# United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

M-36993

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Memorandum

To: Secretary

From: Solicitor

Subject: Options Regarding Applications for Hardrock Mineral Prospecting Permits on Acquired Lands Near a Unit of the National Park System

## I. Introduction and Summary

You have asked for legal advice regarding decision options that are within the Secretary's authority with respect to applications now pending before the Department to approve mineral exploration activities (prospecting permits) on acquired federal lands outside the boundaries of a unit of the National Park System where such exploration might eventually lead to leasing and mining activities that could have adverse impacts on resources found within the park unit.

For the reasons that follow, I conclude that the Secretary has the legal authority:

(1) to reject the applications if the record supports a finding that mineral development activities that might eventually follow exploration could be detrimental to the resources or values of the park unit;

(2) to suspend action on the applications pending further study of possible impacts of mineral development on the park unit and on the environment generally;

(3) to grant the applications, with further protective stipulations to address possible impacts of mineral development on the park unit that might follow from the issuance of a development lease; or

(4) to grant the applications upon entering into an agreement with the applicant whereby the applicant agrees to waive any legal or equitable rights to a lease arising from the issuance of prospecting permits, so as not to constrain the Secretary's decision, after further study, whether lease issuance and mining would be in the public interest.

As the complexity of this answer suggests, your request for decisionmaking options requires analysis of a number of different areas of public land and administrative law. It raises, for example, issues concerning the process of deciding when and under what conditions to

approve prospecting permits and mineral leases on acquired federal lands. Another question is whether the environmental assessment prepared by the Forest Service and the Bureau of Land Management (BLM) must address the environmental consequences of mineral extraction, as opposed to exploration, which raises, in turn, questions about the extent to which a commitment to allow exploration is a commitment to allow mining. These issues are discussed in Section III. Another broad category of inquiry involves the responsibility of the Secretary in deciding whether to authorize activities outside units of the National Park System that may lead to adverse impacts inside these units. These issues are discussed in Section IV. Following this analysis, Section V analyzes the decision options available to you.

## II. Background

The Doe Run Company has submitted five applications for prospecting permits to explore for lead in the Doniphan/Eleven Point Ranger District of the Mark Twain National Forest in Missouri. The applications seek permits covering 7,970 acres. If approved, the applications would authorize the drilling of a minimum of 25 holes and a maximum of 200 holes.[1]

Missouri has a long history as a leading producer of lead and zinc, which occur in numerous deposits in three large areas of the State and as scattered occurrences in the Ozarks. The zinc and lead deposits of southwestern Missouri, together with those in adjacent parts of Kansas and Oklahoma, form the Tri-State District, which was once one of the most productive mining districts in the world. Ore deposits in this area consisted predominantly of zinc sulfide and lead sulfide.

The first mining activity in southwestern Missouri was in 1848, for lead ore near Joplin, Missouri. Because markets for zinc metal had not yet been developed, zinc ores were not mined or were discarded as waste in the initial 20 years of mining. By 1874, however, zinc was in demand, and Missouri became the country's leading producer of zinc ore. The State maintained this position for the next 43 years. Production began declining after 1916, with the last mine closing in 1966.

Lead was first discovered in Southeast Missouri by French explorers around 1700. Full-scale mining began around 1720 and has continued almost uninterrupted ever since. The region of the State around Bonneterre and Flat River is referred to as the Old Lead Belt. The St. Joseph Lead Company (the predecessor to the Doe Run Company) was formed here in 1864, and by 1933 had become the dominant mining company in the area. St. Joseph mined in the Old Lead Belt until depletion of the ore forced the gradual shutdown of activities. The last mine ceased operation in 1972.

[1] The Doe Run Company's current proposal contemplates the immediate drilling of 13 exploration holes. Depending on the results, Doe Run would drill between 12 and 187 additional holes in the permit area, after obtaining approval for each specific location.

Beginning in the mid 1940s facing eventual exhaustion of the ore reserves of the Old Lead Belt, St. Joseph mounted an extensive exploration program seeking out new reserves. This effort paid off in 1955 with the discovery of the Viburnum Trend, located approximately 35 miles west of the Old Lead Belt.

The Viburnum Trend, also known as the New Lead Belt, is a zone of mineralization which stretches south from the town of Viburnum for over 30 miles. Approximately 85% of domestic newly-mined lead, along with substantial quantities of zinc, copper, silver, cadmium, and cobalt, is produced from 9 mines in this mining district. About half of this metal is mined from Federal leases issued by the BLM; the other half is mined under leases issued by the State of Missouri.

With exhaustion of the Viburum Trend looming in recent years, Doe Run refocused its exploration efforts in the Doniphan/Eleven Point Ranger District of the Mark Twain National Forest. In 1979, BLM issued prospecting permits covering approximately 3,700 acres in this area to Doe Run. Following this exploration, Doe Run submitted four Preference Right Lease Applications (PRLAs), two in 1983 and two in 1989. BLM and the Forest Service prepared environmental impact statements on these applications, and in 1995, BLM rejected them, finding that Doe Run had failed to show it had made a "valuable discovery." In 1996, Doe Run submitted three new applications for prospecting permits. These applications followed a pending application for extension of a previously approved permit, and another application for prospecting permits submitted in 1991. These applications cover much of the same area covered by the earlier PRLAs.

Under applicable law, explained in more detail in Part III below, the Department of Agriculture (through the Forest Service) and the Department of the Interior (through BLM) each play a role in the issuance of prospecting permits. The Forest Service must determine whether development will interfere with the purposes for which the land was acquired. Section 402 of the Reorganization Plan No. 3 of 1946, 5 U.S.C. App. 1;[2] see also 43 C.F.R. §§ 3500.9-1(b), 3560.3-1.[3] If the Forest Service finds no interference with these purposes (which finding may be based on the inclusion of protective stipulations in the permit), BLM then decides whether to issue the permits and what conditions or stipulations to include (in addition to any called for by the Forest Service). 43 C.F.R. § 3562.8-4.

As a precursor to their respective decisions on Doe Run's applications for prospecting permits at issue here, BLM and the Forest Service released a draft environmental assessment (EA) regarding Doe Run's applications for prospecting permits in May, 1997. The two agencies received comments from, among others, the National Park Service, the Fish and Wildlife Service, Region VII of the Environmental Protection Agency, and the Attorneys

[2] All citations are to the 1994 United States Code, unless otherwise noted.

[3] All citations are to the 1997 Code of Federal Regulations, unless otherwise noted.

General of Missouri and Arkansas. Although each federal agency and state official raised the issue in a slightly different fashion, together their comments register strong objections to the EA's lack of any analysis of the adverse effects of mineral development (as opposed to exploration) on the resources of the area. To date, the Forest Service has not issued a decision on whether mining would interfere with the purposes for which the forest was created.

Of particular concern to the National Park Service is the prospect that mineral development could degrade water quality in the Ozark National Scenic Riverways (ONSR), a unit of the National Park System. The area proposed for prospecting is approximately 16 miles west of the ONSR's boundary. See map attached as Exhibit A. The area covered by the prospecting permits is in the Big Springs recharge zone, which feeds numerous springs in ONSR, including the three largest single conduit springs in the United States, and two National Scenic Rivers administered by the Park Service, the Jacks Fork and the Current. 16 U.S.C. § 460m. See Jeffrey L. Imes and Michael J. Kleeschulte, Seasonal Ground-Water Level Changes (1990-1993) and Flow Patterns in the Fristoe Unit of the Mark Twain National Forest, Southern Missouri U.S. Geological Survey, Water Resources Investigations Report 95-4096, (1995). It is also two miles north of Greer Spring on the Eleven Point River, a National Scenic River administered by the Forest Service. 16 U.S.C. § 1274(a)(2).

## III. The Secretary's Authority to Authorize Hardrock Mining Activity on Acquired Lands

The lands embraced in these applications were acquired under Section 6 of the Weeks Act of 1911, 16 U.S.C. § 515, which authorized the purchase of "forested, cut-over, or denuded lands within the watersheds of navigable streams" that the Secretary of Agriculture determines "may be necessary to the regulation of the flow of navigable streams or for the production of timber."

In 1917, Congress gave the Secretary of Agriculture broad discretion to permit mineral activity on these lands. Act of March 4, 1917, 16 U.S.C. § 520 (hereinafter "section 520"). This Act provided, in pertinent part:

> The Secretary of Agriculture is authorized, under general regulations to be prescribed by him, to permit the prospecting, development, and utilization of the mineral resources of the lands acquired under the [Weeks Act], upon such terms and for specified periods or otherwise, as he may deem to be for the best interests of the United States . . . .

The authority granted under section 520 was transferred from the Secretary of Agriculture to the Secretary of the Interior by section 402 of the Reorganization Plan No. 3 of 1946, 5 U.S.C. App. 1. The transfer statute added the following proviso:

> That mineral development on such lands shall be authorized by the Secretary of the Interior only when he is advised by the Secretary of Agriculture that such development will not interfere with the primary purposes for which the land was acquired and only in accordance with such conditions as may be specified by the Secretary of Agriculture in order to protect such purposes.

The Department of the Interior initially published regulations to implement this general grant of authority in 1947. 12 Fed. Reg. 8678 (1947). These regulations were revised in 1955 to include a prospecting permit/lease system of mineral development. 20 Fed. Reg. 6021 (1955).[4] The regulations were further revised and recodified in 1986 to, among other things, standardize the prospecting permit/lease system utilized for mineral development on lands acquired under the Weeks Act with the system used for mineral development under Mineral Leasing Act of 1920 (MLA). 51 Fed. Reg. 15204 (1986).[5] The regulations have remain unchanged since 1986. Under this regulatory system, the first step is to obtain a prospecting permit for exploration of a particular area. If, during the term of the permit, the applicant believes it has discovered a valuable mineral deposit, it may apply for a preference

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[4] Interior did not invent this regulatory system out of whole cloth. A prospecting permit/lease system had been adopted by Congress in the Mineral Leasing Act of 1920 (MLA) for a number of minerals. See, e.g., 30 U.S.C. § 201-l (1970) (coal prospecting permits) (repealed by Federal Coal Leasing Act Amendments of 1976); 30 U.S.C. § 211 (phosphate). Thus, under the MLA, the Secretary of the Interior is authorized to issue prospecting permits for phosphate, but if the permittee demonstrates the discovery of a valuable deposit within the area covered by the permit, he "shall be entitled to a lease for any or all of the land embraced within a prospecting permit." 30 U.S.C. § 21l(b).

