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Through the Forest of the Onshore Oil and Gas Leasing Controversy toward a Paradigm of Meaningful NEPA Compliance

Marla E. Mansfield

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Through the Forest of the Onshore Oil and Gas Leasing Controversy Toward a Paradigm of Meaningful NEPA Compliance

*Marla E. Mansfield**

TABLE OF CONTENTS

I. INTRODUCTION	86
II. THE STATUTORY FRAMEWORK: THE MINERAL LEASING ACT AND THE WILDERNESS ACT	88
A. <i>Conflicts Between Wilderness Preservation and Mineral Development</i>	88
B. <i>The Nature of a Federal Oil and Gas Lease</i>	90
1. General Method of Issuance Before 1987 Amendments ..	90
2. Discretionary Nature of a Decision to Lease	92
3. Control of Development Post-Lease	97
III. AN ANALYSIS OF THE HOLDINGS OF THREE CASES	98
A. <i>Sierra Club v. Peterson</i>	99
B. <i>Conner v. Burford</i>	101
C. <i>Park County Resources Council v. Department of Agriculture</i>	105
IV. LEGAL FRAMEWORK FOR A PARADIGM OF COMPLIANCE	110
A. <i>A Reconciliation of Holdings</i>	110
B. <i>Case Holdings in Context of Existent NEPA Interpretation</i> ..	113
1. Prerequisites of a "Proposal"	114
2. Mitigation's Role in Ascertaining Impacts	116
3. Precedents on "Cumulative" and "Interconnected" Actions	118
V. CONCLUSION: IDENTIFICATION OF A PARADIGM TO DIRECT NEPA COMPLIANCE	122

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I. INTRODUCTION

Any edition of any major newspaper reveals concrete examples of how our national resolve to preserve natural amenities clashes with our determination to develop the nation's resources. In the federal sphere, the National Environmental Policy Act of 1969 ("NEPA")¹ is a "constitution"² intended to chart agencies' paths towards the environmental goals of our society. Experience and interpretation have filled the interstices of NEPA's general language. Additionally, after nearly twenty years of existence, NEPA's essential function is characterized as a procedural mechanism,³ not a substantive power to forbid environmentally damaging activity.⁴ NEPA's teeth lie in Section 102, which contains a deceptively simple Congressional requirement. In certain circumstances, a "detailed statement" examining the following five subjects must accompany a decision:

- (i) the environmental impact of the proposed action,
- (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
- (iii) alternatives to the proposed action,
- (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
- (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.⁵

Those who work with NEPA call the detailed statement an "Environmental Impact Statement" ("EIS").⁶

1. 42 U.S.C. §§ 4321-4370(a) (1982 & Supp. III 1985).

2. Compare Frankfurter, *The Task Of Administrative Law*, 75 U. PA. L. REV. 614, 618 (1927), who likens administrative law to constitutional law because both approach their goals through institutionalized process, not detailed codes of prohibitions.

3. *Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 227-28 (1980); *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 558 (1978); Scalia, *Responsibilities of Regulatory Agencies under Environmental Laws*, 24 Hous. L. Rev. 97, 98 (1987) (courts reverse agencies because of faulty process, not because of a decision's result).

4. Section 101 of NEPA, codified at 42 U.S.C. § 4331 (1982) includes the policy that "Congress recognizes that each person should enjoy a healthful environment . . ."; however, no "right" to such an environment emerged despite a tentative movement towards one. Compare *Calvert Cliffs' Coordinating Committee, Inc. v. AEC*, 449 F.2d 1109, 1113-15 (D.C. Cir. 1971) (limited substantive review of an agency's choice) with *Strycker's Bay Neighborhood Council*, 444 U.S. at 227-28 (NEPA only mandates procedural review). See also *Methow Valley Citizens Council v. Regional Forester*, 833 F.2d 810, 813-14 (9th Cir. 1987) and *Oregon Natural Resources Council v. Marsh*, 832 F.2d 1489 (9th Cir. 1987), cert. granted, 108 S. Ct. 2869 (U.S. June 27, 1988) (Nos. 87-1703 and 87-1704, consolidated for argument). The Justice Department interpreted these cases as imposing a duty to mitigate harm upon agencies through NEPA. 19 Env't Rep. 298-99 (BNA) (July 1, 1988). See generally Gray, *NEPA: Waiting for the Other Shoe to Drop*, 55 CHI-KENT L. REV. 361, 370 (1979).

5. Section 102(2)(C) of NEPA, codified at 42 U.S.C. § 4332(2)(C) (1982).

6. 40 C.F.R. § 1508.11 (1987).

Much dispute surrounds what situations require an EIS.⁷ This provides the topic of this article, which reviews three cases that point the way towards a paradigm of NEPA compliance that best merges the goals of NEPA with practical reality. The cases grappled with the question of EIS necessity in the context of grants of federal on-shore oil and gas leases. The fundamental question before the three courts was whether a "proposal[] for . . . major Federal action[] significantly affecting the quality of the human environment"⁸ existed.

The cases do not reach identical holdings. The first in time, *Sierra Club v. Peterson*,⁹ required an EIS when a lease authorized development without retaining the right to forbid future activity if environmental concerns were revealed upon later analysis. Conversely, leases with an agency "veto" provision could have the detailed statement deferred.¹⁰ The second decision, *Conner v. Burford*,¹¹ disagreed with *Sierra Club* at the district court level: An EIS must precede lease authorization even if the leases allowed the government to preclude activity.

The Ninth Circuit reversed this holding, thus aligning itself with the *Sierra Club* court.¹² The third case, *Park County Resources Council v. United States Department of Agriculture*,¹³ proceeded down a different path. It found no pre-issuance EIS necessary for a lease on which future development could not be prohibited, but only mitigated to avert environmental harm discovered by later analysis.¹⁴ At first glance, the courts appear to provide conflicting responses to the problem of when to prepare an EIS. The *Conner* and *Sierra Club* resolutions initially seem the most protective of the preservationist stance.

7. The Act was perhaps intentionally vague because NEPA applies to agencies with disparate functions. One commentator, however, traces criticisms of NEPA's effectiveness to § 102's ambiguous and indeterminate language, which has minimal legislative history. Case-by-case implementation by courts resulted. Stenzel, *The Need for a National Risk Assessment Communication Policy*, 11 HARV. ENVTL. L. REV. 381 (1987).

8. Section 102(2)(C) of NEPA, codified at 42 U.S.C. § 4332(2)(C) (1982). It also requires that "all agencies of the Federal Government . . . include [a detailed statement] in every recommendation or report on proposals for legislation . . ." For explication of the requirement's dual nature, see *Andrus v. Sierra Club*, 442 U.S. 347, 362 (1979). The Council on Environmental Quality ("CEQ") defined the elements. See 40 C.F.R. §§ 1508.3, 1508.8, 1508.12, 1508.14, 1508.17, 1508.18, 1508.23, and 1508.27 (1987). Despite the mandatory nature of these regulations, room for interpretation remains. See *Andrus v. Sierra Club*, 442 U.S. at 358.

9. 17 Env't Rep. Cas. 1449 (BNA) (D.D.C. 1982), *aff'd in part and rev'd in part*, 717 F.2d 1409 (D.C. Cir. 1983).

10. *Sierra Club*, 717 F.2d at 1415.

11. 605 F. Supp. 107 (D. Mont. 1985), *aff'd in part and rev'd in part and remanded*, 836 F.2d 1521 (9th Cir. 1988), *superseded*, 848 F.2d 1441 (9th Cir. 1988).

12. *Conner*, 848 F.2d at 1446-51 (leases without veto provisions require EIS's). On another issue, concerning the Endangered Species Act (16 U.S.C. § 1536), the district court was affirmed. Both courts required a finding on whether *lease development*, as opposed to lease issuance, would be "likely to jeopardize the continued existence of any threatened or endangered species" before the grant of the lease despite the agency's reserved power to stop future activity if jeopardy would be likely to occur. *Id.* at 1451-52. One judge dissented and the Department of the Interior received a rehearing, but the decision was not changed.

13. 817 F.2d 609 (10th Cir. 1987).

14. *Id.*

However, *Park County* on its merits is not a loss for environmentalists.¹⁵ The Tenth Circuit's substantive rulings help return the NEPA exercise to its proper place, namely, as an impetus to improved decision-making. They ensure that agencies concentrate on the actual physical environment to be affected by any proposed action. For habitués of the national forests and public lands, its holding can lead to laudable results.¹⁶

Nevertheless, no pervasive "rule of law" emerges from any one of the three cases because, if NEPA is properly applied, the agency must focus on specific impacts from defined activity. The reconciled holdings of the three cases contain a flexible approach to the question of whether, in assessing a particular action's impacts, the agencies must consider full oil and gas development of the area or some lesser level of activity. This is as it should be.

Before analyzing this conclusion, section II outlines the federal oil and gas leasing system and its conflict with the Wilderness Act. Next, section III reviews the three cases in detail, leading to a reconciliation of their holdings in the next section. Section IV also examines the holdings in the context of general NEPA litigation, focusing on definitions of the term "proposal," approaches to the use of mitigation to limit the significance of impacts, and requirements to broaden analysis beyond the immediate activity before the agency. Finally, section V constructs a framework designed to promote meaningful analysis and balance the conflicting desires of development and preservation to avoid both paralysis and blind decisionmaking.

II. THE STATUTORY FRAMEWORK: THE MINERAL LEASING ACT AND THE WILDERNESS ACT

A. *Conflicts Between Wilderness Preservation and Mineral Development*

Before explaining the leasing process, a brief look at why these particular leases sparked litigation is in order.¹⁷ In 1964, Congress adopted a policy and procedure for maintenance of wilderness values, with wilderness defined as "an area of undeveloped Federal land retaining its primeval character and influence, . . . which . . . generally appears to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable."¹⁸ The passage of the Wilderness Act did not

15. The case also contains procedural rulings immediately recognizable as helpful to the environmental cause. *Id.* at 616-20, discussed in text accompanying notes 149-60, *infra*.

16. Professor Rodgers distinguishes between a *habitué* and a *drifter*. A *drifter* has only a short-term, one-shot goal and therefore seeks to maximize an advantage in one dispute. A *habitué*, however, has a continuing nexus to a problem and has a greater stake in the overall process of dispute resolution. Rodgers, *The Evolution of Cooperation in Natural Resources Law: The Drifter/Habitué Distinction*, 38 U. FLA. L. REV. 195 (1986).

17. For more extensive background on wilderness issues, see, e.g., Leshy, *Wilderness and Its Discontents - Wilderness Review Comes to Public Lands*, 1981 ARIZ. ST. L.J. 361; Symposium: *Wilderness and the Public Lands*, 16 IDAHO L. REV. 379 (1980); and Nelson, *Oil and Gas Leasing on Forest Service Lands: A Question of NEPA Compliance*, 3 PUB. LAND L. REV. 1, 38-44 (1982).

18. 16 U.S.C. § 1131(c) (1982). Additionally, the Act requires a wilderness to contain at least 5,000 acres, be "roadless," and have "outstanding opportunities for solitude or a primitive and unconfined type of recreation." *Id.*

end conflicts between preservation and development. Even in designated wilderness areas, which are to receive special management, mineral leasing and mining claim location generally were permitted until December 31, 1983.¹⁹ Until the Reagan administration, however, little or no mineral leasing took place in either designated wilderness areas or in areas being studied for inclusion in the system.²⁰

At first, the failure to lease created few disputes. Wilderness areas and potential wildernesses were often remote and unattractive to oil and gas companies because of drilling expenses and the lack of reliable data. The calm ended when oil prices rose and preliminary information revealed a geological feature, the Overthrust Belt, which coincided in part with potential wilderness.²¹ Exceedingly encouraging estimates of the feature's potential undiscovered oil and gas reserves circulated.²² Even if these figures were optimistic, the stage was set for the inevitable conflict.²³

An administration more oriented towards development than was its predecessor provided another key element for conflict. In addition, at least one court pressured the Department of the Interior to commence decisionmaking on oil and gas lease applications in areas that overlapped potential wilderness without awaiting final planning documents.²⁴ Leases began to be issued. Congress occasionally entered the fray on the side of preservation.²⁵ It did not act conclusively until December of 1987, when

19. *Id.* at 1133(d)(3) (unless a particular statute designating an area stated otherwise). For an explanation of the compromise, see Leshy, *supra* note 17, at 392-94.

20. The original 1964 Act required the Forest Service, Fish and Wildlife Service and Park Service to review their lands to make recommendations for inclusions into the system. 16 U.S.C. §§ 1132(b) and (c). In 1976, the BLM received similar instructions. 43 U.S.C. § 1732 (1982). For more extensive historical background, see Note, *Oil and Gas Leasing on Wilderness Lands: The Federal Land Policy and Management Act, the Wilderness Act, and the United States Department of the Interior*, 14 ENVTL. L. 585 (1984); Edelson, *The Management of Oil and Gas Leasing on Federal Wilderness Lands*, 10 B.C. ENVTL. AFF. L. REV. 905, 907-09, 917-18 (1983); and Gill, *Intergovernmental Restraints on Oil and Gas Development*, 16 LAND & WATER L. REV. 457, 468-74 (1981).

21. More specifically, it was beneath 95% of the possible wilderness candidates in Montana, 54% of those in Utah, 39% in Idaho, and 37% in Wyoming. Note, *supra* note 20, at 587-90. See also Noble, *Oil and Gas Leasing on Public Lands: NEPA Gets Lost in the Shuffle*, 6 HARV. ENVTL. L. REV. 117, 118 (1982).

22. *E.g.*, those cited by the Wyoming District Court, namely, undiscovered recoverable oil in the Montana portion of the belt alone as high as 10 billion barrels, together with a potential reserve of 100 trillion feet of natural gas. Additionally, for the Overthrust Belt in Idaho, Wyoming, and Utah, estimates of undiscovered oil approached 15 billion barrels. Natural gas estimates reached 75 trillion cubic feet. Mountain States Legal Foundation v. Andrus, 499 F.Supp. 383, 386 (D.C. Wyo. 1980) [hereinafter *Mountain States I*].

23. See, *e.g.*, *Bob Marshall Alliance v. Hodel*, 852 F.2d 1223, 1226 (9th Cir. 1988) (Deep Creek area rated high for both wilderness and potential gas recovery, necessitating more planning).

24. *Id.* See also *Mountain States Legal Foundation v. Hodel*, 668 F. Supp. 1466 (D.C. Wyo. 1987) [hereinafter *Mountain States II*] and, generally, Edelson, *supra* note 20, at 907-09 and Note, *supra* note 20, at 602-08.

25. *Pacific Legal Foundation v. Watt*, 529 F. Supp. 982, clarified, 539 F. Supp. 1194 (D. Mont. 1981). For details of appropriation bills and emergency withdrawals ordered by Congress, see Note, *supra* note 20, at 608-13 and Watson, *Mineral and Oil and Gas Development in Wilderness Areas and Other Specially Managed Federal Lands in the United States*, 29 ROCKY MTN. MIN. L. INST. 37, 50-53, 66, 68-69 (1983). For later bills, see Continuing Appropriations Act, 1985, 98 Stat. 1837, 1871 (1984) and The Appropriations Act, 1987, 100 Stat. 3341-261 (1986).

it amended the Mineral Leasing Act to forbid leasing in areas recommended for wilderness allocation by federal agencies or being studied for such recommendations,²⁶ but despite this action, conflicts between wilderness and oil and gas development still remain on issued leases and may affect some pending lease applications.²⁷ Moreover, areas rejected from wilderness consideration may have other significant values worthy of protection from negative impact. Therefore, it is necessary to ascertain what, if any, threat to the environment a federal oil and gas lease poses.

B. The Nature of a Federal Oil and Gas Lease

1. General Method of Issuance Before 1987 Amendments

When the three cases arose, there were two statutory ways to gain rights to develop federally owned oil and gas reserves under the general Mineral Lands Leasing Act of 1920.²⁸ Pursuant to the then relevant terms of the statute, lands in "Known Geological Structures" ("KGS's") were leased by competitive bid.²⁹ Lands outside a KGS were leased non-competitively, that is, to the first qualified applicant, without bidding or market value appraisal.³⁰ Such lands could be valuable prospects for development or rank wildcat acreage.³¹ The leases at issue in all three cases

26. As part of Title V of the Omnibus Budget Reconciliation Act of 1987 (P.L. 100-203), Congress passed "The Federal Onshore Oil and Gas Leasing Reform Act of 1987," 101 Stat. 1330-256 *et seq.* [hereinafter Leasing Reform Act]. Section 5112 thereof, creating a new 30 U.S.C. § 226-3, prohibited leasing in certain areas.

27. Section 5106 of the Leasing Reform Act provides, with some named exceptions, that bids and applications for leases pending on December 22, 1987, "shall be processed, and leases shall be issued under the provisions . . . in effect before . . . amendment by this subtitle . . ." This grandfather clause was constitutionally unnecessary. See text at and authorities cited at notes 41 and 52, *infra*. See also Eugene Water and Electric Board, 98 IBLA 272, 273-74 (July 10, 1987) (rejection of geothermal lease offer filed in 1978 for lands in designated wilderness). Some pending offers may be eliminated because the appropriations act for fiscal year 1987 prohibited spending money to process leases or drilling proposals in potential wilderness areas except in certain circumstances. The savings provision that made prior law govern excepted situations "where the issuance of any such lease would not be lawful under such provision [the unamended act] or other applicable law." Leasing Reform Act, *supra* note 26, § 5106 (b).

28. 30 U.S.C. §§ 181 *et seq.*, (especially 226) (1982). Specialized acts apply to resources in acquired lands and under rights-of-way. *Id.* at § 351 and § 301. For a simplified overview, see Hall, *Leasing of Oil and Gas Interests on Federal Lands*, 6 E. MIN. L. INST. 13-1 (1985). For those often involved with public lands, one of the more useful provisions of the new act was its change of the short title of the chapter to the "Mineral Leasing Act." Leasing Reform Act, *supra* note 26, § 5113.

29. 30 U.S.C. § 226(b)(1), before amendment by the Leasing Reform Act.

30. 30 U.S.C. § 226(c), before amendment by the Leasing Reform Act, which abolished the distinction between lands within and outside KGS's. All land must now be put up for competitive bidding before it may be leased non-competitively. Congress established a minimum bid of \$2 per acre, which may be changed by regulation after two years, and this will be deemed acceptable without reference to the lands' actual value. If no lease issues as a result of the auction, the first qualified applicant after 30 days may receive a lease. If the lands remain unleased for two years or a lease expires, then the bidding process must begin again. Leasing Reform Act, *supra* note 26, § 5102(a) and (b), amending 30 U.S.C. §§ 226(b)(1) and (c).

