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Report to Congressional Requesters

September 1994

MINERAL RESOURCES

Federal Coal-Leasing Program Needs Strengthening

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Resources, Community, and
Economic Development Division

B-252412

September 16, 1994

The Honorable Richard Lehman
Chairman, Subcommittee on Energy
and Mineral Resources
Committee on Natural Resources
House of Representatives

The Honorable Nick J. Rahall, II
House of Representatives

This report responds to the Subcommittee's request that we address a number of issues related to the Federal Coal Management Program. This report discusses the measures taken by the Department of the Interior's Bureau of Land Management to (1) encourage the development of federal coal leases, (2) address the cumulative environmental impacts of additional coal leasing, and (3) consider projected demand in coal-leasing decisions.

As agreed, unless you publicly announce its contents earlier, we plan no further distribution of this report until 10 days from the date of this letter. At that time, we will send copies to the Secretary of the Interior; the Acting Director, Bureau of Land Management; the Secretary of Agriculture; the Chief, Forest Service; and the Director, Office of Management and Budget. We will make copies available to others on request.

This work was performed under the direction of James Duffus III, Director, Natural Resources Management Issues, who may be reached on (202) 512-7756 if you or your staff have any questions. Major contributors to this report are listed in appendix XII.

Sincerely yours,

Keith O. Fultz

Keith O. Fultz
Assistant Comptroller General

Executive Summary

Purpose

In 1976, only 59 of the 535 existing federal coal leases were producing coal. To discourage the speculative holding of federal coal leases and encourage the development of leased coal, the Congress enacted the Federal Coal Leasing Amendments Act of 1976 (FCLAA). Concerned about whether the Department of the Interior's Bureau of Land Management (BLM) was properly implementing FCLAA, the Chairman, Subcommittee on Mining and Natural Resources, House Committee on Interior and Insular Affairs (now the Subcommittee on Energy and Mineral Resources, House Committee on Natural Resources), asked GAO to assess Interior's actions to (1) encourage the development of federal coal leases, (2) address the cumulative environmental impacts of additional coal leasing, and (3) consider projected demand in coal-leasing decisions.

Background

Because many federal coal leases were being held and not developed while leases with more stringent terms on private and state lands were being developed, the Congress amended the Mineral Leasing Act of 1920 (MLA) by passing FCLAA. To discourage the speculative holding of federal coal leases and encourage the development of leased coal, FCLAA requires lessees of coal tracts leased after the act's passage to produce commercial quantities of coal within 10 years (referred to as diligent development); otherwise, the lease will be terminated. Holders of leases in effect when FCLAA was passed in 1976 who have held such leases for more than 10 years since then must be producing coal in commercial quantities; otherwise, the holder is disqualified from obtaining new oil, gas, coal, and other mineral leases covered by the MLA. FCLAA also authorized the combining of contiguous federal leases and nonfederal lands into a logical mining unit (LMU) to promote the efficient, economical, and orderly development of coal resources if the Secretary of the Interior determines that an LMU will result in the maximum economic recovery of coal. FCLAA authorizes the Secretary to consider diligent development and continued operation and production on any lease within the LMU to be occurring on all leases in the LMU.

Interior established a new federal coal-leasing program in 1979 and designated geographic areas with significant amounts of federal coal as federal coal regions. Within these regions, Interior conducted lease sales through a process in which it established regional coal-leasing levels after considering many factors, including the projected demand for coal, and prepared regionwide environmental impact statements (EIS). Outside these regions, Interior leased coal tracts by a process known as lease-by-application, in which applicants requested specific tracts and

Interior prepared environmental documents for each tract. Both leasing approaches required competitive sales procedures.

In March 1984, the Secretary suspended regional lease sales, pending the development of revised coal-leasing procedures. From March 1984 to February 1987, federal coal leases within the federal coal regions could be sold only to continue existing operations or to avoid leaving coal in the ground that could not be subsequently mined. Between 1987 and 1990, all of the federal coal regions "decertified," or disbanded, because of decreased interest in coal leasing. As regions disbanded, BLM changed its sales procedures from regional sales to lease-by-application. From February 1987 through December 1992, BLM received 40 applications for 1.9 billion tons of coal—less than 1 percent of total reserves in these areas.

Results in Brief

BLM has taken actions that do not further FCLAA's goals of discouraging speculation and encouraging the development of federal coal leases. GAO found that BLM has issued 36 federal oil, gas, and coal leases to an unqualified lessee, contrary to FCLAA's lessee qualification provisions, while disqualifying other companies with nonproducing federal coal leases. In some cases, other companies have taken actions such as surrendering nonproducing coal leases to remain qualified to obtain additional federal mineral leases.

BLM has also allowed the act's LMU provision to be used when the lessee's primary purpose for using the provision was to extend the life of a federal coal lease that was within months of being terminated for lack of production. GAO is concerned that BLM's action may encourage other coal lessees to form LMUs for the primary purpose of extending the diligent development periods of their nonproducing federal coal leases.

National Environmental Policy Act (NEPA) regulations require that cumulative impacts be adequately assessed, and federal regulations and agency policies require that these impacts be documented in environmental assessments (EA) and EISs. BLM's Wyoming and Eastern States offices addressed cumulative environmental impacts on most resources affected by coal mining in environmental analyses they prepared. In Utah, analyses prepared by BLM and the Forest Service addressed cumulative impacts on only about 22 percent of the potentially affected resources.

BLM can meet FCLAA's objectives without using projected demand to set leasing levels. BLM has used projected demand to set leasing levels for its regional sales in order to meet various objectives of the coal-leasing program. While setting leasing levels in this way could help meet some of FCLAA's objectives, the act has specific requirements that more directly ensure that its objectives are met. For example, the act requires BLM to obtain fair market value when leasing federal coal, and FCLAA's diligent development requirement is intended to ensure that federal coal leases are developed and not held for speculation.

Principal Findings

Certain Actions by BLM Do Not Discourage Speculation or Encourage Federal Coal Development

GAO found that BLM issued federal mineral leases to a lessee who does not meet FCLAA's qualification requirements. FCLAA requires that in order to remain qualified to obtain additional oil, gas, coal, and other mineral leases covered by MLA, holders of leases issued before FCLAA was passed who have held such leases for more than 10 years must be producing commercial quantities of coal from them. BLM determined that although a company held two pre-FCLAA coal leases in an LMU from which no coal had been produced since February 1988, the company was qualified to obtain additional federal mineral leases. From March 1988 through November 1992, BLM issued 36 additional federal mineral leases to this company, while BLM disqualified other companies with nonproducing federal coal leases. In addition, other companies have taken actions such as surrendering nonproducing coal leases to remain qualified to obtain additional federal mineral leases.

BLM has also allowed the act's LMU provision to be used when the lessee's primary purpose for using the provision was to extend the life of a federal coal lease that was within months of being terminated for lack of production. In Wyoming, a nonproducing federal coal lease estimated to contain about 545 million tons of recoverable coal was due to terminate in February 1993 because commercial quantities of coal had not been produced from the lease. However, the lessee applied for an adjoining federal coal lease containing an estimated 55 million tons of recoverable coal with the stated intent of forming an LMU. By leasing the smaller tract and combining it with the much larger tract into an LMU, the lessee has extended the diligent development period of the larger tract for 10 years without compensation to the government. BLM's actions were taken without criteria defining when the formation of an LMU would further FCLAA's goals of discouraging the speculative holding of federal coal leases and encouraging the development of coal production from federal leases.

In July 1994, Interior advised GAO that the Department was in the process of drafting regulations that would help prevent lessees from using an LMU primarily to extend the life of a nonproducing lease. GAO believes that it is important for Interior to develop these criteria because other nonproducing federal leases are approaching the end of their diligent development periods. GAO found that 89 federal coal leases were considered active but not producing and were due to expire within the next 5 years. Without such criteria, GAO is concerned that other coal lessees will seek to form LMUs for the primary purpose of extending the diligent development periods of their nonproducing federal coal leases. This would postpone, without compensation to the government, the time when commercial production levels must be achieved and royalty payments begin.

Not All Cumulative Impacts Addressed in Utah's Environmental Analyses

NEPA regulations require agencies to evaluate cumulative impacts when preparing site-specific EAS or EISS. Since the decertification of the coal regions, surface-managing agencies have addressed cumulative environmental impacts on tract (site)-specific EAS and EISS rather than on regionwide EISS. Specifically, NEPA regulations and BLM and the Forest Service's policies require the agencies to evaluate cumulative impacts on specific resources such as air, surface water, and groundwater and to document the results of these analyses in EAS and EISS.

Eleven environmental documents prepared for lease sales in Alabama, Kentucky, Utah, and Wyoming show a wide range in content and format for addressing cumulative impacts. For purposes of this review, GAO considered cumulative impacts to be addressed if EAS or EISS demonstrated no significant cumulative impact to the individual resource or referenced an analysis in a prior study. Documents prepared by BLM in Alabama, Kentucky, and Wyoming addressed cumulative impacts on most resources, whereas documents prepared by BLM and the Forest Service in Utah addressed cumulative impacts on only about 22 percent of the resources potentially affected by coal mining. BLM and Forest Service officials in Utah said that some cumulative impacts were addressed in previously prepared EISS or that effects on other resources were not raised as issues during their scoping process. However, BLM and the Forest Service did not clearly make reference to previous cumulative impact analyses done for other EISs, nor did they document why certain resources were not addressed.

The Use of Projected Demand Is Not Necessary to Meet FCLAA's Objectives

Although FCLAA does not require that BLM's leasing decisions be tied to projected demand, BLM used projected demand in the regional coal sale process in deciding on the amount of coal to be offered for lease. Interior does not have to use projected demand to obtain fair market value or ensure that the amount of coal leased is developed in a reasonable time because FCLAA contains specific provisions that, if enforced, will ensure that these and other objectives are met.

Proponents of using projected demand argue that tying leasing decisions to demand results in higher values for each tract. However, the government is not required to maximize revenues but is only required to obtain fair market value. Furthermore, GAO does not believe Interior could count on receiving a higher value for leases if it adjusted leasing levels to meet projected demand.

To obtain fair market value, BLM independently assesses the market value of each coal tract and uses the assessed value as the minimum bid it will accept. BLM also has specific regulations intended to ensure that leases are developed. If these provisions are enforced, FCLAA's objectives could be met without attempting to match leasing levels to projected demand.

Recommendations

GAO recommends that the Secretary of the Interior cease issuing any additional MLA leases to unqualified companies and amend existing regulations to ensure that lessees holding pre-FCLAA leases will not be issued new mineral leases under the MLA unless they have met the coal production requirements that FCLAA added to the MLA.

With respect to the MLA leases already improperly issued to the company that GAO found to be unqualified or to other companies that were not qualified, GAO recommends that the Secretary review these leases for action in accordance with all applicable statutory and regulatory provisions.

In addition, GAO recommends that Interior continue its efforts to revise its regulations to provide criteria that BLM can use to determine whether the formation of an LMU is consistent with FCLAA's goals of discouraging speculation and encouraging the development of federal coal leases. GAO also recommends that for each LMU approved, BLM document how the approved LMU meets these regulatory criteria.

Agency Comments

Interior, the Department of Agriculture, and the company GAO found to be unqualified provided GAO with written comments on a draft of this report.

Interior and the company disagree with GAO's position that the company was unqualified to be issued federal mineral leases. In summary, the Solicitor's opinion, as well as the company's opinion, is that the Secretary has the authority to issue regulations that substitute an LMU's diligent development requirement for commercial production requirements that holders of pre-FCLAA leases must meet to remain eligible to obtain additional federal mineral leases. GAO believes that the MLA does not provide authority for exempting pre-FCLAA leases from the requirement to produce coal from those leases in order for the company to continue to be eligible. The Solicitor indicated that BLM's interpretation of the regulation substituting an LMU's diligent development requirement for commercial production requirements was the policy of past administrations and appeared to be inconsistent with FCLAA's goal of reducing coal speculation. He noted the regulation could be amended and pointed out that Interior's proposed rulemaking may address this issue.

In commenting on GAO's recommendation that criteria be established for approving LMUs, Interior stated that in December 1993 it published an advance notice of proposed rulemaking requesting public comments on all aspects of LMUs, including the need for criteria. In July 1994, Interior told GAO that it is considering a draft of proposed regulations that would provide criteria for BLM to use in determining whether an LMU will foster the maximum economic recovery and the economical, efficient, and orderly development of coal resources. Interior believes that these criteria will help prevent lessees from using an LMU principally to extend the life of nonproducing leases.

Both Interior and Agriculture accepted GAO's proposal to reemphasize to field personnel the importance of complying with requirements for identifying cumulative environmental impacts from coal leasing and development. As a result, GAO is no longer making a recommendation.

The comments of Interior, Interior's Office of the Solicitor, the company GAO found to be unqualified to receive additional mineral leases under the MLA, and Agriculture have been incorporated in the report where appropriate and are presented and evaluated in detail in appendixes VII, VIII, IX, X, and XI.

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Contents

Appendixes

Abbreviations

BLM	Bureau of Land Management
DOE	Department of Energy
EA	Environmental Assessment
EIS	Environmental Impact Statement
FCLAA	Federal Coal Leasing Amendments Act of 1976
GAO	General Accounting Office
LBA	lease-by-application
LMU	logical mining unit
MLA	Mineral Leasing Act of 1920
NEPA	National Environmental Policy Act
NWR	Northwestern Resources Company

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Introduction

The federal government owns and administers about one-third of the country's coal resources. These resources are located on about 76 million acres, primarily in the western United States. The Department of the Interior's Bureau of Land Management (BLM) is responsible for leasing coal on these federal lands, even when other agencies such as the Department of Agriculture's Forest Service have primary jurisdiction over the lands. BLM conducts its leasing activities primarily through six of its state offices that are located in areas containing almost two-thirds of the federal coal resources.

Almost 960 million tons of coal was produced in the United States in 1993. And about 260 million tons, or about 27 percent, came from federal lands—up from about 8 percent in 1979. Federal royalties of $264 million were collected from this production. About 97 percent of this coal came from the following four western states: Colorado, Montana, Utah, and Wyoming. (See table 1.1.)

Table 1.1: Federal Coal Production for Calendar Year 1993

State	Federal coal production (short tons[a])	Percent of total federal production
Wyoming	193,742,000	74
Montana	25,013,000	10
Utah	19,248,000	7
Colorado	13,905,000	5
All others	8,244,000	3

[a]A short ton equals 2,000 pounds

Source: U.S. Department of the Interior, Minerals Management Service

Federal coal has become an increasing share of total U.S. production since 1979. Much of the increase has come from large surface mines in the Powder River Basin of Wyoming and Montana. In fiscal year 1991, federal lands in this area produced about 200 million short tons of coal—about 20 percent of the nation's total. The Department of the Interior noted in 1990 that the Clean Air Act Amendments of 1990 could stimulate significantly greater demand for low-sulfur coal from western federal lands.

Procedures for Leasing Federal Coal Under the Mineral Leasing Act of 1920

The Mineral Leasing Act of 1920 (MLA) gave Interior responsibility for leasing coal on federal lands. In areas with known coal reserves, parties interested in leasing a particular federal coal tract filed their applications with the BLM state office. BLM generally held a competitive lease sale for a single tract and awarded the lease to the highest bidder. In areas where commercial coal deposits were not known to exist, an applicant could apply for a prospecting permit. If the permittee subsequently discovered a commercial coal deposit, he or she could file a noncompetitive, "preference right," lease application with BLM and could be issued a lease.

Until 1960, little demand existed for federal coal, and little leasing occurred. In the 1960s, leasing greatly increased, but by 1970, coal was being produced from only about 10 percent of the acreage under lease. Leases could be held virtually forever and at minimal cost. In 1971, Interior imposed a moratorium on coal leasing in response to public concern that federal leases were being acquired mainly for speculation rather than development. In 1973, Interior instituted a complete moratorium on the issuance of new prospecting permits and a near-total moratorium on the issuance of new federal coal leases. New leases could be issued only to avoid situations where small tracts of coal would be bypassed if not leased, to maintain existing mines, or supply reserves for production in the near future.

Leasing Procedures Under the Federal Coal Leasing Amendments Act of 1976

In 1976, the Congress amended the MLA by passing the Federal Coal Leasing Amendments Act (FCLAA). FCLAA was passed to discourage the speculative holding of and encourage the development of federal coal leases and to help create a more efficient and environmentally sound leasing process. A key factor leading to passage of FCLAA was the Congress' concern that nonproducing leases were being held for speculative purposes. The House Report on FCLAA[1] noted that as of 1976, only 59 of 533 active federal coal leases were actually producing coal. The report also observed that under then-existing requirements, any coal lease issued by the Secretary of the Interior was effective virtually forever, and the report criticized the near impossibility of terminating nonproducing leases. Thus, according to the report, the Congress sought to spur coal production on federal leases by ending the practice of speculating on coal prices by allowing leases to remain idle for years.

FCLAA established production requirements for leases and penalties for lessees when those requirements are not met. FCLAA also eliminated

[1]H.R. Rep. No. 681, 94th Cong., 1st Sess. at 9-11 (1975).

preference right leasing and required Interior to complete comprehensive land use plans and consider environmental impacts before coal leasing could occur. In addition, FCLAA established a minimum royalty rate, established exploration licenses, and required a Department of Justice review before leases are issued to ensure compliance with antitrust laws.

Requirements for Producing and Penalties for Not Producing

The MLA, as amended by FCLAA, contains two penalties for lessees who do not develop their federal coal leases. These penalties are designed to encourage development of federal coal leases and discourage speculative holding of leases. Depending on conditions within the coal market, some lessees could be forced to produce from their leases under uneconomic conditions, give up their leases to remain qualified, or allow their leases to terminate.

First, the diligent development provisions under section 7 of the MLA require that lessees produce coal in commercial quantities[2] within 10 years of the lease's issuance or, for leases existing when FCLAA was passed, within 10 years after the lease becomes subject to section 7.[3] If a lease does not achieve commercial production within this time period, the lease terminates. According to Interior's regulations, diligent development is achieved once an operator has cumulatively produced, within the 10-year period, 1 percent of the recoverable reserves.

Second, section 2(a)(2)(A) of the MLA penalizes holders of nonproducing leases issued prior to FCLAA's passage. Specifically, section 2(a)(2)(A) disqualifies any lessee who holds and has held a coal lease for more than 10 years (not counting any years prior to FCLAA's passage) from receiving new mineral leases under the MLA (oil, gas, coal, and other mineral leases), unless the lease is producing coal in commercial quantities.[4]

For leases subject to section 7 of the MLA, as amended by FCLAA, once diligent development has been achieved, the lessee must continue to produce 1 percent of the recoverable coal reserves annually, unless BLM grants a suspension. In some instances, this can result in the lessee's

[2]For the purpose of FCLAA's diligent development requirement, Interior's regulations define commercial quantities as annual production of 1 percent of the recoverable coal reserves. (Interior's prior definition, for leases issued before Aug. 4, 1976, was 2.5 percent.)

[3]A lease issued before FCLAA's passage becomes subject to the diligent development provisions of FCLAA when the lease's terms and conditions are readjusted.

[4]Section 2(a)(2)(A) will rarely apply to nonproducing leases issued after FCLAA's enactment in 1976 because under section 7 such leases terminate after 10 years.

paying an advance royalty.[5] The effect of these provisions is to ensure that commercial production begins within a reasonable time after leasing and that coal continues to be produced at a reasonable rate.

Logical Mining Units

FCLAA also authorized the formation of logical mining units (LMUs) to foster the maximum economic recovery and the efficient, economical, and orderly development of coal resources. An LMU may consist of two or more contiguous tracts of land, at least one of which must be a federally leased tract. Within an LMU, diligent development, continued operation, and production occurring on one lease are construed as occurring on all of the LMU's federal leases.[6] Thus, the diligence requirement could be met through a mining operation that began anywhere on the LMU and proceeded according to a logical mine plan.

The LMU provision was enacted in recognition that in some instances, requiring adjoining federal leases to meet separate diligence requirements would not result in the efficient, economical, and orderly development of coal resources. However, because the LMU assumes the date of the newest federal lease for meeting lease diligence requirements,[7] the date by which production is required on the older federal lease(s) is extended and the time for beginning royalty payments to the government is delayed. The extension of the diligence requirement is provided to the applicant without compensation to the government.

Regional Coal Sales

In 1979, Interior issued regulations implementing a new federal coal-leasing program pursuant to FCLAA and lifted the moratorium on federal coal leasing. These regulations originally identified eight geographic areas as containing significant amounts of federal coal and designated them as federal coal regions or subregions. Because industry had expressed little leasing interest in two areas, BLM promptly reduced the number of designated coal regions to six. In the designated coal regions, BLM formed regional coal teams, consisting of BLM and state government representatives, to guide leasing decisions. The federal coal

[5] An advance royalty is a royalty paid on coal not yet produced. When coal is produced, the advance royalty is subtracted from the royalties due from actual production.

[6] The Solicitor's office at Interior has concluded that FCLAA "allows production in commercial quantities (as defined for section 2(a)(2)(A) purposes) anywhere within a logical mining unit to be construed as occurring on all federal leases in the unit for purposes of section 2(a)(2)(A)."

[7] This means that the diligence period for most LMUs will be less than 10 years. For LMUs containing a pre-FCLAA lease, not readjusted since FCLAA's passage and before the LMU's effective date, the diligent development period begins on the LMU's effective date.

regions were certified, or authorized, to lease groups of federal coal tracts within the regions at formal regional sales.

After completing a comprehensive land use plan for a federal coal region, BLM was required to solicit industry's expressions of interest in leasing specific tracts and review these tracts for compatibility with the comprehensive land use plan. On the basis of environmental, social, and economic impacts; advice from governors of affected states; interest from industry; projections of future demand for federal coal; anticipated coal production; and consideration of national energy needs, the regional coal team recommended to the Secretary the amount of coal that should be leased in the federal coal region. After the Secretary established a regional leasing level,[8] the regional coal team was to rank and select a group of tracts that approximated this level. This selection was to be based on the economics, environmental impacts, and socioeconomic impacts of coal. BLM was then to prepare a regionwide environmental impact statement (EIS) on the recommended combination of tracts as well as on other possible combinations. After consulting with surface-managing agencies, governors, and affected Indian tribes, the Secretary could approve the tracts, and BLM could offer them through a competitive sale.

Lease-By-Application

Federal coal tracts outside of federal coal regions can be sold through a simpler set of procedures known as lease-by-application (LBA). Tracts sold under this process must conform to a comprehensive land use plan, but BLM does not have to recommend a leasing level, nor does it solicit expressions of industry interest. Under the LBA procedures, an interested party can file an application for a specific tract which, if approved, will be offered for competitive bid. BLM reviews the application and prepares an EIS or environmental assessment (EA)[9] on the proposed tract. After BLM consults with the same parties that would be consulted for regional leasing, the Secretary can approve the tract, and BLM can offer it through a competitive lease sale.

Fair Market Value

The MLA, as amended, requires that the government be compensated for its coal. The compensation is provided in three forms. In BLM's competitive

[8] Between July 1979 and July 1982, the Secretary established regional leasing targets. Interior's July 1982 regulatory revisions changed the targets to levels to reflect a change in leasing policy from a specific amount to a range of amounts.

[9] An EA is less detailed than an EIS. If the EA results in a finding of no significant impact, the coal tract can be offered for sale. Otherwise, an EIS must be prepared before the sale.

lease sales, applicants submit bids called bonus bids that set out the amount they will pay to BLM to receive a lease.[10] The lease is awarded to the highest bidder provided that the applicant's bid meets or exceeds the value BLM establishes as the fair market value of the lease.[11] Lessees also pay rent on leases. And once production begins, lessees pay a royalty, calculated as a percentage of the value of the coal produced.

In 1983, as a result of controversies over leasing procedures, the Congress established the Commission on Fair Market Value Policy for Federal Coal Leasing (the Linowes Commission) to review coal-leasing procedures to ensure receipt of fair market value, and the Congress imposed a moratorium on most lease sales. The moratorium was to last until 90 days after the Linowes Commission submitted its report to the Congress. In March 1984, the Secretary of the Interior again suspended regional lease sales, pending the development and implementation of revised coal-leasing procedures. From March 1984 to February 1987, federal coal within the federal coal regions could be sold only to applicants under emergency criteria.[12]

Leasing Since Decertification of Federal Coal Regions

From 1987 through 1990, regional coal teams recommended that Interior decertify, or disband, all six federal coal regions. The Powder River, Uinta-Southwestern Utah, and Southern Appalachian regional coal teams cited a declining interest in leasing coal and poor coal market conditions as reasons for decertifying. The Uinta-Southwestern Utah regional coal team further concluded that existing coal production capacity was sufficient to meet near-term regional needs. The Utah and Eastern States BLM offices also cited substantial savings in administrative costs by changing from regional leasing to LBA. Although all regions have been decertified, several regional coal teams still meet periodically to advise BLM on leasing decisions.

Since decertification, BLM regions have leased coal under the LBA procedures. From February 1987 through December 1992, BLM received 40 applications for 1.9 billion tons of recoverable coal in the decertified federal coal regions and Kentucky—less than 1 percent of the federal,

[10] A bonus is a sum of money paid at the time of the lease sale to the lessor, in this case the federal government, in addition to royalty payments.

[11] According to Interior's regulations, fair market value is the amount for which the coal deposit would be sold by an owner who is willing but not obligated to sell to a knowledgeable purchaser who desires but is not obligated to buy.

[12] An emergency sale could be held if an existing mining operation needed the coal within 3 years, if an existing operation needed the coal to fulfill contracts signed prior to July 19, 1979, or if the coal would be bypassed in the reasonably foreseeable future. Reserves are limited to 8 years' worth of production.

state, and private in-place reserves in these areas. Thirty-three of these lease applications are for tracts adjacent to existing mines. The added reserves will allow these mines to maintain production and extend the life of the mines. Within 4 months of the Powder River Region's decertification, industry filed four applications for about 800 million tons of recoverable coal to maintain existing mines in that region. Similarly, industry filed three applications for slightly over 100 million tons of recoverable reserves within the first year after decertification of the Uinta-Southwestern Utah Region to maintain mines in the Wasatch Plateau. BLM officials attributed the initial surge of applications to industry's pent-up demand for coal stemming from the fact that Interior had not leased major coal reserves since the last regional sale in 1984.

Objectives, Scope, and Methodology

Concerned about whether BLM was properly implementing FCLAA, the Chairman, Subcommittee on Mining and Natural Resources, House Committee on Interior and Insular Affairs (now the Subcommittee on Energy and Mineral Resources, House Committee on Natural Resources), asked us to review various aspects of the federal coal program. Specifically, we examined actions taken by (1) BLM to encourage the development of federal coal leases, (2) BLM and the Forest Service to address the cumulative environmental impacts of additional coal leasing, and (3) BLM to consider projected demand in coal-leasing decisions.

We selected for review four geographic coal-leasing areas: the Wyoming portion of the Powder River Basin, the Wasatch Plateau and Book Cliffs areas of central Utah, the Warrior Basin of Alabama, and the Appalachian Basin of eastern Kentucky. Descriptions of these areas appear in appendix I. At the time we developed our audit methodology, these four geographic areas contained 23, or 68 percent, of the 34 lease applications filed since decertification; 80 percent of the acreage under application; and 93 percent of the coal reserves under application. The four areas selected are also diverse in terms of their geology, topography, and environmental impacts. Finally, the areas contain lands administered by different surface-managing agencies, such as BLM and the Forest Service.

