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Resource Law Notes: The Newsletter of the Natural Resources Law Center (1984-2002)

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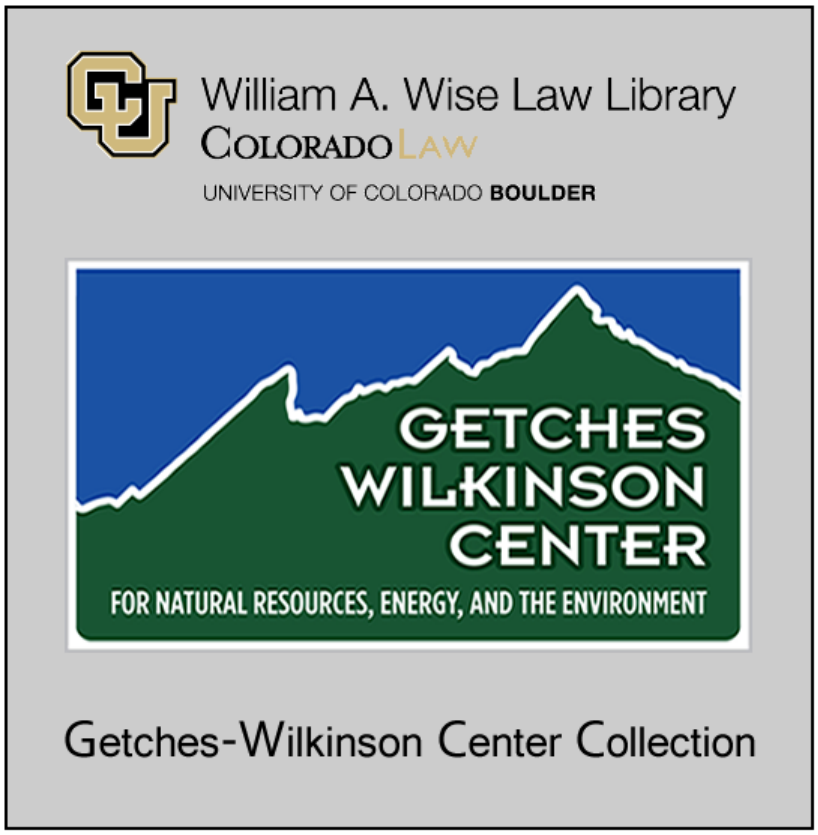

RESOURCE LAW NOTES: THE NEWSLETTER OF THE NATURAL RESOURCES LAW CENTER, no. 7, Jan. 1986 (Natural Res. Law Ctr., Univ. of Colo. Sch. of Law).

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Resource Law Notes

The Newsletter of the Natural Resources Law Center
University of Colorado, Boulder • School of Law

Number 7, January 1986

Colorado Water Program Held

Colorado Water Issues and Options: The 90's and Beyond provided the focus for a two-day conference held in Denver on October 8 and 9, 1985. The conference was cosponsored by the Natural Resources Law Center and the Colorado Water Resources Research Institute. The program attracted 290 participants.

David Getches led off with an overview of the issues facing Colorado. **Clyde Martz** called for a study comparing the Colorado system for handling water rights with other states. **Professor Stephen Williams** advocated a market-oriented approach for water allocation. At lunch, **Ray Moses** discussed the historical development of Colorado water law. **Steve Shupe** proposed an administrative system for improving the efficiency of water use. **William Paddock** critiqued the current state of nontributary groundwater administration. The papers were discussed in three concurrent afternoon workshops—water administration, efficiency disincentives, and nontributary groundwater.

On the second day **Jeris Danielson** talked about plans for augmentation. **Glenn Porzak** described two complex water transfers in which he was recently involved. **Professor Neil Grigg** discussed the benefits of cooperative water management. During the luncheon talk on the second day, **Justice George Lohr** talked about the types of water issues that have been decided by the Colorado Supreme Court in recent years. **Lee Rice** described some of the hydrological and engineering issues that arise in water rights proceedings. **Howard Holmes** presented a thorough review of the legal issues surrounding interstate transfers of water. **Ken Wright** coauthored the paper. Again three concurrent workshops were held in the afternoon—plans for augmentation, innovative water management, and interstate transfers.

The papers from these presentations will be the basis for a book on Colorado water law being prepared by the Natural Resources Law Center. Portions of the workshop discussions also will be included.

