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FEDERAL COAL LEASING AND PARTISAN POLITICS:
ALTERNATIVES AND THE SHADOW OF CHADHA

C. PETER GOPLERUD, III*

I. INTRODUCTION

It has been said that the more things change the more they stay the same. This adage is presently very applicable to the policies surrounding the leasing of federally owned coal reserves. The United States owns approximately fifty percent of the nation's coal reserves.1 Nearly all of these reserves are located in the western part of the country and they represent a substantial portion of the reserves most likely to be developed in the future.

The history of coal development on federal land is fraught with controversy, uncertainty, and litigation.2 The early days of federal leasing were based on a policy of disposal. This policy resulted in individuals and companies obtaining leases strictly for speculation purposes. By 1970, however, the Department of the Interior (DOI) began to appreciate the seriousness of speculation and concentration of ownership problems. Secretary of the Interior Rogers Morton declared an informal cessation of issuance of leases or prospecting permits under the Mineral Lands Leasing Act of 1920 (the 1920 Act).3 This moratorium lasted until 1973, when the Secretary announced an end to the ban and a new limited leasing program. During this interim program the DOI formulated two different ill-fated "permanent" programs for federal coal leasing. One died within the DOI and the other met its demise in litigation.4 At about this same time, Congress enacted, over President Ford's veto, the Federal Coal Leasing Amendments Act of 1976 (FCLAA).5 These amendments injected concern for environmental protection and the evils of speculation into federal coal leasing legislation.

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1 C.P. GOPLERUD, COAL DEVELOPMENT AND USE 8 (1983).
2 Id. at 8-16. See also Watson, The Federal Coal Follies—A New Program Ends (Begins) a Decade of Anxiety? 58 DENVER L.J. 65 (1980); COAL LAW AND REGULATION, § 82.01-.05 (D. Vish & P. McGinley eds. 1983).
4 This program, labeled the Energy Minerals Allocation Recommendation Systems (EMARS I) stressed federal identification of tracts to be leased. Public involvement was to be minimal. GOPLERUD, supra note 1, at 12.
5 This plan was dubbed the Energy Minerals Activity Recommendation System (EMARS II). It stressed much more industry and public involvement in the development process. The program was invalidated by the U.S. District Court for the District of Columbia in Natural Resources Defense Council v. Hughes, 437 F. Supp. 981 (D.D.C. 1977), modified, 454 F. Supp. 148 (D.D.C. 1978). The court struck down the program because of deficiencies in the environmental impact statement which accompanied it.
The next steps taken by the DOI were under the Carter administration. In 1979 final regulations for the Federal Coal Management Program (FCMP) were issued. The basic approach of that program was to provide for leasing of only those tracts which were consistent with reasonable production goals and which could be developed in an environmentally sound manner. This program was not without its critics, but it did ultimately yield the first federal lease sales of coal reserves in over twelve years. The most significant and controversial of these involved coal reserves in the Powder River Basin area of Wyoming and Montana. Sales were planned for late 1983 and early 1984 in other areas of the West.

The most recent controversies in coal leasing focus on two events: the issuance of yet another regulatory package by DOI, and the Powder River sale. The Powder River sale in April 1982 has been characterized as a “giveaway.” It has been so labeled because demand for coal was so low at the time of the sale that it produced over $100 million less than objective estimates of the fair market value of the coal. A number of groups have filed lawsuits challenging various aspects of the sale. In addition, Congress has been swamped with legislative proposals attempting to respond to perceived abuses of the program by Secretary of the Interior James Watt.

In July 1982, DOI promulgated new regulations governing leasing of federally owned coal reserves. Litigation challenging the validity of these regulations is pending in district court in the District of Columbia. Thus, the coal leasing program is in a state of disarray.

This article will examine the history and details of the program since the inception of the 1979 regulations. The changes in the regulations developed in 1982 will be analyzed, as will the litigation challenging this program. The controversy surrounding the Powder River sale will be discussed. This arti-

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8 GOLPERUD, supra note 1, at 16.
9 See id. at 18.
10 These include sales in the San Juan, Green River—Hams Fork, Uinta-Southwestern, and Powder River regions. Because of a moratorium on coal leasing included in appropriations legislation none of these sales will take place on schedule. Department of the Interior and Related Agencies Appropriations, 1984, Pub. L. No. 98-146, 97 Stat. 919, 937 (1983).
14 Secretary Watt resigned under pressure on October 9, 1983.
cle will also look at proposed legislative and regulatory changes dealing with other aspects of federal coal leasing. The general thesis of the article is that today, despite thirteen years of moratorium, legislation, regulation, and litigation, the program is no smoother or efficient than it ever was. Speculation is still rampant. Uncertainty and litigation are the norm. Partisan politics are determining the course of coal development on federal land. The author will propose both a policy and a legislative change to alleviate the deficiencies. The policy change would involve more active use of section 204 (e) of the Federal Land Policy and Management Act (FLPMA) as a legislative review mechanism for the program. An alternative is amendment of the FCLAA to include a similar, but more coal oriented equivalent. The author will also propose a transfer of jurisdiction for the program from DOI to a newly created five member independent commission which would be relatively insulated from the politics of the moment. In view of the travesty of the recent Fort Union sale and the imminence of the San Juan, Uinta-Southwestern and Powder River sales, such action should be expedited.

II. REGULATORY CHANGES

A. The Philosophy Underlying the Changes

In December 1981, Secretary Watt unveiled proposed regulations which would bring a new philosophy to the coal management program. The major purposes of the 1979 regulations had been:

1. To remedy environmental policy defects of the Energy Minerals Allocation Recommendation System program which were litigated in NRDC v. Hughes. The court in this suit mandated that Interior comply with the Environmental Impact Statement requirements of the National Environmental [Policy] Act when developing its coal program.

2. To integrate the coal leasing program into land use planning. This would be accomplished through application of screening processes, including unsuitability criteria, and provisions for state and public comment at various stages in the coal leasing sale planning process.

3. To design an operative leasing program, free from the constraints of constant litigation. During the period in which these regulations were drafted, there was continual contact with state governor's representatives. The regulations struck a balance between environmental, industry, and state demands.