To determine if BLM was taking actions that would encourage the development of federal coal leases, we concentrated on BLM's rationale for approving the formation of LMUs. To determine whether BLM was allowing companies to use LMUs primarily to extend the life of existing leases, we reviewed all 13 existing LMUs in the geographic areas we selected. We reviewed BLM's files to determine if each LMU was currently producing coal, how the formation of the LMU affected the termination of individual leases within each LMU, and the justification cited in each LMU application for forming the LMU. We also reviewed BLM's nationwide data on outstanding leases to determine the number of active, nonproducing leases with fewer than 5 years remaining to meet their diligence requirements. These leases constitute the universe of leases that potentially could be candidates for LMUs formed to extend the life of leases that would otherwise terminate.

During discussions with BLM and Interior officials, we learned that a potentially unqualified lessee had acquired mineral leases contrary to the provisions of FCLAA. To assess this situation, we interviewed BLM officials in Washington, D.C., and in Casper and Cheyenne, Wyoming. We also sought the legal views of Interior's Office of the Solicitor and examined relevant laws, legislative histories, and agency regulations. We did not review all existing federal leases to determine if Interior awarded any mineral leases to lessees that were not qualified to obtain additional mineral leases. Such a review would have required that we examine hundreds of lease files and make determinations of the lessees' qualifications. However, we did review Interior's files and internal controls to determine whether the Department was disqualifying lessees that did not met FCLAA's lessee qualification provisions.

To assess the extent to which environmental documents prepared under the LBA process addressed cumulative environmental impacts and met BLM's and the Forest Service's requirements that the agencies analyze and document these impacts, we reviewed pertinent legislation and regulations. For example, we reviewed the National Environmental Policy Act (NEPA), FCLAA, and the Surface Mining Control and Reclamation Act of 1977. We also reviewed BLM's and the Forest Service's NEPA handbooks to identify the agencies' requirements for documenting cumulative impacts. We considered that the agency had addressed cumulative impacts if the EA or EIS (1) contained a brief discussion presenting evidence demonstrating no significant cumulative impact on the individual resources or (2) referenced directly to a section in a prior environmental document or study.

We also interviewed personnel who prepare and review environmental analyses in (1) BLM's District Offices in Price, Utah; Jackson, Mississippi; and Casper, Wyoming; (2) the Manti-LaSal National Forest Supervisor's Office; and (3) the Office of Surface Mining's offices in Denver, Colorado, and Knoxville, Tennessee. The leaders and resource specialists on the teams who prepare environmental documents in these areas informed us of the resources for which cumulative environmental impacts must be analyzed. We also contacted environmental groups in Kentucky, Utah, and Wyoming to determine their level of participation in environmental reviews.

We then analyzed the environmental documents prepared under the LBA process in the Wyoming portion of the Powder River Basin, the Book Cliffs and Wasatch Plateau of central Utah, and the Warrior Basin of Alabama, since their respective coal regions were decertified to determine how cumulative impacts were documented. We also examined environmental assessments prepared in eastern Kentucky under the LBA process since February 6, 1987. For the areas examined, we also reviewed pertinent documents such as cumulative hydrologic impact assessments, BLM's tract delineation and geological reports, regional EISs, and hydrologic reports prepared by the U.S. Geological Survey.

To determine how BLM uses market demand in leasing federal coal, we interviewed BLM personnel and industry representatives to ascertain how demand had been used and is presently being used in the federal coal-leasing program. In addition, we reviewed the legislative history of FCLAA and reviewed the literature on the federal coal program to identify any requirements for using demand.

We performed our review from December 1991 through April 1994 in accordance with generally accepted government auditing standards.

BLM Has Taken Actions That Do Not Further FCLAA's Goals of Discouraging Speculation and Encouraging Development

BLM has taken actions that do not further FCLAA's goals of discouraging speculation and encouraging the development of federal coal leases. In the first action, BLM issued federal oil, gas, and coal leases to a lessee who is unqualified to receive them. The lessee holds two pre-FCLAA leases which have not met the coal production requirements that FCLAA added to the MLA. In the second action, BLM allowed the act's LMU provision to be used for the primary purpose of extending the life of a federal coal lease that was within months of being terminated for lack of production. The lessee acquired a new, much smaller federal coal lease, formed an LMU with the two leases, and thus obtained a 10-year extension of the older lease's diligent development period. This action could set a precedent for allowing nonproducing federal coal leases to be formed into LMUs to avoid being terminated.

Unqualified Lessee Allowed to Acquire Additional Mineral Leases

BLM has issued federal mineral leases to a lessee who does not meet the coal production qualification requirements that FCLAA added as section 2(a)(2)(A) to the MLA. Under section 2(a)(2)(A), no lessee who holds and has held a pre-FCLAA coal lease for more than 10 years is qualified to be issued new mineral leases under the MLA (oil, gas, coal, and other mineral leases), unless the coal lease is producing coal in commercial quantities. The provision seeks to spur development of pre-FCLAA federal coal leases by discouraging holders of pre-FCLAA leases from keeping those leases for long periods of time without producing coal from them. BLM considers that, although the Kerr-McGee Coal Corporation has held two pre-FCLAA coal leases in an LMU from which no coal had been produced since February 1988, Kerr-McGee is qualified to be issued additional federal mineral leases.[1] From March 1988 through November 1992, Kerr-McGee acquired 36 additional federal mineral leases—35 oil and gas leases and 1 coal lease.

If found to be disqualified, companies can reestablish their qualifications in a number of ways. Among these ways are (1) relinquishing the nonproducing lease, (2) assigning the lease to an unrelated entity, or (3) combining the lease into an LMU that is producing in commercial quantities. Once these actions have been taken, the company and its affiliates are removed from the list of disqualified lessees. However, if the company holds any disqualifying leases, it remains disqualified from being issued additional mineral leases. For example, a company included four

[1] BLM's headquarters provides its state offices with a list of lessees who are disqualified under section 2(a)(2)(A) on the basis of their production activities on federal coal lease tracts in all states. In the past few years, these disqualification lists have identified 20 to 30 companies that are not qualified to obtain additional mineral leases.

nonproducing federal coal leases in a producing LMU, and BLM determined that while these leases no longer were disqualifying leases, because the company had other disqualifying leases, it remained disqualified. In another case, a company included leases in an LMU; however, BLM determined that because the LMU was not producing, these leases continued to disqualify the company.

History of Kerr-McGee Leases

In 1965 and 1970, Kerr-McGee obtained two federal coal leases. After the passage of FCLAA in 1976, Kerr-McGee became subject to the act's requirement that it produce coal in commercial quantities from these leases after December 30, 1986, or become disqualified from obtaining additional oil, gas, coal, or other mineral leases covered by the MLA. As of September 26, 1986, these two pre-FCLAA leases had not produced coal, and Kerr-McGee had combined these leases with an adjoining producing state coal lease to form an LMU. As a result, Kerr-McGee would be a qualified lessee as long as the LMU was producing coal in commercial quantities. Under the act, production on any lands contained in the LMU is considered as occurring on all federal leases in the LMU. On October 26, 1987, Kerr-McGee notified BLM's Wyoming State Office that it intended to place the LMU on temporary standby, and production stopped in February 1988.

The question of Kerr-McGee's qualification arose several days before a scheduled September 1991 coal lease sale in which Kerr-McGee would be a bidder. BLM staff raised questions of how to interpret a lessee's qualifications under section 2(a)(2)(A) for leases in an LMU that was not producing and had not yet produced in commercial quantities. On October 1, 1991, attorneys for Kerr-McGee wrote to Interior's Regional Solicitor's office to explain why the company was qualified to bid under section 2(a)(2)(A) for this and other federal mineral leases. They noted that because of depressed market conditions and contract requirements, Kerr-McGee temporarily suspended mining operations on the LMU. They asserted that in accordance with Interior's regulations implementing this provision, Kerr-McGee had a "producing" mine because it was "operating an ongoing mining operation consistent with standard industry practice." As evidence, their letter cited the multimillion-dollar investment already made in the LMU and the fact that the company was maintaining all its permits. Furthermore, they contended that the temporary cessation of production was typical of industry practice. The letter also indicated that Kerr-McGee expected to resume production in the near future. Over the next year, discussion took place between the district and state offices, headquarters, and the Regional and Headquarters Solicitors' offices about whether Kerr-McGee was qualified.

On February 22, 1993, we asked Interior's Solicitor to provide its opinion on whether Kerr-McGee was qualified to receive new mineral leases. (See app. III.) On August 4, 1993, Interior's Associate Solicitor for Energy and Resources advised us that BLM had been properly issuing MLA leases to Kerr-McGee since March 1988, despite the continued absence of commercial production on its LMU. (See app. IV.) The Associate Solicitor did not rely on the reason cited by Kerr-McGee's attorneys in their 1991 letter. Instead, the Associate Solicitor argued that a federal lease is producing coal in commercial quantities pursuant to section 2(a)(2)(A) if that lease is within an LMU that is producing in accordance with its "stipulations of approval."[2] The stipulations of approval for Kerr-McGee's LMU provide that Kerr-McGee must meet the 10-year diligent development requirement, under which the operator promises to produce coal in commercial quantities from the LMU within 10 years of the LMU's effective date. Accordingly, in the Associate Solicitor's view, "the holder of a lease in an LMU meets the production in commercial quantities requirements of section 2(a)(2) (A) when the LMU is meeting the diligent development requirement for the LMU."

The Associate Solicitor concluded that section 2(a)(2)(A) has not prohibited BLM from issuing leases to Kerr-McGee. However, the Associate Solicitor acknowledged that this view was "not entirely free from doubt" and represented an interpretation that was "a matter of policy formulated by the previous administration that meets the letter of the law." Furthermore, the Associate Solicitor conceded that this interpretation "appears not to be in concert with a major goal of FCLAA, which was to reduce speculation."

FCLAA's and BLM's Regulations and Instruction Memorandum Do Not Support BLM's Determination

We believe that Kerr-McGee is not qualified to obtain federal mineral leases under section 2(a)(2)(A) because it has not produced coal in commercial quantities from the LMU since the LMU was formed and has not produced any coal at all from the LMU since 1988. The language of this section is clear that a holder of a pre-FCLAA coal lease who has held this lease for 10 years only qualifies to obtain any additional MLA leases if the holder is presently producing coal under the lease in commercial quantities. For the purposes of this determination, under the act, actual coal production anywhere in an LMU is attributed to all leases in the LMU

[2] Stipulations of approval are provisions governing a lessee's operations under a specific LMU.

and could be used to satisfy section 2(a)(2)(A)'s present production requirement. However, in this case, Kerr-McGee has never produced coal from the two federal leases in the LMU and has not mined coal anywhere else in the LMU since 1988. Additionally, while coal was produced from the LMU prior to 1988, coal was not produced in commercial quantities.

We disagree with Interior's Associate Solicitor's interpretation that FCLAA permits BLM to use the 10-year LMU diligent development period to satisfy the commercial production requirements that holders of pre-FCLAA leases must meet to remain eligible under section 2(a)(2)(A). FCLAA's legislative history indicates a congressional awareness that the term "diligent development" refers to a period of time distinctly preceding "producing in commercial quantities."[3] The Congress chose to employ only the latter phrase in section 2(a)(2) (A). Where the Congress wished to make a lessee subject to "diligent development," as in section 7(b) of FCLAA, it specifically used this term.

Also, both section 2(d) of FCLAA, which authorizes the formation of LMUs, as well as the LMU stipulations distinguish between "diligent development and coal "production." Furthermore, the Associate Solicitor's interpretation is at odds with a previous Solicitor's opinion that concluded that equating diligent development with the production of commercial quantities "would empty the section [2(a) (2) (A)] of any meaning."[4] It would permit the lessee to extend its eligibility under section 2(a)(2)(A) for the length of the LMU's diligent development period, thereby defeating the antispeculative purpose of this provision.[5]

We also disagree with the assertion of Kerr-McGee's attorneys that the company is not disqualified by section 2(a)(2)(A) from receiving new leases because it has been producing coal from its LMU since 1988 in accordance with standard industry practice. BLM's regulations and guidance make clear that a lessee still would be considered as producing coal in accordance with standard industry practice, even though

[3]H.R. Rep. No. 681 at 13, 122 Cong. Rec. 488 (1976).

[4]92 I.D. at 548-51 (1985). The Associate Solicitor's opinion is also at odds with an Office of Technology Assessment report on section 2(a)(2)(A). "Potential Effects of Section 3 of the Federal Coal Leasing Amendments Act of 1976-A Special Report," OTA-ITE-300, Mar. 1986, p. 84.

[5]We also note that according to the Solicitor's April 11, 1994, opinion, even if a lessee's LMU failed to produce coal in commercial quantities during the LMU's diligent development period, the lessee would not be considered as retroactively ineligible to receive the leases issued during this period. We disagree. Such leases would have been issued in violation of the statutory requirement of section 2(a)(2)(A), i.e., a lessee is ineligible to receive new mineral leases when not producing coal in commercial quantities on a pre-FCLAA lease.

production is interrupted for short periods (i.e., days to months). While the repair of equipment and weather conditions are examples of such short-term interruptions, the cessation of production because of market conditions is not listed as an exception. In fact, BLM Instruction Memorandum No. 87-526 clearly states that market conditions do not justify the suspension of production.

We believe that Kerr McGee's interpretation of "standard industry practice" conflicts with the congressional policy behind FCLAA—to spur coal production from federal leases—which remains as valid now as when enacted in 1976. In passing FCLAA, the Congress wished not merely to increase the nation's supply of coal but also to increase the federal contribution to that supply. There is no evidence to suggest that during periods of low coal demand, the Congress intended federal coal leases to remain idle while state and private leases with more stringent terms provided such coal as the market required. Indeed, the idea that operators could treat their federal coal reserves as surplus to be called on only in periods of peak demand appears to contradict squarely FCLAA's goals of encouraging current production and discouraging the speculative holding of federal coal.

Section 2(a)(2)(A) does not require coal production in a depressed market. Rather, a lessee wishing to qualify for new leases may sell or relinquish the leases that are causing disqualification. Such transfers will either allow the leases to be obtained by an operator who will produce coal from them or will allow Interior to re-lease the tracts in question.

Lessee Allowed to Form an LMU to Keep a Nonproducing Federal Lease From Being Terminated

FCLAA provides that LMUs be used to foster the maximum economic recovery and the efficient, economical, and orderly development of federal coal. However, BLM allowed the act's LMU provision to be used when the primary purpose was to extend the life of a soon-to-be-terminated nonproducing federal lease by combining it with a much smaller, newly acquired lease. This action raises concerns about fairness, precedent, and compensation to the government for 89 other federal coal leases that are within 5 years of being terminated for lack of production. In July 1994, Interior officials advised us that they are developing criteria to prevent lessees from using the LMU provision principally to extend the life of nonproducing federal coal leases.

History of Wyoming LMU

The Northwestern Resources Company (NWR) LMU is different from other existing LMUs in the areas covered by our review in that a nonproducing federal lease that otherwise would have been terminated was combined with a much smaller, newly acquired federal lease primarily to extend the life of the nonproducing lease. BLM's Wyoming state office noted that the small lease, acquired under the LBA process, was the only LBA lease that the office was aware of that would require a new mine to start production—all other LBA leases had been acquired to extend the life of or solve coal quality problems with existing mines. In July and September 1992, BLM officials responsible for the areas included in our review told us that there were 13 existing LMUs, 12 of which were producing at that time. All 13 LMUs had been formed from existing federal coal leases, none of which was less than 4 years old.

In the Wyoming portion of the Powder River Basin, a large federal coal lease known as the Rocky Butte tract, containing an estimated 545 million tons of recoverable coal, was due to terminate in February 1993 because the lessee—NWR—had not produced coal from the lease. NWR acquired the Rocky Butte lease from another company in late 1990—less than 3 years before the lease had to meet its diligence requirement or be terminated. As part of a subsequent evaluation, BLM's Northwest Regional Evaluation Team concluded that the price that NWR paid to acquire the Rocky Butte lease represented a speculative coal value and the lease had no chance to achieve production in time to meet its diligence requirement.

However, before the Rocky Butte tract lease would have terminated, NWR applied for a federal coal lease on an adjacent tract of land containing an estimated 55 million tons of recoverable coal with the intent of forming an LMU. NWR publicly stated that the primary purpose of acquiring the smaller tract, known as West Rocky Butte, was to form an LMU to save the Rocky Butte tract from terminating for not achieving diligence. Even before the lease sale was held, BLM officials in the Casper District Office were reviewing a draft application and mine plan for the proposed LMU. By leasing the West Rocky Butte tract and combining it with the much larger Rocky Butte tract into an LMU, NWR would extend by 10 years—until 2003—the diligence period within which it would be required to begin commercial production and payment of federal royalties.

On September 24, 1992, before the pending West Rocky Butte lease sale, we requested that the Director of BLM reconsider the appropriateness of the sale and the subsequent formation of an LMU. (See app. [illegible]) We were concerned that the effect of allowing NWR to form this LMU would be to provide the company with an additional 10 years in which to meet FCLAA's diligence provision on the existing lease and could set a precedent for other nonproducing federal coal leases that were getting close to termination. BLM's response to our inquiry noted that holding the lease sale for the West Rocky Butte tract was in the public's best interest, but the response did not explain how the sale and proposed LMU would foster the maximum economic recovery of the coal deposit any more than reoffering the lease tract for sale at a later date would. (See app. VI.)

NWR submitted a formal application to BLM on January 7, 1993, to combine the Rocky Butte and West Rocky Butte tracts into an LMU. Subsequently, on January 19, 1993, BLM awarded the West Rocky Butte lease to NWR, the sole bidder. The lease was made retroactive to January 1, 1993. And, on December 10, 1993, BLM approved the LMU, effective January 19, 1993, thereby extending, by almost 10 years, the life of the Rocky Butte tract, which otherwise would have terminated in February 1993. BLM, however, did not have criteria for determining that approval of an LMU was consistent with FCLAA's goals of discouraging speculation and encouraging the development of federal coal leases.

Furthermore, BLM approved the formation of the LMU application, apparently accepting the company's statement that it would begin production within the new diligent development period, even though BLM's figures suggested that the LMU could not begin production within this time frame. NWR stated in its LMU application that coal production from the LMU would begin in 1996—well within the time frame required to meet the act's diligent development provision. However, in arriving at a minimum acceptable bid for the West Rocky Butte tract, which in part was based on the assumption that the tract would be included in the proposed LMU as well as on BLM's analysis of the market for Powder River Basin coal, BLM concluded that coal production from the LMU would not start until 2016. BLM's projected production date is 13 years after the proposed LMU's diligence period terminates.

Approving NWR's LMU Raises Concerns

BLM's approval of NWR's LMU raises concerns relating to fairness, precedent, and compensation to the government. In order to meet FCLAA's diligence requirements, other coal lessees have allowed their leases to terminate or faced having to produce coal under uneconomic conditions in order to hold them. In the case of NWR, the company acquired a small coal tract located next to an existing, much larger, but soon to be terminated federal lease. Consequently, it was able to obtain a 10-year diligence extension through the LMU provision.

NWR's LMU could set a precedent for other nonproducing federal coal leases to be formed into LMUs to primarily extend the diligent development period of the existing lease(s). In the areas we reviewed, 16 nonproducing federal leases were in pending LMUs. For example, in Utah, there were 9 pending LMU applications to consolidate 14 nonproducing leases. Three of the applications, if approved, would result in LMU tracts with no mine. A fourth application included a lease with a mine, but the mine was not producing. The remaining three LMUs would each contain at least one producing lease. Nationwide, as of September 30, 1992, there were 89 active but nonproducing leases with 5 years or less remaining to meet their diligent development requirements.

Approval of LMUs primarily to extend the life of a federal coal lease may result in a substantial loss of revenue to the federal government compared with reoffering the tract for lease. By extending leases that are about to terminate, the federal government grants lessees the right to postpone production and related royalty payments without compensation to the government. Furthermore, while NWR was the sole bidder for the West Rocky Butte lease and the federal government received a $16.5 million bonus bid, allowing the Rocky Butte lease to terminate and reoffering the two tracts as a single new lease tract may have generated a larger bonus bid and brought the lease into production as soon or sooner than BLM estimates that NWR will. BLM officials concluded in 1990 that if the Rocky Butte lease terminated, there would be no impediment to future development of the tract by the lessee or another entity when the market for Powder River Basin coal was no longer saturated. BLM also noted that letting the lease terminate and then offering the combined Rocky Butte/West Rocky Butte tract would create a far more competitive leasing situation where numerous companies could bid on the combined tract, rather than just NWR. BLM's Branch of Mining Law and Solid Minerals and the Northwest Regional Evaluation Team in Wyoming estimated that bonus bids for the Rocky Butte tract could range from $25 million to $125 million. Tracts in the Powder River Coal Basin, somewhat smaller in size than those in Rocky Butte, have sold for large bonus bids. For example, in 1992, the West Black Thunder tract, with an estimated 418 million tons of coal (compared with the estimated 600 million tons of recoverable coal in the combined Rocky Butte/West Rocky Butte tract), sold for $72 million. And the North Antelope/ Rochelle tract, with an estimated 394 million tons of coal, sold for $87 million.

BLM Is Developing Criteria to Ensure That LMUs Meet FCLAA's Goals

FCLAA does not specify, nor does BLM have criteria for determining, when an LMU is consistent with FCLAA's goals of discouraging speculation and encouraging the development of federal coal leases. However, on December 10, 1993, BLM published in the Federal Register an advance notice of proposed rulemaking requesting public comments on all aspects of LMUs, including the issues discussed in this report. In July 1994, Interior officials told us that they are considering proposed regulations that would provide criteria for BLM to use in determining whether to approve an LMU.

Conclusions

Both we and Interior agree that BLM has taken certain actions that do not further FCLAA's goals of discouraging speculation and encouraging the development of federal coal leases. We continue to believe that Kerr-McGee is not qualified to obtain federal mineral leases under section 2(a)(2)(A) because it has not produced coal in commercial quantities from the LMU since the LMU was formed and indeed has not produced any coal at all from the LMU since 1988. Interior's interpretation of this provision fails to encourage the development of those federal coal leases as contemplated by the act. While Interior concluded that section 2(a)(2)(A) has not prohibited BLM from issuing leases to Kerr-McGee, the Associate Solicitor acknowledged that this view was "not entirely free from doubt" and represented an interpretation that was "a matter of policy formulated by the previous administration that meets the letter of the law." Furthermore, the Associate Solicitor conceded that this interpretation "appears not to be in concert with a major goal of FCLAA, which was to reduce speculation" and the regulation could be amended as part of the proposed rulemaking on LMU issues.

Since March 1988, Kerr-McGee has obtained 36 mineral leases covered by the MLA. Because BLM has deemed Kerr-McGee to be a qualified lessee, Kerr-McGee can continue to obtain additional oil, gas, coal, and other mineral leases, even without producing from existing coal leases that it has held for over 20 years, until later in the LMU's diligent development period. By contrast, BLM has regularly disqualified other lessees with nonproducing federal coal leases from obtaining additional mineral leases. In addition, other companies that were not qualified to obtain additional mineral leases reestablished their qualifications by relinquishing nonproducing leases, assigning leases to unrelated entities, or combining leases into producing LMUs.

BLM has also allowed the act's LMU provision to be used when the primary purpose was to extend the life of a federal coal lease that was about to be terminated because it had not achieved its diligent development requirement. We are concerned that BLM's actions may encourage other coal lessees to form LMUs for the primary purpose of extending the diligent development periods of their nonproducing federal coal leases. While BLM's actions were taken without criteria defining when the formation of an LMU would further FCLAA's goal of discouraging the speculative holding of federal coal leases and encouraging the development of coal production from federal leases, Interior is now considering proposed regulations that would provide such criteria.

Recommendations

We recommend that the Secretary of the Interior cease issuing any additional MLA leases to unqualified companies and amend existing regulations to ensure that lessees holding pre-FCLAA leases will not be issued new mineral leases under the MLA unless they have met the coal production requirements that FCLAA added to the MLA.

With respect to the MLA leases already improperly issued to Kerr-McGee or other companies that were not qualified, we recommend that the Secretary review these leases for action in accordance with all applicable statutory and regulatory provisions.

In addition, we recommend that Interior continue its efforts to revise its regulations to provide criteria that BLM can use to determine whether the formation of an LMU is consistent with FCLAA's goals of discouraging speculation and encouraging the development of federal coal leases. We also recommend that for each LMU approved, BLM document how the approved LMU meets these regulatory criteria.

Agency Comments and Our Evaluation

Interior's Solicitor, as well as Kerr-McGee, disagreed with our conclusion that Kerr-McGee was ineligible to receive new leases under the MLA because two pre-FCLAA coal leases that Kerr-McGee holds have not satisfied the production requirements of section 2(a)(2)(A) of the MLA. The Solicitor stated that the Secretary of the Interior has the authority to issue regulations that substitute an LMU's diligent development requirement for commercial production requirements that holders of pre-FCLAA leases must meet to remain eligible under section 2(a)(2)(A) to obtain additional federal mineral leases. We believe that the MLA provides no authority for exempting Kerr-McGee's pre-FCLAA leases from the requirement to produce coal from those leases in order to continue to be eligible. In addition, although Interior's regulations provide for temporary suspensions of mining operations, we do not believe that Kerr-McGee's production stoppage for a continuous 6-year period is the kind of temporary suspension envisioned by Interior's regulations. Despite the Solicitor's disagreement, the Solicitor stated that while BLM's interpretation of and compliance with section 2(a)(2)(A) was the policy of past administrations and arguably did not well serve a major goal of FCLAA—to reduce speculation—the regulation could be amended at any time and may be considered in the proposed rulemaking on LMU issues.

Environmental Assessments Do Not Always Address Cumulative Impacts of Coal Mining

Since decertification of the federal coal regions, most lease sales have added reserves to existing mines rather than providing the basis for new mines. Consequently, BLM and the Forest Service have generally prepared tract-specific environmental assessments rather than the more comprehensive regional environmental impact statements prepared under the regional leasing process. Federal regulations and BLM's and the Forest Service's policies require that cumulative impacts be adequately assessed and that these impacts be documented in EAs and EISs.

While EAs can provide an adequate basis for identifying and addressing cumulative environmental impacts, we found that documents prepared by BLM and the Forest Service did not always identify and address the cumulative impacts of coal mining. Specifically, the EAs and EISs prepared for coal leasing in three of the four locations that we reviewed addressed cumulative impacts on most resources, whereas EAs prepared in Utah addressed cumulative impacts on only a few resources. For the purposes of this review, we considered that the agency had addressed the cumulative impacts if the EA or EIS (1) contained a brief discussion presenting evidence demonstrating no significant cumulative impact to the individual resources or (2) referenced directly to a section in a prior environmental document or study. Documentation of impacts in EISs and EAs is important because it clearly demonstrates that environmental impacts have been considered. The failure to consider the potential effects of coal mining on key resources, such as groundwater and wildlife, could have serious adverse consequences.

