

BLACKHAWK COAL CO.

IBLA 82-519

Decided October 26, 1982

Appeal from the decision of the Utah State Office, Bureau of Land Management, imposing certain readjusted terms and conditions on coal leases. Salt Lake 029093-046653, Utah 058184, and U-25484.

Affirmed in part, reversed in part, and remanded.

1. Coal Leases and Permits: Leases -- Mineral Leasing Act: Generally

The Board of Land Appeals will not reverse as unreasonable a readjustment of an underground coal lease establishing a royalty of 8 percent, since the lessee may seek further rate relief under 30 U.S.C. § 209 (1976) if needed.

2. Coal Leases and Permits: Leases -- Mineral Leasing Act: Generally

A decision proposing a provision in a readjustment coal lease for suspension of continued operations upon the payment of advance royalty will not be reversed merely because it makes the terms and conditions of the payments the subject of a future agreement.

3. Coal Leases and Permits: Leases -- Mineral Leasing Act: Generally

The Bureau of Land Management may properly include provisions requiring submission of new mining and exploration plans in a readjusted coal lease even though a mining plan has been approved, since new or revised plans may be needed for other mineable coalbeds or because rock conditions may require mining changes.

4. Coal Leases and Permits: Leases -- Environmental Quality: Generally -- Mineral Leasing Act: Generally

A provision in a readjusted coal lease requiring the lessee to conduct operations so as to avoid damage "to non-Federal lands in the vicinity of the leased lands," and "where practicable, to repair" such damage as does occur, subject to the approval of the lessor, is improper, unenforceable, and void.

5. Coal Leases and Permits: Leases -- Environmental Quality: Generally -- Mineral Leasing Act: Generally

It is proper to include in a readjusted coal lease a provision requiring the lessee to conduct at its own expense a survey and inventory archaeological and paleontological values prior to approval of a mining plan or any activity that would disturb the surface of the land.

6. Coal Leases and Permits: Leases -- Mineral Leasing Act: Generally

It is proper to include a provision in a readjusted coal lease which reserves to the United States the right to authorize other uses of the leased lands that do not unreasonably interfere with the exploration and mining operations of the lessee, even though it contains no express provision for notification to the lessee, since any authorized use would be subject to the lease.

7. Coal Leases and Permits: Leases -- Mineral Leasing Act: Generally

Under 30 U.S.C. § 187 (Supp. II, 1978), a coal lease must include a provision requiring twice-monthly payment of wages in the absence of a showing that compliance with the provision would place the lessee in violation of state law.

8. Coal Leases and Permits: Leases -- Environmental Quality: Generally --
Mineral Leasing Act: Generally

A readjusted coal lease may properly require that buildings and surface structures be painted in a color which conforms or blends with the natural color of the surrounding area in order to mitigate negative visual impacts in a nearby recreation area where the lessee fails to establish that compliance with the requirement is not infeasible.

APPEARANCES: Hugh C. Garner, Esq., Salt Lake City, Utah, for appellant.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

Blackhawk Coal Company (Blackhawk) has appealed from the January 26, 1982, decision of the Utah State Office, Bureau of Land Management (BLM), overruling Blackhawk's objections to proposed terms and conditions of coal leases Salt Lake 029093-046653, U-058184, and U-25484, and readjusting the terms of those leases effective November 1, 1981. The leases were issued to appellant's predecessor in interest on June 17, 1921, under the provisions of section 7 of the Mineral Leasing Act of 1920, 30 U.S.C. § 207 (1976), which provides that the United States may readjust the terms of those leases at the end of 20 years. ^{1/} On August 4, 1981, appellant's immediate predecessor in interest was notified of the proposed readjustment of the leases. Blackhawk timely filed objections to certain proposed readjustment terms. BLM's decision overruling those objections is the subject of this appeal.

Blackhawk objects to the imposition of a production royalty of 8 percent of the value of coal produced by underground methods by proposed section 6 and offers some economic arguments why this rate is unduly burdensome. The decision below pointed out that the Mineral Leasing Act requires a royalty rate of 12.5 percent, "except the Secretary may determine a lesser amount in the case of coal recovered by underground mining operations." 30 U.S.C. § 207(a) (1976). The decision further pointed out that 43 CFR 3473.3-2(a)(3) provides for a royalty of not less than 8 percent of the value of coal removed from an underground mine, except that the authorized officer may determine a lesser amount, but in no case less than 5 percent if conditions warrant. A lessee may apply for relief from the royalty rate established in the lease under 30 U.S.C. § 209 (1976); 43 CFR 3473.3(d)(2).

^{1/} Salt Lake 029093 and Salt Lake 046653 were combined into one lease. Leases U-058184 and U-25484 resulted from partial assignments of land from the combined lease.

Appellant contends that it is arbitrary and capricious to designate a royalty rate by regulation without assessing a company's economic capability to support such a rate. Appellant points to 43 CFR 3473.3-2(a)(1) which states that royalty rates shall be determined on an individual case basis prior to lease issuance, citing *Rosebud Coal Sales Co. v. Andrus*, No. C79-160B, slip op. at 15-16 (D. Wyo. 1980), *aff'd*, 667 F.2d 949 (10th Cir. 1982). Appellant contends that in proposing the 8 percent production royalty, the Department has given no consideration to variations in mining conditions, geography, labor markets, or transportation.

[1] Departmental regulation 43 CFR 3473.3-2 provides two ways of granting underground coal lessees relief from the statutory 12-1/2 percent royalty. Subsections (a)(1) and (a)(3) implement 30 U.S.C. § 207(a) (1976) and provide that a rate as low as 5 percent may be determined at lease issuance. Alternatively, the Department may establish a royalty rate in the lease and provide relief after lease issuance upon application of the lessee under subsection (d), which implements 30 U.S.C. § 209 (1976). Appellant has not persuaded us that it is unreasonable to establish an 8 percent royalty rate in the lease now, since the rate may temporarily be reduced later if conditions warrant. If a lower rate is put into the lease now and economic conditions change favorably during the term of the lease, there will be no opportunity for upward adjustment of the royalty figure until the lease is again ripe for readjustment. The method chosen by BLM thus assures the United States a fairer return over the life of lease, provides appellant some relief from statutory 12-1/2 percent rate, yet affords appellant an opportunity for further royalty relief when it is really needed. We previously have affirmed BLM decisions denying special royalty relief at lease readjustment, requiring lessees to seek such relief under 43 CFR 3473.3-2(d). Lone Star Steel Co., 65 IBLA 147 (1982); Garland Coal and Mining Co., 49 IBLA 400 (1980).

