Sales of Federal Fuel Resources: Achieving "Fair Market Value"

INTRODUCTION

The Reagan administration hopes to increase significantly the rate at which federal acreage will be mined for coal and at which offshore oil and gas resources will be exploited.[1] As a result, the government is increasing the amount of the Outer Continental Shelf and federal lands throughout the nation that may be leased to private parties for fuel resource development.[2] As the lease market becomes saturated, the method of valuing such lands becomes increasingly important. In two major lawsuits, several states and environmental groups allege that the Department of Interior ("DOI") under Secretary James Watt sold federally-held public resources for less than their worth. *California v. Watt*[3] attacks DOI's program for development of the one billion acres of the Outer Continental Shelf ("OCS"). *The Northern Cheyenne Tribe v. Watt*[4] challenges the government's sale of 1.6 billion tons of coal in the Powder River Basin under the Mineral Lands Leasing Act.[5] Because these constitute some of the largest fuel resource sales in the nation's history, the seemingly narrow issue of valuation takes on broader significance, especially in light of its effect on the way in which our national resources are developed.

1. Barron, *Watt's Economic Folly*, N.Y. Times, Feb. 16, 1983, at A31, col. 2; *Mr. Watt Rages at the Wilderness*, N.Y. Times, Jan. 2, 1983, at E14, col. 1; *see also Changes Proposed for Coal Leasing*, N.Y. Times, Mar. 20, 1984, at A39, col. 1.

2. *See Hearings Before House Subcomms. of Mines and Mining and Oversight and Investigations Regarding the Five Year OCS Leasing Program*, 97th Cong., 2d Sess. (1982) (statement of David C. Russell, Deputy Director, Minerals Management Service); *see also Clark Says He Will Offer A Role to Critics in Offshore Oil Leasing*, N.Y. Times, Jan. 13, 1984, at A10, col. 3.

3. California v. Watt, 712 F.2d 584 (D.C. Cir. 1983). Parties included the states of California, Alaska, Florida and Oregon, as well as environmental groups, including Natural Resources Defense Council, Inc., Sierra Club, Conservation Law Foundation of New England, Inc., Friends of the Earth, National Wildlife Federation and National Audubon Society.

4. The Northern Cheyenne Tribe v. Watt, No. 82-116 (D. Mont. filed June 21, 1982); National Wildlife Federation v. Burford, No. 82-117 (D. Mont. filed June 21, 1982) (consolidated cases).

5. 30 U.S.C. §§ 181-263 (1976 & Supp. V 1981).

Both the Mineral Lands Leasing Act, as amended by the Federal Coal Leasing Amendments Act of 1976 ("FCLAA"),[6] and the Outer Continental Shelf Lands Act ("OCSLA")[7] and Amendments of 1978 ("OCSLAA"),[8] require that the government receive "fair market value" ("FMV") for the lands it leases. Under the FCLAA, section 2, "no bid shall be accepted which is less than the fair market value, as determined by the Secretary [of the Interior], of the coal subject to the lease."[9] The OCSLAA, section 18(a)(4), requires that "leasing activities be conducted to assure receipt of fair market value."[10]

Neither act defines the term "fair market value."[11] However, in assessing lands under both the OCSLAA[12] and the FCLAA,[13] the government uses the definition set forth in the Uniform Appraisal Standards for Federal Land Acquisitions:

> "[F]air market value" is defined as the amount in cash, or on terms reasonably equivalent to cash, for which in all probability the property would be sold to a knowledgeable owner willing but not obligated to sell to a knowledgeable purchaser who desired but is not obligated to buy.[14]

This definition evolved from eminent domain and condemnation cases and is generally applicable to government acquisitions and sales.[15] Its use in these acts is not questioned by plaintiffs in either case.[16]

6. Pub. L. No. 95-554, 92 Stat. 2073 (codified in scattered sections of 30 U.S.C. (Supp. V 1981)).

7. 43 U.S.C. §§ 1331-1356 (1976 & Supp. V 1981).

8. Pub. L. No. 95-372, 92 Stat. 629 (1978) (codified in scattered sections of 43 U.S.C. (Supp. V 1981)).

9. 30 U.S.C. § 201(a)(1) (Supp. V 1981).

10. 43 U.S.C. § 1344(a)(4) (Supp. V 1981).

11. Although a definition of FMV appears at § 201(o) of the OCSLAA, 43 U.S.C. § 1331 (o) (Supp. V 1981), this definition applies only to the value of "any mineral" under § 27, and not to the value of lands leased and rights conveyed. H.R. REP. No. 1474, 95th Cong., 2d Sess. 79 (1978), *reprinted in* 1978 U.S. CODE & AD. NEWS 1674, 1678.

12. OCS Tract Evaluation Procedures for Assuring Receipt of Fair Market Value (Secretarial Issues Document accompanying Mar. 1982 Tentative Proposed Program, app. 3, at 1) [hereinafter cited as SID, app. 3].

13. 43 C.F.R. 3400.0-5(n) (1982).

14. INTERAGENCY LAND ACQUISITION CONFERENCE, UNIFORM APPRAISAL STANDARDS FOR FEDERAL LAND ACQUISITIONS 3 (1971).

15. *See, e.g.*, United States v. 564.54 Acres of Land, 441 U.S. 506 (1979); Olson v. United States, 292 U.S. 246 (1934); Annot., *Valuation of Mineral Interests in Federal Condemnation Proceedings*, 40 A.L.R. Fed. 656 (1978) [hereinafter cited as Annot.]; United States v. Miller, 317 U.S. 369, 373-75 (1943).

16. *Watt*, 712 F.2d at 606; Plaintiffs' Amended Complaint for Declaratory and Injunc-

This definition raises more questions than it answers, however. Does FMV require maximizing revenue from the sale of public resources? If so, the Secretary of the Interior must exploit DOI's control over federally-held resources to make the price as high as possible. Such a policy might entail increasing the price by restricting the supply. On the other hand, Congress might have meant to emphasize another aspect of the term: a "fair return to the public." That was was the meaning ascribed to the 1973 version of the FCLAA by John C. Whitaker, then Acting Secretary of the Interior.[17] In that sense, the determination of FMV would include an analysis of a fair price: determination of an equitable return to the government and of a fair cost to the developer/purchaser.

The price received for the resources reflects the method by which the Secretary sells them. The word "fair" has been used by the General Accounting Office to refer not to the justness of the amount received but to the method by which it is determined.

> The "fair" element of the term "fair market value" applies to the *method* of determining market value. The market value of the coal does not necessarily have to be "fair." Rather it is to reflect the lease's value as the time and place of the sale—*fairly determined.* Thus the method utilized by the Secretary of the Interior to determine the market value of the lease must be suitable for this purpose.[18]

To determine the price, therefore, the Secretary must look to the process Congress felt would ensure receipt of FMV. Is FMV purely a market term, depending on the prevailing market conditions at the time the leases are sold? Or, where there is no competition to acquire certain tracts (as where lands are known to have few mineral resources), does the phrase reflect something *other* than market forces, such as an objective assessment of the appropriate value? If so, what is the nature of evidence required to ascertain such a value? These issues—the means of attaining FMV, the method of

tive Relief at 6-10, National Wildlife Federation v. Burford, No. 82-1166 (D.D.C. filed Apr. 27, 1982).

17. "The proposed Mineral Leasing Act of 1973 would place all minerals under a leasing system thereby continuing the historical trend toward discretionary disposal and a fair return to the public." S. REP. No. 984, 93rd Cong., 2nd Sess. 14 (1974) (letter from John C. Whitaker, Acting Secretary of the Interior, to Spiro T. Agnew, President of the Senate (Feb. 27, 1973)).

