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Thomas D. Mauriello

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Comments

ONSHORE OIL AND GAS LEASING ON PUBLIC LANDS: AT WHAT POINT DOES NEPA REQUIRE THE PREPARATION OF AN ENVIRONMENTAL IMPACT STATEMENT?

The National Environmental Policy Act of 1969 (NEPA) has become the major legal instrument for monitoring and litigating conflicts between oil and gas development, and other resource values on federal public lands. Courts have differed over whether the issuance of oil and gas leases triggers NEPA’s environmental impact statement requirement. This Comment suggests that, while NEPA has some inherent limitations as a land use planning statute, courts can and should provide aggressive review of agency leasing decisions in order to effectuate NEPA’s policies.

INTRODUCTION

The National Environmental Policy Act of 1969 (NEPA)1 requires the government to prepare an environmental impact statement (EIS) for every major federal action significantly affecting the environment. Whether the federal government must prepare an EIS for the issuance of an oil or gas lease on onshore public lands has been treated inconsistently by the courts. Specifically, courts have differed over whether leasing constitutes a significant effect and, if so, whether lease stipulations which prohibit surface occupancy serve to preempt the statutory EIS requirement. Given the continuing uncertainties of foreign energy sources and the pressures to increase domestic energy development, a rational framework is needed to recog-

nize and resolve environmental impacts which flow from leasing. NEPA may provide such a framework. The agencies responsible for oil and gas leasing, however, have failed to incorporate NEPA coherently and effectively into the leasing process.

The environmental effects of oil and gas activities can be substantial. At a minimum, exploration is likely to require the construction of access roads for seismic equipment, the cutting of trees to allow accurate surveying, and the use of explosives. If full-scale development occurs, pipelines, drilling gear, and drilling wastes all will have an impact.²

This Comment will discuss the requirements and policies of NEPA, consider the legal and administrative structure of oil and gas leasing on public lands, and analyze recent case law regarding the application of NEPA to the issuance of oil and gas leases. The cases indicate that whether an EIS is required for lease issuance depends, at the very least, on the type of lease issued and the conditions which may be attached to it. Whether an EIS is required also seems to depend on the perceived likelihood of environmental damage in the particular case and, in no small measure, upon the reviewing court’s policy interpretations regarding NEPA. The statute does not provide all the answers, and policy analysis constitutes the decisive ingredient in judicial treatment of the issue.

After evaluating the legal and policy issues involved, this Comment concludes that the decision whether to prepare an EIS should not be based on the likelihood of environmental harm, but rather on the scope of the rights granted in the lease. The Comment recommends requiring an EIS at the leasing stage in order to faithfully effectuate NEPA. The Comment also analyzes leases which avoid the EIS requirement by prohibiting surface occupancy of the land containing the mineral estate, or by deferring surface occupancy until the requisite environmental analysis is performed. The Comment suggests limitations on the use of such leases in order to better integrate environmental planning into leasing decisions.

THE NATIONAL ENVIRONMENTAL POLICY ACT OF 1969

NEPA was passed by Congress “[t]o declare a national policy which will encourage productive and enjoyable harmony between man and his environment [and] to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man. . . .”³ NEPA’s sponsors sought to assure that “environmental amenities and values may be given ap-

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propriate consideration in decisionmaking along with economic and technical considerations. . . .” To that end, NEPA requires that an EIS be prepared in connection with “every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment.” Courts have held that if substantial questions are raised regarding whether there is a significant effect on the human environment, then an agency must prepare an EIS.

In addition to preparation of a comprehensive EIS, NEPA contains other important requirements. Federal government agencies are required to consider alternatives to the proposed action. NEPA also established, within the Office of the President, a Council on Environmental Quality (CEQ) charged with the duty to analyze environmental trends and information, formulate and recommend national environmental policies, and evaluate government programs and activities in light of those environmental policies.

The regulations promulgated by the CEQ describe in detail the process and methods of implementing the environmental analysis required by NEPA. Before the EIS milestone is reached, an agency normally is required first to prepare an environmental assessment (EA) in connection with an agency action or proposal. An EA is a

4. Id. § 4332(2)(b).
5. Id. § 4332(2)(c). Although NEPA requires preparation of an environmental impact statement (EIS) for a “recommendation or report on proposals for legislation,” most of the attention devoted to NEPA, as well as the majority of NEPA litigation, has focused on the need for an EIS in connection with “other major Federal actions,” usually consisting of proposals, plans, permit approvals, projects and other actions by federal agencies. For analysis of NEPA’s application to proposals for legislation, see, e.g., Comment, NEPA’s Forgotten Clause: Impact Statements for Legislative Proposals, 58 B.U.L. Rev. 560 (1978). The present Comment will analyze NEPA’s EIS requirement only as it applies to “other major Federal actions,” namely, the recommendation and issuance of oil and gas leases on public lands.
7. The EIS itself must contain a discussion of alternatives. 42 U.S.C. § 4332(2)(C)(iii). In addition, whether or not an EIS is called for, all federal agencies must “study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources.” Id. § 4332(2)(E).
8. Id. § 4342.
10. Id. §§ 1501.3(a), 1501.4(b). Exceptions to the environmental assessment (EA) requirement occur in cases where an EIS clearly is required, or in situations embracing certain designated “categorical exclusions.” Id. § 1501.4(a)-(b).
brief document which determines that an EIS is required or, alternatively, supports a finding of no significant impact (FONSI), which obviates the need for EIS preparation. Thus, for actions other than those which clearly do, or clearly do not, require an EIS, the EA is the vehicle for determining whether to proceed with preparation of an EIS or to issue a FONSI.

In addition to explaining how to implement the required environmental documentation, the CEQ regulations serve other important functions. Like NEPA, the regulations also provide for discussion and evaluation of alternatives to the proposed action. The alternatives analysis, the “heart of the environmental impact statement,” is designed to “present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decisionmaker and the public.”

As the last sentence implies, the NEPA process also is designed to foster public input into federal environmental decisionmaking. After the need for an EIS has been decided, agencies must publish in the Federal Register a notice of intent to prepare an EIS, so that interested persons may participate to influence the scope of the issues in the EIS. Interested persons may comment on a draft EIS, and the agency must respond to these comments in the final EIS.

The CEQ regulations also state that an EIS must consider cumulative actions and cumulative impacts of the proposed action. “Cumulative actions” are defined as “[actions], which when viewed with other proposed actions have cumulatively significant impacts and should therefore be discussed in the same impact statement.” “Cumulative impact” is defined as:

[f]he impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.

11. Id. § 1508.4. A finding of no significant impact (FONSI) contains a brief explanation of why an action other than a categorical exclusion will not significantly affect the human environment and, thus, why an EIS does not have to be prepared. Id. § 1508.13.
12. Id. § 1508.4.
13. Id. §§ 1502.10, 1502.13-1502.16.
15. Id.
16. Id. § 1501.7(a)(1).
17. Id. § 1503.1(a)(4).
18. Id. § 1503.4(a).
19. Id. § 1508.25.
20. Id. § 1508.7.
21. Id.
The regulations provide that an agency should consider the severity of cumulative impacts in determining whether the action "significantly" affects the environment and thus requires preparation of an EIS.22

With respect to oil and gas activities on public lands, an example of a governmental action which normally would require preparation of an EIS would be a broad policy proposal by an agency to categorize a large tract of land as "wilderness" (and thus protected from development) or "nonwilderness" (and thus not so protected).23 Another example would be a site-specific action leading to direct physical consequences to the environment, such as agency issuance of a permit to drill on public lands. Both actions, one broad and the other narrow, will result in a significant impact to the environment, whether the analysis focuses on the likelihood of harm from the action, or the scope of the rights granted by the action.

Leasing, on the other hand, admits of less certainty. Whether an EIS is required for leasing depends not only on whether a given lease includes surface occupancy restrictions, but also on a court's interpretation of NEPA regarding those restrictions, and whether a court applies the "likelihood of harm" analysis or the "scope of rights granted" analysis.

