Environmental Considerations in Public Lands Mineral Leasing and Development I

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ENVIRONMENTAL CONSIDERATIONS IN PUBLIC LANDS MINERAL LEASING AND DEVELOPMENT, I.

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Public Lands Mineral Leasing:
Issues and Directions

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University of Colorado School of Law

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REFERENCES

I. Statutes


National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321 et seq.


II. Regulations

Council on Environmental Quality (CEQ) Regulations Implementing NEPA, 40 C.F.R. 1500

BLM Minerals Management Regulations, 43 C.F.R. 3100

III. Cases

California v. Block, 690 F.2d 753 (9th Cir. 1982)

Calvert Cliffs Coordinating Comm. v AEC, 449 F.2d 1109 (D.C. Cir. 1970)


Foundation for North American Wild Sheep et al. v. U.S. Dept. of Agriculture, 681 F.2d 1172 (9th Cir. 1982)

Knight v. United Land Assoc., 142 U.S. 161 (1891)


Monroe County Conservation Council v. Volpe, 472 F.2d 693 (2d Cir. 1972)


Rocky Mountain Oil and Gas Assoc. v. Andrus, 500 F. Supp. 1338 (D. Wyo. 1980), rev'd, 696 F.2d 734 (10th Cir. 1982)


Thomas v. Peterson, 753 F.2d 754 (9th Cir. 1985)

Udall v. Tallman, 380 U.S. 1 (1965)

IV. IBLA Decisions

Jones O'Brien, 85 I.D. 89 (April 21, 1978)

Sierra Club et al., 80 IBLA 251 (May 2 and August 10, 1984)

James E. Sullivan, 54 IBLA 1 (1981)

Diane B. Katz, 47 IBLA 77 (1980)

V. Articles


DISCUSSION

I. Background on Oil and Gas Leasing

A. The Mineral Leasing Act, 30 U.S.C. § 226, authorizes the Secretary of the Interior to issue oil and gas leases for federal lands open to mineral leasing, including lands administered by other agencies of government such as the Forest Service.
B. The Secretary has the discretion to lease lands for oil and gas. He is not required to do so. 30 U.S.C. § 226; 43 C.F.R. § 3100.0-3; Udall v. Tallman, 380 U.S. 1 (1965); Duesing v. Udall, 350 F.2d 748 (D.C. Cir. 1965)

C. For lands where oil and gas deposits are not known to exist, leases are issued on a non-competitive basis to the first applicant completing a valid application.

D. The Bureau of Land Management (BLM) acts for the Secretary of the Interior in the administration of oil and gas leases on federal lands. 43 C.F.R. 3100.

E. BLM consults with the Forest Service before issuing oil and gas leases in National Forests, and upon receipt of drilling permit applications for such leases. 43 C.F.R. § 3101.7-1-4. The Forest Service makes recommendations concerning lease issuance and stipulations and conditions to be included in leases or drilling permits. Although the Forest Service has no statutory authority over lease issuance or
administration, BLM generally accepts its recommendations.

F. The Forest Service is the lead agency for NEPA compliance concerning oil and gas leasing in National Forests.

G. An oil and gas lessee may not conduct exploratory drilling on his leasehold before receiving approval of an Application for Permit to Drill (APD). 43 C.F.R. § 3162.3-1(c)-(f)

II. Environmental Constraints on Oil and Gas Leasing

A. The Secretary of the Interior acts as trustee for the federal lands on behalf of the people of the United States. Knight v. United Land Assoc., 142 U.S. 161 (1891).

B. Protecting the environment is one of the Secretary's management responsibilities under the Mineral

C. Several federal statutes require agencies to consider the effects of oil and gas activities on the environment. For example:

1. The Endangered Species Act, 16 U.S.C. §§ 1531 et seq., requires consideration of the impact of proposed oil and gas exploration and development activities on threatened and endangered species in areas to be affected by these activities.

2. The National Historic Preservation Act, 16 U.S.C. §§ 470 et seq., requires federal agencies to assess the affect of a proposed undertaking on cultural and archeological resources.
3. The National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321 et seq. mandates that agencies evaluate "to the fullest extent possible," the environmental consequences of federal actions which may have the potential to affect the environment, before those actions are taken. Calvert Cliffs Coordinating Committee v. AEC, 449 F. 2d 1109 (D.C. Cir. 1970). This evaluation is set forth in an environmental impact statement which complies with Section 102(2)(C) of the Act.

D. Federal agencies must consider the environmental impacts of oil and gas activities at each stage of the leasing process.

1. Pre-lease

   a. With very few exceptions, issuance of an oil and gas lease is a major federal action requiring preparation of an environmental impact statement pursuant to Section 102(2)(C) of NEPA. NRDC v. Berklund, 458 F. Supp. 925 (D.D.C. 1978); Conner v. Burford, No. CV-82-42-BU (D. Mont. March 8, 1985); Sierra Club v. Peterson, 717 F.2d 1409 (D.C. Cir. 1983); California v. Block, 690 F.2d 753 (9th Cir. 1982)
b. If lease issuance is determined to be a major federal action under NEPA, agencies must consider, inter alia, the following matters before issuing a lease:

1. site specific information (California v. Block, supra);

2. alternatives to the proposed action, including specifically the alternative of not leasing (California v. Block, supra; Monroe County Conservation Council v. Volpe, 472 F.2d 693 (2d Cir. 1972));

3. the environmental consequences of activities permitted by lease issuance, including the cumulative effects of leasing (40 C.F.R. 1508.25; Thomas v. Peterson, 753 F.2d 754 (9th Cir. 1985));

4. a "worst case analysis," if information on the environmental impacts of the action is lacking or uncertain (40 C.F.R. § 1502.22; Southern Oregon Citizens
5. Mitigation measures designed to reduce or eliminate environmental impacts (Foundation for North American Wild Sheep et al. v. Dept. of Agriculture, 681 F.2d 1172 (9th Cir. 1982)).

