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HISTORY OF FEDERAL COAL LEASING—A LAWYER'S VIEWPOINT

Jerome H. Simonds*

I. INTRODUCTION

The topic of discussion I will address is a case that has been in litigation since 1975; but, unfortunately, they just settled the case, and that doesn't leave me much to discuss. However, I will do the best I can.

The case is *Natural Resources Defense Council* v. *Hughes*,[1] which was filed in October, 1975, and settled February 25, 1978, although a portion of it is still on appeal. There is a quotation on the Archives Building in Washington that proclaims "What is past is prologue." On the theory that this is sound wisdom, let me describe the history of federal coal leasing since 1971. By that I mean the public sale of new federal leases, the conversion of prospecting permits into preference right leases, and lease exchanges. This of course involves Interior Department activity under Secretaries Morton, Hathaway, Kleppe, and Andrus, the litigating endeavors and accomplishments of the Natural Resources Defense Council and other environmental groups, and of course, the now famous Judge Pratt, who decided *Natural Resources Defense Council* v. *Hughes*.

Between 1920, when the Mineral Leasing Act[2] was enacted, and 1971, federal coal leasing was essentially reactive in nature. It worked, at least in my view, reasonably well. Leases were offered and prospecting permits were converted, either pursuant to industry nomination (in the case of competitive lease offerings), or when the prospector made a valuable discovery (in the case of prospecting permits). The environmental interests will assert, and I will be the first to admit that they have half a point, but only half, that it did not work perfectly. They

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1. Natural Resources Defense Council v. Hughes, 437 F. Supp. 981 (D.D.C. 1977).
2. Mineral Leasing Act of 1920, 30 U.S.C. § 181 (1976).

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will argue, and it is a fact, that some seventeen billion tons of coal are now under lease in the west, and only a fraction of it is being mined. Of course, the first answer to that is that many existing leases are located in areas where they cannot be mined from an environmental, marketing, or transportation standpoint. Additionally, however, many existing federal leases do not offer the grades or the qualities of coal in demand in today's market. From industry's standpoint, many of these leases do not provide the potential coal operator with the so-called logical mining unit[3] to produce coal efficiently and profitably. Finally, many federal coal leases are in so-called checkerboard patches, which must be filled in before economical mining can begin. In any event, for better or for worse, this is the way leasing worked until 1971.

In 1971, two years after the National Environmental Protection Act (NEPA)[4] was enacted, a rather obscure memorandum of the Bureau of Land Management pointed out that only a fraction of federal coal under lease was being produced relative to the amount of reserves already under lease. The memorandum recommended to Secretary Morton that the Department of Energy stop, look, and listen, particularly in light of the new statute on the books, NEPA, and halt all federal coal leasing. The lethargy of western coal production in 1971 was, of course, understandable. Our industry was just gearing up for entry into that relatively new market. Mines had to be designed and planned, permits (state and federal) had to be obtained, and new markets had to be established for what was then essentially a new product. Secretary Morton reacted with great vigor. He froze the offering of new federal leases, and he enjoined the issuance of new prospecting permits. For approximately three years, nothing happened. On February 17, 1973, Secretary Morton announced a partial thaw. He instituted the so-called short-term leasing policy. Under it, new competitive coal lease sales were to be resumed, and prospecting permits could be converted into preference right leases, where coal production was needed to maintain an existing operation, or where coal was needed as a reserve for production in the near future. "Near future" meant development was to commence within three years, and production was to commence within five years.

3. A logical mining unit consists of a consolidation of leases, which is made upon approval of the Secretary of the Interior. This is done to promote the development of coal deposits in an orderly fashion.

4. National Environmental Policy Act of 1969, 42 U.S.C. § 4321 (1970).

II. The Energy Minerals Allocation Recommendation System

October, 1973, is the next crucial date. That is when the Bureau of Land Management (BLM) announced EMARS—Energy Minerals Allocation Recommendation System. Please remember the word "allocation" because it is crucial. EMARS, said Interior, would enable it to resume federal coal leasing. It was, in essence, a mechanism to lease environmentally acceptable coal.

