Oil and Gas Leasing on Forest Service Lands: A Question of NEPA Compliance

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OIL AND GAS LEASING ON FOREST SERVICE LANDS: A QUESTION OF NEPA COMPLIANCE

Robert A. Nelson*

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I. SETTING THE STAGE

Every American is aware of an increasing need for change in our lifestyle caused by the sky-rocketing cost of energy. The events of 1973 caused a painful awakening to our growing dependence on foreign sources of oil and gas. Indeed, the problem is worldwide, with most countries experiencing an energy crisis worse than our own.

Several factors are contributing to the situation. Worldwide population has nearly doubled since 1900; it is expected to double again within the next fifty years. At the same time, efforts are being made everywhere to raise living standards. This is accomplished through industrialization which, in turn, requires a growth in per capita energy consumption. In the United States, for example, population grew thirty-four percent between 1950 and 1970, while energy consumption increased about one hundred percent. The trend is more exaggerated in developing countries where population grew fifty-three percent for the twenty-year period, while energy consumption rose one hundred sixty-two percent. Finally, the most readily available energy sources have already been tapped, leaving us now with the less accessible, and consequently more expensive, resources.

The energy problem we perceive at home is naturally the most motivating factor in national energy policies and programs. Americans use more oil per capita than any other country, excepting Canada. This extravagant use of energy is largely responsible for a very high living standard. (Some would argue that we enjoy a high living standard in spite of excessive energy consumption. This argument seems convincing to the extent that we could have an even higher standard if
we used energy more efficiently.) Now, however, we are being forced to pay dearly for this practice. In 1973, Americans spent $7.6 billion to import foreign oil; by 1977 the cost had jumped to $41.5 billion. The price of a barrel of imported oil has risen from three dollars to approximately ten times that amount in the past decade.

Due to the importance of maintaining an adequate national supply of energy, as well as the opportunity for large profits, there has been a flurry of activity aimed at exploring for and developing domestic oil and gas sources. On the heels of the 1973 Arab oil embargo, former President Nixon issued an executive order initiating "Project Independence" to address this concern. The impact of this situation has hit home here in Montana. Energy consultants at a recent Montana Chamber of Commerce Convention predicted that the oil and gas industry is about to surpass coal as Montana's leading mineral extraction industry.\(^1\) National policy remains committed to this goal of energy development.

While the past ten years has created hunger for resource development, there has been a concurrent demand for consideration of environmental concerns. Legislation has been important in defining these concerns,—most notably the National Environmental Policy Act (NEPA),\(^2\) but also other acts such as the Wilderness Act of 1964,\(^3\) and the Endangered Species Act.\(^4\) Moreover, it is certainly an understatement to say that these concerns do not always square with the drive for resource development.

II. DEFINING THE PROBLEM

A major battle has developed in the continuing conflict between resource development pressures and environmental considerations. The Forest Service (FS) has generally taken the position that decisions concerning whether or not to lease Forest Service lands for oil and gas activities are not "major federal actions significantly affecting the human environment," and thus do not call for the issuance of environmental impact statements (EIS's)\(^5\) pursuant to NEPA. The import of this interpretation is readily apparent when one considers that the FS is responsible for managing 188 million acres, or approximately one fourth of the Federal lands. Environmental organizations and concerned citizens challenged this interpretation.\(^6\) The problem is immedi-

\(^1\) Great Falls Tribune, May 31, 1981, at 1-D, col. 3.
\(^6\) See, e.g., In Re: Appeal of Decision Regarding Oil and Gas Leasing in the Pali-
ate, and the stakes are high.

In the Northern Region (R-1) alone, the Forest Service is responsible for the surface management of approximately 26 million acres. A year ago, 2.2 million acres of this area had been leased for oil and gas activities, and another 2.5 million acres (over 3,000 square miles) were under application for leases. Although no recent figures have been compiled, it is generally accepted by those close to the situation that virtually all of the applications have been granted, and that new ones continue to be processed. Most of this activity is in the Montana portion of the Western Overthrust Belt, which also happens to be prime wildlife habitat and recreational area. Concerns are further amplified by the fact that much of the land under application is wilderness or areas designated for further planning as wilderness pursuant to RARE II and other mandated studies.

While much of the information presented in this article pertains to Montana and the Northern Region of the Forest Service, that is certainly not to imply that the problem is confined to that area. The Western Overthrust Belt, which has excited the imagination of the oil and gas industry, runs from Mexico to Canada. Minerals and geology officials in all affected regions of the Forest Service have assured this writer that oil and gas activity is steadily increasing, especially in light of recent administrative directives to eliminate lease application backlogs.

Region 1 is following a practice of preparing individual Environmental Assessments to establish guidelines for oil and gas leasing on each National Forest. Approximately ten million acres have been opened for leasing in Montana alone. Region 3 is following the same procedure. Region 2, however, has decided to prepare one Environmental Assessment (EA) to establish oil and gas leasing guidelines.

7. "With the increased seriousness of the energy situation, the Forest Service is faced with a deliberate Service-side reorientation of its mineral program, especially for oil and gas and other leasable resources." Forest Service, Department of Agriculture, Oil and Gas Activity in the Northern Region: An Information Document (1980).
8. Montana, North Dakota, South Dakota, and part of Idaho.
10. Oil and gas exploration, drilling and production is also proceeding rapidly in the Wyoming, Idaho and Utah portions of this area. The geology and terrain of Montana is similar to these areas. Oil wells in the Overthrust Belt are typically 9,000-12,000 feet deep, and require transportation of heavy drilling rigs into very remote areas. Id.
11. Region 1, Missoula, MT; Region 2, Denver, CO; Region 3, Alberquerque, NM.
This EA was issued November 7, 1979, and affects 17.4 million acres.\textsuperscript{12} Region 6 issued a similar EA on April 27, 1981, for all non-wilderness forest lands in Washington and Oregon, at which time there were currently 1.7 million acres under lease application.

Many people were surprised by the discovery of an Eastern Overthrust Belt. This is a recently defined area of sedimentary rocks in the Appalachian region, running from Virginia to Alabama, where geologists believe oil and gas may be abundant. A minerals and geology officer for Forest Service Region 8 has stated that oil and gas activity in National Forests of this area is comparable to that in the Western Overthrust Belt. Although the bulk of Forest Service land is in the West, the problem has become national in scope.

III. FEDERAL OIL AND GAS LEASING

A. Historical Development

The first national law to establish policy concerning exploitation of minerals was the Mining Law of 1866,\textsuperscript{13} as substantially amended by a later act entitled "An Act to Promote the Development of the Mining Resources of the United States."\textsuperscript{14} Several minerals, including oil and gas, were removed from the Mining Law by the 1920 Mineral Leasing Act\textsuperscript{15} which applied to all lands belonging to the Federal Government that had not been privately owned.\textsuperscript{16} Federal mineral leasing authority was further extended by the 1947 Mineral Leasing Act\textsuperscript{17} which applies to acquired mineral estates which were patented and subsequently returned to Federal ownership through purchase, donation, condemnation, special act of Congress, or exchange under the Weeks Law.\textsuperscript{18}

The basic policy of promoting mineral exploitation has remained unchanged by the Mineral Leasing Acts of 1920 and 1947. The major changes made were: title to minerals remains with the United States, which has full discretion whether to make the resources available through leasing; the United States must be compensated for resource exploitation by payment of rentals or royalties; monopoly in federal mineral holdings is prevented and development is required.\textsuperscript{19}

\begin{itemize}
  \item \textsuperscript{12} Forest Service, Department of Agriculture, Environmental Assessment on Forest Service Recommendations and Consent for Oil and Gas Lease Issuance, National Forest System Lands, Colorado, Wyoming, Kansas, Nebraska and South Dakota (1979).
  \item \textsuperscript{13} 30 U.S.C. § 13m, et. seq. (1976).
  \item \textsuperscript{14} Ch. 152, 17 Stat. 91 (1872).
  \item \textsuperscript{16} 30 U.S.C. § 181 (1976).
  \item \textsuperscript{17} 30 U.S.C. §§ 351-359.
  \item \textsuperscript{18} 16 U.S.C. §§ 480, 500, 513-519, 521, 522, 563 (1976).
  \item \textsuperscript{19} 30 U.S.C., \textit{supra} note 15.
\end{itemize}
B. Current Practices

Oil and gas leases are issued under two basic processes: competitive and non-competitive.\textsuperscript{20}

When an area is within a known geological structure (KGS), competitive leases are issued. These leases are limited to a maximum area of 640 acres, and are always subject to competitive bidding. If a bid is accepted, a five-year renewable lease is issued.

Non-competitive leases are issued for lands outside a KGS. Because lessees usually lease areas surrounding proposed or ongoing drilling operations awaiting possible discovery of oil and gas, most Federal lands are leased non-competitively. In fact, roughly 97\% of the lands offered for leasing are outside a KGS and are, therefore, leased non-competitively.\textsuperscript{21} These leases may include an area of up to 2,560 acres and are for renewable ten year periods. An individual lessee may lease up to a total of 246,080 acres of federal land in any one state (except Alaska).\textsuperscript{22}

Rent on non-competitive leases is one dollar per year per acre, while competitive leases are two dollars per year per acre. Lessees are also required to pay royalties on production of oil or gas.\textsuperscript{23}

C. Decision-making Authority

The Mineral Leasing Acts of 1920 and 1947 have vested authority for issuing leases with the Secretary of the Interior.\textsuperscript{24} The agency directly responsible for exercising the Secretary’s discretion is the Bureau of Land Management (BLM). Once a lease is issued, the United States Geologic Survey (USGS) exercises the Secretary’s authority with respect to on-the-ground operations.

BLM attaches any stipulation to the lease which it deems necessary to protect the environment. This is where the Forest Service becomes involved. Since 1945, there has been a cooperative agreement between the Departments of Agriculture and the Interior, allowing the Forest Service to make recommendations regarding leases on land for

\begin{enumerate}
\item \textit{Id.}
\item Forest Service, Department of Agriculture, Oil and Gas Training Guide 5-4 (1979).
\item Oil royalties are 12\% for wells averaging up to 100 barrels per day and rise to 25\% for wells producing 400 or more barrels per day. Half this amount is returned to the host state (except in Alaska which gets 90\%), 10\% goes to the U.S. Treasury, and 40\% is deposited in the Federal Reclamation Fund. \textit{Id.}
\end{enumerate}
which they are responsible as the surface management agency. In these cases, the BLM has established a policy of not acting on a lease without Forest Service recommendations which are generally controlling. In addition, the Mineral Leasing Act of 1947 requires the consent of the Secretary of Agriculture for all acquired federal lands.

There are several levels of decision-making authority within the Forest Service itself. The District Ranger reviews all lease and permit applications and operating plans relating to his district. He then makes a recommendation to the Forest Supervisor on whether or not the permit or lease should be issued and what stipulations should be attached. The Regional Forester is responsible for the final review of recommendations on the lease or permit, which he then forwards to the appropriate BLM official for action. The Forest Service Chief retains final authority to make recommendations with regard to certain Forest Service lands, including wildernesses designated under the Wilderness Act of 1964, primitive areas, recreation areas designated by the Secretary of Agriculture, and irrigation districts.

25. This policy was first established by exchange of letters between the Secretaries of Agriculture and Interior in 1945. Interior Oil and Gas Training Guide, supra note 22, at 5-5.

26. The court in Mountain States Legal Foundation v. Andrus, 499 F. Supp. 383 (D. Wyo. 1980) has said that “[t]he recommendations of the Forest Service are always followed by the BLM with respect to the issuance of oil and gas leases. . . .” Id. at 388. It is also true, however, that lease stipulations recommended by the FS have occasionally been deleted on administrative appeal. See, e.g., Stanley v. Edwards, 24 I.B.L.A. 12, 83 LD. (1976), where the Board said it was “insistent that proposed stipulations be reasonable. If the stipulation is unreasonable, it will be deleted, or the case will be remanded. . . .”

Perhaps more importantly, it has been suggested that Congress intended, through FLPMA, to monitor the Secretaries' actions. To do this, agencies are mandated to develop rules and regulations governing their policies. "Yet, in the absence of published rules and regulations, this policy exists only in their 1945 correspondence." Mountain States Legal Foundation, 499 F. Supp. at 396. As a result, the agencies have been ordered to adopt rules and regulations in this matter. See, e.g., Department of Agriculture, Forest Service, Oil and Gas and Mineral Leasing on Designated Wilderness, etc., 45 Fed. Reg. 82010 (1980) (Notice of the proposed development and issuance of standards, criteria and guidelines). In Wilderness areas, the Secretary of Agriculture does have statutory authority to impose reasonable stipulations, but actual leasing itself is still the province of the Interior.