Center Research Update

During 1985 the Center was involved in research in several different areas. In August the Colorado Water Resources Research Institute published "The Endangered Species Act and Water Development Within the South Platte Basin" (Completion Report No. 137). Authored by **Larry MacDonnell** with research assistance from second year law students **Laurie Lambrix** and **Gregg Renkes**, this 122-page report provides a detailed analysis of the Endangered Species Act (ESA). The ESA seeks to provide federal protection to threatened and endangered plant and animal species. Section 7 prohibits any federal action jeopardizing the continued existence of such species. In the West, virtually all water development and much land-based development is subject to federal regulatory review. As a consequence, endangered species considerations are a part of all such activities. Major conclusions of the research are that, in spite of recent efforts to narrow its application, the ESA has an extraordinarily broad reach and that its potency for preventing development should be redirected toward solutions that would enhance the protection of endangered species. The full report may be obtained from the Colorado Water Resources Research Institute, Colorado State University, Fort Collins, Colorado 80523 for $6.

In October, Center fellow **Steve Shupe** presented the results of his research on "The Problems and Promise of Improving Efficiency Under Western Water Law" to the Colorado Water Issues conference. His paper documents the benefits that can result from efficiency improvements including salinity reduction, erosion control, reduced operating costs as well as increased water availability. He discusses the major impediments—costs, concerns about adverse effects in the downstream system, and legal barriers. He offers a number of options for improving the efficiency of water use encompassing both regulatory and market-oriented mechanisms. This paper will be included in the book on Colorado water law now in preparation by the Center.

In December the Center completed a report, "Guidelines for Area of Origin Compensation." Primary report authors are **Larry MacDonnell** and **Professor Charles Howe** of the economics department at the University of Colorado. **Professor James Corbridge** and **Ashley Ahrens,** a graduate student in economics, also contributed to the report. Although the prior appropriation doctrine generally permits the diversion of water from its source to any location where it will be

beneficially used—even out of the basin of origin, many states have established some kind of legislative restrictions. The objective of the research was to consider the approaches that have been taken and to offer suggested guidelines for such out-of-basin transfers. A survey of relevant state laws is provided with special attention to Colorado's "compensatory storage" provision. Economic principles suggest that a transbasin diversion is desirable if it represents the least cost source of water supply and if the resulting benefits exceed the full costs. The report recommends that the area of origin be compensated for costs associated with such diversions. Copies of the report are available from the Colorado Water Resources Research Institute or from the Center.

Mastbaum to Be Center Fellow

David Mastbaum will be a Visiting Fellow at the Natural Resources Law Center during the spring semester, 1986. His research will focus on external stresses to national parks posed by adjacent large-scale development.

Mr. Mastbaum is a graduate of the University of Michigan Law School. In his more than 15 years of practice he has been involved in litigation on a broad number of issues. Much of his work has involved environmental and energy matters. Between 1975 and 1981 he was a senior attorney with the Environmental Defense Fund in the Denver and Berkeley offices.

Land Use and Water Quality:

Thoughts About Nonpoint Source Pollution Control

by N. Earl Spangenberg

Extracts from a "brown bag" session, November 7, 1985, by ***N. Earl Spangenberg,*** *Visiting Fellow, NRLC. Mr. Spangenberg is Associate Professor, College of Natural Resources, University of Wisconsin-Stevens Point.*

In 1972, Congress started us on a serious effort to clean up the country's lakes, streams, rivers and reservoirs. Today, after thirteen years, we can see cleaner water, but we can also see that we still have a way to go. Continued progress is going to lie less with cleaning up the way we use water, and more with cleaning up the way we use the land. Almost ninety-five percent of the daily sediment loading, and seventy to ninety percent of the daily nutrient loading in the nation's waters comes from surface and subsurface runoff which carries the detritus from land use in agriculture and forestry, in mining and construction, and in urban land use. Federal legislation attempted to address these "nonpoint source" problems by mandating areawide waste treatment management planning processes in the Clean Water Act, but we have yet to develop strategies to effectively handle the problems on a nationwide basis.

The biggest of the nonpoint source problems is agricultural land use. Variations in topography, soils and climate result in variations in the severity and distribution of pollution problems, as well as variations in agricultural productivity. Not every acre of land produces high yields, nor does every acre produce pollution, but particular areas with specific land uses often have particular problems. The national problem is that there are a lot of "local" problem areas in a lot of states. Forty-six states have identified agriculture as a problem or potential problem for water quality.

The mechanics of nonpoint pollution control are not mysterious or unknown. We have sufficient technical abilities to control movement of soil and chemicals into the water. But, because we are dealing with people who manage land for a living, there are social and economic factors that can get in the way of installing the necessary "Best Management Practices" for pollution control. Often, the farmer may not agree, or believe, that his land management is a problem. For example, in a soil erosion study in Missouri, ninety-three percent of the farmers questioned were concerned about soil erosion, but only fifty-nine percent felt there was a problem on their own land. Whether a farmer agrees that there is a problem or not, the cost of solving the problem may stand in the way of implementing a solution. There is some work which shows that adoption of erosion control practices reduces income. Even if the cost is manageable, returns may be low and a long time in coming, and benefits may all be off-site and of little or no immediate value to the operation.

