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## THE FEDERAL COAL LEASING WALTZ

BRIAN E. MCGEE\* AND GERALD E. DAHL\*\*

Few Americans will deny that if we are not already immersed in an energy crisis, we are at least on the brink of a very serious energy crunch. Consequently, it is critical that we reassess our present and future energy resources, our escalating consumption of finite reserves, and our commitment to energy conservation. Pivotal to such an assessment is the development of our nation's vast western coal deposits and the vital part that federal coal can play in this tableau. Just one short year ago, the nation was primed to embark upon a new era of federal coal leasing as a meaningful start toward providing for tomorrow's energy needs. Today, we find ourselves almost at a standstill in federal coal leasing. This article will review the tragic state in which the coal industry and the nation now find themselves as a result of this standstill and will consider the limited alternatives which are available to cope with this unfortunate situation.

### I. BACKGROUND

Although significant amounts of federal coal reserves were already under lease in 1971, very little federal coal was actually being mined. Serious criticism was directed at the sufficiency of the existing federal coal leasing program's built-in precautions for the protection of the environment. Consequently, a moratorium on coal leasing was imposed in May, 1971, by the then Secretary of the Interior, Rogers Morton.

On February 13, 1973, Secretary Morton placed a moratorium on the issuance of further prospecting permits for coal,<sup>1</sup> which were then authorized under Title 30, section 201(b) of the United States Code. The Secretary emphasized that all pending applications for such coal prospecting permits would be rejected, but that the moratorium would not affect the rights of current holders of prospecting permits to obtain preference right coal leases. On February 17, 1973, Secretary Morton partially lifted the 1971 moratorium to

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<sup>1</sup> DEPARTMENT OF THE INTERIOR, INTERIOR SECRETARY ORDER No. 2952 (February 13, 1973).

permit coal leasing under emergency or "short-term criteria."<sup>2</sup> Such situations included instances where the coal was needed to maintain an existing mining operation or as a reserve for near term mining operations. In either case, however, leasing was permitted only when the land could be reclaimed in accordance with environmental standards stipulated in each lease and when an Environmental Impact Statement (EIS) had been prepared if required under the National Environmental Policy Act of 1969 (NEPA).<sup>3</sup>

More recently, then Secretary of the Interior Kleppe announced a comprehensive program for future coal leasing on January 26, 1976.<sup>4</sup> The primary objective of the program was to lift the 1971 moratorium and to make coal leases available under a competitive leasing system. The Secretary's comprehensive program included the following elements:

1. Adoption of the Energy Minerals Activity Recommendation System (EMARS) by which tracts of land desirable for coal leasing would be nominated and selected.
2. Implementation of a totally competitive leasing system under which no new coal prospecting permits would be issued.
3. Promulgation of regulations which would govern the conduct of mining and reclamation operations.
4. Preparation of regional environmental impact statements which would examine the impact of the proposed leasing program in defined geographic areas.
5. Continuation of short-term criteria leasing until the new competitive leasing system had been implemented.
6. Promulgation of "due diligence" standards which would require the holders of current federal coal leases to either develop or relinquish such leases.
7. Promulgation of a firm definition for "commercial quantities" pursuant to which existing preference right lease applications could be granted or denied.
8. Rescission of the 1971 moratorium.

All of the elements of the comprehensive program were not implemented at the same time; accordingly, they will be discussed in the order in which they became effective.

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<sup>2</sup> DEPARTMENT OF THE INTERIOR, NEWS RELEASE OF THE SECRETARY OF INTERIOR (February 17, 1973).

<sup>3</sup> National Environmental Policy Act of 1969 § 1, 42 U.S.C. § 4321 (1971).

<sup>4</sup> DEPARTMENT OF THE INTERIOR, NEWS RELEASE OF THE SECRETARY OF THE INTERIOR (January 26, 1976).

*Commercial Quantities Regulations*

On May 7, 1976, final regulations were promulgated by the Department of Interior which defined commercial quantities.<sup>5</sup> The new criteria incorporated a "prudent person" test as the standard set forth for determining whether an applicant had demonstrated the discovery of commercial quantities of coal:

A permittee has discovered commercial quantities of coal or a valuable deposit of one of the other permit minerals if the mineral deposit discovered under the permit is of such a character and quantity that a prudent person would be justified in the further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine. The permittee must present sufficient evidence to show that there is a reasonable expectation that his revenues from the sale of the mineral will exceed his costs of developing the mine, and extracting, removing, and marketing the mineral.<sup>6</sup>

This standard is expressly declared to be applicable to all future applications for preference right leases and to applications pending on the effective date of the regulations, May 7, 1976.<sup>7</sup>

As initially proposed, the regulations required that the applicant submit "detailed cost estimates" for the entire operation before being informed of the proposed lease terms and royalties. In an attempt to resolve this problem, the Bureau of Land Management (BLM) bifurcated the applicant's submission process into an "initial"<sup>8</sup> and a "final"<sup>9</sup> showing. In the initial phase, the applicant must submit reserve information describing the physical characteristics of the area covered by its prospecting permit and its proposed mining operation. Upon the applicant's initial submission, the BLM then undertakes a technical examination and environmental analysis, which will culminate in a Technical Examination/Environmental Analysis Report.<sup>10</sup> Based upon this report, the BLM then prepares its proposed lease terms and stipulations. Armed with a copy of the BLM report and the proposed lease terms and stipulations, the applicant must then submit its final showing of projected costs and revenues to substantiate that it has, in fact, discovered commercial quantities of coal.<sup>11</sup> Such projected costs

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<sup>5</sup> 43 C.F.R. §§ 3520.1-1 to 3521.1-1 (1976).

<sup>6</sup> 43 C.F.R. § 3520.1-1(c) (1976).

<sup>7</sup> 43 C.F.R. § 3520.1-1(d) (1976).

<sup>8</sup> 43 C.F.R. § 3521.1-1(b) (1976).

<sup>9</sup> 43 C.F.R. § 3521.1-1(c) (1976).

<sup>10</sup> 43 C.F.R. §§ 3521.1-4, 1-5 (1976).

<sup>11</sup> 43 C.F.R. § 3521.1-1(c) (1976).

include those attendant to actual mining, transportation, and adherence to environmental requirements. If there is a reasonable expectation that the applicant's projected revenues from the sale of coal will exceed such projected costs,<sup>12</sup> a preference right lease will be granted.<sup>13</sup>

### *Coal Mine Operating Regulations*

A major facet of the Secretary's comprehensive program was the promulgation on May 17, 1976, of regulations governing both the operation of coal mining and the reclamation of lands after such mining has been completed.<sup>14</sup> On August 4, 1976, the Federal Coal Leasing Amendments Act of 1975 (FCLAA) became law, thereby necessitating substantial revision of the May 17, 1976, regulations. The revised regulations were effective January 19, 1977,<sup>15</sup> with further minor corrections to the regulations effective May 17, 1977.<sup>16</sup> It should also be noted that with the passage of the Surface Mining Control and Reclamation Act of 1977, further revisions to portions of these regulations were proposed on November 29, 1977.<sup>17</sup>

While some of the regulations are specifically applicable to the Bureau of Land Management (BLM), and others to the U.S. Geological Survey (USGS), both track quite closely and apply to all federal coal, with the exception of deposits on Indian lands which are subject to the trust protection of the United States. The regulations, although subsequently amended, were effective as of May 17, 1976, and provide obligations and standards of performance for all mining operations conducted pursuant to a federal lease or license. "Existing operations" were brought within the ambit of the regulations, but operators were allowed eighteen months to prepare a suitable plan of operations or to modify a previously approved plan.<sup>18</sup> Existing operations are defined so as to include all operations for which a plan had been approved prior to May 17, 1976, or for which a proposed plan had been submitted before May 17, 1976.<sup>19</sup> In the case of proposed plans, a determination must

<sup>12</sup> 43 C.F.R. § 3521.1-1(e) (1976).

<sup>13</sup> 43 C.F.R. § 3521.1-1(h) (1976).

<sup>14</sup> 43 C.F.R. §§ 3041.0-1 to 3041.8 (1976).

<sup>15</sup> 42 Fed. Reg. 4,442 (1977) (to be codified in 43 C.F.R. §§ 3041.0-1 to .8 and 30 C.F.R. §§ 211.1, .2, .10, .40, .5).

<sup>16</sup> 42 Fed. Reg. 25,462 (1977) (to be codified in 43 C.F.R. §§ 3041.01 to .8).

<sup>17</sup> 42 Fed. Reg. 60,890 (1977) (to be codified in 30 C.F.R. §§ 211.1-.2, .10, .40, .70, .72, .78, .74, .75).