[5] The Department had previously published regulations on preference right leases under the Mineral Leasing Act. See 43 C.F.R. Part 3500. In 1976, BLM revised these regulations to, among other things, define "commercial quantities" under 30 U.S.C. § 201(b) and "valuable deposit" under 30 U.S.C. §§ 211(b), 262, 272 and 282. 41 Fed. Reg. 2648 (1976). The preamble to the draft version of these regulations stated BLM's intention to apply these regulations to prospecting permits issued for hardrock minerals on acquired lands under the Reorganization Act, as well as under the MLA. 41 Fed. Reg. 2648 (1976). The preamble to the final rule, however, noted that Interior's authority under the Reorganization Plan does not require "any particular leasing system or standard. In the past, the Department has used the same standard under the Reorganization Plan as it used under the [MLA]." 41 Fed. Reg. 18845, 18847 (1976). Because the Department was "presently considering whether to adopt a different system for leasing minerals subject to the Reorganization Plan," it deleted those permits from this rulemaking. 41 Fed. Reg. 18847 (1976). Thus, between 1976 and 1986, the regulations governing mineral development on lands acquired under the Weeks Act did not contain specific definitions of "commercial quantities" and "valuable deposit." Since the 1986 revisions, the regulations for MLA minerals and for Weeks Act lands have been substantively the same.

right lease. 43 C.F.R. § 3563. If BLM confirms the existence of a valuable mineral deposit, it "shall issue" a preference right lease. 43 C.F.R. § 3563.3.

### A. Extent of the Secretary's Discretion Whether to Issue a Mineral Prospecting Permit on Acquired Lands

Section 520 allows the Secretary to permit, among other things, "prospecting" for such minerals "upon such terms . . . as he may deem to be for the best interests of the United States." 16 U.S.C. § 520. The applicable regulations say that prospecting permits "may" be issued. 43 C.F.R. § 3562.1. There is no case law construing the scope of the Secretary of the Interior's discretion to grant or reject applications for prospecting permits under section 520.

Analogous leasing provisions and case law provide some guidance on this issue. Specifically, as noted above, section 520 is similar to provisions found in the MLA, which give the Secretary of the Interior broad discretion to dispose of "deposits of coal, phosphate [and several other minerals] . . . in the form and manner provided by this chapter." 30 U.S.C. § 181. The Mineral Leasing Act for Acquired Lands (MLAAL) contains a similar provision. 30 U.S.C. § 352.[6]

Like section 520, particular sections of the MLA and the MLAAL specify that the Secretary's authority to authorize mineral development is discretionary, limited only by the public interest. That is, there appears to be no difference between the "as he may deem to be for the best interests of the United States" in section 520 and generic references to "the public interest" in other comparable statutes. See, e.g., 30 U.S.C. § 211(a) (MLA section authorizing the Secretary to lease lands containing deposits of phosphates "when in his judgment the public interest will be best served thereby"); see also 30 U.S.C. § 201(a) (authorizing the Secretary to issue coal leases "in the public interest" and "in his discretion").

The U.S. Supreme Court and other tribunals have addressed the scope of an agency's discretion to issue leases or permits, including the Secretary's authority to do so under the MLA. For example, in United States v. Wilbur, 283 U.S. 414 (1931), the Court affirmed the Secretary's denial of oil and gas leases under section 13 of the MLA, 30 U.S.C. § 221. The applications had been rejected by the Department to carry out the oil conservation policy

[6] Although acquired federal lands are involved here, the MLAAL does not apply to Doe Run's applications for lead prospecting permits, because it applies only to minerals that are leasable under the MLA, and lead is not such a mineral. See 30 U.S.C. § 352 (referring to, among other things, "coal, phosphate, oil, oil shale, gilsonite . . . , gas, sodium, potassium, and sulfur"). Lead is a "hardrock" mineral like gold, silver, uranium, and molybdenum. Hardrock mineral activity on ordinary public land is governed by the Mining Law of 1872. On acquired lands, development is governed by section 520.

of the President. See also Udall v. Tallman, 380 U.S. 1, 21 (1965) (holding that MLA "did not compel the issuance of prospecting permits"); Duesing v. Udall, 350 F.2d 748, 751 (D.C. Cir. 1965) (holding that the Secretary "has discretionary authority to refuse to issue [MLA] leases where he thinks issuance would not be in the public interest"), cert. denied, 383 U. S. 912 (1966); Pease v. Udall, 332 F.2d 62 (9th Cir. 1964); Stanford R. Mahoney, 12 IBLA 382 (1973) ("The Department of the Interior has no obligation to issue the prospecting permit."); W.A. Hudson, 78 I.D. 15, 17 (1971) ("It is within the discretion of the Secretary of the Interior to issue leases or prospecting permits on acquired lands . . ." under the "public interest" standard).

In Part V below, we will address the question of judicial review of a decision to grant or deny a prospecting permit.

### B. National Environmental Policy Act Compliance in the Issuing of Prospecting Permits

The Forest Service and the BLM for two decades have taken the position that, with the proper permit stipulation, the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321 et seq., requires an assessment of the environmental effects only of mineral exploration, as opposed to mineral extraction, in deciding whether to issue hardrock prospecting permits. That is, they have determined that the decision whether to allow exploration is distinct, legally and practically, from the decision whether to allow mining. To this end, these two agencies have included the following stipulation (or something much like it) in all hardrock prospecting permits issued in the past two decades:

> [N]o mineral development of any type is authorized hereby, and consent to the issuance of this prospecting permit as required by law and regulation (43 C.F.R. 3500.9-1(b)) is given subject to the express stipulation that no mineral lease may be issued for the land under permit without the prior approval of the USDA Forest Service and the proper rendition of an environmental analysis in accordance with the National Environmental Policy Act (NEPA) of 1969, the findings of which shall determine whether or not and under what terms and conditions the lease may be issued.

This special stipulation was prompted by a July 27, 1976, memorandum from the Assistant Solicitor for Minerals to the Director of the BLM on NEPA compliance in issuing prospecting permits under the MLA (hereinafter "1976 Memorandum"). The Assistant Solicitor noted that BLM "has total discretion to refuse to issue a prospecting permit" but that issuance of the permit under the MLA "commits the Department to issue a lease" where the permittee satisfies the Secretary that a "valuable deposit" has been discovered of the mineral for which the permit was issued. Id. at 1.[7] Therefore, the issuance of the permit is

[7] See supra note 4 and accompanying text.

"the last time at which the Secretary has full discretion to determine whether to authorize full-scale mining operations." Id. For that reason, compliance with NEPA at the prospecting permit stage requires the Department to "assume that the prospecting will be successful, and that mining will occur," and therefore, based on this assumption, the BLM must evaluate the environmental effects of mining. Id. at 2 (emphasis in original). As the Assistant Solicitor noted:

> While this analysis is admittedly speculative, it will serve its intended purpose: to determine, before committing the Department to mineral leasing in an area, whether mining is consistent with the proper use of the land in the proposed permit area.

Id. The 1976 Memorandum closed by noting that the IBLA had held, in Stanford R. Mahoney, 12 IBLA at 382, 388 (1973), that the Department may avoid an environmental assessment of mineral extraction at the exploration permit issuance stage by including in the permit a stipulation postponing that assessment until a lease is applied for, and reserving the authority to make an independent determination at that point whether to issue a lease. That IBLA decision, the 1976 Memorandum noted, had never been challenged but neither had the Solicitor's Office ever expressed agreement with it.

Sometime after this memorandum was completed, the Department of Agriculture developed the permit stipulation quoted above for use in issuing prospecting permits for lead ore in the Mark Twain National Forest in Missouri. Congressman Richard Ichord then asked the American Law Division of the Library of Congress' Congressional Research Service to render its opinion on whether the stipulation was within the Department's authority for Weeks Act lands. The answer, contained in a memorandum issued December 6, 1977, (hereinafter "1977 CRS Opinion"), was in the affirmative. Without extended analysis, the 1977 CRS Opinion concluded that the stipulation "falls within the Secretary [of Agriculture]'s authority to veto mineral development which would interfere with, or to impose conditions to protect, . . . primary purposes of national forests. Further support for such stipulation can be found in [NEPA]." Id. at 4.[8]

Nine years after this, in April 1986, an acting regional attorney in the Department of Agriculture's Office of General Counsel addressed an important issue raised by the use of

[8] The 1977 CRS Opinion went on to state that the Department of the Interior did not then have regulations in place governing hardrock mineral leasing on acquired federal lands, and thus there was no "basis in the statutes or regulations for the assertion that permits for lead ore prospecting in Weeks-Law-acquired national forest lands must provide for preference right leasing." Id. at 5. In fact, as noted earlier, see supra note 5, BLM did have regulations in place on the subject. The author of the 1977 CRS Opinion apparently was under the impression that, because BLM in 1976 chose not to standardize the regulations governing mineral development under the MLA with the regulations governing mineral development on Weeks Act lands, BLM therefore had no regulations on the latter.

this permit stipulation; namely, whether the Forest Service's stipulation, reserving its authority to consent to the lease, is consistent with the Department of the Interior regulations (hereinafter "1986 Agriculture OGC Memorandum"). The question arose because Interior regulations in effect at the time did not expressly contemplate Forest Service consent on so-called preference right hardrock leases on acquired lands (though the regulations did contemplate such consent on competitive leases and on leases issued under other regulations). See 43 C.F.R. § 3501.2-6 (1985).

The 1986 Agriculture OGC Memorandum noted that the stipulation requires a NEPA analysis, which includes an "assessment of the kind and extent of necessary surface disturbance [from mining] and measures to be taken to reclaim that disturbance," which in mm informs whether a "valuable deposit" of mineral has been discovered. 1986 Agriculture OGC Memorandum at 2. As the memorandum put it, "[w]hether a positive 'valuable deposit' determination could be made in the face of a negative NEPA analysis is questionable." Id. Thus, the memorandum concluded, "[c]urrent BLM regulations notwithstanding, it is within the authority of the Secretary of Agriculture, on acquired lands, to withhold consent to a mineral lease after consenting to a BLM hardrock prospecting permit." Id. at 3.

