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LANDS AVAILABLE FOR MINERAL LEASING

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PUBLIC LANDS MINERAL LEASING:
ISSUES AND DIRECTIONS

A Short Course Sponsored by the
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University of Colorado School of Law

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I. Introduction

A. The history of the public lands largely reflects the history of the United States west of the Alleghenys.

B. The issue: Is title to the tract in question in the United States? If so, is it available for lease? If so, under what conditions?

II. Historical Background.

A. Policies established by the Land Ordinance of 1785 -- Settlement, Revenue, Survey and Disposal.

B. History of disposal to private individuals.
   1. Credit sales -- 1800-1820
   2. Cash sales -- 1820-1862
   3. Preemption laws
   4. Military bounties
   5. Homestead Act 1862 (43 U.S.C. § 161 et. seq.)
   7. Reclamation Homesteads of 1902 (43 U.S.C. § 431 et. seq.)
   8. After 1866, homesteads were granted only as to lands deemed to be non-mineral in character, 30 U.S.C. § 21.

C. Indian Lands -- Tribal, Trust and Allottment.

D. Land Grants to States.
   1. School lands -- generally one or two sections
per township (e.g. Colorado, 18 Stat. 475 (1875)) up to four sections (e.g. Utah, 28 Stat. 109 (1894)).


3. Other grants for various purposes -- canals, roads, buildings, colleges, penitentiaries, etc.

4. Until 1927, state grants also were generally limited to lands deemed to be non-mineral. (As to pre-1927 procedures, see West v. Standard Oil Co., 278 U.S. 200 (1929); 43 U.S.C. § 870 contains post-1927 procedures.)


E. Land Grants to Railroads.

1. Either specific grants (e.g. Union Pacific, 12 Stat. 489 (1862)) or grants under general statute (Act of March 3, 1875, 43 U.S.C. § 934 et. seq.).

2. Usually included the right of way for the railroad alignment plus other adjacent lands to sell off for financing i.e. every other section along the line in a checkerboard pattern.

3. Widths of grant areas and other terms and conditions varied. Usually only non-mineral
lands were granted. (See Northern Pacific Ry. Co. v. Sodenberg, 188 U.S. 526 (1903)).

F. Disposition of minerals -- history.
1. 1785 Land Ordinance
2. California -- Colorado Gold Rushes
3. Mining Laws of 1866 and 1870 (43 Stat. 253 (1866) and 16 Stat. 218 (1870))
5. 1897 Act (29 Stat. 526 (1897))
7. Prior to 1920, oil and gas, coal, oil shale, etc. could be produced only under the mining claim format under the 1872 Mining Law. See Hickel v. Oil Shale Corp., 400 U.S. 48 (1970); Andrus v. Shell Oil Co., 446 U.S. 657 (1980).

G. Split Estates -- Mineral Reservations
1. The 1866 Act (30 U.S.C. §§ 21) reserved all lands containing valuable mineral deposits from non-mineral entry and provided for disposition solely under the 1872 Mining Law.
2. Split Estates -- surface patents -- with certain minerals reserved to United States.
   b. 1914 Act (30 U.S.C. § 121) (phosphate, nitrate, potash, oil, gas or asphalt)
   c. 1933 Act (30 U.S.C. § 124) (sodium and
sulphur)

   b. Taylor Grazing Act of 1934 (43 U.S.C. § 315g)

H. Competing Entries -- Multiple Mineral Development.

1. Policy of "unity" -- fee conveyances.
   a. Homesteader v. Miner
   b. Homesteader v. Homesteader

2. Application of "unity" policy to Leasing Act lessees as against mining claimants.
   a. General Rule: Second in time void ab initio


1. Interpreted to apply only to public domain and not to acquired or other lands. See 40 Ops. Att'y. Gen. 9 (1941) and 43 C.F.R. § 3100.0-3(a)(1).
2. As noted, if title to mineral interest in a particular tract is in the United States, the issue is then whether it is available for lease and under what conditions.

B. Other exclusions from 1920 Act. (30 U.S.C. § 181, unless otherwise noted.)

1. Incorporated cities, towns, etc.
3. Naval petroleum and oil shale reserves.
4. Lands within existing leases or lease application. (See Martin Judge, 49 L.D. 171 (1922): Law of Federal Oil and Gas Leases § 2.6 (1967 ed.).)

C. Special Leasing Acts.

2. Right of Way Leases (30 U.S.C. § 301 et. seq.).


E. Non-Competitive Leases (30 U.S.C. § 226(c)) "person
first making application for the lease who is qualified". Application of Section 226(c) to simultaneous drawing (lottery) system -- Thor-Westcliff Development, Inc. v. Udall, 314 F.2d 257 (D.C. Cir. 1963).