[2] Appellant objects to section 7 which implements the Department's authority to "suspend the condition of continued operation upon the payment of advance royalties." 30 U.S.C. § 207(b) (1976). Previously, a definite figure for the advance royalty could be determined from the lease. Section 7, however, provides as follows:

Upon request by the lessee the Mining Supervisor may accept, for a total of not more than ten years, the payment of advance royalties in lieu of the condition of continued operation for any particular year. Any payment of advance royalties in lieu of continued operation shall be pursuant to an agreement, signed by the lessee and the Mining Supervisor, which shall be made a part of this lease. The agreement shall include a schedule of payments and shall be subject to the advance royalty conditions set forth in the regulations. The advance royalty shall be based on a percent of the value of a minimum number of tons which shall be determined on a schedule sufficient to exhaust the leased reserves in 40 years from the date of approval of the mining and reclamation plans or from June 1, 1976, depending on effective date of the lease.

Appellant finds this exception unacceptable because it contemplates that the parties, without knowing the terms and conditions, are agreeing to agree to something at a future date. The decision below fully responds to this objection as follows:

Section 7 of all coal leases is inserted to comply with Section 7(b) of the MLLA. In its objections to this lease stipulation, the lessee appears to be overlooking two points. First, the lessee, not the Mining Supervisor, requests that advance royalties be paid. The lessee may not wish to pay advance royalties in lieu of continued operation and thus may not ever need to exercise the provisions of Section 7. Second, Section 7 generally outlines the terms of any advance royalty agreement. The agreement "shall include a schedule of payments" and "shall be based on a percent of the value of a minimum number of tons which shall be determined on a schedule sufficient to exhaust the leased reserves in 40 years . . ." If the regulations about advance royalties (43 CFR 3473.3-2(b)) change, then those regulations would apply to the leases under their current language.

We see no reason to reverse BLM's decision with respect to section 7.

[3] Appellant objects to sections 9 and 10 which require submission of exploration and mining plans, contending that those sections are inapplicable since the mining plan has already been approved. We accept BLM's reason for overruling the objection:

Although these leases are currently under production, unforeseen circumstance may require future exploration to obtain additional data on the coal deposits. There is also the remote possibility that operations could terminate along with the mining plan. Should the lessee then wish to resume mining operations on the leases, new mining plans would be required. Absent a requirement for such plans, the lessee might argue that it was not required to submit mining plans under its leases. In addition mining plans approved relate to coal beds that are currently under production. For other minable coal beds on these leases new or revised mining plans will be required. It is also necessary to revise mine plans as rock conditions may require mining changes. In addition, if the lessee has submitted exploration and mining plans which have been approved and no further changes would occur, then including Sections 9 and 10 in these leases should be harmless.

[4] Section 12 of the proposed readjustment of the lease concerns operations on the leased lands. Subsection (b) provides:

The lessee shall conduct operations in such a manner as may be needed to avoid or, where avoidance is impracticable, to minimize and where practicable, to repair damage to: (1) any forage or timber growth on Federal or non-Federal lands in the vicinity of the leased lands; (2) crops, including forage and timber, or

improvements of a surface owner; or (3) improvements, whether owned by the United States or by its permittees, licensees, or lessees. The lessor must approve the steps to be taken and the restoration to be made in the event of the occurrence of damage described in this subsection. [Emphasis added.]

Appellant objects only to the extension of the terms of section 12(b)(1) to include non-Federal lands, and questions the authority of the Government to impose such limitations on a lessee in favor of unnamed, unidentified third parties. As authority for this provision, BLM cites 30 U.S.C. § 187 (Supp. II, 1978), which authorizes lease provisions "for the safeguarding of the public welfare."

Appellant's objection to this provision is well taken insofar as it relates to damage or claims of damage to "non-Federal lands in the vicinity of the leased lands" resulting from the Federal lessee's operations. The most reasonable construction of this provision is that only "forage and timber growth" on off-lease private premises are intended to be protected, because the reference to "crops, including forage and timber or improvements" must belong to "a surface owner" (presumably of the leased premises), and the the only other protected "improvements" are those "owned by the United States or by its permittees, licensees, or lessees." Therefore, the crux of our concern with this provision is centered upon BLM's authority to require the lessee to avoid or minimize damage to any forage or timber growth on non-Federal lands in the vicinity of the leased lands, and to require the lessee, "where practicable," to repair any such damage "where avoidance is impracticable."

There is a great deal wrong with this provision. First, it appears to put the Department's stamp of approval on its lessee's operations which damage a neighboring private landowner's forage and timber "where avoidance" of such damage "is impracticable," so long as such damage is minimized, and the lessee "repairs" it "where practicable." This Department has no right to authorize, allow, sanction or acquiesce in any contemplated damage to any third party's property by its lessee -- not even if the lessee agrees to hold such damage to a minimum "where avoidance is impracticable," and further agrees to repair the damage that occurs, unless, of course, the repairs are considered "impracticable." Such a cavalier attitude by the Department with respect to damage on "non-Federal lands in the vicinity" surely cannot reflect established Departmental policy; and it can hardly be regarded by the landowners in the vicinity as an expression of benign good will, or as protection of their interests.

Moreover, where a provision is included in a Federal coal lease, it devolves on the Secretary to enforce it. If a private landowner in the vicinity of the leased premises complains that the lessee's operations have damaged his trees or his forage, and the lessee disclaims liability, what then? Will the administrator, in furtherance of his obligation to enforce the lease terms, investigate the damage claims and undertake to adjudicate their merits? If he concludes that the lessee's operations did in fact cause the damage complained of, will he then assess the amount, extent, and degree of such damage where disputed between the parties as, for example, where a

fire has caused some damage to grass and trees? Will he decide what will be required of the lessee "to repair" such damage in order to avoid noncompliance with the lease provision? Will he threaten cancellation or suspension of the lease if the lessee refuses to accept liability or to undertake the "repair" ordered by the administrator? If the administrator is not going to function in the foregoing fashion to ensure compliance with the lease provision, what purpose does the provision serve? If he is going to engage in the adjudication of private damage claims against the lessee, he is intruding into an area of endeavor where he does not belong. Tort claims between private parties can only be resolved by the parties themselves, their insurance companies, their attorneys, or in the courts, and the fact that one of the parties happens to be a Federal coal lessee should not constitute a basis for bureaucratic interposition.

There is no need to insert in a coal lease a provision which requires the lessee to operate in such a way as to avoid nonspecific tortious conduct with respect to non-Federal entities, unless, of course, the Congress has imposed upon the executive agency a statutory responsibility to regulate in that area, which it has not done. The obligations, rights, and remedies relating to tortious acts between private parties are firmly established and deeply rooted in the civil law, and require no gratuitous involvement of the Department of the Interior.