31. See Comment, *Toward an All-Competitive System for Federal Onshore Oil and Gas Leasing*, 21 HARV. J. ON LEGIS. 531, 537 (1984). (Although many leases were worthless and never incited drilling interest, others resold soon after issuance and earned profits for the grantees of several million dollars.)

were non-competitive leases, for which the applicants might have invested little to obtain the lease.³²

The Bureau of Land Management ("BLM"), an agency of the Department of Interior, issued numerous noncompetitive leases each year.³³ Leases issued by it not only cover oil and gas underlying the public lands, but also minerals in lands in national forests.³⁴ The three cases involved lands under the jurisdiction of the Forest Service, an agency of the Department of Agriculture. Therefore, additional complications entered the deliberative process.

The BLM maintained that it must be the final arbiter and independently assess the propriety of lease grants and terms.³⁵ Nevertheless, in practice, the BLM generally accepted Forest Service recommendations on whether leasing would be advisable and what terms would be suitable if a lease were to issue.³⁶ This process could constitute an abdication of the BLM's duty to administer the mineral laws,³⁷ or, conversely, an untoward interference in the Forest Service's management of the surface resources.³⁸ Congress recently settled the dispute. The BLM may not issue an oil and gas lease within a national forest over the objection of the Secretary of Agriculture.³⁹ Additionally, the Forest Service gains explicit control over surface-disturbing activities conducted pursuant to an oil and gas lease.⁴⁰

32. An application fee of \$75 and rental of \$1 an acre per year. 43 C.F.R. §§ 3111.1-1 (a) and 3103.2-2(b) (1987); Comment, *supra* note 31, at 536-39.

33. The Mineral Leasing Act vests the Secretary of Interior with lease issuance authority and the BLM is the agency within the Department designated to carry out these functions. See regulations under the old act, 43 C.F.R. Subparts 3111 and 3112 (1987), revised 53 Fed. Reg. 22,814 (June 17, 1988). Total leases in fiscal year 1984 numbered 5478. *Park County*, 817 F.2d at 623. For fiscal year 1987, 576 over-the-counter leases and 5781 simultaneous system leases were issued. BUREAU OF LAND MANAGEMENT, U.S. DEPT. OF INTERIOR, PUBLIC LAND STATISTICS 1987 Table 39 at 60-63 (1988). Competitive leases numbered 890. *Id.* Table 38 at 58-59.

34. Mineral Leasing Act for Acquired Lands, as amended, 30 U.S.C. §§ 351-59 (1982) and 30 U.S.C. § 181 (1982). The BLM also leases minerals reserved beneath private lands, 30 U.S.C. § 182 (1982) and in any acquired lands. 30 U.S.C. §§ 351-59 (1982).

35. See, e.g., *Esdras K. Hartley*, 23 IBLA 102 (1975); *Earl R. Nilson*, 21 IBLA 392 (1975); and *Duncan Miller*, 8 IBLA 285 (1972).

36. *Mountain States I*, 499 F. Supp. at 388-89. BLM regulations reflected this. The BLM would have the final say but it would include reasonable terms suggested by the Forest Service. Appeal to the Interior Board of Land Appeals ("IBLA") or Forest Service could occur. 43 C.F.R. § 3101.7-4 (1987). The IBLA occasionally modified stipulations in leases upon appeal. See also 49 Fed. Reg. 37,440 (1984) (interagency agreement gave Forest Service primary NEPA responsibility for oil and gas leasing in forests).

37. *Mountain States I*, 499 F. Supp. at 388-89.

38. Comment, *The Interrelationships of the Mineral Lands Leasing Act, the Wilderness Act, and the Endangered Species Act: A Conflict in Search of Resolution*, 12 ENVTL L. 363, 382-84 (1982).

39. Section 5102(d)(1) of the Leasing Reform Act, *supra* note 26, amending 30 U.S.C. § 226 by inserting a new subsection (h). The Act only refers to leases on "National Forest System Lands reserved from the public domain." Other lands in National Forests are acquired lands. However, as to those lands, consent was already required. 30 U.S.C. § 352 (1982).

40. Section 5102(d)(1) of the Leasing Reform Act, *supra* note 26, amending 30 U.S.C. § 226 by inserting a new subsection (h).

2. Discretionary Nature of a Decision to Lease

The Secretary of the Interior has discretion to not lease lands for oil and gas exploration. The Secretary may simply decide to withhold lands from oil and gas leasing.⁴¹ The operative word in the enabling statute is "may:" "All lands subject to disposition under [the Act] which are known or believed to contain oil and gas deposits may be leased by the Secretary."⁴² The Federal Onshore Oil and Gas Leasing Reform Act of 1987 did not modify this provision.⁴³ The discretionary wording affects both initial leasing decisions and subsequent lease development.

The original Mineral Leasing Act enhanced existing Secretarial control over the resources of the public lands.⁴⁴ Prior to the Mineral Land Leasing Act of 1920, the Secretary could "withdraw"⁴⁵ specific lands from the mining law's applicability.⁴⁶ Massive withdrawals preceded passage of the Act as the Secretary attempted to place some order on petroleum development.⁴⁷ After passage, the Secretary could exercise his discretionary authority to refuse to issue leases by withholding lands from mineral leasing, either by formal withdrawal,⁴⁸ executive order,⁴⁹ or regulation.⁵⁰ Decisions on individual lease applications also can effectively declare specific lands unavailable for leasing.⁵¹ An applicant for an oil and gas lease only receives the right to be treated fairly, not a vested entitlement

41. *Udall v. Tallman*, 380 U.S. 1, 4 (1965); *McDonald v. Clark*, 771 F.2d 460, 463 (10th Cir. 1985) (Secretary may act anytime before a lease is issued even if an offer preceded a decision not to lease.); *cf.*, *McLennan v. Wilbur*, 283 U.S. 414, 419 (1931) (Secretary's general power to protect the public lands supports rejection of all exploration permits).

42. 30 U.S.C. § 226(a) (1982).

43. Leasing Reform Act, *supra* note 30. *But see* exclusion of certain lands from leasing and consent requirement for leases in forests, *supra* notes 26 and 39.

44. *Boesche v. Udall*, 373 U.S. 472, 480-83 (1963); *see generally* Comment, *supra* note 38, at 364-70.

45. A "withdrawal" is currently defined, *inter alia*, as:

A withholding . . . of Federal land from settlement, sale, location, or entry, under some or all of the general land laws, for the purpose of limiting activities under those laws in order to maintain other public values in the area or reserving the area for a particular public purpose or program . . .

43 U.S.C. § 1702 (j) (1982). Prior definitions paralleled this. *Leshy*, *supra* note 17, at 403 n.211.

46. *See, e.g.*, *United States v. Midwest Oil Co.*, 236 U.S. 459, 469-71 (1915) (implied executive authority to withdraw); 36 Stat. 847, the "Pickett Act," formerly codified at 43 U.S.C. § 141. Current withdrawal authority is codified at 43 U.S.C. § 1714 (1982), which repealed prior authority, including implied.

47. *Midwest Oil Co.*, 236 U.S. at 466-68.

48. *Udall v. Tallman*, 380 U.S. at 6 and 21-22, which also found withdrawal unnecessary because of the discretionary nature of leasing. *Id.* at 20. *Mountain States I*, and undoubtedly *Mountain States II*, will be miscited as modifying this authority. They do not do so substantively, but merely hold that when the BLM's failure to process lease applications is the equivalent of a withdrawal, then it must follow proper procedures. *Mountain States I*, 499 F. Supp. at 395-97; *Mountain States II*, 668 F. Supp. at 1473-74. For criticisms that the Wyoming court inaccurately defined a withdrawal, *see Bob Marshall Alliance*, 852 F.2d at 1229-30; *Leshy supra* note 17, at 403 and Comment, *supra* note 38, at 371 n.58.

49. *Learned v. Watt*, 528 F. Supp. 980 (D. Wyo. 1981) (Secretarial memorandum).

50. *Udall v. Tallman*, 380 U.S. at 13-14.

51. *Bob Marshall Alliance*, 852 F.2d at 1229-30; *Cf.* *Chapman v. Sheridan-Wyoming Coal Co.*, 338 U.S. 621, 627-28 (1950) (Secretary has a "continuing duty to be governed by the public interest in deciding to lease or withhold leases.").

to a lease.⁵² Protection of resources other than oil and gas could justify the decision to not grant a lease,⁵³ because oil and gas leasing need not dominate public land management.⁵⁴

Moreover, if a lease is to be granted, the BLM may insert conditions in it to protect against degradation of surface or other resources. The Secretary of the Interior has express authority in the Mineral Leasing Act to include "provisions . . . for the protection of the interests of the United States"⁵⁵ in oil and gas leases. This authority to condition rights in an oil and gas lease is supplemented by the general implication that, if an agency has direct discretionary power to grant or not grant a benefit, then it also may attach specific terms and conditions to the grant.⁵⁶

The passage of NEPA only reinforced this pre-existing ability to displace oil and gas development because of environmental concerns. Although the EIS requirement of Section 102 of the Act is basically procedural and does not require an agency to favor the least environmentally disruptive course of action, NEPA has had a substantive impact on an agency's range of options.⁵⁷ If an agency ever believed that it had no mandate to consider environmental concerns as a basis for a decision, that excuse disappeared with NEPA's enactment. NEPA states that "to the fullest extent possible . . . the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with

52. *McDonald*, 771 F.2d at 463; *Arnold v. Morton*, 529 F.2d 1101, 1105-06 (9th Cir. 1976) (court cannot order lease issuance even if Secretary erred in rationale for rejecting offer.); *Burglin v. Morton*, 527 F.2d 486, 488 (9th Cir. 1975); *Duesing v. Udall*, 350 F.2d 748, 750-51 (D.C. Cir. 1965) (an application creates no property right that may be "taken" by a refusal to lease); *Mountain States I*, 499 F. Supp. at 396. See generally Laitos and Westfall, *Government Interference with Private Interests in Public Resources*, 11 HARV. ENVTL. L. REV. 1, 18-19 (1987).

53. See, e.g., cases cited *supra* notes 50 and 51 and *Copper Valley Machine Works, Inc. v. Andrus*, 653 F.2d 595, 600 (D.C. Cir. 1981) (authority to regulate for "conservation" in statute includes protection of all natural resources, not simply oil and gas.).

54. See generally Mansfield, *The "Public" in Public Land Appeals: A Case Study in "Reformed" Administrative Law and Proposal for Orderly Participation*, 12 HARV. ENVTL. L. REV. 465 (1988).

55. 30 U.S.C. § 187 (1982). See generally Pring, "Power to Spare": *Conditioning Federal Resource Leases to Protect Social, Economic, and Environmental Values*, 14 NAT. RES. LAW 305 (1981).

56. *Getty Oil Co. v. Clark*, 614 F. Supp. 904, 915-16 (D.C. Wyo. 1985), *aff'd sub nom*, *Texaco Producing Inc. v. Hodel*, 840 F.2d 776 (10th Cir. 1988). Compare *United States v. Appalachian Electric Power Co.*, 311 U.S. 377, 424 (1940), which held that because the commerce clause enabled the government to exclude all structures on navigable waters, building could be conditioned upon getting a license, which in turn could contain terms. The conditions in the license related to the commerce power, but the court continued: "Even if there were no such relationship the plenary power of Congress over navigable waters would empower" both a denial of a license or a conditioned license. *Id.* at 426-27. Congress's power under the property clause has similarly been called "plenary." U.S. CONST. art. IV, § 3, cl. 2; *Kleppe v. New Mexico*, 426 U.S. 529, 539-40 (1976). But see *California Coastal Comm'n v. Granite Rock Co.*, 107 S. Ct. 1419 (1987) (some concurrent state jurisdiction).

57. See, e.g., *Calvert Cliffs Coordinating Committee*, 449 F.2d at 1112. ("It [the Atomic Energy Commission] is not only permitted, but compelled, to take environmental values into account.").

the policies set forth in" the Act.⁵⁸ Because NEPA declares that "[t]he policies and goals set forth in [it] . . . are supplementary to those set forth in existing authorizations of Federal agencies,"⁵⁹ it empowers agencies to exercise discretion in favor of the environment.⁶⁰

NEPA authorizes actions to preserve the environment, but its power has certain limits. NEPA cannot transform a non-discretionary, ministerial act into one with discretion.⁶¹ For example, if a law mandates a private property right when someone complies with certain requirements, fears of environmental degradation cannot undercut the statutory command.⁶² Conversely, if an agency has discretion to set the terms and conditions of a grant of private rights, NEPA's goals must influence their contents.⁶³ Environmental concerns therefore can affect oil and gas lease issuances in at least two ways: They can support a decision to forego a lease altogether or modify the terms and conditions of a proposed lease.

In analyzing the bounds of the BLM's authority to regulate oil and gas development, however, the stage in the process that is at issue becomes important. At the pre-lease stage, its power is at its apex. The proprietary power discussed above gives the BLM not only the right to say "no" to any leasing activity, but also the opportunity to set the terms on which a private party gains rights to the "property of the United

58. Section 102(1) of NEPA, codified at 42 U.S.C. § 4332(1) (1982). Additionally, it instructs all agencies to "identify and develop methods and procedures . . . which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations." Section 102(2)(B) of NEPA, codified at 42 U.S.C. § 4332(2)(B) (1982). See also Section 101 (3) of NEPA, codified at 42 U.S.C. § 4331(B) (1982): "In order to carry out the policy set forth in this Chapter, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy" to foster environmental goals.

59. Section 105 of NEPA, codified at 42 U.S.C. § 4335 (1982).

60. *E.g.*, *Union Oil Co. of California v. Morton*, 512 F.2d 743, 749 (9th Cir. 1975), applying this conclusion to mineral leasing decisions on the Outer Continental Shelf; *Zabel v. Tabb*, 430 F.2d 199, 213 (5th Cir. 1970), *cert. denied*, 401 U.S. 910 (1971); *Public Service Co. of New Hampshire v. United States Nuclear Regulatory Commission*, 582 F.2d 77, 86 (1st Cir. 1978), *cert. denied*, 439 U.S. 1046 (1978). See generally Tobias and McLean, *Of Crabbed Interpretations and Frustrated Mandates: The Effect of Environmental Policy Acts on Pre-Existing Agency Authority*, 41 *MONT. L. REV.* 177 (1980).

61. *South Dakota v. Andrus*, 614 F.2d 1190, 1193 (8th Cir. 1980), *cert. denied*, 449 U.S. 822 (1980); *Natural Resources Defense Council, Inc. v. Berkland*, 609 F.2d 553, 558 (D.C. Cir. 1979).

62. *South Dakota v. Andrus*, 614 F.2d at 1193. Under the Mining Law of 1872, certain federal lands are "open" to mineral exploration. 30 U.S.C. § 22 (1982). A person discovering a "valuable mineral deposit" may "locate" - or mark - his or her claim and proceed to develop it. If the Act's requirements are met, the claimant has a right to receive a "patent," or fee title to the land. 30 U.S.C. §§ 29, 35-38 (1982). See also 30 U.S.C. § 201(b) (1976), repealed by the Coal Leasing Amendments Act of 1975, Pub. L. 94-377, § 4, 90 Stat. 1083, 1085; *Natural Resources Defense Council, Inc.*, 609 F.2d at 558 (resource conflicts could not justify rejection of lease applications, but, by considering the costs imposed by environmental statutes in defining the pre-requisite to lease issuance, Secretary complied with NEPA "to the fullest extent possible.").

63. *Utah International, Inc. v. Andrus*, 488 F. Supp. 976, 987 (D. Colo. 1980) (even if an applicant has a vested right to a coal lease, NEPA requires delineation of the terms of such lease); *accord*, *Utah International, Inc. v. Andrus*, 488 F. Supp. 962, 966-67 (D. Utah 1979).

States."⁶⁴ With two caveats, the Secretary, and the BLM as his delegate, has broad discretion on terms to include in a lease. Prohibitions against "arbitrary and capricious" exercises of authority⁶⁵ and contraventions of direct provisions of the Mineral Leasing Act⁶⁶ - which now include Forest Service rights to object to leases⁶⁷ - restrain choices on stipulations.

Nevertheless, whether a lease term could render development impossible has been a controversial proposition.⁶⁸ One court declared that Congress could not have intended the Secretary to issue mere "shell" leases with no potential for oil and gas recovery.⁶⁹ Other courts have by implication upheld the Secretary's authority to issue a lease that ultimately may not be developed.⁷⁰ Practical considerations also indicate that a lease should be valid even if development might be precluded on particular lands.

First, the lease's grant of a right to develop hydrocarbon resources might be satisfied without entry onto the surface of the leased lands. Even if a lease directly forbids surface occupancy, directional drilling or drainage from adjacent lands could develop some reservoirs.⁷¹ Viewed in this light, a no surface occupancy stipulation is simply a restraint on the manner of resource recovery, albeit a strict one.⁷² But the BLM has included terms

64. Cf. *Boesche*, 373 U.S. at 478-79; *Freese v. United States*, 639 F.2d 754, 758 (Ct. Cl. 1981), cert. denied, 454 U.S. 827; *Freese v. United States*, 6 Ct. Cl. 1, aff'd, 770 F.2d 177 (Fed. Cir. 1985). (As a proprietor, Congress may dictate the terms on which private parties may initiate rights to the nation's resources.)

65. 5 U.S.C. § 706(2)(A) (1982). See also *Burglin*, 527 F.2d at 489 and *Edras K. Hartley*, 23 IBLA at 105 (in deciding whether to issue a lease, BLM must examine public interest and individual facts).

66. Cf. *FMC Wyoming Corp. v. Hodel*, 816 F.2d 496, 500-02 (10th Cir. 1987); *Coastal States Energy Co. v. Hodel*, 816 F.2d 502, 506-07; and *Union Oil Co. of California*, 512 F.2d at 748. See also *Sierra Club v. Hodel*, 848 F.2d 1068, 1090 (10th Cir. 1988) (at least in some instances, an affirmative duty to "prevent unnecessary and undue degradation" of public lands might circumscribe discretion).

67. 30 U.S.C. § 226-3 (1987 Supp.).

68. See, e.g., *Leshy*, supra note 17, at 412-21; *Edelson*, supra note 20, at 922-23; and *Noble*, supra note 21, at 136-39.

69. *Rocky Mountain Oil and Gas Ass'n v. Andrus*, 500 F. Supp. 1338, 1345 (D. Wyo. 1980); reversed in part, *Rocky Mountain Oil and Gas Ass'n v. Watt*, 696 F.2d 734 (10th Cir. 1982). See Ray and Carver, *Section 603 of the Federal Land Policy and Management Act: An Analysis of the BLM's Wilderness Study Process*, 21 ARIZ. L. REV. 373 (1979).