IV. Withdrawals and Reservations.

A. Early history.

B. Withdrawals as a management tool.

C. Recent developments.

   2. Systematic review and report to Congress.
   3. Revokations.


3. Rocky Mountain Oil & Gas Assn. v. Watt, 696 F.2d 734 (10th Cir. 1982).
4. FY-83 through FY-85 DOI Appropriation Acts (see e.g. FY-85, 98 Stat. 1871 (1984)).
5. BLM Procedures
   a. No surface occupancy
   b. All uses temporary and totally reclaimable.

V. Miscellaneous Problems.
   A. Inland Water Bodies.
1. Navigable -- State title
2. Non-navigable -- Federal
3. See North Dakota v. Block, 671 F.2d 231 (9th Cir. 1982), rev. other grounds --

B. Coastal Waters

C. Unsurveyed Lands -- Metes and bounds surveys or protracted surveys.

VI. Stipulations -- Legal Basis

A. General Statutes
   1. 30 U.S.C. § 226(a) "may be leased by the Secretary" (see Udall v. Tallman, 380 U.S. 1 (1965).
   2. 30 U.S.C. § 189 authorizes the Secretary to promulgate "necessary and proper" rules and regulations.
   3. 30 U.S.C. § 187 "Each lease shall contain provisions relating to:
      a. Reasonable diligence, skill and care in operations.
      b. Hours, wages conditions of employment and safety and welfare of miners and minors.
      c. Prevention of undue waste.
      d. Sale at reasonable prices.
e. Prevention of monopoly.

f. Protection of the interests of the United States.

g. Safeguarding of the public welfare.

4. As to post-1976 coal leases, see also 30 U.S.C. § 207(a) ("...such other terms and conditions as the Secretary shall determine."

B. Other Asserted Bases

1. Stipulations are a "lesser included power" in lieu of deciding not to lease.

2. The lease as a contract -- The lessee has a choice accept the lease as is with the stipulations and bid or submit a drawing entry or not.

3. Stipulations as an exercise of sovereignty, i.e. land use regulation.

4. Stipulations as regulations (see 43 C.F.R. §§ 3101.1 and 3101.1-2).


C. Specific Statutory Authorizations for Stipulations.


3. Wilderness Study Areas under Section 603 of FLPMA (43 U.S.C. § 1782) -- See IV, F, supra.


VII. Administration of Stipulation Processes.

A. May stipulations be attached to the lease only or may they be incorporated at some later state, i.e. as a part of APD or mining plan approval.

1. As to post-1976 coal lease mine plans, see 30 U.S.C. § 207(c). ("The Secretary shall approve or disapprove the plan or require that it be modified.")

2. As to coal lease readjustments, see 30 U.S.C.
§ 207(a) ("such rentals and royalties and other terms and conditions of the lease will be subject to readjustment at the end of its primary term of twenty years...[and each ten years thereafter]").

B. The ultra vires or "taking" issues.

1. Over zealous regulation and stipulation - See Gulf Oil Corp. v. Morton, 493 F.2d 141 (9th Cir. 1973); Union Oil Co. of California v. Morton, 512 F.2d 743 (9th Cir. 1975); Sun Oil Corp. v. United States, 572 F.2d 786 (Ct. Cl. 1978).

2. Limits of the sovereign authority to regulate land uses. See Whitney Benefits, Inc. v. United States, 752 F. 2d 1554 (F. Cir. 1985).

C. Must there be a reasonable nexus between:

1. A proposed stipulation and an authorizing statute, regulation or lease term?

2. A proposed stipulation and on-site lease activities, i.e. a stipulation addressing remote, off-site socio-economic impacts?

D. Does the portion of Section 35 of the Mineral Leasing Act (30 U.S.C. 191) providing for sharing of Leasing Act revenues with the states and local governments for the purpose of mitigating socio-economic effects of federal leasing cast doubt on
the Secretary's authority to stipulate as to remote, off site socio-economic impacts?

E. May the Secretary fundamentally alter the economic terms of the bargain by imposing major cost-increasing stipulations at the APD or mine plan approval stage unless such action is authorized by statute, regulation or lease term (e.g. Contingent Right Stipulation, see 47 F.R. 34,577 (1982) and 48 F.R. 3370 (1983)).

F. Is the Secretary authorized to issue leases where they are so thoroughly stipulated that they effectively convey no appreciable interest in the land?

VIII. Conclusion.