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NATURAL RESOURCES AND PUBLIC LANDS

OVERVIEW

Economic exposure and contractual uncertainty have intensified for the oil and gas and mining industries. These negative factors are a direct result of the Tenth Circuit Court's decisions analyzed during this survey period.

In *Park County Resource Council v. Department of Agriculture*,[1] the court concluded that the National Environmental Policy Act (NEPA) does not automically require the preparation of an Environmental Impact Statement (EIS) for issuance of federal onshore oil and gas leases. The court ruled, however, that NEPA challenges may be initiated against holders of federal onshore oil and gas leases *at any time*, so long as exploration or development operations are in progress or contemplated for the leased land. NEPA contains no statute of limitations and the court was unwilling to limit its application with other federal statutes. Thus, the *Park County* court has vested NEPA proponents with new latitude to pursue NEPA challenges free from time restraints. Susceptibility to this continuous right to assert NEPA challenges serves to undermine the value of issued and approved federal oil and gas leases by diminishing the oil and gas industry's incentive to undertake costly and often risk laden exploratory ventures on federal lands.

While the oil and gas industry began to battle with this new dimension of economic uncertainty, the coal industry learned from the companion cases of *Coastal States Energy Co. v. Hodel*[2] and *FMC Wyoming Corp. v. Hodel*[3] that the coal industry's vested, indeterminate-term commercial coal lease contracts are no longer vested contractual rights. Rather, these contracts are actually agreements of a finite term, subject to material alteration by the Federal Coal Lease Amendment Act when such leases celebrate their next anniversary. These changes create substantial economic problems for coal mining companies who have tailored their supply and price committments to the original terms of the coal lease contract.

In *Martin Exploration Management Co. v. FERC*,[4] the Tenth Circuit held that when Congress provides oil and gas producers with the right to elect the highest price for natural gas under the complex regulatory scheme found in the Natural Gas Policy Act, such right shall not be summarily abrogated by the Federal Energy Regulatory Commission in the name of reasonable rulemaking.

The Tenth Circuit held in *Navajo Tribe of Indians v. New Mexico*,[5] that

1. 817 F.2d 609 (10th Cir. 1987).
2. 816 F.2d 502 (10th Cir. 1987).
3. 816 F.2d 496 (10th Cir. 1987).
4. 813 F.2d 1059 (10th Cir. 1987).
5. 809 F.2d 1455 (10th Cir. 1987).

the Indian Claims Commission Act was established to provide the sole forum and remedy for Indian claims arising before 1946. The harsh outcome of this case renders all courts incompetent to entertain any claim arising before 1946 and those not timely submitted to the Indian Claims Commission. By sleeping on its rights, the Navajo Tribe missed the opportunity to avail itself to the only forum empowered to hear its case.

I. NEPA Challenge to Federal Onshore Oil and Gas Leasing

A. *Park County Resource Council v. Department of Agriculture*

1. Background

This case further defined the relationship between the National Environmental Policy Act of 1969 (NEPA)[6] and onshore federal oil and gas leases by expanding plaintiff's rights under NEPA. The primary issue in *Park County*[7] was whether an EIS was required prior to the issuance of a federal onshore oil and gas lease. The lease at issue covered non-wilderness federal lands and was subject to customized stipulations limiting the scope of exploration activities. These stipulations restricting the lessee's activities, were designed to minimize environmental damage.[8] Before reaching the primary issue, however, the Park County court faced three distinct procedural issues of equal importance: (1) whether Park County Resource Council's (Park) claim was time-barred by the ninety day statute of limitations as found in the Mineral Lands Leasing Act of 1920 (MLLA),[9] (2) whether Park's claim was time-barred by the equitable doctrine of laches,[10] and (3) whether the courts were unavailable to Park due to its failure to exhaust administrative remedies.[11] The district

6. The National Environmental Policy Act, 42 U.S.C. § 4332(2) (1982) provides: all agencies of the Federal Government shall- . . . (C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on - (i) the environmental impact of the proposed action, (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented, (iii) alternatives to the proposed action, (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented. Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of title 5, and shall accompany the proposal through the existing agency review processes.

7. *Park County*, 817 F.2d at 620.

8. *Id.* at 612-13.

9. 30 U.S.C. § 226-2 (1982).

10. *Park County*, 817 F.2d at 617. The district court concluded that the equitable doctrine of laches applied since Park County's delay in filing a known claim prejudiced the intervenor, Marathon Oil Company. Park County v. Department of Agriculture, 613 F. Supp. 1182 (D. Wyo. 1985).

11. *Park County*, 817 F.2d at 619. *See* 43 C.F.R. § 4.411 (1987).

court found that all three procedural points barred Park from pursuing its substantive claim in court. This ruling forced Park to appeal the lower court's decision to the Tenth Circuit Court of Appeals.

2. Facts

Park's case was comprised of three substantive claims. First, Park asserted that the BLM should have prepared an EIS covering the entire lease area prior to issuing the oil and gas lease.[12] It claimed that lease issuance constitutes a major federal action significantly affecting the quality of the human environment, thereby requiring an EIS under NEPA.[13] Second, it claimed that the site specific North Fork well EIS was inadequate because it failed to address the cumulative surface impact that may result from a successful well completion.[14] Third, Park contended that the defendants violated the Endangered Species Act,[15] alleging that they failed to draft appropriate measures protecting nearby grizzly bears.[16]

In June 1983, Marathon Oil Company (successor in interest to May Petroleum, Inc., and representing co-owners Amarada Hess Corp. and Rosewood Resources, Inc.) submitted to the BLM an Application for Permit to Drill (APD) covering the North Fork well location.[17] The APD was approved after the BLM prepared an EIS for the well site.

Thereafter, Park filed a complaint seeking an injunction prohibiting oil and gas exploration and drilling on the lease, alleging that the BLM prepared an inadequate EIS and thus failed to comply with NEPA.[18] Park also sought a declaratory judgement that an EIS should have been prepared *prior to the issuance* of the federal oil and gas lease. Park alleged that the act of issuing the lease constituted a major federal action which significantly affected the quality of the human environment because the lease vested the lessee with the right to drill wells on National Forest Service land.[19]

a. *North Fork Lease and Well Location*

Park's request for a preliminary injunction prohibiting drilling at the North Fork site obligated Park to prove that irreparable harm would

12. *Id.* at 615, 620.
13. *Id.*
14. *Id.* at 614.
15. 16 U.S.C. §§ 1531-43 (1982).
16. *Park County*, 613 F. Supp. at 1185, 1188.
17. *Id.* at 1184.
18. *Id.* at 1184-85.
19. *Id.* at 1185. *Park County*, 817 F.2d at 614. Moreover, Park County prayed for an order "requiring defendants to withdraw their approval on any leases or permits previously given pending their compliance with . . . NEPA." *Id.* Park's motion for a temporary restraining order was denied June, 1985. The parties agreed to consolidate the hearing of Park's motion for preliminary injunction with a trial on the merits. The district court denied Park's motion for preliminary injunction and dismissed the complaint with prejudice. Park unsuccessfully sought a stay pending appeal from the Tenth Circuit. Thereafter, Park petitioned the Chief Justice of the United States Supreme Court for a stay in July 1985. This petition was denied in October 1985. 106 S. Ct. 42 (1985).

occur to the surrounding environment.[20] The North Fork well was staked on an untimbered ridge located 28 miles west of Cody, Wyoming, and 26 miles east of Yellowstone National Park, in the Shoshone National Forest.[21] The district court concluded the area was "not pristine, or primitive, or even very unusual."[22] The North Fork well was completed as a dry hole during the course of this action and reclamation work has been completed and continues to be monitored.[23] Moreover, Congress had had three opportunities to designate the area as a "Wilderness Area," but declined to do so.[24]

Prior to offering the lease, the Forest Service issued a "Finding of No Significant Impact" (FONSI).[25] This means, that with appropriate controls protecting environmental resources, an EIS at the leasing stage would not be necessary.[26] Indeed, when the lease was issued, it was subject to a number of provisions and stipulations protecting the environment from the harmful affects of oil and gas exploration.[27]

The district court ruled that the EIS prepared on the North Fork well site was adequate. It also declared that the BLM was not obligated to prepare an additional EIS prior to lease issuance.[28] Its ruling on this issue, however, was one of accommodation only, since it had ruled that Park County lost the right to attack the issuance of the lease.[29] The district court found that Park's EIS attack was time-barred by the ninety day statute of limitations in the MLLA; furthermore, Park's claim was barred by the equitable doctrine of laches; and finally it was prohibited from pursuing its claim because it failed to exhaust the administrative remedies.[30]

3. The Tenth Circuit Decision

Affirming in part and reversing in part the district court's decision, the Tenth Circuit declared that the BLM's decision to issue the lease without first preparing an EIS was reasonable,[31] in that the lease issuance itself was not a major federal action significantly affecting the quality of the human environment. The court grounded its conclusion on the bases that (1) substantial mitigating measures were imposed on Marathon's activities; (2) further environmental appraisals prior to any surface disturbance were required; (3) the possibility of future drilling

20. FED. R. CIV. P. 103.
21. *Id.* at 1184.
22. *Id.* at 1187. The court noted that the North Fork well area has always been a multiple-use area, as recently reaffirmed by Congress when it enacted the Wyoming Wilderness Act of 1984. *See* Wyoming Wilderness Act of 1984, Pub. L. No. 98-550, 98 Stat. 2807 (1984).
23. *Park County*, 817 F.2d at 614.
24. *Park County*, 613 F. Supp. at 1187.
25. *Park County*, 817 F.2d at 612.
26. *Id.*
27. *Id.* at 613.
28. *Park County*, 613 F. Supp. at 1186-87.
29. *Id.* at 1186.
30. *Id.*
31. *Park County*, 817 F.2d at 624.

activities at time of lease issuance were remote; and (4) federal agencies would have significant involvement in any future exploration activities.[32]

Judge McKay, writing for the court, removed the procedural hurdles erected by the lower court's decision. He declared that Park's action was not time-barred under the Mineral Lands Leasing Act of 1920, that the equitable doctrine of laches did not bar Park from pursuing its action, and that the failure to exhaust the administrative remedies doctrine was inapplicable to Park in this case.[33] The Tenth Circuit refused to address, however, the adequacy of the EIS covering the APD. It had declared this issue moot since the well was completed as a dry hole.[34]

a. *NEPA Not Subject to MLLA's Statute of Limitations*

In an issue of first impression, the district court held that a NEPA challenge to an oil and gas lease on federal forest land issued without an EIS is not subject to the ninety day statute of limitations found in the Mineral Lands Leasing Act of 1920.[35] The statute, in the pertinent part, provides that "[n]o action contesting a decision of the Secretary involving an oil and gas lease shall be maintained unless such action is commenced or taken within ninety days after the final decision of the Secretary relating to such matter."[36] Park knew as early as 1983 that the lease was issued without an EIS, but chose not to bring this action until 1985.[37] The Tenth Circuit, in concluding the trial court had erred, adopted the reasoning established by the Ninth Circuit Court in *Jones v.*

32. *Id.*

33. *Id.* at 619.

34. *Id.* at 614-15. The court discussed the case-or-controversy requirement for federal court jurisdiction: the litigant must have suffered actual injury "that can be redressed by favorable judicial decision." *Park County*, 817 F.2d at 614. The court concluded that the "redressability arm of the case-or-controversy requirement is not satisfied here." *Id* at. 615. There was no meaningful remedy which Park County could obtain because the completion of all activities authorized by the permit to drill had been completed. Thus, it concluded, reversal of the district court's denial of a preliminary injunction prohibiting drilling would result in an "empty gesture." *Id.* at 615. The court conceded that although redressability was possible when the suit was initiated (well activity in progress), the court forfeited its jurisdiction at the time the well was plugged, abandoned and reclaimed. "[A] court can determine the merits of a controversy only if jurisdiction exists at all stages of the proceeding." *Id.* at 615 (quoting Amalgamated Sugar v. Bergland, 664 F.2d 818, 822 (10th Cir. 1981)).

Plaintiffs addressed the mootness issue by arguing that in spite of the fact that the North Fork well was plugged and abandoned, the issue surrounding the adequacy of the EIS was of such "great public importance" it required consideration by the court. The court rebutted that the "[e]motional involvement in a law suit is not enough to meet the case-or-controversy requirement." *Id.* (quoting Ashcroft v. Mathis, 431 U.S. 171 (1977) (per curiam).

35. 30 U.S.C. § 226-2 (1982). The court overruled the district court's finding which declared that the statute was "clear and unambiguous and that no action contesting an oil and gas lease decision shall be maintained unless taken within 90 days." *Park County*, 613 F. Supp. at 1186. The lower court's decision was based on the rationale that NEPA challenges can be devastating to the predictability of title, which is precisely what the statute is intended to guard against. *Id.* *See also* Geosearch v. Andrus, 508 F. Supp. 839, 845 (D. Wyo. 1981).