OIL AND GAS LEASING ON PUBLIC LANDS: A LEGAL AND ADMINISTRATIVE OVERVIEW

The Mineral Leasing Act of 1920 (Leasing Act)24 authorizes leasing of federal public lands for private resource development.25 The Leasing Act provides for federal control over the rate of leasing, but not of exploration and development once a lease has been issued.26 The Leasing Act vests authority for issuing leases with the Secretary of the Interior; the agency which exercises this authority is the Bureau of Land Management (BLM), within the Department of the Interior.27

An oil or gas lease is a contract which determines the rights and

22. Id. § 1508.27(b)(7).
23. For further discussion of "wilderness" designation, see infra note 54 and accompanying text.
25. Id. § 226(a).
obligations of both parties to the contract.\textsuperscript{28} The lessee "receives a property right enforceable against the government."\textsuperscript{29} The Leasing Act characterizes the lease as conveying absolute rights to drill.\textsuperscript{30}

BLM has primary responsibility for leasing decisions on lands under its jurisdiction.\textsuperscript{31} Responsibility for leasing on Forest Service lands is divided between BLM and the Forest Service, an agency within the Department of Agriculture. For Forest Service \textit{public domain} lands,\textsuperscript{32} BLM has jurisdiction over the mineral estate, and the Forest Service has jurisdiction over the surface.\textsuperscript{33} The Forest Service prepares the necessary environmental analysis\textsuperscript{34} but by statute BLM has final authority over the decision of whether and under what terms to issue a lease.\textsuperscript{35} By agreement, the Forest Service issues a recommendation either to lease with specified terms, or not to lease. BLM generally accepts the proposal.\textsuperscript{36} On the other hand, with regard to Forest Service \textit{acquired} lands, BLM may issue leases only with the Forest Service’s permission.\textsuperscript{37}

The decision whether to issue an oil and gas lease is discretionary. The Leasing Act provides that "[a]ll lands subject to disposition under this Act which are known or believed to contain oil or gas deposits \textit{may be leased} by the Secretary [of Interior]."\textsuperscript{38} In exercising his discretion, the Secretary of Interior may refuse to lease an area.\textsuperscript{39} Moreover, the Secretary of Interior may decline to lease

\begin{itemize}
\item \textsuperscript{28} See \textit{Continental Oil Co. v. United States}, 184 F.2d 802, 807 (9th Cir. 1932);
\item \textsuperscript{29} \textit{Sun Oil Co. v. United States}, 572 F.2d 786, 818 (9th Cir. 1978).
\item \textsuperscript{30} \textit{Union Oil v. Morton}, 512 F.2d 743, 747 (9th Cir. 1975).
\item \textsuperscript{32} Public domain lands are those which have been held by the federal government since their original acquisition. \textit{BUREAU OF LAND MANAGEMENT, U.S. DEP’T OF THE INTERIOR, PUBLIC LAND STATISTICS} 187 (1981), \textit{supra} note 31, at 914 n.55. The other type of federal lands, acquired lands, are those which once were privately held but have since been acquired by the government. \textit{Id.} at 181, \textit{supra} note 31, at 914 n.55.
\item \textsuperscript{34} \textit{Id.}, \textit{supra} note 31, at 914.
\item \textsuperscript{35} 30 U.S.C. §§ 187, 226.
\item \textsuperscript{36} \textit{MEMORANDUM OF UNDERSTANDING}, \textit{supra} note 33, at 4.
\item \textsuperscript{37} 30 U.S.C. § 352. Acquired lands are leased under the \textit{Mineral Leasing Act for Acquired Lands}. \textit{Id.} §§ 351-359.
\item \textsuperscript{38} \textit{Id.} §§ 226(1) (emphasis added). Lands subject to the Leasing Act constitute a very broad category, including most open lands containing known or suspected mineral deposits. \textit{See id.} § 181.
\item \textsuperscript{39} \textit{Udall v. Tallman}, 380 U.S. 1, 4 (1965); \textit{Burglin v. Morton}, 527 F.2d 486, 488 (9th Cir.), \textit{cert. denied}, 425 U.S. 973 (1976).
\end{itemize}
based solely upon environmental reasons.\textsuperscript{40}

The Leasing Act does not provide specific standards to guide BLM's leasing authority, but it authorizes the government to prescribe regulations "necessary to carry out . . . the purposes of [the Act]."\textsuperscript{41} BLM can control the environmental effects of oil and gas leasing by several methods. Not only can BLM refuse to lease an area (or require mitigation measures in drilling permits), but it also can include protective stipulations in the leases.\textsuperscript{42} BLM includes a number of standard stipulations in all leases.\textsuperscript{43} In addition, special stipulations may be included in leases for lands that are particularly sensitive to adverse environmental impact.\textsuperscript{44} The strict No Surface Occupancy (NSO) Stipulation prohibits drilling on the leased land itself; access to leased minerals must be made by slant drilling from outside the leased area.\textsuperscript{45}

A variation on the NSO Stipulation is the Contingent Rights Stipulation,\textsuperscript{46} which prohibits surface occupancy unless and until such activity is specifically approved by the appropriate agency.\textsuperscript{47} If the subsequent EIS determines sufficient adverse environmental impacts due to proposed activities, a drilling permit will not be granted.\textsuperscript{48}

\begin{footnotes}
43. These include stipulations which: (1) require that the lessee avoid or mitigate adverse impacts to visual, cultural, and paleontological values; (2) give the government the authority to control the manner and location of drilling and other activities, and to control vehicle use (BUREAU OF LAND MANAGEMENT, U.S. DEP'T OF THE INTERIOR, Form 3109-5 (Aug. 1973)); and (3) restrict or prohibit activities that cause erosion or that adversely impact threatened or endangered species. Id., Form MSO-3100-47(a) (Feb. 1980). Additional standard stipulations apply to leases of Forest Service lands, requiring implementation of mitigation and restoration measures, and proven land management techniques. Id., Form 3109-3 (June 1971).
44. 43 C.F.R. § 3103.1-2.
46. See generally Edelson, supra note 31.
47. See Sierra Club v. Peterson, 717 F.2d 1409, 1411 (D.C. Cir. 1983); Edelson, supra note 31, at 940-50.
48. Edelson, supra note 31, at 941-42. With both the Contingent Rights Stipulation and the strict no surface occupancy (NSO) Stipulation, the government maintains legal authority over surface use of the leased tract, and no vested rights are conveyed. The difference between the two stipulations is that the NSO Stipulation precludes any surface use, while under the Contingent Rights Stipulation surface use is possible, but not guaranteed.

It appears that the Contingent Rights Stipulation has fallen into disuse. When originally implemented by the government in the early 1980s, the Contingent Rights Stipula-
With NSO leases, the Interior Department retains complete control over surface occupancy. For non-NSO leases, on the other hand, the Interior Department cannot deny a drilling permit after issuing the lease. It may only impose reasonable conditions designed to mitigate environmental effects of the drilling operations.\textsuperscript{49}

After a lease has been issued, the United States Geological Survey (USGS), an agency within the Interior Department, oversees any oil and gas operations on the leased tract.\textsuperscript{50} A lessee must submit an application for a permit to drill (APD) and an operations plan before the initiation of drilling.\textsuperscript{51} USGS may require certain site-specific environmental mitigation measures during the approval process, but it is not statutorily empowered to block oil and gas operations.\textsuperscript{52}

**Case Law Discussing NEPA’s Application to Oil and Gas Leasing**

The cases discussed below represent the major judicial treatment of the issue of whether NEPA requires the preparation of an EIS at the leasing stage of oil and gas activities on public lands.

Sierra Club v. Peterson

The first case squarely addressing the issue of whether an EIS is required for the issuance of oil and gas leases on public lands was *Sierra Club v. Peterson*.\textsuperscript{53} This case involved a challenge to the decision of the Forest Service and the Interior Department to issue oil and gas leases in the Palisades Further Planning Area (Palisades Area), a roadless area of approximately one quarter-million acres in the Targhee and Bridger-Teton National Forests of Idaho and Wyoming.\textsuperscript{54}
The Sierra Club argued that the Forest Service had violated NEPA by recommending the leasing without first preparing an EIS. The district court upheld the decision to issue the leases without preparing an EIS. The Court of Appeals for the District of Columbia Circuit reversed that decision. After conducting an EA, the Forest Service recommended issuing the leases with various stipulations attached. In addition to standard stipulations, the leases contained an NSO Stipulation for specific portions of the Palisades Area designated as "highly environmentally sensitive." The leases for the remaining lands, which were not considered highly environmentally sensitive, did not contain NSO Stipulations, and thus did not prohibit surface occupancy.

The Interior Department retained the authority to prohibit all surface-disturbing activity on land leased with the NSO Stipulation until further site-specific environmental studies were made. Thus, the court upheld the issuance of the NSO leases without an EIS. The court then addressed the issuance, without an EIS, of the non-NSO leases. The Forest Service argued that most leases never reach the drilling stage and that any impacts from the act of leasing would be insignificant or, if significant, could be mitigated by the controls provided for in the lease stipulations. The Court of Appeals for the District of Columbia Circuit disagreed. It noted that no matter how extensive the mitigation measures in the leases, none of the stipulations at issue expressly authorized the Interior Department or the Forest Service to prevent a lessee from conducting surface-disturbing activities. Thus, the court concluded that "[t]he decision to allow surface disturbing activities has been made at the leasing stage and, under NEPA, this is the point at which the environmental impacts must be evaluated."