Having outlined the nonpoint problem in agriculture, let us take a look at one effort at a solution. In 1978, the state of Wisconsin established a nonpoint source pollution abatement program. The keys to the program are state cost-sharing efforts, concentration on high-impact problem areas, and local action to gain local response and cooperation.

A continuing statewide survey and evaluation process by the Wisconsin Department of Natural Resources identifies "priority watersheds" throughout the state to be the subjects of intensive planning and support efforts. Watersheds are selected on the basis of the severity of the problems in the basin, the potential for improvement by reducing nonpoint pollutant loads, the willingness of landowners and municipalities to participate, the willingness and ability of local agencies to carry out their roles, and the potential for general public benefit from the project.

When a priority watershed is selected, a basin analysis identifies water quality problems, significant nonpoint and other pollution problem areas, reasonably achievable water quality improvements, and management needs. Based on this analysis, an implementation strategy defining tasks and identifying local agencies for accomplishing the tasks is developed. Overall administrative responsibility and allocation of cost-share funds lies with the Department of Natural Resources, but local project operations and administration is the responsibility of local agencies. Usually, the local agencies involved are the county Land Conservation Committees. These committees are standing committees of the county board that have replaced the Soil and Water Conservation Districts. Local administration involves carrying out basinwide information and education programs in cooperation with the University of Wisconsin Extension Service, arranging cost-share agreements with landowners, and designing Best Management Practice packages.

Pollution control in priority watersheds is not going to happen immediately. State officials see an eight- to nine-year planning and implementation period in each watershed. After the analysis and plan development, landowners and municipalities have a three-year period in which to sign cost share agreements, and a five-year period following that during which the practices are to be designed and installed. An

important feature of the agreements is that they aim toward comprehensive control by prescribing all the Best Management Practices for a particular farm or municipality. A participant must agree to an entire suite of practices for pollution control, rather than choosing to install some practices while ignoring others of less direct benefit or profit.

Cost sharing for eligible practices ranges from fifty to seventy percent, depending on the on-site benefits and the relation of the practice to customary operating procedures. Contour cropping and reduced tillage are examples of eligible practices in the low cost-share range, while shoreline protection and settling basins are examples of eligible practices in the higher support range.

The priority watershed program is new in Wisconsin. Since its inception in 1978, twenty-six basins have been identified as priority watersheds. Currently, only two have finished the sign-on period and are into the installation phase. Interim accomplishments indicate that significant gains will have been accomplished by the end of the project. However, because some landowners chose not to participate, there will still be subwatersheds with significant local problems. State officials have noted that although the voluntary program will achieve between fifty and seventy percent reduction in pollution loading, regulatory mechanisms must be considered to accomplish higher levels of pollution control in some situations.

The nonpoint control program in Wisconsin has shown that a state program of cost sharing and targeted funding administered at the state level, but carried into action at the local level has the power and flexibility to achieve significant results with landowner cooperation. It has also shown that an entirely voluntary program will probably never reach uniformly high levels of pollution control, and that some sort of regulatory program may need to be considered.

The Wisconsin experience seems to say that probable elements of success in a nonpoint source control program will include local control, state financial support, targeting of critical areas for efficient fund use, and opportunity for voluntary participation backed by some sort of regulatory goad to move the recalcitrant. It would be folly to suggest that this formula would work everywhere, but it presents a pattern worth thinking about in those places where nonpoint source pollution is a significant water quality problem.

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Compromise Is Not a Dirty Word: Environmental Negotiating in an Imperfect World

By Cecil D. Andrus

Cecil D. Andrus *was the Natural Resources Law Center's Distinguished Visitor in September, 1985. Mr. Andrus served as the governor of Idaho between 1971 and 1977. From 1977 to 1981 he was Secretary of the Interior. Among his many accomplishments during this tenure, he led the effort to set aside large areas in Alaska for national parks, wildlife refuges, wild and scenic rivers, and national forest lands. Recognizing the need for balanced development on public lands, he was instrumental in reinstituting the federal coal leasing program.*

The following remarks are taken from a public presentation at the University of Colorado School of Law on September 26, 1985.

It is a great honor for a nonlawyer like me to be named Natural Resources Distinguished Visitor at the Law School. The remarks I'll make about law and natural resources are intended for everyone who is concerned enough about our natural heritage of land, air, and water to participate in deciding how that heritage will be used.

The Role of Compromise

I want to talk to you today about compromise. To many of us, that word has a slightly sinister overtone. We speak of a person or a company being put in a "compromising position" because of some embarrassing disclosures. We even go so far as to say that a young woman's virtue has been "compromised," implying that compromise is really a surrender to superior and maybe immoral force.

