanently withdrawn and reserved for its use."

The draft EA recognizes this requirement in Section 6.2.1.1.2 and identifies a "plan" to accomplish the land-use and withdrawal actions necessary for site characterization and for developing a geologic repository. The plan was developed by the Nevada Nuclear Waste Storage Investigations (NNWSI) Project and is described in a DOE report: NVO-281, R. Richards and D. Vieth, "Land Use and Withdrawal Actions Necessary for and in Support of the NNWSI Project," U.S. Department of Energy, Nevada Operations Office, Las Vegas, September 23, 1983. The plan (if it can even be characterized as a plan) contained in the referenced report is simply an itemization of problems that must be overcome and contingencies that must be successfully dealt with. Nothing in Richards and Vieth or in the draft EA suggests that the Nellis Air Force Range or the Nevada Test Site enjoy a status akin to that of a federal

reservation or enclave. The additional BLM land that has been identified for withdrawal obviously does not. Consequently, none of the lands have been reserved for DOE use, and permanent withdrawal is not presently even contemplated.

The Richard and Vieth report recognizes that the Nellis Range withdrawal authorization expired in 1975 and is before Congress for renewal, as required by the Engle Act (PL 85-337) and FLEMA (PL 94-519). Under a proposed extension of the withdrawal period currently awaiting Congressional approval, the Department of Defense (DOD) or the Air Force will continue to use these public lands under the administrative jurisdiction of the Bureau of Land Management (BLM) and the Fish and Wildlife Service (FWS). A cooperative agreement (which will expire on May 31, 1993) was entered into between DOE and BLM whereby DOE would have access to land (now used by the Air Force and administered by the BLM) that is needed for repository-related activities. Because of the unsettled condition of the Nellis Range segment, the validity of a permit negotiated between the Air Force and DOE to construct an exploratory shaft on the Nellis Range is uncertain.

The Richard and Vieth report states that in November 1980 DOE entered into a cooperative agreement with the BLM for two townships in Crater Flat, and that in September 1981 it entered into a similar agreement for 4,902 acres south of the Nellis Range. Both of these land segments were consolidated to permit exploration on these parcels. Other multiple-use activities on these lands were not curtailed.

The Nevada Test Site, which contains approximately 800,000 acres, has been temporary withdrawn by predecessor agencies to the DOE for conducting nuclear-weapons tests and related research in a series of withdrawals from February 1952 to August 1965. These withdrawals are currently under review by the BLM. Referring to the Nevada Test Site segment of the proposed Yucca Mountain site, Section 6.2.1.1.2 of the draft EA (p. 6-9) states:

Pursuant to Public Land Order (PLO) 2568, December 19, 1961, this land has been withdrawn from all forms of appropriation under the public-land laws, including the mining laws, and is under the jurisdiction and control of the DOE. The DOI has jurisdiction and control over "the mineral resources and mineral and vegetable materials" of the land. DOE has control over all other surface and subsurface rights, including water rights from points of extraction on the land. The private acquisition of any surface or subsurface rights is presently precluded by virtue of the current public-land order.

The foregoing statement from the draft EA contains at best a series of half-truths and at worst outright falsehoods that must be addressed in the final EA, particularly in light of the following paragraph from PLO 2568:

Authority to change the use specified by this order or to grant rights to others to use the lands, including grants of leases, licenses, easements and rights-of-way but excluding permits revocable at will, is reserved to the Secretary of Interior or his delegate.

If the DOE has arranged to be the Secretary of Interior's delegate, the final EA should reference this arrangement; otherwise, it does not appear that DOE has the jurisdiction and control claimed in the draft EA. Furthermore, it does not appear that the "jurisdiction and control" requirement of 10 CFR 60.121 is or can be satisfied without Congressional action.

