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SENATE

{ REPORT
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BIG HORN BENTONITE ACT

AUGUST 25, 2004.—Ordered to be printed

Filed, under authority of the order of the Senate of July 22, 2004

Mr. DOMENICI, from the Committee on Energy and Natural Resources, submitted the following

R E P O R T

[To accompany S. 203]

The Committee on Energy and Natural Resources, to which was referred the bill (S. 203) to open certain withdrawn land in Big Horn County, Wyoming, to locatable mineral development for bentonite mining, having considered the same, reports favorably thereon with an amendment and an amendment to the title and recommends that the bill, as amended, do pass.

The amendments are as follows:

1. Strike out all after the enacting clause and insert in lieu thereof the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Big Horn Bentonite Act".

SEC. 2. DEFINITIONS.

In this Act:

(1) COVERED LAND.—The term "covered land" means the approximately 20 acres of previously withdrawn land located in the E $\frac{1}{2}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$ of sec. 32, T. 56N., R. 95W., sixth principal meridian, Big Horn County, Wyoming.

(2) SECRETARY.—The term "Secretary" means the Secretary of the Interior.

SEC. 3. AUTHORIZATION OF MINING AND REMOVAL OF BENTONITE.

(a) IN GENERAL.—Notwithstanding the withdrawal of the covered land for military purposes, the Secretary may, with the consent of the Secretary of the Army, permit the mining and removal of bentonite on the covered land.

(b) SOLE-SOURCE CONTRACT.—The Secretary shall enter into a sole-source contract for the mining and removal of the bentonite from the covered land that provides for the payment to the Secretary of \$1.00 per ton of bentonite removed from the covered land.

(c) TERMS AND CONDITIONS.—

(1) IN GENERAL.—Mining and removal of bentonite under this Act shall be subject to such terms and conditions as the Secretary may prescribe for—

(A) the prevention of unnecessary or undue degradation of the covered land; and

(B) the reclamation of the covered land after the bentonite is removed.

(2) REQUIREMENTS.—The terms and conditions prescribed under paragraph (1) shall be at least as protective of the covered land as the terms and conditions established for Pit No. 144L (BLM Case File WYW136110).

(3) LAND USE PLAN.—In carrying out the provisions of this Act, the Secretary is not required to amend any land use plan under section 202 of the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1712).

(4) TERMINATION OF INTEREST.—On completion of the mining and reclamation authorized under this Act, any party that has entered into the sole-source contract with the Secretary under subsection (b) shall have no remaining interest in the covered land.

SEC. 4. CLOSURE.

(a) IN GENERAL.—If the Secretary of the Army notifies the Secretary that closure of the covered land is required because of a national emergency or for the purpose of national defense or national security, the Secretary shall—

(1) order the suspension of any activity authorized by this Act on the covered land; and

(2) close the covered land until the Secretary of the Army notifies the Secretary that the closure is no longer necessary.

(b) LIABILITY.—Neither the Secretary nor the Secretary of the Army shall be liable for damages from a closure of the covered land under subsection (a).

2. Amend the title so as to read: “A bill to provide for the sale of bentonite in Big Horn County, Wyoming.”.

PURPOSE OF THE MEASURE

The purpose of S. 203 is to provide for the sale of bentonite on military lands in Big Horn County, Wyoming.

BACKGROUND AND NEED

Bentonite is currently being mined on public lands in Big Horn County, Wyoming, on the north and south sides of military lands that were withdrawn from military purposes by Executive Order 7491, dated November 14, 1936. These lands were withdrawn from settlement, location, sale or entry and reserved for use by the War Department. The lands remain withdrawn and reserved under the jurisdiction of the Secretary of the Army for use as a target range. They are currently used by the Wyoming National Guard.

Providing authority to mine bentonite on a specified portion of these withdrawn lands will avoid the bypass of the mineral and enable the mining operation to follow the natural sequence for mining. The Wyoming National Guard does not object to the mining of bentonite on the specified lands at this time, and has indicated the mining operations will not inhibit military training.

LEGISLATIVE HISTORY

S. 203 was introduced by Senator Enzi on January 22, 2003. The Subcommittee on Public Lands and Forests held a hearing on the bill on February 27, 2003. At the business meeting on July 14, 2004, the Committee on Energy and Natural Resources ordered S. 203, as amended, favorably reported.