In some Islamic countries, there really is no good translation for the word "compromise." You'll recall the agonized and lengthy negotiations between the United States and Iran in 1979 and 1980 over the hostages from the American Embassy. Part of the problem in working out an agreement for their safe release came from the way the Iranians perceived the word "compromise."

In their language, it means "to surrender in a weak or immoral way," as in our example about the young woman's virtue. Imagine the hostility generated in Iran when an American negotiator announced publicly that he expected Iran to "compromise" by releasing the hostages.

But in our language, compromise has strong positive meanings . . . and it's *those* meanings that I want to explore with you here.

". . . compromise has strong positive meanings."

In my current business as an adviser to various companies on natural resources issues, I am always searching for ways in which people who disagree can negotiate a compromise that satisfies both their interests.

In my former incarnation as a public servant, my

major tool was compromise. Politics, as someone once observed, is the art of the possible. You only achieve in politics and government as much as your opponents will permit . . . and never as much as your friends hope for. That's why the solutions that we devise to the various problems we all wrestle with are always compromises. Maybe that's how all politicians see themselves . . . as problem-solvers.

In my experience it's a rare fight that couldn't have been avoided if all of the participants had strained to the utmost to hammer out a creative and satisfactory compromise. What often happens during the course of negotiations is that you realize that the other side's principles, interests, and—yes, even arguments—are as valid and deeply held as your own. Out of that discord and negotiating process can grow a new respect for your adversary which will stand you in good stead the next time you disagree.

Environmental Accomplishments

In the past twenty years in America, we have achieved a great deal. The Wilderness Bill was passed. So was the Clean Water Act and the Clean Air Act. The Environmental Protection Agency was created. The Land and Water Conservation Fund was established, and we passed the Alaska Lands Bill, which protected more land than any legislation in history. The Wild and Scenic Rivers Act was passed, and we succeeded in protecting for our children and their children many of the crown jewels in America.

Each of these laws was a compromise between people of strongly held principles. No one got all he wanted out of those laws, but everyone who participated in their passage got something that was important. Even though the conservationists didn't get all they wanted in any of these particular acts, they got something very important: the chance to shape the decisions that we make about our natural resources.

The Dilemma: When to Fight and When to Settle

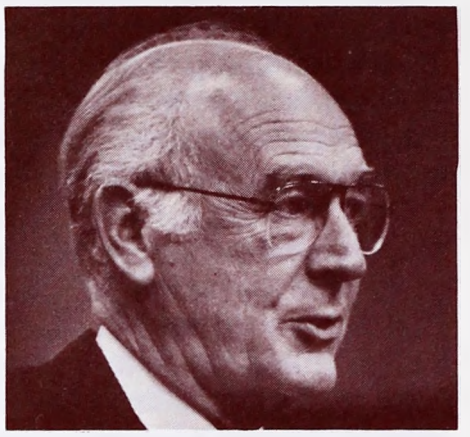
As I see it, the conservation movement faces a dilemma caused by its very successes over the past fifteen years. On one hand, there should be some justifiable pride over the victories that have been won. Although economic development is on everyone's mind these days because of the depression we find ourselves in, surveys continually report that environmental protection is as popular as ever. The Gallup poll has concluded that the goals of environmental protection are shared as widely as any political idea in modern American history.

The outrage that greeted Jim Watt's and Anne Gorsuch's campaigns to gut federal environmental management programs showed just how much a part of the mainstream the values of the conservation movement have become.

But there's the dilemma: the more procedures we've established to ensure procedural due process in environmental decision-making, the harder it's become to make any decision at all. Now that any interest group can be heard, it takes just a couple of well-organized special interests to impede the wishes of the majority.

The Challenge: Advocacy Toward Problem Solving

The practicing lawyers in the audience will understand why I say that a lengthy court case is a poor way to resolve a good faith dispute between two or more parties. They know the costs, both the ones measured in dollars and the ones you can't put a dollar figure on but pinch the client just as badly. They also know too well the risks of civil litigation, which is too much like gambling to be predictable and too much like a duel to be fun. Seldom in my experience as a client are there any true winners after a long court struggle.



". . . a lengthy court case is a poor way to resolve a good faith dispute between two or more parties."

The litigation process produces a decision from the judge. It's like Jupiter thundered from the heavens. You've either won or you've lost—that's it. The decision was not in your client's hands, but rather in the hands of someone who doesn't know the special needs or concerns of you and your adversary nearly as well as you know them yourself. Wouldn't it have been more satisfying to have played a part in shaping the final outcome, rather than to have accepted the judge's ruling like a contestant in a beauty pageant?