<sup>18</sup> 43 C.F.R. § 3041.0-5(b) (1976).

have been made either that an environmental impact statement was not required, or, if required, that substantial resources of the Department have been expended in the preparation or completion of such an EIS.<sup>20</sup> If overburden had not previously been removed, application of the performance standards was tolled for a period of 180 days.<sup>21</sup> With respect to "new operations," such obligations and standards of performance were applicable as of the effective date of the regulations.<sup>22</sup>

Performance is insured by a required compliance bond<sup>23</sup> and inspection procedures.<sup>24</sup> Upon the detection of a violation which threatens "immediate and serious damage to the environment, resources, or the health and safety of the public," an order may be issued requiring the immediate cessation of activity.<sup>25</sup> Variances from the performance standards can be granted only if the applicant submits a new or revised mining plan and can demonstrate that the proposed postmining land use will meet certain specified conditions.<sup>26</sup>

The regulations applicable to the USGS do depart from those applicable to the BLM in at least one important respect. The former regulations require that the Secretary review state laws and regulations relating to the reclamation of lands disturbed by the surface mining of coal.<sup>27</sup> If the Secretary finds that state law affords environmental protection to at least as stringent a degree as under the exclusive application of federal regulations, the Secretary must condition the approval of any federal mining lease upon compliance with such state laws and regulations, unless he further determines that the net effect of such state laws or regulations would be to prohibit, for all practical purposes, the mining of federal coal and that it is in the "overriding national interest that the coal be produced."<sup>28</sup> The Secretary is also directed to consult with representatives of the respective states in an effort to reach agreements for the joint federal-state administration and enforcement of pro-

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<sup>19</sup> 43 C.F.R. § 3041.0-5(b)(1)(iii)(A) (1976).

<sup>20</sup> 43 C.F.R. § 3041.0-5(b)(1)(iii)(B) (1976).

<sup>21</sup> 43 C.F.R. § 3041.0-5(b)(1)(i) (1976).

<sup>22</sup> 43 C.F.R. § 3041.0-5(b)(2) (1976).

<sup>23</sup> 43 C.F.R. § 3041.3 (1976).

<sup>24</sup> 43 C.F.R. § 3041.6 (1976).

<sup>25</sup> 43 C.F.R. § 3041.7(c) (1976).

<sup>26</sup> 43 C.F.R. § 3041.8 (1976).

<sup>27</sup> 30 C.F.R. § 211.75(a) (1977).

<sup>28</sup> *Id.*

grams related to the operation and reclamation of federal coal lands.<sup>29</sup>

### *The Energy Minerals Activity Recommendation System*

As described by Secretary Kleppe in his January 26, 1976, press release, the Energy Materials Activity Recommendation System (EMARS) was considered the cornerstone of the new federal coal program.<sup>30</sup> Under EMARS, the Department of the Interior was to determine where coal would be needed, where coal should be leased, and when the environmental consequences of coal leasing outweighed the need for such coal. The implementation of the EMARS program was effectively suspended, however, by the decision of *Natural Resources Defense Council v. Hughes*<sup>31</sup> where it was held that the EIS accompanying the program was deficient because it failed to consider alternatives and to take into account substantive changes which had occurred between the release of the draft EIS and the final EIS. As such, EMARS will not be extensively developed in this article. It is also the authors' understanding that the Carter administration is disenchanted with the EMARS concept and an "allocation" system may be resurrected with respect to federal coal leasing. In any event, it should be borne in mind that the provisions of FCLAA will be applicable to any future federal coal leasing program.

By way of cursory review, the EMARS program includes the following major elements: 1. Management Framework Plans to identify and to inventory minerals and other values, such as agriculture, grazing, wildlife, recreation, and water resources as well as analyzing the compatibility of varying land uses.<sup>32</sup> 2. Nominations by industry, state and local governments, environmental groups and the public at large to identify which tracts of land should or should not be leased.<sup>33</sup> 3. Environmental analyses to determine the environmental effects of proposed coal development, in accordance with NEPA.<sup>34</sup> 4. Economic analyses to deter-

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<sup>29</sup> 30 C.F.R. § 211.75(b) (1977).

<sup>30</sup> While the EMARS regulations were originally promulgated at 43 C.F.R. Subpart 3520 on June 1, 1976, the enactment of the Federal Coal Leasing Act of 1975 on August 4, 1976, necessitated certain revisions. The regulations were subsequently revised at 43 C.F.R. § 3525 on October 28, 1976, and again on January 25, 1977, and May 17, 1977.

<sup>31</sup> 437 F. Supp. 981 (D.C. 1977).

<sup>32</sup> 42 Fed. Reg. 25,473 (1977) (to be codified in 43 C.F.R. § 3525.4).

<sup>33</sup> 42 Fed. Reg. 25,472 (1977) (to be codified in 43 C.F.R. § 3525.2-2).

<sup>34</sup> 42 Fed. Reg. 25,471 (1977) (to be codified in 43 C.F.R. § 3525.1(c)); 42 Fed.

mine the value of the coal to be leased and whether the value of such coal outweighs the environmental risks.<sup>35</sup>

After a tract of land has been identified as desirable and suitable for leasing under EMARS, the Secretary is required to prepare a land use plan for such lands prior to issuing a lease.<sup>36</sup> The land use plan preparation process involves consultation and public meetings, as well as compliance with NEPA. EMARS also requires that the Secretary consult with the governors of states in which any federal leases are to be issued and provides a special leasing opportunity system.<sup>37</sup> This system provides that public bodies, including federal agencies, rural electric cooperatives, or nonprofit corporations controlled by any of such entities, would be eligible to lease federal coal for their own use or for sale to their members.

Prior to issuing a lease, but subsequent to having conducted the lease sale, the Secretary is further required to notify the Attorney General of the proposed lease issuance, the name of the proposed lessee, and other relevant information.<sup>38</sup> The Attorney General is then to determine whether the proposed lease would create or maintain a situation inconsistent with federal statutes protecting trade and commerce from unlawful restraints and monopolies.

#### *Diligent Development and Continuous Operation Regulations*

As of January, 1976, some sixteen billion tons of federal coal was already under lease. Perhaps as much as one-third of that amount, however, was not suitable for mining because of economic or environmental reasons. In order to hasten either the development of such previously leased coal or the relinquishment of existing coal leases, the Department promulgated regulations on May 28, 1976, for the diligent development and continuous operation of coal leases.<sup>39</sup> FCLAA, while maintaining the policy concepts of diligent development and continuous operation, changed some of the "ground rules" applicable to such situations. Consequently, the regulations have been revised to conform with FCLAA.<sup>40</sup>

One of the most significant concepts set forth in the regula-

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Reg. 25,473 (1977) (to be codified in 43 C.F.R. § 3525.3-2 (b)).

<sup>35</sup> 42 Fed. Reg. 25,473 (1977) (to be codified in 43 C.F.R. § 3525.3-2).

<sup>36</sup> 42 Fed. Reg. 25,473 (1977) (to be codified in 43 C.F.R. § 3525.4).

<sup>37</sup> 42 Fed. Reg. 25,473-25,474 (1977) (to be codified in 43 C.F.R. § 3525.5-2).

<sup>38</sup> 42 Fed. Reg. 25,474 (1977) (to be codified in 43 C.F.R. § 3525.7).

<sup>39</sup> 43 C.F.R. §§ 3500.0-3 to 3509.1 (1976).

<sup>40</sup> 41 Fed. Reg. 56,643 (1976) (to be codified in 43 C.F.R. §§ 3500.0-3 to 3509.1).



tions is that of a Logical Mining Unit (LMU), a concept that was preserved under FCLAA. As defined in the regulations, an LMU is "an area of coal land that can be developed and mined in an efficient, economical and orderly manner with due regard to the conservation of coal reserves and other resources."<sup>41</sup> An LMU may consist of one or more federal coal leases and may also include contiguous nonfederal lands. In addition, all of the lands within any one LMU must be under the effective control of a single operator and, by definition, must be capable of being developed and operated as a single mine. All future federal coal leases will, in their individual capacities, be considered to be LMU's.<sup>42</sup>

While the regulations rely upon a complex calculation of "LMU reserves" and minimum mining requirements for such reserves (or the payment of advance royalties) in order to insure "diligent development"<sup>43</sup> and "continuous operation,"<sup>44</sup> treatment of these requirements is beyond the scope of this article.

#### *Federal Coal Leasing Amendments Act of 1975*

The Federal Coal Leasing Amendments Act of 1975 (FCLAA) was passed on August 4, 1976, over President Ford's veto.<sup>45</sup> Under FCLAA, the Secretary is authorized to divide lands, which are subject to the Act and which have previously been classified for coal leasing, into such tracts as he deems appropriate and to offer them for lease by competitive bid at not less than their fair market value.<sup>46</sup> In any one year, however, at least fifty percent of the total acreage offered for lease by the Secretary must be leased under a system of deferred bonus payments.<sup>47</sup> In addition, a "reasonable"

<sup>41</sup> 43 C.F.R. § 3500.0-5(d) (1976).

<sup>42</sup> *Id.*

<sup>43</sup> 43 C.F.R. § 3500.0-5(f) (1976): "Diligent Development of a Federal lease means the timely preparation of coal from the LMU of which the lease is a part so that one fortieth of the LMU reserves associated with that lease are extracted within a period of ten years . . . ."

<sup>44</sup> 43 C.F.R. § 3500.0-5(g) (1976):

Continuous operation means the extraction, processing, and marketing of coal in the average annual amount of one percent or more of the LMU reserves; the annual amount shall be computed on a three year basis, and the three year period for which the average shall be computed shall consist of the year in question and the two preceding years.

<sup>45</sup> Federal Coal Leasing Amendments Act of 1975 § 1(a), 30 U.S.C.A. § 181 (West Supp. 1978).

<sup>46</sup> 30 U.S.C.A. § 201(a)(1) (West Supp. 1978).