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18 The Fort Union sale brought bids of $911,800. Only maintenance tracts were sold. No new, separate parcels were sold. Most of the bids barely topped the $100/acre minimum bid set by DOI. DOI now estimates the sale cost nearly $1 million dollars to hold. It appears the government lost money on the sale. COAL WEEK, Sept. 19, 1983 at 4.
To have a foresighted, not hindsight program. Diligent development was the answer to the problems of overleasing and speculation. Previous reliance on the market to induce development of existing coal leasing had been a failure. On the recommendation of Interior’s legal unit, the diligent development forfeiture concept was adopted into the regulations. Those leases which remained undeveloped in 1986 would be forfeited to the federal government. After appropriate legislative (Surface Mining Control and Reclamation Act, Federal Land Policy and Management Act), and economic screening, many could be relet. 

On the other hand, the proposed regulations emphasized industry input into the key decisionmaking components of the program. These regulations were issued in final form in July of 1982. A follow-up amendment to the regulations was issued in August of 1983. The major stated purposes of the 1982 regulations are to streamline leasing procedures, remove troublesome language and requirements, and allow for an earlier input of information and opinions from various interested persons, most notably industry. The most significant philosophical change in the program is that it is now geared toward leasing for demand for reserves rather than leasing for the demand for the coal itself. While the regulatory changes imposed by the new package are numerous, this article will focus on only a few of the most significant changes. These include the change in the nature of the influence on tract selection, changes with regard to surface owner consent, and finally the diligent development requirements.

B. Specific Changes and Problems

1. Tract selection, leasing terms and local input

The 1982 regulations stand in marked contrast to the 1979 regulations. As noted above, the 1979 regulations culminated a lengthy period of instability, moratorium, and litigation, and were an attempt to establish a litigation proof coal management program. The 1982 regulations, however, have been cloaked in controversy from the moment that they were circulated in draft form among interested parties. The regulations most definitely changed the focus of the coal leasing program so that industry apparently now has the primary responsibility for tract selection and leasing levels. This would be based on industry demand for reserves as opposed to projected market demand for actual coal production. The regional coal team concept, developed in

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29 Appropriations Committee Report, supra note 12, at 17-18.
33 Appropriations Committee Report, supra note 12, at 18.
34 Id. at 20.
the 1979 regulations to allow input from local and regional governmental officials into the tract selection and leasing decisions, suffered first a blow to its role and more recently a restoration of that role.\(^{27}\) It now appears that the coal team will have the same significant role that it played under the 1979 regulations. This restoration has not come about, however, without some considerable pressure being imposed on Secretary Watt.

The regulations now require the agency to establish leasing levels based on industry’s expression of interest as opposed to leasing targets based on governmental production goals.\(^{28}\) It is clear that under the 1979 regulations, industry was brought into the picture at too late a stage. However, industry dominance in tract selection may present a problem. There are indications that this industry dominance has already led to an overload of maintenance tracts being offered for lease as opposed to new tracts. There may also be market dominance by just a few companies as a result of leasing these maintenance tracts. An additional problem in the 1982 regulations as originally promulgated, is that the state governors were limited in their role in the leasing process. This limited role caused no small amount of consternation on their part. Following an intense lobbying effort by the governors, Secretary Watt reversed the agency’s position and reestablished governors as an influential factor in the leasing decision.\(^{29}\)

Where the program stands now in terms of whose input is significant is not totally certain. Industry dominance in the process, which appeared to be a major aspect of the 1982 regulations, may not be as significant today. A balance may well have been restored in terms of the input, a balance which was


\(^{28}\) 43 C.F.R. § 3420.2(c)(3) (1982).

\(^{29}\) The 1979 regulations provided for a detailed role for the regional coal teams (RCT) in the policy formulation and site selection and evaluation processes. 43 C.F.R. § 3400.4 (1982). However, the proposed and final 1982 regulations changes appeared to vastly limit the RCT’s role by deleting many of the specific duties of the coal teams and replacing them with broad, vague directives. See 43 C.F.R. § 3400.4 (1982).

The limited role of the RCT’s under the 1982 regulations was confirmed by action taken by the federal chairman of the Green River—Hams Fork RCT. Governors’ representatives on this RCT attempted to have the RCT recommend to Interior Secretary Watt a preferred amount of coal for leasing in their region. The federal chairman of the RCT ruled that the RCT had no authority to make such a recommendation. Western Energy Update Newsletter no. 82-20, Oct. 15, 1982, at 1.

Indications are that this decision of the federal chairman of the Green River—Hams Fork RCT was reached with considerable help from DOI. From this, it appears clear that Interior views the role of the RCT to be more limited under the 1982 regulations than was true under the 1979 regulations.

However, largely in response to complaints from western governors, amendments to the 1982 regulations were issued which partially revived the role of the RCT. The most notable change under this interim final rulemaking was the increase of the governors’ formal input into the decision-making process. 48 Fed. Reg. 37,654 (1983).
arguably missing from the 1982 regulations. On the other hand, the major decision-making stages have passed already for several lease sales scheduled up through 1984 without this balance. The market situation is now so bleak that following those 1984 sales, if DOI is indeed relying on market indicators to govern the sale process, there may not be any sales for a while. This would make the increased participation by the regional coal teams and the governors illusory at best.

2. Due diligence requirements

Yet another controversial aspect of the new regulations is the due diligence requirements. In order to avoid the problems associated with speculation, which existed prior to 1970, the FCLAA included requirements for diligent development of coal tracts. The 1979 regulations implemented these requirements. However, the 1982 regulations have relaxed the 1979 rules because of DOI's belief that the rules were too harsh. The old regulations required that all leases entered into prior to August 4, 1976, were subject to diligent development requirements by June 1, 1986, in order to prevent forfeiture. Essentially this meant that within ten years, or by 1986, that the operator had to be diligently developing the coal lease. In order to prove diligent development, the operator had to show that 2.5% of the coal reserve was being mined annually. This minimal amount indicates a good faith effort to develop the property and not simply sit on it for speculative purposes. The new regulations relax these requirements and inject renewed possibilities for speculation into the program. Diligent development is not required now until ten years following the first lease readjustment date after August 4, 1976. Thus, it is conceivable that on some tracts diligent development requirements will not become effective until the next century. The commercial quantities test for these leases has also been reduced from 2.5% to 1% of the coal reserves.

