

Northern Arizona Public Land Withdrawal Spurs Multiple Lawsuits

By Cynthia M. Chandley and Christopher W. Payne

Reprinted and/or posted with permission (ABA Mining Committee Newsletter, Vol. 6, No. 1, May 2012).

On January 9, 2012, U.S. Secretary of Interior Ken Salazar signed Public Land Order No. 7787, which became effective on January 21, 2012. The order withdrew 1,006,545 acres of public lands from location and entry under the Mining Act of 1872 for a period of 20 years. The secretary's reported reason for the withdrawal is to protect the Grand Canyon watershed from adverse effects of mineral exploration and development.

Secretary Salazar's decision to withdraw these lands from hardrock mining claims has spurred four lawsuits in federal district court challenging the withdrawal. The legal theory behind each of these suits is the alleged failure of the secretary to comply with the National Environmental Policy Act (NEPA) and the Federal Land Policy and Management Act (FLPMA).

The withdrawn lands are located in Mohave and Coconino counties in northern Arizona, outside of the Grand Canyon National Park. The vast majority of the lands contained in the boundaries of the withdrawal are federal; however, some state lands, as well as private lands, are also contained within the withdrawal area. The likely reason for their inclusion is that these state and private lands are split estates where the locatable minerals are owned by the federal government.

Public Land Order No. 7787 withdrew these lands from hardrock mining, which prevents all exploration and new mining claims during the 20-year withdrawal period. But the withdrawal should not limit the development of nonfederal mineral estates or federal leasable minerals—such as oil and gas leasing, and sand and gravel permits—that are not subject to the Mining Act of 1872. These lands should remain available for mineral leasing, geothermal leasing, and mineral materials sales.

The secretary claims authority for the withdrawal under section 204 of FMPLA. FMPLA requires that public lands be managed “in a manner which recognizes the [United States's] need for domestic sources of minerals, food, timber, and fiber from the public lands” while also protecting “the quality of scientific, scenic, historical, ecological, environmental, air

and atmospheric, water resource, and archeological values.” Section 204 authorizes the secretary to make withdrawals of 5000 acres or more for a period of not more than 20 years, subject to congressional review.

The secretary justifies this withdrawal, in part, on the grounds that the final environmental impact statement (FEIS) for the withdrawal found that the impacts of uranium mining in parts of the region were “uncertain.” The record of decision (ROD) for the withdrawal concludes that “[a] twenty-year withdrawal will allow for additional data to be gathered and [a] more thorough investigation” to be conducted. The secretary cites “unique resources” in the area as a reason for withdrawing the lands now rather than waiting for additional investigation to determine whether uranium exploration and mining in the region has any actual measurable adverse impact on the Grand Canyon watershed.

The withdrawal encompasses significant lands where the probability of adverse impact has already been determined to be either low or unlikely. For example, the FEIS concluded that, in some areas included in the withdrawal, the probability of adverse impacts from uranium mining is minimal or unlikely. Yet, rather than limit the withdrawal to the areas where the FEIS found at least a reasonable probability of adverse impact, the secretary withdrew the entire area that was included in the review without regard to the findings.

There is a long history of uranium mining in the area of the withdrawal. Uranium ore deposits in the area were first discovered in the 1940s, and uranium mines were opened shortly thereafter. Exploration increased dramatically in the 1970s, but mining activities later decreased in the early 1990s due to both economic and sociopolitical impacts. Exploration began anew in 2004, and by 2009, over 3100 mining claims had been located within the withdrawal area.

Although Public Land Order No. 7787 prohibits new hardrock mining claims in the withdrawal area, it is not supposed to prohibit mining activities that were approved prior to January 21, 2012. The FEIS estimates that during

the 20-year withdrawal period, up to 11 uranium mines—including four that are currently approved—could still be developed within the withdrawal area based on these preexisting rights. Although the mine sites that received federal approval prior to the withdrawal should be allowed to develop and operate, the ROD states that these sites will now be subject to additional review prior to the approval of any plan of operations, which could ultimately prevent any mines from being developed.

So far, the withdrawal has spawned four lawsuits. All four suits were filed in the U.S. District Court, District of Arizona. The first lawsuit was filed by Yavapai County (Arizona) prospector Gregory Yount on November 1, 2011 (*Yount v. Salazar, et al.*, 11-cv-08171 (D. Ariz.)). Mr. Yount, who owns two hardrock mining claims for uranium in the withdrawal area, filed a complaint for declaratory and injunctive relief, alleging, among other things, that the secretary is in violation of NEPA for its refusal to publish a supplemental draft EIS due to significant new information that was submitted during the public comment period. Grand Canyon Trust, the Havasupai Tribe, Center for Biological Diversity, Sierra Club, and National Parks Conservation Association moved to intervene in this litigation on March 12, 2012.

On February 27, 2012, the National Mining Association and the Nuclear Energy Institute also filed a complaint for declaratory and injunctive relief (*National Mining Assoc., et al. v. Salazar, et al.*, 12-cv-08038 (D. Ariz.)). This

complaint challenges the withdrawal on the grounds that the secretary did not properly consider the economic impacts of the withdrawal, the FEIS relied on outdated information in violation of NEPA, and section 204 of FLPMA is unconstitutional because it contains a legislative veto provision that allows Congress to overturn the withdrawal, in violation of the Presentment Clause. The Northwest Mining Association filed a complaint for declaratory and injunctive relief on March 6, 2012, on grounds similar to that of the complaint filed by the National Mining Association and the Nuclear Energy Institute (*Northwest Mining Assoc. v. Salazar, et al.*, 12-cv-08042 (D. Ariz.)).

Quaterra Alaska, Inc. and the Mohave County (Arizona) Board of Supervisors filed a complaint for declaratory and injunctive relief on April 17, 2012 (*Quaterra Alaska, Inc. et al. v. Salazar, et al.*, 12-cv-8075 (D. Ariz.)). In their complaint, Quaterra and Mohave County cite several NEPA and FLPMA violations in the FEIS and withdrawal process, including failure to address scientific controversies, failure to coordinate with local authorities, and failure to objectively consider all the evidence.

It is likely that all four of these lawsuits will be consolidated. In fact, a motion to consolidate the first three of these suits was filed by the National Mining Association and the Nuclear Energy Institute on March 23, 2012. The United States opposes consolidation, but it remains to be seen what the court will decide.



Cynthia M. Chandley
602.382.6154
cchandley@swlaw.com

Cynthia Chandley practices in the areas of water, mining, natural resources, energy and environmental law as part of the firm's Real Estate, Energy and Finance practice group.



Christopher W. Payne
602.382.6153
cwpayne@swlaw.com

Christopher Payne practices in the areas of water and environmental law. His law practice includes providing legal advice on groundwater and surface water rights and supplies, representing clients in Arizona State stream adjudications and federal water rights litigation, and advising clients about compliance with county, state and federal environmental laws and regulations.

Snell & Wilmer
L.L.P.
LAW OFFICES

www.swlaw.com