February 2, 1982

FREEING AMERICA'S RESOURCES: REVISING FEDERAL LEASING POLICY

INTRODUCTION

Among the most important issues facing the new administration when it took office was the question of access to public lands. At present, the federal government owns or controls some 775 million acres. These holdings roughly equal the size of all states east of the Mississippi River and comprise about one-third of the total on-shore area of the United States.

The public domain was first established in the years immediately following the Revolutionary War. Prior to that, a number of states had made competing claims on the western territories. Conflicts over these claims erupted as the new nation struggled to organize a government in the period shortly after winning independence. As the Articles of Confederation were being drafted, some former Colonies such as Virginia and North Carolina claimed extensive holdings in the west. Others, such as Maryland, bitterly opposed them. To resolve the problem, drafters of the Articles persuaded the states to cede these lands to the Confederation government. With this cession was born the public domain, "to be disposed of for the common benefit of the United States." In the years following, it served this purpose well.

Public lands provided the farmland for settlers pushing westward. Construction of the first transcontinental railroad was spurred by grants from the public domain. Land grants also provided sites for many colleges in the midwest and west and served as the basis for a system of national parks probably unsurpassed in the world. Perhaps the most important contribution of the public domain was its role in fueling the American industrial revolution.

The public domain continues to be critical to American economic well-being. Just as the virgin farmland available to

early settlers made possible the American agricultural miracle, the untapped energy and mineral resources of our public lands could well serve as a catalyst for future economic growth.

THE ISSUE

Accomplishing this goal requires rethinking the public lands policy which evolved over the last decade. Prior to that time, the guiding principle was the concept of multiple-use, which simply holds that a variety of activities can take place on a tract of land without conflicting with one another. Examples of the multiple-use concept are found in the National Parks. Although these areas are kept in a relatively undeveloped state, activities such as camping, hunting, and fishing are allowed. Roads, campsites, and some buildings are constructed. Under closely supervised circumstances, timber cutting and limited resource extraction are even allowed.

In contrast to the multiple-use designation, there also are a number of restrictive classifications for lands in the public domain. Among the most restrictive is the "Wilderness" designation. This category originally was intended for a limited number of highly sensitive or unique "ecosystems," which were to be kept in their pristine state. Road-building, use of motorized vehicles, and even fire-fighting are prohibited in such areas, as is all development. This, in turn, severely limits access to wilderness areas, essentially restricting it to those willing and physically able to enter on foot.

As long as the use of highly restrictive land classifications was limited to a relatively small percentage of our public lands, there were few problems. Since the early 1970s, though, restrictions have been applied to vast new areas, many of which hold great promise as sources of strategically critical minerals and energy resources. At the same time, reasonable access to the public domain has also been increasingly limited by restrictive statutes, rules, and regulations. Even where access is permitted, Washington often imposes such a formidable barrier of red tape that mineral or energy development becomes economically infeasible.

Where the federal government does not directly obstruct resource development, special interest groups often do. Ignoring the broader consequences of their actions, they frequently manipulate statutes and regulations intended for other purposes and impose delays on firms seeking access to public lands. The costs of these delays and the legal fees generated in overcoming them are often so high that firms find they must ultimately abandon their efforts at development. As such situations have become more common, they have eroded dramatically America's ability to achieve energy-self sufficiency.

The Reagan Administration has signalled its intention to revise land use policy. Interior Secretary James Watt long has advocated multiple-use. His early actions in office indicate that it may again become the core of Interior Department policy, recognizing that true conservation means the judicious use -- not curtailment -- of resources.

Watt has begun to review, streamline, and improve the federal leasing process. He has expanded the amount of acreage available for lease and has initiated an in-house analysis of existing statutes, rules, and regulations to pinpoint delays. He also has begun to review actions by previous administrations which placed vast tracts of land in highly restrictive categories. A major focus of this view will be on whether re-classification of these tracts into some less restrictive category would better serve the public interest.