In sum,

the 1979 regulations sought to end a system which condoned hoarding leases without benefit to the government or the public and gave the lessee the choice of spending the money or forfeiting the lease. The 1982 regulations said the 1979 rule was too harsh. The change would have ostensibly given more freedom for market place mechanisms to govern the development of coal.

3. Surface owner consent

The 1982 regulations also incorporate a major change in the surface

31 Appropriations Committee Report, supra note 12, at 20.
32 30 C.F.R. § 211.20 (1979).
33 30 C.F.R. § 211.20(a)(2) (1979).
36 Appropriations Committee Report, supra note 12, at 20.
owner consent requirements. A key component of the 1979 regulations was
the protection of surface owners from unwarranted, unwanted leasing. Section 714(d) of the Surface Mining Control and Reclamation Act (SMCRA) requires DOI to determine the preference for or against surface mining on the lands of qualified surface owners. A qualified surface owner is one who holds legal equitable title to the surface of split estate lands. The new provision, however, presumes the lack of qualification of a surface owner. A surface owner must now submit written evidence as proof that he or she is qualified to withhold consent to mine. This appears to work an unnecessary hardship on owners of split estate lands and may result in tracts being leased that would not have been under the old program.

C. Litigation Challenging the Changes

Shortly after the regulations were issued in final form, the Natural Resources Defense Council (NRDC) and other public interest groups filed suit in district court for the District of Columbia seeking to overturn the regulations. The litigation, which is still awaiting a decision from the federal court, includes roughly a dozen claims on numerous issues. Plaintiffs contend that the new regulations constitute a new coal leasing program and thus require an environmental impact statement (EIS). DOI has not prepared an EIS. It is the plaintiffs' contention that certain aspects of the Administrative Procedure Act have been violated. NRDC also argues that the FLPMA has been violated as a result of changes in the land use planning aspects of the coal leasing tracts. It is further alleged that section 522 of the SMCRA, relating to unsuitability criteria, was violated because the regulations failed to specify applicability of these criteria to existing leases and to preference right lease applications. Pubic participation requirements of the FLPMA have allegedly been violated. NRDC also contends the diligent development requirements in the new regulations violate the FCLAA. Further, it is argued the surface owner consent regulations also violate SMCRA.

The plaintiffs have asked for an injunction against the coal leasing program pending preparation of an EIS and have further requested the court to enjoin the sale of any tracts resulting from use of this new program. The in-

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Footnotes:
41 EnvTL. L. REP. (ENVTL. L. INST.) 65764, 75765 (pending litigation).
42 Id.
43 Id.
45 EnvTL. L. REP., supra note 41.
46 Id.
47 Id.
48 Id.
junction has not been issued and the lease sales have been held. It would appear that the best chance for success in this litigation is that of the NEPA claim. The changes in the program are substantial enough to constitute a new program. New programs, under the terms of NEPA, require preparation of an environmental impact statement, or at the very least a thorough environmental assessment in order to determine that no impact statement is necessary. The rest of the changes in the program do not violate statutory requirements of the various impacted statutes. They are, however, questionable changes from a policy standpoint. The changes probably represent a giant step backward in the theory of coal leasing and are indeed costly to the government and the people of the United States. However, it is likely that only the NEPA claim provides a legal basis for the court to strike down the program.

III. THE POWDER RIVER SALE

The lease sale held by DOI on April 28, 1982, for tracts in the Powder River Basin was the largest in history. It involved approximately 1.6 billion tons of coal on thirteen tracts of land. Bids totalling nearly $55 million were received for eleven of the tracts. One of these bids was rejected, leaving the final sale tally at $43.5 million for ten tracts. In October 1982 there was a follow-up sale of two tracts for which data was incomplete in April. Shortly after the sale, controversy flared. Three major issues surfaced: Did the government receive a fair price for the tracts? Why did DOI change bidding procedures immediately prior to the sale? Was there a leak of Interior data to bidders prior to the sale? The controversy surrounding the Powder River sale in particular, and the leasing program in general, produced two lengthy reports, litigation, and legislation.

The reports on the program and the sale developed by the Government Accounting Office (GAO) and the House Appropriations Committee are both highly critical of DOI’s actions in connection with the sale. In addition many politicians have been vocal in their criticism of DOI and Secretary Watt. Without attempting detailed economic or political analyses of the sale, the

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42 U.S.C. 4332(2)(C) (1976); see also 40 C.F.R. §§ 1501.4-.4(b) (1982).

50 COMPTROLLER GENERAL’S REPORT TO THE CONGRESS, ANALYSIS OF THE POWDER RIVER BASIN FEDERAL COAL LEASE SALE: ECONOMIC VALUATION IMPROVEMENTS AND LEGISLATIVE CHANGES NEEDED 1 (1983) [hereinafter cited as GAO REPORT]; APPROPRIATIONS COMMITTEE REPORT, supra note 12, at 34.

51 GAO REPORT, supra note 50, at 2.

52 APPROPRIATIONS COMMITTEE REPORT, supra note 12, at 34.

53 GAO REPORT, supra note 50, at 2.

54 See generally APPROPRIATIONS COMMITTEE REPORT, supra note 12; GAO REPORT, supra note 50.

55 New Mexico Governor Toney Anaya has labeled the program “Watt’s folly.” COAL WEEK, June 1, 1983, at 4.
following discusses the issues raised and the actions resulting from those issues.

The initial concern of the critics is whether the government received a fair price for the leases. The FCLAA prohibits the Secretary from accepting the bids for leases which are less than the fair market value. The Bureau of Land Management (BLM) regulations for coal leasing define fair market value as:

that amount in cash, or on terms reasonably equivalent to cash, for which in all probability the coal deposit would be sold or leased by a knowledgeable owner willing but not obligated to sell or lease to a knowledgeable purchaser who desires but is not obligated to buy or lease.

In order to determine whether the total bids for the various tracts constituted fair market value, one must analyze the market conditions and sale procedures at the time of the sale. Thus, the questions surrounding the bidding methods and the leak of data ultimately have a bearing on the issue of fair market value.

