Public Lands Mineral Leasing: Issues and Directions (Summer Conference, June 10-11) 1985

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Environmental Considerations in Public Lands Mineral Leasing and Development II

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I. Introduction

A. The Mineral Leasing Act of 1920, 30 U.S.C. § 181, et seq., the basic statute authorizing mineral leasing on the public lands, does not specifically address environmental protection. The only reference arguably dealing with environmental protection is found in Section 30 of the Act, which provides that the Secretary shall require certain provisions in each lease, including "provisions for the purpose of insuring the exercise of reasonable diligence, skill, and care in the operation of said property; a provision...for the prevention of undue waste...and such other provisions as he may deem necessary...for the protection of the interests of the United States,...and for the safeguarding of the public welfare...." 30 U.S.C. § 187.

1. The Federal Coal Leasing Amendments of 1976 amended the Mineral Leasing Act provisions concerning the issuance of coal leases, and require the Secretary to consider the environmental impacts of issuing a coal lease. 30 U.S.C. § 201(a)(3)(C).

B. Environmental laws passed mainly in the 1970's (e.g., the Clean Water Act, Clean Air

Act, Resource Conservation and Recovery Act, Endangered Species Act, etc.) apply to operations on mineral leases. Beyond requiring compliance with those laws, the Secretary's power to manage lease operations (for example, to preserve subjective scenic values) is determined largely by the terms of the lease contracts, including "stipulations" attached to them, and his regulations in effect when the leases were issued. It has long been held that when the United States "comes down from its position of sovereignty and enters the domain of commerce, it submits itself to the same laws that govern individuals there." Cooke v. United States, 91 U.S. 389 (1875). This means that in determining the respective rights of the Secretary and mineral lessees, the courts will look to general contract law principles. See Rosebud Coal Sales Co. v. Andrus, 667 F.2d 949, 951 (10th Cir. 1982) (involving interpretation of federal coal lease).

C. The lease terms typically included in federal mineral leases, as well as the Secretary's regulations, give the Secretary broad power

to regulate mineral operations on the leases in order to protect the environment. The lease form and regulations for oil and gas leases illustrate this.

D. The federal oil and gas lease form now in effect provides that the "rights granted are subject to applicable laws, the terms, conditions, and attached stipulations of this lease, the Secretary of the Interior's regulations and formal orders in effect as of lease issuance, and to regulations and formal orders hereafter promulgated when not inconsistent with lease rights granted or specific provisions of this lease." (Form 3100-11, March 1984). The lease form also contains the following clause concerning the conduct of operations:

"Sec. 6. Conduct of operations--Lessee shall conduct operations in a manner that minimizes adverse impacts to the land, air, and water, to cultural, biological, visual, and other resources, and to other land uses or users. Lessee shall take reasonable measures deemed necessary by lessor to accomplish the intent of this section. To the extent consistent with lease rights granted, such measures may include, but are not limited to, modification to siting or design of facilities, timing of operations, and specification of interim and final reclamation measures. Lessor reserves the right to continue existing uses and to authorize further uses upon or in the leased lands, including the approval of easements of rights-of-ways. Such uses shall be

conditioned so as to prevent unnecessary or unreasonable interference with rights of lessee.

Prior to disturbing the surface of the leased lands, lessee shall contact lessor to be apprised of procedures to be followed and modifications or reclamation measures that may be necessary. Areas to be disturbed may require inventories or special studies to determine the extent of impacts to other resources. Lessee may be required to complete minor inventories or short term special studies under guidelines provided by lessor. If in the conduct of operations, threatened or endangered species, objects of historic or scientific interest, or substantial unanticipated environmental effects are observed, lessee shall immediately contact lessor. Lessee shall cease any operations that would result in the destruction of such species or objects."

E. The Secretary's regulations governing oil and gas operations provide that "the lessee shall conduct operations in a manner which protects the mineral resources, other natural resources and environmental quality." 43 C.F.R. § 3162.5-1(a) (1984). Furthermore, "the lessee shall exercise due care and diligence to assure that leasehold operations do not result in undue damage to surface or subsurface resources or surface improvements." 43 C.F.R. § 3162.5-1(b) (1984).

F. Despite this broad power to mitigate environmental impacts from mineral lease operations, environmental groups frequently object to the

issuance of mineral leases or, alternatively, argue that the Secretary should attach a stipulation to the lease reserving the power to prohibit operations if he later decides that the environmental impacts are unacceptable. While recognizing the Secretary's broad power to mitigate environmental impacts by regulating the manner, method, timing and location of lease operations, the courts have held that in the absence of specific power to deny development, the lease gives the lessee the right to explore for and develop the minerals on a lease. See Sierra Club v. Peterson, 717 F.2d 1409 (D.C. Cir. 1983); Union Oil Company of California v. Morton, 512 F.2d 743 (9th Cir. 1975); Sun Oil Company v. United States, 572 F.2d 786 (Ct. Cl. 1978).

II. The Consideration of Environmental Protection at the Lease Issuance Stage

A. Discretion to lease

1. The Mineral Leasing Act gives the Secretary discretion to decide not to issue a lease at all. See Udall v. Tallman, 380 U.S. 1 (1965). Thus, if the Secretary concludes that the environmental

consequences of mineral activities on a proposed lease would be unacceptable, he can simply not issue a lease.

2. An exception to this rule applies to the issuance of "preference right coal leases" to holders of prospecting permits issued prior to the Federal Coal Leasing Amendments of 1976. Such leases cannot be rejected for environmental reasons. NRDC v. Berklund, 609 F.2d 553 (D.C. Cir. 1979). The 1976 amendments eliminated the prospecting permit/preference right coal lease system.

B. Limitations on Secretary's discretion

1. The Mineral Leasing Act does not place any restrictions on the Secretary's discretion to lease or not to lease. However, Congress has placed various restrictions on his discretion in other statutes. These restrictions relate primarily to leasing in wilderness and wilderness candidate areas.

2. As of January 1, 1984, new leasing was barred in designated wilderness areas by the Wilderness Act of 1964, 16 U.S.C. § 1133(d)(3).

3. New leasing is currently prohibited in four types of wilderness candidate areas -- RARE II areas recommended for wilderness designation, RARE II further planning areas, BLM wilderness study areas and Congressionally designated wilderness study areas -- by a "rider" attached to the Department of the Interior and Related Agencies Appropriations Act for fiscal year 1985. Pub. L. No. 98-473, Section 308, 98 Stat. 1871. This leasing ban expires on October 1, 1985, but there is no indication that it will be lifted for fiscal year 1986. The ban has been in effect since October 1982.

Comment: Congress's increasing use of appropriation measures as vehicles to amend substantive legislation has been criticized. Among other things, the appropriations committees generally do not have the experience or expertise in natural resource and environmental matters that the substantive committees have. The Senate and House rules also

discourage, if not prohibit, attaching substantive legislation to appropriation acts. Yet the courts have generally enforced such measures, although "an amendment will not readily be inferred" and the intent of Congress to effect such a change "must be clearly manifest." New York Airways, Inc. v. United States, 369 F.2d 743, 749 (Ct. Cl. 1966).

4. The National Environmental Policy Act ("NEPA") requires the Secretary to consider the environmental impacts of issuing mineral leases. 42 U.S.C. § 4332. If the impacts are "significant," the Secretary is required to prepare an environmental impact statement. 42 U.S.C. § 4332(2)(C). However, NEPA does not place any substantive constraints on the Secretary's discretion to issue mineral leases. See Strycker's Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 223, 227 (1980); Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 558 (1978).

5. The Interior Board of Land Appeals, which issues final decisions for the Secretary, has held that the Bureau of Land Management (which administers the leasing program for the Secretary) cannot reject a lease unless (1) it has considered leasing with restrictive stipulations to protect the environment (Robert G. Lynn, 76 IBLA 383) and (2) the record supports BLM's conclusion that the public interest would be served by rejection of the lease application (Eagle Exploration Co., 69 IBLA 96).

6. Another limitation on the Secretary's authority to decide not to issue leases is that, depending on the circumstances, such a decision may amount to a withdrawal of public land which must be reported to Congress under the Federal Land Policy and Management Act ("FLPMA"), 43 U.S.C. § 1714(c). In Mountain States Legal Foundation v. Andrus, 499 F. Supp. 383 (D. Wyo. 1980), the court found that the Secretary's inaction for several years on oil and gas

lease applications in areas of Wyoming, Idaho and Montana because of the RARE I and II wilderness studies constituted a withdrawal that had to be reported to Congress.

C. Issuance of leases with environmentally protective stipulations

1. In recent years, the Secretary has been attaching various stipulations when issuing new leases, particularly in environmentally sensitive areas. The Secretary's objective is to inform the lessee of potential restrictions on his normal lease development rights, and to retain the contractual authority to control environmental impacts. In addition, as noted above, the Board of Land Appeals has held that a lease should not be rejected if stipulations will adequately protect the environment.

2. Certain of these stipulations are now standard, e.g., the Department of the Interior's "surface disturbance" stipulation (form 3109-5), the stipulation for lands under jurisdiction of the

Department of Agriculture (form 3109-3) and the Forest Service Supplement to form 3109-3. Others are classified as "special" stipulations, and they include a wildlife protection stipulation, a "cultural resource" protection stipulation, a "Jackson Hole Area oil and gas" stipulation, a "coordinated exploration" stipulation, a "wilderness protection" stipulation for BLM wilderness study areas (see 44 Fed. Reg. 72031 (Dec. 12, 1979)), a "further planning area" stipulation for RARE II further planning areas, a "conditional no surface occupancy" stipulation and a "contingent right" stipulation (see 47 Fed. Reg. 18158 (April 28, 1982)). For the most part, these stipulations condition drilling and development operations on obtaining prior approval from the Secretary. However, whether the Secretary has the power actually to deny approval of the necessary permit or to place conditions on development that would make operations uneconomical is seldom spelled out.

3. In Sierra Club v. Peterson, 717 F.2d 1409 (D.C. Cir. 1983) (Attachment A), the court interpreted the Secretary's power under several of these stipulations. In that case, BLM and the Forest Service had attached the standard surface disturbance stipulations (forms 3109-3, 3109-5, and 3109-3 Supp.), the further planning area stipulation, the coordinated exploration stipulation, the Jackson Hole Area stipulation and the conditional no surface occupancy stipulation to all or part of leases in a RARE II further planning area. The court found that only the conditional no surface occupancy (NSO) stipulation authorizes the Secretary to preclude exploration or development on the leases. The other stipulations merely authorize the Secretary to mitigate the impacts of the operations by regulating the location of well-sites, construction of access roads etc., and do not take away the lessee's right to develop. A copy of the NSO stipulation at issue in

Sierra Club v. Peterson is Attachment B. A copy of the "contingent right" stipulation, which was not involved in Sierra Club v. Peterson, but which is a clearer statement of the Secretary's attempt to reserve the contractual authority to prohibit development, is Attachment C.