The so-called "Plan" to acquire jurisdiction and control referred to in the draft EA is deficient insofar as it purports to satisfy the requirement of 10 CFR 60.121. According to Richards and Vieth (1984, p. 7):

The plan to withdraw Federal land for a repository will be implemented if, and only if, the Yucca Mountain site is recommended to the Congress by the President for a repository and the recommendation is supported by the Congress. It is expected that the initial FLPMA land withdrawal request (with its 20-year limit) will be forwarded to BLM at the same time as the license application is sent to NRC. It is anticipated that permanent withdrawal via special legislation will not be requested until NRC approves the decommissioning and sealing of the repository. Until the requirement for retrievability of waste from the repository is no longer necessary, there is no reason (based on NRC regulations) to request Congress to effect a permanent withdrawal.

The draft EA ignores the fact that the NRC regulation, 10 CFR 60.121 must be satisfied prior to licensure. At present DOE cannot satisfy the requirement. At best, the DOE presently is simply a user of certain public lands known as the Nevada Test Site, which are temporarily withdrawn from the public domain. This status has little to do with jurisdiction. The draft EA fails to address the jurisdictional complications suggested by the referenced land-acquisition "plan," which proposes to maintain the nebulous jurisdictional status quo until the requirement for retrievability of waste from the repository is no longer necessary. At some future time, DOE expects Congress to approve permanent withdrawal and reservation of jurisdiction and control over surface and subsurface rights.

While DOE's expectation of favorable treatment by Congress may have some practical support, it totally ignores constitutional principles that limit Congressional action. For example, Article I, Section 8, Clause 17 of the U.S. Constitution provides for exclusive federal jurisdiction over withdrawn or acquired lands only in limited circumstances. In Surplus Trading Co. v. Cook, 281 U.S. 647, 650 (1930), the United States Supreme Court stated that "It is not unusual for the United States to own within a State lands which are set apart and used for public purposes. Such ownership and use without more do not withdraw the lands from the jurisdiction of the State."

The general principle emerging from the cases is that when lands are acquired or set aside for purposes not enumerated in Article 1 (such as for the repository) without the express consent of the State, the United States does so just as any other proprietor. A federal statute, 40 U.S.C. Subsection 255, provides that the head of a department of the government may secure from the state "consent to or cession of such jurisdiction, exclusive or partial, not theretofore obtained, over any such lands or interests as he may deem desirable and indicate acceptance of such jurisdiction on behalf of the United States. . . ." In Section 6.2.1.1.5, the draft EA seems to concede

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL WILDLIFE FEDERATION,)

Plaintiff,)

v.)

ROBERT F. BURFORD, et al.,)

Defendants.)

Civil Action No. 85-2238

FILED

FEB 10 1986

MEMORANDUM OPINION

JAMES S. DAWY, Clerk

Plaintiff National Wildlife Federation (NWF) has sued the Director of the Bureau of Land Management, the Secretary of the Interior and the Department of the Interior to achieve, inter alia, reinstatement of air land classifications and withdrawals in effect on January ~~1, 1981~~ 1991 until defendants take certain actions that plaintiff claims are required by law. This opinion addresses several pending motions.

Background

On December 4, 1985 we granted a preliminary injunction. The order included a prohibition against defendants' modifying, terminating, or altering any withdrawal, classification or other designation governing protection of the lands in the public domain that was in effect on January 1, 1991 or taking any action inconsistent with such withdrawals, classifications or other designations. It also enjoined all persons holding interests in the lands at issue from taking any action inconsistent with the present status of the lands.

EXHIBIT "C"

Since our order of December 4, 1985, the parties have filed several motions. The federal defendants asked us to amend, reconsider and clarify the order. Defendant-intervenor Mountain States Legal Foundation (Mountain States) also moved for reconsideration and, in addition, for either reconsideration of our order denying its earlier motion to dismiss or, in the alternative, certification of the joinder issue to the Court of Appeals. Finally, plaintiff moved to consolidate a hearing on defendants' motions with a hearing on the merits.

We issued a stay of our preliminary injunction on December 16, 1985. On January 6, 1986, we heard arguments on defendants' motions. At the hearing, the federal defendants submitted a proposed order similar to plaintiff's suggested revision. We then asked the parties to confer and attempt to agree on a draft order. Plaintiff and the federal defendants now offer such an order but disagree on the interpretation of one of its provisions. Mountain States does not join in presenting this order but renews its earlier objections to the issuance of any injunction. We will discuss the various motions pending as well as detail our intention with respect to certain provisions of the new order.