36. *Park County*, 817 F.2d at 616 (quoting 30 U.S.C. § 226-2 (1982)).

37. *Id.*

Gordon.[38]

i. *Jones v. Gordon* Analysis

In *Jones*, an operator of an aquatic zoological park, Sea World, applied for a permit to capture killer whales for purposes of scientific research and public display.[39] The Marine Mammal Protection Act of 1972 (MMPA)[40] provides authority for such proposed ventures. In May of 1984, Jones sought declaratory and injunctive relief against the National Marine Fisheries Service in federal court alleging that the Service's issuance of the permit to Sea World without preparation of an EIS violated NEPA.[41] The Service contended that Jones' action was time-barred by the sixty day statute of limitations found in § 104(d)(6) of the MMPA,[42] since Jones did not file his action until six months after the Service issued the permit to Sea World.[43]

The Ninth Circuit, affirming the lower court's decision, held that the statute of limitations period set forth in the MMPA does not apply to NEPA challenges since NEPA itself provides an independent source of jurisdiction for Jones' action.[44] The court interpreted the statute of limitations in the MMPA to apply to "substantive" elements of the permit only, and not to the "procedural" requirements of NEPA.[45] Thus, since Jones' challenge was essentially procedural in nature, the sixty day statute of limitations did not operate to bar his action.[46]

By direct analogy to *Jones*, the Tenth Circuit reasoned in *Park County* that the statute of limitations embodied in the MLLA only applied to "actions contesting either the lease issuance or substantive decisions relating to the lease itself."[47] In short, since a NEPA challenge is procedural in nature and does not attack the substantive elements of an oil and gas lease, the MLLA's provision simply does not apply to NEPA attacks. Therefore, they held that a NEPA challenge to the issuance of oil and gas leases on federal forest lands is not subject to the ninety day statute of limitations found in the MLLA.[48] The court also held the eq-

38. 792 F.2d 821 (9th Cir. 1986).
39. *Id.* at 823.
40. 16 U.S.C. §§ 1361-1407 (1982). The statute authorizes the Secretary to issue permits for the taking or importation of any marine mammal.
41. *Jones*, 792 F.2d at 823.
42. Section 104(d)(6) of the MMPA provides that:

> Any applicant for a permit, or any party opposed to such permit, may obtain judicial review of the terms and conditions of any permit issued by the Secretary under this section or of his refusal to issue such a permit. Such review, which shall be pursuant to Chapter 7 of Title 5, may be initiated by filing a petition for review in the United States District Court for the district wherein the applicant for a permit resides, or has his principal place of business, or in the United States District Court for the District of Columbia, *within sixty days* after the date on which such permit is issued or denied. (emphasis added).

16 U.S.C. § 1347(d)(6) (1982).
43. *Jones*, 792 F.2d at 824.
44. *Id.*
45. *Id.*
46. *Id.*
47. *Park County*, 817 F.2d at 616.
48. *Id.* at 616-17.

uitable doctrine of laches as the sole defense against an untimely NEPA challenge since NEPA contains no statute of limitations.[49]

b. *Application of Laches Under NEPA*

While the laches doctrine is invoked at the discretion of the trial court, courts have held that "laches must be invoked sparingly in environmental cases because ordinarily the plaintiff will not be the only victim of alleged environmental damage. A less grudging application of the doctrine might defeat Congress' environmental policy."[50] With this qualification in mind, the Tenth Circuit overruled the district court's application of laches[51] in the instant case. By reasoning that the district court abused its discretion by invoking the doctrine of laches, it held that the district court failed to explicitly recognize that laches must be invoked sparingly in NEPA cases in order to protect Congress' environmental policy.[52]

Contrary to the district court's ruling, the Tenth Circuit did not perceive Park's tactical decision to fight the APD first rather than the lease issuance as constituting unreasonable delay. The court stated that evidence of an unreasonable delay in pressing a known claim, coupled with prejudice to the defendant resulting from such delay, was necessary to sustain a laches claim. They viewed Park's decision as a tactical maneuver and not as an unreasonable delay causing prejudice to the defendants. The court recognized that because Park was an organization with limited financial resources, it was forced to pursue the one claim that could result in the maximum benefit.[53] The two year delay in challenging the lease issuance was not due to a lack of vigilance, but rather, because "plaintiffs expected that their strategic decision to focus on the APD approval would render challenge to the underlying lease issuance

49. *Park County*, 817 F.2d at 617. In the context of NEPA challenges, there are three criteria that must be satisfied before laches can be applied: (1) a delay in asserting a right or a claim; (2) such delay was not excusable; and (3) there was undue prejudice to the defendants as a result of the delay. Sierra Club v. Cavanaugh, 447 F. Supp. 427, 429 (D. S.D. 1978).

50. *Id.* (quoting Preservation Coalition, Inc., v. Pierce, 667 F.2d 851, 854 (9th Cir. 1982)). "[L]aches . . . has received a lukewarm reception in suits presenting environmental questions, for not only will others than the plaintiff suffer the possible adverse environmental effects, but the agency will escape compliance with NEPA, a result not to be encouraged." Minnesota Public Interest Research Group v. Butz, 498 F.2d 1314, 1324 (8th Cir. 1974).

51. *Park County*, 613 F. Supp. at 1186. The district court was convinced that Park knowingly delayed the filing of a known claim concerning the lease issuance and that such delay prejudiced the defendants. Park was aware no later than June 1983, that the North Fork lease was issued without an EIS and failed to bring an action at that time. Instead, Park demanded that an EIS be prepared on the North Fork APD even though it was convinced that such APD would never be approved. Once the APD was approved, Park County reversed its position and brought an action challenging the issuance of the North Fork lease. *Id.*

52. *Park County*, 817 F.2d at 617.

53. *Id.* at 617-18. The court further added that "[t]he general public, whose interest plaintiffs essentially represent in environmental cases, should not be penalized for plaintiffs decision to pursue the avenue that they thought to be most fruitful in vindicating their concerns." *Id.* at 618.

superfluous."[54]

Moreover, the court failed to find that Marathon was prejudiced by the two year delay.[55] In determining whether a delay is prejudicial, the pertinent inquiry is whether substantial work on the project has been completed before suit is brought.[56] Here, the North Fork well had been completed and reclaimed and further drilling under the lease had yet to transpire. Therefore, the court resolved that preparation of an EIS at this point in time could still reasonably be expected to ameliorate any feared environmental damage arising from future lease activities.[57]

The court did not find that the one million dollar expenditure by Marathon or the costs incurred by the Environmental Assessment (EA) and EIS delay constituted prejudice.[58] The use of capital expenditures in defining prejudice was eroded by the way the court defined the relationship between laches and NEPA. Specifically, the dispositive issue seems to be not the amount of dollars spent, but rather what "percentage of total costs has already been committed."[59] Furthermore, the court considered any increase in costs due to delay as an irrelevant factor of prejudice since NEPA, by its very nature, contemplates such delay.[60]

c. *Exhaustion of Administrative Remedies*

The thirty day period to appeal the lease issuance to the Interior Board of Land Appeals (IBLA) had long passed when Park lost on the APD issue.[61] Hence, since Park could not appeal to the IBLA even if it had wanted to, the court stated that the administrative process was not disrupted. Moreover, the *Park County* court found that the *McKart* factors, which are necessary to promote the exhaustion doctrine, were inapplicable to NEPA cases.[62] *McKart* presupposes that an administrative agency possesses expertise beyond that of the courts and that it is there-

54. *Park County*, 817 F.2d at 618. In the environmental arena, laches will not attach if (1) the party has made an attempt to make its position known to the agency before filing suit; (2) the agency makes some response to such request; and (3) physical developments such as partial construction or drilling have not taken place that would motivate citizens to investigate the legal basis for challenging the agency's action. Watershed Associates Rescue v. Alexander, 586 F. Supp. 978, 984 (1982). In the instant case, the initial challenge to the APD, rather than the lease itself, constituted Park County's attempt to make its overall position known to the BLM and Forest Service. Furthermore, absent additional drilling, there was no immediate physical indication that drilling activity would soon resume. Hence, the public had no on-the-ground evidence that would motivate their interest to seek legal redress; thus, the delay associated with pursuing their claim did not constitute laches.

55. *Park County*, 817 F.2d at 618.

56. *Watershed*, 586 F. Supp. 978, 985.

57. *Park County*, 817 F.2d at 619. For example, in light of more probing information found in an EIS, as opposed to an environmental assessment, additional lease stipulations may be devised which could further protect the environment. *Id.*

58. *Id.* at 618.

59. *Id.*

60. *Id.*

61. *Id.* at 619. *See* 43 C.F.R. § 4.410-.411 (1986).

62. The *McKart* factors are: (1) avoidance of premature interruption of the administrative process; (2) deference to bodies possessing expertise in areas outside the conventional

fore better qualified to handle the issue affecting that agency's decision.[63] In the NEPA context, however, the *Park County* court opined that it was every bit as qualified as the agency to pass judgment on NEPA claims, and that application of the exhaustion doctrine in this case would undermine the goal that prompted NEPA's development; therefore, it concluded that the trial court erred when it applied the exhaustion doctrine.[64]

d. *EIS Not Required For Issuance of Oil and Gas Lease*

The *Park County* court upheld the trial court's ruling that the BLM's lease issuance was not unreasonable. Thus, at the leasing stage, with the proper stipulatory controls, an EIS was held not to be required.[65] The court found that "the hybrid goal [of the] nation is to encourage the development of domestic oil and gas production while at the same time ensuring that such development is undertaken with an eye towards environmental concerns."[66] The *Park County* court stated that the goals of NEPA must be harmonized with the seemingly divergent views of both the Federal Land Policy and Management Act of 1976[67] (FLPMA) and the Energy Security Act,[68] which "explicitly [establishes] a national policy to end dependence on foreign energy sources."[69]

e. *Application of NEPA*

NEPA is essentially a procedural statute; it does "not require agencies to elevate environmental concerns over other appropriate considerations."[70] It simply requires that an agency take a "hard look" at the environmental consequences of any major federal action.[71] In the instant case, it is the BLM's and Forest Service's responsibility to determine whether an EIS is required prior to lease issuance.[72] To aid in this determination, the agency is required to prepare an environmental assessment (EA).[73] The EA process allows the agency to identify adverse environmental consequences that may arise from the contemplated op-

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experience of judges; (3) recognition of executive and administrative autonomy; and (4) development of a factual record. McKart v. United States, 395 U.S. 185, 193-94 (1969).

63. *Park County*, 817 F.2d at 620.

64. *Id.*

65. *Id.* at 624. The district court applied an arbitrary and capricious standard to the agency's decision of whether an EIS must be prepared. *Park County*, 613 F. Supp. at 1186. *See also* Cabinet Mountains Wilderness v. Peterson, 685 F.2d. 678 (D.C. Cir. 1982); Hanly v. Kleindienst, 471 F.2d 823 (2d Cir.), *cert denied*, 412 U.S. 908 (1972). However, the Tenth Circuit used a reasonableness standard when it reviewed the agency's action.

66. *Park County*, 817 F.2d at 621.

67. 43 U.S.C. § 1701-84 (1982). Section 1701(a)(12) stands for the proposition that public lands must be managed in a manner which recognizes the nation's need for domestic sources of minerals, food, timber and fiber from public lands.

68. 42 U.S.C. § 8701(b)(1) (1979).

69. *Park County*, 817 F.2d at 620.

70. *Id.* (quoting Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc., 462 U.S. 87 (1983)).

71. *Id.* (quoting Kleppe v. Sierra Club, 427 U.S. 390, 410 (1976)).

72. *Id.* at 620.

73. 40 C.F.R. § 1501.4(b) (1986).

eration. If the envisioned environmental harm can be substantially mitigated through the use of protective measures and restrictions on lease activity, this exercise will lead to a Finding of No Significant Impact ("FONSI"), in which case an EIS will not be required. Should such mitigating measures fail to satisfy a sufficient number of environmental concerns, however, an EIS will be required.[74]

Based on the strength of the EA that was drafted prior to issuance of the contested lease,[75] the BLM determined that the lease issuance itself did not warrant prior preparation of an EIS.[76] To determine whether an EIS should have been prepared, the role of the reviewing court is a narrow one. Its role is to determine whether it is reasonable for the BLM and the Forest Service to conclude that "the action under review will have no significant environmental consequences."[77] The party challenging the agency's decision "shoulders the burden of establishing that the FONSI was unreasonable."[78] Finally, in its analysis of whether an EIS is required under NEPA, the BLM and Forest Service may properly weigh the mitigating measures it will impose on lease ac-

74. *Park County*, 817 F.2d at 621. Federal onshore oil and gas leases are issued through the Department of Interior-BLM pursuant to the Mineral Leasing Act of 1920, as amended in 30 U.S.C. §§ 181-226 (1982). Upon lease issuance, the lessee is entitled to conduct exploration and/or drilling activities in accordance with the terms and conditions of the lease, subject to any stipulations attached to the lease. Often, as in this case, special lease stipulations require approval of activities by the Forest Service, which is the surface managing agency. If lease offerings affect lands administered by the Forest Service, the BLM submits them to the Forest Service for review. The Forest Service makes a recommendation whether the lease should be issued and, if so, recommends mitigating measures in the form of lease stipulations that will control the environmental impacts that may be caused by lease activity. It is the general practice of the BLM to accept Forest Service recommendations.

