Collection: Roberts, John G.: Files
Folder Title: JGR/Coal Leasing
Box: 11

TARR, O.G.C. BILL O.G.C.

Discussed w/ Satterfield, ALEX GOOD

43 U.S.C. 1714(c) House Interior Committee

late July - avoid [counsel rejected]

→ F.L.M.P.A. legis veto 1976

→ mineral leasing Act 30 U.S.C.

committee veto. 1925

~~severability~~ severable - clearly

~~8/3~~ 8/3 resolution.

Ted - CRS

Interior: intrigued Article IV -

but ← plenary power of Congress.

... wednesday hearing scheduled

at 1, 8

√ U.S. v. California 332 U.S. 19, 27-28

power of A.G. to litigate, 1947

Cong. acts. joint resolution

CA said no go : so like

legis veto

sent out for bids tomorrow.
Sent reviews. 60 days
before sent lease.

NWF v. Watt, filed
last week, Friday
hearing, D.D.C. Oberdorfer,
Denied TRO —
nothing for 60 days.
Briefing schedule, Oct 21
argument, cross motion
s. j.
Complaint - not legis veto —
arb + cap, abuse of disc, A.P.A.
5 USC 706
second count → 43 CFR §2310.5
'resolution': lands to be taken
off list.

not following
regs

[Π's not raised
issue
directly]

P.L.F. v. Watt, D. Mont (1981) [Cust Coor segment wilderness areas]

not reported Civ. 81-141-BLG

4/21/81 resolution

same issue. Ct. avoided const issue — Sect can set length of w/drawal — would hold unconst on Chadha.

Decided not legis veto.

sep powers → no tie, can not lock on, → no real effect.

not bi-c or unicam [no appeal]

ID # 165070 CU

NR005 JGR

John

WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

☐ O - OUTGOING

☐ H - INTERNAL

☐ I - INCOMING
Date Correspondence
Received (YY/MM/DD) / /

Name of Correspondent: CRAIG FULLER

☐ **MI Mail Report** **User Codes:** (A) ______ (B) ______ (C) ______

Subject: Legislative Veto / Coal Leases

ROUTE TO:	ACTION		DISPOSITION		
Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
CUHOll	ORIGINATOR	83/08/22			/ /
	Referral Note:				
CUAT 18	D	83/08/23		S	83/09/02
	Referral Note:				
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	Referral Note:				
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	Referral Note:				
		/ /			/ /
	Referral Note:				

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5/81

THE WHITE HOUSE

WASHINGTON

August 31, 1983

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS JGR

SUBJECT: Legislative Veto/Coal Leases

Craig Fuller has alerted us to the possibility of a legislative veto fight concerning Secretary Watts' coal leasing program. I have advised the Justice Department working group, which was already aware of the issue and actively working on it in any event. I will raise the question again at the next scheduled meeting of the working group, September 8, and keep you advised of any developments. OK

No response to Fuller or other immediate action by our office is necessary.

Attachment

THE WHITE HOUSE

WASHINGTON

August 22, 1983

165070 CU

MEMORANDUM FOR FRED F. FIELDING

FROM: CRAIG L. FULLER CF

SUBJECT: Legislative Veto/Coal Leases

I was told last Friday that Secretary Watt plans to proceed with a coal leasing program in early in September that Senator Udall believes must first be cleared with Congress. Reportedly, the effort by Interior to proceed in the absense of Congressional approval, or inspite of Congressional objections may bring us our first legislative veto test.

A review of the legal issues involved here would seem appropriate.

R. TARR

THE WHITE HOUSE

WASHINGTON

August 31, 1983

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Sent to DGH 8/31/83 alw

ID # 165070 CU

NR005 JGR

John

WHITE HOUSE
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☐ H - INTERNAL

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THE WHITE HOUSE

WASHINGTON

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165070 CU

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R. TARR

THE WHITE HOUSE

WASHINGTON

September 13, 1983

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS

SUBJECT: Coal Leasing Dispute

Earlier this summer, Secretary Watt announced plans to sell coal leases on federal land in the Fort Union area along the North Dakota-Montana border, under provisions of the Mineral Lands Leasing Act, 30 U.S.C. § 201. This act does not itself contain a legislative veto provision. The Federal Land Policy and Management Act of 1976, however, authorizes the Secretary to withdraw federal land from sale to preserve "public values in the area," 43 U.S.C. § 1714; § 1702(j). This act establishes various procedures by which the Secretary may effect a withdrawal. Under 43 U.S.C. § 1714(e), however, if the Secretary or either the Senate or House Committee on Interior and Insular Affairs determines that an emergency situation exists with respect to certain lands, the Secretary "shall immediately make a withdrawal" of the lands in question. By resolution dated August 8, the House Interior Committee determined that an emergency situation under 43 U.S.C. § 1714(e) existed with respect to the land subject to the coal lease sale announcement. Secretary Watt has responded that the committee's action is without legal effect in light of the Chadha decision, and plans to accept bids for the coal leases tomorrow, as scheduled.

