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THE MANAGEMENT OF OIL AND GAS LEASING ON FEDERAL WILDERNESS LANDS

*Stephen S. Edelson**

I. INTRODUCTION

In the last five years¹ a heated controversy has arisen over the extent to which federal lands with wilderness qualities² should be dedicated to oil and gas development. Many of our most cherished wildlands coincide with geological formations that have recently emerged as tempting targets of our prodigious appetites for profit and energy. This conflict calls for caution and a rational selectivity in allowing energy development in wilderness. The current administration has nevertheless indicated a willingness to lease nearly any wilderness land that is sought for oil and gas development. Moreover, the government frequently issues oil and gas leases in wilderness after only cursory environmental analysis and without adequate environmental protection in the lease terms. Regretably, these lands are leased at subsidized prices, which only increases the incentive to develop rather than preserve lands with wilderness qualities.

The broad conflict concerning the management of these lands recently has emerged as a legal dispute challenging the government's leasing procedures. Specifically, the dispute is over which of three available leasing approaches conforms with and satisfies decisionmaking requirements of the National Environmental Policy

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1. This article is current as of April 1983.

2. What constitutes "wilderness qualities" varies from person to person, but most people would probably agree that wilderness is pristine, scenic in some sense, and offers solitude. Quoting Congress' definition of wilderness in the Wilderness Act is apparently *de rigueur* for any article on the topic:

Act (NEPA).³ These three approaches, described below, may be termed "Environmental Impact Statement leasing," "Environmental Assessment leasing," and "Contingent Rights Stipulation leasing."

NEPA requires federal agencies to prepare an Environmental Impact Statement (EIS) before taking any action that may have significant environmental impacts.⁴ Essentially, an EIS is a detailed statement of any environmental impacts of an action; it requires thorough study of such possible impacts. It would appear that any leasing proposal involving large wilderness acreages requires an EIS under NEPA. The government, however, has preceded even its largest leasing proposals, covering up to a million acres each, by preparing only Environmental Assessments (EAs). EAs are documents that certify that a given leasing proposal does not have potential for significant environmental impact. In the context of public lands leasing, the government agencies' justification for a finding of no significant impact in certifications rests on lease stipulations which regulate the conduct of oil and gas drilling operations by lessees. This approach to leasing is referred to as "EA leasing." The government has recently initiated a third approach to leasing in which it avoids initial environmental analysis by conditioning leases with the Contingent Rights Stipulation (CRS).⁵ The CRS itself purports to

A wilderness, in contrast with those areas where man and his own works dominate the landscape, is hereby recognized as an area where the earth and its community of life are untrammelled by man, where man himself is a visitor who does not remain. An area of wilderness is further defined to mean in this chapter an area of undeveloped Federal land retaining its primeval character and influence, without permanent improvements or human habitation, which is protected and managed so as to preserve its natural conditions and which (1) generally appears to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable; (2) has outstanding opportunities for solitude or a primitive and unconfined type of recreation; (3) has at least five thousand acres of land or is of sufficient size as to make practicable its preservation and use in an unimpaired condition; and (4) may also contain ecological, geological, or other features of scientific, educational, scenic, or historical value.

16 U.S.C. 1131(c) (1976 & Supp. IV 1980).

In this article, the term "designated wilderness" refers to lands in the National Wilderness Preservation System (NWPS). "Wilderness candidate" refers to the several categories of land that have been administratively or congressionally classified for possible inclusion in the NWPS. These include "RARE II," "recommended wilderness," and "further planning areas," "Bureau of Land Management wilderness study areas," and "congressionally-designated wilderness study areas." See *infra* text and notes at notes 20, 25-38. The term wilderness is used generically to mean designated wilderness, wilderness candidates, and all other lands with wilderness qualities.

3. 42 U.S.C. §§ 4321-4361 (1976 & Supp. IV 1980).

4. 42 U.S.C. § 4332(2)(c) (1976 & Supp. IV 1980).

5. 47 Fed. Reg. 18,158 (April 28, 1982).

make all of a lessee's development rights contingent rather than vested, thereby postponing the need for environmental analysis until a lessee has prospected on his lease and actually seeks permission to begin drilling. These three leasing approaches differ dramatically in their potential for wilderness protection and will be discussed in more detail below.

The introductory section of this article explains the sources of the present leasing and management conflict by providing background information on the administrative organization of wilderness lands, the process of development of oil and gas leases, and the system for issuing leases. The current leasing situation and the NEPA compliance issue are presented next. Part III examines *Sierra Club v. Peterson*, a federal district court decision affirming the government's reliance on the EA leasing approach to large-scale wilderness leasing.⁶ Part III addresses the new Contingent Rights Stipulation leasing system. The section questions the CRS approach and its purported ability to fulfill the requirements of NEPA, and further points to its inefficacies and other defects as a land management tool. The remainder of the article treats the implications of the available wilderness leasing policies. Specifically, section IV argues that the government's leasing approach unwisely aims at the wholesale leasing of virtually all sought-after wilderness areas without sufficient attention to environmental analysis, environmentally protective lease stipulations, or internal contradictions in agency policy. Section V proposes that future leasing in wilderness occur only on a truly selective basis with thorough environmental analysis. It also proposes a rate increase for leasing, at least in wilderness areas, as a sound "free market" approach toward attaining rational selectivity in the leasing of public lands for development.

II. BACKGROUND TO THE PRESENT CONTROVERSY

Interest in developing wilderness lands for oil and gas increased dramatically at the close of the 1970's. Since that time, the future of our pristine lands amidst development pressure has been a controversy of front-page proportions. The chief factor responsible is the drastic rise in the price of oil and other energy sources, which increased the economic attractiveness of domestic oil and gas production.⁷ A second factor is the impending deadline for new leasing in

6. 17 ERC 1449 (D.D.C. March 31, 1982), *appeal docketed*, No. 82-1695 (D.C. Cir. August 19, 1982).

7. Sumner, *Oil and Gas Leasing in Wilderness—What the Conflict is About*, *Sierra*, at 28,

designated wilderness areas set by the Wilderness Act of 1964.⁸ Under the Wilderness Act, no new leasing may occur in designated wilderness after the end of 1983.⁹ Finally, the federal government recently has encouraged the domestic production of oil for national security and balance of trade reasons.¹⁰ These factors have been translated into federal policies favoring oil and energy development on public lands. While both the Carter and Reagan administrations have maintained such policies, the current administration has abandoned its predecessor's attempt to minimize development on the small fraction of federal land that has wilderness qualities. The Reagan administration is the first, for example, to attempt oil and gas leasing in designated wilderness areas.¹¹

Unfortunately, some of the most precious and ecologically vulnerable wildlands are also areas of high oil and gas resource potential. This is true for the fragile tundra of the Alaskan North Slope, which is close to the rich Prudhoe Bay oil fields.¹² It is also the case in the Western Overthrust Belt, a geological formation that runs in the continental United States along the eastern edge of the Rocky Mountains from Montana to New Mexico.¹³ The Overthrust Belt is an area of complex geology, where oil is generally found only in small deep pockets. Due to the geology and the terrain, oil production here tends to be particularly costly and environmentally destructive.¹⁴

The wilderness leasing controversy is by no means restricted to Alaska and the West. Oil and gas leases are pending in the majority of states east of the Mississippi that have national forestland.¹⁵ The

31 (May/June 1982). The barrel price of domestic crude oil increased from \$3.39 in 1972 to \$33.76 in July 1981. Edsall, *Boom & Bust: Economic Ills Strain Alliance of Oilmen, GOP*, Washington Post, Apr. 25, 1983 at 1, col. 1.

8. 16 U.S.C. §§ 1121-1136 (1976 & Supp. IV 1980).

9. 16 U.S.C. § 1133(d)(3) (1976 & Supp. IV 1980).

10. U.S. DEPT OF THE INTERIOR, *A YEAR OF CHANGE: TO RESTORE AMERICA'S GREATNESS* Jan. 1981, cover letter, 1 (hereinafter cited as DOI REPORT 1981).

11. 46 Fed. Reg. 27,734 (May 21, 1981) (planned leasing in Washakie Wilderness, Wyoming); 46 Fed. Reg. 27,735 (May 21, 1981) (planned leasing Bob Marshall, Great Bear, Scapegoat, and Mission Mountains Wildernesses, Montana).

12. *See, e.g.*, Alaska Lands Act P.L. 96-487 (December 2, 1980) §§ 1001-1011, 16 U.S.C. 3141-3151 (Supp. IV 1980).

13. *See, e.g.*, ENVIRONMENTAL ASSESSMENT: OIL AND GAS LEASE DEVELOPMENT, MT. VIEW, EVANSTON & KAMAS RANGER DISTRICTS, U.S. DEPT AGRICULTURE FOREST SERVICE, WASATCH-CACHE NATIONAL FOREST 13-25 (January 1, 1982) [hereinafter cited as HIGH UNITAS EA].

14. *Id.*

15. There is also an Eastern Overthrust Belt, but it is less significant and less promising than the Western Overthrust Belt. *See* Nelson, *Oil and Gas Leasing On Forest Service Lands: A Question of NEPA Compliance*, 3 PUB. LAND L. REV. 1 (1982).

Forest Service has, for example, recently attempted to lease 150,000 acres of the Hoosier National Forest in Indiana¹⁶ and 273,000 acres of the Green Mountain National Forest in Vermont.¹⁷

A. Wilderness Administrative Structure

The federal government owns 410 million acres of land in the lower forty-eight states. This amounts to 22 percent of the total acreage of the continental United States.¹⁸ The vast majority of these lands are under the jurisdiction of four federal agencies. In the Department of Interior, the Bureau of Land Management (BLM) manages 175 million acres; the National Park Service manages 20 million acres; and the Fish and Wildlife Service manages the National Wildlife Refuge System, which consists of 9 million acres.¹⁹ In the Department of Agriculture, the Forest Service manages the National Forest System, which contains 167 million acres.²⁰

Each agency's domain includes significant wilderness acreage. Many of these wilderness lands are "designated wilderness" or "wilderness candidates." Designated wilderness lands are those which have been statutorily designated for special management as part of the National Wilderness Preservation System.²¹ "Wilderness candidate" lands comprise several different administrative cat-

Oil and Gas leases are pending *inter alia* in Illinois, Indiana, Michigan, Pennsylvania, Vermont (letter to Howard Fox from Steve Yurich, Regional Forester, Forest Service Region 9 (November 16, 1982)); in Alabama (letter to John M. McMillan, Jr. from Joe J. Brown, Forest Supervisor, Alabama National Forests (October 27, 1982)); in Arkansas (Sumner, *supra* note 7, at 29); in Georgia (ENVIRONMENTAL ASSESSMENT REPORT, ADMINISTRATIVE ACTION OIL AND GAS LEASING IN CHATTAHOOCHEE-OCONEE NATIONAL FORESTS, U.S. DEP'T AGRICULTURE FOREST SERVICE (January 16, 1981) [hereinafter cited as CHATTAHOOCHEE EA]); in South Carolina (letter to Stephen S. Edelson from Donald W. Eng, Forest Supervisor, Francis, Marion & Sumter N.F. (November 11, 1982)); in Tennessee (letter to Stephen S. Edelson from Donald L. Rollens, Forest Supervisor, Cherokee N.F. (November 23, 1982)); and in Virginia (letter to George M. Smith, Forest Supervisor, George Washington N.F. from Ernie Dickerman (November 30, 1981)).

16. NOTICE OF DECISION, U.S. DEP'T AGRICULTURE FOREST SERVICE CONSENT TO ISSUANCE OF OIL AND GAS LEASES, HOOSIER NAT'L FOREST, INDIANA (August 6, 1982) [hereinafter cited as HOOSIER DECISION NOTICE].

17. ENVIRONMENTAL ASSESSMENT, ISSUANCE OF OIL AND GAS LEASES, GREEN MOUNTAIN NATIONAL FOREST, VERMONT, U.S. DEP'T OF AGRICULTURE FOREST SERVICE (June 16, 1982) [hereinafter cited as GREEN MOUNTAIN EA].

18. BUREAU OF LAND MANAGEMENT, U.S. DEP'T OF THE INTERIOR, PUBLIC LAND STATISTICS 9 (1981). The total acreage of the continental United States is 1902 million acres. The figures that follow in the text deal only with the lower forty-eight states.

19. PUBLIC LAND STATISTICS, *supra* note 18, at 19-22.

20. *Id.* at 13.

21. The National Wilderness Preservation System was established in 1964 by the Wilderness Act, 16 U.S.C. §§ 1131-1136 (1976 & Supp. IV 1980).

egories of lands which are being considered for statutory wilderness designation. The specific categories of various wilderness candidate lands and the management standards applied vary from agency to agency. That lands are classified as designated wilderness, wilderness candidate, or without a wilderness classification is frequently due to the existence of resource conflicts and other political and historic factors rather than the actual or relative wilderness quality of the lands.²²

Currently, in the lower forty-eight states there are 23.3 million acres of designated wilderness and 59.1 million acres in various wilderness categories.²³ Most of these designated wilderness areas are National Forest lands managed by the Forest Service; the rest are divided among the three land management agencies in the Interior Department—BLM, National Park Service, and the Fish and Wildlife Service.²⁴ The Forest Service wilderness candidate lands consist of 7 million acres of RARE II “recommended wilderness,”²⁵ 5.9 million acres of RARE II “further planning areas,”²⁶ and 2.4 million acres of “congressionally-mandated wilderness study areas.”²⁷ There are also 24 million acres of “BLM wilderness study

22. For example, a prejudice favoring protection of forest over non-forest land among environmentalists and others presumably explains why the public lands administered by the Bureau of Land Management (BLM) in the lower forty-eight states, which are primarily non-forest, contain only 12,000 acres of designated wilderness. See *infra* note 24. Conflicts with non-wilderness resources was the main factor that kept Forest Service lands suitable for wilderness from becoming “recommended wilderness.” See *infra* text and notes at notes 34-36. Similarly, resource conflicts allegedly factored in BLM’s selection of “wilderness study areas” despite Congress’ contrary instructions in the Federal Land Management Policy Act, 43 U.S.C. 1782(a) (Supp. III 1979). Baker, *BLM Wilderness Review: New Beginning, Same Old Story?*, *Sierra*, at 50, 54 (Mar./Apr. 1983).

23. WILDERNESS FACT SHEET, RECREATION MANAGEMENT STAFF, FOREST SERVICE U.S. DEPT OF AGRICULTURE (March 8, 1982) (as of 12/31/81). The National Wilderness Preservation System when established in 1964 by the Wilderness Act, 16 U.S.C. § 1132a (1976 & Supp. IV 1980), contained 9.1 million acres. C. COGGINS & C. WILKINSON, *FEDERAL PUBLIC LAND AND NATURAL RESOURCES LAW 774* (1981). The system has grown to its present size of 80 million acres through subsequent additions mandated in numerous wilderness bills, Wilderness Fact Sheets, and the Alaska National Interest Lands Conservation Act of Dec. 1980, P.L. 96-487, §§ 701-05, 94 Stat. 2371, 2417-20, 16 U.S.C. § 1132 (Supp. IV 1980).

24. Of the 23.3 million acres of designated wilderness in the continental U.S., the Forest Service administers 19.7 million, BLM administers 12,000, the Park Service manages 3.0 million, and the Fish and Wildlife Service manages 0.7 million. WILDERNESS FACT SHEET, *supra* n.23.

25. *Hearing Before the Senate Subcommittee on Public Lands and Reserved Water on S.2801* (Wilderness Act of 1982) (September 23, 1982) (statement of Senator Malcolm Wallop). The Reagan Administration has “unrecommended” some of these lands.

26. *Id.*

27. WILDERNESS FACT SHEET, *supra* n.23, table 6.

areas"²⁸ and 19.8 million acres of wilderness candidate under the National Park Service and Fish and Wildlife Service.²⁹ Thus, of the federal land in the continental United States, 6 percent is designated wilderness and 14 percent is wilderness candidate acreage.³⁰

Most of the Forest Service wilderness candidate lands were selected by the Service's Roadless Area Review and Evaluation II (RARE II).³¹ This study was mandated by the Wilderness Act of 1964³² and completed in November 1979.³³ After surveying the roadless lands of the Forest Service, the study divided the lands into three categories: nonwilderness, which was proposed for release from further consideration as wilderness;³⁴ recommended wil-

28. Comment, *Tenth Circuit Approves Interior's Wilderness Protection Policies in Energy-Rich Rocky Mountain Region*, 13 ENVTL L. REP. 1004, 1005 (1983). See *Rocky Mountain Oil and Gas Association v. Andrus*, 500 F. Supp. 1338, 1348 (1980), *rev'd on other grounds*, *Rocky Mountain Oil and Gas Ass'n v. Watt*, 13 ELR 20036. (10th Cir. Nov. 30, 1982). This figure is not adjusted for the major deletions recently made or those soon to be made by BLM. See *infra* note 96.

29. *Id.* at 9. The National Park Service has recommended 10.2 million acres of land it manages in the lower forty-eight states under the wilderness review instructions in the Wilderness Act, the Eastern Wilderness Act, and other legislation. Telephone interview with Jeffrey Chidlaw, Outdoor Recreation Planner, Division of Parks and Special Studies, National Park Service (April 21, 1983). A further 6.2 million acres of non-Alaskan NPS land are subject to wilderness studies in progress, pursuant to other legislation. *Id.* Of the non-Alaskan land under Fish and Wildlife Service jurisdiction, 3.4 million acres are "wilderness opportunity areas proposed to Congress." Telephone interview with Jonathan Gold, Land Acquisition Specialist, Fish and Wildlife Service, U.S. Dep't of the Interior (April 14, 1983).