2. Lease

The Secretary of the Interior has the authority and duty to include in oil and gas leases stipulations and conditions necessary to protect the environment. The Forest Service recommends stipulations for leases in National Forest lands. Stipulations may authorize the Secretary to prohibit all exploration and development activities on a lease. NRDC v. Berklund, supra; Copper Valley Machine Works v. Andrus, 653 F.2d 595 (D.C. Cir. 1981), Sierra Club v. Peterson, 17 ERC 1449 (D.D.C. 1982); Rocky Mountain Oil and Gas Assoc. v. Andrus, 500 F. Supp. 1338 (D. Wyo. 1980), rev'd 696 F.2d 734 (10th Cir. 1982); James E. Sullivan, 54 IBLA 1 (1981); Diane B. Katz 47 IBLA 77 (1980).
3. Application for Permit to Drill

a. The Secretary of the Interior is authorized to include stipulations, restrictions and conditions in drilling permits which regulate the timing, manner and method of drilling operations in order to protect the environment.

b. The Forest Service is consulted for its recommendations for appropriate drilling permit conditions.

c. The Endangered Species Act consultation process could determine mitigation measures or drilling restrictions required to protect threatened or endangered species.
d. Depending upon the lease stipulations and necessary restrictions on drilling, APDs may be denied.


4. Unit Agreement

Unitization can be required to protect the environment. The Secretary of the Interior is authorized to require the inclusion of protective conditions and restrictions in unit agreements. See authorities above.

5. Suspension

The Secretary of the Interior is authorized to suspend a lease "in the interest of conservation" to provide time
to prepare an environmental impact statement and/or to
determine new conditions and restrictions on operations
necessary to protect the environment. The Interior Board
of Land Appeals (IBLA) has held that the authority to
suspend a lease in some circumstances provides a basis for
denial of drilling. Copper Valley Machine Works v. Andrus,
supra; Jones-O'Brien, 85 I.D. 89 (April 21, 1978); Sierra
Club et al., 80 IBLA 251 (May 2 and August 10, 1984); 30
U.S.C. § 209; 43 C.F.R. § 3103.3-8

III. Problems with Federal Agency Compliance with Environ-
mental Requirements

A. Although it is clear that environmental constraints
apply at each stage of the mineral leasing, exploration and
development process, the Department of the Interior and
the Forest Service continue to fail or refuse to comply
with the requirements of NEPA and other environmental
protection statutes. California v. Block, supra; Sierra
Club v. Peterson, supra; Conner v. Burford, supra; Thomas
v. Peterson, supra; Sierra Club et al., supra.

1. The agencies seem incapable of denying an oil
lease application.
2. The agencies have a crabbed approach to NEPA.

3. The agencies are unwilling to do the environmental analysis required at the appropriate time.

4. The agencies either piecemeal a decision or bite off more than they can chew.

B. The federal agencies' poor compliance with environmental requirements has served the interest of the oil and gas industry. The industry has fostered the practices of the agencies.
IV. Some Possible Reasons for Agency Lack of Compliance with Environmental Requirements

A. The federal agencies assume that they have a mandate to lease all federal lands not withdrawn from mineral leasing. *Mountain States Legal Foundation v. Andrus*, 499 F. Supp. 383 (D. Wyo. 1980)

B. The federal agencies are responding to political decisions to make available for leasing lands which were previously considered inappropriate to lease.

C. The federal agencies assume that the majority of leases issued will not be developed.

D. The federal agencies assume that leasing is a paper transaction.

E. The federal agencies assume that court decisions concerning one part of the federal lands do not apply
elsewhere.

V. Consequences of Federal Agency Failure to Comply with Environmental Requirements

A. One significant consequence of the federal agencies' failure to comply with environmental requirements is a growing body of case law that restricts their management authority and discretion.

B. As a result of the agencies' unwillingness to prepare environmental analyses at the appropriate point in time, the legal significance of a mineral lease, particularly with respect to the rights granted to a lessee, is unclear. The leasing system is becoming more confused and irrational and the value of mineral leases is diminished.

C. The agencies' mineral leasing decisions continue to be successfully challenged in time consuming and expensive litigation.
D. The agencies must spend time and money re-doing environmental analyses which could, and should have been properly prepared the first time around.

VI. Recommendations for Changes in the Federal Agencies' Approach to Environmental Considerations in Mineral Leasing

A. The federal agencies must define rational leasing decisions.

B. The federal agencies must comply with NEPA prior to issuing oil and gas leases.

C. The alternative of denying lease applications, or of refusing to lease in particular areas must always be considered.

D. The environmental analyses prepared for proposed oil and gas leases must be sufficiently detailed to permit
the federal agencies to decide whether or not to lease in the area concerned and, if leasing is to be permitted, what kinds of stipulations will be required. These analyses must consider cumulative effects of oil and gas leasing activities.

E. The agencies must not rely on stipulations as substitutes for compliance with NEPA and other environmental laws. Stipulations should be specific and tailored to meet particular problems identified in the environmental analyses.

F. The federal agencies must prepare site specific environmental analyses before exploratory drilling is permitted or development undertaken. These analyses may provide new stipulations and conditions to be applied to drilling operations, or provide the basis for denial of drilling permits or plans for development.