DEPARTMENT OF THE INTERIOR

INFORMATION SERVICE

OFFICE OF THE SECRETARY

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SECRETARY CITES AUTHORITY TO CONTROL OIL LEASING ON WILDLIFE LANDS

Secretary of the Interior Fred A. Seaton today reaffirmed his conviction that he has the authority to regulate oil leasing on Federal wildlife lands and to withdraw lands for wildlife conservation.

The Secretary expressed this view in a letter to Senator Joseph C. O'Mahoney, chairman of the Senate Public Lands Subcommittee.

Secretary Seaton said an opinion of the Solicitor of the Department convinced him that "I not only have the necessary authority to withdraw lands for wildlife conservation purposes, but also that I have an administrative duty to effectuate harmoniously the objectives of both the Mineral Leasing Act and the various wildlife conservation programs."

The Secretary's letter was in response to a request of Senator O'Mahoney that the legal aspects of the question be studied by Solicitor Elmer Bennett in the light of a memorandum of law on the subject prepared by Stewart French, counsel for the Senate Interior Committee.

In memorandum opinion to the Secretary on the validity of the Department's regulations on oil and gas leasing in wildlife refuges, game ranges and coordination lands, the Solicitor declared:

1. The Secretary of the Interior is not authorized by law to effectuate the policies of the Mineral Leasing Acts so singlemindedly that he is thereby equally required to ignore the objectives of the wildlife conservation laws.

2. The granting of oil and gas leases on Federal lands is a matter within the discretion of the Secretary of the Interior and regulations reasonably requiring lessees to prevent waste and protect property are valid.

3. Under the permissive language in the Mineral Leasing Act, consent to lease may be granted subject to appropriate conditions prescribed by the Secretary.

4. Administrative withdrawals of public lands for wildlife sanctuaries or refuges in connection with national and international programs are valid.

5. Withdrawals made under the Pickett Act must be within the bounds of of a "public purpose," or one of the specified purposes, and the termination of such reservations depends either on an administrative or a congressional revocation.

Secretary Seaton said that the Solicitor's memorandum was prepared following consultations with Mr. French, as suggested by Senator O'Mahoney.

The text of the Secretary's letter and of the Solicitor's memorandum is attached.

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UNITED STATES
DEPARTMENT OF THE INTERIOR
Office of the Secretary
Washington 25, D. C.

August 7, 1958

Dear Senator O'Mahoney:

In accordance with your letter of May 22, 1958, I requested my Solicitor to examine further the questions you raise concerning my authority to issue oil and gas leases on Federal wildlife refuges and my authority to withdraw lands for such sanctuaries. Mr. Bennett has submitted a memorandum opinion on these matters, a copy of which I am enclosing for your information. Also, I am advised that Mr. Bennett has conferred with Mr. French as you suggested.

I am further convinced by Mr. Bennett's opinion that I not only have the necessary authority to withdraw lands for wildlife conservation purposes, but also that I have an administrative duty to effectuate harmoniously the objectives of both the Mineral Leasing Act and the various wildlife conservation programs.

I wish to thank you for the copy of the memorandum of law prepared by Mr. French and for your courtesy in having him consult with Mr. Bennett on these matters.

Sincerely yours,

(Sgd) Fred A. Seaton
Secretary of the Interior

Hon. Joseph C. O'Mahoney
Chairman, Public Lands Subcommittee
United States Senate
Washington 25, D. C.

Enc.

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UNITED STATES
DEPARTMENT OF THE INTERIOR
Office of the Solicitor
Washington 25, D. C.

M-36519

Memorandum

To: Secretary of the Interior

From: The Solicitor

Subject: Regulations relating to oil and gas leases on wildlife refuges, game range and coordination lands

You have requested an informal memorandum opinion concerning your authority to issue the regulations of January 8, 1958,[1] which were designed to protect wildlife sanctuaries in granting oil and gas leases under the Mineral Lands Leasing Acts. It has been suggested that you lack statutory or other authority thus to protect the public interests by issuing these regulations assuring the preservation of wildlife areas for the purposes for which they were set aside or acquired. It has been suggested further that you lack authority to withdraw, by administrative action, areas of the public domain for wildlife conservation purposes. In my opinion, neither suggestion is well-founded in the law.