Five years later, the same office responded to further questions on this subject raised by a letter from Doe Run. In its brief July 5, 1991, memorandum, Agriculture's General Counsel's Office observed that the Forest Service could consent to mineral development so long as it did not interfere with "either of . . . the two purposes" for which the lands were acquired under the Weeks Act; namely, "regulation of the flow of navigable streams . . . [and] the production of timber." Id. at 2. It also noted that the Forest Service could "segment or delay" the decision whether to consent to mineral development through the use of a permit stipulation that "shifts the timing of [consent] . . . from the prospecting permit stage to the leasing and development stage." Id.

This segmentation of the decisionmaking process, and postponement of environmental analysis of mining activity from the permit to the lease issuance stage, was upheld by the Interior Board of Land Appeals in Missouri Coalition for the Environment v. Bureau of Land Management, 124 IBLA 211 (1992). Environmental groups, joined by, among others, the State of Arkansas, had challenged BLM's decision to issue Doe Run special use permits to drill exploratory holes on land in this region on which the company had already secured prospecting permits, and on which it had pending applications for preference right leases. The exploration proposal was in response to a Forest Service request for "more precise information regarding anticipated lead mining operations," and was also to help BLM decide whether the company had discovered a valuable mineral deposit. Id. at 213. BLM and the Forest Service prepared an environmental assessment (EA) under NEPA that looked only at the environmental impacts of exploratory drilling, and determined the proposal would not have a significant effect on the environment. The environmental groups and their allies contended the assessment should have also addressed the impact of possible mining.

IBLA upheld the limited scope of the EA. It observed that lease issuance is not automatic upon completion of exploration. "At the very least, issuance of a lease will be preceded by another environmental review" which will consider the environmental impact of mineral development. Id. at 217. IBLA did acknowledge the possibility that BLM would be "required to issue a lease [to Doe Run] and then to permit mineral development in some form." Id. at 218. But that would happen only if Doe Run made a discovery of lead "of commercial quality, in commercial quantities, and in a place that permits economical extraction . . . ." Id.

IBLA also noted that the Forest Service must give its consent to leasing, and that it had reserved its authority to consent at the lease stage by the stipulation that was included in the prospecting permit. Such a stipulation was proper, IBLA held, relying on its earlier decision in Stanford R. Mahoney. Id. at 218.

### C. The Secretary's Discretion in Deciding Whether to Grant or Deny a Preference Right Lease Application Following Grant of an Exploration Permit

The Missouri Coalition for the Environment decision does not squarely answer at least one key question posed by the current applications: If the Secretary decides to grant these prospecting permits, is there any legal constraint on the ability of the Secretary (as well as the Forest Service) to reject an application for a preference right lease that may follow, on the ground that full-scale mining may produce unacceptable environmental impacts?

IBLA suggested in Missouri Coalition for the Environment that the circumstance might arise where the permittee would be entitled to a lease and Interior would be required "to permit mineral development in some form." 124 IBLA at 218. The problem might arise this way: Suppose the prospecting permit is issued with the standard stipulation quoted earlier, and, following exploration, the permittee applies for a preference right lease, arguing that a "valuable mineral deposit" has been discovered. Interior then prepares a NEPA document that analyzes the potential environmental impacts of mineral development should the lease be issued. That document discloses that mining could cause potentially severe impacts on the environment, including the nearby unit of the National Park System, and it also reveals that the environmental damage cannot be mitigated through lease stipulations or regulations. May the Secretary deny the lease application, without incurring any legal liability, such as a takings claim?

It must be fairly said that the answer is not free from doubt. On the one hand, the stipulation in the prospecting permit disclaims any authorization of "mineral development," and specifically provides that the decision to lease requires both the "prior approval" of the Forest Service, and compliance with NEPA. Further, it says that the "findings" of the NEPA analysis "shall determine whether and under what terms and conditions the lease may be issued." This comes close to saying that a preference right lease application may be rejected without liability if unmitigable and unacceptable environmental impacts would result from mineral extraction.

There is, however, a credible argument to the contrary. BLM's implementing regulations for Weeks Act lands provide that if the permittee believes it has discovered a valuable mineral deposit during the term of the permit, it applies to the BLM for issuance of a preference right lease. 43 C.F.R. § 3563.1-2. BLM then determines whether the permittee has discovered a valuable mineral deposit. If BLM confirms the existence of a valuable mineral deposit, under BLM regulations, it "shall issue" a preference right lease. 43 C.F.R. § 3563.3.[9]

It could be argued that this regulation is contrary to the lease stipulation discussed above. Because agencies are ordinarily bound by their own regulations, see, e.g., United States v. Nixon, 418 U.S, 683, 696 (1974), any inconsistency between the regulation and the stipulation arguably should be resolved in favor of the regulation. In other words, to the extent the Secretary has committed in a regulation to issue a lease to a prospecting permittee who finds a valuable deposit, the Secretary may not pull back from that commitment through a contrary stipulation in the prospecting permit.[10]

Court decisions in at least somewhat analogous circumstances add to the uncertainty of whether issuance of a prospecting permit narrows or even eliminates the Secretary's discretion to choose whether or not to issue a mineral lease. These decisions examine the extent to which NEPA analysis can be postponed when a further decision is necessary before full-scale development can proceed. The courts in these cases generally ask whether the initial decision (such as to issue a prospecting permit) carries with it some irretrievable commitment of resources. In Sierra Club v. Peterson, 717 F.2d 1409 (D.C.Cir. 1983), for example, the Forest Service and the Department of the Interior conducted an environmental assessment prior to the issuance of several leases for oil and gas exploration, and concluded

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[9] Similarly, as the Assistant Solicitor observed in his 1976 Opinion discussed earlier, the MLA appears to require the Secretary to issue leases after issuing prospecting permits in certain circumstances. 1976 Opinion at 1. The MLA provides that if the permittee demonstrates the discovery of valuable deposits within the area covered by a permit, he "shall be entitled to a lease for any or all of the land embraced in the prospecting permit." 30 U.S.C. § 211 (b); see also 30 U.S.C. § 272 (sulphur deposits); 30 U.S.C. § 282 (potash deposits). The courts have read it as requiring lease issuance. See Natural Resources Defense Council v. Berklund, 609 F.2d 553, 557 (D.C.Cir. 1979) (MLA requires issuance of a preference right lease upon a showing by the permittee of a discovery of commercial quantities of coal). The MLA's coal preference right lease section refers to discovery of "commercial quantities" of coal, while comparable provisions for other minerals refer to discoveries of "valuable deposits." There appears to be no difference between these concepts.

[10] It should be noted that, because the Department of Agriculture does not have regulations governing mineral development on Weeks Act lands, it is likely that the Secretary of Agriculture can more comfortably rely on the joint stipulation to protect forest lands at issue. But see Part III.D, infra.

that an environmental impact statement was unnecessary. Most of the leases contained a "no surface occupancy" ("NSO") stipulation that "preclude[d] surface occupancy unless and until such activity is approved by the Forest Service." About twenty percent of the leases contained no "NSO" stipulation. The court held that, for those leases containing the NSO stipulation, an EIS was not required because the Department had retained the authority "to preclude all surface disturbing activities on land leased with a NSO Stipulation until further site-specific environmental studies are made." Id. at 1412. On the other hand, the court ruled, an EIS was required prior to issuance of the leases without the NSO stipulation, because such a lease was a "commitment" to permit some surface disturbing activity. Id. at 1414-15; accord Conner v. Burford, 848 F.2d 1441, 1449 (9th Cir. 1988).

On the other hand, in Sierra Club v. Hathaway, 579 F.2d 1162 (9th Cir. 1978), the court approved the issuance of leases under the Geothermal Steam Act of 1970 before the preparation of a site-specific environmental impact statement, holding that pursuant to the "staged leasing" provided for under the Act and the Department's regulations, the Department did not make an irretrievable commitment to permit full-scale operations at the exploration stage. Id. at 1168. A similar result was reached in Park County Resource Council v. Department of Agriculture, 817 F.2d 609 (10th Cir. 1987), where the court upheld the Department's decision not to conduct an EIS on an oil and gas lease issued under the Mineral Lands Leasing Act, 30 U.S.C. § 226-2 (1982). The court ruled that the lease itself "does not cause a change in the physical environment," and that the lessee must, in order to work the lease, submit site-specific proposals to the Department, which are subject to continuing environmental review. 817 F.2d at 622. "[T]he steps from leasing to full field development are not 'so interdependent that it would be unwise or irrational to complete one without the others' -- the benchmark signaling the need for a cumulative impact EIS." Id. at 623.

Whether and to what extent the government would be making a legal commitment to allow some kind of mineral development if it issued prospecting permits to Doe Run may turn to some extent on the government's authority to address environmental impacts through lease terms. In Natural Resources Defense Council v. Berklund, 458 F. Supp. 925, 938 (D.D.C. 1977), for example, the Department and the plaintiffs agreed that NEPA applies to the issuance of preference right leases, in part to inform the setting of the terms of the lease. The lease terms, and particularly the environmental mitigation and protection requirements they set, influence the permittee's cost of developing the mineral discovered. These costs, in mm, influence BLM's determination whether a "valuable deposit" has been discovered. Natural Resources Defense Council v. Berklund, 609 F.2d 553, 558 (D.C. Cir. 1979) (affirming district court opinion at 458 F. Supp. 925 (D.D.C. 1977)); cf. Kerr-McGee v. Hodel, 630 F. Supp. 621 (D.D.C. 1986), vacated on other grounds, 840 F.2d 68 (D.C.Cir. 1988) (Florida phosphate). It is well settled under the Mining Law, for example, that the determination of whether a valuable mineral deposit has been discovered involves consideration of whether a profit can be made after complying with applicable environmental regulatory laws. See, e.g., United States v. Kosanke Sand Corporation, 80 I.D. 538, 546-547 (1973); United States v. Pittsburgh Pacific Company, 84 I.D. 282, 290 (1977), aff'd sub

Nom., South Dakota v. Andrus, 462 F. Supp. 905 (D.S.D. 1978), aff'd. 614 F.2d 1190 (8th Cir.), cert. denied, 449 U.S. 822 (1980).