Much more, however, remains to be done. Leasing federal lands is a highly complex question, touching on a variety of concerns, interests, and competing needs. This was recently illustrated by the controversy over expansion of the acreage made available for lease on the Outer Continental Shelf.

Some of the opposition to Watt's action ironically comes from oil companies who were already active in offshore oil and gas exploration: the very interests which would benefit from his decision. According to some industry observers, these criticisms were in part the result of a failure initially to understand the new policy, due to erroneous press reports. In some instances, though, the criticisms seemed motivated by a fear of the additional competition the Secretary's action would spark.

THE LEASING PROCESS

There are sixty-eight federal agencies with authority of some kind over the disposition of land in the public domain. Exercising primary authority are the Department of the Interior's Fish and Wildlife Service and Bureau of Land Management, the Department of Agriculture's Forest Service, the Department of Defense's Army Corps of Engineers and five other agencies. The current dispersion of authority is a major cause of leasing delays. A lease applicant commonly requires dozens of permit approvals, certifications and permissions before operations can begin. Inter-agency conflicts are enormous, but are only the tip of the iceberg. An analysis of leasing policy, therefore, should begin with analysis of the leasing process.

THE LEASING PROCESS

At the heart of the issue is the manner in which many agencies exercise their authority. They often act as though their role is essentially negative, seeking reasons -- often trivial -- for

denying a permit. In some cases, an agency with primary responsibility will grant a lease and then be reversed by another agency which has, at best, a peripheral interest in the matter. In many instances, agencies feel that their mandated role in the leasing process requires detailed reviews of every application, even if such reviews do not really make a material contribution to protecting the public interest. This, in turn, leads to still more delay.

Since the most trivial objection normally receives the same consideration as the most substantial, documents must be prepared, hearings held, and great amounts of legal, technical, and accounting manpower committed. This not only creates an increased financial burden for the applicant, but also adds uncertainty, which discourages companies from developing resources on federal lands.

Designating a "lead" agency could solve many of these problems. Such an agency would oversee the entire leasing process; all other agencies would delegate authority to it. This system could be established, at least in part, though a letter of understanding between the agencies involved or through an Executive Order. Immediate congressional action would thus not be required. Numerous precedents exist, including a variety of personnel sharing arrangements between agencies, and a number of interagency task forces.

Because some agencies, especially the Environmental Protection Agency, have clear legal responsibilities to exercise authority in certain areas, it is likely that revisions of existing law ultimately will be required. Although the question of legal responsibilities might be partly resolved by allowing the other agencies to act in a consulting role to that taking the lead, there will remain instances where such an accomodation will remain inadequate.

For example, EPA currently has authority over the permits which must be obtained by firms discharging certain pollutants. Up to the present, Congress has made it clear that it intends EPA to continue to exercise this authority even if the area for which the permit is sought falls in the public domain. It is unclear, therefore, whether a letter of understanding or Executive Order transferring responsibility for issuing these permits will suffice. Allowing EPA to retain a consultative role, however, might meet the requirements of the law. The best approach to this and some other environmental issues might be to proceed under a letter of understanding or Executive Order while seeking a simultaneous legislative clarification of the lines of authority.

One advantage of the legislative approach is that it could bring about the one action which could provide a long-term solution to the problems stemming from the present fragmented authority over federal lands: concentrating them within a single agency. Preferably, the agency selected for this role would be the Interior

Department. It traditionally has been responsible for the public domain and has a large staff of highly qualified personnel thoroughly familiar with the issues relating to these areas. Selecting Interior would give lease applicants a single place to go for decisions, eliminate much of the potential for inter-agency conflict, and ensure that all aspects of federal lands policy are integrated.

CONSOLIDATED PERMITS AND STREAMLINED HEARINGS

While it is unclear whether it would be possible, or even desirable, to consolidate all permits, many could be combined. This would reduce the burden on the applicant, the amount of paperwork reviewed by federal agencies, and the large number of hearings -- something about which applicants bitterly complain.