The Office of Legal Counsel has been working closely with Interior as this confrontation developed. Deputy Assistant Attorney General Ralph Tarr and Interior Associate Solicitors Bill Satterfield and Alex Good met with committee counsel in late July in an unsuccessful effort to avoid a committee resolution. According to Tarr, Watt is on solid legal ground. Whether termed a legislative veto or not, the action taken by the committee under 43 U.S.C. § 1714(e) is an effort to affect legal rights without satisfying the bicameralism and presentment requirements, contrary to Chadha. There have been some rumblings that Congress has additional powers in this area by virtue of Article IV, § 3, which provides that "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States..." This grant of power is no different than typical grants of legislative power in Article I, however, and there is no reason to suppose that the requirements specified in Chadha would not apply. United States v. California, 332 U.S. 19, 27-28 (1947), undermines any claim of broader Congressional power under Article IV. In that case, the Court rejected an argument that a joint resolution concerning lands was not subject to presentment to the President and Presidential veto because it was enacted pursuant to Article IV powers.

At the same time, however, there is a confusing, unreported district court case from Montana offering support to Congress. According to Tarr, the issue in Pacific Legal Foundation v. Watt, Civ. 81-141-BLG (D. Mont. 1981), was identical to the one before us. The judge ruled that § 1714(e) did not contain a legislative veto, and that the authority of congressional committees to withdraw lands did not violate separation of powers. The judge based this ruling, however, on a determination that there was no minimum time limit on committee withdrawals - i.e., the Secretary, after a committee resolution of withdrawal, could immediately place the lands in the sale category once again. Broad language in Chadha - not decided at the time - make the validity of this case very suspect.

Private litigation is also pending in this case, styled as National Wildlife Federation v. Watt. Last week, Judge Oberdorfer denied plaintiffs' request for a TRO blocking the sale, largely because while bids will be accepted tomorrow, it will take some 60 days for the Secretary to review the bids and finalize any sales. A hearing is set for October 21. The plaintiffs have not stressed the legislative veto aspects, but rather have argued that Watt abused his discretion by not withdrawing the lands himself, as he is authorized to do by § 1714(e), and that Watt failed to follow his own regulations. The latter contention is certainly correct, but the regulation in question, 43 C.F.R. § 2310.5, simply implements the unconstitutional committee "veto" provision of § 1714(e), specifying action to be taken in the event of receipt of a committee withdrawal resolution.

Attachment

(10) the time and place of hearings and of other public involvement concerning such withdrawal;

(11) the place where the records on the withdrawal can be examined by interested parties; and

(12) a report prepared by a qualified mining engineer, engineering geologist, or geologist which shall include but not be limited to information on: general geology, known mineral deposits, past and present mineral production, mining claims, mineral leases, evaluation of future mineral potential, present and potential market demands.

Withdrawals aggregating less than five thousand acres; procedure applicable

(d) A withdrawal aggregating less than five thousand acres may be made under this subsection by the Secretary on his own motion or upon request by a department or an agency head—

(1) for such period of time as he deems desirable for a resource use; or

(2) for a period of not more than twenty years for any other use, including but not limited to use for administrative sites, location of facilities, and other proprietary purposes; or

(3) for a period of not more than five years to preserve such tract for a specific use then under consideration by the Congress.

Emergency withdrawals; procedure applicable; duration

(e) 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 subsections (c)(1) and (d) of this section, shall immediately make a withdrawal and file notice of such emergency withdrawal with the Committees on Interior and Insular Affairs of the Senate and the 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) of this section, whichever is applicable, and (b)(1) of this section. The information required in subsection (c)(2) of this subsection shall be furnished the committees within three months after filing such notice.

Review of existing withdrawals and extensions; procedure applicable to extensions; duration

(f) All withdrawals and extensions thereof, whether made prior to or after October 21, 1976, having a specific period shall be reviewed by the Secretary toward the end of the withdrawal period and may be extended or further extended only upon compliance with the provisions of subsection (c)(1) or (d) of this section, whichever is applicable, and only if the Secretary determines that the purpose for which the withdrawal was first made requires the extension, and then only for a period no longer than the length of the original withdrawal period. The Secretary shall report on such review and extensions to the Committees on Interior and Insular Affairs of the House of Representatives and the Senate.

