



United States Department of the Interior

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Memorandum

To: Director, Bureau of Land Management

From: Solicitor

Subject: BLM's Authority to Recover Costs of Minerals Document Processing

I. INTRODUCTION

This Opinion addresses the Bureau of Land Management's (BLM) cost recovery efforts for minerals document processing. It is intended to resolve legal questions that have arisen regarding cost recovery. Some of these questions resulted from the issuance of two reports by the Office of Inspector General (OIG) in the past eight years. The January 1995 OIG report, Report No. 95-I-379¹, found that delayed implementation of a revised user fees schedule had resulted in loss of the opportunity to recover an estimated \$40 million from September 1989 to August 1993, and continued delay results in an estimated annual loss of \$7.6 million beginning with fiscal year 1994. Id. at 5. The report recommended (id. at 7) that BLM

take action to expedite the establishment and the collection of user fees for processing documents that have a significant impact on the amount of cost recovery and continue efforts to establish and collect user fees on those documents that have less financial significance.

This Opinion is intended to assist BLM in implementing cost recovery measures. It examines the statutory authority and Departmental policy relating to cost recovery, discusses the case law interpreting the applicable statutes, analyzes a BLM study relating to specific cost recovery items, and discusses options for BLM to consider as it drafts proposed regulations.

¹ Entitled "Followup of Recommendations Relating to Bureau of Land Management User Charges for Mineral-Related Document Processing."

II. SUMMARY

BLM has authority under the Federal Land Policy and Management Act (FLPMA) to establish fees with respect to transactions involving the public lands to recover the reasonable processing cost of services that provide a special benefit not shared by the general public to an identifiable recipient. Because Congress expects services provided by federal agencies to be "self-sustaining to the extent possible" (Independent Offices Appropriation Act), and because the Departmental Manual mandates cost recovery whenever possible, BLM has an obligation to establish fees for all services for which it has cost recovery authority.

Cost recovery authority is quite broad. Courts have held that the conferral of a required license or permit bestows a special benefit, as do routine inspections, required environmental reviews, license renewals, and myriad other agency actions. However, FLPMA contains several "reasonableness factors" that BLM must take into consideration when promulgating cost recovery regulations. These factors are: actual costs, the monetary value of the rights or privileges sought, the efficiency to the government processing involved, that portion of the cost incurred for the benefit of the general public interest,² the public service provided, and "other [relevant] factors".²

Each of the "reasonableness factors" must be considered in setting a fee. One factor is actual costs; therefore, those costs must be calculated for each type of action for which BLM has cost recovery authority. The agency may not, however, base a fee decision on one factor to the exclusion of others; therefore, a fee may not be based on consideration of actual costs alone. By the same reasoning, the fact that a portion of the cost is incurred for the benefit of the general public interest is not a basis to decide that no fee will be charged; it is only one factor to consider along with the others.

So long as it considers all of the required factors, BLM may be creative in structuring the regulatory framework. One example it may wish to consider is the right-of-way regulations, which combine a fee schedule for routine actions with case-by-case determination of fees for complex actions. BLM should also consider providing in the regulations for periodic automatic fee

² The FLPMA reasonableness factors have been defined by BLM in the context of its right-of-way regulations at 43 C.F.R. § 2800.0-5. For example, "efficiency to the government processing" is there defined as "the ability of the United States to process an application with a minimum of waste, expense and effort." BLM may find these definitions helpful in preparing minerals document processing regulations.

adjustments due to inflation in order to eliminate the need to undertake future rulemakings to make such adjustments.

III. COST RECOVERY AUTHORITY

A. Statutory Authority

The 1952 Independent Offices Appropriation Act (IOAA), as amended, 31 U.S.C. § 9701 (originally codified at 31 U.S.C. § 483a), provides generally for cost recovery by federal agencies. The IOAA expresses the intent that services provided by agencies should be "self-sustaining to the extent possible," 31 U.S.C. § 9701(a), and authorizes agency heads to "prescribe regulations establishing the charge for a service or thing of value provided by the agency." 31 U.S.C. § 9701(b).

In 1976 Congress passed the Federal Land Policy and Management Act (FLPMA),³ 43 U.S.C. §§ 1701-1784. Section 304(a) of FLPMA specifically authorizes the Secretary of the Interior to "establish reasonable filing and service fees and reasonable charges, and commissions with respect to applications and other documents relating to the public lands"⁴ and to "change and

³ Sixteen years before FLPMA, and eight years after the IOAA, Congress had, in the Public Land Administration Act (PLAA), 43 U.S.C. §§ 1371, 1374 (repealed 90 Stat. 2792 (1976)), specifically authorized the Secretary of the Interior to establish reasonable fees. The PLAA was expressly repealed by FLPMA.

⁴ This provision is broadly inclusive. Documents "relating to the public lands" may pertain to transactions arising either under FLPMA itself or under other statutes, such as the Mineral Lands Leasing Act of 1920, 41 Stat. 437 (30 U.S.C. §§ 181-263), or the General Mining Law of 1872, Rev. Stat. § 2319 (30 U.S.C. §§ 22-47). Under the rulemaking provision at section 310 of FLPMA, 43 U.S.C. § 1740, the Secretary may promulgate cost recovery regulations relating to transactions arising under other statutes: "The Secretary, with respect to the public lands, shall promulgate rules and regulations to carry out the purposes of this Act and of other laws applicable to the public lands...." (Emphasis added.) Section 103(e) of FLPMA defines "public lands," with certain exceptions, as "any land and interest in land owned by the United States within the several States and administered by the Secretary of the Interior through the Bureau of Land Management . . ." 43 U.S.C. § 1702(e).

abolish such fees, charges, and commissions." 43 U.S.C. § 1734 (a).⁵

In section 304(b) of FLPMA, the Secretary is authorized to "require a deposit of any payments intended to reimburse the United States for reasonable costs,"⁶ which "include, but are not limited to, the costs of special studies; environmental impact statements; monitoring construction, operation, maintenance, and termination of any authorized facility; or other special activities." 43 U.S.C. § 1734(b).

Section 304(b) also lists the following factors that the Secretary "may take into consideration" in determining whether costs to be reimbursed under that subsection are "reasonable":

actual costs (exclusive of management overhead), the monetary value of the rights or privileges sought by the applicant, the efficiency to the government processing involved, that portion of the cost incurred for the benefit of the general public interest rather than for the exclusive

⁵ Congress may itself establish certain fees for transactions involving the public lands. See, *e.g.*, the Omnibus Budget Reconciliation Act of 1993, Sec. 10102, mandating a \$25 fee for recording the location of a mining claim. Such independent legislative provisions do not, of course, trigger the application of the FLPMA reasonableness factors. This Opinion focuses on the authority granted by section 304 of FLPMA. Any questions that BLM may have regarding other statutes or provisions that it believes might supersede or impact on section 304 should be addressed to this Office.

⁶ Section 304(b) of FLPMA does not apply to all of the amounts authorized in section 304(a), but only to those "intended to reimburse the United States for reasonable costs." Nominal "filing" fees, which serve to limit filings to serious applicants, are not intended to reimburse the United States for its processing costs and therefore do not fall under section 304(b). While filing fees must be "reasonable," as mandated by subsection (a) ("the Secretary may establish reasonable filing and service fees..."), they are not subject to the "reasonableness factors" listed in subsection (b). "Service fees," however, are intended to recover the costs of processing, and are subject to the provisions of subsection (b). A filing fee is not, of course, a substitute for a service fee. In determining the amount of a service fee, BLM may take into account any filing fee relating to the same transaction, so that the total amount does not exceed BLM's processing costs.

benefit of the applicant, the public service provided, and other factors relevant to determining the reasonableness of the costs.

43 U.S.C. § 1734.(b). A federal court of appeals has held that, despite the use of the word "may," the Secretary in fact must take these "reasonableness factors" into consideration when establishing the reasonable costs of document processing. Nevada Power Co. v. Watt, 711 F.2d 913, 925 (10th Cir. 1983) (discussed in subsection D., infra).⁷

FLPMA did not repeal the IOAA in the context of public land management; instead, section 701 of FLPMA cautions that nothing in it "shall be deemed to repeal any existing law by implication." 43 U.S.C. § 1701 note, 90 Stat. at 2786. The interplay between the IOAA and FLPMA is discussed infra at subsection D.⁸

⁷ The Nevada Power court noted that "Sections 304(a) and 504(g) grant Interior authority to charge reasonable fees. Section 304(b) is not another grant of authority, but rather appears intended by Congress to establish the outer boundaries of the blanket delegation given the Secretary elsewhere." 711 F.2d at 921.