This situation is distinguishable from certain of those cases where this Department has required a Federal lessee or grantee to avoid certain damage to private lands, or to rehabilitate private lands where damage was unavoidable. There are three distinctions between that line of cases and the instant case. First, the requirements were imposed either for the protection of associated Federal property or for the protection of a broad public interest, *e.g.*, the environment. Second, the requirements were specific, *i.e.*, the reseeded of disturbed lands, protection of archeological values, fire protection measures, etc. Third, the imposition of the requirement had a statutory premise in each instance. Grindstone Butte Project, 24 IBLA 49 (1976), *aff'd*, Grindstone Butte Project v. Kleppe, 638 F.2d 100 (9th Cir. 1981), *cert. denied*, U.S.; Cominco American, Inc., 26 IBLA 329 (1976). See General Crude Oil Co., 28 IBLA 214, 83 I.D. 666 (Stuebing, A.J. dissenting, joined by Henriques, A.J., and Fishman, A.J.). By contrast, the provision in the instant case (insofar as it is applicable to private lands) has no nexus either to the protection of Federal property or the broad public interest, is nonspecific and ambiguous in the imposition of the lessee's obligations, and is not a statutory function of the Department of the Interior. *Cf.* Kleppe v. New Mexico, 426 U.S. 529 (1976) (where the Secretary's jurisdiction over wild horses and burros on private lands was found to derive from a statute held valid under the property clause of the Constitution).

We have reviewed the dissenting opinions on this issue, and we remain unpersuaded that the statutory admonition to "safeguard the public welfare" affords adequate justification for BLM's effort to assume jurisdiction of a

lessee's legal liabilities to owners of private ("non-Federal") land who assert purely private tort claims. We find nothing wrong with the provision to the extent that it protects Federal lands and interests, but that portion of the provision was not challenged by appellant, and is not at issue in this case. The dissenters cite other Federal statutes that impose various "public interest" obligations on BLM and its lessees, such as the protection of the environment. However, strands from those statutes may not be woven into an elastic blanket of law which then can be stretched to cover private tort claims by third-party landowners against private lessees of Federally-owned mineral deposits.

Therefore, we hold that the lease provision, section 12(b)(1), is unenforceable and void insofar as it pertains to damage "on non-Federal lands in the vicinity of the leased lands," and that BLM improperly overruled the company's objection.

[5] The proposed lease contains three provisions for the protection of cultural and paleontological resources. Section 13 authorizes a survey of the leased land by a qualified archaeologist to provide an inventory of any historical, cultural, archaeological, and paleontological values. Subsection (a) provides that the cost of the survey or measures to protect such values discovered as a result of the survey shall be borne by the lessee, and that items and features of historical, cultural, archaeological, or paleontological value shall remain under the jurisdiction of the United States. Subsection (b) provides that if any items of such value are discovered during during lease operations, the lessee must notify the mining supervisor. That subsection provides that if the lessee is ordered to take measures to protect any items discovered, the cost shall be borne by the lessor. 2/

Section 31 of the proposed lease sets forth several stipulations. Stipulation 5 requires a cultural resource intensive field inventory before undertaking activities that may disturb the surface of the lease lands. The cost of the inventory, reporting, and mitigation measures shall be borne by the lessee. Subsection (d) of stipulation 5 makes essentially the same provisions as subsection (b) of section 13 of the lease. Stipulation 6 generally makes similar provision for protecting paleontological values as stipulation 5 provides for cultural resource values.

Appellant objects to section 13 as inapplicable, since a mining plan for these leases has been heretofore submitted and conditionally approved while the section is a condition precedent to the approval of a mining plan. We note, however, that section 13(a) also provides that the continuation of lease operations may be conditioned on the approval of the survey report and the approval of measures to protect the historical, cultural, archaeological,

2/ This provision offers no clear justification why the lessee must bear the cost of protecting these values if found during the survey while the Government would bear the cost of measures to protect them if discovered during lease operations.

and paleontological values. Appellant makes a similar objection to stipulation 5. Appellant further objects to the imposition of the costs of a survey for these values and the measures necessary to protect them. In General Crude Oil Co., *supra*, and Cecil A. Walker, 26 IBLA 71 (1976), the Board reviewed an oil and gas lease stipulation which required the lessee to provide for a survey of the land for archaeological values and protect such values at cost to the lessee. After making a detailed analysis of legislation concerning cultural resource values on the public lands, the Board sustained the stipulation. However, because multiple provisions in the coal lease conflict in assigning responsibility for the cost of protecting and mitigating damage to cultural resources 3/ and for recovery of data, 4/ the case must be remanded to eliminate the internal conflicts between section 13 and the stipulations.

[6] Section 14 of the proposed lease reserves to the United States the right to authorize other uses of the leased lands that do not unreasonably interfere with the exploration and mining operations of the lessee. Appellant objects to this section because it has no express provision for notifying appellant of any change in the status or use of these lands. However, the decision below notes that all lessees or permittees would be notified in advance of the authorization of any other uses of the lands in the leasehold, and that the valid existing rights of all existing lessees or permittees are required to be recognized by statute, whether stated in the leases or not. Since any use of the surface would be subject to appellant's lease, we see no need for including an express notification requirement in the lease.

[7] Appellant objects to the provision in section 17 requiring that wages be paid at least twice each month to persons employed on the leased lands. Appellant contends that the lease operator employs nonminers performing administrative functions on the premises who are paid salaries on a monthly basis which is permitted under Utah law. We note that this provision is merely a restatement of a provision in appellant's prior lease, and was not substantially changed on readjustment. The requirement of paying wages twice each month has always been set forth by statute. 30 U.S.C. § 187 (1976). Although that section states that no such provision of a lease shall be in conflict with the laws of the state in which the leased property is situated, appellant has not demonstrated that compliance with this lease provision would put appellant or its operator in violation of State law. In Lone Star Steel Co., *supra*, we indicated that we would affirm decisions by BLM to include provisions required by statute in readjusted coal leases.

[8] Lastly, appellant objects to special stipulation 12 which requires buildings and surface structures to be painted in a color that conforms or blends with the natural color of the surrounding area. Appellant asserts

3/ Compare section 13(b) with stipulation 5(c).

4/ Costs of salvaging fossils are assigned to the United States under stipulation 6(d). However, the authorized officer of the surface management agency may specify otherwise with respect to "data recovery for cultural resources" under stipulation 5(d).

that it is not feasible to compel a coal operator who handles a black substance to paint his buildings and surface structures tan, the natural background color of the surrounding area in this case. Appellant's statement of reasons merely restates the objection submitted to BLM and offers nothing to refute BLM's reasons for overruling that objection. Those reasons, which we adopt, are as follows:

These lease areas can be viewed from trails and overlooks around the Price Canyon Recreation Area. Therefore, due to Visual Resource Management considerations negative visual impacts shall be mitigated by imitating the form, line, color and texture of the natural landscape to the greatest extent practical as determined by the authorized officer. The feasibility argument loses merit due to the fact that the major surface structure already in use for the processing and shipping of coal as well as other coal holdings are already painted a suitable color that blends with the landscape. The visual effect does not appear to be adversely affected by the coal.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed in part, reversed in part, and remanded for further action consistent with this opinion.