1. The regulations.

Section 1 of the Mineral Leasing Act of February 20, 1920,[2] provides, with certain specifications and exceptions, that lands owned by the United States containing designated mineral deposits shall be subject to disposition. Your discretionary authority, as the Secretary of the Interior, in making such disposition stems primarily from section 17 of the act, as amended.[3] It clearly states in permissive language[4] that all lands subject to disposition under the act which are known or believed to contain oil and gas deposits "may be leased by the Secretary of the Interior."

1/ 23 F. R. 227.

2/ 41 Stat. 437, as amended, 30 U. S. C. 181.

3/ 30 U. S. C. 226.

4/ U. S. ex rel. Siegel v. Thoman, 156 U. S. 353, 360 (1895), and Terre Haute & I. R. Co. v. Indiana, 194 U. S. 579, 588 (1904).

Further, you are authorized in section 32[5] to prescribe necessary and proper rules and regulations and to do all things necessary to carry out and accomplish the purposes of the act. We will return to the subject of discretionary authority later.

It has been suggested that by reason of the exclusions in section 1[6] the maxim expressio unius est exclusio alterius applies and limits your authority. That maxim is subject to many safeguards and certainly cannot be properly invoked here. According to Sutherland,[7] it requires great caution in its application, and in all cases is applicable only under certain conditions:

> . . . As a tool of statutory interpretation the maxim is important only insofar as it is a syllogistic restatement that the courts will first look strictly to the literal language of the statute to determine legislative intent. And so, where the meaning of the statute is plainly expressed in its language, and if it does not involve an absurdity, contradiction, injustice, invade public policy, or if the statute is penal in nature or in derogation of the common law, a literal interpretation will prevail. Conversely, where an expanded interpretation will accomplish beneficial results, serve the purpose for which the statute was enacted, is a necessary incidental to a power or right, or is the established custom, usage or practice, the maxim will be refuted, and an expanded meaning given. In all cases the numerous intrinsic and extrinsic aids of interpretation are of importance in ascertaining whether the maxim will prevail [Emphasis supplied].

In this instance, any prescription of rules and regulations necessary to carry out the purposes of the Mineral Leasing Acts on wildlife sanctuaries inevitably involves other statutory programs and national commitments. See for examples:

1. Game Laws of May 25, 1900, 31 Stat. 187, 16 U. S. C. 701. See also 18 U. S. C. 41 et seq.

2. Game Birds Eggs Act of June 3, 1902, 32 Stat. 285, 16 U. S. C. 702.

5/ 30 U. S. C. 189.

6/ 30 U. S. C. 181.

7/ Statutes and statutory construction, (3d ed. by Horack, 1943) 2:418-422.

3. Migratory Birds Act of March 4, 1913, 37 Stat. 847, 16 U. S. C. 673.

4. Kansas Game Preserve Act of June 22, 1916, 39 Stat. 233, and March 10, 1928, 45 Stat. 300.

5. Migratory Birds Treaty Act of July 3, 1918, 40 Stat. 755, 16 U. S. C. 703-711.

6. Migratory Birds Protection Proclamation of July 31, 1918, 40 Stat. 1812.

7. Ozark National Forest Game Refuge Act of February 28, 1925, 43 Stat. 1091, 16 U. S. C. 682.

8. Ozark National Game Refuge Proclamation, April 26, 1926, 44 Stat. 2611.

9. The Upper Mississippi Wild Life and Fish Refuge Act of June 7, 1924, 43 Stat. 650, 16 U. S. C. 721 et seq.

10. Fish Conservation Act of May 1, 1928, 45 Stat. 478.

11. Fish and Game Preserve Act (Idaho), December 15, 1928, 45 Stat. 1022.

12. Fish Culture Act, January 29, 1929, 45 Stat. 1142.

13. Migratory Bird Conservation Act of February 18, 1929, 45 Stat. 1222, 16 U. S. C. 715-715r.

14. Migratory Bird Conservation Act of March 16, 1934, 48 Stat. 452, 16 U. S. C. 718-718h.

15. Wildlife Conservation Act of May 19, 1948, 62 Stat. 240, 16 U. S. C. 667b-667d.

16. Fish Restoration and Management Projects Act of August 9, 1950, 64 Stat. 430, 16 U. S. C. 777 et seq.

17. Migratory Birds Conservation Act of July 30, 1956, 70 Stat. 722, 16 U. S. C. 718a et seq.

18. Fish and Wildlife Act of August 8, 1956, 70 Stat. 1119, 16 U. S. C. 742a et seq.

In connection with the above statutory programs it is of interest to note that the Criminal Code specifically states that:

> Whoever, except in compliance with rules and regulations promulgated by authority of law, hunts, traps, captures, willfully disturbs or kills any bird, fish, or wild animal of any kind whatever, or takes or destroys the eggs or nest of any such bird or fish, on any lands or waters which are set apart or reserved as sanctuaries, refuges or breeding grounds for such birds, fish, or animals under any law of the United States or willfully injures, molests, or destroys any property of the United States on any such lands or waters, shall be fined not more than $500 or imprisoned not more than six months, or both. [Emphasis supplied][8/]

Even if the Mineral Leasing Acts, taken together were to be considered in the nature of a positive mandate to grant leases rather than as a grant of permissive authority to you as Secretary to take certain action in your discretion,[9/] careful consideration to the applicability of those wildlife conservation laws nevertheless would be essential. As a policy matter, you necessarily should adhere to the general proposition that you were not by law authorized to effectuate so single-mindedly the policies of the Mineral Leasing Acts, that thereby you equally were required to ignore the congressional objectives of the above wildlife conservation laws.[10/]

> . . . Frequently the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another, and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis upon its immediate task.[11/]

That principle, in my opinion, should control in this instance.

However, returning to the subject of your leasing authority, it is pertinent also to note that the Supreme Court has clearly indicated that the public interest is a factor to be considered in mineral leasing itself.[12/]

8/ 18 U. S. C. 41 as enacted into positive law June 25, 1948, 62 Stat. 686. Based largely on Conservation Act of January 24, 1905, 33 Stat. 614.

9/ U. S. v. Wilbur, 283 U. S. 414 (1931).

10/ In this connection see Southern Steamship Co. v. N. L. R. B., 316 U. S. 31 (1942).

11/ Ibid., p. 47.

12/ Chapman v. Sheridan-Wyoming Coal Co., Inc., 338 U. S. 621 (1950).

"The Mineral Lands Leasing Acts," it has said, "confer broad powers on the Secretary as leasing agent for the Government. We find nothing that expressly prevents him from taking into consideration whether a public interest will be served or injured by opening a particular mine. 'But we find no grant of authority to create a private contract right that would override his continuing duty to be governed by the public interest in deciding to lease or withhold leases.[13]

". . .[W]e find no authority to freeze this public interest into an irrevocable private property right."[14]

In connection with noncompetitive oil and gas leases issued earlier on lands within wildlife refuges, Assistant Secretary C. Girard Davidson has held:

> . . . With regard to such [wildlife refuge] lands [within the Bitter Lake Unit Area], the purpose of the Fish and Wildlife Service in protecting the wildlife of the refuge would be effectuated by the protection secured by the terms of the unit agreement prohibiting drilling on those lands except with the consent, in writing, of this Department and by the provisions, hereinafter set forth, to be included in this lease . . . The lands of the Unit Area, including the Wildlife Refuge lands within the Unit Area, have been designated as comprising a block of land regarded as logically subject to development under the unitization provisions of the Mineral Leasing Act. The drilling of a test well or wells will be on land outside the refuge. No drilling will be authorized within the refuge area at this time. Should oil or gas be discovered on unitized land outside the refuge and drilling within the refuge prove to be necessary and advisable for the conservation of natural resources, no drilling will be permitted within the refuge even then except <u>with the consent</u> in writing of the head of the agency having jurisdiction over the said refuge <u>and under such terms and conditions as he may deem necessary for the protection of the refuge</u>. The above provision in the unit agreement and the hereinafter-mentioned provisions of the lease will adequately protect the Wildlife Refuge from the devastation of its

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13/ P. 627-628.

14/ P. 629.

prime function, while at the same time making possible the adequate unitization and development of the oil pool [emphasis supplied].15/

Speaking generally of administrative power to condition consent, Mr. Chief Justice Hughes said in James, State Tax Commissioner v. Dravo Contracting Co., 302 U. S. 134, 148 (1937).

