



United States Department of the Interior

OFFICE OF THE SOLICITOR

M-36980

MAY 2 1994

Memorandum

To: Secretary

From: John D. Leshy
Solicitor

Subject: Secretary's Authority for Creating the National
Biological Survey

I understand that questions continue to arise about your authority to establish the National Biological Survey. As you are aware, we reviewed this question in detail prior to the issuance of Secretary's Order No. 3165 and advised that you had the authority to proceed with the National Biological Survey. This memorandum is intended to set out in writing our views on the subject. As discussed below, we conclude that:

(1) The Secretary has broad authority to reorganize the Department's functions among its bureaus and offices, because Reorganization Plan No. 3 of 1950 transferred to the Secretary all functions of all other officers of the Department and all agencies and employees of the Department and then authorized the Secretary to delegate his functions to any other officer, agency, or employee of the Department.

(2) Existing statutes authorize the Secretary to undertake the functions that were transferred to the National Biological Survey.

(3) In view of the Secretary's broad reorganization authority, and his authority to conduct the functions now with the National Biological Survey, the establishment of the National Biological Survey constituted a proper exercise of the Secretary's authority.

The Secretary's Reorganization Authority

The Secretary's authority to reorganize the bureaus and offices of the Department of the Interior stems principally from Reorganization Plan No. 3 of 1950, 64 Stat. 1262 ("Reorganization

Plan No. 3").¹ Section 1(a) of the Reorganization Plan provides:

[T]here are hereby transferred to the Secretary of the Interior all functions of all other officers of the Department of the Interior and all functions of all agencies and employees of such Department.

5 U.S.C. App. § 1(a).² Section 2 provides:

The Secretary of the Interior may from time to time make such provisions as he shall deem appropriate authorizing the performance by any other officer or by any agency or employee of the Department of the Interior of any function of the Secretary, including any function transferred to the Secretary by the provisions of this reorganization plan.

Reorganization Plan No. 3 was one of several such plans transmitted to Congress as a result of the report of the Commission on the Organization of the Executive Branch ("the Hoover Commission"). The bipartisan Hoover Commission was established in 1947 by Chapter 207, Public Law No. 162, 80th Congress. Its members were appointed by the President, the President pro tempore of the Senate, and the Speaker of the House of Representatives. Herbert Hoover served as the chairman of the Commission and Dean Acheson as the vice-chairman. The purposes of the Commission included:

[The promotion of] economy, efficiency, and improved service in the transaction of public business . . . by--

(1) limiting expenditures to the lowest amount consistent with the efficient performance of essential services, activities, and functions;

(2) eliminating duplication and overlapping of services, activities, and functions:

¹ The authority of the Secretary to establish bureaus or offices for the purpose of carrying out any function vested in the Secretary by law is not limited to Reorganization Plan No. 3. For example, 5 U.S.C. § 301 provides that the Secretary "may prescribe regulations for the government of his department . . . [and] the performance of its business." Reorganization Plan No. 3 obviates the need to address any alternative source of the Secretary's authority.

² This section, by its terms, did not apply to functions vested in hearing examiners by the Administrative Procedure Act, or in the then existing Virgin Islands Corporation. 5 U.S.C App. § 1(b).

(3) consolidating services, activities, and functions of a similarnature;

(4) abolishing services, activities, and functions not necessary to the efficient conduct of government; and

(5) defining and limiting executive functions, services, and activities.

Section 1, Chapter 207, Pub. L. No. 162, 80th Congress. The Hoover Commission was authorized to investigate all executive branch operations to determine what changes could be made to accomplish its purposes, and to report- its findings to the Eighty-First Congress.

On January 13, 1949, the Hoover Commission wrote to Congress and recommended that Congress give the President authority to reorganize the Executive Branch. The Commission specifically found that:

The United States is paying heavily for a lack of order, and lack of clear lines of authority and responsibility, and a lack of effective organization in the executive branch. . . .[G]reat improvements can be made in the effectiveness with which the Government can serve the people if if its organization and administration is overhauled.³

The, on February 5, 1949, the Commission submitted to Congress its report on the General Management of the Executive Branch ("GM Report"). In that report, the Commission listed eight conditions then existing in the Executive Branch that were undermining the effective operations of the Federal Government. The Commission noted: "Many of the statutes and regulations that control the administrative practices and procedures of the Government are unduly detailed and rigid." GM Report at 5. The Commission further stated:

It is impossible to secure efficiency of administration unless administrators have enough authority and -discretion to seize opportunities for economical and effective operation. Present laws and regulations establish patterns so detailed and rigid that department heads are granted almost no operational discretion or flexibility necessary to give real efforts to the purpose of the Congress.

