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PUBLIC LANDS FIRE REGULATIONS ENFORCEMENT ACT OF 2003

SEPTEMBER 10, 2003.—Ordered to be printed

Mr. POMBO, from the Committee on Resources, submitted the following

SUPPLEMENTAL REPORT

[To accompany H.R. 1038]

This supplemental report shows the dissenting and minority views with respect to the bill (H.R. 1038), as reported, which was inadvertently omitted in part 1 of the report submitted by the Committee on Resources on July 17, 2003 (H. Rept. 108–218, pt. 1).

U.S. DEPARTMENT OF JUSTICE,
OFFICE OF LEGISLATIVE AFFAIRS,
Washington, DC, July 7, 2003.

Hon. SCOTT MCINNIS,
Chairman, Subcommittee on Forests and Forest Health, Committee on Resources, House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: This letter sets forth the views of the Department of Justice on H.R. 1038, the "Public Lands Fire Regulations Enforcement Act of 2003." H.R. 1038 seeks to increase the penalties to "a fine of not less than $1,000 or imprisonment for not more than one year, or both" for a violation for fire regulations on public lands, National Park Service lands, or National Forest System lands when damage to public or private property results from the violation. The organic statutes applicable to these lands establish offenses for certain violations of fire regulations. Those offenses include minimum fines, longer prison terms for National Park Service and Forest Service offenses than for offenses occurring on lands managed by the Bureau of Land Management (BLM), and a heightened burden of proof for establishing violations on BLM lands. Through the use of the term "notwithstanding," however, the proposed legislation appears to preempt the provisions of the various organic statutes and instead create new offenses. The bill does not alter penalties for violating other regulations currently found

in the organic statutes of BLM (43 U.S.C. § 1733(a)), the National Park Service (16 U.S.C. § 3), and the Forest Service (16 U.S.C. § 551).

The proposed legislation invites a number of questions. One is whether the goal of H.R. 1038 is to increase imprisonment terms, fines, or both. The bill increases jail time from six months to one year for offenses under the organic statutes for the National Park Service and Forest Service. By increasing the maximum term of imprisonment, however, this proposed legislative "fix" complicates the resolution of these cases in federal court in at least two ways. First, it disrupts the availability of streamlined disposition procedures that federal land management agencies currently use to write "tickets" under Forfeiture of Collateral Schedules established in most judicial districts. Such tickets dispose of most of the offenses the agencies detect and prosecute. Second, by increasing the maximum imprisonment term to one year, it allows anyone who gets a ticket to demand a jury trial. The legislation also fixes a minimum fine but not a maximum one. If the goal is to impose higher fines, however, these can be achieved under existing law without creating these collateral consequences.

Increase fines under existing authority

Notwithstanding the maximum fine amounts stated in each of the organic statutes, which are either $500 or $1,000, the actual maximum amounts available to courts are much higher. Since 1987, fines for all federal offenses were increased across the board to the maximums set under 18 U.S.C. § 3571 if the fine amounts in the statute creating the offense, such as the organic acts for the federal lands covered by H.R. 1038, were lower. Consequently, for current Forest Service and National Park Service offenses, whose maximum penalties are six month imprisonment, the maximum fines are now $5,000 (for individuals), $10,000 (for organizations), or an alternative fine based upon twice the pecuniary loss or gain from the offense. For BLM offenses, where the maximum term of imprisonment is one year, fines were increased by 18 U.S.C. § 3571 to a maximum of $100,000 (for individuals), $200,000 (for organizations), or a similar alternative fine.

H.R. 1038 appears to overcome the operation of 18 U.S.C. § 3571 pursuant to which much higher fines than those stated in the organic statutes already are authorized, including fines that capture the "Pecuniary loss" caused by a defendant's criminal conduct such as pecuniary damage to public or private property. These higher amounts can be adopted in Forfeiture of Collateral Schedules used by courts to expedite resolution of minor federal offenses. Forfeiture of Collateral Schedules, which are established in most judicial districts by local rule, provide for payment of a fixed sum in lieu of a court appearance by someone charged with a minor federal offense. See Federal Rule of Criminal Procedure 58(d)(1). The fixed-sum payment that can be required in lieu of an appearance is the statutory maximum authorized by law.

