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Natural Resources: Federal Coal Leasing in the Powder River Basin - A Call for Reform

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COMMENT

NATURAL RESOURCES: FEDERAL COAL LEASING IN THE POWDER RIVER BASIN—A CALL FOR REFORM

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I. INTRODUCTION

Millions of years ago, a unique combination of climate, flora, fauna, and groundwater flow patterns contributed to the development of massive coal-forming swamps in the Powder River Basin of Wyoming.

ing and Montana.¹ The Wyoming Powder River Basin, typified by thick coal seams with relatively shallow overburden, generated extensive interest within the coal industry² and is currently one of the largest federal coal production regions in the United States.³

Like other public mineral resources,⁴ the Secretary of the Department of the Interior (Interior Department) has overall responsibility for the management and disposition of most western coal reserves.⁵ The Secretary of the Interior (Secretary), in turn, has delegated the duty of administering the federal coal management program to the Bureau of Land Management (BLM).⁶ Through the program's regulations,⁷ the BLM leases coal to private mining companies. In the West, the leasing program is of particular interest because the federal government controls nearly eighty percent of the vast western coal reserves.⁸

1. Frank G. Ethridge & Timothy J. Jackson, *Regional Depositional Framework of the Uranium- and Coal-bearing Wasatch (Eocene) and Fort Union (Paleocene) Formations, Powder River Basin, Wyoming* in GUIDEBOOK TO THE COAL GEOLOGY OF THE POWDER RIVER COAL BASIN, WYOMING 11 (Gary B. Glass, ed., 1980) (Public Information Circular No. 14). The authors detail the Paleocene epoch and Eocene epoch geological events which contributed to the massive coal reserves of the Powder River Basin.

2. Thomas E. Ebzery & Brent R. Kunz, *Federal Coal Leasing in the 1980's: Lessons Learned From the 1970's*, 28 ROCKY MTN. MIN. L. INST. 315, 358 (1983). In 1979, the BLM anticipated that the Powder River Basin, with its low sulfur content coal and favorable mining conditions, would become a leading coal production region. See generally BUREAU OF LAND MANAGEMENT, U.S. DEP'T OF THE INTERIOR, ABSTRACT OF THE FINAL ENVIRONMENTAL STATEMENT, FEDERAL COAL MANAGEMENT PROGRAM at 2-1 to 2-5, 2-15 to 2-28 (1979) [hereinafter Final EIS].

3. In 1990, the state of Wyoming produced over 164 million tons of coal. *Coal Production on Federal Lands Exceeded 234 Million Tons*, INSIDE ENERGY WITH FEDERAL LANDS, Aug. 19, 1991 at 16. According to other data, Wyoming produced 184 million tons in 1990. Of that total, the Powder River Basin produced 88.4%, or 162.7 million tons. See Richard W. Jones, *Coal Update*, WYOMING GEO-NOTES, Feb. 1992, at 17, 20. In 1991, Wyoming coal production totaled 193.9 million tons, which represents a 5.4% increase from 1990. The Powder River Basin production total exceeded 173 million tons (89.4% of the 1991 total). Richard W. Jones, *Coal Update*, WYOMING GEO-NOTES, Aug. 1992, at 22. Commercial development of the Powder River Basin reserves dates back to the 1800's. Gary B. Glass, *Coal Resources of the Powder River Basin*, in GUIDEBOOK TO THE COAL GEOLOGY OF THE POWDER RIVER COAL BASIN, WYOMING, *supra* note 1, at 120. Since 1925, surface-mined coal production has increased steadily. *Id.* at 121.

4. The disposition of fuel and chemical minerals is governed through the Mineral Leasing Act of 1920. 30 U.S.C. §§ 181-287 (1988). See *infra* notes 42 to 43 and accompanying text. Section 201 authorizes the Secretary of the Interior to lease tracts of federal coal. 30 U.S.C. § 201 (1988).

5. Due to the historical development of the West, the United States government controls much of the western coal reserves. See *infra* notes 28 to 40 and accompanying text (describing the government's reservation of the mineral resource).

6. 54 AM. JUR. 2D *Mines and Minerals* § 18 (1971). See also Peter L. Strauss, *Rules, Adjudications, and Other Sources of Law in an Executive Department: Reflections on the Interior Department's Administration of the Mining Law*, 74 COLUM. L. REV. 1231, 1243 (1974).

7. 43 C.F.R. §§ 3400.0-3 to 3487.1 (1991).

8. H.R. REP. NO. 681, 94th Cong., 2d Sess. 9 (1975), reprinted in 1976 U.S.C.C.A.N. 1943, 1945 (Federal Coal Development (Current Situation)). The federal government owns nearly sixty percent of western coal and due to ownership patterns, federal coal leasing policies affect nearly eighty percent of coal reserves. As noted in 1975, "[t]he overwhelming majority of the federal leases lie in the Western United States." *Id.*

The regulatory leasing program, mandated by the Mineral Leasing Act of 1920,⁹ as revised by the Federal Coal Leasing Amendments Act (FCLAA),¹⁰ consists of two main components, competitive leasing in certified coal production regions¹¹ and leasing on application (commonly called leasing-by-application or LBA).¹² Within certified coal production regions,¹³ the BLM issues leases following completion of three phases: land use planning, activity planning, and lease sale activities.¹⁴ When reserves are located outside of certified coal production regions, the BLM leases coal through the LBA process which includes two phases of land-use planning and lease sale activities.¹⁵

In 1989, the Kerr-McGee Coal Corporation (Kerr-McGee) submitted an application to mine additional reserves at its existing Jacobs Ranch Mine, located in the Powder River Basin of Wyoming.¹⁶ At that time, the area was a certified coal production region and in accordance with the established federal coal leasing program, the BLM processed Kerr-McGee's application through the LBA process as an "emergency by-pass lease."¹⁷ During the processing period, the BLM decertified the Powder River Basin coal production region which effectively placed all of the federal reserves "outside" of a coal production region. Due to decertification, the BLM changed the classification from an emergency by-pass to a maintenance tract lease application.¹⁸

9. 30 U.S.C. §§ 181-287 (1988).

10. Federal Coal Leasing Amendments Act of 1975, Pub. L. No. 94-377, 90 Stat. 1083 (1976) (codified as amended in scattered sections of 30 U.S.C.). See *infra* notes 58 to 60 and accompanying text. The regulatory program also implements the provisions of other acts, including the Federal Land Policy and Management Act of 1976 and the Surface Mining Control and Reclamation Act of 1977. See 43 C.F.R. § 3400.0-3 (1991).

11. 43 C.F.R. §§ 3420.0-1 to 3420.6 (1991).

12. *Id.* §§ 3425.0-1 to 3425.5. The regulatory nomenclature is "leasing on application."

13. The regulations do not expressly define "certified coal production region" but they do specify that the BLM shall "establish," by publication, a coal production region in order to comply with the coal management program. 43 C.F.R. § 3400.5 (1991). "Coal production regions shall be used for establishing regional leasing levels . . . Coal production regions shall be used to establish areas in which leasing shall be conducted under [the section entitled Activity planning: The leasing process] . . . and for other purposes of the coal management program." *Id.* Under the BLM's interpretation, the term includes regions of high leasing interest. See *infra* note 133. Common usage recognizes an "established" coal production region as "certified." The BLM "decertifies" coal production regions when industry leasing interest has lessened and activity planning is no longer practical. See *infra* note 163 and accompanying text.

14. See *infra* notes 94 to 117 and accompanying text (describing the three-phase regional leasing process).

15. See *infra* notes 118 to 124 and accompanying text (describing the LBA process).

16. BUREAU OF LAND MANAGEMENT, DEPARTMENT OF THE INTERIOR, ENVIRONMENTAL ASSESSMENT OF THE JACOBS RANCH COAL LEASE APPLICATION FOR KERR-McGEE COAL CORPORATION (FEDERAL COAL LEASE APPLICATION WYW117924) 2 (1991) [hereinafter Jacobs Ranch EA]. Kerr-McGee filed the application on October 2, 1989.

17. The BLM may use the LBA process in certified coal production regions when the applicant demonstrates an "emergency need for unleased coal . . ." 43 C.F.R. § 3425.0-2 (1991). See *infra* note 87 (listing the emergency by-pass lease requirements).

18. Maintenance tracts "continue or extend the producing life of an existing mine." Jacobs Ranch EA, *supra* note 16, at 1; see also *infra* note 172 and accompanying text.

In August, 1991, the Wyoming State Director of the BLM recommended leasing the requested Jacobs Ranch reserves and scheduled the lease sale.¹⁹ One day prior to the scheduled sale, the Powder River Basin Resource Council, Wyoming Outdoor Council, and the Wyoming Chapter of the Sierra Club challenged the sufficiency of the agency's environmental evaluation and filed an appeal (Jacobs Ranch Appeal) with the Interior Board of Land Appeals (IBLA).²⁰ Notwithstanding the appeal, the lease sale commenced the next day; Kerr-McGee was both the sole and successful bidder.²¹

On September 15, 1992, the IBLA sustained the BLM's leasing decision.²² The IBLA held that, as a matter of law, the appellants did not successfully demonstrate the inadequacy of the agency's environmental evaluation.²³ The IBLA did not address the appellants' assertions that the Powder River Basin had been improperly decertified nor the appellants' general concerns about the propriety of the Powder River Basin lease sales. The Board stated that both issues were beyond the jurisdiction of the IBLA.²⁴ However, regardless of the IBLA's inability to focus on these issues, the fact remains that the problems associated with decertification need to be addressed.

This comment discusses the effect of decertification on the management of a vast and valuable public resource: the Powder River Basin coal reserves. In order to emphasize the significance of the public coal resource, this comment first discusses the history of the federal coal leasing program, tracing the disposition of federal coal from Congress' constitutional power over public lands through the BLM's leasing procedure in coal production regions. Secondly, this comment contrasts the leasing procedure utilized in certified coal production regions (regional coal leasing) with the LBA process. This comment then centers on the meaning of a coal production region and the use of the LBA process in such regions. As demonstrated by the discussion, the use of the LBA process in the Powder River Basin coal production regions does not comply with the intent of FCLAA. To ensure compliance, the BLM could recertify the Powder

19. Powder River Basin Resource Council, 124 I.B.L.A. 83, 87 (1992).

20. *Id.* at 86-87. The groups filed a notice of appeal on September 25, 1991. Brief for Appellant at 1, Powder River Basin Resource Council, 124 I.B.L.A. 83 (1992) [hereinafter Appellants' Statement of Reasons]. On October 25, 1991, the appellants filed their Statement of Reasons. *Id.* at 22.

21. Bureau of Land Management, Official Case File No. WYW117924 (Jacobs Ranch Tract) (on file with the Bureau of Land Management, Wyoming State Office, Cheyenne, Wyo.). At the September 26, 1991 lease sale, Kerr-McGee bid \$20,114,930 for 132,681,204 tons of coal. *Id.*

22. Powder River Basin Resource Council, 124 I.B.L.A. 83, 96 (1992).

23. *Id.*

24. *Id.* at 90. Because the Secretary approved the decertification decision, the IBLA had no reviewing authority. "[T]he Board's authority is limited to considering appeals from decisions of the BLM." *Id.*

River Basin coal production region. Alternatively, the federal government should reform the coal management program, either by the Interior Department promulgating new rules or by Congress enacting new legislation to address the shortcomings of using the LBA process in large coal production regions.