Until the Powder River sale, the DOI fair market value procedures focused on presale public determinations. DOI considered public comments and other information submitted to the agency during the presale period. The determinations were to be made by comparable sales analyses and discounted cash-flow analyses. A notice of the sale, complete with minimum bids, was published. Sealed bids were then received by the sale date, and the bids were reviewed by a sales panel of DOI officials. This panel determined whether the bids were reflective of fair market value and if the successful high bidder was qualified to hold a lease.

Six weeks prior to the Powder River sale, the Minerals Management Service (MMS) of DOI received the minimum acceptable bids. MMS decided these were too high and that they would "chill bidder participation and competition at the upcoming sale." DOI decided to change the method for calculating fair market value. A short time later, just prior to the Powder River sale, the department unveiled its new "entry level bidding system." Essentially this is a post sale valuation procedure which commences with "standard bidding principles used at auctions." The bidding was to start at a floor
level well below the estimated value of the tracts. DOI published these entry levels prior to the sale. Some of these values represented reductions of as much as fifty percent from the original fair market estimates. The problem with these entry level bids was that apparently no systematic method of any sort was used to arrive at the figures. A DOI official responsible for setting the figures conceded:

that he had never been to Powder River at the time; he had not discussed his proposal with the MMS/Casper team, which originally prepared the estimates of fair market value/minimum acceptable bids, nor was he aware of coal lease sales occurring in Powder River; and finally that he had not even spoken to any energy company officials located in the Powder River Basin. His only support for his belief "that the minimum acceptable bids were too high" and should be drastically reduced, was his professional opinion based on reading periodicals such as Coal Week.

In short, no sophisticated calculations were made. DOI apparently picked figures out of the air in order to lower the bidding and make the sale more attractive and competitive.

The new procedures apparently were a dismal failure. While the total bids were a record, the bidding was not competitive and produced total revenues far below what sources outside DOI estimated to be fair market value. It would seem that even DOI was less than pleased with the experimental procedures. At the Powder River followup sale held in October 1982, yet another bidding system was used.

Controversy also focused on concern that DOI may have leaked proprietary information about the Powder River tracts to potential bidders prior to the sale. At this time these allegations have not been substantiated.

The controversy did not die with consummation of the Powder River sale. One government investigation asserts the tracts sold for $110 million less than they should have. Another report also concludes the tracts sold for far less than fair market value.

The Powder River sale has also produced litigation and legislative pro-

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65 GAO REPORT, supra note 50, at 19.
66 APPROPRIATIONS COMMITTEE REPORT, supra note 12, at 49.
67 GAO REPORT, supra note 50, at 21-23. The bids totalled $43.5 million, which was only $2 million or five percent over the entry level bids. Eleven tracts received bids. Of these, eight received only one bid. No tract received more than two bids. Two tracts received no bids.
68 Id. at 24. The system is labeled a minimum bidding procedure. It relies on post sale determination of fair market value and does have a floor below which bids cannot go. It relies on sealed bids, however. The follow-up sale was too small to evaluate the new method.
69 Id. at 44.
70 APPROPRIATIONS COMMITTEE REPORT, supra note 12, at 54-62.
posals. Two separate lawsuits were filed challenging the validity of the sale and have now been consolidated for trial in federal district court in Montana. These suits were originally filed to enjoin the sale. The plaintiffs now seek to have the leases rescinded. The plaintiffs allege the sale is contrary to provisions and requirements of the FLPMA, the FCLAA, the Administrative Procedure Act, and the SMCRA. Essentially the arguments are: (1) that the sale produced less than fair market value, thus violating the FCLAA; (2) that planning provisions of the FLPMA have been violated; (3) that reclamation viability review mandated by SMCRA did not occur; and (4) that the APA notice and comment requirements were violated when DOI changed its surface owner consent rules just prior to the sale. Motions for summary judgment have been filed by both sides and a decision is expected shortly.

The sale also produced a flurry of activity on Capitol Hill. Outraged members of both houses introduced legislation calling for a moratorium on leasing pending a full investigation by an independent commission. Ultimately Congress enacted, as a portion of the supplemental appropriations bill for fiscal year 1983, provisions creating a commission to study the Powder River sale and the program in general. The commission has been appointed and is conducting hearings. Congress subsequently enacted legislation requiring a moratorium on leases until ninety days after the Commission on Fair Market Value Policy reports to Congress. This is a reasonable approach which avoids the disaster of another indefinite moratorium. The program must be depoliticized as much as possible, but cannot be allowed to wither away in suspended animation.

IV. OTHER LEGISLATIVE AND LITIGATION ACTIVITY

In addition to the regulatory changes and the turmoil surrounding the Powder River sale, other aspects of the coal leasing program have been subjected to scrutiny. A remnant of previous programs, the preference right...
leasing application (PRLA), is still creating controversy. Litigation in 1978 made clear the issuance of a PRLA may require preparation of an EIS if such issuance constitutes a major federal action significantly affecting the human environment. Since 1979, DOI has processed the PRLA's in hopes of meeting a 1984 deadline for completion. Recently DOI stepped up this process in an effort to beat the deadline. NRDC has contended that part of the expedited process is an avoidance of NEPA responsibilities, and thus non-compliance with the court's mandate in Berklund.

NRDC threatened to go back to the D.C. District Court to have the matter reopened. However, it now appears DOI and NRDC have worked out an agreement in an effort to avoid further litigation. DOI has agreed to prepare EIS's or environmental impact assessments for all tracts.

In addition to the legislation noted above, two other proposals have surfaced in Congress. One of these would repeal section 2(c) of the Mineral Lands Leasing Act of 1920. This section effectively bans railroads from leasing federal coal. The section was enacted to prevent railroad domination of coal industry which would have resulted from a combination of leases and checkerboard lands already granted to the railroads. The legislation has not received substantial support in the past, and presently no bill has been introduced in the 98th Congress.

The other proposal eliminates language in section 3 of the Act which prohibits awarding new leases to parties that have held undeveloped tracts for longer than ten years. The legislation, introduced by Senator Wallop, is presently the subject of active debate.