Discussion

I. Motions for Reconsideration

At the outset we deny the federal defendants' request for reconsideration of our issuance of the preliminary injunction. They offer no new points in opposition, and we continue to adhere to our reasoning as set out in the December 4,

1985 Memorandum Opinion. Mountain States, on the other hand, does introduce several new arguments, which we will now address separately.

A. Lack of Injury to Plaintiff

Mountain States claims that since the lands at issue were subject to certain commercial exploitation even before defendants' classification terminations and withdrawal revocations, NWF can prove no injury.¹ It contends, in essence, that once commercial development was authorized, there could be no further injury to the environmental and aesthetic interests of plaintiff's members. This generalization sweeps too broadly. It fails to distinguish among types of commercial development. The fact that land was previously open to activities such as "dam construction, airports, hydroelectric power sites, and military reservations and target ranges," Mtn. States Reply at 3, hardly eliminates injury when the land is later made available for strip mining. Similarly, there is injury to plaintiff's members ability to use land, once open only to mineral leasing, that becomes subject, through operation of the mining laws, to fee interest transfer. Mountain States has not shown that the prior commercial uses of the lands are identical to those allowed since the withdrawals were revoked and the classifications terminated. We continue to find irreparable injury to plaintiff and reaffirm plaintiff's standing to bring this action.

¹ This contention, while challenging our jurisdiction to grant equitable relief, raises the issue of plaintiff's standing to sue.

B. Exhaustion

Mountain States also raises, for the first time, a claim that this court may not review plaintiff's claims since NWF has not exhausted its administrative remedies. Mountain States concedes that the withdrawal decisions represent final agency actions. Reply at 8 n.5. Thus, its exhaustion argument can focus only on the classification terminations.

Neither the Federal Land Policy and Management Act, 43 U.S.C. §§ 1701, et seq. (FLPMA), nor the applicable regulations foreclose this court's review of defendants' actions. The statute itself imposes no exhaustion requirement,² and in fact emphasizes Congress' desire to provide for judicial review of public land adjudication decisions. 43 U.S.C. § 1701(a)(6). Similarly, the regulations appear to vest a right of appeal only in an individual "party" to a discrete classification termination case. 43 C.F.R. § 4.410(a)(1984). NWF was not a "party" to any of defendants' termination decisions.

Mountain States argues that the regulations pertaining specifically to land classifications establish a right -- and a duty -- to seek administrative review. The regulations provide that classifications may be "changed" using specified procedures, 43 C.F.R. § 2461.4, which include a sixty-day delay after publication of the proposed classification, § 2461.2, and a thirty-day period after final publication for administrative

² Mountain States alleges that 43 U.S.C. § 1704 mandates application of the review mechanism of the Administrative Procedure Act, 5 U.S.C. § 551, et seq. Reply at 10. We have read Title 43 but do not find a § 1704.

review. § 2461.3. However, the procedures of Subpart 2461 relate only to the process of classifying public lands. They do not appear to address actions terminating such classifications. We do not share Mountain States' confidence that "changing" classifications necessarily includes terminating them. Furthermore, the government never published its proposed decisions, as required by 43 C.F.R. § 2461.2. Pl. Opp. to Mtn. States Motion at 7. It would be anomalous to impose a rigid exhaustion requirement on plaintiff where defendants have not followed or attempted to follow their own procedures.³ . .

We note further that mere publication in the Federal Register may not alert even the most careful reader that defendants' classification terminations should inspire protest. As plaintiff noted earlier, the notices in the Federal Register do not indicate "whether environmental impact statements were prepared, whether land use plans supported the action, or whether the action had been sent to the President and Congress for review." Pl. Reply to Def. Opp. to Pl. Motion for Prelim. Inj. at 13. Unlike most challenges to agency action, plaintiff's complaint raises concerns which the agency's notice, on its face, may not have triggered or aroused.

