

Congress of the United States

Washington, DC 20515

November 3, 2022

The Honorable Thomas J. Vilsack
Secretary
U.S. Department of Agriculture
1400 Independence Avenue, S.W.
Washington, D.C. 20250

Dear Secretary Vilsack:

We write to bring to your attention *West Virginia v. EPA*, a recent Supreme Court decision that clarified the limitations of certain agency action.¹ Although Article I, Section 1 of the United States Constitution vests “all legislative powers” in Congress,² the Biden administration has largely relied on executive action to advance its radical agenda. For example, in his first year, President Biden issued more executive orders³ and approved more major rules⁴ than any recent president. Such reliance on the administrative state undermines our system of government. Our founders provided Congress with legislative authority to ensure lawmaking is done by elected officials, not unaccountable bureaucrats. Given this administration’s track record, we are compelled to underscore the implications of *West Virginia v. EPA* and to remind you of the limitations on your authority.

In *West Virginia v. EPA*, the Court invoked the “major questions doctrine” to reject an attempt by the Environmental Protection Agency (EPA) to exceed its statutory authority.⁵ As the Court explained, “[p]recedent teaches that there are ‘extraordinary cases’ in which the ‘history and breadth of the authority that [the agency] has asserted,’ and the ‘economic and political significance’ of that assertion, provide a ‘reason to hesitate before concluding that Congress’ meant to confer such authority.’”⁶ Under this doctrine, an agency must point to “clear congressional authorization for the authority it claims.”⁷ However, the EPA could not point to such authorization. Rather, the EPA “discover[ed] an unheralded power representing a transformative expansion of its regulatory authority in the vague language of a long-extant, but rarely used, statute designed as a gap filler.”⁸ Notably, such discovery “allowed [EPA] to adopt a

¹ *West Virginia v. Environmental Protection Agency*, 597 U.S. ___ (2022).

² U.S. Const. art. I, § 1.

³ Federal Register, *Executive Orders* (accessed Aug. 2022), available at <https://www.federalregister.gov/presidential-documents/executive-orders>

⁴ Deep Dive, *How Biden Has Made Policy With Short-Term, Costly Rules: Charts*, Bloomberg Law (May 2022), available at <https://news.bloomberglaw.com/environment-and-energy/how-biden-has-made-policy-with-short-term-costly-rules-charts>

⁵ *West Virginia*, 597 U.S. at 5-6.

⁶ *Id.* at 4 (citing *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 129, 159-160).

⁷ *West Virginia*, 597 at 4.

⁸ *Id.* at 5.

regulatory program that Congress had conspicuously declined to enact itself.”⁹ As a result, the Court rejected the EPA’s attempt to so plainly exceed its statutory authority.

Unfortunately, EPA’s attempt to invent new authorities is not unusual for the Biden administration. Recently, the Court struck down the Centers for Disease Control and Prevention’s attempt to impose an eviction moratorium¹⁰ and the Occupational Safety and Health Administration’s attempt to impose a vaccine or testing mandate.¹¹ Thankfully, in *West Virginia v. EPA*, the Court made clear that such reliance on the administrative state will no longer be allowed. To be clear, “the Constitution does not authorize agencies to use pen-and-phone regulations as substitutes for laws passed by the people’s representatives.”¹² In the United States, it is “the peculiar province of the legislature to prescribe general rules for the government of society.”¹³

The Forest Service (FS) at the U.S. Department of Agriculture (USDA) falls within the jurisdictions of the House Committee on Natural Resources and the House Committee on Agriculture (the Committees). Under the Biden administration, the FS’s actions have called into question whether the agency is exceeding its authority or acting purely for political purposes. As a result, the FS is hampering our nation’s development of domestic resources and preventing the implementation of management practices need to maintain healthy forests.

Several actions by FS raise significant concerns that the agency is ignoring scientific conclusions and departmental processes in order to advance President Biden’s political agenda. As demand for minerals continues to increase, the Biden administration repeatedly stifles domestic development of our natural resources. For example, on January 15, 2021, the FS completed a Final Environmental Impact Statement (FEIS) and draft Record of Decision (ROD) for the Resolution Copper Project.¹⁴ Yet, less than two months later, on March 1, 2021, USDA directed FS to rescind both the FEIS and draft ROD.¹⁵ Despite the completion of a FEIS, the Biden administration is initiating a lengthy reexamination process, further delaying production of copper.