⁸ The disposition of receipts differs under the two statutes. Under section 304(b) of FLPMA the amounts recovered "shall be deposited . . . in a special account and are . . . authorized to be appropriated and made available until expended." 43 U.S.C. § 1734(b). In contrast, as noted in the Departmental Manual, "[a]mounts collected under the IOAA authority must be deposited into the General Fund of the Treasury as Miscellaneous Receipts." 346 DM 1.3 C (emphasis added). Department of the Interior appropriations acts have for years appropriated amounts collected under section 304 of FLPMA. See, e.g., Department of the Interior and Related Agencies Appropriations Act for the Fiscal Year ending Sept. 30, 1996, Pub. L. 104-134, section entitled "Service Charges, Deposits, and Forfeitures." The appropriations act passed on Sept. 30, 1996, makes permanent the appropriation of amounts under section 304 that are in excess of 1996 collections and not otherwise committed:

[I]n fiscal year 1997 and thereafter, all fees, excluding mining claim fees, in excess of the fiscal year 1996 collections . . . under the authority of 43 U.S.C. 1734 . . . which are not presently being covered into any Bureau of Land Management appropriation accounts, and not otherwise dedicated by law for a specific distribution, shall be made

B. OMB Circular No. A-25

Office of Management and Budget (OMB) Circular No. A-25, 58 Fed. Reg. 38144 (adopted 1959; revised July 15, 1993), establishes federal policy regarding user charges under the IOAA. It also "provides guidance to agencies regarding their assessment of user charges under other statutes....to the extent permitted by law."

The Circular sets out the general federal policy on cost recovery: "A user charge ... will be assessed against each identifiable recipient for special benefits derived from Federal activities beyond those received by the general public."

C. Departmental Manual

The Department of the Interior Manual mandates cost recovery for special services:

Departmental policy requires (unless otherwise prohibited or limited by statute or other authority) that a charge, which recovers the bureau or office costs, be imposed for services which provide special benefits or privileges to an identifiable non-Federal recipient above and beyond those which accrue to the public at large.

346 DM 1.2 A. The Manual also specifies situations in which exemptions from cost recovery are appropriate:

- (1) The charge is prohibited by legislation or executive order.
- (2) The incremental cost of collecting the charges would be an unduly large part of the receipts from the activity.

immediately available for program operations in this account and remain available until expended.

Department of the Interior and Related Agencies Appropriations Act for the Fiscal Year ending Sept. 30, 1997, Pub. L. 104-208. This means that any future increases in recovered costs which are not currently covered by another permanent appropriation or otherwise dedicated for a specific purpose, will be available to BLM for expenditure without the need for future appropriations.

(3) [Certain charges to foreign countries or international organizations.]

(4) The recipient is engaged in a nonprofit activity designed for the public safety, health, or welfare.

(5) The bureau or office has some other rational reason for exempting the program, subject to the approval of the Office of Financial Management.

346 DM 1.2 C.

The Departmental Manual provides a process for exempting agency activities under the provisions described above, 346 DM 1.2 C., through which BLM has in the past exempted some of its actions. Unless and until BLM establishes through this process that a specific exemption applies, the Departmental policy on cost recovery must be followed.

D. Case Law

In 1974 the Supreme Court decided two companion cases outlining the limits of cost recovery under the IOAA. National Cable Television Ass'n v. United States, 415 U.S. 336 (1974) and Federal Power Comm'n v. New England Power Co., 415 U.S. 345 (1974), involved challenges to fee schedules of the Federal Communications Commission and the Federal Power Commission, respectively. The Court interpreted the IOAA to permit only specific charges to identifiable recipients for services that provide special benefits not shared by the general public. A reimbursable fee, the Court noted, is "incident to a voluntary act, e.g., a request that a public agency permit an applicant to practice law or medicine or construct a house or run a broadcast station." 415 U.S. at 340.⁹ The agencies' fee schedules before the Court had sought to recover the entire costs of regulation without regard to specific benefits received by the regulated entities. Characterizing them as improper tax levies, the Court struck them down.

Although the Court was construing the IOAA, it set limits on cost recovery based on constitutional restrictions on the power to tax. Those limits, as subsequently interpreted by the

⁹ This "voluntary act" identifies an applicant for "a grant which ... bestows a benefit . . . not shared by other members of society." *Id.* at 341. For a more detailed discussion of "identifiable recipients," see note 13 infra.

appellate courts, are therefore also applicable to cost recovery under FLPMA.

A seminal lower court decision applying National Cable Television and New England Power is Mississippi Power & Light Co. v. United States Nuclear Regulatory Comm'n, 601 F.2d 223 (5th Cir. 1979), cert. denied 444 U.S. 1102 (1980).¹⁰ There the Fifth Circuit upheld a Nuclear Regulatory Commission (NRC) licensing fee schedule. The court first rejected petitioners' argument "that the work of the NRC benefits the general public solely and that the conferral of a license or permit does not bestow upon [petitioners] any special benefit whatsoever." Id. at 228. The court concluded that "[a] license from the NRC is an absolute prerequisite to operating a nuclear facility, and as such, is a benefit 'not shared by other members of society.'" Id. at 229, quoting National Cable Television, 415 U.S. at 341. In addition, the court pointed out that petitioners benefited from a limitation on liability and that routine NRC inspections could uncover hazardous conditions which undetected would jeopardize safe operation of the facility. Id.

The Fifth Circuit also rejected the argument that, even if some special benefit to petitioners were found, the NRC should exclude from its fees the portion of the agency service representing the benefit inhering to the public. The court held that under the IOAA as interpreted by the Supreme Court in New England Power, "the NRC may recover the full cost of providing a service to an identifiable beneficiary, regardless of the incidental public benefits flowing from the provision of that service." Id. at 230.

The court borrowed the term "incidental" from the D.C. Circuit opinion in Electronic Industries Ass'n v. Federal Communications Comm'n, 554 F.2d 1109 (D.C. Cir 1976). An "incidental" public benefit is one that is incident¹¹ to the providing of a special benefit. In contrast, as noted by the Fifth Circuit, "expenses incurred to serve some 'independent' public interest cannot be included in the fee...." 601 F.2d at 230.

The D.C. Circuit further delineated the distinction between incidental and independent public benefits in Central & Southern Motor Freight Tariff Ass'n v. United States, 777 F.2d 722 (D.C. Cir. 1985). There petitioners had argued that an agency must

¹⁰ Mississippi Power & Light is cited twice in the Departmental Manual. 346 DM 2.3 B. and 2.4 B.(1).

¹¹ "Incident" in this context is defined in Webster's II New Riverside University Dictionary (1994): "adj. . . . 2. Law. Contingent upon or related to something else".

exclude from its fees that part of costs attributable to public benefit if that benefit were "greater than incidental." The court rejected this argument, concluding that:

The proper test . . . is whether the agency activity at issue produces a public benefit that is independent of the private benefit upon which the agency properly relies in assessing the fee. . . . Accordingly, whether an agency must allocate a portion of its costs depends not so much on the magnitude of the benefits to the public, as petitioners suggest, but rather on the nature of the public benefits and on their relationship to the private benefits produced by the agency action. What flows from this is the following principle: If the asserted public benefits are the necessary consequence of the agency's provision of the relevant private benefits, then the public benefits are not independent, and the agency would therefore not need to allocate any costs to the public.

Id. at 731-32 (footnote omitted) (final emphasis added). See also, OMB Circular No. A-25, at 6.a.(3) ("when the public obtains benefits as a necessary consequence of an agency's provision of special benefits to an identifiable recipient . . . an agency need not allocate any costs to the public"); 346 DM 2.3.

The Fifth Circuit in Mississippi Power & Light gave an example of an independent public benefit:

[A] programmatic [environmental] statement prepared by [an agency] on its own instigation in support of a general agency program expected to have significant benefit both for the public and for private recipients as yet unidentified . . . creates an 'independent public benefit' in the sense used by the District of Columbia Circuit in Electronic Industries.

601 F.2d at 231 n.17.¹² This kind of programmatic function of an agency does not specifically benefit an identifiable recipient,

¹² The Departmental Manual quotes this footnote at 346 DM 2.4 B.(1).

and is easily distinguishable from a service that does benefit an identifiable recipient.¹³

The Fifth Circuit went on in Mississippi Power & Light to uphold the following specific fees assessed by the NRC:

(1) Routine Inspections. The court noted that "the receipt and retention of the license is of unquestionable benefit to the applicant. In conducting routine inspections, the Commission provides a service to the licensee by assisting him in complying with those statutory and regulatory requirements necessary for retention of his license." Id. at 231.

(2) Environmental Reviews required by the National Environmental Policy Act (NEPA). The court found these to be "a necessary part of the cost of providing a special benefit to the licensee." Id.

(3) Uncontested Hearings. The court reasoned that "these costs are necessarily incurred by the agency in providing a service to the applicant." Id.

(4) License Renewals. Fees were upheld even where a license must also be obtained from the appropriate state. The court concluded that "[a] company operating a waste disposal site ... must of necessity obtain a license from the NRC, and the Commission is entitled to recover the full cost of conferring that benefit." Id. at 233.