Coal Mining Can Greatly Affect the Surrounding Environment

Both the surface and underground mining of coal can greatly affect the surrounding environment. Surface mining disturbs the overlying topsoil and vegetation, while underground mining can fracture the overlying rock strata and cause it to subside. Also, water draining from mined areas can pollute surface water, and groundwater aquifers can be destroyed, depleted, or degraded. Coal mining can also adversely affect fish and wildlife habitat and can degrade the human environment by putting additional strain on a nearby community's infrastructure. For example, a large influx of new workers at a coal mine can put an additional burden on existing transportation, housing, schools, health care, law enforcement, water, and sewage facilities. When the potential impacts of coal mining are identified in EAs or EISs, these impacts can often be mitigated, and the land can be reclaimed and restored, to some degree, to its original appearance. In some instances, wildlife habitat can actually be improved. Coal mining can also have positive impacts. The creation of new jobs in an economically depressed area is generally welcomed by the community. Associated increases in state and local taxes can be used to improve the community's infrastructure.

NEPA and FCLAA Require That Environmental Impacts From Leasing Coal on Public Lands Be Assessed

Beginning in the 1960s, the Congress passed legislation to protect the environment from the effects of various activities including coal mining. The National Environmental Policy Act directs the responsible federal agency to prepare a detailed statement on the environmental impact of major federal actions that significantly affect the quality of the human environment. FCLAA specifically directs the Secretary of the Interior, before issuing a coal lease, to consider the effects that mining may have on the environment, the economy, agriculture, and public services.

Under regulations implementing NEPA, federal agencies are required to analyze and document environmental impacts in either an EA or an EIS. An EA is intended to be a concise public document that briefly provides sufficient evidence and analysis for determining whether any significant impacts exist. If upon completing an EA, the agency does not identify significant impacts, it prepares a finding of no significant impact; this completes the environmental analysis. However, if significant impacts are found after preparing an EA or significant impacts are expected initially, the agency must prepare a more-detailed and formal EIS. NEPA's regulations list extensive requirements for the format and content of EISs but are not as specific for EAs.

NEPA's regulations allow individual agencies to identify specific actions for which an EIS must be prepared and other actions for which a less-detailed EA is adequate. In implementing FCLAA, BLM has promulgated its own regulations, which outline how BLM is to assess the environmental impacts of coal leasing and how to determine whether an EIS or an EA is needed. When leasing federal coal under regional leasing procedures, BLM's regulations require that the Bureau prepare an EIS on the combinations of tracts that are to be offered for lease. When leasing under the LBA process, the surface-managing agency may prepare either an EA or an EIS, depending on the significance of anticipated impacts. Of the 11 environmental documents that we examined, the surface-managing agency prepared an EA for 10. BLM prepared an EIS for the West Rocky Butte Tract in Wyoming's Powder River Basin because the lease application was for a new mine start, which could significantly affect the environment.

The preparation of environmental documents can be a collaborative effort of the affected federal agencies. For example, in Wyoming, Interior's Office of Surface Mining contributed to the preparation of all four EAs and EISs that we reviewed, even though BLM was the lead agency. The Forest Service also contributed to the EA prepared by BLM for the West Black Thunder Tract in Wyoming because some federal lands within the lease boundary are managed by the Forest Service. In the Wasatch Plateau of central Utah, the Forest Service takes the lead in preparing environmental documents, and BLM is a contributing agency. BLM was the sole agency involved in preparing the EAs that we examined in Alabama and Kentucky.

BLM and the Forest Service Must Document Cumulative Impacts on Individual Resources

In addition to NEPA's regulations that require agencies to evaluate cumulative impacts, BLM's and the Forest Service's handbooks for NEPA's implementation contain policy stating that the results of agencies' analysis must be documented in EAs and EISs. A cumulative impact is the impact on the environment that results from the incremental impact of a single action when added to other past, present, and reasonably foreseeable future actions. For example, when a federal agency evaluates the impact of water draining from a mine on a nearby stream's trout fishery, it must determine this impact together with drainage from nearby mines and from new mines from which water is planned to be discharged into the stream in the future. It is important to consider actions collectively because a certain action that individually may seem to have a minor impact may have a significant impact when added to other actions.

Some Environmental Assessments Address Cumulative Impacts on Only Few Resources

Environmental documents prepared for coal lease applications in Utah addressed few of the cumulative impacts from coal mining, whereas environmental documents that we examined in Kentucky and Wyoming addressed cumulative impacts on most resources. BLM and Forest Service officials in Utah reported that they did not address cumulative impacts in EAs because these impacts were already discussed in previously prepared EISs that they used in their analyses. They added that documentation of cumulative impacts on many of the resources was unnecessary because no issues concerning these resources were raised during scoping meetings. However, this determination was not made part of the EA. In Wyoming and Kentucky, where environmental documents more completely documented cumulative impacts, we found that the public was more involved in the environmental evaluation process.

In the four areas we visited, BLM and Forest Service interdisciplinary teams prepare EAs and EISs. These interdisciplinary teams generally consist of individuals with occupations appropriate to the scope and issues to be discussed in the environmental document. For coal leasing, these individuals include geologists, biologists, mining engineers, and economists. BLM's and the Forest Service's handbooks contain lengthy lists of resources that should be analyzed when preparing environmental analyses. However, not all resources are affected by coal mining. BLM and Forest Service officials said that when evaluating coal leasing, it is important to evaluate cumulative impacts on air quality, surface water quality and quantity, groundwater quality and quantity, fisheries, game species, threatened and endangered species, socioeconomic resources, transportation facilities, visual resources, and recreation. In addition to these resources, BLM officials responsible for EAs in Alabama and Kentucky also evaluate cumulative impacts on wetlands and floodplains and on vegetation.

We examined EAs and EISs prepared for 11 leases-by-application filed for tracts in the Wasatch Plateau-Book Cliffs of central Utah, the Powder River Basin in Wyoming, the Warrior Basin in Alabama, and the Appalachian Basin in Kentucky. We determined whether cumulative impacts to the above resources were addressed in each EA and EIS and the level of detail contained in each document. Our criteria for considering the cumulative impact to be addressed was that the environmental document (1) contain a brief discussion of the evidence demonstrating no significant cumulative impact on the individual resource or (2) reference directly to a section in a prior environmental document or study. Some agency officials said that they considered cumulative impacts but did not document the results in EAs or EISs. For the purposes of our analysis, we did not consider this to meet the agencies' regulatory requirement that cumulative impacts be assessed and documented in EAs and EISs. However, we do not intend our analysis to be a review of NEPA's compliance. Our results are summarized in figure 3.1.

Figure 3.1: Cumulative Impacts on Individual Resources Addressed in Environmental Documents

Resource	Jacobs Ranch, Wyoming	West Black Thunder, Wyoming	North Antelope, Rochelle, Wyoming	West Rocky Butte, Wyoming	Centennial, Utah	Trail Mountain, Utah	Quitchupah, Utah	Castle Valley Ridge, Utah	Davisburg, Kentucky	Caney Creek, Kentucky	Yellow Creek, Alabama
Air quality	○	○	○	○	●	●	●	●	○	○	○
Surface water quality	●	○	○	○	●	○	●	○	○	○	○
Surface water quantity	●	○	○	○	●	○	●	○	○	○	●
Groundwater quality	○	○	○	○	●	●	●	●	○	○	○
Groundwater quantity	○	○	○	○	●	●	●	●	○	○	○
Game species	●	○	○	○	●	●	●	●	○	○	●
Fisheries	NA	NA	NA	NA	●	●	●	●	●	○	●
Threatened & endangered species	NA	NA	NA	NA	●	NA	NA	NA	NA	○	○
Socioeconomics	○	○	○	○	○	○	○	○	○	○	○
Transportation	○	○	○	○	●	○	○	●	○	○	○
Visual resources	○	○	○	○	●	●	●	●	NA	○	●
Recreation	NA	●	●	○	●	●	●	●	●	○	NA
Wetlands & floodplains	NA	NA	NA	NA	NA	NA	NA	NA	NA	○	○
Vegetation	NA	NA	NA	NA	NA	NA	NA	NA	NA	○	●

○ = Agency addressed cumulative impacts on a specific resource.

● = Agency did not address cumulative impacts on a specific resource

NA = Cumulative impacts on a specific resource not applicable

Source: Trail Mountain, Quitchupah, and Castle Valley EAs were prepared by the Forest Service All other documents were prepared by BLM

Environmental Assessments in Utah Do Not Specifically Address Cumulative Impacts on Most Resources

Upon reviewing EAS and EISS prepared by BLM and the Forest Service for the 11 lease applications, we found that 2 of the 11 documents specifically addressed cumulative impacts on all relevant resources. Four EAS, all of which were prepared in Utah, addressed cumulative impacts on less than half of the resources, while three EAS and one EIS prepared in Wyoming and one prepared in Kentucky addressed cumulative impacts on 90 percent or more of the relevant resources. Resources most frequently absent in discussions on cumulative impacts included fisheries, recreation, and game species. On the other hand, all documents addressed cumulative impacts on socioeconomic resources, and only one document failed to address threatened and endangered species.

The number of resources absent from discussions on cumulative impacts varied according to where the environmental documents were prepared. BLM's Wyoming Office addressed cumulative impacts, on average, on 87 percent of the relevant resources per document. On the other hand, BLM and the Forest Service in Utah only addressed cumulative impacts on an average of 22 percent of the relevant resources per document. The Eastern States BLM Office, which is responsible for EAs prepared for Alabama and Kentucky, addressed cumulative impacts on an average of 81 percent of the relevant resources.

Reasons for Not Addressing Impacts

Although BLM and Forest Service officials in Utah stated that they evaluated cumulative impacts on all the resources, they did not address or document all of their results in EAs. They told us that it was unnecessary to document much of the cumulative impact analysis because these impacts had already been documented in the previously prepared EISs for the Round II Regional Sale (Round II EIS) and for the Manti-LaSal National Forest EIS (Manti-LaSal EIS). They said that the EAs they prepared simply updated these cumulative impacts.

This process of referring to a previously prepared environmental document is called tiering, and its use may eliminate repetitive discussions. Agencies may incorporate by reference general discussions and concentrate solely on the issues specific to the statement being prepared. We believe that neither BLM nor the Forest Service in Utah clearly tiered their EAs to previously prepared EISs. None of their attempts to tier specifically state that cumulative impact analyses from the previously prepared EISs were used to prepare the current EAs. Also, none of these attempts summarized cumulative impact discussions contained in these EISs. For example, BLM's only reference to the Round II EIS in the Centennial Tract is a statement explaining that this tract is part of two proposed tracts previously recommended for leasing. The only statement in the Forest Service's EAs linking them to the Manti-LaSal EIS is a sentence stating that cumulative impacts are expected to be within threshold limits established in the Manti-LaSal EIS. Although the Forest Service documents that it used the Round II EIS in deciding to lease, this statement makes no reference to cumulative impact analyses and only appears in the findings of no significant impact, a two- to three-page document issued separately from EAs. BLM and Forest Service interdisciplinary team leaders stated that their links to cumulative impact discussions in previous EISs could have been clearer.

BLM and Forest Service officials also told us that cumulative impacts on many of the resources were not documented because they were not raised as issues during scoping. Scoping is a process employed early in the environmental evaluation by which agencies, together with interested and affected parties, identify the significant issues to be analyzed in depth and eliminate from detailed study the issues that are not significant. Although we acknowledge that scoping can be effective in focusing the analysis on important issues, we were unable to verify that the agencies had evaluated the cumulative impacts on all the resources because of the lack of documentation in EAs.

The Extent to Which Cumulative Impacts Were Addressed Is Associated With the Extent of Public Involvement

Cumulative impacts were more completely addressed when the public chose to be more involved. BLM officials in Wyoming told us that because of concerns expressed by environmental groups and local citizens, they addressed environmental impacts in more detail than would be expected in most EAs. In addition, they added that when the public expressed concern over impacts on a specific resource, they discussed impacts on this resource in greater detail in subsequent environmental documents. Attendance at public meetings on environmental impacts in Wyoming was high, and an environmental group was also active in commenting on EAs prepared for tracts in Kentucky.

On the other hand, BLM and Forest Service officials in Utah told us that there was a lack of public concern over coal leasing in central Utah. At meetings to identify the possible scope of environmental impacts, attendance was low, generally consisting of coal company representatives and BLM and Forest Service personnel. In addition, Forest Service officials noted that they received few public comments on the three EAs that the Forest Service prepared. Members of one Utah environmental group told us that because of their limited resources, they are not concerned with coal mining in Utah's Wasatch Plateau and Book Cliffs but, instead, concentrate on their higher priorities in the Canyonlands and Kaparowitz Plateau. We also noted that there was little public involvement in environmental review in Alabama, where the Yellow Creek EA addressed cumulative impacts on 62 percent of the resources.

Conclusions

Since decertification of the federal coal regions, surface-managing agencies, for the most part, have prepared tract-specific EAs rather than the more-detailed EISs prepared under the regional leasing process. While these documents can provide an adequate basis for identifying and addressing the cumulative impacts of coal mining, they did not always do that. NEPA requires that cumulative impacts be adequately assessed, and federal regulations and BLM's and the Forest Service's handbooks require that these impacts be documented in EAs or EISs. The environmental documents prepared by BLM in Wyoming and the eastern states addressed cumulative impacts on most resources, whereas EAs prepared by BLM and the Forest Service in Utah addressed cumulative impacts on an average of only 22 percent of the resources. In Kentucky and Wyoming, where EAs and EISs more completely addressed cumulative impacts, the public chose to be more involved in the environmental evaluation process. In Alabama, there was little public involvement in the environmental review process.

Agency Comments and Our Evaluation

Both Interior and Agriculture accepted our proposal to reemphasize to field personnel the importance of complying with requirements for identifying and addressing cumulative environmental impacts from coal leasing and development. As a result, we are no longer making a recommendation. On March 17, 1994, in response to a draft of this report, BLM issued an instruction memorandum to its field offices directing that each environmental document either directly address cumulative impacts or incorporate, by reference, other environmental documents that address cumulative impacts.

Projecting Demand for Coal Is Not Necessary to Meet FCLAA's Objectives

BLM initially used projected demand for coal in its regional leasing program to help it determine the amount of coal to lease. Although FCLAA did not require BLM to consider the demand for coal when making leasing decisions, BLM chose to consider demand under its regional leasing process to set leasing targets and meet objectives that it had set for the coal program. However, difficulties in accurately projecting demand led BLM to quickly reduce its reliance on demand in determining the amount of coal to lease. Under the lease-by-application process, BLM does not set the amount of coal to be leased and thus does not use projections of the demand for coal for that purpose. Not using the demand for coal in BLM's LBA process should not adversely affect FCLAA's objectives, provided that provisions in FCLAA such as those dealing with diligence and fair market value are enforced. These provisions, for example, help ensure that leased coal will be developed in a timely manner and that the government receives a fair price.

Projected Coal Demand Was Considered in Setting Regional Coal Sale Targets

In 1979, Interior issued regulations for a coal-leasing program designed in response to an anticipated large demand for federal coal. The regulations established procedures for determining future coal-leasing targets, in part, on the basis of the projected demand for coal.[1] Although consideration of the projected demand for coal was not required by FCLAA, BLM chose to use projected demand along with other factors to meet the coal program's objectives. These objectives include (1) meeting national energy objectives, (2) promoting more desirable methods of developing coal, and (3) increasing competition in the coal industry.

Under regional leasing, BLM initially tried to lease enough coal to exactly meet the demand and production estimates derived from the Department of Energy's (DOE's) projections. BLM estimated the amount of coal production expected in each coal region in the absence of new federal leasing, and if this estimate fell short of DOE's regional coal production goal, BLM would initiate new federal coal leasing to compensate for the shortfall.

However, the procedures for setting leasing targets provoked considerable controversy over the feasibility of precisely predicting coal's supply and demand. It is very difficult to accurately predict the demand for coal, and the further into the future the forecasts are extended, the more unreliable the predictions become. For example, DOE's medium 1978 coal demand

[1]Interior's July 1982 regulations changed the process for determining future coal demand from one that sets leasing targets to one that sets leasing levels to account for the uncertainty in forecasting the future demand for coal.

projections for 1990 were 70 percent higher than what actually occurred. Difficulties in projecting demand stem from the inherent uncertainties in projecting electrical consumption, the use of alternative fuels, improvements in technology, and the ultimate effects of the Clean Air Act. As a result, Interior de-emphasized the use of projected demand as a determinant of the amount of coal to be offered for lease and instead used projected demand as only one of many factors in deciding the amount of coal to be offered.

Projected Demand Does Not Determine the Amount of Coal to Be Leased in the LBA Process

Under the current LBA process, projected demand does not determine the amount of coal that BLM offers for lease. BLM's coal regions changed to the LBA process because companies had excess production capacity from their existing leases and the demand for additional coal leases was low. Although BLM regulations require that projected demand be considered in the regional sale process, they do not require BLM to use such projections in the LBA process. Consequently, BLM does not base its decision to offer a specific tract for lease on projected demand for federal coal. Instead, a company's application to lease a specific coal tract initiates the leasing process. Collectively, industry's expressions of demand for leases largely decide the amount of coal offered. BLM also exercises some discretion about the amount of coal offered by reconfiguring lease tracts to ensure maximum economic recovery[2] or delaying processing applications in response to changes in the coal market.

According to a BLM official, companies generally have a good understanding of the coal market, and if they are willing to pay the fair market value for a tract then they are demonstrating the demand for coal. Also, this official stated that FCLAA's diligent development requirement discourages companies from leasing tracts that they do not intend to mine in a timely manner. As mentioned earlier, FCLAA's requirements that leases be terminated if they are not producing commercial quantities of coal within 10 years of a lease's issuance were intended to discourage the speculative holding of coal leases.

[2]Maximum economic recovery means that, on the basis of industry's standard operating practices, all profitable portions of a leased federal coal deposit must be mined.

FCLAA's Objectives Can Be Met Without Tying Leasing Levels to Projected Demand

FCLAA addresses major congressional concerns with the federal coal-leasing program—speculation, concentration of holdings, fair return to the public, maximum economic recovery of the resource, environmental protection, and planning and public participation. It addresses these concerns by requiring that companies diligently develop their leases, the Justice Department review the concentration of the market, the federal government receive fair market value, and potential lease tracts be configured to maximize the recovery of coal. If these provisions are enforced, FCLAA's objectives can be met without trying to match leasing levels to projected demand. For example, enforcing the diligent development provision discourages companies from leasing tracts that they do not intend to mine in a timely manner, thereby discouraging the speculative holding of leases and encouraging the production of leased coal.

FCLAA does not require that leasing levels be tied to projected demand as a means of achieving the act's objectives. However, under the regional leasing process, BLM tried to tie leasing levels to projected demand. Although some of Congress's concerns could be partially addressed by leasing exactly the amount of federal coal needed to meet projected demand, this proved very hard to do and the effort was discontinued. (See app. II for a discussion of the demand for coal and the problems involved in forecasting those levels).

Proponents of using projected demand, however, argue that demand projections are important because they influence the government's return from lease sales and should, therefore, influence whether and when BLM offers leases. For example, they argue that leasing would be curtailed in weak markets where leases would obtain a lower fair market value and increased in strong markets where lease values would be higher. However, we do not believe Interior could count on receiving a higher value for leases if it adjusted leasing levels to meet projected demand. Even if projected demand and coal prices are low when a lease tract is sold, there is no guarantee that they will be higher in the future or that the net present value of the resource will increase with a delay of the sale. Furthermore, FCLAA requires the receipt of fair market value, not maximization of federal revenues. BLM ensures that it obtains fair market value by independently assessing the market value of each coal tract and using the assessed value as the minimum bid it will accept for a proposed sale.

BLM Continues to Monitor Demand

While BLM's leasing decisions are no longer tied to projected demand, BLM officials prepare coal market analyses and, together with the regional coal teams, continue to monitor the national coal market and review regional market information. BLM officials do not use this information to establish a particular level of leasing but, rather, to discern market trends and to estimate future coal prices for their fair market valuations. In addition, BLM officials in Utah use their regional market analyses to determine the priority for processing lease applications. If the officials believe that the demand for a particular tract will be high, they give higher priority to processing that lease application.

BLM officials and the regional coal teams also use information from the coal market in deciding whether to recertify the regions. According to BLM officials, if the demand for coal increases significantly, such that it leads to an increased number of lease applications, then they may find it appropriate to revert to a regional leasing process. At certain leasing levels, the regional leasing process offers administrative efficiencies and economies of scale, such as conducting a regional EIS rather than tract-by-tract EAS. However, the levels of increase (both in demand and in the number of applications) that would precipitate a return to the regional leasing process have not been specified by BLM or the regional coal teams.

Conclusions

Although some of FCLAA's objectives could be partially addressed by leasing exactly the amount of federal coal needed to meet projected demand, accurately estimating future demand is difficult. Furthermore, it is not necessary because the act has definite requirements, which if enforced, allow its objectives to be met. For example, by enforcing FCLAA's diligence requirements, BLM can discourage speculation and encourage the development of coal leases, and by ensuring that it properly calculates a lease's fair market value, BLM can ensure that it obtains fair market value for leases.

According to BLM officials, if the demand for federal coal increases significantly, it may be appropriate to revert to a regional leasing process, whereby projected demand is used as a factor in setting leasing levels. This regional leasing process offers certain administrative efficiencies and economies for a large-scale leasing operation.

Geographic Areas of Coal's Production That Are Included in This Report

This appendix describes the four geographic areas we selected for study. The descriptions of each area contain information on the areas' topography, economy, geology, and coal-mining activities. The environmental impacts associated with coal mining are also summarized.

Powder River Basin, Wyoming

The coal-producing trend in the Wyoming portion of the Powder River Basin lies largely in eastern Campbell County. Minable coal also occurs in Converse, Johnson, and Sheridan counties.[1] The landscape in this portion of the Powder River Basin is dominated by plains and low-lying hills interrupted by stream valleys, ridges, and isolated buttes. Elevations range from about 3,600 feet in the valley floors to 5,000 feet in the upland areas. The average annual precipitation of less than 20 inches is only sufficient to support a mixture of grasses and shrubs, but cottonwood trees commonly grow within the stream's drainage.

Campbell County is predominantly rural and had a population of about 33,000 in 1990. Gillette and Wright are the largest communities in the area. Most of the land in the area is used for grazing cattle and sheep. Other uses include the farming of hay and grain, oil and gas development, and coal mining.

The Powder River Basin contains almost 24 billion tons of coal reserves, of which about 7.5 billion tons, or about 32 percent, is under existing federal leases. The major coal bed mined in the area is the Wyodak Coal. This bed occurs at the top of the Paleocene Fort Union Formation and is generally thick and widespread. The coal is subbituminous,[2] contains little sulfur, and can exceed 80 feet in thickness. Coal in the eastern Powder River Basin is mined by surface-mining techniques that include removal and storage of the overburden for later reclamation. The industry's trend is to develop large-scale, efficient operations, and many mines produce over 10 million tons per year. The volume of production compensates for the small profit margin per ton on this low-priced coal.

Groundwater resources should be considered in environmental assessments because they could be affected by coal mining in the eastern

[1]We did not include in our study those other counties in the Powder River Basin that do not have federal coal production.

[2]As increased overburden increases temperature and pressure, the coal cycle progresses through six stages—peat, lignite, subbituminous, bituminous, anthracite, and graphite. As overburden increases, water and gases are pressed out of the carbon. The greater the coal's carbon content, the higher the coal's ranking as fuel.

Powder River Basin. Discontinuous aquifers[3] in the overlying Eocene Wasatch Formation are completely disturbed when this overburden is removed and stockpiled for reclamation. The main coal seam, the Wyodak Coal, is a regional aquifer, and it is removed during mining. The undisturbed coal aquifer adjacent to the mined areas can also experience a lowering of its water level. In addition, aquifers in the reclaimed areas that are backfilled with debris from mining experience a decrease in the quality of groundwater.

Wildlife can also be affected by coal mining. Local populations of mule deer and pronghorn antelope can be temporarily displaced. The removal of sagebrush during mining and failure to replace it during reclamation can adversely affect the habitat of antelope and sage grouse.

Wasatch Plateau and Book Cliffs, Utah

The Wasatch Plateau and Book Cliffs consist of portions of Emery, Carbon, Sevier, and Sanpete counties in central Utah. The Wasatch Plateau is a series of north-south trending mountains dissected by steep canyons, while the Book Cliffs are steep, south-facing cliffs capped by broad, gently sloping mountain tops. Elevations in the areas range from about 6,000 to over 11,000 feet. Desert shrubs, sagebrush, and pinion-juniper woodlands dominate the warmer, drier low elevations, while conifers and aspen dominate the cooler, wetter high elevations.

The Wasatch Plateau and Book Cliffs are predominantly rural. The four-county area had an estimated 1990 population of about 62,000, and Price and Richfield are the largest communities in the area. Much of the federal and state land is used for grazing and recreation, but timber and minerals are also produced. Much of the private land is agricultural. Coal mining, trade, services, and government account for the majority of the employment in the area.

The Wasatch Plateau and Book Cliffs contain about 9 billion tons of coal reserves, and the state of Utah estimates that about 2.6 billion tons of this amount is recoverable. Less than 10 percent of the total reserves are under federal lease. Coal primarily occurs in the Cretaceous Blackhawk Formation, a thick sequence of sandstone and shale with several coal beds from 4 to 28 feet in thickness. Coal is mined exclusively by underground methods in this area. Mines generally access the coal seams where they

[3] An aquifer is a water-bearing rock formation that is permeable enough to yield water in sufficient quantities to supply wells and springs.

crop out along cliff faces. The industry's trend is to expand existing mines through the use of long-wall mining technology.

Major environmental effects from coal mining include impacts on the area's water resources. The mining of underground coal has resulted in subsidence that has affected springs and shallow aquifers overlying the mined areas. Coal mining can also disrupt the flow of groundwater in the mined area and can lead to local dewatering of the regional Starpoint-Blackhawk aquifer. Water discharged from mines can increase the flow of streams, and some of the receiving streams have been found to contain higher concentrations of trace elements such as lead, selenium, and chromium and to be more mineralized than naturally occurring runoff. The construction of access roads and surface facilities can increase suspended sediments in nearby streams and can disrupt the migration of wildlife. In addition, raptor nests along cliff faces can be adversely affected by subsidence.

Warrior Basin, Alabama

The Warrior Coal Basin consists of Walker, Tuscaloosa, Fayette, Lamar, Pickens, and small parts of Jefferson and other adjacent counties in northwestern Alabama. The area is a plateau of low relief dissected by narrow valleys. Elevations range from 500 to 1,000 feet. A moist temperate climate with an average annual precipitation of about 54 inches per year supports a forest of southern pines and upland hardwoods that cover much of the area.

The Warrior Basin is predominantly rural and had a 1990 population of about 924,000. Major urban areas include the cities of Tuscaloosa and Birmingham. Much of the land consists of unmanaged forest; forestry is a major industry. Secondary land uses include agriculture and coal mining.

Most of the mineral ownership of the approximately 21 billion tons of coal reserves in the Warrior Basin is private. Less than 1 percent of the reserves are under federal lease. Mineral rights to federal coal consist of small, isolated tracts whose surface is generally privately owned. Bituminous coal in the Warrior Basin occurs at the tops of repeating mudstone and sandstone cycles in the Pennsylvanian Pottsville Formation. Mining is by both surface and underground methods.