18. COMPTROLLER GENERAL OF THE UNITED STATES, PUB. NO. GAO/RCED-83-119, ANALYSIS OF THE POWDER RIVER BASIN FEDERAL COAL LEASE SALE: ECONOMIC VALUATION IMPROVEMENTS AND LEGISLATIVE CHANGES NEEDED 45 (1983) [hereinafter cited as POWDER RIVER BASIN SALE ANALYSIS].

determining whether FMV has in fact been attained and the degree to which FMV must be ascertained before the sale of development rights—are the subjects of litigation against the Secretary under FCLAA and the OCSLAA.

The means and import of FMV can be defined more concretely by scrutinizing the legislative histories of the acts, the administrative interpretations of the phrase, its significance in other areas of federal land stewardship and current case law developments.[19] This Note will examine these sources in search of a working definition of FMV. Part I sketches the lease-sale provisions of the FCLAA and the OSCLAA, as they pertain to the FMV requirements in the two acts, and describes the controversy surrounding the implementation of these acts. In Parts II and III, the Note discusses the uses of FMV in eminent domain proceedings and other federal land sale acts. Parts IV and V describe the development and purpose of FMV in the two acts, examining the impetus behind the relatively recent addition of the FMV requirement, and the conjunction of the FMV requirement and the acts' broader goals. Parts VI and VII explore the means of achieving FMV, referring to analyses of fuel resource sales by the General Accounting Office and looking closely at Congressional intent. The Note concludes that the FMV policies promulgated by the Interior Department under President Reagan and Secretary Watt did not satisfy congressional intent, that Watt's resource development policies fell short of achieving the statutorily-mandated standard and that there is little indication from Secretary Clark that DOI plans to modify these policies.

I. THE STRUCTURE OF THE LEASE-SALE PROVISIONS IN THE OCSLAA AND THE FCLAA AND CURRENT MEANS OF ACHIEVING FAIR MARKET VALUE

A. *The Process under the OCSLAA*

The parameters of the FMV equation were noted by DOI in 1982; they postulate a transaction in a fair market between willing parties selling and buying voluntarily.

> The most important features of prices in a fair market is that they are satisfactory to both parties to the transaction, given

19. *See Watt*, 712 F.2d 584.

> their knowledge and voluntary participation. The seller in such a transaction accepts the payment offered in confidence that he could not receive more from another buyer. For such confidence to be placed in a market, it must
>
> - operate through a competitive process;
> - provide sufficient opportunity for those who most highly value the item being sold to participate;
> - be free of non-market restrictions on, or advantages to, any party competing to purchase the item;
> - be free of collusion.[20]

To meet these conditions, previous administrations used pre-sale evaluation of each tract and exercised restraint in leasing the Outer Continental Shelf tracts. In commenting on the program promulgated by Secretary Andrus, the office of the Solicitor of the Interior under Secretary Watt noted that:

> [I]n the past, the Department has performed resource economic evaluations prior to lease sales to identify high bids which were below fair market value. This practice has been repeatedly upheld by the courts. This approach has also acted as a deterrent against collusion and systematic underbidding because bidders realize that they must "outbid" [Geological Survey] evaluators. Consequently, the current practice has served the function of maintaining a fair market.[21]

However, upon increasing the acreage offered, Secretary Watt's administration viewed this assessment process as too cumbersome. Watt's main objection to this process was that it would be inefficient to evaluate tracts for which no bids would ultimately be received. The Watt DOI therefore adopted an alternative system.[22] The solicitor's report continued:

> [U]nfortunately, this practice is now proving to be too expensive in terms of both money and manpower for application to recent policy proposals to accelerate the leasing of OCS tracts. Another

20. SID, app. 3, *supra* note 12, at 3.

21. *Id.* at attached Solicitor's Opinion 2-3 (May 11, 1981) (citations omitted).

22. The Secretary of Interior asserted in California v. Watt that the new tract evaluation process is proposed only, and is not to be implemented until tested. Although the petitioners disputed this characterization, the court held: "[w]e do not need to resolve the dispute, because we find both the 'old' and the 'new' tract evaluation procedures sufficient when considered in conjunction with the reasonable reliance on the market and the increased minimum bid price, to assure receipt of fair market value." *Watt*, 712 F.2d at 607-608 n. 115. The Note therefore refers throughout to the process as implemented.

> approach to the problem is to assure that bids are made in a market which is sufficiently fair. It relies on competition to eliminate the effects of collusion and systematic underbidding. The problem then becomes one of assuring a level of competition sufficient to eliminate these factors.[23]

The Watt program increased the size of the lease offerings twenty times from their size under the Andrus program to approximately one billion acres, encompassing virtually the whole of the Outer Continental Shelf.[24] This lease offering is approximately twenty-five times the forty million acres offered under the OCS program from 1954 to 1980.[25] In order to be able to make available such vastly increased amounts of acreage and to accelerate the development pace, the Secretary had to modify the leasing system.

Secretary Watt altered the procedures most significantly with respect to the timing of the sales and the evaluation of the resources.[26] Under the previous evaluation system, formulated by DOI during the tenure of Secretary Andrus, the government assessed each tract before bidding to determine the minimum bid necessary for the receipt of FMV.[27] The present procedures evaluate the FMV of approximately 35% of the undeveloped tracts—30% selected on the basis of predetermined criteria and 5% randomly selected.[28]

Secretary Watt adopted this reduced scrutiny to counter the inefficiency of evaluating all tracts. When coupled with the in-

23. SID, app. 3, *supra* note 12, at attached Solicitor's Opinion 2-3 (May 11, 1981).

24. GENERAL ACCOUNTING OFFICE, REP. EMD-81-59, ISSUES IN LEASING OFFSHORE LANDS FOR OIL AND GAS DEVELOPMENT 3 (1981). The government estimates that the U.S. Outer Continental Shelf is approximately one billion acres.

25. *Id.* at 22.

26. The process for receiving bids on offshore tracts is now a competitive sealed bidding procedure. None of the bidders knows what its competitors will bid. The Secretary has set a minimum acceptable bid at $150 per acre (increased from the previous minimum bid of $25) so that those tracts with modest prospects will not be sold short in the event of little or no competition. *Watt*, 712 F.2d at 607.

27. Currently, although each high bid is assessed relative to others, each tract is not. "Each high bid will be subjected to a quantitative evaluation developed to decide whether to accept or reject bids and, when validated, to a comparative evaluation." *Id.* at 608.

28. "Bids received for frontier areas will be evaluated in two ways. First, an appropriate sample of the tracts receiving bids, depending on the particular sale, but generally in the range of thirty percent will be evaluated. Second, a 'random' sample of five percent of the tracts will be evaluated." *Id.*

creased number of tracts offered for bidding, he claimed that the evaluation work would be onerous and would slow the leasing process.

> It is no longer necessary to regard tract evaluation as a filter through which all bids must pass so that below-fair-market-value bids can be detected, a costly and essentially impossible role. Instead, tract evaluation can be viewed as a back-up to the market, as a mechanism to deter any tendency for bidders to exploit unusual situations or new conditions by systematically underbidding or colluding.[29]

The suit brought under the OCSLAA by the states and environmental groups challenged the increase in tract offerings, especially in light of the reduction in evaluations.[30] Petitioners in *California v. Watt* argued that the program's accelerated pace of leasing and increased acreage would undermine the attempt to achieve FMV.[31] The petitioners charged that the dramatic increase in acreage offered constitutes flooding of the market, and that, in a flooded market, the Watt measures to ensure receipt of FMV are inadequate. "If more and more tracts are offered, bids will be submitted based on less and less information. Uncertainty will increase. As uncertainty over the value of the resource increases, expected profits from the lease decrease and, as expected profits decrease, the willingness to pay of the prospective bidder decreases.[32] Thus petitioners argued that the expanded Watt leasing program would reduce revenues.

By contrast, DOI felt that the restraint used in the Andrus program was not socially optimal because it may have produced prices exceeding FMV.