¹³ According to the Supreme Court, "the proper construction of the [IOAA]" is the OMB Circular test that "no charge should be made for services rendered, 'when the identification of the ultimate beneficiary is obscure and the service can be primarily considered as benefitting broadly the general public.'" New England Power, 415 U.S. at 350, quoting OMB Circular No. A-25 at 6.a.(4). An identifiable recipient does not necessarily have to be identifiable by name at the time the agency performs the special service. The Supreme Court in New England Power went on to give a hypothetical example that illustrates this point: "A blanket ruling by the Commission, say on accounting practices, may not be the result of an application. But each member of the industry which is required to adopt the new accounting system is an 'identifiable recipient' of the service and could be charged a fee, if the new system was indeed beneficial to the members of the industry. There may well be other variations of a like nature which would warrant the fixing of a 'fee' for services rendered." 415 U.S. at 351. The Court makes it clear that the beneficiaries in this hypothetical example are not "obscure," even though their identification by name would apparently only occur after the agency costs had been incurred.

The court also upheld the authority of the agency under the IOAA to include administrative and technical support costs within the fee schedule. Id. at 232.

The Tenth Circuit has also addressed the Supreme Court's interpretation of the IOAA, in a case involving both the IOAA and FLPMA. In Nevada Power Co. v. Watt, 711 F.2d 913 (10th Cir. 1983), a consolidation of three cases contesting BLM's cost recovery regulations for right-of-way applications, the court examined the history of the acts and the regulations at issue, with special emphasis on the legislative history of FLPMA.

Two of the three consolidated cases involved rights-of-way granted subsequent to enactment of FLPMA. In these, the Tenth Circuit interpreted the regulations under FLPMA, but also referenced the case law interpreting cost recovery under the IOAA to determine the outer parameters within which the Department of the Interior must structure cost recovery. Citing Mississippi Power & Light, the court concluded that the Supreme Court doctrines laid out in National Cable Television and New England Power did not restrain Interior from charging the full cost of environmental impact statements required by law to be performed when an application triggers NEPA, because "[t]hese studies are a necessary prerequisite to the receipt by the applicant of a 'special benefit,' the grant of a right-of-way." 711 F.2d at 930. The Nevada Power court did, however, conclude that restraints exist under FLPMA.

The court concluded that the language of FLPMA is more restrictive on the Secretary than that of the IOAA.¹⁴

¹⁴ The IOAA cannot be read independently from FLPMA in connection with activities governed by FLPMA. The IOAA itself provides that it "does not affect a law of the United States ... prescribing bases for determining charges" 31 U.S.C. § 9701(c). The OMB Circular which establishes federal policy regarding user charges under the IOAA specifies that "where a statute ... addresses an aspect of the user charge (e.g., . . . how much is the charge ...) the statute shall take precedence over the Circular." OMB Circular No. A-25 at 4.b. The Departmental Manual also provides that "[t]he principles and guidelines in this Part must be used in recovering costs to the extent they are not in conflict with ... specific [statutory cost recovery] authority [for individual programs or services]." 346 DM 1.3 A. The Departmental Manual includes FLPMA in its list of examples of specific authority. The greater restrictions of FLPMA thus govern over the IOAA for cost recovery "with respect to applications and other documents relating to the public lands." 43 U.S.C. § 1734(a).

Specifically, the court held that, despite the facially discretionary language of FLPMA, "the Secretary must, when establishing reasonable costs of processing applications, consider the reasonableness factors listed in section 304(b) [43 U.S.C. §1734(b)]." Id. at 925.¹⁵ (These factors are quoted in subsection A., supra.)

The court found that in promulgating the post-FLPMA regulations at issue the Secretary had considered only the first factor: "actual costs." Id. at 926-27. The court concluded that FLPMA mandates consideration of each of the factors,¹⁶ and consequently invalidated the regulations. Id.¹⁷

In certain instances, a statutory provision may address cost recovery for applications or documents that relate to the public lands but are governed by statutes other than FLPMA. In a case involving a pipeline right-of-way under the Mineral Leasing Act (MLA), the Federal Circuit noted that the MLA contained a specific reimbursement clause for pipeline rights-of-way: "The applicant for a right-of-way ... shall reimburse the United States for administrative and other costs incurred in processing the application" MLA section 28, 30 U.S.C. § 185(l), quoted in Sohio Transp. Co. v. United States, 766 F.2d 499, 502 (Fed. Cir. 1985). Because the MLA mandated reimbursement of administrative and other costs in this specific instance, its cost recovery provision took precedence over FLPMA.

¹⁵ As already noted, section 304(b) of FLPMA provides that "'reasonable costs' include . . . the costs of ... environmental impact statements" The Nevada Power court made it clear that the costs of environmental impact statements are not thereby "reasonable per se," but must be weighed against the reasonableness factors on the same basis as other processing costs. 711 F.2d at 929-30.

¹⁶ This does not mean that the Secretary may never impose a fee that recovers actual costs. See infra note 45 and accompanying text.

¹⁷ The court in Nevada Power held that Interior could determine reasonable costs "either by rulemaking or by case-by-case adjudication." 711 F.2d at 933. In 1987 the Secretary promulgated new right-of-way cost recovery regulations at 43 C.F.R. Subpart 2808, combining a fee schedule with case-by-case determination. These regulations specifically permit right-of-way applicants in complex cases to request reduction or waiver of reimbursable costs, and list ten factors for the State Director to consider in processing such requests. 43 C.F.R. § 2808.5. For a more detailed discussion of options for rulemaking, see Section V, infra.

The third consolidated case in Nevada Power involved a right-of-way application granted prior to enactment of FLPMA. There the court considered the regulations only under the IOAA, and concluded from its discussion of National Cable Television, New England Power, and Mississippi Power & Light that the Department of the Interior could recover the full costs of an environmental impact statement triggered under NEPA by the application. Id. at 933.

Collectively, these decisions establish the following principles: (1) an agency action that provides both a special benefit to an identifiable recipient and an incidental public benefit is not automatically excluded from consideration for cost recovery; rather, (2) if the agency action meets the criteria of providing a special benefit to an identifiable beneficiary, the costs associated with it may be recovered, whether or not there is incidental public benefit associated with the action.

The Departmental Manual requires that a charge be imposed in this latter circumstance.¹⁸ FLPMA requires that the agency, in establishing this charge, consider the "reasonableness factors" of section 304(b), including what portion of the cost was incurred to benefit the public interest. As with the right-of-way regulations promulgated in response to the dictates of Nevada Power, regulations implementing the cost recovery measures for minerals document processing will have to include consideration of the "reasonableness factors."¹⁹

¹⁸ The Departmental Manual specifies three prerequisites to recovering costs for services: (i) "special benefits or privileges" to (ii) "an identifiable non-Federal recipient" that are (iii) "above and beyond those which accrue to the public at large." 346 DM 1.2 A.

¹⁹ Any new such regulations will apply to present as well as future mineral leases, as modern federal mineral leases include language making them subject to future regulations. See, e.g., BLM Form 3100-11 (October 1992) "Offer to Lease and Lease for Oil and Gas" ("Rights granted are subject to . . . the Secretary of the Interior's regulations and formal orders in effect as of lease issuance, and to regulations and formal orders hereafter promulgated when not inconsistent with lease rights granted or specific provisions of this lease.") Coal leases and previous versions of oil and gas leases contain similar language.

The original grant of rights in the underlying lease does not impede BLM from recovering costs for subsequent services that are necessary to continued operations under the lease. As already noted, in Mississippi Power & Light the court upheld the right of the NRC to assess fees for routine inspections despite the prior grant of a license. 601 F.2d at 231. The rights

There has, not surprisingly, been considerable disagreement between agencies and regulated entities over whether certain agency actions provide any private "special benefits." The petitioners in Mississippi Power & Light argued, for example, that NRC regulation did not confer any benefit on them whatsoever. Many regulated industries might echo this sentiment. The courts, however, have been consistent in rejecting this subjective interpretation of a "benefit," as explained in a 1987 law review article:

Certainly, some industries would prefer no regulation to regulation, and in this subjective sense they receive no benefit from regulation. Nevertheless, each court that has addressed the issue has joined the Mississippi Power & Light court's judgment that industry distaste for regulation, standing alone, is insufficient to contradict the presumption of a benefit. The rationale for this conclusion appears to be that fees under the IOAA are properly imposed for "voluntary acts," a standard derived from the Supreme Court's analysis in National Cable Television. That standard presumes that if an entity voluntarily enters a business believing that the business will return benefits superior to the next best use of the entity's resources, it necessarily assumes all the burdens associated with operating that business, including the payment of fees.

Gillette & Hopkins, Federal User Fees: A Legal and Economic Analysis, 67 B.U. L. Rev. 795, 831 (1987)(footnotes omitted). The article cited, as illustrations, two companion cases from the D.C. Circuit: National Cable Television Ass'n v. Federal Communications Comm'n, 554 F.2d 1094, 1101-02 (D.C. Cir. 1976) (National Cable II) (rejecting as irrelevant petitioners' argument that cable TV industry could have developed better without FCC regulation because "[t]he fact is that the FCC has undertaken to regulate this industry . . . with the result that a certificate of compliance has become a necessary and therefore valuable license"); and Electronic Industries Ass'n v. Federal Communications Comm'n, 554 F.2d 1109, 1115 (D.C. Cir. 1976) (an agency "is entitled to charge for services which assist a person

granted by a license or lease are not absolute. Exercise of those underlying rights depends on continued compliance with applicable laws and regulations; when such compliance necessitates the services of the regulatory agency, the agency has authority to recover those costs.

in complying with his statutory duties. Such services create an independent private benefit").