Counsel for Doe Run appears to appreciate the complexity of this legal landscape. During our legal review, and before issuance of this Opinion, counsel for Doe Run submitted a "Briefing Paper," which addresses many of the issues discussed here. In this Briefing Paper, counsel for Doe Run appears to take the position that issuance of a prospecting permit does not mandate lease issuance or mine development, and thus, does not confer any legal or equitable rights on the permit holder. Briefing Paper at 4-5. Nevertheless, the Briefing Paper does not squarely face the question of whether a lease stipulation can override a regulation, if all other elements of the regulation have been satisfied. As noted earlier, IBLA failed to address the same question in its decision in Missouri Coalition for the Environment, 124 IBLA 211 (1992). IBLA's holding, and Doe Run's Briefing Paper, therefore, leave a critical question unanswered -- the extent to which a legal commitment to mineral development is being made in a prospecting permit.

How these uncertain contours of the legal landscape might affect the Secretary's decisionmaking options are considered further in Section V, below.

D. The Requirement of Forest Service Consent to Lease

As noted earlier, assuming the prospecting permits are issued to Doe Run, both the terms of section 520 and the permit stipulation discussed above require that the consent of the Forest Service be obtained before a lease can be issued. But the authority of the Forest Service to withhold or condition consent is limited to safeguarding the purposes for which the lands were acquired under the Weeks Act; namely, "regulation of the flow of navigable streams . . . [and] the production of timber." 16 U.S.C. § 515. The "flow of navigable streams" might relate to some extent to the Park Service's concerns about mining interfering with the hydrology of the region and water flows in the ONSR, but it seems a stretch to conclude that the Forest Service has authority to use its consent provision simply to protect the national park system unit. To the extent the Forest Service lacks authority to protect the park unit in deciding whether to consent to lease issuance -- or at least is not required to exercise its authority to protect the park unit -- the responsibility to address possible park impacts in the permit/lease decision is left solely to the Secretary of the Interior.

One protracted dispute involving the Forest Service's consent to the issuance of a preference right lease sounds a cautionary note. In the 1960s BLM issued prospecting permits under the MLAAL for phosphate exploration on acquired federal lands in Florida. These prospecting permits pre-dated the development of the joint Forest Service/BLM stipulation now in use, but did contain other stipulations required by the Forest Service to protect surface resources in the event leases were issued. The permittees then applied for preference right leases. Following preparation of an environmental impact statement under NEPA, the Forest Service submitted stipulations to be included in the leases. One of these required the lessee to reclaim the area to the conditions that existed prior to mining. An interagency task

force was formed to determine whether reclamation to this standard was technologically feasible. When the task force reported that there was no reasonable likelihood the area could be reclaimed to this standard, the Secretary of the Interior rejected the preference right lease applications.

The permittee sued, and the federal district court upheld the Secretary. Kerr-McGee, 630 F. Supp. 621. The Court of Appeals vacated the decision and dismissed the case as moot, because Congress had, in the meantime, designated the permit area as part of the National Wilderness Preservation System, effectively prohibiting mining. The Court noted that the permittees could bring a takings action in the U.S. Claims Court, intimating no view on the merits of such a claim. 840 F.2d 68 (D.C.Cir. 1988). Kerr-McGee subsequently sued in the Claims Court, and when the trial judge expressed doubts about jurisdiction, the lessees obtained a congressional reference. (Congress enacted a bill asking the Court of Claims for an advisory opinion.) The Court of Claims then decided to address whether the Forest Service and Interior had given the company an adequate opportunity to determine whether reclamation was possible. Kerr-McGee Corp. v. United States, 36 Fed. Cl. 776 (1996). Eventually the case was settled when the U.S. agreed to give the permittees several million dollars in return for dismissing the claims. While this dispute ultimately did nothing to clarify the law regarding the scope of the Forest Service's consent and its authority to incorporate protective terms and conditions in a prospecting permit, it illustrates possible limits on federal agency authority over mineral development once a prospecting permit is issued.

We will address specific decisionmaking options for the Secretary after we discuss the impact of the National Park Organic Act.

## Iv. The Secretary's Duties and Authorities Under National Park Service Laws

### A. The Organic Act Provisions

Congress has made it clear that the Secretary bears a heavy responsibility to safeguard the National Park System. [11] The 1916 Organic Act provides the general statutory basis for the management of the National Park System, as follows:

> The [National Park Service] thus established shall promote and regulate the use of the Federal areas known as national parks, monuments and reservations hereinafter specified . . . , by such means and measures as conform to the

[11] The National Park System is defined to "include any area of land and water now or hereafter administered by the Secretary of the Interior through the National Park Service for park, monument, historic, parkway, recreational, or other purposes." 16 U.S.C. § lc(a). This Opinion occasionally uses the shorthand "parks" to refer to units of the National Park System.

> fundamental purposes of the said parks, monuments, and reservations, which purpose is to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.

16 U.S.C. § 1.

The most recent generic statement by Congress on this subject came in 1978, when it amended 16 U.S.C. § la-l to read:

> Congress further reaffirms, declares, and directs that the promotion and regulation of the various areas of the National Park System, as defined in [16 U.S.C. § lc], shall be consistent with and founded in the purpose established by [16 U.S.C. § 1], to the common benefit of all the people of the United States. The authorization of activities shall be construed and the protection, management, and administration of these areas shall be conducted in light of the high public value and integrity of the National Park System and shall not be exercised in derogation of the values and nut-noses for which these various areas have been established, except as may have been or shall be directly and specifically provided by Congress.

16 U.S.C. § la-l (emphasis added)(hereafter, 1978 Amendment).

This language was originally submitted to Congress by the Department, with the following explanation:

> This provision provides that the protection, management and administration of the various areas of the [national park] system . . . must be consistent with those high purposes originally established by Congress with the creation of the National Park Service in 1916. While this standard of decisionmaking should be self evident, we feel that the continued pressure upon the National Park System today makes a restatement and reenforcement of these basic premises very appropriate.

Letter from Cecil D. Andrus, Secretary of the Interior, to Morris K. Udall, Chairman of the House Committee on Interior and Insular Affairs, reprinted in H.R. Rep. No. 95-581, at 33 (1978); see also S. Rep. No. 95-528, at 19 (1978).

The House Committee on Interior and Insular Affairs adopted the Interior-proposed provision and noted in its report that "the Secretary is to afford the highest duty of protection and care" to park lands. H.R. Rep. 95-581, at 21 (1978). The Senate Committee on Energy and

Natural Resources reported the identical provision with the following comments:

> This restatement of these highest principles of management is intended to serve as the basis for any judicial resolution of competing private and public values and interests in . . . areas of the National Park System.
>
> The Secretary has an absolute duty, which is not be compromised, to fulfill the mandate of the 1916 Act to take whatever action and seek whatever relief as will safeguard the units of the National Park System.
>
> [T]he primary purpose is to refocus and insure that the basis for decision-making concerning the National Park System continues to be the criteria provided by 16 U.S.C. § 1 . . . . [T]his provision suggested by the administration would appear to be particularly appropriate. The Secretary is to afford the highest standard of protection and care to the natural resources within . . . the National Park System. No decision shall compromise these resource values except as Congress may have specifically provided.

S. Rep. No. 95-528, at 8, 9, 13-14.

As this legislative history suggests, these statutory provisions were intended to be the sole source of any judicially enforceable duty of the Secretary with respect to park lands.[12] See also Sierra Club v. Andrus, 487 F. Supp. 443, 449 (D.D.C. 1980), aff'd on other grounds, 659 F.2d 203 (D.C.Cir. 1981) (holding that only statutory duties, not non-statutory "trust" duties, are imposed on the Secretary in the management of the National Park System).

[12] The legislative history also indicates that this congressional clarification was at least partially a reaction to recently concluded litigation involving Redwoods National Park. See S. Rep. No. 95-528, at 14 (1977) ("The committee has been concerned that litigation with regard to Redwoods National Park and other areas of the system may have blurred the responsibilities articulated by the 1916 Act creating the National Park Service."). In that litigation, the court found that the Secretary owes both a federal common law trust obligation and a statutory obligation when administering Redwoods National Park. See Sierra Club v. Department of Interior, 424 F. Supp. 172 (N.D. Cal. 1976); Sierra Club v. Department of Interior, 398 F. Supp. 284 (N.D.Cal. 1975); Sierra Club v. Department of Interior, 376 F. Supp. 90 (N.D.Cal. 1974).

Consequently, the inquiry into the Secretary's responsibilities in managing the National Park System should focus on the language of 16 U.S.C. §§ 1 and la-1.[13]

### B. The 1978 Amendment to the Organic Act and the Exercise of Secretarial Authority over Activities on Non-Park Lands - In General

We look first at the text of the 1978 Amendment, for as the Supreme Court reminds us, "the starting point for interpreting a statute is [its] language." Consumer Product Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980). Neither the 1916 Organic Act nor the 1978 Amendment explicitly addresses the issue of extraterritorial reach. In particular, the 1978 Amendment does not distinguish between activities on inholdings within the outer boundaries of the park unit, and activities beyond park boundaries. On the other hand, unlike the 1916 Organic Act (which speaks of promotion and regulation of the use of the national park system areas), the 1978 Amendment speaks explicitly of "protection" as well as "management and administration" of the various areas of the national park system. The focus on protection carries some implication that external threats fall within its reach, an implication supported, or at least not contradicted, by the legislative history discussed above. Finally, the reference to the "authorization of activities" in the second sentence of 16 U.S.C. § la-l is not limited to activities inside the boundaries of national park system units. It can, then, be read to encompass the Secretary's authority over hardrock mineral activity in 16 U.S.C. § 520 in circumstances where park units might be affected by the exercise of that authority.