The Forest Service administers responsibility over the EA process. In addition, when the lessee or its designated operator exercises its rights to drill under the oil and gas lease, it is required to file a proposed operating plan to the BLM in order to receive an approved permit to drill. 43 C.F.R. § 3162.3-1(a) (1986). Environmental documents pursuant to NEPA are prepared prior to approval of the proposed operations. 43 C.F.R. § 3162.5-1(a) (1986). The BLM and Forest Service work in tandem to scrutinize the proposed plan in light of NEPA and, if appropriate, tailor environmental stipulations allowing the operator to fulfill his operating plan while minimizing any impact his operations may have on the environment. Brief for Appellees/Cross Appellants at 5-7, Park County Resource Council v. Department of Agriculture, 817 F.2d 609 (10th Cir. 1987).

75. *Park County*, 817 F.2d at 621. The Forest Service prepared an EA exceeding 100 pages. It evaluated the effects of, and alternatives for, its recommendations on oil and gas lease offers involving the Shoshone National Forest. The Forest Service opted to recommend lease issuance with appropriate stipulations to protect surface resources. The EA also recommended against leasing where strict statutory control over operations would be insufficient to avoid unacceptable irreversible damage to resources. *Id.*

76. *Id.* On November 9, 1979, the Regional Forester issued a Finding of No Significant Impact ("FONSI"). Hence, its final determination stated that there would be no significant impact on the human environment as a result of oil and gas lease issuance under the stipulations promulgated by the Forest Service. *Id.*

77. *Id.* at 621. There is a split among the circuit courts as to the appropriate standard of review in evaluating whether an agency's determination to forego an EIS should be overturned. *Id.* at note 4. The Tenth, Third, Fifth, Eighth, and Ninth Circuits adhere to the "reasonableness standard." The First, Second, Fourth, and Seventh Circuits apply the "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" standard, as set forth in the Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (1982). *Id.*

78. *Park County*, 817 F.2d at 621 (citing Vieux Carre Property Owners, Residents & Associates v. Pierce, 719 F.2d 1272, 1279 (5th Cir. 1983)).

tivity which serve to reduce negative environmental impacts.[79]

As a result of these factors, the *Park County* court held that Park failed to meet its burden. The Court concluded that the BLM and the Forest Service took the requisite "hard look" at the environmental consequences of oil and gas leasing, and that the FONSI was "within the bounds of reasonable decision making."[80]

The issuance of the oil and gas lease was fundamentally a paper transaction, that is, the lease issuance itself did not allow the lessee to do anything. A gamut of environmentally mitigating measures were in place forcing the lessee to obtain prior federal approval and conduct futher environmental analysis before carrying out any surface disturbing activities.[81] Hence, the BLM and Forest Service maintained tight control over future activities. They reserved the right to impose strict modifications, or in the case of threatened or endangered species, disallow those activities that they considered detrimental.[82]

Park argued that an EIS must be prepared at the leasing stage because they were convinced that exploratory drilling would eventually lead to full field development.[83] They argued that if such effects are not considered at the leasing stage, they could not adequately be addressed at a later time.[84] The court noted, however, that there are no definite foreseeable effects of full field development at the leasing stage.[85] Indeed, oil and gas exploration statistics prove that one exploratory success, let alone full field development, is extremely tentative and speculative at the leasing stage.[86] The court recognized that requiring a cumulative EIS, which contemplated full field development at the leasing stage, would result in a gross misallocation of resources and would not provide a useful environmental analysis for major federal actions that affect the environment.[87]

The court added that when an APD for a specific site is proposed, an EIS evaluating the myriad environmental concerns should be initiated.[88] The purpose of an EIS can only be fully realized when a project

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79. *Id.*

80. *Id.* at 622 (quoting Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, 462 U.S. 87, 125 (1983)).

81. *Id.*

82. *Id.* The court in *Park County* relied on Davis v. Morton, 469 F.2d 593 (10th Cir. 1972), where the major issue was whether the lease of Indian land to a corporation constituted a "federal" action, which would trigger NEPA. *Id.* In that case the court held that an EIS was required prior to lease issuance because there were plans to develop the leased land. The *Park County* court held that *Davis* "does not stand for the proposition that an EIS is required whenever the Federal Government leases land." *Park County*, 817 F.2d at 622.

83. *Park County*, 817 F.2d at 622.

84. *Id.*

85. *Id.* at 623.

86. *Id.* Exploration activities take place on only one out of ten federal leases issued and development activities are conducted on only one of ten of those leases on which exploration activities have been approved and completed.

87. *Id.*

88. *Id.* at 623.

is *proposed* not merely *contemplated*.[89] "[T]he project must be of sufficient definitiveness before an evaluation of its environmental impact can be made and alternatives proposed."[90] Otherwise, requiring an EIS at the leasing stage is like "demanding that the Department specify the probable route of a highway that may never be built from points as yet unknown over terrain as yet unchartered in conformity with state plans as yet undrafted. A more speculative exercise can hardly be imagined."[91]

4. *Conclusion*

At first blush it appears the oil and gas industry can claim a victory in that the BLM is not required to prepare a cumulative EIS prior to issuance of an onshore federal oil and gas lease, because such action does not constitute a "major federal action significantly affecting the quality of the human environment."[92] This ruling, however, rests on the tender underpinnings that the reviewing agency reasonably identify the potential environmental harm arising from speculative lease activities and that these concerns are adequately embodied in an EA with companion lease stipulations mitigating any adverse environmental effects. NEPA contains no statute of limitations, thus leaving the equitable doctrine of laches as the sole remaining affirmative defense available to the lessee who is forced to defend against a NEPA challenge.[93] Since courts sparingly apply laches to environmental issues raised in the name of NEPA, the weakness of the laches defense is obvious. This effectively means that exploration and development plans for federal leases will remain susceptible to NEPA attack until these activities have been completed and reclaimed.

II. Federal Coal Lease Readjustments

A. *Background*

The companion cases of *Coastal States v. Hodel*[94] and *FMC v. Hodel*[95] dealt with the statutory application of the rules and regulations governing the leasing of federal coal lands. The primary issues presented to the Tenth Circuit concerned the timeliness of the Bureau of Land Management's (BLM) coal lease readjustment practices and the reasonableness of the terms mandated thereunder. The results of these two cases dramatically change the vested rights conferred upon pre-Federal Coal Leasing Amendment Act[96] leases, a result that will have a far reaching

89. *Id.* (citing Weinberger v. Catholic Action, 454 U.S. 139, 146 (1981) (emphasis in orginal)).
90. *Id.* at 624 (quoting Upper Pecos Ass'n v. Stans, 452 F.2d 1233, 1237 (10th Cir. 1971), *vacated on other grounds*, 409 U.S. 1021 (1972) (emphasis added)).
91. *Id.* (quoting County of Suffolk v. Secretary of the Interior, 562 F.2d 1368, 1379 (2d Cir. 1977), *cert. denied*, 434 U.S. 1064 (1978)).
92. *Id.*
93. *See supra* notes 50-60 and accompanying text.
94. 816 F.2d 502 (10th Cir. 1987).
95. 816 F.2d 496 (10th Cir. 1987).
96. 30 U.S.C.S. § 207(a) (Law. Co-op. Supp. 1986).

impact on the mining and development of western federal coal lands.

B. *Coastal States Energy Co. v. Hodel*

1. Facts

Coastal States Energy Company (Coastal) owns and operates an underground coal mine in Sevier County, Utah, known as the SUFCO Mine.[97] In March 1985, the BLM attempted to readjust two federal coal leases[98] owned by Coastal pursuant to the Mineral Lands Leasing Act of 1920 (MLLA)[99] and the regulation promulgated thereunder. These two leases embrace the largest portion of the coal reserves making up the SUFCO Mine. The two leases, issued pursuant to the MLLA,[100] carried royalty burdens equal to 15 cents per ton of coal mined.[101]

In accordance with the MLLA, the leases were issued for an indeterminate period of time, subject to the BLM's right to reasonably readjust and fix the terms and conditions of each lease at the end of twenty years from the date of issuance and thereafter at the end of each succeeding twenty-year period.[102] Thus, on September 1, 1981, and February 28, 1982, the two leases in question (the "SL" lease and "U" lease, respectively) were subject to readjustment.[103]

Two months before the end of the second twenty-year period, the BLM notified Coastal that it had intended to readjust the SL lease. The notice did not outline the readjustment terms, but simply stated that the terms and conditions would be forwarded within two years, and that the readjustment would take effect sixty days after the anniversary date.[104] Seventeen days after the second twenty-year period had expired, the BLM sent Coastal a Notice of Proposed Readjustment of Lease, and notified Coastal that it had sixty days in which to file objections to the pro-

97. The SUFCO Mine employs over 250 people. In recent years Coastal has made capital improvements to the mine in amounts in excess of $33,000,000. To date, the mine has produced over two million tons of coal, of which 80% of the annual production is committed and sold pursuant to long term coal supply contracts. The price that Coastal receives for this coal is directly tied to the royalty it must pay to the federal government pursuant to the underlying coal lease. Opening Brief for Appellant at 6, Coastal States Energy Co. v. Hodel, 816 F.2d 502 (10th Cir. 1987).

98. *Coastal*, 629 F. Supp. at 12. On September 11, 1941, Coastal's predecessor, Lorenzo R. Hansen, as Lessee, entered into coal lease Number SL-062583 (the "SL" Lease) with the United States. *Id.* On March 1, 1962, the United States, as Lessor, and Coastal State's predecessors, Southern Utah Fuel Company and Equipment Rental Service, as Lessees, entered into coal lease Number U-062453 (the "U" Lease), *Id.*

99. Mineral Lands Leasing Act of 1920, 30 U.S.C. § 185 (1985).

100. *See* 30 U.S.C. § 207 (1976) which mandated that each federal lease contain the following material terms: a royalty of not less than 5 cents per ton of coal mined payable on a quarterly basis; annual lease rentals topping out at no greater than $1.00 per acre on the fifth anniversary date; lease term was for an indeterminate period of time conditioned upon diligent development and continued operations.

101. *Coastal*, 629 F. Supp. at 12.

102. 30 U.S.C. § 201-07 (1976).

103. *Coastal*, 629 F. Supp. at 12.

104. *Id. See also* BLM Instruction Memorandum No. 80-463 (April 17, 1980) requiring that such notices be sent to lessee at least 120 days prior to the end of the current twenty year period.

posed terms or surrender the lease.[105]

In similar fashion Coastal received a readjustment notice from the BLM affecting the U lease. Two months prior to the U lease's twenty-year anniversary, specific readjustment terms were proposed.[106]

The Secretary proposed the readjustment of several lease provisions[107] similar for both leases, mandating an increase in the royalty rate from 15 cents per ton to 8% of the value of the coal removed by underground mining methods.[108] Coastal, objecting to the proposed readjustments, made a timely protest to the BLM. The BLM refused to amend the proposed readjustments, forcing Coastal to appeal the BLM's decision to the Interior Board of Land Appeals (IBLA).[109] The IBLA affirmed the BLM's decision,[110] after which Coastal appealed to the Federal District Court for the District of Utah, challenging both the readjustments and the underlying regulations and policies upon which they were grounded.[111] The district court entered summary judgment in favor of the BLM, holding that: "(1) [the] readjustment process was not required to be completed prior to end of lease term; (2) the Federal Coal Leasing Amendments Act (FCLAA) royalty provisions apply to readjustments of a pre-FCLAA lease; and (3) the regulations (underlying the BLM's action) were valid."[112] Coastal appealed this adverse decision to the Tenth Circuit Court of Appeals.[113] Judge McWilliams affirmed the lower court's decision and ruled that (1) the coal lease readjustments were timely and (2) that the FCLAA applies to pre-FCLAA leases.[114]

2. The Tenth Circuit Decision

The two principle issues presented on appeal were (1) whether the BLM preserved the right to formally readjust the leases after the expiration of the twenty year anniversary date by serving Coastal with a notice of intent to readjust the coal leases before the expiration of their twenty year anniversary date, and (2) whether Section 6 of the FCLAA, and the regulations and policies promulgated thereunder should apply to pre-FCLAA leases on their anniversary dates.[115]

105. *Id.* Coastal filed its objections with the BLM regarding the SL lease on November 24, 1981.

106. *Id.*

107. In addition to the royalty readjustment the BLM had proposed readjusting the following terms: (1) increase in the bonding requirement from $3,000 to $450,000; (2) change in royalty payments from monthly to quarterly; and (3) the deletion of the right to credit rental payments against royalty payments. *Coastal*, 629 F. Supp. at 12-13.