27. 30 U.S.C., supra note 15. The significance of this requirement is somewhat limited in the current situation due to the fact that 95% of the Overthrust Belt is outside the scope of the Acquired Lands Act 1947. Moreover, as noted in footnote 25 the procedure required for acquired lands is voluntarily followed with respect to other land.

28. FOREST SERVICE DEPARTMENT OF AGRICULTURE, FOREST SERVICE MANUAL (FSM) § 2822.04d [hereinafter cited as FSM].
D. Environmental Consideration Under NEPA

Prior to the passage of NEPA in 1969, there was little Forest Service review of oil and gas lease applications. NEPA, however, established a National policy "to promote efforts which will prevent or eliminate damage to the environment and biosphere, and stimulate the health and welfare of a man." Federal agencies are now under an affirmative duty to fully consider the environmental impacts of their actions in the decision-making process. Specifically, "all agencies of the Federal Government shall . . . include in every recommendation or report on proposals for . . . major federal actions significantly affecting the quality of the human environment, a detailed statement" concerning five specified factors. This provision for preparing an Environmental Impact Statement (EIS) is commonly referred to as the "guts" of NEPA, and the action-forcing element of the legislation. NEPA also mandated the creation of the Council of Environmental Quality (CEQ), which has further defined compliance with NEPA through regulations.

When an agency decides that an action will not be a major one significantly affecting the human environment, they do not have to prepare an EIS. That determination is normally made after an Environmental Assessment (EA) is prepared. As noted above, the Forest Service has determined that the art of leasing is not, in itself, a major federal action requiring compliance under NEPA.

IV. WHEN THE DUTY TO PREPARE AN EIS ATTACHES

A. Leasing As A "Major Federal Action Significantly Affecting The Quality Of The Human Environment"

The Forest Service has made the threshold determination that a lease is not a "major federal action significantly affecting the quality of the human environment." The rationale for this determination is that a lease, although carrying the rights and obligations of a contract, does not identify any specific actions which will be taken in a definable area.

37. Those factors are: "the environmental impact of the proposed action, any adverse environmental effects which cannot be avoided should the proposal be implemented, alternatives to the proposed action, the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented." 42 U.S.C. § 4332(2)(C) (1976).
Moreover, permits must be obtained before any actual drilling is undertaken. The key is the belief that stipulations attached to a lease serve to retain agency authority to approve future actions.\textsuperscript{41} If a specific proposal is developed, so the rationale goes, a determination can later be made whether or not an EIS should then be prepared.

Two key elements of this threshold determination which were focused on early in NEPA's development are "major" and "significant." It is generally recognized that these determinations are dependent.\textsuperscript{42} In other words, it would be paradoxical to speak of a "minor" federal action significantly affecting the environment. "To separate the consideration of the magnitude of federal action from its impact on the environment does little to foster the purposes of the Act, i.e., to 'attain the widest range of beneficial uses of the environment without degradation, risk to health and safety, or other undesirable and unintended consequences.'"\textsuperscript{43}

The phrase "actions significantly affecting the human environment" is intentionally broad, "reflecting the Act's attempt to promote an across-the-board adjustment in federal agency decision making so as to make the quality of the environment a concern of every federal agency."\textsuperscript{44} Thus, courts have held that the leasing of federal lands does trigger the NEPA EIS procedure.\textsuperscript{45} It is arguable, however, that these cases may be distinguished on the basis that the leases under consideration were the last remaining obstacle to the ultimately significant action, and that the result was more direct than in oil and gas leasing involving subsequent regulation and approvals. On the other hand, there have been instances where major federal action had been found even where further regulatory steps would have to be taken. (Below is a discussion of cases apparently favoring the Forest Service interpretation; followed by cases rejecting it.)

A case frequently relied upon by the Forest Service to support

\textsuperscript{41} See, e.g., statements made by FS Chief, Max Peterson, in his decision rejecting the challenge to oil and gas leasing procedure in the Palisades Further Planning Area. Appeal of Decision Regarding Oil and Gas Leasing, supra note 6.

\textsuperscript{42} F. ANDERSON, NEPA IN THE COURTS: A LEGAL ANALYSIS OF THE NATIONAL ENVIRONMENTAL POLICY ACT 74 (1973).

\textsuperscript{43} Minnesota Public Interest Research Group v. Butz, 498 F.2d 1314, 1321 (8th Cir. 1974) (citing 42 U.S.C. § 4331(b)(3)). But see Scherr v. Volpe, 466 F.2d 1027 (7th Cir. 1972).


\textsuperscript{45} Cady v. Morton, 527 F.2d 786 (9th Cir. 1975); Davis v. Morton, 469 F.2d 593 (10th Cir. 1972).
their position is *Sierra Club v. Hathaway*, where the Sierra Club attempted to force the Bureau of Land Management to prepare an EIS prior to issuing leases under the Geothermal Steam Act of 1970. The Bureau contended that there was no major federal action at the leasing stage, since actual development is segmented into several phases (identical to those for oil and gas), and environmental analysis will be conducted at those stages as specific projects are identified. The court accepted BLM's argument, reasoning that lease provisions, coupled with BLM regulations, establish continuing federal control with the required environmental considerations at succeeding phases of the leasing program.

Although language in this case provides strong support for Forest Service arguments, it is arguably distinguishable on several points. First, the opinion is written in the context of deciding whether the district court had abused its discretion in denying an injunction. The court specifically noted: "Our review at this juncture is limited to the propriety of the denial of injunctive relief and we intimate no review regarding the merits of the underlying controversy." Second, the court limited its consideration to the exploration phase, and did not have the benefit of argument of prior case law, such as *Rocky Mountain Oil and Gas Association v. Andrus*, to the effect that development beyond exploration could not be effectively stopped. Third, this case involved the Geothermal Leasing Program, which the court noted "has yet to reach dimensions of specific proportions such that it amounts to a proposal for major federal action." On the other hand, as noted throughout this article, the oil and gas leasing "program" is well-developed and has reached enormous proportions. Finally, the court placed great emphasis on the fact that a programmatic EIS had already been prepared for the Geothermal Leasing Program, and that the State of Oregon had also prepared a site-specific EIS for the project in question.

Another recent case appears to affirm the FS position. In *State of South Dakota v. Andrus*, the Court held that the Department of Interior is not compelled to prepare an EIS prior to issuing a mineral patent to a private party. In this case, Pittsburg Pacific Co.'s application for a mineral patent under the General Mining Act of 1872 was contested by the BLM, at the request of the Forest Service. The court rea-
asoned that granting the patent would not allow the company to engage in mining operations, and that any development would presumably require subsequent permits from the Forest Service for roads, water pipelines, and railroad rights of way.

Of course, this case is not controlling authority in other circuits, and may always be attacked as wrongly reasoned. It is also distinguishable. The patent application was made under the 1872 Mining Law, which differs from the Mineral Leasing Acts of 1920 and 1947 in that the latter specifically reserves to the Secretary of Interior full discretion regarding lease issuance. However, "if a qualified locator of a mining claim locates, marks and records his claim to unappropriated public lands in accordance with federal and local law, he has an 'exclusive right of possession to the extent of his claim as located, with the right to extract the minerals, even to exhaustion, without paying any royalty to the United States as owner, and without ever applying for a patent.'"\(^{53}\) This is apparently what leads the court to its conclusion that ministerial acts... have generally been held outside the ambit of NEPA's EIS requirement. Reasoning that the primary purpose of the impact statement is to aid agency decision-making, courts have indicated that non-discretionary acts should be exempt from the requirement,"\(^{54}\) (emphasis added). It is unlikely that the Forest Service would be willing to assert that their recommendation process to the BLM involves no real decision-making that might affect oil and gas development. A final case specifically adopting the FS position is discussed below.

Several cases reject the Forest Service position. A decision directly in conflict with *State of South Dakota*, is *Natural Resources Defense Council v. Berklund*\(^{55}\). The district court held that the Secretary of Interior must prepare an EIS on any proposed issuance of coal leases where the issuance would constitute a major federal action, even though the Secretary had no discretion to reject lease applications when coal had been found in commercial quantities. On appeal, NRDC contended that the issuance of leases under section 2 of the Mineral Leasing Act of 1920\(^{56}\) was a discretionary act. This position was ultimately rejected, but at oral argument both parties agreed with the district court's conclusion that an EIS was required.

In *Environmental Defense Fund v. Andrus*,\(^{57}\) a similar situation

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54. Id. at 1193.
57. 596 F.2d 848 (9th Cir. 1979).
again elicited a conclusion quite dissimilar to *South Dakota v. Andrus*. At issue were two flood control projects located in Montana and Wyoming. The Department of Interior began a program in 1967 for marketing water from these reservoirs for industrial uses. By 1974, 658,000 acre feet of water per year had been committed in option contracts for industrial use.

No EIS was prepared for the industrial marketing program. The Secretary of Interior argued that the letting of mere option contracts for water from the two reservoirs was not a federal action significantly affecting the environment; he believed that an EIS was needed only if the option was ultimately exercised, and supported that conclusion with the assertion that licensing would be required before any water was actually withdrawn. This situation closely parallels Forest Service reliance on APD's, prospecting permits, etc. The district court affirmed the Secretary's position, relying primarily on *Kleppe v. Sierra Club*. The Ninth Circuit reversed, pointing out the reality that some commitment had already been made with, at least marginally predictable results in the future. The primary emphasis was on the commitment itself, however.

In focusing on the uncertainty of industrial use if and when the option contracts are exercised, the court ignored the definite federal action already taken in major commitment of project water to industrial use. Any uncertainty about the details of subsequent use of the diverted water does not obviate the importance of the decision to divert and the necessity to evaluate the environmental consequences of that decision.

The court's decision supports a conclusion that the act of leasing itself is the "irreversible and irretrievable commitment of the availability of resources." Even though details of the option holder's future use of the water may not be known at the time of contract execution, "it is that time at which the government must decide among various potential users, and in doing so must conjecture as to possible effects of commitment to one user versus another." Where there is a present commitment to resource allocation, a "Finding of No Significant Impact" (FONSI), based upon the necessity of future licensing or specific project approvals, should be improper.

A similar Ninth Circuit case preceded *Environmental Defense Fund* by only a few weeks. In *Port of Astoria v. Hodel*, the court

59. 596 F.2d at 851.
60. *Id.* at 852.
61. *Id.* at 853.
62. 595 F.2d 467 (9th Cir. 1979).
considered whether a programmatic EIS was required prior to executing the first industrial firm power contract of Phase 2 of Bonneville Power Administration (BPA) Hydro Thermal Power Program, a regional proposal for development and distribution of power resources in BPA's marketing region. The court held that EIS's were required for both the individual contracts and for the Phase 2 Program.

In connection with the present consideration of oil and gas leasing, it is interesting to note that the Ninth Circuit required an EIS because the Phase 2 program was "a long-range regional policy with definite goals and fixed roles for participants." This conclusion was reached in spite of the fact that only one contract had been entered into, and that further concrete proposals were speculative; the important factor was BPA's commitment to a program. The Forest Service and BLM are similarly committed to a program of mineral leasing. If such a program is normally difficult to identify, this is no longer a valid argument considering the current management direction to eliminate a ten-year-old backlog of lease applications which cover millions of acres, and to expeditiously process new applications within newly established guidelines.

Finally, in a California case, the court initially noted that the California Environmental Quality Act was almost identical to NEPA, and entailed the same considerations. State agencies acting on proposals which might have a significant effect on the environment were required to prepare an EIS. The court found that failure to do so prior to issuance of a conditional use permit was in violation of the California Environmental Quality Act, even though the facts of the case indicated that a building permit was subsequently needed before any construction could begin under the conditional use permit.

In the final analysis, it appears that in a case such as oil and gas leasing, determining the significance of the Forest Service recommendation as it affects the human environment is largely a question of timing. In other words, when must a federal agency stop deferring preparation of an EIS on the basis that it can be done in conjunction with some later agency decision?