II. A HISTORICAL REVIEW OF FEDERAL COAL LEASING

During the 19th century, Congress utilized the Property Clause of the United States Constitution to encourage settlement in the West.²⁵ Congress freely granted federal lands to individuals, soldiers, newly formed state governments, and railroads. At the same time, Congress legislatively withdrew or "reserved" certain lands or land types from the disposal process, thus retaining ownership in the federal government.²⁶ Congress reserved these lands for "public purposes," such as military reservations, trading posts, lighthouses, town sites, and Indian reservations.²⁷

By the latter part of the 19th century, the "disposal-orientated" policies precipitated controversies.²⁸ Realizing that the federal government owned vast amounts of subsurface minerals, and wanting to retain the property for the public benefit, Congress reacted.²⁹ In 1872, Congress passed the General Mining Law which reserved "lands valuable for minerals" that would otherwise be sold under the homestead laws.³⁰ The Act established a claim-patent (patent-location) system for

25. The Property Clause of the United States Constitution vests Congress with the power to "dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . ." U.S. CONST. art. IV, § 3, cl. 2. Congress could exercise the power by lease or grant. Raymond A. Peck, Jr., *"And Then There Were None": Evolving Federal Restraints on the Availability of Public Lands for Mineral Development*, 25 ROCKY MTN. MIN. L. INST. 3-1, 3-15 to 3-16 (1979).

26. *Id.* at 3-16. The government typically uses three mechanisms to withdraw public resources from disposition or to prevent development: (1) withdrawal, (2) classification, or (3) reservation. A particular parcel of land may be "withdrawn" from application of some or all public land laws. Use of lands which are "classified" as a particular type or designated for a particular use may be restricted through application of specific laws. "Reservation" concerns reserving a particular geographic area for future public use. Peck, *supra* note 25, at 3-9 to 3-10 & n.30. Peck also notes that administrative federal land-use planning policies and procedures may achieve the same effect as the traditional withdrawal mechanisms. *Id.* at 3-10.

27. *Id.* at 3-16 to 3-17. Congress also delegated "some authority to control the disposition of public lands" to the executive. *Id.* at 3-17.

28. *Id.* "A growing sentiment away from the policy of disposal and toward conservation of public lands for public purposes developed." *Id.* at 3-18.

29. *Id.* Congress' actions "reflected a heightened public and congressional awareness of the enormous value of the resources which had been passing almost without notice into private ownership." *Id.* at 3-17. The movement towards conservation of public lands for public purposes began to expand in other areas as well. In 1872, Congress enacted legislation which created Yellowstone National Park. Act of March 1, 1872, 17 Stat. 32 (current version at 16 U.S.C. § 21 (1988)). See also Peck, *supra* note 25, at 3-18.

30. General Mining Law of 1872, 17 Stat. 91 (codified as amended at 30 U.S.C. §§ 21-47 (1988)).

development of mineral lands.³¹ A successful mining claimant then could apply for a land patent.³²

Theodore Roosevelt's administration (1900-1908) used the "general supervisory power of the Executive," in conjunction with other authorization, to increase the amount of reserved public property beyond that authorized by Congress.³³ President Roosevelt pushed land withdrawals to prevent "great fraud upon the public domain."³⁴ In 1906, Secretary of the Interior James R. Garfield withdrew virtually all coal lands to prevent "monopolistic acquisitions."³⁵ Toward the close of his administration, President Roosevelt appointed the National Conservation Commission (Commission) to review the status of the nation's natural resources.³⁶

Soon after the release of the Commission's report,³⁷ Congress passed the Acts of March 3, 1909 and June 22, 1910 which reserved

31. Under the location system, a prospector may enter public domain and search for specified locatable minerals. Once the prospector discovers a valuable mineral deposit, and follows applicable laws, the prospector is entitled to an unpatented mining claim. 1 AM. L. OF MINING § 30.01 (2d ed. 1984). In addition to obtaining mineral rights, a successful locator is also entitled to "the exclusive right of possession and enjoyment of all the surface included within the lines of their locations . . ." 30 U.S.C. § 26 (1988).

32. 30 U.S.C. § 29 (1988). Although the location system served the Act's purpose of encouraging mineral development on federal land, the general public received no benefit from the use of public property. The successful prospector was under no obligation to give any of the proceeds to the federal government. 1 AM. L. OF MINING § 30.06[2] (2d ed. 1984). This type of acquisition can still be used for hard rock minerals on *public* lands. Other minerals and *acquired* hard rock minerals are disposed of through lease or sale systems. George Cameron Coggins & Jane Elizabeth Van Dyke, *NEPA and Private Rights in Public Mineral Resources: The Fee Complex Relative?* 20 ENVTL. LAW 649, 653-655 (1990). Public lands are lands obtained from other countries, through treaties, cession or purchase while *acquired* lands refer to those lands the federal government purchased from private entities. Final EIS, *supra* note 2, at 1-8.

33. Peck, *supra* note 25; at 3-19.

34. *Id.*

35. *Id.* at 3-20. The Secretary acted under President Roosevelt's directive. ROY M. ROBBINS, *OUR LANDED HERITAGE, THE PUBLIC DOMAIN 1776-1970* 346 (1976). Because of the vast unclaimed coal reserves in the West, this perceived overextension of the executive authority caused considerable concern in the unsettled western territories. Peck, *supra* note 25, at 3-20 n.71. Acting in response to the belief that the executive withdrawal authority was being exceeded, Congress, in 1907, required that further forest withdrawals be achieved only through legislation. *Id.* Immediately prior to the revocation of his authority, President Roosevelt withdrew an additional twenty-one forest reserves, totalling 16 million acres. *Id.* at 3-20 to 3-21 & n.75. In 1910, William Howard Taft, Roosevelt's successor, requested that Congress delineate the extent of the executive withdrawal power. Congress responded with the General Withdrawal Act of June 25, 1910, more commonly known as the "Pickett Act." *Id.* at 3-23 to 3-24. See generally 43 U.S.C. §§ 141-158 (1988). However, the United States Supreme Court upheld the propriety of the executive to withdraw lands. *United States v. Midwest Oil Co.*, 236 U.S. 459 (1915). In *Midwest Oil Co.*, the Court held that in the absence of specific legislation authorizing withdrawal, the Executive Branch could issue executive withdrawal orders when such orders served the public's interest. *Id.*

36. ROBBINS, *supra* note 35, at 356.

37. *Id.* The Commission noted that corporations were acquiring valuable coal land under the auspices of agricultural land laws. The Commission recommended "that the remaining federal coal lands should be *leased*, reserving the surface for agricultural purposes if suitable." *Id.* at 359 (emphasis added).

the mineral estate of lands that the United States Geological Service (USGS) classified as valuable.³⁸ The Stock-Raising Homestead Act, enacted in 1916, reserved the mineral estate to the United States for every patent issued.³⁹ Both the Act of March 3, 1909 and the Stock-Raising Homestead Act provide that the ultimate disposal of reserved coal will be accomplished under the law "in force at the time of disposal."⁴⁰ In 1920, Congress passed the Mineral Leasing Act⁴¹ to facilitate disposal of withdrawn fuel and chemical minerals.⁴²

A. *The Mineral Leasing Act of 1920*

The Mineral Leasing Act of 1920 represented a significant departure from the General Mining Law of 1872. The Act segregated fuel and chemical minerals, including coal, out of the former location system and established a leasing system.⁴³ Depending on the extent of USGS surveys, the government leased federal coal through competitive bidding or through a non-competitive "Preference Right Lease" system. In areas of known deposits, the Interior Department conducted competitive bidding. For unsurveyed lands, miners had to obtain prospecting and mining permits from the Secretary. Once a permit holder demonstrated that the unsurveyed land contained commercial quantities of coal, the Interior Department awarded a Preference Right Lease.⁴⁴ Through either system, the Interior Department granted the leases for indeterminate time frames, providing the conditions of diligent development and continuous operations were met. Lease terms were subject to readjustment after twenty-year periods, and leases could be modified by an additional 2,500 contiguous acres.⁴⁵

38. Hon. Leo M. Krulitz, *Management of Federal Coal Reserves*, 24 ROCKY MTN. MIN. L. INST. 139, 179-80 (1978). The USGS classified lands either prior to entry or at the time of patent application. *Id.* at 180. See 30 U.S.C. § 81 (1988); 30 U.S.C. § 83 (1988). See also ROBBINS, *supra* note 35, at 370-71.

39. The Stock-Raising Homestead Act required reservation regardless of the value of the mineral estate. Krulitz, *supra* note 38, at 180. See also 30 U.S.C. §§ 81-90 (1988).

40. Krulitz, *supra* note 38, at 180. See 30 U.S.C. § 81 (1988) and 43 U.S.C. § 299 (1988), respectively.

41. Mineral Leasing Act of 1920, 41 Stat. 438 (codified as amended at 30 U.S.C. §§ 181-287 (1988)).

42. Coggins & Van Dyke, *supra* note 32, at 654.

43. *Id.* In 1917, the United States Supreme Court decided a case which involved Utah's assertion that a federal forest reserve located in Utah was subject to that state's laws. *Utah Power & Light Co. v. United States*, 243 U.S. 389 (1917). Utah constructed a series of water works, the majority of which were located on the federal reserve, to generate electricity. *Id.* at 402-03. The federal government sought to enjoin Utah from using and occupying the federal land. Writing for the majority, Justice Van Devanter stated that Congress, and only Congress, determined the disposition of federal lands. *Id.* at 404. One author suggests that this decision lead to the conclusion that "[t]he leasing system offered the best compromise between the two extremes of state control and federal reservation, and toward this objective the two contending schools of thought turned their efforts." ROBBINS, *supra* note 35, at 394. Soon thereafter, Congress enacted the Mineral Leasing Act of 1920.

44. Coggins & Van Dyke, *supra* note 32, at 659.

45. Ebzery & Kunz, *supra* note 2, at 316.

Between 1920 and 1970, the Interior Department issued competitive coal leases for approximately 800,000 acres of land. During the same time period, the Interior Department granted numerous prospecting permits. Of these permits, prospectors submitted Preference Right Lease applications for an additional 470,000 acres.⁴⁶ Analysts estimated that coal under lease by 1970 could have supplied 250 million tons per year; however, actual federal coal production totalled a mere 7.4 million tons.⁴⁷

Responding to the wide disparity between potential and actual production, in 1971, the Interior Department issued an informal moratorium on all new federal coal leasing and prospecting permits. In 1973, the Secretary formalized the moratorium and directed the Interior Department to begin work on a new federal coal management program.⁴⁸ The Interior Department implemented an interim program to address coal leasing while the federal coal management program was restructured.⁴⁹ Through the interim program, the BLM issued short-term leases only to maintain an existing mine operation or to supply coal for immediate future production.⁵⁰ With short-term leasing in place, the Interior Department turned to the new program.

Under the mandate of the National Environmental Policy Act (NEPA),⁵¹ the Interior Department prepared a programmatic environmental impact statement (EIS) for the new leasing program.⁵² The sufficiency of the EIS was promptly challenged.⁵³ In *Natural Resources Defense Council v. Hughes*, the plaintiffs claimed that the Interior Department failed to comply with NEPA.⁵⁴ In 1977, nearly two years later, the court held that the Interior Department violated

46. Krulitz, *supra* note 38, at 140.

47. *Id.* at 140-41. A BLM report stated that "less than ten percent of the total leased acreage was producing coal." David B. Pariser, *Current Issues Relating To Emergency Federal Coal Leasing*, 89 W. VA. L. REV. 593, 597 (1987).

48. Krulitz, *supra* note 38, at 141.

49. *Id.*

50. Ebzery & Kunz, *supra* note 2, at 318. Unless the lessee needed the coal to supply an existing market and the lessee intended to initiate mining within three years, the Interior Department would not issue the lease. *Id.* One author characterizes the interim short-term leasing process as the "beginning of an emergency federal coal leasing policy." Pariser, *supra* note 47, at 597. For further discussion of emergency leasing, see *infra* note 87.

51. 42 U.S.C. §§ 4321-61 (1988). Under NEPA, an EIS is required for "every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment" 42 U.S.C. § 4332(2)(C) (1988). See 40 C.F.R. § 1502.3 (1991).