70. See, e.g., *Sierra Club*, 717 F.2d at 1415; *Conner*, 848 F.2d at 1449-51. Cf. *Rocky Mountain Oil and Gas Ass'n*, 696 F.2d at 745-50 (statutory command to manage wilderness study areas to not "impair the suitability of such areas for wilderness" enforceable even if it precludes development); *Alaska v. Andrus*, 580 F.2d 465, 482-85 (D.C. Cir. 1978) (Secretary could insert a "termination clause" in an Outer Continental Shelf lease to end it without compensation if development would pose an unacceptable threat of harm; employed precedents under the Mineral Leasing Act, e.g., *Boesche*, 373 U.S. at 476-79) vacated in part and remanded sub nom *Western Oil and Gas Ass'n v. Alaska*, 439 U.S. 922 (1978). See generally Comment, supra note 38, at 425-34.

71. See *Conner*, 848 F.2d at 1447; *Chevron Oil Co.*, 24 IBLA 159 (1976). This was the rationale behind the initial, "true" No Surface Occupancy stipulation that directly prohibited surface use. Comment, *Onshore Oil and Gas Leasing on Public Lands: At What point Does NEPA Require the Preparation of An Environmental Impact Statement?*, 25 SAN DIEGO L. REV. 161, 167 (1988) and Comment, supra note 38, at 411-15.

72. See Max B. Lewis, 56 IBLA 293 (1981) (admonishing the BLM to consider less restrictive provisions before imposing NSO stipulations).

that can metamorphose into a species of a "no surface occupancy" provision in leases that are not amenable to development by directional drilling or drainage. These stipulations often state that approval of all surface occupancy is conditioned on the result of subsequent analysis being favorable to development. Because surface disturbance is essential to oil and gas recovery on these leases, this provision essentially defers the decision as to whether the resource will be exploitable.⁷³ It does not, however, render the lease a nullity.

Basic principles of contract and property law explain this conclusion. The potential lessee is on notice of the stipulation prior to lease issuance.⁷⁴ The lessee may exercise independent business judgment on the lease's value. Moreover, if the lessee believes the provision to be unreasonable, appeal is possible.⁷⁵ Absent appeal and modification, the contractual term that was accepted with the knowledge of all parties should be binding as a material part of the lease.⁷⁶ Additionally, a lease with such a stipulation is neither meaningless nor valueless. The lessee receives a property interest that is often the subject of exchange: a preference right or first option to develop the property should development be deemed possible.⁷⁷

Those who argue that a provision in a lease that could forbid future development would equal a "taking" of the lessee's rights⁷⁸ confuse the Secretary's proprietary power to initially define lease terms with the Secretary's "police power" to regulate development on a lease that has already been issued. A "taking" of private property may only occur after a private property right exists. The development rights granted by the lease may be limited so that the lease itself defines the boundaries of expecta-

73. *Sierra Club*, 17 Env't Rep. Cas. at 1453. These stipulations evolved to allow for completion of forest wilderness studies and preserve highly sensitive environmental areas. The courts have referred to these "decision-deferring" or "conditional surface occupancy" stipulations as "No Surface Occupancy" or "NSO" stipulations. *Sierra Club*, 717 F.2d at 1411-12 and *Conner*, 848 F.2d at 1444. See Edelson, *supra* note 20, at 924-25. Following the courts and other commentators, both the "true" prohibitors of surface occupancy and the "conditional surface occupancy" stipulations, will be termed "NSO" stipulations. See *Id.* at 925 and Comment, *supra* note 71, at 167. Compare the expressly named "contingent rights stipulation" advanced for use on a voluntary basis when the agency was uncertain of the impacts leasing would create. 47 Fed. Reg. 18,158 (April 28, 1982), discussed in Burton, *Federal Leasing - Restrictions and Extensions*, 28 ROCKY MOUNTAIN MIN. L. INST. 1133, 1139-41 (1983) and Edelson, *supra* note 20, at 940-50, and geothermal conditional surface occupancy stipulation, discussed in *Union Oil Co. of California*, 99 IBLA 95, 96-97 (Sept. 17, 1987).

74. Lease terms are available before a lease is signed and, in the competitive realm, before a lease is offered for bid. See Kenneth W. Bosely, 91 IBLA 172 (Mar. 28, 1986); Robert LaFavre, 95 IBLA 26 (Dec. 12, 1986). See also current law requiring public notice of proposed terms, amending 30 U.S.C. § 226 by adding a new subsection (f); 43 C.F.R. § 3102.04, as amended, 53 Fed. Reg. 22,835 (June 17, 1988).

75. 43 C.F.R. § 3101.7-5 (1987) and amendment at 53 Fed. Reg. 22,835 (June 17, 1988). For appeal provisions generally, see 43 C.F.R. Part 4 (1987); Mansfield, *supra* note 54, at 479-88; Burton, *supra* note 73, at 1144-45.

76. RESTATEMENT (SECOND) OF CONTRACTS § 77 comment c (1981).

77. *Conner*, 848 F.2d at 1447 n.16; Leshy, *supra* note 17, at 420-21. Compare description of the rights granted by an Outer Continental Shelf Lease, Secretary of the Interior v. California, 464 U.S. 312, 317 (1984).

78. *Rocky Mountain Oil and Gas Association*, 500 F. Supp. at 1345.

tion.⁷⁹ Even if the lease does not reserve veto authority, the government retains a degree of power to regulate drilling activity.

3. Control of Development Post-Lease

A lessee does not receive an unfettered right to develop oil and gas. Unlike a patent that divests the United States of title to land, an oil and gas lease grants less than a fee interest and is subject to continuing supervision.⁸⁰ The Mineral Leasing Act gives broad authority for the regulatory control of activities on leases.⁸¹ Regulations applicable to all leases require advance approval of drilling and other surface-disturbing activities. The lessee must present an "Application for Permission to Drill" (APD).⁸² The BLM or the Forest Service can condition APD approval by including reasonable requirements to protect the environment.⁸³

The government's ability to control development, like that of the lessee to gain the benefits of its lease, is not without limits.⁸⁴ Various restraints circumscribe the general police power incumbent in land management duties. These limits on controlling the lessee's activities include the terms of the lease as a contract,⁸⁵ the provisions of the Mineral Leasing Act,⁸⁶ regulatory requirements,⁸⁷ and the fifth amendment's proscrip-

79. *State of Alaska*, 580 F.2d at 484 (no "taking" occurs if a lease term is exercised); cf. *Bowen v. Gillard*, 107 S. Ct. 3008, 3019 (1987) (inclusion of all family members' incomes to ascertain eligibility for a benefit not a "taking" because no requirement to grant benefit); see also *Leshy*, *supra* note 17, at 414 n.265 and Comment, *supra* note 38, at 399-402.

80. *Boesche*, 373 U.S. at 477-78.

81. 30 U.S.C. § 189 (1982); see *McKenna v. Wallis*, 344 F.2d 432, 441 (5th Cir. 1965), *vacated on other grounds*, 384 U.S. 63, 72 (1966) (authorizes the Secretary "to prescribe rules and regulations governing in minute detail all facets of the working of the lands leased"). See also new specific directives to both Interior and Forest Service to create regulations to protect surface resources. Leasing Reform Act, *supra* note 26, § 5102 (d), amending 30 U.S.C. § 226 by inserting a new subsection (g). Moreover, since 1920, all leases expressly reserved rights to enact and enforce regulations and, since 1947, "all federal lessees were accepting a contract that by its own terms was to be governed by future 'regulations' subject only to the condition that those mandates would be both 'reasonable' and 'not inconsistent with any express and specific provisions' of the lease itself." (footnote omitted). Klein, *Notices to Lessees Under Federal Leases*, 25 ROCKY Mtn. MIN. L. INST. 17-1, 17-5 (1979).

82. 43 C.F.R. §§ 3162.3-1, -3, as amended, 53 Fed. Reg. 22,846 (1988). See also Leasing Reform Act, *supra* note 26, amending 30 U.S.C. § 226 by insertion of a new subsection (g), which requires approval by the appropriate surface managing agency, thereby giving authority to the Forest Service when the lands to be disturbed are within its jurisdiction.

83. See authorities cited *supra* note 82; *Copper Valley Machine Works*, 653 F.2d at 600; see also Standard Surface Disturbance Stipulation (Form 3109-5) inserted in nearly all leases, which subjects all surface disturbing activities to advance approval and reasonable conditions, not inconsistent with the purposes for which the lease is issued (discussed, together with other common lease terms, in *Burton*, *supra* note 73, at 1134-36); see discussion *infra* note 235.

84. See generally *Laitos* and *Westfall*, *supra* note 52.

85. *Sun Oil Co. v. United States*, 572 F.2d 786, 818 (Ct. Cl. 1978); *Continental Oil Co. v. United States*, 184 F.2d 802, 810 (9th Cir. 1950).

86. See *Copper Valley Machine Works*, 653 F.2d at 604-05 (although the BLM could prevent drilling for six months each year, Mineral Leasing Act § 209 required it to extend the lease).

87. *Union Oil Co. of California*, 512 F.2d at 748.

tion against taking private property without compensation.⁸⁸ The precedents that confirm these boundaries do not restrict the BLM's ability to act pursuant to terms initially included in a lease; in fact, they imply that the inclusion of the objectionable power in the lease would have changed the outcome of the cases.⁸⁹

Lease issuance, therefore, is a crucial juncture in defining the potential development of an area for oil and gas recovery. Because the BLM exercises discretion when it issues a lease, it must comply with NEPA's procedures. If the grant of a lease is a major federal action significantly affecting the human environment, an EIS would be required.

III. AN ANALYSIS OF THE HOLDINGS OF THREE CASES

Evaluating NEPA compliance for oil and gas lease issuance presents a classic NEPA Gordian knot: EIS's must be late enough in a potential activity's delineation to contain meaningful information, but early enough in the process so that the EIS can actually influence decisionmaking.⁹⁰ An EIS, of course, is only necessary (in the absence of a proposal for legislation) if there is a "proposal" for a "major federal action significantly affecting the human environment."⁹¹ The three cases focus on the term "proposal," seeking to delineate when an agency actually "proposes" activity, as well as the "scope" of the particular activity proposed. Two major analytical frameworks provide methods to approach the problems. The differences between the two help explain, to a certain extent, the differing results in the cases.⁹²

The first approach concentrates on what a federal action authorizes, and on whether an "irretrievable commitment of resources" results from

88. U.S. CONST. amend. V; *Union Oil Co. of California*, 512 F.2d at 750-51 (post-lease regulations that would authorize an indefinite suspension of operations equivalent to lease cancellation and would be a "taking" if applied to the lease). *Compare* *Gulf Oil Corp. v. Morton*, 493 F.2d 1141, 1145 (9th Cir. 1973) (same court approved a temporary suspension of lease operations for a reasonable time).

89. *E.g.*, *Continental Oil Co.*, 184 F.2d at 810 (BLM could not change its royalty calculation method "in the absence of an express reservation" in the lease); *Union Oil Co. of California*, 512 F.2d at 749 ("lease may be terminated by its own terms in the event that stated conditions subsequent occur"). *See also* Note, *Oil and Gas Leasing in Proposed Wilderness Areas - The Wyoming District Court's Interpretation of Section 603 of the Federal Land Policy and Management Act*, 17 LAND & WATER L. REV. 487, 504 (1984) (criticizing lack of distinction in treatment of leases based on knowledge of development restrictions at time of bargaining); Solicitor's Opinion, *The Bureau of Land Management Wilderness Review and Valid Existing Rights* (M-36910, supp.), 88 Inter. Dec. 909 (1981) (making such a distinction in management capabilities), discussed and approved in *Sierra Club v. Hodel*, 848 F.2d at 1086-87.

90. *Scientists' Institute for Public Information, Inc. v. Atomic Energy Commission*, 481 F.2d 1079, 1093-94 (D.C. Cir. 1973) [hereinafter *SIP*].

91. Section 102(C) of NEPA, codified at 42 U.S.C. § 4332 (C) (1982).

92. On the existence of the two tests, *see generally* Barney, *The Programmatic Environmental Impact Statement and the National Environmental Policy Act Regulations*, 16 LAND & WATER L. REV. 1 (1981) and Hapke, *Thomas v. Peterson: The Ninth Circuit Breathes New Life into CEQ's Cumulative and Connected Actions Regulations*, 15 ENVTL. L. REP. 10,289 (1985). *See also* Fogelman, *Threshold Determinations Under The National Environmental Policy Act*, 15 B.C. ENVTL. AFF. L. REV. 59, 69-70 (1987), who identifies a third test: The "irrational or unwise" test. To this author, this is a component of and method to determine "independent utility." *See* standard quoted *infra* note 132.

the authorization.⁹³ Because NEPA directly requires an EIS to analyze "irretrievable commitments,"⁹⁴ logic mandates that the EIS precede the commitment.⁹⁵ To a large extent, this orientation enfuses both the *Sierra Club v. Peterson*⁹⁶ and the final *Conner*⁹⁷ decisions. To both courts, a lease itself "commits" lands to oil and gas development unless direct authority to preclude all future activity is retained. If the lease does not allow the agency to veto development, an EIS must precede its issuance.

A second line of cases imposes practical limits on an action's dimensions. Although a questioned activity might relate to a larger project, if it has an "independent utility,"⁹⁸ it can be analyzed apart from the more comprehensive scheme. The district court in *Conner* and both *Park County* courts employed this mode of analysis. The results differ in what at first might seem to be a surprising degree. To the *Conner* trial judge, a lease had no utility unless full field development was possible,⁹⁹ while the *Park County* judges found the opposite.¹⁰⁰ They allowed the agencies to separate impacts of leasing from those of development, but the *Conner* court viewed development as part and parcel of the grant of the lease. Because the independent utility approach is factually oriented, these disparate holdings should not be surprising.¹⁰¹

A. *Sierra Club v. Peterson*

Two sets of leases with different mechanisms to control development were before the district court in *Sierra Club*.¹⁰² Some of the leases contained a provision known as a "No Surface Occupancy" stipulation, or "NSO."¹⁰³ It precludes surface disturbance without subsequent environmental review and reserves the right to forbid surface use - and therefore development. Another set of leases had no NSO stipulations attached, although they contained numerous other provisions that detailed controls retained to protect specific environmental values.¹⁰⁴ The circuit court

93. See, e.g., *Foundation on Economic Trends v. Heckler*, 756 F.2d 143, 158 (D.C. Cir. 1985) (emphasizing locating an agency's "point of commitment" to a decision), *aff'd in part*, 587 F. Supp. 753 (D.D.C. 1984).

94. Section 102(C) of NEPA, codified at 42 U.S.C. § 4332 (1982), quoted in text accompanying *supra* note 5.

95. *SIFI*, 481 F.2d at 1094; *Sierra Club*, 717 F.2d at 1414.

96. *Sierra Club*, 717 F.2d at 1414.

97. *Conner*, 848 F. 2d at 1448.

98. First express use in *Indian Lookout Alliance v. Volpe*, 484 F.2d 11, 19 (8th Cir.1973).

99. *Conner*, 605 F. Supp. at 107. This decision is short and devoid of exposition. Its author wrote a second decision that provides additional reasoning. *Bob Marshall Alliance v. Watt*, 685 F. Supp. 1514 (D.Mont. 1986), *aff'd in part*, *Bob Marshall Alliance*, 852 F.2d 1223 (9th Cir. 1988).

100. *Park County*, 613 F.Supp. at 1188; *Park County*, 817 F.2d at 622-24.

101. The method originated to analyze how much of a highway to include in an EIS, but is used for other purposes and, to one commentator, fuels mixed and subjective decisions. Hapke, *supra* note 92, at 10,290-91.

102. *Sierra Club*, 717 F.2d at 1411.

103. *Id.* As discussed *supra* note 73, courts have confused the original terminology applied to various stipulations. For ease of discussion, the term NSO applies to any stipulation that either initially precludes or could later "veto" surface disturbance.

104. *Id.*; see also, *Id.* at 1414 n.7; *Sierra Club*, 17 Evn't Rep. Cas. (BNA) at 1453.

decided the question of EIS necessity on the absence or presence of an NSO provision, but the district court did not make this distinction.

In the initial stage of the case, the leases involved covered 247,000 acres of primitive and roadless lands in the Targhee and Bridger-Teton National Forests in Idaho and Wyoming.¹⁰⁵ The region was a "Further Planning Area" in the Forest Service's RARE II wilderness review program, which indicated that wilderness designation was still a possibility.¹⁰⁶ The Forest Service recommended leasing the entire area and indicated which stipulations the leases would contain.¹⁰⁷ It did not prepare an EIS, but relied upon a "Finding of No Significant Impact" ("FONSI")¹⁰⁸ supported by an "Environmental Assessment" ("EA").¹⁰⁹ Four premises underlay the FONSI: 1) the leases did not necessarily trigger physical activity; 2) whether or not development would be desired would be decided by the lessees at a later date, if ever, and most leases were never developed; 3) analysis of environmental impacts would occur later if drilling approval was sought; and 4) the relevant stipulations mitigated the potential for harm.¹¹⁰ The district court accepted the decision's bases for leases both with and without NSOs.¹¹¹ The Sierra Club only appealed the finding that no EIS was necessary for leases without NSO stipulations.¹¹²

The case squarely questioned what rights a federal oil and gas lease bestows. The actual granting clause, like that of any private lease, purports to award the exclusive right to drill for and produce oil and gas,¹¹³ but any offer to lease is subject to the terms and conditions of the lease

105. *Sierra Club*, 717 F.2d at 1410; *Sierra Club*, 17 Evt Rep. Cas. (BNA) at 1449-50.

106. *Sierra Club*, 717 F.2d at 1411. Briefly, RARE II was the Forest Service's second attempt to evaluate its undeveloped lands to ascertain whether to recommend them for inclusion in the wilderness system. Three categories of land resulted: Wilderness, Non-Wilderness, and Further Planning. In Further Planning Areas, all resource uses may proceed, so long as the potential wilderness characteristics of the lands are preserved until completion of a unit management plan in which wilderness potential would be further analyzed. For more detailed discussion of the wilderness review process, see Comment, *supra* note 38, at 385-88.

107. *Sierra Club*, 717 F.2d at 1411.

108. 40 C.F.R. § 1508.13 (1987). If a FONSI is issued, an action may proceed without an EIS.