> Normally, where governmental consent is essential the consent may be granted upon terms appropriate to the subject and transgressing no constitutional limitation. Thus, as a State may not be sued without its consent and "permission is altogether voluntary," it follows "that it may prescribe the terms and conditions on which it consents to be sued." Beers v. Arkansas, 20 How. 527, 529; Smith v. Reeves, 178 U. S. 436, 441, 442. Treaties of the United States are to be made with the advice and consent of the Senate, but it is familiar practice for the Senate to accompany the exercise of this authority with reservations. Hyde, International Law, Vol. 2, §519. The Constitution provides that no State without the consent of Congress shall enter into a compact with another State. It can hardly be doubted that in giving consent Congress may impose conditions. See Arizona v. California, 292 U. S. 341, 345.

This Department has taken a similar position consistently in asserting the power to condition its administrative consent. As stated earlier by the Assistant Secretary:

> The power of the Secretary of the Interior to establish this legal relationship [between the United States and the lessees] flows from the fact that assignments may be made only with his consent, and "where governmental consent is essential, the consent may be granted upon terms appropriate to the subject and transgressing no constitutional limitation." James v. Dravo Contracting Co., 302 U. S. 134, 148. That is to say, the power to grant or withhold consent includes the power to impose reasonable conditions in giving consent. 36 Op. Atty. Gen. 29; 56, I. D. 174, 183; cf. Montana Eastern Pipeline Company, 55 I. D. 189, 191. The establishment of the legal relationship resulting from the approved assignment is such a condition and therefore valid.16/

15/ 59 I. D. 309, 311 (1946).

16/ 58 I. D. 712, 715 (1944). In this connection, see also Sunderland v. U. S., 266 U. S. 226, 235 (1924).

Since the granting of oil and gas leases on Federal lands therefore is a matter within your discretion,[17] any regulation you adopt reasonably requiring lessees to conform to certain specifications and instructions designed to prevent waste and protect property certainly will be sustained by the courts.[18]

2. Authority to withdraw lands.

The exercise of administrative discretion, whether based on implied authority or on specific statutory authority, often can be a source of argument. However, there are well-founded principles to guide an executive or an administrative officer in the exercise of such discretion. Long ago the Supreme Court noted that we have no officers in this Government from the President down to the most subordinate agent who does not hold office under the law, with prescribed duties and limited authority.[19] However, "a practical knowledge of the action of any one of the great departments of the government," that Court also has said, "must convince every person that the head of a department, in the distribution of its duties and responsibilities, is often compelled to exercise his discretion. He is limited in the exercise of his powers by the law; but it does not follow that he must show a statutory provision for everything he does. No government could be administered on such principles. To attempt to regulate, by law, the minute movements of every part of the complicated machinery of government would evince a most unpardonable ignorance on the subject. Whilst the great outlines of its movements may be marked out, and limitations imposed on the exercise of its powers, there are numberless things which must be done, that can neither be anticipated nor defined, and which are essential to the proper action of the government . . ."[20]

In this instance, however, statutory authority is not lacking. Section 1 of the Pickett Act of June 25, 1910,[21] authorized the President ". . . at any time in his discretion, temporarily [to] withdraw from settlement, location sale or entry any of the public lands of the United States, including . . . Alaska and reserve the same for water-power sites, irrigation,

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17/ U. S. ex rel. Jordan v. Ickes, 55 F. Supp. 875 (1943), aff'd 143 F. 2d 152, cert. den. 320 U. S. 801 and 323 U. S. 759.

18/ U. S. v. Grimaud, 220 U. S. 506, 516 (1911), Forbes v. U. S. 36 F. Supp. 131 (1940), aff'd 125 F. 2d 404 (1942), aff'd 127 F. 2d 862 (1942).

19/ The Floyd Acceptances, 7 Wall. 666, 676-677 (1868).

20/ U. S. v. Macdaniel, 7 Pet. 1, 14-15 (1833).