Instead of being unified organizations, many departments

³ This letter is set out in its entirety in the Hoover Commission's first report to Congress, dated February 5, 1949.

and agencies are but loose federations of bureaus and subdivisions, each jealously defending its own jurisdiction. Department heads will not be able effectively to aid the President in the coordination of administration unless reorganizations produce unity and integration in fact as well as in appearance.

GM Report at 5-6.

The Commission offered specific recommendations to Congress on how to improve the management operations of the Executive Branch. The 20th recommendation was

that the department head should be given authority to determine the organization within his department. He should be given authority to assign funds appropriated by the Congress for a given purpose to that agency in his department which he believes can best effect the will of Congress.

GM Report at 41.

On March 13, 1950, President Truman sent twenty-one reorganization plans to Congress. President Truman's general message transmitting the plans stated department heads would, among other things, "be enabled to effect appropriate internal adjustments as may be necessary within their departments to permit the most effective organization of departmental resources and bring about continuous improvement in operations." Reorganization Plan No. 3 of 1950 dealt exclusively with the Department of the Interior. The Senate Committee on Expenditures in the Executive Departments reported favorably on Reorganization Plan No. 3.⁴ The Committee Report noted that the Reorganization Plan reflected four recommendations

⁴ The process for Congressional consideration of a reorganization plan was governed by the Reorganization Act of 1949. Under that Act, if one of the Houses of Congress objected to a reorganization plan, it was not approved. If either House of Congress did not disapprove a reorganization plan within 60 days of continuous session, the plan was effective. Thus, the Senate Committee was not required to report favorably on Reorganization Plan No. 3 under the terms of the Reorganization Act of 1949.

The Supreme Court's decision striking down legislative vetoes, Immigration and Naturalization Service v. Chadha, 462 U.S. 919 (1983), called into question the validity of actions taken pursuant to numerous statutes including the Reorganization Act of 1949. Congress responded by ratifying and affirming as law each reorganization plan that was enacted prior to October 19, 1984, which included Reorganization Act No. 3. Pub. L. No. 98-532, 98 Stat. 2705.

in the Hoover Commission Report, including the 20th recommendation set out above. The Committee also found that the Reorganization Plan centralized the authority in the Secretary of the Interior over his department. Finally, the Committee recognized that the plan would vest in the Secretary of the Interior "complete authority over all of [its] operating units, except as to the Virgin Islands Corporation . . ." ⁵ Senate Report 1545, 81st Congress (emphasis added).

In 1955, the Acting Solicitor of the Department rendered an opinion on the Secretary's authority under Reorganization Plan No. 3 to establish the position of "associate" or "deputy" director of the Fish and Wildlife Service. Reorganization Plan No. III of 1940 had consolidated the Bureau of Fisheries and the Bureau of Biological Survey into one agency to be known as the Fish and Wildlife Services. The plan also had provided that the functions of the consolidated agency were to be administered under the direction and supervision of the Secretary of the Interior by a Director and not more than two Assistant Directors. 62 I.D. 65. The Acting Solicitor concluded that Reorganization Plan No. 3 removed any limitations that the earlier plan imposed on the structure of the organization through which functions relating to fish and wildlife were to be performed, and advised the Secretary that he was authorized by Reorganization Plan No. 3 to establish the position of "associate" or "deputy" director. Id.

Because of concerns over whether the Comptroller General would object to the payment of salary to an "associate" or "deputy" director, the Department requested the Comptroller General's views. The Comptroller General agreed with the Acting Solicitor's opinion, stating, among other things: "The effect of a reorganization plan which has not been rejected by Congress in the manner prescribed by section 6 of the Reorganization Act of 1949, 63 Stat. 205, is tantamount to that of a statute. It has the force and effect of law." 34 Comp. Gen. 410, 411.

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 vest all authority in the Secretary, including the authority to redelegate functions. 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

⁵ Operating units specifically cited in the Senate Report and still within the Department of the Interior are: the Bureau of Reclamation, the Bureau of Indian Affairs, the Geological Survey, the Bureau of Mines, Government in the Territories, National Park Service, Fish and Wildlife Service, Bureau of Land Management and Office of the Secretary.

officials.⁶ Accordingly, most authority now exercised by bureaus and offices of the Department has been delegated to them by the Secretary.

