

Memorandum

cc: Olson
Tarr
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Subject

Legislative Veto Provision
Contained in § 204(e) of FLPMA

Date

September 12, 1983

To
FILES

From

NAME:

Ralph W. Tarr

OFFICE SYMBOL:

OLC

STATEMENT:

This memorandum memorializes the oral advice I recently conveyed to the Solicitor's Office of the Interior Department concerning conclusions we reached as to the legislative veto provision contained in § 204(e) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1714(e).. That section provides in pertinent part that the Committee on Interior and Insular Affairs of either House of Congress (subsequently designated as the Committee on Energy and Natural Resources in the Senate) may notify the Secretary of the Interior ("Secretary") that an emergency situation exists and direct the Secretary to withdraw certain public lands from disposition under laws pertaining to mineral leasing.

Previous litigation under this provision followed a Resolution of May 21, 1981, by the House Committee, directed to the Secretary, for the withdrawal of certain lands in the Bob Marshall, Great Bear, and Scapegoat Wilderness Areas. This Office determined, and the Department subsequently took the position in that litigation, that § 204(e) was unconstitutional insofar as it authorized a Committee of either House to direct the Secretary to take an action which would change the status of public lands. It was our view that the provision, as legislative action, violated the Bicameralism and Presentment Clauses, Art. I, § 1, and Art. I, § 7, cl. 2 and 3, and, as executive action, violated principles of separation of powers and the Incompatibility Clause, Art. I, § 6. See generally Memorandum in Support of Federal Defendants' Cross-Motion to Dismiss and/or for Summary Judgment and in Response to Memorandum in Support of Plaintiffs' Motions for Summary Judgment in Pacific Legal Foundation v. Watt, Civil No. 81-141-BLG, and Mountain States Legal Foundation v. Watt, Civil No. 81-168-BLG (D. Mont.)

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The Department's Memorandum submitted to the court at that time also concluded that the portion of § 204(e), which provided for committee veto was severable from the Secretary's leasing authority, which is contained in entirely different and earlier statutes, and from the Secretary's authority under § 204(e) to withdraw lands on his own initiative. Section 707 of FLPMA, 43 U.S.C. § 1701 note, provides that if any provision or its application of the Act is held invalid, the remainder of the Act and its application shall not be affected. See, e.g., Champlin Refining Co. v. Corporation Commission of Oklahoma, 286 U.S. 210 (1932), quoted with approval in Buckley v. Valeo, 424 U.S. 1, 108-109 (1976).

In the court decision which resulted, the district court upheld § 204(e) against the separation of powers challenge, on the ground that the scope and duration of a withdrawal order under § 204(e) were within the Secretary's discretion, subject to judicial review. The court did not view § 204(e) as a veto provision and thus did not address the bicameralism and presentment issues. The court added, however, that if the section were interpreted to permit a congressional committee, by majority vote, to direct the Secretary to withdraw wilderness areas until the date specified in the Resolution, the committee action would be, in effect, an attempt to amend the Wilderness Act of 1964, and would be unconstitutional under the Ninth Circuit's decision in Chadha v. INS, 634 F.2d 408 (9th Cir. 1980). See Pacific Legal Foundation (PLF) v. Watt, 529 F. Supp. 982 (D. Mont. 1982), on reconsideration, 539 F. Supp. 1194 (D. Mont. 1982) (final order of Aug. 31, 1982, unpublished).

The constitutionality of the legislative veto device has since been firmly and finally decided. INS v. Chadha, 51 U.S.L.W. 4907 (June 23, 1983); Consumer Energy Council v. FERC, 673 F.2d 425 (D.C. Cir. 1982), aff'd, 51 U.S.L.W. 3935 (June 29, 1983), Consumers Union v. FTC, 691 F.2d 575 (D.C. Cir. 1982), aff'd, 51 U.S.L.W. 3935 (June 29, 1983). There remains no doubt that the power to direct withdrawal of lands granted to a single Congressional Committee by § 204(e) is, by its terms, a legislative veto and is unconstitutional under Chadha.

At the request of Interior, this Office examined § 204(e) and the relevant case law in conjunction with a Resolution of August 3, 1983, by the House Committee on Interior and Insular Affairs, which purported to direct the Secretary to withdraw lands in the Fort Union Coal Region of Montana and North Dakota. We determined and advised Interior that the Resolution passed pursuant to § 204(e) purporting to direct withdrawal was unconstitutional as a legislative veto and was not salvageable under the construction of the court in PLF v. Watt. We further determined and advised that constitutional failure of the veto provision has no effect on the substantive authority granted to the Secretary of Interior by the statutes.