V. THE FUTURE OF FEDERAL COAL LEASING

It is painfully clear that the federal coal leasing program is once again caught in a quagmire of litigation and confusion. The factor most responsible for the current mess is partisan politics. It is essential, therefore, that the impact of politics on the program be buffered as much as possible. This neutral-
ization can be accomplished by providing for continuous congressional oversight of leasing and by transferring jurisdiction for the program from DOI to a five member independent commission. While there would undoubtedly be obstacles to implementation of these changes, their effect could be significant.

A. Congressional Oversight (Modified Legislative Veto)

1. Mechanics of "report and wait"

The continuous congressional oversight would come in the form of "report and wait" directives from Congress. This oversight is a type of legislative veto which orders an agency to defer action while it prepares a report to Congress on the action it intends to take. This tool helps to maintain the status quo and gives Congress the opportunity to carefully study the proposed action and react with legislation if necessary. The House Committee on Interior and Insular Affairs recently utilized section 204(e) of the FLPMA to delay the Fort Union Sale. This statute is a "report and wait" provision which can be useful in dealing with federal coal leasing.

2. The problem with Chadha

A major stumbling block to usage of the "report and wait" provision is the Supreme Court's recent decision in *Immigration and Naturalization Service v. Chadha*. In this case the Court struck down section 244(c)(2) of the Immigration and Nationality Act. Section 244 authorized the Attorney General to suspend deportation proceedings against aliens, upon application from a deportable alien. The alien must prove he or she has been physically present in the United States for not less than seven years, is of good moral character, and that deportation would work an extreme hardship on the alien or his family. The Attorney General upon such a showing may adjust the alien's status to "lawfully admitted for permanent residence." Chadha was lawfully admitted to the United States in 1966. His visa expired in 1972, and in 1973 he was ordered to show cause why he should not be deported. He conceded...
he was deportable and applied for suspension of deportation. The Attorney General granted the suspension and pursuant to the Statute reported such suspension to Congress.88

It is at this stage that the legislative veto came into play. Upon receipt of the Attorney General's report of suspension, Congress has the power to veto the Attorney General's determination. Section 244(c)(2) provides:

(2) In the case of an alien specified in paragraph (1) of subsection (a) of this section—if during the session of the Congress at which a case is reported, or prior to the close of the session of the Congress next following the session at which a case is reported, either the Senate or the House of Representatives passes a resolution stating in substance that it does not favor the suspension of such deportation, the Attorney General shall thereupon deport such alien or authorize the alien's voluntary departure at his own expense under the order of deportation in the manner provided by law. If, within the time above specified, neither the Senate nor the House of Representatives shall pass such a resolution, the Attorney General shall cancel deportation proceedings.89

The order suspending Chadha's deportation remained outstanding for over a year. Congress finally exercised its veto power on December 16, 1975, three days prior to the final date on which it could be exercised. Had Congress failed to act, Chadha's status would have been permanent resident alien. Chadha was ordered deported on November 8, 1976. The established appellate process took him to the United States Court of Appeals for the Ninth Circuit. The Ninth Circuit held the House was without constitutional authority to veto the suspension. The court struck down section 244(c)(2) as being violative of the separation of powers doctrine.90

The Supreme Court agreed with the Ninth Circuit in a sweeping opinion that apparently invalidates all variations of the legislative veto.91 After addressing preliminary procedural matters,92 Chief Justice Burger, writing for the majority, tackled the constitutional issues. The majority initially conceded the veto to be in efficient and useful political invention. But the Court noted that efficiency is not necessarily the key to democratic government. Fundamental to analysis of any statutory scheme is the notion that "even useful 'political inventions' are subject to the demands of the Constitution,

90 Chadha v. INS, 634 F.2d 408 (9th Cir. 1980), aff'd, 103 S. Ct. 2764 (1983).
91 This would include a veto of agency adjudication by one or both houses, such as in Chadha. It would also include a one-house or two-house veto of rulemaking. See the cases cited in notes 101 and 102.
92 The Court considered and discussed arguments relating to its jurisdiction to hear the case, the severability of section 244(c)(2) from the rest of section 244, standing, availability of statutory relief, whether a case or controversy was present, and whether the issues presented amounted to nonjusticiable political questions.
which defines powers and, with respect to this subject, sets out just how those powers are to be exercised."

The separation of powers issue necessarily focused on the presentment and bicameralism clauses of article I of the Constitution. In discussing the presentment clause, the Court emphasized the fundamental importance of the presidential check on the lawmaking function of Congress. This check was fortified by article I, section 7, clause 3, prohibiting evasion attempts by calling a proposed law something other than a bill. The majority viewed the bicameralism requirement as equally important. With this requirement "the Framers reemphasized their belief . . . that legislation should not be enacted unless it has been carefully and fully considered by the Nation's elected officials."

The framers were also quite concerned over the roles played by the small states and the large states. This led to creation of a bicameral legislature under which one house represents the people and one house represents the states. The Chief Justice portrays the constitutional framework as follows:

The President's participation in the legislative process was to protect the Executive Branch from Congress and to protect the whole people from improvident laws. The division of the Congress into two distinctive bodies assures that the legislative power would be exercised only after opportunity for full study and debate in separate settings. The President's unilateral veto power, in turn, was limited by the power of two thirds of both Houses of Congress to overrule a veto thereby precluding final arbitrary action of one person.

With the basic functions delineated and the groundwork for separation of powers established, the Court proceeded to discern whether Congress is exercising a legislative function when it acts pursuant to section 244(c)(2) or any other legislative veto. In the majority's view, if pursuant to section 244(c)(2) Congress is exercising a legislative function, separation of powers concepts generally, and the specified requirements of the bicameralism and presentment clauses, are violated. The Court determined the one-house veto to be

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103 S. Ct. at 2781.
24 Article I provides in pertinent part:
All legislative Powers granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives. (Art. I, § 1). Every Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a law, be presented to the President of the United States; . . . (Art. I, § 7, cl. 2).
Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and the House of Representatives, according to the Rules of Limitations prescribed in the Case of a Bill. (Art. I, § 7, cl. 3).
103 S. Ct. at 2783.
26 Id. at 2784.
27 Id. at 2786.
legislative in nature. It "had the purpose and effect of altering the legal rights, duties, and relations of persons . . . outside" Congress. The majority also maintains that without the veto, Congress could only have accomplished what it did through legislation mandating deportation. The Court conceded that not every action taken by Congress is legislative, and thus subject to bicameralism. But the Court stated that it does believe the exceptions are limited and explicit in the Constitution. The legislative veto is not one of these explicit exceptions; nor did the Court find room for implied exceptions.