30. Alaska has 56 million acres of designated wilderness, with 5 million under the Forest Service, 32 million under the Park Service and 19 million under the Fish and Wildlife Service. WILDERNESS FACT SHEET, *supra* n.23. There are also 2 million acres of congressionally-designated wilderness study areas in the Chugach National Forest. *Id.* Section 1317 of the Alaska Lands Act requires that all Alaskan lands that are in the National Park System or National Wildlife Refuge System but not designated wilderness be reviewed for wilderness suitability and recommended to Congress for wilderness or non-wilderness by 1987. 16 U.S.C. § 32005 (Supp. IV 1980). However, that section expressly provides that the wilderness review and recommendations are not to be construed as affecting the administration of the areas. *Id.*

As of June 1982, there were 293 million acres of federal land in the State, with 23 million under the Forest Service, 142 million under BLM, 50 million under the Park Service, and 75 million under the Fish and Wildlife Service. Telephone interview with Grant Guidry, Information Officer, Office of Public Affairs, BLM, U.S. Dep't of Interior (Apr. 25, 1983). BLM's domain will eventually decrease to 74 million acres when the selections by the State and Native corporations are complete. *Id.* Alaska contains 365 million acres. PUBLIC LAND STATISTICS, *supra* note 18 at 9.

31. FINAL ENVIRONMENTAL STATEMENT ROADLESS AREA REVIEW AND EVALUATION, U.S. DEP'T AGRICULTURE FOREST SERVICE (FS-325) (January 1979) [hereinafter cited as RARE II].

32. *Id.* at 5.

33. *Id.*

34. *Id.* at 9. *But see* *California v. Bergland*, 438 F. Supp. 465 (1980), *aff'd sub nom.* *California v. Block*, 690 F.2d 753 (9th Cir. 1982) (lands designated as non-wilderness by RARE II may not be administered as such because environmental analysis was inadequate).

derness, which was endorsed by President Carter for inclusion into the wilderness system; and an intermediate category, further planning areas (FPAs).³⁵ FPAs contain lands that meet the statutory definition of wilderness but which, because of other factors such as mineral potential, were not immediately allocated to either wilderness or nonwilderness.³⁶ The BLM wilderness study areas were selected as a result of a similar study of BLM lands which was mandated by the Federal Land Management Policy Act of 1976 (FLPMA).³⁷ Congressionally-mandated wilderness study areas became wilderness candidates by act of Congress.³⁸

B. The Development Process

A basic knowledge of the process of oil and gas development is required to understand fully the wilderness controversy.³⁹ The process of oil and gas development generally occurs in three stages: prospecting, exploratory drilling,⁴⁰ and production. In the prospecting stage, a number of investigatory measures may be undertaken, including on-site examination, aerial surveys, radar mapping, and seismic surveying.⁴¹ Seismic surveying is the most important of these techniques since it is the most expensive and almost always precedes drilling.⁴² Seismic mapping involves creating shock waves, either with a mechanical "thumper" or with dynamite explosions, at a series of points along a line on the ground. The shock waves are transmitted through the ground, and are recorded and analyzed to gain information about the underlying formations. In mountainous areas, dynamite is the generally-used agent, with crew transportation by helicopter.⁴³ A number of threatened and endangered

35. RARE II, *supra* note 31, at 9.

36. *Id.*

37. Pub. L. No. 94-579, (October 21, 1976) § 603, 43 U.S.C. § 1782 (Supp. III 1979).

38. WILDERNESS FACT SHEET, *supra*, n.23.

39. For a detailed discussion of the process of oil and gas development and its environmental impacts, see Noble, *Oil and Gas Leasing on Public Lands: NEPA Gets Lost in the Shuffle*, 6 HARV. ENV'TL L. REV., 117, 120-130 (1982). Two other major law review articles on oil and gas leasing in wilderness appeared during 1982. Martin, *The Interrelationship of the Mineral Lands Leasing Act, the Wilderness Act, and the Endangered Species Act: A Conflict in Search of Resolution*, 12 ENV'TL L. 363 (1982); Nelson, *Oil and Gas Leasing on Forest Service Lands: A Question of NEPA Compliance*, 3 PUB. LAND L. REV. 1 (1982).

40. The term "exploration" encompasses both prospecting and exploratory drilling.

41. ROCK SPRINGS, WYOMING DISTRICT, BUREAU OF LAND MANAGEMENT, U.S. DEPT OF THE INTERIOR, KEMMENER RESOURCE AREA OIL AND GAS LEASING ENVIRONMENTAL ASSESSMENT RECORD I-8, A-III-1, A-VII-1 (1979) [hereinafter cited as KEMMENER EA].

42. *Id.* at A-III-1.

43. Mechanical "thumpers" generally require vehicular transport.

species, such as the grizzly bear or the Dall sheep, are timid enough in their behavior that their habitat areas can be reduced by seismic exploration.⁴⁴ For the sake of legal analysis, such habitat disruption generally is considered to be the only significant effect of prospecting,⁴⁵ though this view is by no means universal.⁴⁶

In the exploratory drilling stage, "wildcat" wells are sunk in regions formerly undrilled.⁴⁷ This requires the levelling and clearing of a drill site of about four acres and the building of an access road, covering about six acres per mile of road. Drilling is very noisy and generally proceeds on a twenty-four hour basis.⁴⁸ Living facilities must be maintained for a crew of about fifty and a pit constructed for holding drilling muds, which are toxic.⁴⁹ The resulting environmental injuries include erosion from clearing land, noise, the presence of people and machines, and subsurface or surface contamination of water and soil by oil or drilling muds.⁵⁰ The impact of these injuries may be more or less severe depending on the precise nature of the ecological factors present in an area. In any event, wilderness areas by their nature are highly sensitive and reclamation and restoration of these areas is exceedingly difficult.

The production phase begins once commercial quantities of oil or gas are discovered. Since this is in many ways a larger-scale version of exploratory drilling, it has the same environmental effects, only more severe. Production may also require pipelines and gas-processing facilities. Production in commercial fields commonly lasts up to fifty years.⁵¹ As a result, while exploratory drilling involves scattered sites that usually are abandoned within one or two years, production involves a greater concentration of activities the effects of which may continue for generations.

Basically, the agencies' approach to environmental analysis for leasing ignores the view that oil development is essentially incompatible with wilderness. As stated above, development produces ero-

44. KEMMENER EA, *supra* note 41, at III-11.

45. *Sierra Club v. Peterson*, 17 ERC 1453.

46. *See, e.g., Sumner, supra* note 7, at 28.

47. *Noble, supra* note 39, at 121.

48. U.S. BUREAU OF LAND MANAGEMENT, DEP'T OF THE INTERIOR, CASPER DISTRICT, WYOMING, BUFFALO RESOURCES AREA OIL AND GAS ENVIRONMENTAL ASSESSMENT 86 (1980); TARGHEE & BRIDGER-TETON NAT'L FORESTS, U.S. FOREST SERVICE, DEP'T OF AGRICULTURE, ENVIRONMENTAL ASSESSMENT FOR OIL AND GAS EXPLORATION IN THE PALISADES FURTHER PLANNING AREA 38 (June 5, 1980) [hereinafter cited as PALISADES EA].

49. KEMMENER EA, *supra* note 41, at III-22.

50. *Id.* at III-4-III-11.

51. *Id.* at I-8, I-13, VI-1.

sion, devegetation, noise, and soil and water pollution. Agency environmental analysis of development focuses on whether these can be avoided or restored.⁵² The extent to which such changes may eventually be erased is a matter of controversy. Agency analysis fails to look beyond these environmental damages to the unavoidable impact on the pristine, scenic, and solitudinal qualities of wilderness. Put simply, "wilderness" by definition arguably ceases to exist once roads are built through it.⁵³ It is recognized that once a road is built in an undeveloped area, the area will probably never return to its former state. There are few, if any, examples of steep mountain wilderness that have been effectively restored after roads have been built.

C. The Present Leasing Controversy

1. The Leasing System

Responsibility for leasing decisions is divided between the various agencies. BLM has primary responsibility for leasing decisions on lands under its jurisdiction.⁵⁴ Responsibility for leasing on Forest Service lands is split between BLM and the Forest Service. The allocation varies according to whether land is "public domain" or "acquired." Public domain lands are those that have been held by the federal government since their original acquisition.⁵⁵ The majority of Forest Service lands are in the West and Alaska and are public domain. Most Eastern National Forests are acquired lands, which are those that were once privately held but have since been acquired by the government.⁵⁶ For Forest Service public domain lands, BLM has jurisdiction over the mineral estate, while the Forest Service has jurisdiction over the surface.⁵⁷ The Forest Service is charged with preparing the necessary environmental analysis,⁵⁸ but by statute BLM has final authority over the decision of whether to lease and

52. See, e.g., GREEN MOUNTAIN EA, *supra* note 17.

53. The requirement that land be "roadless" is inherent in the statutory definition of "wilderness" in 16 U.S.C. § 1131(c)(1) (1976 & Supp. IV 1980). See *supra* note 2. The absence of roads on land generally is a statutory prerequisite for consideration for wilderness review as well. See, e.g., FLPMA § 603(a), 43 U.S.C. § 1782(a) (1976 & Supp. IV 1980).

54. Order of the Sec'y of the Interior No. 2948 (October 6, 1972).

55. PUBLIC LAND STATISTICS, *supra* note 18, at 187. However, land that has been obtained in an exchange for other federal land takes on the public domain or acquired character of the land for which it was exchanged. *Id.* at 181, 187.

56. *Id.* at 181. See also *supra* note 55.

57. BUREAU OF LAND MANAGEMENT, U.S. DEPT OF THE INTERIOR & U.S. FOREST SERVICE, DEP'T OF AGRICULTURE, INTERIM MEMORANDUM OF UNDERSTANDING BETWEEN THE BUREAU OF LAND MANAGEMENT AND THE FOREST SERVICE (December 30, 1980) [hereinafter cited as MOU].

58. *Id.*

lease terms.⁵⁹ By agreement and convention, the Forest Service issues a proposal either to not lease or to lease with specified terms, and BLM generally accedes to the proposal.⁶⁰ In contrast, BLM is empowered to lease acquired Forest Service land, only with Forest Service permission.⁶¹

Oil and gas development on federal onshore lands occurs under two leasing systems.⁶² The vast majority of federal oil and gas leases are issued under a noncompetitive leasing system.⁶³ The process begins when firms or individuals submit applications for public lands they would like to lease. The first party that submits a proper application conforming to the applicable agency standards is entitled to receive a lease if the government decides that one should be issued.⁶⁴ The agencies may act on individual leases, or, as is the practice of the Forest Service, consider all the leases in one area collectively.⁶⁵ Non-competitive leases cost one dollar per acre per year plus a 12.5 percent royalty on any revenue produced. They run for an initial term of ten years.⁶⁶

A very small percentage of onshore land is leased through the competitive leasing system, under which the government auctions off areas of known commercial potential to the highest bidder.⁶⁷ Unfortunately for the public coffers, only lands overlying a "known geologic structure" are issued competitively, and that term is so narrowly defined⁶⁸ that only 3 percent of the federal onshore leases are issued under this system.⁶⁹ Competitive leases run for a five-year initial term with the minimum rent of two dollars per acre per year and a minimum royalty rate of 12.5 percent.⁷⁰ The royalty rate may be in-

59. The Forest Service has no authority to control leasing on public domain land under the Mineral Leasing Act, 30 U.S.C. §§ 187, 226 (1976 & Supp. IV 1980); Chevron Oil Co., 24 IBLA 159, 163 (1976).

60. MOU, *supra* note 57, at 4.

61. Mineral Leasing Act for Acquired Lands, 30 U.S.C. 351-59 (1976 & Supp. IV 1980). The same is true for designated wilderness, 16 U.S.C. § 1133(d)(3) (1976 & Supp. IV 1980).

62. HALL, OYNES, ZABLER, & WHITE, TASK FORCE WORKING PAPER, ONSHORE OIL AND GAS LEASING POLICY REVIEW, U.S. DEPT OF INTERIOR 37 (March 19, 1979) [hereinafter cited as LEASING POLICY REVIEW].

63. *Id.* at 40. When non-competitive leases expire they are reissued through a lottery system and called Simultaneous Oil and Gas Leases.

64. *Id.* at 38.

65. *See, e.g.*, PALISADES EA, *supra* note 48.

66. LEASING POLICY REVIEW, *supra* note 62, at 39.

67. *Id.* at 42.

68. *Id.* "A known geologic structure is technically the trap in which an accumulation of oil or gas has been discovered by drilling and determined to be productive, the limits of which include all acreage that is presumptively productive." 43 C.F.R. § 3100.0-(a) (1977).

69. LEASING POLICY REVIEW, *supra* note 62, at 40.

70. *Id.* at 37, 39, 42.

creased in the bidding process, which also may involve bonus payments.⁷¹

To set the terms of individual leases, stipulations are attached to the lease forms. Stipulations may, for example, prevent drilling within 200 feet of hiking trails or during certain seasons of the year.⁷² The strict No Surface Occupancy (NSO) Stipulation prohibits drilling on the leased land itself, so that any access to the leased minerals must be by directional (slant) drilling from outside the lease area.⁷³

In general, a lessee may proceed with prospecting activities as soon as a lease is granted. However, before drilling, a lessee must submit and obtain approval of an Application for a Permit to Drill (APD).⁷⁴ Leases may be renewed if drilling or production is occurring on the date of expiration.⁷⁵

2. Current Leasing Policy

The Reagan administration's policy is to aggressively increase oil and gas leasing even on wilderness lands.⁷⁶ The threat to designated wilderness has been neutralized, at least for the moment, by litigation, congressional action, and public pressure. This is not the case for wilderness candidates and other federal lands with wilderness qualities.

71. Sprague & Julian, *An Analysis of the Impact of An All Competitive Leasing System on Onshore Oil and Gas Leasing Revenue*, 10 NAT'L RES. J. 515, 522 (1970).

72. HIGH UNITAS EA, *supra* note 13, at E-7, E-21.

73. *Id.* at E-3.

74. Prospecting permits are required to begin seismic activities, but obtaining these once a lease has been issued is generally routine. *Id.* at 9.

75. LEASING POLICY REVIEW, *supra* note 62, at 37.

76. See Noble, *supra* note 39, at 118 & n.13; Nelson, *supra* note 15, at 4-5. In the year 1981 alone the amount of onshore acreage leased was 150% greater than that of the 1980 acreage; in 1982 acreage leased was double the 1981 acreage. U.S. DEPT OF THE INTERIOR, A YEAR OF PROGRESS: PREPARING FOR THE 21ST CENTURY Jan. 1982 at 1 [hereinafter cited as DOI REPORT 1982].

The Reagan administration is the first to propose leasing in designated wilderness and continues to eliminate substantial wilderness candidate areas. See *supra* text and notes at notes 11, 26; *infra* text and note at note 96. The administration has proposed delaying the Wilderness Act ban on mineral development for 20 years or its termination by the year 2000. DOI REPORT 1981, *supra* note 10, at 3; Dougherty, *District Court's Approval of Bob Marshall Withdrawal Upstaged by Watt's Proposed Wilderness Legislation*, 12 ENV'TL L. REP. 10034, 10036 (1982). In contrast to previous congresses, the Ninety-Seventh Congress approved only 130,000 new acres of designated wilderness. In addition, President Reagan has vetoed Congress's approval of some 49,000 acres as designated wilderness — the first such presidential veto ever made. 13 ENV'T REP. (BNA) Current Dev. 1620 (Jan. 21, 1983); New York Times, Aug. 14, 1982, at 8, col. 3.

The Wilderness Act of 1964 provides that oil and gas leasing may continue in designated wilderness areas through 1983, and is prohibited thereafter.⁷⁷ This is the result of a political compromise when the Act was passed in 1964. Anti-leasing forces obtained a statutory prohibition on leasing in designated wilderness, but leasing proponents delayed its effective date for twenty years.⁷⁸ It has been the policy of all previous administrations to not lease in designated wilderness, and only a small handful of leases containing "designated wilderness" has ever been issued.⁷⁹

In contrast, the present administration has come forward with major initiatives for designated wilderness leasing. For example, in 1981, the Department of the Interior attempted to issue leases in four Montana designated wilderness areas, including the Bob Marshall Wilderness.⁸⁰ The House Committee on Interior and Insular Affairs invoked the legislative veto provision of FLPMA,⁸¹ and ordered the withdrawal of these areas from leasing consideration.⁸² Although a subsequent federal district court decision ruled that the Secretary of the Interior had sole authority over the duration of the withdrawal,⁸³ Secretary of Interior James Watt agreed not to lease in designated wilderness until the end of 1982.⁸⁴ BLM did issue a few leases in New Mexico's Cabinet Mountain Wilderness in 1981,⁸⁵ but the lessees agreed to exchange the wilderness portions of their leases for acreage in other areas after a lawsuit was filed challenging the leases.⁸⁶

During 1982, Congress passed appropriations riders prohibiting the processing or issuance of leases in designated wilderness through September 1983.⁸⁷ After this date, there is a three-month window until the leasing prohibition in the Wilderness Act becomes

77. 16 U.S.C. § 1133(d)(3) (1976 & Supp. IV 1980).

78. C. COGGINS & C. WILKINSON, *supra* note 23, at 774.

79. 46 Fed. Reg. 27,735, 27,735 (May 21, 1981).

80. 46 Fed. Reg. 27,735 (May 21, 1981); Pacific Legal Foundation v. Watt, 529 F. Supp. 982, *clarified*, 1194 F. Supp. 539 (D. Mont. 1981).