The Lawyer's Task: Creative Counseling

As I see it, your task as a natural resources lawyer is to be a wise counselor. You must train yourself to see all apects of the problem and advise your client realistically. Only after you have explored the client's problem thoroughly from all angles should you begin to play the advocate.

But once you don the advocate's clothes, you owe it to your client and to the decision-making system to press his positions vigorously.

I've often noticed that a client comes to a lawyer for advice only when he has already locked himself into a position. That's why you must train yourself to explore an issue from all perspectives, including your adversary's. The more you can perceive the interests that your client shares with his adversary, the easier it will be to adjust their dispute.

I've also often detected a tendency on the part of clients—and I've been one often enough to know—to hear only what they want you to say. Your duty is to tell them the bad with the good.

Conclusion

We in the environmental movement have grown up in the past fifteen years. We have created lasting monuments that protect our wild lands and waters. We have established a rational system for deciding how to manage our scarce national resources in the future. In the public's mind, the hard job of conservation is over.

But you know that the real work is just beginning. We must continue to improve the decision-making process so that we can realize the ideals of the conservation pioneers as well as satisfy the needs for balanced growth.

We must act as responsible stewards of our national heritage of land, water, and air. We cannot preserve every rock or tree, but we must not mindlessly consume all of our natural resources and rob future generations of their rightful legacy to the same aesthetic pleasures and economic opportunities we've enjoyed. We must strike a balance between these two extremes.

Stipulations in Mineral Leasing Act Leases: Power to Spare or Spare Power?

By John R. Little, Jr.

Jack Little *is an attorney with the Denver office of Duncan, Weinberg & Miller. He was formerly Regional Solicitor, Rocky Mountain Region, and Associate Solicitor, Energy and Resources, of the Department of the Interior. The following article is a development of part of his presentation on "Lands Available for Mineral Leasing" at the June 1985 Conference on Public Lands Mineral Leasing: Issues and Directions.*

Red tape and fine print are as much a part of the average American's perception of their government as the Washington Monument and Lincoln Memorial are central to their minds-eye vision of the District of Columbia. It may, therefore, seem incongruous to suggest that mineral lease stipulations—the very essence of government fine print—may rapidly be becoming among the most controversial aspects of the administration of the venerable Mineral Leasing Act of 1920. However, a few moments reflection will suggest that although Leasing Act leases have historically contained a lot of verbiage, most of this has simply executed the statute and the regulations or has provided for housekeeping details. As such, most of the provisions in the average lease have not been of major independent, economic or operational significance to either the lessor or lessee. It is the author's view that this is no longer the case and that stipulations are now much more important to lessor and lessees because they are becoming more pervasive in addressing not only on-lease activities but alleged off-site impacts as well.

Changes in Public Land Management

In significant part, this recent increase in the use of lease conditions is merely a reflection of a gradual but substantial change in the self-perceived role of the Bureau of Land Management in the past decade and a half. The Department of the Interior and its constituent General Land Office were established originally as the instruments of execution of the early policies of encouragement of settlement and disposal of the public lands. Beginning about the time of passage of the Taylor Grazing Act in 1934 (43 U.S.C. § 315 *et seq.*), however, the Department and the BLM gradually began to think of themselves more as land use planners and managers than as disposers of the public lands. This change in philosophy was confirmed in the Federal Land Policy and Management Act of 1976 (FLPMA), which stated clearly that the remaining public lands were to be retained in federal ownership and managed on a multiple use and sustained yield basis unless there were substantial reasons in the national interest that required the disposal of a particular tract. (43 U.S.C. § 1701.) Section 202 of the Act also required that BLM expand its prior management practices through the establishment of an extensive land use planning system as to these retained lands. (43 U.S.C. § 1712.) Six years earlier, Congress had passed the National Environmental Policy Act, which required the preparation of environmental assessments and impact statements when significant federal actions were being proposed or considered (42 U.S.C. § 4332).

Partly as a result of the paperwork explosion brought about by NEPA compliance and FLPMA mandated land use planning but also partly in response to outside political influences and internal policy changes, the decision-making process of both the Department and BLM have generally become more complex and convoluted over the past fifteen years. This has sometimes made the Department and BLM appear "muscle bound" or as if they had become entangled in their own paperwork and procedural underwear. A further complication is that BLM actions and decisions have also become much more controversial and subject to litigative challenge. In practical terms, this combination of events and forces has dictated major changes in the manner in which federal mineral leases are issued and administered.