COMMITTEE RECOMMENDATION

The Committee on Energy and Natural Resources, in open business session on July 14, 2004, by a unanimous vote of a quorum present, recommends that the Senate pass S. 203, if amended as described herein.

COMMITTEE AMENDMENTS

During the consideration of S. 203, the Committee adopted an amendment in the nature of a substitute and an amendment to the title. The substitute authorizes the Secretary, with the consent of the Secretary of the Army, to permit the mining and removal of bentonite on covered land. The substitute directs the Secretary of the Interior to negotiate a sole source contract for the mining and sale of bentonite from a portion of the military lands that adjoins the public lands on which bentonite is currently being mined. The amendment also makes the land subject to closure in the event of national emergency or for the purpose of national defense or security. The bill establishes a price of \$1 per ton and stipulates terms and conditions for mining and reclamation.

SECTION-BY-SECTION ANALYSIS

Section 1 contains the short title.

Section 2 provides definition used in the bill.

Section 3(a) authorizes the Secretary of the Interior, with the consent of the Secretary of the Army, to permit the mining and removal of bentonite on the covered land.

Subsection (b) directs the Secretary of the Interior to enter into a sole source contract for the mining removal of the bentonite that provides for the payment of \$1.00 per ton of bentonite removed.

Subsection (c) sets forth requirements relating to the terms and conditions applicable to the mining and removal of bentonite from the covered land. It provides that in carrying out this Act, the Secretary is not required to amend any land use plan under section 202 of the Federal Land Policy and Management Act of 1976. The subsection also provides that upon completion of mining and reclamation under this Act, the party entering into the sole source contract with the Secretary shall have no remaining interest in the covered land.

Section 4(a) directs the Secretary of the Interior to suspend any mining activity and close the covered land if the Secretary of the Army requires the land for the purpose of national defense or security.

Subsection 4(b) addresses liability.

COST AND BUDGETARY CONSIDERATIONS

The following estimate of costs of this measure has been provided by the Congressional Budget Office.

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, July 19, 2004.

Hon. PETE V. DOMENICI,
Chairman, Committee on Energy and Natural Resources,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for S. 203, the Big Horn Bentonite Act.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Megan Carroll.

Sincerely,

ELIZABETH M. ROBINSON
(For Douglas Holtz-Eakin, Director).

Enclosure.

S. 203—Big Horn Bentonite Act

CBO estimates that S. 203 would not significantly affect the federal budget. Enacting the bill could increase offsetting receipts (a credit against direct spending), but by less than \$5,000. The bill would not affect revenues. S. 203 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would impose no costs on state, local, or tribal governments.

S. 203 would open 20 acres of federal land in Big Horn County, Wyoming, to bentonite mining. (Under current law, that land is closed to all mineral development.) Under the bill, the federal government would receive \$1 for each ton of bentonite removed from the affected land. Based on information from the Bureau of Land Management about the amount of bentonite located within the affected land, CBO estimates that, over the next several years, S. 203 would generate a total of less than \$5,000 in offsetting receipts. We also estimate that any increase in administrative costs to the agency would be minimal.

The CBO staff contact for this estimate is Megan Carroll. This estimate was approved by Peter H. Fontaine, Deputy Assistant Director for Budget Analysis.

REGULATORY IMPACT EVALUATION

In compliance with paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee makes the following evaluation of the regulatory impact which would be incurred in carrying out S. 203. The bill is not a regulatory measure in the sense of imposing Government-established standards or significant economic responsibilities on private individuals and businesses.

No personal information would be collected in administering the program. Therefore, there would be no impact on personal privacy.

Little, if any, additional paperwork would result from the enactment of S. 203, as ordered reported.

EXECUTIVE COMMUNICATIONS

On, February 25, 2003, the Committee on Energy and Natural Resources requested legislative reports from the Department of the Interior and the Office of Management and Budget setting forth Executive agency recommendations on S. 203. These reports had not been received at the time the report on S. 203 was filed. When the reports become available, the Chairman will request that they be printed in the Congressional Record for the advice of the Senate. The testimony provided by the Bureau of Land Management at the Subcommittee hearing follows:

STATEMENT OF JIM HUGHES, DEPUTY DIRECTOR, BUREAU
OF LAND MANAGEMENT

Mr. Chairman, and members of the Subcommittee, thank you for the opportunity to appear here today to discuss S. 203, a bill to open certain withdrawn lands in Big Horn County, Wyoming, to locatable mineral development for bentonite mining. The Department of the Interior generally supports the intent of S. 203, but has some concerns about how the bill would be implemented.

