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LANDS AVAILABLE FOR MINERAL LEASING

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**PUBLIC LANDS MINERAL LEASING:
ISSUES AND DIRECTIONS**

A Short Course Sponsored by the
Natural Resources Law Center
University of Colorado School of Law

June 10-11, 1985

LANDS AVAILABLE FOR MINERAL LEASING
June 10-11, 1985

I. Introduction

- A. The history of the public lands largely reflects the history of the United States west of the Alleghenys.
- B. The issue: Is title to the tract in question in the United States? If so, is it available for lease? If so, under what conditions?

II. Historical Background.

- A. Policies established by the Land Ordinance of 1785 -- Settlement, Revenue, Survey and Disposal.
- B. History of disposal to private individuals.
 - 1. Credit sales -- 1800-1820
 - 2. Cash sales -- 1820-1862
 - 3. Preemption laws
 - 4. Military bounties
 - 5. Homestead Act 1862 (43 U.S.C. § 161 et. seq.)
 - 6. Desert Land Act of 1877 (43 U.S.C. § 321 et. seq.)
 - 7. Reclamation Homesteads of 1902 (43 U.S.C. § 431 et. seq.)
 - 8. After 1866, homesteads were granted only as to lands deemed to be non-mineral in character, 30 U.S.C. § 21.
- C. Indian Lands -- Tribal, Trust and Allotment.
- D. Land Grants to States.
 - 1. School lands -- generally one or two sections

per township (e.g. Colorado, 18 Stat. 475 (1875)) up to four sections (e.g. Utah, 28 Stat. 109 (1894)).

2. Indemnity or In Lieu Lands (43 U.S.C. § 851-52).
3. Other grants for various purposes -- canals, roads, buildings, colleges, penitentiaries, etc.
4. Until 1927, state grants also were generally limited to lands deemed to be non-mineral. (As to pre-1927 procedures, see West v. Standard Oil Co., 278 U.S. 200 (1929); 43 U.S.C. § 870 contains post-1927 procedures.)
5. See also 48 U.S.C. § 353 (Alaska Statehood Act).

E. Land Grants to Railroads.

1. Either specific grants (e.g. Union Pacific, 12 Stat. 489 (1862)) or grants under general statute (Act of March 3, 1875, 43 U.S.C. § 934 et. seq.).
2. Usually included the right of way for the railroad alignment plus other adjacent lands to sell off for financing i.e. every other section along the line in a checkerboard pattern.
3. Widths of grant areas and other terms and conditions varied. Usually only non-mineral

lands were granted. (See Northern Pacific Ry. Co. v. Sodenberg, 188 U.S. 526 (1903)).

F. Disposition of minerals -- history.

1. 1785 Land Ordinance
2. California -- Colorado Gold Rushes
3. Mining Laws of 1866 and 1870 (43 Stat. 253 (1866) and 16 Stat. 218 (1870))
4. Mining Law of 1872 (30 U.S.C. § 21 et. seq.)
5. 1897 Act (29 Stat. 526 (1897))
6. Mineral Leasing Act of 1920 (30 U.S.C. § 18 et. seq.)
7. Prior to 1920, oil and gas, coal, oil shale, etc. could be produced only under the mining claim format under the 1872 Mining Law. See Hickel v. Oil Shale Corp., 400 U.S. 48 (1970); Andrus v. Shell Oil Co., 446 U.S. 657 (1980).

G. Split Estates -- Mineral Reservations

1. The 1866 Act (30 U.S.C. §§ 21) reserved all lands containing valuable mineral deposits from non-mineral entry and provided for disposition solely under the 1872 Mining Law.
2. Split Estates -- surface patents -- with certain minerals reserved to United States.
 - a. 1909 Act (30 U.S.C. § 81) (coal)
 - b. 1914 Act (30 U.S.C. § 121) (phosphate, nitrate, potash, oil, gas or asphalt)
 - c. 1933 Act (30 U.S.C. § 124) (sodium and

sulphur)

3. Split Estates -- full mineral reservations to United States.

- a. Stock Raising Homestead Act of 1916 (43 U.S.C. § 291 et. seq.)
- b. Taylor Grazing Act of 1934 (43 U.S.C. § 315g)
- c. Federal Land Policy and Management Act of 1976 (FLPMA, 43 U.S.C. 1719(a)).

H. Competing Entries -- Multiple Mineral Development.

1. Policy of "unity" -- fee conveyances.

- a. Homesteader v. Miner
- b. Homesteader v. Homesteader
- c. Miner v. Miner (30 U.S.C. § 30)

2. Application of "unity" policy to Leasing Act lessees as against mining claimants.

- a. General Rule: Second in time void ab initio
- b. Multiple Mineral Development Act of 1955 (30 U.S.C. § 521 et. seq.)