Edward W. Stuebing
Administrative Judge

We concur:

Douglas L. Henriques
Administrative Judge

Anne Poindexter Lewis
Administrative Judge

C. Randall Grant, Jr.
Administrative Judge

Gail M. Frazier
Administrative Judge

ADMINISTRATIVE JUDGE IRWIN CONCURRING IN PART AND DISSENTING IN PART:

I. Introduction

I believe section 12 of the readjusted lease is authorized by law and advisable as a matter of policy. Therefore, although I concur with the balance of the majority decision, I am disappointed in their discussion and conclusion concerning this provision.

II. Legality

A. The Mineral Leasing Act of 1920

Section 30 of the Mineral Leasing Act of 1920, as amended, 30 U.S.C. 187 (Supp. II 1978), requires several mandatory provisions in a coal lease. It provides in part:

Each lease shall contain provisions for the purpose of insuring the exercise of reasonable diligence, skill, and care in the operation of said property; a provision that such rules for * * * the prevention of undue waste as may be prescribed by the Secretary shall be observed, * * * and such other provisions as he [the Secretary] may deem necessary * * * for the protection of the interests of the United States, * * * and for the safeguarding of the public welfare. [Emphasis added.]

Section 12 of the readjusted lease is specifically based on and implements these clauses of section 30 of the Mineral Leasing Act. It reads in full:

Sec. 12. OPERATIONS ON LEASED LANDS. In accordance with the conditions of this lease, the exploration and mining plans, the regulations and the Act, the lessee shall exercise reasonable diligence, skill and care in all operations on the leased lands. The lessee's obligations shall include, but not be limited to the following:

(a) The lessee shall conduct all operations on the leased lands so as to avoid injury to life, health, or property.

(b) The lessee shall conduct all operations in such a manner as may be needed to avoid or, where avoidance is impracticable, to minimize and where practicable, to repair damage to: (1) any forage and timber growth on Federal or non-Federal lands in the vicinity of the leased lands; (2) crops, including forage and timber, or improvements of a surface owner; or (3) improvements, whether owned by the United States or by its permittees, licensees, or lessees. The lessor must approve the steps to be taken and the restoration to be made in the event of the occurrence of damage described in this subsection.

(c) The lessee shall minimize to the maximum extent possible wasting of the mineral deposits and other resources, including, but not limited to, surface resources which may be found in, upon, or under such lands. [Emphasis added.]

The introductory language of section 12 of the lease iterates the first-quoted clause of section 30 of the Act. Section 12(a) specifies the first obligation to avoid injury to life, health, or property; it does not limit the obligation for the benefit of life, health, and property only on the leased lands. Section 12(b) makes explicit that the lessee is obligated to exercise care for the benefit of both Federal and non-Federal lands. Section 12(b)(1) calls for damage to forage and timber on Federal and non-Federal lands in the vicinity of the leased lands to be avoided or minimized and repaired; section 12(b)(2) is designed to safeguard the crops and improvements of a surface owner, not limited to the surface owner of the leased lands; section 12(b)(3) is designed to protect the interests of the United States in improvements owned by it or its lessees, not limited to improvements on the leased lands. Section 12(c) implements the clause of section 30 concerning rules to prevent undue waste, not limiting the obligation to the leased lands for either mineral deposits or surface resources.

What the majority finds troubling about section 12 of the lease is its coverage of non-Federal, that is, private land, not only the private land over the leased coal but also neighboring private lands. Section 30 of the Act does not distinguish between lease provisions for the benefit of public lands, private lands, or private lands near public lands. Its language is general and, in my view, may be applied to prevent undue waste, protect the interests of the United States, and safeguard the public welfare wherever there is a reasonable nexus with operations on the leased lands. In this case there is such a nexus. In addition to considerable Federal land in the township, there are Federal coal lessees on, and reserved mineral interests beneath, private lands that are contiguous to Blackhawk's leased lands. ^{1/} It is reasonable, in my view, to provide for the prevention of waste of these mineral interests by requiring Blackhawk to exercise diligence, skill, and care in order, for example, not to impair future access to these minerals. It is also reasonable to protect the interests of the United States in any improvements it may have, wherever they may be, or any improvements its coal lessees, for example, may have that facilitate production under other leases on the contiguous lands. Finally, it is reasonable in my view to safeguard the public welfare by requiring diligence, skill, and care to avoid or minimize and repair damage to forage, timber, crops, or improvements on either Federal or non-Federal lands. This not only safeguards against losses of personal time and property of private citizens. It also safeguards the public's interest in the productivity of the land and the integrity of the environment against damages due to crop loss, soil erosion, and water pollution, as well as against attendant harm to area biota.

Thus, I conclude that under the specific language of section 30 of the Mineral Leasing Act the BLM may impose section 12 of the readjusted lease.

^{1/} The land in Ts. 12 and 13 S., R. 9 E., Salt Lake meridian, contiguous to the lands covered by the leases in this case includes lands patented without any mineral reservation, lands patented with reservation of all minerals to the United States, state indemnity lands with coal reserved to the United States, and public land. All of these contiguous public lands and the reserved coal are covered by three other coal leases, U 25683, U 25485, or SL 071737, only one of which is held by Blackhawk.

I would add that quite recently the Secretary has stated that "[u]nder section 30 of the Mineral Leasing Act, as amended, the Secretary of the Interior has authority to insert such lease terms as he/she deems appropriate for the protection of the interests of the United States and for other purposes." 47 FR 33132 (July 30, 1982). 30 U.S.C. § 207(a) (1976) contains a similarly-worded authorization. See Natural Resources Defense Council v. Berklund, 609 F.2d 553, 555 n.4 (D.C. Cir. 1979).

B. Other Statutes Governing Coal Leasing

The requirements of several other statutes directly support the inclusion of section 12.

