DECISION

THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-209981 DATE: December 30, 1982

MATTER OF: Proposed Agreement for Exchange of Lands for Federal Coal Lease Bidding Rights

DIGEST:

1. Rattlesnake National Recreation Area and Wilderness Act of 1980 authorized exchange of Montana Power Company's lands for equal value of "bidding rights" for competitive Federal coal leases. Proposed "Exchange Agreement" would require Treasury to pay State of Montana 50 percent share of total received, including bidding rights, under section 35 of Mineral Lands Leasing Act of 1920, 30 U.S.C. § 191, which provides for remitting "money" received by Treasury. Since bidding rights are not money, State payment may not be based on their receipt.

2. Under proposed "Exchange Agreement" where Montana Power Company's total payment is in cash but it is accompanied by notice of use of bidding rights, Treasury would be required to pay Company for the amount of rights used pursuant to the notice. Reimbursement to Company is not proper absent authority to retire bidding rights by payment and lack of available appropriation for that purpose.

3. Proposed "Exchange Agreement" calls for increased bidding rights for Montana Power Company at 10 percent interest rate on outstanding unused bidding rights. Increase in value of bidding rights is not legally permissible since their value is limited to fair market value of lands under section 4(b)(2) of the Rattlesnake National Recreation Area and Wilderness Act, 16 U.S.C. § 460ll-3(b)(2) (Supp. IV) 1980).

We received a request from the Director of the Bureau of Land Management (BLM), Department of the Interior

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(Interior), for our opinion as to whether he has the authority to agree to a proposal from the Montana Power Company (Company) relating to the exchange of its lands to be included in the Rattlesnake National Recreation Area, and Rattlesnake Wilderness, Montana.

The request indicates that under the Rattlesnake National Recreation Area and Wilderness Act of 1980, lands owned by the Company have been appraised at approximately $17.5 million and that one acquisition method provided for in the Act is for the exchange of the lands for bidding rights in an amount equal to the lands' value. These rights may be used to pay the bonus or other payment required of the successful bidder for a competitive Federal coal lease. Under the proposed "Exchange Agreement" the Company would use the bidding rights for only half of any lease payment, assuring a 50 percent payment in cash. The cash payment would be remitted to the State of Montana as its 50 percent share of money received from sales, bonuses, royalties and rentals of Federal public lands under section 35 of the Mineral Lands Leasing Act of 1920 (MLLA).

In his submission the Director states as follows:

> "The Department's informal position, since adoption of regulations authorizing the creation and use of bidding rights in 1977 (43 C.F.R. Subpart 3526), has consistently been that only cash receipts are to be distributed by the Treasury to the various states under section 35 of the MLLA. Thus, a 50 percent portion of bonuses in competitive coal sales or royalties paid in cash would be subject to redistribution to the state where the lease is situate, however, any portion of the bid that would be satisfied by the bidder or lessee tendering a certificate of bidding rights would simply not be 'money received' and thus would not be subject to distibution. We describe this position as informal since, at the time the Rattlesnake Act was passed, no Departmental regulation or written opinion so stated, and no bidding rights had then been created or exercised to establish the precedent on their treatment under section 35 of the MLLA."

According to the Director, it appears that establishment of the proposed method of payment was to have been accomplished by a "Statement of Intent" signed by the Company, the Regional Forester of the United States Forest Service, Region I, and the Montana State Director of BLM. This statement was incorporated by reference in the Rattlesnake bill, but was deleted prior to its passage. The Director's tentative conclusion is that the statement has no effect on the disbursement of cash to be received from the Company because all mention of the statement was removed before the bill was enacted and furthermore, the statement is ambiguous regarding the 50 percent payment.

The Director further states that he will not agree to the proposal for distribution of revenues under section 35 of the MLLA absent our concurrence. Subsequent to the Director's submission, at a meeting with his staff, we were requested to also consider an additional method of payment contained in a later proposal dated December 2, 1982. Under it the Company would pay 100 percent in cash for Federal coal lease payments, from which the State of Montana would receive 50 percent and the Federal Treasury would reimburse the Company for its cash payment, cancelling a like amount of bidding rights. In addition, the Director's staff informally requested our views concerning the interest provision of the proposed Exchange Agreement which would entitle the Company to 10 percent interest on the value of the bidding rights during the time they were unused.