108. *Coastal*, 629 F. Supp. at 12.

109. *Id.* at 13.

110. 70 I.B.L.A. 386 (Feb. 9, 1983).

111. *Coastal*, 629 F. Supp. at 13.

112. *Id.* at 9.

113. Coastal States Energy Co. v. Hodel, 816 F.2d 502 (10th Cir. 1987).

114. *Id.* at 502.

115. *Id.*

a. *Timeliness of the Readjustment*

Coastal reasserted it's argument made in the district court, that for readjustment to be effective, the terms of the readjustment must be final before the end of the leases' twenty-year anniversary period.[116] The Department of Interior took the contrary position, that final readjustment is effective so long as the BLM sends a notice of intent to readjust to the coal lessee prior to the end of the twenty years.[117] Both parties claimed that *Rosebud Coal Sales Co. v. Andrews*[118] is controlling.

i. The Tenth Circuit's Interpretation of the *Rosebud* Decision

In *Rosebud*, the Tenth Circuit held that the BLM's attempt to readjust the terms and conditions of a coal lease was unlawful, when the notice of intent to readjust was provided two and one half years after expiration of the lease's twenty-year period.[119] The *Rosebud* court, however, did not address the issue of whether filing a notice of intent to readjust prior to expiration of the twenty year period preserved the right to readjust the lease after expiration of such time.[120] In the instant case, however, the district court, by relying heavily on the Tenth Circuit's contemporaneous decision in *FMC v. Hodel*,[121] expanded the rationale of *Rosebud*. It declared that "[a]ll *Rosebud* required was that Notice of Readjustment be given on or before the Twenty-year anniversary date of the lease," to preserve the Secretary's right to readjust.[122] The district court claimed that its finding was consistent with the MLLA, the FCLAA (1976) and the language embodied in the leases themselves.

The MLLA, as amended by the FCLAA (1976) establishes the framework by which the government must abide in the leasing of federal coal lands to private parties. The statute, as amended, vests the Secretary of the Interior with the right to readjust the terms and conditions of a coal lease at the end of the lease's anniversary period.[123] Coastal argued that the phrase, "at the end of" such period, is unambiguous and must be afforded its plain meaning, which required the readjustment to be final at the end of the twenty-year period for it to be effective.[124] The district court, however, found Coastal's statutory interpretation too narrow and unconvincing. The court insisted that such interpretation is subject to the examination of all relevant statutes and regulations

116. *Coastal*, 629 F. Supp. at 13.
117. *Id.*
118. 667 F.2d 949 (10th Cir. 1982).
119. *Id.* The court emphasized that it was not "difficult to reach the conclusion that the readjustment was to be when each twenty-year period expired, on that date and not at a later time." It concluded that the statement of time " 'at the end of' on its face is not susceptible to any variation as it is a precise time." *Id.* at 951.
120. *Coastal*, 629 F. Supp. at 13.
121. 816 F.2d 496 (10th Cir. 1987). *See also infra* notes 159-91 and accompanying text.
122. *Coastal*, 629 F. Supp. at 13 (quoting Gulf Oil v. Clark, 631 F. Supp. 29 (D.N.M. 1985)).
123. 30 U.S.C.A. § 207 (Law. Co-op. 1971).
124. *Coastal*, 629 F. Supp. at 13.

promulgated thereunder. Since there are numerous regulations governing the readjustment process, the district court concluded that the requirements of these regulations created a readjustment process as opposed to requiring the BLM to readjust the leases in a single act.[125] As a result, the otherwise plain meaning of the word "at" as interpreted in *Rosebud* has turned from a particular point in time, to an entire period of time required for readjustment.

ii. Reasonableness of the Coal Leasing Regulations

Coastal next attacked the reasonableness of the regulation process that had been established to accomplish the mandated readjustments. As authorized in the MLLA, the Secretary promulgated regulations that implemented the specifics of the FCLAA. This resulted in the installation of a comprehensive procedure whereby the Secretary would be required to notify the lessee, prior to the expiration of the twenty-year lease term or any succeeding ten-year period thereafter, of whether readjusted terms would be made prior to the end of such period.[126] If the Secretary fails to notify the lessee of its intent to readjust, this shall be deemed a waiver of its right to readjust for the ensuing lease period.[127] The regulations further provide that the Notice to Readjust must inform the lessee when the specific terms will be transmitted, and that such transmission must be done within two years upon receipt of notice. If the BLM fails to comply within this two year period it waives its right to readjust.[128] Finally, the regulation scheme allows the lessee a sixty-day period following receipt of the readjusted terms to lodge an objection thereto with the IBLA.[129]

Coastal asserted that the foregoing regulations must be set aside because they were "arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law."[130] The court analyzed the reasonableness of the regulations by the standards set out by the Adminis-

125. *Id.* at 15.

126. *Id.* at 14. *See* 30 U.S.C. § 207 (1976). *See also* 43 C.F.R. § 3451.1(a)(1) (1981) (which subjects the two leases to readjustment at the end of their current twenty year period and at the end of each ten year period thereafter).

127. *Coastal*, 629 F. Supp. at 14. *See also* 43 C.F.R. § 3451(d)(1) (1981) which states that: "[t]he Secretary shall, prior to the expiration of the current or initial twenty year period or any succeeding ten year period thereafter, notify the lessee of any lease which becomes subject to readjustment after June 1, 1980, whether any readjustment of terms and conditions will be made prior to the expiration of the initial twenty year period or any succeeding ten year period thereafter. On such a lease the failure to so notify the lessee shall mean that the United States is waving its right to readjust the lease for the readjustment period in question." *Id.* The BLM sent Coastal notice, required by this Section, 63 days prior to the end of the second year period of the SL Lease and well in advance of the end of the initial twenty year period of the U Lease. *Coastal*, 629 F. Supp. at 12.

128. *Coastal*, 629 F. Supp. at 14. *See* 43 C.F.R. § 3451.1(d)(2) (1981).

129. *Id.* at 14-15. *See* 43 C.F.R. § 3451.1 (1981).

130. *Coastal*, 629 F. Supp. at 17. Coastal asserts that the Secretary violated the Administrative Procedures Act, which in pertinent part required the Court to "hold unlawful and set aside agency action, findings and conclusions found to be (A) arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law . . . , (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; [or] (D) without observance of procedure required by statues." 5 U.S.C. § 706(2)(a) (1982).

trative Procedures Act (APA).[131] A regulation is considered arbitrary and capricious only if the agency relied on factors which were not intended by Congress or if it failed to consider the crucial aspects of the problem, or issued a decision so implausible as to defy reality.[132] The court found the BLM's regulations to be consistent with the APA and accordingly held that the regulations were not arbitrary, capricious, or an abuse of agency discretion.[133] "Congress has authorized the Secretary to 'prescribe necessary and proper rules and regulations to carry out and accomplish the purposes of the Act of 1920.'"[134] Since Congress failed to define the procedures by which readjustment was to take place, the regulations established by the BLM setting forth those procedures are within the BLM's authority so long as the regulations are not contradictory to the MLLA.[135] Furthermore, the recognized policy of the FCLAA was "to provide a more orderly procedure for the leasing and development of coal presently owned by the United States and to assure its development in a manner compatible with public interest."[136] The court concluded that the regulations promulgated by the Secretary were consistent with the goals of the MLLA, and therefore they were within the bounds of the Secretary's authority.[137]

In *Rosebud,* the court concluded that the plain meaning of "at the end of" each twenty year period was clear, that "it is a precise point in time and not susceptible to any other meaning."[138] By adopting the lower courts analysis, as discussed above, the Tenth Circuit in essence transformed this "precise time" into a continuum whereby the process of readjustment may take place over a period of time, provided that the process begins before the end of the lease period.[139]

b. *Application of FCLAA to Pre-FCLAA Leases*

Citing section 7 of the MLLA the court noted that "leases shall be for an indeterminate period . . . upon the further condition that at the end of each twenty-year period succeeding the date of the lease such readjustment of terms and conditions may be made as the Secretary of Interior may determine, *unless otherwise provided by law at the expiration of such periods.*"[140] The court, relying heavily on *FMC,*[141] interpreted this

131. 5 U.S.C. § 706(2)(A) (1982).
132. *Coastal,* 629 F. Supp. at 17-18.
133. *Id.* at 17. The court concluded that the APA Standard was satisfied since the BLM complied with the Act by publishing the challenged regulations for comment and incorporating some of the comments received in the final regulation. *Coastal,* 816 F.2d at 505. In fact, the district court noted that Coastal did not object to the challenged rule when proposed. *Coastal,* 629 F. Supp. at 16.
134. *Coastal,* 629 F. Supp. at 18.
135. *Id.*
136. *Id.* (quoting H.R. REP. No. 681, 94th Cong., 2d Sess. 8, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 1943).
137. *Id.* at 19.
138. *Id.* 667 F.2d at 951.
139. *Coastal,* 816 F.2d at 505.
140. 41 Stat. 437 § 207 (1920).
141. 817 F.2d 496 (10th Cir. 1987).

language to mean that Congress empowered the Secretary with the right to impose any new lease term or condition, no matter how broad or wide sweeping those changes might be, at the readjustment stage of the subject leases.[142] The Tenth Circuit conceded this was a very broad authority, subject only to the stipulation "unless otherwise provided by law . . . ."[143] The Tenth Circuit, departing from the trial court, recognized that this language required the statutes in effect at the time of readjustment to be incorporated into the leases.[144] Hence, at readjustment time, the Secretary was required to readjust the leases in conformity with the FCLAA.[145]

Close examination of the court's interpretation of the FCLAA reveals that the FCLAA transformed the lessee's lease from an indeterminate term coal lease to one with a finite period, which will expire when commercial production ceases. Coastal argued that such a change would undermine the fundamental character of the lessee's vested property rights, a result they concluded, was not intended by Congress when it enacted the FCLAA.[146] Furthermore, by applying the FCLAA to pre-FCLAA leases, Coastal asserted that such statutory application served to interfere with Coastal's antecedent rights, thus giving the statute retroactive effect.[147] Coastal relied on the general proposition that such retroactive application of the FCLAA must be supported by explicit "unequivocal and inflexible import of the terms [of the statute] and the manifest intention of the legislature."[148] Coastal claimed the government failed to make such necessary showing in this case. The district court concurred with Coastal's argument, however, it did not view the application of the FCLAA to pre-FCLAA leases as interfering with antecedent rights through retroactive application.[149] To the contrary, the district court asserted that the Secretary "specifically reserved the power to readjust the leases, both in the leases themselves and in the Act of 1920, as amended."[150] The district court concluded, and the Tenth Circuit affirmed, that the powers granted to the Secretary by Congress in no way altered the rights that the original leases gave to Coastal.[151]

i. The Eight Percent Royalty

The MLLA of 1920 set the minimum royalty rate at five cents per

142. *Coastal*, 816 F.2d at 505.

143. *Id.*

144. *Id.* The trial court determined that 'the unless otherwise provided by law' language only allows the Secretary to readjust leases "unless the law in effect at the time of readjustment has taken that right away." *Coastal*, 629 F. Supp. at 20. The Tenth Circuit interpreted the same language to mean that the Secretary was required to base readjustments according to the law in effect at the time of readjustment. *Coastal*, 816 F.2d at 506.

145. *Coastal*, 816 F.2d at 506.

146. *Coastal*, 629 F. Supp. at 20.

147. *Id.*

148. *Id.* (quoting Union Pacific v. Larimie, 231 U.S. 190 at 199 (1913)).

149. *Id.* at 20-21.

150. *Id.* at 21.

151. *Coastal*, 816 F.2d at 506.

ton.[152] This rate was increased by the FCLAA to not less than 8% of the value of the coal removed from an underground mine, subject to the proviso that the BLM may select a lesser amount, but in no case less than 5%.[153] The BLM argued that this regulation required the imposition of the 8% royalty rate at readjustment time and that a lower rate could not be considered.[154] It further asserted that Coastal, if finding the 8% rate excessive, could file application for relief under Section 39 of the MLLA.[155] Coastal rebutted the BLM's argument asserting that the regulations required the imposition of the 5% rate as the authorized minimum royalty rate.[156] The district court affirmed the BLM's position that the 8% rate was the reasonable minimum rate.[157] The Tenth Circuit aligned itself with the district court's analysis, with one minor departure. The Tenth Circuit concluded that the Secretary, prior to installing an 8% rate, must take into consideration conditions that would justify the imposition of the lower 5% rate.[158]

C. FMC v. Hodel

1. Facts

Unlike the mining operation in *Coastal States*[159] the two leases at issue here make up a surface coal mine near Kemmerer, Wyoming, known as the Skull Point Mine.[160] Both leases were issued in March,

152. *Supra* note 100 and accompanying text.

153. C.F.R. § 3473.3-2(a)(3) (1979).

154. *Coastal*, 816 F.2d at 506.