> [The] monopolistic tendencies of past leasing rates raise the possibility that lease prices were at least somewhat higher as a

29. SID, app. 3, *supra*, note 12, at 7.

30. "At the same time that the Watt Program floods the market place with lease offerings, thus driving down the price and reducing competition, the Program also abandons the evaluation procedures which DOI has in the past used to determine if the bids received constitute fair market value." Brief for Petitioners State of California, State of Alaska, Natural Resources Defense Council, Inc., North Slope Borough and Cenaliuriit at 157, California v. Watt, 712 F.2d 584 (D.C. Cir. 1983) [hereinafter cited as Brief for Petitioners].

31. "[T]he large number of tracts expected to receive only 1 and 2 bids is an indication that sufficient competition does not exist for the government to receive fair market value for much of the acreage leased." *Id.* at 154 (citations omitted).

32. Brief for Petitioners, *supra* note 30, at 154.

> result. The question now is, what is the effect from the perspective of fair market value of increasing the rate of leasing in order to catch up on the amount of investment in exploration? Lease prices could be held at higher levels by continuing to restrict the availability of leases. Such a policy could result in prices that would be higher than those in a market in which supply is competitively determined. It would, however, be tantamount to exertion of monopoly power by the government. Losses to the economy would result just as they do from private monopolies. It would be very costly to the Nation to exercise the government's monopoly over the supply of OCS leases as the means for assuring receipt of fair market value. Other means are available that are far less costly to the nation's economy.[33]

The District of Columbia Circuit in the *California v. Watt* decision accepted the Secretary's decision to rely on the newly formulated bidding process, designed to assure receipt of FMV. The court ruled that the fair market value requirement in the OCSLAA was adequately met by the Watt revised five-year program and upheld the decision as reasonable.

> There may be more effective means available, as petitioners assert, but that does not mean that the chosen method is unreasonable. Therefore, the proposed evaluation process, coupled with the Secretary's reasonable reliance on the integrity of the competitive bid process, is sufficient to assure that the fair market value is received.[34]

B. *The Leasing Process under the FCLAA*

The government has not fared as well in recent assessments of its coal leasing program. In particular, reports of the General Accounting Office ("GAO") and the Commission on Fair Market Value Policy for Federal Coal Leasing criticized the procedures used to determine whether FMV was received for the sale of coal in the Powder River Basin of Wyoming and Montana.[35] As in the case

33. *Watt*, 712 F.2d at 607 (quoting joint app. at 1361).

34. *Id.* at 608.

35. POWDER RIVER BASIN SALE ANALYSIS, *supra* note 18; U.S. GOVERNMENT PRINTING OFFICE, PUB. NO. 024-000-00884-3, FINAL REPORT: COMMISSION ON FAIR MARKET VALUE POLICY FOR FEDERAL COAL LEASING (1984) [hereinafter cited as FMV REPORT]. The Commission on Fair Market Value was chartered by DOI in August, 1983, to assess the Department's procedures to ensure receipt of FMV, to evaluate efforts to improve DOI's FMV policies and to recommend improvements. The Commission's report was published in February, 1984.

of the OCS lease-sales, the Powder River Basin sales were part of the DOI commitment to increase the development of resources under the FCLAA.[36] The Powder River Basin Sale was the largest sale of coal-bearing land in the nation's history, comprising thirteen coal tracts, representing about 1.6 billion tons of coal.[37] DOI again used new evaluation procedures and offered greater quantities of acreage containing coal than had been offered under Andrus.

In implementing the FCLAA, the Watt DOI revised the existing leasing program to allow evaluation of FMV to be made after, rather than before, the sale. The previous procedure had been to publish a presale estimate of coal value as a minimum acceptable bid.

The new procedures were based on an evaluation of the bids after the sale:

> These complex procedures required a three stage analysis of each tract to: (1) make a "determination of adequate competition" based on elements of a competitive market structure, the extent of bidder participation, and a comparison of the high bid received with the high bids on comparable tracts (in which case, the competitive market assures fair market value); (2) on tracts not clearly competitive, perform a "comparable high bid analysis" to determine whether the high bid fit within a range of values that would be expected from direct market evidence of comparable tracts (in which case, fair market value would be found); and (3) on tracts not meeting the second test, make an "examination of special circumstances" to determine if the coal lease bid still equals fair market value.[38]

36. *See* Barron, *supra* note 1, at col. 3.

37. POWDER RIVER BASIN SALE ANALYSIS, *supra* note 18, at i.

38. Intervenor's Motion for Summary Judgment at 6, The Northern Cheyenne Tribe v. Watt, No. 82-116 (D. Mont. filed June 21, 1982); National Wildlife Federation v. Burford, No. 82-117 (D. Mont. filed June 21, 1982).

The sale occurred in several stages. The initial sale occurred in April before the new procedures were promulgated. For the April sale, DOI adopted an experimental "entry level" bidding system. Under this system, applicants submitted sealed bids, which usually commenced at levels "well below" the estimated value of individual tracts. Following receipt of two or more bids for any tract, the bidding continued orally and the highest bidder received the lease.

The current procedures were issued in September 1982; in October, a followup sale adopted the approach that each bidder could bid only once—a sealed minimum bid. This method was designed to encourage higher bidding, since presumably the companies would offer their highest bid to secure the lease. POWDER RIVER BASIN SALE ANALYSIS, *supra* note 18, at ii-iii.

The General Accounting Office, in a 1983 report analyzing the Powder River Basin Sale,[39] found that these methods relied on active bidding interest to ensure true "best" bids. However, the April sale had little bidder participation: eight of the eleven tracts bid upon received only one bid and the other three tracts received only two bids apiece.[40] GAO found that due to the lack of genuine competition for the bulk of the leases, the DOI analysis "allowed virtually any bid to be accepted regardless of whether it approximated fair market value."[41] As a result, GAO concluded that the bids for the tracts offered in April fell $15 million short of DOI's original estimated value of $70 million.[42] GAO found that DOI's post-sale estimation of FMV in the Powder River Basin Sale relied extensively on data derived from the bidding process itself, rather than on direct evaluation of each tract. Absent competition, GAO found little assurance that FMV could be realistically achieved.[43]

As under the OCSLAA, the change in the lease sale system under the FCLAA resulted from DOI reluctance to exercise what it considered monopolistic powers to keep the price at higher levels.

> The change to the entry level bidding system was prompted by Departmental concerns over a possible reluctance by industry to bid if Interior set minimum acceptable bid values as under the previous system. Interior believed these values would have been too high—under existing market conditions—to encourage the level of industry participation desired.[44]

In *National Wildlife Federation v. Burford*,[45] challenging the Powder River Basin Sale, the National Wildlife Federation alleged

39. POWDER RIVER BASIN SALE ANALYSIS, *supra* note 18.

40. *Id.* at ii. Lack of competition is not only a feature of the April sale but pervades the federal coal leasing program. "Having more than one bidder for a federal coal lease tract is the exception rather than the rule. From 1978-1982, 70 percent of Interior Department's lease offerings received only one bid. A similar absence of competitive bidding is found throughout the Department's leasing from 1920 to the mid-1970's." FMV REPORT, *supra* note 35, at 500.

41. POWDER RIVER BASIN SALE ANALYSIS, *supra* note 18, at 48.

42. "In addition, the October followup sale offered little indication of the worth of Interior's 'minimum' bidding concept, since only two tracts were offered and each attracted, as expected, only one bidder. As with entry level bidding, minimum bidding theory requires an active bidding interest in tracts to ensure honest 'best' bids." *Id.* at iii.

43. *Id.* at vi.

44. *Id.* at iii.