81. 43 U.S.C. § 1714(e) (1976 & Supp. IV 1980).

82. Pacific Legal Foundation v. Watt, 529 F. Supp. at 986.

83. *Id.* at 982.

84. Dougherty, *supra* note 76, at 10026 n.38 (1982).

85. Complaint for Declaratory Judgment and Injunctive Relief at 8, Sierra Club v. Watt, No. ____ (D.N.M. filed February 23, 1982).

86. Sierra Club v. Watt, No. ____ (D.N.M. filed February 23, 1982) (subsequently settled).

87. Continuing Appropriations for Fiscal Year 1983 (Oct. 2, 1982), Pub. L. No. 97-276, § 126, 96 Stat. 1186, 1196, 16 U.S.C. § 1132; Int. Dep't and Related Agencies, Appropriations for Fiscal Year 1983 (Dec. 30, 1982), Pub. L. No. 97-394, § 308, 96 Stat. 1966, 1996-97, 16 U.S.C. § 1132.

effective. Secretary of the Interior Watt has agreed not to attempt leasing in designated wilderness during this period.⁸⁸ Thus, barring future statutory changes, oil and gas leasing in designated wilderness has been permanently prohibited.

The government also has attempted to lease in RARE II recommended wilderness areas and further planning areas. The government has proceeded using the EA approach to leasing. Some of these initiatives have been completed without litigation.⁸⁹ Environmental organizations have actively opposed many of the Forest Service decisions to lease major wilderness candidate acreages. Most of these proposals are tied up in administrative appeals or litigation.⁹⁰ Their future depends largely on the outcome of *Sierra Club v. Peterson*.⁹¹ This case, which was recently argued before the D.C. Circuit, will influence whether the agencies may continue their current practice of EA leasing without the preparation of an EIS.

The future of wilderness candidates will also hinge on legislative developments. In 1982, for example, a wilderness protection bill passed the House overwhelmingly, but an identical Senate bill died in committee despite having fifty-three co-sponsors.⁹² This bill applied to all states except Alaska and would have withdrawn designated wilderness from leasing on a permanent basis, and withdrawn Forest Service wilderness candidates on a temporary basis.⁹³ The ban on designated wilderness leasing in the current appropriations rider also applies to the processing or issuance of leases in RARE II recommended wilderness future planning areas and to

88. 13 ENV'T REP. (BNA) (Current Developments) 1505 (Dec. 31, 1982).

89. For example, in 1982 leases were successfully issued on RARE II FPAs in Tennessee (Cherokee letter, *supra* note 15) and in Georgia (letter to Howard Fox from Steven Briggs, Fire and Lands Staff Officer, Chattahoochee-Oconee N.F. (November 15, 1982)) without administrative appeal or litigation.

90. *Bob Marshall Alliance v. Watt*, No. 82-15 GF (D. Mont.); *Connor v. Burford*, No. CV-82-42 BU (D. Mont.); Administrative Appeal of Forest Service Decision to Lease in Green Mountain National Forest, Vermont (pending before Forest Service); Administrative Appeal of Forest Service Decision to Lease in Hoosier National Forest, Indiana (pending before Forest Service).

91. *Sierra Club v. Peterson*, No. 82-1695 (D.C. Cir. appeal docketed August 19, 1982).

92. *Peterson* was argued on February 16, 1983 before Circuit Judges MacKinnon, Wright, and Scalia.

93. The proposed Wilderness Protection Act of 1982, H.R. 6542, 97th Cong., 2d Sess., passed the House by a vote of 340 to 58 on August 12, 1982. H5784 (Aug. 12, 1982); Tunderman, *Preservation vs. Mineral Development of Withdrawn Federal Lands — Much Ado, But Little to Show*, 13 ENV'T L. REP. 10017 (1983) 128 CONG. REC. The Senate bill, S. 2801 died in the 97th Congress in the Senate Energy and Natural Resources Committee. Senator McClure (R-Idaho), the committee chairman, opposed the bill because it lacked language "releasing" non-wilderness. Tunderman, *supra* note 73, at 10021 (1983).

congressionally-mandated wilderness candidate areas.⁹⁴ This provides a brief respite for these areas, but does not apply to BLM wilderness study areas or to those federal lands with wilderness or other special qualities that are not wilderness candidates. In addition, administrative efforts to make wilderness candidates available for leasing continue. In the last several months, the Forest Service announced plans to reevaluate the land covered by RARE II⁹⁵ and BLM initiated a program to declassify up to 20 percent of the wilderness study areas it is protecting pursuant to FLPMA.⁹⁶

94. See *supra* text and note at note 87.

95. On February 1, 1983 Assistant Secretary of Agriculture Crowell announced plans to reevaluate 120 individual units of RARE II in the course of land and resource management plans being undertaken by the Forest Service. U.S. Dep't Agriculture Press Release and Attachments, February 1, 1983. The review is presented as a response to *California v. Block*, 690 F.2d 753 (9th Cir. 1982), which ruled that under NEPA RARE II was inadequate to justify allocation of roadless land to *non-wilderness* with respect to 46 such areas in California. The case is a substantial barrier to the commercial use of those RARE II lands categorized as non-wilderness because it requires further site-specific environmental analysis before those lands may officially be treated as non-wilderness. An admitted purpose of the reevaluation announcement is to encourage Congress to legislatively ratify RARE II's non-wilderness allocation by declaring it legally adequate under NEPA. Although *California v. Block* may be confined to its facts and probably also in its holding to the *non-wilderness* allocation under RARE II, the announced reevaluation includes all categories of RARE II land. Thus, the reevaluation may also be intended to remove RARE II recommended wilderness and further planning areas from their wilderness candidate status.

96. In December 1982, the Department of the Interior announced a program to delete three categories of land from the wilderness study areas previously designated by BLM under FLPMA § 603. 47 Fed. Reg. 58,372 (December 30, 1982). The three categories are areas under 5,000 acres, "split-estate lands" (lands where the surface is federally owned but the subsurface mineral estate is not), and "contiguous areas" (areas over 5,000 acres which alone lack wilderness characteristics but do have wilderness characteristics in association with contiguous designated wilderness or wilderness candidate lands administered by federal agencies other than BLM). *Id.* The action was taken based on a solicitor's opinion and on three decisions of the Interior Board of Land Appeals. Memorandum from Solicitor to Sec'y of Interior, Review of Interior Board of Land Appeals Decisions on Wilderness Study Areas (December 15, 1982); Tri-County Cattlemen's Association, 60 IBLA 305 (1981) (areas less than 5,000 acres); Santa Fe Pacific Railroad Co., 64 IBLA 27 (1982) (split-estate lands); Don Coops, 60 IBLA 30 (1982) (contiguous areas). These state that the Department lacked the authority to treat the three categories as Wilderness Study Areas (WSAs) under § 603 of FLPMA. On February 3, 1983, the Regional Solicitor for the Department's Northwest Region issued an opinion that contradicts this conclusion and stated that the Department "appears to have ample legal authority" to manage 42,000 acres of split-estate lands in California as WSAs. The Regional Solicitor was subsequently transferred and all copies of the opinion were ordered returned and destroyed. *Washington Post*, April 2, 1983, at A3, col. 1.

In announcing this program, the Department simultaneously deleted wilderness study areas totalling 667,587 acres consisting of the areas under 5,000 acres and a portion of the split-estate lands. Fed. Reg. *supra*. Deletions of the other split-estate lands and the contiguous areas are being processed, *Id.*, and one environmental group has estimated that these could amount to about two million additional acres. *Sierra Club National News Report* at 1 & 10 (December 30, 1982).

D. NEPA and Other Legal Issues

The premier legal issue in the wilderness controversy concerns the government's compliance with NEPA. NEPA requires that the government prepare an Environmental Impact Statement (EIS) before undertaking any major federal action that may significantly affect the environment.⁹⁷ Where there is doubt as to whether a federal action requires an EIS, the preparation of a Environmental Assessment (EA) is required.⁹⁸ An EA is a smaller version of an EIS the purpose of which is to determine whether an action may have significant environmental effects and therefore require an EIS.⁹⁹ Ultimately, the validity of an EA, as opposed to an EIS, is premised on a finding of no significant impact concerning the action under consideration.

In response to increased leasing applications over the last few years, the agencies have tended to propose "blanket" leasing of an entire National Forest area or other large unit of public land.¹⁰⁰ In making such a proposal, the agencies frequently admit that virtually any substantial oil and gas development of an area will have a significant environmental impact.¹⁰¹ Nonetheless, the agencies do not precede their leasing decisions with an EIS; instead, they prepare an EA.¹⁰² These EAs uniformly conclude that stipulations to be attached to the leases will prevent any significant environmental effects from occurring and that, therefore, an EIS is not required.¹⁰³ Formally, these conclusions are contained in a "Finding of No Significant Impact" (FONSI), a brief document that accompanies the EA.¹⁰⁴

NEPA challenges to agency decisions to lease actively dispute the validity of the Finding of No Significant Impact in the EA. Such

In fact, the Department has deleted an additional 325,878 acres from WSA status in Colorado, Oregon, and Nevada. 48 Fed. Reg. 11,346-11,347 (Mar. 17, 1983), 12,842-12,842 (Mar. 28, 1983), 16,129 (Apr. 14, 1983), 16,975 (Apr. 20, 1983). Several environmental groups have challenged the action, claiming violations of FLPMA, NEPA and obligations to provide notice and comment opportunities. Complaint for Injunction, Declaratory Relief, and/or Mandamus, *Sierra Club v. Watt*, No. S-83-035 (E.D. Cal., filed January 12, 1983).

97. 42 U.S.C. § 4332(2)(C)(v) (1976 & Supp. IV 1980); 40 C.F.R. §§ 1502.3, 1508.3 (1982).

98. 40 C.F.R. § 1501.3 (1982).

99. 40 C.F.R. §§ 1501.4, 1508.9, 1508.13 (1982).

100. See, e.g., GREEN MOUNTAIN EA, *supra* note 17, at 5-7.

101. See, e.g., CHATTAHOOCHEE EA, *supra* note 15, at 9.

102. The government has opted to prepare an EIS in connection with proposals to lease in a particular area on only two occasions. Those were the two proposals to lease in designated wilderness which were announced in 1981 and subsequently abandoned. See *supra* note 11.

103. See e.g., CHATTAHOOCHEE EA, *supra* note 15, at iii (third "summary" page).

104. 40 C.F.R. §§ 1501.4(e), 1508.13 (1982).

challenges generally contain at least one of three legal arguments, which can be considered sub-issues of the overall NEPA compliance issue, that an EIS must be prepared prior to leasing. The first argument is that the leasing agency, once it has decided to lease, lacks the authority to impose and enforce the proposed lease stipulations. If the stipulations are unenforceable then they cannot prevent significant impact, and so the FONSI cannot be justified. The second argument is that the stipulations, even if enforceable, are ineffective in precluding significant impacts, either in their wording or their application. According to this argument, either the soft language of the stipulations does not reserve to the agency sufficient control over lease activities or the resources requiring protection do not receive sufficient protection under the stipulations. The third argument is that, even if the stipulations are enforceable and potentially effective, they may not be implemented in a sufficiently protective manner. This would occur, for example, where a stipulation reserves authority to control the timing of drilling but the agency fails to exercise this authority to prevent activity during critical elk calving and breeding periods. For convenience, this article refers to these sub-issues of the overall NEPA issue as the issues of stipulation "enforceability," "effectiveness," and "implementation" respectively.¹⁰⁵

105. This article focuses largely on the NEPA compliance issue. This issue is only one of many intertwined legal issues that the agencies must consider in trying to balance their conflicting mandates of oil and gas production and environmental protection. The scope of these issues is illustrated by the collective decision that the responsible agencies face when they receive a lease application: (1) Do they have to act on it? If so, (2) what duty is there to deny or approve the application; and (3) what management standards guide this decision? If they are inclined to approve the lease; (4) what restrictions may be put on the lease; and (5) what environmental analysis is required? These questions correspond to five elements into which the legal issues involved can be conveniently divided: (1) the duty to process leases; (2) the authority to deny leases; (3) land management standards; (4) the authority to restrict lease activity; and (5) the NEPA compliance duty.

The first element, the duty to process leases, concerns the agencies' obligation to act on lease applications that are received. It includes the scope of the power to "withdraw" public lands altogether from disposition for oil and gas leasing. What constitutes a "withdrawal" is a matter of dispute. Recent decisions on this issue are *Mountain States Legal Found. v. Andrus*, 499 F. Supp. 383 (D. Wyo. 1980) (Forest Service failure to process leases on RARE II further planning areas constitutes a withdrawal under FLPMA § 204 and is therefore illegal unless executed in compliance with the procedures in FLPMA § 102); *Pacific Legal Foundation v. Watt*, 529 F. Supp. 982, *clarified*, 539 F. Supp. 1194 (D. Mont. 1981). (Although FLPMA § 204 permits congressional committees to withdraw lands from leasing, the Secretary of the Interior may determine the scope and duration of the withdrawal).

The second element, which is the authority to deny leases, may also be stated as the duty to issue leases. This element includes the environmental grounds upon which an agency may deny a lease application and the evidence or procedural requisites needed to justify lease denial. For example, there is a line of Department of Interior administrative decisions ruling that

The implementation issue has not yet been addressed by the courts, probably because it presents the plaintiff with the difficult evidentiary problem of predicting the defects of future agency management. To date, the implementation issue has been raised in administrative appeals only.¹⁰⁶ There may be convincing indications that an agency will lack the funding, personnel, information, or willingness to use the regulatory power retained through stipulations to a degree that prevents significant impacts.¹⁰⁷ Nevertheless, the way an agency will use stipulations is a question of what will happen in the future and an extremely strong showing on the likelihood of weak implementation of stipulations will probably be needed to obtain judicial intervention on such a speculative basis.

The courts have resolved the enforceability issue in a manner that is probably definitive. Specifically, the district court's holding in *Sierra Club v. Peterson*¹⁰⁸ appears to assure the enforceability of even the strictest stipulations used by the government, with the possible exception of the new contingent rights stipulation.¹⁰⁹ At the time of the holding in *Peterson*, there was a Wyoming District Court decision to the contrary, *Rocky Mountain Oil and Gas Association v. Andrus (RMOGA I)*.¹¹⁰ *RMOGA I* indicated that the issuance of a lease with stipulations such that the lease ultimately had no development rights constituted an unconstitutional "taking," and was contrary to congressional intent and unfair to lessees.¹¹¹ The *RMOGA I*

wilderness values alone are an insufficient basis for lease denial. Robert Schulein, 42 I.B.L.A. 54 (1979); Neva H. Henderson, 31 I.B.L.A. 217 (1977); Stanley M. Edwards, 83 Interior Dec. 33 (1976); Edras K. Hartley, 23 I.B.L.A. 102 (1975); W. T. Stalls, 18 I.B.L.A. 34 (1974); Rainbow Resources, Inc., 17 I.B.L.A. 142 (1974).

A third and closely related element concerns the "land management standards" that dictate the goals or principles that must govern agencies decisions for each administrative category of public land. For example, FLPMA § 603(c) sets forth two standards, "nonimpairment" and its weak sister "no undue degradation" that apply to certain management duties for BLM wilderness study areas. *Rocky Mountain Oil & Gas Ass'n v. Watt*, 696 F.2d 734 (10 CA, 1982), rules on when each of these standards applies.

The authority to restrict lease activity concerns the scope of agency authority to impose and enforce stipulations on leases that are issued. Note that this issue, although important in its own right, is subsumed in the NEPA sub-issue of whether stipulations are enforceable.

106. See, e.g., Statement of Reasons (by Vermont Wilderness Assoc., et al., Appellants) at 9-11, *In re: Consent to issuance of oil and gas leases, Green Mountain National Forest (Forest Service administrative appeal, filed July 29, 1982)*.

107. See, e.g., *infra* note 243.

108. 17 ERC at 1453.

109. The enforceability of the CRS is discussed *infra* at text and notes at notes 218-21.

110. 500 F. Supp. 1338 (D. Wyo. 1980), *rev'd sub nom.* *Rocky Mountain Oil & Gas Ass'n v. Watt*, 696 F.2d 734 (10th Cir. Nov. 30, 1982).

111. *Id.* at 1345.

decision was criticized in *Peterson*¹¹² and has since been reversed by the Tenth Circuit in *Rocky Mountain Oil and Gas Association v. Watt (RMOGA II)*.¹¹³ Since the reversal in *RMOGA II* was made on other grounds, *RMOGA I*'s reasoning conceivably retains some viability.¹¹⁴ There is, however, no law contradicting *Peterson*'s determination that stipulations are enforceable even if they prevent development.

In contrast to the other NEPA sub-issues, the effectiveness issue

112. 17 ERC at 1453.

113. *RMOGA I*, 500 F. Supp. at 1339-43; *RMOGA II*, 696 F.2d at 738, 739.

114. In *RMOGA*, an industry group challenged the Interior Department's interpretation of § 603 of the Federal Land Management Policy Act (FLPMA), 43 U.S.C. § 1782 (1976 & Supp. IV 1980). The section directs the Department and then the President to issue recommendations on whether certain BLM lands with wilderness characteristics are suitable for preservation as wilderness. It also sets forth two management standards applicable to such "BLM wilderness study areas" (WSAs) until Congress acts on the recommendations. The Department interpreted the section as making the strict "nonimpairment" management standard the norm for all oil and gas activity on leases on WSAs. It interpreted the section's grandfather clause to apply the less strict "no undue degradation" standard only to those activities actually occurring on the 1976 enactment date of FLPMA. The Department thus applied the stricter standard to all post-FLPMA leases and all post-FLPMA activities on pre-FLPMA leases. The plaintiff argued, and the district court agreed, that the lesser standard applied to all oil and gas activity and particularly to all pre-FLPMA leases. The district court interpreted the nonimpairment standard to divest affected leases of development rights. The court's reasoning was based on statutory interpretation, constitutional standards, and fairness rationales for such an effect on leases. See *supra* text and notes at notes 110-14.

