Current Developments in Public Lands Administration

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CURRENT DEVELOPMENTS IN PUBLIC LANDS ADMINISTRATION

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PUBLIC LANDS MINERAL LEASING: ISSUES AND DIRECTIONS

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I. Departmental Organization and Responsibilities

A. Interior is the primary public land management agency.

1. Most public land statutes vest authority in the Secretary, subject to his power to delegate it. (E.g., 30 U.S.C. 181; Reorganization Plan No. 3 of 1950, §1(a), 64 Stat. 1262, 5 U.S.C. Appendix.)

a. Most statutes authorize the Secretary to issue rules and take 'necessary and proper' action to implement the statutes. (E.g., 30 U.S.C. 189.)

b. The Secretary has general powers to administer public lands by statute (e.g., 43 U.S.C. 1201) and by case law even where the statute is silent (Cameron v. U.S., 252 U.S. 450 (1920)).

2. Statutes vesting authority in the Secretary may apply to lands otherwise administered by another agency, such as the Forest Service. The Mineral Leasing Act of 1920 is one of these. (30 U.S.C. 181—see paper # 2.)

B. Interior's current delegations are from the Secretary, through the Under Secretary and the Assistant Secretary, Land and Minerals Management, to the Bureau of Land Management (BLM) and the Minerals Management Service (MMS).

1. From 1920 to present BLM, and its predecessor the General Land Office, issued mineral leases and kept lease records. (E.g., GLO Circular No. 672, 47 L.D. 437 (1920); sec. 403 of Reorganization Plan No. 3 of 1946, 60 Stat. 1097, 5 U.S.C. Appendix; Secretarial Order (S.O.) No. 2948 (Oct.
2. From 1925 to 1982, the Conservation Division of the U.S. Geological Survey administered lease operations and collected royalties. (Instructions, 51 L.D. 219 (1925); but see 47 L.D. at 438, ¶2.)

3. In January 1982 the Conservation Division's onshore mineral leasing functions were transferred to the new MMS. (S.O. No. 3071, Jan. 19, 1982.)

4. In December 1982 the lease operations supervision—permits to drill, onsite inspections—functions of MMS were transferred to BLM. MMS retained the production and royalty reporting, valuation, and collection functions for all leases, offshore and onshore federal as well as Indian. (S.O. No. 3087, §5, Dec. 3, 1982.)

5. In December 1983 the relevant Assistant Secretaries' functions were realigned and both MMS and BLM came under the same Assistant Secretary. Any inconsistency in policy or position between MMS and BLM on a matter handled in common, such as a royalty reduction request, can now be resolved without having to ascend the Department to the Under Secretary's level.

6. A Memorandum of Understanding between MMS and BLM describes the functions of and relations between the two in detail.

C. The Solicitor's Office's role is often misunderstood.

1. It advises the Secretary and all delegates of the Secretary, both informally and in writing.

2. Written opinions come in different kinds.
a. Formal "M" numbered opinions are published and indexed, and are intended to disseminate the Department's legal position.

b. 'Lower' level opinions may be subject to the assertion of attorney-client privilege, although generally they are available as guidance for the public as well as the agency officials.

3. Roles may change. The Solicitor's Office will represent BLM before the Board of Land Appeals and, through the Justice Department, represent the Board of Land Appeals in court even though the Board rejected BLM's position. (E.g., Getty Oil Co. v. U.S., Civil No. 84-0320 (D. Wyo.).)

D. The role of the Office of Hearings and Appeals, and its Interior Board of Land Appeals (IBLA), is developed in Part III. B. below.

II. New Developments in Mineral Leasing--Oil and Gas and Coal

A. Legislative proposals are being drafted to change the current mix of noncompetitive and competitive oil and gas leasing chiefly to deal with the perceived problems in the so-called 'simultaneous' leasing system applicable to lands that have previously been leased. (See paper # 8.)