45. No. 82-117 (D. Mont. Filed June 21, 1982). This suit, consolidated with The Northern Cheyenne Tribe v. Watt, No. 82-116 (D. Mont. filed June 21, 1982), is still pending in U.S. District Court for the District of Montana, Billings Division, as of the date of publication.

that without a different procedure for assuring that bids amount to FMV, FMV would not be received. The overburdened market, it was argued, would reduce competition, forcing the price of the tracts below FMV.[46]

The National Wildlife Federation also alleged that the government violated the fair market value provisions of the FCLAA because of the lack of bidding, the change in bidding system and the post-sale evaluation process.[47] The extent of the controversy surrounding DOI's lease-sale procedures is not surprising, considering the $3.5 million discrepancy between DOI's projected revenues and accepted bids,[48] GAO's conclusion that the amounts received were $100 million short of the actual FMV,[49] and more recent allegations of collusion between industry and DOI.[50] Specifically, the environmental groups charged that the sale violated the purpose of the FCLAA and the congressional intent behind the FMV provision, arguing that "the principal impetus for passage of the Act was overwhelming evidence that valuable federal coal resources had been virtually given away under the old law."[51]

Congress had recently amended the FCLAA to include the FMV requirement, following the amendment of the OCSLAA. Congressional intent in these actions may be traced by reference to and

46. "The overall outcome of the sale—little competitive interest and generally low bids—presents a graphic demonstration of what predictably will happen when large amounts of coal are dumped on a soft market where there is little demand. Fair return will not be received. The Secretary has a fiduciary duty to see that this situation does not occur. Acceptance of bids under the circumstances of this sale would be arbitrary and capricious." Plaintiffs' Amended Complaint for Declaratory and Injunctive Relief at 10, National Wildlife Federation v. Burford, No. 82-117 (D. Mont. filed June 21, 1982).

47. *See generally id.*

48. POWDER RIVER BASIN SALE ANALYSIS, *supra* note 18, at 25.

49. "Notwithstanding the problems associated with the change to entry level bidding, accepted bids for the April and October sales, combined, totaled $67.2 million for 12 tracts, compared to Interior's original minimum acceptable bid estimates of $70.7 million as adjusted by Interior economists. Nevertheless, we believe the amounts received for these leases were substantially less than a reasonable determination of fair market value. [W]e reviewed Interior's initial determinatons [*sic*] of fair market value and identified several technical problems which show the amounts received to be understated by roughly $100 million." *Id.*

50. *Coal Lease Disclosure to Industry is Reported*, N.Y. Times, Jan. 28, 1984, at A8, col. 1.

51. Plaintiffs' Amended Complaint for Declaratory and Injunctive Relief, National Wildlife Federation v. Burford, No. 82-117 (D. Mont. filed June 21, 1982) (citing H.R. REP. 681, 94th Cong., 1st Sess. (1975)).

comparison with statutes authorizing federal land sales and eminent domain purchases—statutes in which FMV has long been a component.

II. FAIR MARKET VALUE IN EMINENT DOMAIN PROCEEDINGS

The federal government's land purchase practices are a prime source for FMV assessment techniques. Historically, federal purchases in forced land sales have utilized the same formulation of FMV as was adopted in the OCSLAA and the FCLAA.[52] The definition contemplates a knowledgeable or "informed"[53] buyer and seller, neither of whom is obligated to buy or sell. According to the Eminent Domain Code of the National Conference of Uniform State Laws, "informed" refers to buyers and sellers having "reasonably complete knowledge of all uses and purposes for which the property is reasonably adaptable and available."[54] This definition leaves unanswered the quesition of degree. To what extent can the criteria be met by knowledge already at hand? Does "knowledge" include information which can only be uncovered by some amount of additional study of the value of the underground resources by both buyer and seller? Or are the buyer and the seller both informed when the facts currently known are mutually understood? The understanding of what is meant by Congress' use of this phrase is important, as plaintiffs in both the OCSLAA and the Powder River Basin suits charged the government with not meeting the knowledge requirement.

In *California v. Watt*, the government attempted to divorce tract evaluations from the knowledge requirement:

> Petitioners do not understand the role of such evaluations. That role is not, as they suggest, primarily to make the seller "knowledgeable." In an auction process, "knowledge" can be acquired from the competitive bids of interested buyers; furthermore, the government's general knowledge of the oil and the gas lease market makes it "knowledgeable." The role of bid evaluation is rather to protect the integrity of the market by providing deterrents to collusion and systematic underbidding.[55]

52. UNIF. EMINENT DOMAIN CODE § 1004(a) (1975).
53. *Id.*
54. *Id.*
55. Brief for Respondent at 94, California v. Watt, 712 F.2d 584 (D.C. Cir. 1983).

Relying heavily on data from the sale itself, the current program anticipates genuine competition. Plaintiffs alleged that where this competition was slack or inadequate, as the GAO found in the Powder River Basin study,[56] the government's information would be biased or incomplete, resulting in the seller being less knowledgeable than the definition requires.

Similarly, the requirement that a seller not be obligated to sell is both a practical and legal obligation.[57] When, as a practical matter, a seller is obligated or needs to sell, FMV may not be reflected in the price received and should therefore be determined by another method.[58] So too, the policy of the Watt DOI to develop its mineral resources under both the FCLAA and the OCSLAA may be viewed as requiring the government to sell. Thus the directive to develop resources may actually undercut the market's ability to determine FMV. To counterbalance this obligation, critics argue that the government should be required to assess the property separately from its received price, establishing its value from comparable pieces of property.

Such assessment is commonly used to determine FMV in eminent domain cases.[59] Just compensation in government condemnation cases is determined not by any one formula of valuation but by methods of assessment that vary according to the circumstances.[60] In a forced sale, if direct market evidence of fair market value of a specific piece is unavailable, the FMV of comparable land with comparable restrictions or potential may be used in valuation. [61] In its revised evaluation methods for coal lands, the Department of Interior proposes to employ such a comparable sales analysis.[62]

In its eminent domain assessment the government does not consider enhancement of value arising from either its need or previous

56. POWDER RIVER BASIN SALE ANALYSIS, *supra* note 18, at vi.

57. UNIF. EMINENT DOMAIN CODE § 1004(a) (1975).

58. Annot., *supra* note 15.

59. *Id.* at 678.

60. United States v. 34.09 Acres of Land More or Less, 290 F. Supp. 551 (1968).

61. United States v. Miller, 317 U.S. 369, 373-74 (1942); United States v. 100 Acres of Land, 468 F.2d 1261, 1265 (9th Cir. 1972).

62. *See* U.S. Department of Interior memorandum from Acting Director of Minerals Management Service to Chairman, Minerals Management Service regarding post-sale evaluation procedure for the Powder River coal lease sale (Apr. 23, 1982).

or prospective taking.[63] Consequently, the government is *not* required to pay for value which it has itself created:

> It is not fair that the government be required to pay the enhanced price which its demand alone has created. The enhancement reflects elements of the value that was created by the urgency of its need for the article. It does not reflect what "a willing buyer would pay in cash to a willing seller," United States. v. Miller, supra, [317 U.S. 369] 374, in a fair market. It represents what can be exacted from the government whose demands in the emergency have created a sellers' market. In this situation, as in the case of land included in a proposed project of the government, the enhanced value reflects speculation as to what the government can be compelled to pay. That is a hold-up value, not a fair market value. That is a value which the government itself created and hence in fairness should not be required to pay.[64]

By analogy, if the government's obligation to buy is excluded from evaluation of the FMV paid to a forced seller, then the government's obligation to sell, and the resultant depressant effect on market prices, ought to be excluded as well. The Natural Resources Defense Council, a petitioner in *California v. Watt*, has raised this point in litigation under the OCSLAA.[65] The government, for its part, maintains that it is not placed in the position of a forced seller by reserving the right to reject any bid.