1. Development Pressures/Lessees' Interests

Oil and gas leasing will naturally pose the probability that subsequent pressures for development will occur. More importantly, this re-

63. Id. at 478.
64. See, e.g., R-I's northern region proposed regional plan and its program objectives for oil and gas leasing (1980).
relationship has been recognized by the courts. In *North Slope Borough v. Andrus*, the court considered, in the context of the Endangered Species Act, the full scope of possible leasing effects.

The court initially noted that the Secretary of Interior apparently realized that the ESA required an "expansive vision" of lease sales and, consequently, had made some attempt to analyze all ramifications of the lease sale. The Secretary later argued that only the lease sale itself, not prospective decisions, constituted agency action under the ESA. The court noted the inconsistency and held that "agency action constitutes the lease sale and all resulting activities." One immediate result of this decision was that the R-1 Regional office sent a letter to all Forest Supervisors in Montana. This letter noted that the Forest Service had been operating under the premise that leases do not authorize any specific development on the leaseholds, and that, therefore, consultation with the Fish and Wildlife Service would not be necessary to comply with the ESA. The Regional Office conceded that the court's opinion "is in conflict with our basis premises." The Forest Service has limited this admission to compliance with the ESA, however.

The "development pressure" factor was also illustrated in *Udall v. Tallman*. At issue was whether certain public lands had been withdrawn from oil and gas leasing. The pertinent language under consideration was as follows:

The public lands within the following-described areas in Alaska . . . are hereby temporarily withdrawn from settlement, location, sale or entry, for classification and examination, and in aid or proposed legislation.

None of the above-described lands . . . shall be subject to settlement, location, sale, or entry, or other disposition (except for fish trap sites) under any of the public land laws applicable to Alaska . . . . (emphasis added). In holding that the affected lands were not withdrawn from oil and gas leasing, the court concluded that such leasing was not a "disposition." This, in spite of the fact that the first section of the Mineral Leasing Act

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67. *Id.* at 351. The court here quoted language from Congressional debate on the ESA: "The earlier in the process of a project a conflict [between a species and a project] is recognized, the easier it is to design an alternative consistent with the requirements of the Act, or to abandon the proposed action." CONG. REC., July 17, 1978, at S10896. It seems clear that the policy concerns involved here are directly analogous to NEPA.
specifically states that "deposits of . . . oil . . . shall be subject to disposition in the form and manner provided by this chapter . . ." 72 (emphasis added). Of course, one can only speculate as to the motivation for this strained interpretation of the orders quoted above. It would be unwise, however, to ignore the court's practical recognition that "the lessees and their assignees had, in turn, expended tens of millions of dollars in the development of the leases." 73

Rocky Mountain Oil and Gas Association v. Andrus 74 provides a recent eye-opening example of development pressure. At issue were leases issued after 1978 in areas under wilderness study, and therefore accompanied by Wilderness Protection Stipulations (WPS). These stipulations were issued under the authority of an Interior Department Solicitor's Opinion holding that no development could take place which might impair the suitability of an area for preservation as wilderness, as mandated by the Federal Land Policy and Management Act of 1976. 75 The ultimate result clearly demonstrates that the administrative solution to the Solicitor's Opinion was ineffective.

The government argues that the inclusion of the WPS with the lease informs the lessee that development may or may not be allowed. Such an argument is a poor excuse for the end result. Once again a lessee could continue to pay rentals and not be allowed to develop oil and gas . . . . Such a system of issuing "shell leases" with no developmental rights is clearly an unconstitutional taking and is blatantly unfair to lessees. 76

The threshold question in the case was the issue of ripeness. In determining the requisite showing of some hardship which would result if the court did not consider the case, the deciding factor was that many of RMOGA's members held leases on the lands in question. Moreover, "[i]rreparable financial harm is accruing to RMOGA's members (due to the WSP's) because of the loss of monies previously invested and the halting of oil and gas exploration and development." 77 "A lease without development rights is a mockery of the term lease." 78 Could the message be clearer? 79

73. 38 U.S. at 7.
76. 500 F. Supp. at 1345.
77. Id. at 1343.
78. Id. at 1345.
79. If further indication of judicial recognition of development pressure is required, it is certainly available.

"The court recognizes that a government can regulate without engaging in a taking. The court also recognizes, however, that when regulation reaches the point of seriously im-
2. Lease Stipulations

In their consistent rejection of oil and gas EA appeals, the Forest Service confidently asserts that development pressures, which are asserted as development *rights*, can be adequately controlled through lease stipulations. As these are the key to Forest Service refusal to consider environmental impacts at the leasing stage, their asserted ability to lock out unacceptable development deserves more than cursory analysis.

As previously noted, certain stipulations which are viewed as unduly restrictive have been struck down by courts, as well as by the Interior Board of Land Appeals (IBLA). An extremely suspect type of stipulation is the “No Surface Occupancy” (NSO), which prohibits the lessee from occupying the surface of his lease some or all of the time. This is essentially what the Wilderness Protection Stipulations invalidated in *Rocky Mountain Oil and Gas Association* were. Millions of acres of leased land are presently subject to NSO stipulations; in fact, 28% of leases issued in the last 15 years are subject to these restrictions. The implications of the recent successful court challenges of these stipulations for federal land management are staggering. Millions of acres of federal land have been leased without the benefit of specific environmental analysis and are unprotected from ultimately unacceptable impacts, since the Forest Service has relied on potentially invalid stipulations to maintain their control of development.

Court challenges are not the only threat to the effectiveness of lease stipulations. It has been proposed, as an administrative action, that leased lands be inventoried to determine the extent of use of stipulations. Stipulations which are determined to be “severely restrictive” would then be removed. A stipulation is considered “severely restrictive” if it is for wilderness protection (WPS), or if it prohibits surface occupancy on some or all of a lease for at least six months each year. Of 48 stipulations used by the BLM for surface protection, 15 have

80. *See supra* note 26 and accompanying text.

81. COMP. GEN. REP., *supra* note 21, at 58.
been labeled “severely restrictive.”

Again, presently leased land would go wholly unprotected, without benefit of an adequate environmental evaluation.

It is instructive to note the Forest Service Chief’s response to the GAO report mentioned above. The GAO made the following assertion:

With respect to oil and gas, both the Forest Service and the Bureau of Land Management have adopted practices which allow them to continue processing leases without committing themselves to approval of future development operations. They incorporate stipulations . . . into some leases which give the agency control over whether development will eventually be allowed under the lease.\(^8\)

Although this echoes FS rationale for FONSI’s in oil and gas EAs, the Forest Service Chief responded to this specific statement with the following observation:

The discussion seems to overstate the control which the agencies maintain by stipulations. The intent of the (FS) in developing stipulations is to retain a degree of control over operations to assure compliance with law . . . Such stipulations do not reserve full control to prevent future development. We believe the process of denying operations on the basis of post lease environmental assessments is more complex than implied. The issuance of a lease carries the right to reasonable use, and the post lease assessment normally only considers the “how to.”\(^8\)

In fact, Chief Peterson stated that the only way to regain total surface control once a lease has issued will be to condemn the mineral rights originally granted. This, of course, would be an extremely expensive proposition, and seems to be foolish to the point of being an abrogation of public trust responsibilities. Moreover, some of the earliest public land withdrawals were made specifically so that the public would not be forced to buy back a resource which it rashly gave away and later decided it needed.\(^8\)

An additional problem with lease stipulations is that the Forest Service will have to ensure that they are continuously and vigorously enforced if they are to be effective. The Forest Service states that they are confident they can control operations and compel adherence to stipulations.\(^8\) Unfortunately, this may be little more than wishful think-

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82. *Id.*
83. *Id.* at 23.
84. *Id.* at 187.
86. *See* Appeal of Decision Regarding Oil and Gas Leasing, *supra* note 6.
ing. A realistic constraint on all agencies, especially under the present administration, is budgeting. The Draft EIS for the Proposed Northern Region Plan identified two alternatives for future oil and gas leasing guidelines. Alternative A provides for following current direction to eliminate the lease application backlog by October, 1981. Alternative B provides for eliminating the lease application backlog by October, 1981. No, you didn't read wrong. In fact, the only difference between the two alternatives is funding levels: $1.8 million versus $3.3 million. The critical point here is that the increased funding level is requested to "assure than environmental effects are mitigated and that environmental stipulations in the lease are followed." 87 It should be apparent to everybody that the Forest Service is not going to have its budget doubled. Moreover, sufficient funds could not be transferred from other facets of the minerals budget, even if this was desired, since 68.6% of this budget already goes toward supervision of operations. 88 This admittedly inadequate situation will achieve crisis proportions as lease applications reach the expected level of three times the current numbers. 89 No matter how hard the Forest Service wishes, it just won't have the money to do the necessary job.

The Forest Service looses almost all management flexibility once a lease is issued based upon its recommendations. Forest Service management itself has concluded that, once a lease is issued, the Forest Service lacks the authority to modify or revoke it—even if approval for its issuance was an inadvertent mistake. Consider the following example.

The Forest Service approved certain leases in a roadless area of the White River National Forest in 1977. It was later discovered that Forest Service personnel had erred in identifying the roadless area boundaries in relation to lease property boundaries, and that leasing should not have been recommended. Despite this error, the Forest Service determined that the lease was a "valid contract with the United States," and that "[a]ny action on the part of the United States to deprive the lessee of his opportunities to exercise his contractual rights and obligations would invite a lawsuit involving probable and significant monetary damages against the United States." 90 Moreover, as the Forest Service noted, 91 "[l]aw and regulations provide for cancellation of oil and gas leases by the United States only for cause, i.e. failure of

89. Id. at 66.
90. Memo from Craig Rupp, R-2 Regional Forester, to Chief, Forest Service re: Mineral Leasing in Roadless Areas, Oil and Gas Lease C-17572 (April 15, 1977).
91. Id. at 2.
the lessee to meet his contractual obligations." Ultimately, it chose to do nothing. The Regional Forester, who approved lease issuance, recognized that the Forest Service might be sued by the Sierra Club for approving leases which had no stipulations and which did not comply with NEPA. This did not outweigh existing commitments and basic principles of contract law.

The Regional Forester stated his options as follows:

The possibilities as we saw them: we may be sued for the error of agreeing to lease without special wilderness character protection stipulations; we may be sued for permitting operations on the lease without a full EIS; we may be sued for agreeing to lease even with protective stipulations; or we may be sued for not honoring a contractual obligation of the United States. I chose to honor the contract.

Finally, there is another revealing aspect of the North Slope Borough case as regards EIS timing. As noted, a recurring theme with respect to Forest Service policy on preparation of EAR's for oil and gas leases is that stipulations in the lease will prevent environmentally damaging acts prior to further Forest Service approval. In other words, the conditions of the lease ostensibly eliminate major environmental concerns which might otherwise require an EIS. It could be argued that the stipulations to forestall environmental impacts themselves trigger NEPA's EIS provision.

[L]ease stipulations are an additional important mechanism for minimizing the impacts of oil exploration and drilling on the Beaufort Sea environment. As such, the rationale of Alaska v. Andrus, requires that the EIS alert the decision maker to the probable effectiveness of each stipulation and to reasonable alternative stipulations. However, the EIS makes no attempt to do this. . . . Without a consideration of alternative lease stipulations, the EIS fails to satisfy the requirements of NEPA.

In Alaska v. Andrus, the court held that if adequate operating orders are a premise for the Secretary's decision to proceed with a lease sale, the issuance of those orders must be conducted with full consideration of environmental consequences and alternatives. The wisdom of this requirement is more apparent upon considering the decisions holding

92. Id.
93. Id at 3.
94. Id. at 2.
96. 580 F.2d 465 (D.C. Cir. 1978).
stipulations invalid.\textsuperscript{97} Moreover, developmental rights, capable of invalidating stipulations, have been recognized by the Department of Interior’s Acting Regional Solicitor,\textsuperscript{98} as well as by the \textit{RMOGA} court in its discussion of “shell leases.”\textsuperscript{99}

3. \textit{Inconsistent FS Statements and Policies}

Some Forest Service Environmental Assessment documents themselves appear to recognize that, to some extent, an “expansive view” of leasing must be taken in order to fully assess possible impacts. In one EAR purporting to defer consideration of anything aside from immediately direct impacts of leasing, the FS still noted that the probability of a wildcat well being subsequently placed on any lease block was 1:2, and that the area in question had been rated 95 for a potential natural gas discovery out of a possible 100 points.\textsuperscript{100} Furthermore, when considering the effects the proposal would have on resources such as wildlife habitat, the FS looked at “traffic, increased public access, helicopter use, drill pad and road construction and wildcat drilling.”\textsuperscript{101} Some of which are activities the Forest Service officially view only as possible results of prospective decisions.