B. The "KGS" is being examined and reexamined. Lands in the "known geological structure of a producing oil or gas field" must be leased competitively; lands not
within the same must be leased noncompetitively. (30 U.S.C. 226(b), 226(c).)


2. What else? The regulation defining KGS as "the trap in which ... oil or gas has been discovered ... includ[ing] all acreage that is presumptively productive" is now in question. (43 CFR 3100.0-5 (l).) The District Court held the rule to be illegally restrictive (562 F. Supp. at 1226), and the Court of Appeals criticized it without any express conclusion. (734 F.2d at 359 n. 16.) But the Court of Appeals also praised the BLM's Instruction Memorandum 84-35 (Oct. 14, 1983) which gives guidance on making geology-based KGS determinations within the context of the existing rule. (734 F.2d at 361-62.)

3. What more? Some say the Court of Appeals established a new, independent basis for a KGS determination, 'competitive interest.' In context, the Court held that the Department's failure to consider the competitive interest in the tracts when
clearing the land as non-KGS rendered the determinations in that case arbitrary and capricious. (734 F.2d at 360-61.) BLM has not employed competitive interest in making KGS determinations except as a warning to do the geology carefully.

C. NEPA compliance in oil and gas leasing, especially over-the-counter (first-time) leasing of national forest and other sensitive lands, and the relation of protective lease stipulations to NEPA compliance, is under court review in several important cases. (See papers 6 and 7.)

D. The rules for inspection and enforcement (I & E) of operating standards for onshore lease sites are in their first-year trial, and portions are already under review for revision. (43 CFR Subpart 3160, 49 Fed. Reg. 37363 (Sept. 21, 1984).

1. The penalty tables and automatic assessment provisions have resulted in assessments out of scale with the severity of the violations.

2. Some industry members continue to object to BLM's rules assessing penalties under Mineral Leasing Act authority for violations prior to the 20-day abatement period provided for in sec. 109(a) of "FOGRMA". (30 U.S.C. 1719(a). See 43 CFR 3163.4-1(a), derived in part from 30 U.S.C. 188(a) and 30 U.S.C. 1753(a).)

3. These rules implement, in large part, recommendations of the first Linowes Commission Report,
"Fiscal Accountability of the Nation's Energy Resources," but they are designed somewhat differently from, and raise different issues than, the royalty rules treated in papers 4 and 5.

E. NEPA compliance in the coal program remains a big source of controversy (see papers 10 and 13).

1. The Montana District Court has found the 1982 Powder River Region lease sale EIS inadequate as it related to the several tracts in Montana on NEPA grounds, among others. (Northern Cheyenne Tribe v. Hodel, Civil No. 82-116 (D. Mont. May 28, 1985).)

2. The comment period closed on the Draft Supplement to the 1979 Program EIS, and the comments of the program's critics make it clear that there is not yet a consensus on the purpose and proper scope of programmatic NEPA work for the federal coal program.

F. Money remains a critical issue in the federal coal program, although the focus has shifted for the time being from public criticism of low bonuses to industry criticism of high royalties.

1. The 'fair market value' portion of the Powder River Lease Sale suit has been submitted to the court since December 1982. Plaintiffs seek further discovery in their challenge on 'fmv', while
defendants challenged plaintiffs' standing to litigate the issue. Now that the Northern Chey­ enne decision is out, we await this one.

2. The readjustment cases (paper # 12) challenge the Department's position that it will impose Federal Coal Leasing Amendments Act (FCLAA) royalty rates on pre-1976 leases when it readjusts them. Discussion of this subject plays against two background themes: economically, we are in a twenty-year transition period where owners of new and readjusted leases (with 12&1/2 % of gross value royalty rates) are competing with those still marketing coal from 20c/ton rate leases; and legally, if the broad, general theory attacking readjustments is correct, then the comparable imposition of FCLAA diligence requirements may be vulnerable.