4. The Secretary's statutory power to impose a stipulation reserving authority to prohibit development anywhere on a lease was not squarely in issue in Sierra Club v. Peterson, and has not been tested in the courts. It could be argued that the Mineral Leasing Act does not authorize the Secretary to so condition a lease. For example, in other statutes Congress has specifically given the Secretary the power to prohibit development for environmental reasons. See 43 U.S.C. § 1334 (dealing with offshore oil and gas leases) and 30 U.S.C. § 201(b) (dealing with coal exploration licenses). It has not done so for onshore oil and gas and other mineral leases. In this regard, the Wilderness

Act of 1964 merely provides that mineral leases issued in designated wilderness areas shall contain "reasonable stipulations...for the protection of the wilderness character of the land consistent with the use of the land for the purposes for which they were leased...." 16 U.S.C. § 1133(d)(3) (emphasis added).

III. NEPA Developments Concerning Issuance of Onshore Oil and Gas Leases

A. NEPA requires an environmental impact statement (EIS) for any major federal action "significantly affecting the quality of the human environment...." 42 U.S.C. § 4332(2)(c). Since NEPA was enacted in 1970, only one EIS has been prepared for the issuance of onshore oil and gas leases. That EIS was for leasing in the Washakie Wilderness Area of Wyoming. Interior and the Forest Service (where National Forest lands are involved) more typically prepare "environmental assessments" of leasing and conclude that an EIS is not required because the impacts will not be significant. Where multiple-use public lands are involved that have no potential for consideration as wilderness, Interior often

relies on a "categorical exclusion" from environmental review in its NEPA implementing regulations and does not prepare even an environmental assessment. This categorical exclusion provides that except in certain specified unusual circumstances, neither an EIS nor an EA is necessary for the "issuance of individual non-competitive upland oil and gas leases." 46 Fed Reg. 7492, 7495 (Jan. 23, 1981).

B. In Sierra Club v. Peterson, supra, 717 F.2d at 1409, the Sierra Club appealed the issuance of oil and gas leases in the "Palisades" area of Idaho and Wyoming, a RARE II further planning area. The Forest Service had prepared an environmental assessment and made a finding of no significant impact. As noted above, the leases were issued subject to numerous stipulations. In particular, the conditional no surface occupancy (NSO) stipulation was attached to all areas that the Forest Service determined were "highly environmentally sensitive," about 80 per cent of the area. Leases on the remaining 20 per cent were issued subject to other

stipulations, but not the NSO stipulation. The Sierra Club contended that an EIS was required for the leases issued without NSO stipulations. Finding that such leases granted lessees the right to explore for and develop oil and gas, and that the impacts of such activities in the Palisades could be "significant" under NEPA, the D.C. Circuit Court of Appeals held that the Secretary either had to prepare an EIS or reserve the authority to prohibit activities that would cause unacceptable impacts to the environment by appropriate stipulations. On remand to the district court, the NSO stipulation was attached to the leases.

C. There has been some question as to the application of Sierra Club v. Peterson (also known as the "Palisades" decision) beyond the facts of that case. In that case, the lands were under study for wilderness, and the terrain was mountainous. Furthermore, the environmental assessment was expressly limited to exploration only and incorrectly assumed that leasing was in effect a paper transaction which would not result in any "physical or

biological impacts." 717 F.2d at 1413. Thus, the court concluded that the finding of no significant impact "is not supportable on this record." Id. (emphasis added). The Palisades decision does not appear, therefore, to establish a per se rule that the issuance of oil and gas leases anywhere on public lands requires an EIS or NSO stipulation.

D. In environmentally sensitive or wilderness areas, however, the Palisades decision may lead to greater reliance by the Secretary on NSO or contingent right stipulations. The Secretary is reluctant to prepare costly and time-consuming EIS's for onshore oil and gas leases because, historically, drilling occurs on only one in ten of these leases.

E. Possible advantages of using lease stipulations to postpone detailed NEPA review

1. Very few leases reach the drilling stage and, where drilling occurs, it usually affects only a small portion of the lease area (about 4 acres). If the Secretary can postpone the environmental analysis until a site-specific drilling proposal is submitted, he can avoid

attempting to analyze the impacts of essentially hypothetical activities on an unknown location, and thus save time and money.

2. Oil and gas lessees obviously prefer leases with development rights, and some companies will refuse to accept a lease with stipulations in effect taking away development rights. However, in some cases a lessee may prefer to have a lease without development rights rather than wait for an EIS to be prepared. For example, the lessee might need the lease not for drilling purposes but to complete a "lease block," i.e., a large area under lease. Where there are gaps in a potential lease block, it is usually not prudent to drill a well because the drilling, which can be extremely expensive in areas such as the Overthrust Belt in the Rocky Mountains (in excess of $10 million for one well), might only establish the location of oil and gas for the benefit of a competitor. Since an oil and gas field can often be

drained without drilling on every lease, a lease without development rights might be adequate to protect the lessee's investment in drilling the well on a different lease.

F. There are, however, some practical problems resulting from the use of such stipulations. Depending on how widespread the use of these stipulations becomes, it could reduce exploratory drilling and the discovery of new domestic oil reserves.

1. Where the stipulations are accepted, the lessee is taking a risk that the Secretary may not allow drilling to occur after preparation of the appropriate environmental analysis. Under what circumstances will the Secretary allow drilling? There are no real guidelines to apply. Until there is some experience with the administration of these stipulations, it is difficult to gauge the extent of the lessee's risk in accepting the stipulations. Consequently, industry will face uncertainties in determining whether to acquire such leases

and, if so, at what price. And despite the risk of not being able to drill, the lessee must make annual rental payments to the Secretary to maintain the lease.

2. There are various forms of pre-drilling seismic exploration work that sometimes require large expenditures of money. This is particularly true in the Overthrust Belt, where the geology is extemely complex. In many cases, industry simply cannot commit the funds necessary for such exploration until leases with development rights have been obtained. Furthermore, where a number of leases in a lease block are subject to NSO or contingent right stipulations, the risk of not being able to extract the oil and gas may discourage exploratory drilling.

G. If exploration or development is denied, should the lessee be entitled to compensation? The question has not yet arisen. On the one hand, it could be argued that the lessee accepted the leases with knowledge of the risk that development might be denied,

and is therefore not entitled to compensation. On the other hand, the Outer Continental Shelf Lands Act, 43 U.S.C. § 1331 et seq., which specifically authorizes the Secretary to preclude operations for environmental reasons, provides for payment of compensation to the lessee if exploration or development is denied. 43 U.S.C. § 1334(a).

H. A Montana federal district court recently held that several hundred oil and gas leases in the Flathead and Gallatin National Forests in Montana were issued in violation of NEPA because an EIS was not prepared. Conner v. Burford, No. CV-82-42-BU (D. Mont. March 8, 1985) (Attachment D). Although the facts of the case are not entirely clear from the court's opinion, it appears that some of the leases had been issued with NSO stipulations; others had not been. With respect to the leases without NSO stipulations, the court merely stated that Sierra Club v. Peterson requires an EIS. The court did not discuss the quality of the environmental assessment, the reasonableness of the agencies' finding of no significant impact, or the character of

the land involved. (The court referred to the area as "potential wilderness" in its opinion, but all of the Flathead and parts of the Gallatin National Forest were allocated to nonwilderness during the Forest Service's RARE II program.) With respect to the leases with NSO stipulations, the court disregarded Sierra Club v. Peterson and held that an EIS was required for those leases as well. The court did not discuss the D.C. Circuit's conclusion that under the NSO stipulation the Secretary can prohibit operations and thus no commitment has been made.

1. The extent to which the court's opinion affects the issued leases is not clear because none of the lessees were ever joined as defendants in the case. Federal oil and gas lessees are generally indispensable parties to any suit that would adversely affect their rights under the leases. See, e.g., Naartex Consulting Corp. v. Watt, 722 F.2d 779 (D.C. Cir. 1983), cert denied, 104 S. Ct. 2399 (1984).

IV. Environmental Considerations After Leases are Issued

A. Lessees must obtain a permit from the Secretary before they can conduct any surface disturbing activities on the leases. See 43 C.F.R. § 3162.3-1. If the proposed activity would "significantly" affect the environment, an EIS must be prepared. 42 U.S.C. § 4332(2)(C).

B. The Secretary has the power to impose certain mitigation measures on operations after leases are issued. However, as noted above, in the absence of a stipulation giving him the power to do so, he cannot impose requirements so stringent as to take away the development rights granted by the lease. The Secretary is bound by the lease contract just as any other private party is bound by a contract. See Lynch v. United States, 292 U.S. 571, 580 (1934).

C. An example of new conditions imposed after mineral leases have been issued is Copper Valley Machine Works, Inc v. Andrus, 653 F.2d 595 (D.C. Cir. 1981). In that case, the Secretary attached a condition to a drilling permit allowing drilling during the winter

season only. While recognizing the Secretary's power to impose such a time limitation, the court also held that the lessee was entitled to an extension of its lease for the length of time drilling operations were prohibited.

D. Preparation of environmental analyses under NEPA for drilling permit applications obviously takes time, in some cases several years. Recognizing that it would be unfair to force the lessee to pay rentals and to continue the clock running on the lease term during this period, the Secretary has suspended leases during the environmental review period under Section 39 of the Mineral Leasing Act, 30 U.S.C. § 209. Suspending the lease term enables the Secretary to prepare the required environmental analysis while also giving the lessee the full benefit of his lease, as the court in Copper Valley held he was entitled to.

E. In granting suspensions, the Secretary generally includes language providing for the termination of the suspension if certain events occur. A pending case involves the

interpretation of language concerning the termination of a suspension, and the authority of the Secretary to take away development rights after a lease has been issued without such a condition. In Sierra Club et al., 80 IBLA 251, 264 (May 2, 1984), the Board of Land Appeals determined that the following language in the lease suspension created authority to prohibit all drilling activity (which therefore required full consideration of the no-action alternative in the EIS prepared for the drilling permit):

> Suspensions are for an indefinite period of time, subject to automatic termination on the first of the month in which (1) the lessees and unit operator are notified in writing of the decision not to approve any oil and gas drilling operations within the Bear Thrust Unit area on the basis of its determination that such operations would result in unacceptable impacts on the wilderness characteristics of the area, or (2) actual approved drilling operations are commenced should it be decided to permit the drilling of the well.

The Board held that the Secretary had authority to alter the lessee's development rights because delays caused by the lessee rather than the government necessitated the suspension. Id. The lessee has challenged the Board's decision on the grounds that (1) the

Secretary did not intend to reserve authority to prohibit all drilling activity; (2) the Secretary lacks authority under the Mineral Leasing Act to deprive the lessee of development rights by means of a lease suspension; and (3) the IBLA erred in concluding that the lessee's conduct necessitated the lease suspension. Getty Oil Company v. Clark, No. 84-432 (D. Wyo.). The case is pending on cross motions for summary judgment.