<sup>47</sup> *Id.*

number of tracts must be reserved and later offered for lease to public bodies, including federal agencies, rural electric cooperatives, or nonprofit corporations controlled by any such entities.<sup>48</sup>

FCLAA requires that prior to holding a lease sale, a comprehensive land use plan must be prepared and that the proposed sale must be compatible with such plan.<sup>49</sup> The Secretary of the Interior and the Secretary of Agriculture are required to prepare the appropriate land use plan for areas under their respective jurisdictions. If the Secretary of the Interior finds that there is a nonfederal interest in the surface or that the coal resources are "insufficient to justify the preparation costs of a Federal comprehensive land use plan," this requirement can be considered to have been fulfilled if a comprehensive land use plan has been prepared by the respective state in which the lands are located or if a "land use analysis" has been prepared by the Secretary.<sup>50</sup> In each instance, consultation must be undertaken with appropriate state agencies, local governments, and the general public. If any interested party is, or may be, adversely affected by the adoption of such a plan, opportunity for public hearing must be provided.<sup>51</sup>

In addition to insuring that the development of a coal lease is conducted pursuant to a comprehensive land use plan, the land use planning system requires that each plan include an assessment of the amount of coal which is recoverable by both deep and surface mining operations.<sup>52</sup> The Secretary must consider the effects which the proposed lease might have on the environment, agricultural and other economic activities and public services. He must also evaluate the effect of mining the coal by deep mining, surface mining or any other method in order to determine which method or methods achieve "the maximum economic recovery of the coal within the proposed leasing tract."<sup>53</sup> Each lease must also contain provisions requiring compliance with the Federal Water Pollution Control Act and the Clean Air Act.<sup>54</sup> In addition, FCLAA main-

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<sup>48</sup> *Id.*

<sup>49</sup> *Id.* § 201(a)(3)(A)(i).

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* § 201(a)(3)(A)(ii).

<sup>52</sup> *Id.* § 201(a)(3)(B).

<sup>53</sup> *Id.* § 201(a)(3)(C).

<sup>54</sup> *Id.* § 201(a)(3)(E). On March 3, 1978, the Department published a Notice of Intent to develop proposed rules to implement the inventory and land use planning provisions of FCLAA, the Federal Land Use and Management Act of 1976, and the Surface Mining Control and Reclamation Act of 1977. See 43 Fed. Reg. 8814 (March 3, 1978).

tains the operation and reclamation requirements of earlier regulations by requiring that lessees submit an operation and reclamation plan within three years from the issuance of a lease if the operation might cause a "significant disturbance of the environment."<sup>55</sup>

There are certain limitations as to who may obtain a coal lease under FCLAA. Any person, association, corporation, or entity (which is under the common control of such person, association or corporation) may not be issued a new lease if it currently holds a federal coal lease from which coal has not been produced in commercial quantities within a period of ten years beginning on August 4, 1976.<sup>56</sup> Acreage limitations are also placed on the holders of coal leases under FCLAA. Any such party, association, or corporation may not hold more than 46,080 acres of federal coal leases in any one state or more than 100,000 acres nationwide.<sup>57</sup> If more than 100,000 acres of coal leases were held nationwide as of August 4, 1976, no further coal leases can be issued to any such holder until its existing acreage holdings fall below 100,000 acres.<sup>58</sup>

In a February 17, 1973, order, Secretary Morton imposed a moratorium on the further issuance of prospecting permits for coal. FCLAA confirmed the demise of the coal prospecting permit and provided, instead, for the granting of coal "exploration licenses," which may be for terms of not more than two years.<sup>59</sup> Contrary to the rights enjoyed by a prospecting permittee under the preference right lease system, an exploration license does *not* confer any entitlement, preferred or otherwise, upon the holder to obtain a lease for the lands explored.<sup>60</sup> An exploration license cannot be issued for any lands already included under a coal lease, and a separate exploration license is required for exploration which is to be conducted in each state. As with competitive coal leasing under FCLAA, the same basic interests are considered in determining whether an exploration license should be granted, *i.e.*, protection of the environment and compliance with all applicable federal, state, and local laws and regulations.<sup>61</sup> Upon violation of any of its terms and conditions, an exploration license may be revoked by

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<sup>55</sup> 30 U.S.C.A. § 207(c) (West Supp. 1978).

<sup>56</sup> *Id.* § 201(a)(2)(A) (West Supp. 1978).

<sup>57</sup> *Id.* § 184(a)(i).

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* § 201(b)(i).

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

the Secretary. While an exploration license does permit a reasonable amount of coal to be removed for analysis and study, it does not authorize a holder to "cause substantial disturbance" to the natural land surface.<sup>62</sup> Finally, FCLAA provides penalties of \$1,000 per day for persons willfully conducting coal exploration for commercial purposes without an exploration license.<sup>63</sup>

FCLAA continues the logical mining unit system and allows the Secretary to consolidate coal leases into an LMU.<sup>64</sup> However, the Secretary may not make such a consolidation until a public hearing has been held if requested by an interested party, and any LMU so established may not exceed 25,000 acres.<sup>65</sup>

While provision for the modification of an original lease has been retained under FCLAA, the total area added by such modifications may not exceed 160 acres or add acreage larger than that in the original lease, whichever is less.<sup>66</sup> If any such lease modification is sought, the Secretary will also prescribe terms and conditions for the original lease, as well as the modification itself, to include the revision of royalty payments, performance standards and environmental stipulations.<sup>67</sup>

A coal lease issued under FCLAA is effective for a term of twenty years and for as long thereafter as coal is produced annually in "commercial quantities."<sup>68</sup> However, a lease will be terminated after ten years if coal is not being produced in commercial quantities under the "diligent development" requirements. FCLAA provides for a royalty of not less than twelve and a half percent of the value of the coal recovered by surface mining operations and of such lesser amount as the Secretary may determine in the case of coal recovered by underground mining operations.<sup>69</sup> The royalty for coal recovered by underground mining operations has been subse-

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<sup>62</sup> *Id.* § 201(b)(2).

<sup>63</sup> *Id.* § 201(b)(4). Regulations incorporating the requirements of FCLAA concerning coal exploration licenses were promulgated on January 25, 1977. See 42 Fed. Reg. 4458 (1977) (to be codified in 43 C.F.R. § 3507). FCLAA also requires the Department to conduct a comprehensive exploratory program designed to obtain sufficient data to evaluate the extent, location and potential for developing "known recoverable federal coal resources." See 30 U.S.C.A. § 208-1(a) (West Supp. 1978).

<sup>64</sup> 30 U.S.C.A. § 202(a)(1) (West Supp. 1978).

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* § 203.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* § 207(a).

<sup>69</sup> *Id.* § 207(b).

quently set at not less than eight percent unless conditions warrant a lesser amount.<sup>70</sup>

Each lease issued under FCLAA is subject to a diligent development requirement.<sup>71</sup> As previously noted, a lease may not be issued to any person, association, or corporation that holds existing leases if coal has not been produced in commercial quantities from any such lease within a period of ten years.<sup>72</sup> This same ten year diligence requirement is also applicable to new leases. An operator may be excused from these requirements when interrupted by "strikes, the elements, or casualties not attributable to the lessee."<sup>73</sup>

The Secretary is authorized to suspend the requirement of continued operation upon the payment of advance royalties.<sup>74</sup> Such royalties must equal or exceed the royalty that would be charged for normal production. The Secretary is also permitted to determine and use a fixed reserve-to-production ratio in computing advance royalties, which may be paid in lieu of continued operation for up to ten years.<sup>75</sup> Advance royalties may be used to reduce later production royalties, but not with respect to those which become due after the initial twenty year lease term.<sup>76</sup> It should be borne in mind, however, that this advance royalty provision does not affect the requirement that production be initiated within ten years of the issuance of a lease.

### *The Federal Land Policy and Management Act of 1976*

The Federal Land Policy and Management Act of 1976, otherwise known as "FLPMA" or the "Organic Act," was enacted into law on October 21, 1976.<sup>77</sup> Although the primary objective of FLPMA is to coordinate and reorganize the manner in which the nation's land resources are administered and utilized, (and not to provide for the leasing of federal coal), the policies and land use planning requirements established by FLPMA will have an important bearing upon coal and other mineral leasing in the foreseeable

<sup>70</sup> 42 Fed. Reg. 4452 (1977) (to be codified in 43 C.F.R. § 3503.3-3(b)).

<sup>71</sup> 30 U.S.C.A. § 207(b) (West Supp. 1978).

<sup>72</sup> *Id.* § 207(a).

<sup>73</sup> *Id.* § 207(b).

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> Federal Land Policy and Management Act of 1976 §§ 102-603, 43 U.S.C.A. §§ 1701-82 (West Supp. 1978).

future. Section 102 sets forth the congressional policies which were recognized in FLPMA's enactment, including the following pronouncements of importance to this discussion:

1. That public lands be retained in federal ownership unless disposal will serve the national interest.<sup>78</sup>
2. That goals and objectives established by law, as guidelines for public land use planning and management, be directed toward the principles of multiple use and sustained yield.<sup>79</sup>
3. That public lands be managed in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmosphere, water resource, and archeological values and that will preserve and protect certain public lands in their natural condition.<sup>80</sup>
4. That the United States receive fair market value for the use of the public lands and their resources.<sup>81</sup>
5. That regulations and plans be established for the protection of public land areas of critical environmental concern.<sup>82</sup>
6. That management of the public lands be conducted in a manner which recognizes the country's needs for domestic sources of minerals, food, timber, and fiber.<sup>83</sup>

Section 202, entitled "Land Use Planning," directs the Secretary to involve the public in developing, maintaining, and revising land use plans for the use of the public lands, regardless of whether such lands have been previously classified, withdrawn, set aside, or otherwise designated for one or more uses.<sup>84</sup> On March 3, 1978, as noted previously, the Department published a Notice of Intent to implement the inventory and land use planning provisions of FCLAA, FLPMA, and the Surface Mining Control and Reclamation Act of 1977.<sup>85</sup>

#### *President Carter's Environmental Message*

In his May 23, 1977, Environmental Message to Congress, President Carter urged passage of the Surface Mining Control and Reclamation Act of 1977.<sup>86</sup> With respect to coal leasing, President

<sup>78</sup> 43 U.S.C.A. § 1701(a)(1) (West Supp. 1978).