This analogy, however, is not found in the case law. Although the prohibition against charging the government the enhanced price applies in cases of forced sale *to* the federal government, there are few cases dealing with the applicability of FMV to cases of forced sale *by* the federal government. Furthermore, when the government is selling land, comparative valuation is made more difficult by the unavailability of comparisons, either because of the unique nature of the resource being sold or because the government has only limited knowledge of the resource.

The examination of eminent domain cases, therefore, should be balanced with a comparison of the use of FMV in federal land sale statutes in order to clarify both the meaning of FMV and the means of achieving FMV in government sales and purchases.

63. United States v. Cors, 337 U.S. 325, 332 (1949); *see* United States v. Miller, 317 U.S. 369, 376-77 (1942).

64. *Cors*, 337 U.S. at 333-34.

65. *See* Brief for Petitioners, *supra* note 30, at 156, n.1.

III. Fair Market Value in Sales of Federal Property

Historically, the government has not relied on a competitive market for disposal of federal lands.[66] Competitive sale as a revenue-raising device was rejected early on when homesteading and other policies encouraging land settlement were accepted over the idea that pioneers should have to pay to settle the frontier.[67] Instead, fees and prices were set by the Secretary of the Interior and, in many instances of land disposal, are still set by the Secretary. As Marion Clawson and Burnell Held pointed out in 1957 in their treatise on federal land use,

> the idea of competitive sale of federal land, its resources, and its uses was early and generally abandoned, and . . . in the few instances it has . . . been adopted, the idea has often been resisted and often, too, found unacceptable in the social standards of the day and place. "A large part of these federally-owned resources are and will be allocated among private enterprisers by administrative decision and not by competition."[68]

However, many of the land disposal acts also require that the government receive FMV for the lands, regardless of the manner by which they are sold. FMV, in turn, depends on competition as an integral part of the market forces determining that value. Thus, where competition for federal properties under a land disposal law does not truly exist, the government ascertains and establishes an FMV as part of its price-setting decision.

In fact, many of the older land acts that require FMV also require assessment. The townsite laws of 1863 and 1867[69] require appraisal and auction for not less than the impartially appraised value of land being sold for townsites.[70] Similarly, isolated or disconnected land tracts must be sold for at least their appraised value.[71] The National Forest Townsite Act[72] requires that lands sold for the creation of a townsite from national forest land or other lands administered by the Secretary of Agriculture may be sold at

66. M. Clawson & B. Held, The Federal Lands: Their Use and Management 199 (1957).

67. *Id.* at 199-201.

68. *Id.* at 201, quoting Kelso, *Current Issues in Federal Land Management in the Western United States*, 29 J. of Farm Econ., No. 4, Pt. II (1947).

69. 43 U.S.C.A. §§ 711, 712 (West 1964) (repealed 1976).

70. 43 U.S.C.A. § 721 (West 1964) (repealed 1976).

71. 43 U.S.C.A § 1171 (West 1964) (repealed 1976).

72. 7 U.S.C. § 1012a (1982).

public sale for not less than FMV. Other acts—the Small Tract Act,[73] the Cemetery Sales Act,[74] the Recreation and Public Purposes Act,[75] the Classification and Multiple Use Act of 1964,[76] the Public Land Sales Act of 1964[77] and the Surplus Reclamation Lands Disposal Laws of 1911 and 1920[78]—all require appraised FMV as a minimum sale price, regardless of the processes by which the land is sold off.[79] Appraisal also extends into the sale of federally-owned resources other than real estate. One example was the sale of timber at not less than the "fair appraisement" value.[80]

By contrast, land sale acts which do not have appraisal or FMV requirements generally purport to achieve a very different goal in disposing of land. Under these acts, the government is usually trying to settle or reclaim land and hence allows for lower prices in order to encourage purchases. For instance, the Homestead Act of 1862 allows homesteaders to settle without applying any FMV or appraisal requirement.[81] The Color of Title Act allows for formalization of adverse possession rights for a set fee,[82] and the Isolated and Mountainous Tracts Act authorized the sale of less desirable land at the best achievable price—*i.e.*, to the highest bidder at public auction.[83] Because the government in these acts seeks to encourage development by setting artificially low prices, the receipt of FMV is not required.

In comparing these various land-sales acts, it is evident that the appraisal or FMV requirement is primarily linked to the goals of increasing revenue or obtaining a fair return for federal lands, and is not employed where the government is attempting to develop less desirable lands or to encourage specific development goals. When trying to increase revenues, the government uses an FMV assessment; to encourage development, the government either sets a price

73. 43 U.S.C. § 682a (1976).
74. 43 U.S.C.A. § 679 (West 1965) (repealed 1976).
75. 43 U.S.C. §§ 869 to 869-4 (1966).
76. 43 U.S.C. § 1417 (1964).
77. 43 U.S.C. § 1421 (1976).
78. 43 U.S.C. §§ 374-375 (1976).
79. BARLOWE, AHL & BACHMAN, LAND DISPOSAL TECHNIQUES AND PROCEDURES (Public Lands Law Review Comm'n Rep. No. 16, rev. 1970).
80. 16 U.S.C.A. § 476 (West 1964) (repealed 1976).
81. 43 U.S.C. §§ 161-164, 169, 173, 183, 201, 211, 255 (1976).
82. 43 U.S.C. §§ 1068-1068(b) (1976).
83. 43 U.S.C. § 1161 (1976); 43 U.S.C.A § 1171 (West 1964) (repealed 1976).

below FMV or accepts bids for less than FMV. In neither case does the government rely on competition alone to assure receipt of FMV.

In contrast to earlier statutes, the FCLAA and the OCSLAA require receipt of FMV while aiming to increase development. The FCLAA's goals, as expressed in its accompanying Senate report, are

1) Timely and orderly development of Federal coal reserves;
2) Environmental protection and
3) Receipt of FMV for public resources.[84]

The OCSLAA's declaration of policy similarly sets these three goals for development of the Outer Continental Shelf: "[The] Continental Shelf is a vital national resource reserve held by the Federal Government for the public, which should be made available for expeditious and orderly development, subject to environmental safeguards, in a manner which is consistent with the maintenance of competition and other national needs."[85]

It is apparently contradictory to find the goal of "timely and orderly" and "expeditious" development in the statutes along with the FMV requirement. If pressed to sell resources for expeditious development, the government may place less value on attaining FMV, and may end up saturating the market until market conditions alone will be unable to satisfy the FMV requirement. Moreover, as a conceptual matter, it may be impossible to satisfy both the expeditiousness requirement and the FMV constraint; when the government is under a mandate to develope, it is not a seller "willing but not obligated," as required by the FMV definition. In these acts, however, the goals are not mutually exclusive, as shown by the legislative histories of the acts' FMV requirements.

IV. The Development of the Fair Market Requirement in the OCSLAA and the FCLAA

Although long a common requirement in other land disposal acts, the emphasis on receipt of FMV is new to the OCSLAA and the FCLAA. The pre-1976 versions of the FCLAA and the pre-1978 versions of the OCSLA did not mention FMV. The 1953 version of the OCSLA, for example, required only that the Secretary sell off

84. S. Rep. No. 296, 94th Cong., 1st Sess. 18 (1975) [hereinafter cited as S. Rep. No. 296].

85. 43 U.S.C. § 1332(3) (1976 & Supp. V 1981).

the leases by competitive bidding in order to hasten development. The Act provided that "in order to meet the urgent need for further exploration and development of the oil and gas resources of the OCS, the Secretary is authorized to grant to the highest responsible qualified bidder by competitive bidding . . . oil and gas leases on the OCS."[86] The 1978 amendments added the FMV requirement and altered the Act's emphasis, adding the FMV requirement as a goal coequal with those of development and environmental protection. In addition to the general FMV mandate of section 18(a)(4),[87] other sections refer to the phrase. For example, elsewhere the Act provides:

> The Outer Continental Shelf contains significant quantities of oil and natural gas and is a vital national resource which must be carefully managed so as to realize fair value, to preserve and maintain competition and to reflect the public interest.[88]

Congressional intent to emphasize the requirement is evident in the House report accompanying the 1978 amendments: "Leasing activities, including scheduling of lease sales and the amount to be included in the lease sales, should assure receipt to the government of fair market value for our public resources."[89] Significantly, the Supreme Court of the United States has recognized that Congress, in revising the Act, "committed the government to the goal of obtaining fair market value for OCS oil and gas resources. The 1978 Amendments themselves proclaim this intention, and the legislative history is replete with references to this purpose."[90]

Similarly, the FCLAA legislative history shows that the FMV requirement was also given new import when introduced into the act in 1976. The previous version read as follows:

> The Secretary of the Interior is authorized to divide any of the coal lands . . . and thereafter he shall, in his discretion, upon the request of any qualified applicant or on his own motion, from time to time, offer such lands or deposits of coal for leasing and shall award leases thereon by competitive bidding or by

86. Outer Continental Shelf Lands Act, § 8, 67 Stat. 468 (1953) (current version at 43 U.S.C. § 1337(a) (1976)).

87. *See* 43 U.S.C. § 1337(a) (1976).

88. 43 U.S.C. § 1801(7) (Supp. V 1981).

89. H.R. REP. No. 590, 95th Cong., 1st Sess. 149 (1977) [hereinafter cited as H.R. REP. No. 590].

90. Watt v. Energy Action Educ. Found., 454 U.S. 151, 162 (1981) (footnote omitted).

> such methods as he may by general regulation adopt, to any qualified applicant. . . .
> No competitive lease of coal shall be approved or issued until after the notice of the proposed offering has been given in a newspaper of general circulation in the county in which the lands are situated in accordance with the regulations prescribed by the Secretary.[91]

This version of the FCLAA did contain an implicit reference to FMV in the royalty requirement. *California Co. v. Udall*[92] established that the "value" used in computing royalties reserved to the federal government should be FMV.[93] This reference was superseded by the more explicit and compelling mandate to assure FMV in section 2 of the 1976 Act.[94]

The Committee report accompanying the FCLAA clarified the new emphasis as follows: "These changes will assure that any future Federal coal leasing program gives the public a fair market return for its resources . . . . "[95]

> The committee feels strongly that the Federal Government should receive fair market value for public resources being used by private parties. Awarding leases for public resources by competitive bidding should help assure that this goal is achieved. The changes in the rental and royalty rates provided by § 103 of S. 391 will be another significant step toward fair return.[96]

The reasons for attaching such importance to FMV are detailed in the legislative histories of both statutes. The Senate and House reports on the 1978 OCSLA Amendments relied on GAO reports which explained the need for explicit recognition of an FMV requirement.[97] These reports concluded that DOI's reliance in the past on competition to assure a good return to the government was insufficient:

> Competitive leasing programs are based on the premise that competition will provide a fair market value for the product sold. This is only true, however, when highly competitive mar-

91. Mineral Lands Leasing Act of 1920, § 2(a), 41 Stat. 438 (current version at 30 U.S.C. § 201(a) (Supp. V 1981).

92. 296 F.2d 384, 386-87 (D.C. Cir. 1961).

93. *Id.* at 386-87.

94. *See* 30 U.S.C. § 201(a) (Supp. V 1981).

95. S. REP. No. 296, *supra* note 84, at 11.

96. *Id.* at 13.

97. H.R. REP. No. 590, *supra* note 89, at 110-11; S.REP. No. 294, 95th Cong., 1st Sess. 60-80 (1977).

> ket conditions exist. When competitive market conditions do not exist, it is necessary to value the product being sold independently and base accept/reject decisions on these valuations . . . Sale #35's results show a lack of competition.[98]

As a result, the GAO report concluded that

> The Department's policy of leasing the maximum resource in minimum time could adversely affect our domestic energy production. This policy encourages speculation in the Outer Continental Shelf and can tie-up industry capital in lands with no or minimal resources and infringe on the public's right to receive fair market value for the resources.[99]

As these reports illustrate, the 1978 amendments carry an implied mandate to moderate the pace of leasing OCS lands in order to protect the public's right to receive FMV.

The FCLAA's FMV requirement stems from a similar publication cited in the accompanying reports. A GAO report on coal sales found that "[t]here has been relatively little mining of Federal coal deposits, and most lessees apparently have no immediate plans to begin coal mining operations."[100] The GAO report mentioned the need to maintain lease prices at market values in order to prevent further speculation and to remedy previous speculation.[101] Such privitization of undeveloped energy resources was seen as depriving the public of its fair return and preventing orderly and timely development of energy fuels.

The House report also relied on a study by the Council on Economic Priorities.[102] As the House report explains it, "this report concludes that the Department of the Interior 'has leased coal rights far ahead of market demand for coal at prices too low to profit the public.' "[103]

Finally, quoting from the Ford Energy Policy Project, the House Committee found that " '[t]he coal leasing program presents a clear

98. GENERAL ACCOUNTING OFFICE, PUB. NO. EMD-77-19, OCS SALE #35—PROBLEMS SELECTING AND EVALUATING LAND TO LEASE (1977) [hereinafter cited as SALE #35] at 30.

99. *Id.* at i.

100. H.R. REP. NO. 681, 94th Cong., 1st Sess. 10 (1975), quoting GENERAL ACCOUNTING OFFICE, PUB. NO. B-169124, IMPROVEMENTS NEEDED IN ADMINISTRATION OF FEDERAL COAL LEASING PROGRAM (1975) [hereinafter cited as H.R. REP. NO. 681].

101. H.R. REP. NO. 681, *supra* note 100, at 11.

102. *Id.*, quoting COUNCIL ON ECONOMIC PRIORITIES, LEASED AND LOST: A STUDY OF PUBLIC AND INDIAN COAL LEASING IN THE WEST (1975).

103. H.R. REP. NO. 681, *supra* note 100, at 11.

picture of private speculation at the public expense. In the past decades, but particularly during the 1960's, vast amounts of federal coal passed freely to private ownership under situations of little or no competition and extremely low payments.' "[104]

The FMV requirement was added in response to these and similar conclusions. In both acts the requirement tended to create an incentive to begin development of leases already purchased as well as discourage additional purchases. By maintaining market prices for unbought leases, DOI would make it too costly for developers to commit monies and other development resources to speculative purchases. Hence one of the purposes for setting the FMV standard was not to slow the purchase and subsequent development of the resources but rather to prevent the speculative overinvestment in unproven tracts and to promote the realization of fuel resources already explored and purchased.

This is a new use of FMV. Although FMV was used only as a revenue-raising device and not to encourage development under the land sales acts, in the FCLAA and the OCSLAA, FMV is meant to increase both revenues and development by slowing the pace of sales.

V. Fair Market Value and the Goals of the OCSLAA and the FCLAA

The history of the introduction of the FMV requirement into the OCSLAA and the FCLAA resolves the apparent contradiction between the FMV goal and the goals of expeditious development and environmental protection. In contrast with the land sales acts, under the OCSLAA and the FCLAA many of the standards and techniques of sale required to meet the FMV constraint actually furthered their other goals. The FMV requirement was part of the overall effort to improve effectively the pace of development in response to deficiencies highlighted by the GAO reports.

The use of FMV to protect the public's due return for sale of federally-held resources is consistent with the use of FMV requirement in those land disposal acts where revenue-raising was the goal. Fair market value, by its plain meaning, denotes an equitable price, and mention of the term throughout the acts' legislative histories indicates an intention to ensure a fair return to the public.

104. *Id.*, quoting from The Ford Foundation, A Time to Choose: America's Energy Future (1974).