Under the present multiple permit system, hearings generally take place in serial fashion. Issues exhaustively examined once and resolved are raised again and again. While it is argued this insures that all issues are fully explored, the costs of delay far exceed the marginal benefit to the public. More important is the uncertainty the system creates by the open-ended opportunity to continually recall previously resolved issues for yet another examination. This makes effective planning nearly impossible; companies never know when a permit is going to be denied or even revoked.

A consolidated permit along with a streamlined hearing process would limit the ability of outside groups to issue specious challenges to projects. Yet it would still provide a public forum for expressing legitimate concerns over the impact on the environment, health or safety. It would also provide a means for addressing another bottleneck which has worsened in recent years: duplication of hearings in the states.

Since the hearing process would be consolidated at the federal level, it would make sense for state regulatory agencies to hold their hearings at the same time as federal hearings. All interested authorities could then come together at the beginning of the process and identify possible areas of conflict. This would help avoid situations in which companies invest large amounts of capital in a project on the strength of federal approvals only to find themselves blocked by the state.

Numerous examples of this exist. In California, both the Diablo Canyon Nuclear Plant and the Santa Ynez Oil Field experienced severe delays as a result of state regulatory actions taking place after all federal approvals had been acquired. New Hampshire blocked construction of a refinery, while several states have intervened to stop federal leasing of the Georges Bank.

Consolidating hearings would also give the Administration an opportunity to delegate more authority to the states and ensure that they are a party to any federal action which materially affects their interests. This, of course, would be in keeping with President Reagan's stated policy of placing a greater emphasis on the role of the states.

DECISION DEADLINES AND DATA COLLECTION

In addition to consolidating the hearings and permit-granting process, setting deadlines for decisions would also expedite consideration of lease applications. Some experts fear, however, that deadlines could only hasten negative decisions. Although this might ocassionally occur, most experts feel that a large number of negative findings, without any clear justification, would trigger some sort of legislative remedy.

A lead agency, of course, could enforce deadlines. Should another agency be unable or unwilling to reach a decision, the lead agency would make it for them. This would create an incentive for the consulting agencies to act in an expeditious and responsible manner.

There currently is extensive duplication in collecting data. For example, costly archeological surveys often are mandated in regions examined previously and found to have little or no archeological value. In one instance, the only artifacts retrieved after an expenditure of several hundreds of thousands of dollars were beer cans.

Environmental impact statements frequently are required in areas which previously have undergone exhaustive environmental reviews. These documents take months or even years to compile and often cost millions of dollars. Rather than require that they be conducted for each individual tract within a given area offered for lease, they could be conducted on an area-wide basis. Futher study of a specific site would be required only if there are concerns unique to its location.

Whenever possible, surveys and data collected to meet one agency's requirements should be accepted as meeting similar requirements of another agency. Studies performed for state agencies should fulfill federal requirements in the absence of any compelling reason to the contrary.

A policy in which studies compiled for one agency could be used to meet the data requirements of another, of course, would mean that agencies would have to cooperate in standardizing the type of information they ask for and the format in which it is reported. Still, the savings realized through eliminating duplication would surely be more than worth the effort.

THE ROLE OF STATES

It may be necessary to provide incentives for the states to consolidate their leasing and permitting processes with those of the federal government. Washington, for example, could underwrite state programs which regulate the environment or process lease applications. In a consolidated format, the cost to the federal government probably would be small; all that would be involved would be printing extra copies of documents and making space available for state officials to participate at the joint hearings. Given the growth of state regulatory activities, elimination of conflicts through consolidation would save sizable sums.