V. Impact of Environmental Protection Measures on Valid Existing Rights

A. Congress has generally grandfathered "valid existing rights" in implementing new regulatory programs. For example, the Wilderness Act of 1964 prohibition of any "commercial enterprise" within the National Wilderness Preservation System is made "subject to existing private rights." 16 U.S.C. § 1133(c). Similarly, all of the provisions of FLPMA repealing a host of public land statutes and instituting a number of new programs, including review of lands managed by the Bureau of Land Management for possible designation as wilderness, are made subject to "valid existing rights." 90 Stat. 2786, 43

U.S.C. § 1701 (note). The objective has been to negate any implication that Congress was authorizing the federal agencies involved to "take" private property rights in carrying out the new programs.

B. Congress has generally not attempted to define the rights protected or to indicate the extent to which such rights might be regulated, leaving both issues to the agencies and courts. One explanation for Congress's reluctance to address these issues is that many private property rights are determined by state law. This is not the case, however, for mineral leases on the public lands.

C. What are valid existing rights?

1. The Solicitor of the Department of Interior issued an opinion in 1981 generally discussing the nature of "valid existing rights" protected under FLPMA. 88 I.D. 90 (Attachment E). With respect to federal mineral leases, he concluded that such leases were valid existing rights, although the extent of the rights protected would depend on the statute under which the leases were issued, the terms

of the lease contracts and the stipulations attached.

2. Oil and gas leases are frequently in conflict with wilderness, particularly in the Overthrust Belt region of the Rocky Mountains. The Solicitor's opinion means that development on such leases cannot be unreasonably restricted or denied unless the leases are subject to a stipulation giving the Secretary the power to preclude development. If the Secretary wants to condemn the leases, he must obtain the authority to do so from Congress.

3. The Interior Department's Office of Surface Mining has been struggling with the definition of "valid existing rights" under Section 522(e) of the Surface Mining Control and Reclamation Act of 1977 ("SMCRA"), 30 U.S.C. § 1272(e). That section prohibits surface coal mining operations on specified categories of lands, subject to "valid existing rights." OSM's 1979 regulations defined valid existing rights under this provision to mean, in part:

(a) except for haul roads, (1) Those property rights in existence on August 3, 1977, that were created by a legally binding conveyance, lease, deed, contract or other document which authorizes the applicant to produce coal by a surface coal mining operation; and (2) The person proposing to conduct surface coal mining on such lands...(i) Had been validly issued, on or before August 3, 1977, all State and Federal permits necessary to conduct such operations on those lands...

44 Fed. Reg. 15342 (1979); 30 C.F.R. § 761.5 (1980). Judge Flannery struck down this definition in 1980 because he concluded that a good faith attempt to obtain all permits before the August 3, 1977 cut off date should suffice for meeting "all permits" test. In re: Permanent Surface Mining Regulation Litigation I, 14 ERC 1083 (D.D.C. Feb. 26, 1980). In 1981, the D.C. Circuit remanded the appeals of the Flannery decision for further consideration in light of Secretary Watt's stated intent to significantly revise the SMCRA regulations. In 1983, OSM published a new definition of valid existing rights under Section 522 of SMCRA:

Except for haul roads, that a person possesses valid existing rights for an area protected under section 522(e) of the Act on August 3, 1977, if the application of any of the prohibitions contained in that section to the property interest that existed on that date would effect a taking of the person's property which would entitled the person to just compensation under the Fifth and Fourteenth Amendments to the United States Constitution.

48 Fed. Reg. 41349 (1983); 30 C.F.R. § 761.5 (1984). This new definition was challenged by environmental groups, and Judge Flannery recently held that it was promulgated without the required notice and comment because it differed substantially from the new definition proposed in 1982. In re: Permanent Surface Mining Regulation Litigation II, 22 ERC 1557 (D.D.C. March 22, 1985).

D. What is the extent of the valid existing rights protection?

1. The extent of the protection depends on the statute and regulations in effect when the lease was issued, and the terms of the lease contract itself. See Solicitor's valid existing rights opinion, supra (Attachment E).

2. Even if a lease conveys certain valid existing rights, it is still subject to reasonable regulation by the Secretary. In other words, exploration and development operations can be made more difficult and more expensive in order to protect the environment. However, the Secretary cannot go so far in his regulation as to make operations unreasonably difficult or expensive, and he obviously cannot deny operations altogether without obtaining condemnation authority from Congress. See Utah v. Andrus, 486 F. Supp. 995, 1010 (D. Utah 1979) (regulations may not "be so prohibitively restrictive as to render the land incapable of full economic development").

3. Whether stringent regulation amounts to a taking depends on the circumstances of each case. Andrus v. Allard, 444 U.S. 51, 65 (1979).

4. In a recent decision involving the valid existing rights provision of FLPMA, a federal district court in California

held that lands in which the minerals were privately owned were not exempt from the wilderness study program of Section 603 of FLPMA. Sierra Club v. Watt, No. S-83-035 (E.D. Cal. April 18, 1985). The Interior Board of Land Appeals had held that such "split estate" lands could not be designated and managed as wilderness study areas because "[t]he fee simple mineral estate owned by appellant, and the attendant rights to use the surface, are unquestionably 'immune from denial and extinguishment by the exercise of secretarial discretion.' To designate such lands as WSA's and to engage in formal studies of them to ascertain whether they are susceptible to management as a permanent part of the wilderness system is to engage in futile and pointless exercises with preordained results, akin to commissioning a study of water to determine if it is dry." Santa Fe Pacific Railroad, 64 IBLA 27, 34 (1982). In reaching a contrary conclusion, the district court

noted that the private mineral rights were still protected during the wilderness study. With respect to one mineral owner's argument that placement in wilderness study status reduces the market value of its property, the court noted that whether this effect would amount to a taking of private rights without just compensation is a question to be addressed in another suit. Slip op. at 70, n. 55.

5. In Rocky Mountain Oil and Gas Ass'n v. Watt, 696 F.2d 734 (10th Cir. 1982), the court held that the nonimpairment standard for wilderness study areas designated under Section 603 of FLPMA applies to mineral leases issued before and after the enactment of FLPMA. However, it pointed out that "[w]hether § 701(h) [the valid existing rights provison] saves a particular lease is an issue that is not before us." Id. at 746, n. 17.

E. Need for Congressional direction

1. Congress needs to undertake a comprehensive review of the problems caused by simply including boilerplate protection of valid existing rights in broad regulatory or preservationist legislation and dropping the tough problems in the laps of federal and state agencies and the courts. However, that effort seems unlikely to occur. Indeed, Congress continued its usual practice in the last Congress in connection with many of the statewide wilderness statutes it enacted. For example, yielding to pressure from wilderness organizations, Congress added a controversial area in Wyoming to the National Wilderness Preservation System even though it was subject to oil and gas leases on which an application for permit to drill (and litigation challenging the approval of the permit) was pending. Congress made a special effort to protect such rights as the affected lessees might be able to establish by providing specific protection for such rights in addition to

the basic language in the Wilderness Act of 1964 to which all wilderness areas are subject. Thus, it created the Gros Ventre Wilderness area in Wyoming "subject to valid existing rights and reasonable access to exercise such rights" (98 Stat. 2808, emphasis added). How the courts will view that effort remains to be seen.

2. In the wilderness designation context, one solution might be to create a special management category providing for environmental protection but allowing mineral development to proceed. For example, in the Wyoming Wilderness Act Congress designated the portion of the Palisades Further Planning Area in Wyoming as a "wilderness study area." However, because of existing oil and gas leases and the high oil and gas potential of the area, Congress provided that oil and gas exploration and development in the Palisades "shall be administered under reasonable conditions to protect the environment according to the laws

and regulations generally applicable to nonwilderness lands within the National Forest System." Pub. L. No. 98-550, Section 301(C)(1), 98 Stat. 2811 (emphasis added) (Attachment F). Activities other than oil and gas exploration and development in the Palisades are subject to wilderness management guidelines.

a. Congress has generally resisted creation of "third tier" management categories, preferring instead to designate lands as either nonwilderness or wilderness. However, the conflicts which exist between mineral development and wilderness preservation are not easily resolved by adhering to a rigid either/or classification system. When Congress addresses statewide RARE II wilderness bills for Idaho and Montana, there may be an effort to deal with resource conflicts by creating special management categories similar to the Palisades Wilderness Study Area in Wyoming.

dence in his possession and declined the agency's request to produce it. To make the agency investigate further is one thing; but to make it duplicate evidence which the employee already possesses (and which, but for his negligent failure to obtain permission, if that is to be believed, he could turn over to the agency at once) is quite something else.

The majority opinion, as I understand it, does not reject this basis of distinction, but reverses the Board for not expressly stating that this was the reason the earlier "duty to investigate" cases were inapplicable. That imposes a degree of refinement which I find inappropriate for such discretionary decisions. I think it no more arbitrary for the Board to fail to distinguish its arguably but not clearly inconsistent precedent when it makes fee-award determinations, than it is arbitrary for us to fail to do so when we award or deny attorneys' fees, *e.g., Order, Greene v. Gibralter Mortgage Investment Co.*, No. 82–1391 (D.C.Cir. May 31, 1983); or when we deny a motion for stay, *e.g., Order, Defenders of Wildlife v. The Endangered Species Scientific Authority*, No. 83–1019 (D.C.Cir. Jan. 27, 1983). For agencies, no less than for courts, it is unnecessary to provide the same high degree, not merely of consistency, but of *explicit justification* for all determinations. For highly discretionary judgments such as the present one it suffices, I think, that there are in fact valid grounds relied upon by the agency for treating the case differently from earlier cases. To require that the agency not merely allude to those grounds (which it *did* here) but also identify them as the specific reason for departing from arguably applicable precedent, is to impose intricacies of process reserved for more important and less discretionary determinations. In holding otherwise, the court continues the progressive complication of agency process and encourages the progressive trivialization of the business of appellate courts.

SIERRA CLUB, Appellant,

v.

R. Max PETERSON, in his official capacity as Chief Forester of the United States Forest Service, Department of Agriculture, et al.

No. 82–1695.

United States Court of Appeals,
District of Columbia Circuit.

Argued Feb. 16, 1983.

Decided Sept. 13, 1983.

As Amended Sept. 28, 1983.

Sierra Club brought action challenging decision by the United States Forest Service and the Department of the Interior to issue oil and gas leases on lands within two national forests without requiring preparation of environmental impact statement. The United States District Court for the District of Columbia, Aubrey E. Robinson, Jr., Chief Judge, upheld decision to issue the leases without preparing an environmental impact statement, and plaintiff appealed. The Court of Appeals, MacKinnon, Senior Circuit Judge, held that the Department had not complied with the National Environmental Policy Act because it sanctioned activities which had potential for disturbing the environment without fully assessing possible environmental consequences.

Judgment accordingly.

1. Health and Environment ⇐25.15(6)

An agency's finding of "no significant impact" and consequent decision not to prepare an environmental impact statement can only be overturned if the decision was arbitrary, capricious, or an abuse of discretion; judicial review of an agency's finding of "no significant impact" is not, however, merely perfunctory as court must ensure that the agency took a "hard look" at envi-

ronmental consequences of its decision. National Environmental Policy Act of 1969, § 102, 42 U.S.C.A. § 4332.