> H.R. 6721 [the Federal Coal Leasing Amendments Act of 1975] contains many provisions designed to insure a fair return to the public from Federal leases. First, all leases are to be awarded by competitive bidding only and not by "such other methods as he (the Secretary) may be [sic] regulations adopt" as in the present law. Second, a bid is not acceptable unless it is at least as high as fair market value, as determined by the Secretary. Third, a minimum royalty of 12.5 percent of the value of the coal is placed on all new leases except for underground mines. Fourth, readjustment of the terms of the lease will occur every ten years to allow the Secretary to adjust the terms to more closely reflect changing market conditions than the present 20-year readjustment period permits.[105]

California Co. v. Udall recognized the purpose of the FCLAA's Leasing Act's royalty provision as "to obtain for the public a *reasonable financial return* on assets that 'belong' to the public . . . . To protect the public's royalty interest [the Secretary] may determine that the minerals are being sold at less than reasonable value."[106]

The development function of the FMV requirement is new to the FCLAA and the OCSLAA, but it is one of the benefits of the FMV requirement not present in the land disposal acts. A concommitant goal to that of achieving FMV in the acts is protection from environmental damage. Both goals are equally affected by the pace of leasing. By retarding the rate at which leases are sold, Congress intended to allow sufficient time to plan for environmental protection during development of sites already purchased. The GAO report cited in the OCSLAA's accompanying House report described the situation thus: "A major policy consideration of the resource program is the rate at which resources are sold out of public ownership for private development. Leasing the Federal domain to developers faster than is practicable makes it difficult to plan for environmental protection . . . . "[107] Congress also recognized this problem in passing the FCLAA. In commenting upon the increased protection offered by the FMV requirement and the restructuring of the Act by the 1976 Amendments to include greater control over the way in which coal passes into private hands, Congress said "[t]hese changes will help to assure that any future Federal coal leasing program gives the public a fair market return

105. *Id.* at 17.
106. California Co. v. Udall, 296 F.2d 384, 385 (D.C.Cir. 1961).
107. SALE #35, *supra* note 98, at 15.

for its resources and provides the maximum amount of protection to the environment."[108] Slowing the development pace for FMV purposes would thus advance the goal of environmental protection as well.

In light of these three functions of the FMV requirement—to protect the public's interest in receiving a fair return, to encourage development of already purchased fuel resources and to offer a safeguard from environmental destruction—the seeming conflict between the acts' tripartite goals disappears. Instead, it becomes clear that the requirement and goal of FMV furthers the other goals of the acts. The need to obtain FMV encourages timely, orderly and expeditious development, protects the environment and promotes competition. The FMV requirement's significance grows in assessing its compatability with the acts' other goals; it is no less important than these goals and they may each be achieved without thwarting the others.

VI. Means of Assuring Receipt of Fair Market Value

Fair market value does not, in a quantifiable sense, exist as a constant. It is a variable term subject to many interpretations and "provable" by many conflicting methods. Thus the government, through studies and predictions, may support the various methods by which it hopes to achieve FMV. At the same time, the opponents of these methods may challenge the government studies with their own often highly contradictory analyses.[109] Rather than prove or identify the optimal and correct FMV, the studies underscore the futility of trying to forecast FMV or even to quantify the market phenomena that will affect and produce a given FMV.

On a more practical level, however, the focus must be on the adequacy of the means of achieving FMV. Evaluation of such methods requires identification of the steps *previously* taken in cases where FMV is less questionable and more easily ascertained. To a

108. S. Rep. No. 296, *supra* note 84, at 11. The Commission on FMV also found that leasing larger quantities of coal may have harmful environmental effects. "[A]dditional land use and environmental damages may result if higher leasing levels put a strain on Government administrative capacities. The Federal coal program contains numerous procedural and policy requirements designed to protect the environment, but full compliance can be achieved only with adequate time and resources." FMV Report, *supra* note 35, at 497.

109. *Compare* Grayson, Canaday, Brumbaugh, Sherman & Sutherland, *Issues of Competition on the Outer Continental Shelf*, 3 Va. J. Nat'l Res. L. 69 (1983) *with* Sierra Club, The Great Giveaway: Public Oil, Gas and Coal and the Reagan Administration (1982).

certain extent, Congress limited DOI's discretion in identifying these steps by citing GAO reports containing specific references and recommendations for attaining FMV. The GAO recommendations are outlined below.

A. *OCSLAA Recommendations*

1. Knowledge and Assessment

GAO's most emphatic recommendations are that the government (1) acquire greater knowledge of the resources being sold and (2) use this knowledge to valuate the leases. The GAO reports were not the first to recognize that the government's knowledge of its resources was not sufficient to guarantee that FMV would be obtained in a market where competition was lacking. Indeed, the Public Lands Law Review Commission (a congressional study group formed to review the nation's resource holdings and disposal methods during the 1960's) recognized that the government's inadequate knowledge of properties being sold caused loss of revenues to the public:

> A number of problems arise in connection with the pricing of fuel mineral resources for disposition. There appears on the whole to be little doubt that competitive bonus bidding procures a fair return for the resource. This is clouded by the fact that certain competitive sale strategies employed by the government can and at times apparently do, minimize the return (*e.g.*, insistence upon competitively selling a coal lease without adequate knowledge of the quality of the resource in terms of its market will result in low prices because of the uncertainty).[110]

The GAO reports also found that the effectiveness of tract evaluation practices were severely hindered by inadequate data and analysis.[111] In OSC tract sales, both overvaluation and undervaluation have a negative effect on the receipt of FMV.

> Tracts overvalued in relation to industry bids might result in turning down a bid even if there appears to be adequate competition. On the other hand, those undervalued would likely be

110. GENERAL ACCOUNTING OFFICE, PUB. NO. RED-75-359, OUTER CONTINENTAL SHELF OIL AND GAS DEVELOPEMENT—IMPROVEMENTS NEEDED IN DETERMINING WHERE TO LEASE AND AT WHAT DOLLAR VALUE 16 (1975).

111. *Id.*

> awarded at less than fair value if there is inadequate competition and could be a bargain to the high bidder.[112]

The GAO reports concluded that poor valuation compounds the problem of attaining FMV because of imperfect market conditions. The report on Sale #35 found that "[s]ince market conditions were not perfectly competitive the only way to assure the public receives the fair market value for the sale of national resources is to improve the reliability of the valuations by obtaining and using better information."[113]

2. Pre-Sale Evaluation

In conjunction with its recommendation of better valuation, GAO noted that assessments should be conducted before sales:

> In our opinion, comparison of presale values to high bids is a more objective way to assess [U.S. Geological] Survey's evaluation capabilities. Values developed after industry bids are known are subject to other than geologic influences. The above example [Sale #35] shows the Department's lack of confidence in their own valuation of tracts. With adequate data on resource potential, the Department could have had greater reliability and confidence in its estimate of tract values. Consequently, decisions to lease tracts are not reliable and cannot assure the receipt of a fair market value for the tracts.[114]

Hence, GAO recommended that the Secretary of the Interior develop extensive plans to share geological information with industry participants. Further, the Secretary was advised to

> —Offer for lease sale only those areas for which the Department has collected and analyzed sufficient information to adequately identify where the resource is, its estimated value, and its potential for development in its near future.
> —Require [Geological] Survey and the Bureau [of Land Management] to consider all necessary information and make final corrections to tract values prior to the sale being conducted.[115]

112. *Id.*

113. SALE #35, *supra* note 98, at 31.

114. *Id.* at 30. Most recently, the Commission on FMV concluded that appraisal capabilities should be improved. The Commission emphasized "the importance of high-quality personnel, a high priority for appraisal efforts, and the importance of outside critical review of appraisals. It concludes that these matters have not been given sufficient attention in the past." FMV REPORT, *supra* note 35, at 516.