1. Federal Coal Leasing Amendments of 1976

The Federal Coal Leasing Amendments of 1976, P.L. 94-377, 90 Stat. 1083, a bill enacted among other reasons to provide "environmental safeguards which are essential to the long term interests of the nation and the regions involved," ^{2/} amended the Mineral Leasing Act by adding several provisions with which section 12 of the readjusted lease is consonant. Section 3 of that Act added subsection 201(a)(3) to the Mineral Leasing Act. That subsection requires each coal lease to contain provisions requiring compliance with the Federal Water Pollution Control Act, 33 U.S.C. § 1251 (1976), and the Clean Air Act, 42 U.S.C. § 7401 (Supp. II 1978) (30 U.S.C. § 201(a)(3)(E) (1976)); requires the Secretary, prior to issuing any coal lease, to consider the effects which the proposed mining might have on an impacted community or area, including impacts on the environment, on agricultural and other economic activities, and on public services (30 U.S.C. § 201(a)(3)(C)); and proscribes any coal lease before the Secretary has prepared a comprehensive land use plan for the lands containing the coal deposits with which the proposed lease sale is compatible (30 U.S.C. § 201(a)(3)(A)). Section 6 of that Act amended 30 U.S.C. § 207 to provide that a lessee must submit for the approval of the Secretary an operation and reclamation plan prior to taking any action on a leasehold which might cause significant disturbance to the environment (30 U.S.C. § 207(c)). This latter requirement is implemented by 30 CFR 211.10(b) and (c), 47 FR 33185 (July 30, 1982).

2. The Surface Mining Control and Reclamation Act of 1977

The Surface Mining Control and Reclamation Act of 1977, P.L. 95-87, 91 Stat. 445, defines "federal lands" as "any land, including mineral interests, owned by the United States without regard to how the United States acquired ownership of the land and without regard to the agency having responsibility for management thereof" (30 U.S.C. § 1291(4) (Supp. II 1978)). The Secretary is required to implement a Federal lands program applicable to all surface coal mining and reclamation operations that take place in accordance with any Federal law on any Federal lands (30 U.S.C. § 1273(a) (Supp. II 1978)). "Surface coal mining operations" is defined to include surface impacts incident to an underground mine (30 U.S.C. § 1291(27), (28)). 30 CFR

^{2/} H.R. No. 94-981, 94th Cong., 2d Sess. (1976), at 8. See generally id. at 18-19.

Part 211 governs surface coal mining on Federal lands, including coal under leases. 30 CFR 211.1(a) (1981). See 47 FR 33154 (July 30, 1982). The general purposes of the regulations in Part 211 as well as the specific performance standards incorporated by it are consistent with the requirements of section 12. 30 CFR 211.1(b), (g); .40 (1981). See, for example, 30 CFR 715.17 and section 717.17 ("[t]he permittee shall plan and conduct coal mining and reclamation operations to minimize disturbance to the prevailing hydrologic balance in order to prevent long-term adverse changes in the hydrologic balance that could result from the * * * operations, both on and off-site"). See also 30 CFR 715.19 and section 717.19 (use of explosives) and 30 CFR 715.20 and section 717.20 (revegetation). Performance standards at least as stringent as these are to be applied to Blackhawk's lease in accordance with the cooperative agreement between Utah and the Department of the Interior. 30 CFR 211.77(b), art. III.C (1981). Blackhawk's surface mining permit and associated mining plan are to be approved by both the state and the Department. 30 CFR 211.3(c)(2), 47 FR 33161-62, 33182 (July 30, 1982); 30 CFR 741.4(b), 741.17(c) (1981); 30 U.S.C. § 1273(c) (Supp. II 1978).

3. The Federal Land Policy and Management Act of 1976

The Federal Land Policy and Management Act of 1976, P.L. 94-579, 90 Stat. 2743, directs the Secretary to manage public lands in accordance with the principle of multiple use. 43 U.S.C. § 1732(a) (1976). The definition of multiple use specifically provides for management "of the various resources without permanent impairment of the productivity of the land and the quality of the environment" and calls for a combination of resource uses "that takes into account the long-term needs of future generations for renewable and nonrenewable resources, including, but not limited to, recreation, range, timber, minerals, watershed, wildlife and fish, and natural scenic scientific and historical values." 43 U.S.C. § 1702(c) (1976).

The Secretary is also directed to manage in accordance with land use plans developed in accordance with section 202 of the Act. That section sets forth several requirements for land use plans:

(c) In the development and revision of land use plans, the Secretary shall --

- (1) use and observe the principles of multiple use and sustained yield set forth in this and other applicable law;
- (2) use a systematic interdisciplinary approach to achieve integrated consideration of physical, biological, economic, and other sciences;
- (3) give priority to the designation and protection of areas of critical environmental concern;
- (4) rely, to the extent it is available, on the inventory of the public lands, their resources, and other values;
- (5) consider present and potential uses of the public lands;

(6) consider the relative scarcity of the values involved and the availability of alternative means (including recycling) and sites for realization of those values;

(7) weigh long-term benefits to the public against short-term benefits;

(8) provide for compliance with applicable pollution control laws, including State and Federal air, water, noise, or other pollution standards or implementation plans; and

(9) to the extent consistent with the laws governing the administration of the public lands, coordinate the land use inventory, planning, and management activities of or for such lands with the land use planning and management programs of other Federal departments and agencies and of the States and local governments within which the lands are located * * *.

43 U.S.C. § 1712(c) (1976).

The Secretary is authorized to manage the use, occupancy, and development of public lands in accordance with these land use plans and with the multiple use principle through leases and is directed to take any action necessary to prevent unnecessary or undue degradation of the lands by regulation or otherwise. 43 U.S.C. § 1732(b) (1976).

4. The National Environmental Policy Act of 1969

The National Environmental Policy Act of 1969, P.L. 91-190, 83 Stat. 852, requires a detailed statement on the environmental effects of every proposed major Federal action that would significantly affect the environment. 42 U.S.C. § 4332(2)(c) (1976). Proposals to issue a lease or approve a mining plan are actions that require an environmental impact statement. Cady v. Morton, 527 F.2d 786, 793 (9th Cir. 1975). Such a statement must adequately discuss not only the environmental impact, but also the unavoidable adverse impacts of the proposed action, alternatives to it, the relationship between short-term uses of the environment and its long-term productivity, and irreversible commitments of resources from implementing the proposed action. 42 U.S.C. § 4332(2)(c)(i) through (v). A statement should also discuss measures to mitigate the effects of the proposed action. 3/ In the context of a proposed coal lease these measures include lease conditions required by the statutes summarized above as well as additional discretionary conditions. 4/

These summaries cover only four of the most important environmental statutes relevant to coal leasing. There are more than a dozen others. 5/

3/ 40 CFR 1502.14(f), .16(h); Sierra Club v. Froehlke, 359 F. Supp. 1289, 1339-41 (D. Tex., 1973), rev'd on other grounds, Sierra Club v. Callaway, 499 F.2d 982 (5th Cir. 1974), Simmans v. Grant, 370 F. Supp. 5, 17-18 (D. Tex. 1974).

4/ Department of the Interior, Final Environmental Statement, Federal Coal Management Program, April 1979, ch. 6.