2. Health and Environment ⇐25.15(6)

In reviewing an agency's finding of "no significant impact" of a proposed action on environment so as to preclude necessity of preparing an environmental impact statement, court ascertains whether the agency took a "hard look" at the problem; whether it identified relevant areas of environmental concern; as to problems studied and identified, whether it made a convincing case that the impact was insignificant; and if there was an impact of true significance, whether it convincingly established that changes in the project sufficiently reduced it to a minimum. National Environmental Policy Act of 1969, § 102, 42 U.S.C.A. § 4332.

3. Health and Environment ⇐25.10(2)

Decision by the United States Forest Service and the Department of Interior to issue leases constituting an irrevocable commitment to allow some surface-disturbing activities, including drilling and road building, in 28,000 acre "non-highly environmentally sensitive lands" located in two national forests without requiring an environmental impact statement violated the National Environmental Policy Act because it sanctioned activities which had potential for disturbing the environment without fully assessing possible environmental consequences. National Environmental Policy Act of 1969, § 102, 42 U.S.C.A. § 4332.

4. Health and Environment ⇐25.10(2)

An environmental impact statement is required when critical agency decision is made which results in irreversible and irretrievable commitments of resources to an action which will affect the environment. National Environmental Policy Act of 1969, § 102, 42 U.S.C.A. § 4332.

Appeal from the United States District Court for the District of Columbia (D.C. Civil Action No. 81–01230).

Karin P. Sheldon, Denver, Colo., for appellant.

Claire L. McGuire, Atty., Dept. of Justice, Washington, D.C., with whom Robert L. Klarquist, Washington, D.C., was on the brief for appellees, U.S.A.

R. Brooke Jackson, Denver, Colo., with whom John F. Shepherd, Denver, Colo., was on the brief for appellees, Wexpro Company, et al.

Gerry Levenberg, Washington, D.C., was on the brief for Bill J. Maddon, et al.

Before WRIGHT and SCALIA, Circuit Judges, and MacKINNON, Senior Circuit Judge.

Opinion for the Court filed by Senior Circuit Judge MacKINNON.

MacKINNON, Senior Circuit Judge:

In proceedings in the district court, the Sierra Club challenged the decision by the United States Forest Service (Forest Service) and the Department of the Interior (Department) to issue oil and gas leases on lands within the Targhee and Bridger-Teton National Forests of Idaho and Wyoming. The plaintiff alleged that the leasing program violated the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 *et seq.* (1976), because no Environmental Impact Statement (EIS) was prepared prior to the action. On cross-motion for summary judgment the district court upheld the decision to issue the leases without preparing an EIS. *Sierra Club v. Peterson,* No. 81–1230 (D.D.C. March 31, 1982). The plaintiff appeals from a portion of the judgment and we reverse the decision of the district court.

I.

The land originally involved in this dispute encompassed a 247,000 acre roadless area in the Targhee and Bridger-Teton National Forests of Idaho and Wyoming, known as the Palisades Further Planning Area. In its most recent Roadless Review

and Evaluation, RARE II,[1] the Forest Service designated this entire area as a Further Planning Area and consequently, the land may be considered for all uses, including oil and gas exploration, as long as its potential wilderness quality is preserved.

In 1980, the Forest Service received applications for oil and gas leases in the Palisades Further Planning Area.[2] After conducting an Environmental Assessment (EA), the Forest Service recommended granting the lease applications, but with various stipulations attached to the leases. Because the Forest Service determined that issuance of the leases with the recommended stipulations would not result in significant adverse impacts to the environment, it decided that, with respect to the *entire* area, no Environmental Impact Statement was required at the leasing stage.

The leasing program approved by the Forest Service divides the land within the Palisades Further Planning Area into two categories—"highly environmentally sensitive"[3] lands and non-highly environmentally sensitive lands. The stipulations attached to each lease are determined by the particular character of the land. All of the leases for the Palisades contain "standard"[4] and "special"[5] stipulations. These stipulations require the lessee to obtain approval from the Interior Department before undertaking any surface disturbing activity on the lease, but do not authorize the Department to *preclude* any activities which the lessee might propose. The Department can only impose conditions upon the lessee's use of the leased land.

In addition, a No Surface Occupancy Stipulation (NSO Stipulation) is attached to the leases for lands designated as "highly environmentally sensitive." This NSO Stipulation *precludes* surface occupancy unless and until such activity is specifically approved by the Forest Service.

For leases *without* a No Surface Occupancy Stipulation, the lessee must file an application for a permit to drill prior to initiating exploratory drilling activities. The application must contain a surface use and operating plan which details the proposed operations including access roads, well site locations, and other planned facilities. On land leased without a No Surface Occupancy Stipulation the Department *cannot* deny the permit to drill; it can only impose "reasonable" conditions which are designed to mitigate the environmental impacts of the drilling operations. *See* Joint Appendix (JA) at 86a.

1. Two Roadless Area Review and Evaluations (RARE I and II) were conducted by the Forest Service to evaluate undeveloped areas within National Forests in order to recommend appropriate areas to Congress for designation as part of the National Wilderness Preservation System. *See* Wilderness Act, 16 U.S.C. § 1131 *et seq.* (1976).

   As a result of RARE II, areas studied by the Forest Service were classified as either Wilderness, Non-wilderness or Further Planning Areas. Further Planning Areas, such as the Palisades, are lands which require additional, more intensive study before the Forest Service can recommend Wilderness or Non-wilderness status to Congress. Until a decision is reached on the ultimate status of the land, its present character is to be maintained.

2. The Mineral Leasing Act of 1920, 30 U.S.C. § 226 (1976), authorizes the leasing of lands owned by the United States for the purpose of oil and gas exploration and development.

3. "Highly environmentally sensitive" areas are defined in the Environmental Assessment as those areas "with definable environmental characteristics which would be irreversibly altered by exploration activities." Environmental Assessment for Oil and Gas Exploration in the Palisades Further Planning Area, Joint Appendix (JA) at 150. These areas include lands necessary for the protection of threatened or endangered wildlife species; lands with slope gradients of more than 40%; lands with regionally unique plant or animal species; and lands with significant cultural resources. *Id.*

4. The "standard" stipulations include the Stipulation for lands under jurisdiction of the Department of Agriculture, 3109–3 (JA at 85), the Surface Disturbance Stipulation, 3109–5 (JA at 86a), and the Forest Service Supplement to Form 3109–3 (JA at 87).

5. "Special" stipulations include the Further Planning Area Stipulation, the Coordination Exploration Stipulation: Standard and Jackson Hole Area and others which are specially designed to protect particular environmental concerns. *See, e.g.*, JA at 89–100.

II.

Following an unsuccessful administrative challenge to the decision to issue all the leases in accord with the Forest Service's plan, the Sierra Club sought declaratory and injunctive relief in the United States District Court for the District of Columbia. The Sierra Club argued that leasing land within the Palisades without preparing an EIS violated NEPA. The federal defendants [6] responded that because of the finding of "no significant impact" contained in the Environmental Assessment, it was not necessary to prepare an EIS.

The district court upheld the finding of "no significant impact" and the decision to lease without preparing an EIS. The court based its decision upon the conclusion that the lease stipulations were valid and that the government could thereby "preclude any development under the leases." *Sierra Club v. Peterson,* No. 81–1230, slip op. at 12 n. 5 (D.D.C. March 31, 1982). The court granted the federal defendants' motion for summary judgment, stating that "[t]he stipulations included in the leases . . . will effectively insure that the environment will not be significantly affected until further analysis pursuant to NEPA." *Id.* at 13–14.

The Sierra Club appeals only that portion of the district court's judgment which involves lands leased *without* a No Surface Occupancy Stipulation. The Sierra Club concedes that the Department retains the authority to preclude all surface disturbing activities on land leased with a NSO Stipulation until further site-specific environmental studies are made. By retaining this authority, the Department has insured that no significant environmental impacts can occur from the act of leasing lands subject to the NSO Stipulation.

Approximately 80% of the Palisades was designated as highly environmentally sensitive and, therefore, leased *with* the NSO Stipulation. Only the remainder, approximately 28,000 acres, is at issue in this appeal. As to this smaller area, the Sierra Club contends that the Department cannot *preclude* surface disturbing activities, including drilling, on lands leased without the NSO Stipulation. The Department has only retained, Sierra Club asserts, the authority to "condition" surface disturbing activities in an effort to "mitigate" any environmental harm which might result from the activities. Thus, *some* surface disturbing activities may result from the act of issuing leases without NSO Stipulations on lands within the 28,000 acres. Appellant asserts, therefore, that the finding of "no significant impact" and the decision not to prepare an EIS, insofar as land leased within this smaller area is concerned, was improper. Because on these leases the Secretary cannot *preclude* surface disturbing activity, including drilling, the Sierra Club argues that the decision to lease is itself the point of irreversible, irretrievable commitment of resources—the point at which NEPA mandates that an environmental impact statement be prepared. We agree.

III.

The National Environmental Policy Act (NEPA) requires preparation of an Environmental Impact Statement whenever a proposed major federal action will significantly affect the quality of the human environment. 42 U.S.C. § 4332(2)(C) (1976). To determine the nature of the environmental impact from a proposed action and whether an EIS will be required, federal agencies prepare an environmental assessment. 40 C.F.R. § 1501.4(b) & (c) (1982). If on the basis on the Environmental Assessment the agency finds that the proposed action will produce "no significant

6. The lessees were allowed to intervene as defendants in the district court proceedings. The "Wexpro" intervenors include Wexpro Co., Sun Exploration and Production Co., Anschutz Corp., and Champlin Petroleum Co. These companies hold the majority of the leases on the Idaho portion of the Palisades. The "Maddox" intervenors include Bill J. Maddox, Ruth Maddox, Kenneth F. Cummings, A.W. Fleming and Co., and Placid Oil Co. These individuals and enterprises are also lessees of the lands at issue.

Both groups of intervenors participated in this appeal.

impact" on the environment, then an EIS need not be prepared. *Id.* at § 1501.4(e).

[1] An agency's finding of "no significant impact" and consequent decision not to prepare an EIS can only be overturned if the decision was arbitrary, capricious, or an abuse of discretion. *Cabinet Mountains Wilderness v. Peterson*, 685 F.2d 678, 681 (D.C.Cir.1982); *Committee for Auto Responsibility v. Solomon*, 603 F.2d 992, 1002 (D.C.Cir.1979), *cert. denied*, 445 U.S. 915, 100 S.Ct. 1274, 63 L.Ed.2d 599 (1980). Judicial review of an agency's finding of "no significant impact" is not, however, merely perfunctory as the court must insure that the agency took a "hard look" at the environmental consequences of its decision. *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n. 21, 96 S.Ct. 2718, 2730 n. 21, 49 L.Ed.2d 576 (1976).

[2, 3] Cases in this circuit have employed a four-part test to scrutinize an agency's finding of "no significant impact." The court ascertains

(1) whether the agency took a "hard look" at the problem;

(2) whether the agency identified the relevant areas of environmental concern;

(3) as to the problems studied and identified, whether the agency made a convincing case that the impact was insignificant; and

(4) if there was an impact of true significance, whether the agency convincingly established that changes in the project sufficiently reduced it to a minimum.