Even if the regulations normally require administrative review, we do not feel that in the factual context of this case any exhaustion rule limits our jurisdiction. Exhaustion is a

³ This failure to publish proposed termination actions also undermines Mountain States' reliance on 43 C.F.R. §§ 4.450 and 2450.4(a), since both sections assume that action has first been "proposed."

flexible requirement, one tailored to "an understanding of its purposes and of the particular administrative scheme involved." McKart v. United States, 395 U.S. 185, 193 (1969); accord Etelson v. Office of Personnel Management, 684 F.2d 918, 923 (D.C. Cir. 1982). As the Supreme Court has observed, the requirement of exhaustion allows the agency the opportunity to make a factual record, to exercise its discretion or to apply its expertise. It permits the agency to discover and correct its own errors. It prevents deliberate flouting of administrative processes. Finally, it avoids the necessity of premature judicial intervention. McKart, 395 U.S. at 194-95.

None of the underlying purposes of exhaustion apply here. The essence of plaintiff's claim is legal: the exercise of agency discretion and expertise and the development of a factual record ~~would not~~ be helpful or necessary to decide this legal issue. Plaintiff's unsuccessful attempts earlier to encourage defendants to reverse their present policies, the government's commitment to these policies as revealed in its vigorous defense, and the magnitude of decisions involved all indicate the futility of further administrative efforts and the inevitability of recourse to the courts. Finally, plaintiff's attempts to present its claims to the government through various means, Pl. Opp. at 8, demonstrate that while plaintiff did not seek full-scale administrative review, it did not "flout" the administrative process.

Thus finding that plaintiff need not have pursued administrative review and that an exhaustion prerequisite would

serve no benefit here, we hold that plaintiff may seek judicial review.

C. Certification of the Joinder
Question Under 28 U.S.C. § 1292(b)

Mountain States urges us either to reconsider our denial of its motion to dismiss for failure to join indispensable parties or to certify the issue to the Court of Appeals under 28 U.S.C. § 1292(b). We recognize Mountain States' legitimate concern for the interests of the absent parties. However, we see no reason to reverse our original ruling. The effective result of preventing plaintiff from litigating its claims were we to require joinder and the "public rights" exception to normal joinder rules combine to reinforce our holding that the absent parties are not "indispensable."

Further, we decline to certify the issue under § 1292(b). ~~The~~ statute permits certification when, on issuing an order, the district judge "shall be of the opinion that such an order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." To begin with, we do not believe there is "substantial ground for difference of opinion" with our conclusion that joinder here is unnecessary. This case clearly fits the doctrine of the "public rights" exception, as established by the Supreme Court in National Licorice Co. v. NLRB, 309 U.S. 350 (1940), and developed in subsequent cases. Contrary to Mountain States' assertion, the potential adverse effect on the absent parties does not reflect a

novel application of the doctrine. See, e.g., Jeffries v. Georgia Residential Finance Authority, 678 F.2d 919 (11th Cir. 1982), cert. denied, 459 U.S. 971 (1982); Swomley v. Watt, 526 F. Supp. 1271 (D.D.C. 1981); Natural Resources Defense Council v. Berklund, 458 F. Supp. 925 (D.D.C. 1978), aff'd, 609 F.2d 553 (D.C.Cir. 1979).

Mountain States argues that the "public rights" exception does not justify nonjoinder where plaintiff's requested relief would not just harm but would "invalidate the property rights" of the absent parties. Memo. in Support of Motion for Reconsideration at 30. Plaintiff, however, does not request direct cancellation of any property rights. It seeks compliance with certain statutes and regulations. Other courts have applied the "public rights" exception where a plaintiff seeks similar compliance with the law, even though the immediate effect of plaintiff's request would be harm to third parties. See NRDC v. Berklund, 458 F. Supp. 925⁴; State of Delaware v. Bender, 370 F. Supp. 1193 (D. Del. 1974).