One function of NEPA is to facilitate agency consideration of the environmental effects of various actions while alternatives are still available. The court of appeals in Sierra Club recognized this aspect of NEPA: "[T]he appropriate time for preparing an EIS is
prior to a decision, when the decisionmaker retains a maximum range of options. . . . An EIS is required when the 'critical agency decision' is made which results in 'irreversible and irretrievable commitments of resources' to an action which will affect the environment."

The court in *Sierra Club* gave the Interior Department a choice with regard to the method by which it could achieve NEPA compliance. The court ordered the Interior Department either to prepare an EIS prior to leasing, or to include NSO Stipulations in *all* leases issued, thus allowing the Interior Department to retain the authority to prevent surface-disturbing activities should the environmental consequences be found to be unacceptable.

**Conner v. Burford**

The next case addressing NEPA’s application to oil and gas drilling on public lands was *Conner v. Burford*. The plaintiffs had challenged the issuance of oil and gas leases in the Flathead and Gallatin National Forests in Montana. Plaintiffs were granted summary judgment on their claim that the Forest Service and the Interior Department violated NEPA by issuing leases without preparing an EIS. Citing *Sierra Club*, the district court held the issuance of the non-NSO leases unlawful. Significantly, the court also held that the NSO leases violated NEPA. The case has been appealed to the Court of Appeals for the Ninth Circuit.

The district court provided three bases for its decision. First, it noted that site-specific analysis of a single development activity may result in a FONSI, without considering the cumulative impacts of several such activities. If a comprehensive environmental analysis was not done prior to any single activity, “a piecemeal invasion of the forests would occur, followed by the realization of a significant and irreversible impact.” The court concluded: “In this case, the

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59. 717 F.2d at 1414 (emphasis original) (quoting Mobil Corp. v. Federal Trade Comm’n, 562 F.2d 170, 173 (2d Cir. 1977)).
60. Id. at 1415.
62. Id. at 108-09. The latter group of leases contained Contingent Rights Stipulations.
63. As discussed above, the Council on Environmental Quality (CEQ) regulations require a consideration of the cumulative impacts of a proposed activity in combination with other activities. 40 C.F.R. § 1508.27(b)(7). For judicial treatment of the necessity to analyze cumulative impacts, see, e.g., Cady v. Morton, 527 F.2d 786 (9th Cir. 1975); Trout Unlimited v. Morton, 509 F.2d 1276 (9th Cir. 1974).
64. *Conner*, 605 F. Supp. at 109. The court cited Thomas v. Peterson, 753 F.2d 754 (9th Cir. 1985), which had stated:

A central purpose of an EIS is to force the consideration of environmental impacts in the decision making process . . . . [T]he purpose cannot be fully served if consideration of cumulative effects of successive, interdependent steps is delayed until the first step has already been taken.
leasing stage is the first stage of a number of successive steps which clearly meet the ‘significant effect’ criterion to trigger an EIS.”

Second, the court stated that NSO stipulations can be modified or even removed without an EIS, presumably in the same manner as any other contractual terms may be voluntarily modified by the parties. Thus, the issuance of a lease, even with an NSO Stipulation, would not guarantee that surface occupancy would not occur.

Third, the court noted that later site-specific analyses might not take into account the objective of protecting the area for possible future wilderness designation, as the leased tract apparently was a Further Planning Area. The court stated: “[T]he promise of a site specific EIS in the future is meaningless if later analysis cannot consider wilderness preservation as an alternative to development.”

Although there were bases for the court’s holding in Conner, the leased tract’s status as a Further Planning Area — and thus as a potential Wilderness Area — perhaps was the crucial factor in the court’s decision. The court stated: “To use the NSO stipulation as a mechanism to avoid an EIS when issuing numerous leases on potential wilderness areas circumvents the spirit of NEPA.” In addition, the court suggested: “The idea of possible site-specific assessments in the future does not comply with the objective of protecting the area for possible wilderness designation.” Thus, the opinion emphasizes the importance of preserving wilderness qualities. The above statements also reflect the court’s aggressive approach to NEPA review and its preference for a strict application of NEPA.

Bob Marshall Alliance v. Watt

One year after deciding Conner, the same district court (and judge) decided Bob Marshall Alliance v. Watt. The plaintiffs had challenged the Interior Department’s decision not to prepare an EIS prior to issuing oil and gas leases in the Deep Creek/Reservoir North Further Planning Area (Deep Creek Area), a 42,000 acre area within Montana’s Lewis and Clark National Forest. The re-
mote Deep Creek Area constitutes critical habitat for several endangered and threatened species, and generally contains an abundance of wildlife. It was given a perfect wilderness attribute rating in the Forest Service's RARE II evaluation. Because of potential oil and gas reserves, however, the Deep Creek Area had been designated as a Further Planning Area, available for all uses (including oil and gas drilling) permitted under applicable land use plans, provided that the Area's wilderness quality was preserved.

The NEPA issue in *Bob Marshall* was whether the Deep Creek leases created a significant effect upon the human environment, thus requiring preparation of an EIS. The Forest Service had prepared an EA for the proposal to lease the Deep Creek Area, and then had issued a FONSI. The EA recommended allowing surface occupancy in the Deep Creek Area on slopes less than forty percent in grade, provided that the leases contained certain restrictive stipulations which would mitigate, to an extent, the environmental impacts of oil and gas exploration. The Forest Service determined that individual site-specific EAs, or perhaps EISs, would be done after site-specific exploration proposals had been submitted, when the extent of the lessees' proposed activities would be known.

In rejecting the Interior Department's argument that the mitigation conditions contained in the EA obviated the need for an EIS, the district court found that such measures would not *totally* mitigate adverse environmental impacts. The court noted that the Deep Creek Area EA concluded that exploration alone — without commercial development or production — would substantially impair the wilderness character of the area for a period of up to twenty years.

The court rejected the use of NSO Stipulations as a substitute for preparing an EIS, citing its own decision in *Conner*, in which it had rejected NSOs as a substitute for EIS preparation because the NSOs could be rescinded, cumulative impacts might not be consid-

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73. *Id.* at 20759-60.
74. The case also involved the issue of whether the Forest Service and the Department of the Interior had violated the Endangered Species Act by failing to make an informed biological assessment of the effects of leasing upon the Deep Creek Area. *Id.*
75. *Id.* at 20760.
76. The agencies relied on *Cabinet Mountains Wilderness/Scotchman's Peak Grizzly Bears v. Peterson*, 685 F.2d 678 (D.C. Cir. 1982), in which the agency held that inclusion in the lease of "[s]pecific mitigation measures which completely compensate for any possible adverse environmental effects stemming from the original proposal, the statutory threshold of significant environmental effects is not crossed and an EIS is not required." *Id.* at 682.
78. *Id.*
79. NSO Stipulations covered 75% of the leased Deep Creek Area and, unlike the Contingent Rights Stipulation leases in *Sierra Club* and *Conner*, the leases prohibited surface occupancy of the leased area.
ered, and a potential wilderness area was threatened. The court in *Bob Marshall* did not mention whether or not the NSOs in the Deep Creek Area leases were similarly rescindable. The court simply concluded: “The NSO stipulations, however, should not be used to circumvent the requirement of preparing an EIS.” Thus, the court rejected outright the use of NSOs as a method of complying with NEPA.

In invalidating the use of NSO stipulations, the court provided a more detailed NEPA analysis than it did in *Conner*. First, the court rejected the propriety of postponing environmental analysis. The court found that an EIS was required at the leasing stage because the “critical decision” for the Deep Creek Area was the decision to issue the leases in the first place. The “critical decision” referred to by the *Bob Marshall* court was defined by the Ninth Circuit in *California v. Block* as a decision which resulted in an “irreversible and irretrievable” commitment of resources. Following *Block*, the court held that such a decision requires a thorough environmental analysis at the time of resource allocation.

With regard to multi-stage environmental analysis of leasing, the *Bob Marshall* court followed decisions of the Ninth Circuit in determining that an EIS must address subsequent phases of the same project when the “dependancy [of one phase upon the other] is such that it would be irrational, or at least unwise to undertake, [sic] the first phase if subsequent phases were not also undertaken.” The

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81. Id.
82. The agencies had relied on *County of Suffolk v. Secretary of the Interior*, 562 F.2d 1368 (2d Cir. 1977), cert. denied, 434 U.S. 1064 (1978), to support their position that a general EIS for leasing was not required. In *County of Suffolk*, the Court of Appeals for the Second Circuit stated two factors that determine whether the environmental analysis has been sufficient to comply with NEPA: first, whether obtaining more detailed information is “meaningfully possible” at the time; second, how “important” it is to have the additional information at an earlier stage in determining whether or not to proceed with the project. 562 F.2d at 1378. Applying the two-part analysis articulated in *County of Suffolk*, the court in *Bob Marshall* found that it was both meaningfully possible and important to discover the site-specific environmental consequences of leasing in the Deep Creek Area before the agency makes the decision to lease. 16 Envtl. L. Rep. (Envtl. L. Inst.) at 20761.
83. *Bob Marshall*, 16 Envtl. L. Rep. (Envtl. L. Inst.) at 20761 (citing *Block*, 690 F.2d 753, which held that the Forest Service had violated NEPA by designating certain roadless areas under RARE II as Non-Wilderness without sufficient site-specific analysis).
84. *Block*, 690 F.2d at 763.
86. 16 Envtl. L. Rep. (Envtl. L. Inst.) at 20761 (quoting *Thomas*, 753 F.2d at 173
court noted that lease issuance is the first step in a process involving substantial investment by the lessee, and that a lessee's capital investments and contractual commitments are relevant to determining the interdependence of phased activities. In the court's analysis, "[i]t would undoubtedly be irrational, or at least unwise to undertake a leasing program, if exploration and ultimate development were not only contemplated but possible." Thus, since lease issuance in reality is the first step in a process which may "significantly affect" the environment, the court required an EIS before the project proceeded.