Water resources in the area can be significantly affected by coal mining. Both subsurface and surface mining can degrade the quality of groundwater and can locally disrupt the flow of groundwater.

Groundwater moving through mined areas becomes more mineralized. Aquifers over surface-mined areas are removed, and aquifers adjacent to surface and underground mines can experience local drawdown. Mineralized or acid drainage from underground mines can pollute receiving streams, killing aquatic life and adversely affecting the water for recreational, domestic, and industrial use.

The clear-cutting of forests over large areas during surface mining increases erosion and subsequently increases the deposition of sediment in streams and reservoirs. Clear-cutting also degrades visual quality, and the associated increase in runoff can result in local flooding. With the removal of vegetation, wildlife's habitat is temporarily lost and can be permanently altered depending on how the land is reclaimed.

Appalachian Basin, Eastern Kentucky

The easternmost portion of Kentucky lies within the Appalachian Basin; active federal coal leases lie in Bell and Whitley counties. Landforms consist of broad plateaus, narrow ridges and valleys, and rugged hills. Elevations range up to 3,000 feet. An average annual precipitation of over 45 inches per year supports a forest consisting primarily of upland hardwoods.

This portion of Kentucky is rural and contains no major cities. The 1990 population of the 35 counties comprising this area was about 836,000. The principal land use is forest, and subordinate uses of land include pasture and cropland. Coal mining is a major industry in the area.

The Kentucky Department of Mines and Minerals has estimated that this portion of the state contains over 55 billion tons of coal reserves. Most federal coal is located on small isolated tracts, and less than 1 percent of the state's reserves are under federal lease. Most of the minable coal occurs in the Pennsylvanian Breathitt Formation—a sequence of siltstone, sandstone, shale, and coal. Coal is mined by both surface and underground methods.

Environmental impacts associated with coal mining in the Kentucky portion of the Appalachian Basin are generally similar to those we described in Alabama. However, acid-mine drainage in this part of Kentucky is seldom troublesome as it is quickly neutralized by calcareous minerals in the surrounding rock

Accurately Estimating Future Demand for Coal Leases Is Difficult

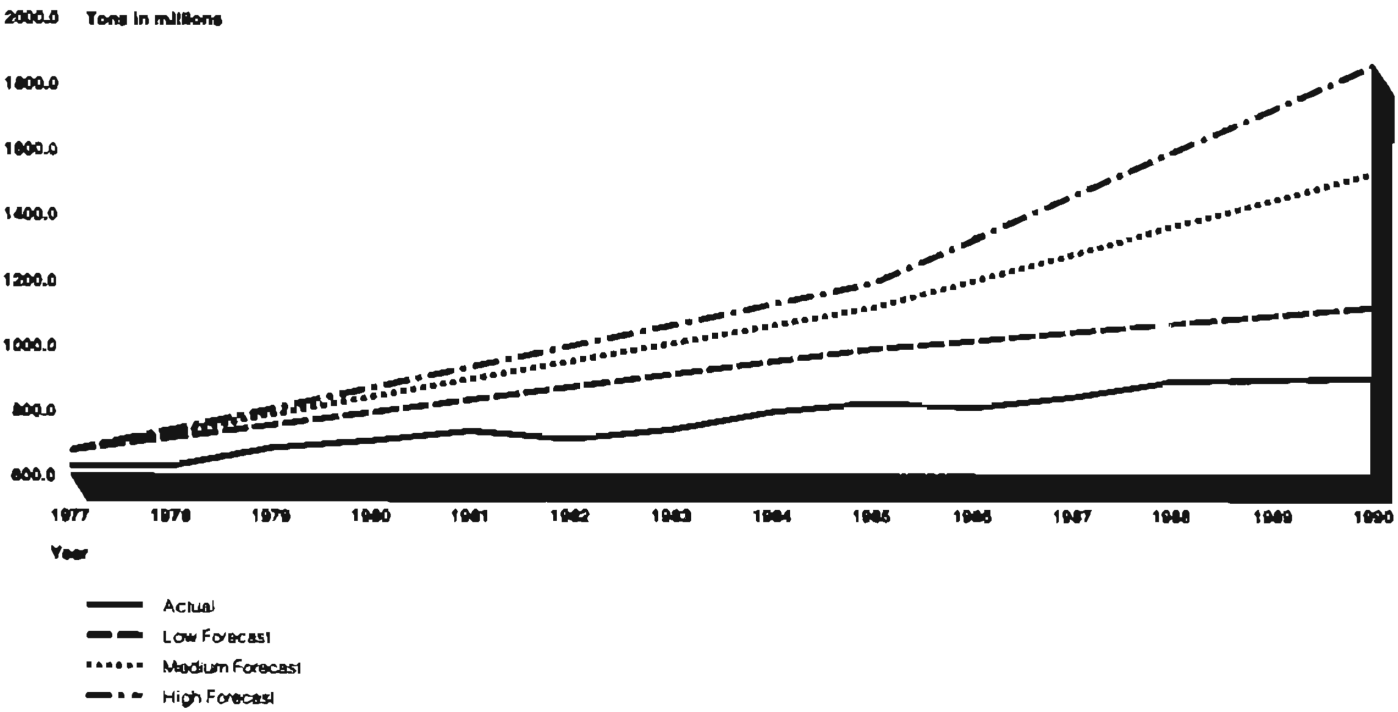
In relation to the Bureau of Land Management's (BLM) coal- leasing program, there are two types of demand: the market demand for coal and individual companies' demand for coal leases.[1] The market demand for coal is the total of all demand from companies that use coal. In other words, it is the number of coal purchases that companies are willing and able to make, given the price of coal and its availability. Similarly, the demand for coal leases is the number of coal leases that individual companies are willing and able to lease, given the price and availability of those leases.

Accurately Predicting Future Demand for Coal Leases Is Difficult

It can be extremely difficult to accurately predict the demand for coal, and the further into the future the forecasts are extended, the more unreliable the predictions become. For example, the Department of Energy's (DOE) 1978 medium coal demand projection for 1985 was 36 percent higher than what actually occurred, and its projection for 1990 was 70 percent higher. The demand for coal is reflected in the amount of coal consumed. Figure II.1 illustrates the difference between DOE's projection for consumption and actual consumption. As a result, if BLM sets coal-leasing levels strictly on the basis of the projected future demand for coal, it risks offering and evaluating more (or fewer) leases than the number that will sell.

[1]In economic terms, "demand" refers to the purchases (e.g., of goods) that people are willing and able to make, given the prices and choices available to them. Demand, in this general sense, is determined by a variety of factors, including a good's own price, related goods' prices and availability, the size of the population, people's level of income, and people's expectations.

Figure II.1: Comparison Between DOE's Forecasted Coal Consumption and Actual Consumption



Source: Forecasted consumption—1978 Regional Coal Production Forecasts, DOE. Actual consumption—1992 Annual Energy Review, DOE.

This difficulty in accurately projecting the demand for coal and coal leases arises primarily from the large number of factors that influence the demand for coal and the uncertainties surrounding those factors. Some of the significant factors that influence the demand for coal and coal leases include: the demand for electricity, coal prices (including the cost of transporting the coal from the mine to the buyer (primarily public utilities), the quality of coal (including Btu[2]—a measure of heating value—and sulfur content), the price and availability of other energy sources (e.g., hydroelectric, nuclear power, and energy conservation), the number of coal users, government policies (e.g., the ultimate effects of the Clean Air Act amendments) and expectations about the availability of

[2]British thermal unit.

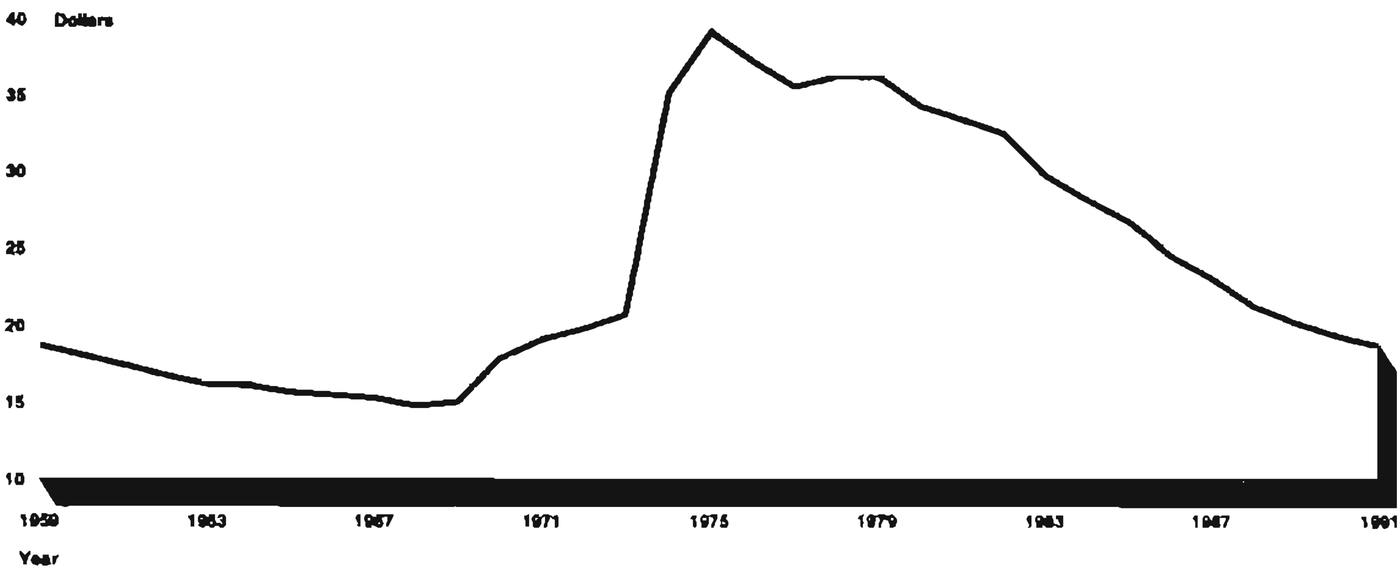
future energy sources. For example, the expectation in the late 1970s and early 1980s of energy shortages resulted in an increased demand for coal, higher coal prices, and consequently a higher demand for coal leases.

Accurately estimating the demand for coal leases is also difficult because of the lag time between when the demand for coal is estimated and when the leases are sold and developed. During regional leasing, for example, market conditions changed significantly after leasing levels were set. As a result, BLM selected and evaluated many tracts that were not leased.

Coal Prices Have Declined Since 1975

Conditions in the coal market have been depressed for several years and continue so today. Slow growth in demand by public utilities, chronic overcapacity in the coal industry, and improved production technology have forced coal prices down since the early 1980s. The average price of coal sold in the United States increased nominally through 1975 but has steadily decreased through 1991. (See fig. II. 2.)

Figure II.2: Average U.S. Coal Prices, 1959 Through 1991



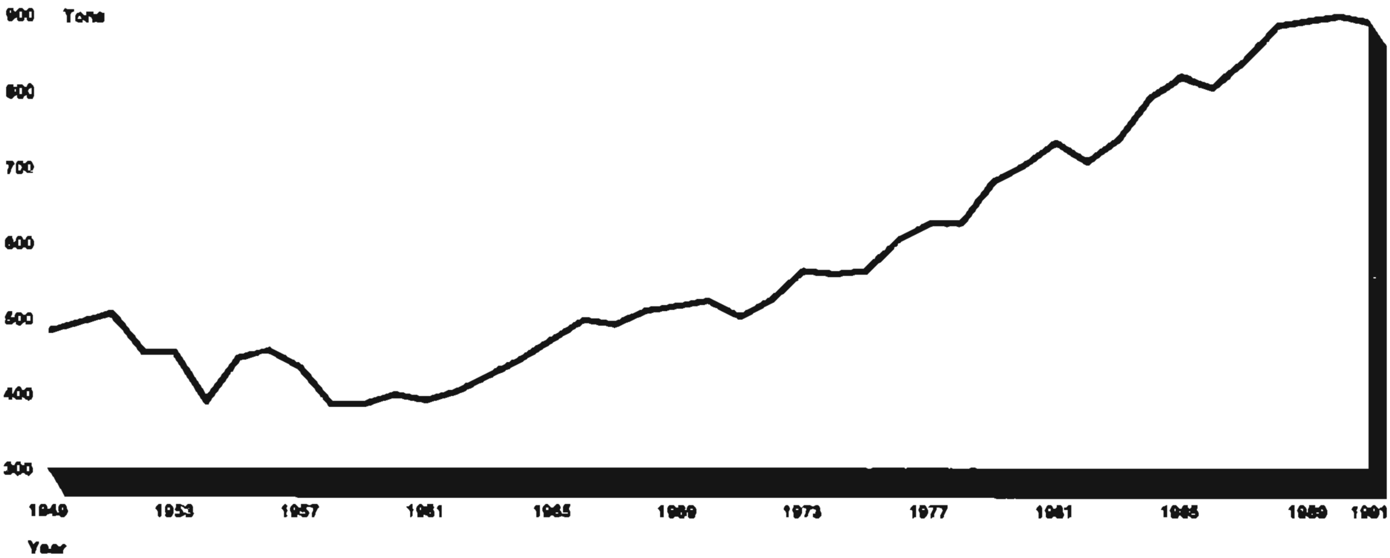
Source: 1992 Annual Energy Review, DOE

We found general agreement among BLM officials that the decline in coal prices can be attributed to the increasing amounts of less-expensive coal produced from Powder River Basin mines. In economic terms, the decline in coal prices is primarily the result of a "shift," or increase in the supply of coal, rather than a change in demand. This increase in supply is a consequence of coal suppliers' bringing more coal to the market at each price level. This is possible because of changes in technology (such as the "long-wall miner"—a machine used in underground mining operations) and larger surface operations in the West (thus, taking advantage of economies of scale in coal mining). As a result, supply has increased, and the price of coal has dropped—even though demand may not have changed—and the quantity of coal has increased.

Primarily as a result of supply increases and price decreases, the quantity of coal demanded—as measured by the consumption of coal—has steadily risen over time.[3] Figure II.3 shows the consumption of U.S. coal from 1949 through 1991.

[3]The growth rate of consumption, however, has decreased since 1988

Figure II.3: U.S. Coal Consumption, 1949 Through 1991



Source: 1992 Annual Energy Review, DOE.

Even though the consumption of coal has risen (albeit recently, at a decreasing rate), the demand for federal coal leases has not similarly increased. Figure II.4 shows the number of federal coal leases issued from 1978 through 1992. The demand for federal coal leases remains far below the high level of demand experienced in the early 1980s. The demand for leases peaked in 1982, when 40 federal coal leases were issued. In comparison, three federal coal leases were issued during 1992. Thus, even without a large number of federal coal leases being issued, the consumption of coal increased.

Figure II.4: Federal Coal Leases Issued, 1978 Through 1992

Source Federal Coal Management Report, fiscal year 1991, the Department of the Interior

According to a BLM official, the slight increase in demand for coal leases in 1990 and 1991 reflected a "pent-up demand." That is, applicants frustrated by the delays inherent in BLM's regional coal sale process were eager to submit applications under the lease-by-application process. In the near future, BLM officials do not anticipate an increase in the number of coal lease applications.

Letter to the Acting Solicitor, Department of the Interior

GAO United States General Accounting Office Washington, D.C. 20548

Office of the General Counsel

B-252412

February 22, 1993

Timothy S. Elliott Esq.
Acting Solicitor
Department of the Interior
Washington, D.C. 20240

Dear Mr. Elliott:

The General Accounting Office is presently reviewing various aspects of the Bureau of Land Management's (BLM) coal leasing program pursuant to a congressional request. One of the matters we are reviewing concerns the application of section 2(a)(2)(A) of the Mineral Leasing Act (MLA), as added by section 3 of the Federal Coal Leasing Amendments Act (FCLAA), Public Law No. 94-377 (August 4, 1976), 30 U.S.C. § 201(a)(2)(A), to the Kerr-McGee Coal Corporation. As of December 31, 1986, under this provision the Secretary of Interior is barred, except in certain limited circumstances, from issuing any new MLA leases (e.g. oil and gas, as well as coal leases) to any entity which presently holds and has held a federal coal lease(s) for a period of 10 years and is not producing coal from its lease deposits in commercial quantities.

Although Kerr-McGee has not mined coal from the East Gillette Federal Mine/Clovis Point Mine Logical Mining Unit (Clovis Point LMU) for several years, BLM has continued to issue new MLA oil and gas and coal leases to the company, having concluded that section 2(a)(2)(A) does not prohibit the issuance of such leases. On February 4, 1993, GAO staff met with Paul Smyth, Acting Associate Solicitor for Energy and Resources, and Sharon Allender, Assistant Solicitor for Onshore Minerals, to discuss this matter.

This letter includes a list of questions, some of which were discussed in our February 4 meeting, for which we would like a written reply.

BACKGROUND

The key facts in this case are as follows:

-- BLM issued two coal leases to Kerr-McGee on October 1, 1965, lease W-0313668, and on

January 1, 1970, lease W-0311810.[1] We understand that coal has never been produced on either of these leases. Section 2(a)2(A) of the MLA applies to these leases.

-- On September 26, 1986, Kerr-McGee received BLM approval to combine these two nonproducing federal coal leases with its producing state coal lease to form the Clovis Point LMU.[2] As a result of the formation of the LMU, Kerr-McGee was considered to have satisfied the requirements of section 2(a)2(A), and accordingly, was eligible to receive new MLA leases. Under the LMU the production on Kerr-McGee's state lease is construed as having occurred on the federal leases in the LMU.[3]

-- Kerr-McGee commenced production on the state lease in August 1979. Since then, Kerr McGee has produced 18.5 million tons of coal under this lease, of which 2.3 million has been produced since the LMU was created in 1986. The company's investment in mining and equipment since 1979 has exceeded $27 million.[4]

-- In March 1988, because of depressed market conditions and contract requirements, the LMU mining operation was temporarily suspended. The mine was placed in a standby status in accordance with a plan for interim stabilization approved by the Wyoming Department of Environmental Quality and subsequently submitted to, and approved by,

[1]Lease No. W-0313668 was readjusted on October 1, 1985, and Lease No. W-0311810 on January 1, 1990.

[2]A Logical Mining Unit refers to an area of land in which the coal reserves can be developed in an economically efficient manner as a unit. It may consist of one or more Federal leases and may include adjacent lands in which the United States does not own the coal. All lands in the LMU should be under the effective control of a single operator/lessee and be operated as a single operation. 30 U.S.C. § 202a(1) and 43 C.F.R. §3480.0-5 (19). An LMU mining plan approved by the Secretary of Interior will contain diligent development, operation, and production requirements for mining the coal.

[3]Section 5(b) of FCLAA, 30 U.S.C. § 202(a)(3).

[4]Letter, dated October 1, 1991, from Holland & Hart, attorneys for Kerr-McGee, to the Denver Regional Solicitor's office at p.1.

2 B-252412

other agencies, including BLM.[5] Kerr-McGee never applied for the suspension of operations because of force majeure[6] or any other reason.

-- Since its temporary suspension of coal mining on the LMU, Kerr-McGee has continued to maintain and abide by the terms and conditions of its permits. Full time security is provided and monthly regulatory inspections are conducted. Facility reclamation maintenance takes place at annual cost of $75,000.[7]

-- In October 1991, Kerr-McGee asserted it could reactivate the LMU within a short period of time and had several possibilities for selling newly recovered coal.[8]

-- In the period March 1988 - October 1992, BLM issued 109 oil and gas and coal leases to Kerr-McGee. In December 1991, BLM staff determined that section 2(a)2(A) did not disqualify Kerr-McGee from participating in the Jacobs Ranch coal lease sale. On October 1, 1992, a lease (WYW117924) was issued to Kerr-McGee as the successful bidder for this sale.

RELEVANT STATUTES AND REGULATIONS

Section 2(a)(2)(A) of the MLA, 30 U.S.C. § 201(a)(2)(A), provides, in relevant part,

> "The Secretary shall not issue a lease or leases under the terms of this Act to any person, association, corporation, . . . where any such entity holds a lease or leases issued by the United States to coal deposits and has held such lease or leases for a period of ten years when such entity is not, except as provided in section 7(b) [30 U.S.C. § 207 (b)] of this Act, producing coal from the lease deposits in commercial quantities. In computing the ten-year period referred to in the previous sentence, periods of

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[5]Holland & Hart letter, at p. 2.

[6]Section 2(a)(2)(A) of the MLA incorporates the force majeure clause of section 7(b) of the MLA, 30 U.S.C. § 207(b). Production can be suspended because of "strikes, the elements, or casualties not attributable to the lessee."

[7]Holland & Hart letter at p. 5.

[8]Id. at p. 5.

time prior to August 4, 1976, shall not be counted."

Under BLM regulations, "producing" means--

"actually severing coal, or operating an ongoing mining operation in accordance with standard industry operation practices[a]. A lease is deemed to be producing, even though:

"(i) Severance is temporarily suspended for reasons beyond the reasonable control of the operator/lessee . . . including but not limited to factors such as: Dragline or other equipment moving, breakdown, or repair; overburden removal; sale of coal from stockpiles; vacations and holidays; orders of governmental authorities; coal buyer's operations of its power plants that require the coal buyer to stop taking coal shipments for a limited duration of time; or

"(ii) Severed coal is being processed, loaded, or transported from the point of severance to the point of sale. 43 C.F.R. § 3400.0-5(rr)(6) (1992).

QUESTIONS

We have the following questions regarding BLM's issuance of mineral leases to Kerr-McGee under the facts set out above:

1. Did section 2(a)(2)(A) of the MLA bar BLM from issuing 109 new mineral leases to Kerr-McGee, after production stopped on the Clovis Point LMU in March 1988? Please provide a detailed explanation of the basis for your answer.

2. In this connection, is Kerr-McGee's cessation of coal production since 1988, while maintaining the Clovis Point LMU ready to resume production on short notice, "operating an ongoing mining operation in accordance with standard industry operation practices," as that term is used to

[a]BLM Information Bulletin No. 90-33, November 13, 1989, Attachment 1-4, mentions that a coal lease will still be considered as producing under section 2(a)(2)(A) if it was producing before an emergency closure and the closure was regarded as within the ambit of standard industry operating practices. The examples of closures that would be included in such practices were all of a limited time duration, not exceeding several months.

define "producing" in 43 C.F.R. § 3400.0-5(rr)(6)? (Please also consider in formulating your answer BLM Information Bulletin 90-33, Attachment 1-4.)
Also, in answering this question, please describe what facts demonstrate that during this 5-year period Kerr-McGee has been "operating an ongoing mining operation." Compare such facts with the examples given in paragraph (i) of the regulation, for "producing" coal without actually severing it, which are all of a short-term nature. Also, please explain why Kerr-McGee's activities are "in accordance with standard industry operation practices" and how such practices have been ascertained, e.g., cases, industry associations, coal company surveys, etc.

3. Even if Kerr-McGee activities are consistent with standard industry practices, isn't nonproduction because of market conditions the very practice of pre-FCLAA leases that section 2(a)2(A) aimed to eliminate? Has nonproduction for market conditions ever been permissible under either section 2(a)(2)(A) or section 7(a) diligence requirements of the MLA?

4. What legal action may/must the Department of Interior take once it has discovered it has issued an improper lease?

We would appreciate an answer to these questions within 30 days of the receipt of this letter. For any inquiries concerning the contents of this letter, please contact Stanley Feinstein, Senior Attorney, at 202- 512-7648 or by FAX at 202-512-7703

Sincerely,

Alan Richard Kasdan

Alan Richard Kasdan
Assistant General Counsel

5 B-252412

Letter From the Associate Solicitor for Energy and Resources, Department of the Interior

United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

AUG - 4 1993

Alan Richard Kasden, Esq.
Assistant General Counsel
United States General Accounting Office
Washington, DC 20548

Dear Mr. Kasden:

By your letter of February 22, 1993, you have asked several questions about the coal leasing program administered by the Bureau of Land Management (BLM). We apologize that our response has taken longer than expected. However, because your inquiry has raised issues of policy, it was important that representatives of the current Administration carefully review these matters.

Your inquiry concerns section 2(a)(2)(A) of the Mineral Leasing Act (MLA), as amended, 30 U.S.C. § 201(a)(2)(A) (1988). Congress enacted section 2(a)(2)(A) in the Federal Coal Leasing Amendments Act of 1976 (FCLAA), 90 Stat. 1083-1085. Section 2(a)(2)(A) prohibits the Secretary of the Interior, after December 31, 1986, from issuing a Federal mineral lease under the MLA to a Federal coal lessee that has held a lease for ten years and is not producing from the lease in commercial quantities. Your inquiry concerns how section 2(a)(2)(A) applies to two Federal coal leases held by the Kerr-McGee Coal Corporation (Kerr-McGee) which are included in a logical mining unit (LMU).

I. Background

On September 25, 1991, Kerr-McGee submitted a bid to acquire a Federal coal lease at a competitive lease sale held in Cheyenne, Wyoming. Kerr-McGee's eligibility for the lease was examined by the Wyoming State Office of the BLM for compliance with section 2(a)(2)(A) because, at the time of the lease sale, Kerr-McGee held two inactive Federal coal leases known as the East Gillette leases. The East Gillette leases are Lease No. W-0311810, issued January 1, 1970, and readjusted under FCLAA on January 1, 1990, and Lease No. W-0313668, issued October 10, 19[illegible], and readjusted on October 1, 1985, respectively. No production has ever occurred on the East Gillette leases.

Effective September 26, 1986, and pursuant to section 2(d)(1) of the MLA, the East Gillette leases were combined with an adjoining coal lease issued by the State of Wyoming (Clovis Point State lease) to form an LMU known as the East Gillette Federal

Mine/Clovis Point Mine Logical Mining Unit (Clovis Point LMU). The effective date of the Clovis Point LMU came little more than three months before the operable date of the prohibition contained in section 2(a)(2)(A), December 31, 1986. Pursuant to section 2(d)(4) of the MLA, the BLM amended the provisions of the East Gillette leases so that mining under the leases would be consistent with the requirements imposed on the LMU. Section 3 of the stipulations of approval for the Clovis Point LMU provided that the diligent development and continuous operation requirements of the individual Federal leases were superseded by the diligent development and continuous operation requirements imposed on the LMU.

Pursuant to section 2(d)(2) of the MLA, the lessee consented to LMU stipulations requiring diligent development, continuous operation and production. The recoverable reserves of the LMU were set forth in the LMU stipulations as 304,346,000 tons, with Kerr-McGee to mine 3,043,460 tons of coal from anywhere within the LMU to achieve commercial quantities. Pursuant to section 2(d)(3) of the MLA, the LMU's stipulations of approval provide in section 3(g) that, for purposes of meeting the commercial quantities requirement of section 2(a)(2)(A), production on any land within the LMU is construed as occurring on all Federal coal leases within the LMU.

The Clovis Point State lease was issued in 1979 and mining commenced immediately. From 1979-1988, Kerr-McGee produced about 18.5 million tons of coal from the Clovis Point State lease, 2.3 million tons of which were produced after the formation of the Clovis Point LMU. In March 1988, Kerr-McGee ceased mining operations on the Clovis Point State lease in the Clovis Point LMU and placed the mine on stand-by status in accordance with a plan of interim stabilization approved by the Wyoming Department of Environmental Quality. Kerr-McGee characterizes this action as a temporary cessation of mining operations, citing depressed market conditions, high mining costs, and the low heat content of the coal relative to competing mines as the factors prompting its decision. Since mining operations on the Clovis Point LMU ceased, BLM has reportedly issued Kerr-McGee over 100 additional Federal oil and gas leases under the MLA.