<sup>79</sup> *Id.* § 1701(a)(7).

<sup>80</sup> *Id.* § 1701(a)(8).

<sup>81</sup> *Id.* § 1701(a)(9).

<sup>82</sup> *Id.* § 1701(a)(11).

<sup>83</sup> *Id.* § 1701(a)(12).

<sup>84</sup> *Id.* § 1712(a).

<sup>85</sup> 43 Fed. Reg. 8814 (1978).

<sup>86</sup> 8 ENVIR. REP. (BNA) 132 (May 23, 1977).

Carter noted that while FCLAA and FLPMA provide the Secretary with the necessary authority to carry out environmentally sound comprehensive planning for the public lands, he was directing the Secretary to take the following actions in order to fully implement the policies of those two Acts: 1. Use environmental reviews, coal assessments, and indications of market interest to determine which lands are appropriate for leasing.<sup>87</sup> 2. Complete a land use plan before making the decision to offer a tract for lease sale.<sup>88</sup> 3. Refuse to lease any tract until satisfied that the environmental impact of mining would be acceptable and that the federal government will receive fair market value for the resource.<sup>89</sup>

With respect to existing leases and pending applications for preference right leases, the President stated that he was also directing the Secretary to take any or all of the following actions, in order to deal with nonproducing and/or environmentally unsatisfactory leases and applications: 1. Exchange environmentally unsatisfactory leases for coal lands of equivalent value which could be developed in an environmentally acceptable manner.<sup>90</sup> 2. Reassess the basis for granting or denying existing preference right lease applications.<sup>91</sup> 3. Develop legislation to permit the condemnation of existing leasehold rights by the federal government to prevent environmental damage.<sup>92</sup>

### *The Surface Mining Control and Reclamation Act of 1977*

The Surface Mining Control and Reclamation Act of 1977 was enacted on the eve of the first anniversary of the Federal Coal Leasing Amendments Act of 1975.<sup>93</sup> Title 2 of the Act creates the Office of Surface Mining Reclamation and Enforcement (OSM), which is charged with the administration of the Act.<sup>94</sup> The two pivotal titles are Title IV, Abandoned Mine Reclamation,<sup>95</sup> and Title V, Control of the Environmental Impacts of Surface Coal Mining.<sup>96</sup>

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<sup>87</sup> *Id.* at 136.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> Surface Mining Control and Reclamation Act of 1977 §§ 1-908, 30 U.S.C.A. §§ 1201-1328 (West Supp. 1978).

<sup>94</sup> 30 U.S.C.A. § 1211 (West Supp. 1978).

<sup>95</sup> *Id.* §§ 1231-1243.

<sup>96</sup> *Id.* §§ 1251-1279.

Of importance to this discussion, coal mining operations on alluvial valley floors and on prime farmlands were specifically addressed, and such operations will henceforth be subject to stringent controls. It should also be recognized that where the surface rights over federal coal are owned by persons other than the United States, such persons will be consulted in the development of the land use plans for those areas.<sup>97</sup> On March 3, 1978, and as previously noted, the Department published a Notice of Intent to develop rules to implement the inventory and land use planning provisions of the Act, FCLAA and FLPMA.<sup>98</sup>

## II. NATURAL RESOURCES DEFENSE COUNCIL v. HUGHES

Following the release of the final programmatic environmental impact statement (programmatic statement) for the Department of the Interior's proposed competitive coal leasing program, the Natural Resources Defense Council, Inc. (NRDC), the Environmental Defense Fund, Inc., the Northern Plains Resource Council, and the Powder River Basin Resource Council, all nonprofit membership corporations, filed Civil Action No. 75-1749 in the United States District Court for the District of Columbia against Royston C. Hughes, who was then an Assistant Secretary of the Interior. The suit alleged that the Department had failed to comply with the requirements of NEPA in formulating and submitting the draft and final programmatic statements and requested that injunctive relief be granted to prevent the Department from issuing any new leases until the NEPA requirements had been satisfied. It should also be noted that the Utah Power and Light Company intervened as a defendant in the suit.

On July 5, 1977, a hearing was held on the parties' Cross Motions for Summary Judgment, and they were asked to submit a "reshaping of their present position." The federal defendants' memorandum, submitted in response to this request, stated that the Department's position had changed in three respects and that, as a result, the disagreement between the parties had been virtually eliminated.

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<sup>97</sup> On September 18, 1978 the Department of the Interior issued its proposed rules for the permanent regulatory program under the Act. *See* 43 Fed. Reg. 41661-41940 (1978) (to be codified in 30 C.F.R. §§ 700.1-851.15). Regulations establishing general requirements for surface coal mining and reclamation on federal lands can be found in Part 740 of the proposed regulations. 43 Fed. Reg. 41817-41823 (1978) (to be codified in 30 C.F.R. §§ 740.1-744.13). The comment period on the proposed regulations extends through November 17, 1978.

<sup>98</sup> 43 Fed. Reg. 8814 (1978).



The first change, which had been precipitated by President Carter's May 23, 1977 Environmental Message, was the initiation of a review of the federal coal program to insure that the program would be managed in an environmentally sound manner. This review had been formalized as the "Federal Coal Management Review" and was intended to carry out the President's directive and other tasks which the Department had independently identified.<sup>99</sup>

Admitting that short-term leasing had been subject to certain abuses, the second change concerned the Department's revision of its short-term leasing criteria.<sup>100</sup> While the previous short-term criteria did not contain any limits on the amount of reserves that could be included in a short-term lease, the revised criteria established an eight year reserve limitation for existing users of coal and also provided that short-term leases would not be issued for new mines if the opening and operation of a mine would require the construction of major new transportation facilities. In a footnote to their memorandum, the federal defendants further asserted that while both sides had agreed that the Department could continue to issue short-term leases during the preparation of a new programmatic statement on its coal program proposals, the Department could also issue new long-term leases during the interim as long as they were not a part of the EMARS coal leasing program. Essentially, the federal defendants' position was that since the lawsuit only questioned the adequacy of NEPA compliance with respect to the EMARS coal leasing program, such non-EMARS leases could continue to be issued on a case-by-case basis.

As a final change, the Department announced that with some exceptions, the revised short-term criteria would be applied to preference right lease applications. The Department thereby left itself free to exempt pending preference right lease applications from the short-term criteria, based upon consideration of the following factors:

1. The length of time that the application had been pending before the Department.
2. The potential environmental consequences of permitting mining.
3. The proposed end use of the coal.
4. The socio-economic effects of lease issuance.

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<sup>99</sup> Federal Defendant's Memorandum in Response to the Court's July 5, 1977, Request, Appendix II, Natural Resources Defense Council, Inc. v. Hughes, 437 F. Supp. 981 (D.D.C. 1977).

<sup>100</sup> *Id.* Appendix IV.

5. The availability of other coal to meet the potential market supply.
6. The impact of lease issuance on the issues involved in the coal policy review.
7. The public interest.

In their response to the federal defendants' memorandum, the plaintiffs denied that the disagreement between the parties had been eliminated. Of primary concern to the plaintiffs was the Department's contention that non-EMARS leases could be issued prior to the development of a new coal leasing policy and the completion of a new programmatic statement on that policy. The plaintiffs took the position that such leasing, even on a case-by-case basis, constituted a "program" and would be in violation of NEPA stating that the "issuance of new leases which alter the existing mining practice on the federal lands prior to that development [new coal leasing program] would violate the letter and the spirit of the President's instructions and the requirements of NEPA."<sup>101</sup> In response to the Department's contention that certain leasing should be permitted during the interim in order to satisfy existing needs, the plaintiffs questioned whether private, state, and Indian coal lands would not be sufficient to supply such existing needs and reiterated their proposed short-term criteria, which would allow new leasing solely to permit existing mining operations to continue at current levels of production for two years.

The plaintiffs also sharply attacked the defendants' revised short-term criteria by asserting that the defendants placed no limit on the number of new leases which could be issued or the number of new mines which could be opened. Further, the plaintiffs argued that the eight year reserve limitation would not limit the size of new preference right leases. This latter contention was based on three arguments:

1. In its memorandum, the Department had specifically reserved authority to exempt pending preference right lease applications from the short-term criteria.
2. The eight year reserve criteria did not limit the number of contracts into which a lease applicant might enter to provide coal to existing coal users.
3. The new criteria did not attempt to control the "tail wag-

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<sup>101</sup> Plaintiff's Reply to Federal Defendant's Memorandum in Response to the Court's July 5, 1977, Request at 6, Natural Resources Defense Council, Inc. v. Hughes, 437 F. Supp. 981 (D.D.C. 1977).

<sup>102</sup> 437 F. Supp. 981 (D.D.C. 1977).

ging the dog" situation in which a company might acquire a small mine in the intent of annexing contiguous federal areas of much larger size.