Second, in rejecting the adequacy of NSO Stipulations as a substitute for EIS preparation at the leasing stage, the court addressed the issue of the cumulative effects of several oil and gas projects. The court noted that such cumulative effects would be significantly different from those of a single operation within the Deep Creek Area, and concluded by quoting from Conner: "‘Obviously a comprehensive analysis of cumulative impacts of several oil and gas development activities must be done before a single activity can proceed.’" The court noted that in determining whether an action significantly affects the environment, the CEQ regulations provide that a factor in determining cumulative impacts is "whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by . . . breaking [an action] down into small component parts." The court asserted that this rule complements the "unassailed principle" that an EIS should be prepared early in the planning process so that environmental impacts would be considered in decision-making.

The final NEPA issue addressed by the court was the NEPA requirement that the agency set forth alternatives to the proposed ac-

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759. In turn quoting Trout Unlimited, 509 F.2d at 1285. In Thomas, the court held that the road construction was a connected action with the timber sales and, thus, must be studied in a single EIS. 753 F.2d at 760-61. In Trout Unlimited, the court held that the EIS was not required for a Second Phase of a Dam and Reservoir Project if the First Phase is substantially independent of the Second Phase. 509 F.2d at 1285).

87. Bob Marshall, 16 Envtl. L. Rep. (Envtl. L. Inst.) at 20761 (citing Cady, 527 F.2d 786, in which the court held that a lessee's capital investments and contractual commitments are relevant to a determination of the interdependence of staged activities. Id. at 795).


90. 40 C.F.R. § 1508.27(b)(7).

Plaintiffs argued that the Interior Department had failed to consider the alternative of denying all lease applications in order to preserve the Deep Creek Area for possible future wilderness designation by Congress. The Interior Department responded that it had considered this alternative, but had rejected it because the EA did not find “unavoidable conflicts” between surface use and resource preservation which it believed were required in order to reject any lease. The court ruled that the Interior Department could indeed base a decision to reject leases solely on the protection of wilderness characteristics. The court emphasized the importance of the alternatives analysis, noting that this requirement appeared twice in the text of NEPA, once more than the EIS requirement itself. The court gave special emphasis to the alternatives requirement in the context of possible adverse impacts to a potential future Wilderness Area. The court stated: “The analysis of the wilderness preservation/no leasing alternative is necessary at a time when that alternative is still viable, a time which is limited to the pre-leasing stage.” Thus, the court held that the mere listing of the no-leasing alternative, without any meaningful consideration, violated NEPA.

Park County Resource Council v. United States Department of Agriculture

In 1987, the Tenth Circuit Court of Appeals issued its decision in Park County Resource Council, Inc. v. United States Department of Agriculture, which cut against the legal principles established in Sierra Club, Conner, and Bob Marshall. The Park County case involved a NEPA challenge by the Park County Resource Council to the issuance of an oil and gas lease in the Shoshone and other National Forests in the Rocky Mountain Region. After preparing an EA, the Forest Service issued a FONSI and recommended issuing a lease containing stipulations which would “in most cases, prevent or satis-

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92. See supra notes 7 & 13-15 and accompanying text.
93. Bob Marshall, 16 Envtl. L. Rep. (Envtl. L. Inst.) at 20762. The Interior Department apparently had relied on the Forest Service Manual for this conclusion. Current policy, as reflected in sections 2822.14b and 2822.46 of the Forest Service Manual, required decisions to reject leases to be based on a finding of such “unavoidable conflicts.”
95. Id.
96. 817 F.2d 609 (10th Cir. 1987).
factorily mitigate unacceptable environmental impacts.” Following the recommendation of the Forest Service, the Interior Department issued an oil and gas lease which encompassed 10,174 acres of non-wilderness, multiple-use land in the Shoshone National Forest. The lease required prior approval, as well as preparation of additional EAs, before any surface-disturbing actions, such as exploratory drilling, would be permitted. The lease, however, did not contain NSO Stipulations, except for one provision that allowed the Forest Service to prohibit any ground-disturbing activity which would harm any threatened or endangered species inhabiting the lands.

There were several important aspects to the Park County case, each discussed below. First, the plaintiffs alleged that the lease issuance violated NEPA because it was a “major federal action which significantly affects the quality of the human environment and thereby requires the preparation of an EIS.” Plaintiffs sought rescission of the lease, as well as an order requiring the Interior Department to withdraw approval of any leases or permits previously granted, pending compliance with NEPA. The District Court denied plaintiffs’ request for a temporary restraining order and a preliminary injunction, and dismissed their complaint on the merits.

The Court of Appeals for the Tenth Circuit held that the Forest Service determination that an EIS was not required for lease issuance was not unreasonable. Although reversing the district court.

98. Park County Resource Council v. United States Dep’t of Agric., 817 F.2d at 612.
99. NORTH FORK WELL FINAL ENVIRONMENTAL IMPACT STATEMENT, BUREAU OF LAND MANAGEMENT [&] U.S. FOREST SERVICE, SHOSHONE NAT’L FOREST 93-94 (Mar. 1985) [hereinafter NORTH FORK WELL EIS]. The lease is reprinted in its entirety in the NORTH FORK WELL EIS.
100. Id. at 94. The latter provision is analyzed in greater detail infra, notes 125-130.
101. Park County, 817 F.2d at 614.
102. Id.
104. Park County, 817 F.2d at 624. The appeals court in Park County applied a “reasonableness” standard of review. Id. at 621-24. As the court noted, a split exists among the circuits as to the appropriate standard of review of an agency decision not to prepare an EIS. Id. at 621 n.4. The Tenth Circuit, along with the Third, Fifth, Eight, and Ninth Circuits, has applied a “reasonableness” standard of review. See, e.g., Jones v. Gordon, 792 F.2d 821, 827 (9th Cir. 1986); Vieux Carre Property Owners, Residents & Assoc., Inc. v. Pierce, 719 F.2d 1279 (5th Cir. 1983); Township of Lower Alloways Creek v. Public Serv. Elec. & Gas Co., 687 F.2d 732, 742 (3d Cir. 1982); Winnebago Tribe v. Ray, 621 F.2d 269, 271 (8th Cir.), cert. denied, 449 U.S. 836 (1980).
105. The First, Second, Fourth and Seventh Circuits, on the other hand, have applied the “arbitrary or capricious” standard of review contained in the Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (1982). See, e.g., City of Alexandria v. Federal Highway Admin., 736 F.2d 1014, 1017 (4th Cir. 1984); City of West Chicago v. United States Nuclear Regulatory Comm’n, 701 F.2d 632, 651 (7th Cir. 1983); Grazing Fields Farm v. Goldschmidt, 626 F.2d 1068, 1072 (1st Cir. 1980); Cross-Sound Ferry Servs., Inc. v. United States, 573 F.2d 725, 732 (2d Cir. 1978).
106. The United States Supreme Court has declined to resolve this issue, despite the urg-
on several procedural issues, the appeals court upheld the district court on the merits of the case — the NEPA issues.

Second, in addition to challenging the issuance of the lease, the plaintiffs also challenged the Interior Department’s approval of an APD. The permit allowed the lessee’s operator to drill an exploratory well in the leased area. Plaintiffs challenged the APD approval on the ground that the EIS accompanying the drilling permit was inadequate. The district court held that the plaintiffs had failed to demonstrate any inadequacy of the EIS accompanying the permit.

