William & Mary Environmental Law and Policy Review

Volume *13 (1988)*
Issue 1 *Environmental Practice News*

Article 2

January 1988

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Peter R. Lucchesi, *U.S. District Court Upholds Department of the Interior's Sale of Coal Mining Leases*, 13 Wm. & Mary Envtl. L. & Pol'y Rev. 1 (1988), https://scholarship.law.wm.edu/wmelpr/vol13/iss1/2

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"U. S. DISTRICT COURT UPHOLDS DEPARTMENT OF THE INTERIOR'S SALE OF COAL MINING LEASES"

By: Peter R. Lucchesi

The National Wildlife Federation and other environmental groups are appealing a decision by the U.S. District Court in Billings, Montana, allowing the Department of the Interior to lease thousands of acres of federal land to private companies for coal mining. The lease sales occurred in 1982, and they were part of a major policy move by the Reagan administration to lease millions of acres of federally owned land, primarily in the Western United States, to private companies for a wide range of industrial activity. The administration wanted to encourage industrial use of these lands, and believed that private companies would operate in a more efficient and economical manner than any government enterprise.[1] Considering the vast amount of land potentially available for leasing, and the environmental effects of any type of industrial activity, court decisions regarding any aspect of this policy are of major importance.

The suit requested declaratory and injunctive relief against the decision by the Secretary of the Interior, (who, at the time, was James Watt), to sell coal leases on over twenty thousand acres of federal land in the Powder River Coal Region, located in southeastern Montana and northern Wyoming. The district court,

[1] Note, "Sales of Public Land: A Problem in Legislative and Judicial Control of Administrative Action," 96 Harvard L.R., 927 (1983).

in National Wildlife Federation v. Robert Burford, et. al.,[2] held that the Department of the Interior had not abused its discretion in approving the leases.

Several federal statutes were examined in detail. These were the Surface Mining Control and Reclamation Act, 30 U.S.C. § 1201 et. seg. (1977), the Federal Land Policy and Management Act, 43 U.S.C. § 1701 et. seg. (1976), and the Mineral Lands Leasing Act, as amended by the Federal Coal Leasing Amendments Act, 30 U.S.C. § 181 et. seg. (1976). The statutes contain numerous environmental guidelines and regulations. These guidelines are consolidated by and provided with a means of implementation by the Federal Coal Management Program regulations, 43 C.F.R. § 3400 et. seg. (1981)[3]

The Federal Coal Management program was developed by the Department of the Interior in the late 1970's in anticipation of renewed federal leasing after almost a decade of inactivity.[4] The regulations set up four steps which the Department must take before it may sell any lease. The steps are creating a land use plan, developing a separate activity plan, setting up the lease sale procedure, and determining the allowable type of mining.[5] The central controversy was over the land use plan eventually adopted by the Department. The Department's bidding procedure

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[2] No. CV-82-117-BLG, U.S. District Court, for the District of Montana, Billings Division, Sept. 3, 1985.

[3] No. CV-82-117-BLG, at 6

[4] Id., at 5.

[5] Id., at 6.

for selling the land was also challenged. The challenged sale represented the largest amount of coal ever offered by the federal government in a single lease sale.[6]

Land use planning is a mechanism for determining those federal lands which are entitled to further consideration for coal leasing.[7] These plans are developed by the Bureau of Land Management, which is part of the Department of the Interior. The land use plan is the initial step in the overall lease sale scheme. Officially termed a "management framework plan," the guidelines were initially set up by the Federal Land Policy and Management Act.[8] In the Powder River leases, the National Wildlife Federation and other plaintiffs focused their attack on one particular aspect of the management framework plan, the "Unsuitability Criteria" set forth in the Federal Coal Management Program regulations.[9] These criteria set out in detailed fashion areas of "critical environmental, historical and ecological characteristics" on which mining will be prohibited.[10] The particular criteria examined by the court will be discussed later.

The stated policy behind the management framework plans is for public lands to be retained in federal ownership and control "unless as a result of land use planning procedures . . . it is determined that disposal of a particular parcel will serve the

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[6] Id., at 6.

[7] Id., at 6.

[8] 43 U.S.C. § 202 (1976).