5/ Id., Table 1-3 at 1-19 to 1-23.

Individually and together, however, these four are sufficient basis for the conclusion that offsite impacts on both public and private lands of mining coal under a Federal lease must be analyzed before the lease is issued and regulated afterwards. Section 12 is only one of the conditions controlling these impacts of operations under a lease, but it is a significant one, and one that is supported by these statutes.

C. Previous Decisions of the Secretary and the Board

Several decisions of the Secretary and this Board support the lease condition involved in this case.

In Montana Power Co., 72 I.D. 518 (1965), the progenitor of section 12 was approved. ^{6/} In that case the company objected to its application to private lands overlying its lease. In affirming the BLM decision, the Secretary said, in part:

The appellant stresses that the Northern Pacific Railway [the principal surface land owner] has no interest in the restoration of the surface. It contends that the restoration provision should be limited to acreage the surface of which is owned by the United States. Although it is true that the United States has a greater interest in its own lands, it also has a substantial concern with lands of others in which it has reserved the minerals, together with the right to prospect for, mine, and remove the minerals * * *. Furthermore, by the end of the 20-year lease the ownership of the surface of the land may well have changed and the new owner may have a different attitude from the railroad's.

72 I.D. at 521.

In Cominco American Inc., 26 IBLA 329 (1976), the same general condition as in Montana Power was included as a stipulation to readjusting Cominco's phosphate lease and a special stipulation required the company to use crushed

^{6/} In that case the condition read:

"Protection of the surface, natural resources, and improvements. The lessee agrees to take such reasonable steps as may be needed to prevent operations from unnecessarily: (1) causing or contributing to soil erosion or damaging any forage and timber growth thereon; (2) polluting the waters of springs, streams, wells, or reservoirs; (3) damaging crops, including forage, timber or improvements of a surface owner; or (4) damaging range improvements whether owned by the United States or by its grazing permittees or lessees; and upon any partial or total relinquishment or the cancellation or expiration of this lease, or at any other time prior thereto when required by the lessor and to the extent deemed necessary by the lessor, to fill any sump holes, ditches and other excavations, remove or cover all debris, and, so far as reasonably possible, restore the surface of the leased land to its former condition, including the removal of structures as and if required. The lessor may prescribe the steps to be taken and restoration to be made with respect to lands of the United States and improvements thereon." 72 I.D. at 521 n.3.

rock and employ dust control measures on roadways and a mine yard that were located on private lands separated from the leased lands. The Board followed Montana Power in upholding conditions applicable to privately owned surface estates overlying the leased minerals. It also rejected Cominco's argument "that the Department has no authority for conditioning the modification and readjustment of the subject lease with environmental stipulations which apply to lands which do not belong to the Federal Government." 26 IBLA at 336.

In rejecting Cominco's private lands objection, the Board relied in part on Grindstone Butte Project, 24 IBLA 49 (1976). In that case several stipulations were attached as conditions to the granting of a right-of-way, including one that required reseeded of disturbed areas along irrigation canal banks on both private and public lands. BLM justified the reseeded on the basis of its belief that "impacts left unmitigated on private land would pose a threat to adjoining National Resource Lands." 24 IBLA at 56. The Board upheld BLM, stating in part:

In the present case, the stipulations required by the BLM concern construction and maintenance requirements, monitoring the use of poisonous substances, reseeded of disturbed lands, removal of refuse, prevention of water pollution, protection of fish, protection of archeological sites, assurances of livestock mobility, and protection of hydroelectric development. We find these interests to be of proper concern to this Department both directly and through the need to cooperate with other federal and state agencies. ^{2/} Therefore, we reject appellant's arguments that the BLM is not empowered to require these stipulations as a condition precedent to the approval of the right-of-way applications. [Text of footnote omitted.]

24 IBLA at 51. Footnote 2 of the Board's decision enumerated several Federal laws supporting its conclusion, including the National Environmental Policy Act. On appeal the circuit court affirmed the Board and relied in part on that Act. Grindstone Butte Project v. Kleppe, 638 F.2d 100 (9th Cir. 1981). ^{7/} Its opinion states:

The Secretary cites NEPA as additional authority for imposing conditions on grants of irrigation rights-of-way. NEPA made environmental protection part of the mandate of every federal agency. Calvert Cliffs' Coordinating Committee, Inc. v. AEC, 449 F.2d 1109, 1112 (D.C.Cir. 1971).

Under NEPA, federal agencies have "the continuing responsibility . . . to use all practicable means, consistent with other essential considerations of national policy, [to protect the environment]." 42 U.S.C. § 4331(b). Congress further mandated that, to the fullest extent possible, policies, regulations, and

^{7/} The court's recitation of the facts referred specifically to the stipulation requiring reseeded on private as well as public land, characterizing it as one designed to "minimize despoliation of public land by reseeded soil disturbed by construction." 638 F.2d at 101.

public laws of the United States "shall be interpreted and administered in accordance with the policies set forth" in NEPA. 42 U.S.C. § 4332.

Thus, the Secretary of the Interior is not only permitted but required to take environmental values into account in carrying out regulatory functions, see Detroit Edison Co. v. Nuclear Regulatory Commission, 630 F.2d 450 (6th Cir. 1980), unless there is a clear and unavoidable conflict of statutory authority prohibiting the Secretary from complying with NEPA's mandate. Flint Ridge Development Co. v. Scenic Rivers Ass'n, 426 U.S. 776, 787-788, 96 S.Ct. 2430, 2437-2438, 49 L.E.2d 205 (1976). Because we hold that the Secretary is vested with statutory authority to impose reasonable terms and conditions upon grants of irrigation rights-of-way, it is clear that no provision in the 1891 or 1901 Acts precludes the Secretary from implementing NEPA's environmental mandate. As stated above, in exercising discretion to impose terms and conditions upon rights-of-way granted over federal lands, the Secretary must comply with NEPA's mandate to protect the environment. See Detroit Edison Co., 630 F.2d at 450, 451.