3. This disparity in royalty rates, combined with current market conditions, have focused lessees' attention on the Department's policy for (or against) reducing the rate at which royalty will be paid below that specified in the lease. The Mineral Leasing Act authorizes the Secretary to do so for "the purpose of encouraging the greatest ultimate recovery of coal... whenever... necessary... in order to promote development, or whenever... the leases cannot be successfully operated under
G. "Diligence" perhaps more than any issue is an emotional touchstone of the coal program. The clock is ticking down on the effective date of FCLAA 'diligence' requirements (see paper 11, as well as 10 and 13).

1. "Section 3" of the FCLAA will become effective August 4, 1986, barring legislation. (30 U.S.C. 201(a)(2)(A).) Interior's guidelines to implement it received much comment. (50 Fed. Reg. 6398 (Feb. 15, 1985).) Interior's Solicitor's Opinion on section 3 has been challenged in one particular--its conclusion that the prohibition in section 3 extends to the issuance of oil and gas leases because the statute uses the phrase "under this Act." (Opinion M-36951, Feb. 12, 1985; Conoco, Inc. v. Hodel, Civil No. 85-277 (D. Del. filed May 10, 1985).)

2. Section 7 diligence requirements ("produce in ten years") are now affecting the first leases issued and readjusted after the FCLAA--prospective purchasers of coal are concerned that the lessee will lose the lease before he will be able to develop the mine and produce the magic, lease-extending tonnage of coal.
H. Preference right coal lease applications are still with us. (30 U.S.C. 201(b)(1970), amended "subject to valid existing rights" by sec. 4 of the FCLAA, 90 Stat. 1085.) About 130 of them are caught in negotiations begun in mid-1983 over BLM's asserted failure to comply with NEPA in processing them. (See NRDC v. Berklund, 458 F. Supp. 925 (D.D.C. 1978), aff'd, 609 F.2d 553 (D.C. Cir. 1979).)

I. Behind these program components are several broader issues that directly impact onshore federal mineral leasing.

1. The BLM-Forest Service "Interchange," as currently conceived, would give mineral leasing authority, as well as lease administration, to the Forest Service for those areas described in the concept maps as ending up under FS jurisdiction. Simplistically, it would be as if the Mineral Leasing Act read like several provisions of the Federal Land Policy and Management Act: "the Secretary of the Interior, and with respect to lands within the National Forest System the Secretary of Agriculture, is authorized...." (Borrowed from 43 U.S.C. 1761.)

2. State participation in program operation, and state and local control over lessees are subjects that generate a group of disputes (see paper 15).

   a. State standing to challenge federal leasing
decisions, derived from its interest in its share of lease revenues (30 U.S.C. 191; Arkla, above, 734 F.2d at 353-54), is at issue. The Western Attorneys General have expressed an interest in a standardized right of notice of and participation in IBLA cases that affect redistributed revenues.

b. BLM is completing Resource Management Plans designed to be consistent with local plans and policies "to the maximum extent [DOI] finds consistent with Federal law." (43 U.S.C. 1712(c)(9); 43 CFR 1610.3-2.) In the mineral leasing context, this returns planners and local officials to the questions: what local law is "applicable" to federal mineral lessees; and what kinds of local ordinances "impermissibly conflict" with federal law (as expressed in the Mineral Leasing Act)? (See Ventura County v. Gulf Oil Corp., 601 F.2d 1080 (9th Cir. 1979), aff'd per curiam, 445 U.S. 947 (1980).

c. Many conflicts arise directly from lessees' assertions of preemption of state law, not from Interior Department action. Secretary Hodel has been asked to state his position on a public utility's authority to condemn geothermal steam leases, not to defeat or term-
inate the federal leases, but to operate them, over the objection of the lessee. The lessee got an injunction against the state law condemnation action, arguing pre-emption--that the state law is inconsistent with the Geothermal Steam Act of 1970 in its limits on how one acquires leases and its policy to promote risk investment in development. (Grace Geothermal Corp. v. Northern Calif. Power Agency, Civil No. 84-6741JPV (N.D. Cal. Oct. 19, 1984), appeal remanded, No. 84-2595 (9th Cir. May 2, 1985), for findings of fact and conclusions of law.)