A further indication of FS recognition that leasing does have an adverse impact in itself, when measured in absolute terms against the area to be leased, is past Forest Service policy with respect to lease applications in fragile areas. Until recently Region 4 of the Forest Service has routinely recommended against the issuance of oil and gas leases in those portions of RARE II areas within its jurisdiction which have also been RARE I Candidate Study Areas.\textsuperscript{102} It has also been the past practice of Region I to refrain from making any recommendations at all to the BLM on oil and gas lease applications involving RARE II areas, other than recommendations not to issue the lease.\textsuperscript{103} An obvious question raised, then, is why the Forest Service should have taken such a position if leasing itself produces no significant impact. Moreover, the Forest Service Manual also implicitly recognizes the possibility of significant impacts resulting from leasing. “The Chief will not

\textsuperscript{97} See, e.g. \textit{supra} note 26; Effect of October 4, 1976 Solicitor’s Opinion M-36888, 843 I.D. Nos. 4 and 5 (1977).
\textsuperscript{98} \textit{Supra} note 79.
\textsuperscript{99} See notes 74-78 and accompanying text.
\textsuperscript{100} \textit{FOREST SERVICE, DEPARTMENT OF AGRICULTURE, ENVIRONMENTAL ASSESSMENT, OIL AND GAS LEASING: DEEP CREEK/RESERVOIR NORTH RARE II FURTHER PLANNING AREA 9} (May 1980).
\textsuperscript{101} \textit{Id} at 65.
\textsuperscript{102} \textit{Supra} note 26.
\textsuperscript{103} \textit{Id}.
normally recommend or approve mineral leases or permits in wilderness or primitive areas unless directional drilling or other methods can be used which will avoid any invasion of the surface."

B. Matters of Spatial Coincidence: Programmatic EIS's

The best starting point to analyze this topic is NEPA itself, and CEQ enforcement regulations. One court which considered the issue stated that "the timing question can best be answered by reference to the underlying policies of NEPA in favor of meaningful, timely information on the effects of agency action." This belief is also reflected in the CEQ guidelines under NEPA:

Agencies shall reduce delay by:
(a) Integrating the NEPA process into early planning.
(f) Preparing Environmental Impact Statements early in the process.

The purpose of this part include:
(a) Integrating the NEPA process into early planning to insure appropriate consideration of NEPA's policies and to eliminate delay.

Although applying NEPA early in the decision-making process may be interpreted as not referring strictly to EIS's, some case law, and realities of certain situations indicate that this would be a faulty conclusion.

1. Segmented Agency Actions

One type of situation where the problem arises is a project segmented into several parts, none of which taken separately will require an EIS. In Conservation Society of Southern Vermont, Inc. v. Secretary of Transportation, the Federal Highway Authority had refused to prepare and EIS on a transportation corridor spanning a three-state area because of the non-existence of any plans to build the 280 mile, three-state highway; all that was immediately proposed was a small segment of road approximately twenty miles long in southern Vermont. This situation is somewhat analogous to lease issuance where there are no concrete development plans.

In affirming the "appropriateness of ordering impact statements for entire development programs when a proposal before an agency concerns only one portion of a more massive undertaking," the court

104. FSM, supra note 28, at § 2323.73.
106. 40 C.F.R. § 1500.5(a), (f) (1980).
108. 508 F.2d 927 (2nd Cir. 1974).
emphasized "the undesirable consequences if each isolated increment is approved in ignorance both of the cumulative environmental impact of fragmented growth and of . . . alternatives . . . ". 109 Of course, this example differs from oil and gas leasing in the respect that the actions concerning highways would all be of the same nature, whereas oil and gas activities involve distinct phases with differing impacts. However, a key element was the Highway Authority's claim that plans for further highway development were non-existent. The court found little problem in addressing this argument by recognizing the interest that the proposed action would generate in later related actions, and resulting pressures for development.

2. Analogy: Technologies Development

Perhaps the decision which goes furthest in applying EIS requirements at preliminary project stages is Scientists' Institute for Public Information, Inc. v. Atomic Energy Commission. 110 At issue was whether a Federal program to develop a liquid metal fast breeder reactor (LMFBR) amounted to a major federal action significantly affecting the environment. The answer was yes. The decision pertained specifically to impacts of technology development programs, but some parallels invite comparison with oil and gas leasing.

To wait until a technology attains the stage of complete commercial feasibility before considering the possible adverse environmental effects attendant upon ultimate application of the technology will undoubtedly frustrate meaningful consideration and balancing of environmental costs against economic and other benefits. Modern technological advances typically stem from massive investments in research and development, as in the case here. Technological advances are therefore capital investments and, as such, once brought to a stage of commercial feasibility, the investment in their development acts to compel their application. (emphasis added). 111

Once a substantial investment is made by a company exploring for oil and gas, that will become a factor in later decisions weighing costs and benefits of alternative decisions. Again, the realities of economic pressure should not be ignored in decisions regarding application of NEPA.

Contrary to the Forest Service position regarding oil and gas leasing, some courts have taken the position that it is the very uncertainty of future development which requires an EIS. In City of Davis v. Cole-

109. Id. at 934.
110. 481 F.2d at 1079.
111. Id. at 1089.
man, the question was whether an EIS was required prior to building a highway interchange a few miles away from the town. The Secretary of Transportation made a negative threshold determination, asserting that the City's claim of developmental impacts was too speculative for meaningful evaluation. This argument boomeranged. "Uncertainty about the pace and direction of development merely suggests the need for exploring in the EIS/EIR alternative scenarios based on these external contingencies. Drafting an EIS/EIR necessarily involves some degree of forecasting."

3. Kleppe and Timing Questions

One more element might support the proposition that the appropriate timing of an EIS is before the Forest Service issues leases. Although Kleppe v. Sierra Club held that an EIS was not required under the circumstances present there, the Court attached significance to the lower court's finding that the action in question was not "part of a plan or program to develop or encourage development." On the other hand, when considering oil and gas lease applications, it is established that "the Secretary of the Interior must administer the Mineral Leasing Act so as to provide some incentive for, and to promote the development of oil and gas deposits in all publicly-owned lands of the United States through private enterprise."

A corollary to the proposition that timing of the EIS requirement should occur as early as possible, is that programmatic EIS's should be prepared when feasible. Again, the CEQ guidelines under NEPA provide some support for such statements:

Agencies shall reduce excessive paperwork by:
(i) Using program, policy, or plan environmental impact statements and tiering from statements of broad scope to those of narrower scope, to eliminate repetitive discussions of the same

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112. 521 F.2d 661 (9th Cir. 1975).
113. Id. at 676. See No Oil, Inc. v. City of Los Angeles, 13 Cal. 3d 68, 85, 118 Cal. Rptr. 34, 45, 529 P.2d 66, 77 (1974); "The very uncertainty created by the conflicting assertions made by the parties as to the environmental effect . . . underscores the necessity of the EIR to substitute some degree of factual certainty for the tentative opinion and speculation." (Citing county of Inyo v. Yorty, 32 Cal. App. 3d 795, 814, 108 Cal. Rptr. 377, 390) Id.
115. Id. at 404.
116. Rocky Mountain Oil and Gas Association, 500 F. Supp. at 392. (citing Harvey v. Udall, 384 F.2d 883 (10th Cir. 1967).) It might be appropriate to note here that the Court did not decide that the nature of leasing, in itself, dispenses with EIS requirements. On the contrary: "Of course, since the kind of impact statement required depends upon the kind of 'federal action being taken', . . . the statement on a proposed . . . lease application may bear little resemblance to the statement on the national coal-leasing program." FOREST SERVICE, DEPARTMENT OF AGRICULTURE, OIL AND GAS TRAINING AID 402 (1979).
Proposals or parts of proposals which are related to each other closely enough to be, in effect, a single course of action shall be evaluated in a single impact statement.\footnote{117}

Judicial decisions have also recognized the value of programmatic EIS's and their advantages, such as providing "an occasion for a more exhaustive consideration of effects and alternatives than would be practicable in a statement on an individual action. It ensures consideration of cumulative impacts that might be slighted in a case-by-case analysis.\footnote{119}"

A request for a programmatic EIS concerning coal leasing in the northwest United States was rejected by the Court in Kleppe. One reason for the decision was that there was already a programmatic EIS for coal leasing on a national scale, moreover, there was no existing plan or program for development of coal resources on a regional level. The Courts' main concern was with practical problems of defining the necessary content of an EIS without a concrete subject matter. The opinion intimated, however, that a programmatic EIS would be called for under some circumstances.\footnote{120}

Two key considerations in deciding the appropriateness of a programmatic EIS are time and space relationships of the actions in question. The Court noted its "general agreement with respondents' basic premise that § 102(2)(c) may require a comprehensive impact statement in certain situations where several proposed actions are pending at the same time."\footnote{121} When several proposals are pending concurrently before an agency, their environmental consequences should be considered together.\footnote{122} Since consideration of oil and gas lease applications occurs at the regional level of the Forest Service, and since applications have recently deluged most regional offices accompanied by action forcing regulations and policy changes,\footnote{123} a program-

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\begin{itemize}
  \item 117. 40 C.F.R. § 1500.4 (1980).
  \item 118. 40 C.F.R. § 1502.4(a) (1980).
  \item 119. Scientists' Institute for Public Info., 481 F.2d at 1087.
  \item 120. In fact, one commentator has interpreted Kleppe as providing broader requirements than previously existed in some lower courts. "One common issue in NEPA/water project cases is whether the particular project should be treated independently or as part of a larger plan." See Sierra Club v. Stamm, 507 F.2d 788 (10th Cir. 1974); EDF v. Armstrong, 487 F.2d 814 (9th Cir. 1974). These cases hold that no consideration of the entire project contemplated was necessary, but all were decided prior to Kleppe. In light of the Court's evaluation of the need for an EIS on the national leasing policy in that case, and its emphasis on agency "proposals for actions, the Ninth and Tenth Circuit cases are questionable authority as precedent." G. COGGINS AND F. WILKINSON, FEDERAL PUBLIC LAND AND RESOURCE LAW 323 (1981).
  \item 121. Kleppe, 427 U.S. at 409.
  \item 122. Id. at 410.
  \item 123. Oil and Gas and Mineral Leasing on Designated Wilderness, Congressionally man-
matic EIS for leases covering the region seems appropriate. The Kleppe Court also noted that spatial boundaries, such as Forest Service regional designations, are an additional element in deciding whether to prepare a programmatic EIS.

Another concept which should be considered is "synergism." This is a natural concern when world and national events have taken such a turn as to encourage rapid and widespread resource development. The environmental impacts from several activities added together may well be greater than the sum of what would normally have been expected from the individual activities. It has been said that "when several proposals for . . . actions that will have cumulative or synergistic environmental impact on a region are pending concurrently before an agency, their environmental consequences must be considered together." 124

4. Reasonable Expectations

As the preceding discussion indicates, decisions regarding preparation of programmatic EIS's will necessarily involve agency judgments based on substantive evaluations. An agency might, for example, determine that a group of proposals is so unrelated in time or space as to make EIS's regarding them a "crystal ball inquiry." There are standards, however, by which an agency must make their determination. Generally, the standard on review will be one of reason. 125

One court has stated the proposition as follows:

Section 102(c)'s requirement that the agency describe the anticipated environmental effects of proposed action is subject to a rule of reason. The agency need not foresee the unforeseeable, but by the same token neither can it avoid drafting an impact statement simply because describing the environmental effects of and alternatives to particular agency action involves some degree of forecasting. And one of the functions of a NEPA statement is to indicate the extent to which environmental effects are essentially unknown. It must be remembered that the basic thrust of an agency's responsibilities under NEPA is to predict the environmental effects of proposed action before the action is taken and those effects fully known. Reasonable forecasting and speculation is thus implicit in NEPA . . . . 126

124. Kleppe, 427 U.S. at 410. See also Wentling v. Bergland, 479 F. Supp. 174, 176 (W.D.S.D. 1979), where the court noted, "The concomitant EIS is therefore of the 'programmatic' variety required when a series of actions will have a cumulative or synergistic environmental impact."