Most federal judicial districts currently use the forfeiture of collateral practice for violations of land management rules, fish and wildlife rules, improper parking, illegal camping, speeding, and other non-felony, minor offenses. By local court rule, Forfeiture of Collateral Schedules list the offenses for which tickets can be

issued and the amount of collateral that must be posted for each offense (i.e., the amount of the ticket). Each federal agency usually prepares separate schedules. Some, but not all, schedules include offenses with maximum terms of imprisonment of one year or identify aggravating circumstances used to increase the amount of collateral to be posted for a particular offense. Forfeitures of collateral are authorized up to the maximum amount of fine authorized by law. Whether or not H.R. 1038 is adopted, these schedules can and should be amended and updated by each agency. While the practice may vary between the districts, it typically involves submission of proposed amendments by the agency to the United States Attorney, who first approves the amendments, then forwards them to the district court for approval and publication or posting as part of the district's local rules.

One drawback of the proposed legislation is that, instead of establishing a maximum fine, it imposes "a fine of not less than $1,000." Subsection 2(c) of the legislation further exempts the fine amounts in subsections 2(a) and (b) from the enhancement provisions of 18 U.S.C. § 3571. See 18 U.S.C. § 3571(e). This drafting language is imprecise and, therefor, creates an unintended result—a $1,000 minimum fine with no apparent maximum.

This legislative fix guarantees every defendant a right to a jury trial and potentially disrupts how tickets are issued

Each of the offenses listed under subsections 2(a) and (b) have maximum one year terms of imprisonment. Under the Sixth Amendment to the United States Constitution, a right to a jury trail attaches to every offense punishable by more than six months incarceration. *Blanton* v. *City of North Las Vegas,* 489 U.S. 538, 542–44 (1989). Consequently, every defendant charged with an offense under this proposed legislation will have a right to a jury trial, no matter how minor the violation. In addition to a jury trial, the defendant can require that a district court judge take his plea and hear his case if the ticket is contested. Fed. R. Crim. P. 58(b)(3). There are several likely results if the land management agencies seek to enforce these higher penalties under a "ticketing" scheme. First and most likely, there will be an increase in demands for a jury trial by those ticketed. The local U.S. Attorney's Office then will be forced to choose between prosecuting them all, or just prosecuting the most serious and refusing to prosecute the others (i.e., dismissing the tickets). Second if court calendars become clogged with demands for jury trials, the court can end the practice of writing tickets for these crimes or recommended a procedure to guarantee that the court sees only the most serious cases. The likely result is that each case would be individually referred to the appropriate U.S. Attorney's Office before it is prosecuted and, as a practical matter, the number actually prosecuted would be limited due to limited prosecutorial resources.

There are several alternatives available to avoid creating a right to a jury trial (and the potential attendant problems) whenever a citation notice or ticket is issued by a law enforcement officer for a National Park Service or Forest Service offenses created by H.R. 1038, while still allowing imposition of significantly higher monetary penalties for such offenses. One alternative is to review and amend Forfeiture of Collateral Schedules to adopted the highest

fines permitted under existing law, which are determined using the enhanced fine provisions of Title 18. A second alternative is to leave the six-month maximum prison terms in the organic statutes for the National Park Service and Forest Service alone, and simply consider increasing the maximum fine amounts. The maximum fines can be raised significantly without creating a right to a jury trial. Indeed, courts have found the imposition of higher fines such as those under some federal wildlife statues (e.g., $25,000 under the Endangered Species Act, 16 U.S.C. 1540(b)(1), and $15,000 under the Migratory Bird Treaty Act, 16 U.S.C. 707(a)) do not establish such a right. These higher fine amounts allow the posting of correspondingly higher amounts of collateral under the forfeiture of collateral process. A third alternative is to create two-tiered penalties similar to those created for offenses under the National Wildlife Refuge Administration Act, 16 U.S.C. § 668dd(f). The National Wildlife Refuge System Improvement Act of 1998, P.L. 105–312, created two sets of penalties—a maximum one-year imprisonment for a person who "knowingly" violates the Act or any regulation issued there under and a six-month penalty for any other violation. Such a system permits each agency to exercise its discretion to seek maximum one-year penalties in appropriate cases, along with potentially higher fines, yet resolve the bulk of the cases under the six-month penalty provisions by issuing tickets that do not create the right to a jury trial.