The Tenth Circuit reversed the district court and upheld the Department's interpretation of the activities to be managed under each management standard. Its rationale was purely one of statutory interpretation. The court did not address District Judge Kerr's interpretation of the nonimpairment standard's effect on leases or reach his ruling on such effect's illegality. Thus, despite the reversal, Judge Kerr's arguments on the illegality of restrictions that divest leases of development rights were not specifically disapproved. They would not be barred by res judicata from subsequent suits, such as one challenging the denial of a drilling permit application.

This conclusion is buttressed by the fact that rejection of those arguments may not be implicit in the Tenth Circuit's holding in *RMOGA II*. The court simply did not need to address them. Specifically, it is not clear that the nonimpairment standard will necessarily divest lessees of development rights. First, the agency may determine that some degree of development does not impair wilderness suitability. Moreover, as the Tenth Circuit observed, since Congress may release WSAs from wilderness consideration, WSA status may only be a temporary and brief hiatus from mineral development. *RMOGA II*, 13 ELR at 20044. Finally, as the Tenth Circuit also observed, the Interior Department under the current administration has altered its predecessor's interpretation of § 603 with respect to activities begun in the post-FLPMA period on pre-FLPMA leases. The Department's new position is that although the nonimpairment standard applies to such activities, the standard's application must be limited by the requirement in FLPMA § 701(h), 43 U.S.C. § 1701 (1976 & Supp. IV 1980), that "[a]ll actions . . . under this act shall be subject to valid existing rights." See *RMOGA II*, 13 ELR at 20043 n.17. Since the nonimpairment standard does not necessarily terminate development rights, the Tenth Circuit was not obliged to address Judge Kerr's arguments on the legality of "shell leases." The failure to address them does not disapprove them.

is very much alive. A challenge on this issue was raised and rejected in *Sierra Club v. Peterson*, along with the enforceability issue. In *Peterson*, however, the court's rationale for rejecting the effectiveness argument was weak¹¹⁵ and the plaintiffs chose to appeal specifically on this issue to the D.C. Circuit.¹¹⁶

The current administration's efforts to lease in designated wilderness have been stymied, at least for the moment. The administration, however, continues to lease in wilderness candidate areas. It undertakes such leasing using the EA approach, which characterizes leasing as environmentally insignificant, rather than the EIS approach, which mandates the thorough and comprehensive identification of each proposal's likely environmental impacts and possible alternatives. The *Sierra Club v. Peterson* appeal is significant because it addresses directly whether the stipulations underlying the EA approach to leasing are effective in precluding significant impacts. The outcome will likely determine whether the agencies may continue to consider millions of acres of potential wilderness under this leasing approach.

III. THE PALISADES CASE, *Sierra Club v. Peterson*

The Palisades Further Planning Area is a rugged mountainous area straddling the Targhee National Forest in Idaho and the Bridger-Teton National Forest in Wyoming. The proposal considered by the Forest Service in its EA was the leasing of the bulk of the Further Planning Area using a variety of stipulations.¹¹⁷ Specifically, the EA identified as "Highly Environmentally Sensitive (HES) Areas" all lands with slopes steeper than 40 percent and applied to them a Conditional No Surface Occupancy (NSO) Stipulation.¹¹⁸ The Conditional NSO Stipulation provides that no drilling activ-

115. See *infra* text and notes at notes 133-35.

116. *Sierra Club v. Peterson*, No. 82-1695 (D.C. Cir. appeal docketed August 19, 1982).

Unlike the PALISADES EA, *supra* note 48, many recent EAs do not detail the stipulations that particular areas will receive but merely state in a general way that protective stipulations will be applied as necessary. See *infra* text and note at note 248; CHATTAHOOCHEE EA, *supra* note 15. This lack of specificity strengthens the effectiveness argument, since a leasing proposal arguably cannot be determined to have no significant impacts before a decision has been made on what stipulations are to be applied to each area.

117. *Sierra Club v. Peterson*, 17 ERC at 1449; PALISADES EA, *supra* note 48.

118. According to the EA and the district court, the HES designation was also applied to important habitat areas for threatened or endangered species and areas with unique plant or animal species or significant cultural resources. *Id.*; *Sierra Club v. Peterson*, 17 ERC at 1453

ity will be allowed on the areas covered unless a subsequent decision with appropriate environmental analysis determines otherwise.¹¹⁹ Areas that did not receive the stipulation received the Standard Surface Disturbance Stipulation and the Further Planning Area Stipulation. These “non-NSO stipulations” state that drilling may not proceed until environmental analysis has been done.¹²⁰ They also retain for the government an indeterminate amount of control over the time, place, and manner of drilling and other surface activities.¹²¹ Since the Conditional NSO stipulation was applied to 80 percent of the leased area, many of the areas with the non-NSO stipulations exist as isolated parcels surrounded by NSO acreage.¹²² A map of the leases shows a “sea” of NSO acreage dotted with scattered “islands” of non-NSO acreage.¹²³ As in other leasing decisions, the EA for the Palisades Further Planning Area contained a Finding of No Significant Impacts (FONSI), relying on the stipulations to preclude any possible environmental impacts.¹²⁴ In challenging the FONSI, the Sierra Club in *Peterson* argued that the lease stipulations were unenforceable and, even if enforceable, were ineffective in precluding impacts.

A. The District Court Decision

In *Sierra Club v. Peterson*,¹²⁵ the District Court for the District of Columbia upheld a determination by the Department of the Interior and the Forest Service that leasing the bulk of the 247,000-acre Palisades Further Planning Area does not require an EIS because stipulations attached to the leases preclude any significant environmental impacts. *Sierra Club v. Peterson* establishes the enforceability of the stipulations being used under the government’s EA approach to wilderness leasing and, unless reversed on appeal,

n.4. However, the plaintiffs alleged that the slope gradient was the only criterion used since NSO stipulations allegedly were not applied to habitat for bald eagle, an endangered species. Sierra Club’s Memorandum in Support of Motion for Summary Judgment at 35, *Sierra Club v. Peterson*, 17 ERC 1449 [hereinafter cited as *Sierra Club’s Palisades Memorandum*].

119. *Sierra Club v. Peterson*, 17 ERC 1449, 1453. For simplicity, Conditional No Surface Occupancy Stipulations will be referred to as NSO stipulations in this article.

120. *Sierra Club v. Peterson*, 17 ERC 1449, 1453.

121. Brief of the Appellant Sierra Club at 3, *Sierra Club v. Peterson*, No. 82-1695 (D.C. Cir. appeal docketed August 19, 1982) [hereinafter cited as *Palisades Appellant’s Brief*].

122. *Sierra Club’s Palisades Memorandum*, *supra* note 118, at 38-39.

123. *PALISADES EA*, *supra* note 48.

124. *Sierra Club v. Peterson*, 17 ERC at 1452-53.

125. 17 ERC 1449 (D.D.C. March 31, 1982), *appeal docketed*, No. 82-1695 (D.C. Cir. August 19, 1982).

the legality of that approach to leasing. The district court decision rejected arguments by the Sierra Club on the NEPA sub-issues of the enforceability and the effectiveness of the stipulations. The case is currently on appeal to the D.C. Circuit Court on the effectiveness question only.¹²⁶ This section discusses Judge Robinson's opinion in *Sierra Club v. Peterson* and reviews the arguments on appeal. It then presents some important decisional criteria and projects possible outcomes and implications of the case.

1. The Enforceability Issue

On the enforceability issue, the district court held that the Secretary of the Interior had broad authority to place conditions on leases and that, therefore, the stipulations were enforceable. The court cited *Natural Resources Defense Council (NRDC) v. Berklund*,¹²⁷ which provided a statutory rationale for the enforceability of stipulations. *Berklund* held that the Secretary's already broad authority under the Mineral Leasing Act¹²⁸ to condition leases to serve the public interest must be construed in light of NEPA's instruction to interpret and administer laws in accordance with NEPA policies to the fullest possible extent.¹²⁹ *Berklund* ruled that this broad authority to set lease terms empowered the government to set lease terms to protect the environment even where such terms would render development commercially impracticable. In addition to reaffirming the *Berklund* rationale, Judge Robinson's reasoning in *Peterson* relied on a simple contract principle. The court noted that the lessees had agreed to the stipulations and that basic contract law allowed the lessees to contract knowingly to conditions that eventually might prevent them from exploring or developing the lease.¹³⁰

In reaching these conclusions, Judge Robinson rejected contrary arguments that underlay the then-standing Wyoming District Court decision in *Rocky Mountain Oil and Gas Association v. Andrus (RMOGA I)*,¹³¹ which has since been reversed on other grounds. In

126. Palisades Appellant's Brief, *supra* note 121, at 3.

127. 458 F. Supp. 925, 937 (D.D.C. 1978) *aff'd*, 609 F.2d 553 (D.C. Cir. 1979).

128. 30 U.S.C. § 187 (1976 & Supp. IV 1980).

129. 42 U.S.C. § 4332 (1976 & Supp. IV 1980).

130. 17 ERC at 1453. It is doubtful that the court's holding could stand on the contract rationale alone since an agency must not exceed its statutory authority when entering into a contract.

131. 500 F. Supp. 1338 (D. Wyo. 1980), *rev'd on other grounds*, 696 F.2d 734 (10th Cir. November 30, 1982).

RMOGA I, Judge Kerr had reasoned that leases which do not eventuate in the right to develop are contrary to the normal understanding of the term "lease" and that issuing such "shell leases" offends congressional intent in authorizing the issuance of leases. According to the court, such action also is unfair to lessees because it makes them pay for an entitlement called a "lease" which might ultimately be useless. Finally, in *RMOGA I* Judge Kerr held that the issuance of a lease which ultimately has no development rights constitutes an unconstitutional "taking."¹³² In *Peterson*, Judge Robinson explicitly rejected this constitutional holding and implicitly disapproved the other aspects of the *RMOGA I* holding. Judge Robinson's focus on the contract aspect of the transaction emphasizes that the lessee is essentially paying for an exclusive preference as the developer of a tract and accepts the terms for actual development at his peril.¹³³ An analogy could be made to the purchase of land by a developer willing to assume the risk of not obtaining the zoning authorization that his plans require.

2. The Effectiveness Issue

On the effectiveness issue, the *Peterson* court concluded that the stipulations would be effective in preventing significant impact from occurring. Its rationale is unconvincing, however. The ruling is premised in part on the court's apparent misapprehension that Sierra Club had conceded that the stipulations, if enforced, would reduce the impacts of the lease issuance to a level of insignificance. Perhaps the court was confused on this point, since the Sierra Club actively argued the opposite.¹³⁴ The other rationale for this holding may be found in the cryptic statement that "the stipulations may prevent development but following the appropriate environmental analysis under NEPA, development may occur."¹³⁵ The deficiencies

132. *Id.* at 1345.

133. 17 ERC at 1453. The *Peterson* facts addressed by Judge Robinson involve restrictions known to the lessee at the time of leasing whereas the *RMOGA I* facts addressed by Judge Kerr also involve restrictions that apply retroactively to leases and not known to lessees when they accepted the leases. Specifically, *RMOGA I* challenged the application of the statutory nonimpairment standard to new development activity on leases already in effect on June 2, when the nonimpairment standard was enacted. *See supra* note 114. Judge Kerr's arguments have more appeal with respect to such retroactive restrictions.

134. Sierra Club's Palisades Memorandum, *supra* note 118, propounds at length on the ineffectiveness of the stipulations. *Id.* at 9-11. "[T]here is no basis on which to conclude that any of the chosen stipulations, when applied to the lands within a particular leasehold, will function to prevent damage to the environment. . . ." *Id.* at 10.

135. 17 ERC at 1453.

of this statement as support for the court's decision are the focus of the pending appeal.

3. Implications of the Decision

Although the Sierra Club "lost" on the enforceability issue, the decision was really a victory for the Sierra Club because the stipulations were declared enforceable. The stipulations would clearly be useless for protecting the environment if they turned out to be unenforceable. In effect, the lawsuit seeks at least one of two remedies as its goal: strong lease stipulations or preparation of an EIS. These alternative remedies reflect an argument that either an EIS should be performed or the leases should not commit irrevocably to development in the first place. The environmental significance of the two approaches can be compared. Following the EA approach, strong stipulations ensure agency power to regulate development. Nevertheless, the very act of leasing may amount to an economic or political commitment to development even though structured not to be a legal commitment. Leasing also authorizes prospecting, which, if successful, creates greater development pressure.¹³⁶ An advantage of the EIS approach is the delay of the leasing decision, perhaps until protective legislation is passed or a more protective administration takes office. An EIS also alerts Congress and the Executive to a proposal,¹³⁷ generates public attention, and allows public participation,¹³⁸ all of which may facilitate a more protective decision. Most important, an EIS forces an agency to admit the impacts of its proposal and identify alternatives.

Thus, both the substantive safeguards of strong stipulations and the procedural safeguards of EIS preparation have protective potential. Because the efficacy of both depends ultimately on their respective application by the agencies, they should be regarded as complementary rather than mutually exclusive protective devices.

B. The Effectiveness Issue on Appeal

Since enforceable stipulations serve to protect environmental concerns in lease areas, the Sierra Club's appeal of the district court's

136. In general, there will be much more pressure to permit development on a given area once seismic surveys indicate the presence of valuable deposits than prior to such surveys.

137. *NRDC v. Berklund*, 458 F. Supp. 925, 938 n.22 (D.D.C. 1978), *aff'd*, 609 F.2d 553 (D.C. Cir. 1979); *Natural Resources Defense Council, Inc. v. Morton*, 458 F.2d 827 (D.C. Cir. 1972).

138. 40 C.F.R. § 1503 (1982).

decision does not contest the holding on the enforceability issue. Instead, the appeal is confined to the effectiveness issue and, specifically, to the question of the effectiveness of the stipulations on the 20 percent of leased land that did not receive a Conditional No Surface Occupation (NSO) Stipulation.¹³⁹ The thrust of the appeal is that the stipulations (other than the Conditional NSO Stipulation) fail to retain for the agency the authority to prevent a lessee from drilling, and that this deficiency prevents the stipulations from guaranteeing that no significant impacts may occur. Accordingly, since there may be significant impacts, an EIS is required.¹⁴⁰ This argument presents two questions that may be discussed sequentially: (1) whether non-NSO leases by their nature convey firm development rights; and, if so, (2) whether the development so authorized may have significant impacts which require that an EIS be prepared.

1. Are Development Rights Assured?

The basic government oil and gas lease without any stipulations grants the lessee a right to develop any oil and gas deposits on the leased tract.¹⁴¹ Unless qualified by stipulations, the lease divests the government of the authority to prevent development.¹⁴² In the absence of stipulations, government action which did prevent development would likely constitute a compensable breach of contract¹⁴³ or a "taking."¹⁴⁴ By applying stipulations to leases, however, the government may limit the rights it conveys to lessees and reserve for itself a degree of control over lease activities.¹⁴⁵ Since the Conditional No Surface Occupancy Stipulation clearly states that the surface of the lease area may not be occupied,¹⁴⁶ it retains for the

139. Palisades Appellant's Brief, *supra* note 121, at 2.

140. *Id.*

141. The lessee is granted the exclusive right and privilege to drill for, mine, extract, remove and dispose of all the oil and gas deposits . . . in the lands leased, together with the right to construct and maintain thereupon, all works, buildings, plants, waterways, roads, or other structures necessary to the full enjoyment thereof. . .

Dep't of the Interior Lease form 3110-1, p. 2, section 1 (March 1977).

142. *Id.* The oil and gas lease is a contract determinative of the rights and obligations of both parties to the contract. *Sun Oil Co. v. United States*, 572 F.2d 786, 818 (Ct. Cl. 1978). The lessee receives "a property right enforceable against the government." *Union Oil Co. of Cal. v. Morton*, 512 F.2d 743, 747 (9th Cir. 1975).

143. *See supra* note 142.

144. *Union Oil Co. of Cal. v. Morton*, 512 F.2d at 747-49.

145. *Sierra Club v. Peterson*, 17 ERC at 1453; *NRDC v. Berklund*, 458 F. Supp. at 937.

146. Federal Defendants' Statement of Points and Authorities in Support of Motion to Dismiss or for Summary Judgment at 32, *Sierra Club v. Peterson*, 17 ERC 1449 [hereinafter cited as Federal Defendants' Palisades Statement].

government the right to prevent activity on the lease altogether. The Sierra Club's appeal, therefore, does not contest the Finding of No Significant Impact in the Palisades EA with respect to such stipulations.

In contrast, the non-NSO stipulations such as the Standard Surface Disturbance Stipulation, and the Further Planning Area Stipulation, may not retain for the government a right to prevent activity. They reserve some ability to control the time, place, and manner of development activity, but their language is permissive in nature, and the degree of control retained is unresolved. Non-NSO stipulations do state that further environmental analysis will be required before drilling is permitted. But if the authority to actually prevent development effectively has been given away at the leasing stage, the agency may find itself unable to prevent significant impacts when it reaches the drilling stage.¹⁴⁷ In brief, the agency will find itself trying to lock "the barn door after the horses have already been stolen."¹⁴⁸

While the federal government has avoided addressing this line of reasoning directly, its apparent position is that it retains authority to prevent development only on areas covered by NSO Stipulations. Specifically, it states that the Conditional NSO Stipulation reserves authority to prevent development, but when discussing the other stipulations the government claims only that it has the power to regulate the time, place, and manner of activity.¹⁴⁹ Thus, the government effectively concedes that it does not retain the power to preclude development on acreage not covered by NSO stipulations.