109. An EA provides the record to support an agency's decision not to prepare an EIS in situations requiring an individual appraisal of the effect of a proposed action. The EA resembles an EIS and contains its component analyses, but is generally shorter and not submitted for interagency or public comment. 40 C.F.R. §§ 1501.4 (b), 1508.9 (1987); see also *Sierra Club v. U.S. Forest Service*, 843 F.2d 1190, 1191-95. (9th Cir. 1988).

110. *Sierra Club*, 717 F.2d at 1413.

111. *Id.* at 1414; *Sierra Club*, 17 Evt Rep. Cas. (BNA) at 1453-54.

112. *Sierra Club*, 717 F.2d at 1412.

113. *E.g.*, standard granting clause for an over-the-counter lease, Form 3110-1 (11th Edition):

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

Reproduced in, BLM and Forest Service, NORTH FORK WELL FINAL ENVIRONMENTAL IMPACT STATEMENT, p. 90 [hereinafter North Fork Well FEIS].

and relevant statutes and regulations.¹¹⁴ Despite this qualification, if the government does not expressly reserve the power to forbid development, it cannot prevent the exercise of the right to produce oil and gas.¹¹⁵ It could condition the exercise of its grant, delineating the location, timing, and manner of drilling. Nevertheless, according to the *Sierra Club* court, this control could not render the lease undevelopable in either practical or absolute terms.¹¹⁶

Because the action approved by granting a lease was the potential drilling the lease authorized, the court found the reasoning of the Forest Service and BLM faulty. In light of the physical location of the lands in possible wilderness, significant impacts could occur and the finding to the contrary was not only unreasonable, but also made without full assessment of possible environmental consequences. The core of the court's opinion is its view that NEPA analysis must precede a decision. To be effective, it must occur while options are still available, thus prior to any full commitment of resources.¹¹⁷ Although lack of knowledge about how the leases would be developed makes more comprehensive site-specific analysis difficult, two-stage evaluation was inappropriate when there was "an irrevocable commitment to allow *some* surface disturbing activities, including drilling and roadbuilding."¹¹⁸ The court emphasized that its decision applied to the specific 28,000 acres of leased lands before it.¹¹⁹ For them, it gave an option to the Department of the Interior: it could either 1) defer analysis by retaining the right to preclude all surface disturbance until receipt of site-specific development plans together with the authority to reject proposed activities that would have unacceptable environmental impacts, or 2) prepare a site-specific EIS prior to lease issuance to analyze potential developmental impacts.¹²⁰

B. *Conner v. Burford*

The *Conner v. Burford* decision reviewed the status of leases covering 1,300,000 acres in the Gallatin and Flathead National Forests.¹²¹ An EA and FONSI preceded their issuance. The Montana district court departed from the conclusion of the D.C. Circuit Court of Appeals. It

114. *Id.* at 89.

115. *Sierra Club*, 717 F.2d at 1414 n.7.

116. *Id.* Increasing drilling expense beyond potential cost recovery could also render a lease undevelopable. See conclusion that requiring helicopter access in one situation would be tantamount to denying approval to drill, *Sierra Club et al.*, 80 IBLA 251, 266-67 (May 2, 1984), *aff'd*, *Texaco Production Co.*, 840 F. 2d at 776.

117. *Sierra Club*, 717 F.2d at 1414, *citing, inter alia*, *SIFI*, 481 F.2d at 1094.

118. *Id.* at 1414-15 (emphasis in original).

119. While theoretically the proposed two-stage environmental analysis [i.e. of the leasing decision separated from site-specific drilling] may be acceptable, in this situation the Department has not complied with NEPA because it has sanctioned activities which have the potential for disturbing the environment without fully assessing the possible environmental consequences.

Id. at 1415.

120. *Id.* The court approved an agreement that added NSO's to the particular leases. Order of April 11, 1984.

121. *Conner*, 848 F.2d at 1443.

required pre-leasing EIS's even when NSO stipulations were present in leases.¹²² The 9th Circuit Court disagreed with District Court Judge Hatfield.¹²³ Both approaches deserve examination.

The district court firmly rejected multi-stage NEPA compliance. The court used the same starting point as did the *Sierra Club* court: Courts must ensure that NEPA's mandates are performed at the earliest possible stage.¹²⁴ However, rather than concentrating on the legal implications that arise from lease issuance, the court took a more pragmatic stance. It asserted that leasing is "the first stage of a number of successive steps which clearly meet the 'significant effect' criterion to trigger an EIS."¹²⁵ If one step proceeds without consideration of "the cumulative effects of successive, interdependent steps," NEPA is thwarted.¹²⁶ The court concluded that future site specific-analyses could not alleviate the problem.

Part of the court's conclusion rested on the BLM's ability to modify individual NSO stipulations in response to particular development proposals. It feared that failure to prepare an EIS at that point could result in piecemeal invasion of the wilderness.¹²⁷ Citing *California v. Block*,¹²⁸ which held that the Forest Service could not release lands to non-wilderness activities without analysis at the site-specific level, the Montana district court found that "the promise of a site specific EIS in the future is meaningless if later analysis cannot consider wilderness preservation as an alternative to development."¹²⁹ The court ignored the fact that the NSO gave the BLM precisely the authority said to be lacking. It could choose wilderness over development at the later date; the "irretrievable commitment" did not legally occur.

Focus on a factually based "independent utility" inquiry explains this oversight. The judge's reasoning is clarified in the *Bob Marshall Alliance*¹³⁰ case. There, the same judge expressed a fundamental belief that a lease will perforce lead to development. To him, no logic supports a grant of a lease without the anticipation of development and hence the signing of the lease is the "critical" decision point: "The first step in the oil and gas leasing process is obviously the issuance of the leases themselves. It would undoubtedly be 'irrational, or at least unwise' to undertake a leasing program, if exploration and ultimate development were not only contemplated but possible."¹³¹ In essence, he concluded that a lease has no independent utility and in fact cited cases that determine an agency's ability to separately analyze parts of phased programs based on whether it would be meaningless to proceed with the first step without proceeding with the

122. *Id.*

123. *Id.* at 1447-49.

124. *Conner*, 605 F. Supp. at 108 (citing 40 C.F.R. § 1501.2 (1987)).

125. *Id.*

126. *Id.*, citing *Thomas v. Peterson*, 753 F.2d 754, 757 (9th Cir. 1985).

127. *Id.* at 109.

128. 690 F.2d 753, 763 (9th Cir. 1982).

129. *Conner*, 605 F. Supp. at 109 (quoting *Block*, 690 F.2d at 763).

130. 685 F.Supp. 1514 (D. Mont. 1986).

131. *Id.* at 1519.

program's latter stages.¹³² Additionally, the court viewed any subsequent multiple oil and gas developments in the area as "cumulative impacts" of leasing, which raised the impacts of lease issuance to the "significant" threshold.¹³³ This, too, presumes that development naturally follows any and all leases. The Ninth Circuit disagreed with the district court in part.¹³⁴

The appeals court sanctioned grants of NSO leases without an EIS provided two conditions were met. The NSO term must apply to the entire leasehold and also must clearly enable the federal government to preclude surface disturbing activities if subsequent analysis reveals unacceptable impacts.¹³⁵ The "irretrievable commitment" theory breathes life into its analysis:¹³⁶ "the sale of an NSO lease cannot be considered the go/no go point of commitment at which an EIS is required. What the lessee really acquires is a first right of refusal . . . This does not constitute an irretrievable commitment of resources."¹³⁷ It silenced the district court's fear that removal of NSO stipulations without an EIS could allow a piecemeal invasion of natural resources. Any modification of lease terms would oblige the surface management agency to comply with NEPA. At that point, according to the court, NEPA requires an EIS that examines potential cumulative impacts.¹³⁸

The Ninth Circuit also reviewed the lower court's conclusion that an EIS must precede the issuance of a lease without an NSO stipulation. The federal appellants did not question the requirement for leases in "roadless" areas, but did challenge the ruling as applied to leases in "roaded" areas. The two types of lands differ because the "roadless" areas involved remained eligible for possible future inclusion in the wilderness system, but the "roaded" areas were never considered for wilderness designation.¹³⁹ The Ninth Circuit rejected the distinction because "nothing in the record" supported a conclusion that impacts to the roaded areas would be less

132. *Id.* The court quoted *Thomas*, 753 F.2d at 759 as follows:

In *Trout Unlimited v. Morton*, 509 F.2d 1276 (9th Cir. 1974), we addressed the issue of when subsequent phases of development must be covered in an environmental impact statement on the first phase. We stated an EIS must cover subsequent stages when the dependency is such that it would be irrational, or at least unwise, to undertake the first phase if subsequent phases were not also undertaken.'

Id. at 1285. Compare CEQ definition of "connected actions," which must be considered in an EIS. 40 C.F.R. §1508.25(a)(1) (1987).

133. *Bob Marshall Alliance*, 685 F.Supp. at 1519-20. Decisions on whether to prepare an EIS are called "threshold determinations" because they ascertain the reach of NEPA's procedural mandate. See generally Fogelman, *supra* note 92. Because NEPA only directly requires an EIS, a "threshold determination" of a FONSI therefore exempts an action from NEPA's direct procedural dictates. 42 U.S.C. § 4332 (1982).

134. *Conner*, 848 F. 2d at 1441. See also *Bob Marshall Alliance*, 852 F.2d at 1223.

135. *Conner*, 848 F.2d at 1447 n.15.

136. *Id.* at 1447-49.

137. *Id.* at 1448. Recognizing the lessee's "first refusal" rights also acknowledges that an NSO lease has "independent utility."

138. *Id.* The court is correct that allowance of surface disturbance requires NEPA compliance because discretion is involved. However, its presumption that an EIS will always be necessary is not accurate. See *infra* text accompanying notes 237-61.

139. *Id.* at 1445 n.11; see also definition of "wilderness," 16 U.S.C. § 1311 (1982), discussed *supra* note 18.

severe.¹⁴⁰ It then concurred with *Sierra Club v. Peterson*, holding that the issuance of a non-NSO lease was the “point of commitment” to oil and gas development activity because it foreclosed the option of “no action” in response to future developmental requests.¹⁴¹

The appellants had further argued that other lease stipulations in non-NSO leases mitigated the potential for harm from future activities to the point that their impacts would not be significant, hence obviating the need for an EIS.¹⁴² Because some development would be allowed, however, the Ninth Circuit rejected the argument. Moreover, it made some factual “findings:”

[I]t is also clear that those activities are likely, if not certain, to significantly affect the environment We understand that the mitigation stipulations enable the government to regulate many of the adverse environmental impacts of oil and gas activities. We seriously question, however, whether the ability to subject such highly intrusive activities to reasonable regulation can reduce their effects to insignificance. NEPA does not require that mitigation measures *completely* compensate for the adverse effects of post-leasing oil and gas activities . . . but an EIS must be prepared as long as “substantial questions” remain as to whether the measures will completely preclude significant environmental effects. . . . Thus, even if there is a chance that regulation of surface-disturbing activities will render insignificant the impacts of those activities, that possibility does not dispel substantial questions regarding the government’s ability to adequately regulate activities which it cannot absolutely preclude.¹⁴³

These reservations about the efficacy of mitigation paralleled those found in *Sierra Club v. Peterson*.¹⁴⁴ The Tenth Circuit also considered the issue in *Park County*, but in a different factual setting.¹⁴⁵

140. *Id.* at 1448, n.17, which reads in pertinent part:

[A]ll appellants argue that oil and gas development and production will have comparatively little impact on roaded areas. However, we find nothing in the record to show that the mere fact that a parcel of national forest land is “roaded” renders the environmental impact [of] oil and gas activities insignificant. . . . The EAs do not attempt to distinguish roaded land as significantly less affected by oil and gas development and production than roadless areas. . . . Since we find nothing in the record to support appellants’ position, we reject the suggestion that our analysis should treat roaded areas differently from roadless areas.

141. *Id.* at 1451.

142. *Id.* at 1450. As discussed *supra* text accompanying note 139, the federal agencies limited this argument to leases in roaded areas. For leasing in roadless areas, they were preparing an EIS. *Id.* at 1445 n.11.

143. *Id.* at 1450. For descriptions of possible impacts from prospecting, exploring, developing and producing, see North Fork Well FEIS, Appendix E; Edelson, *supra* note 20, at 912-14; Noble, *supra* note 21, at 120-30. The court’s hesitancy to endorse mitigation may be tied to its belief that no lease provision could operate unless it was “reasonable” - meaning not destructive of the right to drill. This reading fails to acknowledge that specific provisions of the lease can impose duties on lessees even if they preclude mineral development, so long as other resource concerns make the provisions “reasonable.” See *infra* note 235.

144. *Sierra Club*, 717 F.2d at 1411, 1414 cited in *Conner*, 848 F.2d at 1449.

145. *Park County*, 817 F.2d at 622.

C. Park County Resources Council v. Department of Agriculture

Park County contrasts with the other cases in several material aspects. First - and of primary importance - it reviewed a single lease of 10,174 acres of Forest Service land.¹⁴⁶ Secondly, no conflict with wilderness designation existed. Not only were none of the lands being studied for wilderness, in 1984 the Wyoming Wilderness Act classified the affected environs as multiple-use areas.¹⁴⁷ Finally, the controversy arose almost three years after the lease's effective date. In the interim, the lessee sought approval for an exploratory well and an EIS was written analyzing its impacts.¹⁴⁸ The factual and procedural differences between *Park County* and both *Sierra Club* and *Conner* explain the disparate substantive results.

Additionally, the procedural status of the case allowed the Tenth Circuit to set administrative law precedents favorable to environmental activists. In both *Conner* and *Sierra Club*, the plaintiffs challenged the leases pursuant to agency administrative processes before the leases issued and promptly sought judicial review.¹⁴⁹ Therefore, the propriety of court intervention was not questioned because of timeliness or exhaustion concerns.¹⁵⁰ However, the defendants in *Park County* pursued, and the District Court upheld, arguments based on laches and exhaustion as well as a statute of limitations found in the Mineral Leasing Act.¹⁵¹

The Tenth Circuit disagreed, and allowed plaintiffs to allege that a violation of NEPA should invalidate the lease despite the time lapse. On the statute of limitations issue, the court found that Congress appended no limitation period to NEPA. To use varying statutes of limitations applicable to reviews under diverse statutory schemes would be incongruous. To it, NEPA imposes obligations outside of and supplemental to duties under the Mineral Leasing Act.¹⁵² Laches, therefore, would be the traditional and only time-control of NEPA actions.

The Tenth Circuit's rejection of the laches defense, being factually oriented, does not result in significant precedential impact.¹⁵³ Although

146. *Id.* at 612.

147. *Park County*, 817 F.2d at 612 n.1 (quoting *Park County*, 613 F. Supp. at 1187).

148. See *Park County*, 817 F.2d at 612-13; North Fork Well FEIS.

149. *Conner*, 848 F.2d at 1444; *Sierra Club*, 717 F.2d at 1412.

150. *Conner*, 848 F.2d at 1444, but see *Sierra Club*, 17 Env't Rep. Cas. (BNA) at 1451-52, where the court rejected Interior's attempt to separate the supplemental pleading by which it was brought into the case from a timely complaint for purposes of determining compliance with the statute of limitations. Other procedural questions on whether lessees were indispensable parties to the proceedings were decided favorably for environmentalists in *Conner*, 848 F.2d at 1458-62. For similar arguments, see *National Wildlife Federation v. Burford*, 835 F.2d 305, 315-16, 332-33 (D.C. Cir. 1987).

151. 30 U.S.C. § 226-2 (1982); *Park County*, 613 F. Supp. at 1185-86.

152. *Park County*, 817 F.2d at 616-17; but see *Forelaws on Board v. Johnson*, 709 F.2d 1310, 1311 (9th Cir. 1983); *Forelaws on Board v. Johnson*, 743 F.2d 677, 686 n.6 (9th Cir. 1984), cert. denied, 478 U.S. 1009 (1986); and the legislative history of the Mineral Leasing Act provision, which emphasized Congressional intent to provide lessees with secure title and to "remove a potential cloud on acreage subject to leasing" S. Rep. No. 1549, 86th Cong., 2d Sess. 5 (1960). This distinguishes leasing from the situations in the cases relied upon by the Tenth Circuit.

153. *Park County*, 817 F.2d at 618-19.

the use of exhaustion doctrine to bar judicial review is similarly a discretionary act based on factual analysis, two points made by the court bear discussion.

The Tenth Circuit's treatment of the issue indicates that the doctrine will have little or no applicability in NEPA challenges to BLM activities. Requiring exhaustion of remedies is often premised on allowing an agency to employ its expertise in an administrative setting.¹⁵⁴ Here, the court broadly stated that agencies have no particular expertise on NEPA. Courts would be as well-suited as an agency to settle the issue of EIS necessity.¹⁵⁵ The court's finding that "deference to agency expertise is inapplicable in the NEPA context"¹⁵⁶ contradicts the circuit's standard of review of threshold determinations, which instructs judges to ascertain whether a FONSI is "within the bounds of reasoned decisionmaking."¹⁵⁷

Additionally, the court refused to require administrative redress of the alleged harm because no forum was currently available to review the decision since more than thirty days had elapsed after lease issuance.¹⁵⁸ The court implied that if a plaintiff allows a statute of limitations for administrative review to run, a court action could never be subject to an exhaustion defense.¹⁵⁹ These procedural rulings could theoretically allow NEPA challenges to any and all existent oil and gas leases.¹⁶⁰ The Court's

154. *McKart v. United States*, 395 U.S. 185, 194-95 (1969); see generally Gelpe, *Exhaustion of Administrative Remedies: Lessons from Environmental Cases*, 53 GEO. WASH. L. REV. 1, 16-20 (1984-85).

155. *Park County*, 817 F.2d at 619-20.

156. *Id.* at 620. It explains its statement by saying that no one agency has particular NEPA expertise.

157. *Id.* at 622, quoting *Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 105 (1983). This case generally is viewed as granting great deference to agencies. See Siegel, *The Aftermath of Baltimore Gas & Electric Co. v. NRDC: A Broader Notion of Judicial Deference to Agency Expertise*, 11 HARV. ENVTL. L. REV. 331 (1987). The Ninth and Tenth Circuits test a FONSI by a "reasonableness" standard. *E.g.*, *Park County*, 817 F.2d at 621 n.4 and *Conner*, 848 F.2d at 1446. Judicial intervention under this test differs from a court's ability to overturn an "arbitrary and capricious" exercise of agency discretion because to not prepare an EIS when needed would embroil the agency in an action "without observance of procedure required by law," which triggers a separate standard of review. *Trout Unlimited*, 509 F.2d at 1282. Nevertheless, because NEPA does not explicitly define the EIS trigger, agency decisions on the act's implementation receive some deference. *E.g.*, *Park County*, 817 F.2d at 621 ("It is the agency's responsibility to initially determine the need for an EIS.').