125. See V, infra, for a detailed discussion of this and other standards of judicial review.

The entire decision hinged upon notions of "reasonable forecasting" and "present expectation." 127

Timing of the EIS requirement should be viewed so that careful consideration occurs early in the decision-making process and to ensure that we keep a "sensitive eye to the options often imperceptibly foreclosed by fragmented growth." 128 Discussion of NEPA in Congress indicates that this very consideration was a motivation for the Act. "Important decisions concerning the use and shape of man's future environment continue to be made in small but steady increments which perpetuate rather than avoid the recognized mistakes of previous decades." 129

5. Preclusion of Site-Specific EIS's

Before concluding on this topic, one caveat should be noted. As the CEQ guidelines referred to above indicate, one administrative reason for program EIS's is to "reduce paperwork." It has been held, for example, that where the Forest Service prepared a program EIS concerning their overall timber management policy, EIS's were not required on four subsequent timber sales; instead, EA's were acceptable. 130 Still concerns as to the individual timber sales should be addressed in the original EIS. Where a programmatic EIS is insufficient in relation to site-specific actions, it may still be argued that the EIS is not sufficiently detailed to meet NEPA requirements. 131

In Get Oil Out, Inc. v. Andrus, 132 for example, the court ruled that the Department of the Interior was not required to prepare site-specific impact statements on two individual oil drilling projects. A programmatic EIS had earlier been prepared.

On the other hand, courts have found a site-specific EIS necessary to supplement preceding programmatic statements. In Natural Resources Defense Council, Inc. v. United States, 133 the court found a programmatic statement dealing with nuclear waste management operations at Hanford, Washington, inadequate to satisfy NEPA with respect to a specific project to build 22 tanks for storage of radioactive

127. See also note 113 and accompanying text: where the court said: "... it was essential to consider and weigh the environmental aspects of transportation, as well as of exploration and production, to the extent 'meaningfully possible'... before deciding whether to authorize the leasing program." (emphasis added) County of Suffolk v. Sec. of Interior 562 F.2d 1368, 1377 (2nd Cir. 1977).
128. Vermont v. Sec. of Transportation, 508 F.2d 927, 936 (2nd Cir. 1974).
130. Minnesota Public Interest Research Group, 498 F.2d at 1323, n.29.
133. 606 F.2d 1261 (D.C. Cir. 1979).
waste. The programmatic statement had not discussed alternative safety and design features which could be incorporated into the tanks under consideration. Moreover, NRDC had not waived its right to contest these specific design alternatives by not raising them during comment periods on the programmatic EIS. The court reasoned that NRDC could not have been expected to present comments with respect to particular facilities which were unplanned at the time the overall program was considered.

Cases such as the two referred to above are extremely diverse in their factual contexts, and if this issue were to be raised in oil and gas leasing assessments, the fact situation would have to be carefully scrutinized. These differences alone do not account for the disparate results, however. An immensely important factor is the deference which the court is willing to give the agency involved. Proper scope of judicial review becomes critically important, and hotly contested. This conflict is repeatedly demonstrated in caselaw.

V. Scope of Judicial Review of the Agency's Threshold Determination Under NEPA

Having discussed the general guidelines requiring preparation of EIS's, a crucial question still remains: To what extent will courts be willing to review the Forest Service threshold determination that the EIS is not required prior to oil and gas leasing? The FS has raised some issues which, at least, arguably, support their finding of no significant impact and, therefore, their conclusion that EIS procedures are not triggered. If courts are willing to give full deference to this decision, the preceding discussion is purely academic and of value only as an intellectual curiosity.

A. Substantive vs. Procedural Requirements

An important initial distinction must be made between substantive and procedural requirements. Section 101 of NEPA sets forth general environmental policies and goals. It requires "all practical means" necessary to:

1. fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;
2. assure for all Americans safe, healthful productive, and esthetically and culturally pleasing surroundings;
3. attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;
4. preserve important historic, cultural and natural aspects of our national heritage, and maintain, wherever possi-
ble, an environment which supports diversity and variety of individual choice;

(5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and

(6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.  

Section 102 describes the procedures agencies are to use in implementing the above policies. Most notable among those is the EIS requirement. Although it has been forcefully argued that NEPA mandates giving value to substantive matters of environmental concern in connection with major federal actions, recent Supreme Court cases have taken the position that NEPA is "essentially procedural." This distinction becomes quite important, since agency discretion in decision making is limited only to the extent that the statutory requirements of NEPA have narrowed it. In reviewing substantive decisions to proceed with a project after an agency has prepared an EIS considering the environmental effects, most courts have adopted an "arbitrary and capricious" standard. This is a result of the judicial attitude that it is inappropriate to "interject the court within the area of discretion of the executive as to the choice of the action to be taken." Unfortunately, emphasis has usually been only on whether the information was "compiled in good faith."

B. Review of Procedural Compliance

Review of agency compliance with procedural requirements is quite another matter. As noted above, the procedural requirement pertinent to this discussion of Forest Service oil and gas leasing procedure is that of a detailed environmental impact statement for "major federal actions significantly affecting the quality of the human environment." The scope of review applied to this agency determination has fallen within a wide spectrum of standards, determined primarily by whether

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137. Vermont Yankee Nuclear Power Corp. v. NRDC. 435 U.S. 519, 558 (1978); Strycher's Bay Neighborhood Council v. Karlen, 444 U.S. 223, 227 (1979) (This case may be an indication of the importance in discussing standards of review; the parties seeking review of the agency decision could conceivably have attacked the decision as arbitrary and capricious, but the Court refused to consider that possibility since the plaintiffs had not so labeled their arguments.)
138. Minnesota Public Interest Research Group, 498 F.2d at 1319.
139. Strycher's Bay, 444 U.S. at 228. (citing Kleppe, 427 U.S. at 410 No. 21).
140. County of Suffolk v. Secretary of Interior, 562 F.2d 1368, 1375 (2d Cir. 1977).
the reviewing court sees the determination as a question of fact, or a question of law.\textsuperscript{141}

1. \textit{Question of Fact}

A few courts have held that agency determination of whether an action will significantly affect the environment is a question of fact and, therefore, subject to very limited review. Such holdings threatened to pull NEPA's teeth in its infancy. An example of such reasoning can be found in \textit{Ely v. Velde},\textsuperscript{142} where the court applied an arbitrary and capricious standard of review to this threshold question. Another court has observed that "[a]s an initial matter, we note that the parties agree that HUD's determination that an environmental impact statement need not be filed must stand unless it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."\textsuperscript{143}

Until recently, the paucity of such judicially conservative decisions in the context of NEPA compliance seriously weakened their impact. In \textit{Cabinet Mountains Wilderness v. Peterson},\textsuperscript{144} however, this standard of review has again reared its head. In that case, plaintiffs contend that NEPA and CEQ regulations required preparation of an EIS prior to FS approval of a mineral exploration program in the Cabinet Mountains Wilderness in northwestern Montana. After preparing an EA which recommended specific mitigation procedures, the Forest Service issued a FONSI. Plaintiffs urged a \textit{de novo} review of this decision.

\textsuperscript{141} Some courts view the agency determination as a factual question reviewable only under the arbitrary and capricious standard of the APA. Others consider the agency judgment to involve mixed questions of law and fact reviewable under a 'rational basis' test, whereby the agency's decision will be accepted where it has warrant in the record and a reasonable basis in law. Still others, a distinct minority, deem the question of applicability to be purely a question of law reviewable \textit{de novo} in the courts." W. RODGERS, ENVIRONMENTAL LAW 751 (1977) (footnote omitted) (quoting Hanly v. Kleindienst (Hanly II), 471 F.2d 823, 829 (2d Cir. 1972), cert. denied 424 U.S. 908 (1973), quoting National Labor Relations Bd. v. Hearst Publications, 322 U.S. 111 (1944).

\textsuperscript{142} 451 F.2d 1130, 1138 (4th Cir. 1971). It should be noted, however, that the court recognized that the agency must make some explanation of why the procedures were not invoked. "If the LEAA, after following the precepts of . . . NEPA, makes a good faith judgment as to the consequences, courts have no further role to play. We note, however, that a federal agency obligated to take into account the values that . . . NEPA seek[s] to safeguard, may not evade that obligation by keeping its thought processes under wraps." After similar decisions, it has become standard practice to prepare "mini-EIS's" \textit{Id.} i.e., EA's. See also Scherr v. Volpe, 466 F.2d 1027 (7th Cir. 1972).

\textsuperscript{143} Nucleus of Chicago Homeowner's Assoc'n v. Lynn, 524 F.2d 225, 229 (7th Cir. 1975). It is interesting to note that this extreme example may have been prompted by the fact that the thrust of the case was to keep low-income HUD projects out of certain neighborhoods, the court noting that "the environmental problems of the city are not as readily identifiable as clean air and clean water." Perhaps the arguably extreme result in Strycker, \textit{supra}, note 137, was similarly influenced.

The court, however, adopted defendants' contention that the "arbitrary and capricious" standard must be applied giving several reasons for this conclusion. First, the court stated that plaintiffs had cited no authority for their position. Second, "subjective value judgements are so entwined with scientific data" that the court would not substitute its own judgement. Finally, the Court expressed its belief that North Slope Borough145 appeared to adopt the arbitrary and capricious standard, although it acknowledged that "the Court of Appeals apparently has not addressed this precise question."

The Court is Sierra Club v. Peterson also applied the "arbitrary and capricious" standard to review a FS FONSI, but formulated that standard in terms of the four factors enumerated above. As noted, those considerations do not necessarily accomodate a strict "arbitrary and capricious" approach; in fact, they have supported searching reviews of agency action. In this case, the court initially indicated that it would emphasize the Forest Service "pursuasiveness" that impacts would be insignificant. The opinion concluded, however, with the observation that the Forest Service had taken a "hard look" at the issues presented and had reached a "rational" conclusion.

2. Question of Law

At the other end of the spectrum are those court decisions which hold the agency threshold determination to be a question of law. The implication of this approach is important; when agencies interpret statutory terms, they are usually given no deference at all, since statutory interpretation is clearly within the court's expertise.146

A mild form of this approach has been termed as "broad judicial review," required by "the responsibility of the judiciary to construe statutory standards and thereby decide whether the agency violated the Congressional command."147 The practical result is an extensive review of substantive information to see if there will, in fact, be a significant impact on the environment. Certain parameters have been established to guide this independent review of possible environmental degradation:

(1) Only if the plaintiff can show an inadequate evidentiary development before the agency should the court take ev-

idence on the environmental impact for the purpose of supplementing the administrative record;

(2) if the plaintiff raises substantial environmental issues, the court should proceed to examine and weigh all the evidence in determining whether the agency’s conclusion was reasonable that the project would have no significant environmental impact; and

(3) it is not the province of the court to review the agency decision on the merits as to the desirability vel non of the project. (emphasis added).\(^\text{148}\)

Far from the arbitrary and capricious standard attendant to questions of fact, the standard of review described here amounts to a de novo determination of the threshold question by the reviewing court. The only limitation is that the party seeking review of the agency’s negative determination must show the possibility of an impact.

Although this approach is certainly a minority position, strong arguments can be made to adopt it. Two of the primary reasons that courts have traditionally given deference to agency decisions are that (1) the courts do not have a full record before them, and to compile one would defeat the purpose of administrative agencies, and (2) decisions should be made by entities with expertise in that area. Under CEQ guidelines implementing NEPA,\(^\text{149}\) agencies are normally required to prepare at least an environmental assessment (EA) to support their decision not to prepare an EIS. The reviewing court will have this record of consideration before it, as well as supplemental information. In addition, the court is the entity with expertise in statutory interpretation; to some extent, terms such as “significant” necessarily take their meaning from the factual context. Finally, the agency responsible for the determination may have little or no expertise in environmental matters. Indeed, it has been noted that some agencies may actually be hostile to environmental concerns.\(^\text{150}\)

3. **Mixed Questions of Law and Fact**

The preceding two sections considered possible extremes of review standards. This section will discuss the middle-of-the-road approach which, not surprisingly, is by far the most common. Under this approach, interpretation of the statutory phrase “major federal action significantly affecting the environment” is a question of law, fully

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149. 40 C.F.R. § 1501.4(c) (1981).
150. “When a court is suited institutionally to decide a legal question on a full factual record, the case for deferring to the agency remains to be made.” W. RODGERS, supra, note 141 at 751.
reviewable by the court, while application of the term in a certain context is a question of fact for the agency. Courts adopting this approach have further divided on the second step of this two tier analysis—scope of review concerning agency application of statutory terms.

a. "Arbitrary and Capricious"

Courts typically utilize the "arbitrary and capricious" scope of review when considering matters left to agency discretion. At least one court has, therefore, applied this standard to review an agency's findings on no significant impact, under the impression that "[c]ongress apparently was willing to depend principally upon the agency's good faith determination as to what conduct would be sufficiently serious from an ecological standpoint to require use of the full-scale procedure." This case is distinguishable from the question of fact cases discussed above in that the court first independently established the meaning of "significant." As noted below, this approach can operate to soften the normal rigidity of the arbitrary and capricious standard.

b. "Rational Basis"/"Reasonableness"

By far, the majority of courts considering agency application of "significantly affecting the environment" language to justify non-compliance with EIS procedures have applied a more rigorous standard of "rational basis." Sometimes this is formulated in terms of whether the agency's determination was "reasonable."