A brief word about EMARS. Under it, Interior would essentially perform three functions. It would allocate, it would select tracts, and it would lease. Under the allocation phase, Interior would inventory federal coal reserves and project energy needs on a regional basis. Under the tract selection phase, leasing targets would be set on a regional basis. In the leasing phase, leases would be sold and issued. Hallelujah. We were on our way—but not for long.

EMARS was actually born in May, 1974. That is when a draft programmatic environmental impact statement (EIS) was issued. The draft EIS evoked great public comment and controversy. Industry said EMARS was no good—it put the coal industry in the hands of the government, and it put government in the coal business. We objected. As discovery in *Natural Resources Defense Council* v. *Hughes* brought out, there were even those at Interior who thought EMARS was no good. It was out of date, they said. It was not well explained. The CEQ said the programmatic contained "informational and analytical deficiencies." EPA gave it bad marks, category three, "inadequate."

Sixteen months went by; nothing happened. But in September, 1975, EMARS had its first birthday. A final environmental impact statement was issued. But something strange happened between the draft and the final environmental impact statement. EMARS went through a genetic change. If the draft, EIS was a girl, then the final was a boy, or vice versa. Remember, in May, 1974, at the draft stage, it was Energy Minerals Allocation System. By September, 1975, EMARS, at rebirth, was rechristened Energy Minerals Activity System. Activity was substituted for Allocation. The basic change was that under the activity system, Interior would seek out and react to industry and public nominations or demoninations. The allocation system under the draft EIS was relegated to the scrap pile.

NRDC and three other environmental groups[5] reacted, not with

5. The Environmental Defense Fund, the Northern Plains Resource Council, and the Powder River Basin Resource Council.

words, but with a lawsuit. On October 21, 1975, the NRDC and these three other environmental groups brought a suit against the Interior Department. The case was assigned to Judge Pratt in the federal district court in Washington, D.C. The basic thrust of the complaint was that the final programmatic EIS was inadequate and that the final EIS was so materially different in final form (activity system) than in draft form (allocation system) that the final EIS should have been republished in draft form and made available for public comment. I will be the first to admit that the environmentalists had half a point (maybe even three-quarters of a point).

The next crucial events occurred in 1976. In Janary, 1976, Secretary Kleppe announced that the short-term criteria would be retained until EMARS was fully operational. In February, Secretary Kleppe announced that preference right lease applications meeting the short-term criteria would be processed first, but that Interior would not grant any preference right leases until new regulations were issued. The new regulations, issued in May, 1976, constituted a substantive change. Under the old test, if you had a prospecting permit, and you made a commercial find, which in those days meant that the value of the coal in the ground exceeded the cost of production, then you were entitled to a preference right lease. Under the new regulations, the applicant for a preference right lease had to demonstrate commercial feasibility, that is, that the coal could be mined and sold at a profit.

In June, 1976, Interior issued its first call for industry nominations. 680 tracts were nominated or denominated by industry and environmental groups. In November, 1976, we had an election, and in January, 1977, a new Administration took office. In short, between 1970 and 1977, nothing happened in federal coal leasing. It was a draught.

III. THE EFFECT OF *NATURAL RESOURCES DEFENSE COUNCIL V. HUGHES*

In July, 1977, the good Judge Pratt said, in effect, to the various lawyers in *Natural Resources Defense Council* v. *Hughes*, "Enough fencing. Enough discovery, enough interrogatories. Shape your positions, and let me decide this case." By this time, Utah Power & Light Company had intervened in the litigation as a party-defendant. The NRDC reshaped its position, and it proposed its own short-term criteria, which were very limited. Interior said to Judge Pratt, "Look, we will fully comply with NEPA,"—in effect, Interior said the final programmatic EMARS statement was inadequate—"but let us issue individual leases as the need requires on a case by case basis." Interior

said the lawsuit ought to be dismissed because it was academic under the new leasing program, which did not involve leasing on an industry-wide basis. Interior said, "We are going forward with our new EIS, but give us the opportunity to issue individual leases to meet demand." In effect, Interior said, "Don't cripple our coal program, even if EMARS is poorly conceived, even if the EIS is deficient. Remember the teaching of the Supreme Court of the United States in *Kleppe* v. *Sierra Club*,[6] where it was clearly held that NEPA does not prevent individual actions from taking place during the preparation of a programmatic, a broad form, industry-wide leasing program."