Almost every court that has examined the question has found that a filing requirement in and of itself is sufficient to satisfy the private benefit test. The only court to identify this as a possible issue declined to address it, and went on to find that the agency could charge a processing fee in connection with a statutory tariff filing requirement, because one purpose of the requirement was "'insuring the economic stability of the trucking industry.'" Central & Southern Motor Freight Tariff Ass'n v. United States, 777 F.2d 722, 734 (D.C. Cir. 1985) (citation omitted). The key question, according to the court, was whether the underlying statute was "passed in large measure for the benefit of the individuals, firms, or industry upon which the agency seeks to impose a fee."

Central & Southern Motor Freight is out of the mainstream of case law in this area and was not addressed on this point in subsequent decisions, even one decision written by the same judge in the D.C. Circuit. Ayuda, Inc. v. Attorney General, 848 F.2d 1297 (D.C. Cir. 1988) (citing Electronic Industries as indicative of broad sweep of cost recovery authority); Phillips Petroleum co. v. Federal Energy Regulatory Comm'n, 786 F.2d 370, 375 (10th Cir. 1986), cert. denied 479 U.S. 823 (1986) ("the term 'special benefits' is broadly defined to include even assisting regulated entities in complying with regulatory statutes").²⁰

In Ayuda, the D.C. Circuit upheld Immigration and Naturalization Service filing fees for deportation order stays, appeals to the Board of Immigration Appeals, and motions to reopen or reconsider decisions. While admitting to an initial

²⁰ The Central & Southern Motor Freight approach of examining statutory purpose is thus not controlling law in this area. Even if it were, however, the mining and mineral leasing laws would satisfy the court's requirement because of the many benefits they provide to industry. For example, the Mining Law of 1872 was passed in order to make the public lands "open to exploration and purchase" by private interests. 30 U.S.C. § 22. Its rules were derived in large part from rules developed by miners themselves with the goal of preventing lawlessness and allowing miners to hold claims by operation of law rather than violence. FLPMA filing requirements and rental/maintenance fee requirements are intended to rid the public lands of stale claims, substantially for the purpose of making them available to bona fide miners. Leases issued under the Mineral Leasing Act and related laws grant lessees a monopoly on the opportunity to develop a particular mineral on a particular tract, to the exclusion of other operators seeking similar development opportunities.

hesitation at "requir[ing] payment of a fee before the agency will review its own determinations," 848 F.2d at 1299, the court concluded that prior case law constrained it to uphold the fees where "we are presented with specific procedural devices that redound to the obvious, substantial, and direct benefit of specific, identifiable individuals, individuals who have themselves invoked those procedures." Id. at 1301.

Even when an application is withdrawn before a license can be issued, resulting in no measurable benefit to the applicant, an agency can impose a processing fee for work done prior to the withdrawal. New England Power Co. v. United States Nuclear Regulatory Comm'n, 683 F.2d 12 (1st Cir. 1982) ("[T]he work done is a necessary part of the process of obtaining a license. That the utility subsequently withdraws its application does not defeat the fact that it has already received a benefit by virtue of the work already done at its request." Id. at 14.) BLM has taken this approach. See 43 C.F.R. § 2808.3-3(b) (applicant for right-of-way who withdraws application before grant or permit is issued is liable for processing costs).

This case law makes it clear that the term "private benefit" is to be broadly construed. The vast majority of court opinions that address the issue look no further than whether a permit or license has been applied for or whether the agency action assists an applicant in complying with statutory or regulatory duties.

IV. ANALYSIS OF BUREAU OF LAND MANAGEMENT COST RECOVERY CATEGORIES

We note at the outset that the term "cost recovery" refers to both the level of costs recovered for a category of transactions and the array of categories for which the recovery of costs is possible. The Departmental Manual mandates cost recovery in both senses of the term. It requires (unless prohibited or limited by statute or other authority) (1) recovery at a level equal to the bureau or office costs, and (2) recovery of costs for all categories of service that provide special benefits to an identifiable recipient above and beyond those which accrue to the public at large. 346 DM 1.2 A. For cost recovery under section 304 of FLPMA, the level of recovery addressed by the first part of the Departmental Manual mandate is limited by the reasonableness factors. 43 U.S.C. § 1734(b). See supra Section III.D. For cost recovery undertaken pursuant to section 304, the array of categories addressed by the second part of this mandate is limited to transactions "relating to the public lands." 43 U.S.C. § 1734(a).

In documents provided to the Solicitor's Office for review, BLM staff divided mineral cost recovery actions/documents into four categories: (1) Not Subject to Cost Recovery; (2) Deferral

Items; (3) Exemptions; and (4) Items Recommended for Cost Recovery Fees. See Bureau of Land Management Energy & Minerals Cost Recovery Analysis (undated); BLM Information Bulletin No. 95-219, dated 6/13/95 - Program Area: Cost Recovery for Minerals Document Processing (summarizing the Cost Recovery Analysis, supra). The "Deferral Items" were determined by BLM to be "subject to cost recovery, but due to insufficient data to prepare a cost analysis, any new fee proposal has been deferred." Information Bulletin No. 95-219, Attachment 3 at 3.

This section specifically addresses the items in the categories "Not Subject to Cost Recovery" and "Exemptions" in light of the statutory and case authority discussed in Section III, supra. This analysis is directed at determining which agency actions are subject to cost recovery, i.e., which actions confer a special benefit not shared by the general public on an identifiable recipient, according to the case law interpretation of these criteria. In promulgating regulations, BLM will have to determine its actual costs for each type of action for which it has cost recovery authority. BLM must then consider each of the FLPMA reasonableness factors, of which actual costs is one and the public benefit is another, in determining the final fee. The relationship of actual costs to the other factors is addressed more specifically in subsection A, infra. The weighing of the reasonableness factors, culminating in the promulgation of regulations, is discussed further at Section V, infra.

This section also considers, at subsection B, infra, certain items for which BLM is inadequately recovering costs.

A. Relationship of Agency's Cost to Other Factors

This section examines certain specific items for which BLM in the past has not asserted cost recovery authority. We conclude that in many such instances BLM does possess the authority to recover costs. Such a conclusion does not imply that BLM must necessarily recover the actual cost to the agency of those items. Under FLPMA, the actual cost to the agency is but one of the criteria to be considered in setting the fee. In the course of establishing the regulatory framework for cost recovery and determining individual fees, each of the "reasonableness factors" must be considered.

BLM must bear in mind that no single factor can be considered to the exclusion of the other factors. In Nevada Power the Tenth Circuit addressed this very issue: "We do not accept the argument . . . that Interior could by purportedly considering [one factor] eliminate other factors also required by Congress to be considered. Such reasoning . . . completely negates Congress' explicit inclusion of the other factors - a result that Congress clearly did not intend." 711 F.2d at 926 n.10.

Thus, for example, although BLM may not exclude an item from consideration for cost recovery on the ground that it benefits the public as well as the applicant, that public benefit will be examined in the process of applying the reasonableness factors to determine the fee to be charged.

That BLM must take into consideration the FLPMA section 304(b) factors before setting a final fee is implicit in each of the discussions in this section of cost recovery for specific kinds of agency actions.

B. Inadequate Cost Recovery

There are categories of document processing services where BLM has been recovering partial costs, but for which it has the statutory authority and the Departmental Manual mandate to recover full costs (subject, of course, to consideration of the FLPMA reasonableness factors). For example, we are informed that the current fee charged for a mineral patent application is based only on such costs as docketing the application and any supporting materials. It does not include recovery of the costs of the required mineral examination and mineral report, which constitute the major expenses of the application. The mineral examination and report are performed as a direct result of the application for a patent, and provide a valuable special benefit to the applicant, who cannot otherwise receive a patent. BLM thus clearly has the authority under applicable law to recover its costs for mineral examinations and reports.

We note that requiring patent applicants to bear the cost of the required mineral examination and resulting report in no way impairs the rights of any locators or claims under the Mining Law of 1872. See FLPMA section 302, 43 U.S.C. § 1732(b). The Mining Law of 1872 requires that a patent applicant show compliance with the terms of the law, which includes a showing of a valid discovery. 30 U.S.C. §§ 22, 23, 29. Regulations reflect that BLM must confirm such a discovery by examination. 43 C.F.R. §§ 3862.1-1(a), 3863.1(a). Nothing in the Mining Law of 1872 requires the United States to bear the costs of confirming that a valid discovery exists under that law.

We also note that the Department of the Interior and Related Agencies Appropriations Act for the Fiscal Year ending Sept. 30, 1996, Pub. L. 104-134, section 322(c), contains a provision that "upon the request of a patent applicant, the Secretary of the Interior shall allow the applicant to fund a qualified third-party contractor to be selected by the Bureau of Land Management to conduct a mineral examination of the mining claims or mill sites contained in a patent application" This language was reiterated in the appropriations act for fiscal year 1997. Pub. L. 104-208. This provision must be read against a companion provision that requires BLM to prepare and implement a plan to

process 90% of the outstanding grandfathered patent applications within five years. It addresses the shortage of BLM resources to meet that target of completion. It does not affect BLM's authority to recover costs for BLM mineral examinations.