Before the case reached the Tenth Circuit, the exploratory well had been drilled and found to be dry, and reclamation work at the site had been completed. Thus, the circuit court dismissed as moot plaintiff’s challenge to the APD approval. Because the lease for the tract remained in force, however, the challenge to the lease...
issuance, unlike the APD challenge, was not mooted by these developments.109

Third, the Park County court addressed the issue of whether the Forest Service should have prepared an EIS in order to assess potential cumulative effects of the lease issuance. In an argument identical to that made by the plaintiff and accepted by the court in Bob Marshall, the Park County plaintiffs argued that leasing was the first step in a foreseeable process including exploratory drilling and then full field development. The cumulative effects of these events, they argued, should be considered at the leasing stage, at a time when it is still possible to consider these effects before they occur.110

The court rejected this argument, ruling that the link between leasing and development was unlikely to occur and could not be specifically described at the leasing stage. The court stated: “Full field development is typically an extremely tentative possibility at best at the leasing stage.”111 The court concluded that the steps from leasing to development are not “so interdependent that it would be unwise or irrational to complete one without the others” — the benchmark signaling the need for a cumulative impact EIS.112

Finally, the Park County court analyzed the tiered approach to environmental review, which is discussed in the CEQ regulations.113 The court stated that, at the leasing stage, the agency does not have the specific information necessary to make a useful environmental evaluation, and that it would only have this information when it received a concrete proposal, in the form of an APD.114 Thus, the court concluded, a tiered review was appropriate in this case.

A Perspective on the Cases

Oil and gas exploration often constitutes, and development almost always constitutes, a “major federal action significantly affecting the quality of the human environment.” In determining whether a lease issuance also constitutes such an action, much depends on whether the lease vests authority in the government to prohibit drilling (or to condition drilling on preparation of an EIS), judicial interpretation of these stipulations, and the specific facts of the case. The following discussion of the cases emphasizes the important distinction between non-NSO and NSO leases.

an additional well in the area. Id. at 615.
109. Id.
110. Id. at 622-24.
111. Id. at 623.
112. Id. (quoting Trout Unlimited, 509 F.2d at 1285).
113. Id. at 624; see also 40 C.F.R. §§ 1502.20, 1508.28. For a detailed analysis of tiered review, see infra notes 140-46 and accompanying text.
114. Park County, 817 F.2d at 624.
Non-NSO Leases

With regard to non-NSO leases, the recent Park County decision contradicts Sierra Club, as well as the more stringent decisions in Conner and Bob Marshall. The Park County court held that the agency did not violate NEPA by issuing an oil and gas lease without preparing an EIS. The lease limited the manner in which drilling could be conducted, but did not grant the government authority to prohibit drilling in order to prevent adverse surface effects, except in the case of adverse impacts of threatened or endangered wildlife.

Non-NSO leases grant the lessee a vested right to drill on the leased tract. The government may regulate how drilling may proceed (i.e., by conditions in the drilling permit, and by non-NSO Stipulations in the lease) but the government has surrendered the authority to decide whether to allow drilling. Even if an EIS prepared at a subsequent stage determines severe adverse impacts, the government may not prohibit the lessee’s surface operations at that point. For these reasons, failure to prepare an EIS for issuance of non-NSO leases clearly violates NEPA. In holding to the contrary, without establishing that drilling under this lease would not significantly affect the environment, the Park County decision reflects a fundamentally erroneous interpretation of the law.

NSO Leases

NSO leases, on the other hand, do not convey vested surface occupancy rights. NSO leases merely convey rights to mineral deposits without rights to surface occupancy (through strict NSO Stipulations), or rights to surface occupancy which are contingent upon agency evaluation and approval of a particular site-specific proposal (through Contingent Rights Stipulations).

In addition to the nature of the leases and the NEPA policy interpretations made by the courts, the case holdings seem to depend on two factual aspects: first, whether the land at issue contains wilderness qualities that may be affected by leasing; and second, whether it is known if oil or gas actually exists in commercially producible quantities on the leased tract.

Regarding the first factor, the courts in Sierra Club, and especially in Conner and Bob Marshall, emphasized the potential effects of leasing on the wilderness qualities of the lands, which were all

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115. Id. at 622-24.
116. See supra notes 99-100 and accompanying text.
Further Planning Areas. In **Park County**, the court stressed the *lack* of wilderness qualities contained in the leased tract.\(^{117}\) Moreover, the mitigation measures involved were extensive.\(^{118}\)

The second consideration in evaluating these cases is that in **Park County**, unlike the other cases, the court knew that no oil or gas existed in the ground, at least in the area of the dry exploratory hole. Because the possibility of an oil or gas discovery in the area was remote, it would be unlikely that leasing would lead to significant environmental effects.

The importance of the second factor distinguishing the two lines of cases — whether there are known oil or gas reserves — reflects a broader dichotomy in the law regarding NEPA and oil and gas leasing. On the one hand, **Sierra Club, Conner,** and **Bob Marshall** represent the view that whether an EIS is required for leasing depends on the scope of the rights conveyed to the lessee. To the extent that the full exercise of those rights requires an EIS, an EIS must be prepared upon conveyance of those rights.

On the other hand, **Park County** represents the view that whether an EIS is required depends on the likelihood of finding oil or gas, and whether the land is potential wilderness or not — in short, the perceived likelihood of significant environmental impact. This also is the position of the BLM generally. In theory it reflects a policy of staged leasing; in reality, however, EISs rarely are prepared at subsequent stages.

Although NSO leasing appears to be a sound administrative method of complying with NEPA, its violation of the spirit and policies written into NEPA raises serious problems. The remainder of this Comment analyzes the **Park County** decision, and discusses relevant legal and policy aspects of oil and gas leasing in the NEPA context. It suggests that, while the **Conner** and **Bob Marshall** decisions are better reasoned than the **Park County** decision, and effectuate a strong NEPA policy, as Congress intended, the two lines of cases are significantly different on their facts. Thus a direct comparison is not fruitful; nor perhaps is a generic discussion of whether

\(^{117}\) The **Park County** court stated:

The lease area has never been designated a wilderness, wilderness study, park, or other restricted-use area. The district court noted: “Congress has had three chances in recent years to incorporate these lands into a Wilderness Area, but each time has refused to do so, including in 1984 when the lands in question were once again classified as multiple-use areas in the Wyoming Wilderness Act. . . . [M]ultiple-use does include oil and gas drilling.” 613 F. Supp. at 1187.

\(^{118}\) The lessee conducted exploratory oil and gas drilling using the only available drilling rig in North America that could be disassembled and flown to the drilling site by helicopter, thus drastically reducing surface disturbance from road construction. **McCrum, NEPA Litigation Affecting Federal Mineral Leasing and Development,** 2 NAT. RESOURCES & ENV'T 7, 10 (Spring 1986).
NSO leasing violates NEPA. The Comment concludes that Conner and Bob Marshall should be affirmed by the Ninth Circuit.

**Detailed Analysis of the Park County Decision**

**Relation to Prior Case Law**

Prior to its analysis of the merits of the case, the circuit court in Park County stated: "We do not approach this issue with a clean slate. A well-developed body of case law under NEPA, as well as considerations of public policy, must guide our analysis." The slate was nonetheless "cleaner" than it reasonably should have been. The court failed to mention or even cite Sierra Club, Conner, or Bob Marshall. Two of the three cases (Conner and Bob Marshall) are district court cases, to which circuit courts owe no deference; these two cases, however, along with Sierra Club, are the only cases directly on point regarding the specific issue before the court in Park County. Although courts are in no way bound to acknowledge case law from other circuits, the court's omissions of relevant law in Park County suggest that perhaps the "well-developed body of case law under NEPA" was overshadowed by the court's own "considerations of public policy."

**Comparative Stipulations Analysis**

The real problem, of course, is not simply that the Park County decision did not cite all the applicable case law available, but that it failed to address the issue of whether, and under what circumstances, stipulations in oil and gas leases will obviate NEPA's EIS requirement. The Park County court failed to resolve important questions about the effect of the lease stipulations, and about the effect of NSO Stipulations generally, even though it changed the tenor, if not the direction, of the law in this area.

119. Park County, 817 F.2d at 620.
120. A note should be made with regard to the timing of these cases. Appellants' brief in Park County was filed on December 19, 1985, and the decision was issued in the case on April 17, 1987. The Bob Marshall decision was issued on May 27, 1986. It is not known whether Bob Marshall was issued in sufficient time for the Park County court to be able to address it, whether the Park County court was unaware of the decision, or whether that court simply was disinclined to address it.

In addition, it should be noted that appellants' brief in Park County did not include reference to Sierra Club. It did include, however, reference to Conner, which does discuss Sierra Club. Appellants' Opening Brief at 17, Park County Resource Council v. United States Dep't of Agric., 817 F.2d 609 (10th Cir. 1985) (No. 85-1000) [hereinafter Opening Brief].
The lease issued by the Interior Department in Park County contained, among other mitigation provisions,\(^{121}\) a stipulation requiring "prior approval, as well as the preparation of further EAs, before any surface disturbing actions, such as drilling [occur]."\(^{122}\) The court did not mention that this stipulation does not provide the Interior Department with the legal authority to prohibit the regulated activities in order to prevent adverse impacts discovered upon site-specific analysis.\(^{123}\) The stipulation does not have the same effect as the NSO stipulations in Sierra Club, Conner, and Bob Marshall.\(^ {124}\) The stipulations in Park County gave the government the authority to limit drilling but not to prohibit it, except where surface occupancy is found to pose harm to any threatened or endangered species on the tract.