Where does this legislation fit in the organic statutes?

The current BLM provisions requires proof that a person "knowingly and willfully" violated the regulations. By using the language "notwithstanding" to introduce new penalty provisions, however, H.R. 1038 appears to create new offenses, rather than amendments to those established by the organic statutes, and thus preempts any language in the organic statutes regarding the Government's burden of proof. H.R. 1038 appears to lower that burden of proof for the offenses it creates because it preempts the language from the organic statute establishing that burden. Consequently, the proof necessary to establish a violation of BLM fire regulations would change depending whether there was evidence of damage to public or private property, as required by H.R. 1038. For example, where no damage can be shown, the Government would be required to prove the violation was "knowingly and willfully" committed in violation of the organic statute. Conversely, where the Government can prove the required damage, it would not have to prove that the offense was "knowingly and willfully" committed. Consequently, even among BLM fire regulations, the proof necessary to show a violation of BLM regulations would differ substantially depending upon whether damage to public or private property resulted, with the higher burden of proof required when no damage can be shown.

Amendments to the organic statutes themselves, however, can establish the minimum penalties sought for these specific regulatory violations and avoid any inconsistency among BLM offenses by leaving the burden of proof the same for all BLM offenses, including fire regulations violations that result in damage to public or private property. We note, however, that harmonizing the burdens of proof for BLM lands would not address the inconsistencies in the burden of proof requirements for the other categories of Fed-

eral lands affected. We would be pleased to work with the Committee to draft appropriate language to amend the organic statutes.

In addition to the discrepancies between the requisite burden of proof for violations on BLM lands, H.R. 1038 creates maximum one-year imprisonment terms for offenses on National Park Service and National Forest System lands and, therefore, subjects such offenses to the Federal Sentencing Guidelines when a defendant is formally charged and convicted in Federal district court. The Sentencing Guidelines, established by the United States Sentencing Commission, create determinative sentencing by limiting a court's sentencing discretion to a matrix of published sentencing criteria that must be applied when fixing the sentence for a defendant convicted of any Federal offense punishable by a term of imprisonment of one year or more. These criteria include a series of factors, beginning with the severity of the offense, then require courts to factor in the defendant's criminal history and other published adjustments to calculate a sentence. The BLM statute used to calculate sentences for these offenses now has such a guideline, which provides for probation in most cases.

Finally, if one of the goals here is to allow the agencies to recover certain costs through the disbursement of fines or collateral amounts collected to them, then a comparable provisions ought to be inserted to allow victims, including the Federal Government, to obtain restitution from the perpetrators. Defendants convicted of Title 16 offenses are not specifically required to pay restitution, either mandatory or discretionary, under 18 U.S.C. § 3663 or § 3663A of the Federal Criminal Code that is generally applicable to many Federal crimes. Instead, the sentencing court may, but is not required to, order restitution as a condition of probation, 18 U.S.C. § 3563(b)(2), or supervised release under 18 U.S.C. § 3583(d). To insure that restitution is paid, the mandatory restitution provisions of the Federal Criminal Code must include H.R. 1038's new offenses. We further note that, pursuant to section 2(d), all fines and collateral amounts collected for Federal crimes under this bill would not be deposited into the Crime Victims Fund as they otherwise would be under current law.

Thank you for the consideration of our views. If we can be of further assistance in this matter, please do not hesitate to contact us. The Office of Management and Budget has advised that there is no objection to the presentation of this report from the standpoint of the Administration's program.

Sincerely,

WILLIAM E. MOSCHELLA,
Assistant Attorney General.

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