Processing and adjudication of existing applications

(g) All applications for withdrawal pending on October 21, 1976, shall be processed and adjudicated to conclusion within fifteen years of October 21, 1976, in accordance with the provisions of this section. The segregative effect of any application not so processed shall terminate on that date.

Los Angeles Times DATE: 9-15-83
PAGE: Part II p. 6

coal leasing

Free Ride for Watt

It took a constitutional shortcut last month for House critics of Interior Secretary James G. Watt to put him and his coal policies on a suitably short leash. With all other efforts to impose a leasing ban stymied by Senate opposition, members of the House Interior Committee took the matter into their own hands, approving a resolution forbidding any more coal tracts to be sold off for the rest of the year. Under a 1976 law, that vote, by a simple majority of a single committee, is binding; congressional panels are permitted to withdraw federal lands from use or sale on an emergency basis.

A simple, convenient, effective way to make policy? Yes, but also no longer legal. The shortcut is a classic example of what has become known as the legislative veto, which the Supreme Court—to its credit—deemed unconstitutional in June.

A legislative veto works like this: Rather than pass laws that give the executive departments specific powers, as the authors of the Constitution intended, Congress instead gives the departments broad authority. But at the same time it requires them to check back for permission on specific actions, preserving all along the right to interfere with—veto—those actions when it sees fit.

The practice, unknown until the New Deal, is now written into hundreds of laws. In this case it is detailed in the 1976 measure, which is called the Federal Land Management Policy Act. It gives the Department of the Interior the right to conduct sales of federal land, but reserves for Congress and its committees the power to block those sales.

Now, because of the Supreme Court decision, that power no longer exists; the committee vote, taken after the court ruling, was invalid all along. The Interior Department realized that right away and gleefully reiterated it Wednesday, when it ignored the prohibition and went right ahead with the long-planned sale of 540 million acres straddling the North Dakota-Montana border. Its action is being contested—a suit by two environmental groups charges that the sale unlawfully defies the House committee resolution—but we won't hold our breath waiting for the sale to be voided. It was nice while it lasted, but the day of the shortcut is over.

Nothing can be done about this sale; the bids are coming in, and the mining is almost sure to go ahead. Unnecessary and unwise as it is, both environmentally and fiscally, it is what the Administration and the full Congress, which failed to impose a ban despite repeated opportunities, appear to want.

It is a bitter lesson for those who have tried to thwart Watt, to slow his rush to mine the nation's coal and dump it on a glutted market, to halt his seeming abandon in selling off oil and federal lands as well. No longer can they take comfort in the legislative veto, which once allowed Congress and congressional committees to serve as stopgap guardians of our natural resources.

From now on, if Congress wants to keep tabs on the Interior secretary it will have to do it by passing laws, not binding committee resolutions. It must first take a clear position. If the President agrees and signs the measure, it becomes law. If he instead vetoes it, it goes back to Congress to become law only if the House and the Senate, by two-thirds votes, override the veto. When Congress wants to change the rules of the game, or interpret them as it goes along, it must operate by the same procedure.

Lacking the power to intervene at the last minute, Congress will have to be judicious—and sometimes stingy—in turning over power to the executive. Policy making will be more cumbersome and less convenient, perhaps, but also orderly, safe and constitutional.

DATE: 9-16-83

The Washington Post

PAGE: A4

coal leasing

House Democrats to Confront Watt

Interior Panel to Seek Invalidation of Lease Sale

By Dale Russakoff
Washington Post Staff Writer

The House Interior Committee will ask a U.S. District Court to invalidate the Interior Department's recent sale of coal leases in North Dakota, committee Democrats said yesterday after a caucus.

The confrontation over the lease sale, held in defiance of an Interior Committee resolution directing the department to postpone it, escalated yesterday after the agency disclosed that some of the leases from Wednesday's sale may be issued in 15 days.

This contrasted to a statement made by the department's lawyer to a federal judge last week that "We don't expect leases to be issued for something like 45 to 60 days, at the absolute earliest."

The accelerated schedule would allow the leases to take effect on Sept. 30, one day before a proposed moratorium on federal coal leasing would take effect if passed by the Senate. The measure passed the House last summer.