Congress has specifically recognized that the Secretary may recover costs for the processing of actions relating to the general mining laws. In 1988 Congress provided that "all receipts from fees established by the Secretary of the Interior for processing of actions relating to the administration of the General Mining Laws shall be available for program operations in Mining Law Administration by the Bureau of Land Management to supplement funds otherwise available, to remain available until expended." Title I of the Department of the Interior and Related Agencies Appropriations Act for the Fiscal Year ending Sept. 30, 1989, 102 Stat. 1774, 43 U.S.C. § 1474.

Four years later, in 1992, Congress directed the imposition for two years of an annual mining claim rental/holding fee for claimants holding more than 10 claims. Department of the Interior and Related Agencies Appropriations Act for the Fiscal Year ending Sept. 30, 1993, Pub. L. 102-381. The following year, Congress authorized the fee to continue through fiscal year 1998. Omnibus Budget Reconciliation Act of 1993, 107 Stat. 405, 30 U.S.C. § 28f. This fee was intended to "confirm the serious intent of claim holders to develop such claims," as well as to provide revenue. H.R. REP. No. 626, 102d Cong., 2d Sess. 14. The fee thus serves the purpose of "ridding federal lands of stale mining claims." Kunkes v. United States, 78 F.3d 1549, 1554 (Fed. Cir. 1996), cert. denied, ___ U.S. ___, 117 S.Ct. 74 (1996). It was not specifically designed to assess and recover the costs of administration.

In recent appropriations acts Congress has earmarked a certain amount of the revenue from mining claim fees for mining law program administration and for the costs of administering the mining claim fee program. See e.g., Department of the Interior and Related Agencies Appropriations Act for the Fiscal Year ending Sept. 30, 1997. There is, however, no indication in these annual appropriations acts or their legislative history that the earmark was intended to repeal or modify the pre-existing authority of the Secretary to engage in cost recovery for minerals document processing. Congress has contemplated, in other words, that mining law program administration will be funded by the collection of both processing fees and mining claim maintenance fees.

There may be other services in addition to the mineral patent examination and report for which BLM has not been attempting to recover full costs. Any such services should also be analyzed in light of the framework provided in this Opinion in order to ascertain whether BLM in fact has the authority, and

therefore the mandate (unless BLM seeks and is granted an exemption pursuant to the process in the Departmental Manual), to recover full costs.

C. Not Subject to Cost Recovery

Several actions described below, which are listed by BLM in the category of "Not Subject to Cost Recovery," appear in fact to be suitable candidates for cost recovery, subject to the application of the reasonableness factors. As already noted, if a service provides a "special benefit[] or privilege[]" to an identifiable non-Federal recipient above and beyond those which accrue to the public at large," then "Departmental policy requires . . . that a charge . . . be imposed." 346 DM 1.2 A.

1. Inspection and Enforcement Activities, including Inspection Reports; Production Verification; Payment of Assessments; Payment of Civil and Criminal Penalties; Well Completion Record; Well Logs; and Written Notice of Violation

With the exception of the payment of civil and criminal penalties, the agency actions listed above appear to be monitoring activities which would be encompassed by the language in section 304(b) of FLPMA specifically authorizing the recovery of reasonable costs for "monitoring construction, operation, maintenance, and termination of any authorized facility . . ." 43 U.S.C. § 1734(b).²¹

The case law does not directly address cost recovery in connection with the imposition of civil or criminal penalties. We are not prepared to say it provides a special benefit to an operator. In contrast, the possibility of a written notice of violation or non-compliance is inherent in inspections and benefits the operator by ensuring compliance and preventing civil and criminal penalties or termination of operations.

Cost recovery for routine inspections was specifically upheld in Mississippi Power & Light, 601 F.2d at 231. Again with the exception of the payment of civil and criminal penalties, the agency actions listed appear to be of the same nature as actions held by the courts to be reimbursable. The benefit to the

²¹ The term "facility" is not defined in the act. It is easily broad enough to include the kinds of things used in mineral extraction and development operations. See, e.g., the definition of "facility" in Webster's II New Riverside University Dictionary (1994): "4. Something created to serve a particular function"

lessee/operator is the ability to continue operations, which would not be possible without such compliance with applicable statutes, regulations, lease terms, and plans of operations or exploration plans from which these agency actions derive. Other benefits may include, as in Mississippi Power & Light, the uncovering of hazardous conditions that undetected could jeopardize the safety of the operation and create substantial liability for monetary damages; no doubt additional similar benefits can be compiled by those specifically familiar with each action.

BLM cites the public benefits that flow from these agency actions as justification for excluding the actions from cost recovery. The applicable case law clearly teaches, however, that these public benefits are incidental to the private benefits. Thus, BLM has authority to recover costs for these services, and the Departmental Manual requires that a fee be imposed where such authority exists, unless properly exempted.

2. Force Majeure and Government-ordered Suspensions

Force majeure suspensions differ from government-initiated suspensions on the question of whether they confer a special benefit on the recipient. In the case of a force majeure suspension, the lessee/operator applies to the government for a suspension of lease terms. While the events giving rise to the application are presumably beyond the control of the applicant, the application nevertheless requests a special benefit, namely, the release for a certain time period from the obligation to comply with all terms and conditions of the lease. As such, the cost of processing the application is subject to cost recovery.

We are not prepared to say that a government-initiated suspension under which a lessee must cease operations or production necessarily confers a special benefit on the lessee. If BLM determines that its actions are indeed beneficial to a lessee, it would be entitled to recover its costs of processing the suspension.

3. Request for Competitive Lease Sale Parcel (Coal; Non-energy Minerals; Geothermal)²²; Request for Sale (Mineral Materials); and Expressions of Interest for Competitive Lease Sale (Oil and Gas)

²² Although the BLM Energy & Minerals Cost Recovery Analysis, Appendix 2 at 4, places "Geothermal" under the category "Expressions of Interest for Competitive Lease Sale," we are advised that the correct category is "Request for Competitive Lease Sale Parcel."

BLM's rationale for not subjecting the above requests and expressions of interest to cost recovery is that the requestor receives no special benefit because the opportunity to participate in competitive bidding is afforded to the public at large. BLM Energy & Minerals Cost Recovery Analysis, Appendix 2 at 3-4.

This formulation, however, appears to be too narrow. A request or expression of interest apparently results in BLM offering the nominated parcel for lease or sales contract (unless it is already under lease or otherwise unavailable²³). The processing functions performed by BLM in order to offer the parcel actually provide special benefits to three classes of recipients: the requestor, the bidders, and the successful bidder.

The special benefit to the requestor is the opportunity to influence the selection of parcels offered for lease sale or sales contract. This is a benefit resulting from agency action that is not available to those not making such a request. Entities that submit bids (a class which presumably will also include the requestor) receive the opportunity of being considered for a lease or sales contract. This benefit is not available to the public at large. The successful bidder receives the opportunity to remove minerals under a lease or sales contract. This benefit would not be possible without BLM's processing work in preparation for offering the parcel.

We note that the requestor and the successful bidder may or may not be the same entity.²⁴ The requestor, the bidders, and the ultimately successful bidder are all identifiable beneficiaries at the time BLM performs the processing work: the requestor is identifiable by name, and the bidders and the ultimately successful bidder are identifiable by definition as the entities who will submit bids and the one to whom the lease

²³ We are advised that information regarding the status of such parcels is readily available and could be easily ascertained prior to the filing of an expression of interest.

²⁴ There is no guarantee that the party making the request or expression of interest will ultimately make the highest bid and be awarded the lease or sales contract. The special benefits to the requestor and the bidders are benefits of opportunity, not guaranteed outcome. A requestor who is unsuccessful at winning the lease has still enjoyed the benefit of having BLM offer the particular parcel, as opposed to others not making such a request; the bidders have enjoyed the opportunity of being considered for the lease or sales contract. This formulation of special benefits appears to be within the broad parameters of the definition of benefits in the case law.

will be awarded. See supra note 13. All have voluntarily requested the agency's services, either by making the original request or expression of interest for lease sale or sale, or by participating in the process of bidding for an agency lease or sales contract.

BLM will need to decide what is a fair allocation of costs among these three possible classes of beneficiaries. It cannot, of course, recover double or triple costs. In applying the FLPMA reasonableness factors, BLM will especially need to weigh the factor of "the monetary value of the rights or privileges sought by the applicant" in deciding what share of the processing costs it is reasonable to recover from each of these beneficiaries.