52. The new leasing program, titled the *Energy Minerals Activity Recommendation System (EMARS)*, consisted of three phases: (1) nominations and programming, (2) scheduling, and (3) leasing. The program also required environmental assessment. Ebzery & Kunz, *supra* note 2, at 319-20.

53. *Natural Resources Defense Council v. Hughes*, 437 F. Supp. 981 (D.D.C. 1977), *modified*, 454 F. Supp. 148 (D.D.C. 1978).

54. *Id.* at 982-83. One of the primary claims involved the Interior Department's failure to evaluate alternatives, which NEPA mandates. See 42 U.S.C. § 4332(2)(C)(iii), (2)(E) (1988).

NEPA in the formulation and adoption of EMARS.⁵⁵ The court imposed further restrictions on short-term leasing and ordered the Interior Department to evaluate the need for a new federal coal leasing program.⁵⁶

B. The Federal Coal Leasing Amendments Act of 1976

From 1974 through 1977, Congress evaluated the Interior Department's management of public lands, including federal coal reserves.⁵⁷ While the *Natural Resources Defense Council* suit was pending and the leasing moratorium was still in effect, Congress enacted FCLAA⁵⁸ which substantially amended the Mineral Leasing Act of 1920.⁵⁹ As characterized in the House Report accompanying FCLAA, the basic purpose of the Act was "to provide a more orderly procedure for the leasing and development of coal presently owned by the United States or in lands owned by the United States and to assure its development in a manner compatible with the public interest."⁶⁰ The House Report identified several major issues that plagued the existing federal coal leasing process,⁶¹ including the need for increased environmental protection, planning and public participation, the assurance of a fair return to the public, and the need to discourage speculation.

55. *Natural Resources Defense Council*, 437 F. Supp. at 993. During the two-year time span, the Interior Department attempted to alter various facets of the program, possibly in hopes that the plaintiffs' concerns would be met. The *Natural Resources Defense Council* was unappealed and maintained that any leasing would violate the intent of NEPA. Ebzery & Kunz, *supra* note 2, at 321.

56. *Natural Resources Defense Council*, 437 F. Supp. at 993. To evaluate the need, the court directed the preparation of a new programmatic EIS. In 1979, under the new administration of President Carter, the Interior Department issued the programmatic EIS for the new Federal Coal Management Program. Pariser, *supra* note 47, at 603. See also *infra* notes 87 to 124 and accompanying text (describing the new Federal Coal Management Program).

57. Pariser, *supra* note 47, at 599.

58. The initial outlook for passing the bill was not promising. However, Senator Clifford Hansen of Wyoming tacked on a provision which increased the states' share of federal mineral royalties from 37.5% to 50.0%. The Senator's amendment gained the support of several western legislators. Ebzery & Kunz, *supra* note 2, at 323. Congress passed FCLAA in 1976 over President Ford's veto. *Id.*

59. Some of the major changes included: eliminating Preference Right Leases, eliminating indeterminate lease terms, mandating competitive bidding, consolidating leases into logical mining units to ensure maximum recovery, reducing acreage that could be added by modification from 2,560 acres to 160 acres, and establishing diligence requirements. Donald L. Humphreys, *Existing Federal Coal Leaseholds-How Strong Is the Hold?*, 25 ROCKY MTN. MIN. L. INST. 5-5 to 5-7 (1979). In 1978, Congress further amended the non-competitive leasing modification provision of the Mineral Lands Leasing Act of 1920. *Id.* at 5-7 to 5-8.

60. H.R. REP. No. 681, *supra* note 8, at 8, reprinted in 1976 U.S.C.C.A.N. 1943, 1943.

61. H.R. REP. No. 681, *supra* note 8, at 14, reprinted in 1976 U.S.C.C.A.N. 1943, 1950. The report identified eight major issues: speculation; concentration of holdings; fair return to the public; environmental protection, planning and public participation; social and economic impacts; need for information; maximum economic recovery of the resource; and military lands.

1. Environmental Protection, Planning and Public Participation

In order to remedy the past effects of the industry-driven leasing, the House Report emphasized the need for the Interior Department to adopt a planning approach.⁶² FCLAA mandated comprehensive planning, which included participation of the public and state and local governments. In addition, FCLAA required that the Secretary "consider the effects which the issuance of the lease might have on the area as it pertains to environmental disruption, community services, economic impacts and the like."⁶³

2. Fair Return to the Public

The House Report stated that the "public [was] being paid a pittance for its coal resources"⁶⁴ due to the Interior Department's practice of issuing Preference Right Leases and the lack of true competitive bidding. By definition, the Preference Right Lease system resulted in non-competitive leasing.⁶⁵ Likewise, non-competitive leasing aptly characterized the "competitive bid" process because often only one bid was submitted, and then accepted, for a particular tract. As stated in the House Report, "[s]ince the bid is related to the number of bidders, those tracts which attract only one bid are not likely to result in payment of a fair return to the public."⁶⁶ The FCLAA addressed both concerns. The Act eliminated the Preference Right Lease system.⁶⁷ Instead, a prospector had to obtain an exploration license and then enter the competitive bid process to procure the lease.⁶⁸ Additionally, FCLAA mandated a competitive bidding process and required that accepted bids be at least equal to fair market value (FMV).⁶⁹

62. H.R. REP. NO. 681, *supra* note 8, at 18-19, *reprinted in* 1976 U.S.C.C.A.N. 1943, 1954-55. The House Report noted that both EMARS and NEPA initiated a planning approach to resource management and emphasized Congress' intent to use the same approach under FCLAA. *Id.* at 18.

63. H.R. REP. NO. 681, *supra* note 8, at 19, *reprinted in* 1976 U.S.C.C.A.N. 1943, 1955.

64. H.R. REP. NO. 681, *supra* note 8, at 17, *reprinted in* 1976 U.S.C.C.A.N. 1943, 1953.

65. *Id.* See also *supra* text accompanying note 44 (characterizing the Interior Department's award of Preference Right Lease).

66. H.R. REP. NO. 681, *supra* note 8, at 17, *reprinted in* 1976 U.S.C.C.A.N. 1943, 1953. Data compiled by the committee demonstrated that while more than 50% of all leases were offered for competitive bid, 72% received less than two bidders. This situation was "not really reflective of a competitive environment." *Id.*

67. 30 U.S.C. § 201(b) (1988). See 43 C.F.R. § 3430.0-7 (1991). After FCLAA's enactment, the Interior Department could not issue coal prospecting permits, the precursor to Preference Right Leases. See *supra* text accompanying note 44.

68. H.R. REP. NO. 681, *supra* note 8, at 18, *reprinted in* 1976 U.S.C.C.A.N. 1943, 1954 (codified at 43 C.F.R. §§ 3410.0 to 3410.5 (1991)).

69. The Interior Department determines fair market value (FMV). 30 U.S.C. § 201 (1988). See 43 C.F.R. § 3422.1(c)(1) (1991); *infra* note 88 (reporting the regulatory definition of FMV).

3. Speculation

The House Report also described how the Mineral Leasing Act facilitated speculation. Through the Act, lease permittees could hold a permit for an extended period of time even though the permittees did not extract a significant amount of coal. Permittees were able to "sit" on leases because the Act did not define expressly the requirements of "diligent development" and "continued operation." Furthermore, the Secretary often waived the limited requirements and accepted a minimum royalty payment in lieu of continued operation.⁷⁰ To remedy these concerns, FCLAA established diligence development and continued operation requirements.⁷¹

III. THE NEW FEDERAL COAL MANAGEMENT PROGRAM

A. *The Rules of the New Federal Coal Management Program*

In 1977, recently elected President Carter issued an Environmental Message⁷² to Congress which outlined actions to implement the policies of FCLAA and the Federal Land Policy and Management Act of 1976 (FLPMA).⁷³ The President also directed Secretary Andrus to manage non-producing and/or environmentally unsatisfactory leases and applications.⁷⁴ Subsequently, the Secretary ordered the preparation of a new programmatic EIS to evaluate the federal coal management program. In June, 1979, Secretary Andrus announced his decision for the new program.⁷⁵

Among the program's new provisions, Secretary Andrus called for public participation in the leasing decision process through the

70. H.R. REP. NO. 681, *supra* note 8, at 14, *reprinted in* 1976 U.S.C.C.A.N. 1943, 1950. In addition to the lessees' speculative holdings, prospectors tied up other coal reserves through the Preference Right Lease process. The House Report noted that the process "contributed to speculative holding . . . by making it possible gain control of public resources at virtually no cost." H.R. REP. NO. 681, *supra* note 8, at 15, *reprinted in* 1976 U.S.C.C.A.N. 1943, 1950.

71. 30 U.S.C. § 207(a), (b) (1988). If a lessee fails to meet the requirements, the Interior Department may initiate cancellation proceedings. 43 C.F.R. § 3452.2-1 (1991). The FCLAA also repealed the Preference Right Lease system. *See supra* note 67 and accompanying text.

72. *President Carter's Environmental Message to Congress*, 8 Env't Rep. (BNA) 132 (May 23, 1977).

73. 43 U.S.C. §§ 1701-1784 (1988). Although FLMPA did not directly address coal, its general land-management policies affect coal development and the federal coal-management program. Also in 1977, Congress passed the Surface Mining Control and Reclamation Act (SMCRA). 30 U.S.C. §§ 1201-1328 (1988). Several of SMCRA's provisions affect the coal management program. Ebzery & Kunz, *supra* note 2, at 330.

74. *Id.* at 329-30. *See also President Carter's Environmental Message to Congress*, 8 Env't Rep. (BNA) 136 (May 23, 1977).

75. *Id.* at 333-37. In the new programmatic EIS, Secretary Andrus thoroughly addressed the alternatives mandated by NEPA, unlike the 1975 EMARS programmatic EIS. *See supra* note 54. For a review of the new federal coal management program alternatives see BUREAU OF LAND MANAGEMENT, UNITED STATES DEPARTMENT OF THE INTERIOR, SECRETARIAL ISSUE DOCUMENT, FEDERAL COAL MANAGEMENT PROGRAM (1976) [hereinafter SID].

formation of Regional Coal Teams (RCT's).⁷⁶ The RCT's, which included state government officials as voting members,⁷⁷ were formed to assist with planning and leasing development within coal production regions.⁷⁸ Other aspects of the program addressed management of existing leases and unsuitability criteria designation, maximum economic recovery, and Preference Right Leasing applications.⁷⁹

The Interior Department promulgated the new coal management program rules in July, 1979. However, before the new rules could be implemented, the administration of President Ronald Reagan, with James Watt as Secretary of the Interior, came to power. The new administration sought "to identify opportunities to streamline the existing rules and ultimately make the leasing process more efficient."⁸⁰ In April of 1981, Secretary Watt requested a review of the program's policies and regulations.⁸¹ The Interior Department amended the 1979 rules and issued final rules on July 30, 1982.⁸²

Significant changes included establishing leasing levels as opposed to leasing targets to assist the Secretary's leasing plans and decisions, relaxation of due diligence requirements, and clarification of the RCT's' role.⁸³ The new rules also lifted some of the emergency leasing cri-

76. A Regional Coal Team (RCT) consists of the BLM State Director(s) (or an appointed representative) for each state in the region, the Governor(s) (or an appointed representative) of each state, and a representative appointed by the Director of the BLM. The Director's appointee serves as chairperson. If the region spans more than one state but is under the jurisdiction of one BLM State Office, each state director appoints a BLM representative. 43 C.F.R. § 3400.4 (1991).

77. The simultaneous input of the public and private industry sectors at the planning stages was, in part, designed to alleviate concerns that industry "drive[s] the system." Ebzery & Kunz, *supra* note 2, at 334.

78. The Federal Advisory Committee Act permits the formation of advisory groups to aid officials, agencies, or officers with decisionmaking. 5 U.S.C. app. § 2 (1988).