On September 27, 1977, District Judge John H. Pratt granted the plaintiffs' Motion for Summary Judgement in *Natural Resources Defense Council v. Hughes*.<sup>102</sup> The effect of his decision has been to suspend the EMARS nomination program, to require the preparation of a new programmatic statement, and to restrict severely the issuance of new preference right and competitive leases.

After reviewing the evolution of the current federal coal leasing policy, the court eliminated two procedural objections which had been raised by the federal defendants. It had been argued that the Federal Coal Leasing Amendment Act of 1975 expressed congressional intent to exempt the coal leasing program from the requirements of NEPA. Upon review of the legislative history of FCLAA, the court found that there was no evidence of such congressional intent.<sup>103</sup> The federal defendants had also asserted that the controversy was nonjusticiable because the program discussed in the programmatic statement had not yet been implemented by specific or concrete application. Citing the United States Supreme Court's decision in *Kleppe v. Sierra Club*,<sup>104</sup> the court held that the actions of the Department had sufficiently matured to assure that the court's intervention would not create unnecessary disruption and that the issues raised in the plaintiffs' complaint were justiciable.<sup>105</sup>

While the federal defendants' failure to comply with section 102(2)(C) of NEPA was not disputed, the court did find that the final programmatic statement was inadequate for two major reasons: the EMARS tract nomination program was inadequately described in the draft and the final programmatic statements; and the final programmatic statement failed to adequately discuss alternatives to the present policy.<sup>106</sup> In its review of the preparation of both the draft and final programmatic statements, the court noted that EMARS had been subject to criticism within the Department, even before the draft statement was issued, and that the draft programmatic statement did not contain a complete description of EMARS, which was to have been the heart of the new

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<sup>103</sup> *Id.* at 983-987.

<sup>104</sup> 427 U.S. 370 (1976).

<sup>105</sup> 437 F. Supp. 981, 987 (D.D.C. 1977).

<sup>106</sup> *Id.* at 987.

federal coal leasing program.<sup>107</sup> However, the court's primary reason for declaring the final programmatic statement to be inadequate was that following the release of the draft statement and prior to the issuance of the final statement, EMARS had been changed from the original Energy Minerals *Allocation* Recommendation System to the Energy Minerals *Activity* Recommendation System, thereby substituting an industry nomination procedure for the original system by which federal agencies were to correlate inventoried federal coal resources with national projections for coal-derived energy needs.<sup>108</sup> The court concluded that this amendment constituted a significant departure and that NEPA required a detailed and comparative explanation of the change.<sup>109</sup> The court also held that in order to comply with NEPA, the Department would have to expand its EMARS explanation through the issuance of a supplemental draft programmatic statement.<sup>110</sup>

The court's second reason for declaring the final programmatic statement to be inadequate was that the final programmatic statement lacked alternatives to the present policy. The court found that the alternative of "no action" received insufficient consideration, particularly in light of the large amount of federal coal currently under lease and available projections which indicated that the demand for production from federal coal reserves will not materially increase in the foreseeable future.<sup>111</sup>

In a final section of its opinion, the court dealt with the appropriateness of injunctive relief. First, it stated that the nation was not faced with a shortage of coal production and that a delay in the issuance of new coal leases would not cause substantial harm.<sup>112</sup> Second, the court addressed the federal defendants' contention that they were free to issue preference right leases on a case-by-case basis, so long as such leases were not "program" leases and a separate EIS, if required, was prepared for each proposed lease.<sup>113</sup> The court specifically denied this contention stating that "if regional or site-specific EIS's are permitted to act as curative of programmatic deficiencies and as a substitute for a Final EIS, the policy of long-range environmental planning would be defeated."<sup>114</sup>

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<sup>107</sup> *Id.* at 988-990.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at 989-990.

<sup>110</sup> *Id.* at 990.

<sup>111</sup> *Id.* at 990-991.

<sup>112</sup> *Id.* at 991-992.

<sup>113</sup> *Id.* at 992.

<sup>114</sup> *Id.*

The court also noted that the D.C. Circuit Court had recently held in *Realty Income Trust v. Eckerd*<sup>115</sup> that when an agency takes an action which violates NEPA, a presumption arises that injunctive relief should be granted against the continuation of the action until the agency complies with the statute. Since the Department had clearly violated NEPA in this case, Judge Pratt held that injunctive relief was proper.

The injunction issued by Judge Pratt prohibited the federal defendants:

from taking any steps whatsoever, directly or indirectly, to implement the new coal leasing program, including calling for nominations of tracts for federal coal leasing and issuing any coal leases, except when the proposed lease is required to maintain an existing mining operation at present levels of production or is necessary to provide reserves necessary to meet existing contracts and the extent of the proposed lease is not greater than is required to meet these two criteria for more than three years in the future. . . .<sup>116</sup>

In so ordering, the court specifically stated that it was not adopting the Department's revised short-term lease criteria of July 25, 1977, because, *inter alia*, the revised short-term criteria would permit the federal defendants to issue preference right leases without meeting the otherwise applicable requirements of the revised criteria.<sup>117</sup>

The court further ordered the federal defendants to issue an official press release, to publish notice in the *Federal Register*, and to send a notice to previous commentators on either of the two programmatic statements announcing that the Department would reevaluate its coal leasing program and accept comments on the final programmatic statement for sixty days after such publication in the *Federal Register*.<sup>118</sup> The federal defendants were also ordered to prepare a draft supplement to the final programmatic statement, which would be responsive to comments previously received on the draft and final programmatic statements, and to announce the publication of the draft supplement in the *Federal Register*.<sup>119</sup> In addition, a forty-five day comment period was ordered following

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<sup>115</sup> 564 F.2d. 447, 456 (D.C. Cir. 1977).

<sup>116</sup> 437 F. Supp. 981, 993 (D.D.C. 1977).

<sup>117</sup> *Id.* at 993, n.\*.

<sup>118</sup> *Id.* at 993.

<sup>119</sup> *Id.*

notice that the draft supplement was available.<sup>120</sup> Lastly, the federal defendants were ordered to prepare a new final programmatic statement, combining the material in the draft supplement with the original final programmatic statement. Until the new final programmatic statement has been made available to the public for at least thirty days, the Secretary was not permitted to reach a decision with respect to any new coal leasing program.<sup>121</sup>

While both the federal defendants and Utah Power and Light filed timely appeals, the plaintiffs and federal defendants entered into a stipulation on February 25, 1978, to settle the case and requested that Judge Pratt modify his order of September 27, 1977, accordingly. However, Utah Power and Light was not a party to the stipulation and, in turn, filed various motions in both the Court of Appeals and the District Court to block the proposed settlement. In the Court of Appeals, Utah Power and Light asserted that as the case was already on appeal, Judge Pratt lacked jurisdiction to modify his original order. In the District Court, they requested that Judge Pratt stay any decision on the proposed settlement until the Court of Appeals decided the jurisdictional issue. In due course, each of Utah Power and Light's motions was denied.

On April 3, 1978, a hearing was held in the District Court on the plaintiffs' and federal defendants' request for a Rule 60(b) modification of Judge Pratt's original order. As proposed, the modified order would enjoin the federal defendants from taking any steps whatsoever, directly or indirectly, to implement the new coal leasing program and from issuing any coal leases except under the following six situations:

1. Shut-down Leases: When the proposed lease is required to maintain an existing mining operation at its average annual level of production as of September 27, 1977, or to provide reserves which are necessary to meet binding contracts (excluding letters of intent and memoranda of understanding) in existence on September 27, 1977, and when the extent of the proposed lease is not greater than is required to meet the foregoing criteria for eight years in the future. Any such lease would also be required to provide that annual production from the lease area would not be greater than the average level of production as of September 27, 1977, or the amount of production needed to meet the annual requirements of a contract existing on September 27, 1977.

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<sup>120</sup> *Id.* at 994.

<sup>121</sup> *Id.*

2. **By-pass Leases:** When the proposed lease is necessary because mining operations existing on September 27, 1977, are being conducted which could remove the coal deposit as part of an orderly mining sequence and the size, location, or physical characteristics are such that removal of the coal reserves, except in conjunction with such ongoing operations, would involve costs demonstrably so high that it would not be sufficiently profitable to develop the deposit in the reasonably foreseeable future or would significantly increase environmental damage. Any such lease would not be issued if there is any reasonable alternative by which the existing mine could continue operations and such coal reserves could be mined at a later date without inordinately high development costs or increased environmental damage. If issued, such a lease cannot be greater than is necessary to provide coal for five years in the future at the average level of production existing as of September 27, 1977.

3. **Alluvial Valley Leases:** When the Secretary determines to issue the proposed lease under the provisions of Section 510(b)(5) of the Surface Mining Control and Reclamation Act of 1977 in exchange for a federal coal lease in an alluvial floor. However, any such lease may not be issued for a federal lease which is held by an applicant who is not entitled to have its surface mining permit approved under Section 510(b)(5) of that Act.

4. **ERDA Research Leases:** When the proposed leases will be used to conduct a project authorized by the Administrator of the Energy Research and Development Administration under Section 908 of the Surface Mining Control and Reclamation Act of 1977, and the technology cannot be adequately demonstrated on existing leases or private coal holdings. Any such lease would be limited to no more than 500,000 tons of annual production, and the proposed demonstration must meet all of the requirements of regulations promulgated pursuant to Section 908 of that Act.

5. **Hardship Leases:** The federal defendants would be permitted to issue seven specifically enumerated and pending lease applications.