Several reasons have been articulated for adopting this broader scope of review concerning application of statutory terms. A frequent argument is that NEPA's mandatory language affirmatively establishes high standards for agency compliance. In other words, normal agency discretion is limited by express statutory language.

Section 102(1) of the Act contains a Congressional direction that environmental factors be considered "to the fullest extent possible." An initial decision not to prepare an EIS precludes the full consideration directed by Congress. In view of the concern for environmental disclosure present in NEPA, the agency's discretion as to whether an impact statement is required is properly exercised only within narrow bounds. Action which could have a significant effect on the environment

151. In Hanly v. Kleindienst (Hanly II), 471 F.2d 823, 829. (2d Cir. 1972), cert. den., 412 U.S. 908 (1973), however, the court noted that even questions of law may not be subject to de novo review where the agency "determination reflects the exercise of expertise not possessed by the court." To the extent this philosophy is adopted by the courts, review of FS decisions may be more limited. Id.


should be covered by an impact statement. (emphasis added).\textsuperscript{154}

Moreover, this analysis is supported by the legislative history of NEPA. During Congressional debate of Section 102, it was noted:

The purpose of the new language ("to the fullest extent possible") is to make it clear that each agency of the Federal Government shall comply with the directives set out in such subparagraphs (a) through (H) unless the existing law applicable to such agency's operations expressly prohibits or makes full compliance with one of the directives impossible.

Thus it is the intent of the conferees that the provision "to the fullest extent possible" shall not be used by any Federal agency as a means of avoiding compliance with the directives set out in § 102 . . . and that no agency shall utilize an excessively narrow construction of its existing statutory authorization to avoid compliance. (emphasis added).\textsuperscript{155}

CEQ guidelines have also supported this approach.\textsuperscript{156}

There are other compelling arguments to support this broader scope of review. It has been noted, for example, that environmental considerations "touch on fundamental personal interests in life and health," thereby invoking a special judicial protection.\textsuperscript{157} In addition, policy considerations suggest that agencies should not be encouraged to shirk their added responsibilities under NEPA.\textsuperscript{158}

Instead of applying the arbitrary and capricious standard, these courts have scrutinized an agency decision to determine if it was "reasonable." As may be expected, however, there has been wide disagreement regarding what constitutes a reasonable threshold decision under NEPA; the result is an even further split on scope of review.

To determine the reasonableness of negative compliance determinations by an agency, some courts have engaged in a \textit{de novo} review of the evidence.\textsuperscript{159} Others have examined the agency decision to see if it demonstrates a "compelling case" of non-significance.\textsuperscript{160} Further

\textsuperscript{154.} Minnesota Public Interest Research Group, 478 F.2d at 1317. \textit{But cf.} Cabinet Mountains, — F. Supp. —.


\textsuperscript{156.} \textit{See supra} note 106, and accompanying text.

\textsuperscript{157.} Scientist’s Institute for Public Information, 481 F.2d at 1094; Environmental Defense Fund v. Ruckelshaus, 439 F.2d 584, 591 (D.C. Cir. 1971).


down the scale of scope of review, it has also been held that a reasonable agency determination is one that shows by "a preponderance of the evidence" that there will be no environmental impact.161

Some courts have declined as "de novo," "compelling case," and "preponderance of the evidence." Instead, they formulate their own balancing tests and laundry lists of what to look for in the agency decision. For example:

1. Did the agency take a "hard look" at the problem, as opposed to bald conclusions, unaided by preliminary investigation;
2. Did the agency identify and adequately investigate the relevant areas of environmental concern;
3. As to the problems studied and identified, does the agency make a convincing case that the impact is insignificant;
4. If an impact is of true significance, has the agency convincingly established that changes in the project have sufficiently minimized it.162

Of course, the standards established by the guidelines above, i.e., "adequate investigation" and "convincing case" could conceivably lead to results similar to the "compelling case" scope of review; the "hard look" approach, however, has generally been associated with very limited judicial review. The revealing aspect of such formulations is the care with which a reviewing court often examines both the weight of evidence considered by the agency, and the procedures the agency used in arriving at their threshold determination. It may be argued, based upon legislative history, CEQ guidelines and caselaw discussed above, that it is not reasonable to conclude that an EIS is unnecessary where a possibility of significant impact has been identified; accordingly, an EIS must be prepared whenever a project may cause a significant degradation of some human environmental factor.163 The agency's burden is substantial under such an approach.

Finally, there is a peripheral matter which also deserves some attention in this discussion. It has often been recognized that procedural requirements of NEPA are so important that violation of them is, in itself, sufficient "irreparable harm" to support an injunction. A distorted decision-making process violates NEPA mandates, regardless of the substantive decision ultimately reached.164

164. "The kind of 'irreparable harm' which must be shown in order to justify the issu-
4. **Effect of Kleppe on Scope of Review**

As noted above, recent Supreme Court cases have restricted judicial review of agency decisions regarding substantive NEPA matters. These opinions have not affected review of agency threshold determinations concerning procedural requirements, however. The *Kleppe* decision stands as the major Supreme Court decision in this area. Moreover, this discussion will submit that even *Kleppe* did not fully rule on agency discretion regarding threshold NEPA determinations.

The commentary following the *Kleppe* decision was abundant, and almost entirely negative. One aspect which did not receive much treatment, however, was the scope of review question; when it was discussed, it was implicitly only in connection with the "timing" question mentioned above. This crucial concern was also very lightly passed over by the Court itself. This is perhaps due to the lack of aggressiveness shown by the litigants in this regard.

Respondents conceded at oral argument that to prevail they must show that petitioners have acted arbitrarily in refusing to prepare one comprehensive statement in this entire region, and we agree. With both parties agreeing to this narrow standard, it would have been surprising for the Court to reach a different conclusion by its own initiative. Certainly, the issue did not receive the extended consideration it deserves. On the other hand, this cursory examination might justify a narrow reading of this part of the decision, limiting it to the facts there under consideration. With this in mind, a careful examination of the context of the Court's holding is warranted.

The main consideration in *Kleppe* was the timing of EIS procedures. In addressing this issue, the Court examined the triggering language of "major federal action significantly affecting the environment." Their conclusion was that there was no federal "action" involved, and, therefore, the EIS requirement was not triggered. This conclusion was reached in the early part of the opinion. It was not until a later section of the five-part opinion that the Court treated an arguably separate issue raised by the respondents.

Respondents renew an argument they appear to have made to the Court of Appeals, but which that court did not reach. Re-
spondents insist that even without a comprehensive federal plan for the development of the Northern Great Plains, a "regional" impact statement nevertheless is required on all coal-related projects in the region because they are intimately related. (emphasis added).\textsuperscript{169}

The Court had initially decided, in a very detailed analysis, that there was no "action," and hence no trigger. The argument they seem to address here is that, even in the absence of triggering, the agency should have exercised its discretion in favor of preparing an EIS. In other words, the statutory mandate has already been determined not to apply. In such a case, arguments concerning NEPA's purpose, as indicated by legislative history, etc., are inapplicable to narrow agency discretion in order to apply a "reasonableness" standard; § 102(c) is already out of the picture. It is in this light that the Court decided: "Absent a showing of arbitrary action, we must assume that the agencies have exercised this discretion appropriately."\textsuperscript{170} Arguably, this standard was not meant to apply to agency decisions to prepare EIS's once it is determined that they are, in fact, proposing some "action." Moreover, it appears that some courts have adopted this interpretation.\textsuperscript{171}

The prognosis for "programmatic" EIS's is much dimmer. It appears that questions as to "timing" of the EIS procedure, based upon spatial coincidence, will be subject to agency discretion, subject to review only under the arbitrary and capricious standard.

The determination of the region, if any, with respect to which a comprehensive statement is necessary requires the weighing of a number of relevant factors, including the extent of the interrelationship among proposed actions and practical considerations of feasibility.\textsuperscript{172}

Agency "expert" opinions regarding spatial parameters will be given great deference by reviewing courts. Once an agency decides not to prepare an EIS, challenging that decision will probably require a showing that it was arbitrary or capricious.

\textsuperscript{169} Kleppe, 427 U.S. at 408.

\textsuperscript{170} Id. at 412.

\textsuperscript{171} In some cases, the courts have continued to articulate a "reasonableness" standard for reviewing agency determinations as to the applicability of NEPA. They have done so without mentioning Kleppe, implicating, at least implicitly, that it is distinguishable. See Conservation Law Foundation v. Andrus, 623 F.2d 712, 719 (1st Cir. 1979); Ventling v. Bergland, 479 F. Supp. 174 (W.D.S.D. 1979).

\textsuperscript{172} "(P)etitioners appear to have determined that the appropriate scope of comprehensive statements should be based on basins, drainage areas and other factors. We cannot say that petitioner's choices are arbitrary." Get Oil Out, Inc., 477 F. Supp. at 414.
5. Definitions/Statutory Interpretation

What if a lower court decides that Kleppe requires application of the arbitrary and capricious standard in reviewing all negative threshold determinations? Is there any way to ease the impact of Kleppe with respect to request for programmatic EIS's? An optimistic answer to these questions is suggested by earlier discussion in this topic of judicial review. Consideration has come full circle to the question of law/question of fact dichotomy.

As previously noted, some courts have treated the entire threshold determination as a matter of law, to be decided in the first instance by the court.\textsuperscript{173} Even where the determination has been treated as a mixed question of law and fact, the courts have jealously guarded their right to interpret statutory language.\textsuperscript{174} It is possible, therefore, that a court may be persuaded to interpret statutory terms such as “significant” so broadly that an agency's determination could easily be labeled “unreasonable,” and perhaps even “arbitrary and capricious.” A brief examination of judicial definitions of “significant” is therefore in order.

The definition of “significant” has been subject to many formulations.

The standard “significantly affecting the quality of the human environment” can be construed as having an important or meaningful effect, direct or indirect, upon a broad range of aspects of the human environment.\textsuperscript{175}

(T)he agency in charge, although vested with broad discretion, should normally be required to review the proposed action in the light of at least two relevant factors: (1) the extent to which the action will cause adverse environmental effects in excess of those created by existing uses in the area affected by it, and (2) the absolute quantitative adverse environmental effects of the action itself, including the cumulative harm that results from its contribution to existing adverse conditions or uses in the affected area.\textsuperscript{176}

Regardless of the specific language used, the thrust of the definitions reflect a basic attitude that the phrase should be broadly construed.\textsuperscript{177}

CEQ guidelines have adopted this broad approach to the defini-

\textsuperscript{173} Supra, VI, B, 2.
\textsuperscript{174} Supra, VI, C, 3.
\textsuperscript{175} Natural Resources Defense Council, 341 F. Supp. at 367.
\textsuperscript{176} Simmans, 370 F. Supp. at 15.
\textsuperscript{177} “The statutory phrase ‘actions significantly affecting the quality of the environment’ is intentionally broad . . .” Scientists' Institute for Public Information, 481 F.2d at 1088. See also Citizens Organized to Defend Environment, Inc. v. Volpe, 353 F. Supp. 520, 540 (D.C. Ohio 1972).
tion of "significant." Some of the more expansive attributes of that term include:

(3) Unique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas.

(4) The degree to which the effects on the quality of the human environment are likely to be highly controversial.

(5) The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.

(6) The degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration. (emphasis added).