Cabinet Mountains Wilderness, supra, 685 F.2d at 682. Applying the foregoing test to this agency decision, we are satisfied that the agency has taken the requisite "hard look" and has "identified the relevant areas of environmental concern." However, in our opinion, the finding that "no significant impact" will occur as a result of granting leases *without* an NSO Stipulation is not supportable on this record.

The finding of "no significant impact" is premised upon the conclusion that the lease stipulations will prevent any significant environmental impacts until a site-specific plan for exploration and development is submitted by the lessee. At that time, the federal appellees explain, an appropriate environmental analysis, either an Environmental Assessment or an EIS, will be prepared. In bifurcating its environmental analysis, however, the agency has taken a foreshortened view of the impacts which could result from the act of *leasing*. The agency has essentially assumed that leasing is a discrete transaction which will not result in any "physical or biological impacts." The Environmental Assessment concludes

> that there will be no significant adverse effects on the human environment due to oil and gas lease issuance. Therefore, no environmental impact statement will be prepared. The determination was based upon consideration of the following factors . . . (a) few issued leases result in active exploration operations and still fewer result in discovery or production of oil or gas; (b) the act of issuing a lease involves no physical or biological impacts; (c) the cumulative environmental effect of lease issuance on an area-wide basis is very small; (d) effects of lease activities once permitted will be mitigated to protect areas of critical environmental concern by appropriate stipulations including no-surface occupancy; (e) if unacceptable environmental impacts cannot be corrected, activities will not be permitted; and (f) the action will not have a significant effect on the human environment.

Finding of No Significant Impact, Environmental Assessment, JA at 26–27. The conclusion that no significant impact will occur is improperly based on a prophecy that exploration activity on these lands will be insignificant and generally fruitless.

While it may well be true that the majority of these leases will never reach the drilling stage and that the environmental impacts of exploration are dependent upon the nature of the activity, nevertheless NEPA requires that federal agencies determine at the outset whether their major actions can result in "significant" environ-

mental impacts. Here, the Forest Service concluded that any impacts which might result from the act of leasing would either be insignificant or, if significant, could be mitigated by exercising the controls provided in the lease stipulations.

Even assuming, *arguendo*, that all lease stipulations are fully enforceable, once the land is leased the Department no longer has the authority to *preclude* surface disturbing activities even if the environmental impact of such activity is significant. The Department can only impose "mitigation" measures upon a lessee who pursues surface disturbing exploration and/or drilling activities. None of the stipulations expressly provides that the Department or the Forest Service can *prevent* a lessee from conducting surface disturbing activities.[7] Thus, with respect to the smaller area with which we are here concerned, the decision to allow surface disturbing activities has been made at the *leasing stage* and, under NEPA, this is the point at which the environmental impacts of such activities must be evaluated.

[4] NEPA requires an agency to evaluate the environmental effects of its action at the point of commitment. The purpose of an EIS is to insure that the agency considers all possible courses of action and assesses the environmental consequences of each proposed action. The EIS is a decision-making tool intended to "insure that . . . environmental amenities and values may be given appropriate consideration in decisionmaking . . . ." 42 U.S.C. § 4332(2)(B). Therefore, the appropriate time for preparing an EIS is *prior* to a decision, when the decisionmaker retains a maximum range of options. *Environmental Defense Fund v. Andrus*, 596 F.2d 848, 852–53 (9th Cir.1979). *Accord, Port of Astoria v. Hodel*, 595 F.2d 467, 478 (9th Cir.1979) (NEPA requires that an EIS be prepared "at an early stage when alternative courses of action are still possible. . . ."); *Scientists' Inst. for Public Information, Inc. v. Atomic Energy Comm'n*, 481 F.2d 1079, 1094 (D.C. Cir.1973) (In determining *when* to prepare an EIS the agency must ascertain to what extent its decision embodies an "irretrievable commitment" of resources which precludes the exercise of future "options."). An EIS is required when the "critical agency decision" is made which results in "irreversible and irretrievable commitments of resources" to an action which will affect the environment. *Mobil Oil Corp. v. F.T.C.*, 562 F.2d 170, 173 (2d Cir.1977). On the facts of this case, that "critical time," insofar as lands leased without a NSO Stipulation are concerned, occurred at the point of leasing.

Notwithstanding the assurance that a later site-specific environmental analysis will be made, in issuing these leases the Department made an irrevocable commitment to allow *some* surface disturbing activities, in-

7. We do not agree with the district court's unsupported conclusion that the Secretary can preclude "any development" under the lease. *Sierra Club, supra*, slip op. at 12 n. 5. In addition to the fact that the lease stipulations themselves do not expressly permit preclusion, when questioned on this point at oral argument, counsel for the government stated:

> The government has never contended that we would preclude all development. We did in fact contend before the district court . . . that in the Conditional No Surface Occupancy areas, those that are highly sensitive, we could preclude development.

In response to the court's question as to whether the agency could refuse to approve a lessee's plan to build an access road (a surface disturbing activity) during exploration, counsel for the government stated:

> There's a very fine line between preclusion and strict control. The agency has retained strict control. They have the authority. They have the right to put certain conditions on road building.
>
> [The government has] never contended that we could preclude all exploration and all development in these non-highly sensitive areas.

Furthermore, counsel for the Sierra Club asserted without contradiction that the government could not *deny* an application for a permit to drill, but could only enforce the lease stipulations to control and/or mitigate any environmental damage which result from the drilling.

We conclude from the language of the lease stipulations, the briefs of the parties, and the statements of counsel at oral argument that once the land is leased the Secretary cannot *preclude* surface disturbing activities, in either the exploratory or the development stage, on the 28,000 acres here in question.

cluding drilling and roadbuilding. While theoretically the proposed two-stage environmental analysis may be acceptable, in this situation the Department has not complied with NEPA because it has sanctioned activities which have the potential for disturbing the environment without fully assessing the possible environmental consequences.

The Department asserts that it cannot accurately evaluate the consequences of drilling and other surface disturbing activities until site-specific plans are submitted. If, however, the Department is in fact concerned that it cannot foresee and evaluate the environmental consequences of leasing without site-specific proposals, then it may delay preparation of an EIS provided that it reserves both the authority to *preclude* all activities pending submission of site-specific proposals and the authority to *prevent* proposed activities if the environmental consequences are unacceptable. If the Department chooses not to retain the authority to *preclude* all surface disturbing activities, then an EIS assessing the full environmental consequences of leasing must be prepared at the point of commitment—when the leases are issued. The Department can decide, in the first instance, by which route it will proceed.

IV.

The National Environmental Policy Act requires federal agencies to evaluate the environmental consequences of their actions *prior* to commitment to any actions which might affect the quality of the human environment. If *any* "significant" environmental impacts might result from the proposed agency action then an EIS must be prepared *before* the action is taken.

In this case, the Department failed to fully assess the environmental consequences of its decision to issue leases without NSO Stipulations on the 28,000 acres in question. To comply with NEPA, the Department must either prepare an EIS prior to leasing or retain the authority to preclude surface disturbing activities until an appropriate environmental analysis is completed. If the Department retains the authority to preclude *all* surface disturbing activities pending submission of a lessee's site-specific proposal as well as the authority to refuse to approve proposed activities which it determines will have unacceptable environmental impacts, then the Department can defer its environmental evaluation until such site-specific proposals are submitted. If, however, it is unable to *preclude* activities which might have unacceptable environmental consequences, then the Department cannot issue leases sanctioning such activities without first preparing an EIS.

Because we find that the Department did not comply with the requirements of the National Environmental Policy Act when it leased the 28,000 acres of non-highly environmentally sensitive lands within the Palisades, we reverse the judgment of the district court and remand the case for further proceedings not inconsistent with this opinion.

Judgment accordingly.

Eleanor GROPER, Appellant

v.

Barry P. TAFF, et al.

No. 83-1595.

United States Court of Appeals,
District of Columbia Circuit.

Submitted June 24, 1983.

Decided Sept. 13, 1983.

As Amended Oct. 7, 1983.

Interlocutory appeal was taken from an order entered by the United States District Court for the District of Columbia, Thomas F. Hogan, J., granting defendant's motion to disqualify plaintiff's trial counsel from further representation in underlying

ATTACHMENT B

Conditional No Surface Occupancy Stipulation

The lessee agrees not to occupy or use the surface of the leased lands in _____ (legal description) except for certain limited uses as permitted in writing by an authorized officer of the surface management agency. This stipulation, at a later date, may be modified, supplemented, eliminated, or remain unchanged. Alteration of the stipulation will be conditional upon the preparation of a site-specific environmental assessment, or if required, an environmental statement. In the event this stipulation is eliminated, it will be replaced by a coordinated exploration stipulation and other special stipulations as required to protect the surface resources.

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

Forest Service

Test of a Contingent Right Stipulation to be Included in Geothermal and Noncompetitive Oil and Gas Leases

AGENCY: Forest Service, USDA.

ACTION: Notice.

SUMMARY: The Forest Service announces that it will recommend or consent to issue oil and gas and geothermal leases which include a contingent right stipulation. Areas will be selected on which to test the use of the stipulation. Criteria are herein discussed for selection of areas where the stipulation will be used. This action is consistent with that of the Department of the Interior which approved the use of a contingent right stipulation on noncompetitive oil and gas leases on February 24, 1982.

EFFECTIVE DATE: May 28, 1982.

ADDRESS: R. Max Peterson, Chief, Forest Service, USDA, Rm. 808–RPE, P.O. Box 2417, Washington, D.C. 20013.

FOR FURTHER INFORMATION CONTACT: Robert F. May, Forest Service, USDA, Minerals and Geology Management Staff, P.O. Box 2417, Rm. 808–RPE, Washington, D.C. 20013, (703) 235–8715.

SUPPLEMENTARY INFORMATION: The Forest Service administers approximately 190.7 million acres of National Forest System lands, most of which are available for oil and gas or geothermal leasing. Over 7,000 lease applications for National Forest System lands are filed each year with the Bureau of Land Management (BLM). The Forest Service is responsible for determining if a lease proposal is compatible with other resource uses and, if so, under what conditions a lease will be issued. Until now the Forest Service examined each application separately or collectively if applications could be logically grouped. In conducting environmental analysis of a lease application, the Forest Service has assumed that issuance of a lease would result in drilling and in productive wells causing extensive impacts on surface resources. Using this assumption as a basis for analyzing leasing impacts and for arriving at recommendations to BLM has proven time consuming and costly in many cases.

Experience has shown that less than 5 percent of all Federal oil and gas leases issued nationally are actually drilled, and even fewer result in productive wells. Thus, the present approach to analysis on lease applications has resulted in excessive backlogs and expense that has proven difficult to justify.

In several lawsuits involving National Environmental Policy Act (NEPA) issues, the courts have endorsed segmented decisionmaking. Segmentation occurs in a Federal mineral disposal context where there is "separate utility" in the granting of leases and the later approval of each subsequent stage of operations, including prospecting, exploration, and production.