6. **Edison Development Company Lease:** The federal defendants would be expressly authorized to fully process the Edison Development Company's competitive coal lease application (W-50061).

Any such lease, which would be issued in accordance with the above criteria, must also be in compliance with all applicable federal laws and regulations, including the provisions of Section 102(2)(C) of NEPA. The federal defendants would also be required to notify the plaintiffs not less than twenty-one days before the

Secretary's approval of any such lease sale concerning the information which appears to qualify the applicant for a lease under the criteria of subparagraphs (1) through (4) above. The first two exceptions, *i.e.*, shut-down and by-pass leases, would clearly be the most significant, in that they are open-ended and could be utilized to cope with short-term or emergency situations until a new federal coal leasing program is adopted.

In addition to the foregoing exceptions, the federal defendants would not be enjoined from *processing* preference right lease applications under Section 2(b) of the Mineral Leasing Act of 1920 for the purpose of determining whether the application had been timely filed, whether the prospecting permit was properly granted, and if a given prospecting permit had been renewed, whether it had been timely renewed. The federal defendants could also evaluate the amount and quantity of coal currently under federal lease and subject to preference right lease application, which can be mined consistent with environmental standards and the goal of preserving prime farmlands and alluvial valley floors.

Specifically, the federal defendants would have been authorized to process twenty pending preference right lease applications, which the plaintiffs and federal defendants mutually agreed would cause the least environmental impact. If the parties were unable to agree, the federal defendants would be authorized to make the eventual selection from a list of disputed applications. In selecting the twenty permissible applications for processing, the federal defendants would have to first choose those preference right lease applications which were for tracts on which at least ninety percent (90%) of the total reserves would be mined by deep mining, and the total amount of surface mining would not affect more than fifty acres, and which were for operations not requiring substantial additional transportation facilities, water storage or supply systems and do not involve substantial new industrial development, both of which would be considered on a regional basis.

While Judge Pratt indicated that he was disposed to grant their Rule 60(b) motion, he questioned the proposed role of the plaintiffs in selecting which of the twenty preference right lease applications should be processed, but not issued, under his order. Accordingly, the plaintiffs and federal defendants were directed to review their proposed modification and to submit a revised request for modification which would be responsive to Judge Pratt's concerns.



On April 6, 1978, the plaintiffs and federal defendants submitted their amended stipulation, which merely deleted any prospective role of the plaintiffs in the selection of preference right lease applications to be processed, and also filed a motion to remand in the Court of Appeals. On April 10, 1978, Judge Pratt notified the Court of Appeals that upon remand, he would modify his September 27, 1977 order pursuant to the plaintiffs' and federal defendants' amended stipulation and request for modified order. As proposed, the text of the modification would be substituted for the second paragraph of Judge Pratt's order of September 27, 1977. In all other respects, however, that order remains unchanged. On June 14, 1978, Judge Pratt formally accepted the settlement between the plaintiff and the federal defendant.

### III. CURRENT STATUS OF AND ALTERNATIVES TO FEDERAL COAL LEASING

In light of the *NRDC* decision, federal coal leasing will be very limited and will only take place on a case-by-case basis in the foreseeable future. Pursuant to Judge Pratt's original order, the BLM published notice in the *Federal Register* that it would accept public comments on the final programmatic statement for a period of sixty days.<sup>122</sup> This initial comment period, which was to have expired on January 20, 1978, was further extended until March 31, 1978.<sup>123</sup> The Department is now required to prepare both a draft supplement to the present programmatic statement and a new final programmatic statement before the Secretary can initiate a new federal coal leasing program. While the Department estimates that the new final programmatic statement will be released in early 1979, it does not appear likely that there will be any major federal coal leasing until at least the early 1980's. Consequently, it becomes important to assess just what federal coal leasing can take place during the interim and to examine what alternatives are available.

Prior to the *NRDC* decision, and as previously discussed, the Department's most recent position on short-term criteria was that expressed in the Secretary's July 25, 1977 memorandum, which, while being incorporated as Appendix IV to the federal defendants' memorandum, was never distributed to the field. However, as contained in Judge Pratt's modified order, the issuance of short-term

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<sup>122</sup> 42 Fed. Reg. 59424 (1977).

<sup>123</sup> 43 Fed. Reg. 9539 (1978).

leases will be restricted to shut-down, by-pass, and certain specified hardship applications. While short-term lease sales are currently the subject of limited treatment in existing regulations,<sup>124</sup> it is our understanding that the BLM is presently drafting short-term criteria guidelines and that such guidelines will be distributed to the various field offices.

With respect to the conduct of competitive leasing generally, the recent decision in *Pitman v. Department of the Interior*<sup>125</sup> is a significant interpretation of the Freedom of Information Act (FOIA)<sup>126</sup> and its impact upon the deliberative process of the USGS in arriving at a minimum fair market value prior to offering a respective lease for sale.

Plaintiff Frank Pitman, a news correspondent for *Coal Week*, charged that records relating to the presale evaluation on Federal Coal Lease No. 20900, in addition to the procedure and formula for appraising coal leases and determining the minimum fair market value, should be made available under the provisions of FOIA. The Department argued that matters relating solely to the internal personnel rules and practices of an agency and to interagency or intraagency memorandums or letters were exempt from disclosure. After an *in camera* inspection, the court held that factual material, which was separable from the deliberative process, was subject to disclosure.<sup>127</sup> However, the court emphasized that the public's interest in obtaining the maximum value for coal in a competitive bidding sale was paramount and went on to order that data and memoranda which would allow potential bidders to discover the evaluated minimum fair market value were to be protected. The court concluded by noting that once a final decision with respect to Tract No. 20900 had been reached, all of the documents which had been requested by Pitman would be subject to disclosure upon proper demand.<sup>128</sup>

As to the conduct of any future short-term lease sales, it is presently uncertain what specific sale procedures will be followed, *i.e.*, how the fair market value of the coal reserves will be calculated and whether such sales will be conducted by sealed bid, oral

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<sup>124</sup> See: 42 Fed. Reg. 25470 (1970) (to be codified in 43 C.F.R. §§ 3525.1(b)(2) and 3525.3).

<sup>125</sup> *Pitman v. Dept. of the Interior*, No. 76-F-1022 (D. Colo. 1977).

<sup>126</sup> 5 U.S.C.A. §§ 552-552(b) (West 1977).

<sup>127</sup> *Pitman v. Dept. of the Interior*, *supra* note 125.

<sup>128</sup> *Id.*

bidding, or a combination thereof. The two most recent federal lease sales are illustrative of the problems which can be encountered:

1. *Energy Fuels* (Colorado Case File C-16284). In the Energy Fuels lease sale, which was held on June 21, 1977, and prior to the NRDC decision, fair market value was represented solely by rental (\$3.00 per acre) and royalty (15½ percent for surface coal and eight percent for underground coal), with the bonus increment having been ostensibly zeroed out. The sale was by sealed bid only, and after an otherwise high bonus bid of \$3.81 per acre was withdrawn, Energy Fuels was declared to be the sole and high bidder at \$1.00 per acre.

2. *Colorado Westmoreland* (Colorado Case File C-25079). In the Colorado Westmoreland lease sale, which was held on February 22, 1978, and subsequent to Judge Pratt's original order in the NRDC case, the rental (\$3.00 per acre), royalty (12½ percent for surface coal and eight percent for underground coal), and bonus (minimum of \$25.00 per acre) were collectively deemed to constitute fair market value. This sale was also by sealed bid only and disclosed a strong argument in favor of a sealed and subsequent oral bidding mechanism. Therein, Colorado Westmoreland submitted a sealed bid pursuant to the Notice of Lease Sale. As the lease sale had to be tailored to the specific qualifications of Colorado Westmoreland pursuant to Judge Pratt's September 27, 1977 order, *i.e.*, Colorado Westmoreland's existing supply contract, delivery schedules thereunder and proposed mining plan, it was of some surprise that a competing sealed bid was received. In light of this unexpected bid, Colorado Westmoreland submitted an amended bid. When the sealed bids were opened, it was revealed that Colorado Westmoreland's initial and amended bonus bids were \$26.05 and \$100.05 per acre, respectively, and that the competing bid was a "dummy" bid from the Rotten Apple Coal Co. in the amount of \$25.01 per acre. As the sale had to be based upon the highest bonus bid received, Colorado Westmoreland was declared to be the high bidder at \$100.05 per acre. To make matters worse, the Rotten Apple Coal Co. did not even submit the requisite bonus installment payment or the additional information necessary to qualify as a bidder in the sale.

### *Preference Right Leasing*

As we have seen, FCLAA has confirmed the demise of the prospecting permit and established the "exploration license" as the sole method by which operators can conduct coal exploration on lands subject to the Act. In another departure from the rules

applicable to prospecting permits, the issuance of an exploration license under FCLAA confers no right or entitlement to the subsequent issuance of a lease.

With respect to prospecting permits which were issued prior to the adoption of FCLAA on August 4, 1976, the Secretary was also authorized to extend such prospecting permits for a period of two years "if he shall find that the permittee has been unable, with the exercise of reasonable diligence, to determine the existence or the workability of coal deposits in the area covered by the permit. . . ." <sup>129</sup> As the passage of FCLAA was "subject to valid existing rights," the question then arose as to its impact upon holders of valid prospecting permits as of August 4, 1976, and upon holders of valid prospecting permits who had applied for an extension of such permits as of that date.