155. *Id. See* 60 Stat. 957 (1946), *reprinted in* 30 U.S.C. § 209 (1982). This section allows the Secretary to reduce or waive a royalty rate whenever he judges it necessary in order to promote development or allow the lessee to successfully operate. The royalty readjustment period is limited to a maximum of three years. Furthermore, the royalty relief may be terminated at the annual evaluation period or upon transfer of lease ownership. *Coastal*, 816 F.2d at 536 n.7.

156. *Coastal*, 816 F.2d at 507. Coastal relied on the underground readjustment royalty regulations promulgated by the Secretary, primarily 43 C.F.R. § 3451.1 (a)(2) (1976) which states: "[a]ny lease subject to readjustment which contains a royalty rate less than the minimum royalty prescribed in § 3473.3-2 of this title shall be readjusted to conform to the minimum prescribed in that Section." They also relied on Section 3473.3-2(a)(1) which provides in pertinent part that: "[r]oyalty rates shall be determined on an individual basis prior to the lease issuance . . . " and Section 3473.3-2(a)(3) which states: "[a] lease shall require payment of a royalty of not less than 8% of the value of the coal removed from an underground mine, except that the authorized officer may determine a lesser amount, *but in no case less than 5% if conditions warrant.*" *Coastal*, 816 F.2d at 507 (emphasis added).

157. *Coastal*, 816 F.2d at 507.

158. *Id.*

159. *Id.* at 502 (10th Cir. 1987).

160. The two coal leases are lease W-061421 and lease W-061422. FMC has spent millions of dollars to produce coal from its mine. The majority of its production fuels FMC's Kemmerer coal generated electrical facility and Green River Trona plant. In fact, FMC spent in excess of $70 million converting its Trona Plant from natural gas to coal generation. The balance of FMC's production is sold under spot purchase orders and long term contracts. In addition, the mine is classified as one of only two mines in the country (the other being Pittsburgh & Midway's mine directly adjoining and in direct competition with FMC's mine) as a special bituminous coal mine. This classification is awarded to mines when the cost of extracting coal increases over the life of the mine and the mine is therefore exempt from certain reclamation standards. FMC v. Watt, 587 F. Supp. at 1546

1963, pursuant to the MLLA and "called for a royalty payment of 17 1/2 cents per ton of coal while providing for periodic readjustment of the terms and conditions of the lease at twenty year intervals."[161]

The twenty year anniversary date for both leases was March, 1983, some seven years following the enactment of the FCLAA.[162] The BLM sent FMC actual notice[163] of its intent to readjust, and a petition of the specific proposed terms and conditions prior to the twenty year anniversary of the leases.[164] The readjusments increased the royalty rate from the present 17 1/2 cents per ton to 12 1/2% of the value of the coal mined.[165] FMC objected to the timeliness and substance of the proposed terms.[166] On administrative appeal the Interior Board of Land Appeal (IBLA) upheld the BLM's judgment that the royalty readjustment was timely and that the adjusted terms were lawful.[167] FMC filed a petition for review in the United States District Court for Wyoming.[168] The IBLA's decision was affirmed in part, and reversed in part, by the district court. The court held that the readjustment was timely but unlawful.[169] Both parties appealed to the Tenth Circuit Court of Appeals. Judge McWilliams held that the royalty readjustment was both timely and lawful.[170]

2. The Tenth Circuit Opinion

Like *Coastal* before it, the central issues on appeal in *FMC* concerned whether (1) the BLM waived its right to readjust FMC's leases for failure to provide final readjusted terms within the anniversary deadline, and (2) whether the FCLAA should be applied to pre-FCLAA leases on their post-FCLAA anniversary dates.[171]

a. *Timeliness of Readjustment*

FMC argued that readjustment occurs when the BLM issues its final decision and the lessee is made aware of what the terms and conditions will be.[172] FMC based its position on its interpretation of Section 7 of the MLLA.[173] FMC took the position that under the MLLA, a final BLM decision to readjust terms and conditions of a coal lease cannot take

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(1984); *see also* Surface Mining Control & Reclamation Act of 1977, 30 U.S.C. § 1277 (1977).

161. FMC v. Hodel, 816 F.2d at 498 (10th Cir. 1987).

162. *Id.*

163. FMC received the BLM's notice on August 23, 1982. *FMC*, 587 F. Supp. at 1546.

164. *Id.* The actual new terms were proposed by the BLM on December 22, 1982.

165. *FMC*, 816 F.2d at 498. This is a royalty increase of over 1,000%. *See FMC*, 587 F. Supp. at 1548.

166. *Id.*

167. 74 I.B.L.A. 389 (1983).

168. *FMC*, 816 F.2d at 498.

169. FMC v. Watt, 587 F. Supp. 1584 (1984).

170. *FMC*, 816 F.2d 496 (10th Cir. 1987).

171. *Id.* at 499-500.

172. *Id.* at 499.

173. *Id.*

effect when the terms are set after the anniversary date.[174] Here, the final terms occurred thirty seven days after the lease's anniversary date.[175] Thus, argued FMC, since the readjustment of the existing leases did not occur *at the end* of twenty years after the date of the leases, as required by the MLLA and the leases themselves, the readjustment was void.[176]

The BLM argued that so long as it sends notice to the lessee of its intent to readjust a lease prior to the twenty-year anniversary date, it reserves the right to establish final readjusted terms at a later date, and that such practice is in compliance with both the statute and the language of the leases.[177] As in *Coastal States*, both parties placed reliance on *Rosebud Coal Sales Co. v. Andrews*.[178]

i. *Rosebud* Revisited

As previously stated, in *Rosebud* the anniversary date of readjustment was April, 1975.[179] However, no notice of any type was sent to the lessee until two and a half years after the expiration of the second twenty-year lease period. Both the district court and the Tenth Circuit found that such a belated adjustment attempt was "untimely and thereby barred."[180] However, the Tenth Circuit in the instant case *strongly suggested* that its *Rosebud* holding incorporates the notion that if the BLM sends a Notice of Intent to readjust the terms and conditions of a coal lease "on or shortly before the 20-year anniversary period" such notice operates to preserve the BLM's rights under the MLLA and the language of the lease to readjust the terms in a reasonable fashion thereafter.[181]

b. *Application of FCLAA to Pre-FCLAA Leases*

The district court found that the BLM's application of Section 6 of the FCLAA (specifically the 12 1/2% royalty mandated therein) to FMC's leases was "arbitrary, capricious, and an abuse of discretion."[182] It conceded that the 12 1/2% royalty rate is now a statutory minimum. But it stopped short of applying it to pre-FCLAA leases by recognizing that such application would abrogate the provision of the leases which provides for reasonable readjustment.[183] The district court viewed the imposition of a 1,000% royalty increase imposed without any inquiry into the factual basis supporting such an increase as arbitrary and as defying notions of equity.[184]

174. *Id.*
175. *Id.*
176. *Id.* (emphasis added).
177. *Id.*
178. 667 F.2d 949 (10th Cir. 1982).
179. *Id.* at 950.
180. *Id.* at 953.
181. *FMC*, 816 F.2d at 500.
182. *FMC*, 587 F. Supp. at 1547.
183. *Id.* at 1549.
184. The district court noted that the method for readjustment applied to pre-FCLAA

The Tenth Circuit found the district court's judgment untenable in light of its interpretation of the MLLA and the language in the leases. The court construed the statute and the lease language to mean that the Secretary may fix "such a new royalty rate as he, or she, may determine is proper, unless the law in effect at the expiration of such twenty-year period provides differently."[185] Thus, the court concluded that, the Secretary had no choice but to impose the 12 1/2% royalty rate, since it was the rate mandated by law at the readjustment period.[186] Implicit in the court's analysis is that the statutory language not only militates against the use of the language in the lease calling for reasonable readjustment, but actually subordinates this reasonableness requirement to the "unless otherwise provided by law" language found in Section 7 of the MLLA.[187]

c. *Retroactive Application of FCLAA*

FMC argued, and the district court agreed, that "mandatory application of the 12 1/2% royalty rate to pre-existing leases, without factual evaluation *is* retroactive application of the provision, which everyone concedes was not intended and is not proper."[188] The district court opined that readjustment of an existing lease is not a new event, rather it is part of the inherent process of the original lease, and to mandatorily apply a 12 1/2% royalty rate materially altered the original term of the lease.[189] No such expressed intent can be found in the FCLAA.[190] The Tenth Circuit found no merit to FMC's argument or the district court's ruling. It concluded that the Secretary clearly had the right to set new terms on the readjustment date and that it is not retroactive application of FCLAA to set new terms in accordance with existing law.[191]

C. *Conclusion*

The implications of *Coastal States*[192] and *FMC*[193] deserve closer at-

leases called for the construction of an evidentiary basis based on an individual analysis of each coal lease up for readjustment. Items analyzed by the BLM with regard to pre-FCLAA cases included: (1) the "existence of a competitive bituminous coal mine which is not subject to readjustment and, therefore, the allegedly mandatory 12 1/2% royalty rate could not be applied until 1998; [and (2)] the very nature of plaintiff's mine, which presumably will be forced to produce less coal as a 12 1/2% royalty rate contributes to making the costs of mining prohibitive." *FMC*, 587 F. Supp. at 1548.

185. *FMC*, 816 F.2d at 501.

186. *Id.*

187. The court discounts the harsh economic realities caused by the readjustment by shifting the burden to Congress. *FMC*, 816 F.2d at 501.

188. *FMC*, 587 F. Supp. at 1548 (emphasis supplied). The district court based its holding on *Rosebud* wherein the court concluded that "[t]he Section 7 amendment provided for a primary term and also for the royalty to be not less than 12.5%. There is no suggestion whatever that the amendment was to be retroactive and the contrary is indicated." *Id.* (quoting *Rosebud* 667 F.2d at 952).

189. *FMC*, 587 F. Supp. at 1548.

190. 30 U.S.C. § 201 (1982).

191. *FMC*, 816 F.2d at 502.

192. *Id.*

193. *Id.* at 496.

tention and further judicial review.

Coal mining is a unique business. It often takes more than ten years to move a mine from the exploration stage, through the permitting process, to actual development. This process requires the expenditure of millions of dollars before one ton of coal can be mined. To justify this expenditure, long term coal sales contracts must be secured. These contracts serve to provide a stable and assured fuel supply for the primary end user and a predictable and assured market for the miner. The long term sales contracts, coupled with the long term nature of pre-FCLAA leases, provided the miner with the necessary confidence and security upon which to undertake the large capital investment required for the successful development of the large, often remote, federal coal reserves.

Congress, aware of the unique nature of the coal business, deliberately provided for indeterminate term leases so that coal companies would have a reliable and a stable estate upon which to plan their investments.[194] Now, as a result of *Coastal States* and *FMC*, the lessee's estate has been transformed from an indeterminate term lease to a much lesser defeasible interest: one which makes coal production a condition precedent to the continuation of that interest. Moreover, the 1,000% increase levied against the leases is repugnant to the notion of reasonable predictability of lease adjustments envisioned by Congress and bargained for by the lessees when they entered into the coal lease contract. The courts claimed that retroactive adjustment was not employed in these cases;[195] the results of the application of FCLAA to pre-FCLAA leases, however, suggests otherwise.

III. Antecedent Tribal Claims Under the Indian Tribal Claims Commission Act

A. Navajo Tribe of Indians v. New Mexico[196]

1. Overview

The principle established in this case is quite simple: all Indian claims, regardless of their nature, that accrued before 1946 and which were not lodged with the Indian Claims Commission by 1951 are forever barred. In the instant case, the Navajo Tribe lost its only remedy available under the law because of the timeliness of their action in accordance with the Indian Claims Compensation Act (ICCA).[197]

194. The legislative history of the MLLA suggests that Congress chose indeterminate coal leases and phosphate leases primarily to satisfy what Congress perceived to be a greater need for reliability of investment in coal mines and phosphate plants. *See* 51 CONG. REC. 14,945 (Sept. 12, 1914).

195. *FMC*, 816 F.2d at 500.

196. 809 F.2d 1455 (10th Cir. 1987).

197. Navajo Tribe of Indians v. State of N.M., 809 F.2d 1455, 1470-71 (10th Cir. 1987). Indian Claims Commission Act of Aug. 13, 1946, ch. 959, 6O Stat. 1049 (1946) (formerly codified as amended at 25 U.S.C. 70-70V (1976)) (omitted from current code because Indian Claims Commission terminated on September 30, 1978).