Use of the contingent right stipulation is based on the premise that NEPA environmental analyses can be most effectively handled at the operational stage of the lease, after submission of a specific proposal. Each proposal must be approved before operations can begin. However, it is expected that rarely will the leasee/operator and the Government fail to agree on an acceptable plan of operations and thereby invoke the contingent right stipulation.

To test the acceptance and workability of the contingent right stipulation, the Forest Service will select certain National Forest areas within which the stipulation will be considered for all geothermal and noncompetitive oil and gas leases issued during the test period. All designated wildernesses, Congressionally mandated wilderness study areas and Administration-endorsed wilderness proposals will be excluded (see 46 FR 25667 of May 14, 1981). If a roadless area designated for further planning is selected, the contingent right stipulation will take precedence over the further planning stipulation (see Forest Service Manual 2822.43). The stipulation will not be applied to leases issued under the simultaneous filing system.

No environmental assessment prior to leasing will be necessary for leases to be issued subject to the contingent right stipulation. The contingent right stipulation will be used in those areas where additional protection is needed beyond that provided by standard lease terms and conditions. If it is determined that the contingent right stipulation will not be used, the usual environmental assessment process will be followed. In either situation, standard lease terms and conditions will be required in the leases.

The text of the Contingent Right Stipulation is as follows:

All operations on this lease are subject to Government approval with such site-specific stipulations as may be necessary to assure reasonable protection of or mitigation of effects on other values. A plan of operations shall not be approved if it results in unacceptable impact on other resources, land uses, and/or the environment. If for these reasons a plan of operations cannot be approved, the lease term may be suspended for up to 5 years subject to timely submittal of an appropriate application by the lessee for a suspension of operating and producing requirements of the lease and approval by the United States. If the conditions do not change sufficiently, and/or significantly improved techniques are not developed such that a plan of operations has not been approved during the suspended term of the lease, the suspension shall automatically terminate. Unless relinquished sooner, the lease will continue for the term remaining at the effective date of the suspension or, if not suspended, for the term remaining when the plan of operations was disapproved, subject to Government approval of all operations as provided herein, without recourse for compensation.

Douglas R. Leisz,
Associate Chief.

April 22, 1982.

[FR Doc. 82-11536 Filed 4-27-82; 8:45 am]

BILLING CODE 3410-11-M

ATTACHMENT D

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

BUTTE DIVISION

JAMES R. CONNER, et al.,)

Plaintiffs,) NO. CV-82-42-BU

vs.)

ROBERT BURFORD, et al.,) MEMORANDUM AND ORDER

Defendants.)

Before this court are motions for summary judgment by plaintiffs James R. Conner and the Montana Wildlife Federation and by defendants The Bureau of Land Management, the Forest Service, and others, involving the issuance of oil and gas leases of vast areas of the Flathead and Gallatin National Forests. Jurisdiction over this action is based on 28 U.S.C. §1331.

Plaintiffs ask the court to declare unlawful the decisions by the Chief of the Forest Service, the Director of the Bureau of Land Management and the Secretary of the Interior to deny plaintiffs' protests and appeals against the issuance of oil and gas leases in the Flathead and the

ALSO COPY OF Jersey Jack Case - Thomas v. Peterson

Gallatin National Forests. Plaintiffs contend that defendants violated the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§4321 et seq., by failing to prepare and consider environmental impact statements ("EIS") prior to making decisions which will significantly affect the environments of the forests in question. Further, plaintiffs claim violations of the Endangered Species Act ("ESA"), 16 U.S.C. §§1536 et seq., by defendants in failing to sufficiently consult with the United States Fish and Wildlife Service before taking such action. The court is asked to set aside the agency actions as being not in accordance with the above cited law under authority of the Administrative Procedure Act, 5 U.S.C. §706(2)(A). Additionally, plaintiffs ask the court to enjoin the issuance of any more leases until the agencies comply with NEPA and ESA.

The federal defendants assert they complied with NEPA and ESA by conducting environmental assessments ("EA's"), obtaining biological opinions, and establishing variously applied stipulations, including a No Surface Occupancy Stipulation ("NSO"), in the leases which render the environmental impact and the danger to threatened and endangered species at the leasing stage insignificant. Defendants assert that subsequent analysis and decision-making, based on individual proposals for further activity on the leases, will continue to uphold the mandates of NEPA and ESA.

I. THE NATIONAL ENVIRONMENTAL POLICY ACT

The NEPA challenge requires the court to determine whether the federal defendants initiated a "major federal action significantly affecting the quality of the human environment...." 42 U.S.C. §4332(2)(C). If the defendants did initiate such an action, they are required to prepare and analyze an environmental impact statement before deciding what action should occur. Id. The standard of review of the decision to forego an EIS at the leasing stage is that of reasonableness. Foundation for North American Wild Sheep v. U.S., 681 F.2d 1172 (9th Cir. 1982). This court finds that the decision to forego an EIS was unreasonable. The EIS should serve to assist agencies in making decisions before any significant steps are taken which may damage the environment.

> A central purpose of an EIS is to force the consideration of environmental impacts in the decision making process. (citations omitted.) That purpose requires that the NEPA process be integrated with agency planning at the 'earliest possible time,' 40 C.F.R. §1501.2, and the purpose cannot be fully served if consideration of cumulative effects of successive, interdependent steps is delayed until the first step has already been taken.

Thomas v. Peterson, No. 84-3887 (9th Cir. Feb. 11, 1985) slip. op. at 6.

In this case, the leasing stage is the first stage of a number of successive steps which clearly meet the "significant effect" criterion to trigger an EIS.

Leases without NSO stipulations have been set aside for lack of NEPA compliance because they fail to ensure that environmentally damaging activity can be precluded by the federal agency. Sierra Club v. Peterson, 717 F.2d 1409 (D.C. Cir. 1983). This ruling clearly extends to leases which allow surface occupancy on any part of the leased acreage.

This court must therefore consider the reasonableness of leasing lands which have an NSO stipulation covering the entire area of the lease. To use the NSO stipulation as a mechanism to avoid an EIS when issuing numerous leases on potential wilderness areas circumvents the spirit of NEPA. Subsequent site-specific analysis, prompted by a proposal from a lessee of one tract, may result in a finding of no significant environmental impact. Obviously, a comprehensive analysis of cumulative impacts of several oil and gas development activities must be done before any single activity can proceed. Otherwise, a piecemeal invasion of the forests would occur, followed by the realization of a significant and irreversible impact. See e.g., Cady v. Morton, 527 F.2d 786 (9th Cir. 1975); Trout Unlimited v. Morton, 509 F.2d 1276 (9th Cir. 1974); 40 C.F.R. §1508.27(b)(7).

The issuance of a lease with an NSO stipulation does not guarantee an EIS before any development would occur. In fact, NSO stipulations can be modified or removed without an EIS. Gallatin Environmental Analysis, page 3 (discussing reevaluation of NSO stipulations in the Crazy Mountains roadless area). This court is compelled to set aside the decisions of defendants to lease without preparation of an EIS. The idea of possible site specific assessments in the future does not comply with the objective of protecting the area for possible wilderness designation.

> ...the promise of a site specific EIS in the future is meaningless if later analysis cannot consider wilderness preservation as an alternative to development.

California v. Block, 690 F.2d 753 at 762-763 (9th Cir. 1982).

II. ENDANGERED SPECIES ACT

The second issue before the court involves federal agency compliance with the provisions of the Endangered Species Act ("ESA"). 16 U.S.C. §§1531 et seq. (1976).

Plaintiffs challenge the sufficiency of the biological opinions, prepared by the Fish and Wildlife Service as mandated by Section 1536(b) of ESA. The court finds federal defendants' compliance with ESA to be analogous to their compliance with NEPA. The biological opinions examine the effects of oil and gas activity only so far as the leasing stage, asserting lack of information

to project consequences of further development. Here again, the defendants rely on stipulations to protect the threatened and endangered species when subsequent intrusion into the critical habitats occurs. The potential for a piecemeal invasion of habitat is present when the agency is allowed to lease without a comprehensive analysis of all stages of oil and gas development. See, North Slope Burrough v. Andrus, 642 F.2d 589 (D.C. Cir. 1980). The environmental assessments of both the Flathead and the Gallatin warn that this piecemeal approach could lead to "...a chipping away and deterioration of important habitat...." Flathead EA p.109-6, Gallatin EA App. D p.7.

The mandate of the Endangered Species Act is to obtain a comprehensive Biological Opinion designed to conserve endangered life and threatened species and their ecosystems. 16 U.S.C. §1531. Essentially, the defendants' purpose here was to expeditiously issue oil and gas leases.

III. CONCLUSION

The federal agencies violated the procedural requirements of NEPA by failing to prepare an EIS on the effects of oil and gas activity on the Flathead and Gallatin National Forests. Additionally, they violated ESA by failing to analyze the consequences of all stages of oil and gas activity on the forests.

Therefore, under the provisions of 5 U.S.C. §706, the agency actions allowing the issuance of the oil and gas leases on the Flathead and Gallatin National Forests are HEREBY SET ASIDE. The defendants are enjoined from further recommendations to lease and issuance of leases pending compliance with NEPA and ESA.

Plaintiffs' motion for summary judgment is GRANTED.

Defendants' motion for summary judgment is DENIED.

Parties shall bear their own costs.

DATED this 10 day of March, 1985.

PAUL G. HATFIELD
UNITED STATES DISTRICT JUDGE

the application of the "rule of reason," namely, that impacts need only be considered (1) which can reasonably be anticipated to occur prior to the completion of the project, or (2) which will definitely occur before or after completion of the project under consultation.

I am not persuaded that these limitations should be placed on the "rule of reason" test. If other activities (both private and governmental) can be reasonably anticipated to impact the endangered species or its critical habitat, those impacts should be included within the scope of the consultation. To exclude consideration of activities and projects which will occur after the completion of the project under consultation could result in our ignoring impacts which are likely to occur and otherwise cognizable under the "rule of reason." Likewise, projects and activities for which administrative discretion remains should also be considered. The degree of administrative discretion, and the likelihood of that discretion being exercised in a manner to diminish impact on the subject species, are matters which should be included under the "rule of reason" test.

In conclusion, the opinion of May 25, 1978 is reissued with the removal of the two limitations in the first full paragraph on the last page. The "rule of reason" test should be used to evaluate impacts which can reasonably be anticipated to occur from projects and activities before or after the completion of the project under consultation or on which administrative discretion remains. These projects and activities, along with their impacts, should be considered and given an appropriate weight in the application of the "rule of reason."

The reissued opinion, modified as indicated in this memorandum, is attached.

LEO M. KRULTZ
Solicitor

THE BUREAU OF LAND MANAGEMENT WILDERNESS REVIEW AND VALID EXISTING RIGHTS

M–36910 (Supp.)