The court's treatment of the legal effects of the lease obscures rather than clarifies these effects. However, the EIS for the approved exploratory well succinctly defines these effects in its discussion of the lease: "Under the existing lease [the] alternative [of not drilling the well] would be authorized only if occupancy would detrimentally affect any endangered or threatened plant or animal species."\(^ {126}\) The EIS also states: "[T]he Secretary of Interior has no authority to deny all activity upon the lease except . . . where use and occupancy would detrimentally affect endangered or threatened species."\(^ {128}\)

The exception referred to in the exploratory well EIS was the lease stipulation which provided that prior to surface-disturbing activities, the leased lands must be surveyed for any threatened or endangered plant or animal species, and a report filed describing the results of the survey, "possibly resulting in use restrictions or even complete use prohibition."\(^ {127}\) Thus, the operator potentially could be precluded from drilling activities if such activities jeopardized a threatened or endangered species. However, the threatened or endangered species stipulation does not purport to vest the government with authority to prevent other kinds of environmental harm.

\(^{121}\) Among other things, the lessee was required to "take all reasonable steps to prevent unnecessary soil erosion or timber damage, unnecessary air and water pollution, and unnecessary damage of surface improvements, fossils and artifacts and to restore the land surface to its former condition after use is terminated." Id. at 4-5 (quoting NORTH FORK WEL EIS, supra note 99, at 91, 93).

\(^{122}\) Id. at 17 (quoting NORTH FORK WELL EIS, supra note 99, at 93-94).

\(^{123}\) See generally NORTH FORK WELL EIS, LEASE W-73230, supra note 99, at 89-94.

\(^{124}\) Even in Conner and Bob Marshall, which held that the NSO Stipulations did not save the lease issuance from violating NEPA, the court recognized that the stipulations, at least when originally issued with the leases, prohibited surface disturbance without additional permission from the government. Conner, 605 F. Supp. 107; Bob Marshall, 16 Envtl. L. Rep. (Envtl. L. Inst.) 20759.

\(^{125}\) NORTH FORK WELL EIS, supra note 99, at 3.

\(^{126}\) Id. at 19.

\(^{127}\) Park County, 817 F.2d at 613 (emphasis added).
The court explicitly recognized the NSO nature of the threatened/endangered species stipulation, but failed to discuss the non-NSO nature of the remaining stipulations. Nor did the court address the distinction between the two types of stipulations. The failure of the appellants’ brief to adequately present this issue to the court is unfortunate. The court’s failure to address this issue is more unfortunate, because the decision is internally inconsistent and obfuscates the law regarding oil and gas leases.

Cumulative Effects

The Park County court’s conclusion with regard to potential cumulative effects of lease issuance is problematic in two respects. First, the court based its conclusion on the statistical probability of a lease issuance leading to field development. The court stated that since development occurs on only one percent of the lands leased, the relation between leasing and development was not so interdependent as to require an EIS.

A purely statistical basis for such decisions seems inconsistent with NEPA’s requirement that an EIS be prepared where significant impacts may occur. Without challenging the validity of the numbers cited by the court, it should be noted that those numbers represent a general average, and that the statistical argument does not reflect the very real possibility of exploratory drilling, and development, in a particular case.

The CEQ regulations provide that an agency, in determining the scope of an EIS, must consider cumulative impacts. The regulations define a cumulative impact as “the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions. . . “ Leasing is designed to facilitate exploration and development. Therefore, exploration and development must be considered “reasonably foreseeable future actions” connected with

128. Id. This was a Contingent Rights Stipulation.
129. See supra notes 121-24 and accompanying text.
130. See generally Opening Brief, supra note 120.
131. Park County, 817 F.2d at 623. The court conceded that “the region-wide ramifications of development will need to be considered at some point.” If an APD were filed, for example, this may require an EIS considering cumulative effects in light of regional development, as well as site-specific effects. Id. at 623.
132. See supra note 6 and accompanying text.
133. 40 C.F.R. § 1508.25(c).
134. Id. § 1508.7 (emphasis added).
leasing. Thus, leasing combined with the incremental impacts of exploration and development constitutes a cumulative impact under the CEQ regulations.138

In addition, in establishing “significance” for the purpose of determining whether an EIS is required, the CEQ regulations provide: “Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment.”137 Failure to prepare an EIS which discusses these cumulative effects thus constitutes a violation of NEPA.

The second problem regarding the court’s conclusion that an EIS analyzing cumulative impacts is unnecessary is more central to the focus of this Comment. The court’s statement that an APD may require a cumulative impact EIS only where other regional development has occurred138 precludes consideration of cumulative impacts of development before such development occurs.139 An EIS after the impact has occurred has no value to the decisionmaker. If the point at which the agency relinquishes control over the land is the lease issuance, after which it cannot prohibit drilling, then an EIS discussing cumulative effects prepared after lease issuance may be of no effect. The cumulative effects of several projects, or of several aspects of a single project, may be accurately realized, but this is all for naught if surface occupancy cannot be prohibited.

Tiered Environmental Analysis

The Park County court also may have muddied the waters regarding the “tiering” of environmental analysis. The CEQ regulations define “tiering” as “the coverage of general matters in broader environmental impact statements (such as national program or policy statements) with subsequently narrower statements or environmental analyses (such as regional or basinwide program statements or ultimately site-specific statements) incorporating by reference the general discussions and concentrating solely on the issues specific to the statement subsequently prepared.”140

The regulations encourage tiering “to eliminate repetitious discussion of the same issues and to focus on the issues ripe for decision at each level of environmental review.”141 The regulations also state the

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136. 40 C.F.R. § 1508.25(c). This impact must be considered in an EIS, pursuant to section 1508.25(c) of those regulations.
137. 40 C.F.R. § 1508.27(b)(7). See supra text accompanying notes 19-22.
138. See Park County, 817 F.2d 609.
140. 40 C.F.R. § 1508.28.
141. Id. § 1502.20.
Whenever a broad environmental impact statement has been prepared (such as a program or policy statement) and a subsequent statement or environmental
functions of tiering as being "to relate broad and narrow actions and to avoid duplication and delay." 142

The Park County court stated that tiering "is calculated to provide the most informed decision making possible in oil and gas leasing." 143 Whether or not this statement is accurate is not clear. The CEQ regulations provide that tiering is designed to bring about efficient decisionmaking, 144 but not specifically informed decisionmaking.

The court's questionable characterization of the underlying policy of tiering is consistent with its subsequent mischaracterization of the tiering process. The court went on to conclude its discussion of tiering by stating: "[T]he specificity that NEPA requires [to prepare an EIS] is simply not possible [at the leasing stage], absent concrete proposals." 145 Yet, the tiering concept, cited by the court, does not support this conclusion. The court used the tiering concept to justify postponing a thorough environmental analysis until more information is available on site-specific proposals. However, simply because tiering contemplates a progression of environmental analyses moving from the broad and general to the narrow and specific, this general administrative mechanism does not support the notion that a meaningful EIS cannot be prepared at the leasing stage. 146

In California v. Block, 147 the Ninth Circuit considered the ade-
quacy of the EIS prepared by the Forest Service in connection with its decision to designate forty-seven roadless areas in California as nonwilderness. The Forest Service contended that a programmatic EIS describing the first step in a multi-step national project need not contain the type of detailed site-specific information normally contained in an EIS prepared for a more narrowly focused project, such as a dam or a federal mineral lease. In affirming the district court, the court held the EIS to be inadequate, stating: "The 'critical decision' to commit these areas for nonwilderness uses . . . is 'irreversible and irretrievable.' The site-specific impact . . . must therefore be carefully scrutinized now and not when specific development proposals are made."

Significantly, the court in Block conceded that "conducting a detailed site-specific analysis of the . . . decision will be no simple task and will be laden with empirical uncertainty." The court went on to conclude: "Having decided to allocate simultaneously millions of acres of land to nonwilderness use, the Forest Service may not rely upon forecasting difficulties or the task's magnitude to excuse the absence of a reasonably thorough site-specific analysis of the decision's environmental consequences."

The Park County decision, on the other hand, condoned the idea that an EIS need not be prepared if that task is a difficult one.

THE SUBSTANCE-PROCEDURE CONUNDRUM OF NEPA

For leases which convey vested drilling rights, lease issuance is the stage at which NEPA's EIS requirement should be triggered, except in extraordinary (i.e., non-significant impact) cases. For leases which do not convey drilling rights, or which convey contingent rights, the EIS requirement may or may not be triggered at some later point. This legal question probably cannot be answered adequately in the abstract, and certainly cannot be answered without analyzing the extent to which the agency or reviewing court emphasizes the substantive policies of NEPA.

