Tom FitzGerald
Director

Board of Directors

Robert Kaplan
Chair

Joe Childers
Vice Chair

Betsy Rudd Bennett

Roger Shott

Liz Edmondson

P. O. Box 1070
Frankfort, KY 40602
(Phone) 502-875-2428
(Fax) 502-875-2845
fitzKRC@aol.com
www.kyrc.org

Monday, February 13, 2012

STATEMENT OF KENTUCKY RESOURCES COUNCIL, INC. CONCERNING PROPOSED MERGER OF OFFICE OF SURFACE MINING WITH BUREAU OF LAND MANAGEMENT

I appreciate both the opportunity to present the grave concerns of the Kentucky Resources Council, Inc. with the proposal by Secretary of the Interior Salazar to consolidate the Office of Surface Mining Reclamation and Enforcement and the Bureau of Land Management, and the scheduling of this and other additional meetings during the process of evaluating if and how the agency functions could be consolidated.

I regret that the meeting is taking place in Lexington, however, rather than in the coalfields of eastern or western Kentucky, where the adverse effects of such a consolidation would be most keenly felt by the citizens who have waited in vain, since 1981, for the promises made by Congress to be fulfilled – that mining would be a temporary use of land that would give way to a restoration of the pre-mining land use or a higher and better use, and that the rights and properties, the health and safety, of coalfield residents would be fully protected from the adverse effects of surface coal mining operations.

By way of introduction, my name is Tom FitzGerald, and I have been the Director of the Kentucky Resources Council since 1984. Prior to that time I worked as a law clerk and staff attorney for the Appalachian Research and Defense Fund of Kentucky, and participated actively both in the many rulemakings that followed the enactment of SMCRA in 1977, and in challenges before Judge Flannery and other District and Court of Appeals Judges, to the efforts of the Reagan and Bush Administrations to weaken the protections provided in the 1979 permanent program regulations. Additionally, I have been Adjunct Professor in Energy and Environmental Law at the Brandeis School of Law at the University of Louisville, since 1986. My statement here is not on behalf of the University, but rather on behalf of the many hundreds of individuals and organizations that KRC has represented over the years.

You have in the record, I assume, the well-crafted and well-reasoned testimony of my colleague Pat McGinley before the Senate Committee on Energy and Natural Resources,

explaining in detail how Secretarial Order 3315 violates the letter and intent of Congress with respect to the functions of the Office of Surface Mining. In the interests of time I will not repeat those reasons, but rather incorporate that testimony into my own for the record.

I am here to address one issue, which is the faulty assumption on the part of the architects within the Department of the Interior that the Secretary has authority under Reorganization Plan No. 3 of 1950, to effect the sweeping change contemplated of collapsing the Office of Surface Mining into the Bureau of Land Management.

Neither the 1950 Reorganization Plan No. 3, which was enacted by the Congress in response to the recommendations of the Hoover Commission, nor the 1994 Solicitor's Opinion authored by then-Solicitor John Leshy, provide any legal support for the proposal to merge OSM and the BLM.

To read the general grant of authority in Reorganization Plan No. 3 as enabling the Secretary to sweep aside the specific language and specific intent of the Congress in a law adopted twenty-seven years later, violates at least three basic rules of statutory construction.

The first, and foremost, is that when construing statutes enacted by Congress, the goal of the courts and the obligation of the agencies is to give effect to the language of the law and the intent of Congress. In this instance, Congress specifically directed the Secretary to implement the provisions of Public Law 95-87 **through the Office of Surface Mining Reclamation and Enforcement.** Moreover, while the Congress authorized the Office to use, on a cost reimbursable basis, employees of the Department and other agencies, the Office was prohibited from transferring to the Office any legal authority, program, or function in any Federal agency that has as its purpose the promotion of the development or use of coal. In the House and Senate Committee Reports, the Congress underscored that the Office of Surface Mining would be "separate from any of the Department's existing bureaus or agencies."

In addition to vitiating the specific intent of Congress, a reading of a general grant of authority in a 1950 statute as trumping the more specific mandate in a statute adopted 27 years thereafter, renders much of the specific and mandatory language of Section 201 of the 1977 law mere surplusage, in contradiction of a second cardinal rule of statutory construction.

A third rule of statutory construction is violated in relying on the Reorganization Plan No. 3 as authority for the proposed merger, which is that the specific grant of authority and imposition of limitations governs over the general. Under the canons of statutory construction, the more-specific grant of authority and direction in Section 201 of SMCRA operates as an express limitation on the broad powers accorded in the 1950 Reorganization Plan No. 3. It is a basic principle of statutory construction that a statute dealing with a narrow, precise, and specific subject is not controlled or nullified by a general one, regardless of the priority of enactment. The Congress is presumed to have knowledge of prior enactments relating to a subject when it legislates, and it chose to specify how this law would be implemented, rather than providing any specific grant of authority to restructure the Office or to eliminate it as a separate Office within the Department. I have not included the citations to the numerous Supreme Court and lower federal court decisions that have applied these rules of construction to numerous instances where a specific statute and a more general one and the relationship of the two are at issue, but will be happy to supply them on request. I will certainly include them in my briefing of the issue before the courts if this ill-conceived merger is concluded.

In summary, Section 2 of the Reorganization Plan No. 3 of 1950 provides no authority for the proposed merger, and the Solicitor's Opinion of May 2, 1994 regarding the authority of the Secretary to establish the National Biological Survey, provides no support for such a conclusion. Instead, that opinion recognizes and distinguishes the grant of authority in SMCRA from the more general grants of authority by Congress to the Department. The Solicitor notes that:

> In short, the effect of Reorganization Plan No. 3 was to wipe out a patchwork of statutory delegations running to subordinate officers and bureaus and to best all authority in the Secretary. Congress has confirmed and carried forward this

> approach, because the usual pattern in the many new statutory delegations given to the Department since 1950 has been, as in Reorganization Plan No. 3, to vest authority in the Secretary, rather than in subordinate officials. Accordingly, most authority now exercised by bureaus and offices of the department has been delegated to them by the Secretary.

The Solicitor cited three grants of authority, under the Endangered Species Act, the Colorado River Basin Project, and the Helium Act, as reflecting this broad grant of authority “to the Secretary”.

Using the Solicitor’s logic, the specific direction in Section 201 that the Secretary shall administer the programs under the Act “through the Office [of Surface Mining Reclamation and Enforcement,” stands in stark contrast to the broad delegation of power to the Secretary under those other statutes. The distinction drawn by the Solicitor underscores that the Congress acted specifically, intentionally, and clearly in directing how this law was to be implemented. The Secretary is without the power to amend by administrative fiat, the specific mandate of Congress, and is frankly without the right to submerge this agency and the promises made and yet unfulfilled, into the Bureau of Land Management.