For the reasons discussed below, it is our opinion that the Treasury may not remit to the State of Montana an amount based on the Treasury's receipt of money from the Montana Power Company when half of the amount due to the United States is satisfied by the Company's use of bidding rights. Additionally, the Treasury is not authorized to retire the bidding rights by payment to the Company nor is there an appropriation available for this purpose. Finally, an increase in the value of bidding rights because of interest on outstanding bidding rights is not permissible since it would increase their value beyond the fair market value of the exchanged lands, which is not authorized by statute.

LEGISLATIVE BACKGROUND

Section 35 of the Mineral Lands Leasing Act of 1920, as amended, 30 U.S.C. § 191 (1976) provides in pertinent part that:

> "All money received from sales, bonuses, royalties, and rentals of the public lands under the provisions of this chapter * * * shall be paid into the Treasury of the United States; 50 per centum thereof shall be paid by the Secretary of the Treasury * * * to the State other than Alaska within the boundries of which the leased lands or deposits are or were located; * * * 40 per centum thereof shall be paid into, reserved, appropriated, as part of the reclamation fund created by * * * the Reclamation Act, approved June 17, 1902, * * * All moneys received under the provisions of this chapter * * * not otherwise disposed of by this section shall be credited to miscellaneous receipts."

The Rattlesnake National Recreation Area and Wilderness Act of 1980, Public Law No. 96-476, October 19, 1980, 94 Stat. 2271, 16 U.S.C. § 460ll (Supp. IV 1980), established the Rattlesnake National Recreation Area and Rattlesnake Wilderness Area. With regard to land acquisition and exchange, section 4 of the Act (16 U.S.C. § 460ll-3) provides in pertinent part as follows:

> "(a) Within the boundaries of the Rattlesnake National Recreation Area and Rattlesnake Wilderness, the Secretary is authorized and directed to acquire with donated or appropriated funds * * * by exchange, gift, or purchase, such non-Federal lands, interests, or any other property, in conformance with the provisions of this section.* * *
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> "(b)(1) The Secretary of the Interior, in consultation with the Secretary of Agriculture, is authorized to consider and consummate an exchange with the owner of the private lands or interests therein within or contiguous to the boundaries of the Rattlesnake National Recreation Area and Rattlesnake Wilderness, * * * by which the Secretary of the Interior may accept conveyance of title to these private lands for the United States and in exchange issue bidding

rights that may be exercised in competitive coal lease sales, or in coal lease modifications, or both, under sections 2 and 3 of the Mineral Lands Leasing Act of 1920, as amended (30 U.S.C. 201(a), 203).* * *

"(2) The coal lease bidding rights to be issued may be exercised as payment of bonus or other payment required of the successful bidder for a competitive coal lease, or required of an applicant for a coal lease modification. The bidding rights shall equal the fair market value of the private lands or interests therein conveyed in exchange for their issuance. The use and exercise of the bidding rights shall be subject to the provisions of the Secretary of the Interior's regulations governing coal lease bidding rights, to the extent that they are not inconsistent with this Act, that are in effect at the time the bidding rights are issued.

"(3) If for any reason, including but not limited to the failure of the Secretary of the Interior to offer for lease lands in the Montana portion of the Powder River Coal Production Region * * * or the failure of the holder of the bidding rights to submit a successful high bid for any such leases, any bidding rights issued in an exchange under this Act have not been exercised within three years from the date of enactment of this Act, the holder of the bidding rights may, at its election, use the outstanding bidding rights as a credit against any royalty, rental, or advance royalty payments owed to the United States on any Federal coal leases(s) it may then hold.

"(4) It is the intent of Congress that the exchange of bidding rights for the private lands or interests therein authorized by this Act shall occur within three years of the date of enactment of this Act."