4 . Bonds (except Stockraising Homestead Bonds²⁵)

A bond, or some other form of financial guarantee, is a regulatory requirement that is a precondition to the commencement of operational activities. See BLM Energy & Minerals Cost Recovery Analysis, Appendix 2 at 6. That fact makes it valuable to an applicant - without it, no operations can begin. As already seen in the discussion of the applicable case law, where statutory or regulatory requirements make approval of an application necessary for the applicant to operate, it is considered to confer a special benefit and the costs of processing are subject to recovery. See, e.g., Mississippi Power & Light, 601 F.2d at 229, 231-33. When a bond is reviewed in connection with review of an application, e.g., for approval of a lease or of the beginning of operations, the costs of reviewing the bond to ensure its sufficiency are recoverable as part of the costs of processing the application.

5 . Mineral Operations, including Application for Permit to Drill, Exploration Plan, Mine Plan, Monthly Report of Operations, Notice of Completion of Exploration Operations, Application for Approval of Participating Area,²⁶ Plan of

²⁵ Stockraising homestead bonds have been determined by BLM to be subject to cost recovery, but are included in the category "Deferral Items." BLM Information Bulletin No. 95-219, Attachment 3 at 3.

²⁶ The BLM Energy & Minerals Cost Recovery Analysis, Appendix 2 at 8, and the BLM Information Bulletin No. 95-219, Attachment 3 at 2 (6/13/95), listed a "Notice of Completion of Exploration Operations Participating Area." BLM staff has informed this Office that this should read: "Notice of Completion of

Operations, Subsequent Well Operation/Sundry Notice, Unit Plans of Development, Well Abandonment, Final Abandonment Notice, etc.

The rationale given in the BLM Energy & Minerals Cost Recovery Analysis, Appendix 2 at 8, for not subjecting the agency costs of processing the above documents to cost recovery is that inherent in the issuance of a mining lease or mining claim recordation is the right to conduct operations. A lessee/operator/claimant has, however, no right under applicable statutes and regulations to begin or continue operations in the absence of the authorizations listed above.

FLPMA specifically allows recovering costs for "monitoring construction, operation, maintenance, and termination of any authorized facility" 43 U.S.C. § 1734(b). The courts have also made it clear that agencies may charge fees for processing costs related to continued operations and to permits and licenses subsequent to those initially required. See, e.g., Mississippi Power & Light, 601 F.2d at 231: "An applicant . . . must meet certain requirements as a prerequisite to obtaining a license; likewise a licensee must comply with certain statutory and regulatory requirements in order to maintain his license."

Agency approval of the above documents allows a lessee/operator/claimant to conduct operations and thus confers a special benefit on the applicant. Processing of these documents is therefore subject to cost recovery.²⁷

Exploration Operations" and "Application for Approval of Participating Area."

²⁷ We note that Congress has addressed one aspect of the administrative costs of the onshore mineral leasing program. Section 35 of the Mineral Leasing Act, as amended, provides that fifty percent of the Department's administrative costs related to onshore mineral leasing is to be deducted before receipts from sales, bonuses, royalties, and rentals of the public lands will be shared with the state within whose boundaries the leased lands are located. 30 U.S.C. § 191. (Sales, bonuses, royalties, and rentals are compensation to the United States for the opportunity to develop resources on public lands; they are not reimbursement for administrative services rendered.) Receipts retained by the United States under this section are paid into the Treasury and do not directly fund program operations. This section provides no new source of recovery for administrative costs and merely ensures that states share the burden of such costs for a program from which they benefit. The section has no bearing on fees charged to recoup the costs of agency services.

6. Notice: Disturbance of 5 acres or less

The filing of a notice under 43 C.F.R. § 3809.1-3 (termed by BLM a "Notice of Disturbance") is a regulatory requirement with which an operator must comply in order to proceed with operations that disturb an area of five acres or less. While formal agency approval is not required, agency review is necessary to ascertain whether the proposed operations are appropriate under such a notice. This section mandates that notification be made at least 15 days before commencing operations, thereby allowing time for agency review.

The provisions of this section benefit the operator by "permit[ting] operations with limited geographic disturbance to begin after a quick review for potential resource conflicts" and by eliminating the need for preparation of environmental documents, as the review does not qualify as major federal action under NEPA. BLM Manual 3809.13. Operators are thus provided, in appropriate circumstances, with a simpler alternative to the submission and approval process for a plan of operations. Filing a notice under this section triggers agency review, which provides a special benefit to an identifiable recipient. BLM thus has authority to recover the agency costs of processing notices under 43 C.F.R. § 3809.1-3.

This section also contemplates agency monitoring to ensure that operations will not cause unnecessary or undue degradation of the land. 43 C.F.R. § 3809.1-3(e). Such monitoring benefits the operator by ensuring compliance with FLPMA and avoiding a notice of non-compliance or other enforcement action. It is clearly subject to cost recovery. See, e.g., Mississippi Power & Light, 601 F.2d at 231 (upholding agency authority to recover costs of routine inspections); 43 U.S.C. § 1734(b) (FLPMA authorization of fees for "monitoring . . . operation . . . of any authorized facility").

7 . Lease Relinquishments, Terminations, Expirations, and Cancellations (Oil and gas, Geothermal, Coal and Non-energy)

Lease relinquishments are initiated by the applicant and provide the special benefit of releasing the applicant from terms and conditions of the lease, including rental and royalty payments. BLM's recognition that all production operations must thereby cease does not negate this benefit; it is precisely the outcome requested by the applicant. Costs of processing

relinquishment applications are clearly subject to recovery under applicable case law.²⁸

Unlike relinquishments - in which the operator specifically requests agency action - terminations,²⁹ expirations, and cancellations are initiated by the agency, either through operation of law (terminations and expirations) or through agency action (cancellations³⁰). We are not prepared to say that a lease termination, expiration, or cancellation necessarily confers a special benefit on a lessee. If BLM determines that its actions are indeed beneficial to a lessee, it would be entitled to recover its processing costs.

BLM must often, however, expend money even after a lease has expired or has been terminated, cancelled, or relinquished, on activities such as approving and monitoring reclamation and abandonment procedures. BLM clearly has the authority to recover its costs for these services because reclamation and abandonment obligations on the former lessee flow out of the original agreement to abide by the terms of the lease and the governing regulations.³¹

²⁸ Certain relinquishments are effective as of the date of filing. See 30 U.S.C. §§ 187b (oil and gas leases) and 1009 (geothermal leases). To ensure collection of processing fees in these cases, BLM may wish to include in the regulations a provision that a written relinquishment under these sections will not be accepted for filing until any required filing fees have been paid.

²⁹ Terminations may also be subject to reinstatement. See, e.g., 43 C.F.R. §§ 3108.2-2 to 3108.2-4. BLM has correctly determined that fees for reinstatements are subject to cost recovery. See Items Recommended for Cost Recovery, BLM Information Bulletin No. 95-219, Attachment 3 at 10.

³⁰ Many lease cancellations are due to a lease having been issued in error, in which case the cancellation occurs prior to any production under the lease. Other causes for cancellation include, e.g., failure to maintain continued operation or failure to meet the requirement for submission of a resource recovery and protection plan (coal). 43 C.F.R. § 3483.2.

³¹ See 30 U.S.C. §§ 187b (oil and gas) and 1009 (geothermal) (lease relinquishment is subject to the continued obligation of the lessee to place all wells in condition for suspension or abandonment "in accordance with the applicable lease terms and regulations"; "no such relinquishment shall release such lessee . . . from any liability for breach of any obligation of the lease, other than an obligation to drill, accrued at the date of the relinquishment"); cf. EP Operating

For example, coal and non-energy lessees must apply for agency approval of a reclamation plan before beginning operations.³² BLM has authority to recover its costs for approval of the plan and for any monitoring subsequently required, including monitoring that is required after the relinquishment, termination, expiration, or cancellation of the lease. FLPMA section 304(b) specifically authorizes cost recovery for "monitoring . . . termination of any authorized facility." 43 U.S.C. § 1734(b).

Oil and gas lessees must file with the application for permit to drill a surface use plan of operations containing, inter alia, plans for reclamation of the surface and waste disposal plans. 43 C.F.R. § 3162.3-1(f). Geothermal lessees must file a plan of operation including methods for waste disposal and measures to protect the environment, 43 C.F.R. § 3262.4, and a plan of utilization including the method of abandonment of utilization facilities and site restoration procedures. 43 C.F.R. § 3262.4-1. In addition, when ready to abandon a well, an oil and gas or geothermal lessee must submit for agency approval a plan to plug and abandon the well. 43 C.F.R. § 3162.3-4 (oil and gas); 43 C.F.R. § 3262.5-5

Ltd. Partnership v. Placid Oil Co., 26 F.3d 563, 567 n.11 (5th Cir. 1994)(citing with approval federal regulations "requir[ing] that when a lease expires or is abandoned, the equipment must be properly cleared from the OCS [Outer Continental Shelf]," noting that one concern of the underlying statute "is that the resources of the OCS be developed in an environmentally safe manner"); 30 C.F.R. § 773.11(a)(regulations regarding surface coal mining and reclamation operations permits provide that "[o]bligations established under a permit continue until completion of surface coal mining and reclamation operations, regardless of whether the authorization to conduct surface coal mining operations has expired or has been terminated, revoked, or suspended"); 58 Fed. Reg. 45257 (Aug. 27, 1993) (preamble to Minerals Management Service bonding regulations for sulphur or oil and gas leasing in Outer Continental Shelf, recognizing that certain obligations may "accrue[] but [are] not yet due for performance," including the obligations "of sealing wells, removing platforms, and clearing the ocean of obstructions[, which] accrue when a well is drilled or used, a platform is installed or used, or an obstruction is created and remain until [abandonment procedures] are followed." Virtually identical language is included in the "Notice to Lessees and Operators of Federal Oil and Gas Leases in the Outer Continental Shelf", NTL No. 93-2N, Oct. 6, 1993.)