Additionally, the Biden administration reversed decisions allowing for the development of the Duluth Complex, one of the largest undeveloped mineral reserves in the world. On September 28, 2021, the FS submitted an application for withdrawal of forest lands in the Rainy River Watershed of the Superior National Forest.¹⁶ The FS proposed a 20-year withdrawal, as

⁹ *Id.* at 5.

¹⁰ *Alabama Assn. of Relators v. Department of Health and Human Servs*, 594 U.S. ___ (2021).

¹¹ *National Federation of Independent Business v. Occupational Safety and Health Administration*, 595 U.S. ___ (2022).

¹² *West Virginia*, 597 at 56 (Gorsuch, J., concurring).

¹³ *Fletcher v. Peck*, 6 Cranch 87, 136 (1810).

¹⁴ U.S. DEP’T OF AGRICULTURE, U.S. FOREST SERVICE, *Resolution Copper Update*, <https://www.fs.usda.gov/detail/r3/home/?cid=FSEPRD858166> (last visited Oct. 6, 2022).

¹⁵ *Id.*

¹⁶ Letter from Gina Owens, Regional Forester, Eastern Region Regional Office, U.S. Forest Service, U.S. Dep’t of Agriculture, to Nada Culver, Acting Dir., Bureau of Land Mgmt., U.S. Dep’t of the Interior (Sept. 28, 2021), available at https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/fseprd969419.pdf.

well as a two-year segregation period for the area.¹⁷ Mirroring the actions of USDA under the Obama administration, the Biden administration is shutting down our nation's ability to develop critical mineral resources.

President Biden continues to take executive actions, leading the FS to overstep its authority. For example, through Executive Order (EO) 14072¹⁸, the management of our national forests will continue to be hampered. Instead of allowing FS to focus on critical forest management projects, this EO will divert resources away toward an onerous exercise that will do nothing to protect old growth forests. Healthy forests are essential to ecosystems, but do not happen by chance. Active and science-driven management is necessary to maintain forests that are healthy and resilient to wildfires. The directives of EO 14072 call into question whether the FS will prioritize the management projects necessary for healthy forests.

Further, by declaring the Camp Hale-Continental Divide National Monument, President Biden utilized the Antiquities Act to establish a monument on lands managed by the FS.¹⁹ Misusing this authority to designate a 53,804-acre monument calls into question whether the President is adhering to the requirement to designate "the smallest area compatible with the proper care and management of the objects to be protected."²⁰ Unfortunately, this action results in the FS creating a de facto wilderness area, significantly limiting the public's access to the public lands. Through this decision, President Biden implemented policies Congress opted not to pursue. If Congress had intended to create a more than 53,000 acre monument, it would have enacted the Colorado Outdoor Recreation and Economy Act, which proposes to do just that. However, this legislation has not passed both chambers of Congress nor become law.²¹ Instead, the Biden administration circumvented Congress and abused its limited Antiquities Act authority.

As the Republican Leaders for the committees of jurisdiction overseeing the Forest Service, we assure you we will exercise our robust investigative and legislative powers to not only forcefully reassert our Article I responsibilities, but to ensure the Biden administration does not continue to exceed Congressional authorizations. Accordingly, to assist in this effort, please answer the following no later than November 17, 2022:

1. As it relates to the Forest Service, please provide the following:
 - a. A list of all pending rulemakings and the specific Congressional authority for each rulemaking.

¹⁷ *Id.*

¹⁸ See Exec. Order 14072, 87 Fed. Reg. 81 (Apr. 22, 2022).

¹⁹ 16 U.S.C. 431-433; Press Release, U.S. DEP'T OF AGRICULTURE, *President Biden Designates Camp Hale-Continental Divide Nat'l Monument*, (Oct. 12, 2022), <https://www.usda.gov/media/press-releases/2022/10/12/president-biden-designates-camp-hale-continental-divide-national>.

²⁰ See 54 U.S.C. § 320301.

²¹ See S. 173 (117th Cong., 2021).

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- b. A list of all expected rulemakings and the specific Congressional authority for each rulemaking.

Sincerely,



Bruce Westerman
Ranking Member
Committee on Natural Resources



Glenn "GT" Thompson
Ranking Member
Committee on Agriculture

cc: Chief Randy Moore, U.S. Forest Service