Once this flaw in the government's position is acknowledged, there are two ways of viewing its reasoning and the EA approach to leasing. The cynical view is that it is trying to cover a spurious finding of no significant impact by asserting that major surface activities cannot occur without a subsequent authorizing decision and attendant environmental analysis. This obfuscates the fact that the subsequent "decision" can only be one that authorizes development. The more generous view is that the government admits it cannot prevent development on the non-NSO areas but has determined that the impacts of development on these areas would not be significant since they amount to only 20 percent of the leased area and can be

147. Reply Brief of the Appellant Sierra Club at 9-10, *Sierra Club v. Peterson*, 17 ERC 1449 [hereinafter cited as *Palisades Appellant's Reply Brief*].

148. *Lathan v. Volpe*, 350 F. Supp. 262, 266 (W.D. Wash. 1971), *aff'd in part*, 455 F.2d 1111 (9th Cir. 1972).

149. Federal Defendants' Palisades Statement, *supra* note 146, at 32.

regulated to a degree. The problem with this view is that the government has failed to specify the scope of the rights being granted or powers being retained under the non-NSO stipulations in the first place. As a consequence, the EA fails to describe what impacts may be expected under the non-NSO stipulations or to articulate why these impacts are not significant.

When viewed in light of the above analysis, Judge Robinson's rationale for finding the stipulations effective is inadequate. The court stated that "both sides concede [the stipulations] may prevent development."¹⁵⁰ While this is true for the Conditional NSO Stipulations, no litigant took the position that the other stipulations may prevent development.¹⁵¹ The court also wrote that "the stipulations may prevent development but following the appropriate environmental analysis under NEPA, development may occur."¹⁵² Perhaps the court intended this as an interpretation of the stipulations. That is, after examining the language of the stipulations and the law governing them, the court was ruling that the non-NSO stipulations do reserve authority to prevent development. Since neither party took this position and since there is no analysis of the stipulation language by the court, this seems unlikely. More likely, the court was simply referring to its finding that the later environmental analysis excused the absence of an EIS at the current stage, without reflecting on the commitment to development inherent in leasing which would be irrevocable by the time the later analysis was performed.

This fundamental issue in *Peterson* is illuminated by a line of cases enunciating what could be called the "irreversible and irretrievable commitment" doctrine. Their principle is that when a project may have significant impacts an EIS must be prepared *before* the action authorizing the project.¹⁵³ Two related mining cases illustrate this principle. *Natural Resources Defense Council (NRDC) v. Berklund*¹⁵⁴ held that an EIS must be prepared before the issuance of coal pref-

150. 17 ERC at 1453.

151. See *supra* text and notes at notes 134, 149.

152. 17 ERC at 1453.

153. NRDC v. Berklund, 458 F. Supp. at 238-39; EDF v. Andrus, 596 F.2d 848, 852 (9th Cir. 1979); Nat'l Forest Preservation Group v. Butz, 485 F.2d 408, 412 (9th Cir. 1973); California *ex rel.* Younger v. Morton, 404 F. Supp. 16, 92 (C.D. Cal. 1975). The phrase "irreversible and irretrievable commitment of resources" is derived from NEPA § 102 (2)(C)(v), 42 U.S.C. § 4332 (2)(C)(v) (1976 & Supp. IV 1980), but is not used there as the standard for when the EIS requirement is triggered. It nevertheless has been used by these courts to illustrate the standard for when an EIS is required.

154. 458 F. Supp. at 237-39.

erence right leases which might have significant impacts and that the EIS may not be delayed until the lessees submit mining plans. Lease issuance was ruled an "irreversible and irretrievable commitment of resources" requiring the preparation of an EIS. In contrast, *Sierra Club v. Hathaway*¹⁵⁵ held that issuance of geothermal resources leases was not an "irreversible and irretrievable commitment" of resources requiring a prior EIS because it entitled lessees only to limited and environmentally insignificant exploration activities.

This line of cases also demonstrates a corollary to this timing principle: the decision on whether an EIS is required must consider the impacts of the entire activity actually authorized.¹⁵⁶ Nevertheless, the cases determine what has actually been authorized only in a rough, practical sense.¹⁵⁷ These cases did not determine the extent to which the government was legally committed to allow development. The *Peterson* appeal is animated by the question of what activity has been "authorized" in a strict legal sense.¹⁵⁸ This is a key question, one neglected by Judge Robinson and, apparently, by the courts in the above line of cases.

On this question of timing, the government in the *Peterson* appeal urges that an EIS is not necessary presently because there is "no 'significant action of known dimensions'"¹⁵⁹ and more thorough analysis at this point is not "'meaningfully possible.'"¹⁶⁰ While it is true that the oil potential of the Palisades area is presently speculative, there is no reason why the government cannot specify those activities to which it is committed under the non-NSO stipulations or what the environmental effects of such activities would

155. 579 F.2d 1162 (9th Cir. 1978).

156. This corollary explains, for example, the difference in outcomes between *Berklund* and *Hathaway*. Both cases concern the need for a pre-leasing EIS in relation to a type of development that can presumably have significant impacts when undertaken on a large scale. The *Hathaway* geothermal leases were found to actually authorize only preliminary prospecting activities with insignificant impacts, whereas the *Berklund* leases represented an after-prospecting authorization which made a commitment to development.

157. In *Berklund*, for example, the court considered the leases to authorize, or at least to commit to development, without looking at the question of whether the leases *legally obligated* the agency to approve subsequent mining plans that precede actual development. The question of what the leases committed to as a legal rather than as a practical manner was missed, despite the agency's statement that it was permitted by regulation to reject mining plans that were unsatisfactory environmentally. 458 F. Supp. at 930.

158. See, e.g., Palisades Appellants' Brief, *supra* note 65, at 23-27.

159. Brief for the Federal Appellees at 32, *Sierra Club v. Peterson*, No. 82-1695 (D.C. Cir. appeal docketed, August 19, 1982) [hereinafter cited as Palisades Federal Appellees' Brief] (quoting *Sierra Club v. Hathaway*, 579 F.2d 1162, 1169 (9th Cir. 1978)).

160. *Id.* (citing Nat'l Wildlife Fed'n v. Appalachian Reg'l Comm'n, 677 F.2d 883, 889 (1981)).

be.¹⁶¹ More important, NEPA requires an EIS prior to an irrevocable commitment of resources regardless of the difficulty of predicting a project's future.¹⁶²

The agencies' determination that the proposed leasing does not commit to any environmentally significant activities is at odds with their position in other cases. For example, in the "Little Granite Creek" case, *Sierra Club v. Chase*,¹⁶³ currently before the federal district court in Wyoming, the government argues that it committed itself to permitting development when it issued stipulated leases on the Gros Ventre recommended wilderness area. The set of stipulations used in Little Granite Creek are comparable to the non-NSO stipulations in the Palisades. Both sets of stipulations on their face retain authority to regulate development but not to prevent it. In *Chase*, the Sierra Club is challenging the issuance of drilling permits on leases issued in 1969. BLM asserts that it is bound by the terms of the lease and stipulations to issue such permits, regardless of its assessment of the environmental damage involved.¹⁶⁴ From this it can be seen that agency policy is inconsistent as it concerns the significance of non-NSO leasing. At the leasing stage the agencies say such leases make no irrevocable commitment and so require no EIS. But at the drilling permit stage when an EIS may be required, the agencies say that they irrevocably committed to development when the leases were issued.¹⁶⁵

There are a number of reasons why it is particularly urgent for the Court of Appeals to define the scope of the rights granted and authority retained under non-NSO stipulations. First, as the *Chase* situation illustrates, the agencies take an inconsistent position on the issue in a way that enables them to avoid NEPA compliance

161. See *infra* text and notes at notes 253-55.

162. *City of Davis v. Coleman*, 521 F.2d 661, 676 (9th Cir. 1975) ("That the exact type of development is not known is not an excuse for failing to file an impact statement at all. Uncertainty about the pace and direction of development merely suggests the need for exploring in the [EIS] alternative scenarios based on these external contingencies"); *Env't Defense Fund v. Andrus*, 596 F.2d 848, 853 (9th Cir. 1979).

163. No. C82-0411 (D. Wyo. filed Oct. 7, 1982).

164. Complaint for Declaratory Judgment and Injunctive Relief, *Sierra Club v. Chase*, No. C82-0411 (D. Wyo. filed Oct. 7, 1982). BLM's position in that case was based upon a legal opinion prepared in response to operating proposals for Little Granite Creek and vicinity. Opinion of the Acting Regional Solicitor, U.S. Dep't of the Interior (Oct. 10, 1980). The legal opinion has been repudiated by the Department of the Interior in the course of the *Peterson* and *RMOGA* litigation.

165. The opinion is one of a number of opinions and regulations indicating that the agencies regard lease issuance as an irretrievable commitment to a mineral development proposal and the point at which an EIS should be prepared. Opinion of the Solicitor, U.S. Dep't of Interior (October 5, 1981); 516 D.M. 4.3d, 45 Fed. Reg. 27,546 (April 23, 1980).

altogether. Under the EA approach to leasing, by the time that specific environmental analysis through an EIS is to be undertaken, agencies may not prepare an EIS because they have divested all discretion. The Little Granite Creek situation in *Chase* must be avoided. Second, as the Interior Department preaches but does not practice, policies of fairness to lessees and economic efficiency require that the reserved right of the government to prevent beneficial use of the lease, if any, be made "crystal clear" at the outset.¹⁶⁶ Third, this issue represents the crux of a number of court and administrative challenges of contested leasing decisions like the Palisades,¹⁶⁷ which must be resolved in the near future. Finally, it is impossible for meaningful environmental analysis on leasing proposals to occur unless the effect of non-NSO stipulations has been defined. As the next section discusses, a finding of no significant impact cannot be meaningful if the effect of the stipulations is indeterminate.

2. May Development have Significant Effects?

Assuming that non-NSO leases commit to some degree of development, the question arises whether that development may be significant. This issue has not been given a "hard look"¹⁶⁸ by the agencies or by the district courts. In *Peterson*, the agency rested its no impact finding on the legal conclusion that the possibility of later environmental analysis at the drilling permit stage obviated the need for an EIS before leasing.¹⁶⁹ The EA itself did not describe the scope of development authorized or the impacts that might result. Similarly, the district court's determination was made on the simple legal presumption that the stipulations could prevent development. The court did so without looking at the extent of development authorized by the lease and its possible impacts. This judicial deference complicates the *Peterson* appeal. The appellate court would seem to lack the factual basis necessary to reach determination on the validity of the no significant impacts conclusion.

The Palisades EA described the impacts of full development, that is, leasing without stipulations, but it did not describe the impacts of the proposed action, which is leasing with stipulations.¹⁷⁰ The prac-

166. *Chevron Oil Co.*, 24 IBLA 159, 160 (1976).

167. *See supra* note 90 (cases and administrative actions cited).

168. *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976) (environmental analysis must take a "hard look" at environmental consequences).

169. *Sierra Club v. Peterson*, 17 ERC at 1452-53.

170. PALISADES EA, *supra* note 48, at 36-47.

tical effect of this omission is to enable the agencies to avoid describing the environmental consequences of the actual activities that it irrevocably authorizes.

This overall deficiency in the EA itself arguably constitutes a NEPA violation quite apart from whether the EA's no impact conclusion is in some technical sense "correct." Specifically, an EA which does not describe the scope of developments violates the requirement that an EA *describe the impacts* of any "proposed action," as required by the primary NEPA regulations.¹⁷¹ EAs have been struck down for neglecting this duty to describe, albeit without specific reference to the NEPA regulations,¹⁷² and the duty would seem to be intrinsic in the D.C. Circuit's stated requirement in *Peterson* that EAs take a "hard look" at a proposal's impacts.¹⁷³

The deficiency has not prevented the government from proposing several reasons why the development should be considered insignificant. First, it notes that, statistically, drilling takes place on only a small percentage of all leases issued.¹⁷⁴ This argument is circular. It urges that authorizing development should not be considered significant because lessees will probably not use their authorization. It ignores the possibility that a valuable field will be discovered and many leases therefore developed. Second, the government argues that impacts can be mitigated or "reclaimed." For example, it recites some of the limitations that the non-NSO stipulations can impose on activity, such as requiring the best available drilling technology or curtailing operations during calving and fawning seasons.¹⁷⁵ The approach is also spurious because it makes the conclusory statement that since the non-NSO areas have not been classified as "Highly Environmental Sensitive Areas," they are, "by definition, not incapable of being rehabilitated if any damage is caused."¹⁷⁶ Such arguments sidestep the EA's fundamental failure to even list the impacts that might occur.¹⁷⁷

171. 40 C.F.R. §§ 1509.9 (a)(1) & (b).

172. *Foundation for N. Am. Wilderness Sheep v. U.S. Dep't of Agriculture*, 681 F.2d 1172, 1178-80 (9th Cir. 1982).

173. *Sierra Club v. Peterson*, 17 ERC at 1452.

174. *Palisades Federal Appellees' Brief*, *supra* note 159, at 26.

175. *Id.* at 30.

176. *Id.* at 28.

177. At the appellate oral argument there was some discussion of the bearing of the size and location of the acreage with non-NSO stipulations on the question of the significance of possible environmental impacts. (Author attended hearing). The non-NSO acreage is approximately 28,000 acres (43 square miles) or about 20 percent of the leased acreage. While some of the non-NSO acreage is at the edge of the Palisades FPA along a road, most is on parcels within

*C. The Standard of Review on Appeal:
The Word "May" and the Arbitrary and Capricious
Standard of Review*

An agency determination that an EIS is not required is subject to the so-called "arbitrary and capricious" standard of judicial review.¹⁷⁸ In addition, whether there may be significant impacts generally is a factual question, committed to agency discretion and subject to the arbitrary and capricious standard of review.¹⁷⁹ Under this standard a court must defer to any reasonable interpretation of the facts by the agency. The existence of another reasonable interpretation contrary to that of the agency is not grounds for reversal.

The deference inherent under this standard of review has an interesting interaction with the word "may" in the NEPA requirement of an EIS for any major federal action that may significantly affect the environment. Although the word "may" does not occur in the language of the NEPA section dictating the EIS requirement, the primary NEPA regulations have interpreted the section to require an EIS when a proposal "may affect" the environment.¹⁸⁰ This reading has been upheld by the courts.¹⁸¹ If the operative language

the FPA. PALISADES EA, *supra* note 48, at A-15. Development, particularly roads and pipelines, of such interior tracts will obviously affect other acreage.

178. There is a split in the circuits over the standard of review for agency findings that an EIS is not required. The "arbitrary and capricious" standard is used in the Second and Seventh Circuits. *Harlem Valley Transp. Ass'n v. Stafford*, 500 F.2d 328 (2d Cir. 1974); *First Nat'l Bank of Chicago v. Richardson*, 484 F.2d 1369 (7th Cir. 1973). A "reasonableness" standard is used in the Fifth, Eighth, Ninth, and Tenth Circuits. *Save Our Ten Acres v. Kreger*, 472 F.2d 463 (5th Cir. 1973); *Minnesota Pub. Interest Research Group v. Butz*, 498 F.3d 1314 (8th Cir. 1974); *City of Davis v. Coleman*, 524 F.2d 661 (9th Cir. 1975); *Wyoming Outdoor Coordinator's Council v. Butz*, 484 F.3d 1244 (10th Cir. 1973). This article uses the arbitrary and capricious standard for its analysis and concludes that a court has substantial freedom to intervene. This conclusion also would hold under the reasonableness standard which, because it is a stricter standard, *Save Our Ten Acres*, 472 F.2d at 466, gives at least as much freedom to intervene. The arbitrary and capricious standard apparently is the standard in the D.C. Circuit, where the Palisades case is being heard, although this is not entirely clear, and the court may even equate the two standards. *See Cabinet Mountain Wilderness/Scotman's Park Grizzly Bears v. Peterson*, 685 F.2d 678, 681-82 (D.C. Cir. 1982); *People Against Nuclear Energy v. NRC*, No. 81-1131, slip op. at 26 (D.C. Cir. May 14, 1982); *Comm. for Auto Responsibility v. Solomon*, 603 F.2d 992, 1002-1003 (1979); *Maryland-National Capital Park and Planning Comm'n v. U.S. Postal Service*, 487 F.2d 1029, 1039 n.7 (D.C. Cir. 1973) [hereinafter cited as *MNCPPC*].

179. *Harlem Valley Transp. Ass'n v. Stafford*, 500 F.2d 328 (2d Cir. 1974).

180. 40 C.F.R. § 1508.3.