Utah Power & Light, the new party in the litigation, advised the court that preference right leases are not issued in response to any Departmental leasing policy, but are issued under Section 2(b) of the Mineral Leasing Act of 1920,[7] which states that if you have a prospecting permit, and you make a commercial discovery, you "shall" (the statute does not say "may") be entitled to a preference right lease. Utah Power & Light pointed out to the court that in *KerrMcGee* v. *Kleppe*[8] (another case which had by then been decided by the United States District Court for the District of Columbia), Judge Barrington Parker held that the holder of a prospecting permit who makes a commercial discovery has a fifth amendment right to a preference right lease. It is true that phosphate, not coal, was involved in that case, but the same rule of law applies, because phosphate, like coal, is a leasable mineral under the 1920 Act.[9] Finally, Utah Power & Light pointed out to Judge Pratt that in a third case, then pending and still pending in the United States District Court for the District of Columbia, *Natural Resources Defense Council* v. *Berklund*,[10] the environmental groups were taking the position that preference right lease applications can be rejected for environmental reasons. Indeed, Utah Power & Light pointed out to the court in the *Hughes* case that in *Berklund* Interior had taken the following position, and this is an exact quote from Interior's brief: "NEPA may not be construed to deprive an applicant for a preference right lease who is otherwise qualified of a right conferred upon him by the Mineral Leasing Act."

6. 427 U.S. 390 (1976).
7. 30 U.S.C. § 201(b) (1976).
8. Kerr-McGee v. Kleppe, — F. Supp. — (D.D.C. 1976)' *appeal docketed*, No. 76-0608 (D.C. Cir. 1976).
9. 30 U.S.C. § 181 (1976).
10. National Resources Defense Council v. Berklund, — F. Supp. — (D.D.C. 1975), *appeal docketed* No. 75-0313 (D.C. Cir. 1976).

This is where we stood in September, 1977. On that date, Judge Pratt ruled. He ruled that the programmatic EIS was legally inadequate because it did not adequately discuss leasing alternatives. The final EIS, he held, was so substantively different from the draft EIS, that the public was not given an opportunity to comment—allocation versus activity. He rejected any application of the short-term criteria to preference right lease applicants. In doing so, he rejected without comment the flat holding of Judge Parker in *Kerr-McGee* v. *Kleppe*. And Judge Pratt enjoined, and wow did he enjoin. He enjoined federal coal leasing "except when the proposed lease is required to maintain an existing mining operation at the present level of production or is necessary to provide reserves necessary to meet existing contracts, and the extent of the proposed lease is not greater than is required to meet these two criteria for more than three years in the future."

On September 30, 1977, Secretary Andrus announced that he would appeal Judge Pratt's decision. He said, and this is a quote from a Department press release, "We believe we have a sound basis for an appeal, and are now preparing points to submit to the Justice Department for its consideration in pursuing the case to a higher court." That is where we were in September, 1977, when settlement discussions started between Interior and the NRDC. In early February of this year, in a press conference, Secretary Andrus was quoted as saying, "At the moment, Judge Pratt controls coal. I've got to get control back into my hot little hands. I have to get some of these court decisions out of my sparse hair."

A settlement agreement was signed on February 25, 1978. Let's look at the settlement agreement. Does it get the good Judge Pratt, and does it get environmental groups, out of the Secretary's hair? The settlement would permit limited types of hardship cases. Seven leases, eleven million annual tons. Employment cases, two to four million tons, thirteen leases. Bypass situations. This is all good and fine, but let's look at what the settlement agreement does not do.