III. Lands Available for Leasing -- Mineral Leasing of 1920.

A. 30 U.S.C. § 181 permits leasing of Leasing Act substances in lands "owned by United States".

1. Interpreted to apply only to public domain and not to acquired or other lands. See 40 Ops. Att'y. Gen. 9 (1941) and 43 C.F.R. § 3100.0-3(a)(1).

2. As noted, if title to mineral interest in a particular tract is in the United States, the issue is then whether it is available for lease and under what conditions.
- B. Other exclusions from 1920 Act. (30 U.S.C. § 181, unless otherwise noted.)
1. Incorporated cities, towns, etc.
 2. National Parks & Monuments.
 3. Naval petroleum and oil shale reserves.
 4. Lands within existing leases or lease application. (See Martin Judge, 49 L.D. 171 (1922): Law of Federal Oil and Gas Leases § 2.6 (1967 ed.)).
- C. Special Leasing Acts.
1. Indian Lands -- generally (25 U.S.C. § 396a-396g).
 2. Right of Way Leases (30 U.S.C. § 301 et. seq.).
 3. Acquired Lands Leasing (30 U.S.C. § 351).
 4. Outer Continental Shelf Lands Act (43 U.S.C. § 1331 et. seq.).
- D. Competitive Leasing -- Known Geologic Structures (30 U.S.C. §§ 189 and 226(b)) -- See Arkla Exploration Co. v. Texas Oil & Gas Corp., 734 F.2d 347 (8th Cir. 1984), cert. denied _____ U.S. _____, 53 U.S. L.W. 3506 (1985).
- E. Non-Competitive Leases (30 U.S.C. § 226(c)) "person

first making application for the lease who is qualified". Application of Section 226(c) to simultaneous drawing (lottery) system -- Thor-Westcliff Development, Inc. v. Udall, 314 F.2d 257 (D.C. Cir. 1963).

F. Leasing Discretionary -- Udall v. Tallman, 380 U.S. 1 (1965).

IV. Withdrawals and Reservations.

A. Early history.

1. Pickett Act of 1910 (43 U.S.C. § 141-3).
2. United States v. Midwest Oil Co., 236 U.S. 459 (1915).

B. Withdrawals as a management tool.

C. Recent developments.

D. FLPMA § 204 (43 U.S.C. § 1714).

1. Implications of Immigration and Naturalization Service v. Chada, ____ U.S. ____, (1983); 103 S.Ct. 2764. See also Pacific Legal Foundation v. Watt, 529 F.Supp 982 and 539 F.Supp 1194 (D.C. Mont. 1981); and National Wildlife Fed. v. Watt, 511 F. Supp 1145, 577 F. Supp 825 (D. D.C. 1983, 1984).
2. Systematic review and report to Congress.
3. Revocations.

E. Examples of types of pre-1976 withdrawals.

(Repealed by FLPMA, 90 Stat. 2792 (1976) except as noted).

1. Reclamation - (43 U.S.C. § 416).
 2. Power site withdrawals (43 U.S.C. § 141 and 16 U.S.C. § 818. The latter section was not repealed by FLPMA).
 3. Stock driveways and waterholes (43 U.S.C. § 300).
 4. Wildlife refuges (see 16 U.S.C. § 668dd, not repealed by FLPMA, 43 U.S.C. § 1714(j)).
 5. Parks and Monuments (Antiquities Act, 16 U.S.C. § 431 -- not repealed by FLPMA, 43 U.S.C. § 1714(j)).
- F. Wilderness Study Areas -- FLPMA § 603 (43 U.S.C. § 1782).
1. Wilderness Act of 1964 -- See 16 U.S.C. § 1131(c).
 2. Solicitor's Opinion M-36912 (September 5, 1978), 86 I.D. 89 (1979).
 3. Rocky Mountain Oil & Gas Assn. v. Watt, 696 F.2d 734 (10th Cir. 1982).
 4. FY-83 through FY-85 DOI Appropriation Acts (see e.g. FY-85, 98 Stat. 1871 (1984)).
 5. BLM Procedures
 - a. No surface occupancy
 - b. All uses temporary and totally reclaimable.

V. Miscellaneous Problems.

A. Inland Water Bodies.

1. Navigable -- State title
2. Non-navigable -- Federal
3. See North Dakota v. Block, 671 F.2d 231 (9th Cir. 1982), rev. other grounds _____ U.S. _____, 103 S.Ct. 1811 (1983).