181. *Found. for N. Am. Wild. Sheep v. U.S. Dep't of Agriculture*, 681 F.2d 1172, 1177-78 (9th Cir. 1982); *Columbia Basin Land Protection Ass'n v. Schlesinger*, 643 F.2d 585, 597 (9th Cir. 1980); *City & County of San Francisco v. United States*, 615 F.2d 498, 500 (9th Cir. 1980); *City of Davis v. Coleman*, 521 F.2d 661, 673 (9th Cir. 1975); *Save Our Ten Acres v. Kreger*, 472 F.2d 463, 467 (5th Cir. 1973). The cases indicate that an EIS is necessary whenever a proj-

of the EIS requirement were "whenever a proposal *will have* (or *will likely have*) significant impact," then the agency's determination of the scenario of environmental impacts that would occur would be entitled to deference as long as it were reasonable. The requirement of an EIS "whenever a proposal *may* have significant impact" puts an additional duty on the agency, that of considering alternative scenarios.¹⁸² Since the question posed by "may" is not whether significant impacts will occur but whether significant impacts are possible,¹⁸³ the agency is required to consider not only the scenario it expects most but also alternative scenarios. Merely evaluating the impact of the scenario it expects does not entitle an agency to deference. The existence of a major unconsidered scenario with significant impacts is grounds for overruling the agency.¹⁸⁴ An agency is not required to consider every conceivable scenario a challenger may present, and is entitled to deference in deciding what is likely enough to require consideration. Nonetheless, theoretically there must be some point at which a scenario with significant impacts is sufficiently likely to occur that the agency must consider it.¹⁸⁵

In *Peterson*, the agency considered the impacts of the scenario in which the stipulations it imposed are effective to preclude development. It failed to consider the impacts of the scenario in which its stipulations cannot preclude development. The court, therefore, is entitled to overrule the agency if it determines that the scenario of ineffective stipulations may have significant impact and is likely enough that the agency should have considered it. The question of how likely this scenario is depends in turn on the court's interpretation of the stipulations. This is a purely legal question. Its integration into what might otherwise be a purely factual inquiry is the agency's doing. That is, the agency chose to structure its proposal and analysis so that its finding of no significant impact rests on the legal question of the stipulations' effectiveness. The court is entitled to

ect "may cause a significant degradation of some human environmental factor." *Save Our Ten Acres*, 472 F.2d at 467. The Ninth Circuit has gone so far as to indicate that an EIS is necessary whenever "the plaintiff has alleged facts which, if true, show that the proposed project *may* significantly degrade some human environmental factor." *Columbia Basin*, 643 F.2d at 597 (emphasis in original).

182. The agency's duty to consider alternative scenarios is stated in *City of Davis v. Coleman*, 521 F.2d 661, 676 (9th Cir. 1975).

183. *Found. for N. Am. Wild. Sheep*, 681 F.2d at 1178 ("A determination that significant effects on the human environment *will in fact occur* is not essential" (emphasis in original)).

184. *Id.* at 1172.

185. It would be nearly impossible for any finding of no significant impact to stand if EAs were required to consider every remotely possible impact of a proposal.

make an independent judgment on this question.¹⁸⁶ It is not a factual question in which the agency's discretion prevails,¹⁸⁷ or a matter of statutory construction for which agencies also receive some deference;¹⁸⁸ rather, it involves the interpretation of a contract between the government and a lessee. In summary, the word "may" in the EIS requirement subjects the agency to reversal for failure to consider a likely scenario with potentially significant impacts; the likelihood of the scenario should be determined by the court's independent assessment of the effectiveness of the stipulations in precluding development.

D. Possible Outcomes on Appeal

The D.C. Circuit's decision in this case likely will determine whether the government may continue large-scale leasing under the EA approach. In this decision, a central issue is whether the non-NSO stipulations preserve government authority to prevent development.¹⁸⁹ A ruling that they do would allow EA leasing to continue, but would facilitate wilderness protection by guaranteeing the government full power to refuse permission to develop leases.¹⁹⁰ The stipulations would be certified both as retaining the option of refusing development and, under the lower court's decision, as enforceable. This ruling, while not mandating a pre-leasing EIS, would "strengthen" leasing stipulations and, as such, would represent a victory of sorts for environmentalists.¹⁹¹ If the court instead decides that the non-NSO stipulations cannot prevent development, it then faces the issue whether significant impacts may occur, the trigger

186. See *supra* text and notes at notes 153-65.

187. *Harlem Valley Transp. Ass'n v. Stafford*, 500 F.2d 328 (2d Cir. 1974).

188. *FTC v. Mandel Bros.*, 359 U.S. 385, 391 (1975).

189. The court conceivably could avoid this issue. For example, it might refuse to upset Judge Robinson's finding that the Sierra Club conceded the stipulations' ability to prevent significant impact, 17 ERC at 1453. Such a decision would have minimal precedential value. The court also could avoid the issue by shaping an opinion around the nebulous four-factor test for evaluating EAs set forth in *MNCPPC*, 487 F.2d 1029, 1039 & n.7 (D.C. Cir. 1973). See *supra* note 179. This would sanction the government's EA approach to leasing. Finally, the court could also remand the question of the stipulations' ability to prevent development to the district court or even the agency.

190. Due to the ambiguous nature of the lower court's ruling on effectiveness, it would be desirable for the Court of Appeals to make clear the scope of its opinion and the rationale for finding that the stipulations retain veto power over future development.

191. A holding that the non-NSO stipulations retain authority to prevent development would be contrary to the argument advanced by the Sierra Club but would serve its interests by "strengthening" the stipulations. The lower court's holding that the stipulations are enforceable has a similar effect. See *supra* text and notes at note 135.

test for the EIS requirement. There are three chief possibilities here: the court could uphold the FONSI, remand for reconsideration of the FONSI, or veto the FONSI.

First, the court could uphold the government's no impact determination despite finding that development rights are guaranteed under non-NSO leases. This holding could only be based on a finding that the development rights guaranteed under the stipulations are so limited that they lack even the potential for significant environmental impact. As discussed above,¹⁹² the court probably lacks the factual basis for this conclusion because the Palisades EA never described the specific impacts that are possible under the lease conditioned by the non-NSO stipulations. Both the agency and the lower court based their determinations on legal presumptions rather than factual analysis. This holding would effectively endorse the government's current practice of rubber stamping major wilderness leasing programs with cursory environmental analysis and boilerplate FONSI's.

Second, the court could rule that development rights are guaranteed under the stipulations but avoid further determination by remanding the question whether the development guaranteed has potential for significant impact. Because the EA did lack the factual basis necessary for a no impact determination, it would be more reasonable to remand to the agency than to the district court. This result amounts to a compromise position. On the one hand, it prevents the EA from standing either on an incorrect legal assessment of the stipulations or an inadequate factual assessment of the development and resultant impacts they authorize. At the same time, it avoids setting a precedent on the acceptability of EAs as leasing decision documents. On the other hand, however, the acceptability of EAs in general is a key issue being widely litigated¹⁹³ that arguably should be resolved here rather than deferred.

Third, the court may conclude that because the stipulations cannot prevent development they do not necessarily preclude the possibility of significant environmental impact. This determination would reflect the obvious significance of any development in wilderness in general and in wilderness of this size and sensitivity in particular. It would also reflect the government's duty to produce an EIS whenever significant impact is possible. In the opinion of this writer,

192. See *supra* text and notes at notes 168-73.

193. See *supra* note 90 (administrative actions and cases cited).

the court has an insufficient factual basis to rule that the development guaranteed will necessarily be insignificant but the court has sufficient legal authority to hold such development significant. Congress' understanding of "significant impact" as the EIS trigger test is a statutory interpretation question on which the court is entitled to use independent judgment.¹⁹⁴ The court, therefore, may require preparation of an EIS if it finds that building roads and drilling wells in the heart of wilderness is within that understanding. "The spirit of [NEPA] would die aborning if the facile, ex parte decision that the project . . . did not significantly affect the environment were too well shielded from impartial review."¹⁹⁵

A determination of significant impact could be limited to the facts of the case to allow the possibility of EA leasing under other circumstances. A no impact result could be permitted, for example, where the acreage involved was smaller, the land less fragile, or the stipulations more restrictive. Within its scope, a holding striking down the FONSI would invalidate the EA approach to large-scale wilderness leasing. The government would then be required either to precede major wilderness leasing projects with EISs or to use leases lacking guaranteed development rights by attaching NSO stipulations or other restrictive stipulations. One such restrictive stipulation is the Contingent Rights Stipulation which, as an alternative to EA and EIS leasing, represents a third approach to leasing. The following section discusses the Contingent Rights Stipulation and its environmental implications in the context of the issues raised by the *Peterson* appeal.

IV. THE CONTINGENT RIGHTS STIPULATION

In mid-1982, the Forest Service adopted a policy of selectively using a new lease stipulation, the Contingent Rights Stipulation (CRS), in order to break the impasse that it had reached in issuing oil and gas leases.¹⁹⁶ Superficially, the CRS is the strictest possible stipulation because in making all rights contingent it purports to retain for the government complete authority to preclude development later.¹⁹⁷ Because the CRS theoretically does not commit irreversibly

194. See *supra* text and notes at notes 153-65, 186.

195. *Save Our Ten Acres v. Kreger*, 472 F.2d 463, 466 (5th Cir. 1973).

196. CRS Policy Notice, 47 Fed. Reg. 18,158 (Apr. 28, 1982) [hereinafter cited as CRS Policy Notice].

197. *Id.* Memorandum, Test of a Revised Leasing Process Through Use of a Contingent Right Stipulation, to Reg'l Foresters from Forest Service Chief R. Max Peterson at 1 (May 28, 1982) [hereinafter cited as CRS Policy Directive]. The CRS would appear to be very similar in

to development, the Forest Service believes that it requires no environmental analysis.¹⁹⁸ Ultimately, the CRS policy chiefly serves the administrative convenience of the Forest Service rather than any coherent approach to natural resource use. As a result, it has been received with reservation by both industry and environmental interests.¹⁹⁹ Industry is skeptical of the CRS because it apparently does not convey a guaranteed right to drill.²⁰⁰ Conservationists are wary of the CRS because it is used to eliminate pre-leasing environmental analysis and because its ability to actually protect wilderness is unclear.

A. *The CRS Described*

The CRS states that an operating plan for activity on a lease will not be approved if the plan will result in unacceptable impacts on land uses or on the environment. It states also that the lessee has no recourse for compensation, notwithstanding the government's failure to approve operating plans.²⁰¹ These provisions are intended to make the government's obligation to allow development completely discretionary by establishing that disapproval of operating plans will not constitute a compensable breach of contract or "taking."²⁰² The Forest Service believes that leases issued with the CRS do not require any initial environmental analysis because the CRS retains authority to preclude any development that is environmentally unacceptable. Instead of initial environmental analysis for a whole leasing area, the Forest Service plans to perform analysis at the operating stage for those leases on which permission to drill is actually sought.²⁰³ Administratively, the amount of environmental analysis

effect to a NSO stipulation, since both purportedly retain the right to prevent development. A lessee however, presumably would have a greater expectation of being allowed to develop under the CRS since the NSO stipulation represents a decision made after environmental analysis not to allow surface occupancy whereas CRS leasing amounts to the deferral of both environmental analysis and a decision on development. The opposite is true for NSO areas located close enough to non-NSO areas to be reached by slant drilling. For such lands the NSO stipulation represents permission to develop in a restricted manner.

198. *Id.*

199. 48 Fed. Reg. 3370 (Jan. 25, 1983). *See, e.g.*, Statement of Reasons at 6-9, *In re: USDA Forest Service Consent to Issuance of Oil and Gas Leases Hoosier National Forest, Indiana.*

200. CRS Policy Notice, 47 Fed. Reg. 18,158 (Apr. 28, 1982).

201. *Id.* The CRS also provides that the government may extend the lease for up to five years without rental payment when it decides an operating plan cannot be approved.

202. *See supra* notes 141-42. The fifth amendment of the United States Constitution requires compensation for "takings": "nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

203. CRS Policy Notice, *supra* note 196.

that the Forest Service performs will be reduced, since operating plans are actually submitted for less than 20 percent of leases issued.

Before the CRS is used, four criteria must be met.²⁰⁴ First, the leases must be non-competitive oil and gas or geothermal leases on further planning areas or non-wilderness candidate lands. Second, there must not be a completed EA or EIS for the area in question. Third, there must be information from land management plans or other documents sufficient to indicate general resource values but insufficient for lease-specific environmental analysis. Finally, potential resource use conflicts must be great enough that considerable expense will be saved by avoiding pre-leasing environmental analysis, but not so great that lease denial is justified for a large proportion of tracts. To date, the CRS has been used in at least two areas, although none of these areas involve significant wilderness candidate land.²⁰⁵

B. Administrative Implications

To understand the CRS policy, consider the chicken-and-egg problem that the Forest Service faces as a land manager trying to design a leasing system. It is inconvenient to do environmental analysis before an operating proposal is made. An operating proposal cannot be made until prospecting has occurred. Companies have little incentive to prospect until they have drilling rights assured. But assured drilling rights may not be issued until environmental analysis is performed. There is no perfect solution to this circular situation where no step can come first because it ought ideally to be preceded by another step.

There are, however, three imperfect solutions (see figure 1). (1) Lease with assured drilling rights, do environmental analysis later. This alternative is obviously illegal because it violates NEPA; it is what *Sierra Club v. Peterson* and similar suits accuse the government of doing. (2) Lease without granting assured drilling rights; do

204. CRS Policy Directive, *supra* note 197, at 2.

205. The Forest Service decided to approve CRS leasing for adjoining sections of the Challis and Salmon National Forests in Idaho. The acceptance rate for such leases appears to be only about 10 percent, as only twelve of over 100 CRS leases offered in this area have been accepted. Telephone interview with Lorrie Meier, Mineral Technician, Mineral Areas Management, Region 4 Forest Service, U.S. Dep't of Agriculture (Apr. 25, 1983). On March 18, 1983, the Forest Service rejected an administrative appeal by environmental groups and gave final consent to CRS leasing on 150,000 acres in the Hoosier National Forest. Telephone interview with Kathy Dolge, Conveyance and Applications Examiner, Minerals Management, Region 9, Forest Service, U.S. Dep't of Agriculture (Apr. 25, 1983).

FIGURE 1

MANAGEMENT ALTERNATIVES FOR OIL AND GAS LEASING SYSTEMS

Alternative	1	2	3
System	Lease with assured drilling rights before doing environmental analysis	Lease without assured drilling rights before doing environmental analysis	Do environmental analysis before leasing with assured drilling rights
Order of Steps	<ol style="list-style-type: none"> 1) assured rights 2) prospecting 3) operating proposal 4) environmental analysis 	<ol style="list-style-type: none"> prospecting operating proposal environmental analysis assured rights 	<ol style="list-style-type: none"> environmental analysis assured rights prospecting operating proposal
Illustration	Procedure government accused of in <i>Sierra Club v. Peterson</i> , etc.	CRS (as purported)	EIS precedes leasing
Drawbacks	Violates NEPA	Some prospecting is wasted	Some environmental analysis is wasted

environmental analysis later. This is what the CRS purports to do. (3) Do environmental analysis first; lease with assured drilling rights later. This is what environmentalists are seeking—a detailed pre-leasing EIS.

There is a practical difference between the two “legal” alternatives above. In alternative two, the CRS, prospecting precedes environmental analysis, and in alternative three, the EIS, these steps are reversed (see figure 2). As the government’s CRS policy claims, environmental analysis is wasted if subsequent prospecting results prevent a lessee from drilling. The other side of the coin is that prospecting is wasted if subsequent environmental analysis prevents drilling. In fact, prospecting for oil is extremely expensive. For a given tract the cost of preparing even a detailed environmental analysis is likely to be small compared to the lessees’ collective prospecting costs.²⁰⁶ Because of this cost disparity, it is much cheaper to do environmental analysis first and risk wasting that expense (alternative three) than the reverse. This rule also holds with respect to lands where either investigation will give negative results, because it is cheaper to decide not to drill through environmental analysis than through prospecting. It is immaterial cost-wise which process occurs first on tracts where drilling proposals are approved since both investigations will give positive results and must precede drilling.²⁰⁷

206. This will generally be true even where exploratory efforts are abandoned after a low level of initial unpromising prospecting. The prospecting costs in a given area tend to be many times greater than the cost of pre-lease environmental analysis. For example, a typical range of cost for seismic surveying in an environmentally sensitive mountainous region might be \$15,000 to \$25,000 per line mile. Telephone interview with Frank Garrett, Domestic Division Manager, Seismograph Contract Co. (December 21, 1982). A frugal geologist might use one line mile of seismography per section (640 acres) for an initial survey. *Id.* Thus, exploration of all sections on a single five section, 3200-acre lease might cost \$200,000. Typical costs for an oil and gas leasing EA (pre-leasing) and for an oil and gas development EIS (operating plan stage) might be \$35,000 and \$350,000, respectively. Telephone interviews with Yvonne MacNeil, Environmental Documents Assessor, Forest Service Region 6, and Elena Green, Environmental Analysis Technician, Env’tl Coordination Office, Forest Service (January 12, 1983). The latter figure probably better represents the cost of detailed analysis that this article advocates for the pre-lease stage. Thus, the \$200,000 cost for a frugal but thorough seismic survey of a *single* 3200-acre lease is in the neighborhood of the \$350,000 cost for a detailed EIS for an *entire administrative area* of 100,000 to 500,000 acres.

207. This analysis assumes that environmental analysis and prospecting are independent decisionmaking processes. It also assumes that industry will accept CRS leases and prospect under them. If this assumption is false then CRS leasing is equivalent to not leasing at all. Finally, it is also assumed that the government will actually use the CRS to prevent development where its effects are environmentally unacceptable despite favorable prospecting results. Of course, if this assumption is false the CRS is nothing more than a device to avoid NEPA.

In fact, BLM's recent decision that the CRS will be used only at the lease applicant's option makes the likelihood of any agency cost savings extremely dubious. This new policy gives the lease applicant the option of refusing an offered CRS without losing his priority as the first or lottery-selected applicant.²⁰⁸ He may simply wait until the agency completes an environmental analysis document and offers a lease with other stipulations.