II. Discussion

A. Application of Section 2(a)(2)(A) to Federal Coal Leases.

1. The Federal Coal Leasing Amendments Act and the Prohibition Contained in Section 2(a)(2)(A).

Congress sought to eliminate what it regarded as the speculative holding of Federal coal leases when it passed FCLAA in 1976. 92 I.D. 537, 540 (1985). The year FCLAA was enacted, only 60 out of a total of 533 outstanding coal leases were in production. Id. The other 473 were being held by the payment of nominal annual advance royalties in lieu of production. Id. Prior to FCLAA, the Secretary had discretion to suspend the condition of production for an indefinite period of time as long as the lessee paid advance royalty. 30 U.S.C. § 207 (1970). There was no effective statutory mechanism in place to ensure diligent development.

Sections 3 and 6 of FCLAA were specifically designed to discourage speculation. 92 I.D. 537, 540 (1985). Section 6 amended section 7(a) of the MLA to require the termination of a lease that fails to produce commercial quantities within ten years. 30 U.S.C. § 207(a) (1988). Section 3 added section 2(a)(2)(A) to the MLA, which prohibits the Secretary from issuing a Federal mineral lease under the MLA to a lessee who holds a Federal coal lease for 10 years after December 31, 1976, and is not producing coal in commercial quantities. 30 U.S.C. § 201(a)(2)(A) (1988).[1] One difference in these two provisions is that section 6 is prospective; it only applies to Federal coal leases issued or readjusted after the enactment of FCLAA. Section 2(a)(2)(A), on the other hand, is a manifestation of Congressional frustration over the lack of development on pre-enactment leases; its prohibition applies to all Federal coal leases effective December 31, 1986.[2]

2. The Secretary Is Authorized to Approve the Formation of LMU's and to Establish Provisions for LMU Compliance with Section 2(a)(2)(A).

Under section 2(d) of the MLA, the Secretary is authorized to approve the consolidation of Federal coal leases with other

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[1]Section 2(a)(2)(A) of the MLA, as added by section 3 of FCLAA, provides:

> The Secretary shall not issue a lease or leases under the terms of this Act to any person, association, corporation, or any subsidiary, affiliate, or persons controlled by or under common control with such person, association, or corporation, where any such entity holds a lease or leases for a period of ten years when such entity is not, except as provided for in section 207(b) of this title, producing coal from the lease deposits in commercial quantities. In computing the ten-year period referred to in the preceding sentence, periods of time prior to August 4, 1976, shall not be counted.

30 U.S.C. § 201(a)(2)(A) (1988).

[2] This deadline was extended by the Act of December 19, 1985, from August 4, 1986, to December 31, 1986. Pub. L. No. 99-190, § 101(d) (1985).

3

Federal leases or non-Federal lands, or both, into an LMU. 30 U.S.C. § 202a(1) (1988). Any mining plan established for an LMU must comport with certain requirements found in section 2(d)(2) of the MLA.[3] Once an LMU is established, the Secretary is authorized to amend any Federal lease included in an LMU so that its terms are consistent with the requirements imposed on the LMU. 30 U.S.C. § 202a(4) (1988).

The Secretary is vested with the authority under section 2(d)(3) of the MLA[4] to provide that production from non-Federal leases in an LMU is attributable to Federal leases in the LMU. 30 U.S.C. § 202a(3) (1988). Under section 2(d)(3) of the MLA, the Secretary appears to have discretion to establish the means of compliance with section 2(a)(2)(A) for lessees which hold coal leases included within LMU's. This interpretation of the term "production," as used in section 2(d)(3), and "producing," as used in section 2(a)(2)(A), rests on the plain meaning of the statutory language, as well as FCLAA's legislative history.[5]

In sum, the Secretary is authorized to approve the formation of an LMU containing Federal leases and non-Federal lands and amend the provisions of any lease included in the LMU so that its requirements for diligent development, continuous operation and production are consistent with the LMU's requirements. Further, the Secretary may also attribute production on any Federal lease or non-Federal lands within the LMU to all Federal leases in the LMU. As a result, it appears that the Secretary has discretion, pursuant to section 2(d)(3) of the MLA to establish that compliance with LMU provisions regarding diligent development,

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[3]The LMU mining plan must require such "diligent development, operation, and production" that the reserves of the entire unit will be mined within forty years. 30 U.S.C. § 202a(2) (1988).

[4]Section 2(d)(3) of the MLA, as added by section 5(b)(3) of FCLAA, states that "[i]n approving a logical mining unit, the Secretary may provide ... that diligent development, continuous operation and production on any non-Federal land in an logical mining unit be construed as occurring on all Federal leases in that logical mining unit." 30 U.S.C. 202a(3)(1988).

[5]A 1985 Solicitor's Opinion addressed this issue as follows:

> Even though no direct reference to section 2(a)(2)(A) was made in the LMU debate, section 2(a)(2)(A) is, although indirect, a requirement forcing "due diligence" from existing leases, and we conclude nothing prevents LMU relief from attributing to a non-producing lease the production that avoids the section's prohibition.

"Section 2(a)(2)(A) of the Mineral Leasing Act of 1920," 92 I.D. 11, 555 (1985).

4

continuous operation and production, will, when satisfied, also serve to meet the requirement for production in commercial quantities found in section 2(a)(2)(A).

3. Congress Understood that LMU's Could Operate as an Exemption from Diligence Requirements.

Although the interaction between section 2(a)(2)(A) and section 2(d) is not specifically explained in the legislative record, several comments lead to the conclusion that, when granting the Secretary broad discretion in the formation of LMU's, Congress understood that LMU's could operate as an exemption from the diligence requirements of sections 2(a)(2)(A) and 7(a) of the MLA. Patsy Mink, Chairman of the Subcommittee on Mines and Mining, appears to have understood the LMU provisions to be an exemption for pre-enactment leases from the diligence requirements that would otherwise be controlling. Chairman Mink referred to the effect of LMU's on diligence requirements when discussing the need for public hearings on LMU formation:

> With respect to logical mining units, where we are providing an enormous exemption to the requirements of due diligence and continuous operation by permitting these old leases to be consolidated and treated as one, that certainly the public ought to be heard: they ought to be apprised of exactly which leases are being consolidated and thereby being given this extraordinary exemption.

122 Cong. Rec. 507 (Jan. 21, 1976).

Later in the discussion, Chairman Mink explained her understanding of how LMU's were intended to interact with requirements for "due diligence in development" of existing leases where she stated:

> [T]he bill here relates to a consolidation of existing leases ... because if we do not give the Secretary of the Interior the authority to consolidate these old leases than every one would have to comply with the requirements of due diligence in development which might not be feasible. So we have agreed to permit this limited use of the LMU device in order to provide for an exemption.

Id. at 508.

These remarks support our conclusion that Congress could be seen to have understood that LMU's could operate as an exemption from section 2(a)(2)(A) because they acknowledge that the statute authorizing the formation of LMU's would, in effect, extend the diligence period for many existing Federal coal leases.

5

4. Regulations Implementing Section 2(a)(2)(A) Allow LMU's to Operate as an Exemption from Diligence Requirements.

The regulations implementing section 2(a)(2)(A) are set out in the rules governing the lease qualification requirements for Federal coal leases. The disqualification stated in section 2(a)(2)(A) is repeated in general terms at 43 C.F.R. § 3472.1-2(e)(1)(i). The rule specifically addressing the lease qualifications of a holder of a Federal coal lease included in an LMU is found in subsection 3472.1-2(e)(6)(ii)(E). It provides:

> (ii) An entity shall not be disqualified under the provisions of this subpart if each lease that the entity holds is:
>
> * * * *
>
> (E) Contained in an approved logical mining unit which is producing coal in accordance with the logical mining unit stipulations of approval pursuant to § 3487.1(a) and (f) of this title.... (Emphasis added.)

43 C.F.R. § 3472.1-2(e)(6)(ii)(E) (1991).

The Secretary has exercised the authority granted to him in FCLAA concerning the interaction between LMU's and section 2(a)(2)(A) by providing in the rules that the LMU must be producing in accordance with stipulations of approval for the LMU in order for the conditions of section 2(a)(2)(A) to be met.[6] The regulations require that the stipulations of approval for an LMU contain all elements required by section 2(d)(2)[7], including a

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[6]We note that your letter focuses on the definition of "producing" found at section 3400.0-5(rr)(6). We do not believe that the definition you have cited applies to section 3472.1-2(e)(6)(ii)(E). Our opinion is based on two factors. First, the context of the usage of "producing" in section 3472.1-2(e)(6)(ii)(E) is different because it refers to the lease qualifications for holders of leases in LMU's, not individual leases. Section 3400.0-5(rr)(6) provides that the leases must be "actually severing coal, or operating an ongoing mining operation in accordance with standard industry practices" in order to be producing and avoid the prohibition of section 2(a)(2)(A), while section 3472.1-2(e)(6)(ii)(E) provides that an LMU must be "producing in accordance with the logical mining unit stipulations of approval." Second, the prefatory language of Part 3400 indicates that the definitions provided in it do not apply to Part 3470; this language could arguably be asserted to its defensive advantage by Kerr-McGee.

[7]Section 2(d)(2) of the MLA, as added by section 5(b)(2) of FCLAA, requires the Secretary to establish an LMU mining plan that requires such diligent development, continuous operation and

6

schedule for achievement of diligent development and continuous operation. 43 C.F.R. § 3487.1(e)(2) (1991). In addition, the Secretary has also exercised the authority granted in section 2(d)(4) of the MLA by providing that the holder of a lease seeking to combine the lease into an LMU must consent to have the lease terms and conditions amended as necessary so that they are consistent with the stipulations of approval for the LMU and the diligence provisions of Part 3480. 43 C.F.R. § 3487.1(b) (1991).

Section 2(a)(2)(A) itself is not mentioned at all in Subpart 3487, which governs the formation of LMU's.[8] The only regulations in Subpart 3487 specifically addressing production are those regarding diligent development and continuous operation. Subpart 3487 makes the LMU subject to diligent development and continuous operation regulations found at subsection 3483.1(c). Tying these various rules together, the Secretary has provided, in his discretionary authority, that the holder of a lease in an LMU meets the production requirements of section 2(a)(2)(A) when the LMU is meeting the diligent development and continuous operation requirements for the LMU.

The regulations provide that diligent development means the production of recoverable coal reserves in commercial quantities prior to the end of the diligent development period. 43 C.F.R. § 3480.0-5(a)(12) (1991). The diligent development period for an LMU is a ten-year period which begins on the effective date of the LMU, if the LMU contains a Federal lease issued prior to August 4, 1976, but not readjusted after August 4, 1976, prior to LMU approval. 43 C.F.R. § 3480.0-5(a)(13)(ii)(A) (1991). Commercial quantities has been defined to be one percent of the LMU's recoverable reserves. 43 C.F.R. § 3480.0-5(a)(6) (1991).

It appears that the Secretary was authorized under section 2(d)(3) of the MLA to make provisions for a coal lessee's compliance with section 2(a)(2)(A) when the lessee holds coal leases contained in an approved LMU. As the Solicitor opined, the specific definition chosen for lessee eligibility under section 2(a)(2)(A) was a matter of policy and program design. 92 I.D. 537, 543 (1985). Where a statute has not directly spoken to the precise question at issue, such as the instant case where

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production that the LMU reserves will be mined in forty years. 30 U.S.C. 202a(2) (1988).

[8]The evolution of the language used in the final rule governing the lease qualifications of holders of leases in LMU's indicates that the rule was amended to require LMU's to produce "in accordance with the LMU stipulations of approval" instead of requiring LMU's to be "producing in commercial quantities," as the proposed rules had provided. Compare 51 Fed. Reg. 37202, 37205 (1986) (Proposed Rule) with 51 Fed. Reg. 43910, 43923 (1986) (Final Rule).

7

FCLAA fails to address the interaction between section 2(a)(2)(A) and LMU's, the court must determine whether the agency's interpretation is permissible. Chevron U.S.A., Inc. v. NRDC, 467 U.S. 837 (1987). Reviewing courts generally defer to an agency's interpretation of the statute unless it is unreasonable. Id.

Under the discretionary authority granted in section 2(d)(3) of the MLA, the Secretary chose, as a matter of policy, to provide by regulation that production from anywhere within an LMU, Federal and non-Federal lands alike, should be construed as occurring on all Federal leases in the LMU for purposes of diligent development and continuous operation. 43 C.F.R. § 3483.6(a) (1991). The Secretary also chose, as a matter of policy, to provide by regulation that a lessee producing in accordance with the LMU stipulations was not disqualified under section 2(a)(2)(A). 43 C.F.R. § 3472.1-2(e)(6)(ii)(E) (1991). Therefore, the Secretary provided that, in the case of LMU's, the production requirements of section 2(a)(2)(A) are satisfied when the lessee is in compliance with diligent development and continuous operation requirements on the LMU.

5. Kerr-McGee Is Producing in Accordance with the Clovis Point LMU Stipulations of Approval.

In the instant case, pursuant to section 2(d)(4) of the MLA, the BLM amended the provisions of the East Gillette leases relating to diligent development, continuous operation and production to be consistent with the LMU's provisions. Section 3 of the stipulations of approval for the Clovis Point LMU provides that the diligent development and continuous operation requirements of the individual Federal leases are superseded by the diligent development and continuous operation requirements imposed on the LMU. The Clovis Point LMU stipulations of approval provide in section 3(g) that, for purposes of meeting production in commercial quantities, production on any Federal lease or non-Federal land within the LMU should be construed as occurring on all Federal coal leases within the LMU.

Pursuant to 43 C.F.R. § 3480.0-5(a)(13)(ii)(A), section 3 of the stipulations of approval provide that the diligent development period for the Clovis Point LMU beg: on September 26, 1986, the effective date of the LMU, because the LMU contained a Federal lease, Lease No. W-0313668, that was issued prior to August 4, 1976, but not readjusted after August 4, 1976, prior to LMU approval. The diligent development production requirements in the Clovis Point LMU stipulations provide that the LMU must achieve production of commercial quantities before September 26, 1996, the date the diligent development period ends. The recoverable reserves of the LMU were estimated to be 304,346,000 tons, so Kerr-McGee must mine 3,043,460 tons from anywhere within the LMU to achieve diligent development. East Gillette Federal Mine/Clovis Point Mine Logical Mining Unit Stipulations, Section 3(c), September 26, 1986.

8

We are advised that the Clovis Point LMU is producing coal in accordance with its stipulations of approval. Thus, under current policy as reflected by regulation, the lessee is not subject to the prohibitions of section 2(a)(2)(A). According to the stipulations of approval for the LMU, the diligent development requirement is the only production requirement that Kerr-McGee must meet for section 2(a)(2)(A) purposes.

B. Application of the Standard "Operating an Ongoing Mining Operation in Accordance with Standard Industry Practices."

After careful consideration, we do not believe that the regulation you have cited in your letter is determinative as to Kerr-McGee's lease qualifications. Your inquiry assumes that the lease qualifications can only be defended based on the definition of the term "producing" as provided at 43 C.F.R. § 3400.0-5(rr)(6). As is clear from the foregoing analysis, we believe that Kerr-McGee's lease qualifications are controlled by 43 C.F.R. § 3472.1-2(e)(6)(ii)(E).

C. Nonproduction Because of Market Conditions under Section 2(a)(2)(A) and Section 7(a).

We agree with the statement in question 3 on the last page of your letter inasmuch as it suggests that nonproduction because of market conditions was one of the practices that section 2(a)(2)(A) was intended to prevent. However, the remainder of your question need not be addressed since it is prefaced on the assumption that Kerr-McGee's lease qualifications can only be defended on the basis that its activities are consistent with standard industry practices.

D. Actions the Secretary May/Must Take if Leases Were Issued Improperly.

As implied in the last question in your letter, the Department of the Interior is authorized to take certain legal actions if it discovers that a Federal mineral lease has been issued improperly. However, your question need not be addressed since it is prefaced on the assumption that Kerr-McGee was not qualified to acquire leases. As is evident from our response to the first question in your letter, we believe that Kerr-McGee was qualified to acquire Federal mineral leases under the regulations implementing LMU compliance with section 2(a)(2)(A).

III. Conclusions

After lengthy analysis, we have determined that the regulations cited in your inquiry are not determinative as to Kerr-McGee's lease qualifications in the instant case. Pursuant to section 2(d) of the MLA, the Secretary is authorized to approve LMU's and to establish the section 2(a)(2)(A) production requirements for leases within LMU's. We believe that Kerr-McGee is qualified to

9

acquire leases under the regulations promulgated to implement the authority granted to the Secretary to approve LMU's and establish their production requirements.

We are advised that Kerr-McGee is producing coal in accordance with the logical mining unit stipulations of approval pursuant to 43 C.F.R. 3487.1(e) and (f), and thus meets the lease qualification provision for LMU's set forth at 43 C.F.R. 3472.1-2(e)(6)(ii)(E). Accordingly, it was not barred from acquiring mineral leases when production stopped on the Clovis Point LMU in March 1988. In effect, 43 C.F.R. 3472.1-2(e)(6)(ii)(E) allows the holder of a lease that would otherwise be in violation of section 2(a)(2)(A) to escape the section 2(a)(2)(A) limitation on the acquisition of new leases by including the lease in an LMU. Kerr-McGee will be required to mine 3,043,460 tons of coal before September 26, 1996, from the LMU in order for the LMU to comply with the diligent development requirements of section 7 of the MLA.

The significance of se-tion 2(a)(2)(A) as a bar to the acquisition of Federal leases is diminishing with the passage of time. Instead, section 7(a) of the MLA is becoming the operative section to ensure diligence and prevent speculation. That section has been construed to provide that any lease which is not producing in commercial quantities at the end of 10 years from the date of issuance or readjustment shall be terminated. Therefore, leases issued or readjusted after 1976 will not often survive to raise section 2(a)(2)(A) issues because they will be terminated under section 7(a) after 10 years when they are neither producing nor paying advance royalties.

In conclusion, while not entirely free from doubt, it appears that the Secretary was authorized under section 2(d) of the MLA to provide that section 2(a)(2)(A) applies to LMU's in the manner described above. This interpretation is a matter of policy formulated by previous Administrations that meets the letter of the law. However, the interpretation appears not to be in concert with a major goal of FCLAA, which was to reduce speculation. This policy could be amended prospectively at any time by following the normal notice and comment rulemaking process. It should be noted that applying such an amendment retroactively to situations such as Kerr-McGee could prove much more difficult.

We trust that the foregoing is responsive to the issues raised in your inquiry. Please contact us should you need further information.

Sincerely,

Patricia J. Beneke

Patricia J. Beneke
Associate Solicitor
Energy and Resources

cc: Assistant Secretary, Land and Minerals Management
Director, Bureau of Land Management

11

Letter to the Director, Bureau of Land Management, Department of the Interior

GAO United States
General Accounting Office
Washington, D.C. 20548

Resources, Community, and
Economic Development Division

September 24, 1992

Mr. Cy Jamison
Director, Bureau of Land Management
U.S. Department of the Interior

Dear Mr. Jamison:

In response to a request from the Chairman, Subcommittee on Mining and Natural Resources, House Committee on Interior and Insular Affairs, we are reviewing various aspects of Interior's federal coal leasing program. During our work we learned that Northwestern Resources Company has applied to lease a tract called West Rocky Butte in Wyoming's Powder River Basin, which, according to the Bureau of Land Management (BLM), contains an estimated 57 million tons of coal. This tract is adjacent to an existing Northwestern Resources lease known as the Rocky Butte lease. BLM estimates that the much larger Rocky Butte lease contains 575 million tons of coal. The lease will expire 1 February 1993, the end of its 10-year "diligence" period, because it has not produced the required commercial quantity of coal.

In the final environmental impact statement for the West Rocky Butte tract, BLM states that if Northwestern Resources Company leases the tract, it will apply to BLM to combine the lease with the Rocky Butte lease into a logical mining unit (LMU). If BLM approves the LMU, a new diligence period will begin for both leases in the LMU, in effect extending the expiration of the Rocky Butte lease from February 1993 to late 2002 (10 years from the date the West Rocky Butte lease is approved).

Before enactment of the Federal Coal Leasing Amendments Act of 1976 (FCLAA), many federal coal leases were held for extended periods and were not producing coal. Concerned about the large number of nonproducing leases, and the possibility that these leases were being held for speculative purposes, the Congress amended the Mineral Leasing Act of 1920 by passing FCLAA. FCLAA contains several provisions designed to encourage diligent development and continued production of coal and to discourage speculative holding of federal coal leases. One such provision provides that any lease that is not producing in commercial quantities at the end of 10 years shall be terminated. Another provision in FCLAA encourages efficient and orderly development of coal leases. This provision allows the Secretary of the Interior to approve the consolidation of federal leases and intervening or adjacent nonfederal leases into an LMU. The purpose of the LMU is to develop the federal coal resources as a unit in an efficient, economic, and orderly manner, with due regard to conservation of coal reserves and other resources.

We are concerned that the effect of allowing Northwestern Resources Company to form this LMU will be to provide Northwestern Resources an additional 10 years in which to meet FCLAA's diligence provision rather than ensuring efficient, economic, and orderly coal production from the Rocky Butte lease. In addition, if the Rocky Butte lease is terminated in accordance with FCLAA, Northwestern Resources, as well as other companies, could bid to lease either the Rocky Butte tract and/or the West Rocky Butte tract. The sale of these leases could result in increased revenue to the government in the form of bonus bids. As demonstrated by Arco's recent bid of $71.9 million for the West Black Thunder tract in Wyoming, which, according to BLM, contains an estimated 429 million tons of coal, these bids can be substantial.

Accordingly, in light of our concerns, we request that you reconsider the appropriateness of the pending West Rocky Butte lease sale and the subsequent formation of an LMU with the Rocky Butte tract. We would appreciate being advised of the results of your reconsideration before the pending lease sale is conducted. Please contact Robert Wilson on (202) 634-7352 if you have any questions.

Sincerely yours,

James Duffus III
Director, Natural Resources
Management Issues

cc: Chairman, Subcommittee on Mining and Natural Resources,
Committee on Interior and Insular Affairs
House of Representatives

Letter From the Deputy Director, Bureau of Land Management, Department of the Interior

United States Department of the Interior

BUREAU OF LAND MANAGEMENT
WASHINGTON, D.C. 20240

IN REPLY REFER TO
3425 (660)

OCT 23 1992

Mr. James Duffus III
Director, Natural Resources
Management Issues
General Accounting Office
Washington, D.C. 20548

Dear Mr. Duffus:

This responds to your letter of September 24, 1992, in which you requested that the Bureau of Land Management (BLM) reconsider holding a coal lease sale for the West Rocky Butte tract. The West Rocky Butte tract is adjacent to the Rocky Butte lease, which terminates in February 1993 unless the lessee, Northwestern Resources Company (NWR), produces coal in commercial quantities from the leasehold. In applying for the West Rocky Butte tract, NWR announced its intention to combine the West Rocky Butte tract with the Rocky Butte lease to form a logical mining unit before he Rocky Butte lease terminates.

After giving careful consideration to your concerns, the BLM, in consultation with the Department of the Interior, has decided to offer the West Rocky Butte tract for lease sale. There were serious policy considerations in reaching the decision, but we have concluded that the public interest is best served by holding the lease sale.

Although the leasing and development of Federal coal resources, especially in the Powder River Basin, generate impressive revenues, Federal coal leasing and development are not managed solely as revenue-generating programs. If revenues were the chief concern, the pace of Federal coal leasing and development would have been much greater than it has been over the last 10 years.

As a manager of coal reserves, the BLM recognizes its responsibility to manage national coal resources in the public interest. The BLM must make coal available to meet industry and consumer demands for energy for those uses in which oil and gas or other energy sources are not a substitute. To do this, it must have a flexible process to analyze the need for competitive leasing at a given time and place and to respond to the need to provide coal at competitive prices for the benefit of energy

2

consumers. It must maintain an orderly, predictable system that protects environmental values and provides a basis for long-range planning by State and local governments, the energy industry, and other groups and individuals concerned about Federal coal development.

Once leases are issued, the BLM must ensure that national interests are protected. Protection is achieved in many ways, among others, by requiring that lessees achieve maximum economic recovery of the leased coal consistent with standard industry operating practices and with conservation of all natural resources. The purpose of a logical mining unit (LMU) is consistent with the statutory maximum economic recovery requirement and aids in promoting the efficient, economic and orderly production of coal and by recognizing that the geology of coal deposits exists apart from lease boundaries and political divisions. The efficient and effective development of coal resources often requires development across lands owned by Federal and State governments and private entities, and LMU formation facilitates such development.

The decision to hold the lease sale in no way guarantees that NWR or any other bidder for the tract will be issued a lease. Coal lease sales are required by statute to be competitive, and competitive bids from lessees of nearby mines are possible. Further, bids must be determined to meet or exceed the fair market value of offered tracts, and there have been instances, including sales in the Powder River Basin, where bids have been rejected for not meeting the BLM's determination of fair market value.

The merits of any LMU application submitted for the West Rocky Butte tract cannot be judged at this time, as no application can be submitted without a lease for the tract. Nevertheless, any such application would be judged on its merits, and approval is not automatic or guaranteed.

We trust that this information has been responsive to your inquiry.

Sincerely,

[signature]

Deputy Director

Appendix VII

Comments From the Department of the Interior

Note: GAO comments supplementing those in the report text appear at the end of this appendix.

United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, D.C. 20240

APR 1 2 1994

Mr. James Duffus III
Director, Natural Resources
Management Issues
General Accounting Office
441 G Street, N.W., Room 1842
Washington, D.C. 20548

Dear Mr. Duffus:

Thank you for the opportunity to comment on the draft report entitled Mineral Resources: BLM's Coal-Leasing Program Needs Strengthening (GAO/RCED-94-10). The report is the latest in a series of substantive reports from the General Accounting Office (GAO) on the Department of the Interior's (DOI) administration of the Federal Coal Management Program. This report affects both the Forest Service (FS) of the Department of Agriculture and the Kerr-McGee Corporation, as well as the DOI. We understand that the FS and Kerr-McGee will respond separately.

The DOI, the Bureau of Land Management (BLM), and all other DOI agencies with coal-related responsibilities stand ready and willing to work with the Congress, the GAO, the industry, and all other interested and affected groups and citizens. The Federal Coal Management Program should be as responsive as possible to changing environmental and societal needs and conditions and to public concerns, while complying with all statutory and regulatory requirements. In that spirit, we provide the following comments to you for your consideration and use.

The report contains findings in four areas: logical mining units (LMU's), lessee qualifications, cumulative environmental impact analysis, and use of projected demand to meet the objectives of the Federal Coal Leasing Amendments Act. Recommendations are made in chapters II and III, and we will respond to these recommendations in the order that they are presented.