[9] 43 C.F.R. § 3461 (a-t), (1981)

[10] 43 C.F.R. § 3461.1 (1981)

national interest."[11] The national interest will "be best realized if the public lands are periodically and systematically inventoried and their present and future use is projected through a land use planning process coordinated with other Federal and State planning efforts."[12] The Secretary of the Interior is also directed to manage public lands "in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air, water, and archeological values, and, if appropriate, provide food and habitat for fish and wildlife (and) for outdoor recreation and human use."[13]

The land lease bidding requirements challenged by the plaintiffs are detailed in several sections of the Federal Coal Management Program regulations. Some important requirements include fair market value determinations, providing notice of the sale, environmental impact statements for certain leases, and surface owner consent.[14] However, none of these requirements were at issue. What was at issue was the Secretary's decision to change the bidding procedures just prior to the lease sales, and whether he had the discretionary right to do so.

The lease sale bidding procedures and the land use planning unsuitability criteria were not the only issues before the court. The defendants, including the Department of the Interior, its Secretary, the State of Wyoming, Shell Oil Company, and other

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[11] 43 U.S.C § 1701(a)(1) (1976)

[12] 43 U.S.C § 1701(a)(2).

[13] 43 U.S.C. § 1701 (a)(8).

[14] See generally 43 C.F.R. § 3422-3427.

private mining companies, claimed that the National Wildlife Federation and several other local environmental groups lacked standing as plaintiffs, and also that the plaintiffs discovery requests were too broad. The courts' determinations on these four issues will now be examined.

I. STANDING

The court concluded that the plaintiffs easily satisfied standing requirements, and cited several U.S. Supreme Court decisions to support its findings. "The gist of the case or controversy requirement of Article II is that a plaintiff must have a sufficient personal interest at stake to assure the Court that the issues raised shall be adversely and sharply presented."[15] The plaintiff must allege "injury in fact and a substantial likelihood that the judicial relief requested would prevent or redress the injury."[16]

The district court then applied these constitutional standards to the various environmental groups. "Plaintiffs, organizations devoted to conservation, education, the environment, and protection of the agricultural industry in the Powder River region represent themselves and their individual members. Each organization alleges that it has members who live, work and regularly use lands that will be affected by the coal leasing. An organization has standing to sue on behalf of injured members even

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[15] Baker v. Carr, 359 U.S. 186, 204 (1962).

[16] Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464, 472 (1982).

in absence of injury to itself."[17]

The court noted that the plaintiffs were also provided with statutory standing. The Administrative Procedure Act entitles a person to judicial review when they suffer any "legal wrong because of an agency action, or are aggrieved or adversely affected by an agency action within the meaning of the relevant statute."[18] Since organizations have standing to sue on behalf of adversely affected members, the only other question was whether the interests affected were under the "zone of interests" to be protected by the statute.[19] In light of the strong environmental concerns stated in the Federal Coal Management Program and other federal statutes incorporated into it, the district court had no problem finding the environmental and ecological interests of the plaintiffs to be adequately covered.[20]

The court's standing requirements for environmental groups was lenient. Clearly for environmental groups, problems of adequate standing should not be difficult in courts that follow the district court in this case. As long as an environmental group alleges that some of its members will be adversely affected, and that, if they're basing their claim on a statute, their interests are within the interests to be protected by the statute,

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[17] National Wildlife Federation v. Burford, CV-82-117-BLG, Sept. 1, 1985, at 19. See also Warth v. Seldin, 422 U.S. 490, 511 (1975).

[18] 5 U.S.C. § 702 (1966).

[19] Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150, 152-153. (1970).

[20] CV-82-117-BLG, at 20.

it will have standing.

II. DISCOVERY

The National Wildlife Federation and other plaintiffs asked for extensive discovery materials from the defendants, including all reports, documents and memoranda referring to the Powder River region land use plans. The district court rejected these requests. "The record to be examined is that which was before the agency at the time the decision being reviewed was made, and it consists of all documents and materials directly or indirectly considered by agency decision makers and includes evidence contrary to the agency's position."[21] The court was worried that extensive discovery requirements covering all deliberations of agency personnel would have "a dampening effect on the candid exchange" between agency decision makers.[22]

Four situations were proposed in which further discovery requests could be justified. These were:

(A) When the record needs to be expanded to explain agency action;

(B) When the agency has relied on documents or materials not included in the record;

(C) To explain or clarify technical matters involved in the decision; and,

(D) When there has been a strong showing of a claim of bad faith or improper behavior on the part of agency

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[21] CV-82-117-BLG. at 24.