Federal courts have found in these generic park management statutes Secretarial power to regulate non-federal activities and interests occurring off federal lands that pose threats to park lands. See, e.g., United States v. Vogler, 859 F.2d 638 (9th Cir. 1988) (regulation of vehicle use on claimed non-federal right-of-way within a national park unit); Free Enterprise Canoe Renters Ass'n v. Watt, 711 F.2d 852 (8th Cir. 1983) (regulation of canoeing activity on non-federal land within the Ozark National Scenic Riverways' external boundary); United States v. Brown, 552 F.2d 817 (8th Cir.) (prohibition of hunting on waters owned by State of Minnesota but within external boundary of Voyageurs National Park), cert. denied, 431 U.S. 939 (1977); United States v. Moore, 640 F. Supp. 164 (S.D.W.Va. 1986) (regulation of pesticide application on non-federally owned land within external boundary of the New River Gorge National River). It should be noted, however, that each of these cases involved

[13] Sections 1 and la-l are made applicable to the Ozark National Scenic Riverways by 16 U.S.C. § 460m-5, which directs that the ONSR be administered "in accordance with," among others, "laws of general application relating to the areas administered and supervised by the Secretary through the National Park Service."

activities that were occurring on non-federal lands within the external boundaries of National Park System units. [14]

More than a decade ago, the Solicitor's Office addressed the earlier decisions in this line of cases in considering the nature and extent of the Secretary's authority to regulate activities on non-federal land outside the external boundaries of a national park. See Memorandum to Director, National Park Service, from Associate Solicitor, Division of Conservation and Wildlife (September 20, 1985) (attached as appendix to *Impacts of Air Pollution on National Park Units: Hearings before the Subcommittee on National Parks and Recreation of the House Committee on Interior and Insular Affairs*, 99th Cong. 371, 388 (1985)) (hereinafter "1985 Opinion"). This Opinion found "no obvious reason why" the power to regulate activities off federal land in order to protect federal land "should extend to internally-adjacent, but not externally-adjacent non-federal lands in comparable proximity to the federal holdings." Id. at 383. I agree that at least some of the reasoning in these cases could be applied to activities occurring outside park boundaries.

The mineral activity that could result from the issuance of these prospecting permits would take place on federal lands, but outside the external boundaries of the National Park System unit. As far as we have been able to determine, the general regulatory authority applicable to the National Park System has not been exercised beyond the boundaries of a park unit. The United States has, however, occasionally brought lawsuits to protect park resources on common law theories such as trespass or nuisance. See, e.g., United States v. Atlantic Richfield Co., 478 F. Supp. 1215 (D. Mt. 1978); United States v. County Board of Arlington County, 487 F. Supp. 137 (E.D.Va. 1979). While the generic park management statutes may inform how those common law principles are applied by the courts in particular cases, the complaints in these cases are bottomed on the status of the United States as landowner. For a discussion of the limitations of such actions -- i.e. they are "cumbersome and by their nature can be invoked only after damage is done or appears inevitable" -- see the 1985 Opinion discussed above.

Whether Congress has authorized the Secretary to regulate or prohibit activities taking place outside the boundaries of a park system unit in order to safeguard the value of that unit has been the subject of considerable scholarly commentary. The leading article prior to the 1978

[14] The Park Service's regulations disclaim application over state and private lands within park boundaries except for regulations that are by their own terms applicable regardless of land ownership. See 36 C.F.R. § 1.2. These latter regulations typically address activities relating to resource protection and visitor safety. See 36 C.F.R. § 2.2 (regulations governing wildlife protection); 36 C.F.R. § 2.4 (regulations relating to the discharge of firearms within a park boundary); 36 C.F.R. Part 6 (regulations governing solid waste disposal sites in units of the National Park System); 36 C.F.R. § 7.16(j) (requirements for sewage disposal systems on privately-owned lands within Yosemite National Park).

Amendment characterized the national parks as "helpless giants" because of the Service's lack of aggressiveness, and perhaps lack of authority, to deal with threats from adjacent private land. Joseph L. Sax, Helpless Giants: The National Parks and the Regulation of Private Lands, 75 Mich. L. Rev. 239 (1976). Following the 1978 Amendment, another commentator asserted that the Organic Act "appear[s] to impose an unspecified duty on the Secretary of the Interior to protect the parks against both internal and external threats," but that the Secretary is hamstrung in carrying out that duty by "his general lack of regulatory authority over activities arising outside the parks." Robert B. Keiter, On Protecting; the National Parks from the External Threats Dilemma, 20 Land & Water L. Rev. 355 (1985); see also Joseph L. Sax & Robert B. Keiter, Glacier National Park and Its Neighbors: A Study of Federal Interagency Relations, 14 Ecology L.Q. 207 (1987); George C. Coggins, Protecting the Wildlife Resources of the National Parks from External Threats, XXII Land & Water L.Rev. 1 (1986); Symposium: The National Park System, 74 Denver L.J. 567-874 (1996).

One recent article argues, by analogy to section 4(f) of the Transportation Act, that the inclusion in the 1916 Organic Act of the phrase "promotion and regulation of the use" of the national parks confers on the Secretary the authority to regulate activities on non-federal land outside the external boundaries of a park that have substantial effects on (and therefore, in some sense, "use") park lands, resources and values. William J. Lockhart, External Threats to Our National Parks: An Argument for Substantive Protection, 16 Stan. Envtl. L.J. 3, 68-71 (1997). Section 4(f) of the Transportation Act prohibits approval of federal transportation projects and programs that "use" any public park, recreation area, or other reserve, unless there is "no feasible and prudent alternative." 49 U.S.C. § 303(c) (1995) (originally codified at 49 U.S.C. § 1653(f)). Courts have interpreted "use" in section 4(f) broadly to include not only "the concept of physical taking, but [also] . . . areas that are significantly, adversely affected by the project," Adler v. Lewis, 675 F.2d 1085, 1092 (9th Cir. 1980), including blocking aesthetic views, noise, and air pollution. Louisiana Environmental Soc'y v. Coleman, 537 F.2d 79, 86 (5th Cir. 1976); see also Allison v. Department of Transportation, 908 F.2d 1024, 1028 (D.C. Cir. 1990); Brooks v. Volpe, 460 F.2d 1193 (9th Cir. 1972). Therefore, Professor Lockhart argues, the term "use" in the Organic Act should be interpreted similarly to authorize the Secretary to regulate activities outside national park boundaries that have the effect of "using" park land or resources. Lockhart, at 68-71.

Whereas the 1916 Organic Act directs the Secretary to "promote and regulate the use of the Federal areas known as national parks," 16 U.S.C. § 1, the 1978 Amendment speaks in its counterpart sentence only of "the promotion and regulation of the various areas of the National Park System" without referring specifically to their "use." 16 U.S.C. § la-l. Given that, at the time Congress was considering the 1978 Amendment, two federal courts of appeals had already issued opinions broadly construing the term "use" under section 4(f) of the Transportation Act, see supra, the term "use" may have been omitted in the 1978 Amendment from the otherwise substantively identical recitation of the Secretary's authority

under the 1916 Organic Act to avoid incorporating the section 4(f) caselaw into National Park System jurisprudence. While its next sentence speaks of the "protection" as well as "management and administration" of these areas, absent a more unequivocal indication from Congress, I am reluctant now to pack this much freight on the word "use" in the 1916 Act, more than eight decades after it became law.

In some instances, Congress has expressly imposed a duty on the Secretary or other officials to protect National Park System areas when exercising authority over other federal or non-federal lands. The Clean Air Act, for example, directs that the Secretary:

> shall have an affirmative responsibility to protect the air quality related values (including visibility) of any such lands within a class I area [e.g., National Parks] and to consider, in consultation with the Administrator, whether a proposed major emitting facility [on non-park or even non-federal land] will have an adverse impact on such values.

42 U.S.C. § 7475(d)(2)(B).

Another example is in a 1988 amendment to the Geothermal Steam Act, 30 U.S.C. § 1001 et seq., which authorizes the Secretary to issue leases for the development and utilization of federal geothermal steam resources.[15] See 30 U.S.C. § 1002. The 1988 amendment requires the Secretary, upon receipt of an application for a lease, to determine whether "the exploration, development or utilization of the lands subject to the lease application is reasonably likely to result in a significant adverse effect on a significant thermal feature within a unit of the National Park System," and if it does, he must not issue the lease. See 30 U.S.C. § 1026(c).

The Surface Mining Control and Reclamation Act (SMCRA), 30 U.S.C. § 1201 et seq., furnishes a third example. Except for certain "valid existing rights," SMCRA expressly prohibits surface coal mining operations "which will adversely affect any publicly owned park or places included in the National Register of Historic Sites unless approved jointly by the regulatory authority and the Federal, State, or local agency with jurisdiction over the park or the historic site." 30 U.S.C. § 1272(e)(3).[16]

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[15] Federal geothermal resources available for leasing include public, withdrawn, and acquired lands; lands administered by the United States Forest Service; and private lands subject to a geothermal steam reservation to the United States, but exclude National Park System lands, National Recreation Areas, National Wildlife Refuges, and certain Indian lands. See 30 U.S.C. § 1014(c).

[16] The "regulatory authority" referred to in SMCRA may be either the Secretary, or a state agency if the Secretary has delegated primary enforcement responsibility to the State.

In contrast to these statutes, the 1978 Amendment lacks an explicit directive or grant of extraterritorial regulatory authority. Had Congress understood that Amendment to give the Secretary new, over-arching, wide-ranging regulatory authority to protect areas within the National Park System from external threats, these laws might seem somewhat superfluous.

Nevertheless, I do not believe that the fact that Congress has expressly given the Secretary duties to protect the National Park System from threats in these specific contexts somehow limits the Secretary's authority in the context of the prospecting permit decision before him. Two of the three pieces of legislation discussed above that addressed park protection issues (the Clean Air Act and the Surface Mining Control and Reclamation Act) predated the 1978 Amendment. The third, the 1988 amendment to the Geothermal Steam Act, was a specific congressional response to a specific kind of threat to parks. It is difficult, therefore, to draw a clear implication from any of these as to how the 1978 Amendment ought to be interpreted.

The difficulty of divining a clear congressional intent on the matter is also shown by the fact that congressional responses to threats to parks have also included non-regulatory approaches such as purchase. The litigation over Redwoods National Park in the 1970s, see supra note 12, was ultimately mooted by legislation enacted in 1978 that expanded the park to include the disputed area where logging was taking place (and also included the 1978 Amendment). See 16 U.S.C. § 79c(b)( 1). In a notable recent example, the Executive and Legislative branches joined forces to protect the world's first national park by purchasing the proposed site for the New World Mine, located near the northeastern comer of Yellowstone. See Title V of the Department of the Interior and Related Agencies Appropriations Act for Fiscal Year 1998, Pub. L. No. 105-83, 111 Stat. 1543 (1997).