Chapter II recommends that the Secretary direct the BLM to revise BLM's regulations to provide clear criteria to determine whether an LMU will further the economic and efficient and orderly development of coal deposits and to ensure that each LMU approval document states how formation of specific LMU's will meet the regulatory criteria. The BLM published a Federal Register notice on December 10, 1993. The notice, an advance notice of proposed rulemaking, requested public comments on all aspects of LMU's, including issues discussed in the report. The notice requests public comments on such matters as whether or not "LMU diligence" should supersede "lease-specific diligence" in meeting production requirements and what should be the effective date of LMU formation.

The closing date for comments on this notice was February 8, 1994. The BLM is now analyzing the comments received. Based on the comments and policy considerations, the DOI will take action to propose any appropriate regulatory changes to the LMU regulations to ensure the efficient, economic, and orderly development of Federal coal with due regard for the conservation of coal and other resources.

See app X.

Chapter II also recommends that the Secretary not issue any additional mineral leases to Kerr-McGee because GAO contends that Kerr-McGee is disqualified, and GAO further recommends that the BLM undertake a study to determine if other leases were inappropriately issued. As is clear from reading the report, different interpretations exist of the meaning of the term "producing" within the context of Section 2(a)(2)(A) of the Mineral Leasing Act. These differences exist because of the complexity of the language of the section and because of the section's even more complex implementation.

The DOI Solicitor's Office provided you with an opinion regarding the application of the section 2(a)(2)(A) requirements to the Kerr-McGee situation. In that instance the BLM had relied on a duly promulgated regulation that provided that a lessee was not disqualified under section 2(a)(2)(A) if the lease involved was in a logical mining unit which was producing in accordance with the logical mining unit stipulations of approval.

The legal opinion stated that the Solicitor's Office was unable to conclude that the contemporaneous interpretation and application of the section 2(a)(2)(A) requirements in that instance were beyond the scope of the Secretary's authority granted by the Federal Coal Leasing Amendments Act. The opinion noted that BLM's interpretation was a matter of policy formulated by previous Administrations that met the letter of the law but that appeared not to be in concert with a major goal of FCLAA, which was to reduce speculation. The opinion further observed that the policy could be amended prospectively at any time by following the normal notice and comment rulemaking process. The Solicitor's Office plans to comment separately on the draft report's comments regarding the legal opinion of that office.

In response to the recommendations on section 2(a)(2)(A), the BLM has and will continue to update its list of disqualified entities under section 2(a)(2)(A) for use by BLM field offices in determining the eligibility of prospective lessees to hold or acquire Federal coal leases and to acquire other mineral leases.

3

The BLM is currently reexamining its lessee qualification procedures and plans to affect appropriate revisions as soon as practicable.

Chapter III recommends that the Secretary of the Interior direct the BLM Director to reemphasize the importance of complying with requirements for identifying and addressing cumulative environmental impacts from coal leasing and development. The BLM has prepared an instruction memorandum to its field offices directing that each environmental document either directly address cumulative impacts or incorporate by reference other environmental documents that address cumulative impacts.

Chapter IV contains no recommendations. The report concludes that the BLM can meet statutory objectives by not tying the amount of coal offered for lease to projected demand or market conditions and that fair market value does not equate with maximizing revenues.

We will keep you apprised of any regulatory or policy initiatives in areas covered by this report. Our detailed comments are enclosed with this letter.

Sincerely,

Bob Armstrong

Bob Armstrong
Assistant Secretary, Land and
Minerals Management

Enclosure

DETAILED COMMENTS

We offer the following suggested changes and comments.

CHAPTER 1. "Introduction."

General. The purpose of reviewing Federal coal leasing procedures (pp. 10-16) is not clear, as no further use is made of the data about procedures in the remainder of the report.

See comment 1.

Page 10, Second Paragraph. Change the numbers as follows: "As of September 30, 1992, BLM had 449 coal leases containing about 14.4 billion tons of recoverable coal. During fiscal year 1992, the BLM had 135 active leases which collectively produced 234.6 million short tons of coal from which $265.7 million in Federal royalties were collected."

See comment 1.

Page 11, First Paragraph. The most recent year for which data are available is 1993. According to the Minerals Management Service, Royalty Management Program, total United States production for 1993 was 958 million short tons, and total Federal production was 245.9 million short tons, or about 25 per cent of the total. Further, there is a discrepancy between the statement that 1991 data were the most recent available and the data shown in the Table 1.1 at the bottom of page 10, which are stated to be 1992 production data. FY 1992 production data for Table 1.1 are as follows: Wyoming, 169.4 M/T (short); Montana, 22.6 M/T (short); Utah, 17.95 M/T (short); Colorado, 12.6 M/T (short); All Others, 9.1 M/T (short).

See comment 2.

Page 11, Lead Paragraph Under "Procedures for Leasing Federal Coal Under the Mineral Leasing Act of 1920." The BLM was not established until 1946, hence could not have been issuing coal leases in 1920. The first Federal leasing agency was the War Department, which, under Congressional authorization, leased lead deposits to miners for a 10 percent royalty in pure lead or money. In 1920 Interior's General Land Office was leasing minerals on lands within its jurisdiction.

See comment 3.

Page 12, First Paragraph. We suggest that the term "little," used twice in the first line, be quantified. The history of coal disposition by the Federal Government suggests a large-scale disposition of coal during certain periods. For instance, as of 1906, 406,370 acres of public coal-bearing lands had been sold under the Coal Lands Act of 1873. (Compare with the 266,620 acres under lease as of the end of FY 1993.) We suggest that the term "greatly," used in the second line, also be quantified, to give readers an idea of the degree of increase.

See comment 2.

Page 13, Last Paragraph on Page. In line 1, it is unclear why the procedures for regional coal leasing are any more or less "rigid" than any other coal leasing procedures. Regional leasing procedures are generally established by regulation, as are the

DETAILED COMMENTS (cont.) 2

procedures for LBA leasing and coal lease exchanges. In line 12, the Secretary is said to have established regional leasing "levels." Between July 1979 and July 1982, the Secretary in fact established regional leasing "targets." The July 1982 regulatory revisions changed targets to levels, to reflect a change in leasing policy from a specific amount (target) to a range of amounts (level). (See further discussion under Chapter IV below.)

See comment 4.

Page 14, Paragraph on LBA Leasing. Leasing levels reflect the tonnages of combinations of tracts. The BLM may modify LBA tract boundaries to comply with the statutory requirements of maximum economic recovery and conservation of the resource (see 43 CFR 3425.1-9), and this may serve as a single-tract leasing level. When an applicant applies for a coal tract, indicating an interest in leasing Federal coal, a call for expressions of leasing interest would be redundant.

See comment 2.

Pages 14-15, Paragraph Split Between Pages. The lease is awarded to the highest bidder provided that the bidder's bid meets or exceeds the fair market value (FMV). The FMV of a tract is not established until after a sale; the value calculated by the BLM before the sale is an estimate and can be modified by various factors, including the amounts of any bids received.

See comment 4.

Page 16, First Full Paragraph. It would be useful to compare the LBA leasing statistics for the 5-year period with those from the regional leasing period (January 1981 through September 1983). During that 33-month period, the BLM leased 46 tracts containing 2.1 billion tons of Federal coal. In other words, in about half the time, the BLM leased twice as much coal.

See comment 4.

Page 17, First Full Paragraph and Appendix 1. For your information, counties in the geographic areas studied are as follows: Powder River (Wyoming portion)--Big Horn, Campbell, Converse, Crook, Goshen, Johnson, Natrona, Niobrara, Sheridan, and Weston; Uinta-Southwestern Utah (Utah portion)--Carbon, Daggett, Duchesne, Emery, Garfield, Grand, Iron, Kane, Morgan, San Juan, Sanpete, Sevier, Summit, Uinta, Utah, Wasatch, Washington, and Wayne; Alabama Subregion, Southern Appalachian--Fayette, Jefferson, Tuscaloosa, and Walker. Kentucky has never been part of a coal production region, but active mines with Federal coal leases are located in Bell and Whitley counties.

See comment 2.

CHAPTER 2, "Certain BLM Actions Do Not Encourage Timely Federal Coal Development and Discourage Speculation."

General. On several pages in this chapter and in the Executive Summary and Introduction, the GAO uses the term "expire" to refer to leases which do not meet the diligent development requirements of the Mineral Leasing Act. The statute specifically uses the term "terminate" to describe that action. The Department

DETAILED COMMENTS (cont.. 3

suggests that the GAO use the terms "expired" and "expiration" only to refer to leases when they fail to maintain continued operation after their twentieth lease years.

See comment 5.

The following sentence appears in this chapter and other parts of the report, "..BLM has allowed non-producing leases to be consolidated into a logical mining unit (LMU) primarily to extend the life of one of the leases rather than to further the economic recovery of federal coal." The GAO should be aware that there was an extensive discussion in Congress about LMU's, which was printed in the Congressional Record, 507-8, Jan. 21, 1976, and in the committee report. Representative Patsy Mink of Hawaii, then chairperson of the subcommittee on mining, explained that the LMU provision provided an "extraordinary exemption" to the 10-year diligence provision. Further, the extensive discussion notwithstanding, Congress specifically did not include in the FCLAA a prohibition against extending the diligent development period of any leases because of their inclusion in an approved LMU.

See comment 2.

Page 22, "Provisions for Economic and Efficient Development." In the first paragraph, it is mentioned that the FCLAA allows the Secretary of the Interior to approve the formation of LMU's. In fact, the statute allows the Secretary to direct the formation of LMU's, i.e., order lessees to form LMU's. (See 30 U.S.C. §202a(6)). To date, the Department has chosen to act only on applications filed by coal lessees and not to dictate LMU formation to coal lessees.

See comment 2.

Page 24, First Full Paragraph. This paragraph confuses lease suspensions with the continued operation requirement. If the BLM grants a coal lessee a lease suspension, no production occurs from the lease, and therefore no payments are due. Per the Mineral Leasing Act and the terms and conditions of the lease, advance royalties are paid in lieu of continued operation. The lease is in effect--not suspended--during the continued operation period.

See comment 6.

Pages 24-25. "BLM LMU Approval May Not Encourage Federal Coal Development." The Department does not believe that extending the life of leases within an LMU and furthering the economic development of the coal within the LMU are mutually exclusive. As was previously mentioned (see General comment at the beginning of these Chapter comments), the Congress was aware that LMU formation was an exemption to the 10-year requirement for individual leases to produce commercial quantities of coal. As at least two of the purposes of LMU formation were to foster the FCLAA-mandates of conservation of the resource and maximum economic recovery, the LMU concept was enacted into law.

It is true that the BLM does not have criteria for determining when an LMU is being created merely to extend the lease rather

DETAILED COMMENTS (cont.) 4

than to promote the "efficient, economical, and orderly" development of coal resources. The BLM will be considering specific criteria for "efficient, economical, and orderly" development of coal resources as part of the revision of the LMU regulations.

See comment 7.

Page 25, Partial Paragraph at Top of Page, Phrase "Approving the LMU...delays the impact of diligence...without compensation to the government...". If, by the phrase "without compensation to the government," the GAO intends to describe delayed royalty payments, we point out that, if leases terminate, no royalty payments are due the Federal Government. If the formerly leased coal is later offered for lease sale, there may or may not be any bidders for the lease. If no lease issues, no royalty payments are due. Even if a lease issues, it is arguable what would cause more of a delay in royalty payments--including the lease within an approved LMU or releasing the coal and having the lessee go through the process of opening a mine.

If, by the phrase "without compensation to the government," the GAO is advocating some sort of LMU holding fee in lieu of production, we point out that the Department has no statutory authority to impose such a fee. The BLM sought on several occasions in the 1980's to seek legislative authority to impose a holding fee on non-producing leases, but this proposal was not adopted by the Congress. The statement also ignores any bonuses and rentals paid by coal lessees.

See comment 8.

Pages 25-27, "Approval of Wyoming LMU Raises Concern About Implementation of FCLAA's Development Objective." The bonus paid for the West Rocky Butte tract was the highest of any tract sold in the Wyoming portion of the Powder River Basin, either on a cents-per-ton or dollars-per-acre basis during the years 1991 to the present. This is significant when compared to all of the other sales, which involved coal with higher Btu values and lower sulfur concentrations. All of the other tracts were located adjacent to existing mining operations, and the Rocky Butte/West Rocky Butte mine will have to be developed, at a fixed capital cost of over $100 million beyond the lease acquisition costs. Expenditure of this amount of money suggests an intent to develop the two leaseholds.

See comment 9.

Further, the lessee assumes the risks . development. If the Rocky Butte/West Rocky Butte LMU is not producing coal in commercial quantities at the end of the LMU diligent development period, the leases revert to their individual diligence periods and terminate at the periods set by statute. It is not clear that, should the BLM reoffer the Rocky Butte or West Rocky Butte tracts for sale, there would be any bidders. The Keeline tract, which contains coal of similar quality, terminated in 1992, with no other companies interested in having it put up for resale.

DETAILED COMMENTS (cont.) 5

Finally, the discussion does not seem to consider the administrative costs of reoffering the West Rocky Butte Tract as an offset to future revenues. Information presented to the GAO during its field investigations, particularly with the BLM Wyoming, indicates the administrative costs to be considerable, i.e., $4 million for the two 1982 Wyoming regional lease sales and $2.5 million for the four LBA Wyoming sales. The lessened cost of the LBA sales was at least partially due to the applicants' paying for the preparation of the environmental documents.

See comment 10.

Page 25, Bottom Paragraph. In line 7, the estimated tonnage contained in the West Rocky Butte tract is 55 million tons, not 57 million tons.

See comment 2.

Page 26, First Paragraph, Last Sentence. Per the draft and final West Rocky Butte EIS's, the intent of the applicant was to combine the West Rocky Butte tract (if obtained in the sale) with the adjoining Rocky Butte Tract to form an LMU. The BLM determined that the West Rocky Butte Tract contained insufficient reserves to support a new mine and thus focused the proposed action in EIS's on combining the Rocky Butte and West Rocky Butte tracts into a new mine. We do not believe that piecemeal or no development of coal resources results in economic, efficient, or orderly development.

See comment 11.

Page 27, First Paragraph. The draft and final West Rocky Butte environmental impact statements announced that the applicant's intent, if it obtained the West Rocky Butte tract, was to combine it into an LMU with the Rocky Butte lease. The compensation was $1[illegible].5 million, or 30 cents per ton, the highest amount paid for any of the Powder River tracts. Further, rentals on the two leases are due annually in the amount of $3 per acre.

See comment 8.

Pages 27-28, "LMU Saves Two Leases From Termination in Alabama." The Department believes that this situation does not enhance the GAO's arguments against LMU's extending the life of leases but in fact supports the purposes for which LMU's were enacted into the law: efficient, orderly, and economical development of coal resources. The Eastern States BLM approved the lessee's LMU application because it met all of the statutory and regulatory requirements for LMU formation. The LMU produced coal in commercial quantities in FY 1993 from non-Federal lands. In other words, the LMU achieved diligent development, economic recovery of coal was attained, royalties and rents were paid to those entities designated by statute, and coal was used to benefit consumers.

See comment 12.

If the leases had terminated, the BLM would have had to reoffer the tracts for competitive sale at a later date. There is no guarantee that the former lessee would bid on those lease tracts if they were reoffered; in fact, the lessee would probably have

DETAILED COMMENTS (cont.) 6

changed its mining sequence to bypass the Federal coal altogether. No revenues would then have been generated from the Federal coal resources.

Page 28, "LMUs Might Be Used to Extend Other Nonproducing Leases Approaching the End of Their Diligence Periods." As of September 30, 1992, there were 449 coal leases.

See comment 2.

The word "active" should be defined. In the context used, it does not mean "producing." In the GAO study area there were in fact 19 approved LMUs as of December 1993, when the report ended: one in Alabama, six in Utah, and 12 in Wyoming's Casper District. Eight LMU applications are pending, all in Utah.

See comment 13.

Page 28, Only Full Paragraph. We do not understand the basis for the $200,000 stated as the loss to the Government of delaying the royalty payments. The calculation assumes that the Rocky Butte lease tract would eventually be resold and developed if it had terminated in February 1993. This may be an optimistic assumption. The tracts used for comparison in the paragraph, West Black Thunder and North Antelope/Rochelle, contain higher Btu value, lower sulfur coal.

See comment 14.

Pages 29- 31, "BLM Has Not Substantiated a Need for Its Proposed Relaxation of Production Requirements." The Department has previously responded to the referenced report, Mineral Resources: Proposed Revisions to the Coal Regulations (GAO/RCED-92-189). It is not clear why the findings of that report are reproduced in this report. We note, however, that the proposal criticized by the GAO was only a request for information to substantiate or not the validity of another commercial quantities amount than 1.0%, and 0.3% was given as a possible option. None of the commenters on that proposal supplied any information which would support a regulatory change in the commercial quantities amount from 1.0% to any other amount. The proposal has not been adopted.

See comment 2.

Pages 32 - 34, "History of Kerr-McGee Leases." Change the date in the first paragraph under this section from December 31, 1986, to December 30, 1986. December 31 was the date on which section 2(a)(2)(A) became effective.

In line 3 on page 32, change the word "produce" to the phrase "be producing coal in." In line 1 on page 33, change the word "produced" to the phrase "continued to be producing."

CHAPTER 3, "Environmental Assessments Do Not Always Address Cumulative Impacts of Coal Mining."

General. The following information is given to provide a context for the discussion on the EA's reviewed by the GAO in Utah. The four lease tracts were adjacent to existing operations and were needed by the prospective lessees to maintain production. In the

DETAILED COMMENTS (cont.) 7

State of Utah, coal mining is chiefly conducted by underground methods because of the depth of the coal beds. Underground mining generally causes impacts on fewer resources than does surface mining. The coal mining industry has undergone consolidation, and old mines are being opened up and reworked. The industry employs about half the workers that it did in 1983 and yet produces more coal. The overall population in the impacted counties (principally Carbon, Emery, and Sevier) has steadily declined since 1983 and is just now leveling off.

This population decline has caused a decline in revenues to the general area. The decline in revenues is encouraging States and counties to seek additional revenues.

See comment 15.

As to the GAO criticisms about Utah's review of cumulative effects, we recognize the need for better documentation. However, Utah in fact did analyze cumulative effects in our view. In recognition of the issue of documentation, we have prepared an Instruction Memorandum to the States to better ensure national consistency and uniformity and to ensure that cumulative effects are fully documented. GAO contends that BLM Utah is not summarizing the results of previous, applicable cumulative analyses from which the site-specific analyses are being tiered. Our BLM Utah State Office indicate that the four environmental assessments (EA's) reviewed by the GAO were site-specific updates of four tracts which had been analyzed in a 600-plus page Round II Uinta-Southwest Utah Regional Environmental Impact Statement (EIS) or a 558-page Forest Land and Resource Management Plan. Both these documents contain cumulative impact analyses.

See comment 2.

Pages 42-43, Paragraph Split Between Pages. The preparation of environmental documents can be a collaborative effort under any process, not just the LBA process. Other surface management agencies often contribute to mineral leasing environmental documents, as their consent must be obtained before the BLM may issue leases on their lands.

See comment 15.

Page 48, "Environmental Assessments in Utah Do Not Specifically Address Cumulative Impacts on Most Resources." Per BLM Utah, the environmental assessments reviewed by the GAO were updates that were intended to identify and evaluate any additional concerns that arose since the preparation of the Round II Uinta-Southwestern Utah EIS or the Forest Land and Resource Management Plan. In Southern Utah Wilderness Alliance, et al, 127 IBLA 331, 350, the Interior Board of Land Appeals noted, "The Board has also pointed out that where BLM has prepared an earlier EIS discussing impacts of proposed management decisions, subsequent analyses may briefly summarize the impacts more fully explored in the EIS, a process known as tiering."

DETAILED COMMENTS (cont.) 7

State of Utah, coal mining is chiefly conducted by underground methods because of the depth of the coal beds. Underground mining generally causes impacts on fewer resources than does surface mining. The coal mining industry has undergone consolidation, and old mines are being opened up and reworked. The industry employs about half the workers that it did in 1983 and yet produces more coal. The overall population in the impacted counties (principally Carbon, Emery, and Sevier) has steadily declined since 1983 and is just now leveling off.

This population decline has caused a decline in revenues to the general area. The decline in revenues is encouraging States and counties to seek additional revenues.

See comment 15.

As to the GAO criticisms about Utah's review of cumulative effects, we recognize the need for better documentation. However, Utah in fact did analyze cumulative effects in our view. In recognition of the issue of documentation, we have prepared an Instruction Memorandum to the States to better ensure national consistency and uniformity and to ensure that cumulative effects are fully documented. GAO contends that BLM Utah is not summarizing the results of previous, applicable cumulative analyses from which the site-specific analyses are being tiered. Our BLM Utah State Office indicate that the four environmental assessments (EA's) reviewed by the GAO were site-specific updates of four tracts which had been analyzed in a 600-plus page Round II Uinta-Southwest Utah Regional Environmental Impact Statement (EIS) or a 558-page Forest Land and Resource Management Plan. Both these documents contain cumulative impact analyses.

See comment 2.

Pages 42-43, Paragraph Split Between Pages. The preparation of environmental documents can be a collaborative effort under any process, not just the LBA process. Other surface management agencies often contribute to mineral leasing environmental documents, as their consent must be obtained before the BLM may issue leases on their lands.

See comment 15.

Page 48, "Environmental Assessments in Utah Do Not Specifically Address Cumulative Impacts on Most Resources." Per BLM Utah, the environmental assessments reviewed by the GAO were updates that were intended to identify and evaluate any additional concerns that arose since the preparation of the Round II Uinta-Southwestern Utah EIS or the Forest Land and Resource Management Plan. In Southern Utah Wilderness Alliance, et al. 127 IBLA 331, 350, the Interior Board of Land Appeals noted, "The Board has also pointed out that where BLM has prepared an earlier EIS discussing impacts of proposed management decisions, subsequent analyses may briefly summarize the impacts more fully explored in the EIS, a process known as tiering."

See comment 2.

See comment 16.

DETAILED COMMENTS (cont.) 8

<u>Page 50. "The Extent to Which Cumulative Impacts Were Addressed Is Associated With the Extent of Public Involvement.</u>" It is unclear what is meant by the use of the word "involvement" in the section title and in the first sentence. It is not clear from the discussion that the opportunities for public involvement were any fewer in Utah than they were in Wyoming or Kentucky. Public concerns in Utah about the impacts of coal leasing, including cumulative impacts, were less.

CHAPTER 4, "Projecting Coal Demand Is Not Necessary to Meet FCLAA's Objectives."

<u>General</u>. The BLM's decision to use coal forecasts in its leasing decisions was due to a variety of factors exclusive of the FCLAA. When the Congress established the Department of Energy (DOE), one of its responsibilities was to set national energy goals. Not only did DOE set these goals based on forecasts using various assumptions and policy decisions; but it also criticized Interior for not leasing enough coal, oil, gas, oil shale, etc., thereby preventing the United States from becoming energy independent.

The DOE's coal demand projections in the late 1970's reflected policy initiatives, including a goal of 1 million barrels of synfuels per day. The DOE requested therefore that forecasters should factor synfuel use into their demand forecasts. The result was greatly inflated demand forecasts.

As a result of uncertainty in forecasting, the BLM de-emphasized the use of forecasting in making lease sale decisions. This de-emphasis was made despite objections from certain groups, including the GAO in its 1980 report, <u>A Shortfall in Leasing Coal from Federal Lands: What Effect on National Energy Goals?</u>. Pressure to rely more on forecasts continued from certain groups, including some State Governments. During the regional leasing period (January 1981 through September 1983), the BLM focused on accounting for market trends, since industry interest was sometimes not apparent until well into the regional process.

Market trend information can be useful. In the early to mid-1980's, coal demand had slumped considerably. With the substantial Federal leasing that had occurred during the regional leasing period, certain forecasters expected additional Federal coal leasing would not be needed for many years and advocated no new Federal coal leasing. The BLM issued a supplemental programmatic EIS in 1985. The conclusions of the market analysis were that, while leasing at that time was not necessary except for isolated site-specific needs, an increase in applications would start in Utah in 2-3 years and a significant increase in leasing interest in the Powder River Region, especially Wyoming, would start by 1990. That is essentially what happened.

Although forecasting may not be necessary under LBA leasing, the BLM should remain aware of market trends for resource management planning and for economic evaluation. Once the recent (1991-1993) bulge in leasing in the Powder River Region is concluded, leasing should continue at a slower but steady rate. (The bulge in leasing activity in that region was due to a 9-year hiatus in competitive leasing.)

<u>Pages 53-54. "Projected Coal Demand Was Considered in Setting Regional Coal Lease Sale Levels</u>." The July 1979 regulations used "regional leasing <u>targets</u>," not "regional leasing levels."

See comment 2.

Leasing targets are exactly described by the first paragraph on page 54. Regional leasing levels were established by the July 1982 regulatory revisions to account for the uncertainties inherent in forecasting future coal demand. The BLM has only minimal experience in using regional leasing levels, as there has been no regional coal leasing activity since September 1983.

See comment 4.

<u>Pages 54-55. "Projected Demand Does Not Determine the Amount of Coal To Be Leased in the LBA Process</u>." The BLM assumes that expressed interest in leasing a specific tract of Federal coal is equivalent to demand. With the exception of the West Rocky Butte Tract, mentioned at length in the report, almost all coal LBA tracts have represented extensions of existing mining operations, and the leased coal has been needed either to prevent the bypass of Federal reserves or to fulfill lessees' contract obligations. The lessee assumes the burden of finding a customer for the leased coal, if there is not one already. The Government has less assuranc hat tracts offered in regional lease sales will be leased. Tracts offered in regional sales predominantly constitute the opening of new mines and are thus more dependent on market conditions than are LBA tracts.

See comment 4.

<u>Page 56. Last Paragraph</u>. With reference to the sentence "FCLAA requires receipt of fair market value, not maximization of Federal revenues," we note that the Department was criticized by the Congress and others for not getting more money for coal tracts located in the Powder River Basin in Wyoming in two 1982 sales. The GAO estimated that the Department had undervalued the coal by about $100 million. An investigative staff of the U. S. Congress charged that the sale had been held in a soft coal market, thereby losing revenues. The Department's defense was that it was not seeking to maximize revenues but instead was considering consumers who required electricity and jobs which was not acceptable to the Congress.

See comment 17.

<u>Page 60. Appendix 1. First Full Paragraph</u>. We would appreciate any data the GAO may have to support that statement that groundwater resources are significantly affected by coal mining in the Powder River Basin. The BLM has conducted a search of its files and can find no substantiation that adverse impacts to the

DETAILED COMMENTS (cont.) 10

groundwater of the Basin have occurred. There are letters of concern about potential impacts, but these letters provide no supporting data. Per BLM Wyoming, the Wyoming Department of Environmental Quality and the Wyoming State Engineer have thus far detected no adverse impacts, despite extensive groundwater monitoring activities.

The following are GAO's comments on the Department of the Interior's letter dated April 12, 1994.

GAO Comments

1. The report has been updated to reflect new information provided by Interior in April 1994.

2. Clarifications have been made to the text of the report.

3. The history of coal demand as we present it is taken from the 1985 Final Environmental Impact Statement Supplement for Interior's Federal Coal Management Program, page 22. We believe that presentation is accurate, appropriate, and fair, and thus we have made no change.

4. We made no change in response to this comment. The presentation in the text is correct, and the suggested change adds additional detail that is not necessary for an understanding of the federal coal-leasing program.