Increased Use of Lease Stipulations

One of the major consequences of all of these changes in emphasis is that BLM is more frequently utilizing stipulations as a means of executing their land use planning and management determinations in a wide array of contexts, including Leasing Act leases. To be fair, it should also be noted that the Department and BLM are under heavy pressure to extensively stipulate, particularly by environmental groups and state and local authorities. These interests argue, for example, that leases should contain provisions requiring that the Department attempt to enforce state and local legal requirements as lease conditions or clauses requiring lessees to address and/or provide for remote off-site socioeconomic impacts of lease development on the community generally such as the costs of roads, schools, water supply, sewers, law enforcement and the like. See Pring, *Power to Spare: Conditioning Federal Resource Leases to Protect Social, Economic and Environmental Values,* 14 Nat. Res. Law 305 (1981); Barry, *The Surface Mining Control and Reclamation Act of 1977 and the Office of Surface Mining: Moving Targets or Immovable Objects,* 27A Rocky Mtn. L. Found. 169, 320-24 (1982).

A further complication is that stipulations are also appearing more often in post-lease, administrative decisions such as approvals of Applications for Permission to Drill, or mining or operation plans. When such conditions impose significant cost-increasing requirements, questions are raised as to whether fundamental post-award alterations of the lease terms are authorized.

Lastly, there exists a rather virulent virus in the Department of the Interior that, in its most extreme form, holds that there are virtually no limits to the Department's authority to stipulate as to almost anything, at any time in the process—on or off-site.

Given all of these sometimes conflicting currents and cross currents, it is clearly evident not only why stipulations to Mineral Leasing Act leases are increasingly employed by BLM but also why their pervasive use has become increasingly controversial, particularly when they address remote, off-site impacts, when they are attached post-lease or, whenever imposed, they cause substantially increased costs of exploration, development or operation.

Statutory Authority

What is the statutory base for inserting conditions in mineral leases? The answer is that it is essentially sparse and very general in nature. For purposes of contrast, attention is drawn to Section 505 of FLPMA (43 U.S.C. § 1765) relating to grants of rights of way, which contains a very broad state-

ment of authority for stipulations including, among other things, minimizing damage to scenic and esthetic values or otherwise protecting the environment, compliance with State public health, safety, environmental and siting standards and protecting the public interest in lands adjacent to the right of way. The Acquired Lands Mineral Leasing Act (30 U.S.C. § 352) also contains a specific direction that leases issued thereunder *shall* be ". . . subject to such conditions as the . . . [managing agency] . . . shall prescribe to insure the adequate utilization of the lands for the primary purposes for which they have been acquired or are being administered."

The analysis of the authority to stipulate under the 1920 Act starts with Section 17 (30 U.S.C. § 226[a]), which states that public lands "*may* be leased by the Secretary." The second is Section 32 (30 U.S.C. § 189) which authorizes the Secretary to promulgate "necessary and proper" rules and regulations providing for administration of the Act and leases issued thereunder. Thirdly, Section 30 (30 U.S.C. § 187) requires that each lease shall contain provisions relating to diligence and care of operations; hours, wages, conditions of employment, and safety and welfare of miners and minors; prevention of undue waste; sale at reasonable prices; prevention of monopoly; "protection of the interests of the United States"; and "safeguarding the public welfare." Obviously, these two latter, very general provisions suggest little in the way of guidance to either lessee or administrator as to the permissible scope of stipulation. What other arguable sources of authority are there?

Other Sources of Authority

First, there is the "broad discretion of the Secretary." See *Udall v. Tallman,* 380 U.S. 1 (1965). This, of course, is yet another of those favorite refuges of scoundrels and Interior Solicitors akin to apple pie, the stars and stripes or even, "the check is in the mail." Yet "broad discretion" clearly has to be reckoned as a further, partial source of authority at least.

The second derives from "broad discretion." This is that leasing with stipulations is a lesser, included power implicit in the concept of discretion, i.e. in lieu of refusing to lease.

The third is the precept that a lease is a contract and the lessee has the option to either accept or refuse the lease as stipulated.

A fourth is that stipulations are a proper method of the exercise of the very broad, sovereign power of the Secretary to regulate uses of the public lands. See *Kleppe* v. *New Mexico*, 426 U.S. 529 (1976).

A fifth is that stipulations are simply a form of regulation authorized by 30 U.S.C. § 189. (See e.g. 43 C.F.R. §§ 3101.1 and 3101.1-2.)

A sixth is that they are authorized by the NEPA provision that requires that existing federal policies, regulations and statutes be construed as to sanction reasonable provisions for environmental protection. See 42 U.S.C. § 332. But this NEPA direction to broadly construe has been held to be limited in scope as applied to Mineral Leasing Act actions. See, *Natural Resource Defense Council* v. *Berklund*, 609 F. 2d 553 (D.C. Cir. 1980).