Congress has in the past considered, but failed to enact, generic "park protection" legislation containing express mechanisms for addressing external threats. In 1982, for example, the House of Representatives passed the National Park System Protection and Resources Management Act (H.R. 5162, 97th Cong., 2d Sess.). This bill contained many different features collectively designed, as its "purpose and policy" section put it, "to maximize the protection and preservation of the natural and cultural resources of the National Park System." H.R. 5162, § 3(2). One part of the bill, section 10(b), addressed the subject at hand. It would have limited the Secretary of the Interior's authority to approve activities in areas "adjacent to any unit of the national park system" in certain respects. Specifically, the Secretary would have needed to determine that the proposed activity "will not have a significant adverse effect on the values for which such national park unit was established," unless he found the "significant adverse effects . . . are clearly of lesser importance than the public interest value of the proposed action," and the approval is "fully consistent" with statutes governing management of the park system. H.R. 5162, § 10(b). After passing the House by a large margin, see 128 Cong. Rec. 26018 (1982), it failed to advance through the Senate Committee on Energy and Natural Resources. A very similar bill passed the House the next year (H.R. 2379, 98th Cong., 1st Sess., see 129 Cong. Rec. 27106 (1983), but again was not acted upon by the Senate.

Congress's failure to enact this legislation also does not limit the Secretary's authority. The Supreme Court has cautioned against placing too much emphasis on bills Congress has failed to enact. See Schneidewind v. ANR Pipeline Co., 485 U.S. 293, 306 (1988). It is noteworthy that this park protection legislation went far beyond the issue addressed in this opinion, to include a sweeping menu of tools to deal with protection of park resources. It beggars political reality to draw from Congress's failure to enact those bills an inference that Congress was specifically rejecting one part of that comprehensive package. One might just as readily infer from it a congressional judgment that much of the bill, including that piece, was redundant with existing law, and therefore unnecessary. [17]

In sum, I believe the text of the 1978 Amendment and the other legal considerations discussed in this section support the conclusion that the Organic Act as amended in 1978 does have application to the Secretary's exercise of his authorities over activities taking place outside the boundaries of park units. I now turn to a more detailed consideration of this interplay.

### C. Meshing the 1978 Amendment with Section 520

We start with the remainder of the second sentence in the 1978 Amendment. It requires that "authorization of activities" shall not be exercised "in derogation of the values and purposes for which these various areas have been established," except as "directly and specifically provided by Congress." 16 U.S.C. § la-l. Turning to the last clause first, its meaning is not completely clear. In his 1985 Opinion to the Director of the National Park Service, the Associate Solicitor for Conservation and Wildlife observed:

> It can be argued that all laws authorizing the Secretary to undertake or oversee developmental activities - such as the coal leasing or surface mine permitting statutes - are "directly and specifically provided by Congress," and so excepted from the policy defined in section la-l. Another reading of the exception would limit it to those secretarial duties mandated by Congress. The narrowest interpretation of the exception would require statutory acknowledgment of the possible adverse consequences of authorized or mandated activities to NPS units before it became applicable.

[17] For example, one of the 1982 bill's chief sponsors in the House argued on the floor that the bill "conveys no new substantive authority to the Secretary." 128 Cong. Rec. 25988 (1982) (Rep. Bereuter of Nebraska). One opponent used the same argument for opposing the bill. Id. at 25993 (Rep. Lujan of New Mexico). The Administration strongly opposed the bill in part because it was "unnecessary" and "duplicates existing laws and administration programs." 128 Cong. Rec. 25991 (1982).

1985 Opinion at 389. The Associate Solicitor concluded that resolution of conflicts between the 1978 Amendment and other statutory authorities "must be undertaken on an ad hoc basis." Id. at 390.

I believe this to be the right approach. Turning to the question immediately before us, had Congress said in section 520, "promote mineral development on these lands as the top priority," there would be little, if any, room for the 1978 Amendment to operate. Had Congress said, "promote mineral development as a priority," there would be more room for the 1978 Amendment to come into play, although the direction by Congress to place some priority on mineral development could limit the scope of the Secretary's ability to take park concerns into account.

But Congress actually said in section 520, in effect, "authorize mineral development to the extent you, the Secretary, deem it to be in the public interest." This is hardly a "direct and specific" provision by Congress, and therefore leaves much room for the 1978 Amendment to operate. Given the Secretary's broad authority for deciding whether and under what terms to issue prospecting permits under the Weeks Act, the Secretary should consider, in exercising that authority, any impacts to the National Park System as well as to other lands and resources. Put another way, it cannot be said that possible effects of mineral activity on nearby national park units are irrelevant to a determination whether that activity is in "the best interests of the United States." 16 U.S.C. § 520.

Next, we must examine the meaning of the clause in the 1978 Amendment that the Secretary shall not exercise his authority "in derogation of the values and purposes for which these [National Park System units] have been established." This clause infuses the Secretary's decisions under statutes like 16 U.S.C. § 520 with a concern for park values and purposes, and signals caution where the "values and purposes" of a park system unit could be threatened. Nevertheless, while national parks may be "the best idea we ever had," Stegner, *The Best Idea We Ever Had*, 46 Wilderness 4 (1983), this is not to say that the 1978 Amendment mandates the Secretary to overhaul the Department's decisionmaking apparatus to make park protection the paramount concern. The statutory language does not clearly force this large step, and the actions of Congress in related contexts do not support such a bold construction. Some practical considerations are also relevant here. There are 377 units of the National Park System. They are found in 49 States, the District of Columbia, Guam, American Samoa, the Virgin Islands and Puerto Rico, and encompass over 80 million acres of land (about 12% of the federal land base, and about 3.5% of the national land base). Many exercises of Secretarial discretionary authority outside the national parks -- from issuance of incidental take permits under the Endangered Species Act to providing various kinds of support for Indian tribal governments -- could have implications for national parks.

Nor, for the same reasons, should the 1978 Amendment be read as requiring the Secretary to give credence to every imaginable threat that a proposed Secretarial action may have on units of the National Park System. One might imagine domino effects on parks from every action

the Secretary may authorize near their borders. The more the threat is direct, specific, and credible, and the more it relates to a fundamental value or purpose of the park in question, the more clearly the 1978 Amendment comes into play. Here, the concern of the National Park Service and its supporters relates primarily to a threat to a resource that is a core value of the Ozark National Scenic Riverways -- the quality of its water. Under these circumstances, it is incumbent on the Secretary to carefully consider the potential adverse effects on park resources when exercising his discretion under section 520.

D. Implementing the Secretary's Responsibility under the 1978 Amendment

The next task is to examine more closely how the Secretary should carry out his responsibility. One court has addressed this issue. Sierra Club v. Andrus, 487 F. Supp. 443.[18] There, the court stated:

> [I]t seems clear that in the event of a real and immediate . . . threat to the scenic, natural, historic or biotic resource values of the [NPS units involved], the Secretary must take appropriate action. However, nowhere in either 16 U.S.C. §§ 1 or la-l is there a specific direction as to how the protection of Park resources and their federal administration is to be effected. Certainly the Secretary is not restricted in the protection and administration of Park resources to any single means. The Court concludes that defendants have broad discretion in determining what actions are best calculated to protect Park resources . . . .

Id. at 448 (emphasis added). The court mentioned several action options open to the Secretary in that context: (1) asserting superior federal property interests to deflect the threat; (2) acquiring property interests that would remove the threat; (3) exercising authority under other federal law, such as by rejecting rights-of-way applications or requests for land exchanges, to remove the threat; or (4) bringing trespass or nuisance actions if appropriate. Id.

While the Secretary's discretion is "broad," it is, the court went on to explain, "not unlimited."

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[18] The Sierra Club litigation was brought by environmental groups seeking to mandate the Secretary to appear, claim, and defend water rights for national park and other federal land holdings in a state court general stream adjudication in Utah, in which the United States had not been joined as a defendant under the McCarran Amendment, 43 U.S.C. § 666(a). The district court ultimately held that the Secretary had not abused his discretion by refraining from joining the state adjudication. The Sierra Club appealed only that part of the district court's opinion that declined to rule on the issue of whether FLPMA created federal reserved water rights in water appurtenant to BLM lands. Sierra Club v. Watt, 659 F.2d 203, 205 (D.C. Cir. 1981). The D.C. Circuit rejected the Sierra Club's arguments and upheld the district court. Id. at 206.

> When Congress provided that the protection, management and administration of National Park resources "shall not be exercised in derogation of the values and purposes for which these various areas have been established . . . ," it clearly set some limit on the Secretary's discretion in discharging his statutory duties.

487 F. Supp. at 448-49.

The district court's approach charts the right course. The Secretary has considerable room in deciding how to satisfy his responsibility for park protection while exercising his discretion under other statutes in circumstances that implicate parks. But there are limits on the Secretary's choices. The most obvious is procedural and informational: to ensure that potential impacts on park units have been thoroughly examined in the Department's decisionmaking process.

The NEPA process, properly implemented, already does this. It contains a generic requirement that all proposed federal actions that could significantly affect the environment be accompanied by full consideration of their environmental impacts. Where a proposal involves mining in a national forest, the environmental analysis must extend to lands outside the forest that could be affected. See, e.g., 40 C.F.R. § 1502.15 (CEQ regulations) ("The environmental impact statement shall succinctly describe the environment of the areas to be affected or created by the alternatives under consideration.") (emphasis added).

In circumstances like those presented here, where a proposed action can lead to a credible threat to the values and purposes of a National Park System unit, the administrative record ought to reflect, at a minimum, consideration of that threat. If the Secretary fails to consider it, his decision may be subject to judicial review as "not in accordance with law" under the Administrative Procedure Act (APA) standard, 5 U.S.C. § 706(2)(A), and "in excess of statutory jurisdiction, authority, or limitations," 5 U.S.C. §706(2)(C). See also Citizens to Preserve Over-ton Park v. Volpe, 401 U.S. 402, 413-4 (1971). The 1978 Amendment constitutes applicable law constraining the exercise of the Secretary's discretionary authority.