NEPA primarily is a procedural statute, as the court in Park County noted. NEPA and the accompanying CEQ regulations impose procedural requirements on the agency but do not replace the substantive decisionmaking which the agency must undertake.

148. Id. at 760-61.
149. Id. at 763.
150. Id. at 765.
151. Id. at 753 (emphasis added).
153. This becomes evident by looking at some of the major provisions of the statute and the regulations. For example, the agency must determine what constitutes a "significant" impact under 42 U.S.C. § 4332(c), and at what point the action or proposal is submitted.
The CEQ regulations state: “The NEPA process is intended to help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore and enhance the environment.”164 Thus, while NEPA and the CEQ regulations facilitate considered environmental decisionmaking, they do not substitute for the substantive judgments and decisionmaking by the responsible public officials.

On the other hand, NEPA embraces an environmental mandate which has been given strict enforcement by the courts.165 NEPA directs federal agencies to consider “to the fullest extent possible” the environmental effects of their policies, regulations, and actions.166 The Supreme Court has noted that this charge is “neither accidental nor hyperbolic.”167 NEPA's EIS requirement is an “action forcing” provision.168 It imposes a duty upon federal agencies to effectuate the purposes of the statute to the fullest degree possible.

Thus, while the agency has wide discretion under NEPA, at some point — presumably at the point of “unreasonableness” or “arbitrariness”166 — courts must overturn an agency decision not to prepare an EIS.

**Policy Analysis of NSO Leasing**

A comparison of the treatment of non-NSO Stipulations in *Sierra Club* and *Park County*, and of NSO Stipulations in *Bob Marshall* and *Park County*, suggests that the legal requirements of NEPA procedure in relation to oil and gas leasing are not universally clear. As noted above, NEPA's procedural requirements leave much room

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164. See Park County, 817 F.2d 609.
165. See Public Serv. Co. of N.H. v. United States Nuclear Regulatory Comm'n, 582 F.2d 77, 81 (1st Cir. 1978).
166. 40 C.F.R. § 1500.1(C).
167. See Public Serv. Co. of N.H. v. United States Nuclear Regulatory Comm'n, 582 F.2d 77, 81 (1st Cir. 1978).
170. See Park County, 817 F.2d 609.

154. 40 C.F.R. § 1500.1(C).
for substantive agency decisionmaking. The legal analysis thus shifts into policy analysis, which becomes determinative.

**NEPA's Policy of Early Environmental Analysis**

One of the strongest policies written into the NEPA process is the provision in the CEQ regulations which requires an early application of NEPA procedures. Agencies must "integrate the NEPA process with other planning at the earliest possible time to insure that planning and decisions reflect environmental values, to avoid delays later in the process, and to head off potential conflicts." Moreover, environmental analysis must "be prepared early enough so that it can serve practically as an important contribution to the decision-making process . . . ." The early application policy is especially relevant to a discussion of oil and gas leasing, since the heart of the issue is the timing of EIS preparation for oil and gas activities. The proposition that an EIS need not be prepared in connection with issuance of an NSO lease is called into question when one considers the "early application" policy specifically incorporated into the NEPA process. Although the issue exists within a grey area of the law, analysis of the "early application" policy is a necessary predicate to a well-reasoned, statutorily honest resolution of the issue.

The court in *Block* recognized the early environmental analysis mandate of NEPA. In that case, the court rejected the agency's failure to prepare an EIS based on the "task's magnitude." The court also noted that NEPA requires that the evaluation of a project's environmental consequences take place at an early stage in the project's planning process. The court conceded the desirability of "defer[ring] detailed analysis until a concrete development proposal crystallizes the dimensions of a project's environmental consequences." The court noted, however, that a site-specific EIS must be done when the "critical decision" has been made to act on site development. This point is reached when, "as a practical matter, the agency proposes to make an 'irreversible and irretrievable' commitment of the availability of resources' to a project at a particular site."

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161. 40 C.F.R. §§ 1500.5(a), 1501.2, 1502.5, 1508.13.
162.  Id. § 1501.2.
163.  Id. § 1502.5.
164.  Id. at 765.
165.  Id. at 761. See also Friends of the Earth v. Coleman, 518 F.2d 323, 327 (9th Cir. 1975).
166.  *Block*, 690 F.2d at 761 (citing *Kleppe*, 47 U.S. at 402).
167.  Id. (quoting *Sierra Club v. Hathaway*, 579 F.2d 1162, 1168 (9th Cir. 1978)).
168.  Id. (emphasis added).
Given the problems associated with NSO Stipulations, this "critical decision" may occur, "as a practical matter," at the leasing stage.

The Economics of EIS Preparation in Connection with Oil and Gas Leasing

The Park County case raises the issue of the cost of preparing an EIS as a practical factor in judicial review of a decision to forego preparation of an EIS. The court made two main points in this regard. First, it noted that, during 1984, the federal government issued 5,478 oil and gas leases. During the same year, the entire Department of Interior, including agencies outside the areas of oil and gas, prepared only 115 EISs—a figure amounting to approximately two percent of the EISs that would be required if an EIS were required to be prepared for every oil and gas lease issued. Second, in a related point, the court noted that requiring an EIS at the leasing stage, absent site-specific data, necessarily would result in preparation of a "boilerplate" EIS which would be of little use to the agency decisionmaker.

Using the two percent figure, the Park County court leaves the horrifying impression that if an EIS were required for every oil and gas lease issued, the Interior Department would have to increase the number of EISs prepared by ninety-eight percent! The court's use of statistics is misleading, however. Since many leases often are issued for a single tract of land, a single EIS often is prepared for the entire leased tract. Agencies need not, nor do they in practice, prepare a separate EIS for every single lease issued.

Moreover, under a reasonable policy towards oil and gas leasing, the exaggerated scenario suggested by the court would not be the case. One aspect of a reasonable policy, and one which also would lower the cost of EIS preparation, is that leases would be issued at a slower pace than in recent years. There would be fewer leases issued in a given year, saving time and money expended by the agency. This would also increase the chances that those leases which are issued would be evaluated more carefully and processed more quickly.

The second aspect of a reasonable leasing policy would be to increase the fees to lessees to help cover the costs of EIS preparation

169. See infra text accompanying notes 182-89.
170. Park County, 817 F.2d at 623.
171. Id. at 624.
for their lease. Lessees are receiving a sophisticated and specialized government service for the opportunity to make great profits from public lands, at the risk of spoiling those lands. Thus, this is not an unfair type of fee, and courts have upheld such fees in similar cases. Moreover, increasing the up-front costs of lease acquisition may be more desirable to the lessee than granting Contingent Rights Stipulation leases, and allowing the lessee to spend large amounts of money on preliminary exploration, and then perhaps preventing him or her from drilling or developing because a subsequent site-specific EIS has revealed an adverse impact.

Requiring an EIS up front on NSO leases makes for better NEPA policy, as well as cost-effectiveness. NEPA requires preparation of an EIS as early as possible when the maximum range of options is available to the agency decisionmaker. The longer the agency waits to preclude the lessee from drilling, if indeed it does so, the more money, time and effort the lessee will spend on the project. During this period, economic considerations gradually increase in importance, and environmental considerations gradually decrease in importance. The attendant pressures naturally may affect the agency decisionmaker's frame of mind, regarding the relative importance of environmental goals and other public policy goals.

Thus, NSO leasing, by itself, may constitute a significant economic and political commitment to oil and gas development. Moreover, leasing authorizes prospecting, and successful prospecting increases the pressure for resource development. These very real pressures affect the people and the agencies charged with regulating oil and gas development on public lands. While such pressures perhaps are not readily quantifiable, their impact upon the fate of the leased tract is not insignificant.

It is difficult to disagree with the Park County court when it notes, "The expenditure in terms of tax dollars, manpower, and time involved in preparing an EIS is substantial." The expenditure is

172. See Edelson, supra note 31, at 946.
175. See supra notes 160-63 and accompanying text.
176. See infra notes 188-91 and accompanying text.
177. Edelson, supra note 31 at 947.
178. The Court of Appeals for the Ninth Circuit clearly recognized this point in Environmental Defense Fund v. Andrus, 596 F.2d 848 (9th Cir. 1979). That court stated: "This court has ... noted that delay in preparing an EIS may make all parties less flexible. After major investment of both time and money, it is likely that more environmental harm will be tolerated." Id. at 853. See also Latham v. Volpe, 455 F.2d 1111, 1121 (9th Cir. 1971).
179. See Edelson, supra note 31. As Edelson noted, "In general, there will be much more pressure to permit development on a given area once seismic surveys indicate the presence of valuable deposits than prior to such surveys." Id.
180. Park County, 817 F.2d at 623.
substantial, and indeed it would become more substantial if an EIS were required for NSO leases, although it would not rise to the nightmarish proportions suggested by the court's misleading statistics. Cost, however, is not dispositive with regard to implementing NEPA. The court in Park County specifically recognized this point. Moreover, as suggested above, costs would decrease substantially with imposition of more moderate leasing schedules and increased fees to the lessee. These measures are not merely practical; they reflect principles of considered, responsible decisionmaking contemplated by NEPA.