2. Facts

Executive Order Number 709 (Original Order),[198] issued by President Theodore Roosevelt, conveyed 1.9 million acres of land to the Navajo Tribe, augmenting the original Navajo Reservation as established by the Treaty of 1868. Subsequently, discoveries revealed that the boundaries of the reservation created by the Original Order intruded upon the boundary of the Jicarilla Apache Reservation. President Roosevelt rectified the problem by issuing Executive Order Number 744 (Amendatory Order),[199] which redefined the lands granted under the Original Order. Both Executive Orders were designed to create temporary reservations of land (allotted lands) which were to be assigned to and occupied by qualified individual Navajo tribal members.[200]

Within five months following the issuance of the Amendatory Order, Congress enacted section twenty-five of the Act of 1908[201] which authorized the President to return all unalloted parcels to the public domain when he was satisfied that all qualified Navajo tribal members had been settled.[202] In December of 1908, President Roosevelt exercised the authority granted under the this Act and issued Executive Order 1,000 (Final Order),[203] restoring to the public domain for further dispo-

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198. The Order states:

> It is hereby ordered that the following-described tract of country in the Territories of Arizona and New Mexico, viz: [description of metes and bounds] is hereby, withdrawn from sale and settlement and set apart for the use of the Indians as an addition to the present Navajo Reservation: *Provided*, That this withdrawal shall not affect any existing valid rights of any person.

Exec. Order No. 709 (1907) *reprinted in* H.R. 1663, 60th Cong., 1st Sess., 2 (1908).

199. The Order states:

> Whereas it is found that the Executive order of November 9, 1907, setting apart certain lands in Arizona and New Mexico as an addition to the Navajo Indian Reservation, conflicts in part with Executive order of November 11, 1907, setting apart certain lands as an addition to the Jicarilla Indian Reservation, N. Mex., said Executive order is hereby so amended that the description of the tract of land set apart as an addition to the Navajo Reservation shall read as follows: [description of metes and bounds].

Exec. Order No. 744 (1907), *reprinted in* H.R. 1663, 60th Cong., 1st Sess., 2-3 (1908).

200. *Navajo*, 809 F.2d at 1458-59.

201. Act of May 29, 1908, ch. 216, 35 Stat. 444 at 457.

202. This legislation was in direct response to the concerns of non-Indian settlers who believed the Indians would hold the land for tribal purposes too long. *Navajo*, 809 F.2d at 1458. The Act of 1908 provided in pertinent part:

> That whenever the President is satisfied that all the Indians in any part of the Navajo Indian Reservation in New Mexico and Arizona created by Executive Orders [709/744] have been allotted, the surplus lands in such part of the reservation shall be restored to the public domain and opened to settlement and entry by proclamation of the President.

Act of May 29, 1908, ch. 216, 35 Stat. 444 at 457.

203. Executive Order Number 1,000 (1908) states:

> It is hereby ordered that the unallotted lands in Tps. 17, 18, 19, 20, and 21 N.,Rs. 5, 6, 7, and 8 W., and Tps. 22 and 23 N., Rs. 6, 7, and 8 W. of the New Mexico principal meridian, withdrawn from sale and settlement and set apart for the use of the Indians as an addition to the Navajo Reservation by Executive orders dated November 9, 1907, and January 28, 1908, be, and the same are hereby, restored to the public domain, except the following-described lands, embracing 110 unapproved allotments, namely: [description of land].

Exec. Order No. 1000 (1908).

Subsequent to Executive Order 1000, President Taft issued Executive Order 1284 on sition, unallotted lands within the reservation created by the Original Order and as amended by the Amendatory Order.[204]

Following the enactment of the ICCA of August 13, 1946,[205] the Navajo Tribe filed a claim seeking compensation under section two of the ICCA for the cession of its lands, which included the lands defined in the Original Order and Amendatory Order, under the Treaty of June 1, 1868.[206] The Tribe successfully argued that it held aboriginal title to the subject lands at the time of the 1868 Treaty and that the United States had paid an unconscionably low price for the land.[207] As a result of the complaint, the United States Court of Claims awarded the Navajo's $14.8 million for the loss sustained.[208]

Thereafter, the Tribe brought this second action in October 1982, in the Federal District Court of New Mexico, seeking a declaratory judgment that the Tribe held equitable title to the unallotted lands that were added to the Navajo reservation by the Original and Amendatory Orders and that the United States breached its fiduciary duty to the Tribe by prematurely restoring the lands to the public domain.[209] The district court dismissed the Tribe's complaint, holding that it lacked subject matter jurisdiction to hear the case because the Tribe's claim against the United States accrued prior to 1946 and, thus, fell within the exclusive jurisdiction of the Indian Claims Commission.[210] At the same time, the Court dismissed the complaint of the private defendants. The Tribe appealed the decision to the Tenth Circuit Court of Appeals. Judge McKay, writing for the court, held that: (1) the Tribe's claim was cognizable exclusively under the ICCA; (2) the Tribe's claim was compensable only by money damages; (3) the claim was barred by the statute of limitations under the ICCA; and (4) the district court properly dismissed the action

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January 16, 1911, restoring the remaining unallotted lands in that reservation to the public domain. Act of May 29, 1908, ch. 216, 35 Stat. 457.

204. *Navajo*, 809 F.2d at 1459. This order was issued in spite of the fact that over one-half of the eligible Navajo allottees had not received allotments. *Id.*

205. *See supra* note 203 and accompanying text. Prior to enactment of the ICCA, Indian tribes could not litigate claims against the United States. *Navajo*, 809 F.2d at 1460. Although the Court of Claims was available to hear claims against the United States, Congress specifically excluded from that court's jurisdiction the power to hear Indian claims based on treaties. *Id. See*, Act of March 3, 1863, ch. 92, 12 Stat. 765 at 767. "The ICCA confined the Commission's jurisdiction to tribal claims that accurred before its 1946 enactment, while it conferred jurisdiction on the Court of Claims to adjudicate any tribal claim accruing after 1946 that would be cognizable in the Court of Claims if the claimant were not an Indian tribe." *Navajo*, 809 F.2d at 1460. Further, Congress limited the period for filing claims to five years. The ICCA further provided that the Commission was to be dismantled 10 years after its creation. Due to the Commission's enormous case load, however, the period to hear pre-1946 claims was extended several times until 1978. *Id.* at 1461.

206. Navajo Tribe of Indians v. United States, 23 Ind. Cl. Comm. 244 (1970).

207. *Navajo*, 809 F.2d at 1461-62.

208. *Id.* at 1462.

209. *Id.*

210. *Id.* In addition, the district court held that, as to the remaining defendants, "under Rule 19(b) of the Federal Rules of Civil Procedure, the action could not proceed against them in the absence of the United States as grantor of the patents through which those defendants derive title." *Id.* at 1462-63.

against the private defendants.[211]

3. The Tenth Circuit Decision

The primary issue addressed by the Tenth Circuit Court was whether the Tribe's claim fell within section 12 of the ICCA. If the claim did qualify as a section 12 action, the district court then lacked jurisdiction over the action against the United States, since the statute of limitations had expired under the ICCA.[212] Second, the Tenth Circuit had to determine whether the district court abused its discretion by dismissing all remaining defendants pursuant to Rule 19(b) of the Federal Rules of Civil Procedure. Since the United States was deemed an indispensable party, it could not be joined and without it the action could not proceed.[213]

a. *"Claim" as Defined Under the Indian Claims Commission Act*

The Tribe argued that the district court erred by categorizing the Tribe's action as a claim within the exclusive jurisdiction of the ICCA, rendering the action susceptible to the statute of limitations in said Act.[214] The Tribe claimed that its title to the land reserved, under the Original and Amendatory Orders, was never extinguished because the President breached the fiduciary requirement not to return the lands to the public domain until the allotment process had been completed.[215] Based on this argument the Tribe interpreted the word "claim," within the meaning of ICCA, to mean exclusively a demand for money for its land.[216] In other words, since "the Commission was only authorized to award money damages for extinguishment of title to Indian lands, this suit, which seeks to establish the Tribe's existing title to land, could not have been entertained before the Commission."[217] Finding the Tribe's argument unpersuasive and that the action did indeed fall under the ICCA the district court dismissed the complaint against the United States for lack of subject matter jurisdiction.[218] The basis of the district court's holding was derived primarily from *Oglala Sioux Tribe of Pine Ridge Indian Reservation v. United States*[219] and *Oglala Sioux Tribe v. Homestake Mining Co.*[220]

The *Oglala* cases resolved issues directly on point with those issues appealed in *Navajo Tribe*. In *Oglala I*, the United States Supreme Court affirmed a $17.1 million award to the Sioux Nation for the "taking" of

211. *Navajo*, 809 F.2d at 1463.
212. *Id.* at 1470.
213. *Id.* at 1471. The remaining defendants were the State of New Mexico, Santa Fe Mining, Norman Ashcroft, Fernandez Company, and Don R. Smouse.
214. *Id.* at 1463.
215. *Id.*
216. *Id.*
217. *Id.*
218. *Id.*
219. 650 F.2d 140 (8th Cir. 1981), *cert. denied*, 455 U.S. 907 (1982) [hereinafter *Oglala I*].
220. 722 F.2d 1407 (8th Cir. 1983).

the Black Hills of South Dakota which were decreed as part of their reservation by an 1877 Act.[221] Following the decision, the Oglala filed suit against several parties including the United States seeking restoration of the lands for which the Sioux Nation received compensation. The Sioux Nation argued that the 1877 Act was unconstitutional and, therefore, void.[222] The district court dismissed the Oglala's action against the United States for lack of subject matter jurisdiction and dismissed the action against the private defendants after concluding that the United States was an indispensable party.[223] In upholding the district court's decision, the Eighth Circuit held that the ICCA created a "one time, exclusive forum" for the resolution of pre-1946 Indian Treaty claims.[224] Although the ICCA's awards are limited to money damages, the court nonetheless determined that "Oglala's action to quiet title, 'as an Indian claim accruing before 1946 and arising under the constitution, [came] within [the] exclusive jurisdiction of the Indian Claims Commission.' "[225]

Based on the persuasive authority presented by the Oglala cases, the court readily adopted the principle that the ICCA bars any action against the United States or third parties seeking the return of tribal lands that were allegedly taken from the Tribe by the unlawful conduct of the United States prior to 1946. The Tribe also argued that the exclusive jurisdiction provision of the ICCA should only apply to the them if it was seeking monetary damages as opposed to the return of its lands. The court found this argument untenable, since the ICCA was enacted specifically to provide a remedy for all possible accrued claims existing before its passage.[226]

In addition, the Tribe attempted to escape the exclusivity of the ICCA by distinguishing its claim from the one asserted in *Oglala I and II*. The Tribe asserted that unlike *Oglala I and II*, which were predicated on the unconstitutional taking for which the Tribe had already received compensation, the instant case was one where the Navajo's title was never extinguished and, therefore, its cause of action did not raise the unconstitutional taking issue.[227] In essence, the Tribe argued that unconstitutional takings claims are not cognizable under the ICCA. The

221. *Navajo*, 809 F.2d at 1463. *See* United States v. Sioux Nation, 220 Ct. Cl. 442, 601 F.2d 1057 (1979), *aff'd*, 448 U.S. 371 (1980).

222. *Navajo*, 809 F.2d at 1463. *See Oglala I*, 650 F.2d at 141-42.

223. *Id. See Oglala I*, 650 F.2d at 143-44.

224. *Oglala I*, 650 F.2d at 143.

225. *Navajo*, 809 F.2d at 1464 (quoting *Oglala I*, 650 F.2d at 143). The *Oglala II* case involved an action against a private defendant named in *Oglala I* and was dismissed on the basis of res judicata. *Oglala II*, 722 F.2d at 1411.

226. *Navajo*, 809 F.2d at 1465-66. Congress was concerned that some meritorious Indian claim might be inadvertently omitted from the Commission's jurisdiction. Therefore, it recommended that the jurisdiction conferred upon the Commission be as broad as possible. "The bill would establish . . . a body, responsible to the Court of Claims and the Supreme Court of the United States with respect to all legal controversies. It would require all pending Indian claims of whatever nature, contractual and non-contractual, legal and nonlegal, to be submitted to this fact- finding body within five years, and would outlaw claims not so submitted." *Id.* at 1465.

227. *Id.* at 1464.

court found this argument unpersuasive, and concluded that the Tribe's claim was cognizable under the ICCA, since the taking was one which arose under executive orders of the President. Claims which arise under executive orders are specifically covered under section 2 of the ICCA and, therefore, are within the jurisdiction of the Commission.[228] Moreover, as illustrated in *Yankton Sioux Tribe v. United States*,[229] the ICCA "clearly granted jurisdiction to litigate just what the Navajo Tribe would like to litigate in this case - validity of Indian title to land."[230] As in *Yankton*, if the Tribe here had timely brought its actions under the ICCA, its sole remedy would have been an award of money damages.[231]

Finally, the Tribe attempted to categorize its claim as an action to quiet title.[232] Such action, however, invokes the Quiet Title Act of 1972, which contains a twelve year statute of limitations that was exceeded by the Tribe in the instant case.[233]

b. *Indispensability of the United States*

The Tribe argued that the district court erred in holding that the claim against the remaining defendants must be dismissed pursuant to Federal Rule of Civil Procedure 19(b). Relying on Rule 19(b), the district court opined that since the action against the United States had failed and given that the United States was deemed an indispensable party to the litigation, the action against the private defendants should also be dismissed. Implementation of Rule 19(b) is largely left to the discretion of the trial court. Therefore, the reviewing court will disturb the trial court's holding only if it finds that the trial court abused its

228. *Id.* at 1471. Under section 2 of the ICCA the Commission was empowered to hear cases falling under the following five broad categories:

> (1) claims in law or equity arising under the constitution, laws, treaties of the United States, and Executive Orders of the President; (2) all other claims in law or equity, including those sounding in tort, with respect to which the claimant would have been entitled to sue in a court of the United States if the United States was subject to suit; (3) claims which would result if the treaties, contracts, and agreements between the claimant and the United States were revised on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether of law or fact, or any other ground cognizable by a court of equity; (4) claims arising from the taking by the United States, whether as the result of a treaty of cession or otherwise, of lands owned or occupied by the claimant without the payment for such lands of compensation agreed to by the claimant; and (5) claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity.