Under his broad reorganization authority, the Secretary may, if he chooses, withdraw these delegations and reassign the authority elsewhere. Over the years, the Secretary frequently has used the authority of Reorganization Plan No. 3 to effect organizational changes in the Department. Attached as Appendix A is a list of some of the instances in which this authority has been exercised.

The National Biological Survey

The creation of the National Biological Survey is in accord with the Secretary's authority described above. In essence, the Secretary (a) withdrew from some bureaus functions being performed by their employees and (b) redelegated those same functions to the National Biological Survey and its employees. Most of those transferred functions came from the U.S. Fish and Wildlife Service, with some from the National Park Service, the Bureau of Land Management, the Minerals Management Service, the Office of Surface Mining Reclamation and Enforcement, the U.S. Geological Survey, and the Bureau of Reclamation. For each bureau from which functions were transferred, the authority for those functions rests with the Secretary.⁸ The Secretary merely revoked the delegation of those

⁶ See, e.g., 16 U.S.C. § 1533 (Endangered Species Act): 43 U.S.C. § 1511; (Colorado River Basin Project); 43 U.S.C. § 1334 (Outer Continental Shelf Lands): and 50 U.S.C. § 167a (The Helium Act).

⁷ Our interpretation of Reorganization Plan No. 3 is not unique in the Federal Government. Other departments for whom the President submitted reorganization plans in 1950 have continued to exercise this organizational authority over the ensuing years. For example, in 1991, by Department Organization Order 10-14, the Secretary of Commerce used his authority under Reorganization Plan No. 5 of 1950, to vest in himself the functions of the Patent and Trademark Office specified in title 35 of the United States Code.

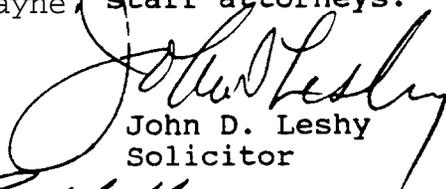
⁸ For example, the Fish and Wildlife Act of 1956 authorizes the Secretary to conduct investigations, prepare and disseminate information, and make periodic reports to the public, to the President, and to Congress with respect to the availability and abundance and the biological requirements of the fish and wildlife resources. 16 U.S.C. § 742d(a)(2). The Secretary also is authorized by the Fish and Wildlife Coordination Act to make surveys and investigations of the wildlife of the public domain, 16 U.S.C. § 661(2), and by the Migratory Bird Treaty Act to collect and publish useful information as to the preservation of migratory birds, 16 U.S.C. § 701. See also 16 U.S.C. §§ 18g (National Park

functions to the above-mentioned bureaus, and redelegated them to the National Biological Survey.

Conclusion

Reorganization Plan No. 3 vests broad authority in the Secretary to organize and reorganize the Department of the Interior "as he deems appropriate." 5 U.S.C. App. § 2. The creation of the National Biological Survey was a proper exercise of that authority.

The following attorneys worked on this opinion: Wilma A. Lewis, Associate Solicitor for the Division of General Law; Timothy S. Elliott, Deputy Associate Solicitor for the Division of General Law; Robert H. Moll, Assistant Solicitor, Branch of Administrative Law and General Legal Services; and Debra Hecox, Alan Palisoul Michael L. Connor, John R. Payne, **staff attorneys.**



John D. Lesly
Solicitor



I concur: _____ Date: May 4, 1994
Secretary of the Interior

Service volunteer authority), 4601-1 (Outdoor Recreation Program), 742c(a) (authority for loans for commercial fishing); 30 U.S.C. § 181 (authority for mineral leases and prospecting permits); 43 U.S.C. §§ 373 (Reclamation Act, 1737 (Federal Land Policy and Management Act). Functions transferred from the Office of Surface Mining Reclamation and Enforcement and the U.S. Geological Survey also are functions that by law are vested in the Secretary. The function transferred from the Office of Surface Mining Reclamation and Enforcement involved mine contaminants research under the Fish and Wildlife Act of 1956 and the Fish and Wildlife Coordination Act. In addition, prior to the establishment of the National Biological Survey, the U.S. Fish and Wildlife Service, pursuant to the Fish and Wildlife Act of 1956 and the Fish and Wildlife Coordination Act, was performing on a reimbursable basis biological services for the U.S. Geological Survey's National Water Quality Assessment Program. Those functions were transferred to the National Biological Survey, which continues to perform those functions for U.S. Geological Survey on a reimbursable basis. By contrast, authority for a National Wetlands Inventory authorized by Pub. Law 99-645 was not transferred to the National Biological Survey. This post-1950 statute requires that the Inventory be carried out through the U.S. Fish and Wildlife Service. 16 U.S.C. § 3931. The Inventory thus could only be transferred to another component of the Department of the Interior by statute.