79. Ebzery & Kunz, *supra* note 2, at 335-37. The new program also gave the Secretary discretion to determine applicable sales systems. One example of a sales system is the intertract sales procedure. Several tracts are offered in a sale but the Secretary retains the discretion to accept only the highest individual tract bids. *Id.* at 335.

80. Pariser, *supra* note 47, at 604.

81. *Id.*

82. 47 Fed. Reg. 33,114-51 (1982). The process of creating a "new" federal coal management program spanned four administrations with three reviewing specifically the program. The initial review began in 1973, during Nixon's administration, and the challenge to EMARS was mounted in 1975, after Ford stepped into the presidency. In 1976, Congress enacted FCLAA. Following the district court's decision in *Natural Resource Defense Council*, newly elected President Carter placed the leasing program under review. See *President Carter's Environmental Message to Congress*, 8 Env't Rep. (BNA) 136 (May 23, 1977). Under Carter's administration, the Interior Department developed a new leasing program and promulgated rules in 1979. Pariser, *supra* note 47, at 601. In 1982, President Reagan's administration finalized the process with the revision of the 1979 rules.

83. Ebzery & Kunz, *supra* note 2, at 339. According to the authors, the 1982 rules eliminated "a number of redundant public hearings", *id.*, and "[t]he [new] regulations for the most part kept the significant features of the program intact." *Id.* However, one of the revised regulations proved to substantially alter the leasing program. The BLM construed the regulation which permitted change or modification of the coal production region boundary to allow "de-certification" of the region. For a discussion of coal production regions and decertification, see *infra*, notes 161 through 170 and accompanying text.

teria.⁸⁴ Shortly after publication of the 1982 rules, which were promulgated without a new or supplemental EIS, the Natural Resources Defense Council filed suit.⁸⁵ The district court determined the plaintiffs lacked standing and dismissed the suit.⁸⁶

B. The Leasing Processes of the New Federal Coal Management Program

The federal coal management program regulations establish two main leasing processes: (1) competitive regional leasing in coal production regions and (2) the LBA process for reserves located outside of coal production regions or for emergency lease situations.⁸⁷ Before the government issues a lease through either process, the government must receive fair market value (FMV).⁸⁸ Regulatory exceptions to the two main leasing processes include Preference Right Leases,⁸⁹ Ne-

84. Pariser, *supra* note 47, at 604-06. The Interior Department reported that "other provisions of the regulations provided sufficient safeguards to prevent abuses to the competitive leasing process." *Id.* at 606.

85. Ebzery & Kunz, *supra* note 2, at 339-40. The plaintiffs asserted that the new rules would have greater impacts on the environment and challenged the adequacy of the existing environmental evaluation. *Id.* See *Natural Resources Defense Council v. Burford*, 716 F. Supp. 632, 633 n.1 (D.D.C. 1988).

86. 716 F. Supp. at 638. The plaintiffs asserted that the revised rules did not comport with the substantive federal statutes governing coal management and land-use planning. *Id.* at 633-35. Although dismissing the suit, the court noted that the program changes were precipitated by the new administration:

In 1981, with the advent of a new administration, Interior [Department] began a review of federal coal leasing policy which culminated in a number of alterations to the federal coal leasing scheme. Among these changes were the shift from a coal leasing program based on the market demand for coal production to one in which industry demand for coal reserves was the basic criterion for setting coal leasing levels.

Id. at 634 (emphasis added).

87. The BLM may issue emergency leases to prevent the by-pass of unleased federal coal and to maintain production levels of operating mines. Pariser, *supra* note 47, at 606. Unless the applicant successfully demonstrates the need, the BLM cannot issue the emergency lease. The applicant must show that the proposed mining will be within the existing operation and that either (1) the reserves are needed within three years to maintain existing production or to satisfy contracts; or (2) the reserves will be otherwise bypassed in the near future and, if leased, some portion will be mined within three years. The emergency need circumstances must have been either beyond the control of the prospective lessee or unforeseeable with proper planning. Additionally, the proposed lease quantity cannot exceed the quantity that would be retrieved in eight years at the existing production rate. 43 C.F.R. § 3425.1-4 (1991). See also Pariser, *supra* note 47, at 606 & n.59.

88. The requirement is mandated by FCLAA. 30 U.S.C. § 201(a)(1) (1988); see 43 C.F.R. § 3422.1(c)(1) (1991). Fair market value "means that amount in cash, or on terms reasonably equivalent to cash, for which in all probability the coal deposit would be sold or leased by a knowledgeable owner willing but not obligated to sell or lease to a knowledgeable purchaser who desires but is not obligated to buy or lease." 43 C.F.R. § 3400.0-5(n) (1991).

89. 43 C.F.R. §§ 3430.0-1 to 3430.7 (1991). Although FCLAA repealed the Preference Right Lease system, the regulations do allow existing holders to apply for noncompetitive leases if they can document compliance with the permit terms. *Id.* § 3430.1-1.

gotiated Sales,⁹⁰ Lease Modifications,⁹¹ Lease Exchanges,⁹² and Exchanges concerning Alluvial Valley Floors.⁹³ The following discussion characterizes the two main processes, regional leasing and the LBA.

1. Regional Leasing in Certified Coal Production Regions

Prior to awarding any leases in a coal production region, the Interior Department must establish prospective coal production leasing levels.⁹⁴ The BLM recommends a leasing level to the Secretary after consulting with other RCT members⁹⁵ and other appropriate agencies. Once the Secretary determines a leasing level, the regional leasing process proceeds through three main phases: (1) land-use planning, (2) activity planning, and (3) lease sale activities.

Phase one, land-use planning, is utilized to identify areas acceptable for coal leasing. To identify the areas, the managing agency uses a four-step screening procedure.⁹⁶ If a potential lease area fails to satisfy the criteria of any of the screens, the agency removes it from further consideration. Federal coal lands which pass the screening can then be further considered for leasing in the activity planning stage.⁹⁷

90. *Id.* §§ 3431.0-1 to 3431.2.

91. *Id.* §§ 3432.0-3 to 3432.3. Prior to FCLAA's enactment, the Secretary could allow an existing operation to be modified by an additional 2,560 acres. Section 13 of FCLAA revised the provision by limiting the modification to 160 acres or to the number of acres in the original permit, whichever is less. 30 U.S.C. § 203 (1988). See 43 C.F.R. §§ 3432.0-3 to 3432.1 (1991).

92. *Id.* §§ 3435.0-1 to 3435.4.

93. *Id.* §§ 3436.0-1 to 3436.2-3. The BLM may exchange federal coal to comply with the mandate of the Surface Mining Control and Reclamation Act which prohibits mining in alluvial valley floors.

94. *Id.* § 3420.2. Leasing levels are based on information obtained from a variety of sources including: land-use planning data, results of calls for coal resource information and/or calls for expressions of leasing interest, and advice and/or suggestions from Governors of the affected states. *Id.* § 3420.2(a)(1).

95. The RCT's provide a vital role in the planning stages of coal leasing. Mandated responsibilities include assisting with tract delineation, selection, and ranking, guiding the preparation of regional environmental impact statements, and recommending regional leasing levels. 43 C.F.R. § 3420.3-1(c)(1)-(4) (1991). According to the regulations, the RCT "shall also serve as the forum for Department/state consultation and cooperation in all other major Department coal management program decisions in the region, including preference right lease applications, . . . emergency leasing and exchanges." *Id.* § 3400.4(c).

96. *Id.* § 3420.1-4(e). The first screen involves the leasing potential of the area. At this stage, parameters of quality and economic recoverability are considered. The second screen concerns the evaluation of unsuitability criteria. These criteria range from unsuitability standards mandated by the Surface Mining Control and Reclamation Act to threatened or endangered species. The third screen involves a multiple land-use decision. An area may be removed from consideration if other resources or uses are deemed to be of greater importance or use. The fourth screen requires consultation with and consent of qualified surface land owners. An area previously removed from consideration due to the lack of land owner consent may be reconsidered if conditions have changed. *Id.* § 3420.1-4(e)(1)-(4).

97. *Id.* § 3420.1-8.

At the second phase, activity planning, prospective leasing tracts are delineated, ranked, analyzed, selected, and scheduled.⁹⁸ First, tracts are delineated, using information obtained from the land-use planning phase. Each tract must be accompanied by a tract profile which includes information used to delineate the tract and site specific environmental information.⁹⁹

Following tract delineation, the RCT, with recommendations from several federal and state agencies, ranks the proposed tracts according to coal leasing desirability. The leasing rules mandate that the team evaluate three main factors: (1) coal economics, (2) environmental impacts, and (3) socioeconomic impacts.¹⁰⁰ The RCT may evaluate other subfactors that are considered regionally important.¹⁰¹ In addition to ranking tracts for regional lease sales, the RCT may need to rank tracts for emergency purposes (such as by-pass leases) or exchanges.¹⁰² The RCT may use the gathered information to modify tract boundaries.¹⁰³ At the RCT meeting when the RCT formally ranks the tracts, the public is given the opportunity to comment on tract ranking.¹⁰⁴ Upon completion of tract ranking, the RCT selects combinations of tracts which approximate the established leasing level. One of the selected combinations provides the base for an EIS while the others are addressed as alternatives. At this stage, the RCT may adjust tract ranking to reflect factors such as compatibility of coal quality and market needs, public comments, and planning to avoid future emergency leasing situations.¹⁰⁵

Once tract delineation, ranking, and selection is completed, the BLM prepares a regional lease sale EIS. The EIS must address all tract configurations proposed by the RCT and all reasonable alternatives. It must include site specific environmental impact information for each tract being considered as well as interregional cumulative environmental impacts for proposed configurations and all reasonable alternatives. Following the release of the draft EIS, public hearings are held to discuss the ranking and selection results, impacts, and proposed mitigation measures. The RCT analyzes comments and if appropriate, revises tract ranking and selection in the final EIS.¹⁰⁶

98. *Id.* § 3420.3-1(a).

99. *Id.* § 3420.3-3(e).

100. *Id.* § 3420.3-4(a)(1).

101. The subfactors used by the team must be published in the regional lease sale EIS.
Id. § 3420.3-4(a)(1).

102. *Id.*

103. *Id.* § 3420.3-4(a)(2).

104. *Id.* § 3420.3-4(a)(5).

105. *Id.* § 3420.3-4(b)(1)-(2).

106. *Id.* § 3420.3-4(c)-(e).

Upon release of the final regional lease sale EIS, the RCT recommends specific tracts for the lease sale and a lease-sale schedule.¹⁰⁷ Before adopting a lease-sale schedule, however, the Secretary must consult with Governors and applicable federal and state agencies.¹⁰⁸ Following regional tract configuration selection and consultation, the Secretary publishes the final regional lease-sale schedule.¹⁰⁹

Phase three, lease sale activities, begins after the Secretary finalizes the bidding procedure.¹¹⁰ Prior to publication of the proposed lease sale, the regulations provide that the public may comment on the FMV appraisal and the maximum economic recovery (MER).¹¹¹ The BLM's authorized officer¹¹² accepts the highest bid providing it is greater than the minimum¹¹³ and the bidder comports with the applicable regulations, including antitrust review.¹¹⁴ After the bid is accepted, the successful lessee must pay the balance of the bonus bid,¹¹⁵ pay the first year's rental,¹¹⁶ pay the proportionate cost of publishing the sale notice, and file a lease bond. Upon completion of these final steps, the authorized officer executes the lease.¹¹⁷

107. The RCTs make their recommendations to the Director who, in turn, submits the final EIS to the Secretary. 43 C.F.R. § 3420.3-4(g) (1991).

108. *Id.* § 3420.4-1 to 3420.4-5.

109. *Id.* § 3420.5-1.

110. *See supra* note 79 (noting one of possible bidding procedures).