This case typifies a "public rights" proceeding. Plaintiff seeks to protect and enforce the public's right to full compliance with the laws governing management of the public

⁴ Mountain States attempts to distinguish NRDC v. Berklund on the ground that the relief eventually provided merely delayed the issuance of coal leases. Yet in discussing the joinder problem earlier in the opinion, Judge Green gave no indication that she was not considering the full relief plaintiff there sought, which included enjoining defendants from issuing the leases without recognizing the Secretary's discretion to reject lease applications on environmental grounds and without preparing an environmental impact statement.

lands. The fact that Mountain States claims also to represent an alternative public interest does not weaken the force of the "public rights" doctrine in this case. See Sierra Club v. Watt, 608 F. Supp. 305, 325 (E.D.Cal. 1985) (opponents of public interest plaintiffs included a public interest group with a viewpoint different from the plaintiffs'). In Sierra Club, several environmental organizations and the State of California challenged, inter alia, the Secretary of the Interior's exclusion of lands less than 5,000 acres from wilderness study area status. In holding that the "public interest" exception justified nonjoinder of the owners of mineral rights in those lands, the court concluded "[w]hatever the outer boundaries of the public interest exception, the instant case falls within the heart of it." 608 F. Supp. at 325. We believe that the facts of this case parallel those of Sierra Club and that this case also "falls within the heart" of the "public interest" exception.⁵

Furthermore, an immediate appeal of the joinder issue is not likely to "materially advance the ultimate termination of the litigation." Today we reissue the preliminary injunction. Plaintiff, through its motion to consolidate, has evidenced its readiness to proceed to the permanent injunction proceeding. While defendants oppose this motion, we do not believe that final adjudication in this court represents a distant hope. An

⁵ Naartex Consulting Corp. v. Watt, 722 F.2d 779 (D.C. Cir. 1984), cited by Mountain States, sheds no light on the present case. In Naartex, the plaintiff was seeking directly to cancel a contract involving the absent parties. Furthermore, it was suing on behalf of its own interests in obtaining the contract; it did not raise the issue of the public interest.

interlocutory appeal to the Court of Appeals, whose own overloaded docket precludes early resolution, would not "materially" advance termination of this case.

Having denied both motions for reconsideration of the preliminary injunction, we now turn to the order itself.

II. Preliminary Injunction Order

The preliminary injunction order accompanies this opinion. We here highlight certain aspects of that order.

First, the preliminary injunction order enjoins only the federal defendants. Third parties are not subject to its prohibitions.

Second, we do not intend by this order to overturn or in any way to upset fee interests. Parties, such as Summit County School District, we understand, which have fee interests in the lands at issue in this case are not affected by the preliminary injunction.

Third, while the order specifically protects state selection and conveyance rights of the State of Alaska, the conveyance rights of Alaska natives, the continued construction of the All American Pipeline, and transactions or activity by Summit County School District. These are limited exclusions. Other third parties are not encouraged to seek exemption. We believe that Alaska, All American and the School District would be able to continue with their present plans regardless of the provisions in the order that mention them. In other words, these

parties are already exempted under the general terms of the order. We name them merely out of an abundance of caution to emphasize that the injunction does not affect them.

Fourth, paragraph 3(a) refers to filing required to be made by holders of existing mining claims in order to preserve their claims. See 43 C.F.R. § 3833.2-1. It does not permit defendants to authorize mining activity.

Finally, the injunction prohibits the federal defendants from taking any action inconsistent with the specific restrictions of the withdrawals and classifications in effect on January 1, 1981. Thus, activities that would have been permitted on the affected public lands under the previous withdrawals or classifications prior to revocation or termination, may still take place.

The parties focus on this issue with respect to lands classified for multiple use management under the Classification and Multiple Use Act of 1964 (CMUA), 78 Stat. 986 (1964). In particular, they disagree over whether such lands would nonetheless be subject to "disposal." The CMUA required the Secretary of the Interior to classify the public lands for either "disposal" or "multiple use management." Although the Act expired in 1970, the savings provision in the FLPMA extended all existing classifications "until modified under the provisions of this Act, or other applicable laws." 43 U.S.C. § 1701. In challenging classification terminations, plaintiff ultimately seeks to reinstate prior classifications, developed pursuant to the CMUA, until defendants comply with their statutory

obligations. Thus, the parties' dispute necessitates analysis of the classification scheme that the CMUA established.