5. See our detailed response to the office of the Solicitor's comments in appendix X.

6. We agree with Interior that extending the life of leases within a logical mining unit (LMU) and furthering the economic development of the coal within the LMU are not mutually exclusive. However, we believe that the LMU provision should be used in a manner consistent with the goals of the act, that is, encouraging the development of coal production on federal leases and discouraging the speculative holding of leases. We believe that the exemption granted by the LMU provision should not be used primarily to extend the diligence period and that rejecting the formation of an LMU would not be inconsistent with fostering the development of the coal, conservation of the resource, and maximum economic recovery. We are pleased to see that Interior is considering proposed regulations that would provide criteria that BLM can use to determine whether to approve an LMU.

7. When BLM sells a lease, it exchanges the rights to produce and sell coal in exchange for a bonus bid, rental payments, and royalty payments. The royalty payments would start within 10 years on the basis of the mine's production of commercial quantities within that time and its continued production of commercial quantities thereafter. If a lease is extended beyond its 10-year term without production, the lessee is obtaining the right to extend the time it is allowed to achieve commercial production without compensating the government.

We are not advocating a holding fee in lieu of production. We are pointing out that when BLM approves an LMU whose primary purpose is to extend the diligence period, BLM is providing something of value for which it has not been compensated.

8. Although Interior notes that the sale price per ton of the 55-million-ton West Rocky Butte lease (about 30 cents per ton) was high, we believe the price was high because the sale and subsequent formation of an LMU allowed the lessee to keep the much larger Rocky Butte lease. In establishing the value for the West Rocky Butte lease, BLM used, as its basis, the combined tonnage of both leases. Had the Rocky Butte lease terminated and a combined Rocky Butte and West Rocky Butte tract been offered and sold for the price that Northwestern Resources Company paid for the West Rocky Butte tract, the bid price of coal acquired would be 2.75 cents per ton. While Interior points out that rentals are due on the two leases, the amount of rent—approximately $16,000 annually—is very small relative to the value of the coal contained in the LMU.

9. The Chief of BLM's Solid Mineral Operations Division concluded in an October 1990 evaluation that if the Rocky Butte lease terminated, there would be no impediment to future development of the tract by the lessee or another entity when the market for Powder River Basin coal is no longer saturated. In addition, BLM's Branch of Mining Law and Solid Minerals and Northwest Regional Evaluation Team in Wyoming concluded that if the Rocky Butte lease terminated, the government would have a strategically placed block of coal ready for sale in the future when coal prices increase. They estimated that the bonus bid could range from $25 million to $125 million and that the sale might elicit true competition.

10. From the potential future sale price that BLM Wyoming officials cite for the Rocky Butte lease—$25 million to $125 million—it appears that BLM believes the potential future selling price would far exceed the cost of the sale.

11. Allowing the Rocky Butte lease to terminate would not promote piecemeal development. To the contrary, the Chief of BLM's Solid Mineral Operations Division concluded in an October 1990 evaluation that if the Rocky Butte lease terminated, there would be no impediment to future development of the tract by the lessee or another entity when the market for Powder River Basin coal is no longer saturated.

12. The discussion of the two Alabama leases and the associated LMU has been deleted from the final version of this report.

13. The discussion of the loss to the government from delaying royalty payments has been deleted from the final version of this report.

14. The discussion of the findings of our August 1992 report has not been repeated in the final version of this report.

15. Our report recognizes that "tiering" is an acceptable practice to avoid redoing assessments. However, when an assessment does not show direct links to prior studies, tiering cannot be assumed. In our reading of the Utah assessments, we could not determine that these assessments had been tiered to prior studies. After discussions with the preparers, we were told that the assessments were tiered.

16. Our report notes the lack of public concern over coal leasing in central Utah.

17. We have revised the text to more clearly convey that mining in eastern Powder River Basin areas containing aquifers clearly has the potential to effect those aquifers and that those impacts need to be considered in the environmental assessments. These impacts are discussed in the U.S. Geological Survey Water Resources Investigations Report 88-4046.

Comments From the Department of the Interior's Office of the Solicitor

Note: GAO comments supplementing those in the report text appear in appendix X.

United States Department of the Interior

OFFICE OF THE SOLICITOR

APR 11 1994

Mr. James Duffus III
Director, Natural Resources Management Issues
United States General Accounting Office
441 G St., N.W., Room 1842
Washington, D.C. 20548

Dear Mr. Duffus:

Thank you for allowing us to comment on the draft report entitled Mineral Resources: BLM's Coal-Leasing Program Needs Strengthening (GAO/RCED-94-10). Our remarks are limited to the discussion in Chapter 2 on Kerr-McGee Coal Corporation's (Kerr-McGee) eligibility under section 2(a)(2)(A) of the Mineral Leasing Act (MLA) to acquire federal onshore mineral leases since March 1988. For the reasons elaborated below, we cannot concur with the conclusion that Kerr-McGee has, since March 1988, been disqualified from acquiring new leases, or with the suggestion that the Bureau of Land Management (BLM) review any leases issued to Kerr-McGee from that time to the present for possible cancellation.

Pursuant to your request, on August 4, 1993, the Department of the Interior's Associate Solicitor for Energy and Resources provided the General Accounting Office (GAO) with an opinion regarding the application of the prohibition on lease issuance provided for by section 2(a)(2)(A) to Kerr-McGee. Kerr-McGee held two federal coal leases which were combined in a logical mining unit (LMU) that had ceased actual production. The Associate Solicitor's opinion advised GAO that the Solicitor's Office was unable to conclude that the contemporaneous interpretation and application of the section 2(a)(2)(A) requirements by BLM in the Kerr-McGee case were beyond the scope of the Secretary's authority granted by the Federal Coal Leasing Amendments Act (FCLAA). I concur in the opinion and in that conclusion.

The opinion observed that the BLM had relied on a duly promulgated regulation in effect at the time in determining that the lessee at issue was not barred from obtaining mineral leases by operation of section 2(a)(2)(A) of the MLA. That regulation, codified at 43 C.F.R. § 3472.1-2(e)(6)(ii)(E), provides that a lessee is not disqualified under section 2(a)(2)(A) of the MLA if the lease involved is contained in an LMU which is producing in accordance with the LMU's stipulations of approval.

Because of the inclusion of the leases at issue in an LMU, the provisions of section 2(d) of the MLA providing for LMUs are triggered. That section grants the Secretary discretion to provide that diligent development, continuous operation and production on any federal lease or non-federal land be construed as occurring on all federal leases in the LMU. The section also specifically states that pre-1976 leases, such as those involved in the matter at hand, may be included in an LMU and become subject to the production requirements of the LMU. The legislative history of FCLAA demonstrates that the congressional drafters recognized that the LMU provisions were "an enormous exemption" to the due diligence provisions otherwise imposed by the MLA as amended.

Based on this discretion granted by section 2(d) of the MLA, the Secretary promulgated the regulation at 43 C.F.R. § 3472.1-2(e)(6)(ii)(E) setting forth special requirements relating to LMUs and section 2(a)(2)(A) compliance. That regulation states that an LMU must be "producing in accordance with the logical mining unit stipulations of approval" in order to escape the prohibition of section 2(a)(2)(A).

The stipulations of approval for Kerr-McGee's LMU provide that Kerr-McGee must meet the 10-year diligent development requirement, under which the operator promises to produce coal in commercial quantities from the LMU within 10 years. While the draft GAO report attaches significance to the fact that the LMU has not produced since 1988, the fact remains that Kerr-McGee is in compliance with these LMU stipulations of approval, even in the absence of present production, so long as production in commercial quantities is achieved by September 26, 1996. Kerr-McGee thus falls within the exception to section 2(a)(2)(A) disqualification provided for by the above-cited regulation.

Given the broad grant of discretion in section 2(d) of the MLA and the existence of the duly promulgated regulation, we are unable to conclude that BLM's determination that Kerr-McGee was not barred under section 2(a)(2)(A) was contrary to law.

As the Associate Solicitor noted, however, BLM's regulation was a matter of policy formulated by previous Administrations. In fact, she observed that, while BLM's interpretation was legally permissible, it arguably did not well serve a major goal of FCLAA, which was to reduce speculation. Accordingly, she suggested that the regulation could be amended prospectively at any time by following the normal notice and comment rulemaking process. In fact, BLM thereafter issued, on December 10, 1993, an advanced notice of proposed rulemaking seeking public comment on LMUs, including diligence requirements relating to LMUs.

Furthermore, the Associate Solicitor's review was confined to the applicable law and regulations relating to section 2(a)(2)(A) and section 2(d) of the MLA, e.g., she did not review any issues surrounding the appropriateness of the formation of the LMU involved.

In our view, the draft report's analysis of Kerr-McGee's qualification to acquire new federal leases since 1988 suffers from three major shortcomings. First is its disregard for the legal significance of the existence of the Clovis Point LMU and the history of production from the non-federal lands within the LMU. Second is its failure to acknowledge that reviewing courts are likely to give great deference to agency regulations implementing statutes which are silent or ambiguous as to the issues addressed by regulation. In this instance, the MLA is silent about the intended interplay between sections 2(a)(2)(A) and 2(d), as they relate to lessees holding federal coal leases included in LMUs. Third is the characterization that BLM's regulations and the Associate Solicitor's opinion are at odds with the commentary of former Solicitor Frank Richardson and the Office of Technology Assessment. These and other points are discussed more fully in the enclosure to this letter.

Thank you again for giving us this opportunity to comment. We hope that you will find our comments on the draft report constructive. If you or your staff would find it useful, we would be glad to meet with you to discuss this matter further.

Sincerely,

John D. Leshy
Solicitor

Enclosure

cc: Assistant Secretary, Land and Minerals Management
Acting Director, Bureau of Land Management

COMMENTS ON CHAPTER 2 OF THE DRAFT GAO REPORT

We offer the following specific comments on and suggested changes in the draft report.

<u>Page 33 (beginning with the last paragraph) through page 34 (including the second paragraph):</u>

Now on p. 25.

We believe the following text provides a more appropriate characterization of the Associate Solicitor's opinion:

> On February 22, 1993, we asked Interior's Solicitor to provide his opinion on whether Kerr-McGee was barred from receiving new mineral leases due to the operation of section 2(a)(2)(A). On August 4, 1993, the Department of the Interior's Associate Solicitor for Energy and Resources advised us that the Solicitor's Office was unable to conclude that the contemporaneous interpretation and application of the section 2(a)(2)(A) requirements by BLM in the Kerr-McGee case were beyond the scope of the Secretary's authority granted by the Federal Coal Leasing Amendments Act. The Department of the Interior's Solicitor has provided GAO with a letter, dated April 11, 1994, concurring in that conclusion and in the Associate Solicitor's earlier opinion.
>
> The Associate Solicitor observed that BLM was acting in reliance on a duly promulgated regulation[1] which provides that a federal lessee is producing coal in commercial quantities for purposes of section 2(a)(2)(A) if the pre-FCLAA coal lease which it holds is included in an LMU that is producing in accordance with its "stipulations of approval."[2] The stipulations of approval for Kerr-McGee's LMU provide that Kerr-McGee must meet the 10-year diligent development requirement, under which the operator promises to produce coal in commercial quantities from the LMU within 10 years. Kerr-McGee is in compliance with these LMU stipulations of approval, even in the absence of present production, so long as production in commercial quantities is achieved by September 26, 1996. Accordingly, the Associate Solicitor noted that, in this instance, Kerr-McGee appears to fall within the exception to section 2(a)(2)(A) disqualification provided for by the regulation.
>
> The Associate Solicitor stated that, given the existing regulation interpreting the interplay between section 2(a)(2)(A) and section 2(d), which grants the Secretary broad discretion with respect to diligent development, continuous operation, and production for logical mining units[3], she was unable to conclude that the section 2(a)(2)(A) prohibition applied to Kerr-McGee in this instance.[4] However, the Associate Solicitor noted that the BLM's interpretation of section 2(a)(2)(A) and section 2(d) was "a matter of policy

formulated by previous administrations that meets the letter of the law." The Associate Solicitor observed that, while BLM's interpretation was legally permissible, it arguably did not well serve a major goal of FCLAA, which was to reduce speculation.

The Associate Solicitor noted that BLM's regulations could be amended prospectively at any time by following the normal notice and comment rulemaking process. Subsequent to the Associate Solicitor's opinion, BLM issued on December 10, 1993, an advanced notice of proposed rulemaking seeking public comment on logical mining units, including diligence requirements relating to LMUs.

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[1] 43 C.F.R. § 3472.1-2(e)(6)(ii)(E).

[2] Stipulations of approval are provisions governing a lessee's operations under a specific LMU.

[3] Because of the inclusion of the leases at issue in an LMU, the Solicitor's Office found that the provisions of section 2(d) of the MLA providing for LMUs are triggered. That section grants the Secretary discretion to provide that diligent development, continuous operation and production on any federal lease or non-federal land be construed as occurring on all federal leases in the LMU. The section also specifically states that pre-1976 leases, such as those involved in the matter at hand, may be included in an LMU and become subject to the production requirements of the LMU. In the Associate Solicitor noted that the legislative history of FCLAA demonstrates that the congressional drafters recognized that the LMU provisions were "an enormous exemption" to the due diligence provisions otherwise imposed by the MLA as amended.

[4] It should be noted that the Associate Solicitor's review was confined to the applicable law and regulations relating to sections 2(a)(2)(A) and 2(d) of the MLA. She did not review any issues surrounding the appropriateness of the formation in the first instance of the LMU involved.

Now on p. 25.

<u>Page 34:</u>

Beginning in the last paragraph of this page, GAO states:

> We believe that Kerr-McGee is not qualified to obtain federal mineral leases under section 2(a)(2)(A) because it has not produced coal in commercial quantities from the LMU since the LMU was formed and indeed has not produced any coal at all

2

from the LMU since 1988.

This conclusion ignores the special treatment of LMUs that Congress provided for in section 2(d) of the MLA, 30 U.S.C. § 202a, including provisions relating to diligent development, continuous operation and production. It further ignores the Secretary's broad discretion to administer LMUs. Section 2(d)(1) and (2) authorize the Secretary to approve the consolidation of federal and non-federal coal leases into a logical mining unit in order to foster the development and mining of included coal resources in an efficient, economical and orderly manner over a period of 40 years. Section 2(d)(2) provides that any approved mining plan for an LMU must require such diligent development, operation and production so that the LMU's reserves will be mined within a Secretarially established period, not to exceed 40 years. Section 2(d)(3) authorizes the Secretary, in the course of approving an LMU, to provide, "among other things," that diligent development, continuous operation, and production on any non-federal land within the LMU shall be construed as occurring on all federal leases in the LMU. Section 2(d)(4) of the MLA authorizes the Secretary to amend any federal lease included in an LMU so that mining under that lease is consistent with the LMU requirements. Section 2(d)(5) explicitly provides that pre-FCLAA leases can be included in an LMU and, if so, "shall be subject to the provisions of this section [setting forth rules relating to LMUs]." We believe that it is legally supportable to read section 2(d) as giving the Secretary the discretion to establish how lessees holding federal coal leases included in an LMU are to comply with section 2(a)(2)(A). This he did by adopting a rule providing that compliance with the LMU's stipulations will also serve to meet the requirement for production in commercial quantities found in section 2(a)(2)(A).[1]

This construction of the interaction between sections 2(a)(2)(A) and 2(d) is consistent with FCLAA's legislative history. During the House debate, Congresswoman Patsy Mink, Chairman of the House Subcommittee on Mines and Mining, described an LMU as "an enormous exemption" from due diligence, 122 Cong. Rec. 507 and 508 (Jan. 21, 1976). Her remarks suggest she understood that, in order to foster the long-term development and mining of non-producing pre-FCLAA

[1] We note that GAO agrees at page 35 of the draft report with our view that production anywhere in the LMU can be attributed to the federal coal leases within the LMU and can be used to satisfy section 2(a)(2)(A)'s production requirement. We also note that, as the Associate Solicitor's opinion stated, we believe that the Secretary has the discretion to adopt a range of different policies and regulations for section 2(a)(2)(A) compliance for leases included in an LMU.

3

leases, these leases may be treated as part of a unit when consolidated into an LMU, free from certain requirements of FCLAA that would apply if they were stand-alone leases.

GAO's conclusion also ignores the duly promulgated BLM regulation which provides that a lessee will not be disqualified so long its lease is contained in an approved LMU which is producing in accordance with its stipulations. Kerr-McGee's qualification is derived from this regulation, which provides:

> (ii) An entity shall not be disqualified under the provisions of this subpart if each lease that the entity holds is:
>
> * * * *
>
> > (E) Contained in a approved logical mining unit which is <u>producing in accordance with the logical mining unit stipulations of approval pursuant to § 3487.1(e) and (f) of this title</u>...[emphasis added].

43 C.F.R. § 3472.1-2(e)(ii)(E). Sections 3487.1(e) and (f) prescribe the contents of LMU stipulations and the criteria for LMU approval. Neither section contains any requirement expressly referring to production of commercial quantities. Rather, 43 C.F.R. § 3487.1(e)(2) requires these stipulations to include a schedule for the achievement of diligent development and continued operation for the LMU.[7]

The prefatory clause in paragraph 3 of the Clovis Point LMU's stipulations of approval makes both federal leases in the LMU subject to uniform requirements for diligent development and continued operation, thereby superseding the comparable requirements for the individual federal leases. After noting that the diligent development period for the LMU began on September 26, 1986, subparagraph 3.c expressly states that "the LMU must have achieved production of commercial quantities before September 26, 1996, the ten-year anniversary of the effective date of the LMU." Subparagraph 3.c goes on to state that Kerr-McGee must mine 3,043,460 tons of coal from anywhere within the LMU to achieve diligent development. Subparagraph 3.f describes the 40-year LMU exhaustion period. Subparagraph 3.g states that for purposes of meeting the commercial quantities requirement of section 2(a)(2)(A), production of any coal within the LMU (which was ongoing at the time of the LMU's effective date of approval on the state lease included in the LMU) shall be construed as occurring on

[7] 43 C.F.R. § 3483.1(c) specifies that any federal coal lease included in an LMU will be governed by the diligent development and continued operation requirements imposed on the LMU in lieu of those comparable requirements that would apply to the lease individually.

all federal leases within the LMU. Subparagraph 3.h provides that, if the LMU fails for any reason, the federal leases included in the LMU would be subject to the diligence requirements that would have otherwise applied had they not be included in the LMU.

The Clovis Point LMU stipulations contain no other provisions which deal with production, production of commercial quantities, diligent development, or continued operation. Although GAO construes the LMU stipulations as not addressing what is required to satisfy the commercial quantities production requirement of section 2(a)(2)(A) or as equating it with diligent development, the fact is that the stipulations only define what is required to accomplish production in commercial quantities in one place -- in subparagraph 3.c. That is the only provision in the stipulations to describe what is required for production of commercial quantities, and it does so by reliance on the notion of diligent development. This approach is consistent with BLM's regulations. Accordingly, as long as Kerr-McGee produces 3,034,460 tons of coal from anywhere within the Clovis Point LMU by September 26, 1996, Kerr-McGee is producing coal in accordance with these LMU stipulations of approval Therefore, by the express terms of 43 C.F.R. § 3472.1-2(e)(6)(ii)(B), it would be difficult to adjudge Kerr-McGee as presently ineligible under section 2(a)(2)(A) on the basis of the federal leases contained in the Clovis Point LMU.

We do not read FCLAA as necessarily imposing a present requirement for actual production when a pre-FCLAA lease is included in an LMU. There appear to be two conflicting paradigms at work here. The first is the paradigm for stand-alone leases for which section 2(a)(2)(A) is effective in ensuring development. The second is the paradigm for LMUs, which measures production on a unit basis over a term of up to 40 years, not on a lease-by-lease basis under the standard lease term. We do not find it illogical for Congress to have granted the Secretary discretion to equate section 2(a)(2)(A)'s "production of commercial quantities" with a "diligent development" requirement for LMUs, thus allowing LMU stipulations to determine what constitutes "production" in the context of an LMU. Especially in the western United States, landholding patterns often do not allow mining companies to acquire all leases for a logical mine simultaneously. For example, Leases A and B on federal lands may be acquired in year one, while Leases C and D on state lands may be acquired in year eight. The most environmentally and economically practical progression for extracting coal on these lands may involve mining on Leases D, C, B, and A, in that order, over a 10-year period. Allowing approved LMU stipulations to define production for the individual leases in the LMU would allow the leases to be produced in the most environmentally and economically beneficial manner. Requiring the lessee in this example to choose between continued eligibility for future leases or mining the LMU illogically appears to be exactly what 43 C.F.R. § 3472.1-2(e)(ii)(B) was designed to avoid. Indeed, the purposes behind Congress' enactment of section 2(d) of the MLA

5

providing for LMUs was to provide for the "efficient, economical, and orderly" development of the coal reserves in the unit.

Now on p. 26.

Page 35:

In the middle of this page, GAO states that:

> We disagree with Interior's Associate Solicitor's interpretation that FCLAA permits BLM to use the 10-year LMU diligent development period to satisfy Section 2(a)(2)(A)'s requirement for the present production of coal in commercial quantities.

Again, this conclusion ignores the scheme that Congress devised in FCLAA for the establishment and operation of LMUs, and BLM's duly promulgated regulations implementing those provisions in FCLAA regarding LMUs and lessee eligibility, discussed above. While Congress has recognized distinctions between "diligent development" and "commercial quantities," the Secretary could and did employ these terms in defining production requirements for LMUs. The principle of judicial deference to agency rulemaking applies here. A court may not substitute its judgment for an agency's when the agency's regulations constitute a reasonable interpretation of the agency's delegated legislative authority. Chevron U.S.A. v. Natural Res. Def. Council, 467 U.S. 837 (1984).

BLM's regulations, which have the effect of allowing the use of the 10-year diligent development period to satisfy the section 2(a)(2)(A) commercial quantities requirement, are consistent with the 1985 opinion of Solicitor Richardson. In 1985, former Solicitor Richardson issued an M-opinion answering various questions about the prohibition in section 2(a)(2)(A), which was to take effect the following year. BLM's regulations are consistent with his interpretation of sections 2 and 7 of the MLA. The first question which he addressed was the possible ways of defining the section 2(a)(2)(A) term "producing...in commercial quantities." Solicitor Richardson stated that:

> There are several lawful ways to implement the term... [including] as the term is used in the regulations defining "diligent development" on a Federal coal lease, as a cumulative amount (over a longer, fixed period, taking into account startup time and initial mine production) of initial production, with a succeeding rate thereafter...."

92 I.D. 538-539. After acknowledging that the term "producing in commercial quantities" was added by sections 3 and 6 of FCLAA to three places in sections 2(a)(2)(A) and 7(a) of the MLA without the benefit of any legislative definition, the Solicitor noted that the Department's initial, contemporaneous interpretation of the "diligent development" definition of commercial quantities called not for a rate of production, but "a cumulative amount of

6

production within the relevant period." Id., at 542.

Solicitor Richardson also addressed whether the prohibition in section 2(a)(2)(A) attaches to the holder of a non-producing lease that is included in an LMU from which coal is being produced at the proper rate. He concluded that it does not. 92 I.D. at 539. He explained that participation in a producing LMU tolls the prohibition. Id., at 548. Solicitor Richardson construed section 2(d)(3) of the MLA as allowing production in commercial quantities (i.e., production of 1 percent of an LMU's recoverable coal reserves prior to the end of the LMU's 10-year diligent development period) occurring anywhere within an LMU to be construed as occurring on all federal leases in the LMU for purposes of section 2(a)(2)(A). Id., at 554. In other words, he saw participation in a producing LMU as relieving the included non-producing federal leases from section 2(a)(2)(A)'s prohibition. Id., at 555.

At this point, Solicitor Richardson did not define a "producing" LMU. But earlier in his opinion, he had stated:

> The Secretary may define the time element of "producing in commercial quantities" for section 2(a)(2)(A) purposes in any of several ways, consistent with the statutory purpose to penalize speculative holding of coal leases, and respecting the key words in the phrase: "producing" and "commercial." Given that speculation ends upon construction of mine facilities, because of the investment that is completed by the time the first ton of sold coal is severed and loaded for shipment, any measure of actual production that respects the words in the phrase is consistent with the statute. We thus advise that the phrase may be define [sic]...as an amount which must be produced over the 10-year holding period of section 2(a)(2)(A) analogous to diligent development....

Id., at 543.

Any effort to declare mineral leases issued to Kerr-McGee since March 1988 as invalid on the premise that Kerr-McGee had to be actually producing from the Clovis Point LMU when the leases were issued, as GAO suggests, could also be highly problematic for several reasons. First, his would be contrary to the language of 43 C.F.R. § 3472.1-2(e)(6)(ii)(B), which refers to "producing coal in accordance with the logical mining unit stipulations of approval pursuant to § 3487.1(e) and (f)." "Producing" is defined in 43 C.F.R. § 3400.0-5(rr)(6) to mean actually severing coal or operating an ongoing mining operation in accordance with standard industry operation practices. Reading the term "producing" in the context of 43 C.F.R. § 3472.1-2(e)(ii)(B), the operative regulation for leases in LMUs, as not requiring present production is, we believe, a legally supportable construction. This is easily distinguishable, for example, from 43 C.F.R. § 3472.1-2(e)(6)(i), which requires an eligible lessee to be "producing" and to meet

7

some other requirement, such as being within its section 2(a)(2)(A) production bracket or having achieved production of commercial quantities during that time frame. The plain meaning of section 3472.1-2(e)(6)(ii)(B) suggests that one need look no further than the Clovis Point LMU stipulations to understand what Kerr-McGee must do to be eligible to acquire new leases.

Second, the prefatory clause to 43 C.F.R. § 3400.0-5 expressly limits the application of the definition of "producing" stated in section 3400.0-5(rr)(6) to Part 3400. The rule on lessee eligibility is found in a different part, Part 3470. Kerr-McGee could well be able to use this technical point to its legal advantage.

We are aware of only one statement of interpretation offered by BLM which supports GAO's view that the Clovis Point LMU must be actually producing in order to afford Kerr-McGee protection from section 2(a)(2)(A)'s disqualification provision. In its internal guidelines[3] for implementing the "regulatory definition of commercial quantities (1 percent of recoverable coal reserves) for section 2(a)(2)(A) purposes," BLM stated:

> If a Federal coal lease, that otherwise is subject to the section 2(a)(2)(A) prohibition, is included in an LMU and that LMU stops productions [sic] (i.e., nonproduction occurring while the LMU is in its specific diligent development period and no advance royalty can be being paid *in lieu* of production), that Federal coal lease, looked at individually in its nonproducing status, would prohibit the Federal coal lessee, or any affiliate, under section 2(a)(2)(A) from being issued another Federal lease on or after August 4, 1986. Although, in this example, the LMU would be in compliance with its approval stipulations and the 1982 regulatory diligence system, the Federal coal lease is not protected by inclusion in an LMU if that LMU *is not producing*.

50 Fed. Reg. 35138 (August 29, 1985). While the quoted language may have represented BLM's interpretation at that time, such a guideline, as distinguished from a regulation designed to implement substantive legislative provisions, is not binding and does not have the force of law. <u>See Conoco Inc.</u>, 110 IBLA 232, 242-243 (1989).