VI. TREATMENT OF FOREST SERVICE LANDS IN TRANSITION FOR OIL AND GAS LEASING

The questionable practice of leasing Federal land without benefit of an environmental analysis of impacts from the full scope of leasing activities is cause for special concern with regard to lands being considered for reclassification as Wilderness. Beginning with the Wilderness Act in 1964, several studies have been initiated to identify areas appropriate for wilderness management. Regardless of the individual statutory authority establishing these studies, the ultimate test for admission to the wilderness system is found in the original Wilderness Act:

A wilderness, in contrast with those areas where man and his own works dominate the landscape, is hereby recognized as an area where the earth and its community of life are untrammeled by man, where man himself is a visitor who does not remain. An area of wilderness is further defined to mean in this chapter an area of undeveloped Federal land retaining its primeval character and influence, without permanent improvements or human habitation, which is protected and managed so as to preserve its natural conditions and which (1) generally appears to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable; (2) has outstanding opportunities for solitude or a primitive and unconfined type of recreation; (3) has at least five thousand acres of land or is of sufficient size as to make practicable its preservation and use in an unimpaired condition; and (4) may also contain ecological, geological, or other

178. 40 C.F.R. § 1508.27(b). See also W. Rodgers, supra, note 141 at 752.
features of scientific, educational, scenic, or historic value.\textsuperscript{179} The ability of areas currently being studied for wilderness designation to meet these criteria may very likely be destroyed by oil and gas activity. As noted above, the FS realizes this potential and is attempting to protect wilderness study areas through reliance on "WPS" (Wilderness Protection) and "NSO" (No Surface Occupancy) stipulations.

A. Vehicles for Reclassification

An area may be reclassified as Wilderness in several ways. Each classification system has been treated individually in management decisions, as well as in caselaw, and will be considered separately for the purpose of lease restrictions.

1. Wilderness Act of 1964

The first officially designated "wilderness" area was established by administrative action in 1924. This area consisted of 700,000 acres of the Gila National Forest in New Mexico.\textsuperscript{180} In succeeding years, other areas valuable for their wilderness resource were managed as "wild", "wilderness" or "canoe" areas. Despite these developments, however, there was general concern over the possibility that these administratively created preserves could just as easily be wiped out by the stroke of the administrative pen. In fact, such reversals did frequently occur, even in the Gila Wilderness. The response was wilderness legislation to establish Congressional designation and protection of wildernesses.\textsuperscript{181}

The Wilderness Act\textsuperscript{182} became law on September 3, 1964. It established two methods of wilderness classification. First, 54 areas, comprising 9.1 million acres which had previously been designated as "wild", "wilderness" or "canoe" areas, became instant wilderness areas.\textsuperscript{183} Second, the Act mandated a ten year study of another 5.4 million acres then classified as "primative".\textsuperscript{184} The purpose of this study was to provide recommendations to the President on the "suitability or non-suitability" of these areas for designation as wilderness; the President, in turn, was to make his recommendations to Congress for final action.\textsuperscript{185} Although the ten year study period is now over, some of

\textsuperscript{179}16 U.S.C. § 1131(c) (1976).
\textsuperscript{180}See Coggins and Wilkinson, supra note 120, at 766.
\textsuperscript{182}Id.
\textsuperscript{183}16 U.S.C. § 1132(a) (1976).
\textsuperscript{184}16 U.S.C. § 1132(b) (1976). Similar studies were also mandated for all roadless areas in the National Wildlife System, as well as all National Park Service roadless areas larger than 5,000 acres.
\textsuperscript{185}Id.
these areas were included in subsequent studies and this language continues to be the subject of controversy with respect to oil and gas leasing in wilderness planning areas.\textsuperscript{186}

Since all present wilderness studies are still geared toward designating lands under the provisions of the Wilderness Act, some attention to judicial construction of that act is warranted. In \textit{Parker v. United States},\textsuperscript{187} the Secretary of Agriculture sought to overturn a lower court's injunction against a timber sale on the grounds that the Wilderness Act had not so limited his discretionary authority. The proposed timber sale was not within a Wilderness, nor was it within a designated Primitive area; rather, it was in an area contiguous to such Wilderness and Primitive areas.

In a decision which may still be highly important today, the court first noted that the general purpose of the Act was to "proceed slowly" with development until the proper balance for all uses could be determined. It also emphasized the following language in the Act:

\begin{quote}
Nothing herein contained shall limit the President in proposing, as part of his recommendations to Congress, the alteration of existing boundaries of primitive areas or recommending the addition of any contiguous area of national forest lands predominatly of wilderness value.\textsuperscript{188}
\end{quote}

The court upheld the conclusion that the Secretary's timber sale would have the effect of foreclosing options for the President in his recommendations to Congress regarding wilderness designation. This holding supports the proposition that oil and gas leasing should not occur in areas under study for wilderness designation until a final resource allocation decision is made. It is undisputed, even by the Forest Service, that such activity may foreclose the option of wilderness designation.

2. \textit{Roadless Area Review Evaluation (RARE)}

An indirect offshoot of the Wilderness Act was the RARE programs: RARE I and RARE II. Although the Wilderness Act did not specifically require wilderness study of other than Primitive areas, the FS administratively initiated a study process to complement the evaluation of Primitive areas. The \textit{Parker} decision illustrated the need for such comprehensive studies; \textit{Parker} placed a cloud on the Secretary's discretionary management authority.

RARE I was begun in 1976. This program sought to inventory roadless areas either larger than 5,000 acres or contiguous to Wilderness and Primitive areas. The long-range goal was to determine which

\begin{flushright}
\textsuperscript{186} See \textit{Infra} VI, B.
\textsuperscript{187} 448 F.2d 793 (10th Cir. 1971), \textit{cert. den.}, 405 U.S. 989 (1972).
\textsuperscript{188} 16 U.S.C. § 1132(b) (1976).
\end{flushright}
areas should be managed for wilderness, and which should be managed under the Multiple Use and Sustained Yield Act of 1960.\textsuperscript{189} 56 million acres were inventoried and 12.3 million of those were ultimately recommended for wilderness management.

RARE I was intensely criticized as inadequate.\textsuperscript{190} When the Forest Service attempted to implement guidelines for those areas excluded from wilderness management by RARE I, they were promptly sued. In \textit{Sierra Club v. Butz},\textsuperscript{191} the Forest Service was enjoined from issuing timber contracts on RARE I lands until an EIS was complete. In \textit{Wyoming Outdoor Coordinating Council v. Butz},\textsuperscript{192} a similar holding enjoined pre-RARE timber sales pending compliance with NEPA. The Final EIS on RARE I was issued in October 1973, after which RARE I was quietly abandoned.

RARE II resurrected the RARE process in 1977. The Forest Service asserted that this new evaluation was part of the broad planning process mandated by the Forest and Rangeland Renewable Resources Planning Act of 1974\textsuperscript{193} and the National Forest Management Act of 1976.\textsuperscript{194} In contrast with RARE I, 62 million acres were inventoried, 15.5 million of those were recommended for immediate wilderness classification, and another 10.8 million were recommended for "further planning" as wilderness. One crucial difference between the two programs is that RARE II identified areas for immediate wilderness recommendation, whereas RARE I had merely identified areas which should be managed for their wilderness resource.

Rare II resulted in classifications of specified areas as "wilderness", "non-wilderness" and "further planning." Of course, the agency was soon authorized to independently create wildernesses. Rare II Wilderness designation is simply a recommendation to Congress for inclusion of an area in the Wilderness Preservation System under the Wilderness Act of 1964. Non-wilderness designation on the other hand, does administratively preclude an area from further wilderness consideration and exposes that area to other resource management or development. A further planning designation is essentially, a "non-decision", leaving further uses of the land, including wilderness use, to

\textsuperscript{190} Many suitable areas were not even inventoried. For example, a 28,000 acre watershed area in the Lolo National Forest southeast of Missoula, MT, was not mentioned in the inventory. To the embarrassment of the FS, that area is now officially designated as the Welcome Creek Wilderness.
\textsuperscript{191} 3 E.L.R. 20071 (N.D. Cal. 1972).
\textsuperscript{192} 484 F.2d 1244 (10th Cir. 1973).
\textsuperscript{194} \textit{Id}. 
later determination under the Forest Service's routine land use planning processes.

"Programmatic" Draft and Final Environmental Impact Statements were prepared to support the ultimate RARE II allocation decisions. The Draft, (consisting of a national document which contains an overview of the RARE II process and alternatives under consideration and State or geographical area supplements which provide more specific information on individual roadless areas) was made available to the public on June 15, 1978. The DEIS identified 10 alternatives, which would designate no more than 34% of the total areas under consideration as wilderness and an eleventh alternative, which would designate 100% of the study area as wilderness.

The final Environmental Impact Statement (FEIS) was filed on January 4, 1979. It identified, for the first time, the Forest Service proposed action which would result in nationwide allocations of 15 million acres to wilderness, 36 million acres to non-wilderness and 10.8 million acres to further planning. Public comment on the proposed action identified in FEIS was not permitted.

In 1979, the State of California challenged the Forest Service's compliance with NEPA in preparation of the Draft and Final EIS and also alleged, violation of the Multiple Use and Sustained Yield Act and the National Forest Management Act of 1976. In California v. Bergland the Court found it unnecessary to reach the issues surrounding violation of the Multiple Use and Sustained Yield Act and of the National Forest Management Act. It held that, because RARE II non-wilderness designation precludes further review of an area for wilderness, it is a major federal action having significant effect on the human environment for which NEPA requires a site specific EIS. Moreover, the court found that the RARE II programmatic EIS failed to contain a site specific analysis of the impacts of non-wilderness designation and, therefore, that the Forest Service RARE II EIS failed to comply with NEPA's mandates.

Finally, the court found that the Forest Service's Wilderness Attribute Rating System (WARS) is skewed against wilderness and utilizes a comparative approach whereby the wilderness values of each area are pitted against those of other areas, thus violating the mandate of the Wilderness Act that requires consideration of intrinsic, not comparative, wilderness values. The opinion also finds that the Forest Service did not examine a reasonable range of alternatives in considering disposition of the RARE II areas, since no alternatives allocating wilderness to more than 34% and less than 100% of the total areas were

considered. Finally, the court ruled that the Forest Service had failed to adequately respond to comments on the Draft Environmental Impact Statement and failed to provide an opportunity for meaningful, public comment on the final decision in a manner required by NEPA. The Forest Service has appealed this decision.

3. Individual Wilderness Study Acts

As a result of dissatisfaction with the RARE process, widely scattered local pressures have resulted in the passage of a number of special wilderness study acts dealing with individual wilderness areas. A more comprehensive example of these efforts in the Eastern Wilderness Act of 1975.196 The Montana Wilderness Study Act197 was signed into law, against the wishes of the FS, on November 1, 1977. The Act creates nine study areas in Montana, consisting of 973,000 acres. Interestingly, the Sierra Club is aligned with the Forest Service in their criticism of the Act. They reason that, had the areas been recommended for wilderness designation, presently, the fate of these areas would not be so uncertain.

The Montana Wilderness Study Areas are distinct from RARE II areas in at least one crucial respect. Any recommendation for oil and gas leasing must come from the Forest Service Chief, rather than the Regional Forester. This is a recognition of the Congressionally mandated status of these areas.

4. The Federal Land Policy and Management Act (FLPMA)

The final major vehicle for wilderness classification was established by the Federal Land Policy and Management Act of 1976 (FLPMA).198 Section 603 of FLPMA199 requires the BLM to undertake a wilderness review of all lands managed by it. All roadless areas larger than 5,000 acres are to be studied. By 1991, the results of these studies must be reported to the President, who then has an additional two years to make recommendations to Congress. In contrast to the 62 million acres of RARE II, the initial BLM inventory identified 174 million acres for study. At present, BLM has already eliminated 150 million acres from further study, claiming that they lack sufficient wilderness characteristics. The remaining area has been designated Wilderness Study Areas (WSA), and is currently in the second stage of

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the BLM review process. Final recommendations are expected long before the 1991 deadline.

In 1979, the first case construing BLM's authority to manage WSA's under FLPMA was decided. In State of Utah v. Andrus, the issue was whether BLM had authority to prevent the State of Utah's lessee (Cotter Corporation) from building roads to its mining claims on leased state school trust lands; this access had been denied because the state lands were locked inside BLM lands which were being studied for wilderness classification pursuant to FLPMA.

Specifically, the court was faced with determining the meaning of the following language:

[I]n a manner so as not to impair the suitability of such areas for preservation as wilderness, subject, however to the continuation of existing mining . . . uses . . . in the manner and degree in which the same was being conducted on October 21, 1976: Provided, That, in managing the public lands [BLM] shall by regulation or otherwise take any action required to prevent unnecessary or undue degradation of the lands and their resources or to afford environmental protection.