We agree with plaintiff that the statute itself does not contemplate disposals of land when classified for multiple use management. The CMUA equates management for multiple use with retention. It commands the Secretary to decide "which lands shall be classified for disposal and which lands he considers to contain such values as to make them more suitable for retention in Federal ownership for interim management" 78 Stat. 986, § 1(b). The legislative history confirms this dichotomy between classifications for disposal on the one hand and classifications for retention under principles of multiple use management on the other. See S. Rep. No. 1506, 88th Cong., 2d Sess. at 2, reprinted in 1964 U.S. Code Cong. & Ad. News 3755, 3756 (Secretary to classify public lands "into at least two broad groups: those subject to disposal and those subject to ~~retention~~ retention").

In arguing that § 7 of the statute weakens this dichotomy, defendants read too much into the phrase "in accordance with this Act." We disagree that § 7 "obviously" allows the Secretary still to dispose of lands regardless of their classification. We read this provision as merely emphasizing that once the Secretary has classified lands for disposal "in accordance with this Act," nothing in the statute further hampers his power to effectuate the disposals.

By way of further elaboration, the applicable regulations on their face do not contradict the statutory

distinction between retention for multiple use management and disposal. To begin with, the regulations also link multiple use management classifications with retention. See e.g., 43 C.F.R. § 2400.0-2 ("retention and management"); § 2400.0-3(j) ("(1) sold . . . or (2) retained, at least for the time being, in Federal ownership and managed"); § 2429.2 ("Lands may be classified for retention . . . if they are not suitable for disposal"). Furthermore, the segregation provisions can be read to harmonize with this two-part framework. Defendants stress the provision keeping open classified public lands to "as many forms of disposal as possible consistent with the purposes of the classification and the resource values of the land." 43 C.F.R. § 2440.2. Defendants suggest that land classified for multiple use management need not be segregated from all forms of disposal and that disposal is proper under such a classification.

This argument, which we suspect reflects ~~much of~~ plaintiff's concern, assumes that "disposal" is necessarily inconsistent with retention in federal ownership. However, the regulations reveal that the term "disposal" covers more than sale or other methods of relinquishing title. A lease, for example, also represents a form of disposal. See 43 C.F.R. § 2440.1 ("settlement, location, sale, selection, entry, lease, or other forms of disposal" (emphasis added)). A lease might be "consistent with the purposes" of a particular classification for retention for multiple use management. A sale would not. Section 2440.2 thus may simply allow some forms of "disposal" on retained lands which do not undermine Federal ownership.

Similarly, § 2440.3(b) does not necessarily demonstrate that lands classified for multiple use management may be "conveyed out of Federal ownership." Mtn. States Br. at 4-5. The fact that these lands would still be subject to mining "location" does not show that they are also subject to the entire sequence under the mining laws that leads from location to fee ownership. This provision in the regulations weighs only the public interest in the "search" for mineral deposits. It says nothing about private acquisition of property rights.

Although we disagree with defendants' interpretation of the statute and regulations, we are bound by the terms of the individual classifications defendants have created. Plaintiffs have brought this suit to reverse classification terminations. They have never challenged the terms of the original classifications. In fact, they seek to reinstate the classifications that existed on January 1, 1981. ~~These~~ pre-1981 classifications all outlined their particular segregative effect pursuant to 43 C.F.R. § 2440.1. In some cases the segregation was complete. See Mtn. States Ex. A, New Mexico 7633. In others, the segregation provision kept the land open to all forms of "appropriation" except those under enumerated statutes. See Mtn. States Ex. A, Montana 944785. It is not clear whether the permissible forms of appropriation included sales or other conveyances of title. However, that issue is irrelevant in the present case. Plaintiffs have asked us to nullify classification terminations since 1981 pending defendants' compliance with the applicable statutes. Plaintiff requests reinstatement, not

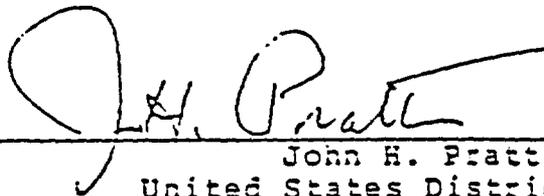
review. Our order therefore enjoins defendants from "taking any action inconsistent with the specific restrictions of a withdrawal or classification in effect on January 1, 1981."