Beyond this there are also a number of specific statutes and regulations that purport to authorize use regulation to varying degrees such as: wild and scenic rivers (16 U.S.C. § 1280 [a]); designated wilderness areas (16 U.S.C. § 1133[d][3]); BLM wilderness study areas (43 U.S.C. § 1782); endangered species (16 U.S.C. § 1531 *et. seq.*); and recreation areas administered by the National Park Service (36 C.F.R. Part 9).

There also should be noted a further provision which may cast some doubt upon the argument for stipulations addressing remote, off-site socioeconomic impacts. This is 30 U.S.C. § 191 which gives 50 percent of the Government's Mineral Leasing Act revenues to state and local governments. Some of the legislative history of this provision suggests that it was intended to be *the* federal contribution to local governments for the impact of federal mineral development. See e.g. 50 Cong. Rec. 7769, 7773-4 (1919) H.R. Rep. No. 94-681, 94th Cong., 1st Sess. 19 (1975), 1976 U.S. Code & Congressional Adm. News at 1955.

Where Are We Headed?

With this background there are several points that should be made. First, the days of automatic lessee acceptance of any lease stipulations that someone in BLM might dream up are over, in part because of increased lessee awareness of stipulation authority issues. We can consequently expect much more dispute and litigation on the subject. Second, the internal and external pressure on BLM to extensively stipulate to address issues raised during NEPA compliance or the FLPMA land use planning process will continue. Third, with the depressed state of the coal market, disputes and litigation about the closely related issues as to the scope of permissible charges in coal lease stipulation during the readjustment process under Section 7 of the Act (30 U.S.C. § 207), as amended by FCCLA in 1976 will continue. See e.g. *Coastal States Energy Co.,* 70 IBLA 386 (1984), appeal pending *Coastal States Energy Co.* v. *Watt,* C 83-0730 J (C.D. Utah, filed 6/3/83).

Beyond these relatively easy predictions, since there has been very little case law on the subject, it is anyone's guess how the law will come out after the litigation is over. Nevertheless, the author will be foolhardy enough to suggest some thoughts which he believes are likely to be featured in future decisions on the subject.

First, there are limits to how far the "protection of the interests of the United States" and "safeguarding the public interest" language of Section 30 of the statute can be stretched. Unless Congress can be persuaded to broaden and expand the present BLM authority base along the lines of Section 505 of FLPMA or the Acquired Lands Act section previously noted, many of the requirements that are finding their way into leases at present do not have reasonable linkage to protection of legitimate federal on-site interests or a specific statutory or regulatory authorizations may not be sustained. We are beginning to see some of this from the IBLA already. See e.g. *Blackhawk Coal Co.,* 68 IBLA 96 (1982); *Gulf Oil Corp. et al.,* 73 IBLA 328 (1983); *Coastal States Energy Co.,* 81 IBLA 171 (1984); and, *Sunoco Energy Dev. Co.,* 84 IBLA 131 (1984).

Second, if stipulations are soundly related to site specific physical conditions, are not overly heavy handed or unreasonable, they probably will be enforced.

Third, excessive stipulations which substantially limit or prevent operations are likely to be challenged. As an example, attention is called to the several thousand leases that have been issued by Interior within BLM Wilderness Study Areas being administered under FLPMA section 603(c) with no surface occupancy stipulations. While isolated instances of this practice might be justified on the basis of site-specific facts (such as the possible ability to develop a particular tract by slant drilling or a need to block up acreage, or the like), it is hard to justify widespread leasing on a "giving with the right-taking away with the left" basis even if the "take it or leave it," contract-based justification is swallowed whole. It

is suggested that the issuance of such leases may, in fact, be a perversion of discretion since it would seem doubtful that they convey *any* interest in the land and are thus mere shells. Perhaps the Department should not issue a lease rather than promulgate one that is arguably a sham. It was therefore interesting to see that the Department recently adopted 43 C.F.R. § 3101.1-2 which says, in part, that mineral leases will be issued only if the stipulations will not absolutely bar exploration of the resource and extraction is technically feasible. But then, the regulation adds: "or the lease, as stipulated, is acceptable to the lessee." Some read *Conner v. Burford*, 605 F. Supp. 107 (D.C. Mont. 1985); *Sierra Club v. Peterson*, 717 F. 2d § 409 (Ca. D.C. 1983); and, *Rocky Mountain Oil and Gas Assn.* v. *Watt*, 696 F. 2d 734 (10th Cir. 1983) as supporting the general use of no surface occupancy stipulations. This construction of these cases is unconvincing to the author.