111. The BLM's authorized officer incorporates this information into a report to be used in the final leasing decision. *See* 43 C.F.R. §§ 3422.1(b); 3422.3-2 (1991). For the regulatory definition of FMV, *see supra* note 88. According to the Interior Department regulations, maximum economic recovery means "that, based on standard industry operating practices, all profitable portions of a leased federal coal deposit must be mined." 43 C.F.R. § 3480.0-5(a)(21) (1991).

112. Authorized officer "means any employee of the Bureau of Land Management delegated the authority to perform the duty described in the section in which the term is used." *Id.* § 3400.0-5(b).

113. The Interior Department may not accept a bid which is less than one hundred dollars per acre (or its equivalent in cents-per-ton). *Id.* § 3422.1.

114. *Id.* § 3422.3-2. Prior to issuance of the lease, the Interior Department submits the successful bidder's qualifications to the Department of Justice for antitrust review. SID, *supra* note 75, at 25 (1986). *See also* 43 C.F.R. § 3422.3-4(a)-(g) (1991).

115. The successful lessee pays a bonus "as part of the consideration for receiving a lease." *Id.* § 3400.0-5(c).

116. *Id.* In addition to the bonus payment and rent, the lease holder must also pay royalties. Rent and royalties "accrue[] to the United States because of coal resource ownership" *Id.* *See id.* § 3473.3-1 (rental payments); *id.* § 3473.3-2 (royalty payments). In the Jacobs Ranch Tract lease sale notice, the BLM announced the additional rent and royalty requirements. The successful lessee would pay \$3.00 per acre, annually, and a 12.5% royalty of the value of the coal extracted through surface-mining methods. 56 Fed. Reg. 41,864 (1991). The value of the coal is calculated through the Product Valuation regulations. 30 C.F.R. §§ 206.250 to 206.265 (1992).

117. *Id.* § 3422.4. The lessee may pay for half of the acreage through a deferred bonus payment basis of five equal installments. The first annual payment is due upon accepting the lease. If a lessee relinquishes, cancels or otherwise terminates the lease and the cause is *not* beyond the lessee's control, the remainder of the bonus is due immediately. *Id.* § 3422.4(c). If the prospective lessee fails to comply with the initial lease award requirements, the deposit is forfeited. *Id.* § 3422.4(d). States in which the leased federal reserves are located receive 50% of leasing revenues (royalties, rent, and bonus payment). 30 U.S.C. § 191 (1988). As indicated by recent sales in Wyoming, the amount of the bonus bid alone can be significant. *See infra* note 194.

2. LBA: Leasing Outside of Certified Coal Production Regions

The LBA process requires land-use planning and adherence to the lease sale activity requirements. However, the procedure differs from regional coal leasing because the activity planning phase, which includes tract delineation, ranking and selection, as well as an EIS preparation,¹¹⁸ is eliminated. Upon receipt of an application to mine a particular tract, the BLM initiates the LBA process.¹¹⁹ The applicant must submit preliminary data concerning the physical and geological characteristics of the desired tract and a description of the mining operation. Also, the applicant must include a statement describing the intended use of the coal.¹²⁰ Any leases sought through the LBA process must have been included in a comprehensive land-use plan or land-use analysis¹²¹ and NEPA's requirements must still be met.¹²² The authorized officer may alter the proposed tract configuration to ensure that the public interest is attained.¹²³ Prior to the lease sale, the public may comment on the environmental evaluation, the FMV, and the MER of the proposed lease tract.¹²⁴

C. *The Role of NEPA in Federal Coal Leasing*

The NEPA is an important component of the federal coal leasing program, due to both FCLAA and NEPA's mandates. The federal coal management program specifically requires the preparation of an EIS during the activity planning phase of regional lease sales.¹²⁵ An EIS may still be required under NEPA even if the activity planning phase is eliminated, as with the LBA process.¹²⁶

NEPA's requirements extend to all federal agencies, and to the land, facilities, and industries that the agencies regulate.¹²⁷ The basic

118. See *supra* notes 98 to 109 and accompanying text (describing the activity planning phase).

119. Thus, the Interior Department leases coal in response to industry interest. See SID, *supra* note 75, at 25. The Interior Department uses the LBA process outside of coal production regions and, depending upon the leasing circumstances, the process may be used within coal production regions. See *supra* note 87 and accompanying text.

120. 43 C.F.R. § 3425.1-7(b) (1991).

121. The decision to allow leasing must be consistent with the plan. *Id.* § 3425.2.

122. *Id.* § 3425.3.

123. *Id.* § 3425.1-9. The Secretary may divide lands which are available for leasing into tracts that are found "appropriate and in the public interest." 30 U.S.C. § 201(a)(1) (1988). Considerations of public interest include achieving maximum economic recovery, prolonging the productive life of a mining operation, and receiving the highest possible bid.

124. 43 C.F.R. § 3425.4(a)(1) (1991).

125. *Id.* § 3420.3-1(c).

126. FCLAA requires NEPA compliance and thus an environmental assessment must be prepared, regardless of which leasing process the BLM uses. *Id.* § 3400.0-5(j).

127. A full discussion of NEPA is beyond the scope of this paper. For excellent presentations of the history and impact of NEPA, see *Special Focus, Articles and Essays: NEPA At Twenty, 25 LAND & WATER L. REV.* 1-142 (1990), *Symposium on NEPA At Twenty: The Past, Present and Future of the National Environmental Policy Act*, 20 ENVTL. LAW 447-810 (1990).

goal of the Act is to ensure that both the agencies and the public are well informed of proposed agency decisions.¹²⁸ To accomplish that result, NEPA regulations require an environmental resource evaluation to ascertain whether the preparation of an EIS is required.¹²⁹ An EIS is mandated for proposals, legislation, major federal actions, or actions which significantly affect the human environment.¹³⁰ Preparation of an EIS is not required if (1) the preparation is categorically excluded, or (2) the agency makes a Finding of No Significant Impact (FONSI) based upon the preparation of an Environmental Assessment (EA).¹³¹ Interested parties may appeal the BLM's leasing decisions, however, decisions approved directly by the Secretary are not appealable.¹³²

D. Implementing Regional Coal Leasing in the Powder River Basin

In 1979, the BLM certified federal coal reserves in the Powder River Basin of Wyoming and Montana as the Powder River Coal Production Region.¹³³ Commensurate with the regional land-use planning requirement, in 1980, the BLM updated and combined regional management framework plans to form the Powder River Area Management Plan. After addressing several land-use planning phases and public comments, the agency targeted 111,500 acres and 8.1 billion tons of coal for leasing.¹³⁴ The Powder River RCT then initiated phase two, activity planning. In late 1980, the RCT reviewed industry ex-

128. 40 C.F.R. § 1500.1 (1991).

129. *Id.* §§ 1500.0 to 1517.7. NEPA compliance is addressed through the Council on Environmental Quality (CEQ) regulations which are binding on all federal agencies. Constance E. Brooks, *Administrative Review and the National Environmental Policy Act: The Impacts On Mineral Development*, 36 ROCKY Mtn. L. INST. 21-1, at 21-5 (1990).

130. 40 C.F.R. § 1502.3 (1991). NEPA mandates that an agency prepare an EIS on "major federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C) (1988). Interpretation of the terms "major," "federal," "action," and "significant" results in the most frequent reason for NEPA litigation. Coggins & Van Dyke, *supra* note 32, at 662.

131. 40 C.F.R. § 1501.4 (1991). When an agency issues a FONSI, the supporting EA and other applicable documentation must accompany the decision. *Id.* § 1508.13. The FONSI is yet another frequent subject of NEPA litigation. DAVID SIVE & FRANK FRIEDMAN, *A PRACTICAL GUIDE TO ENVIRONMENTAL LAW* 180 (1987).

132. 43 C.F.R. § 4.410 (1991).

133. Relying on the coal management program rules, the BLM identified coal production areas having "major interest," and then certified six "coal production regions for the management of federally-owned coal." 44 Fed. Reg. 65,196 (1979). The BLM identified six regions of major interest: Green River-Hams Fork, Uinta-Southwestern Utah, Powder River, San Juan River, Fort Union, and Denver-Raton Mesa. *Id.* at 65,197. The areas were certified four months after the promulgation of the initial rules through the coal management regulation titled "Regional production goals and leasing targets, General." See 43 C.F.R. § 3420.3-1(a) (1979). Subsequent to the 1982 rule amendments, the Interior Department establishes, changes or modifies coal production regions through the coal management regulation titled "Coal production regions." 43 C.F.R. § 3400.5 (1991).

134. Ebzery & Kunz, *supra* note 2, at 362.

pressions of interest and USGS data to begin the process of tract delineation.¹³⁵ Following review of the activity planning phase information, the Interior Department decided to offer 1.5 million tons of coal at the regional lease sale.¹³⁶ The BLM published the lease sale notice and initiated the third phase, lease sale activities.¹³⁷ On April 28, 1982, the Powder River Sale was held and in May, 1982, the sale panel met to ensure FMV had been procured from the high bids. At that point, two bids were rejected. The successful bidders then proceeded with the final step before lease issuance, antitrust compliance.¹³⁸

Notwithstanding completion of the lease sale activities, challenges to the Powder River Sale continued. On the day before the sale, the National Wildlife Federation, Northern Plains Resource Council, Montana Wildlife Federation, and Powder River Basin Resource Council filed suit, challenging the Secretary's decisions.¹³⁹ The issues raised in *National Wildlife Federation* included allegations that fair market value was not received for the leases, that the comprehensive land-use plans were inadequate and that leasing was not compatible with the land-use plans.¹⁴⁰ Prompted by the plaintiffs' allegations, Congress requested a review of the federal coal leasing program. Congress then directed Secretary Watt to appoint an investigating commission and, subsequently, the Linowes Commission was formed in July of 1983.¹⁴¹ The Commission's report included numerous recommendations and suggestions to improve the regional leasing program.¹⁴² However, because the BLM decertified all of the coal

135. The USGS data identified 24 tracts and approximately 7.5 billion tons of recoverable coal. *Id.* at 364.

136. To determine the quantity of coal to offer at the sale, the Interior Department also considered surface owner consent, the EIS leasing alternatives, and incorporated Secretary Watt's recommendations. *Id.* at 366-67, 370.

137. *Id.* at 371. The Northern Cheyenne Tribe of Montana challenged the prospective sale one week prior to the scheduled sale date. The Tribe maintained that the lease sale EIS violated the requirements of NEPA because the EIS failed to "identify, consider, and if possible, mitigate the social, economic, and cultural impacts upon the Tribe resulting from the development of these coal leases." *National Wildlife Fed'n v. Burford*, 677 F. Supp. 1445, 1452 (D. Mont. 1985), *aff'd*, 871 F.2d 849 (9th Cir. 1989). The district court issued an order, addressed only at the Montana tracts, which forced the Secretary "to void the sale, refrain from issuing leases, and rescind any leases that have been issued." *Id.*

138. Ebzery & Kunz, *supra* note 2, at 374-75. See also *supra* note 114 (referring to the antitrust regulatory requirements).

139. *National Wildlife Fed'n*, 677 F. Supp. at 1452.

140. *Id.* at 1450. The plaintiffs also alleged that the Secretary failed to review lands for reclamation potential. Furthermore, the plaintiffs charged that two of the sales were unlawful because the Interior Department changed the bidding procedures in violation of the Administrative Procedures Act. *Id.*

141. SID, *supra* note 75, at ES-6.

142. *Id.* One of the Commission's recommendations included cutting about fifty percent of the total tonnage planned for leasing. Although the Commission believed coal leasing was in the country's best interests, it believed the Interior Department "tended to dismiss the risks of overleasing federal coal and to exaggerate the risks of underleasing." Andrea Chancellor,

production regions,¹⁴³ the agency did not implement the Commission's specific recommendations.

