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# Non-NEPA Legal Aspects of Federal Coal Leasing and Development Policy: An Environmental Attorney's Analysis

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# **Non-NEPA Legal Aspects of Federal Coal Leasing and Development Policy: An Environmental Attorney's Analysis**

## **A. INTRODUCTION**

I will address my remarks specifically to coal development in the West since that is where the most confusion and uncertainty exist, especially absent a Federal Surface Mining Reclamation Law. The magnitude of projected western coal development and the severity of environmental impacts involved hardly need emphasizing. Suffice it to say that federal leases and prospecting permits already exist for well over a million acres of federal coal lands, containing perhaps 30 billion tons of coal.<sup>1</sup> More millions of acres and billions of tons have been leased by state and local governments, railroads and other private surface owners. Up to 85 million acres of federal land alone may ultimately be affected. In short, arid, fragile and sparsely populated areas of the West stand on the threshold of unparalleled coal-related energy development.

Examination of the legal situation relating to this development must start with the federal government, since it owns some 60 percent of the coal in the region outright and controls—through complex surface and subsurface interrelationships—the development of an additional 20 percent. Analysis of the federal role should be subdivided into three categories, pertaining to (a) existing leases, (b) pending lease applications, and (c) future leases.

## **B. EXISTING LEASES**

Prior to the adoption of a moratorium on new coal leases and permits by some BLM state directors in the early 1970s (an action later embraced by

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<sup>1</sup> Information on the coal leasing program and policies is derived generally from the final environmental impact statement, proposed federal coal leasing program, U.S. Department of the Interior (September 1975), unless otherwise noted.

then-Secretary Morton through his order of a near-total moratorium on new federal coal leases in February 1973), the Department of the Interior's coal leasing policy was simple—to give industry what it wanted, when and where it wanted it, and on its own terms. The issuance of prospecting permits and leases in BLM field offices was essentially automatic upon request, without guidance or apparent concern from Washington.

The lack of a firm leasing and development policy and the traditional laissez-faire attitude toward public land mineral exploitation led during this period to a widespread failure to enforce many regulations governing leasing procedures and stipulations. Although the department adopted surface mining reclamation regulations in January 1969 for land where the federal government owned the surface, subsequent investigations have shown that these regulations were honored perhaps as much in their breach as in their observance.<sup>2</sup> And, while most pre-1969 leases contain a general clause ("Section 5" of the standard lease form) allowing the government to require reclamation, enforcement was loose on the few mines that were operating.<sup>3</sup> Moreover, the principal reason few mines were in operation was because the Mineral Leasing Act requirement that there be diligent development and continuous operations on existing leases was not observed at all.

The present implication of this past failure is that many environmentalists, ranchers and others viewing rapid western coal development with considerable concern and skepticism are beginning to look more closely at these existing leases and to question whether many of them in fact were issued or are held illegally, and whether many of them should in fact be developed. For example, the Department of the Interior now concedes that many of these existing leases were issued without regard for environmental protection, and some probably should not have been issued at all. The department estimates that perhaps 20 percent of the federal coal deposits already leased are in areas environmentally unacceptable to mine.

Among the possible illegalities uncovered by recent studies have been (a) leasing without first performing the required technical examination of the area<sup>4</sup>—a key requirement underpinning the formulation of environmental protection regulations in the lease itself; (b) improper issuance of

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<sup>2</sup> See, e.g., IMPROVEMENTS NEEDED IN THE ADMINISTRATION OF THE FEDERAL COAL LEASING PROGRAM, REPORT NO. B-169124, GENERAL ACCOUNTING OFFICE (MARCH 29, 1972); ADMINISTRATION OF REGULATIONS FOR SURFACE EXPLORATION, MINING, AND RECLAMATION OF PUBLIC AND INDIAN COAL LANDS, NO. B-148623, GAO (AUGUST 10, 1972); FURTHER ACTION NEEDED ON RECOMMENDATIONS FOR IMPROVING THE ADMINISTRATION OF THE FEDERAL COAL LEASING PROGRAM, NO. RED-75-346 (APRIL 28, 1975); LEASED AND LOST, COUNCIL ON ECONOMIC PRIORITIES (1974).

<sup>3</sup> See note 2, *supra*.