The most interesting part of the settlement agreement relates to section 510(b)(5) of the Surface Mining Control and Reclamation Act of 1977.[11] Under that section, if an operator has a federal coal lease or fee coal in a so-called alluvial valley, and the operator is not grandfathered, that is, if it did not produce coal in commercial quantities in the year preceding the enactment of the Act, or it did not have a state permit, then it has a right under regulations to be developed by

11. Pub. L. No. 95-87, § 510(b)(5), 91 Stat. 481 (to be codified as 30 U.S.C. § 1260).

the Secretary, to exchange its lease, or to exchange its fee coal, for non-alluvial valley coal. To be more precise, under Section 510(b)(5) of the Act, the Congress provided a mechanism for current federal lease holders or fee owners to exchange their environmentally unacceptable leases or fee interests (those located in alluvial valleys) for environmentally acceptable leases. This was a Congressional mandate to the Department. But under provision (3) of the proposed settlement, such exchanges are enjoined, except where the holder of a federal lease can obtain an "approved" mining permit—which, of course, such a holder cannot obtain under the very language of section 510(b)(5). Thus, the proposed settlement, in this instance, frustrates one of the key environmental objectives that the Congress had in mind in enacting the statute.

The settlement agreement authorizes the Department to process twenty preference right lease applications. Mind you, it does not say grant twenty preference right lease applications, but only process twenty preference right lease applications. But look at the limitations in the settlement agreement. The preference right lease applications are to be those which the Interior Department and the NRDC mutually concur would cause the lease environmental impact of all preference right lease applications pending before the Secretary on the date of this agreement. I understand there are 160 or 170 of them pending. It then states that if the Department and the NRDC are unable to agree, the Department shall submit a list of applications two times the number of disputed applications, but not less than twenty for final·consideration. If agreement is not then reached within ten days, the Interior Department shall select the remaining applications from the list. It is not so bad at that point. But it goes on.

It states that in selecting the twenty applications, Interior "shall choose first those preference right lease applications which are for tracts on which at least ninety percent of the total reserves would be mined by deep mining rather than surface mining, and the total amount of surface mining would affect no more than fifty acres;" and, secondly, applications which are for "operations which would not require substantial additional transportation facilities or water storage or supply systems in the region, and would not involve substantial new industrial development." Now, under those criteria, if you cannot construct a railroad, for example, and move your coal out by rail, the only way you could develop a new coal mine, under these so-called twenty preference right lease applications, is to have a mine-mouth generating

plant right at the mine. But then the settlement agreement says you cannot construct new industrial facilities. Catch-22.

Even a part from section 510(b)(5)[12] exchanges, Interior has published in final form lease exchange regulations, which provide a procedure for exchanging environmentally unacceptable leases for environmentally acceptable leases. This is specifically authorized by section 206 of the B.L.M. 1976 Organic Act Amendments.[13] But, under this stipulation, such exchanges are probably frozen.

Now, despite the settlement agreement, which is not yet approved by Judge Pratt (but I have no doubt that it will be approved), this case is still going to go to the Court of Appeals for the District of Columbia because Utah Power & Light Company, which was an intervening defendant in the court below, was not a party and did not sign the settlement agreement. Enough analysis and enough words.

IV. Conclusion

The real issue today is whether it is in the national interest to have coal policy shaped by litigators and judges rather than by the executive branch of the government, a cabinet officer, Secretary Andrus. I fully recognize the role of NEPA and the courts in coal leasing. But I am reminded of the Supreme Court's view in *Sierra Club* v. *Kleppe* that the role for a court is to insure that the Agency has examined environmental consequences. The court cannot assume the discretion of the executive as to the action to be taken.[14] It may well be that Interior in settling *Natural Resources Defense Council* v. *Hughes*[15] has opened, to some limited extent, federal coal leasing, and that is good. But the real question is, whether the settlement is a luxury which our economy can afford in this energy short era, or whether it would not have been more prudent for Interior to seek a flat reversal of Judge Pratt. Only time will answer that question.

A final word for the law students to ponder because it is too much for me. The settlement agreement will bring into production somewhere between thirteen million and seventeen million annual tons. Is this or is this not major federal action requiring a NEPA statement? I leave the answer to that question to the scholars. I am a mere lawyer.

12. *Id.*
13. Federal Land Policy Management Act of 1976, Pub. L. No. 94-579, § 206, 90 Stat. 2756 (to be codified as 43 U.S.C. § 1716).
14. 427 U.S. at 410 n.21.
15. 437 F. Supp. 981 (D.D.C. 1977).