IV. DISCUSSION: DECERTIFICATION AND THE FEDERAL COAL MANAGEMENT PROGRAM IN THE POWDER RIVER BASIN

In 1987, the BLM began decertifying coal production regions¹⁴⁴ and by 1990, as a result, the agency was not conducting any regional coal leasing with its required activity planning phase.¹⁴⁵ The agency did not expressly list the standards justifying decertification but merely referred to the lack "industry interest" and that decertification was being made "in accordance with 43 CFR 3400.5."¹⁴⁶ However, given the newly heightened interest in federal coal leasing, the BLM's prior decertification decision has become inconsistent with the intent of FCLAA. A review of recent production levels¹⁴⁷ and leasing interest in the Powder River Basin¹⁴⁸ indicates that the area now clearly qualifies as a "coal production region," despite any past determination.

The literal meaning of "coal production region" is clear and should be determinative; the Powder River Basin is a region where coal is produced in significant quantities. Furthermore, FCLAA's intent to "provide a more orderly procedure for the leasing and development" of federal coal "in a manner compatible with the public interest,"¹⁴⁹ is compromised through the use of the LBA process in coal production regions. In fact, because of the current Powder River

Leasing Commotion Reaps Harvest of Caution, 10 COAL WEEK 2 (Feb. 27, 1984) (quoting the Commission Report). The head of the Commission, David Linowes, stated that "[w]e tried to stay away from personalities. But clearly we found that the management of the programs was confusing. It kept changing directions and causing controversies." Cass Peterson, *Interior Panel Reports; Coal-Lease Program Assailed*, THE WASHINGTON POST, Feb. 17, 1984, at A1 (quoting David F. Linowes). Secretary Watt's characterization of the Commission as "a black, a woman, two Jews and a cripple" led to his resignation. *Id.*

143. See *infra* notes 144 to 146 and accompanying text (referring to the decertification of coal production regions).

144. Actually, the BLM began decertifying coal production regions in 1982 using the former section 3420.3-1(a)(2). The BLM first canceled regional coal leasing in the Denver-Raton Mesa coal production region. 47 Fed. Reg. 14,227 (1982). Subsequently, the agency decertified the other five coal production regions through the use of section 3400.5. See *infra* notes 145 to 146 and accompanying text.

145. The first decertification using section 3400.5 involved the Uinta-Southwestern Utah Coal Production Region. 52 Fed. Reg. 48,327 (1987). In 1990, the BLM decertified the last remaining coal production region located in the Powder River Basin. 55 Fed. Reg. 784 (1990). Because of decertification, the Interior Department is not required to implement the activity planning phase anywhere in the country. See 43 C.F.R. § 3400.5 (1991) (activity planning is restricted to coal production regions).

146. The decertification notice indicated that "industry interest, based on market conditions and existing potential production capacities, does not justify the federally initiated coal lease sale program procedures . . ." 52 Fed. Reg. 48,327 (1987). See *infra* note 162 (citing language from decertification notices).

147. See *supra* note 3 and accompanying text.

148. See *infra* notes 198 to 200 and accompanying text.

149. H.R. REP. NO. 681, *supra* note 8, at 8, reprinted in 1976 U.S.C.C.A.N. 1943, 1943.

Basin leasing situation, the BLM may need to seriously consider "recertifying" the coal production region.

A. The Plain Meaning of Words: What Is a Coal Production Region?

Although the federal coal management regulations do not define "coal production region," materials issued by the BLM in 1979 supply the intended meaning. These materials include the Final EIS of the coal management program,¹⁵⁰ the final rules, and the initial certification notice.¹⁵¹ In the Final EIS, the BLM discussed the coal reserves and characteristics of federally owned coal. The Final EIS used coal production regions as the "geographic basis for identifying coal production levels and subsequent impacts."¹⁵² The document further noted that regions are delineated according to their similarities of coal characteristics "and on opportunities for and the likelihood of new or expanded coal production, both from Federal and non-Federal sources."¹⁵³ It also predicted that the Powder River Coal Region would play a central role in the increased demand for western coal.¹⁵⁴ For planning purposes, the BLM keyed the production regions into a defined program that included RCT participation. The program emphasized coal production potential and energy requirements, not leasing interest as expressed by industry.¹⁵⁵

Through section 3420.3-1 of the 1979 rules,¹⁵⁶ the BLM certified six coal production regions.¹⁵⁷ Although the certification notice did not define "coal production region," it did describe the functions served by the regions. Coal production regions: (1) define the geographical areas for which coal leasing plans are formulated; (2) define the administrative regions for the BLM's planning, together with the RCTs' participation, for tract delineation and scheduling of lease sales; and (3) define the areas for which the BLM may offer lease sales, once other planning provisions are completed.¹⁵⁸ The 1979 rules limited the use of the LBA process to certified coal production regions located *east* of the 100th prime meridian only if the region "contain[ed] insufficient Federal coal deposits to justify treating coal leas-

150. See Final EIS, *supra* note 2.

151. The BLM certified, or established, the coal production regions in 1979. See *supra* note 133 and accompanying text.

152. Final EIS, *supra* note 2, at 2-1.

153. *Id.* The Final EIS included the Powder River Basin as one region in which the federal government administers large amounts of coal. *Id.*

154. *Id.* at 2-15.

155. *Id.* at 3-7 to 3-8.

156. See 44 Fed. Reg. 42,619 (1979) (codified at 43 C.F.R. § 3420.3-1(a)(2) (1979) as amended at 43 C.F.R. § 3400.5 (1991)).

157. 44 Fed. Reg. 65,196-97 (1979).

158. 44 Fed. Reg. 65,196 (1979).

ing in the entire region through activity planning” and for regions “in which activity planning is unlikely to occur in the foreseeable future”¹⁵⁹ Significantly, neither the 1979 rules nor the certification notice indicated that coal production regions were to be defined through interest expressed by the industry.¹⁶⁰

Upon revision of the 1979 rules,¹⁶¹ however, the Interior Department began to define coal production regions through the expression of industry interest, not by virtue of the region’s capability to supply federal coal. Beginning in December of 1987, the BLM used the 1982 revised rules to permit “decertification” of coal production regions.¹⁶² In the first decertification notice, the BLM stated that “[r]ecent assessments indicate that industry interest, based on market conditions and existing potential production capacities, does not justify the federally initiated coal lease sale program procedures”¹⁶³ The BLM proposed to administer future lease applications for the entire coal production region through the LBA process. In

159. 44 Fed. Reg. 42,619 (1979) (codified at 43 C.F.R. § 3420.3-1(a)(2) (1979) as amended at 43 C.F.R. § 3400.5 (1991)).

160. The BLM’s emphasis on industry interest has changed markedly. To determine whether an area should be a “certified coal production region,” the BLM now specifically reviews the parameter of industry interest in addition to the other characteristics. U.S. BUREAU OF LAND MANAGEMENT, DEPT. OF THE INTERIOR, COMPETITIVE COAL LEASING HANDBOOK (H-3420-1) ch. 2, I-2, II-4 (Supp. 4/20/89) [hereinafter BLM Coal Leasing Manual].

161. The Interior Department changed the regulations pursuant to the review requested by Secretary of the Interior Watt. See *supra* notes 80 to 82 and accompanying text. The section was “substantially revised” and the new regulation did not limit the LBA process to specific situations in eastern coal production regions. 46 Fed. Reg. 61,392 (1981); see 46 Fed. Reg. 61,406 (revised coal production region section) (codified at 43 C.F.R. § 3400.5 (1991)).

162. A review of the 1979 rules reveals that the Interior Department could have revised the regulations to include the former escape hatch for regions located *east* of the 100th prime meridian. See *supra* note 159 and accompanying text. In fact, the BLM relied on the former section 3420.3-1(a)(2) to decertify the Denver-Raton Mesa Coal Production Region. 47 Fed. Reg. 14,228 (1982). In the later decertification notices, the language is very similar to the former provision which allowed the use of the LBA process in coal production regions “in which activity planning is unlikely to occur in the foreseeable future.” 44 Fed. Reg. 42,619 (1979) (formerly codified at 43 C.F.R. § 3420.3-1(a)(2) (1979)). For example, when the BLM decertified the Uinta-Southwestern Utah Coal Production Region, the agency stated that “industry interest, based on market conditions and existing potential production capacities, does not justify the federally initiated coal lease sale program procedures of [the Competitive Leasing section].” 52 Fed. Reg. 48,327 (1987). The decertification notices for the other coal production regions contained similar language. See 53 Fed. Reg. 13,195 (1988) (Fort Union Coal Production Region); 53 Fed. Reg. 13,196 (1988) (Green River-Hams Fork Coal Production Region); 53 Fed. Reg. 44,956 (1988) (San Juan River Coal Production Region). When the BLM proposed to decertify the Powder River Coal Production Region, the agency referred to the RCT’s recommendations: “The RCT recommended that no regional Federal coal leasing activity planning efforts be initiated at this time. The RCT recommendation was based largely on a recognition of limited leasing interests in the region, soft market conditions for the foreseeable future, and public input. . . . [I]f the region were partially or totally decertified, then these areas would be opened to leasing-by-application” 54 Fed. Reg. 6339 (1989).

163. 52 Fed. Reg. 48,327 (1987). The language of the decertification notice reflects the BLM’s altered perception that coal production regions are defined through industry interest. See *supra* note 160; *infra* text accompanying note 204 (referring to coal production area delineation considerations of the BLM Coal Leasing Manual).

each subsequent decertification notice, the BLM repeated the theme that the lack of industry leasing interest prompted the need to forego regional leasing.

Although the areas were no longer "certified" coal production regions, the BLM continued to recognize the importance of reviewing leases on a regional basis. As a condition for decertification of the Powder River Basin, the BLM endorsed four criteria for increased RCT involvement.¹⁶⁴ The criteria required that: (1) the RCT remain active in the LBA decisionmaking process, (2) the team restrict the LBA process to maintenance tracts, (3) the RCT process applications for expansion of an existing operation or for a new start up mine on a case-by-case basis, and (4) the RCT approve of the LBA process operating guidelines.¹⁶⁵ In the following year, the BLM prepared the Powder River Regional Coal Team Operational Guidelines for Coal Leasing-By-Application (LBA Operational Guidelines) which incorporated the decertification conditions. Additionally, the LBA Operational Guidelines dictated that the State Director not make any final decisions unless the RCT "had an opportunity to review and comment on the regional implications of the application and provide guidance."¹⁶⁶ In the Charter of the Powder River Regional Coal Team (RCT Charter)¹⁶⁷ similar language stated that the RCT will "guide the preparation of EIS's on coal leasing actions that appear to have significant regional implications."¹⁶⁸ Both of these documents, endorsed by the BLM, indicated that coal leasing in the Powder River Basin continued to require careful regional evaluation.

Through decertification, the Interior Department may have intended to alleviate the circumstances which caused the *National Wildlife Federation* suit.¹⁶⁹ Alternatively, the Interior Department may have been acting on some of the recommendations of the Linowes Commission Report concerning soft markets.¹⁷⁰ Regardless of the force behind the decision, the fact remains that there is no existing regulatory provision under which the Interior Department can decertify

164. 55 Fed. Reg. 784-85 (1990).

165. *Id.*

166. BUREAU OF LAND MANAGEMENT, DEPARTMENT OF THE INTERIOR, POWDER RIVER REGIONAL COAL TEAM OPERATIONAL GUIDELINES FOR COAL LEASING-BY-APPLICATION 5 (August, 1991) [hereinafter LBA Operational Guidelines]. According to the guidelines, a voting RCT member may request a special meeting to address a particular lease. *Id.*

167. BUREAU OF LAND MANAGEMENT, DEPARTMENT OF THE INTERIOR, CHARTER - POWDER RIVER REGIONAL COAL TEAM (Sept. 1990). The RCT Charter notes that the RCT can make recommendations on leases that "appear to have significant regional implications." *Id.* at 3.