115. SALE #35, *supra* note 98, at 35.

The references to these recommendations in the legislative history surrounding the passage of the OCSLAA evinces Congress' intention that pre-sale evaluations be a primary tool for attaining FMV.

3. Slower Offering of Leases

Another recommendation embodied in the GAO reports, and the most important in achieving all goals, was to slow the rate at which tracts were offered for leasing. Overburdening the market not only drives prices down but, more importantly, has a significant effect on the government's ability adequately to obtain and evaluate geological information, to assess the resource's true value and to maintain competition. The reports questioned the philosophy and policy motivating such increased sale.

> A major policy consideration of the resource program is the rate at which resources are sold out of public ownership for private development. Leasing the Federal domain to developers faster than is practicable makes it difficult to plan for environmental protection, assess the value of the resources, and promote competition. This situation can contribute to the uncertainty of the value of Federal resources, encourage private speculation in these resources and cause industry to tie-up capital in lands with no or minimal resource potential. Leasing too slow on the other hand could lead to scarcity of these resources and increased prices.
>
> The decision to increase the OCS acreage leased annually was based on the overall policy goal of decreasing the Nation's reliance on foreign energy supplies. The apparent guiding philosophy behind this decision was to release as much of the resource as could be sold, with little concern for the revenue impact of flooding the market with tract offerings and with no assurance about when oil and gas would be produced, or what price the consumer would eventually pay.
>
> The results of the OCS Sale #35 demonstrate the effects of operating a lease program under this type of philosophy. The Department's desire to lease maximum acreage in minimum time resulted in selecting frontier acreage for sale before assessing the true resource development potential of these lands. As a result, [the Geological] Survey thought the majority of OCS sale tracts had no or low resource development potential.[116]

Based on these findings, the GAO report urged that the Department should conduct a program to identify the amounts available

116. *Id.* at 15-16.

to be developed. Such a program would provide the Department of Interior with a basis for curbing the excess lease sales and "prioritizing the areas for leasing purposes".[117]

B. *FCLAA Recommendations*

The GAO recommendations concerning the OCSLAA are echoed in the GAO and FMV Commission reports and analyses that have appeared since the Powder River Basin sale. GAO again recommends that DOI proceed more cautiously in implementing the FCLAA.

> We recommend that the Secretary of the Interior postpone scheduled regional coal lease sales until Interior has had an opportunity to correct deficiencies in its valuation, leasing, and fair market value determination procedures. This would help to ensure that (1) fair market value is received in exchange for competitively sold new-production type coal leases, and—if authorized by Congress—that a reasonable return is received in exchange for negotiated sales of maintenance-type coal leases, and (2) Interior is able to act as a knowledgeable seller at both competitive and—if authorized—negotiated lease sales.[118]

To this end, GAO offers specific recommendations to the Secretary of the Interior, advising that the Secretary not resume coal leasing until the recommendations have been adopted. These suggestions are roughly the same as those made by GAO for OCSLAA implementation.

According to GAO, Interior should develop

> —a detailed analysis of the economic and geological variables affecting the value of a Federal coal lease, including how changes in one variable affect others;
> —new internal procedures for conducting coal lease valuations, including criteria for comparable sales analyses—refining the technique used to develop original minimum acceptable bids for the April 1982 Powder River sale;
> —new guidelines for using untried or experimental bidding systems . . . at regional coal lease sales, including limits on the percentage of the leasing target permitted under such experimentation;
> —minimum regulatory selling prices for coal leases in each Federal coal region on a cents per ton basis; and

117. *Id.* at 34.
118. POWDER RIVER BASIN SALE ANALYSIS, *supra* note 18, at 79.

> —revised fair market value determination procedures that include specific quantitative tests (1) applicable whether or not adequate bidding competition is present and (2) placing greater reliance on prior comparable sales and recent arm's length sales in the absence of bidding competition at the actual sale.[119]

In addition, GAO recommends that DOI cancel the leases for which FMV was not received to allow implementation of the new procedures.[120] These changes would correct the procedural errors determined by GAO to result in less than FMV.

VII. CONCLUSION

As GAO recognized, the problems faced by DOI in implementing the FCLAA and OCSLAA are inherent in the acts themselves:

> We believe much of Interior's trouble stems more from the leasing dilemma it faces than from its administrative practices. Under the Federal Coal Leasing Amendments Act, Interior is charged with a very difficult task: selling coal competitively in a market which—as a consequence of noncompetitive leasing, speculation, and current land use and coal activity planning processes—is in many cases noncompetitive. Thus, certain fundamental disparities must be rectified before Interior's task becomes one that is practicable.[121]

The GAO conclusions underscore the difficulty of attaining FMV when the government is both obliged to sell and unable to meet the "knowledgeable" requirement in the FMV definition.[122] Unfortunately, as GAO also recognized, DOI's practices tend to compound, rather than compensate for, these problems.[123]

Most harmful is DOI's insistence on selling vast amounts of resources at a tremendous rate, making sufficient competition impossible and adequate valuation impracticable. Neither act forces DOI to sell as rapidly as DOI has chosen to, even though DOI regards speed as of the utmost necessity. Both acts, by their plain meaning,

119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.* at 77.
123. "In addition to the *presale* weaknesses . . . GAO found weaknesses in the fair market value determination procedures used *after* the . . . sale[s]. Both sets of procedures were unclear and overly dependent on data derived from the sale itself, which—absent competition—is not an appropriate measure of fair market value." *Id.* at v.

incorporate the sense of appropriate development, rather than speed. In the FCLAA, the use of the words "timely and orderly development" indicates not speedy but seasonable development. "Timely" means "in time," "coming early or at the right time" and "appropriate or adapted to the times or the occasion"[124] while "orderly" implies some restraint to ensure methodical development.[125]

Similarly, in the OCSLAA, "expeditious development" does not mean speedy, but rather "prompt and efficient" development.[126] While the element of speed may be read into the word, "prompt" also implies "responding to the occasion,"[127] while "efficient" means "without waste."[128] Hence both acts require sensible and seasonable development, not undue haste without proper attention to efficiency.

These definitions are substantiated by the GAO reports to which Congress looked in passing the acts. Time after time GAO points to the inefficiencies of overrapid leasing, proposing alternatives to ensure competition and adequate assessment and safeguards to prevent underselling the nation's resources. These findings are echoed in the recent report of the Commission on FMV Policy for Federal Coal Leasing—the Commission recommends that "the quantity of coal leased should be determined so the government will receive a fair return consistent with the achievement of other public policy objectives, such as promoting efficient land use and environmental planning and conserving appropriate amounts of coal for the future."[129]

DOI could ensure that future sales do not fail to receive their congressionally-mandated worth if it implemented the recommendations outlined in the GAO reports. Congressional intent would be satisfied by (1) slower leasing, (2) pre-sale assessment to establish meaningful minimum bidding limits, (3) adequate knowledge to ensure that such assessments are accurate, and (4) safeguards to ensure that, when adequate bidding competition is lacking, DOI's process will nonetheless assure receipt of FMV. Whether DOI will

124. WEBSTER'S NEW COLLEGIATE DICTIONARY, 1222 (1st printing 1973).
125. *Id.* at 808.
126. *Id.* at 403.
127. *Id.* at 921.
128. *Id.* at 367.
129. FMV REPORT, *supra* note 35, at 497.

be more receptive to these recommendations under Secretary Clark than under Secretary Watt remains to be seen.[130] Although Clark has announced his intention to alter the information-gathering and competition-inducing procedures, he has not indicated a willingness to reduce the amount of acreage offered—a key step in assuring receipt of FMV.[131] At the least, DOI's duty as steward of the nation's resources requires a more conscientious effort to meet the FMV standard.

M. Alice Thurston

130. *Clark Says He Will Offer a Role to Critics in Offshore Leasing*, *supra* note 2.
131. *Changes Proposed for Coal Leasing*, *supra* note 1.