S.3072, 96th Cong., 2d Sess. which was enacted as Public Law No. 96-476, was introduced by Senator John Melcher of Montana on August 26, 1980. At a hearing on S.3072 held by the Subcommittee on Parks, Recreation, and Renewable Resources of the Committee on Energy and Natural Resources of the Senate on September 9, 1980 (96th Cong., 2d Sess. 21, 22), the Associate Director of BLM testified on section 4 of the bill. He indicated that Interior would support the bill if certain technical changes were made and if all reference to the statement of intent were deleted. He said that "Reference to an agreement that did not exist at this time was neither necessary or helpful." Additionally, he explained as follows:

> "Use of the bidding rights approach does nothing more than permit the Federal Government to obtain the private lands in question for a price to be paid in a medium other than cash. * * *
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> "I must point out, however, that use of bidding rights would have an impact on the State of Montana or any other Sate where they are used. States are entitled to 50 percent of the receipts from Federal mineral leasing within their borders. To the extent that Montana Power applies its bidding rights to a coal lease sale or modification, or to other payments required of a lessee, cash receipts that the company would have paid for bonus bids, royalties or rentals, would be proportionately reduced and so will the State's share of those receipts.
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> "In other words, if you are to protect the State's 50 percent of mineral leasing receipts, then you would have some language in there to do that."

The Senate Committee on Energy and Natural Resources favorably reported on S. 3072 with amendments, on September 25, 1980, S. Rep. No. 996, 96th Cong., 2d Sess. 1. Notwithstanding the Associate Director's comments, the bill as reported contained no additional provision regarding the State's share of receipts. It did include reference to the proposed statement of intent as follows: "In accordance with the agreement entitled 'Statement of Intent' entered into by the Montana Power Company, the Regional Forester of

the United States Forest Service, Region 1, and the State Director of the Bureau of Land Management, signed _____ 1980, * * *."

An Appendix to the Report contained a draft Statement of Intent signed only by the Montana Power Company. In the Appendix it was noted that the agreement was not in final form and was subject to change (Report, pages 7 & 8).

The bill as reported by The House Committee on Interior and Insular Affairs on September 17, 1980 (H.R. Rep. No. 1340, 96th Cong., 2d Sess.) did not contain a similar provision, nor an appendix.

S. 3072 was considered by the Senate on October 1, 1980. Prior to its passage, Senator Melcher proposed an amendment which among other things (without explanation) deleted reference to the Statement of Intent. The amendment was agreed to by the Senate. 126 Cong. Rec. S 14206 (daily ed. October 1, 1980).

The next day the bill, as passed by the Senate, was considered by the House of Representatives. Prior to its approval Chairman Seiberling of the Subcommittee on Public Lands and National Parks of the Committee on Interior and Insular Affairs inserted into the Congressional Record a "Statement of Intent" signed by all the parties, and dated October 2, 1980. The statement which differed from the draft appearing in the Senate Report reads in pertinent part as follows:

> "2* * *(B)* * * Future royalty payments and rentals may also be paid in cash or a combination of cash and bidding rights. All payments related to the Federal coal leases must include a minimum of 50 percent (1/2) cash. Cash portions of all receipts, up to 50 percent (1/2) of these [sic] total amount received by the Federal government, will be used to pay the State of Montana in accordance with the Mineral Leasing Act as amended.* * *
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> "4. In the event a land exchange cannot be mutually agreed to, or if only a portion of the Montana Power Company lands are included in the exchange, the Montana Power

> Company may, at its option, obtain a cash payment for all of, or the remainder of, its 'Rattlesnake Lands' subject to appropriation by the United States Congress." 126 Cong. Rec. H 10345-6 (daily ed. October 2, 1980).

PROPOSED EXCHANGE AGREEMENT

We have been provided with an unapproved draft "Exchange Agreement" dated December 2, 1982, between the Company and the Secretaries of Agriculture and the Interior. This differs from the two Statements of Intent mentioned above, which were agreements in principle to be used as the basis for a binding agreement between the parties--the Exchange Agreement. Under the Exchange Agreement the Company would agree to deed to the United States its Rattlesnake lands and in exchange the United States, through Interior, would issue bidding rights to the Company. This would entitle it to receive credit for coal-related bonus and royalties in the amount of $17.5 million. The bidding rights would also allow a rate of interest of 10 percent per annum, compounded daily, so that the current value of the bidding rights could be obtained by the Company. The current value would be reduced by the amount of bidding rights value applied to lease payments. (Section 3.1 & .2.)