The Court has apparently sounded the "death knell" for the legislative veto. This view is reinforced by the Court's summary disposition of legislative veto cases following Chadha. In cases involving a one-house veto of Federal Energy Regulatory Commission rulemaking and a two-house veto of Federal Trade Commission rulemaking, the Court once again invalidated

__98 Id. at 2784.__

The Court noted that:

(a) The House of Representatives alone was given the power to initiate impeachments.
   Article I, § 2, cl. 6;

(b) The Senate alone was given the power to conduct trials following impeachment on
   charges initiated by the House and to convict following trial. Article I, § 3, cl. 5;

(c) The Senate alone was given final unreviewable power to approve or to disapprove
   presidential appointments. Article II, § 2, cl. 2;

(d) The Senate alone was given unreviewable power to ratify treaties negotiated by
   the President. Article II, § 2, cl. 2.

103 S. Ct. at 2786.

   aff'g Consumer Energy Council of Am. v. FERC, 673 F.2d 425 (D.C. Cir. 1982); Interstate Natural
   Gas Ass'n of Am. v. Consumer Energy Council of Am., 103 S. Ct. 3556 (1983), aff'g Consumer
   Energy Council of Am. v. FERC, 673 F.2d 425 (D.C. Cir. 1982); Petrochemical Energy Group v.
   FERC, 673 F.2d 425 (D.C. Cir. 1982); American Gas Ass'n v. Consumer Energy Council of Am., 103
   S. Ct. 3556 (1983), aff'g Consumer Energy Council of Am. v. FERC, 673 F.2d 425 (D.C. Cir. 1982);
   Consumer Energy Council of Am. v. FERC, 673 F.2d 425 (D.C. Cir. 1982), cert. denied, 103 S. Ct.
   3556 (1983).

102 United States Senate v. F.T.C., 103 S. Ct. 3556 (1983), aff'g Consumers Union of United
   States, Inc. v. F.T.C., 691 F.2d 575 (D.C. Cir. 1982); United States House of Rep. v. F.T.C., 103 S.
   Ct. 3556 (1983), aff'g Consumers Union of United States, Inc. v. F.T.C., 691 F.2d 575 (D.C. Cir.
   1982). In these cases and those cited in Ebzerg & Kunz, supra note 21, Justice White wrote a
   vigorous dissent taking essentially the same position he had in Chadha. In addition, he argued
   that the majority's reasoning in Chadha is not applicable to vetoes of independent regulatory
   agency action. He asserted: "Disapproval [of a regulation] nullifies the suggested regulation and
   prevents the occurrence of any change in the law. The regulation is void. Nothing remains on
   which the veto power could operate. It is as though a bill passed in one house and failed in
   another." 103 S. Ct. at 3558 (White, J., dissenting) (quoting Buckley v. Valeo, 424 U.S. 1, 285 n.30
   (1976) (White, J., concurring in part and dissenting in part).

He argued that invalidation of the legislative veto in this situation would completely insulate
independent agencies from direct control of either the executive or legislative branch, a result he
does not believe mandated by the Constitution.
legislative vetoes. As appealing as Justice White's policy and legal arguments in favor of the legislative veto may be, the concept has apparently been laid to rest.

3. Finding an alternative—FLPMA section 204(e)

The task at hand is to find an alternative means of controlling agency action, in this particular instance, DOI's control of the federal coal leasing program. As noted above, a useful, and apparently constitutional alternative, already exists and has recently been utilized with regard to the Fort Union coal sale. Section 204(e) of the FLPMA provides:

When the Secretary determines, or when the Committee on Interior and Insular Affairs of either the House of Representatives or the Senate notifies the Secretary, that an emergency situation exists and that extraordinary measures must be taken to preserve values that would otherwise be lost, the Secretary notwithstanding the provisions of subsection (c)(1) and (d) of this section, shall immediately make a withdrawal and file notice of such emergency withdrawal with the Committee on Interior and Insular Affairs of the Senate and House of Representatives. Such emergency withdrawal shall be effective when made but shall last only for a period not to exceed three years and may not be extended except under the provisions of subsection (c)(1) or (d), whichever is applicable, and (b)(1) of this section. The information in subsection (c)(2) of this subsection shall be furnished the committees within three months after filing such notice.

Pursuant to section 204(e) of the FLPMA, the House Committee on Interior and Insular Affairs adopted a resolution declaring an emergency to exist in relation to the proposed Fort Union sale. In the resolution the committee noted concern for population boom impacts on communities in the area of the sale, air and water pollution, the potential degradation of the environment of the Fort Pick Indian Reservation, impairment of agricultural activities, adverse impacts on the Theodore Roosevelt National Memorial Park, impacts on significant wildlife habitats, damage to important archaeological sites, and the wisdom of conducting a sale under the prevailing market conditions. The resolution then directed the Secretary of the Interior to withdraw twenty-

More recently, a federal district court has ruled that the Equal Employment Opportunity Commission (EEOC) has no authority to enforce the Equal Pay Act. The EEOC has claimed this authority emanated from Section 1 of Reorganization Plan No. 1 of 1978, reprinted in 1978 U.S. CODE CONG. AND ADMIN. NEWS 9799. This provided Congress with a legislative veto of reorganization plans. The court found this provision unconstitutional under Chadha and thus the EEOC has no power to enforce the Equal Pay Act. EEOC v. Allstate Ins. Co., 570 F. Supp. 1224 (S.D. Miss. 1983).

Alternatives such as oversight hearings, budgetary powers, or passage of new legislation are more indirect than the veto and more indirect than desirable.


A copy of the resolution which was passed August 3, 1983, is on file with the author.
seven tracts from coal leasing. Secretary Watt refused to comply, contending that the actions taken by the committee were unconstitutional in light of Chadha. The Fort Union sale was held as scheduled on September 14, 1983. Several public interest groups, joined by Congressman Morris Udall, filed an action in federal district court in the District of Columbia seeking to declare the sale illegal and enjoin the issuance of a lease. On September 28, 1983, the court issued a preliminary injunction against issuance of the leases.