Interior Committee Democrats, who voted along party lines on Aug. 3 for a resolution directing Interior Secretary James G. Watt to postpone Wednesday's lease sale, viewed the 15-day notice from the department as "obviously another effort to circumvent the will of Congress," according to committee member John F. Seiberling (D-Ohio), who attended a Democratic caucus on the matter.

Watt said he defied the committee's directive because he considered it unconstitutional and unnecessary.

Deputy Assistant Interior Secretary J. Steven Griles said the department has not accelerated the leasing schedule in hopes of dodging a moratorium. He stressed the agency has given notice only that it "may" issue leases in 15 days, not that it "will."

The notice was given in a letter to the National Wildlife Federation, which has filed a lawsuit attempting to invalidate Wednesday's sale on the grounds that the Interior Committee's directive was constitutional. The committee's Democratic majority decided in caucuses over the last two days to enter the suit on the side of the federation, committee sources said.

Because there are 27 Democrats and 14 Republicans on the panel, this ensures a committee vote to challenge Watt, sources said. Watt argued the directive constituted a "legislative veto," which the Supreme Court struck down last summer.

U.S. District Court Judge Louis Oberdorfer postponed ruling on the case last Friday after an Interior Department lawyer told him the agency expected not to issue the leases for 45 to 60 days after Wednesday's sale.

"Watt's attempt to process the leases in the next 15 days is in direct conflict with what Watt's lawyers told a federal judge," said National Wildli'e Federation official Norman Dean.

The group will "return to the courthouse as soon as possible to stop this illegal action," Dean said.

Interior's lawyer said at Friday's hearing that the agency would give the federation 15 days' notice before issuing leases from Wednesday's sale. Department officials said yesterday's letter complies with that agreement, although it occurred four weeks earlier than indicated.

Of the 540 million tons of coal offered for leasing on Wednesday, companies placed bids on only 140 million tons, contained in five tracts. There was only one bid per tract, four from the same company, and all bids were within $10 an acre of the government's $100 per-acre minimum bid.

Because of the slack bidding, Griles said the government will be able to process the leases more quickly than anticipated. The law requires the Interior Department to determine that the bids are at least equal to the fair market value of coal in the region, and requires the Justice Department to review them for possible antitrust violations.

"We understand that Justice is willing to process these without any delay," Griles said. The Interior Department would be required to perform lengthy market value tests only if there had been competition for the tracts, he added.

THE WHITE HOUSE

WASHINGTON

October 17, 1983

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS

SUBJECT: Proposed Statement of William F. Baxter Regarding Federal Coal Leasing Policies

We have been asked for our views by noon today on the above-referenced proposed testimony. The testimony consists of economic analysis demonstrating that the most desirable coal leasing policy is one which promotes economic welfare, and that this goal is not the same as maximizing federal revenue. As Baxter points out, maximizing federal revenue from the coal leasing program would simply mean higher rates for electric utility users. Baxter's economic analysis concludes that federal coal leasing policy would enhance economic welfare if it ensured that sufficient coal were leased to assure adequate competition among holders of coal reserves and that the most efficient reserves to supply utility demands were available in the market. Baxter's testimony also suggests several reforms of the statutory scheme to permit achievement of this objective. The most prominent of these suggestions is that the "diligent development" requirement in the current statutory scheme be revoked. Under this requirement, federal coal leaseholders are required to develop their leasehold within ten years. Baxter points out that this requirement distorts the market in coal leases, and results in inefficiencies.

In light of the short turn-around time, I contacted Fred Khedouri directly to discuss this testimony. Khedouri advised me that the only controversial aspects of Baxter's testimony, from the point of view of the Administration's program, was the suggested revocation of the "diligent development" requirement. Khedouri indicated that he would have Baxter's testimony revised to suggest review of this requirement rather than flatly supporting its revocation. I advised Khedouri that such a revision seemed desirable, and that I had no other objections. Unless you disagree, no further action is required.

Attachment

ID #________________CU

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Date Correspondence Received (YY/MM/DD) / /

Name of Correspondent: Randy Coleman

☐ **MI Mail Report** **User Codes:** (A) ________ (B) ________ (C) ________

Subject: Prepared Statement of William F. Baxter re: Federal Coal Leasing Policies

ROUTE TO: ACTION DISPOSITION

Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
CUHOLL	ORIGINATOR	83/10/17			/ /
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5/81

U.S. Department of Justice

DRAFT

Washington, D.C. 20530

Prepared Statement

of

William F. Baxter
Assistant Attorney General
Antitrust Division

Submitted to the

Commission on Fair Market Value
Policy for Federal Coal Leasing

Concerning

Federal Coal Leasing Policies

October __, 1983

Mr. Chairman and Members of the Commission:

I am pleased to have this opportunity to convey the views of the Department of Justice on certain issues relating to federal coal leasing policies. First, I wish to point out that the Department is keenly interested in ensuring that federal policies generally do not stifle competition or produce inefficiencies. The antitrust laws are a broad "consumer welfare prescription," Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979), and enforcing them requires that the Department carefully evaluate the effects on economic welfare of the various business practices that come under its jurisdiction. Moreover, in carrying out its congressional mandate to promote economic welfare, the Department has frequently been involved in the formulation of federal policy concerning a wide variety of industries, and has advocated deregulation and maximum reliance upon competition wherever that is appropriate.

With respect to coal leasing in particular, the Department has been extensively involved in the formulation of federal policy at least since the passage of the Federal Coal Leasing Amendments Act of 1976. Section 15 of that Act requires the Department of the Interior to consult the Department "[a]t each stage in the formulation and promulgation of rules and regulations concerning coal leasing . . . and at each stage in the issuance, renewal, or readjustment of coal leases." The

Department of Justice has advised Interior on numerous occasions pursuant to this provision. Under Section 15, the Department of Justice also reviews federal coal lease issuances, readjustments, and transfers, and advises Interior whether such action would "create or maintain a situation inconsistent with the antitrust laws."

In addition, Section 8 of the Act requires the Department annually to report to Congress "on competition in the coal and energy industries." The Department has submitted six such reports, which analyze in detail the state of competition in western coal markets, articulate the standards the Department applies in reviewing federal coal lease issuances, readjustments, and transfers, and analyze competitive and efficiency aspects of the statutes, rules, and regulations that govern federal coal leasing.

I believe it is important for this Commission to understand clearly the economic basis for the Administration's leasing policies. Specifically, it has been contended that the government has not been receiving "fair market value" for its coal leases on the ground that the Administration is (1) leasing too much coal too soon, and (2) leasing it below some estimate of its "fair market value." This criticism apparently reflects a belief that the major, if not the only, goal of the federal coal leasing program ought to be to generate as much revenue as possible for the government. In fact, however, the Administration's policies are not designed to achieve that goal, nor should they be.

The Department of Justice strongly believes that the primary goal of an economically rational government coal leasing policy should be to promote the economic welfare of the nation, not to maximize the revenue of the government. At the same time, it should go without saying that the government ought to realize the greatest possible revenue achievable under that leasing program that best serves the economic welfare of the nation. Within this framework, I address below three distinct issues: (1) the characteristics that a coal leasing program must have in order to promote economic welfare; (2) whether a program with such characteristics would provide the government with "fair market value" for coal leases; and (3) whether measures could be taken to increase the government's revenues without creating inefficiencies.

(1) Promoting economic welfare should be the goal. In considering the characteristics of welfare-promoting federal coal leasing policy, it is essential to understand that the federal government has considerable monopoly power in Western coal markets by virtue of its vast coal reserve holdings. Despite more than sixty years of leasing, unleased federal coal reserves constitute most of the coal reserves in the West overall and about two-thirds of the reserves in the area with the lowest extraction costs per ton in the nation, the Powder River Basin.

In addition, because of interspersed ownership patterns, as much as half of the non-federally owned coal reserves cannot be mined economically, except in conjunction with as yet unleased federal reserves.

Because of its monopoly power, the government could easily realize substantial monopoly revenues by restricting the pace at which it leases its coal reserves. But restricted leasing would force firms to mine some private deposits or already leased federal deposits instead of unleased federal coal, even though the private and leased deposits are more costly to mine. This would increase the price of western coal, ninety percent of which is consumed by electric utilities. With higher prices, coal producers would compete up the bonuses they pay for coal leases, federal or otherwise. This situation would result in increased revenues for the federal treasury and private reserve holders, and for state treasuries as well, because they share in the revenues from federal coal leasing and also own some coal reserves.

In this time of high government budget deficits, this may sound like an attractive proposition, but such a policy would, in fact, be very undesirable for the American people. The increase in coal prices paid by electric utilities would necessarily be passed along to rate payers, so the result would, at best, be equivalent to that of an excise tax on electric power consumption, with the public no better off.