Section 3.4(b) provides that:

> "Lease payments which make use of Bidding Rights shall be (i) in cash, in a minimum amount of fifty percent (50%) of the total debt then due, and the remaining amount shall be represented by a Bidding Rights Use Notice ('Notice') * * * or (ii) one hundred percent (100%) in cash, upon receipt of which along with a Notice, USDI shall authorize immediate reimbursement to Montana Power by the United States Treasury by certified check in the amount indicated as 'Amount Applied to Bidding Rights' on the Notice; or (iii) one hundred percent (100%) by conveyance of a Notice instead of cash payment."

Section 3.4(e) provides that:

> "The USDI, upon receiving a Notice, shall notify the United States Treasury by normal notice procedures of receipt of full

payment so that payments to the states in which the leases are located may be made in the same manner and amount as if the United States Treasury had received one hundred percent (100%) of the Lease payment in cash without application of Bidding Rights."

ANALYSIS

We first consider the proposed Exchange Agreement's requirement that the Treasury remit to the State 50 percent of the total debt due to the United States for coal-related bonuses and royalties including that portion of the debt for which bidding rights have been utilized. We understand the provision to mean that if, for example, the Company must pay $1,000 bonus on a lease, it utilizes bidding rights worth $500 and pays $500 for the remainder. The State of Montana's share would be one-half of the $1,000 debt, $500.

Section 35 of the MLLA requires that "All money"received from sales, bonuses, royalties, and rentals of public lands under the Act shall be paid into the Treasury of the United States with 50 per centum thereof to be paid by the Secretary of the Treasury to the State where the lands or deposits are located. Under the Rattlesnake Area Act coal lease bidding rights equal to the fair market value of the lands to be included in the recreation area and wilderness may be exchanged for the lands. These rights may be used in competitive coal lease sales or coal lease modifications as payment for bonuses or other required payments. To the extent they are not exercised within 3 years of the date of the Rattlesnake Area Act's enactment, the holder of the rights may use them as a credit against any royalty, rental or advance royalty payments owed to the United States on Federal coal leases it holds.

It appears clear that the bidding rights which may be accepted in certain specific situations in lieu of money are not themselves money. "Money" as used in the MLLA, section 35 is not defined, but appears to be employed in the commonly understood sense of a general medium of exchange--ordinarily legal tender coin or paper money. See definition of "money" in 58 C.J.S. 844 (1948) and Webster's Third New International Dictionary 1458 (Unabridged ed. 1981).

The bidding rights created by the Rattlesnake Area Act are for the special purpose of barter or exchange for

certain lands, a form of payment not requiring the appropriation of funds with which the lands might otherwise be purchased. They may only be used in connection with the amount due to the Government incident to Federal coal leases, as specified in the Act. They cannot, for example, be used to pay the Company's Federal or State taxes, or other obligations. Bidding rights under the Act are, in short, substitutes for money, to be given to the Company for its land, to be used only as prescribed in the Act.

Under the Rattlesnake Area Act, bidding rights may received by Interior in lieu of some or all monies to be paid by the holder of the rights in connection with Federal coal leases. However, since they are not money, the rights should then be retired by Interior. Only money received by Interior under section 35 of the MLLA would be forwarded to the Treasury for appropriate disposition, including payment of 50 percent of the money to the appropriate State. Absent specific statutory authority to do so, we are aware of no appropriate basis for payment to the State of Montana of any amount in excess of 50 percent of the money received by the Treasury. To do so would result in both the Reclamation Fund and the miscellaneous receipts account receiving less than their appropriate shares of money obtained under section 35.