Here, as already discussed, see supra Part III.B., there is a significant question whether NEPA permits postponing the environmental analysis of impacts of mineral development from the prospecting permit stage to the preference right leasing stage. That, in turn, may affect the determination of whether the Secretary has fully complied with the 1978 Amendment in deciding whether to issue the prospecting permits.

### E. Reviewability of Secretary's Decision Implementing the 1978 Amendment

Beyond assuring that potential adverse impacts on parks have been considered in the decisionmaking process, there is the further question of the extent to which the Secretary's decision following that consideration is reviewable in the courts. I believe the proper course was charted by the federal district court in Colorado which, like the district court in Sierra

Club v. Andrus, was asked to review a federal land manager's choice of means to protect federal natural resources -- there, water in federal wilderness areas. See Sierra Club v. Block, 661 F. Supp. 1490 (D.Colo. 1987); 622 F. Supp. 842 (D.Colo. 1985); 615 F. Supp. 44 (D. Colo. 1985). The court reviewed the agency's choice against an arbitrary and capricious standard under the Administrative Procedure Act.

Where the administrative record reflects a credible threat of serious injury to park resources, a Secretarial decision to authorize the activity posing the threat could be deemed arbitrary and capricious under APA review if the Secretary did nothing other than acknowledge the existence of the threat. The 1978 Amendment limits the breadth of Secretarial discretion at least to the point of requiring that some attention, beyond mere awareness, be paid to the threat. Any other conclusion marginalizes that legislation's concern with preserving park values and purposes resources from derogation.

## V. The Secretary's Decisionmaking Options on Doe Run's Prospecting Permit Applications

Informed by the above discussion, I believe the Secretary has four options. Each is evaluated below.

> Option A: The Secretary could reject the prospecting permit applications if the administrative record supports a finding that mineral development activities that might eventually follow mineral exploration could pose unacceptable risks to the resources or values of the park unit.

This is the most protective course regarding the park unit. It would avoid all questions, discussed in Part III above, concerning the Secretary's authority, once a prospecting permit is issued, to prohibit or condition mineral development that might follow in order to protect park resources. The only significant question that might be raised about this option is whether the record supports a determination that issuance of the prospecting permit is not in the public interest due to credible threats to the park resources and values.

It is not entirely clear whether a court would even substantively review the denial of a prospecting permit application. As discussed in Part III.A., section 520 appears to vest the decision entirely within the Secretary's discretion, and therefore a decision to deny the requested permits might be held unreviewable as "committed to agency discretion" by law under the Administrative Procedure Act. 5 U.S.C. § 701(a)(2). This narrow exception applies "in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.' " Overton Park, 401 U.S. at 410 (quoting S. Rep. No. 79-752, at 26 (1945)). Some public lands permitting decisions have been held unreviewable. See, e.g., Ness Investment Corn. v. U.S. Dep't of Agric., Forest Serv., 512 F.2d 706, 715 (9th Cir. 1975) (holding that Secretary of Agriculture's authority to issue special-use permits "subject to the condition that the general public not [be] precluded from full enjoyment of the

national forests" left to the sole discretion of the Secretary who was qualified to receive a permit). Neither section 520 nor the regulations at 43 C.F.R. Subpart 3562 provide guidance on what Congress intended to be in the best interests of the United States. And neither spells out factors to be considered in determining whether issuing a permit is in the best interest. The regulations merely confirm that permit issuance is discretionary, stating only that they "may be issued." 43 C.F.R. § 3562.1.

While there is a credible argument that a decision whether to grant a prospecting permit is unreviewable, it is more likely that a reviewing court would determine that the "the best interests of the United States" standard in section 520 provides sufficient legal guidance for judicial review. If so, the reviewing court would likely review the Secretary's decision under the abuse of discretion standard contained in 5 U.S.C. § 706(2)(A). See, e.g., Arizona Power Pooling Ass'n v. Morton, 527 F.2d 721, 726-28 (9th Cir. 1975), cert. denied, 425 U.S. 911 (1976). In a case reviewing the Secretary's decision not to lease under the MLA, the Ninth Circuit both recognized the Secretary's discretion not to lease at all if leasing would be detrimental to the public interest, and also held that the Secretary's balancing of different interests to deny an application for an oil and gas lease constituted a valid exercise of discretion. Pease v. Udall, 332 F.2d 62, 63-64 (9th Cir. 1964)(applying abuse of discretion standard); accord McTiernan v. Franklin, 508 F.2d 885, 887-88 (10th Cir. 1975) (same).

A general statutory direction to consider the "public interest" has been held to allow consideration of a broad range of factors in making a decision. See. e.g., Committee to Save WEAM v. FCC, 808 F.2d 113, 116 (D.C. Cir. 1986) (discussing FCC decision based on "public interest" standard); cf. NAACP v. FPC, 425 U.S. 662, 669 (1976) (holding that the term "public interest" in regulatory scheme must be interpreted in light of the statute's overall purposes); National Audubon v. Clark, 606 F. Supp 825, 835 n. 48 (D. Alaska 1984) (same). In the circumstances posed by the Doe Run application, the "public interest" criterion, when viewed through the lens of the Park Service Organic Act provisions, plainly allows consideration of the extent to which permit issuance may impact nearby units of the National Park System.

Assuming the decision is reviewable, the question of the Secretary's authority to deny applications for prospecting permits turns on the evidence in the record that would support a determination that such a denial is in "the public interest." A reviewing court would likely engage in a limited review to determine whether the record contains any information to justify the Secretary's concern for the adverse effects on the national park from mineral activity that may result from issuance of the prospecting permit.[19]

[19] Some IBLA decisions seem to take a closer look at the record as a whole and seem to require a higher level of justification for permit denial. For example, in Stanford R. Mahoney, 12 IBLA at 388, the IBLA set aside BLM's rejection of an MLA phosphate prospecting permit that was based, in part, on the "best interests" standard. The IBLA

We further note that, if the Secretary were to conclude that the administrative record supports a finding that issuance of the prospecting permits is not in the public interest, no NEPA analysis is required (though one might be undertaken as a matter of policy, as discussed in the next option). The courts have made clear that a federal agency's decision not to do something it has the discretion to do -- action that does not commit federal resources -- ordinarily does not trigger NEPA. Alaska v. Andrus, 591 F.2d 537, 541-42 (9th Cir. 1979); Defenders of Wildlife v. Andrus, 627 F.2d 1238, 1243-44 (D.C. Cir. 1980); Sierra Club v. Penfold, 857 F.2d 1307, 1313-14 (9th Cir. 1988).

Furthermore, even were a reviewing court to find that the decision to reject the application was arbitrary, the appropriate remedy is to order the agency to make a new decision. That is, a court does not have the power to exercise the Secretary's discretion, by directing the issuance of permits. See. e.g., U.S. ex rel McLennan v. Wilbur, 283 U.S. 414, 420 (1931) (a "writ of mandamus cannot be made to serve the purpose" of compelling lease issuance, because that decision is discretionary, as opposed to "require[d]" by law); see also Tallman, 380 U.S. at 21; Elizabeth B. Archer, 82 IBLA at 24 (remand for reassessment of whether a prospecting permit should be issued).

If the Secretary were inclined to pursue this option, my office would undertake a review of the administrative record to determine whether it supports a finding that issuance of the permits is not in the public interest. In addition to analyzing the factual record, we would need to assess the legal risks of proceeding with issuance of the permits and the legal risks of denying the application. As discussed above in Part III, the legal risks involved in issuing the permits include the uncertainty regarding whether permit issuance creates any legal or equitable rights to obtain a preference right lease. On the other hand, because counsel for Doe Run has suggested in a "Briefing Paper" submitted to the Solicitor's Office that issuance of the permits does not create any rights to issuance of a preference right lease, a reviewing court might conclude that it was arbitrary and capricious to deny the applications without inquiring further as to whether Doe Run would agree to waive any rights that might arise under BLM's regulations. See discussion of Option D, infra.

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extensively reviewed the record, finding protection of an urban water supply "unpersuasive" as a reason for rejection. The IBLA accepted the applicant's information that both contradicted the agency's data and provided additional justification for issuing a permit. Id. at 387-88; see also Elizabeth B. Archer, 82 IBLA 14, 24 (1984) (setting aside BLM's rejection of MLA phosphate prospecting permit applications because of an inadequate record). IBLA, however, has not been entirely consistent on this issue. See Powhatan Mining Co., 10 IBLA 308, 310 (1973) (affirming BLM's rejection of an MLA asbestos prospecting permit, finding appellant had failed to show that USGS's record determination was erroneous). To the extent decisions like Stanford R. Mahoney create a more stringent standard of review, they are disapproved

In addition, Secretarial denial of the prospecting permits at this stage, based on concern for the environmental impacts to the Ozark National Scenic Riverways, may lead Doe Run to argue that the denial is, in effect, a withdrawal of land that must follow the processes outlined in the Federal Land Policy and Management Act. See 43 U.S.C. § 1702(j) (defining "withdrawal"); § 1714 (procedures for making withdrawals). In Mountain States Legal Foundation v. Andrus, 499 F. Supp. 383, 391-97 (D.Wyo. 1980), the district court held that the Department's (and the Forest Service's) failure to act on pending oil and gas lease applications, while at the same time evaluating the public land at issue for wilderness preservation, amounted to a withdrawal under FLPMA; see also Mountain States Legal Foundation v. Hodel, 668 F. Supp. 1466 (D.Wyo. 1987) (same). The Ninth Circuit, in Bob Marshall Alliance v. Hodel, 852 F.2d 1223, 1229-30 (9th Cir. 1988), cert. denied, 489 U.S. 1066 (1989), rejected this reasoning, holding that the Mineral Leasing Act confers on the Secretary the discretion to determine which lands should be leased, and thus, the Secretary's denial of a lease application simply "constitute[d] a legitimate exercise of the discretion granted to the Interior Secretary under that statute." 852 F.2d at 1230 (citing Burglin v. Morton, 527 F.2d 486, 488 (9th Cir. 1975)). I believe that Bob Marshall represents the better view of the law, but a lawsuit by Doe Run likely would be heard in either the courts in the D.C. Circuit or the Eighth Circuit, neither of which has addressed this issue.

Option B: The Secretary could suspend further action on the prospecting permit applications pending further study of possible impacts of mineral development on the park unit, and on the environment generally.