More importantly, this interpretation is not clearly reflected in 43 C.F.R. § 3472.1-2(e)(ii)(E), which was subsequently adopted in 1986. The preamble to the 1986 rulemaking promulgating section

[3] These guidelines were created for the use of BLM personnel in implementing the producing in "commercial quantities" requirement of section 2(a)(2)(A). 50 Fed. Reg. 35125, 35126, and 35132-35133. (August 29, 1985).

8

3472.1-2(e)(ii)(B), at 51 Fed. Reg. 43910 (Dec. 5, 1986), incorporated the consistent supplementary information found in the preamble to the final 1985 guidelines[4] answering public comments on the draft 1985 guidelines, but not the final guidelines themselves. The final guidelines, in answering public comments about the need to publish the guidelines as regulations, stated that BLM would be engaging in a forthcoming regulatory review which would deal with interpretations of the phrase "producing in commercial quantities." 50 Fed. Reg. 35132 (August 29, 1985).

One reason that the existing rule, section 3472.1-2(e)(ii)(B), can be permissibly interpreted as at variance with the final 1985 guidelines is because of the difference between the text of the proposed and final 1986 rulemaking. The proposed rulemaking would have clearly made actual production, despite an LMU's compliance with its stipulations of approval, including its diligent development requirement, a requirement for continued eligibility under section 2(a)(2)(A)'s producing in commercial quantities requirement. The proposed rule, proposed as 43 C.F.R. § 3472.1-2(e)(5), stated:

> As long as an approved logical mining unit is producing in commercial quantities (either Federal or non-Federal coal), the Federal coal leases contained in the logical mining unit shall not disqualify the entity(s), or any of its affiliates, under the provisions of this subpart [Subpart 3472].

51 Fed. Reg. 37205 (October 20, 1986). As it turned out, the final rule, section 3472.1-2(e)(ii)(B), simply states that an entity shall not be disqualified under section 2(a)(2)(A) as long as its lease is contained in an LMU which is "producing coal in accordance with the logical mining unit stipulations of approval pursuant to § 3487.1(e) and (f)." It is the language of this rule that governs Kerr McGee's eligibility. Kerr-McGee is meeting the requirements of the rule.

However, even if we were to conclude that "producing" was a present requirement whenever Kerr-McGee was issued new leases, independent of its compliance with its LMU's diligence requirement, BLM found

[4] The 1985 supplementary information did contain the following statement in response to two comments stating that "the failure of an LMU should not retrigger the section 2(a)(2)(A), 10-year holding period from the point at which it was suspended by inclusion in a producing LMU":

> Section 2(a)(2)(A) is retriggered by failure of an LMU. It is also retriggered by an LMU that stops producing, provided that the LMU is in its LMU-specific diligent development period.

50 Fed. Reg. 35129 (August 29, 1985).

9

Now on p. 26.

that Kerr-McGee met this requirement, and we have no reason for concluding that BLM's finding was invalid. In effect, despite the fact that Kerr-McGee had suspended its operations for some period of time, BLM found that this suspension was consistent with standard industry practice and, thus, allowable under its definitional regulation for "producing", 43 C.F.R. § 3400.0-5(rr)(6). This is also consistent with the preamble to the final 1986 rulemaking, which states:

> It was not the intent of the proposed rulemaking to compromise standard industry operating practices. That is why the rulemaking was couched in terms of "such reasons as", not "the following reasons." Allowing standard industry operating practices to govern "producing" is less burdensome to the mining industry and more administratively efficient for the Bureau of Land Management. It also provides a satisfactory basis from which the Authorized Officer can determine whether the mining operation is "producing" in accordance with the approved plan of operations. Standard industry operating practices will be used as the primary basis for determining whether the mining operation is "producing," but it must be stressed that conformity with standard industry operating practices is not dispositive of "producing," and variances from the practices may be required where case-specific conditions warrant such a variance.

51 Fed. Reg. 43916 (Dec. 5, 1986). A November 13, 1989, BLM memorandum[5] to field personnel (couched as clarification of issues associated with lessee qualification criteria, but not expressly addressing leases in an LMU), also stated that producing is defined by standard industry practice and that such practice would be determined on a case-by-case basis, according to what constitutes such practice for a particular region. In this instance, BLM found that Kerr-McGee was engaged in ongoing coal production in the manner of a prudent operator in the Powder River Basin by electing the temporary cessation, because four other mines in the region have from time to time been "mothballed", such that the removal of coal has been halted, and, in at least two such instances, for a period of years.

Pages 35 and 36:

GAO states:

> Further, the Associate Solicitor's interpretation is at odds with a previous Solicitor's opinion, which concluded that equating diligent development with production of commercial quantities "would empty the section [2(a)(2)(A)] of any

[5] Information Bulletin No. 90-33 (Nov. 13, 1989).

10

meaning."[14] It would permit the lessee to extend its eligibility under section 2(a)(2)(A) for the length of the LMU's diligent development period, thereby defeating, as the Associate Solicitor's opinion recognizes, the anti-speculative purpose of this provision.

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[14] 92 I.D. at 548-51 (1985). The Associate Solicitor's opinion is also at odds with an Office of Technology Assessment report on section 2(a)(2)(A). "Potential Effects of Section 3 of the Federal Coal Leasing Amendments Act of 1976-A Special Report", OTA-ITE-300, March 1986, p. 84.

The Associate Solicitor's opinion is not at odds with either the 1985 Solicitor's opinion or the 1986 OTA report. GAO cites a discussion in Solicitor Richardson's opinion addressing the issue of whether a lessee is eligible to acquire mineral leases under the section 7(b) exception to section 2(a)(2)(A) when, although the lessee is not actually producing from his lease, he is nonetheless in compliance with his diligent development obligation. Solicitor Richardson concluded that this broad construction of the section 7(b) exception to section 2(a)(2)(A) would nullify section 2(a)(2)(A). Solicitor Richardson was discussing the eligibility of a lessee based on its holding of a stand-alone lease, rather than a lease contained in an LMU. The OTA report expressed a similar viewpoint. At page 84, it states "[c]ompliance with other lease diligence provisions is not, however, sufficient to satisfy the section [2(a)(2)(A)] producing in commercial quantities requirement." Once again, this discussion was not in the context of LMUs.

These remarks merely signify that compliance by pre-FCLAA leases with section 7(b)'s diligent development condition would not satisfy section 2(a)(2)(A)'s production in commercial quantities requirement in the absence of circumstances, present on the date for determining a lessee's eligibility, which toll section 2(a)(2)(A)'s 10-year holding period or its statutory bar, such as participation in a producing LMU, a lease suspension under section 39 of the MLA, force majeure, or the payment of advance royalties. Solicitor Richardson expressly recognized all of these examples as tolling the prohibition and 10-year holding period found in section 2(a)(2)(A). 92 I.D. 547-548. Despite GAO's suggestion to the contrary, the 1985 opinion and the 1986 report can also be read to construe FCLAA and BLM's regulations to allow the treatment accorded Kerr-McGee in this instance.

Furthermore, a pragmatic approach as to what constitutes producing in commercial quantities for purposes of section 2(a)(2)(A) was also recognized in the 1986 OTA report.

11

> OTA believes that as long as a lessee is actually producing or has produced coal after August 4, 1976, FCLAA allows the Secretary to consider other factors in determining whether the amount of coal produced is commercial quantities for the purposes of [section 3 of FCLAA]... or whether the amount produced is merely "frivolous." Examples of such other factors include: the eventual capacity of the mine; the amount of reserves, and geological and engineering restraints on the rate of initial production; the demonstrated investment in mine construction and facilities; and the schedule for production and delivery of coal under a long term contract. The term "producing" implies some continuity of activity, however OTA believes that section 3 does not impose an additional annual or continued operation obligation on the lessee. Intermittent or sporadic production from an ongoing commercial mining operation could be sufficient for compliance with section 3, even if the mine is temporarily idled.

OTA report, supra, at 87.

In the present case, from the establishment of the Clovis Point LMU[4] until early 1988 we are advised that approximately 2.3 million tons of coal were produced from the Clovis Point Mine. The mine is located on the state lease included in the LMU. As noted earlier, this production, which accounts for approximately 75% of the diligent development definition of the commercial quantities requirement for the LMU, is expressly attributable to both of the federal leases contained in the LMU. We are informed that Kerr-McGee's total investment in the mine as of 1991 was in excess of $27 million. Following Kerr-McGee's cessation of mining operations in 1988 and placement of the mine in a stand-by status pursuant to an approved plan of interim stabilization, we are informed that Kerr-McGee has provided full-time security to the mine's remaining facilities and equipment and has maintained all federal and state mining permits and reclamation activities at an annual cost of over $75,000. Kerr-McGee could argue that these facts meet the "producing" tests articulated by Solicitor Richardson and the OTA and satisfy the anti-speculation objective of section 2(a)(2)(A).

Moreover, the OTA report expressly recognizes that a lessee can use the LMU device to avoid disqualification under section 2(a)(2)(A).

> Section 3 [of FCLAA] is silent as to whether production from an LMU is sufficient for section 3 compliance. The language

[4] We are informed that prior to the LMU's establishment, Kerr-McGee had produced over 16 million tons of coal from its state lease.

12

> of section 7(b) [of the MLA] and section 5 [of FCLAA] and the legislative history of section 5, however, strongly suggest that LMU formation was intended as an aid to development and maximum economic recovery of Federal coal and to satisfaction of diligence [sic] production and continued operations requirements. Section 7(b) provides that each lease is subject to the conditions of diligent development and continued operation. If production in an approved LMU can satisfy the section 7 diligence requirement, by extension such production should also satisfy the section 3 production requirement for a nonproducing lease in the LMU.

OTA report, supra, at 102. Cf., id., at 88 and 94. This extension has been achieved in the present case by BLM's establishment, through rulemaking and in LMU stipulations, of a production goal, i.e., a cumulative amount of 1 percent of total LMU recoverable resources by no later than 10 years after the LMU's approval. The rationale for this interpretation is presumably that LMU formation was intended, as OTA has noted, as an aid to the development and maximum economic recovery of coal resources and as an aid to the satisfaction of the diligent production and continued operations requirements of included pre-FCLAA leases.

Now on p. 26.

Page 36, footnote 15:

In this footnote, GAO states:

> We also note that the Associate Solicitor's view can lead to absurd consequences. If production in commercial quantities had not commenced by the end of the diligent development period, the lessee might be considered as retroactively ineligible to receive leases issued during the diligent development period. The problem would be particularly acute where the lessee received competitive leases that might have been issued to other qualified bidders.

We disagree that this interpretation would lead to absurd results. The preamble language explaining the final 1986 BLM rulemaking undercuts GAO's contention that, if production in commercial quantities has not been achieved by the end of the LMU's diligent development period, the lessee might be considered as retroactively ineligible to receive the leases issued during the diligent development period. The preamble, at 51 Fed. Reg. 43914 (Dec. 5, 1986), suggests that the termination of the LMU for failure to produce diligently and in commercial quantities would only operate to disqualify a lessee prospectively, assuming the individual leases in the LMU were also out of compliance at the date of the LMU's termination.

Comments From Kerr-McGee Corporation

Note: GAO comments supplementing those in the report text appear at the end of this appendix and in appendix X.

KERR-McGEE CORPORATION

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Law Department

Writer's Direct No.
(405) 270-2838

February 22, 1994

James Duffus III
Director, Natural Resources
Management Issues
United States General Accounting Office
Washington, D.C. 20548

Re: Draft Report Entitled Mineral Resources: BLM's Coal-Leasing Program Needs Strengthening
Your File No. B-252412

Dear Mr. Duffus:

We are in receipt of your letter of January 25, 1994, enclosing a copy of the portion of the referenced report which relates to Kerr-McGee Corporation's East Gillette-Clovis Point mine in Campbell County, Wyoming and requesting that we comment on your conclusion that since 1988 Kerr-McGee Corporation has been disqualified from acquiring federal leases under section 2(a)2(A) of the Mineral Leasing Act, as amended by section 3 of the Federal Coal Leasing Amendments Act.

We believe your conclusion is in error. As your proposed report recognizes, the issue in this matter is whether the East Gillette-Clovis Point LMU is deemed to be producing coal under applicable BLM regulations. It is apparent from the portion of the report you submitted to us that you are in possession of the letter dated October 1, 1991, written by our attorneys to the Department of the Interior's Denver Region office setting forth Kerr-McGee Corporation's rationale supporting the conclusion that the East Gillette-Clovis Point LMU is in fact a producing mine. We continue to believe that the legal position stated in that letter is sound.

Without repeating in detail the arguments contained in the October 1, 1991 letter, we would ask that before you issue your report, you consider carefully the following points:

1. The East Gillette-Clovis Point mine has produced approximately 18.5 million tons of coal since production commenced in 1979, of which about 2.24 million tons have been produced since the LMU was created in 1986.

James Duffus III
February 22, 1994
Page 2

2. Under the LMU stipulation, Kerr-McGee is required to have mined approximately 3.04 million tons of coal by September 26, 1996, to meet its diligent development obligation. Kerr-McGee has already mined more than 75% of the coal it is required to mine during the diligent development period. Although operations are temporarily suspended, Kerr-McGee has stated its intention to resume operations to mine the remaining 800,000 tons required to meet its diligent development obligation by the end of the diligent development period. As the BLM has previously advised you in its opinion of August 4, 1993, Kerr-McGee is in full compliance with its diligent development operations on the LMU.

3. There is no requirement that mining operations be conducted continuously during the 10 year due diligence period to meet the due diligence development requirements. To the contrary, the BLM regulations (as well as the courts in general) recognize that in any mining operation there may be temporary cessations of production. Such temporary cessations of production do not change the status of a mine from "producing" to "non-producing." As recently as 1991 the Office of Surface Mining and Reclamation Enforcement completed a study showing that 1,140 of the nation's coal mines were in a temporary cessation of operation mode. In the case of the East Gillette-Clovis Point LMU, the mine is on standby status in accordance with a plan of stabilization approved by governmental authorities with BLM concurrence. The East Gillette-Clovis Point LMU is a fully operational mine, in which Kerr-McGee made an initial investment of more than $27 million in mining and equipment. Additional expenditures have increased the cumulative investment in the mine to about $50 million. The mine is being operated in accordance with standard industry practice.

4. BLM regulations contained in 43 CFR 3400.1(rr) provide that:

> "For purposes of section 2(a)2(A) of the Act:
>
> . . .
>
> (6) Producing means actually severing coal, <u>or operating an ongoing mining operation in</u>

James Duffus III
February 22, 1994
Page 3

> accordance with standard industry operating practices." (emphasis supplied)

Section 43 CFR 3472.1-2(6)(ii) of the same regulations provides:

> "An entity shall not be disqualified under the provisions of this subpart if each lease that the entity holds is:
>
> . . .
>
> E. Contained in an approved logical mining unit which is producing coal in accordance with the logical mining unit stipulations of approval . . ."

Under these BLM regulations, the conclusion that the East Gillette-Clovis Point mine is a producing mine under section 2(a)2(A) of the Act is inescapable.

The conclusion that the East Gillette-Clovis Point mine is a producing mine not only is within the letter of the law, it also is in full accord with the spirit of the law. Section 2(a)2(A) was enacted to prevent a party from holding coal leases for speculation without development. In this case, Kerr-McGee has a developed, operative mine in which millions of dollars have been invested and which is in full compliance with diligent development requirements of an approved LMU stipulation.

In addition to our disagreement with your conclusion that Kerr-McGee is disqualified from acquiring federal leases, we note two statements in the draft you submitted which we believe are factually inaccurate.

See comment 1.

On the first page of the portion of the draft you sent there is a garbled statement that from March 1988 through November 1992, Kerr-McGee acquired at least 151 additional federal mineral leases--150 oil and gas leases and one coal lease. Our records indicate that during that period the BLM issued 35 oil and gas leases and one coal lease to Kerr-McGee. Kerr-McGee acquired other oil and gas leases by assignment from other leaseholders during that same period. However, as you no doubt are aware, section 2(a)2(A) of the Act only prohibits the issuance of leases by the Secretary of

James Duffus III
February 22, 1994
Page 4

the Interior. It has no application to the acquisition of existing oil and gas leases by assignment.

On the third page of the draft you furnished us there is a statement that Kerr-McGee has not produced coal in commercial quantities since the LMU was formed. This assertion obviously ignores the fact that more than 2.24 million tons of coal have been produced from the mine since the LMU was created, and that this 2.24 million tons constitutes more than 75% of the quantity required to be mined during the 10 year diligent development period. The facts do not support this statement.

We respectfully request that you reconsider your conclusion as to the status of this LMU in your proposed report.

Very truly yours,

Jack L. Brandon

Jack L. Brandon
Assistant General Counsel

JLB:sj

The following are GAO's comments on Kerr-McGee Corporation's letter dated February 22, 1994. GAO's detailed evaluation of Kerr-McGee's comments and the comments of the Department of the Interior's Office of the Solicitor appear in appendix X.

1. In its comments, Kerr-McGee correctly noted that when the production requirements of section 2(a)(2)(A) of the Mineral Leasing Act (MLA) are not met, the section prohibits only the issuance of leases by the Secretary of the Interior. It has no application to the acquisition of existing leases by assignment. Thus, we revised, to 35, the number of oil and gas leases that the Secretary issued to Kerr-McGee between March 1988 and November 1992.

Evaluation of the Office of the Solicitor's and Kerr-McGee Corporation's Comments

The Department of the Interior's Office of the Solicitor and Kerr-McGee Corporation provided us with written comments on a portion of a draft of this report.[1] They disagreed with our conclusion that Kerr-McGee was ineligible to receive new leases under the Mineral Leasing Act of 1920 (MLA) because two of its coal leases obtained before the Federal Coal Leasing Amendments Act of 1976 (FCLAA) was passed have not satisfied the production requirements of section 2(a)(2)(A) of the MLA. However, the Solicitor indicated that the regulation on which Interior relied concerning logical mining units was the policy of past presidential administrations and arguably was not consistent with FCLAA's goal of reducing coal speculation. Consequently, he noted that the regulation could be amended at any time. In this connection, he pointed out that, on December 10, 1993, BLM requested public comments about changes that should be made in the regulations governing LMUs. 58 Fed. Reg. 64919, Decemember 10, 1993.

After carefully evaluating the Solicitor's and Kerr-McGee's comments, we continue to believe that BLM should not have issued mineral leases to Kerr-McGee. In summary, the MLA provides no authority for exempting Kerr-McGee's pre-FCLAA coal leases contained in an LMU from the commercial quantities production requirement of section 2(a)(2)(A). Accordingly, Interior cannot transform the "present production" requirement of section 2(a)(2)(A) into a "future production" requirement, that is, diligent development. Furthermore, Kerr-McGee is not presently "producing" coal under section 2(a)(2)(A) and the regulations which define this term.

Interior Lacks Authority to Equate Diligent Development With Current Production

Both Interior and Kerr-McGee argue that by including the two pre-FCLAA leases in an LMU, Kerr-McGee need only produce "coal in commercial quantities" by the end of the LMU's 10-year diligent development period in order to remain qualified to obtain new mineral leases. We disagree. Nothing in section 2(a)(2)(A), section 2(d), or any other provision of the MLA authorizes the Interior to exempt pre-FCLAA leases contained in an LMU from the current production requirement of section 2(a)(2)(A). After a 10-year holding period, section 2(a)(2)(A) imposes a present, rather than prospective ("diligence"), production requirement in order for a lessee to qualify to receive new mineral leases. While section 2(d) does give the Secretary discretion to attribute production from one lease within an LMU to all leases within the LMU, nothing in the language of this provision suggests that diligent development on one lease may be considered to be

[1]Comments from the Department of the Interior's Office of the Solicitor (dated Apr. 11, 1994) are provided in app. VIII. Kerr-McGee Corporation's comments (dated Feb. 22, 1994) are provided in app. IX.

production on the others.[2] In fact, Interior acknowledged in the discussion accompanying the publication of its final rulemaking for section 2(a)(2)(A) that this provision is not a "diligence" provision but a lease "qualification" provision. 51 Fed. Reg. 43911 (Dec. 5, 1986).[3]

FCLAA's legislative history as well as Interior's LMU regulations indicates that "diligent development" refers to a period preceding production in commercial quantities and embodies a commitment to produce coal in commercial quantities at some future date rather than at the present time. H.R. Rep. No. 681 at 13; 122 Cong. Rec. 488, January 21, 1976; 43 C.F.R. 3480.0-5 (12) and (13). Also, FCLAA's legislative history does not support the Solicitor's view that section 2(d) transformed the section 2(a)(2)(A) "production in commercial quantities" requirement into a "diligence requirement." As support for its position, the Solicitor's letter relies on a statement by Chairwoman Patsy Mink on the House floor that refers to section (2)(d) as "an enormous exemption" to the due diligence provisions otherwise imposed by FCLAA. However, the floor debate from which this phrase was extracted does not address the interplay between section 2(d) and section 2(a)(2)(A). Rather, the comment was made in the context of opposition to a proposal to remove from the House version of FCLAA a requirement for a public hearing before the formation of an LMU. 122 Cong. Rec. 507-508 (Jan. 21, 1976). 92 I.D. at 554 (1985).

Under these circumstances, Chairwoman Mink's statement provides little support for the transformation of the section 2(a)(2)(A) "producing in commercial quantities" requirement into a "diligence requirement." A more appropriate interpretation of Chairwoman Mink's reference, in keeping with the actual language of section 2(d), is that the attribution to all leases in an LMU of diligent development on any of the leases is the "enormous exemption." This view is consistent with the discussion of the effect of

[2]Also, we do not find support for the Solicitor's position in section 2(d)(5) of the MLA, which states that pre-FCLAA leases may be included within an LMU and, if so included, shall be subject to the provisions of section 2(d). All that this means is that the pre-FCLAA leases will be subject to the diligent development, continuous operation, and production requirements of the LMU. This provision does not transform section 2(a)(2)(A)'s "production in commercial quantities" requirement into a "diligence" requirement.

[3]Given the fact that both section 2(a)(2)(A) and section 2(d) were enacted as part of the same law, we believe it significant that the Congress did not specifically exempt pre-FCLAA leases contained in an LMU from the production in commercial quantities requirement of section 2(a)(2)(A). The Congress had every opportunity to consider doing so, but it did not.

including a section 2(a)(2)(A) lease in an LMU in the Solicitor's 1985 memo on this provision.[4]

Kerr-McGee Is Not Presently Producing Coal

Both the Solicitor and Kerr-McGee also argue that Kerr-McGee's leases are presently producing coal in accordance with Interior regulations. As stated in our report, 43 C.F.R. 3400.0-5(rr) defines "producing" for the purposes of section 2(a)(2)(A) as "actually severing coal, or operating an ongoing mining operation in accordance with standard industry operation practices." Under this regulation, a lease is considered to be "producing," even though the severing of coal is temporarily suspended for "reasons beyond the reasonable control of the lessee." These reasons include, but are not limited to, equipment breakdown and repair, vacations and holidays, orders of governmental authorities, sale from stockpiles, and a power plant's cessation of purchases for a "limited duration of time."

Kerr-McGee asserts that the cessation of production of the LMU is in keeping with operating an ongoing mine in accordance with industry's standard operating practice. Kerr-McGee alleges that it is not engaged in a speculative holding of coal because it has invested about $50 million—$27 million in mining and equipment alone.[5] Also, the Solicitor's letter points out that even though Kerr-McGee has suspended its operation for some time, BLM found that its suspension was consistent with industry's standard operating practice and thus allowable under this regulation.

As stated in our report, Kerr-McGee is not producing coal in accordance with Interior's regulatory definition of "producing." Kerr-McGee's suspension of coal production is not the kind of suspension envisioned by the regulation. Such suspensions are of short duration and do not include long-term multiyear cessation of production because of market conditions.

[4]In an effort to find support for the issuance of these leases to Kerr-McGee, both the Solicitor and Kerr-McGee have cited an Interior coal management regulation. This regulation, 43 C.F.R. 3472.1.2(e)(6)(ii)(E), provides that a lessee is not disqualified under section 2(a)(2)(A) if a pre-FCLAA lease is contained in an LMU that is producing in accordance with the LMU's stipulations of approval. The Solicitor and Kerr-McGee argue that this regulation transforms section 2(a)(2)(A) into a diligence requirement because the stipulations of approval for Kerr-McGee's LMU provide that the company must produce coal in commercial quantities within a 10-year diligent development period. As made clear by Interior's comments to the final regulations implementing section 2(a)(2)(A), this regulation means something different: although it gives a pre-FCLAA lessee 10 years to achieve production of coal in commercial quantities, it requires that at the time of qualification for a new MLA lease, the lessee must be producing coal. 51 Fed. Reg. 43914 (Dec. 5, 1986)

[5]Kerr-McGee's investment in mining and equipment has been primarily associated with the production of coal from the nonfederal lease in the LMU. This lease had been in production since 1979—6 years before the formation of the LMU. Coal mined from this lease before the formation of the LMU totaled 16.2 million tons, representing about 81 percent of the coal mined from the leases in the LMU to date.

To define, as Kerr-McGee and the Solicitor do, standard industry operating practice to include a continuous 6-year, 1988-94 stoppage of production because of market conditions would defeat the purpose of section 2(a)(2)(A), that is, to obtain production from the pre-FCLAA leases and thereby to limit the speculative holding of federal coal.[6]

[6] The Solicitor's letter also disagrees with the draft report's statement that Interior's present position is at odds with a previous 1965 Solicitor's memorandum and a 1986 Office of Technology Assessment report on section 2(a)(2)(A). We continue to believe that Interior's present position is contrary to the views contained in both of these documents.

Comments From the Department of Agriculture

United States Department of Agriculture | Forest Service | Washington Office | 14th & Independence SW, P.O. Box 96090, Washington, DC 20090-6090

Reply To: 1420/2900

Date:

Mr. James Duffus III
Director, Natural Resources Management Issues
General Accounting Office
441 G St., NW
Washington, DC 20548

Dear Mr. Duffus:

This reply pertains to your request for comments on the U.S. General Accounting Office (GAO) Draft Report RCED-94-10, "Mineral Resources: BLM's Coal-Leasing Program Needs Strengthening." The Forest Service was assigned the lead to coordinate responses to the draft report. We did not receive comments from other agencies, hence our response reflects information that pertains to the Forest Service only.

The report contains one finding that cumulative impacts have not always been addressed and documented in environmental assessments for coal leasing. It appears that Forest Service field offices believed such impacts had been adequately evaluated in previous NEPA documents and that since environmental assessments were "tiered" to these documents there was no need to further discuss the impacts. Tiering, however, requires that documents be incorporated by reference, and that pertinent analyses be carried forward in summary form. GAO's recommendation, when implemented, will accomplish this. The recommendation states the Forest Service should be directed to "reemphasize to field personnel the importance of complying with Agriculture's requirements for identifying and addressing cumulative environmental impacts from coal leasing and development." We accept GAO's finding.

Thank you for the opportunity to submit comments. Questions about our response may be addressed to Karl Duscher at (202) 205-1246 or to Hattie Silva at (202) (202) 205-1315.

Sincerely,

CHIEF, FS — DATE

2/18/94
OFFICE OF THE GENERAL COUNSEL — DATE

OBPA — DATE

2-25-94
ASSISTANT SECRETARY, NRE — DATE

Caring for the Land and Serving People

338

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