The legislative history of the Rattlesnake Area Act indicates that a similar view was expressed by the Associate Director of BLM during a Senate hearing on the bill. He clearly stated that the effect of the use of the bidding rights would be to reduce the money received by the Treasury from which the State of Montana's 50 percent share would be disbursed. As a result, the State would not receive revenues amounting to one-half of the fair market value of the Company's lands. He indicated the need for a specific statutory provision to provide for payment to the State of 50 percent of the total amount due to the Government, including bidding rights. However, this was not done.

We note that the Statement of Intent which appeared in the Appendix of the Senate Report was silent as to Montana's share of the bonuses, royalties, etc. for which the bidding rights would be substituted. The second Statement of Intent, signed by all parties and dated October 2, 1980, was inserted in the Congressional Record of that day prior to the House approval of the Rattlesnake Area bill. It contained a provision which arguably might require the Treasury to remit to the State of Montana payment for 50 percent of the total payment received by Interior. In any event, the

legislation as enacted included no authority for the Treasury to remit to the State of Montana payments under section 35 of the MLLA representing what amounts to 50 percent of bidding rights received by Interior. Without this or similar provision, we are aware of no authority under which the Treasury might properly make payment under section 35 to the State of Montana for other than money actually received, notwithstanding the existence of the October 2, 1980, Statement of Intent signed before passage of the Act.

In summary, the proposed Exchange Agreement would require the Treasury to pay a State as if 100 percent of a lease payment had been received in cash, even though some part of the lease payment would be made in bidding rights. To this extent it is not in accord with current statutory authority, and therefore there is no available appropriation to pay out more than 50 percent of the cash received.

The Exchange Agreement also provides that where the Company's lease payment is entirely in cash, and is accompanied by a "Bidding Rights Use Notice", the Treasury shall reimburse the Montana Power Company for the amount stated in the notice. This would permit the State of Montana to receive 50 percent of the entire cash payment. However, the Treasury would have to disburse to the Company an amount equal to the bidding rights used at that time. The Treasury has no authority to retire bidding rights by payment, nor are we aware of an appropriation which would be available for this purpose. It follows that this provision is legally objectionable.

Finally, we consider the proposed Exchange Agreement's requirement (section 3.1 & .2) that the bidding rights be adjusted in value to reflect "a rate of interest growth of ten percent (10%) per annum, compounded daily." This would appear to be computed on the outstanding amount of unused bidding rights. The rationale for this procedure is that legal title to the lands would be deeded to the United States on execution of the Exchange Agreement but that it might take a number of years before all of the bidding rights were used. (Both in the Statement of Intent included in the Senate Report and the Statement of Intent dated October 2, 1980, and signed by all parties, legal title would not be conveyed to the Federal Government until the total fair market value of the lands was received by the company.)

The Rattlesnake Area Act states that, "The bidding rights shall equal the fair market value of the private

lands or interests therein conveyed in exchange for their issuance." (Sec. 4(b)(2).) Bidding rights not exercised within 3 years from the date of the law's enactment may be used as a credit against any royalty, rental or advance royalty payments on any Federal coal leases it may then hold. (Sec. 4(b)(3).) It is apparent from these provisions that the value of the bidding rights exchanged for the Company's lands may not exceed the fair market value of the lands. Upon establishment of the lands' fair market value at $17.5 million, that became the maximum value of bidding rights that could be provided to the Company, regardless of when the bidding rights are exercised. Provision was made for bidding rights not used within 3 years of passage of the Act. In that case, the use of the bidding rights is broadened to include credit against any royalties, rents or advance royalty payments due on Company-held coal leases.

There is no statutory provision for an increase in the amount of bidding rights because of delay in using them. To allow for an increase in the value of bidding rights in excess of the agreed fair market value of the lands as proposed in the Exchange Agreement before us would exceed the authority conferred by the Rattlesnake National Recreation Area and Wilderness Act. This would be so even if we were to view the 10 percent annual value increase as establishing a new or updated fair market value since there is no authority to increase it because of the passage of time. For the reasons stated, the increase in the value of bidding rights called for in the proposed Exchange Agreement is not legally permissible.

for Milton J. Socolar
Comptroller General
of the United States