Actually, however, the result would be far less benign than that of an excise tax. Restricting federal leasing would cause an inefficient use of the nation's resources because the cheapest-to-mine coal would not be used first to satisfy demand. Moreover, a significant proportion of the revenue generated by restricting federal leasing would go to private reserve holders and to current holders of federal coal leases. Thus, there would be a net loss in economic welfare as well as a transfer of income from electric utility rate payers to coal companies and to others with interests in coal reserves. Even if the government leases substantial quantities of coal reserves but fails to lease the reserves that would be the most economical for each particular electric utility customer to use, substantial inefficiencies would result. If the least costly reserves are unavailable, more costly reserves will be used and resources will be wasted.

It could be argued that as long as the government leases the reserves that would most efficiently satisfy electric utility demands, the total quantity of reserves that the government would need to lease each year in order to avoid inefficiencies would be only a tiny fraction of the government's total holdings. There are two significant problems with this argument, however.

First, it simply is not possible for the government to implement such policy. The efficient matching of parcels of undeveloped reserves with utilities needing fuel is an extremely complicated process that is effectively performed by the impersonal forces of the marketplace but could not be duplicated by an army of even the most dedicated and brilliant government officials. Second, even if such a policy could be implemented, it could still lead to signficant inefficiencies. If there were only enough coal reserves in private hands to satisfy utility demands at competitive prices, then any reserve holder might profit significantly by withholding some of its reserves to drive up prices.

Thus, to guarantee the efficient development of the nation's coal resources, it is necessary for the federal government to lease sufficient reserves to assure that there is adequate competition for those reserves and that the reserves that can most efficiently be used to supply electric utility demands are available to the market. If the government does this, there is no danger that inefficiencies will result. From an efficiency perspective, it simply is not possible for the government to lease "too much" coal. No matter how much coal the government offers for lease, the price of an individual lease cannot be driven below the competitive level. This is so for the simple reason that if the government is leasing at least those reserves that efficiently satisfy demands, then the value of any tract of coal is determined by its ability to satisfy energy needs more cheaply than other coal tracts or other resources, and this value cannot be lessened by making the tract available to the market. */<

Of course, if the federal government were unexpectedly to offer to sell leases on a sufficiently enormous quantity of coal, such that the capital markets could not finance the purchases, illiquidity would cause the price received for such reserves to drop temporarily; but even this problem would not arise in any planned coal leasing program.

It is true that the government could get more nominal dollars for particular tracts by leasing them later instead of sooner, even if it does not exercise its monopoly power; but future dollars are worth less than present ones, so that postponing lease offerings will not result in the realization of any greater present value to the government. */<

It is also true that the average value of all coal leased would tend to fall if more coal were leased, but that is only because the average quality of coal leased would tend to fall as the quantity leased rose.

Thus, increased leasing above the minimum efficient level would not reduce the present value of individual tracts, nor would it decrease the present value of overall revenues attributable to leasing. On the other hand, as discussed above, the failure to lease enough coal will lead to significant inefficiencies and higher coal prices for consumers. Thus, in order to promote consumer welfare, the government must lease significantly more coal than it is currently economical to mine in order to be certain to avoid the negative consequences of leasing too little coal.

(2) Assuring that the government receives "fair market value" is not a problem. Would the policies I have outlined above result in the government failing to receive "fair market value" for its coal, as is required by law? It is clear that the government would not receive as much revenue for its coal under those policies as it would if it exercised its monopoly power, but clearly it does not follow that such policies would prevent the government from receiving "fair market value"; fair market value does not imply a monopoly price but a competitive, or market, price.

By regulation (43 C.F.R. § 3400.0-5(n)), the Secretary of the Interior has defined the term "fair market value" to mean "that amount . . . for which . . . 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." This definition is eminently reasonable and entirely consistent with definitions of the term used in other areas of law. It in no way suggests that the government must exercise its monopoly power for it to realize "fair market value." Rather it suggests (at least with respect to tracts that are logical mining units, as explained below) that when the government conducts a truly competitive lease sale, the high bid will necessarily return "fair market value."

(3) Remedial steps do need to be taken. The government can and should take two types of steps to increase its revenues without creating inefficiencies through monopoly pricing. The first involves changing the economic environment so as to increase the total value of the government's coal leases. The second involves extracting a larger share of this value. The former increases economic welfare while the latter merely redistributes wealth; thus, the former is more important as a matter of coal leasing policy.

There are at least two actions the government could take to increase the value of its coal leases without exercising market power. First, Congress could eliminate certain statutory provisions intended to discourage "speculative" holding of federal coal leases. The most significant of these provisions requires the termination of "[a]ny lease which is not producing in commercial quantities at the end of ten years." 30 U.S.C. § 207(a). This and related provisions are premised on the belief that speculation in coal reserves is undesirable. In fact, coal companies serve a useful role by holding parcels of undeveloped reserves while searching for the utilities for which those parcels are the most economical sources of coal. But the ten-year development requirement does not permit companies to hold the reserves until they can find the best match of coal deposit and customer, thus significantly impairing the efficiency of the market.