The appellants contended that this provision established "non-impairment as a general policy statement, but gave BLM actual management authority only to prevent unnecessary or undue degradation of the lands under study. Of course, the "unnecessary" language is subject to modification in regard to uses such as mining, whereas non-impairment is a much more absolute standard.

The court ultimately determined that BLM has two types of authority: 1) as to lands which were subject to actual uses before FLPMA (as opposed to rights to use), BLM may regulate so as to prevent unnecessary or undue degradation of the WSA, keeping in mind reasonable requirements of the activity; 2) as to lands which were not subject to preexisting actual uses, BLM may regulate so as to prevent impairment of wilderness characteristics. Even the strict nonimpairment standard is subject to an important limitation, however. "[S]uch regulation cannot be so restrictive as to constitute a taking"

B. Recent Caselaw Developments

As deadlines for wilderness designation approach, developers feel a sense of urgency to establish a lease position in wilderness study areas. Deregulation and ever higher oil and gas prices also fuel the rush for mineral exploration in wilderness study areas. At the same time,

201. Id. at 1003.
conservation groups are maintaining their anxious vigilance over these areas. The result is a body of caselaw relating to wilderness transition lands in the context of oil and gas leasing.

1. Mountain States Legal Foundation v. Andrus

In the summer of 1977, Region 2 of the Forest Service proposed to issue oil and gas leases in a pristine area of the Teton National Forest in northwestern Wyoming. Part of this area was under study for wilderness designation by the then new RARE II. The Sierra Club filed an administrative appeal with the Department of Agriculture which was ultimately dismissed. Before the issue was taken to court, however, representatives from Forest Service Regions 1 and 2 and the Sierra Club met in Denver and agreed that no leases would be issued in most RARE II areas pending completion of the evaluation. Interior Secretary James Watt, then head of the Mountain States Legal Foundation called this arrangement "paralysis by analysis" and challenged it in court. In October 1980, the Wyoming federal district court issued its decision.

FLPMA requires that the Secretary must report any withdrawal greater than 5,000 acres to Congress before it is implemented. A withdrawal is defined as:

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

MSLF argued that, based upon these two provisions, and the general intent of FLPMA, the Secretaries had made an illegal de facto withdrawal. Judge Brimmer agreed.

As noted above, this language—"settlement, sale, location, or entry"— is the very language which was determined not to amount to a withdrawal of lands from operation of the Mineral Leasing Act of 1920 in Udall v. Tallman. This apparently irreconcilable inconsistency can perhaps best be explained as another example of the distortions which can be caused by development pressures.

The court further rejected the contention that the Secretaries had authority to make such a temporary management withdrawal under the Wilderness Act and the Mineral Leasing Act of 1920. As to the latter,

the court concluded that the Secretary of Interior actually had an obligation under the Mineral Leasing Act to "provide some incentive for, and to promote the development of oil and gas deposits in all publicly-owned lands of the United States through private enterprise." The answer to the Wilderness Act claim was simple:

It would surely be inconsistent with the intent to keep lands designated as wilderness areas open until December 31, 1983, that lands merely under administrative study for a proposed wilderness area may be effectively withdrawn from the leasing without the consent of Congress.

The practical result of this decision was that the Forest Service decided to proceed with the leasing process in RARE II Further Planning Areas (FPA's). Again, they have declined even to prepare an EIS, placing great emphasis on arguments that any leases issued would carry an "FPA stipulation" which puts the lessee on notice that he may never be able to develop his lease if the area is ultimately designated a Wilderness.

2. Rocky Mountain Oil and Gas Association v. Andrus

Three weeks after the MSLF decision, Judge Kerr, also of the Wyoming Federal District Court, issued his decision in Rocky Mountain Oil and Gas Association v. Andrus (RMOGA). Although these cases are significant in their own right, they become much more important when considered together.

As in State of Utah v. Andrus, the RMOGA court was faced with construing BLM's authority under § 603(c) of FLPMA. The Solicitor General for the Interior Department had issued an opinion which interpreted FLPMA as establishing a "non-impairment" standard for Wilderness Study Areas. This opinion formed the basis for BLM's Interim Management and Policy Guidelines for Wilderness Review (IMPS). These IMP's prohibited development of oil and gas leases within WSA's, much like FPA stipulations currently relied upon by the FS. In a result clearly contrary to prior caselaw, the court struck down the Solicitor's Opinion and BLM's IMP's as conflicting with the requirements of FLPMA. Even the non-impairment standard was determined to be subject to existing mining uses. The logical result is that there are no longer two standards for pre- and post-FLPMA actual uses; instead,

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208. Id. at 393.
210. Id.
the "impairment" standard is subject to the same modifiers as the "unnecessary and undue degradation" standard.

The court summarily dismissed conflicting prior caselaw. Utah v. Andrus, it said, was distinguishable since it dealt with access to school trust lands. Although this is true, the Utah court has also gone to great lengths to set out BLM's authority with respect to both the State and private parties; it had also been concerned with mining claims held by Cotter Corporation on Federal land.

Parker v. United States\(^{212}\) was likewise distinguished as involving timber harvesting. Again, regardless of the context of the case, the basic issue of preserving wilderness characteristics of an area during wilderness studies was identical. Perhaps realizing the tenuousness of their position, the RMOGA court went on to say:

Although this alone would be sufficient to condemn the Solicitor's misplaced reliance on Parker, the Senate Committee Report specifically states that the language of Section 201(a) of FLPMA was included to bar suits similar to Parker v. United States, S. Rep. No. 873, 93rd Cong., 2d Sess. 36 (1974)."\(^{213}\)

In this connection, note the following observation by the Utah court:

"Amicus American Mining Congress has cited a portion of legislative history indicating that Congress inserted section 202 into FLPMA with the intent of overruling the Parker case. It should be noted, however, that the statement quoted by the amicus is from the Senate Committee Report on Senate Bill 424, a bill that was debated some time prior to the debate and passage of FLPMA. Perhaps more important, the final statement of the Senate intent behind including Section 201 contains language almost identical to that quoted by the amicus, but does not include any reference to the Parker case. The fact that this language was omitted from the subsequent statements of legislative intent argues that Congress, in fact, did not intend to overrule Parker."\(^{214}\)

This finding was either overlooked or ignored by Judge Brimmer.

Even if the RMOGA court had decided to adopt the Utah dual standard under section 1714(c), it must be remembered that the Utah court held that, even under the stringent non-impairment standard, regulation could not become so restrictive as to constitute taking. The RMOGA court determined that precluding a lessee from developing his lease does constitute a taking.\(^{215}\) This holding clearly squares with

\(^{212}\) 448 F.2d at 793.

\(^{213}\) 500 F. Supp. at 1342.

\(^{214}\) 486 F. Supp. at 1007, n.16.

\(^{215}\) 500 F. Supp. at 1338.
the sentiment of oil and gas industry officials. For example, Jim Short of Williams Exploration, a firm exploring for oil and gas in the Montana Overthrust Belt, has bluntly suggested, “If they didn’t want us to develop this land, they shouldn’t have leased it to us. We have been paying for these leases for 12 years. Are they willing to give us our money back with interest? This is a simple and appealing argument. Moreover, it has now gained legal support.

BLM has conceded the aspect of the RMOGA decision relating to pre-FLPMA leases, but the Department of Justice has filed an appeal of the remainder in the Tenth Circuit Court of Appeals on January 7, 1981. The Sierra Club has also filed an appeal on the issues conceded by BLM.

3. Sierra Club v. Peterson

The Palisades is a roadless area comprised of 247,090 acres situated partly in the Targhee National Forest of Idaho (111,250 acres) and partly in the Targhee (91,380 acres) and Bridger-Teton (44,460 acres) National Forests of Wyoming. RARE II allocated this area to FPA status. The BLM requested recommendations from the FS on lease applications which cover this entire area. On June 5, 1980, the Regional Forester for Region 2 recommended full leasing of the Palisades after issuing a FONSI. The Sierra Club immediately appealed this decision to the FS Chief.

On administrative appeal, two basic issues were raised. The first was based on RARE II, although it did not directly attack it. The RARE II FEIS had indicated a general policy of exploring for oil and gas in FPA’s to assess their mineral potential prior to final designation. In furtherance of this policy, it set forth several stipulations which should be used to protect wilderness characteristics. The Sierra Club sought closer adherence to these stipulations on a “lesser-of-two-evils” theory. The second argument was that oil and gas leasing is a major federal action and requires preparation of an EIS.

The Chief responded on December 29, 1980, rejecting the Sierra Club arguments. After a brief analysis of the stipulations used in the Palisades leases, the Chief summarily concluded that they would provide sufficient protection.

The real issue here is the issuance of leases with conditional stipulations to protect the environment in the event that actual drilling takes place. Appellant is assured that before any activities can take place, a site-specific analysis (EA or EIS) will

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Despite good intentions, it has become obvious that the Chief may be in no position to fulfill his assurances. The real issue does, indeed, appear to be the stipulations. The preceding discussion, however, indicates that these stipulations may be unenforceable. It is possible that any site-specific analysis would be an exercise in futility since actual development could not be prevented. Moreover, current pressures on administrators may well result in categorical exclusions from environmental analysis for noncompetitive lease applications and Applications for Permits to Drill.

The thrust of the Chief's decision is summed up in the following twisted logic:

In the Palisades, if valuable oil and gas resources are found, then the wilderness option might have to be forgone. On the other hand, if little or no oil and gas is found, a decision for wilderness classification would be an informed one. (emphasis added)

Obviously, the underlying resource allocation decision has already been made; the information would merely support a predetermined result. The Sierra Club decided to challenge this situation. In Sierra Club the court applied the "arbitrary and capricious" standard of review to conclude that the decision to delay preparation of appropriate EIS's until site-specific development proposals are submitted did comply with Forest Service NEPA obligations. The Forest Service argued that NSO and FPA stipulations attached to the leases eliminated the possibility of significant affects prior to further study. The Sierra Club countered that RMOGA made such stipulations unenforceable. Citing NRDC v. Berglund, the court concluded that the Secretary of the Interior can condition a lease right to the extent that a lessee may ultimately be unable to explore or develop the lease. RMOGA was dismissed as an opinion of questionable validity.

The legal and environmental ramifications of the Forest Service approach to oil and gas leasing are still uncertain. Mountain States Legal Foundation and RMOGA both stand for the proposition that leasing should not be held in abeyance pending wilderness classification studies. The validity of Forest Service reliance on stipulation to issue those leases prior to full environmental consideration is unfortunately uncertain; RMOGA and Sierra Club v. Peterson are in direct conflict on this point. There is an alarming possibility, however, that the leases now being issued cannot be subjected to restrictive development stipu-

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218. Appeal of Decision Regarding Oil and Gas Leasing, supra note 6, at 8.
219. Id. at 9.
lations. Most pending lease applications have been granted, and new ones continue to be expeditiously processed. It appears that critically important transition lands may be disposed of without any effective protection.

VII. Conclusion

The key to this issue seems to be Forest Service reliance on stipulations for ultimate protection of resources. Unfortunately, indications are that these stipulations may well be unenforceable, legally or practically. The ultimate result may be that important areas of FS land will be leased without adequate environmental protection and, indeed, without even any specific study to determine what would be necessary and desirable protection.

Moreover, even if stipulations are enforceable and enforced, their effectiveness is threatened by shifting administrative policies. On areas already leased, it has been proposed that stipulations be administratively reviewed and those “excessively restrictive” be eliminated. Additionally, once an EA establishes leasing guidelines, the basic assumptions of those EA’s regarding stipulations will likely be administratively undermined, but the procedure established thereby will be carried forward for future lease applications. The result would be the same as if no studies were ever done.

In conclusion, there seems to be ample indication of the possible impacts of oil and gas development, impacts which are almost certain to occur due to current economic pressures. It should also be apparent, to a “sensitive eye”, that the oil and gas leasing process is, by itself, a major factor in this concern. NEPA EIS’s are essential to preserve the integrity of the decisionmaking process at the earliest stage; although it may be true that the most informed analysis can be made after specific impacts are known, dependance on hindsight is an abrogation of management responsibility. The oft cited policies of NEPA support this position, as do the recent court decisions recognizing the overwhelming influence of investment and development pressure, and the need to account for that reality. It is time to appreciate oil and gas leasing of our Federal land for what it really is.