25 U.S.C. § 70(a) (1976).

229. 272 U.S. 351 (1926).

230. *Navajo*, 809 F.2d at 1466. In *Yankton*, the Tribe claimed title to a piece of land known as the Red Pipe-Stone Quarry. It sought judicial reformation of its title, not compensation for the taking of the land by the United States. The Tribe prevailed in that the Supreme Court recognized that it owned the property in fee. However, because the land was subsequently conveyed to bona fide third party purchasers by the United States, the Court ordered monetary compensation. Yankton v. United States, 272 U.S. 351 (1926).

231. *Navajo*, 809 F.2d at 1467.

232. *Id.* at 1469. The Tribe argued in the alternative, that since its claim was not for monetary damages it had the right to classify its action as a Quiet Title Action, which falls outside the bounds of the ICCA, and thus vests the district court with subject matter jurisdiction.

233. *Navajo*, 809 F.2d at 1469.

discretion.[234] Here, the Tenth Circuit court found no such abuse and affirmed the lower court's dismissal.[235] The Tenth Circuit adopted the trial court's reasoning that the Tribe's claim against the remaining defendants was, in reality, a challenge to the validity of the transaction by which the United States assumed title to the subject land. "It is a fundamental principle of the law that an instrument may not be cancelled by a court unless the parties to the instrument are before the court."[236]

The Tenth Circuit was satisfied with the lower court's inquiry as to whether in "equity and good conscience" it could find the United States indispensable. The Tenth Circuit found that to avoid potential prejudice both to the interest of the United States and those of the other defendants, dismissal of the remaining defendants was required.[237]

The court conceded, however, that by affirming the dismissal, the tribe had no alternative adequate remedy at law. The court reasoned, however, that the weight afforded this particular factor should be minimal because it arose from the tribe sleeping on its rights and not from the actions of a third party.[238]

4. Conclusion

The court was compelled to uphold the legislative intent behind the ICCA, in which the Act was established to be the exclusive remedy for Indian claims arising before 1946.[239] As the ICCA's sponsor stated:

> [L]et us see that the Indians have their fair day in court so that they can call the various governmental agencies to account on the obligations that the federal Government assumed. And let us make sure that when the Indians have their day in court, they have an opportunity to present all their claims of every kind of shape, and variety, so that this problem can truly be solved once and for all without coming back to haunt us or our successors.[240]

Here, the Navajo tribe had a claim that was cognizable only under the ICCA; however, by sleeping on its rights and not bringing its action timely, it missed its only window of opportunity provided under the law.

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234. *Id.* at 1471; *See also* Glenny v. American Metal, 494 F.2d 651 (10th Cir. 1974).

235. *Id.* at 1476.

236. *Id.* at 1472 (quoting Terra v. Morton, 360 F. Supp. 452 (D.N.M. 1973), *aff'd*, 498 F.2d 240 (10th Cir. 1974)).

237. *Id.* at 1472. The trial court found:

> (1) the claims against the non-federal parties rested on documents of title or possession derived from the United States; (2) that the tribe seeks to cancel all such instruments; (3) that this court has affirmed the principle that all parties to an instrument must be present, else it may not be cancelled; (4) that, more specifically, validity of a deed or patent issued by the Federal Government cannot be questioned in suit by a third party against the grantee; and (5) that the Eighth Circuit Court has found indispensability in analogous circumstances.

Id.

238. *Id.* at 1473.

239. *Id.* at 1465.

240. 92 CONG. REC. H5312 (1946) (statement of Rep. Jackson, Chairman, House Committee on Indian Affairs).

IV. FERC INTERPRETATION

A. Martin Exploration Management Co. v. FERC[241]

1. Overview

This case presents a challenge by natural gas producers to the Federal Energy Regulatory Commission's (FERC) natural gas pricing regulations. Specifically challenged are those provisions which provide that natural gas which qualifies for both a ceiling price or regulated price, and a deregulated price, as established by the complex statutory scheme in the Natural Gas Policy Act of 1978 (NGPA)[242] must be deemed to be deregulated for purposes of price determination.[243]

2. Facts

In the NGPA, Congress developed an intricate pricing system by which natural gas was divided into numerous pricing categories and assigned a maximum lawful price.[244] In response to the pricing system embodied in section 121 of the NGPA, FERC issued a notice of proposed rule making to institute partial decontrol for intrastate gas, generally, and gas produced from "new wells,"[245] defined as operations which commenced on or after February 19, 1977, specifically.[246] This

241. 813 F.2d 1059 (10th Cir. 1987).

242. 15 U.S.C. §§ 3301-3432 (1978). Specifically, the producers challenged FERC Order 406 codified at 18 C.F.R. § 270.208 (1986) which provides in pertinent part that:

> First sales of natural gas that is deregulated natural gas . . . is price deregulated and not subject to the maximum lawful prices of the NGPA, regardless of whether the gas also meets the criteria for some other category of gas subject to a maximum lawful price under Subtitle A of Title I of the NGPA.

Id.

243. 813 F.2d 1059 (10th Cir. 1987).

244. *Martin*, 813 F.2d at 1062. The NGPA is a comprehensive esoteric scheme outlining Congress' intent to settle the market and price imbalance that have historically plagued the intrastate and interstate gas markets. In 1938 Congress enacted the Natural Gas Act (NGA), Pub. L. No. 75-688, 52 Stat. 821 (1938) (codified as amended at 15 U.S.C. 717-717W (1976)). "The NGA was enacted in response to reports suggesting that the monopoly power of interstate pipelines was harming consumer welfare." *Martin*, 813 F.2d at 1062 (quoting Public Service v. Mid-Louisiana, 463 U.S. at 327 (1983)). "The NGA authorized the Federal Power Commission (FPC was superceded by FERC in response to the Department of Energy Organization Act of 1977, 42 U.S.C. § 7101, et seq., 7134) to establish such price ceilings for the sale of interstate gas for resale as were 'just and reasonable.'" *Martin*, 813 F.2d at 1062; (citing in part 15 U.S.C. § 717(c)(a) (1976)). The NGA did not regulate the price of gas sold in intrastate markets. This resulted in intrastate gas commanding higher prices than the regulated interstate gas, which created an artificially high demand for interstate gas and a coincident shortage in the interstate market.

In response to this market imbalance, Congress and the President endeavored to establish legislation providing for predictable and steady supplies of natural gas in both the intrastate and interstate gas markets. Their efforts resulted in the NGPA of 1978 which "did not adopt either the uniform regulation or the complete deregulation approach in their entirety; rather, the bill was the 'careful reconciliation of two strong, but divergent, responses to the natural gas shortage.'" *Id.* at 1063; (quoting Public Service v. Mid-Louisiana, 463 U.S. at 331 (1983)).

245. *Martin*, 813 F.2d at 1063. The NGPA defines a new well as one whose surface drilling began on or after February 19, 1977, or which was deepened by at least 1,000 feet after that date. *See* 15 U.S.C. § 3301(3) (1978).

246. Section 121 of the NGPA defines a portion of the complicated pricing system. In

proposed rule making was entitled Order Number 406.[247] Order 406 essentially assigned a deregulated price to gas that qualifies for both a regulated incentive price and deregulated price.

The price categories established under the NGPA are not mutually exclusive, "a particular sale may be 'dually qualified' within a 'new' or 'old' gas category and also a 'difficult to produce category.' "[248] This provides the producer with two pricing categories from which to choose. Each category is defined and a procedure for price determination is set out in the statute.[249] FERC's proposed rule would eliminate the producers pricing election.

The purpose of the regulated incentive price scheme was to increase the availability of difficult to produce gas and encourage production from otherwise marginal wells.[250] FERC construed this policy to mean that natural gas producers should be denied access to a still-regulated category if such access would result in a higher price over a deregulated gas price.[251] Several parties contested FERC's proposed order, but FERC upheld the essence of Order No. 406 when it promulgated Order Number 406(A).[252] Order 406(A) again stated that whenever gas qualifies for a deregulated and regulated price, the deregulated price category would prevail.[253]

Unhappy with FERC's rehearing results, the gas producers sought judicial review to the Tenth Circuit Court of Appeals pursuant to the judicial review provision found in the NGPA.[254] The Tenth Circuit affirmed in part and reversed in part, holding that if natural gas qualifies under more than one pricing category or for an exemption from such a pricing category, then the statute requires application of the category that would result in the highest price. This means that if gas qualifies for both a regulated and deregulated category, the category which yields the highest price shall prevail. The court also ruled that the application of a special rule that limits the price obtainable pursuant to an indefinite price escalator clause to any indefinite price escalator clause in existing or successor intrastate contracts that was or would have been in excess of one dollar per million BTU's on December 31, 1984, was a reason-

essence the NGPA "divides natural gas production into numerous categories that are distinguished by the date that production began from a well or the particular type of drilling involved." *Martin*, 813 F.2d at 1063. The three gas categories are "old" gas, "new" gas, and "difficult to produce" gas.

247. *See supra* note 242.

248. *Martin*, 813 F.2d at 1064.

249. *Id.* at 1064-65; *see also* NGPA § 503, 15 U.S.C. § 3413 (1978).

250. *Martin*, 813 F.2d at 1065.

251. *Id.* at 1066. This case centers around the interpretation of § 121(b)(5) which states: "If any natural gas qualifies under more than one provision of this subchapter providing for any maximum lawful price or for any exemption from such a price with respect to any first sale of such natural gas, the provision which could result in the highest price shall be applicable." *See* 15 U.S.C. § 3311(b)(5) (1978).

252. *Martin*, 813 F.2d at 1065; (Order 406-A, RM 84-14-000, III FERC Stats. Regs. (CCH) 30,614 (November 16, 1984)).

253. *Martin*, 813 at 1072. The court also reviewed FERC Order 406(B), which addressed the application of price increases under indefinite price escalator clauses.

254. *Id.* at 1065.

able interpretation of the statutes that deregulated intrastate, natural gas.[255]

3. The Tenth Circuit Opinion

The court addressed (1) whether Section 101(b)(5) of the NGPA gives natural gas producers the inherent right to elect any applicable NGPA pricing category, regulated or deregulated, that would result in the highest price for its product; and (2) whether the commission's regulation regarding the impact of Indefinite Price Escalator Clauses found in gas purchase contracts on otherwise decontrolled sales of gas was reasonable in light of the congressional intent underlying the NGPA.[256]

a. *Standard Of Review For FERC Actions*

The threshold inquiry concerning the standard of review applicable to FERC interpretations of the NGPA by the court is whether Congress has addressed the precise issue. If Congressional intent is unambiguous, the court, as well as the agency, must give it effect.[257] It is the traditional stance of the court to defer to the agency's position when it has chosen between alternative possible constructions of an ambiguous statute, especially in a highly complex statutory design as is found in the NGPA.[258] The court stated that "[w]here the plain words of the statute do not answer a particular question, the agency interpretation must be reasonable, but it need not be the only reasonable interpretation or the interpretation that the reviewing court would adopt."[259] The court found FERC's regulations to be in direct contravention to the clear intent of Congress, and therefore held FERC's regulation void, as it was applied to incentive price determination.[260]

b. *Interpretation of NGPA Pricing System*

Gas producers argued that Congress, by enacting section 101(b)(5) of the NGPA, expressly conferred upon producers the right to select the highest price its gas could achieve under the applicable pricing categories. They also argued that the commission's regulation automatically eliminated this statutory right of election.[261] The court, finding the producer's argument dispositive, concluded that Congress "anticipated precisely" the dual category pricing question in section 101(b)(5), and that FERC could not deny gas producers a right which Congress specifically

255. *Id.* at 1059, 1065.
256. *Id.* at 1065.
257. *Id.* (quoting Chevron v. Natural Resources, 467 U.S. 837, 842-843 (1984)).
258. *Id. See also* Union Texas v. FERC, 721 F.2d 146 (5th Cir. 1983).
259. *Id. See, e.g.*, Chemical v. Natural Resources, 470 U.S. 116, 125 (1985).
260. *Id.*
261. *Id.* at 1066. FERC interprets the "cease to apply" language of § 121 of NGPA, that applies to the deregulation of certain categories of gas, to mean that "if gas has been determined to be in one of the listed categories, there is no longer a ceiling price for such a gas even if the gas has been determined to be in a category that is not listed." *Id.*

provided.[262]

c. *Incentive Pricing Under Section 101(b)(5)*

In deciding an issue of first impression, the Tenth Circuit held that section 101(b)(5) applied to those categories of gas "providing for any maximum lawful price or for any *exemption* from such a price."[263] FERC argued that reference to "any exemption from such a price" does not refer to deregulated gas, but allows FERC to establish special ceiling prices in particular situations.[264] The court responded that FERC's ability to establish special ceiling prices in certain situations is covered by section 101(b)(5); however, the court also declared that section 101(b)(5) applied to deregulated gas.[265]