638 F.2d at 103.

The majority attempts to distinguish Cominco and Grindstone Butte. The provision in this case, they say, "(insofar as it is applicable to private lands) has no nexus either to the protection of Federal property or the broad public interest, is nonspecific and ambiguous in the imposition of the lessee's obligations, and is not a statutory function of the Department of the Interior" (majority opinion, supra at 102). I am not persuaded by any of these purported distinctions. First, section 12 does have a nexus to protection of Federal interests. It protects forage and timber on nearby Federal lands (section 12(b)(1)); it protects Federal improvements, as well as those of Federal lessees, wherever they may be affected (section 12(b)(3)); and it prevents wasting reserved mineral interests underlying contiguous and nearby private lands and other Federal lands as well as other resources (section 12(c)). Section 12 also has a nexus with the broad public interest (or, in the words of section 30 of the Mineral Leasing Act, it safeguards the public welfare). In terms it provides for avoidance of injury to life, health, and property (section 12(a)). It protects both the private property value and the environmental values of forage and timber (section 12(b)(1)) and of crops (section 12(b)(2)), as well as the property value of private improvements (section 12(b)(2)). Second, the obligations imposed are no vaguer than those approved in Cominco. Concerning the general stipulation involved in that case the objection of vagueness was answered in Montana Power: the language of the surface restoration clause "is not unusual legal terminology and its interpretation should occasion no more than ordinary difficulties." 72 I.D. at 522. The terms of the special stipulation affecting private lands were not definitive ("Material should be selected with physical properties which will reduce dust production and reduce or prevent surface pooling or flow of water. Dust control measures should be taken on these areas."), although they could be more specific than some of those in section 12 because they were addressing known conditions. Third, I agree

with my colleagues that the conditions in those cases "had a statutory premise" (majority opinion, supra at 102). In Grindstone Butte, it was the Act of March 3, 1891, 26 Stat. 1101, as amended by the Act of February 15, 1901, 43 U.S.C. § 959 (1970). ^{8/} In Cominco it was 30 U.S.C. § 211 (1976), the provision of the Mineral Leasing Act for leasing phosphates. In this case it is section 30 of that Act, an act designed to enhance the Secretary's control over United States mineral interests, Boesche v. Udall, 373 U.S. 472, 481 (1963), that is the statutory basis of section 12.

Finally, in General Crude Oil Co., 28 IBLA 214, 83 I.D. 665 (1976), the Board decided the question whether BLM could impose as a condition precedent to the issuance of oil and gas leases a stipulation concerning protection of cultural resources that applied to patented land in which the United States had reserved mineral interests. A majority held that it could.

In my view these cases are ample precedent in support of section 12. Cf. Dean W. Rowell, 37 IBLA 387 (1978), Quantex Corp., 4 IBLA 31, 78 I.D. 317 (1971). See also Solicitor's Opinion, M 36917, 87 I.D. 27 (1979).

III. Policy Considerations.

Several policy arguments convince me that section 12 should be upheld.

A. The Purpose of Lease Readjustment

"The purpose of the lease readjustment is to bring existing leases into conformity with statutes passed and policy changes made since their issuance." 47 FR 33129 (July 30, 1982). ^{9/} In this case section 12 is the first change in the provision implementing section 30 of the Mineral Leasing Act of 1920 since the one contained in the original lease agreement dated June 17, 1921. ^{10/} Our knowledge has increased, several statutes have passed, and our policies have evolved considerably since then. Section 12 represents the current combination of that knowledge and those policies. The purpose of readjusting leases would be undermined if provisions such as this are rejected.

^{8/} The statutory basis for such conditions is now 43 U.S.C. § 1765 (1976).

^{9/} See Rosebud Coal Sales Co., Inc. v. Andrus, 667 F.2d 949, 951 (10th Cir. 1982): "A time is thus stated when the Government can 'readjust' the royalty and other terms * * *. The scope or nature of the changes is not limited and there thus exists a very broad power to make changes considered to be in accordance with the proper administration of the lands." See also Solicitor's Opinion, M-36939, 88 I.D. 1003, 1008-09 (1981).

^{10/} Section 4(a) of the original lease provided:

"The lessee shall carry out and observe regulations prescribed by the Secretary of the Interior and in force at the date hereof relative to (1) reasonable diligence, skill, and care in the operation of said property in accordance with approved methods and practices; (2) the prevention of undue waste; (3) the safety and welfare of miners; and (4) insuring the fair and just weighing or measurement of the coal mined by each miner."

B. The Precedent is Important

At least four other coal lease readjustment cases presently pending before the Board include the language of section 12. More importantly, however, there are literally hundreds of leases covering hundreds of thousands of acres containing billions of tons of Federal coal. In 1974 there were 533 leases covering more than 780,000 acres and involving more than 16 billion tons of coal. 11/ In addition, in 1976 there were more than 490,000 acres involving 12 billion tons of coal subject to preference right lease applications. 12/ Thus, it would be very serious if BLM could not include this provision to protect United States interests and safeguard neighboring private lands affected by all these present and future leases of Federal coal. The social and environmental impacts of mining Federal coal have been thoroughly analyzed. It is not necessary to recount them here. 13/ It is enough to say that if the Federal Government can compel private landowners to expend efforts on their land for the protection of public lands, and it can, 14/ then it is only fair for it to compel its own lessees to make similar efforts to protect the public at large and safeguard neighboring private landowners and to remedy any harm that may occur from activities under the leases. Otherwise, the good neighbor policy of BLM will become simply a slogan and a sham.

C. The Roles of Private Law and Public Agencies

The majority is apparently offended by BLM's effort to interfere in matters that should in their view be dealt with at private law and to arrogate to itself a roving commission to do good in the name of some ill-defined public interest. I disagree. Although tort and trespass law are of course the genesis of the legal response to the kinds of problems addressed in section 12, the sun has long since set on the day when they were the sole system for reallocating the burdens of economic activity in this country. Today the recurring policy issue is the relative degree of reliance on private law, insurance, and social legislation. In the context of the legislation summarized above, the issue in this case is the proper role of BLM. In my view section 12 does not interpose BLM in other people's private business. As steward of United States lands and lessor of United States mineral interests

11/ H.R. Rep. No. 94-981 at 10, supra note 2.

12/ Natural Resources Defense Council v. Berklund, supra at 555 n.1. The Secretary is not free to reject these applications on environmental grounds if the applicant otherwise fulfills the requirements of 30 U.S.C. § 201(b) (1976). Id. at 557.

13/ See generally National Academy of Sciences, Rehabilitation Potential of Western Coal Lands (Ballinger 1974); U.S. Department of the Interior, Final Environmental Statement, Federal Coal Management Program (Apr. 1979), ch. 5; Department of the Interior, Permanent Regulatory Program Implementing Section 501(b) of the Surface Mining Control and Reclamation Act of 1977, Final Environmental Impact Statement, OSM-EIS-1, January 1979, section III.

14/ See, for example, Shannon v. United States, 160 F. 870 (9th Cir. 1908); United States v. Johnston, 38 F. Supp. 4 (D.C. W. Va. 1941). Cf. State of Minnesota by Alexander v. Block, 660 F.2d 1240, 1248-1251 (8th Cir. 1981), cert. denied, 102 S. Ct. 1645 (1982).

it is BLM's preeminent business to manage those lands and those interests for maximum efficient production with minimum adverse effects on society in general and other interest holders in particular. This responsibility certainly encompasses section 12.