The acceptance rate for CRS leases in National Forests seems likely to be as low as 10 percent.²⁰⁹ There are likely to be no cost savings to an agency if it still has to do full environmental analysis for the majority of the tracts in a given area. In sum, the CRS policy is wasteful because it places large costs on industry for the sake of small savings to the Forest Service.

FIGURE 2
ECONOMIC EFFICIENCY OF OIL AND GAS LEASING SYSTEMS

		Prospecting Results:	
		positive	negative
Environmental analysis results:	positive	drill prospecting & environmental analysis both needed	no drilling (for geological reasons) environmental analysis wasteful
	negative	no drilling (for environmental reasons) prospecting wasteful	no drilling (for geological & environmental reasons) prospecting & environmental analysis both wasteful

There has been considerable industry opposition to the CRS, since the contingent nature of a lessee's entitlement under the CRS makes his investment more speculative.²¹⁰ In addition to the great risk of not finding valuable oil or gas, the CRS lessee risks not being able to develop a discovery. This risk may discourage exploration and, where development is limited after successful prospecting, the production cost of oil and gas may be increased. Both are contrary to national energy policy.²¹¹ Imposing the cost of this increased risk on in-

208. 48 Fed. Reg. 3370 (Jan. 25, 1983).

209. See *supra* note 205.

210. See *supra* text and note at note 199.

211. See DOI REPORT 1981, *supra* note 10, at cover letter, 1.

dustry is poor policy because it is justified only by a relatively tiny cost saving to government. In fact, faced with a choice, industry would probably prefer an increase in lease fees to cover environmental analysis costs.

The CRS policy is readily understandable with respect to the likely institutional motives of the Forest Service. First, the Forest Service operates on a fixed budget and is under orders to process leases quickly. The CRS allows the Forest Service to avoid the expense and delay of initial environmental analysis. Unfortunately, the policy ignores the economic inefficiency of the budget savings achieved and that industry would generally wait the time necessary for leases with specific stipulations to be issued rather than take CRS leases immediately.²¹² Second, the Forest Service inevitably is the victim of pressure and criticism both from industry and its proponents in the Reagan administration as well as from conservationists. The CRS policy responds to pro-leasing pressure by allowing the rapid leasing of large acreages with little or no lease denial or restriction. The agency responds to discontent with the contingent nature of the lease rights by stating that the CRS will not be used to prevent development of discovered resources.²¹³ It simultaneously states that the CRS retains legal authority to prevent development with unacceptable impacts.²¹⁴ Thus, the policy is essentially a non-decision that delays and legally recognizable commitment and so can be painted as favorable to either side of the controversy. In reality, it may satisfy neither. Finally, the CRS embodies an institutional mindset that finds the idea of doing environmental analysis on projects that might very well not result in drilling proposals to be extremely distasteful.

C. NEPA and Other Environmental Implications of the CRS

From the conservationist viewpoint, the CRS poses a number of

212. See *supra* note 205.

213. CRS Policy Directive, *supra* note 197, at 1. The Directive also states that "[t]he CRS is not to be interpreted as providing for 'staged' leasing, or for withholding of mineral development rights." *Id.* The Forest Service defines staged leasing as "the theoretical concept that leases be issued only for exploration and subject to extension by a second level decision dealing with development." Memorandum re: Streamlining of Oil and Gas and Geothermal Leasing through Deferral of Detailed Analyses to Operation Stage 4 (January 19, 1982) [hereinafter cited as CRS Streamlining Memo]. By stating that the CRS leasing is not staged leasing, the Forest Service indicates that the decision to allow development is made at the leasing stage and not the operating plan stage. See also *infra* text and note at note 216.

214. CRS Policy Directive, *supra* note 197, at 1; CRS Policy Notice, *supra* note 196.

problems. First, there is the concern that once exploration is successful, there will be no stopping development regardless of the results of environmental analysis. This concern includes the "sunk cost" problem of delayed environmental analysis. As the investment in a project grows with time, so does its weight relative to the environmental costs that it must be balanced against in deciding whether the project should continue. The chance of environmental factors affecting a decision decreases with time. This effect is well recognized by the courts and is a prime factor supporting the use of an EIS.²¹⁵ In addition, a great deal of political pressure may be generated once exploration is successful. These fears are compounded by such Forest Service statements as: "It is our intention that the CRS not be invoked to prevent the development of a discovered mineral resource."²¹⁶ Such statements, apparently designed to assuage the fears of industry, conflict directly with the agency's claim that the CRS obviates the need for initial environmental analysis because it will be used to prevent development that has unacceptable environmental effects.²¹⁷

Beyond these problems in implementation, the CRS has three potential legal deficiencies which could lead to judicial interpretations of the stipulation contrary to the agency's interpretation. These interpretations involve questions about the eventual enforceability and effectiveness of the CRS. Under these interpretations, the CRS would not fully empower the government to prevent future development as the Forest Service claims, and CRS issuance without environmental analysis would violate NEPA.

The first and least likely of such interpretations is that the government lacks the authority to prevent development under the CRS. Although the district court's opinion in *Sierra Club v. Peterson* states broadly that the government has authority to attach restrictive stipulations to leases,²¹⁸ the CRS arguably is distinguishable from the Conditional NSO and other stipulations involved in that case. For example, an NSO restriction could be called a technical stipulation because it imposes a physical limitation on lease activities: the lessee may not occupy the surface. In contrast, the CRS could be termed a discretionary stipulation since it can be read to

215. *Environmental Defense Fund v. Andrus*, 596 F.2d 848, 853 (9th Cir. 1979) ("After major investment of both time and money, it is likely that more environmental harm will be tolerated"); *Latham v. Volpe*, 455 F.3d 1111, 1121 (9th Cir. 1971).

216. CRS Policy Directive, *supra* note 197, at 1.

217. *Id.*

218. 17 ERC at 1453.

make beneficial use of the leasehold contingent on a future agency decision on whether to proceed with development. The lower court's holding in *RMOGA I* seems more appropriate in this situation and could support such a distinction.²¹⁹ In language that was disallowed but not disapproved by the appellate decision,²²⁰ District Judge Kerr in *RMOGA I* reasoned that when Congress authorized the issuance of leases in the Mineral Leasing Act it did not intend for the conferred entitlement to be speculative.²²¹ Arguably, the entitlement under the CRS is speculative while the entitlement under the NSO stipulations, though limited, is not speculative. There is, however, no statute or case law currently in force that would directly support such an argument. On balance, the above distinction between the CRS and NSO stipulations is very contrived. In light of the well reasoned decision in *Peterson* supporting the enforceability of lease stipulations even when they prevent development, this distinction should not carry any weight.

Second, there is a small chance that courts will not give effect to the CRS provision that lessees may receive no compensation for the government's denial of their operating plans. Specifically, a court might find that such Forest Service pronouncements as "the CRS will not be invoked to prevent the development of a discovered mineral resource,"²²² engender in the lessee a legitimate property expectation, the termination of which constitutes a compensable "taking."²²³

Third, the government's discretion to limit development under the CRS will be significantly eroded if the stipulation is interpreted to place on the government a burden of demonstrating unacceptable impacts before it may disapprove a leasing plan. In this regard, the standard stated in the CRS for operating plan disapproval is whether there are unacceptable impacts,²²⁴ a limited standard compared with the government's usual authority to disapprove lease applications that are not in the public interest.²²⁵ In fact, one Forest Service

219. *RMOGA I*, 500 F. Supp. 1338 (D. Wyo. 1980), *rev'd sub nom.*, *Rocky Mountain Oil and Gas Ass'n v. Watt*, 13 ELR 20036 (10th Cir. Nov. 30, 1982).

220. *See supra* note 114.

221. *RMOGA I*, 500 F. Supp. 1338 (D. Wyo. 1980).

222. CRS Policy Directive, *supra* note 197, at 1.

223. *Union Oil Co. of Cal. v. Morton*, 512 F.2d 743, 747 (9th Cir. 1973); *Sun Oil Co. v. United States*, 215 Ct. Cl. 716, 769 (1978).

224. The text of the CRS given in CRS Policy Notice, *supra* note 196, states: "A plan of operations shall not be approved if it results in unacceptable impact on other resources, land uses, and/or the environment."

225. 30 U.S.C. § 187 (1976 & Supp. IV 1980); *NRDC v. Berklund*, 458 F. Supp. 925, 936

memorandum states that "CRS assumes [the] right to drill and develop, unless the government can make a prima facie case against it and the operator is unable or unwilling to provide reasonable mitigation the government requires."²²⁶ This view is consistent with the Interior Department policy that generally requires BLM to demonstrate the necessity of any restrictions on leases²²⁷ and does not consider wilderness qualities alone as grounds for restriction.²²⁸ Such circumscribed ability to limit development under the CRS would be a practical barrier to wilderness protection. As a technical matter, the CRS policy violates NEPA if the category of "unacceptable impacts" that the government may prevent under the CRS is narrower than the category of "potential significant impacts" that the government is forbidden to commit to without a prior EIS.

The above deficiencies could be argued in a NEPA suit challenging a CRS leasing project. Such a suit would be similar to *Peterson*, in that losing on a claim that a protective stipulation is deficient would set a precedent bolstering its protective potential while winning such a claim would establish a defect that the agency may have to either cure or address in NEPA analysis.²²⁹ Environmentalists should consider this possibility from all sides before pursuing one avenue exclusively.

It is difficult to compare the wilderness preservation value of the CRS with that of the EA and EIS leasing approaches due to the uncertainties over the legal interpretation and eventual implementation of the CRS and the outcome of the *Peterson* appeal. Moreover, the substance and not the process of government decisions is what ultimately provides environmental protection. The EIS approach has many advantages, however, such as public participation²³⁰ and detail in environmental analysis, that make it environmentally preferable to the CRS. The chief advantage of the CRS is that it purportedly does not make a legal commitment to development. Of course, if the *Peterson* court should determine that the non-NSO stipulations used under EA leasing also do not commit to development, the one main advantage of the CRS over EA leasing would disappear.

The CRS has three apparent disadvantages. First, it permits much faster leasing than the EA approach, which in turn is faster than the

n.17, *aff'd*, 609 F.2d 553 (D.C. Cir. 1978).

226. CRS Streamlining Memo, *supra* note 213, at 6.

227. Dell K. Hatch, 34 I.B.L.A. 274 (1978). *See also* W. E. Haley, 46 I.B.L.A. 151 (1980).

228. *See supra* note 105 (administrative cases).

229. *See supra* text and notes following note 135.

230. 40 C.F.R. § 1503 (1982).

EIS approach. Second, it may produce a greater number of drilling proposals since drilling proposals may be made on lands where the screening function of pre-leasing environmental analysis would have prevented prospecting and resultant proposals from ever occurring. Finally, development decisions under the CRS occur at the operating plan stage and not at the leasing stage, so that pressure to develop at the time of decision may be greater. At the operating plan stage, favorable prospecting results have been obtained, whereas at the leasing stage prospecting has not yet been done. At the operating plan stage, the position of the CRS lessee who has been encouraged to believe he will be allowed to develop²³¹ can be urged sympathetically. Moreover, an operating plan seems to threaten only one tract of a leasing area, while an EA leasing decision appears to affect a whole national forest or other leasing area. On the other hand, preservationist pressure might be greater when it is actual drilling that is proposed rather than just leasing.

The environmentalist stand on the CRS should hinge on the outcome of *Sierra Club v. Peterson*, since the appellate decision may determine whether the government can continue the present system of large-scale leasing without preparing EISs.²³² If the court finds that non-NSO stipulations commit to development but affirms the EA leasing system, the government may continue to lease with EAs, and environmentalists may support the CRS as a more environmentally protective alternative. If the court affirms the current system by finding that non-NSO stipulations can prevent development, then the CRS loses its chief advantage and environmentalists may prefer the EA system. Finally, if the court disapproves the current system, the choice may be CRS leasing or full EISs before leasing, with environmentalists likely choosing the latter. In any event, the support of one leasing approach over another is directed toward the attainment of some rational, environmentally responsible decisionmaking in a leasing system in need of substantial improvement.

V. CRITICISM OF CURRENT LEASING POLICY

The government's neglect of the procedures mandated by NEPA, discussed above, contributes to a program that is environmentally irresponsible in substance. In particular, the government leases indiscriminately and enmeshes itself in a web of inconsistent policy

231. See *supra* note 213; text and note at note 216.

232. See *supra* text and notes at notes 189-95.

statements which preclude the assessment of environmental problems raised by public lands leasing.

A. Indiscriminate Leasing

The current leasing pattern is indiscriminate in four respects. First, the government seems to be willing to lease nearly any wilderness land that is sought by applicants. Second, it is trying to lease quickly. Third, leases in a given area are issued on a blanket rather than a selective basis. Finally, leases are issued with insufficiently protective stipulations.

As to the first defect, it is apparently government policy to give oil and gas leasing complete priority over wilderness considerations. Leases are to be issued in any area for which there are applications, with wilderness as the dedicated land use only in those areas that are not sought for development.²³³ This approach stems largely from the current administration's high priority on domestic energy development.²³⁴ There have been some efforts to justify this policy by finding a legal obligation to lease. The Wilderness Act is one source for this leasing obligation argument. The rationale here is that by setting a deadline of December 1983 for new leasing in designated wilderness,²³⁵ Congress affirmatively instructed that leasing take place in wilderness. Specifically, agency policy prohibits the denial of lease applications solely to protect wilderness characteristics²³⁶ on the theory that the deadline expresses the judgment that such denial would be against the public interest.²³⁷ A more reasonable reading of the statutory deadline, however, is that the Wilderness Act simply permits leasing prior to the deadline without affecting the Secretary's broad authority under the Mineral Leasing Act to decide whether to lease.

The holding of *Mountain States Legal Foundation v. Andrus*²³⁸ is a second source for the leasing obligation argument. That case involved a challenge to the government's failure to process lease applications on a three million acre area of Wyoming, Idaho, and Colorado. The court found that the failure to process lease applications

233. See generally *supra* notes 75, 76.

234. DOI REPORT 1981, *supra* note 10, at cover letter, 1.

235. 16 U.S.C. § 1133(d)(3) (1976 & Supp. IV 1980).

236. Forest Service Manual 2822.46; Memorandum from Dep't of the Interior Solicitor to Director, Bureau of Land Management (October 19, 1981) [hereinafter cited as Lease Denial Memo].

237. Lease Denial Memo, *supra* note 236.

238. 499 F. Supp. 383 (D. Wyo. 1980).

amounted to an administrative withdrawal of lands requiring notice to Congress under section 201 of FLPMA. It ordered the government either to promptly process the leases or provide the requisite notice to Congress. The Reagan administration would like to find an affirmative duty to lease in this holding. The action ordered in *Mountain States* was the giving of proper notice or the processing of applications; this is not the same as the issuance of leases. In fact, with the appellate decision in *Rocky Mountain Oil and Gas Association (RMOGA II)*,²³⁹ there is now no law dictating a duty to issue leases.²⁴⁰ A balanced leasing policy must begin with the premise that some areas should be selected for leasing and other areas reserved for wilderness by denial of lease applications.

The second problem is that the rate at which the government wants to lease is too fast to allow decisions which are environmentally sensible. Rapid leasing is a declared policy of the government,²⁴¹ and, of course, is a key goal of the CRS policy; it also supports the EA leasing approach.²⁴² The haste may be partially motivated by a desire to get as much land as possible leased while the current administration is still in office. At least one Regional Office of the Forest Service has admitted that the increased pace of mineral leasing is resulting in "an inability to adequately protect and manage the Forest System."²⁴³ The detailed environmental analysis required for prudent development of wilderness land is being sacrificed by the government's determination to mass produce leasing decisions.

Third, more often than not, the leasing decisions reached by the government involve blanket leasing of entire administrative areas with stipulations that are grossly inadequate. For example, the Forest Service recently proposed issuing leases covering all of Vermont's 292,000 acre Green Mountain National Forest except for the 9 percent of the land that is designated wilderness or "municipal watershed."²⁴⁴ In the Palisades Further Planning Area discussed

239. 13 ELR 20036 (10th Cir. Nov. 30, 1982).

240. *Haley v. Senton*, 281 F.2d 620, 625 (D.C. Cir. 1960) (Interior Secretary has "discretionary power, rather than a positive mandate to lease" under the Mineral Leasing Act); *Udall v. Tallman*, 380 U.S. 1, 4 (1965) (Secretary has "discretion to refuse to issue any lease at all on a given tract" under the Mineral Leasing Act).

241. DOI REPORT 1982, *supra* note 76, at 1.

242. CRS Policy Notice, *supra* note 196.

243. DRAFT: FOREST MANAGEMENT PLAN, U.S. DEPT OF AGRICULTURE FOREST SERVICE EASTERN REGION (1981), *quoted in* Williams, *Farewell to a Forest*, Boston Magazine 133 (November 1982).

244. GREEN MOUNTAIN EA, *supra* note 17, at 1 (entitled Decision Notice and Finding of No Significant Impact).

earlier, the government has applied stipulations that surface occupancy is prohibited on 80 percent of the leased acreage but lessees have been granted development and access rights to the remaining 20 percent of land which exists mostly as islands surrounded by NSO areas.²⁴⁵ For development to occur on these approved areas the government will have to allow access roads to be built.²⁴⁶ These roads will be built over the large acreage areas that the government has already determined to be too environmentally sensitive for the construction of roads or drill sites.