158. *Park County*, 817 F.2d at 619-20. Initial BLM decisions may be appealed within thirty days to the Interior Board of Land Appeals. 43 C.F.R. § 4.411 (1988). It may review the sufficiency of NEPA compliance underlying a decision and has overruled BLM actions on this ground. *E.g.*, *State of Wyoming Game and Fish Commission*, 91 IBLA 364 (Apr. 24, 1986); *Glacier-Two Medicine Alliance*, 88 IBLA 133 (Aug. 9, 1985); and *In Re Upper Flores Timber Sale*, 86 IBLA 296 (May 13, 1985).

159. See comment on this holding, to wit, that to "adopt[] . . . the view that exhaustion is excused whenever parties let the time for administrative review expire [would be] a proposition as novel as it would be destructive." *National Wildlife Federation v. Burford*, 835 F.2d 305, 332 (D.C. Cir. 1987) (Williams, J., dissenting). See generally Gelpe, *supra* note 154, at 35.

160. The court did dismiss the plaintiffs' challenge to the approval of the exploratory well as moot. The well - a dry hole - had already been completed. *Park County*, 817 F.2d at 614-15. Because the lease continued to exist and could be the basis of additional developmental proposals, the question of its validity was not moot. *Id.*

ruling on the merits of the case does not make this a hollow victory for environmentalists, regardless of initial impressions of the substantive result.

The Tenth Circuit did hold that a lease had been issued validly despite the fact that no EIS preceded its grant. This holding must be placed in context. The plaintiffs had broadly asserted that "issuance of such a lease [for oil and gas on national forest land] always constitutes a major federal action significantly affecting the quality of the human environment."¹⁶¹ This was the position of the District Court in the *Conner* case,¹⁶² which had not yet been partially overruled by the Ninth Circuit. Even with the partial reversal of *Conner*, however, the situation before the Tenth Circuit would initially appear to require an EIS under the final *Conner* and *Sierra Club* rationales: The lease did not contain an NSO lease stipulation. Many other stipulations existed to control and regulate development, but, unless endangered or threatened species were adversely affected, the BLM could not veto all surface disturbance.¹⁶³ Nevertheless, the Tenth Circuit approved a FONSI based on the Forest Service's EA for oil and gas leasing in the Shoshone Forest.

The court endorsed the concept that agency decisionmaking should proceed reasonably by incremental steps.¹⁶⁴ It identified leasing as the first step in the oil and gas recovery scenario. The court examined the EA, which appraised the impacts of leasing itself, not possible future drilling. The document considered alternatives, such as leasing with and without various stipulations or not leasing at all. The court's description of the EA continues:

It examines the potential effects of each of these alternatives on energy use and conservation, on national forest administration, and, as its name indicates, on the environment. It concludes that "[o]il and gas lease issuance, as such, creates no environmental impacts. The imposition of appropriate stipulatory controls for operations subsequent to lease issuance can, in most cases, prevent or satisfactorily mitigate unacceptable environmental impacts." Consequently, the Forest Service's announced preferred alternative is to recommend lease issuance with appropriate stipulations. The EA specifically notes that prior to any drilling activity, the need for a site-specific, much more comprehensive EIS must be examined. (citations omitted).¹⁶⁵

161. *Id.* at 620.

162. *Conner*, 605 F. Supp. at 109.

163. Compare description of lease in *Park County*, 817 F.2d at 613 with description of non-NSO leases in *Sierra Club*, 717 F.2d at 1411, nn.4-5; and *Conner*, 848 F.2d at 1444, 1449-50.

164. *Park County*, 817 F.2d at 624, refers to the "tiered approach to environmental review." The court misconstrued the cited CEQ regulation by ignoring guidelines on when it is to be used and simply concentrating on the purpose of tiering - "to focus on the issues which are ripe for decision and exclude from consideration issues already decided or not yet ripe." 40 C.F.R. § 1508.28 (1987). See Comment, *supra* note 71, at 184-86.

165. *Park County*, 817 F.2d at 612.

Despite its holding that agencies have no particular expertise in NEPA, the court reviewed the EA under the reasonableness standard and found it within the bounds of agency discretion to conclude that lease issuance, with appropriate stipulations, would be an "essentially paper transaction" that would not significantly affect the environment.¹⁶⁶ Two rationales for the decision are directly apparent.

First, the court acknowledged that the lessee did not receive *carte blanche* developmental rights. Its oil and gas activities would be subject to the requirements of the stipulations appended to the leases. These would mitigate impacts, arguably below the threshold that would trigger an EIS, that is, below significance.¹⁶⁷ More importantly, subsequent development would require further analysis. To the court, the agency had not yet relinquished all the necessary "strings" precedent to development.¹⁶⁸

The facts of the case undoubtedly bolstered a belief that subsequent review of proposed drilling activity can provide meaningful environmental protection: "an EIS was prepared prior to the exploratory drilling at the North Fork Well."¹⁶⁹ The EIS was before the court. It examined not only the drillsite, but a study area of 39,000 acres. Drilling access was limited to helicopters. The agencies researched environmental concerns and consulted extensively. After analysis, the BLM approved the well, but only with mitigation measures not originally in the company proposal.¹⁷⁰ At least in this instance, the District Court for Montana's cynicism as to the possibilities of subsequent meaningful agency compliance with NEPA was undeserved.¹⁷¹

In its second reason for approval of the FONSI, the Tenth Circuit used the "independent utility" justification. The plaintiffs argued that to only consider impacts from leasing would be an improper segmentation of agency action; a proper definition of the "action" would encompass the eventual cumulative and foreseeable effects of exploratory drilling as well as full field development.¹⁷² However, based on the low incidence of

166. *Id.* at 621.

167. *Id.* at 621-22.

168. *Id.* at 622. The court analogizes to patenting a mining claim, which was the subject of *South Dakota v. Andrus*, 614 F.2d at 1190. As discussed *supra* note 62, a decision to grant a mineral lease is qualitatively different from a decision to grant a fee patent under the Mining Law; the latter is fundamentally a ministerial action if the private party fulfills certain prerequisites, while decisions under the Mineral Leasing Act present the BLM with a wide array of usable terms and conditions. An unqualified analogy is decidedly erroneous. However, the Tenth Circuit possibly desired to concentrate on the second reason the *South Dakota* court employed to justify not requiring an EIS at patent issuance, namely, that further approvals and analysis would precede actual mining. *Id.* at 1194.

169. *Park County*, 817 F.2d at 622.

170. *Id.* at 613. See also *Park County*, 613 F.Supp. at 1187-88 and the North Fork Well FEIS. Compare the 9th Circuit's approval of a brief and "inadequate" discussion of mitigation when subsequent site-specific actions displayed environmental sensitivity, *Sierra Club v. Clark*, 774 F.2d 1406, 1411 (9th Cir. 1985).

171. See *Conner*, 605 F. Supp. at 109. Moreover, the requirement of helicopter access belied the D.C. Circuit's conclusion that a non-NSO oil and gas lease always authorized road building. *Sierra Club*, 717 F.2d at 1414.

172. *Park County*, 817 F.2d at 622.

development on noncompetitive oil and gas leases, the court found it irrational to attempt meaningful analysis of full field development at such an early stage.¹⁷³ The effects could not be deemed "reasonably foreseeable." Leasing and full field development are not so interdependent that it would be irrational to proceed with the first step without considering the latter.¹⁷⁴

Pragmatic concerns drove the court's reasoning. Because of the sheer number of leases issued, an EIS requirement would overwhelm the agency while the unavailability of concrete development information would produce EIS's with only speculative data.¹⁷⁵ In fact, the EIS for the APD did contain an overview of impacts from a generic full field. The District Court queried whether anything more informative could be prepared without further information.¹⁷⁶

The Tenth Circuit treated the issue of when full field development should be considered in an EIS as a matter of timing. Because the impacts would eventually be addressed in an EIS, the court allowed the precise moment of analysis to be deferred if the agency presented a "rational basis" for its timing choice.¹⁷⁷ Here, the court concurred that awaiting a concrete proposal for further development provided such a rationale. Again, the particular facts of the case undoubtedly influenced the conclusion. The well drilled at the North Fork site did not trigger production or an urgent drive towards full field development. The well was dry and the site abandoned.¹⁷⁸ *Park County* presented a rare situation. A comprehensive EIS examined a low-impact well and an "affected environment" of 39,000 acres. The well turned out to be dry. No more fortuitous set of facts could be found for developers.¹⁷⁹

The three cases examined what NEPA requires an agency to consider when granting private rights to develop public resources. They focus on

173. *Id.* at 623.

174. *Id.*

175. *Id.* at 623-24.

176. *Park County*, 613 F.Supp. at 1188. The first draft EIS for the North Fork well did attempt to analyze impacts of various levels of full field development. Reaction to the draft was critical. Many commented that they could not comprehend what the proposed action was. BLM AND FOREST SERVICE, NORTH FORK WELL SECOND DRAFT ENVIRONMENTAL IMPACT STATEMENT, 65 (Sept. 1984) [hereinafter North Fork Well DEIS II]. The second draft EIS concentrated on alternatives to the single exploratory well with an appendix on development and production of the exploratory well and the area. *Id.* at 113-20. See also NORTH FORK WELL FEIS 8-9, 123-30.

177. *Park County*, 817 F.2d at 624 n.5. This review was more deferential than that employed generally for a FONSI. Compare Second Circuit's belief that even if one aspect of a project proceeds to an "irreversible" commitment, a separate EIS on a latter stage could still consider and ameliorate environmental concerns in that stage. *Hudson River Sloop Clearwater v. Dep't of Navy*, 836 F.2d 760 (2nd Cir. 1988).

178. *Park County*, 817 F.2d at 614.

179. No national environmental group was a plaintiff in *Park County*, although some participated in the other two cases. The facts of *Park County* might have restrained suit by "habitués." In fact, an attorney for the Sierra Club Legal Defense Counsel, speaking in her personal capacity, stated that she would not have brought the action. K. Sheldon, Speech to the Mineral Law Section of the Colorado Bar Association (May 6, 1988). The absence of experienced counsel also might have led to less than perfect representation for the environmental viewpoint. See Comment, *supra* note 71, at 187-88.

two potentially disparate concerns: what is factually likely and what is legally permitted to occur as a result of the grant. Although the holding of *Park County* appears to contradict the final decisions in the other two cases, the three are reconcilable. Viewed in proper context, moreover, the reconciled holdings are in full conformity with NEPA and may provide useful guidance that will enhance environmental protection.

IV. LEGAL FRAMEWORK FOR A PARADIGM OF COMPLIANCE

A cursory reading of *Sierra Club*, *Conner*, and *Park County* creates a serious misapprehension, namely, that the extensive litigation has left the BLM and Forest Service no closer to knowing how to proceed than they were in 1981. This need not be true. Although to a large extent the cases are dependent on facts peculiar to them, analysis of how the facts diverge leads to a coherent framework which recognizes that absolute requirements are the exception, not the rule, under NEPA.

A. A Reconciliation of Holdings

In two respects, the holdings of *Sierra Club* and *Conner* appear to contradict those of *Park County*. The former cases refused to approve issuance of an oil and gas lease without an EIS unless the BLM retained the right to veto all future surface disturbance;¹⁸⁰ *Park County* approved a FONSI and subsequent issuance of a lease without this safeguard.¹⁸¹ Additionally, the *Conner* court implied that an analysis of the impacts of the first surface disturbance should include not only the activity for which direct approval was requested, but also consider the impacts of full field development.¹⁸² The *Park County* court, in contrast, found a NEPA document adequate when it only analyzed the impacts of the individual well requested in a drilling proposal.¹⁸³ The differing factual contexts of the decisions, however, explain the disparate conclusions.

The *Sierra Club* decision involved a large roadless region, the Palisades Further Planning Area, which was required to be managed to preserve its current wilderness attributes pending intensive review.¹⁸⁴ Any activity could impact wilderness characteristics and these effects are difficult, although not impossible, to categorize as "insignificant."¹⁸⁵ The *Sierra Club* court itself acknowledged that, in some circumstances, a two-stage environmental analysis that separates leasing impacts from those flowing from development might be appropriate.¹⁸⁶ The situation before it, however, was not such an instance.

180. *Sierra Club*, 717 F.2d at 1412-15; *Conner*, 848 F.2d at 1449-51.

181. *Park County*, 817 F.2d at 622-24.

182. *Conner*, 848 F.2d at 1448.

183. *Park County*, 613 F.Supp. at 1188, *see also Park County*, 817 F.2d at 622-24.

184. *Sierra Club*, 717 F.2d at 1411, n.1.

185. *Compare Leshy*, *supra* note 17, at 379 (courts have developed almost a per se rule requiring an EIS when proposed federal action threatens an area's wilderness characteristics) and *Edelson*, *supra* note 20, at 912-14 (oil and gas development is incompatible with wilderness); *with Cabinet Mountains Wilderness v. Peterson*, 685 F.2d 678, 681-84 (D.C. Cir. 1982) (A 36-hole exploratory drilling program in a designated wilderness was sufficiently mitigated so as to not require an EIS before approval.).

186. *Sierra Club*, 717 F.2d at 1415.

In the Ninth Circuit case, the federal defendants made specific arguments for two-stage impact analysis when "roaded" lands were at issue.¹⁸⁷ Although the court in *Conner* rejected the argument, it indicated that this result was based on the inadequacy of the evidence to support disparate treatment simply because lands were classified as either "roaded" or "roadless."¹⁸⁸ The record was similarly devoid of information about how mitigation measures could avoid subsequent impacts in the absence of an NSO stipulation. Although the court acknowledged that "NEPA does not require that mitigation measures *completely* compensate for the adverse environmental effects of post-leasing oil and gas activities,"¹⁸⁹ the record left it unassured that the regulatory measures and stipulations would preclude significant environmental impacts.¹⁹⁰

The *Park County* court, however, examined a different record applied to specific "roaded" lands. The District Court described the leased area as not only non-wilderness, but also "not pristine, or primitive, or even very unusual."¹⁹¹ Both it and the Court of Appeals described the EA for leasing the lands as being a document that examined alternatives and chose one that would sufficiently control any impacts that might result from leasing.¹⁹² This implied the agencies actually looked at specific lands, applied the alternative proposed stipulations to their resources, and concluded in the EA that any remaining impacts from foreseeable development were insignificant.¹⁹³ The EA at issue, however, broadly examined the impacts of leasing over an entire forest region.¹⁹⁴ Local offices of the Forest Service applied general standards derived from the EA to recommend specific lease terms without formally doing an EA.¹⁹⁵ "Tiering," a process of going from a broad environmental document to a more specific document, is an allowable procedure,¹⁹⁶ but the Forest Service should have

187. *Conner*, 848 F. 2d at 1448, n.17 and 1445, n.11.

188. *Id.* at 1448, n.17; *see supra* note 140 for quote in full.

189. *Id.* at 1450.

190. *Id.*

191. *Park County*, 613 F. Supp. at 1187.

192. *Park County*, 817 F.2d at 622-23.

193. *Cf.* the D.C. Circuit's test for upholding a FONSI. A court must ascertain:

(1) whether the agency took a "hard look" at the problem; (2) whether the agency identified the relevant areas of environmental concern; (3) as to the problems studied and identified, whether the agency made a convincing case that the impact was insignificant; and (4) if there was impact of true significance, whether the agency convincingly established that changes in the project sufficiently reduced it to a minimum.

Cabinet Mountains Wilderness, 685 F.2d at 682. The Tenth Circuit does not articulate these particular steps, but requires that an agency take a "hard look" at environmental concerns and be "reasonable" in its conclusions. *See, e.g., Park County*, 817 F.2d at 622.

194. It was to be used for 17.4 million acres and the actual analysis comprised 14 pages; the remaining 86 pages were exhibits of stipulations and pre-existing guidelines. FOREST SERVICE, DEP'T OF AGRIC., ENVIRONMENTAL ASSESSMENT ON FOREST SERVICE RECOMMENDATIONS AND CONSENT FOR OIL AND GAS LEASE ISSUANCE, NATIONAL FOREST SYSTEM LANDS, COLORADO, WYOMING, KANSAS, NEBRASKA, AND SOUTH DAKOTA (1979); described in Nelson, *supra* note 17, at 5 and Comment, *supra* note 38, at 435-36.

195. Comment, *supra* note 38, at 435-36.

196. 40 C.F.R. § 1508.28 (1987). For a discussion of typical problems arising from tiering, see Hapke, *supra* note 92, at 10,289.

made a formal record of its analysis of particular lands before lease issuance. The subsequent EIS, which did specifically study impacts of the drilling proposal on 39,000 acres,¹⁹⁷ perhaps merged with the EA in the judges' minds and influenced the reviewing courts.

The apparent conflict over issuance of a non-NSO lease without an EIS may be resolved as a difference based on factual proof. Although the lands affected by the drilling in *Park County* were multiple use lands and not wilderness lands,¹⁹⁸ land classification alone did not dictate the result. Wilderness lands arguably are more sensitive to any impact by man, but it is possible to design activities within wilderness areas that will not significantly impact the human environment.¹⁹⁹ Conversely, some actions on non-wilderness lands can trigger significant impacts. The crucial element of the *Park County* decision was that the EA - if it actually had been as described - would have examined particular lands and particular mitigation measures. A site-specific EA may indicate the absence of significant impacts.

The second perceived conflict is more problematical: how much future oil and gas activity must be considered in the initial evaluation of impacts? *Park County* approaches the level to which analysis of potential activity must be taken flexibly. In some situations, enough may be known about potential activities so that full-field development must be addressed when analyzing a particular well²⁰⁰ - or even before leasing.²⁰¹ However, the analysis need not occur at the same time in all instances and could be deferred if information on potential drilling was too speculative.²⁰² The *Conner* and *Sierra Club* decisions react differently to forecasting difficulties.

Both courts suggest that the proper response to uncertainty about future drilling plans is to reserve the right to preclude all development.²⁰³ Moreover, both cases imply that effects from developing the leased area fully for oil and gas recovery must be a necessary component of any appraisal of the first agency action that allows any surface disturbance. Specifically, the *Conner* decision maintains that "government evaluation of surface-disturbing activity on NSO leases must include consideration of the *potential* for further connected development and cumulative impacts from all oil and gas development activities pursuant to the federal leases."²⁰⁴ (emphasis added). The court's use of the word "potential," however, indicates that full field development might not be presumed likely in all instances. Indeed, the cases and regulations cited for including more than one specific activity at once use a reasonableness test to

197. North Fork Well FEIS, at 53-72 (Chapter II, Affected Environment).

198. *Park County*, 817 F.2d at 622.