<sup>4</sup> See 43 C.F.R. § 23.5.

prospecting permits in areas where coal was known or should have been known to exist; (c) failure to require bonds for exploration or mining activity; and (d) failure to obtain renewals of prospecting permits or failure to apply for preference right leases within the time allotted in the permit.<sup>5</sup>

I daresay a careful perusal of the files on many existing leases could turn up one or more of these violations. Their existence has been confirmed by both governmental and non-governmental studies. While laches and other technical defenses could insulate some of these leases from judicial review and rescission, concerned groups and individuals affected by development of existing leases will by no means take the legal validity of their existence for granted.

### C. PENDING LEASE APPLICATIONS

Many of the same possible infirmities can be found in existing lease applications. The department's coal leasing moratorium has frozen, for the time being, action on pending preference right lease applications covering more than half a million acres containing some 12 billion tons of coal. These applications had matured from prospecting permits issued in the late 1960s and early 1970s. The Mineral Leasing Act provides that prospecting permits are properly issued only when the existence or workability of coal is in doubt, and thereafter, a lease may be obtained if it is shown that coal has been found in commercial quantities within the time allowed by the permit. As noted above, many prospecting permits issued in the last decade or so may have been illegally issued, since the existence and workability of coal in these areas were not in doubt. The department's geological survey—whose responsibility it is to determine such matters—has adopted a complex definition of "workability" which has only confused the issue,<sup>6</sup> but again we can expect closer scrutiny to be given to the circumstances surrounding issuance of these permits.

Two other key legal issues posed by existing preference right lease applications are now being raised in a lawsuit in which I am counsel for plaintiffs.<sup>7</sup> These issues are intimately related; indeed, they can be seen as two sides of the same coin. They are, *first*, whether the Department of the Interior must, under NEPA, take environmentally-related costs of extracting and developing the coal into account in deciding whether "commercial

<sup>5</sup> See note 2, *supra*.

<sup>6</sup> See *James C. Goodwin*, Decision of the Interior Board of Land Appeals No. 71-120 (January 23, 1973). USGS defines "workability" as being primarily concerned with the physical parameters of the coal (chemical content, thickness, depth, etc.) with some considerations given to the economics of so-called "intrinsic factors" (such as the cost of extraction) but *not* to the economics of "extrinsic factors" (such as transportation costs and available markets).

<sup>7</sup> *NRDC v. Berkland*, C.A. No. 75-0313 (D.C.D.C., filed March 1975).

quantities” of coal have been found (as noted above, this is a statutory prerequisite to issuing a preference right lease); and *second*, whether the department has discretion under NEPA and the Mineral Leasing Act to refuse to issue a preference right lease where it believes unacceptable environmental harm would follow. We believe a strong argument can be made for the affirmative of both of these propositions, and the case is now under submission to the U.S. District Court here in the District of Columbia. The issue is especially important not only because of the vast acreages and quantities of coal in pending applications, but also because the department has in effect admitted that it may be environmentally unacceptable to develop substantial amounts of it.<sup>8</sup>

#### D. FUTURE LEASES

The department has now taken steps to rectify some of the shortcomings of its past leasing program, but the shape of its new leasing program and its regulations for control of future leasing and mining are by no means clear—even apart from the fate of several proposals now pending before Congress. I will attempt to outline briefly some of the key pending developments and possible legal issues they raise.

*First*, the department recently proposed, for the first time in the 55-year history of the Mineral Leasing Act, to issue regulations implementing the “diligent development” and “continuous operations” requirements of that act, both to require development (or relinquishment) of existing leases and to ensure that whatever coal is leased in the future will be developed.<sup>9</sup> The regulations as proposed raise several important environmentally-related issues. For example, environmentally undesirable leases already issued could be “recaptured” by carefully structured regulations. Uncertainty over the need for further major new leasing could be reduced by rapid and firm enforcement of diligent development requirements. Moreover, coordinated planning of federal and other coal land development—through application of the “logical mining unit” concept—could also mitigate environmental damage.

The department’s proposed regulations did not satisfactorily deal with these issues. They left unclear such key issues as to what extent and how quickly they will or should be applied to existing leases; what constitutes a start toward development (*e.g.*, initiation of baseline studies, contracting

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<sup>8</sup> The Interior Department has not taken a formal position on the second issue, and on the first has promised for nearly a year to initiate rule-making proceedings to determine whether to include environmental considerations in applying the “commercial quantities” test. Despite departmental assurances, so far there has been no movement to do this.