ON-SHORE OIL AND GAS LEASING ISSUES

With the federal government owning or controlling some 775 million acres, resolving the problems regarding on-shore oil and gas leasing could be an important step towards facilitating the development of American energy sources. Issues involving federal on-shore areas are regulatory, legislative, and administrative in nature. Many difficulties arise, for example, from the manner in which regulations are interpreted rather than from their substance. Of particular concern are the widely differing interpretations various field offices choose to give regulations governing the issuing of permits, ranging from extremely strict to relatively moderate. This adds yet another element of uncertainty to an already uncertain process.

WILDLIFE REFUGES

Among the substantive regulatory problems involving on-shore leasing is the prohibition of oil and gas leases in areas designated Wildlife Refuges. Many areas which currently carry this designation contain highly promising oil and gas prospects. While the concern for preserving wildlife in their natural habitat which prompted these restrictive rules generally has been well-intentioned, experience demonstrates that the dangers are vastly exaggerated. It is now clear that oil and gas development need not cause irreparable harm to the environment. Therefore, it is no longer necessary to keep such restrictive regulations in effect.

Secretary Watt has moved to ease access to wildlife refuges in Alaska. He should also remove them in the lower forty-eight states.

DREDGE AND FILL PERMITS

In need of attention too are the regulations governing dredge and fill permits designed to implement Section 404 of the Clean Water Act. This provision grants the Army Corps of Engineers

authority to regulate activities taking place in navigable waterways and wetlands where any discharge or other disturbance is involved. The problem is that the courts have defined "wetlands" so broadly that they now include many areas which historically have not been considered "navigable waterways." Both tundra and Louisiana bayou, for example, are now included in this definition. A major improvement in the leasing process would be to restrict the definition to what it historically has been. Re-defining "wetlands" requires action by the Congress.

No congressional action is needed to allow the Corps to issue general permits on a variety of activities. At present, firms must obtain individual permits for each activity in a wetland area even if all are part of a single, larger project. This requires unnecessary duplication and increases costs. In most cases, a general permit would do just as well.

Finally, clear guidelines should be established for the mediation of inter-agency disputes arising from the review of dredge and fill permits. There are a number of agencies which now must approve applications for these permits and disputes between them often are another cause of delay.

LEASE STIPULATIONS

A third concern relates to lease stipulations or conditions -- amendments to a lease which impose some limitation or special requirements on the firm operating it. A particularly troublesome condition, for instance, is the "no surface occupancy" stipulation. This prohibits the erection of any permanent or semi-permanent structure on the lease in question. It effectively precludes almost any sort of development.

Though imposing highly restrictive stipulations may not violate the letter of the Wilderness Act of 1964, it seems to violate the spirit. The Act clearly states that all leases shall contain such reasonable stipulations as may be prescribed by the Secretary of Agriculture for protecting the wilderness character of the areas concerned. It is inconsistent with the purpose of the Act, however, to impose stipulations so restrictive that they preclude the "purpose for which the lands were leased, permitted, or licensed."

To prevent this, guidelines could be drafted to prohibit stipulations that effectively proscribe the activity for which the lease was originally granted. This would avoid misunderstanding about the intent of the law or about how it should be interpreted.

LAND WITHDRAWALS

Among the most contentious issues related to leasing on-shore federal lands is the extent and nature of land withdrawals. In

recent years, millions of acres have been closed to oil and gas development through arbitrary withdrawals under such authorities as the Antiquities Act and Federal Land Policy and Management Act. Many areas withdrawn are thought to contain vast energy and strategic mineral resources.

Although the administration has signaled its intent to exercise greater moderation in land withdrawals than its predecessor, problems remain. One relates to the land designation "Area of Critical Environmental Concern," or ACEC. At present, any citizen can petition the Bureau of Land Management to have a tract of land classified under this designation. If the Bureau grants the classification, it can then prohibit oil and gas leases for the tract. The ease with which tracts can be nominated for this restrictive category offers an opportunity for those whose only aim is to stop development--even though no environmental issues are involved. Although the Department of the Interior has drafted guidelines governing the granting of the ACEC designation, there remains a possibility for abuse.