168. *Id.*

169. *National Wildlife Fed'n v. Burford*, 677 F. Supp. 1445 (D. Mont. 1985). In *National Wildlife Fed'n*, the plaintiffs challenged various aspects of the 1982 regional sale. See *supra* notes 139 to 140 and accompanying text. Upon decertification, the possibility of a regional lease sale challenge is eliminated.

170. See *supra* note 140.

coal production regions. Nonetheless, through the Interior Department's actions and its manipulation of the regulatory language of section 3400.5, an essential portion of the federal coal management program, the activity planning phase, has been completely circumvented. In turn, the Interior Department compromised the intent of FCLAA, particularly with respect to ensuring environmental planning, public participation and competitive bidding, and discouraging speculation.

B. The Lease-By-Application Process in the Powder River Basin Coal Production Region

At the time Kerr-McGee submitted the Jacobs Ranch emergency lease application, the Powder River Basin retained the status of a certified coal production region.¹⁷¹ While the application was pending, the BLM decertified the region and, therefore, the BLM processed Kerr-McGee's application as a "maintenance tract."¹⁷² In accordance with NEPA,¹⁷³ the BLM prepared an EA and determined that if Kerr-McGee mined the coal as a maintenance tract, there would likely be no significant impacts. Subsequently, the agency issued a FONSI¹⁷⁴ and the state director approved the lease application. Shortly thereafter, the environmental groups filed the Jacobs Ranch Appeal.¹⁷⁵ Two of the appellants' concerns, inadequate environmental evaluation and lack of true competitive bidding, parallel concerns identified in the earlier FCLAA House Report.¹⁷⁶ The resurfacing of these problems indicates that the LBA process was neither designed nor intended to serve as the main leasing process in coal production regions.

1. The LBA Process: Environmental Evaluation Concerns

While the regional activity process specifically requires the preparation of an EIS,¹⁷⁷ by using the LBA process, the BLM must follow

171. See *supra* notes 16 to 18 and accompanying text (providing additional details of the Jacobs Ranch lease application).

172. As characterized within the Powder River Basin decertification notice, the LBA process would be "restricted to applications for maintenance tracts only to continue or extend the life of a mine . . ." 55 Fed. Reg. 784 (1990). The term maintenance tract is defined in the Powder River LBA Operational Guidelines as "unleased blocks of Federal coal adjacent to operating coal mines which could be added to that mine to expand it geographically and extend the life of the mine through time but not expand any permitted annual production capacity of that mine." LBA Operational Guidelines, *supra* note 166, at 1. By changing the nomenclature from an "emergency by-pass" lease to a maintenance tract, Kerr-McGee was able to avoid the more stringent leasing requirements of the emergency lease application process. See *supra* note 87.

173. See *supra* notes 129 to 131 and accompanying text (noting the requirements of NEPA).

174. DEPARTMENT OF THE INTERIOR, BUREAU OF LAND MANAGEMENT, DECISION RECORD, JACOBS RANCH FEDERAL COAL LEASE APPLICATION 1 (August 16, 1991).

175. See *supra* text accompanying note 20.

176. See *supra* notes 61 to 71 and accompanying text (discussing the concerns identified in the House Report).

177. The EIS must address both the site-specific environmental impacts of each tract and the intraregional cumulative impacts. 43 C.F.R. § 3420.3-4(c) (1991).

only the general requirements of NEPA.¹⁷⁸ Thus, in the latter case, the decision to require an EIS depends on whether the BLM considers the application to fall within the "major Federal actions significantly affecting the quality of the human environment" category.¹⁷⁹ Historically, this terminology has spawned litigation¹⁸⁰ and the Jacobs Ranch Appeal is no exception.

In that appeal, the appellants pointed to the BLM's administration of six LBA's, involving over one billion tons of coal and covering 8,737 acres in the Powder River Basin of Wyoming.¹⁸¹ The appellants maintained that the pending LBA's represented a "cumulative impact"¹⁸² having a "significant effect on the environment" and thus an EIS, not an EA, should be prepared.¹⁸³ Nevertheless, the BLM

178. 43 C.F.R. 3425.3 (1991). The BLM's leasing decision must be consistent with phase one and three of regional coal leasing. See *supra* notes 119 to 124 and accompanying text (referring to the level of review for the LBA process).

179. 42 U.S.C. § 4332(2)(C) (1988).

180. See *supra* note 130.

181. Appellants' Statement of Reasons, *supra* note 20, at 6, 12.

182. *Id.* at 11. Cumulative impact is defined as the environmental impact "which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time." 40 C.F.R. § 1508.7 (1991) (emphasis added). NEPA's regulations specifically recognize that "individually insignificant" actions may result in a "cumulatively significant impact on the environment." *Id.* § 1508.27(a)(7).

183. In 1975, the United States Supreme Court decided a case wherein the plaintiffs asserted that a regional EIS was required, in part because of the potential cumulative effects. *Kleppe v. Sierra Club*, 427 U.S. 390 (1976). In *Kleppe*, various environmental groups challenged the Interior Department's decision not to issue a comprehensive EIS for proposed coal leasing and mining development in the Northern Great Plains Region. The Northern Great Plains Region, as identified by the respondents, included sections of four states: eastern Montana, western North Dakota, western South Dakota, and northeastern Wyoming. *Id.* at 396. The respondents asserted that the various projects, when viewed collectively, should be considered as a proposal for federal action of regional scope, and thus the projects triggered the EIS mandate of NEPA. *Id.* at 395. However, the Supreme Court did not find that the proposals amounted to "an action or a proposal for an action of regional scope." *Id.* at 400. The *Kleppe* Court stated that "[a]bsent an overall plan for regional development," *id.* at 402, the agency could not realistically prepare a cumulative EIS. *Id.* Instead, the exercise would merely repeat an existing environmental evaluation. *Id.* The Supreme Court deferred to the agency's decision. *Id.* at 410 n.21, 412. "Neither [NEPA] nor its legislative history contemplates that a court should substitute its judgment for that of the agency as to the environmental consequences of its actions. (Citation omitted.) The only role for a court is to insure that the agency has taken a "hard look" at environmental consequences; it cannot "interject itself within the area of discretion of the executive as to the choice of the action to be taken." *Id.* at 410 n.21 (quoting *Natural Resources Defense Council v. Morton*, 458 F.2d 827, 838 (D.C. Cir. 1972)). However, the *Kleppe* Court did state that "when several proposals for coal-related actions that will have cumulative or synergistic environmental impact upon a region are pending concurrently before an agency, their environmental consequences must be considered together." *Id.* at 410.

A later Ninth Circuit Court of Appeals decision mandated preparation of an EIS to address cumulative impacts. In *Thomas v. Peterson*, the United States Forest Service proposed and approved a timber road in an area adjacent to a Wild and Scenic River and located within a "recovery corridor" for the Rocky Mountain gray wolf, an endangered species. *Thomas v. Peterson*, 753 F.2d 754, 756 (9th Cir. 1985). The environmental evaluation consisted of various EAs which did not address the interrelated cumulative effect. Each EA resulted in a FONSI. *Id.* at 757. In *Thomas*, the court reviewed the CEQ regulations concerning connected and cumulative actions and determined that an EIS was required. *Id.* at 758-59.

processed the Jacobs Ranch Tract application independently of the five other LBA's.¹⁸⁴ A review of prior precedent,¹⁸⁵ and the factual basis for which the 1982 regional sale EIS was prepared,¹⁸⁶ suggests that the BLM should prepare a regional EIS to address the current leasing situation in the Powder River Basin of Wyoming. Yet because the LBA process permits fragmented review of pending leases, the process may effectively circumvent the regional EIS requirement.¹⁸⁷

2. The LBA Process: Economic Concerns

The FCLAA mandates competitive bidding and receipt of FMV for coal leases issued through either the regional or LBA processes.¹⁸⁸ By definition, the LBA process is initiated when an operator expresses interest in leasing a particular tract. The tract boundaries chosen by the applicant invariably will facilitate mining only for that specific mine. To encourage active competition, the BLM may modify the proposed tract configurations. Nevertheless, the final tract configurations are typically "captive" to the mining operation of the applicant. Consequently, the BLM receives customarily only one bid, that of the applicant, for leases offered through the LBA process.¹⁸⁹ In fact, the General Accounting Office (GAO), in 1983, recognized that "[f]or all intents and purposes production maintenance lease[sales] are noncompetitive"¹⁹⁰ The report also stated that the lease sales would likely not receive "fair market value . . . or a reasonable return."¹⁹¹

In 1986, data presented in the Secretarial Issue Document support the GAO's findings. The data indicate that the price per ton for

184. Appellants' Statement of Reasons, *supra* note 20, at 6, 12.

185. See *supra* note 183.

186. For the 1982 Powder River Basin coal sale, the regional EIS concerned 1.5 billion tons of coal in two states, Montana and Wyoming. See Ebzery & Kunz, *supra* note 2, at 368.

187. In 1992, the IBLA indicated that the BLM adequately incorporated prior studies into the Jacobs Ranch application, thus suggesting the BLM properly assessed the environmental impact. Powder River Basin Resource Council, 124 I.B.L.A. 83, 95 (1992).

188. 30 U.S.C. § 201(a)(1) (1988). See 43 C.F.R. § 3422.1(c)(1) (1991). The Act provides various exceptions to the competitive bidding requirement. See *supra* notes 89 to 93 and accompanying text (listing the exceptions).

189. In the Jacobs Ranch LBA process, the BLM did modify the tract boundaries. Jacobs Ranch EA, *supra* note 16, at 2. Yet the sale still generated only one bid, that of Kerr-McGee. Appellants' Statement of Reasons, *supra* note 20, at 8.

190. U.S. GENERAL ACCOUNTING OFFICE, REPORT TO THE CONGRESS: ANALYSIS OF THE POWDER RIVER BASIN COAL LEASE SALE: ECONOMIC EVALUATION IMPROVEMENTS AND LEGISLATIVE CHANGES NEEDED at vii (May 11, 1983) [hereinafter GAO Powder River Basin Report].

191. *Id.* The GAO report also described the reality of maintenance tract lease sales: "[S]uch leases are underpriced in competitive sales because they are worth little to companies other than the one whose mining operation they are designed to sustain. Not surprisingly they generally do not attract competition—usually receiving only one bid." *Id.* The House Report of FCLAA, published eight years earlier, reported nearly an identical situation. H.R. REP. NO. 681, *supra* note 8, at 17, reprinted in 1976 U.S.C.C.A.N. 1943, 1953. See *supra* text accompanying note 66 (referring to that portion of the House Report).

regional lease sales was over three times higher than the price obtained through the LBA process; regional lease sales generated six cents a ton while the leasing-by-application process sold coal for less than two cents a ton.¹⁹² Between 1989 and 1991, the BLM held seventeen federal coal lease sales for maintenance and emergency by-pass tracts. Of those lease sales, only two received more than one bid.¹⁹³ In the Powder River Basin of Wyoming, the BLM held three LBA lease sales from 1991 to 1992. Each sale generated one bid, that of the applicant.¹⁹⁴ All these data support the challenge raised in the Jacobs Ranch appeal that the current use of the LBA process in the Powder River Basin does not encourage truly competitive bidding.¹⁹⁵

C. *The Next Step: Recertification or Reform?*

In 1979, the Interior Department predicted a large production increase for federal coal in the Powder River Basin, due in part, to the relatively low sulfur content of the coal reserves. According to the Final EIS, "[t]he development of western coal has been stimulated by the greater ease with which low sulfur coal can meet air quality standards, creating a demand in the East for western coal."¹⁹⁶

The 1979 prediction of the Final EIS has held true. In 1990, Congress enacted the Amendments to the Clean Air Act (CAA).¹⁹⁷

192. SID, *supra* note 75, at 6-7 (Table 1 - Leases Sold in All Regional Sales (January 1981 through July 1985) and Table 2 - Leases Sold in All Lease-By-Application Sales (January 1979 through September 1985)). In Table 1, the BLM reported that 2,130.0 million tons were sold for \$133,753,543. In Table 2, the figures were 389.13 million tons and \$7,193,290.70. A simple arithmetic calculation demonstrates that the Regional Lease Sales generated six cents a ton and the lease-by-application process sold coal for less than two cents a ton (\$0.0628/ton and \$0.0185/ton, respectively).