The costs and delays, not to mention the haphazard results, of private litigation are well known. It is in the interest not only of BLM and its lessees, but also of neighboring landowners, to resolve disputes concerning damage allegedly caused by lessees' operations with less expense and less delay and more certainty: In the interests of BLM and its lessees because more efficient production will be enhanced; in the interests of neighboring interest holders because they can obtain prompt and informed decisions from BLM on their complaints of damage and administrative review of those decisions they feel ignore the facts or pervert the law. If they wish to place their complaints before the courts they would, of course, remain free to seek judicial review.

The kinds of complaints suggested by my colleagues, majority opinion, supra at 101, are not improbable; likely there would be bizarre ones, perhaps even frivolous ones. Even though some of them may be unanticipated, I doubt that BLM would be unable to referee them. I recognize that section 12 places BLM in the position of approving what a lessee must do to repair damage. I am no more concerned that it will impose unfair burdens on lessees than I am that it will inflict unwanted remedies on complainants. Administrative review would be available in the event of either.

IV. Conclusion

It is possible BLM has additional legal authorities or other policy reasons in support of section 12. Since it did not file an answer I do not know. On the basis of those recited above, however, I would uphold section 12 in its entirety. I therefore concur with the decision except for the portion that holds section 12(b)(1) "unenforceable and void insofar as it pertains to damage 'on non-Federal lands in the vicinity of the leased lands.'"

Will A. Irwin
Administrative Judge

ADMINISTRATIVE JUDGE BURSKI DISSENTING IN PART:

My objection to the majority decision is limited to its analysis of section 12(b)(1) of the standard lease form. In effect, the majority declares that the Secretary has no authority to attempt to protect non-Federal lands in the vicinity of the leased lands from actions undertaken by the United States' lessee under a lease issued by the United States. The majority's analysis of the existence or nonexistence of the Secretary's authority is, itself, dependent upon the subjective view of a majority of this Board that the policy, as manifested by the language of section 12, is "unenforceable and void." The majority, however, fails to distinguish between what the Secretary has the authority to do and what the Secretary might be well-advised to do and makes the latter standard the test for determining the extent of Secretarial authority. Inasmuch as I do not subscribe to the implicit view of the majority that a subjective determination by this Board as to the felicity of a policy circumscribes what the Secretary may or may not do, I respectfully dissent.

The first question to be faced is whether the Secretary has the authority to precondition a renewal of a lease, or a lease itself, on acceptance by a lessee of not only the obligation to minimize the detrimental effects of his operations on non-Federal land but a provision which might possibly entail cancellation of the lease for failure to so comply. I think that, in the abstract, the answer is clearly in the affirmative. Contrary to the majority, I think the language of section 30 of the Mineral Leasing Act, as amended, 30 U.S.C. § 187 (Supp. II 1978), is more than sufficient in scope to embrace such a provision. Even should this statutory language be deemed insufficient to support this lease provision, the other statutory bases discussed in Judge Irwin's dissent makes it clear beyond peradventure that such authority exists. I would note, in passing, that a similar provision relating to the obligations of coal lease operators "to minimize, control or prevent * * * adverse impacts upon adjacent land uses" was codified in the Department's regulations. (Emphasis added.) See 30 CFR 211.4(d)(10) (1981). While this language was deleted in the amendments to Subpart 211, published on July 30, 1982, 47 FR 33183, there is no indication whatsoever, that this change was promulgated because the Department felt it lacked authority to expressly police such impacts. See also Proposed Amendments, 46 FR 61424 (Dec. 16, 1981).

I do not mean to imply that the statutory language directing the Secretary to include, in every lease, provisions "to safeguard the public welfare" gives the Secretary a roving commission to include any provision in a coal lease, regardless how attenuated a relationship it might have to the purposes of the lease. Rather, I believe that any such provision must have a nexus to the subject of the lease itself, in this case the development of coal deposits. Such a nexus is clearly demonstrated by section 12(b)(1), since it is operations under the lease which serve as the precondition for Departmental involvement.

The majority, while affirming the Secretary's authority to enforce such provisions on "Federal" lands, states that enforcement of a similar provision

on adjacent "non-Federal" lands would constitute a gratuitous involvement by the Department in "the obligations, rights, and remedies relating to tortious acts between private parties." This attempted dichotomy between "Federal" and "non-Federal" lands does not work.

"Federal" lands, for the purposes of coal leasing, includes "lands owned by the United States, * * * including surface estate, mineral estate and coal estate." 47 FR 33133 (July 30, 1982), amending 43 CFR 3400.0-5(t). Why the mere fact that the Government may have a reserved mineral estate permits the Government to undertake to protect an adjacent privately owned surface estate, which the Government may not do in the absence of such a reservation, is unexplained. The only possible nexus for Government involvement would be its reserved mineral interest. The majority does not address how the mere existence of this interest is sufficient to grant the Department authority to regulate private tortious conduct or how this interest serves to make the provision more enforceable. All of the procedural objections raised by the majority necessarily apply to "Federal" land as well. If this provision is truly unenforceable as it relates to "non-Federal" lands I fail to see how it becomes more enforceable because the Government has a reserved mineral estate in land privately owned.

Finally, I agree with the majority's interpretation of the limited coverage presently provided by section 12(b)(1). The arguments which it makes as to the negative inferences which might be drawn from the limiting language relating to "impracticality" are well-taken. But I find it strange that, after lamenting the limited nature of the protection afforded, we then proceed to correct this problem by removing all protection whatsoever. I doubt there is a single landowner in the vicinity of a Federal coal lease who would appreciate that he is better protected by this provision's removal than he was by its existence.

The language of this provision is not as I would have drafted it. But the matter of personal preference is not properly a consideration in our adjudicative role. We should limit ourselves to determining whether or not authority exists for this provision, not whether we think it is either needed or wise. The authority exists; the language, though limited, is capable of rational interpretation; the problems of enforcement are properly considered when this provision is applied. These problems must be faced, in any event, when we are presented with a violation of section 12(b)(1) relating to "Federal" lands.

This lease provision does not, and could not, preempt any remedies available under state law. It is clearly cumulative to such remedies as already exist. It merely attempts to involve the Government, as lessor, in affirmatively policing the operations of its lessee as they may affect other members of the public. Just as a private landlord could and often does condition a lease for a residence with an express provision relating to the playing of loud music so as to protect other residents in the peaceful and quiet enjoyment of their premises, so, too, the Government should be able to undertake minimal efforts to protect its neighbors. I fail to see what

interest of the Government or this Department is advanced by denying it the authority to be a good neighbor.

I dissent.

James L. Burski
Administrative Judge

I concur:

Bruce R. Harris
Administrative Judge