Fourth, in addition to the inadequacy of the stipulations that are eventually applied,²⁴⁷ there is an unfortunate trend toward issuing an EA for an entire administrative area without even discussing any specific application of stipulations. For example, in the EA embodying the decision to lease 200,000 acres of the Chattahoochee National Forest in Georgia, there is no discussion of the specific sites that will be protected by stipulations and no indication of what stipulations will be used.²⁴⁸ In such cases, a FONSI in the document is obviously based on mere supposition rather than any real analysis.

B. Inconsistent Policy and Lack of Environmental Goals

In pursuing its leasing goals, the government has articulated contradictory policies on key matters. Specifically, the government continues to be inconsistent concerning the scope of its ability to prevent environmental damage to lands it has leased, its ability to perform meaningful environmental analysis at the leasing stage, and its policy toward leasing where sharp conflict exists between development and other resource values.

First, as discussed above, the agencies frequently take contradictory stances on whether they have the authority and resolve to preclude development on leases once leases are issued. At least for leases with NSO stipulations, the agencies and their critics agree that authority to preclude surface occupancy is retained. With regard to almost all other stipulations—non-NSO stipulations as well as the new CRS—the agencies themselves adopt contradictory positions. For example, in the Little Granite Creek litigation and in a

245. PALISADES EA, *supra* note 53, at A-18.

246. It is conceivable that helicopters could be used as a means of access to these "islands." However, there is no statement in the lease or stipulations that this extremely expensive step can be required.

247. See *supra* text and notes at notes 139-77.

248. CHATTAHOOCHEE EA, *supra* note 15.

related regional solicitor's opinion, the government claims it lacks authority to prevent development once it issues leases containing non-NSO stipulations, regardless of the environmental consequences.²⁴⁹ By contrast, government lawyers repudiated the regional solicitor's opinion in the Palisades litigation²⁵⁰ where the agencies' position is that they have retained the right to prevent any activities that would have significant impacts.²⁵¹ Similarly, the government simultaneously represents that it can and will invoke the CRS to prevent any development that has unacceptable environmental consequences but that the CRS will not be invoked to prevent the development of a discovered mineral resource.²⁵²

The government also contradicts itself on whether it is able to perform meaningful, site-specific environmental analysis at the leasing stage. As the EA for leasing in the High Uintas in Utah demonstrates,²⁵³ the Forest Service is quite capable of producing such analysis. In this EA, lease denial and leasing with stipulations were proposed on a lease-by-lease basis using a system of analysis that evaluated the wildlife, fish, recreational, visual, soil, and water resources of each lease. Instead of the typical blanket leasing proposal, the EA contained a combination of no leasing, NSO, and special and standard stipulation recommendations.²⁵⁴ This example of sensible leasing policy contrasts sharply with the government's assertion in the Palisades litigation that detailed environmental analysis was "not meaningfully possible" and that an EIS at the leasing stage could only be "unfocused."²⁵⁵

Government policy is also inconsistent on the issue of whether leases should issue for land where development probably will not be permitted. Despite the Interior Board of Land Appeals²⁵⁶ doctrine that such lands should not be leased at all,²⁵⁷ the government has

249. Opinion of the Acting Regional Solicitor, U.S. Dep't of the Interior (October 10, 1980). See *supra* text and notes at notes 163-65.

250. Transcript of Proceedings on Motion for Preliminary Injunction at 21, *Sierra Club v. Peterson*, 17 ERC 1449. The Regional Solicitor's Opinion was also repudiated in the *RMOGA* litigation. Reply Brief for Federal Defendants at 15 n.15, *Rocky Mountain Oil and Gas Ass'n v. Watt*, 13 ELR 20036 (10th Cir. Nov. 30, 1982).

251. Palisades Federal Appellees Brief, *supra* note 159, at 31.

252. See *supra* text and notes at notes 216-17.

253. HIGH UNITAS EA, *supra* note 13.

254. *Id.* at vi.

255. Palisades Federal Appellees' Brief, *supra* note 159, at 32.

256. The Interior Board of Land Appeals is a unit of the Department of the Interior that hears administrative appeals.

257. Bill J. Maddox, 24 I.B.L.A. 147, 150 (1976) ("[N]o lease should issue with stipulations so restrictive that the use of the land for any purpose associated with the production of oil and

issued leases in a number of areas that are so thoroughly covered and surrounded by NSO restrictions that they are outside of the range of any current slant drilling technology.²⁵⁸

In their zeal to promote oil and gas development on public land, the agencies minimize environmental analysis, lease indiscriminately, and contradict themselves in policy and deeds. There is ample opportunity for improvement.

VI. RECOMMENDATIONS FOR AN IMPROVED LEASING POLICY

A. *Selective Leasing*

The government should curb the indiscriminate leasing of wilderness suitable lands and lease such lands only on a selective basis after full environmental analysis. Selectivity in leasing should extend both to the decision of which wilderness candidate *areas* should be opened to leasing and, once it is determined which areas are to be leased, to the question of which portions of each area should be leased. Leasing only portions of a lease application area has a number of advantages. First, while lands cannot be "unleased," withheld portions of a leasing area can always be leased later. Poor exploration results on one tract may lead industry or the government to conclude that it is not worth leasing an adjacent portion. By postponing decisions on those tracts which appear least promising for energy or most in need of protection, the agencies could avoid altogether the conflict and expense of environmental analysis and decisionmaking. They would always have the benefit of information developed during the delay. In this light, selective leasing respects both the Forest Service's limited resources for environmental decisionmaking and management²⁵⁹ and industry's limited ability to accelerate its current rate of exploration.²⁶⁰ In fact, oil companies are

gas is totally precluded"); Stanley M. Edwards, 24 I.B.L.A. 12 (1976) ("Stipulations cannot be used essentially to withdraw lands from mineral leasing"); A. Helander, 15 I.B.L.A. 107 (1974); John Snyder 15 I.B.L.A. 253 (1974).

258. Sierra Club's Palisades Memorandum, *supra* note 118, at 13-17. Slant drilling is limited to a horizontal reach of about one mile in the Western Overthrust Belt. *RARE II Wilderness Proposals, Report of Hearings before the Subcommittee on Environment, Soil Conservation & Forestry of the Senate Committee on Agriculture, Nutrition & Forestry*, 96th Cong. 1st Sess. 110 (Feb. 6, 8, 9, 1979) (report on directional drilling prepared for Senator John Melcher of Montana by ARCO Oil & Gas Co.). Thus, some NSO leases in the Palisades are too far from non-NSO areas to be developed using current technology. PALISADES EA, *supra* note 53, at A-18.

259. See *supra* text and note at note 243.

260. The rate at which new rigs can be produced currently limits the rate of drilling. Lohr, *The Forest Oil Rush of the Eighties*, N.Y. Times Magazine 20, 22 (Aug. 30, 1981).

to some extent the victims of the competitive nature of public land leasing and might be just as happy with this system. Specifically, when lease issuance in one area appears imminent, oil companies are obliged to apply for neighboring leases, not because they have a high current interest in the area, but because someone else will take the area and preclude their leasing it if they do not lease it themselves. This defensive approach to leasing is fostered by the profusion of speculators in the public leasing system, who takes leases only in the hope of later assigning them to oil companies at a profit.²⁶¹ The utilization of a truly selective leasing system should prevent this.

B. Thorough Environmental Analysis

A second suggested principle is that leasing should occur only after thorough environmental analysis in the form of an EIS or in connection with the Forest Planning Process.²⁶² An EIS is desirable because it requires detailed, site-specific environmental analysis, public participation, and an inquiry that explores rather than conceals resource conflicts. Since the stipulations of each lease are the key to protecting each tract's particular resources as well as to maximizing the lessee's opportunity to work his lease within the constraints of environmental protection, the environmental analysis must include site-specific resource evaluation. Detailed analysis is particularly important because government leasing proposals tend to avoid the realities of their inherent land use choices by emphasizing agency ability to mitigate impacts and discussing conflicts only in vague terms.²⁶³

The Forest Service has proven in a few instances that it is quite capable of detailed and prudent environmental analysis and decision-making.²⁶⁴ Specificity is not necessarily confined to an EIS, and

261. Leasing Policy Review, *supra* note 62, at 50-51.

262. The process was mandated by the National Forest Management Act, 16 U.S.C. § 604 (1976 & Supp. IV 1980). The Forest Planning Process is an attempt to construct an integrated and evolving set of land use plans for the National Forest System. The first round of plans is still in preparation. Planning is undertaken in a four-layer hierarchical system proceeding from the top down. National objectives and policies are set by the Chief Forester. Specific planning generally is undertaken at each of the four levels in the overall plan: the national, "area", national forest, and "unit" level, with unit size ranging from under 50,000 to several hundred thousand acres. EISs are to be prepared at the area and national forest levels, but not at the unit level. 46 C.F.R. §§ 219.9(b), 219.11(b) (1982). There are numerous other provisions for public participation. See generally Wilson, *Land Management Planning Processes of the Forest Service*, 8 ENV'TL L. 461 (1978).

263. See, e.g., CHATTAHOOCHEE EA, *supra* note 15; GREEN MOUNTAIN EA, *supra* note 17.

264. See *supra* text and notes at notes 253-54.

there have been a few leasing EAs that are specific and embody balanced decisions.²⁶⁵ But since many EAs have not been specific or balanced,²⁶⁶ the EIS, with its legally enforceable requirement for detail,²⁶⁷ should be required for leasing decisions.

The EIS is also preferable to the EA because it requires public participation.²⁶⁸ To the extent that an action is environmentally harmful, public scrutiny subjects an agency to criticism either for the harms themselves or the agency's failure to admit them. It also promotes consideration of the desires of a broader range of the public than those of the industry and conservation interests that are routine agency clients. Further, EISs alert Congress and the Executive to a proposal's impacts and alternatives.²⁶⁹

Theoretically, both EAs and EISs are documents that *guide* agency decisions. In reality, they largely are used to *justify* agency decisions. Since an EA is a sufficient decision document only when it reaches a no impact result, EAs must justify decisions by arguing that a proposal will have no significant impacts. EISs on the other hand, may admit impacts and still be valid. EISs allow for greater disclosure and have a greater possibility of being honest and accurate documents than EAs because they can admit resource tradeoffs, still satisfy NEPA, and support the agency's decision. They have a greater chance of guiding rather than just rationalizing agency decisions.

The ongoing Forest Planning Process is an alternative to lease proposal EISs.²⁷⁰ In this process, detailed land use plans with accompanying EISs are formulated for each Forest Service region and each national forest. An advantage of this approach is that it provides an opportunity to make decisions that consider the land management resources of an entire forest or region. Land use for mineral development as well as for wilderness, wildlife, recreation,

265. HIGH UNITAS EA, *supra* note 13.

266. *See supra* note 263.

267. 40 C.F.R. §§ 1502-1503 (1982).

268. 40 C.F.R. § 1503 (1982).

269. *Natural Resources Defense Coun. v. Morton*, 458 F.2d 827 (D.C. Cir. 1972).

270. *See supra* note 261. One provision of the Energy Security Act would seem to pose a barrier to using the forest planning process to plan leasing in stating that the Department of Agriculture should continue to process leases on national forest land "notwithstanding the current status of any plan being prepared" through the forest planning process. P.L. No. 96-294, 94 Stat. 611, 710 (1980), 43 U.S.C. § 8855. Nevertheless, the provision is vague and has apparently been given little attention. Further, in placing a moratorium on the processing of leases on designated wilderness and Forest Service wilderness candidates lands, *see text and notes at notes 87, 94*, Congress has more recently expressed a contrary intent.

timber and grazing can be considered in terms of area-wide goals rather than in the abstract, as is the case with lease proposal environmental analyses. The various agencies should consider the applicability of this system to their own leasing operations.

The land management agencies currently operate under a leadership that considers extensive leasing on public lands including wilderness to be an urgent priority.²⁷¹ They are subject to substantial industry pressure. Environmental analysis and public scrutiny are, therefore, essential ingredients to prudent development decisions and may be done practicably.

C. Pricing of Leases

The overall leasing system would be improved if the base price for leasing wilderness candidate lands were to be increased. The current leasing price structure effectively subsidizes oil and gas leasing on public land and thereby creates an artificial incentive for companies to lease federal land instead of state or private land or offshore tracts.²⁷² Specifically, 97 percent of federal land is leased non-competitively, with a set charge of one dollar per acre per year and a 12.5 percent royalty.²⁷³ The one-dollar rental figure has not been changed since 1977, despite the fact that the price for domestic oil has more than doubled since then.²⁷⁴ By definition, leasing at a fixed price does not recoup fair market value. In fact, there are usually numerous parties willing to take a given noncompetitive lease by the time it is issued, all of whom are potential bidders.²⁷⁵

The price issue is complicated by the presence of various national policies, some of which relate only indirectly to land use, yet retain some validity. The economic and national security reasons for this subsidy may be defensible for some federal lands, where conflicting alternative uses may be economically less productive or even non-existent. The subsidy is not defensible, however, on wilderness suitable lands where there is a highly valued alternative use. It simply makes no sense to lease our prized pristine lands for the same subsidized price used to stimulate development of other federal land.

For the last fifteen years there have been strong initiatives within

271. DOI REPORT 1981, *supra* note 10, as cover letter, 1; DOI REPORT 1982, *supra* note 76, at 1.

272. See Sprague & Julian, *supra* note 71, at 520-22.

273. Leasing Policy Review, *supra* note 62, at 39.

274. *Id.* at 50.

275. *Id.* at 50-51.

both the Interior Department and in Congress for making oil and gas leasing rates more competitive. For example, during the last two Congresses, the Senate Committee on Energy and Natural Resources has reported out bills that would put all onshore leasing on a competitive system.²⁷⁶ Although a rate increase for wilderness leasing could obviously be enacted legislatively, there is sufficient authority under existing law for this change to be undertaken administratively.²⁷⁷

A price increase could take place in either a competitive or a non-competitive system and the increase could occur in either the yearly rental rate or the royalty rate or in the form of bonus payments. One obvious benefit of a price hike is the increased revenues the government would derive from leasing at rates closer to fair market value. The essential element of any reform would be an increase in the minimum rate charged for leasing. This would restrict leasing demand to the more promising areas by eliminating interest in the lands that are only marginally promising. Balanced wilderness leasing requires a system to screen out lands that will not be leased because of their relatively high environmental value and low mineral potential. The current system consists of a value-laden choice made by an agency which is under intense political pressure and possesses little access to prospecting data.²⁷⁸ With a price increase, much of the decision would repose in an economic-based choice made collectively by the oil exploration industry using the best available technical and geological information. The elegance of this system is that it relies on market prices, which reflect technical and geological information, to ensure that the wilderness lands sacrificed for development are those which are truly promising for development.

VII. CONCLUSION

Oil and gas development is essentially incompatible with wilderness values. Development of virtually any kind by its nature conflicts with other environmental values. Rising oil prices, new pros-

276. Federal Oil and Gas Leasing Act of 1980, S.1637, S. REP. NO. 793, 96th Cong., 1st Sess. (1980). The committee reported on a similar bill in the previous Congress. Higher lease prices have also been urged by BLM economists. See Sprague & Julian, *supra* note 71, at 523-25.

277. The only way to administratively expand the category of lands subject to competitive leasing would be to expand the definition of "known geologic structure." 43 C.F.R. §§ 3100.0-.5(a) (1982). The rental rate for noncompetitive lands could not be increased administratively. 30 U.S.C. §§ 181-226 (1976 & Supp. IV 1980).

278. There is generally no mechanism providing the government with access to industry exploration data.

pecting and drilling technology, and the discovery of the Eastern and Western Overthrust belts have made oil and gas leasing in wilderness areas the focus of vigorous controversy since the late 1970s. Despite the current administration's efforts, new mineral development within the National Wilderness Preservation System has been banned indefinitely. Nevertheless, leasing on wilderness areas that are candidates for inclusion in the system has proceeded apace, particularly in 1981 and 1982.

The agencies consistently undertake wilderness leasing without preparing an environmental impact statement, the prerequisite imposed by the National Environmental Policy Act for any federal action that may have significant environmental effects. This approach to leasing has been challenged in the Palisades litigation, *Sierra Club v. Peterson*. The Palisades plaintiff in *Peterson* convincingly argues that leasing major wilderness acreages without lease stipulations that retain veto power over development risks that such development will cause significant environmental impacts and, therefore, requires a prior EIS. From the standpoint of judicial review, NEPA's mandate for an EIS stands regardless of the reasonableness of the agency action, the cost or difficulty of EIS preparation, or the quality of any environmental analysis performed. The courts and agencies charged with this mandate should not shirk it.

In the face of *Peterson* and similar challenges, the land management agencies have issued some leases under the new Contingent Rights Stipulation. The CRS purports to avoid the EIS requirement by making the drilling rights of oil and gas lessees conditional on a subsequent agency decision to proceed with development. The CRS has received mixed reviews from environmental and industry factions because of uncertainties over its effect and implementation. It may turn out to be a device that facilitates development in wilderness by avoiding the serious environmental decisionmaking envisioned by NEPA. Alternatively, the CRS may be an oilman's nightmare that vetos development only after lessees have invested heavily in prospecting. The inadequacies of the CRS as a compromise approach indicate the need to confront the basic issues underlying the *Peterson* appeal.

As part of a long-term improvement of public lands leasing, the agencies should curb their present attempt at the wholesale leasing of wilderness land. Instead, they should lease wilderness selectively, and only with detailed environmental analysis developed in individual EISs or studies similar to those in the forest planning process. Finally, an end to subsidy prices for federal oil and gas leases, at

least on wilderness land, would be a profitable and administratively simple step toward a rational selectivity in wilderness leasing.