In an opinion dated July 1, 1977, the Deputy Solicitor of the Department of the Interior, examined whether such holders qualified as holders of "valid existing rights" and whether they were entitled to consideration for the extension of such prospecting permits by the Secretary. <sup>130</sup> After reviewing the legislative history of FCLAA, as well as the case law defining "valid existing rights," the Deputy Solicitor concluded that FCLAA terminated the Secretary's authority to grant extensions for outstanding coal prospecting permits. This conclusion was accepted by the Department, and the state BLM directors were instructed to reject all pending applications for extension of coal prospecting permits. <sup>131</sup>

A related question concerns the holder of a valid prospecting permit who has applied for a preference right lease under the old law, alleging the discovery of "commercial quantities" of coal. In the same Deputy Solicitor's Opinion discussed above, <sup>132</sup> it was also concluded that applications for preference right leases, which were based on valid existing prospecting permits, could be adjudicated on their merits and that leases could be issued if the requirements of FCLAA and other applicable law were met. As such, the only surviving "valid existing rights" are pending applications for preference right leases and, of course, previously issued preference right leases.

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<sup>129</sup> 30 U.S.C.A. § 201(b)(1)-(b)(4) (West Supp. 1978).

<sup>130</sup> OPINION OF THE DEPUTY SOLICITOR, DEPARTMENT OF THE INTERIOR (July 21, 1977).

<sup>131</sup> See, e.g., DIRECTOR OF THE BUREAU OF LAND MANAGEMENT, MEMORANDUM TO THE STATE DIRECTOR OF UTAH, (September 9, 1977).

<sup>132</sup> See OPINION OF THE DEPUTY SOLICITOR, *supra* note 130.

With respect to pending applications for preference right leases, it is important to determine what standards will govern the granting or denying of such applications, and this may depend upon whether the respective application was submitted before or after May 7, 1976. On that date, the Department promulgated final regulations to define "commercial quantities" pursuant to Title 30, Section 201(b) of the United States Code.<sup>133</sup> This standard was expressly declared to be applicable to all applications pending on the effective date of the regulations (May 7, 1976). Although this article will not attempt to fully develop the initial showing, technical examination/environmental analysis and final showing requirements of the regulations, it can be safely stated that the applicant's burden toward satisfying the commercial quantities standard is quite stringent and, the Department's denials notwithstanding, the current standard is a marked departure from past practice.

While it is clear that the May 7, 1976 regulations would be applicable to applications for preference right leases submitted after that date, their retroactive effect has been tangentially challenged in *Kerr-McGee Chemical Corp. v. Andrus*.<sup>134</sup> In that case, Kerr-McGee was the holder of five prospecting permits for phosphate, which were issued in 1965 and 1966. Each permit was subsequently renewed for two years. On January 20, 1969, and August 13, 1970, and prior to the expiration of the permits, Kerr-McGee filed applications pursuant to Title 30, Section 211(b) for preference right leases on portions of the lands described in the prospecting permits. On March 18, 1969, and December 11, 1970, the USGS certified that Kerr-McGee had made valid discoveries of "valuable mineral deposits" on those lands within the meaning of the statute.

On January 27, 1971, the State of Florida filed a complaint in the United States District Court for the District of Columbia against the Secretary of the Interior and other governmental officials, principally charging that the Secretary had failed to comply with NEPA with respect to the permit applications.<sup>135</sup> After various delays associated with the preparation of an EIS, which was released in final on June 17, 1974, the Secretary informed Kerr-McGee that a final decision on its preference right lease applica-

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<sup>133</sup> 43 C.F.R. §§ 3520.1-1 and 3521.1-1 (1976).

<sup>134</sup> No. 76-0608 (D.D.C. Sept. 9, 1977).

<sup>135</sup> *Florida v. Morton*, No. 1496-71 (D.D.C. filed Jan. 27, 1971).

tions would be deferred until the Department had obtained more detailed information regarding the northern Florida aquifer. Meanwhile, on May 7, 1976, the subject regulations had been promulgated in final form.

Thereafter, Kerr-McGee brought an action asserting its entitlement to the preference right leases and requesting that the Secretary be compelled to issue the leases. Essentially, the government argued that the criteria for "valuable deposit" and "commercial quantities" established by the May 7, 1976 regulations were nothing more than a continuation and an affirmation of standards which the Department had used since 1960. Because the USGS had certified that valuable discoveries had been made, the government was in the uncomfortable position of arguing that the USGS certifications had not been based upon such "prevailing and long utilized standards and criteria." On September 29, 1976, the court entered a Memorandum Order granting Kerr-McGee's motion for summary judgment and directing the Secretary to issue the preference right leases.<sup>136</sup> On March 3, 1977, the court affirmed its Memorandum Order. However, on March 28, 1978, the Circuit Court of Appeals reversed the District Court's decision and dismissed the suit.<sup>137</sup>

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<sup>136</sup> Kerr-McGee Chemical Corp. v. Kleppe, *supra* note 134.

<sup>137</sup> Kerr-McGee Chemical Corp. v. Kleppe, No. 76-0608 (D.C.Cir. March 28, 1978). While *Kerr-McGee* might have proven useful in determining the general applicability of the May 7, 1976 regulations, it does not apply squarely to pending coal preference right lease applications for the following reasons:

1. The preference right lease applications in *Kerr-McGee* were for phosphate.
2. The USGS had certified that the plaintiff had, in fact, made valid discoveries of the mineral deposits.
3. The Court did not deal directly with the "retroactive" application of the regulations, but rather it held that the USGS certifications had been made pursuant to prevailing and long utilized standards and criteria, without indicating whether the new regulations constituted a significant departure from those criteria.

In addition to the *Kerr-McGee* decision, *Utah Power and Light Co. v. Kleppe*, No. C-76-136 (D. Utah, filed May 3, 1976) and *Utah International v. Andrus*, No. 772-585 (D. Colo., filed June 23, 1977), both of which involve applications for coal preference right leases, may provide further judicial interpretation with respect to the retroactive application of the May 7, 1976 regulations. See also *Natural Resources Defense Council, Inc. v. Berklund*, No. 75-0313 (D. Mass., filed June 30, 1978) (held, neither NEPA nor the Mineral Leasing Act of 1920 give the Secretary of the Interior the discretion to reject preference right coal leases on environmental grounds alone).

In addition to the foregoing uncertainties concerning coal preference right leases, Solicitor Leo M. Krulitz issued a memorandum opinion on August 1, 1977, which addressed the effect of existing, valid, unpatented mining claims upon the Secretary's authority to issue prospecting permits and preference right leases for coal and phosphate.<sup>138</sup> The opinion concluded that prospecting permits and preference right lease applications are invalid as to areas covered by prior unpatented mining claims. This conclusion has been adopted by the Department, and instructions in keeping with the Solicitor's opinion were issued by the Director of BLM on August 18, 1977.<sup>139</sup>

In reaching his decision, the Solicitor traced the historical background of the current coal leasing law. Of critical importance to the reasoning of the opinion is the wording of the Mineral Leasing Act of 1920, which authorized the Secretary, prior to the enactment of the Federal Coal Leasing Amendments Act of 1975, to issue prospecting permits for coal in any "unclaimed, undeveloped" area.<sup>140</sup> From an examination of the legislative history of the 1920 Act, the Solicitor concluded that Congress placed the "unclaimed, undeveloped" limitation upon the issuance of coal prospecting permits because the public interest would not be served by the issuance of prospecting permits, and eventually non-competitive leases, in areas where, because of prior mining or prospecting activity, information had already been gained about mineral deposits. The Solicitor's opinion goes on to conclude that the "unclaimed, undeveloped" limitation applies to all public lands "subject to a valid mining claim, coal land claim, or any other claim which could ripen into full ownership of the land."<sup>141</sup> Further, the Solicitor rejected the curative avenue by which a prospective coal applicant might endeavor to have the prior mining claimant give up or transfer his right, in order to "clear" prior claims from the land. In this regard, the opinion asserts that it is the "act" of locating a prior, valid mining claim which removes such lands from the "unclaimed, undeveloped" category of eligible lands for prospecting permits or later preference right leases.<sup>142</sup>

The effect of the Solicitor's opinion is limited to holders of

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<sup>138</sup> L. KRULITZ, SOLICITOR'S OPINION No. M-36893 (August 2, 1977).

<sup>139</sup> DIRECTOR OF THE BUREAU OF LAND MANAGEMENT, BUREAU OF LAND MANAGEMENT INSTRUCTION MEMORANDUM No. 77-410 (1977) (expires June 30, 1978).

<sup>140</sup> 30 U.S.C. § 201(b) (1971).

<sup>141</sup> See L. KRULITZ, *supra* note 139.

<sup>142</sup> *Id.*

existing prospecting permits issued under Title 30, Section 201(b) prior to the enactment of FCLAA and to holders of pending preference right lease applications. Holders of existing preference right leases are excluded from the operation of the opinion because of their justifiable reliance that all the lands included within the lease granted to them were available for development. With respect to holders of existing prospecting permits, their permits are only valid as to lands originally included within the permits which are *not* covered by pre-existing, valid mining claims. Discovery of commercial quantities of coal, thus qualifying the holder of a prospecting permit for a preference right lease, must have occurred on the "unclaimed, undeveloped" portion of the prospective leasehold. If a preference right lease is eventually granted, it will not extend to any lands which are covered by such prior, valid mining claims.