193. Brian E. McGee, *Federal Coal: Reserves, Royalties, and Rattlesnakes 3*, paper presented at the National Coal Association 1991 Coal Lawyers Conference, Key Largo, Fla. (Sept. 26-29, 1991) (on file with author).

194. Kerr-McGee was the successful bidder for a tract covering 1708.62 acres and containing an estimated 132,681,204 tons of recoverable coal. Bureau of Land Management, Official Case File No. WYW117924 (Jacobs Ranch Tract) (on file with the Bureau of Land Management, Wyoming State Office, Cheyenne, Wyo.). The BLM awarded the West Black Thunder Tract to the Thunder Basin Coal Company in August, 1992. The lease involved 3492.49 acres and 417,800,000 tons of recoverable coal. Bureau of Land Management, Official Case File No. WYW118907 (West Black Thunder Tract) (on file with the Bureau of Land Management, Wyoming State Office, Cheyenne, Wyo.). In September, 1992, the Powder River Coal Company received the North Antelope/Rochelle Tract lease which covered 3064.04 acres and contained an estimated 393,600,000 tons of recoverable coal. Bureau of Land Management, Official Case File No. WYW119554 (North Antelope/Rochelle Tract) (on file with the Bureau of Land Management, Wyoming State Office, Cheyenne, Wyo.). The companies paid between fifteen and twenty-two cents per ton for the bonus bid. The total price paid for the bonus bids exceeds \$179,000,000. Wyoming receives half of that amount and will receive half of future rents and royalties. 30 U.S.C. § 191 (1988).

195. See Appellants' Statement of Reasons, *supra* note 20, at 18-20. As intimated by the BLM, the Kerr-McGee maintenance tract lease sale would likely attract only one bidder, Kerr-McGee. *Id.* at 18; Jacobs Ranch EA, *supra* note 16, at 15.

196. Final EIS, *supra* note 2, at 2-15.

197. 1990 Amendments to the Clean Air Act, Pub. L. No. 101-549, 104 Stat. 2399.

Because the amendments provided a large incentive for eastern power companies to shop for low-sulfur coal, western coal producers quickly realized the benefits of the amendments. Several power companies promptly set up test burns and following the tests, many contracts were proposed.¹⁹⁸ Not surprisingly, interest in federal coal leases followed suit.¹⁹⁹

In the same year that Congress passed the CAA amendments, the BLM decertified the Powder River Basin. Within two years of these events, several mines in the Powder River Basin of Wyoming filed lease applications.²⁰⁰ The applicants acknowledged that the CAA Amendments were highly influential in their decisions.²⁰¹ Although some companies filed applications prior to the decertification, the BLM implemented the LBA process because, essentially, it is the only available leasing mechanism.²⁰²

When the Interior Department decertified the coal production regions, it also stated that regions could be recertified “[i]f the demand for Federal coal increases significantly”²⁰³ The BLM Coal Leasing Manual supplies some recertification criteria including future demand for federally owned coal, transportation facilities, economic and sociocultural conditions, administrative efficiencies, and industry

198. Several issues of COMPLIANCE STRATEGIES REVIEW contain articles relating to the impact of the CAA amendments on Powder River Basin coal. For example, analysts originally predicted that the use of Powder River Basin coal in the East and Midwest would be restricted because of the coal's inherent characteristics of low Btu value, high moisture content, and fouling or slagging tendencies. However, new information demonstrates that Powder River Basin coal can be used in these areas. The commentators predict a widening acceptance and broader market for the use of Powder River Basin coal. Forest E. Hill & Jeffrey A. Watkins, *Low Sulfur Fuel Supplies and Acid Rain Compliance*, COMPLIANCE STRATEGIES REV., EXPERT OPINION SUPP. 1, 3 (March 30, 1992).

199. The BLM's 1990 annual federal coal management report stated that the CAA amendments were expected to have a “major impact on coal markets and production. . . .” and could “stimulate significantly greater demand for the low-sulfur coals in the West, particularly in the *Powder River Coal Production Region*.” *Coal Production on Federal Lands Exceeded 234 Million Tons*, INSIDE ENERGY WITH FEDERAL LANDS, Aug. 19, 1991 at 16 (emphasis added). Even after the BLM decertified the Powder River Basin, the same agency still recognizes the area as a *coal production region*.

200. Five companies filed six LBA's for a total of 1.035 billion tons of coal covering 8,737 acres of land. The companies include Kerr-McGee (filed in Oct. 1989), ARCO (filed on Dec. 12, 1989), Peabody (two applications filed on Feb. 28, 1990), Northwestern Resources (filed on Dec. 4, 1990), and AMAX (filed on July 25, 1991). Appellants' Statement of Reasons, *supra* note 20, at 6 & n.10.

201. Various private companies and governmental entities filed briefs in opposition to the Jacobs Ranch Appeal. The briefs referred to the impact of the CAA Amendments and highlighted the need to lease Powder River Basin reserves. See Government's Reply Brief (BLM) at 45; State of Wyoming's Reply Brief to Appellant's Statement of Reasons, Affidavit of G. Alan Edwards at 5; Thunder Basin Coal Company Answer at 34; Brief of Amicus Curiae Powder River Coal Company at 15-16; Amicus Curiae Brief of City of Gillette at 6. See also Motion to Vacate Stay at 9.

202. See *supra* notes 89 to 93 (referring to the other available leasing mechanisms which are narrow in scope).

203. See 52 Fed. Reg. 48,328 (1987). Other decertification notices contain similar language.

interest.²⁰⁴ The decertification criteria adopted for use in the Powder River Basin limits the use of the LBA process to maintenance leases, which by definition, are to maintain, not increase production.²⁰⁵ If a recent report which indicates that production levels will likely increase for the recently submitted LBA's²⁰⁶ is correct, the BLM will need to evaluate the applications on a "case-by-case basis," not through the LBA process. Based on the decertification criteria, the BLM Operational Manual directives, the recent flurry of leasing activity in the Powder River Basin, and the possible increase in production levels, comprehensive regional planning is needed in the Powder River Basin. Indeed, it now appears that the BLM's own recertification criteria have been met.

However, simply recertifying the Powder River Basin coal production region may not be the best answer. The fact remains that the regional planning process is time consuming. The Interior Department noted that one substantial industry advantage of the LBA process over regional leasing is time. The regional leasing process consumes a minimum of three years while the LBA may be completed in approximately one year.²⁰⁷ Another fact is that states receive a substantial amount of revenue from federal coal lease sales.²⁰⁸ Understandably, states may be reluctant to return to regional planning for fear that industry will no longer bid on federal lease sales and thus, the states will lose their revenue share.²⁰⁹ Initially, the countervailing views on re-implementing regional leasing may appear irreconcilable; in reality, they are not.

Through the promulgation of revised regulations, the Interior Department can comply with FCLAA, particularly with respect to environmental concerns and economic return, while addressing the welfare of both the states and industry. For example, environmental evaluation could be improved by re-implementing the periodic environmental review as originally required in the 1979 regulations.²¹⁰

204. BLM Coal Leasing Manual, *supra* note 160, at Ch. 2, II-2 to II-4. Recently, the BLM referred to the increase of federal leasing and the need for additional resources. The agency stated that "[t]he need for additional planning and environmental review work is most critical in the Powder River Region of Wyoming and . . . count[ies] . . . of Utah." 17 COAL WEEK 8 (Aug. 26, 1991).

205. 55 Fed. Reg. 784 (1990). See *supra* note 165 and accompanying text (listing the RCT's decertification criteria).

206. *Optimism Remains For Western Coal Moves East*, COMPLIANCE STRATEGIES REV. at 7 (Sept. 30, 1991).

207. 54 Fed. Reg. 6339 (1989). In Wyoming, the BLM estimates that the LBA process, from the initial application to the lease-sale stage, can be completed in one and a half to two years. 57 Fed. Reg. 20,703 (1992).

208. See *supra* note 194.

209. States receive fifty percent of federal coal leasing revenues. 30 U.S.C. § 191 (1988). See *supra* note 117.

210. The revised regulations deleted the requirement for environmental assessment updates which the Interior Department maintained "needlessly restricts its flexibility in meeting the mandate of the National Environmental Policy Act." 46 Fed. Reg. 61,395 (1981) (citations omitted).

The goal of fair market value might be obtained through the use of negotiation, rather than blind bid submissions.²¹¹ Indeed, the 1983 GAO report encouraged the use of negotiation for "all but new production leases."²¹² Another possible approach to managing the public resource is to create an independent commission.²¹³

Regardless of which approach is taken, the current leasing program in the Powder River Basin should be addressed. As noted by Judge Skelly Wright, the Secretary retains jurisdiction over a substantial portion of the nation's low-sulfur reserves and "prudent development of this valuable national asset is largely subject to federal initiative and control."²¹⁴ Given the vast reserves of the Powder River Basin and the current interest in developing those reserves, it is time for the Interior Department or Congress to address the leasing of federal coal in large coal production regions, such as the Powder River Basin.

V. CONCLUSION

The United States Constitution provides Congress with the inherent power to dispose of property belonging to the United States. Congress has an obligation to the people to ensure that the best possible use, including consumption, is made of federal resources. To carry out the task of managing federal coal reserves, Congress has placed the authority in the hands of the Secretary of the Interior. Clearly, the Secretary owes that same obligation to the people of the United States and regulations promulgated through the Department of the Interior must reflect the Congressional mandate.

However, the current federal coal leasing program falls short of the Congressional mandate. Through decertification, comprehensive regional planning is no longer conducted in large coal production regions, such as the Powder River Basin. Instead, the LBA process has been implemented and as exemplified by the recent leasing activity

211. Pariser, *supra* note 47, at 620-25. The Interior Department's staff researched and reviewed various methods of negotiated sales. *Id.* However, the negotiation proposals did not reach Congress. *Id.* at 625. In 1986, Secretary Hodel "selected th[e] third option of not supporting the granting of coal lease sale negotiation authority from Congress." *Id.* A more recent study suggests that the negotiation program would work well for situations where competition "is highly unlikely, such as bypass and maintenance tracts." *Id.*

212. GAO Powder River Basin Report, *supra* note 190, at 64. The GAO Report cautioned that "Congress should establish strong controls ensuring adequate public participation and coal industry protection through consistent, fair, and equitable negotiations." *Id.*

213. C. Peter Goplerud, III, *Federal Coal Leasing and Partisan Politics: Alternatives and the Shadow of Chada*, 86 W. VA. L. REV. 773, 794 (1984). The author suggests that the commission would be structured similar to the Interstate Commerce Commission, the Federal Trade Commission, or the Federal Communications Commission. *Id.*

214. *Sierra Club v. Morton*, 514 F.2d 856, 862 (D.C. Cir. 1975), *rev'd on other grounds*, *Kleppe v. Sierra Club*, 427 U.S. 390 (1976).

in the Powder River Basin, leasing may soon occur only on an ad-hoc, first-come, first-serve basis. The leasing situation easily could revert back to the inconsistent, chaotic state of the 1970's program which FCLAA was intended to eliminate.

Now is the time for the Interior Department to accept the responsibility delegated by Congress and mandated by FCLAA. In coal production regions such as the Powder River Basin, disposal of the public's resources cannot be accomplished properly through the LBA process. Only through careful, regional activity planning can the Interior Department's responsibilities and the requirements of FCLAA be met. If the Interior Department does not step forward to accept the mandate, Congress should respond with appropriate legislation. FCLAA should be amended to require regional planning in coal production regions while responding to the realities of the current coal market.

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