<sup>9</sup> See 39 Fed. Reg. 43229 (December 11, 1974).

for the purchase of equipment); and how much discretion the mining supervisor should have to enforce these regulations. These questions may be resolved by the final regulations or may have to be settled by subsequent litigation.

*Second*, the department recently proposed, for the third time in as many years, to revise both the USGS's coal mining operating regulations and the BLM's coal surface mining reclamation regulations.<sup>10</sup> Barring legislation, these regulations are, when revised and officially put into effect, expected to form the core of federal environmental protection requirements for years to come. Like existing regulations, they require submission and approval of a plan before exploration or mining can be conducted, and contain performance standards for evaluating environmental controls during mining and reclamation operations.

As proposed in draft form, these regulations contain enough ambiguity to keep dozens of lawyers busy for years. In some respects they are significantly weaker than either the Surface Mining Reclamation Law vetoed by the President, the administration's own surface mining reclamation bill introduced in Congress earlier this year, or the prior proposed revision of these same regulations published in January of this year.<sup>11</sup> Relaxation of environmental protection standards will be resisted by environmentalists and their allies, and I look for some tough battles over the meaning and enforcement of key provisions of these regulations. It is ironic that the Administration—which has consistently objected to congressional surface mining proposals as being too general, subject to conflicting interpretation, and susceptible to litigation-inspired delays—now proposes guidelines phrased so loosely; *e.g.*, “to the maximum extent practicable” is a standard pervasively used.

These new regulations expressly would apply to tribal land and to private land over federal coal. This would clear up a point of considerable uncertainty, since although the 1969 regulations explicitly exempted private surface, the department subsequently moved *de facto* toward enforcing them on federal leases operating under private surface. So far, industry has not questioned the department's authority to apply these regulations to the private surface, although I note that American Electric Power Corporation, perhaps the most vociferous advocate of greater use of western coal, is now suing Kerr-McGee Corporation because the latter's effort to mine its

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<sup>10</sup> 40 Fed. Reg. 41122 (September 5, 1975), Previous proposals appeared at 38 Fed. Reg. 10686 (April 30, 1973); appendices D and F to the Draft Environmental Impact Statement, proposed Federal Coal Leasing Program (May 1974); and 40 Fed. Reg. 4428 (January 30, 1975).

<sup>11</sup> 40 Fed. Reg. 4428 (January 30, 1975).

federally-leased coal under AEP-owned surface land in Wyoming will allegedly deprive AEP of its property.<sup>12</sup>

*Third*, the department's coal leasing system may, after two attempts at a description in the environmental impact statement on the coal leasing program, politely be termed "substantially unexplained." The EMARS system is apparently some sort of land use planning process—perhaps similar or identical to the system already in use on BLM-managed lands. Whether leases will be issued consistent with a comprehensive land use plan for the affected area will be closely followed by environmentalists and others. Furthermore, whether the planning process itself fully considers all environmental factors will be a focus of environmental concern.

*Fourth*, an issue which has never been squarely settled, or even faced, is the extent to which state mining and reclamation law will apply to federal coal leases. The main reason this complicated issue has never been decided is simply because federal coal leases issued to date have routinely required the lessee to comply with state laws, whether the surface is private or federal. Now, however, spurred by the passage of tougher state reclamation laws—tougher perhaps than this Administration can countenance—the new proposed regulations allow for the application of state law whenever the Governor requests it and the Secretary finds that application of state law would, *first*, result in protection of environmental values "at least as stringent" as is possible under the federal regulations and, *second*, would be "consistent" with federal policy on coal development. Both key phrases are quite ambiguous, but I take the department's intent to be to encourage states to adopt strip mining standards as strict (or loose) as, but no more stringent than, the Administration's standards. Another question raised by this deferral mechanism is whether it applies to substantive state standards only, or whether it also permits federal enforcement of state procedures (e.g., annual permits) as well.

*Fifth*, the interior department is known to be preparing a new coal lease form, but its contents have not yet been finally determined. In particular, we will examine closely the environmental stipulations to be inserted in federal coal leases. The most important function of lease stipulations is to tailor operations on the particular lease site to the specific environmental conditions existing there. While the department's "Technical Examination-Environmental Analysis Report" is designed to provide this information,<sup>13</sup> it has not really been conscientiously enforced; *i.e.*, lease stipulations have

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<sup>12</sup> New York Times, May 25, 1975.