21/ 36 Stat. 847, 43 U. S. C. 141.

classification of lands, or other public purposes to be specified in the orders of withdrawals, and such withdrawals or reservations shall remain in force until revoked by him or by an Act of Congress." [Emphasis supplied]

Three observations are pertinent at this point in connection with that language: (1) The reservation authority is not limitless, but must be exercised within the bounds of a "public purpose," or one of the specified purposes; (2) the temporal extent of any such reservation for a public purpose depends either on an administrative or a congressional revocation; (3) within general authority of law such as the McCormack Act of August 8, 1950,22/ the President can vest and has vested this statutory authority to withdraw or reserve lands in the Secretary of the Interior.23/

On the general authority of the Secretary of the Interior to withdraw public lands, Acting Solicitor Cohen once said:

> The function of administering the public lands of the United States is conferred on the Secretary of the Interior by statute. Title 5, sec. 485, United States Code, provides:
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> > The Secretary of the Interior is charged with the supervision of public business relating to the following subjects [and agencies]:
> >
> > . . . [13] [P]ublic lands, including mines.
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> Also see Title 43, secs. 2 and 1201, United States Code. This statutory authorization includes authority over "the acquisition of rights in the public lands and the general care of these lands." Cameron v. United States, 252 U. S. 450, 459; Riverside Oil Co. v. Hitchcock, 190 U. S. 316, 324; Knight v. U. S. Land Association, 142 U. S. 161, 177, 181; United States v. Schurz, 102 U. S. 378, 395.
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> The courts have consistently adopted the view that the Secretary of the Interior is authorized to withdraw public lands. Northern Pac. Ry. Co. v. Wismer, 246 U. S. 283, 287; Chicago, Mi. & St. P. Ry. v. United

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22/ 64 Stat. 419, now re-enacted and codified as 3 U. S. C. 301 et seq.

23/ Ex. Ord. No. 10355, May 26, 1952, 17 F. R. 4831.

States, 244 U. S. 351, 356, 357; United States v. Morrison, 240 U. S. 192, 212; Wood v. Beach, 156 U. S. 548, 550; Riley v. Welles, 154 U. S. 578; Bullard v. Des Moines Railroad, 122 U. S. 167, 172; Wolsey v. Chapman, 101 U. S. 755, 768-770; Wolcott v. Des Moines, 5 Wall. 681, 688; Wilbur v. United States, 46 F. (2d) 217, 219 (aff'd, 283 U. S., 414); Stockley v. United States, 271 Fed. 632 (rev'd on other grounds, 260 U. S. 532). All of these cases involved the validity of orders of withdrawal issued by the Secretary of the Interior. In each case the withdrawal was held valid on the ground that the act of the Secretary of the Interior was, in legal contemplation, the act of the President. This has also been the position previously taken by this Department. Daniel P. Nolting, A. 17134, January 28, 1933.24/

The Acting Solicitor went further even insisting ". . . The President . . . has inherent power, apart from these statutes,25/ to make permanent reservations of public lands for Federal uses. Opinion of Attorney General to Secretary of the Interior, dated June 4, 1941 . . . ."26/ While it is unnecessary for you to claim or rely on any "inherent power" theory in this instance, it is of interest to note that the existence of such authority has been asserted in prior administrations.27/

3. Congressional hearings.

It has been suggested that the Public Lands Subcommittee of the Senate Committee on Interior and Insular Affairs may desire to hold hearings on this matter. The Legislative Reorganization Act of August 2, 1946,28/ "As an exercise of the rule-making power of the Senate," has vested in the Committee legislative jurisdiction over this subject.29/ Further, the legislative oversight provision (§136) of that act authorizes that Committee to conduct such studies and hearings and to propose such changes in the laws as it may deem necessary or proper. These provisions

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24/ 57 I. D. 331, 332-333 (1941).

25/ Referring to the Act of June 25, 1910, 36 Stat. 847, 43 U. S. C. 141-143, as amended by the Act of August 24, 1912, 37 Stat. 497.

26/ Ibid., p. 332.

27/ Cf. Steel Seizure Case, Youngstown v. Sawyer, 343 U. S. 579 (1952).

28/ 60 Stat. 812.

29/ See sections 101 and 102.

are not substantive law but simply procedural rules and committee jurisdictional authorizations of the Senate.

Being simply procedural matters, they do not disparage your authority to exercise your judgment, as an officer in the Executive Branch, and promulgate regulations effectuating both statutory programs and protecting the public interest in each.

4. Conclusion.

Withdrawals of public lands for national wildlife sanctuaries or refuges representing administrative action are only a part of essential national and international programs. They are, as I have shown, reasonable in scope and sound in law.

Harmonizing the objectives of the wildlife conservation program and the Mineral Leasing Act, in my opinion, represents effective administration as well as sound application of law.

(Sgd) Elmer F. Bennett

Elmer F. Bennett
Solicitor

Interior--Duplicating Section, Washington, D. C.