III. Dispute Resolution in Mineral Leasing

A. Informal methods exist and may work best, especially before any formal decision is rendered.

1. The letter usually gets answered. "What happened to my application?" "Have you changed policy on subject X?" Refer to the case serial number(s) and the letter will make it to the file.

2. The meeting puts misconceptions, misunderstandings and concerns or issues on the table. Schedules may be negotiated.

3. The PROTEST asserts any error in, or complains about, a proposed BLM action or a pending matter. (43 CFR 4.450-2.) It is the bridge to more formal action. BLM must act on the written protest be-
fore or at the same time that it acts on the application or matter protested.

4. There are two traps to avoid: the delegation trap and the estoppel trap.

a. The BLM is a decentralized agency. Know who is responsible for the decision you are concerned about (lease issuance, permit to drill, lease readjustment, etc.). Many field personnel advise, do reports and recommend, and BLM may not be able to act until they all do. But know who decides. The ubiquitous term 'authorized officer' may be a district manager, a state director, a branch chief in a state office, or an area Manager. It is the lowest person in the hierarchy to whom the decision power has been delegated. (43 CFR 3000.0-5(e).

b. BLM resists estoppel. It will not be bound by oral misstatements or mis-advice by its officials regarding statutory or regulatory requirements, filing deadlines, etc. (43 CFR 1810.3.) The courts have made this rule less than absolute, but under the standard formulation, to bind BLM to a misstatement by its employee, you will have to show: i) you reasonably relied on the BLM assertion; ii) the reliance was detrimental—you were
harmed; iii) BLM intended that you rely on the matter misrepresented (was the properly delegated official speaking?); and iv) that there was "affirmative misconduct" in BLM so representing the matter. (U.S. v. Wharton, 514 F.2d 406 (9th Cir. 1975) (estoppel found); U.S. v. Ruby Co., (9th Cir. 1978), cert. denied, ___ U.S. ___ (1979) (no estoppel--no affirmative misconduct); see U.S. v. Locke, No. 83-1394 (U.S. April 1, 1985), Slip Op. at 5 n. 7, concurrence at 2-3.)

B. Formal dispute resolution within Interior.

1. Several types of BLM action are reviewable within BLM.

   a. Resource management plans are formulated by district managers but adopted, after public comment and with the managers' recommendations, by state directors. (43 CFR 1610.4-7, .4-8, .5-1.) Specific protest procedures exist here. (43 CFR 1610.5-2.)

   b. "Technical and procedural review" is available from the State Director within ten days of any order or instruction issued (usually by a district or area manager) under the oil and gas operating rules. (43 CFR 3165.3, for all matters treated in 43 CFR Part 3160.)
2. Final BLM action may generally be appealed to the Office of Hearings and Appeals (OHA) for its review. (E.g., 43 CFR 4.410.) Some BLM actions, where hearings are required, go to an Administrative Law Judge (ALJ). (E.g., 43 CFR 3163.4-1(b)(7).) Most adjudications, where a protest is dismissed or denied, or a "Decision" is rendered to an applicant or lessee, or both, go to the Board of Land Appeals (IBLA).

3. IBLA was formed, within OHA, by Secretarial directive in 1970 to consolidate appeal functions, and in part to resolve a recurring due process problem in the hearings process where the Solicitor's Office (Washington) decided appeals on cases the Solicitor's Office (field) had prosecuted for BLM. (Memorandum of Jan. 30, 1970 from Solicitor to Secretary Hickel, "Reorganization of Departmental Appeals and Hearings Administration;" re due process see Oil Shale Corp. v. Morton, 370 F. Supp. 108, 129 (D. Colo. 1973), vacated, No. 74-1344 (10th Cir. Sept. 22, 1975).)