Pursuant to the Director's Instruction Memorandum of August 18, 1977,<sup>143</sup> holders of existing prospecting permits and pending preference right lease applications were to be sent a notice by certified mail, requiring them to submit at their own expense a certified abstract from a qualified abstractor as to the presence of any mining claims located prior to the date of the permit. The abstract must be submitted within 120 days from the date of the notice (not the date of receipt). The Solicitor's opinion does leave the Department free to issue a competitive lease with respect to any such lands as may be subject to valid mining claims. In this context, however, it will remain to be seen which of the pending preference right lease applications will be selected for processing pursuant to *NRDC v. Hughes* and which applications will have to await approval of the final programmatic statement before processing can be initiated. In any event, it can safely be said that preference right leasing cannot be expected to provide additional coal reserves in the immediate future.

The Federal Coal Leasing Amendments Act of 1975 authorizes the Secretary to modify original coal leases by the inclusion of additional coal lands or deposits which are contiguous to the property specified in the lease. Such modifications, however, may not exceed 160 acres or add acreage larger than that in the original lease, whichever is less.<sup>144</sup> As any such action merely constitutes a modification of an existing lease and not the issuance of a new

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<sup>143</sup> DIRECTOR OF THE BUREAU OF LAND MANAGEMENT, *supra* note 140.

<sup>144</sup> 30 U.S.C.A. § 203 (West Supp. 1978).



lease, it is our opinion that *NRDC v. Hughes* would not be applicable thereto.

### *Land and Lease Exchanges*

Until recently, the only available exchange mechanism entailed the exchange of "offered" fee lands for "selected" federal lands, and as anyone who has had any exposure to this process can readily attest, it has been an arduous and often frustrating exercise. However, the concept of federal exchanges has undergone significant revision of late and has been broadened to include the exchange of federal coal lease rights for both coal lease bidding rights and other federal coal leases.

The Federal Land Policy Management Act of 1976 revised certain of the previous land exchange procedures.<sup>145</sup> Section 205 authorizes the Secretaries of the Interior and of Agriculture to acquire private lands, or interests therein, by purchase, exchange, donation, or eminent domain, and provides that upon acceptance of title, such private lands will become public lands.<sup>146</sup> In turn, Section 206(a) provides specific authority to exchange tracts of public lands for private lands when the Secretary concerned determines that the public interest will be served by making the exchange.<sup>147</sup> Section 206(b) limits exchanges to cases in which the nonfederal lands offered for exchange are located in the same state as the federal lands and in which the values of the lands to be exchanged are either equal or capable of being equalized by the payment of money to the grantor or to the Secretary. Such payment may not exceed twenty-five percent of the total value of the lands transferred out of federal ownership. Because regulations have not yet been promulgated to establish the procedures for determining the respective valuation of tracts or the methods to be utilized in equalizing such values, the Department has recently stated that exact equalization must occur in all cases and that since no federal money is available at this time for equalization payments, reductions in the federal acreage will be made in order to equalize such values.<sup>148</sup> If the value of the offered fee lands is less than that of the selected federal lands, the acreage of the offered lands may be increased, or the offeror may use cash to equalize

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<sup>145</sup> See, 42 Fed. Reg. 25,473, *supra* note 31.

<sup>146</sup> 43 U.S.C.A. § 1715 (West Supp. 1978).

<sup>147</sup> *Id.* § 1716(a).

<sup>148</sup> DEPARTMENT OF THE INTERIOR, INTERIM REPORT ON FLPMA, (October 21, 1976, to June 30, 1977).

such values. It should also be noted that Section 210 requires the Secretary to notify the governor of the state in which the selected federal lands are located at least sixty days prior to offering such lands for exchange under the Act.

While regulations will certainly be forthcoming with respect to the implementation of land exchange procedures under FLPMA, the only currently proposed regulations are those which were published by the Department of Agriculture on December 19, 1977,<sup>149</sup> with respect to the exchange of National Forest System lands or interests in lands for non-federally owned lands or interests therein. As for the BLM, any such regulations are still in the "pre-draft" stage, and no target date has been set for promulgation.

On December 23, 1977, the Department promulgated a new subpart 3526, entitled "Mineral Leases - Exchange," under Title 43 of the Code of Federal Regulations.<sup>150</sup> The regulations apply both to holders of and applicants for preference right leases. Under the regulations, any such lease exchange can only be initiated by the Department, and the lessee must demonstrate that it either has a preference right lease or has a right to a preference right lease. The Secretary is then empowered to determine the fair market value of either the leasehold or the right to a lease. In exchange for relinquishment of the lease or the right to a lease, the Secretary is authorized to issue a "certificate of bidding rights" for the value of the relinquished leasehold, which may be utilized as payment for the balance due on a successful bonus bid in a later competitive coal lease sale.<sup>151</sup>

Essentially, these exchange regulations establish a "scrip" system, rather than one by which coal leases could be relinquished for cash or for other leaseholds. Consequently, and as an interest in land (leasehold or right to a lease) is exchanged for "bidding rights," which may or may not be useful to the holder, the regulations provide only limited relief to owners of environmentally sensitive coal properties. It is presently uncertain whether a lessee could give up only a portion of its coal lease or right to a lease in exchange for such bidding rights.

The regulations also contain a provision for the relinquishment of such leases or rights to a lease in exchange for a modifica-

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<sup>149</sup> 42 Fed. Reg. 63,649 (1977) (to be codified in 36 C.F.R. § 254).

<sup>150</sup> 42 Fed. Reg. 64,346 (1977) (to be codified in 43 C.F.R. § 3526).

<sup>151</sup> *Id.*

tion of an existing lease to add contiguous lands of comparable value.<sup>152</sup> Any such modification would, of course, be restricted to the 160 acre limitation established by FCLAA and would be available to the applicant in any event. Prior to any such exchange, the regulations provide for notice and public hearing to allow public comment on the merits of the proposed relinquishment and the grant of bidding rights.

Section 510(b)(5) of the Surface Mining Control and Reclamation Act of 1977 has extended the exchange mechanism to alluvial valley floors which are underlain by either federal or private coal reserves.<sup>153</sup> With respect to situations in which the Secretary determines that "substantial financial and legal commitments" were made by an operator prior to January 1, 1977, for surface mining operations, the Secretary is authorized to lease other federal coal deposits in exchange for the relinquishment by such an operator of its federal coal lease or pursuant to Section 206 of FLPMA, to convey fee title to other available federal coal deposits in exchange for the fee title of such an operator to private coal deposits. In addition, the Secretary also was directed to develop and carry out a "coal exchange program" pursuant to Section 206 of FLPMA for the acquisition of private fee coal precluded from being mined under the Act.

The thrust of regulations to be adopted pursuant to the Act were included in the Department's interim management plan,<sup>154</sup> and, as of this writing, final regulations are in the proposal stage.<sup>155</sup> It should also be noted that the issuance of a federal coal lease in exchange for a coal lease on an alluvial valley floor would be specifically authorized under Judge Pratt's modified Order in *NRDC v. Hughes*.

#### IV. PROGNOSIS

The Mining and Minerals Policy Act of 1970<sup>156</sup> declared it to be the continuing policy of the federal government in the national interest to foster and encourage private enterprise in the following areas:

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<sup>152</sup> *Id.*

<sup>153</sup> Act of August 3, 1977, *supra* note 34.

<sup>154</sup> See 42 Fed. Reg. 62,639-62,716 (1977) (to be codified in 30 C.F.R. §§ 700.1-837.16).

<sup>155</sup> See 43 Fed. Reg. 41,661-41,940 (1978).

<sup>156</sup> Mining and Minerals Policy Act of 1970 § 2, 30 U.S.C.A. § 21a (West Supp. 1978).

1. Development of economically sound and stable domestic mining, minerals, metal and mineral reclamation industries.
2. Orderly and economic development of domestic mineral resources, reserves, and reclamation of metals and minerals to help to assure satisfaction of industrial, security, and environmental needs.
3. Mining, mineral, and metallurgical research.
4. Study and development of methods for the disposal, control, and reclamation of mineral waste products, and the reclamation of mined lands.

The Act specifically applies to the fuel minerals, including oil, gas, coal, oil shale, and uranium.<sup>157</sup> The Committee Report recognized that such fuel minerals comprise about sixty-five percent of the total value of all domestically produced minerals and emphasized that except in the most unusual circumstances, the development and production of minerals are, and should remain, the role of private enterprise.<sup>158</sup> As perhaps a precursor to the heightened interest in energy policy and energy development witnessed in the middle years of this decade, the Committee concluded by saying that there existed a need and urgency for an energy policy and that the nation could no longer afford to ignore its needs for a long-range national minerals policy.

It can only be hoped that the policy and intent of the Mining and Minerals Act will be resurrected in the not too distant future and that a balance will be struck between the national need for increased domestic energy production and for the protection of the environment. Unfortunately, any prospective role for western coal in satisfying such a need or in contributing to a long-range national minerals policy has been effectively stymied by the decision in *NRDC v. Hughes*. Depending on who is making the prognostication, it does not appear that a new comprehensive federal coal leasing program will be adopted until sometime in 1979 or even 1980. As we are all well aware, this scenario does not include the additional lead time that would be necessary to implement such a program and to bring new coal operations to a productive level. This makes it all the more imperative that the coal industry closely monitor the preparation of the final programmatic statement and the evolution of a new national coal leasing program.

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<sup>157</sup> *Id.*

<sup>158</sup> H.R. REP. NO. 91-1442, 91st Cong., 2d Sess., reprinted in [1970] U.S. CODE CONG. & AD. NEWS 5792.