(emphasis added). If the specific restrictions of a particular classification condoned some form of "disposal," the terms of the classification again apply.

III. Motion to Consolidate

Plaintiff's motion, filed shortly before the hearing, is now moot. We intend to allow the parties to present their respective cases at a permanent injunction hearing to be held as soon as possible. The attached preliminary injunction order sets a status call to determine the schedule for remaining discovery and any motions that will follow.

Orders consistent with this opinion have been entered this day.



John H. Pratt
United States District Judge

February 10, 1986

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL WILDLIFE FEDERATION,)
)
Plaintiff,)
)
v.)
)
ROBERT F. BURFORD, et al.,)
)
Defendants.)

Civil Action No. 85-2238

FILED

FEB 10 1986

ORDER

JAMES A. GANEY, Clerk

Upon consideration of plaintiff's motion for a preliminary injunction, defendants' opposition and plaintiff's reply, and

Finding that a preliminary injunction is necessary to preserve the relative positions of ~~the~~ parties until this case can be decided on the merits, and further

Finding that the plaintiff has shown a substantial likelihood of success on the merits, and further

Finding that plaintiff will suffer irreparable harm if the requested injunction is not issued, and further

Finding that issuance of the requested injunction would serve the public interest, it is by the court this 10th day of February, 1986,

ORDERED that plaintiff's motion for a preliminary injunction is granted, and it is

ORDERED that

(1) Defendants, their officers, agents, servants,

employees, and attorneys and those persons in active concert or participation with them are hereby enjoined from:

(a) modifying, terminating or revoking, in full or in part, under the Federal Land Policy and Management Act (FLPMA), any withdrawal or classification that was in effect on January 1, 1981; or

(b) taking any action inconsistent with the specific restrictions of a withdrawal or classification in effect on January 1, 1981, including, but not limited to, the issuance of leases, the sale, exchange or disposal of land or interests in land, the granting of rights-of-way, or the approval of any plan of operations;

(2) Terminations or modifications under the FLPMA of classifications and revocations or modifications under the FLPMA of withdrawals occurring since January 1, 1981, are hereby suspended until further action by this court;

(3) Nothing in this order shall be construed to prohibit or affect:

(a) The acceptance by the Department of the Interior of filings required to be made by Federal law;

(b) State selection and conveyance rights afforded to the State of Alaska by § 906 of the Alaska National Interest Lands Conservation Act, 94 Stat. 2371, or

(c) Native conveyance rights afforded to Alaskan natives by the Alaska Native Claims Settlement Act, 85 Stat. 688, and the Alaska National Interest Lands Conservation Act, 94 Stat. 2371;

(d) The construction of the All American Pipeline project pursuant to a right-of-way grant issued by the Bureau of Land Management on May 17, 1985;

(e) Any transactions or other activity on the Frisco Administrative Site No. 2 S1/2SE1/4, Section 26, Township 5 South, Range 78 West of the Sixth Principal Meridian in Summit County, Colorado.

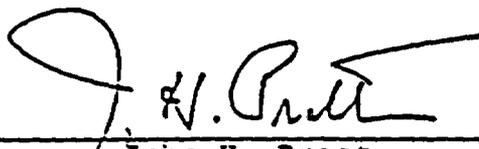
(4) Defendants shall forthwith cause a copy of this order to be published in the Federal Register and posted and made available to the public in defendants' offices in any State where this order might affect any person.

(5) Pursuant to Rule 65(c) of the Federal Rules of Civil Procedure, plaintiff shall post security for this injunction in the amount of one hundred dollars (\$100.00).

(6) ~~Nothing in~~ this order shall be construed to affect any party's right to appeal this order.

(7) This preliminary injunction shall take effect upon publication in the Federal Register or on the fifth day after this order is filed, whichever day occurs sooner, and it is

FURTHER ORDERED that the parties shall appear for a status call on February 19, 1986 at 9:30 a.m., Courtroom No. 12, United States Courthouse.



John H. Pratt
United States District Judge