³² See 43 C.F.R. §§ 3482.1(b) & (c) (5) (coal); 43 C.F.R. §§ 3512.3-3, 3522.3-3, 3532.3-3, 3542.3-3, 3552.3-3, 3562.3-3, & 3592 (non-energy).

(geothermal). Again, BLM has authority to recover its costs for approval of the plan and for subsequent monitoring, without regard to the status of the lease.

8. Lessee Qualification Documents

BLM's rationale for not subjecting review of lessee qualification documents to cost recovery is that "recommendations for processing fees for lease issuance include the review of qualification documents" BLM Energy & Minerals Cost Recovery Analysis, Appendix 2 at 9. This presumably means that costs of this review are in fact being recovered in the processing fees for lease issuance. Review of these documents clearly qualifies for cost recovery as part of the initial lease application processing costs.³³

9. Appeals

As noted in Section III.D., *supra*, a 1988 D.C. Circuit case upheld, under the IOAA, Immigration and Naturalization Service filing fees for deportation order stays, appeals to the Board of Immigration Appeals, and motions to reopen or reconsider decisions. *Ayuda, Inc. v. Attorney General*, 848 F.2d 1297 (D.C. Cir. 1988). BLM notes that most appeals of its decisions are processed within the Office of Hearings and Appeals and that BLM is not authorized to make fee recommendations for that Office. BLM Energy & Minerals Cost Recovery Analysis, Appendix 2, Addendum.

Some appeals, however, are made first to the BLM State Director. See, e.g., 43 C.F.R. § 3165.3(b). Under the reasoning of *Ayuda*, BLM could recover costs for processing appeals to a BLM State Director. It could also recover the costs of the minimal processing that takes place in BLM offices prior to the transfer of a case file to the Office of Hearings and Appeals.

10. Other Actions

Compensatory Royalty Assessment/Agreement;
Government Initiated Contests

We are not prepared to say that compensatory royalty assessments/agreements or government-initiated contests confer a

³³ We are informed that oil and gas lessee qualification is a process of self-certification. Nevertheless, if BLM reviews self-certification documents, the costs of that review may be recovered.

special benefit on a lessee or claimant. In the absence of a special benefit, they would not be subject to cost recovery.

D. Exemptions

This category in BLM Information Bulletin No. 95-219, Attachment 3 at 4-6, lists 17 exemption items. Four of these items were "determined by the Bureau to be exempt from cost recovery." BLM Energy & Minerals Cost Recovery Analysis, List of Documents/Actions Determined By the Bureau To Be Exempt From Cost Recovery, unnumbered section at 1. These four, based on the Departmental exemptions for statutory prohibitions and non-profit activities, are addressed in subsections 1 and 2, infra.

The remaining 13 items were the subject of an exemption request from BLM to the Director of Financial Management, and are addressed in subsection 3, infra.

1. Exemptions Based on Statutory Prohibitions

BLM determined that "Lease Exchanges - Coal" and "Lease Exchanges - Nonenergy" should be exempted from cost recovery due to statutory prohibitions (exemption #1 in the Departmental Manual; see Section III.C., supra). BLM cites the Federal Land Exchange Facilitation Act of 1988 (FLEFA), 43 U.S.C. § 1716(b)-(i), which amended FLPMA in order to facilitate and expedite land exchanges. Section 3(a) of FLEFA provides, at 43 U.S.C. § 1716(f) (2):

[T]he provisions of such rules and regulations shall-

(B) with respect to costs or other responsibilities or requirements associated with land exchanges-

(i) recognize that the parties involved in an exchange may mutually agree that one party (or parties) will assume, without compensation, all or part of certain costs or other responsibilities or requirements ordinarily borne by the other party or parties; and

(ii) also permit the Secretary . . . upon mutual agreement of the parties, to make adjustments to the relative values involved in an exchange transaction in order to compensate a party . . . for assuming costs . . . which would ordinarily be borne by the other party

It is not appropriate to characterize the language of the statute as a "prohibition" against recovering costs. Rather,

the statute provides a separate framework for addressing lease exchange issues, including the apportionment of costs.

The Departmental Manual, as already noted, requires that a charge be imposed for "services which provide special benefits or privileges." 346 DM 1.2 A (emphasis added). Negotiable agreements such as lease exchanges are by their very nature subject to bargaining and do not constitute "services." They do not fall under the Departmental mandate for cost recovery and there is thus no need to consider the exemptions to that mandate. Because lease exchanges are governed by an independent statutory framework, it is unnecessary to address them in this Opinion. BLM remains free, in its discretion, to recover some costs of processing exchanges by mutual agreement through adjustments to the relative values involved in the exchange transaction.

2. Exemptions Based on Non-Profit Activity

a. BLM also determined that "License to Mine - Coal" should be exempted from full cost recovery,³⁴ under exemption #4 in the Departmental Manual: "The recipient is engaged in a nonprofit activity designed for the public safety, health, or welfare." See Section III.C., supra.

The licenses to mine coal at issue here are governed by section 8 of the Mineral Leasing Act of 1920, which provides:

In order to provide for the supply of strictly local domestic needs for fuel, the Secretary of the Interior may [by regulation] issue limited licenses or permits to individuals or associations of individuals to prospect for, mine, and take for their use but not for sale, coal from the public lands without payment of royalty for the coal mined or the land occupied

30 U.S.C. § 208. The implementing regulations allow an individual, association of individuals, municipality, charitable organization, or relief agency to hold a license to mine. 43 C.F.R. § 3440.1-2.

BLM is correct that mining under such a license must be a non-profit activity (thus satisfying the first prong of the

³⁴ BLM's recommendation is: "Exempt from cost recovery, but retain current [\$10] fee." BLM Energy & Minerals Cost Recovery Analysis, List of Documents/Actions Determined By the Bureau To Be Exempt From Cost Recovery, unnumbered section at 4.

Departmental exemption). 43 C.F.R. § 3440.1-3(b) ("[c]oal extracted under a license to mine shall not be disposed of for profit.") However, mining under a license to mine does not necessarily fall within the second prong of the Departmental exemption, i.e., an "activity designed for the public safety, health, or welfare."

BLM apparently concluded that a license to mine was related to the public safety, health, or welfare by assuming that "[t]he intent and effect of the issuance of a license to mine is to serve a public purpose in instances of demonstrated hardship." BLM Energy & Minerals Cost Recovery Analysis. However, while this may be true in certain instances (e.g., in the case of a charitable organization or relief agency), a showing of hardship, or of public purpose, is not required by the statute or the regulations.

The only clear intent of the act is to "provide for the supply of strictly local domestic needs for fuel."³⁵ Individuals are apparently allowed to use such coal for their personal domestic fuel needs, without any demonstration that their usage relates to the public safety, health, or welfare. It is thus not appropriate to apply exemption #4 across-the-board to all license-to-mine applicants. Unless the applicant is in fact "engaged in a nonprofit activity designed for the public safety, health, or welfare," BLM has the authority to recover the costs of processing a license to mine.³⁶

b. BLM further determined that "Free Use Permit - Mineral Materials" should be exempted from cost recovery, also under exemption #4 in the Departmental Manual: "The recipient is engaged in a nonprofit activity designed for the public safety, health, or welfare." See Section III.C., supra.

Free use permits are governed by section 1 of the Materials Act of 1947, which provides:

[T]he Secretary is authorized in his discretion to permit any Federal, State, or Territorial agency, unit or subdivision, including municipalities, or any association

³⁵ This section, now codified at 30 U.S.C. § 208, was part of the original 1920 law.

³⁶ While the act grants the holder of such a license the right to mine coal without charge, this does not mean that the license must also be issued without charge. The processing of the license application is distinct from the underlying right to mine and is subject to cost recovery.

or corporation not organized for profit, to take and remove, without charge, materials and resources subject to this subchapter, for use other than for commercial or industrial purposes or resale.

30 U.S.C. § 601. The implementing regulations specify that a free use permit may be issued to a governmental entity only upon "a satisfactory showing to the authorized officer that these materials will be used for a public project." 43 C.F.R. § 3621.2(a). It is not clear, however, that "public project" is synonymous with the "public safety, health, or welfare" standard of the Departmental exemption. Nor is it evident that every project of "any association or corporation not organized for profit" necessarily qualifies for the "public safety, health, or welfare" exemption.