This is the option recommended by the National Park Service and most of the other commentators concerned about possible impacts on the park and its vicinity. There are at least two possible (though not mutually exclusive) approaches under this option. One is a rather narrowly-focused, scientific study of the hydrology of the region, the possible pathways of water quality degradation from mining on the OSNR, and the credibility of the threat. The other is to more broadly examine the possible effects of full-scale mineral development (assuming a valuable deposit is discovered) on the park unit and on other aspects of the environment in the region. This latter approach would likely be in the form of an environmental impact statement under NEPA.

The Secretary's broad discretion under section 520, coupled with NEPA and the 1978 Amendment put this approach beyond any successful legal challenge.

Option C: The Secretary could grant the permit applications after a review of the administrative record.

A decision to proceed on the BLM and Forest Service recommendations would be consistent with past practice, but it does not answer the questions discussed earlier, and would be the most problematic option legally. For one thing, it could create an expectation, and perhaps a legal right, in the permittee to develop minerals that might be found through exploration,

regardless of whether adverse environmental effects such mineral development may have on the park unit are mitigable.

To the extent that a commitment to issue a prospecting permit is tantamount to a commitment to issue a lease, both the lawfulness and the policy wisdom of adopting such a staged approach may be questioned. If applicable regulations require BLM to issue a lease to Doe Run if it discovers a valuable deposit under its prospecting permit, postponing an evaluation of the environmental impacts of mining to the lease issuance stage would undermine the usefulness of that evaluation -- because the actual decision whether to issue a lease would effectively have been made earlier, at the point of issuing the prospecting permit.[20]

Even if, on the other hand, it were finally determined that the Secretary could reject a lease application after the permittee has discovered a valuable mineral deposit, there would at that point be considerable momentum behind mineral development, which might make outright rejection more difficult. Cf. Village of False Pass v. Clark, 733 F.2d 605, 617-19 (9th Cir. 1984) (Canby, J. concurring).[21]

If a Secretarial decision to proceed to issue the prospecting permits were tested to determine whether it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. § 706(a)(2), I believe there is a significant risk that it would be found wanting because of the 1978 Amendment. That is, it would leave ambiguous, for reasons explained in Part III above, the extent of the Secretary's authority in deciding whether and on what terms to issue a preference right lease and control any mineral development that might subsequently occur, in order to protect the park unit.

The language of the stipulation proposed by the BLM/Forest Service for the prospecting permits could be modified to address this concern more directly, as follows:

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[20] This was the thrust of the 1976 Opinion of the Assistant Solicitor discussed supra, at 7-8.

[21] Postponement of environmental analysis of mineral development until the lease issuance stage would likely make that analysis more focused, and therefore more useful. More developed knowledge about the nature and character of the deposit and possible extraction techniques would reduce the amount of speculation required to assess possible environmental impacts of mining. Furthermore, postponing such consideration could also avoid the need for unnecessary analysis, if prospecting were unsuccessful. These policy considerations were discussed, in the context of federal oil and gas leasing, in a 1989 National Research Council report, Land Use Planning and Oil and Gas Leasing on Onshore Federal Lands (Committee on Onshore Oil and Gas Leasing, National Research Council, 1989), at 83-85, 102-03.

> No mineral lease may be issued for the land under permit without each of the following: (a) the preparation of an environmental analysis or environmental impact statement in accordance with the National Environmental Policy Act (NEPA) of 1969, which environmental document shall assess the potential impacts on, among other resources, the Ozark National Scenic Riverways (ONSR), and ways to mitigate those impacts; (b) a determination by the Secretary of the Interior that a valuable mineral deposit has been discovered on the lands, which determination shall take into account the costs and feasibility of mitigating environmental impacts from mining activity that could follow the issuance of a preference right lease; (c) a determination by the Secretary of the Interior that issuance of the preference right lease is not in derogation of the values and purposes for which the ONSR was established; and (d) approval by the Forest Service, subject to any conditions specified by the Forest Service to protect the purposes for which the forest land was acquired.

Such a stipulation would make much more explicit the decisionmaking process to be followed, and provide notice to the permittee that the environmental issues, including impacts on the ONSR, would need to be addressed and resolved satisfactorily before a preference right lease could issue and mineral development could occur. While this would be an improvement over the stipulation currently recommended, it still leaves somewhat open the question whether a lease stipulation could override the BLM's existing regulation that suggests the issuance of a preference right lease is mandatory in certain circumstances.[22] For that reason, this option is not without risk.

> Option D: The Secretary could negotiate an agreement with Doe Run whereby Doe Run would agree to relinquish any and all property rights that may arise under BLM's regulations in exchange for the Secretary's issuance of the prospecting permits, pending further environmental review.

This Option is similar to Option C, except that it would resolve, at least in this instance, the question of whether a stipulation can override an existing regulation. Under this Option, the Secretary would propose to Doe Run that it agree to relinquish any rights it may have to the issuance of a preference right lease, and in exchange, the Secretary would issue the prospecting permit, with the stipulation set out in option C. This option is attractive for another reason. As discussed in Part III, counsel for Doe Run submitted for the record a Briefing Paper, which appears to take position that the issuance of a prospecting permit does not create any property right to the issuance of a preference right lease, or to the mineral. Thus, a denial of the prospecting permit based on concerns about the legal risk of going

[22] To avoid the problem in the future, I strongly recommend that BLM amend its regulations to make clear that the Secretary's decision to issue prospecting permits and preference right leases on Weeks Act lands is within his discretion. BLM should remove from its regulations at 43 C.F.R. Subpart 3560 the "shall issue" language that could be construed as giving prospecting permittees an entitlement to a preference right lease.

forward -- without evidence in the record that Doe Run was given the opportunity to remove that risk -- could be considered "arbitrary and capricious."

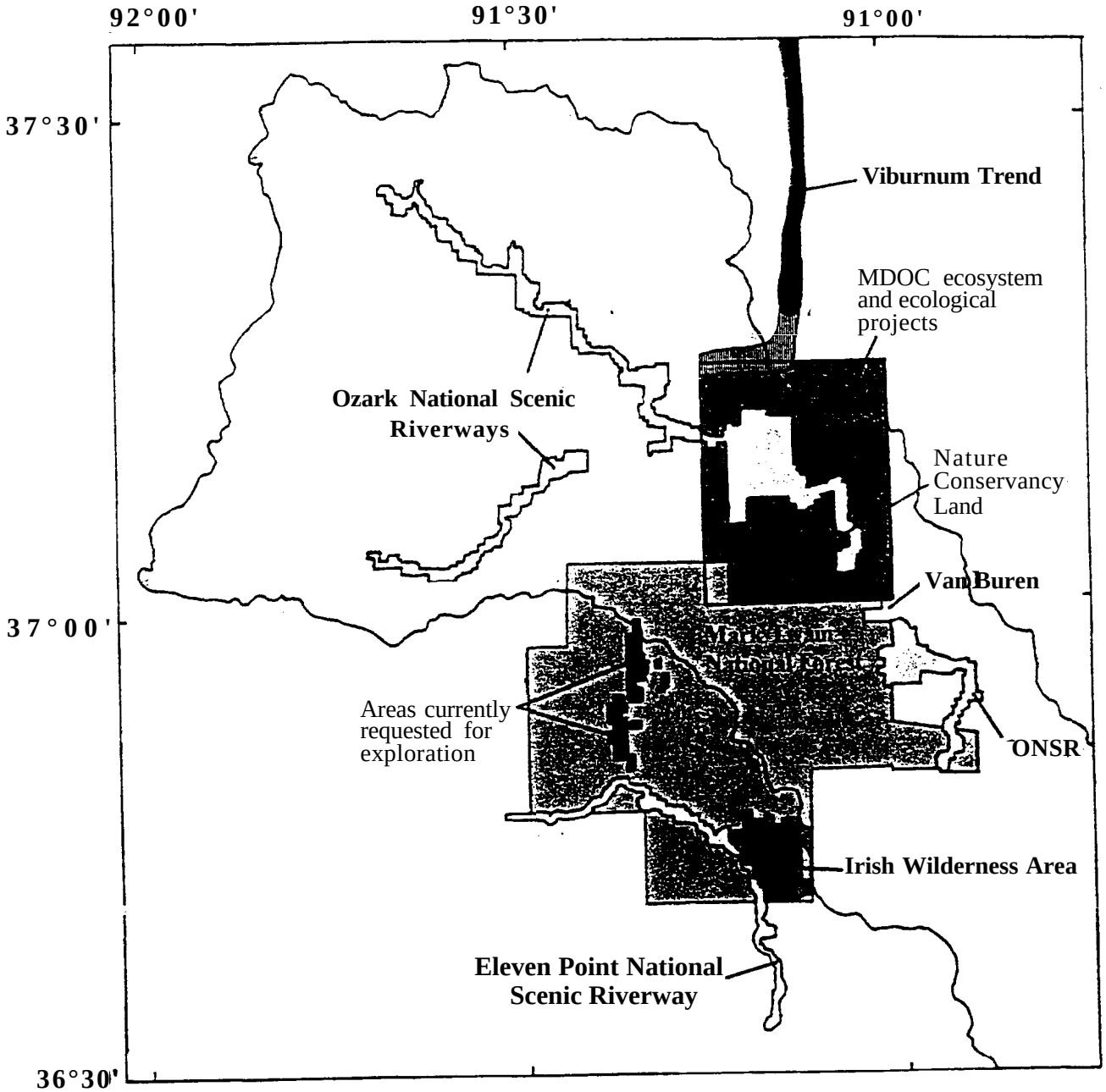
This Opinion was prepared with the substantial assistance of Wendy Thurm, Special Assistant to the Solicitor; David Watts, Deputy Associate Solicitor, Division of Conservation and Wildlife, Barry Roth, Division of Conservation and Wildlife, Kay Henry, Associate Solicitor, Division of Mineral Resources, Peter Schaumberg, Deputy Associate Solicitor, Division of Mineral Resources, Natalie Eades, Division of Mineral Resources, Lisa Hemmer, Division of Mineral Resources, and Stephen Gidiere and Cymie Payne, Honors Program Attorneys.

Solicitor

I approve this Opinion and choose Option 4.

Secretary of the Interior

4/16/98
Date




# Land Status Map

ATTACHMENT A