Perhaps equally important to the Commission, these provisions can greatly reduce the sums that coal companies are willing to bid for coal leases. For example, if there were only one chance in five that the ten-year development requirement could be met, then, since firms are risk-averse, no coal company would be willing to bid even as much as one-fifth of the value that the tract would have if it were certain that it would meet the requirement. In other words, these provisions unnecessarily increase the risk inherent in buying federal coal leases. They interfere, therefore, with the efficient functioning of coal markets and reduce the value of federal coal leases. Accordingly, the Department strongly recommends that all provisions in existing coal leasing law relating to "diligent development" or "continued operation" of federal coal leases be repealed.

Another way in which the government might increase the value of federal coal leases without exercising market power is to reduce the uncertainty about leasing and other federal policies that affect coal use. Among those uncertainties are rail rates, the future of coal slurry pipelines, restrictions on emissions, from coal or substitute fuels, owing to acid rain and other environmental problems, and the amount and timing of coal to be leased. These uncertainties translate into uncertainties about the value of particular coal deposits and, because investors treat risk as costly, they reduce the value of a tract. Such mistaken estimates could cause tracts not to be leased, in which case the government would realize no revenues. In addition, the costs of mining could be increased because economical resources would not be extracted. Moreover, the valuation process itself expends resources.

There are several steps that Congress can take to increase the government's return from coal tracts that are not logical mining units. For tracts not adjacent to or surrounded by on-going mining operations, joint lease sales, including both federal and non-federal coal, could be arranged. Such sales could often be conducted through the voluntary cooperation of adjacent non-federal owners. It might be useful, however, if the public purpose requirement would be met, for the Department of the Interior to have the power of eminent domain, so that it could conduct the lease sale even over the objection of the other coal holders. Because logical mining units would then be leased, a reasonable return would be assured. Therefore, no valuation procedure would be necessary either to determine whether high bids represent "fair market value" or, if the practical problems of condemnation litigation are not insurmountable, to set the amount of compensation to be paid to condemnees for their pro rata portion of the logical mining unit.

No similar procedure could be used for tracts that are adjacent to or surrounded by on-going mining operations. The present system, which requires competitive leasing for all tracts, including those which are not logical mining units, seems not to be optimal either, however. It is surely wasteful to employ a lengthy administrative procedure that produces no lease sale only because the sole prospective lessee under-estimates the amount that the government is willing to take. A better approach might be for the government simply to publish the minimum bid it will accept. Even this approach does not assure that the leases will be issued, of course, since the government may over-estimate tract values, in which case the sole prospective lessees would decline to bid at all. Alternatively, the government might under-estimate tract values, in which case it would fail to realize as large a return as it could have. Thus, negotiated sales may be the best mechanism for dealing with this type of tract. If negotiated sales were to be permitted by statute, however, it would be important to ensure that only tracts that could not be leased competitively were the subject of negotiated sales.

<u>Summary and Conclusions.</u> In conclusion, the Department strongly believes that the primary goal of federal coal leasing should be to enhance economic welfare. A federal coal leasing policy designed to achieve this goal would provide that sufficient coal be leased to assure that there is adequate competition among holders of coal reserves and that the most efficient reserves to supply electric utility demands are

available to the market. While such a policy would prevent the government from receiving as much for its coal as it would if it exercised its market power, it would provide the government "fair market value" for the coal.

In addition, several actions could be taken both to enhance efficiency and increase the return to the government from coal leasing. One is to repeal all existing provisions of coal leasing laws relating to "diligent development" or "continued operation" of federal coal leases. The other is to adopt stable, long-term policies in a variety of areas affecting the value of coal reserves. Finally, while there are measures that could be taken to increase the proportion of the value of coal leases that would accrue to the government, rejecting bids below estimates of "fair market value" entails significant risks of inefficiency and revenue loss, and is destinctly inferior to other techniques that could be used in leasing logical and non-logical mining units.

Mr. Chairman, I appreciate the opportunity to submit these comments for the record, and I would be happy to attempt to answer any questions that you or members of the Commission might care to submit.