October 5, 1981

Federal Land Policy and Management Act of 1976: Wilderness

Valid existing rights are limitations upon the Secretary's authority to manage activities occurring within wilderness study area under the nonimpairment standard. In general, the nonimpairment standard remains the management norm unless it would preclude enjoyment of the rights. When it is determined that the rights can be enjoyed only through activities that will permanently impair an area's suitability, the Secretary must manage the lands to prevent unnecessary and undue degradation and to afford environmental protection.

Solicitor's Opinion M–36910, 86 I.D. 89 (1979), modified.

OPINION BY OFFICE OF THE SOLICITOR

TO: SECRETARY
FROM: SOLICITOR
SUBJECT: THE BLM WILDERNESS REVIEW AND VALID EXISTING RIGHTS

I. INTRODUCTION

On Sept. 5, 1978, the Solicitor issued opinion M–36910, 86 I.D. 89 (1979), interpreting sec. 603 of the Federal Land Policy and Management Act (FLPMA), 43 U.S.C. § 1782. In addition, two supplementary memoranda have been issued. The first, the memorandum of Aug.

7, 1979 ("Palmer Oil/Prairie Canyon"), reviewed the "grandfather clause" of sec. 603. The second, the memorandum of Feb. 12, 1980 ("Further Guidance on FLPMA's section 603"), discussed the Bureau of Land Management's Interim Management Plan and valid existing rights in the context of mining claims located pursuant to the general mining laws.

This opinion addresses the relationship between valid existing rights and the wilderness review requirements of sec. 603.[1] It modifies Solicitor's Opinion No. M-36910 and incorporates the memorandum of Feb. 12, 1980.

II. *THE NONIMPAIRMENT STANDARD AND ITS EXCEPTIONS AND LIMITATIONS*

Congress has delegated to the Secretary general and comprehensive authority to manage the public lands. As the Supreme Court has noted, the Secretary "has been granted plenary authority over the administration of public lands * * * and * * * has been given broad authority to issue regulations concerning them." *Best v. Humboldt Placer Mining Co.*, 371 U.S. 334, 336 (1963). *See also Cameron* v. *United States*, 252 U.S. 450, 459-60 (1920); *Boesche* v. *Udall*, 373 U.S. 472, 477-78 (1963). *See generally* 30 U.S.C. §§ 22, 189; 43 U.S.C. §§ 2, 1712. With the enactment of FLPMA, Congress has restricted the Secretary's discretion in managing the public lands by imposing two standards to guide management decisions. The first is a general standard applicable to all management activities: "In managing the public lands the Secretary shall, by regulation or otherwise, take any action necessary to prevent unnecessary and undue degradation of the lands." 43 U.S.C. § 1732(b). The second and more stringent limitation is part of the wilderness review mandated by sec. 603 of FLPMA. 43 U.S.C. § 1782.

Under sec. 603 of FLPMA, the Secretary is directed to review the public lands and identify those areas that meet the wilderness criteria contained in sec. 2(c) of the Wilderness Act, 16 U.S.C. § 1131 (c). Those areas that have wilderness characteristics are then to be studied to determine their suitability for inclusion in the National Wilderness Preservation System. The Secretary is required to make recommendations on their suitability or nonsuitability to the President by Oct. 21, 1991. In turn, the President makes recommendations to the Congress which decides which areas will be designated wilderness.

Sec. 603(c) establishes a specific management standard, known as the "nonimpairment standard," appli-

[1] This opinion formalizes and is consistent with the position adopted by the Department on appeal from the decision of *Rocky Mountain Oil & Gas Association v. Andrus*, 500 F. Supp. 1338 (D. Wyo. 1980), *appeal docketed*, No. 81-1040 (10th Cir. Jan. 5, 1981). Although consistent with the result reached by the court in regard to allowing activities on oil and gas leases issued prior to Oct. 21, 1976 (pre-FLPMA leases), this opinion does not adopt the court's rationale.

cable only during this wilderness review:

> *During the period of review* of such [wilderness study] areas and until Congress has determined otherwise, *the Secretary shall continue to manage such lands* according to his authority under this Act and other applicable law *in a manner so as not to impair the suitability of such areas for preservation as wilderness*, subject, however, to the continuation of existing mining and grazing uses and mineral leasing in the manner and degree in which the same was being conducted on the date of approval of this Act: *PROVIDED*, That, in managing the public lands the Secretary shall by regulation or otherwise take any action required to prevent unnecessary or undue degradation of the lands and their resources or to afford environmental protection.

43 U.S.C. § 1782(c) (italics added). *See generally* Solicitor's Opinion M-36910, 86 I.D. 89, 109–11 (1979).

There is, however, an exception to and a limitation on the nonimpairment standard. The exception is the section's grandfather clause which authorizes the continuance of existing mining, grazing, and mineral leasing uses, "in the manner and degree" in which they were occurring on Oct. 21, 1976, the date of enactment of FLPMA. This grandfather clause was analyzed in both the initial Solicitor's Opinion and the supplemental memorandum of Aug. 7, 1979.

The limitation on the nonimpairment standard, and the subject of this opinion, is the savings clause of sec. 701(h) of FLPMA. This section provides:

> All actions by the Secretary concerned under this Act shall be subject to valid existing rights.

43 U.S.C. § 1701 note.

The clause limits the applicability of the nonimpairment standard by specifying that the standard cannot be applied in a manner that would prevent the exercise of any "valid existing rights."

III. *VALID EXISTING RIGHTS*

Although the legislative history is largely silent on the scope of this term,[2] it is not unique to FLPMA. The term has an extensive history both in the Department and the courts.

In defining "valid existing rights," the Department distinguishes three terms: "vested rights," "valid existing rights," and "applications" or "proposals." [3] "Valid existing rights" are distinguished from "applications" because such rights are independent of any secretarial discretion. They are property interests rather than mere expectancies. *Compare Schraier* v. *Hickel*, 419 F.2d 663, 666–67 (D.C. Cir. 1969) *and George J. Propp*, 56 I.D. 347, 351 (1938) *with Udall* v. *Tallman*, 380 U.S. 1, 20 (1965), *United States ex rel. McLennan* v.

[2] *See generally* H.R. Rep. No. 1724, 94th Cong., 2d Sess. 65 (1976), *reprinted in* Senate Comm. on Energy & Natural Resources, 95th Cong., 2d Sess., *Legislative History of the Federal Land Policy and Management Act of 1976* at 871, 935 (Comm. Print 1978).

[3] Each of these terms applies only to third parties. They do not apply to interests of federal agencies, departments, or agents. *See, e.g., Townsite of Liberty*, 40 I.B.L.A. 317, 319 (1979).

Wilbur, 283 U.S. 414, 420 (1931), *and Albert A. Howe*, 26 I.B.L.A. 386, 387 (1976). "Valid existing rights" are distinguished from "vested rights" by degree: they become vested rights when all of the statutory requirements required to pass equitable or legal title have been satisfied.[4] *Compare Stockley* v. *United States*, 260 U.S. 532, 544 (1923) *with Wyoming* v. *United States*, 255 U.S. 489, 501–02 (1921) *and Wirth* v. *Branson*, 98 U.S. 118, 121 (1878). Thus, "valid existing rights" are those rights short of vested rights that are immune from denial or extinguishment by the exercise of secretarial discretion.

Valid existing rights may arise in two situations. First, a statute may prescribe a series of requirements which, if satisfied, create rights in the claimant by the claimant's actions under the statute without an intervening discretionary act. The most obvious example is the 1872 Mining Law: a claimant who has made a discovery and properly located a claim has a valid existing right by his actions under the statute; the Secretary has no discretion in processing any subsequent patent application. Second, a valid existing right may be created as a result of the exercise of secretarial discretion. For example, although the Secretary is not required to approve an application for a right-of-way, if an application is approved the applicant has a valid existing right to the extent of the rights granted. Similarly, the Secretary has discretion to approve, deny, or suspend an application for an oil and gas lease. Once the lease is issued however, the applicant has valid existing rights in the lease.

Valid existing rights are not, however, absolute. The nature and extent of the rights are defined either by the statute creating the rights or by the manner in which the Secretary chose to exercise his discretion.[5] *See, e.g.*, *Best* v. *Humboldt Placer Mining Co.*, 371 U.S. 334 (1963); *Continental Oil Co.* v. *United States*, 184 F. 2d 802, 807 (9th Cir. 1950). Thus, it is not possible to identify in the abstract every interest that is a valid existing right; the question turns upon the interpretation of the applicable statute and the nature of the rights conveyed by approval of an application. Because of the importance of the individual approval and its stipulations, a review of each ap-

[4] "Vested rights" has a narrower meaning within public land law terminology than in other areas of the law. In public land law, "vested rights" typically applies to legal or equitable rights to a fee title. *See e.g., Wyoming v. United States, supra* at 501–02. Oil and gas leases, which do not convey fee title, have not been couched in terms of the traditional "vested right" usage.

[5] For example, there are interests less than leaseholds that are "valid existing rights." These include noncompetitive (preference right) coal lease applications that were preserved by the "valid existing rights" clause of sec. 4 of the Federal Coal Leasing Act Amendments of 1976, 90 Stat. 1085, *amending* 30 U.S.C. § 201(b) (1970). The Secretary does not have the discretion to reject these applications if the applicant can meet the statutory test for lease issuance. Nevertheless, the right to a lease does not accrue until that determination has been made. *NRDC* v. *Berklund*, 609 F.2d 553 (D.C. Cir. 1979); *Utah International, Inc.* v. *Andrus*, 488 F. Supp. 962, 969 (D. Utah 1979). The right preserved is to an adjudication and, if that adjudication is favorable, to a lease.

proval document will be required to determine the precise scope of an applicant's valid existing rights where such rights are created by an act of Secretarial discretion.

IV. *REGULATION OF VALID EXISTING RIGHTS UNDER SEC. 603 OF FLPMA*

The determination that a particular interest is a "valid existing right" is a limitation on the congressionally mandated management standard applicable to activities occurring within wilderness study areas. Although the nonimpairment standard remains the norm, this standard cannot be enforced if to do so would preclude recognition of the right or, in the case of an issued lease, would preclude development under the right. In general, restrictions on the right designed to protect wilderness values may not be so onerous that they unreasonably interfere with enjoyment of the benefit of the right. In other words, regulations may not be "so prohibitively restrictive as to render the land incapable of full economic development." *Utah* v. *Andrus*, 486 F. Supp. 995, 1010 (D. Utah 1979).

The resolution of specific cases under these general guidelines is dependent upon an analysis of two variables. The first is the scope of developmental rights actually conveyed by the person's actions under the statute or by the Department's issuance of the lease or other document. The second variable is the site-specific conditions confronting the right holder. In general, however, the nonimpairment standard governs activities unless this would unreasonably interfere with enjoyment of the valid existing rights. When the nonimpairment standard would unreasonably interfere with the use of the rights conveyed, the holder of the rights may exercise the rights although it impairs the area's suitability for preservation as wilderness. For example, under such circumstances a claimant with a valid mining claim under the Mining Law of 1872 may develop the claim even if this impairs the area's suitability for wilderness preservation. Similarly, the holder of an oil and gas lease or a right-of-way authorization issued prior to the enactment of FLPMA may develop the leasehold or right-of-way to the extent authorized by the issuance or approval document.