Upon considering the merits, the district court (and any other courts on appeal) will have to grapple with the obstacle of Chadha. This is not an insurmountable hurdle. Section 204(e) is not, properly viewed, a legislative veto provision. The section is more properly labeled a "report and wait" provision. This type of provision has historically been viewed as separate from normal Congressional legislative activities. The basic concept of delaying agency action was approved by the Supreme Court in the context of a

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108 A letter dated September 9, 1983, from Secretary Watt to Congressman Morris Udall, Chair of the House Committee on Interior and Insular Affairs detailing his reasons for ignoring the resolution is on file with the author. The Secretary relied heavily upon Chadha, contending section 204(e) is legislative in purpose and thus an unconstitutional legislative veto. He also questioned the basis for the determination that an emergency existed.

107 See supra note 18 for details of the sale.


challenge to legislation requiring submission of the Federal Rules of Civil Procedures to Congress for review prior to their becoming effective.\textsuperscript{113}

The "report and wait" provision does not alter the rights and responsibilities of persons outside the legislative branch. In this particular instance, at the point that the Interior Committee Resolution was passed, no leases had been sold. No party was absolutely precluded from taking any action. The Secretary merely planned to hold a sale which, by its very nature, would not automatically result in the issuance of leases.\textsuperscript{114} The committee's action pursuant to section 204(e) does not prohibit the holding of the sale, it merely delays it. The action maintains the status quo, pending a report from the Secretary responding to Congressional concerns for certain environmental aspects of the planned sale. It cannot properly, therefore, be viewed as legislation. Any actual prohibition of the sale of these tracts can only come about through traditional legislation, enacted following receipt of the report from the Secretary.

It should be noted further that of the fifty-six different statutes contained in the appendix to Justice White's dissent, (examples of current statutory provisions for legislative veto by one or both houses of Congress), none is of the "report and wait" structure. All are traditional fundamental legislative vetoes. The commentators are unanimous in believing that "report and wait" procedures do not involve rewriting legislation or engaging in basic law making.\textsuperscript{115} The procedures do not "formalize" anything which might be set to violate the constitution.\textsuperscript{116} Indeed, even those arguing in \textit{Chadha} that the legislative veto is unconstitutional conceded that a "report and wait" provision is properly placed in a wholly different category for constitutional analysis. They found no constitutional violation inherent in the "report and wait" type provision.\textsuperscript{117} The majority opinion in \textit{Chadha} also appears to separate the "report and wait" type provision from the legislative veto. In noting other avenues of congressional pressure upon administrative branches, the Court appears to include among these other tactics the "report and wait" type provision.\textsuperscript{118} Moreover, Justice White in his dissent treats the concept of "report and wait" procedure as different from the legislative veto provision being invalidated by the majority in \textit{Chadha}.\textsuperscript{119}

In his Memorandum With Respect to Preliminary Injunction, Judge

\textsuperscript{113} Sibbach v. Wilson & Co., 312 U.S. 1 (1940).
\textsuperscript{114} See supra notes 57-60.
\textsuperscript{115} See supra note 112.
\textsuperscript{116} Watson, supra note 111, at 1061.
\textsuperscript{117} Brief of Amicus Curiae, American Bar Association at 24, INS v. Chadha, 103 S. Ct. 2764 (1983).
\textsuperscript{118} 103 S. Ct. at 2786 n.19.
\textsuperscript{119} 103 S. Ct. at 2795 n.10 (White, J., dissenting).
Oberdorfer attempts to distinguish section 204(e) from traditional "report and wait" statutes. He holds it unconstitutional, contending it is not a "report and wait" provision since it does not apply automatically as did the provision in Sibbach. 120 Nowhere in Chadha or Sibbach is this limitation delineated. The mere fact that Congress has some discretion does not change the nature of the action taken. As noted, the use of section 204(e) simply defers action, it does not alter rights. There is no power vested in Congress to prevent leasing, the basic legal right in question.

Judge Oberdorfer thus chose to base the injunction on nonconstitutional grounds. He held that Secretary Watt acted contrary to 43 C.F.R. § 2310.5,121 which merely restates section 204(e). He stated that even though this regulation is derived from an unconstitutional statute, it remains valid until repealed through notice and comment rule-making proceedings. 122 Watt chose to simply ignore the regulation. While this ruling is technically correct, it is the easy way out and does nothing for the future of coal leasing or the use of report and wait statutes.

An alternative analysis of section 204(e) of the FLPMA views it as action taken by Congress pursuant to its Property Clause powers. 123 This approach was also taken by Judge Oberdorfer in granting the preliminary injunction in the Fort Union sale case. It requires one to view Congressional actions under these powers as something other than legislative, and thus not subject to Chadha's proscription of legislative vetoes. The operative language of article IV, section 3 is that "Congress shall have the power to dispose of and make all needful rules and regulations" regarding the federal lands. It is long established that the power to dispose includes the power to lease. 124 Thus, the area of power discussed here is certainly included within the Property Clause powers possessed by Congress. Congress' powers pursuant to the Property Clause have been interpreted broadly by the Supreme Court. The Court has noted that "while the furthest reaches of the power granted by the Property Clause have not yet been definitely resolved, we have repeatedly observed that 'the power over the public land thus entrusted to Congress is without limitations.'"125

It is also clear that the Court has viewed congressional authority under the Property Clause as somewhat of a bifurcated power. That is, Congress'

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120 571 F. Supp. at 1155.
121 43 C.F.R. § 2310.5 (1982).
123 U.S. Const. art. IV, § 3, cl. 2, which provides: "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory . . . [of] the United States . . . ."
power is not only that of a legislature, but of a proprietor.\(^{126}\) It follows then, that action taken in the role of a proprietor is not legislative and thus not subject to the constraints of Chadha. The difficulty with this argument is that the proprietary/legislative distinction is unworkable. Congress would appear to have the power to regulate federal lands, to dispose of federal lands, to protect federal lands, and to manage federal lands. One could argue that proprietary powers seem to be more in the nature of police power; that is, protecting the federal land. Yet even this view would still require legislative action to implement the protective measure. The general powers of the legislature are also usually thought to include authority to regulate mineral development.\(^{127}\) In another context, one commentator has summed up the situation as follows:

It is clear that federal control over the public land is unlike that of any proprietor in history. The difference between the United States as “sovereign” and “proprietor” has been whittled away to the point where it is now a distinction without substance. It is clear that Congress, with the aid of the courts, has extended its purported proprietary role to a point where it in fact exerts sovereign control over the public lands, rather than merely exercising its claimed Constitutional authority to make “needful rules and regulations” respecting these properties. The exceptions have consumed the rule; regulation has become supreme legislative jurisdiction in all but name only.\(^{128}\)

It appears, therefore, that the legislative/proprietary dichotomy is stated to indicate the expanse of the Property Clause powers, not the use or nonuse of article I procedures to implement it. Thus, the argument utilized in part by the district court to grant the preliminary injunction in the Fort Union case has substantial weaknesses. While Congress certainly has nearly boundless powers over the federal lands, these are powers which do indeed alter the legal rights and responsibilities of persons outside the legislative branch, thus fitting within the definition of legislation embodied in the Chadha opinion. While the property clause argument at first blush is quite appealing as a way to circumvent Chadha, it must ultimately fail.

It is thus vital in order to maintain some control or check over the executive branch with regard to the coal leasing program, that Congress more vigorously utilize section 204(e) of the FLPMA. However, perhaps a better ap-

\(^{126}\) Id. at 540.


\(^{128}\) Brodlin, A Question of Enumerated Powers: Constitutional Issues Surrounding Federal Ownership of the Public Lands, 12 PAC. L.J. 693, 711 (1981). It is also noteworthy that leading constitutional scholars devote little attention to property clause analysis. The analysis which can be found does not relate to the distinction or the issues relevant here. The discussions primarily focus on state-federal relations in the public lands area. See J. Nowak, R. Rotunda & J. Young, CONSTITUTIONAL LAW 124 (1978); L. Tribe, AMERICAN CONSTITUTIONAL LAW 254-55 (1978).
The approach is to amend the FCLAA in a manner which would provide a similar "report and wait" provision relating specifically to coal. Such a provision would not require a finding of emergency and would not focus primarily on environmental concerns. Rather, it would require a finding by the House Committees on Interior and Insular Affairs or the Senate Energy Committee that market conditions, environmental conditions or public welfare factors require the Secretary to provide further study and information regarding the proposed sales. A limited time period could be provided for the Secretary's report, thus minimizing delay.

The reason for suggesting that a new "report and wait" provision be added to the FCLAA is that the existing provision in the FLPMA could impact upon more than just coal leasing in situations where perhaps other mineral development might properly move ahead. In addition, the FLPMA provision requires an emergency to be declared in situations where the declaration amounts to nothing more than a fiction. Congress should avoid such game playing at times when it is otherwise justified in temporarily halting action proposed by the Secretary of the Interior. Once again, it should be kept in mind that such Congressional action would not prohibit the lease sales. Only additional lawfully enacted legislation could do that. This "report and wait" provision would merely maintain the status quo, pending further study. This further study might provide Congress with information which would stimulate new legislation. On the other hand, it might satisfy Congress that the Secretary acted appropriately in proposing to lease the tracts in question.

B. Transfer of Jurisdiction

Another means by which the partisan politics might be removed from the coal leasing program would be to remove the program from the domain of DOI. This would best be accomplished through legislation transferring jurisdiction of the program to a five member independent commission, to be designated the Federal Coal Management Commission (FCMC). The Commission would be structured and function much like the Interstate Commerce Commission, the Federal Trade Commission, or the Federal Communications Commission.


130 This would include the regulatory package plus any references to DOI in the 1920 Act or the FCLAA.


The FCMC members would, of course, be appointed by the President, by and with the consent of the Senate. The chairperson of the Commission would be designated by the President, thus allowing the Executive Branch to retain some power over the program. No more than three of the members could be from the same political party. The initial commissioners would be appointed for terms of three, four, five, six, and seven years respectively. Following this beginning, the appointments would be for seven year terms. The President would be authorized to remove a commissioner only for inefficiency, neglect of duty, or malfeasance. The chairperson would have the authority to appoint and supervise all necessary administrative personnel. The chair would also distribute the commission’s business among the various administrative units of the commission. It is anticipated that certain segments of Bureau of Land Management (BLM), Minerals Management Service (MMS) and United States Geological Survey (USGS) would be transferred from DOI to the FCMC.

Such a commission would go a long way toward removing the coal management program from partisan politics. Both Congress and the executive branch would retain some control over the policies and functioning of the program. However, the independent commission would be more isolated from partisan politics than DOI is.

Granted, politics will still influence the program. But influence would be limited to a substantially smaller degree. It is also conceded that an argument can be made that this proposal, by creating yet another government agency, merely enlarges an already obese federal bureaucracy. That objection is an oversimplification. The proposal merely transfers jurisdiction for an existing program; it does not establish any new programs. Moreover, with the exception of criticisms noted here and elsewhere, no substantive program changes are suggested in conjunction with the proposal.

VI. CONCLUSION

Concern for the future of the coal leasing program, particularly the impact of politics upon it, should not dissipate merely because Secretary Watt resigned. His departure does not guarantee an absence of partisan politics. The potential for appointment of another equally flamboyant partisan is always present. This possibility produces the necessity for some congres-

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134 To respond to critics of a burgeoning bureaucracy it might be suggested that in exchange for creation of a new agency that an existing agency be eliminated; say for example the U.S. Synthetic Fuels Corporation.

135 See supra text accompanying notes 19-49; see generally GOPLERUD, supra note 1, at 7-46.

136 He has been replaced by William Clark. Critics have commented that this is the third position to which Clark has been appointed for which he has no apparent qualifications. TIME MAGAZINE, Oct. 24, 1983, at 22.
sional oversight of the program. The proposed "report and wait" provision offers a constitutional check of sorts upon the power of the executive. Further insulation can be provided by creation of the FCMC. Coal is a resource of very high value to the American people. It should not be squandered. The present system clearly provides an opportunity for the resource to be *given away*. 