[22] Id. at 26.

decision makers.[23]

Overall, the court gave great deference to the Department of the Interior's ability to choose between all the reports, documents and memorandums generated for developing its land use plans, those specific ones "relied upon" for the agency's ultimate decision. Moreover, the court rejected the plaintiff's assertion that more documents had to be examined due to possible bad faith influence by private coal companies on the Department as mere speculation. "Inquiry into the mental process of administrative decision makers is usually to be avoided."[24] In spite of the district court's narrow view of the discovery exceptions, other courts with a more expansive interpretation of them probably could find reasons for further discovery. The ability of a plaintiff to obtain more documents than just those offered by the agency will therefore be heavily dependent on the particular court's viewpoint.

III. LAND USE PLANNING-UNSUITABILITY CRITERIA

The Federal Coal Management Program regulations provide a list of twenty unsuitability criteria to "be applied to all coal lands with development potential identified in the comprehensive land use plan or land use analysis."[25] At the outset of the case, the court stated its opinion about the proper scope of inquiry

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[23] Id. at 26. The court adopted the holding of the Ninth Circuit in Public Power Council v. Johnson, 674 F.2d 791 (9th Cir. 1982).

[24] Id. at 26.

[25] 43 C.F.R. § 3461.1, 3461.3-1 (1982).

into the Department's application of the unsuitability criteria. "The court must consider whether the agency's decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. Although inquiry into the facts is to be searching and careful, the ultimate standard of review is to be a narrow one. The court is not empowered to substitute its judgement for that of the agency."[26] Agency decisions could be reversed as arbitrary and capricious only if the agency failed to provide a reasonable basis for its decision, and the court should confine its review to the full administrative record before the agency.[27]

For several of the Montana tracts of land, the National Wildlife Federation claimed that the Department failed to satisfy Criteria 15. This provides that lands unsuitable for mining shall include "Federal lands which the surface management agency and the state jointly agree are fish and wildlife habitat for resident species of high interest to the state and which are essential for maintaining these priority wildlife species." Among the areas protected are "active dancing and strutting grounds" for sharp tailed grouse (a game bird noted for its spectacular display of colors somewhat like the peacock). A lease could be issued if "after consultation with the state, the surface management agency determines that all or certain stipulated methods of coal mining will not have a significant long-term impact on the species being

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[26] Id., at 13, see also Citizens to Preserve Overton Park, Inc. v. Vol. p.e, 401 U.S. 402 (1971).

[27] Id. at 13, see also Camp v. Pitts, 411 U.S. 138, 142 (1973).

protected."[28]

The court rejected the plaintiff's contention that Criteria 15 had not been satisfied. The official administrative records provided by the Bureau of Land Management indicated that consultations had occurred with the Montana Department of Fish, Wildlife and Parks, and as a result stipulations were written into the lease requiring that before any mining would occur, the mining companies would assure the Department of State Lands that "no significant long term negative impact on the short tail grouse and their habitat would occur."[29]

In Wyoming, the National Wildlife Federation challenged the Department's actions regarding Criteria 3. This provides that land unsuitable for mining shall include "lands within 100 feet of the outside line of the right of way of a public road or within 100 feet of a cemetery, or within 300 feet of any public building, school, church, community or institutional building or public park or within 300 feet of an occupied dwelling. Exceptions are provided in certain cases after a public hearing with written notice has been held, or consent of dwelling owners has been obtained.[30] The Wyoming tracts contained several public highways. The court again noted that the official administrative record showed that the highways had been considered and that the lessee, Shell Oil Company, allowed in its lease a stipulation that it would honor

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[28] 43 C.F.R. § 3461.1(0)(1) (1982).

[29] National Wildlife Federation v. Burford, CV-82-117-BLG, at 45.

[30] 43 C.F.R. § 3461.1 (c)(1-2) (1982).

the 100 foot limits regardless of what the mining plans might show, and that it would eventually relocate one of the affected highways.[31]

The third criteria raised by the plaintiffs was Criteria 7. This provides that unsuitable lands shall include "all publicly owned places on the National Register of Historic places . . . (including) any areas that the surface management agency determines, after consultation with the Advisory Council on Historic Preservation and the State Historic Preservation Officer, are necessary to protect the inherent values of the property."[32] On one of the Wyoming tracts a prehistoric site was located during the preparation of the land use plan. The Bureau of Land Management never consulted with the Advisory Council and the State Historic Preservation Officer about the site, but the court did not find this an absolutely necessary requirement. The administrative record showed that "considerable attention" had been given to the site, as evidenced by the stipulation in the lease that "all cultural resources within the area would be protected from lease related activities until any cultural resource mitigation measures could be implemented." Moreover, the lessee, Shell Oil Company, promised to consult with the Advisory Council and State Historic Preservation Officer before any mining began.[33]

All three challenges based on the Federal Land Management

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[31] CV-82-117-BLG, at 49.