It is important to note the distinction between pre- and post-FLPMA leases and authorizations. With the enactment of FLPMA on Oct. 21, 1976, the Secretary was required to manage the public lands under wilderness review "so as not to impair the suitability of such areas for preservation as wilderness." 43 U.S.C. § 1782(c). Thus applicants who received a lease or other use authorization after Oct. 21, 1976, for lands within an area under wilderness review did not receive an unlimited right to develop since after that date the Secretary had author-

ity only to issue those leases, permits, and licenses that would not impair an area's suitability for preservation as wilderness. *See generally Utah* v. *Andrus*, 486 F. Supp. 995, 1006 (D. Utah 1979).

The right to develop even if it impairs an area's suitability does not, however, mean that the right is unlimited. The Secretary remains under a statutory mandate to manage these areas and their resources: "in managing the public lands the Secretary shall by regulation or otherwise take any action required to prevent unnecessary or undue degradation of the lands and their resources or to afford environmental protection." 43 U.S.C. § 1782(c).[6] By implication, this standard allows the Secretary to authorize uses or activities necessary to the purposes of the valid existing rights subject to reasonable mitigating measures to protect environmental values. The requirement that the Secretary regulate uses and activities to prevent unnecessary and undue degradation and to afford environmental protection is consistent with the power of the Federal Government to regulate property interests. Since the regulation extends at a minimum only to prohibiting activities that are not necessary or that are excessive or unwarranted, the taking issue is not implicated.[7]

V. *CONCLUSION*

Valid existing rights may be created by operation of a statute or an act of secretarial discretion. A valid mining claim, an oil and gas lease, and a right-of-way authorization are examples of valid existing rights. If such rights were created prior to the enactment of FLPMA, they limit the congressionally imposed nonimpairment standard. Although the nonimpairment standard remains the norm, valid existing rights that include the right to develop may not be regulated to the point where the regulation unreasonably interferes with enjoyment of the benefit of the right. Resolution of specific cases will depend upon the nature of the rights conveyed and the physical situation within the area. When it is determined that the rights conveyed can be enjoyed only through activities that will permanently impair an area's suitability for preservation as wilderness, the activities are to be regulated to prevent unnecessary and undue degradation or to afford environmental protection. Nevertheless, even if such activities impair

[6] *See also* 43 U.S.C. § 1732(b).

[7] These management requirements are compatible with the concept of valid existing rights. First, such rights may constitutionally be regulated and their value diminished for a proper governmental purpose. *See, e.g., Andrus* v. *Allard*, 100 S.Ct. 318 (1979); *Penn Central Transp. Co.* v. *City of New York*, 438 U.S. 104 (1978); *Goldblatt* v. *Hempstead*, 369 U.S. 590 (1962). Since the management standard prohibits only "unnecessary and undue degradation," it does not raise constitutional issues. Second, the rights granted by the United States are often explicitly limited by the government's authority to regulate. For example, the 1872 Mining Law provides that "all valuable mineral deposits in lands belonging to the United States * * * shall remain free and open to exploration and purchase * * * *under regulations prescribed by law*." 30 U.S.C. § 22. *See generally* 30 U.S.C. § 189; *Boesche* v. *Udall*, 373 U.S. 472, 477–78 (1963); *United States* v. *Richardson*, 599 F.2d 290 (9th Cir. 1979), *cert. denied*, 444 U.S. 1014 (1980).

the area's suitability, they must be allowed to proceed.

WILLIAM H. COLDIRON
Solicitor

CLYDE K. KOBBEMAN

58 IBLA 268

Decided *October 8, 1981*

Appeal from decision of the Montana State Office, Bureau of Land Management, rejecting simultaneous noncompetitive oil and gas lease application M 49009.

Affirmed.

1. Oil and Gas Leases: Applications: Generally—Oil and Gas Leases: Applications: Attorneys-in-Fact or Agents

An oil and gas lease application, Form 3112–1 (June 1980), is not completed in accordance with regulation 43 CFR 3112.2–1 or the instructions on the application itself where questions (d) through (f) are not answered by checking appropriate boxes in the application as the instructions require.

2. Administrative Authority: Laches—Estoppel—Laches

The authority of the United States to enforce a public right or protect a public interest is not vitiated or lost through lack of enforcement by some of its officers.

APPEARANCES: Bruce A. Budner, Esq., Dallas, Texas, for appellant.

OPINION BY CHIEF ADMINISTRATIVE JUDGE PARRETTE

INTERIOR BOARD OF LAND APPEALS

Clyde K. Kobbeman filed a simultaneous noncompetitive oil and gas lease application for parcel MT 1 in the September 1980 drawing in the Montana State Office, Bureau of Land Management (BLM). This application was drawn with first priority and assigned serial number M 49009.

On Apr. 30, 1981, BLM issued a decision rejecting Kobbeman's application because questions (d), (e), and (f)[1] were not completed on the back of the application by checking appropriate boxes, which violates 43 CFR 3112.2–1(a) (1980). Kobbeman appealed this decision.

[1] We agree that appellant's application was not completed and that BLM therefore properly rejected it. A simultaneous noncompetitive oil and gas lease application must be *completed* (43 CFR 3112.2–1(a)) or it must be rejected as an improper filing. 43 CFR 3112.6–

[1] The portion of the application in question is as follows:

"UNDERSIGNED CERTIFIES AS FOLLOWS (*check appropriate boxes*) [emphasis in original]:

• • • • •

"(d) Does any party, other than the applicant and those identified herein as other parties in interest, own or hold any interest in this application, or the offer or lease which may result? Yes ☐ No ☐

"(e) Does any agreement, understanding, or arrangement exist which requires the undersigned to assign, or by which the undersigned has assigned or agreed to assign, any interest in this application, or the offer or lease which may result, to anyone other than those identified herein as other parties in interest? Yes ☐ No ☐

"(f) Does the undersigned have any interest in any other application filed for the same parcel as this application? Yes ☐ No ☐"

of-way or other authorization for said projects on the basis of any present or future wilderness characteristics, wilderness designations, or wilderness studies or evaluations of lands in the Medicine Bow National Forest or in Natrona, Sweetwater, or Carbon Counties in Wyoming.

LEGAL DESCRIPTION AND WILDERNESS BOUNDARIES

SEC. 202. As soon as particable after the enactment of this Act, a map and a legal description of each area described in titles II and III shall be filed with the Committee on Energy and Natural Resources of the United States Senate and the Committee on Interior and Insular Affairs of the House of Representatives, and each such map and description shall have the same force and effect as if included in this Act, except that correction of clerical and typographical errors in each such legal description and map may be made. Each such map and legal description shall be on file and available for public inspection in the Office of the Chief of the Forest Service, Department of Agriculture.

APPLICATION OF THE WILDERNESS ACT OF 1964

SEC. 203. Subject to valid existing rights, each wilderness area designated by this Act shall be administered by the Secretary in accordance with the provisions of this Act and the Wilderness Act, except that any reference in the provisions of the Wilderness Act to the effective date of the Wilderness Act shall be deemed to be a reference to the effective date of this Act.

TITLE III—WILDERNESS STUDY AREAS

SEC. 301. (a) In furtherance of the purposes of the Wilderness Act, the Secretary of Agriculture shall, upon revision of the initial land management plans for the Bridger-Teton, Targhee, and Shoshone National Forests required by the Forest and Rangeland Renewable Resources Planning Act of 1974, as amended by the National Forest Management Act of 1976, review the following lands as to their suitability for preservation as wilderness:

(1) certain lands in the Bridger-Teton and Targhee National Forests of Wyoming, which comprise approximately one hundred and thirty-five thousand eight hundred and forty acres, as generally depicted on a map entitled "Palisades Wilderness Study Area—Proposed", dated September 1984, and which shall be known as the Palisades Wilderness Study Area;

(2) certain lands in the Bridger-Teton National Forest, which comprise approximately thirty thousand acres, as generally depicted on a map entitled "Shoal Creek Wilderness Study Area—Proposed", dated September 1984, and which shall be known as the Shoal Creek Wilderness Study Area; and

(3) certain lands in the Shoshone National Forest of Wyoming, which comprise approximately fourteen thousand seven hundred acres, as generally depicted on a map entitled "High Lakes Wilderness Study Area—Proposed", dated September 1984, and which shall be known as the High Lakes Wilderness Study Area.

(b) Subsequent to such review the Secretary shall submit his reports and findings to the President and the President shall submit

his recommendations to the Congress within three years of the date of receipt of the Secretary's report.

(c) Subject to valid existing rights and reasonable access to exercise such rights, until Congress determines otherwise, the Palisades, High Lakes and Shoal Creek Wilderness Study Areas shall be administered by the Secretary of Agriculture so as to maintain their presently existing wilderness character and potential for inclusion in the National Wilderness Preservation System: *Provided*, That—

(1) with respect to oil and gas exploration and development activities, the Palisades Wilderness Study Area shall be administered under reasonable conditions to protect the environment according to the laws and regulations generally applicable to nonwilderness lands within the National Forest System;

(2) subject to valid existing rights, the Palisades Wilderness Study Area as designated by this Act is hereby withdrawn from all forms of appropriation under the mining laws;

(3) the provisions of section 308 of the Interior Department Appropriations Act for fiscal year 1984 (Public Law 98-146) or similar provisions which may hereafter be enacted concerning oil and gas leasing, exploration and development in further planning or wilderness study areas shall not apply to the Palisades Wilderness Study Area; and

(4) within the Palisades, High Lakes and Shoal Creek Wilderness Study Areas, snowmobiling shall continue to be allowed in the same manner and degree as was occurring prior to the date of enactment of this Act.

TITLE IV—RELEASE OF LANDS FOR MULTIPLE USE MANAGEMENT

ADMINISTRATIVE AND CONGRESSIONAL REVIEW OF ROADLESS AREAS

SEC. 401. (a) The Congress finds that—

(1) the Department of Agriculture has completed the second roadless area review and evaluation program (RARE II); and

(2) the Congress has made its own review and examination of national forest roadless areas in Wyoming and the environmental impacts associated with alternative allocations of such areas.

(b) On the basis of such review, the Congress hereby determines and directs that—

(1) without passing on the question of the legal and factual sufficiency of the RARE II final environmental statement (dated January 1979) with respect to national forest lands in States other than Wyoming, such statement shall not be subject to judicial review with respect to National Forest System lands in the State of Wyoming;

(2) with respect to the national forest lands in the State of Wyoming which were reviewed by the Department of Agriculture in the second roadless area review and evaluation (RARE II) and those lands referred to in subsection (d) except those lands remaining in wilderness study upon enactment of this Act and subject to section 301, that review and evaluation or reference shall be deemed for the purposes of the initial land management plans required for such lands by the Forest and Rangeland Renewable Resources Planning Act of 1976 (Public Law 94-588) to be an adequate consideration of the suitability of such lands for inclusion in the National Wilderness Preserva-