THE WHITE HOUSE

WASHINGTON

October 18, 1983

MEMORANDUM FOR MICHAEL E. BAROODY
DEPUTY ASSISTANT TO THE PRESIDENT
DIRECTOR, OFFICE OF PUBLIC AFFAIRS

FROM: FRED F. FIELDING Orig. signed by FFF
COUNSEL TO THE PRESIDENT

SUBJECT: Domestic Briefing Material --
Coal Leasing

The fourth bullet in the Coal Leasing briefing material should be revised. While the judge in question originally based his issuance of a preliminary injunction on Congress' authority over federal lands, he departed from that reasoning in a subsequent opinion, focusing instead on Interior Department regulations. We suggest the following version of the fourth bullet item:

- A Federal District Judge last month issued a preliminary injunction blocking the planned North Dakota leases, and a hearing on the dipute is scheduled for October 27. It is not clear how the judge will ultimately rule or what the basis for his decision will be.

cc: Richard G. Darman

FFF:JGR:aea 10/18/83

bcc: FFFielding
JGRoberts
Subj
Chron

ID #______________ CU

WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

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Name of Correspondent: RICHARD G. DARMAN

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Subject: Additional Domestic Briefing Materials (see topics below)

ROUTE TO: ACTION DISPOSITION

Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
CJHOLL	ORIGINATOR	83/10/18			/ /
Referral Note:					
CWAT04	D	83/10/18		S	83/10/18 3:00
Referral Note:					
CWAT02	D	83/10/18		S	83/10/18 3:00
Referral Note:					
CWAT17	D	83/10/18		S	83/10/18 3:00
Referral Note:					
[redacted]	D	83/10/18		S	83/10/18 3:00
Referral Note:					

ACTION CODES:

A - Appropriate Action
C - Comment/Recommendation
D - Draft Response
F - Furnish Fact Sheet to be used as Enclosure
I - Info Copy Only/No Action Necessary
R - Direct Reply w/Copy
S - For Signature
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Completion Date = Date of Outgoing

Comments: LG-Legal Services Bd, JR-Coal Leasing, RAH-Acid Rain, SC-Civil Rights Commission

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WHITE HOUSE STAFFING MEMORANDUM

DATE: 10/18/83 ACTION/CONCURRENCE/COMMENT DUE BY: 3:00 TODAY

SUBJECT: ADDITIONAL DOMESTIC BRIEFING MATERIALS

	ACTION	FYI		ACTION	FYI
VICE PRESIDENT	☐	☐	HERRINGTON	☐	☐
MEESE	☐	☐	HICKEY	☐	☐
BAKER	☐	☐	JENKINS	☐	☐
DEAVER	☐	☐	McMANUS	☐	☐
STOCKMAN	✓	☐	MURPHY	☐	☐
CLARK	☐	☐	ROGERS	☐	☐
DARMAN	☐P	✓SS	ROLLINS	☐	☐
DUBERSTEIN	✓	☐	SPEAKES	☐	☐
FELDSTEIN	☐	☐	SVAHN	✓	☐
FIELDING	✓	☐	VERSTANDIG	✓	☐
FULLER	✓	☐	WHITTLESEY	✓	☐
GERGEN	✓	☐	BAROODY	☐	✓

REMARKS:

Please provide any edits directly to Mike Baroody, Room 160, by 3:00 p.m. today, with an information copy to my office.

Thank you.

RESPONSE:

OCT 18 1983

Richard G. Darman
Assistant to the President
Ext. 2702

COAL LEASING

JR

Reminder: It was Watt's comments about members of Coal Leasing Commission that prompted latest controversy. May be questions about the issue itself.

- Coal reserves leased now take about 10 years to develop to the point of commercialization.
- Current energy "glut" can't last forever. Prudent to begin now to take steps necessary to permit expanded future coal production.
- Interior proposed to do just that. Congress has opposed the Department's lease plans but Interior took position that Supreme Court decision on legislative veto made Congressional opposition non-binding.
- Federal District Judge last month ordered Interior to hold up planned North Dakota leases, saying Congress retained legitimate rights concerning federal lands policy despite the Supreme Court legislative veto ruling.
- Both Houses have voted for leasing moratoriums -- and the legislation is now in conference.

Background

- During the Carter Administration, reports from GAO, the Energy Department, Justice, all recommended leasing of federal coal reserves -- in interest of consumers.
- U.S. Geological Survey estimated that overly restrictive leasing policies could cost the economy $2 billion by 1995.
- A moratorium on leasing went into effect in 1971 -- and development was at a virtual standstill for next 11 years.
- The federal government owns about 200 million tons of coal reserves -- and only about 18 million have been leased to date.