One reform which might prevent this would be to require broad public notice before ACEC designation could be assigned to tracts of over 5,000 acres. This would insure that all interested parties would be aware of the potential withdrawal of large areas; they then would have an opportunity to voice their views. At the same time, small but environmentally sensitive areas, such as bird sanctuaries or nesting grounds and the like, could be withdrawn rapidly if it were necessary to protect them. This reform would provide the flexibility to move quickly to protect threatened areas while still ensuring that large areas are not locked away forever without adequate opportunity for public comment.

RESOURCE ASSESSMENTS

Resource assessments are a valuable tool for ensuring that deposits of strategic minerals or energy resources lying on federal lands are not inadvertently locked away. New technologies now make it possible to conduct assessments without disrupting the environment in the area. Much of the geophysical work can now be done, for instance, by low flying aircraft employing Synthetic Aperture Radar, aeromagnetic survey equipment, airborne gravitometers and similar new technology. The data these devices collect, when processed by computers, give a fairly good idea of whether or not further land-based geophysical work is justified. Much data also can be gathered on site without drilling or using explosives -- methods which characterized seismic work in the past.

Although drilling is the only way to be absolutely sure that a resource is present, remote techniques can limit the drilling. Moreover, contemporary techniques for exploratory wells need not irreparably damage the environment. Using these techniques for a

resource assessment would not materially affect the ability to maintain an area in a relatively pristine condition for later classification if it proves that no resources are present.

At the same time, however, conducting the survey would ensure that the existence of resources would be known so that decisions could be made on the basis of full information and the resources developed if desired.

APPLICATIONS FOR PERMITS TO DRILL

The rate at which applications for permits to drill (APDs) are processed presents a major problem. In many instances, there are unnecessary delays; in some cases, applications have been lost. With drilling activity now at its highest level in three decades and drilling equipment and rigs in short supply, the disruptions caused by delays in permit processing have an impact far beyond the specific site for which the application is made. This is especially true regarding the scheduling of drilling rigs -- a delay can disrupt operations on leases next in line to use the rig.

A major cause of the delays appears to be the disparity in the manner in which local offices of the U.S. Geological Survey interpret regulations. There seems no standard application of the rules governing their issuance. A clarification memorandum from the Secretary of the Interior outlining exactly the procedure to be followed and mandating a time frame within which APDs must be issued would substantially reduce the delays.

THE WILDERNESS DESIGNATION

Some problems with leasing policy can only be solved by congressional action. One of the most serious of these involves the Wilderness Act of 1964. The Act, in Section 4(d)(3), sets a December 31, 1983, deadline for oil and gas exploration in wilderness areas. If the deadline is allowed to remain in effect, vast tracts of potentially resource-rich public lands will be permanently closed to exploration. Congress should either repeal or extend the deadline.

Section 603 of the Federal Land Policy and Management Act also presents a problem that only Congress can solve. Under this section, Congress must review all tracts which the Bureau of Land Management has designated "Wilderness Study Areas." This includes areas which the Bureau has found to be unsuitable for classification in the wilderness category. The result of this provision is that all of these lands must be managed <u>as if</u> they were wilderness until Congress acts. Areas found unsuitable thus are under the same severe limitations as those designated as wilderness. This makes little sense; Congress should therefore amend section 603 to allow the release of areas found unsuitable for classifications as wilderness to other uses.

There is a broader problem in the overuse of the wilderness designation. During the Carter Administration, this became a favorite tool for limiting growth. Congress never intended that vast areas of the U.S. be permanently closed to virtually any activity when it created the wilderness category. It was intended, rather, for use in a limited number of instances to protect unique or especially sensitive habitats or environments.

The best solution may be relatively simple: an absolute limitation on the number of acres designated as wilderness. Once the limitation is reached, the addition of any area to the list of those in the wilderness category must be offset by the removal of a like amount of acreage.