1. The move abolished the BLM Director's Office of Appeals and Hearings, then a mandatory review step, but it did not abolish a comparable intermediate review step for Geological Survey decisions. This intermediate review step was inherited and retained by MMS, and
applies to all onshore royalty cases.
(30 CFR Part 290 (1984).)

b. IBLA is not statutory, but it does serve the purpose of meeting FLPMA's 1976 state-
ment of policy that the Secretary "struc-
ture adjudication procedures to assure... objective administrative review of initial

4. What IBLA does and does not do.

a. IBLA construes statutes and regulations, making law for the Department as it does so. Inherent in this is the power to overrule its own decisions, and Solicitor's Opinions. (E.g., U.S. v. Union Carbide Corp., 84 I.D. 309 (1977), overruling M-36823 (May 7, 1971).)

b. IBLA has 'de novo' review power over factual matters, including facts found by ALJ's at adversary hearings, and de novo review over land management judgments and policy state-
ments. (43 CFR 4.1(3), 4.1--"as fully and finally as might the Secretary". Eldon Brinkerhoff, 83 I.D. 185 (1976); also 79 I.D. 596 (1972).) It has imposed limiting review standards on itself over time. Check the cases on your subject matter to find out if such a standard applies to your appeal. (E.g.,
George Jalbert, 39 IBLA 205 (1979) (timber sale--will not reverse decision unless "clearly in error"); Apache Oro Co., 16 IBLA 281 (1974) (mineral lease rejection--will not reverse if "adequate basis of record").

c. IBLA does not rule on the constitutionality of statutes, having concluded that is outside its authority. (E.g., Charlie Carnal, 43 IBLA 10 (1979); Al Sherman, 38 IBLA 300 (1978).)

d. IBLA does not declare duly promulgated regulations to be in excess of statutory authority, having concluded that the legality of rules is determined by the Department when it promulgates them. (E.g., Exxon Co., U.S.A., 45 IBLA 313 (1980); City of Kotzebue, 83 I.D. 313 (1976).)

5. What are the procedural possibilities and traps in an IBLA case.

a. During the appeal period, and upon its filing until IBLA decision, the BLM decision is suspended or stayed. (43 CFR 4.21(a), except as BLM rules provide to the contrary.) Parties, including BLM, may seek to reverse the status quo by filing for relief using standards like preliminary injunction considerations-- irreparable injury, balance of harms, etc.
b. Standing at IBLA approximates federal court standing, but one must focus on IBLA's specific regulation: "Any party to a case who is adversely affected by a [BLM] decision" has a right to appeal. (43 CFR 4.410.) Someone who timely protests a proposed action thereby becomes a "party," according to IBLA, but one must still establish that one is "adversely affected." (Donald Pay, 85 IBLA 283 (1985).) It is also possible to be adversely affected and not be a party, by failure to have protested timely. (In Re Pacific Coast Molybdenum Co., 68 IBLA 325 (1982).)

c. Few mineral leasing situations call for adversary hearings, but they may be ordered by IBLA in its discretion. (43 CFR 4.415, referring to 43 CFR 4.430 to 4.439.) IBLA has employed this authority in some disputed KGS cases. (Jack J. Bender, 40 IBLA 26 (1979), rev'd on other grounds, Bender v. Clark, 744 F.2d 1424 (10th Cir. 1984).)

d. Once a case is appealed, it is no longer within BLM's jurisdiction, according to IBLA. (E.g., Duncan Miller, 38 IBLA 154, 158 (1978); Utah P. & L. Co., 14 IBLA 372 (1974).)