B. Coastal Waters

1. Submerged Lands Act, 43 U.S.C. § 1301 et. seq.
2. Outer Continental Shelf, 43 U.S.C. 1331, et. seq.

C. Unsurveyed Lands -- Metes and bounds surveys or protracted surveys.

VI. Stipulations -- Legal Basis

A. General Statutes

1. 30 U.S.C. § 226(a) "may be leased by the Secretary" (see Udall v. Tallman, 380 U.S. 1 (1965)).
2. 30 U.S.C. § 189 authorizes the Secretary to promulgate "necessary and proper" rules and regulations.
3. 30 U.S.C. § 187 "Each lease shall contain provisions relating to:
 - a. Reasonable diligence, skill and care in operations.
 - b. Hours, wages conditions of employment and safety and welfare of miners and minors.
 - c. Prevention of undue waste.
 - d. Sale at reasonable prices.

- e. Prevention of monopoly.
 - f. Protection of the interests of the United States.
 - g. Safeguarding of the public welfare.
4. As to post-1976 coal leases, see also 30 U.S.C. § 207(a) ("...such other terms and conditions as the Secretary shall determine.")

B. Other Asserted Bases

- 1. Stipulations are a "lesser included power" in lieu of deciding not to lease.
- 2. The lease as a contract -- The lessee has a choice accept the lease as is with the stipulations and bid or submit a drawing entry or not.
- 3. Stipulations as an exercise of sovereignty, i.e. land use regulation.
- 4. Stipulations as regulations (see 43 C.F.R. §§ 3101.1 and 3101.1-2).
- 5. See also Pring, "Power to Spare: Conditioning Federal Resource Leases to Protect Social, Economic and Environmental Values, 14 Nat. Res. Law 305 (1981); Barry, "The Surface Mining Control and Reclamation Act of 1977 and the Office of Surface Mining: Moving Targets or Immovable Objects, 27A Rocky Mtn. L. Found. 169, 320-24 (1982).

C. Specific Statutory Authorizations for Stipulations.

1. Designated Wilderness Areas -- 16 U.S.C. § 1133(d) (3).
2. Wild and Scenic Rivers -- 16 U.S.C. § 1280(a).
3. Wilderness Study Areas under Section 603 of FLPMA (43 U.S.C. § 1782) -- See IV, F, supra.
4. Cultural - Historical Protection -- 16 U.S.C. §§ 433, 470 f and 470aa through 470^{ll} -- See also Executive Order 11593 (May 13, 1971) 36 C.F.R. Part 800.
5. Endangered Species Act -- 16 U.S.C. § 1531 et. seq.
6. Acquired Lands -- 30 U.S.C. § 352.
7. National Park Service Administered Areas -- 36 C.F.R. Part 9.
8. National Environmental Policy Act, 42 U.S.C. § 4332. See also National Resource Defense Council v. Berklund, 609 F. 2d 553 (D.C. Cir. 1980).

VII. Administration of Stipulation Processes.

A. May stipulations be attached to the lease only or may they be incorporated at some later state, i.e. as a part of APD or mining plan approval.

1. As to post-1976 coal lease mine plans, see 30 U.S.C. § 207(c). ("The Secretary shall approve or disapprove the plan or require that it be modified.")
2. As to coal lease readjustments, see 30 U.S.C.

§ 207(a) ("such rentals and royalties and other terms and conditions of the lease will be subject to readjustment at the end of its primary term of twenty years...[and each ten years thereafter]").

B. The ultra vires or "taking" issues.

1. Over zealous regulation and stipulation - See Gulf Oil Corp. v. Morton, 493 F.2d 141 (9th Cir. 1973); Union Oil Co. of California v. Morton, 512 F.2d 743 (9th Cir. 1975); Sun Oil Corp. v. United States, 572 F.2d 786 (Ct. Cl. 1978).
2. Limits of the sovereign authority to regulate land uses. See Whitney Benefits, Inc. v. United States, 752 F. 2d 1554 (F. Cir. 1985).

C. Must there be a reasonable nexus between:

1. A proposed stipulation and an authorizing statute, regulation or lease term?
2. A proposed stipulation and on-site lease activities, i.e. a stipulation addressing remote, off-site socio-economic impacts?

D. Does the portion of Section 35 of the Mineral Leasing Act (30 U.S.C. 191) providing for sharing of Leasing Act revenues with the states and local governments for the purpose of mitigating socio-economic effects of federal leasing cast doubt on

the Secretary's authority to stipulate as to remote, off site socio-economic impacts?

- E. May the Secretary fundamentally alter the economic terms of the bargain by imposing major cost-increasing stipulations at the APD or mine plan approval stage unless such action is authorized by statute, regulation or lease term (e.g. Contingent Right Stipulation, see 47 F.R. 34,577 (1982) and 48 F.R. 3370 (1983)).
- F. Is the Secretary authorized to issue leases where they are so thoroughly stipulated that they effectively convey no appreciable interest in the land?

VIII. Conclusion.