TRACT SIZE IN ALASKA

The state of Alaska is one of America's most promising areas for oil and gas exploration. Much of the state is relatively unexplored, though known to contain the geologic formations normally associated with oil and gas deposits, and there is great hope that large new fields will be discovered. While holding great promise, however, Alaska also presents a unique set of problems.

For instance, since much of the state is unexplored, maps are incomplete. Climatic conditions there are the harshest of any potential petroleum province in the U.S.. These conditions reduce the drilling season to a few months each year. Even during those precious months, special care must be taken to ensure that the environment is protected.

These factors raise the risks, costs, and uncertainties in Alaskan oil and gas operations. As a result, companies find it necessary to lease large tracts in order to make their operations financially feasible. A second effect of the unique conditions found in Alaska has been the evolution of a few companies with particular expertise in Arctic operations. But the law limits the amount of acreage that a company can hold in any state. Acreage limitations were imposed in the lower forty-eight states to guard against a single company monopolizing a resource; since the size of a tract a company had to lease in order to be financially viable was fairly small, the limitation posed no problem. The Alaskan situation is quite different; large tracts are essential to a company's ability to explore for minerals. Many companies active in Alaska in the past, moreover, and who therefore have the experience and specialized equipment necessary for successful Arctic operations already are at or near the acreage limitation. This means that as new areas open to exploration, the most qualified firms could be barred from participating in the search for oil. At best, they would have to sell part of their existing holdings and thereby forgo some of the rewards they earned by taking early risks. This would be both inequitable and counter-productive.

A far better solution would be to exempt Alaska from the limitations on both the amount of acreage a firm could hold and on the size of any given tract offered for lease. It would also be helpful to extend the time a company is allowed to engage in exploration before initiating production; this would compensate for the Arctic's short drilling season.

THE VISIBILITY STANDARD

Under the Amendments to the Clean Air Act of 1977, regulations were issued to implement what is termed "the Prevention of Significant Deterioration." This phrase refers to certain areas, many in the public domain, where the levels of air pollution are below the minimums set under the National Ambient Air Quality Standards. The regulations are intended to keep the air in such areas from becoming more polluted, even though the air is already cleaner than the law requires. While serving an admirable goal, the regulations drafted to achieve it seem excessively strict and, in some cases, may be impossible to enforce. A prime example is the so-called visibility standard.

Visibility regulations affect 156 large federal parks and wilderness areas. The purpose is to protect visibilty from these areas -- to insure that the view looking out from park or wilderness remains unimpaired by air pollution. The trouble is that there are no objective scientific means of measuring visibility. As a result, any test would be purely subjective and might prove impossible to enforce. This is particularly true of decisions regarding "buffer zones." These are simply areas in which no new facility can be built. The assumption is that the only way of being absolutely sure that visibility is not impaired is to prohibit anything from being built near the park or wilderness area being protected. Many buffer zones, however, are drawn with unnecessarily large borders, in some cases extending 100 miles from the boundary of the park. Since the decision on how large the buffer zone must be to ensure visibility is subjective, it is difficult to marshall scientific evidence proving that the zone should be smaller. What must be done, perhaps, is eliminate the unenforceable standard itself.

CONCLUSION

Although much remains to be done to improve the leasing process, it is critical to recognize that the Secretary of the Interior is making a serious attempt to accomplish this task. Although his policies have met with heavy criticism, such dissatisfaction stems much from his willingness to strike out in a radically different direction from his predecessors. It is essential, however, that he persist on the course he is taking.

Reforming the manner in which the U.S. leases lands in the public domain is a vital step towards freeing the nation from its

dangerous dependence on imported petroleum and strategic minerals. On two occasions in the last decade, Americans have witnessed just how vulnerable this dependence makes them. To continue to allow this vulnerability to exist in a nation which enjoys one of the world's richest energy endowments is inconsistent with the responsible exercise of government. Preventing the full use of the resources found within the public domain has been a major factor contributing to our dependence. It is time that this circumstance be reversed.

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