199. *Cabinet Mountain Wilderness*, 685 F.2d at 681-84.

200. *Park County*, 817 F.2d at 623.

201. See *Id.* at 624 n.5 (Court implies that an EIS might be required "at the leasing stage" if "firm plans to develop" exist.).

202. *Id.* at 624.

203. *Sierra Club*, 717 F.2d at 1415, quoted in *Conner*, 848 F.2d at 1451.

204. *Conner*, 848 F.2d at 1448. See also definition of oil and gas activities as "all activities undertaken by oil and gas lessees, including exploration, development, production, and abandonment." *Id.* at 1444, n.5.

delineate the extent to which additional potential activities must enter into an initial analysis.²⁰⁵ Determinations of “reasonableness” require factual examinations.

Park County reviewed a particular scenario and held “that, in this case, developmental plans [for additional wells and region-wide development] were not concrete enough at the leasing stage to require such an inquiry.”²⁰⁶ The district court found that information was still insufficient to trigger a concrete analysis of full development when the first well was proposed. Possible consequences of future development were not totally ignored, however, because the EIS for the well did examine a generic oil and gas field.²⁰⁷ Specific factual records aid in bringing the seemingly discordant pronouncements into harmony.

Combining the three holdings and the three factual records reveals a rule of reason. NEPA requires different levels of analysis based on what actions are foreseeable and what physical surroundings are impacted. The actual resources present on lands determine whether lease stipulations other than NSO provisions may sufficiently reduce impacts so that no EIS would be necessary before leasing. On some lands, any development at all would perforce include significant impacts to the human environment. Other lands may contain different non-oil and gas resources so that controls on drilling and other activities could avoid significant adverse impacts. Similarly, no pervasive rule of law governs what activities need to be considered in assessing the effectiveness of the proposed lease stipulations. Facts about an area’s geology and a company’s existing plans to develop oil and gas resources may influence this decision. This fact-dependent approach is a reaffirmation of NEPA’s purpose and is not contrary to case law that arose in contexts other than federal onshore oil and gas leasing.

B. Case Holdings in Context of Existent NEPA Interpretation

The following discussion places the reconciled holdings in context. Three questions will guide the summary:

- 1) When does a “proposal” for agency action exist?
- 2) What role does mitigation play in assessing impacts?
- 3) What is the “scope” of the necessary analysis if an “action” is found to exist?

Because at least one court questioned the appropriateness of using an NSO stipulation to defer an EIS, each question will examine both NSO and non-NSO leases. To a large extent, these questions all consider how an agency should cope with uncertainty.

205. *Id.* at 1448. The court cited *Thomas v. Peterson*, 753 F.2d at 757-61 and CEQ regulations at 40 C.F.R. §§ 1508.7, 1508.8, 1508.25(a)(1) and 1508.25(a)(2) (1985).

206. *Park County*, 817 F.2d at 623. The court relied on one of the same regulations as did the *Conner* court, namely, 40 C.F.R. § 1508.7.

207. *Park County*, 613 F. Supp. at 1188. The sufficiency of the EIS for the North Fork well was moot on appeal. *Park County*, 817 F.2d at 614.

1. Prerequisites of a "Proposal"

In all three cases, a primary argument against a pre-lease or other early appraisal of the effects of oil and gas development was that impacts could not be addressed meaningfully without knowing how, when, or even if the lessees would proceed.²⁰⁸ However, uncertainty about future events²⁰⁹ is never a *carte blanche* excuse to avoid NEPA's dictates. NEPA always requires some degree of forecasting.²¹⁰ A method is needed to distinguish when a possible future activity is sufficiently definite to have become a "proposal" for action.

An early case approached the temporal dilemma in defining a "proposal" by examining four factors:

- 1) The likelihood that the program (or larger activity) will actually be developed;
- 2) The extent information exists currently on the environmental effects of proceeding with a program;
- 3) The extent to which irretrievable commitments have been made and other options thereby precluded; and
- 4) The severity of the impacts that would result from implementing the program.²¹¹

Although this analytical framework focuses attention on important issues, the Supreme Court firmly rejected its judicial use: "A court has no authority to depart from the statutory language and, by a balancing of court-devised factors, determine a point . . . at which an impact statement *should be prepared*."²¹² Agency "contemplation" of action is insufficient to trigger an EIS; there must be a "proposed action."²¹³

208. *Conner*, 848 F.2d at 1450-51; *Park County*, 817 F.2d at 623-24; and *Sierra Club*, 717 F.2d at 1415.

209. This situation differs from one in which there is scientific uncertainty as to potential significant adverse effects. What is missing here is *not* the ability to analyze impacts from developmental activities, but certainty about whether any exploration or production will occur on a particular tract. North Fork Well FEIS, at 53. "Worst case analysis" should not be an issue. See 40 C.F.R. § 1502.22 (1985) and current regulation, 40 C.F.R. § 1502.22 (1987); *Methow Valley Citizens Council Regional Foresters*, 833 F.2d 810, 817-18 (9th Cir. 1987) *cert. granted sub nom.* Robertson v. Methow Valley Citizens Council, 108 S. Ct. 2869 (1988); and Note, *Federal Agency Treatment of Uncertainty in Environmental Impact Statements Under the CEQ's Amended NEPA Regulation* § 1502.22: *Worst Case Analysis or Risk Threshold?*, 86 MICH. L. REV. 777 (1988). Nevertheless, some might insist that there is "incomplete or unavailable information." However, the problem with grafting CEQ "incomplete and unavailable information" procedures onto the leasing process is that they apply when "evaluating reasonably foreseeable significant adverse effects." 40 C.F.R. § 1502.22 (1987). One comes full circle: The missing information is what determines whether impacts are foreseeable.

210. *Cf. Jicarilla Apache Tribe of Indians v. Morton*, 471 F.2d 1275, 1280 (9th Cir. 1973) ("If we were to impose a requirement that an impact statement can never be prepared until all relevant environmental effects were known, it is doubtful that any project could ever be initiated.").

211. *SIPI*, 481 F.2d at 1094-98.

212. *Kleppe v. Sierra Club*, 427 U.S. at 406. The D.C. Circuit decision below had expressly employed the *SIPI* test. *Sierra Club v. Morton*, 514 F.2d 856, 879-83 (D.C. Cir. 1975). For the Supreme Court's description of the test, see *Kleppe v. Sierra Club*, 427 U.S. at 404-05.

213. *Kleppe v. Sierra Club*, 427 U.S. at 401. See also the Supreme Court's somewhat cryptic pronouncement that cumulative impacts only need be considered when concrete "proposals" are before an agency. *Id.* at 401 n.12; *Weinberger v. Catholic Action*, 454 U.S. 139, 146 (1981), quoted in *Park County*, 817 F.2d at 623.

Despite this pithy directive, the Supreme Court failed to precisely define when a "proposal" comes into existence. The CEQ regulations attempt guidance: a proposal exists when an agency has a goal and is actively moving toward a decision on one or more ways to accomplish the goal and the effects of these methods can be evaluated meaningfully.²¹⁴ Additionally, CEQ's comments to the definition provide that a proposal should not be deemed present at a point too early in the planning process to make adequate analysis possible.²¹⁵ This elaboration reflects the Supreme Court's practical concern. To have a proposal for an "action," it required a concrete plan of activity. Otherwise, there would be nothing to analyze except "estimates of potential development and attendant environmental consequences."²¹⁶ The five components of an EIS would have no grounding in fact.²¹⁷ This emphasis on practicality does not completely resolve the problem of when a proposal might exist. Additionally, it does not delineate fully the "scope"²¹⁸ of necessary analysis if a proposal for action exists.

One test that attempts to resolve both issues is the "irretrievable commitment" approach, which looks for the point at which the agency can no longer deny an action.²¹⁹ Precedents employing this concept clearly indicate that the three circuits were in the mainstream when they held that an oil and gas lease issued with a NSO stipulation is not equivalent to a "proposal" for full development of the leased area for oil and gas recovery. First, actual drilling and other activities were never "proposed" in the common meaning of the term because no concrete plan for resource recovery with specific well-sites existed at lease issuance. Moreover, despite arguments derived from the basic policies of the Mineral Leasing Act,²²⁰ a lease grant in itself does not represent a definite goal to develop the land either from the government's or the lessee's perspective.

214. 40 C.F.R. § 1508.23 (1987).

215. Comment 2 to § 1508.22, 43 Fed. Reg. 55,989 (1978) (§ 1508.22 to be renumbered § 1508.23).

216. *Kleppe v. Sierra Club*, 427 U.S. at 402.

217. *Id.* at 401-02. For a listing of the five factors, see *supra* text accompanying note 5.

218. "Scope" is "the range of actions, alternatives, and impacts to be considered in an environmental impact statement." 40 C.F.R. § 1508.25 (1987). Although it technically refers to what must be in an EIS, in common usage the "scope of the action" before an agency is said to include the same elements.

219. *Foundation of Economic Trends*, 756 F.2d at 158. (The "point of commitment" is crucial to the existence of a "proposal;" a policy position that simply allows for a grant or denial of activity in the future on a case-by-case basis would be but a "decision deferred."); see Note, *Environmental Review of Recombinant DNA Experiments Under NEPA: Foundation of Economic Trends v. Heckler*, 21 UNIV. S.F.L. REV. 501 (1987) (at least an EA needed at policy adoption stage because some potential for people to avail themselves of the newly created authority must have existed or the policy revision was meaningless). See also *Sierra Club v. Hathaway*, 579 F.2d 1162, 1167-68 (9th Cir. 1978); *SIPI*, 481 F.2d at 1094.

220. *E.g., Rocky Mountain Oil and Gas Association*, 500 F. Supp. at 1345 (To issue an oil and gas lease without contemplating development "is clearly contrary to Congressional intent . . . of mineral production."); and Nelson, *supra* note 17, at 23 (An oil and gas lease represents a "plan" for development.). For a summary of arguments for a dominant federal mineral estate, see Brooks, *Multiple Use Versus Dominant Use: Can Federal Land Use Planning Fulfill the Principles of Multiple Use for Mineral Development?*, 33 ROCKY Mtn. MIN. L. INST. 1-1, 1-9 - 1-19 (1987).

The Mineral Leasing Act authorizes leasing of lands that are merely "believed" to contain oil and gas.²²¹ No party guarantees resource production, nor are lessees subject to any censure if they do not produce.²²² The lease will expire eventually absent production, but oil and gas companies routinely acquire more acreage than they produce to await future trends.²²³ Most importantly, with an NSO stipulation inserted, the BLM has not assented yet to any surface disturbance. The physical status quo remains unchanged.²²⁴ Although a lease without an NSO stipulation also does not directly authorize drilling, whether the control retained in it is sufficient to negate any potential for significant impacts requires further analysis.

2. Mitigation's Role in Ascertaining Impacts

An NSO stipulation, by precluding any surface-disturbing activities unless approved, in essence mitigates²²⁵ any future adverse effect lease issuance could trigger. The court's sanction of NSO stipulations, as well as less restrictive lease stipulations designed to temper environmental impacts, indicates their approval of mitigation as a proper technique to eliminate or postpone the need for an EIS.

The CEQ, in advice to agencies entitled "Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations,"²²⁶ attempted to limit the practice. It required that the specific means employed to compensate for impacts be an inherent part of either the proposal or the agency's enabling authority:

Mitigation measures may be relied upon to make a finding of no significant impact only if they are imposed by statute or regulation, or submitted by an applicant or agency as part of the original proposal. As a general rule, the regulations contemplate that agencies should use a broad approach in defining significance and

221. 30 U.S.C. § 226(a) (1982).

222. Compare 30 U.S.C. § 226(e) (1982), which merely provides that, absent special circumstances, an oil and gas lease expires without production at the end of its primary term with strict "diligent development" requirements for coal leases, *Id.* at 207(b), 201(a)(2) (1982 & Supp. 1985). *But see*, National Wildlife Federation v. Hodel, 839 F.2d 694, 758-59 (D.C. Cir. 1988) (Even coal lease development is speculative.). *See also* Comment, *supra* note 31 (Lessee might have little invested in lease acquisition.).

223. A high percentage of non-competitive federal leases are never drilled. *Park County*, 817 F.2d at 623.

224. *But see* discussion of developmental pressures if lease is issued, *infra* note 275. For cases holding that no EIS is required if the physical status quo is unchanged, *see* *Sierra Club v. F.E.R.C.*, 754 F.2d 1506 (9th Cir. 1985); *Burbank Anti-Noise Group v. Goldschmidt*, 623 F.2d 115 (9th Cir. 1980), *cert. denied*, 450 U.S. 965 (1981); and *Committee for Auto Responsibility v. Solomon*, 603 F.2d 992, 1001-03 (D.C. Cir. 1979), *cert. denied*, 445 U.S. 915 (1980). Compare controversy over inaction as action, *Sierra Club*, 848 F.2d at 1089; *Defenders of Wildlife v. Andrus*, 627 F.2d 1238 (D.C. Cir. 1980); *Alaska v. Andrus*, 591 F.2d 537 (9th Cir. 1979); and Note, *Does NEPA Require an Impact Statement on Inaction*, 81 MICH. L. REV. 1337 (1983).

225. The CEQ definition of mitigation includes "[a]voiding the impact altogether." 40 C.F.R. § 1508.20 (1987).

226. Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations, 46 Fed. Reg. 18,026 (1981) [hereinafter Forty Questions].

should not rely on the possibility of mitigation as an excuse to avoid the EIS requirement.²²⁷

In the cases, the stipulations attached to the leases modified the basic lease and emerged from the EA process for use in the leasing option. No regulation or statute *directly* mandates the inclusion of any particular stipulation in a lease.²²⁸

The courts' approval of any lease stipulation to eliminate the need for an EIS accords with general NEPA case law.²²⁹ In fact, the fourth criterion of the D.C. Circuit's FONSI review standard incorporates this technique: It directs a court to ascertain "whether the agency convincingly established that changes in the project sufficiently reduced . . . [an impact of true significance] to a minimum."²³⁰ Two rationales support the use of mitigation measures in this manner. First, it enables agencies to conserve financial and technical resources and apply the EIS process to truly significant problems.²³¹ Secondly, more environmentally sound actions emerge from the process as agencies seek ways to minimize harm.²³² Before lease stipulations may act as mitigation, however, there are two prerequisites: They must be enforceable and effective.²³³

For a stipulation to be enforceable, applicable law must authorize its implementation. The BLM may delineate precisely the rights contained

227. *Id.* at 18,038 (Question 40).

228. *But see* Leasing Reform Act, *supra* note 26, amending 30 U.S.C. § 226 by adding a new subsection (g), which requires the Secretary of the Interior or the Secretary of Agriculture, in regard to Forest Service lands, to "regulate all surface-disturbing activities conducted pursuant to any lease issued . . . and . . . determine reclamation and other actions as required in the interest of conservation of surface resources." Enforcement should be effective; the BLM must deny any new oil and gas leases or approval of assignments of existing leases to anyone who has failed or refused "in any material respect" to comply with a reclamation requirement or other standard established pursuant to this power. *Id.*

229. *See, e.g.,* C.A.R.E. Now, Inc. v. F.A.A., 844 F. 2d 1569, 1575 (11th Cir. 1988); and *Cabinet Mountain Wilderness*, 685 F.2d at 681-83. *See generally* Fogelman, *supra* note 92, at 99-102; and Glitzenstein, *Project Modification: Illegitimate Circumvention of the EIS Requirement or Desirable Means to Reduce Adverse Impacts*, 10 *ECOL. L.Q.* 253 (1982). *But see* *Sierra Club v. Marsh*, 769 F.2d 868 (1st Cir. 1985) (rejecting a FONSI based on the Forty Questions restriction.).

230. *Cabinet Mountain Wilderness*, 685 F.2d at 682.

231. *Id.*

232. Herson, *Project Mitigation Revisited: Most Courts Approve Findings of No Significant Impact Justified by Mitigation*, 13 *ECOL. L.Q.* 51, 70-72 (1986) (additionally suggests circulation of mitigation reliant EA's for public and inter-agency input) Forty Questions also recommends this procedure. *Supra* note 226, at 18,038 (Question 40). *But see* Note, *A New Approach to Review of NEPA Findings of No Significant Impacts*, 85 *MICH. L. REV.* 152, 197-98 (1986) (An EA and EIS provide very different signals to the public; the former implies that the agency's action is environmentally sound and that the public need not take a vigilant stance.).

233. Nelson, *supra* note 17, at 16-21. A third requirement, that the agency will actually implement them, is also relevant. Because of the presumption of regularity applied to agency action, it is difficult to initially challenge the usefulness of stipulations on this ground. Edelson, *supra* note 20, at 921-22; *Conner*, 848 F.2d at 1448. *See also* *Conservation Law Foundation of New England, Inc. v. Andrus*, 623 F.2d 712, 715 (1st Cir. 1979) (Presume Secretary will act lawfully.). *Compare*, assertion that for an EIS to adequately disclose impacts of an action, mitigation measures must be developed and analyzed in advance. *Methow Valley Citizens Council*, 833 F.2d at 819-20, *cert. granted*.

in a lease because of its proprietary power.²³⁴ Authority therefore exists to include the most stringent of stipulations - the NSO stipulation.²³⁵ The government may also impose lesser restrictions, such as requiring specific development techniques or limiting the use of the surface to particular areas or seasons.

In addition to being enforceable, stipulations must be effective, that is, they must in actuality prevent significant impacts. The NSO clearly eliminates all impacts. None can occur until each and every surface-disturbance is approved after subsequent analysis.²³⁶ Whether less restrictive stipulations are effective would require examination of the resources - such as wildlife, streams, and vegetation - of particular lands to identify what development could affect. The stipulations would then have to protect the identified values and reduce any unavoidable impacts to insignificance. Naturally, the difficulty or ease of reaching this result would vary dependent on the scope of the action that the stipulations must control.

3. Precedents on "Cumulative" and "Interconnected" Actions

The reconciled holdings of the three cases contain a flexible approach to the question of whether, in assessing a particular action's impacts, the agency must consider full oil and gas development of the area or some lesser level of activity. Evaluation of this result necessitates review of

234. Congress recently reaffirmed that more than mineral development must be considered in exercising authority under the Mineral Leasing Act. Leasing Reform Act, *supra* note 26, § 5102 (d) (1) discussed *supra* note 228. Arguably, another directive of this section could transform all leases into NSO leases: "No permit to drill on an oil and gas lease . . . may be granted without the analysis and approval by the Secretary concerned [i.e., Interior or Agriculture] of a plan of operations covering proposed surface-drilling activities within the lease area." However, another provision requires public notice of specific lease terms prior to offering lands for lease. *Id.*, amending 30 U.S.C. § 226 by adding a new subsection (f). This implies discretion in setting lease terms, including whether or not a lease should contain an NSO stipulation.