Fourth, as to general socioeconomic clauses, unless they are simply reflections of provisions generally applicable (e.g. nondiscrimination in employment) or can be shown to have a solid nexus to a specific statutory base, they may be in trouble. As a specific example of these socioeconomic issues, the fascinating subject of cultural-historical-archeological resource survey and preservation stipulations comes to mind. While it is tempting to deal with the subject in detail, it will suffice to suggest that unless there is strong evidence that the bones of General Custer or some historical, cultural or archeological find of similar dignity are located on the lease premises, there is little obvious legal justification for a pervasive stipulation requiring, for example, the employment of a full-time archeologist on site for the complete lease term or a full, pre-drilling cultural-historical survey of the entire lease tract. Certainly, there are good and sufficient reasons to require lessees to take reasonable steps to identify and protect these kinds of resources if they are found on the public domain. The trouble is that these legitimate objectives have been prostituted by overextension, largely by the professional in and out-house historical-archeological lobby. The Act (§ 106 of the National Historic Preservation Act, 16 U.S.C. § 470f) merely says that the Agency head shall "take into account the effect" of any federal undertaking on any historical site or structure included or eligible for inclusion on the Register and shall give the Advisory Council the opportunity to "comment" on such undertakings. See also Executive Order 11593 (May 13, 1971) and 36 C.F.R. Part 800. It is thus very difficult for the author at least to see how the Act authorizes a requirement that a lessee must develop the evidence as to whether or not there is a historic site or structure on the lease so that it can be nominated, accepted on the Register, commented upon and then be "taken into account."

Fifth, the more tenuous and distant the nexus between the authorizing statute and the stipulation, the greater the risk of it being upset in litigation.

Sixth, the less stipulations address physical on-site conditions and the more they are concerned with off-site matters, the greater chance the lessee has of successful challenge. The supporters of a more liberal reading of the Secretary's stipulation authority find comfort in *National Res. Defense Council v. Berklund*, 609 F. 2d 5531 (D.C. Cir. 1980) and *Sierra Club v. Peterson, supra*. While it is granted that there is some language in both cases suggesting that use of stipulations may be a way of dealing with issues raised in the NEPA process, it is the author's view that the cases are being overread if interpreted much farther than that.

Seventh, since the lease is a contract, overaggressive postlease administrative actions may give rise to breach damages or injunctive relief. The cited cases resulting from the 1969 "blow out" in the Santa Barbara channel clearly suggest that there are limits to the postlease power of the Secretary to regulate, particularly if such stipulations cause major postlease cost increases or unreasonable delay. See *Gulf Oil Corp.* v. *Morton*, 493 F. 2d 141 (9th Cir. 1973); *Union Oil Co. of Calif.* v. *Morton*, 512 F. 2d 743 (9th Cir. 1975); and *Sun Oil Corp.* v. *United States*, 572 F. 2d 786 (Ct. Cl. 1978).

Eighth, there are limits to the Secretary's implied sovereign powers to regulate land uses. Specifically, DOI should be concerned about instances where the Secretary has, with his discretionary leasing hat on, issued coal leases for lands that are only suitable for surface mining development and has then, with his zoning, land use, regulatory or sovereignty hat on, designated them unsuitable for surface mining or as unmineable alluvial valley floors under SMCRA. The recent *Whitney Benefits* case strongly suggests that this sort of power must be exercised with caution and restraint. *Whitney Benefits, Inc.* v. *United States*, 752 F. 2d 1554 (Fed. Cir. 1985).

Last, leaving aside any consideration of the kinds of dual sovereignty issues arising out of arguments as to the meaning of *Ventura County* v. *Gulf Oil Corp.*, 601 F. 2d 1080 (9th Cir. 1979) affd. 445 U.S. 947 (1980), there are serious legal and policy concerns with the assertion that violations of state and local laws and regulations should be reasons for assessment of federal civil penalties or cancellation of federal leases. It would not seem to be a seemly posture for the United States to, in effect, "throw its weight around" by attempting to enforce state and local tax laws, state or local roadway load limits, local zoning laws, or the like. State and local governmental units have plenty of enforcement weapons and abundant power to tax already. They don't need Uncle Sam to do their enforcement for them.

Summing up, the use of stipulations is a most reasonable, effective, efficient and straightforward method of exercising the wide range of legitimate discretion which the law accords to the Secretary under the 1920 Act. The trouble is that there seem to be many, both in and out of the Department of the Interior, who erroneously view the authority to stipulate as being essentially unlimited in time and scope and who have attempted to use stipulations as a way of "dealing with" a lot of peripheral or remote problems or to feather their own parochial policy nests. In my judgment, in so doing, they have at times overreached the reasonable limits of the Secretary's authority base. To this point, these indiscretions have gone largely unchallenged because lessees have swallowed hard, have rejected the expense, delay and hassle of litigation, and have grudgingly accepted the stipulations. Those days are over, in my view.

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