The producers argued that Congress established higher ceiling prices for certain categories of natural gas, i.e., those gases that are considered difficult to produce, for the express purpose "[of assuring] adequate supplies of natural gas at fair prices."[266] Two of these categories, stripper wells and tight formation producing gas, fall within dual pricing categories: incentive pricing under sections 108 and 107(c)(5), respectively; and, deregulated prices under sections 102 and 103.[267] When faced with such a pricing dilemma, the producers argued that section 101(b)(5) allows them to elect the provision which could result in the highest price, assuming the underlying contract permits such an election. Any other interpretation, producer's argued, eliminating the pricing election would circumscribe the intent of Congress.[268] Embracing the producers analysis, the court concluded that FERC's orders rested on the erroneous assumption that gas can be determined to qualify for a particular category without going through the specific determination procedure set forth in the statute. The court therefore concluded that FERC's interpretation could not be upheld.[269]

The court noted that the NGPA was a hard fought compromise

262. *Id.* at 1066.
263. *Id.* at 1067 (emphasis supplied).
264. *Id.*
265. *Id.* In support of its position the court points out that its interpretation of the word "exemption" is also consistent with the meaning of "exemption" as found throughout the NGPA, specifically § 101(b)(9), which provides: "In the case of . . . any price which is established under any contract for the first sale of natural gas which is *exempted* under Part B of this subchapter from the application of a maximum lawful price under this subchapter, such maximum lawful price, or such exemption from such a maximum lawful price shall not supercede or nullify the effectiveness of the price established under such contract." *Id.* (emphasis added). *See also* 15 U.S.C. § 3311(b)(9) (1978); Pennzoil v. FERC, 645 F.2d 360, 374 (5th Cir. 1981), *cert. denied*, 454 U.S. 1147 (1982).
266. *Martin*, 813 F.2d at 1070 (quoting Transcontinental v. State, 106 S. Ct. 719 (1986)).
267. *Id.* at 1064.
268. When addressing Section 121(b)(5) the court quoted Senator Jackson who noted that it "stands for the proposition that a producer may claim or apply for the highest price to which he is entitled. It does not imply an administrative duty to compel a State or Federal agency to search through the various price classifications under the Act and find the permissible price." *Id.* at 1070 (quoting 124 CONG. REC. 29,109 (1978)).
269. *Martin*, 813 F.2d at 1070.

"and a careful reconciliation of two strong, but divergent responses to the natural gas shortage."[270] The overall purpose of the Act was "to provide incentive prices to encourage exploration and development of new reserves in the short-term, and to gradually substitute market forces for regulated prices by phasing in deregulation in 1985 and 1987."[271] The court emphasized that the NGPA is not exclusively a deregulation statute, but rather a combination of phased deregulation and incentive pricing, that serves to maximize gas production from all phases of the gas exploration effort. The general wisdom was that natural gas prices would rise steadily in the future.[272]

> Prices have actually dropped drastically, however, and this accounts for the anomalous situation we now see: producers seek the regulated ceiling price rather than the deregulated market price. As enunciated in section 101(b)(5), the category which could result in the highest price is available to producers. Hence, "gas that has been qualified in both a regulated and deregulated category will now be sold at the regulated price until the market price rises above the ceiling price." Therefore, provided the market price remains below the ceiling price section 101(b)(5) will have the unanticipated effect of operating as a price floor for producers.[273]

The court also remarked that Congress surely possessed the authority to amend this perhaps unintended application of the NGPA, however, since Congress has to date refrained from doing so, the courts' only role is "simply to give effect to the words Congress has chosen."[274] Accordingly, the court held that "FERC acted contrary to the intent of Congress as evidenced in the unambiguous language of section 101(b)(5)."[275]

d. *Application of Indefinite Price Escalator Clauses*

The court also reviewed a segment of FERC Order 406-B, concerning the deregulation of intrastate gas.[276] The relevant statutory provision, 15 U.S.C. § 3331(a)(3),[277] "deregulates intrastate gas that is sold under a contract that had set a price in excess of $1.00 on December 31,

270. *Id.* at 1070 (quoting Public Service v. Mid-Louisiana, 463 U.S. at 331).
271. *Id.* at 1070 (quoting FERC Reg. 49 Fed. Reg. at 36,401; § 49 Fed. Reg. at 46,878).
272. *Id.*
273. *Id.* at 1071.
274. *Id.* at 1072.
275. *Id.*
276. *Id.* at 1072; Rule 406-B, issued February 15, 1985, RM 84-14000-30, FERC (CCH) 61,152, adopts rules under NGPA § 121(a)(2), 15 U.S.C. § 3331(a)(3); § 121(e), 15 U.S.C. § 3321(e) and 15 U.S.C. § 3315 (b)(3)(A).
277. Section 121(a)(3) provides for the deregulation of "natural gas sold under an existing contract, any successor to an existing contract, or any rollover contact if (A) such natural gas was not committed or dedicated to interstate commerce on November 8, 1978; and (B) the price paid for the last deliveries of such natural gas occurring on December 31, 1984, or, if no deliveries occurred on such date, the price that would have been paid had deliveries occurred on such date is higher than $1.00 per million BTU's." 15 U.S.C. § 3331(a)(3).

1984."[278]

Of the gas producers involved in this litigation, only Shell Oil Corporation contested FERC Order 406-B. This Order, which essentially allowed for any gas found to be sold at a price established under an indefinite price escalator clause, returns that gas to a controlled status thus subjecting its price to the limitations set forth in Sections 121(e) and 105(b)(3)(A) of the NGPA.[279] Congress enacted these statutes in response to the fear that "following deregulation, the operation of indefinite price escalator clauses . . . could operate to increase rapidly intrastate gas prices following deregulation."[280]

Shell concurred with the commission that the pricing rule in section 105(b)(3)(A) operates to limit only those price increases created by an indefinite price escalator clause. Shell's position departs from that of the Commission on the issue of what gas category is subject to the pricing rule. Shell urged a narrow interpretation of the statute that would provide that "the limitation applies to intrastate contracts only 'if they were above $1.00 on December 31, 1984 *solely by reason of indefinite price escalator clauses*.' "[281] This argument advanced by Shell was found by the Commission to be inconsistent with the governing statutory provisions and the legislative history.[282] FERC concluded "that the limitations imposed by sections 121(e) and 105(b)(3)(A), apply to any indefinite price escalator clause in an existing or successor intrastate contract that is, or would have been, in excess of $1.00 per MMBTU's on December 31, 1984."[283]

The crucial difference between the two positions is that the "FERC interpretation does not focus on how the price was established on December 31, 1984, while Shell would limit the application of the special rule to those circumstances in which the indefinite price escalator clause established the price on December 31, 1984."[284] The court concluded that FERC's interpretation of the statute was reasonable and that the language of the statute did not require the interpretation promoted by Shell.[285]

5. Conclusion

While oil and gas producers struggle with the unprecedented low gas prices plaguing the contemporary market, this case reaffirms the

278. *Martin*, 813 F.2d at 1072.
279. *Id.* at 1073. Sections 121(e) and 105(b)(3)(A) serve to limit the price that can be established by an indefinite price escalator clause.
280. *Id.* at 1072-73; quoting 124 CONG. REC. 38,365 (1978) (Statement of Rep. Dingell).
281. *Id.* at 1073 (quoting Supplemental Initial Brief of Shell Offshore Inc. and Shell Western E & P, Inc. in Brief for Appellant at 12, Martin Exploration Management Co. v. FERC, 813 F.2d 1059 (10th Cir. 1987) (emphasis supplied)).
282. *Id.* For example, the conference report makes it clear that *how* the December 31, 1984, price exceeds $1.00 is irrelevant.
283. *Martin*, 813 F.2d at 1073 (quoting FERC 49 Fed. Reg. at 50, 641).
284. *Id.* at 1073.
285. *Id.* at 1074.

producers' right to elect whichever gas category could result in the highest price for its product. Such ruling serves (1) to encourage drilling and production of natural gas, particularly tight gas sands which are found in ample supply in certain areas of the Rocky Mountain Region of the United States; and (2) promotes the Congressional intent to establish a viable gas market characterized by predictable supplies and prices of natural gas.

CONCLUSION

In general, the natural resource extraction industry did not fare well in a number of cases decided during this survey period. In *Park County*, the court found that the paper transaction of issuing an onshore federal oil and gas lease does not automatically trigger the EIS requirement found in NEPA. Once a lease has been issued, however, virtually unrestricted court access is available to claims pursued in the name of NEPA. In *Coastal States* and *FMC*, the court decided that a coal lease subject to readjustment will be adjusted according to the law in effect at the time of readjustment, regardless of how drastic it changes the terms and conditions of the original coal lease contract. In *Navajo Tribe of Indians*, the court held firm to the congressional intent behind the Indian Claims Commission Act, by holding that any Indian claim arising before 1946 and not timely filed with the Commission is forever barred. Finally, in *Martin Exploration Management Co.*, the court concluded that incentive natural gas pricing means that producers may elect the highest price for its natural gas if such gas falls into both a regulated and deregulated category.

It seems evident that based on the cases analyzed during this survey period, the Tenth Circuit Court will not be accused of showing favoritism to the extractive industries that do business within its jurisdictional borders. It appears that the narrow statutory construction practiced by the court in the cases discussed herein, requires future industry litigants to approach the Tenth Circuit forum with much care and caution.

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ADDENDUM

After the preceeding article was accepted for publication, the United States Supreme Court reversed the Tenth Circuit's *Martin Exploration Management Co. v. FERC*[1] decision in *FERC v. Martin Exploration Management Co.*[2] The entire Court joined in Justice Brennan's opinion except Justice White who took no part in the decision. The Court upheld FERC's interpretation[3] of The Natural Gas Policy Act of 1969 (NGPA).[4]

The NGPA established various categories of natural gas for the purposes of phased price deregulation and also set up a three stage elimination of price ceilings.[5] Recognizing that many of the catagories overlapped, Congress provided in § 101(b)(5) of the NGPA "[i]f any natural gas qualifies under more than one provision of this title providing for any maximum lawful price or for any exemption from such a price with respect to any first sale of such natural gas, the provision which could result in the highest price shall be applicable."[6]

Many gas producers had entered long term contracts containing a two tiered pricing structure. If the gas was regulated the contract price was usually near the ceiling allowed by law; if the gas was deregulated the contract price was based on market price.[7] Because market prices had plunged below the regulated price ceilings, the producers stood to reap higher prices if their gas was classified as regulated rather than deregulated.[8]

The Court held the language of the NGPA "[i]f any natural gas qualifies under more than one provision of this title . . . the provision which could result in the highest price shall be applicable" meant that where gas could be classified as regulated or deregulated it would be classified as deregulated.[9] The Court reasoned that a deregulated classification *could* result in a higher price than a regulated price.[10] The Justices rejected the Tenth Circuit's reasoning that "could" in § 101(b)(5) meant that the gas must be classified according to the highest price that could be obtained at any particular point in time.[11] Reasoning that "the conditional meaning of 'could' makes perfect sense if the statute does not refer to particular contracts but rather to the generic situation of parties in a precontract state: the provision that allows the parties to contract to the highest conceivable price applies."[12]

After examining the legislative history of the NGPA, the Court

1. 813 F.2d 1059 (10th Cir. 1987).
2. 108 S.Ct. 1765 (1988).
3. FERC Order 406 codified at 18 C.F.R. § 270.208 (1986).
4. 15 U.S.C. § 3311(b)(5) (1978).
5. 108 S.Ct. at 1768.
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.* at 1769.
12. *Id.*

found the Tenth Circuit's decision contrary to the whole thrust of the Act because it would have the effect of changing a statutory scheme of price ceilings and deregulation to one of unintended price supports for producers.[13] No one involved in the legislative process suggested producers should receive more than deregulation would allow. Deregulation was seen as "the maximum economic incentive" for producers.[14]

Finally, the Court rejected the Tenth Ciruit's decision because it would make the applicable provision of the NGPA vary from producer to producer, contract to contract and day to day depending on the market price of gas for any particular type of gas.[15] The Court found "[t]he statute is phrased in a general way that implies that all gas fitting the same overlapping provisions will be treated the same, and one would normally expect that a regulatory regime would apply uniformly rather than varying in such a chaotic fashion."[16] The Justices found no Congressional intent that the classification of gas should turn on contractual terms.[17]

13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*