235. See discussion accompanying and authorities cited notes 55-67 *supra*. The court in *Conner* asked whether an NSO's authorization to veto activity survives the Standard Oil and Gas Stipulation, which subjects all surface disturbance "[to] such reasonable conditions, not inconsistent with the purposes for which this lease is issued, as the Supervisor [now the Authorized Officer of the BLM or Forest Service] may require to protect the surface of the leased lands and the environment." *Conner*, 848 F.2d at 1447, n.15 (emphasis in original). The answer is yes. The "standard stipulation" is a catch-all provision, alerting the lessee that all rights to develop are regulated. By nature, as its name implies, it is a general provision. If inconsistencies exist between general and more specific terms in an agreement, the more specific provisions prevail. WILLISTON, ON CONTRACTS, §§ 619 and 624 (3rd ed. 1979), RESTATEMENT 2ND OF CONTRACTS, § 229 (c) (1973). Moreover, grants of public lands are construed in favor of the government. *Watt v. Western Nuclear Inc.*, 462 U.S. 36, 59-60 (1983); *Adams v. United States*, 687 F. Supp. 1479, 1490 (D. Nev. 1988). See also 43 C.F.R. 3101.1-2 and 3101.1-3, as amended, 53 Fed. Reg. 17,351 (May 16, 1988) and 22,835 (June 17, 1988) (specific lease stipulations control).

236. Cf. *LaFlamme v. Federal Energy Regulatory Commission*, 842 F.2d 1063, 1071 (9th Cir. 1988), which required an explanation of how mitigation methods would lessen impacts and forbid reliance on future studies. The agency, however, had only retained the right to make reasonable changes in the stream flow after the studies. *Id.* at 1067. See also *Methow Valley Citizens Council*, 833 F.2d at 819-20.

related analyses, namely, court treatment of "the scope of an action" and the additional need to evaluate "cumulative impacts"²³⁷ and "indirect effects."²³⁸

A second test for delineating a "proposal" emphasizes the practical, rather than legal, implications of an action. Courts may limit an action's scope when its "independent utility" appears to sever it from a larger scheme.²³⁹ Conversely, CEQ requires "connected actions" to be analyzed together. A "connected" action includes those which automatically trigger other actions, which cannot or will not proceed without other actions, or which "are interdependent parts of a larger action and depend on the larger action for their justification."²⁴⁰ The last element of the definition coincides with pre-existing tests that precluded a finding of "independent utility."²⁴¹ Major cases employing this analytical technique support the propriety of the combined holdings.

Courts have refused to sever activities when the contours of the larger plan are known to a reasonable extent. For example, if an overall allocation of a resource has been made, then an EIS must analyze the impact of this dedication, even if the precise impacts of any sub-allocation are still unknown.²⁴² When future development of an area is logically required to satisfy contractual commitments or justify a large upfront capital investment, an EIS cannot examine just an initial plan; it would be irrational to conclude that the remainder of a known resource would not be developed.²⁴³ Similarly, if additional activities under the control of the agency are the sole or major justification for the initial action, any analysis of its impacts must include those of the actions to follow.²⁴⁴ The decision to grant an oil and gas lease differs substantively from other actions that were found to be connected to subsequent activity.

Key points of the linking rationales are missing from the leasing situation. These include the elements of 1) agency initiative, 2) firm allocation, and 3) predictable development. After the agency issues an oil and gas lease, it will not originate developmental proposals. These will emanate from the lessee, if at all. The lease, moreover, is not a complete allocation

237. 40 C.F.R. § 1508.7 (1987).

238. 40 C.F.R. § 1508.8(b) (1987). "Effects" and "impacts" are synonymous. *Id.*

239. See discussion at and authorities cited in note 98 *supra*.

240. 40 C.F.R. § 1508.25(a)(1) (1987). For a discussion of the concept in relation to oil and gas drilling, see *Glacier-Two Medicine Alliance*, 88 IBLA at 144-47 (production from well usually within scope of drilling proposal because drilling has no independent utility apart from production).

241. *Hudson River Sloop Clearwater, Inc.*, 836 F.2d at 764.

242. *Environmental Defense Fund v. Andrus*, 596 F.2d 848, 851-53 (9th Cir. 1979) (analyze overall plan for putting 832,000 acre-feet of project water to industrial uses even if all end uses uncertain).

243. *Methow Valley Citizens Council*, 833 F.2d at 816-17 (Ski area will lead to residential construction.); *Cady v. Morton*, 527 F.2d 786, 795 (9th Cir. 1975) (EIS on 770-acre coal mine plan insufficient to support issuance of lease of over 30,000 acres of coal when lessee had contracted to supply large amounts of coal for 20 years and would need to extend mine.)

244. *Thomas v. Peterson*, 753 F.2d at 757 (proposal to build road for access to timber harvest area cannot be severed from planned timber sales); *Hudson River Sloop Clearwater, Inc.*, 836 F.2d at 763 (because the Navy would proceed with first project even without family housing facilities, the latter not connected to the first).

of the embraced lands to the recovery of oil and gas at the preclusion of other uses. Even in the absence of an NSO stipulation, the government may control development to coordinate with other users and protect other resources.²⁴⁵ In contrast to coal reserves, whether sufficient oil or gas exists to justify development is unknown for most potential lease tracts, especially those which used to be leased non-competitively.²⁴⁶ Full scale oil and gas activity does not necessarily follow lease issuance. The precedents do not preclude finding a limited scope for the leasing decision.

Other case law, which allowed severance of impact analysis, also indicates that, at least in some instances, leasing impacts may be separated from those of development. Independent utility does not only result from finding that an action serves a function of its own, but relates to whether the decision point for later activity has passed. An action may be independent if subsequent stages have not been and need not be approved.²⁴⁷ Therefore, if the initial action does not provide permission to change the status quo, impact analysis may be deferred until the grant of the requisite precondition.²⁴⁸ If the agency may at a later date preclude the actual action that might be damaging, or if it will have the opportunity to mitigate its effects, then the scope of the initial action will not include the latter.²⁴⁹ The overriding theme of these decisions permitting severance of

245. See, e.g., *Copper Valley Machine Works, Inc.*, 653 F.2d at 604-05 (BLM can preclude drilling for six months of each year to preserve tundra.); and "Limited Surface Use Stipulation," which covered nearly all of the lease in *Park County* and provided that oil and gas activities during specified times would be controlled to protect big game habitat and recreational use. North Fork Well FEIS, at 94; Noble, *supra* note 21, at 135. But see Comment, *NEPA Compliance in Oil and Gas Leasing: Leasehold Segmentation and the Decision to Forego an Environmental Statement*, 58 U. COLO. L. REV. 677, 689-91 (1988) (Concludes that a lease is a total commitment to resource development and thus the act of issuing one is "vertically" connected to future development.)

246. See notes 30-33, *supra*. Prior to drilling, geologists are only correct 15% of the time in their predictions of a site's worth for development. Hapke, *supra* note 92, at 10,294 n.71. Even after seismic investigation, success probabilities are still low. Noble, *supra* note 21, at 121 n.31.

247. *Hudson River Sloop Clearwater, Inc.*, 836 F.2d at 763 (shore facility); *Trout Unlimited*, 509 F.2d at 1285 (Teton Dam and Reservoir) and *Sierra Club v. Stamm*, 507 F.2d 788, 793 (10th Cir. 1974) (Strawberry Irrigation System).

248. *Sierra Club v. F.E.R.C.*, 754 F.2d at 1509 (preliminary permit allowed no activity on the land); *Columbia Basin Land Protection Assn. v. Schlesinger*, 643 F.2d 585, 597 (9th Cir. 1981) (powerline grant, not mere access agreement, should trigger EIS); *cf.*, *Secretary of the Interior v. California*, 464 U.S. at 335-43 (drilling, not issuance of an off-shore lease, "directly affects" a coastal zone); *C.A.R.E. Now, Inc.*, 844 F.2d at 1573-74 (if the subject action will not cause the activity in question, it is not connected to the action).

249. *Village of False Pass v. Clark*, 733 F.2d 605, 614 (9th Cir. 1984), *aff'd* *Village of False Pass v. Watt*, 505 F. Supp. 1123 (D. Alaska 1983) (because offshore leasing statute allows preclusion of exploration, can defer worst case analysis of spills); *County of Suffolk v. Andrus*, 562 F.2d 1368, 1382 (2nd Cir. 1977), *cert. denied*, 434 U.S. 1064 (1978) (EIS on proposed offshore lease sufficient without pipeline analysis); *Colorado River Conservancy District v. U.S.*, 593 F.2d 907, 910 (10th Cir. 1977) (if Secretary could cancel water contracts after analysis, impacts of later use need not be analyzed at signing); *cf.*, *National Wildlife Federation v. Hodel*, 839 F.2d 694, 726 (D.C. Cir. 1988) (phased reclamation bonding meets statute's goals); *Secretary of Interior*, 464 U.S. at 342-43; *North Slope Borough v. Andrus*, 486 F. Supp. 326, 329, *aff'd in part*, 642 F.2d 589, 607-11 (D.C. Cir. 1980) (lease issuance not a jeopardizing action if may stop later development); but see *Conner*, 848 F.2d at 1451-58 (rejecting this last holding for leases issued under the onshore Mineral Leasing Act).

activities is whether the agency retained authority to reject or substantially modify later stages of a project.

Control placed on subsequent oil and gas development activities in a lease can provide this cleansing safeguard. An NSO provision meets the criteria for impact severance because the agency may separately evaluate and reject each stage of surface occupancy. Other mitigation measures included in leases may also be sufficient to limit the action's scope. Such a conclusion, however, will require analysis of the physical resources of a particular area.

Nevertheless, even if lease issuance is not necessarily "connected" to development, another hurdle exists: CEQ regulations also demand consideration of "cumulative impacts." A "cumulative impact" is one which "results from the incremental impact of the action when added to other past, present, and *reasonably foreseeable* future actions regardless of what agency (Federal or non-Federal) or person undertakes such actions. Cumulative impacts can result from individually minor but collectively significant actions over a period of time." (emphasis added).²⁵⁰

Such impacts enter into an assessment of an action's "significance." The agency must consider "[w]hether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is *reasonable to anticipate* a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts." (emphasis added).²⁵¹ Concentration on whether full-field development is a "cumulative impact" of the leasing decision can avoid some of the legalistic line drawing prevalent in efforts to delineate an action's scope by the irretrievable commitment and independent utility methods.²⁵²

Under this requirement, the potential future action - or actual past activity - that must be included does not have to be "connected" to the subject proposal, but merely have the potential to increase or affect the nature of the proposal's impacts.²⁵³ Geographic proximity may suffice.²⁵⁴ The definition of a "cumulative impact," however, as well as its role in ascertaining "significance," turns upon the "reasonableness" of anticipat-

250. 40 C.F.R. § 1508.7 (1987).

251. 40 C.F.R. § 1508.27 (b) (7) (1987).

252. See generally Hapke, *supra* note 92. Fogelman, *supra* note 92, at 72-77 calls these analyses "CEQ tests."

253. *Sierra Club v. Forest Service*, 843 F.2d 1190, 1194-95 (9th Cir. 1988); *Save the Yaak Committee v. Block*, 840 F.2d 714, 720-21 (9th Cir. 1988); *Big Hole Ranches Association, Inc. v. U.S. Forest Service*, 686 F. Supp. 256, 261-63 (D. Mont. 1988); *Oregon Natural Resources Council*, 832 F.2d at 1497-98 (Corps of Engineers must take into account existent dams in basin; "[t]he synergistic impact of the project should be taken into account at some stage, and certainly before the last dam is completed"); but see *C.A.R.E., Now, Inc.*, 844 F.2d 1569, 1574-75 (limits the definition of cumulative impacts to those directly or indirectly caused by the action under analysis).

254. See acknowledgment by the Supreme Court that, in some instances, cumulative impacts from activities geographically near one another will necessitate a comprehensive EIS, *Kleppe v. Sierra Club*, 427 U.S. at 409-10.

ing future activity.²⁵⁵ This requires individual factual inquiry. In some cases, evidence will be overwhelming. Future actions would be reasonably certain when an agency has planned them,²⁵⁶ when parties are heading towards a defined goal,²⁵⁷ or when an agency has clear knowledge of resource availability and development needs.²⁵⁸ Oil and gas leasing does not always present any of these situations. Room for individual appraisal exists.

The combined holdings on the breadth of necessary analysis are not contrary to law. Nevertheless, the *Park County* court could have erred as greatly in one direction as the *Conner* district court did in the opposite. Although the Tenth Circuit said it was only ruling on the need for full-field analysis in the particular case before it,²⁵⁹ figures on the low probability of development of federal leases in general apparently influenced it.²⁶⁰ Conversely, the court in *Conner*, when considering cumulative impacts, indiscriminately presumed all leases contained the same inevitable developmental potential.²⁶¹ In a paradigm of proper NEPA compliance, agencies would avoid both extremes.

V. CONCLUSION: IDENTIFICATION OF A PARADIGM TO DIRECT NEPA COMPLIANCE

To simply reconcile the holdings of the three cases and place them in perspective does not create a framework for meaningful NEPA analysis. Any suggested solution must foster NEPA's primary purpose, which

255. 40 C.F.R. §§ 1508.7 and 1508.27(b)(7) (1987).

256. *Save the Yaak Committee*, 840 F.2d at 720-21; *Thomas v. Peterson*, 753 F.2d at 755 (future timber sales are "cumulative impacts" and not speculative when EA's on the sales were prepared immediately after the questioned EA covering a road's construction). Cf. *City of Davis v. Coleman*, 521 F.2d 661, 676 (9th Cir. 1975) (when justification for highway interchange is future development, must include same in analysis).

257. *Sierra Club v. Marsh*, 769 F.2d at 878-80 (industrial park must be included in analysis of causeway and port when plans for it exist); *Conservation Society of Southern Vermont, Inc. v. Secretary of Transportation*, 508 F.2d 927, 934-36 (2nd Cir. 1974) (avowed desire of three states to convert route to an expressway necessitated cumulative analysis); *Oregon Natural Resources Council*, 832 F.2d at 1497 (existent dams in area).

258. *Cady*, 527 F.2d at 795 clearly expresses the rationale: "[I]t can not be denied that the environmental consequences of several [coal] strip mining projects extending over twenty years or more within a tract of 30,876.45 acres will be significantly different from those which accompany Westmoreland's activities on a single tract of 770 acres." See also *Methow Valley Citizens Council*, 833 F.2d at 816-17 cert. granted (residential development logical extension of planned recreation facility); and *LaFlamme*, 842 F.2d at 1072-73 (development in river basin foreseeable).

259. *Park County*, 817 F.2d at 622-23.

260. *Id.* at 623:

Full field development is typically an extremely tentative possibility at best at the leasing stage. Because 'exploration activities are conducted on only about one of ten federal leases issued and development activities are conducted on only one of ten of those leases on which exploration activities have been approved and completed' . . .

261. *Conner*, 605 F. Supp. at 109 ("Obviously a comprehensive analysis of cumulative impacts of several oil and gas activities must be done before a single activity can proceed."); see also *Bob Marshall Alliance*, 685 F. Supp. at 1519. (Quotes without qualification the *Cady* conclusion on coal development, *supra* note 258.) For a similar emphasis on a basin-wide impact of a discovery of oil or gas, see Comment, *supra* note 245, at 694-95.

is to improve decisionmaking.²⁶² Its disclosure provisions not only force agencies to grapple with often-neglected environmental concerns,²⁶³ but also provide opponents of actions with information on potential adverse effects for use in the political arena.²⁶⁴ But if NEPA's provisions merely thwart and hogtie agency programs without an attendant increase in constructive information, no one will gain. The proposed procedure must balance an agency's need to implement its substantive duties with NEPA's charge to prevent damage to the environment by blind decision-making.

Before describing any improved process, NEPA's goals should be more closely scrutinized. Congress, in imposing NEPA's decisionmaking duty on federal agencies, perhaps did not anticipate the almost all-pervasive influence of its procedures. They have caused beneficial changes in federal decisions,²⁶⁵ but much agency expertise is expended in fulfilling NEPA's directives.²⁶⁶ An EIS may take twelve months or more to complete²⁶⁷ and can cost \$350,000 or more.²⁶⁸ Because Congress did not appropriate any additional funds for agencies concurrently with NEPA's passage, it might not have intended such expenses.²⁶⁹ Even if a Congressional backlash because of costs does not occur in regard to oil and gas leasing, courts also attempt to place boundaries on burdensome NEPA

262. See generally Dreyfus and Ingram, *The National Environmental Policy Act, A View of Intent and Practice*, 16 NAT. RESOURCES J. 243, 254 (1976) and Tarlock, *Balancing Environmental Consideration and Energy Demands: A Comment on Calvert Cliffs Coordinating Committee v. AEC*, 47 IND. L.J. 644, 661-67 (1972).

263. E.g., *Oregon Natural Resources Council*, 832 F.2d at 1492; *Silva v. Lynn*, 482 F.2d 1282, 1285 (1st Cir. 1973) ("[H]elps insure the integrity of the process of decision by precluding stubborn problems or serious criticism from being swept under the rug."); *N.R.D.C., Inc. v. Morton*, 458 F.2d 827, 833 (D.C. Cir. 1972) (EIS is "environmental source material" for the Executive, Congress, and public.); and *Trout Unlimited*, 509 F.2d at 1283.

264. Therefore, an allegation by an affiant that an agency failed to prepare an EIS provides an "injury in fact" sufficient to grant standing. *National Wildlife Federation v. Hodel*, 839 F.2d at 712. See also Andrews, *Agency Responses to NEPA: A Comparison and Implications*, 16 NAT. RESOURCES J. 301, 321 (1976) and Friesma and Culhane, *Social Impacts, Policy, and the Environmental Impact Statement*, 16 NAT. RESOURCES J. 339, 340 (1976).

265. See Hammond, *Embedding Policy Statements in Statutes: Perspectives on the Genesis of a new Public Law Jurisprudence*, 5 HASTINGS INT'L. & COMP. L.J. 323, 345-48 (1982), (Astute judges used NEPA's procedural provisions to coalesce vague policy provisions.). For summaries of critical evaluations, see Murchinson, *Does NEPA Matter? An Analysis of the Historical Development and Contemporary Significance of the National Environmental Policy Act*, 18 U. RICH. L. REV. 557 (1984) and Gray, *supra* note 4, at 369-78. For a view of the BLM see ENVIRONMENTAL LAW INSTITUTE, *NEPA IN ACTION: ENVIRONMENTAL OFFICES IN NINETEEN FEDERAL AGENCIES*, 176-205 (1981).