6. A number of procedures bypass IBLA or reverse the normal status of a case pending at IBLA.
a. Several recent BLM regulations make BLM decisions 'final' agency actions. (E.g., 43 CFR 1610.5-2(b); 43 CFR 3427.2(k).) These rules, however, were not accompanied by any amendment to IBLA's jurisdictional rule. (43 CFR 4.410.) IBLA has not spoken in an adjudication on the effect of such a provision; BLM, however, will treat such a decision as effective, and there will be no 'right of appeal' paragraph in such a decision.

b. Another cluster of BLM rules, and MMS's rules governing royalty disputes, make the decisions issued thereunder effective pending appeal, employing the 'out' in 43 CFR 4.21(a). (E.g., 43 CFR 3451.2(e); 43 CFR 2884.1(b); 30 CFR Parts 202, 203 and 290 (1984).) Here the appellant must proceed at IBLA to get expedited review, or to get the decision stayed pending appeal. Note that such an MMS or BLM decision is final for purposes of judicial review, and the appellant may elect judicial instead of IBLA review.

c. An adjudication by, or specifically approved by, the Secretary, is final for the Department, and the Secretary may assume jurisdiction over any case at any time. (43 CFR 4.5.) For mineral leasing purposes, "Secretary " includes the Assistant Secretary, Land and
d. IBLA's decision is final agency action. IBLA's rules authorize reconsideration, and authorize Secretarial and OHA Director's reconsideration of IBLA decisions. (43 CFR 4.21(c); 43 CFR 4.5(a)(2) and 4.5(b).) However, it is not necessary to do so to have a final decision, and doing so will not prevent any relevant statute of limitations from running. (43 CFR 4.21(c); 30 U.S.C. 226-2; Winkler v. Andrus, 494 F. Supp. 946 (D. Wyo.), rev'd on other grounds, 614 F.2d 707, 709 (10th Cir. 1980)).

i. Only if IBLA grants the petition will there be a new decision to start a new limitations period. (See Tallman v.
Reconsideration is likely to be granted only to reconsider a case in light of intervening case law, or in light of some novel argument or facts raised in the petition and excusably not raised before.

C. Litigation has its virtues, but speed, simplicity and dispute resolution are rarely among them.

1. Know the relation between the administrative process and judicial review.
   a. The relation between decisions of BLM, MMS and IBLA and finality is discussed above in connection with effectiveness and reconsideration.
   b. Any suit regarding a Departmental proceeding that is not final (or not effective pending appeal) is subject to a federal motion to dismiss as premature for failure to exhaust administrative remedies, and in the alternative for a stay under the doctrine of primary jurisdiction.
   c. Any suit regarding a BLM or MMS decision not timely appealed to IBLA is subject to a federal motion to dismiss as barred for failure to exhaust a required administrative remedy.
d. Review of an IBLA case is usually review under 5 U.S.C. 706(2)(A), on the certified administrative record. The extent to which a court will allow discovery, and the introduction of the fruits of discovery for any reason either to impeach the record, to supplement an inadequate record, or not at all varies from circuit to circuit, and among factual circumstances.

2. The Justice Department is the Secretary's trial lawyer, and controls the conduct and disposition of litigation, generally as the Secretary requests.

   a. On matters of litigation policy, including practice construing the federal rules, and on matters of law common to multiple agencies, Justice is obligated to assert consistent positions, and to reconcile diverging positions of its agency clients.

   b. In this role, Justice settles cases, decides to appeal (or not to appeal) adverse court decisions, and otherwise to represent the interests of the United States in a manner different in these important respects from private trial counsel. Once litigation is begun, a negotiated settlement requires working with both agencies, Justice and Interior, not just one.
3. I present the 1985 speed and certainty awards for litigation involving minerals and the Department of the Interior. The nominees are:

   a. The oil shale mining claims assessment work contests.

   b. The Powder River Coal Lease Sale litigation, Part II, involving fair market value, proper tract delineation and the unsuitability standards for pre-lease environmental review.

   c. The Jicarilla Apache reservation gas royalty valuation cases.

   d. The leasing of Fort Chaffee, Arkansas for oil and gas development.