[32] 43 C.F.R. § 3461.1, (g),(1) (1982).

[33] CV-82-117-BLG, at 51.

Program regulations were rejected by the district court. The basic message the court gave was that there had to be some evidence in the official administrative records (those records used by the Department in reaching its decision and offered to the court in discovery proceedings) that the unsuitability criteria were considered. Also, there had to be some stipulation or promise by the lessee to follow those provisions and consult with any necessary agency. "It is within the authority and discretion of the Department to enter into lease stipulations to limit surface coal mining operations on areas that have been designated unsuitable."[34] What the land use plan does not require is an actual scheme for following the unsuitability criteria.

IV. BIDDING PROCEDURES

In March 1982, just prior to the lease sales, Secretary of the Interior Watt changed the bidding procedures on lands with non-transferrable consents to surface mining, which allowed only the particular lessee on the land to do any mining activity; no consents to other private companies to mine on the land could be given. Originally, any bidding procedure was controlled by the lessee, who set the price. The Secretary's decision changed to allow competitive bidding by any interested company, with the hope that competitive bidding would take less time, attract a greater number of companies, and through these companies bidding with each other competitively, perhaps secure a higher price on the lease for the federal government.

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[34] Id. at 49.

The Secretary's decision could be overruled only if it constituted agency rule making, and not simply a change in policy. Policy changes are a matter of agency discretion, while rule making involves certain procedural requirements including notice and hearings about the proposed rule change.[35]

The district court defined a rule to "establish a standard of conduct which has the force and effect of law. A rule affects the rights and obligations of the parties being regulated."[36] A policy, on the other hand, "establishes non-binding norms of flexible criteria which do not have the force or effect of law," and is directed not towards the regulated industries, but towards agency personnel.[37] Using this analysis, the court decided that change in bidding procedures is a policy decision entirely within the Department's discretion. "The mere setting (of) departmental guidelines for the future leasing of tracts, as long as fair market value is received and a tract is otherwise properly leased, (is within) the Department's choice."[38]

The assertion that policy decisions affect agency personnel and not the regulated industries is difficult to accept. The change in bidding procedures will ultimately have a substantial impact on both the industries doing the bidding and the land

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[35] Id. at 65; see the Administrative Proceedures Act, 5 U.S.C. § 553 (1966).

[36] Id. at 66; see also Chrysler Corp. v. Brown, 441 U.S. 281, 297 (1979).

[37] Id. at 66, see also Noel v. Chapman, 508 F.2d 1023 (2nd. Cir.) cert. denied, 423 U.S. 824 (1975).

[38] Id., at 67.

rule making and policymaking could be drawn, and that the definitions they adopted were the most sensible. The court also noted that neither the Federal Coal Management Program regulations or any other of the federal statutes involved actually mandated a specific method of bidding.[39] The inference from all of this is that one should look to actual statutory changes or requirements to find rule making decisions, and not simply administrative record reports.

CONCLUSION

The district court's holding clearly shows the problems with challenging agency decisions. On the positive side, the court adopted a liberal standard for environmental and other public interest groups to achieve standing to challenge such decisions. The court was also willing to go into detailed statutory analysis and examination of agency records to find evidence of agency compliance with statutory requirements. The terms of compliance, however, consisted basically of consideration of statutory requirements and promises to ultimately follow those requirements. No actual plan for compliance was necessary. Discovery was limited only to those agency records actually used by the agency in reaching its decision. Discovery was limited only to these agency records actually used by the agency in reaching its decisions. Essentially, this good faith reliance on the agency's complete discretion in choosing which records to submit. Also, an agency may get away with decisions which are "policy chores" even

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[39] Id., at 68.

though such decisions may have a huge impact on the lands regulated by the agency.

Because the Reagan Administration, through the Department of the Interior, wants to lease millions of acres of federal land for industrial activity, any limitation on the agency's discretion to do so would be welcomed. Instead, absent clear neglect or a deliberate attempt to disregard statutory requirements, it will be extremely difficult to overturn agency decisions regarding private industrial use of federally owned lands.