266. Cf. Wichelman, *Administrative Agency Implementation of the National Environmental Policy Act of 1969: A Conceptual Framework for Explaining Differential Responses*, 16 NAT. RESOURCES J. 263 (1976) (decisions improve with additional expertise).

267. Forty Questions, *supra* note 226, at 18,077 (Question 35) estimated twelve months. However, the EIS process for the North Fork well began in August of 1983 with a Notice of Intent to prepare an EIS. The agencies released the final EIS in March of 1985 and granted the APD May 5, 1985.

268. Estimate contained in Edelson, *supra* note 20, at 944 n.206, where he argues that because an EIS can analyze several leases for this expense and it costs approximately \$200,000 to perform a seismic survey for one lease, it would be more economical to conduct pre-leasing EIS's. This reasoning, however, presumes that all leases will have expensive exploratory work.

269. Dreyfus and Ingram, *supra* note 262, at 256, 260-61.

compliance and any paradigm to improve the process must address the courts' concerns.

Two basic premises fuel judicial desires to moderate over-reliance on expensive EIS's. The first is to avoid a "trivialization" of NEPA. NEPA requires an EIS only when significant results are likely to occur. To concentrate resources on an EIS when such impacts are unlikely would divert attention from actions that truly require analysis.²⁷⁰ The second motivation involves the fear that if NEPA procedures are grafted onto indefinite or abstract activities, NEPA would founder like Antaeus removed from contact with the earth. Only theoretical estimates of potential impacts from differing levels of activity will result. No analysis of specific impacts from alternative actions could emerge to point towards appropriate measures to avoid potential harm.²⁷¹ NEPA requires a grounding in physical reality. Forced to undertake unstructured analysis, agencies may balk, turn to boilerplate language, and eventually grow numb to NEPA's usefulness in more appropriate situations.

Park County is sensitive to some of these problems,²⁷² but the court was perhaps too eager to embrace broadly worded pragmatic arguments. The sheer number and cost of potential EIS's do not justify judicial erasure of NEPA from the statute books.²⁷³ Nevertheless, ignoring the limited nature of agency resources and using the EIS process as an unyielding roadblock will not increase environmentally sensitive decisionmaking. Over the long run, environmentalists must factor bureaucratic reality into their strategy.²⁷⁴ The goal must be marshalling agency attention to avoid unwitting loss of irreplaceable natural treasures while allowing actions of lesser impact to proceed with proper regulatory oversight preventing unnecessary damage.

The combined holdings grant the necessary tools for responsible agency action. They provide five major options:

1. A pre-leasing EIS analyzing the impacts of leasing only;

270. *E.g.*, *Cabinet Mountain Wilderness Association*, 685 F.2d at 682 (in the context of a "mitigated" action); *Isaak Walton League of America v. Marsh*, 655 F.2d 346, 377 (D.C. Cir. 1981), *cert. denied sub. nom.*, *Atcheson, Topeka & Santa Fe Railway Co. v. Marsh*, 454 U.S. 1092 (1981) (an impact found to be highly unlikely); *Sierra Club v. Andrus*, 442 U.S. at 358 (response to allegation that all appropriation requests required an EIS).

271. *Kleppe v. Sierra Club*, 427 U.S. at 401-02. A close look at the affected environment, an important section of any EIS, could alert agencies to potential conflicts. The result of the conflict, nevertheless, would be unclear until the contours of an activity are known.

272. *Park County*, 817 F.2d at 623-24.

273. Perhaps the most famous and analogous situation involved the Forest Service's decision to simultaneously allocate millions of acres to non-wilderness use. The court responded that the agency "may not rely upon forecasting difficulties or the task's magnitude to excuse the absence of a reasonably thorough site-specific analysis . . ." *California v. Block*, 690 F.2d at 765. For other cases not excusing compliance due to cost or lack of manpower, see, *e.g.*, *N.R.D.C., Inc. v. Morton*, 388 F. Supp. 829, 840-41 (D.C.D.C. 1974), *aff'd*, 527 F.2d 1386 (D.C. Cir.), *cert. denied*, 417 U.S. 913 (1976) and *Conservation Society of Southern Vermont*, 933 F.2d at 932 n.24.

274. *Rogers*, *supra* note 16. See also, *Hammann, Response to Rogers*, 38 U. FLA. L. REV. 205, 207-8 (1986); *Stewart, The Discontents of Legalism: Interest Group Relations in Administrative Regulation*, 1985 WIS. L. REV. 655, 661-69.

2. A pre-leasing EIS analyzing not only the impacts of leasing, but also the impacts of exploration, development, production, abandonment, or a combination of these activities;
3. A pre-leasing EA analyzing the impacts of leasing only;
4. A pre-leasing EA analyzing not only the impacts of leasing, but also the impacts of exploration, development, production, abandonment, or a combination of these activities; or
5. A lease may be issued on the basis of an EA (or an EIS) with an NSO stipulation, deferring completion of an EA or EIS with any of the broadened scopes described above until receipt of a definite proposal for development.

What should drive the choice of one procedure rather than the other? The first step in answering this question is to identify what purpose a pre-lease EIS serves and whether any substitutes for it exist.

Naturally, an EIS is only appropriate if potentially significant impacts could result from the proposed action. A pre-leasing EIS would disclose significant effects prior to the grant of any developmental right, however limited, and could result in a decision not to lease. This would avoid a crucial problem with the current system. Once a lease is issued, even with an NSO stipulation negating the legal right to proceed, the playing field between preservation and oil and gas activity is no longer level. A lessee exists that will demand approval to recover potential oil and gas reserves. The agency has also made a commitment to at least consider development of the tract. Exploration or production pressures may distort future analysis.²⁷⁵ In appropriate situations, the agencies must confront the difficult decision not to lease.²⁷⁶ They therefore must obtain the information necessary to make an informed decision.

The BLM and Forest Service do not approach these resource allocations isolated from other tasks. Both agencies must undertake comprehensive land use planning. The BLM is to prepare "Resource Management Plans"²⁷⁷ and the Forest Service, predictably, creates "Forest Management Plans."²⁷⁸ EIS's accompany these plans and can reveal the signifi-

275. See, *Secretary of Interior v. California*, 464 U.S. at 342; *Northern Cheyenne Tribe v. Hodel*, 851 F.2d 1152, 1156-57 (9th Cir. 1988); *Environmental Defense Fund*, 596 F.2d at 53; *North Slope Borough*, 486 F. Supp. at 351; *Nelson supra* note 17, at 13-15; and *Noble, supra* note 21, at 157-58. Compare *Nelson, supra* note 17, at 45-46 (pressure for development distorted legal precedents in *Mountain States I*); and *Plater, In the Wake of the Snail Darter: An Environmental Paradigm and Its Consequences*, 19 U. MICH. J. LAW REFORM 805, 854-58 (1986) (Tellico Dam illustrates how proposals gain a life of their own within an agency despite evidence of the irrationality of proceeding.).

276. For descriptions of reluctance to recommend against lease issuance, see *Bob Marshall Alliance*, 685 F.Supp at 1520-21 and *Edelson, supra* note 20, at 951-53.

277. Section 202 of the Federal Land Policy and Management Act, 43 U.S.C. § 1712 (1982). See generally *National Wildlife Federation v. Burford*, 835 F.2d at 320-22 and, for a discussion of the precursors of these plans see *Headwaters Inc. v. BLM, Bedford District*, 684 F. Supp 1053 (D. Or. 1988).

278. Forest and Rangeland Renewable Resources Planning Act, as amended by the National Forest Management Act, 16 U.S.C. § 1600-14 (1982 and Supp. III 1985). See generally *Comment supra* note 38, at 436-50. For a criticism that these plans ignore mineral resources, see *Brooks, supra* note 220, at 1-501-7.

cant impacts of resource conflicts and suggest appropriate mitigation measures.²⁷⁹ They may identify lands that should not be leased. Conversely, oil and gas recovery could be the best use of certain lands despite the presence of either mitigatable or non-mitigatable significant impacts. NEPA does not require avoidance of all significant effects, but only that decisions to proceed in the face of such adverse impacts are made knowingly.²⁸⁰

In a perfect world, land use planning would precede not only oil and gas leasing,²⁸¹ but all decisions on potential disturbances. More site-specific analyses of definite proposals could then use the knowledge gained from the comprehensive EIS and build on the earlier EIS.²⁸² All activities, however, cannot cease pending plan completion.²⁸³ Oil and gas lease decisions may not always have the benefit of comprehensive planning EIS's.

Even without a current management plan, the BLM and the Forest Service are not ignorant of the attributes of the lands they administer. They must choose the appropriate level of NEPA analysis based on this knowledge together with an estimate of what oil and gas activity is reasonably likely to occur in an area. Refuge to nation-wide statistics will not suffice.²⁸⁴

Rational judgments are possible despite a lack of certainty on the existence of a commercial oil or gas deposit in a particular area. An analogous problem is addressing indirect effects of proposals such as "disposal[s] of federal lands, when the identity or plans of future landowners is unknown."²⁸⁵ The CEQ responded to a question in this area:

[I]f there is total uncertainty about the identity of future land owners or the the nature of future land uses, then of course, the agency is not required to engage in speculation or contemplation about their future plans. But, in the ordinary course of business, people do make judgments based upon reasonably foreseeable occurrences. It will often be possible to consider the likely purchasers and the development trends in that area or similiar areas

279. For a description of some BLM Resource Management Plans that attempt delineation of necessary stipulations, see Brooks, *supra* note 220, at 1-43 - 1-45. Congress has requested a report from the National Academy of Sciences and Comptroller General on the treatment of oil and gas resources in RMP's and MFP's. Leasing Reform Act, *supra* note 26, § 5111.

280. *E.g.*, *Strycker's Bay Neighborhood Association*, 444 U.S. at 227-28.

281. Comment, *supra* note 38, at 437-40.

282. That is, a proper use of CEQ's tiering approach could occur. 40 C.F.R. § 1508.28 (1987). If a later EA reveals no additional significant impacts, another EIS would not be required. The EA, however, would consider specific alternatives and mitigation measures for the now more concrete proposal. See *Headwaters Inc.*, 684 F. Supp. at 1055-56; and *Sierra Club*, 774 F.2d at 1411. For a criticism that *Park County* misapplied this guidance see *supra* note 165.

283. In fact, the agencies are explicitly precluded from deferring leasing decisions on National Forest Lands until National Forest Plans are finished. The Energy Security Act of 1979, 42 U.S.C. § 8855 (1982).

284. *Cf.* McCrum, *NEPA Litigation Affecting Federal Mineral Leasing and Development*, 2 NAT. RESOURCES & ENVIRONMENT 7, 57 (Spring 1986).

285. Forty Questions, *supra* note 226, at 18,031 (Question 18).

in recent years The agency has the responsibility to make an informed judgment, and to estimate future impacts on that basis, especially if trends are ascertainable or potential purchasers have made themselves known. . . .²⁸⁶

Here, the question is whether the lands are likely to be developed for oil or gas recovery and "business judgments" are possible. Geologists for oil and gas companies routinely rank potential lease tracts both for acquisition and drilling purposes. BLM geologists, no longer required to delineate KGS's or to set minimum acceptable bids for competitive sales,²⁸⁷ can also estimate a tract's potential for oil or gas reserves through experience in adjacent areas or geologically similar formations. They can then predict attendant levels of development.

Armed with the initial appraisal of likely activity, the BLM and Forest Service could then analyze the surface resources of the prospective lease areas. The *SIFI*²⁸⁸ balancing test suggests consideration of the following factors to choose the appropriate level of analysis: 1) the likelihood that oil and gas will actually be developed; 2) the extent information exists currently on the environmental effects of proceeding with development; 3) the extent to which irretrievable commitments have been made and other options thereby precluded; and 4) the severity of the impacts that would result from implementing the activity.²⁸⁹

Although the Supreme Court rejected judicial use of the test to decide when an EIS should be prepared,²⁹⁰ nothing prevents its use by an agency to choose between legally appropriate options under NEPA. It filters the leasing decision through the relevant screens; namely, what rights are to be granted, what mitigation measures exist, what particular resources could be damaged, and what likely development will occur.

The agencies would then order their priorities: high rankings on either severity of impacts from development or the likelihood of development would require extensive initial analysis or upfront mitigation. Lands with exceptionally high recreational, scientific, or wildlife values²⁹¹ and relatively high developmental potential would require an EIS to disclose significant impacts and devise ways to avoid or mitigate the adverse results. Although the agencies would not be able to predict perfectly how develop-

286. *Id.* See also *City of Davis*, 521 F.2d at 676, requiring an analysis of likely development at a highway interchange.

287. Sections 5102(a) and (b) of the Leasing Reform Act, discussed *supra* note 30.

288. *SIFI*, 481 F.2d at 1094-98. For a criticism that the *SIFI* test is too flexible and turns everything into a matter of degree see Barney, *supra* note 92, at 16-17.

289. *SIFI*, 481 F.2d at 1094. See also, *County of Suffolk*, 562 F.2d at 1378, which looked at two questions to decide if analysis could be deferred: 1) whether the agency could obtain meaningful information on future activity at the first analysis and 2) how important is the missing information to a decision to proceed with the first step?

290. *Kleppe v. Sierra Club*, 427 U.S. at 406.

291. Except for some lease offers outstanding on December 22, 1987, conflicts with potential wilderness should not exist. Section 5106 of the Leasing Reform Act, discussed *supra* note 27. However, the scope of NEPA compliance in response to an initial well could be filtered through the test.

ment would occur, knowledge of the affected environment would increase so that any decision to either preserve or sacrifice surface values would be an informed one.

Areas with less pronounced conflicts between mineral recovery and other resource use will require either an EA or an EIS. The choice depends on a balancing of the level of reasonably foreseeable cumulative or connected activities and the nature of the values that could be impacted. Alternatives must include not leasing as well as options to control development, be it individual wells or full field development. This site-specific analysis of a particular tract of land's attributes must be prepared in good faith, with an acknowledgment that an EA might reveal unmitigatable significant impacts and result in a decision to prepare an EIS.²⁹²

The cases did provide the agencies with a blanket deferral mechanism: no EIS is necessary if the lease authorizes no surface disturbance at all. The BLM should only employ the NSO option when analysis reveals that sensitive areas can be developed by drainage or directional drilling²⁹³ or where there are unresolvable gaps in relevant information sufficient to require a deferral of a decision on how or if development should proceed.²⁹⁴ Deferring decisions without firm reasons merely increases uncertainty for both oil companies and preservationists. Reasoned analysis must occur before lease issuance and the agency should not haphazardly avoid the process by use of NSO stipulations.

The form this analysis takes may vary because NEPA recognizes that differing actions may require divergent levels of analysis based on the nature of the proposed action and the affected human environment. Forcing the agencies to examine each factor in the balancing process best serves the disparate goals of our society. Development and preservation compete, while allocators made knowledgeable by the process make the decision. When Congress has not demanded that either mineral development or environmental amenities dominate any particular tract of public land or National Forest, full information is a primary goal of the administrative process.²⁹⁵

Any decision to allocate lands based on predictions about subsurface resources by definition will not be perfect. The BLM or Forest Service may err in their forecasts of oil and gas activity on a tract and some unexpected sacrifices of surface values might result. Three significant safeguards will help avoid environmental Armageddons: 1) the public can alert the agencies to significant resources in proposed leased tracts;²⁹⁶

292. Cf. Edelson, *supra* note 20, at 956-57 (only those Forest Service EA's that were site-specific led to prudent decisionmaking).

293. *I.e.*, the original use of a stipulation forbidding surface occupancy.

294. *I.e.*, a reasoned use of the contingent rights philosophy. See critique of wholesale use of NSO stipulations as a bad faith avoidance of NEPA responsibilities, Comment *supra* note 71, at 189-93 and Comment, *supra* note 245, at 688 n.75.

295. Mansfield, *supra* note 54, at 488-507.

296. See provision for public notice of proposed lease terms, Leasing Reform Act, *supra* note 26, § 5102(d), discussed *supra* note 90.

2) oil company bidding in the now compulsory competitive process can provide a check on the BLM's pre-offer analysis of likely development;²⁹⁷ and 3) the agencies may mitigate subsequent surface disturbance pursuant to their reserved powers.²⁹⁸ The Onshore Oil and Gas Leasing Reform Act of 1987 greatly increased control of mineral leasing and the information that would be available to assist the BLM in the balancing procedure. It should enable the BLM to accommodate conflicting mandates to promote energy development and prevent unnecessary and undue degradation of natural resources.²⁹⁹

The lesson that emerges from the controversy over the leasing of onshore oil and gas has a broader import. It can aid agencies to deal with the uncertain nature of impacts from other proposals. Mitigation and reserved authority to cope with the unforeseen can tailor actions so that NEPA analysis is based on a firm footing. The combined holdings also reflect judicial concern that agencies be allowed to employ a rule of reason to avoid speculative junkets that could prevent reasonable development.³⁰⁰ Sufficient control must exist to avoid headlong rushes into environmental disasters, but NEPA need not forgo "paralysis by analysis."

297. Leasing Reform Act, *supra* note 26, §§ 5102(a) and (b), discussed *supra* note 30. The BLM can reassess a decision to offer a lease up until the time of signing. *McDonald*, 771 F.2d at 463. If competitive interest in a tract belies the developmental ranking of the BLM, it can, if necessary, undertake additional NEPA analysis resulting in a decision not to lease or to reoffer the lease with different stipulations. *Cf.* suggestion that the non-competitive system subsidized oil and gas leases and that a competitive system would allow the market to pace leasing, Edelson, *supra* note 20, at 958-59 and discussion of Forest Service's ability to reject timber contract bids. *Prineville Sawmill Co. v. United States*, 859 F.2d 905 (Fed. Cir. 1988).

298. See text at and authorities cited in notes 80-83 *supra*.

299. See, e.g., 43 U.S.C. § 1732 (1982) and Mansfield, *supra* note 54, at 493-95.

300. Compare treatment of requirement to consider "cumulative" hydrological impacts from existing mines, the subject mine, and "anticipated" mines:

[T]he Secretary's decision represents a basic policy trade-off between holding up or denying *current* mining permit applications until additional data about possible future mining in the area is generated, and risking the possibility that *future* mining in the same area may be delayed or precluded because the full extent of mining activity was not fully anticipated and proper hydrological safeguards were not required. Absent the expression of clear Congressional intent to the contrary, there is no basis for judicial second-guessing. (emphasis in original) (citations omitted)

National Wildlife Federation v. Hodel, 839 F.2d at 759.