Appendix A

EXAMPLES OF THE SECRETARY'S EXERCISE OF AUTHORITY UNDER REORGANIZATION PLAN NO. 3 OF 1950*

1. Secretary's Order No. 2577 of July 28, 1950, established the Office of Territories under the administration of a Director, and transferred to that office the powers, functions, and responsibilities theretofore vested in the Division of Territories and Island Possessions and in the Director of that Division.
2. Secretary's Order No. 2596 of November 3, 1950, provided that the Solicitor may exercise all the authority of the Secretary respecting the legal work, the attorney positions, and the attorney personnel of the Department and its several agencies.
3. Secretary's Order No. 2598 of November 24, 1950, created the Division of International Activities and assigned to it certain functions and responsibilities.
4. On April 2, 1962, by Departmental Manual Release, the Secretary established the Bureau of Outdoor Recreation and assigned to it the functions vested in him by the Act of June 23, 1936 (16 U.S.C. § 17k-n), which formerly were exercised by the National Park Service.
5. On April 8, 1970, by Departmental Manual Release, the Secretary established the Office of Hearings and Appeals and transferred to it some functions formerly performed in the (Bureau of Land Management and the Office of the Solicitor.
6. On May 4, 1971, by Departmental Manual Release, the Secretary created the Office of Legislation and transferred to it the functions of the Division of Legislation in the Office of the Solicitor.
7. Secretary's Order No. 2953 of January 7, 1973, established the Mining Enforcement and Safety Administration and transferred to it functions of the Bureau of Mines. Effective March 9, 1978, and memorialized by Departmental Manual Release, the functions of the Mining Enforcement and Safety Administration were transferred to the Department of Labor in accordance with Public law 95-164.
8. Secretary's Order No. 3017 of January 25, 1978, established the Heritage Conservation and Recreation Service and assigned

* Delegations are sometimes made by changes, directed by the Secretary, in the Departmental Manual, and sometimes by Secretary's Order. Both are equally binding.

to it nearly all of the functions of the Bureau of Outdoor Recreation, the functions of the Office of Archeology and Historic Preservation, and three functions which formerly were exercised by the National Park Service. This was followed by Secretary's Order No. 3060 of February 19, 1981, which abolished the Heritage Conservation and Recreation Service and transferred its functions to the National Park Service.

9. Secretary's Order No. 3062 of March 23, 1981, transferred the ethics functions from the Office of Inspector General to the Assistant Secretary--Policy, Budget and Administration.
10. Secretary's Order No. 3071 of January 19, 1982, established the Minerals Management Service and transferred to it functions from the Geological Survey and the Bureau of Land Management.
11. Secretary's Order No. 3073 of February 1, 1982, transferred the Mineral Institutes Program from the Office of Surface Mining Reclamation and Enforcement to the Bureau of Mines.
12. Secretary's Order No. 3074 of February 1, 1982, transferred the Mined Lands Demonstration and Reclamation Projects from the Bureau of Mines to the Office of Surface Mining Reclamation and Enforcement.
13. Secretary's Order No. 3084 of August 25, 1982, terminated the Office of Water Research and Technology and transferred its functions to the Bureau of Reclamation, Geological Survey, and the Office of Water Policy.
14. Secretary's Order No. 3096 of October 19, 1983, abolished the Office of Water Policy and transferred its functions to the Office of Policy Analysis and the Geological Survey.
15. Secretary's Order No. 3099 of December 22, 1983, realigned the assistant secretariats for Water and Science and Land and Minerals Management.
16. Secretary's Order No. 3173 of September 29, 1993, established the National Biological Survey and transferred to it functions from the U.S. Fish and Wildlife Service, the National Park Service, the Bureau of Land Management, the Minerals Management Service, the Office of Surface Mining Reclamation and Enforcement, the U.S. Geological Survey, and the Bureau of Reclamation.