Executive Order 7491 of November 14, 1936, withdrew over 3,500 acres of public land in Big Horn County, Wyoming, from settlement, location, sale or entry, and reserved the lands for use by the War Department as a target range. These lands remain withdrawn and reserved under the jurisdiction of the Secretary of the Army for target range purposes, and are currently used by the Wyoming Army National Guard. The most recent review and rejustification of this withdrawal occurred in May 1984 and concluded that mining operations could not be allowed in the area because of the concerns with small arms training. S. 203 would open approximately 40 acres of this withdrawn land for bentonite mining.

The BLM has no objection to the mining of bentonite on this parcel, however, the BLM is concerned about some ambiguity in S. 203, in its current form. As written, it is not clear whether the lands will be opened to bentonite location under the 1872 Mining Law, which would require BLM to record and regulate the location of the claims. Secondly, it is unclear whether the actual mining of the bentonite will be managed by the Secretary of the Army or the BLM as the bill does not appear to return the lands to the public domain by revoking the withdrawal. We would also prefer to draw a more narrow exception for this parcel than the broad sufficiency language the bill currently provides.

Bentonite may either be a "locatable mineral" under the 1872 Mining Law or valued as a "common variety mineral" and salable under the Materials Act of 1947. The Department of the Interior recommends that language in S. 203 be modified to direct the BLM to use the authority of the Materials Act of 1947 to allow for a competitive sale of the bentonite on this parcel. The BLM currently has the authority to sell common variety bentonite off the parcel with the consent of the Department of Army, and subject to their operations. It is our understanding, however, that the bentonite on this 40 acre parcel may be of a locatable nature. Location and discovery of a valuable mineral under the 1872 Mining Law allows the claimant the right to apply for patent for the lands. While there remains in force a legislative moratorium on the issue of patents for surface lands, a locatable claim could create a future property interest in minerals that could conflict with the Department of Army's ability to use the land. Therefore, we could not support this bill if it allows the minerals on the

site to be mined in a way that would complicate any future military use of the land.

Should the withdrawal be modified or revoked, and the lands placed under BLM management by this bill, it is important that an examination of the use of the proposed withdrawn lands be completed before a decision can be made to open them to bentonite mining. Without additional statutory direction, if the proposed use is acceptable, an amendment to the existing resource management plan would need to be completed and the 40 acres of withdrawn lands placed back into the public domain. Subject to any existing 1872 Mining Law claims, the BLM might need to complete a process of opening the land in an equitable manner to all claimants.

Mr. Chairman, the Department looks forward to working with the Committee on this bill. Thank you for the opportunity to testify before you today. I would be pleased to answer any questions that you or the other members may have.

DEPARTMENTS OF THE ARMY AND THE AIR FORCE,
NATIONAL GUARD BUREAU,
Arlington, VA, March 24, 2003.

Hon. PETE V. DOMENICI,
*U.S. Senate, Dirksen Senate Office Building,
Washington, DC.*

DEAR SENATOR DOMENICI: Thank you for your recent letter to Major General Fred Rees, Acting Chief of the National Guard Bureau, regarding Senate Bill 203 (opening of certain withdrawn land in Wyoming to locatable mineral development for bentonite mining).

The National Guard Bureau contacted The Adjutant General, Wyoming, regarding your request on behalf of the Senate Committee on Energy and Natural Resources. The Wyoming National Guard has no objection to Senate Bill 203. In fact they have a good relationship with the company involved and the opening of the land as stated in the Bill will not inhibit military training in Wyoming.

Again thank you for your letter, if I can be of any further assistance, please do not hesitate to contact me.

Very Respectfully,

KELLY MCKEAGUE,
*Colonel, U.S. Air Force,
Chief, Office of Policy and Liaison.*

CHANGES IN EXISTING LAW

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, the Committee notes that no changes in existing law are made by the bill S. 203, as ordered reported.