<sup>13</sup> See 43 C.F.R. § 23.5; proposed 43 C.F.R. § 3041.2, 40 Fed. Reg. 41128 (September 5, 1975).



been formulated largely without regard to peculiar local conditions. Here again, environmental and ranching groups will work to see that these provisions are fully implemented in any future lease offerings.

### **E. POWER PLANTS AND OTHER INDUSTRIAL FACILITIES**

Another uncertainty concerns the extent to which power plants and other coal-related industrial facilities can and will be sited on federal land. The new proposed BLM surface protection regulations expressly provide that any use of the federal lands for "a power generation plant or a commercial or industrial facility" will be authorized "under a separate permit."<sup>14</sup> There is substantial question whether the most important federal land management agencies, the BLM and the Forest Service, have the authority to issue such permits. The Forest Service's Multiple Use Act alone may not authorize the issuance of permits for huge power plants and the BLM has no statutory organic act (although Congress is considering one). The use of now somewhat infamous "Special Land Use Permits" (SLUP's) to allow controversial developments on public lands—developments either prohibited or not expressly authorized by other acts—can no longer be so easily tolerated after the decision in the *Alaska Pipeline* case, *Wilderness Society v. Morton*, 479 F.2d 842 (D.C. cir. 1973), holding illegal the slup issued for the pipeline right-of-way in excess of the statutory width limitation.

### **F. CONGRESS**

Congress' attempts to participate in the formulation of federal coal development policy is a subject deserving extensive treatment, but is beyond the scope of my remarks. I would be remiss if I didn't emphasize what should be obvious; namely, that a solid majority in Congress is obviously very seriously concerned about strip mining and federal coal leasing policy. Whether the veto of federal surface mining reclamation legislation will stick over the long term is uncertain. Moreover, a bill reforming the present federal coal leasing system has already passed the Senate, and is now before the House Interior Committee. Passage of this bill—with or without surface mining reclamation standards<sup>15</sup>—could seriously affect the department's whole coal leasing program.

<sup>14</sup> Proposed 43 C.F.R. § 3041.0-8, 40 Fed. Reg. 41128 (September 5, 1975).

<sup>15</sup> The Senate-passed Federal Coal Leasing Bill (S. 391) includes basically the reclamation standards from the vetoed surface mining bill. The House Interior Committee is considering a proposal by Representative Melcher to include the vetoed bill's standards for mining and reclaiming non-federal as well as federal coal; in effect, this proposal would, with some minor changes, tack the entire vetoed bill on the Federal Coal Leasing Reform Act.

### G. INDIAN TRIBES

Before closing, I would like to say a word about the peculiar position of Indian tribes. Several tribes, notably the Crow and Northern Cheyenne, own enormous coal deposits. It is an understatement to say that the unique legal status of Indian tribes vis-à-vis federal and state governments has created uncertainties and difficulties for the tribes, the governments, and for corporations dealing with them both. Administrative petitions and a recently-filed lawsuit<sup>16</sup> are contesting whether the Bureau of Indian Affairs has fulfilled its trust responsibilities to the tribes in advising and providing information to them prior to approving the prospecting permits and leases entered into by the tribes in the late 1960s and early 1970s. Among the allegations of abuse of trust responsibility is the failure of the BIA to comply with NEPA and its own regulations providing for technical examinations, environmental analyses, bonding, acreage limitations, etc., in approving tribal coal leases. Thus, some of the same shortcomings noted above with respect to existing non-tribal federal leases are now being litigated in connection with tribal leases.

### H. CONCLUSION

The traditional laissez-faire attitude toward federal coal leasing and development is rapidly passing. The rise of environmental consciousness means that increasingly federal coal policy formulation will find itself steeped in controversy. The D.C. Circuit Court of Appeals' *en banc* decision in the *Alaska Pipeline* case adds momentum to this trend toward greater scrutiny of interior department public land management practices. It marks the arrival of a new era whereby the judicial branch will not automatically approve the unbridled exercise of near-plenary power by federal agencies over public land management. Similarly, the courts will not defer without question to an agency's supposed expertise in dealing with such problems, and will increasingly require strict compliance with an agency's own regulations. These trends, coupled with the well-recognized expansion in the law of standing and judicial review, will inevitably mean that more of these questions of federal public land management, and particularly federal coal management, will wind up in the courts.

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<sup>16</sup> Crow Tribe of Indians v. Frizzell, No. \_\_\_\_ (D.C.D.C.), filed September 1975.