NSO Leasing: A Questionable Means of Environmental Protection

Although NSO leasing purports to insure adequate environmental analysis prior to development, questions exist as to the enforceability, implementation and effectiveness of NSO leases. Although the court in Sierra Club implicitly assumed that NSO Stipulations are enforceable, the court in Conner rejected the use of NSO Stipulations partly because, as it stated, these later could be modified and even rescinded without preparation of an EIS. If the NSO Stipulations are not enforced or enforceable, of course, the government cannot prevent drilling and thus cannot insure that significant adverse environmental impacts will not occur. The enforceability issue must be resolved before full reliance may be placed on a policy of NSO leasing.

Another potential problem with relying on NSO Stipulations is that, even if they are enforceable, they may not be fully implemented. There are indications that federal agencies may have neither the funding nor the staff to continuously and vigorously enforce these stipulations. One commentator has noted: "[C]lean-up measures and reclamation [may be] difficult to enforce even if stipulated in leases." If costs are being saved up front by not preparing EISs for lease issuance, and if the government does not or cannot pay the costs of proper implementation and enforcement of NSO

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181. "Of course, such [financial] considerations are not dispositive of the legal requirements under NEPA." Id. at 623-24.
182. For a good overview of these problems, see generally Edelson, supra note 31, at 920-24.
186. Runge, supra note 2, at 62.
Stipulations, those costs must eventually be borne, at least in part, by the leased lands themselves, in the form of environmental degradation.

The general effectiveness of NSO Stipulations in precluding significant impacts has been a matter of considerably differing opinion. Sierra Club condoned the NSO approach as sufficient to comply with NEPA; the court accorded the agency the discretion to choose its preferred method of NEPA compliance (either preparing an EIS, or attaching NSO Stipulations to the leases). The court in Bob Marshall, on the other hand, rejected NSO Stipulations outright as violative of NEPA, based on NEPA policy.

For purposes of environmental planning, the EIS should be prepared early enough to “serve practically as an important contribution to the decisionmaking process and will not be used to rationalize or justify decisions already made.” EIS preparation draws attention to the proposed lease from Congress, the Executive, and the public, and allows public participation, so that a more considered decision may result. The court in Thomas v. Peterson stated:

A central purpose of an EIS is to force the consideration of environmental impacts in the decision making process. . . . That purpose requires that the NEPA process be integrated with agency planning at the 'earliest possible time,' 40 C.F.R. Sec. 1501.2, and the purpose cannot be fully served if consideration of cumulative effects of successive interdependent steps is delayed until after the first step has already been taken.

Thus, NEPA's contemplation of an EIS as an effective planning device, as well as a project monitoring document, supports the notion that NSO violated the policies and the spirit of NEPA.

CONCLUSION

Courts have treated with inconsistency the issue of whether an EIS is required for the issuance of NSO and non-NSO leases. In Sierra Club, the Court of Appeals for the District of Columbia held that the government had violated NEPA by issuing non-NSO leases without preparing an EIS. In Conner, the district court held that an EIS must be prepared even for NSO leases, since the NSO Stipulations could later be modified or removed without preparation of an EIS. In Bob Marshall, the same court again held that an EIS was required for issuances of NSO leases, without discussing the rescindability of the stipulations. The court held that NEPA requires site-specific evaluation at the earliest meaningfully possible time in

187. Sierra Club, 717 F.2d at 1415.
189. 40 C.F.R. § 1502.5.
190. Edelson, supra note 31, at 928.
191. 753 F.2d 754 (9th Cir. 1985).
192. Id. at 757.
the life of the project, that an EIS must be prepared when there exists a potential for cumulative effects, and that conducting environmental analysis in stages violates the spirit and the letter of NEPA.

In a recent decision, Park County, the Tenth Circuit Court of Appeals held that leasing, with or without NSO Stipulations, does not require an EIS. The Park County decision is problematic for a number of reasons. The court failed to accurately discuss the precise effects of the lease involved, and failed to discuss the case law construing NSO leases. Moreover, unlike the other cases, the court gave little emphasis to the underlying policy behind the EIS requirement. Thus, the decision confuses rather than clarifies the law regarding application of NEPA's EIS requirement to oil and gas leasing on public lands.

The problem with the legal dispute over NSO leasing is that the dispute must be waged largely on the grounds of policy since NEPA largely is a procedural statute. The substantive policy aspects of NEPA take the form of generalities and exhortations, rather than specific requirements. The “early application” policy is a good example. Thus, it is difficult to answer with certainty whether issuing NSO leases without an EIS violates NEPA. This Comment argues that NSO leasing contravenes the spirit and purposes of NEPA. As the Park County case indicates, however, this argument becomes less persuasive where a particular set of facts leans strongly in one direction and the court is either less searching in its review or more flexible in its interpretation of NEPA.

Despite the problems discussed in this Comment, NSO leasing has its benefits. For one thing, it saves the government money and resources which would be spent on preparing EISs. To the extent that NSO leasing keeps the leasing system flowing and puts leases into the hands of those who want them, this also may be a benefit. A large portion of leases expire with no test drilling, as many lease holders apparently decide that the costs of development will exceed the benefits. Rather than using this phenomenon to argue for EISs based on likelihood of development — an argument which subverts NEPA by allowing the possibility of development without an EIS — one simply might infer from this that, at least in theory, NSO leasing is an effective way to expedite leasing and to conserve adminis-

193. See supra notes 161-69 and accompanying text.

194. Runge, supra note 2, at 60. The United States Geological Survey has estimated that 75% of oil and gas leases on all federal lands expired with no test drilling. Id.
The main problem with NSO leasing is that it undermines NEPA's functions as a land-planning statute. The other problem is that the special facts of these cases — especially the existence of wilderness qualities on the leased lands, which heightens the need for early environmental review — so often are determinative in judicial review of NSO lease issuances. The results may be good on a case-by-case basis, but they are poor in terms of establishing consistency and predictability in the law.

One solution might be for the government to adopt the likelihood of development (and thus of environmental impact) as the determinative factor, not in whether to prepare an EIS, but in deciding whether to issue an NSO lease or a regular lease. This idea has been advocated specifically for Contingent Rights leases, and it could apply just as well to strict NSO leases (leases conveying vested drilling rights but requiring slant drilling from surface lands adjacent to the leased tract). Such an approach has the appeal of lending some degree of consistency to administrative decisionmaking and judicial review in this area, and yet it allows the land manager to retain flexibility.

Given the shortcomings of judicial lawmaking in the area of NEPA and oil and gas leasing, a legislative solution would seem desirable. A number of bills are being considered in Congress which would, among other things, require Forest Service and BLM land management plans to include provisions for oil and gas leasing. It makes sense to bring environmental decisions regarding the leasing of specific lands within the framework of broader, substantive agency planning, and to rely less on the somewhat piecemeal process of lease evaluation through the EIS.

In the meantime, both the Conner and the Bob Marshall decisions have been appealed to the Ninth Circuit Court of Appeals. Oral arguments have been made, and decisions in these cases are expected to be issued in early 1988. The facts of the Park County case — the lack of wilderness qualities on the leased lands, and the extensive mitigation measures adopted in the lease — were strong factors in

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195. McCrum, supra note 118, at 57.
Where the likelihood of actual development is sufficiently high and [environmental] impacts are expected to be significant, it makes sense to prepare the EIS at the leasing stage and grant the lessee full development rights. However, where the actual development — and the attendant governmental royalty — is perceived to be a remote possibility, contingent right leasing provides a low-cost option for the government to get some limited exploration and development rights into the hands of private industry, without preparing an EIS, or even an EA, and without violating NEPA.

Id.
favor of upholding the lease issuance. Moreover, the *Park County*
court's analysis of the lease stipulations, cumulative effects, and tier-
ing reflects the view that EIS preparation depends on the lessee's
plans, rather than on the scope of the rights conveyed. This view
elevates administrative convenience over environmental protection of
public lands. Clearly, leasing itself can significantly affect the envi-
rонment. Given the distinctive facts of that case, as well as the
weaknesses in the court's NEPA analysis, the Ninth Circuit should
not find *Park County* a barrier in affirming the holdings in *Conner*
and *Bob Marshall* to require an EIS at the leasing stage for NSO
and non-NSO leases.

**Thomas D. Mauriello**