A statute providing that materials may be taken and removed without charge does not automatically mean that the permit to do so must also be issued without charge. BLM has the authority to require that applicants for free use permits make a showing that their activities are "designed for the public safety, health, or welfare" before exempting them from cost recovery.

3. Exemptions Based on Public Interest

BLM has recommended that 13 items be exempted from full cost recovery under the rationale of "public interest."³⁷ This is not a specific exemption in the Departmental Manual. Rather, BLM appears to be relying on exemption #5: "The bureau or office has some other rational reason for exempting the program, subject to the approval of the Office of Financial Management." 346 DM 1.2 C. See Section III.C., *supra*. In a memorandum to the BLM Director dated Nov. 6, 1992, the Director of Financial Management granted exemptions from full cost recovery for these 13 items, emphasizing that the twelve document categories for which partial costs were being recovered through user fees should be included

³⁷ These 13 items are: Exploration License - Coal; Exploration License - Nonenergy; Nonenergy Fringe Acreage Lease Application; Prospecting Permit Application; Coal Lease Modification; Nonenergy Lease Modification; Deferment of Assessment Work - Mining Claim; Adverse Claim - Mining Claim; Protest - Mining Claim; Stockraising Homestead Bond - Locatable Minerals; Oil and Gas Geophysical Exploration Permit (Alaska only); Geothermal Unit Review and Approval; and Geothermal Successor Unit Operator. BLM Energy & Minerals Cost Recovery Analysis, List of Exemption Requests, unnumbered section at 1.

in biennial reviews required by section 205 of the Chief Financial Officers Act of 1990. 31 U.S.C. § 902(a) (8).

Although BLM requested exemption of these items based on "public interest," the memorandum from the Director of Financial Management showed that he also considered other factors:

In addition to the justifications given, the Office of Financial Management calculates . . . that the estimated annual total cost of the 13 documents identified amounts to slightly over \$300,000 The activities involved do not constitute a material amount and further deliberations on the matter would neither be prudent nor cost effective.

These considerations relate to exemption #2: "The incremental cost of collecting the charges would be an unduly large part of the receipts from the activity." 346 DM 1.2 C.

At the time it sought exemptions for these actions, BLM may not have been aware of the applicable case law in the area of cost recovery. As already noted, the Tenth Circuit in Nevada Power concluded that FLPMA mandates consideration of each of the factors in section 304(b). 711 F.2d at 926-27 & n.10. See Sections III.D. & IV-A., supra, and Section V., infra. When BLM conducts its biennial review of these exemption requests,³⁸ it and the Office of Financial Management should bear in mind that a fee set under FLPMA cannot be based on a single reasonableness factor.

V. RULEMAKING OPTIONS

One of the FLPMA "reasonableness factors" that BLM must consider in promulgating cost recovery regulations is actual costs. The first step toward determining a "reasonable" cost for a service is therefore ascertaining the actual cost to BLM of providing that type of service. The next step is to take into consideration the actual cost along with all of the other reasonableness factors in determining the final fee.

The Nevada Power court made it clear that it is not acceptable simply to set fees, then point to general background statements as evidence of having considered the factors. The

³⁸ BLM is also required, by the terms of the Nov. 6, 1992, memorandum from the Director of Financial Management granting the exemptions, to recertify the exemption for Stock Raising Homestead Bonds five years from the date of that memorandum.

court rejected Interior's contention that the regulatory preambles at issue in that case reflected sufficient consideration of each of the reasonable factors. It found, instead, that Interior had provided no evidence of having given "the effective consideration that must be given each of the 304(b) factors." Indeed, the court noted that there was "no showing in the record that the factors other than actual costs were considered at all." 711 F.2d at 926-27.

Interior had stipulated that it gave no consideration to the "monetary value of the rights or privileges sought by the applicant." It justified this on the ground that the independent review of each application that would be required would violate the companion factor in FLPMA of "efficiency to the government processing involved." 711 F.2d at 926. The court rejected the contention, implicit in this argument, that consideration of one 304(b) factor could eliminate consideration of others.

The court in Nevada Power recognized that Interior has considerable latitude in choosing how to address the reasonableness factors: "Interior may, consistently with this opinion, determine and assess the reasonable costs of processing an individual application either by rulemaking or by case-by-case adjudication." 711 F.2d at 933. While finding it "difficult to envision in what manner [several of the reasonableness factors] may be calculated other than by a determination in an individual case," the court concluded that "Interior is free to do so by whatever means it finds practicable. The Department may, if it so chooses, use rulemaking as far as possible to achieve this result, bearing in mind only that 'the problem may be so specialized and varying in nature as to be impossible of capture within the boundaries of a general rule.'" 711 F.2d at 927, quoting Securities & Exchange Comm'n v. Chenery Corp., 332 U.S. 194, 203 (1947).

As BLM constructs a regulatory framework for cost recovery regulations for minerals document processing, it would do well to examine other frameworks in which the same considerations have been addressed. A prime example is the right-of-way cost recovery regulations promulgated in response to Nevada Power, at 43 C.F.R. Subpart 2808.

The right-of-way regulations combine a fee schedule for routine, predictable actions, with case-by-case determination of fees for complex actions. This type of framework charts a middle course between, on the one hand, the enormous labor involved if every application were to be individually reviewed in light of each of the reasonableness factors and, on the other hand, the seeming impossibility of assessing in advance combinations of

individual circumstances with reasonableness factors in a complex case.³⁹

Right-of-way applications are divided into five categories, depending on how much of the data necessary to comply with NEPA and other statutes are readily available and how many field examinations, if any, are required. 43 C.F.R. § 2808.2-1. The first four categories are assigned specific fees ranging from \$125 to \$925; the fee for the fifth, most complex category - Category V - is "as required."⁴⁰ 43 C.F.R. § 2808.3-1(a). In determining fees for applications falling into Category V, the authorized officer must give consideration to the section 304(b) factors on a case-by-case basis.⁴¹ 43 C.F.R. § 2808.3-1(e). An applicant under Category V may also request that the State Director reduce or waive reimbursable costs. 43 C.F.R. §§ 2808.3-1(c)(2) & 2808.5. The State Director may base this case-by-case determination on any of ten factors listed in the regulations. 43 C.F.R. § 2808.5(b).

BLM may be creative in structuring its regulatory framework, so long as it articulates how each of the reasonableness factors was taken into account.⁴² For example, BLM could consider

³⁹ The Nevada Power court was particularly skeptical regarding the possibility of assessing in a general rule "the monetary value of the rights or privileges sought", the 'portion of the cost incurred for the benefit of the general public interest rather than for the exclusive benefit of the applicant,' or 'the public service provided.'" 711 F.2d at 927.

⁴⁰ The right-of-way regulations provide that the authorized officer may periodically estimate the costs to be incurred by the United States in processing or monitoring, and the applicant must make advance payments based on those estimates. 43 C.F.R. § 2808.3-2(a). Excess payments are adjusted, and actual costs may be re-estimated if necessary. 43 C.F.R. §§ 2808.3-2(b) and (c). Minerals document processing regulations presumably should include similar advance payment provisions.

⁴¹ The factors as they relate to right-of-way cost recovery are defined at 43 C.F.R. § 2800.0-5. BLM may wish to use parts of these definitions as it defines the factors in the context of minerals management cost recovery.

⁴² "The touchstone of the Secretary's determination is reasonableness, and the Secretary is thus vested with considerable discretion in performing the weighing mandated by section 304(b), whether by rulemaking or adjudication. However, . . . the Secretary must provide a reasonably articulate record showing the bases of the determination...." Nevada Power, 711 F.2d at 927-28.

developing guidelines regarding how much weight should be accorded each of the reasonableness factors in individual determinations.⁴³ A factor such as "the monetary value of the rights or privileges sought by the applicant" could, when that value is greater than BLM's processing costs, be weighed as an enhancing factor, offsetting a diminution due to another factor such as "the public service provided." BLM might thus in appropriate cases recover all of its processing costs⁴⁴ after weighing the factors.⁴⁵ Rules could also be developed regarding actions which may at first appear to be routine, but have unusual costs that appear at a later stage.⁴⁶ BLM could decide in certain instances to structure a rule so that a new fee is phased in over a period of time, if it finds this arrangement to be indicated by the existence of "other factors relevant to determining the reasonableness of the costs," 43 U.S.C. § 1734(b). Such a phase-in would need to be supportable by BLM's determination that a particular group needs a period of adjustment. A phase-in is more defensible where fees would be sharply increased over current levels. BLM would, of course, need to articulate the reasoning behind such a decision.

A final consideration is that fees specifically set out in regulations with no provision for adjustment must remain at those levels, regardless of how obsolete, until new regulations are promulgated. We strongly recommend that BLM include a provision in its regulations mandating periodic adjustment of regulatory fees by reference to a price index, such as the Consumer Price

⁴³ Cf. 30 C.F.R. Part 845 (regulatory scheme for assessing civil penalties related to surface coal mining and reclamation operations, in which points are assigned to a number of factors, and penalties are calculated according to total number of points).

⁴⁴ See National Cable Television Ass'n v. F.C.C., 554 F.2d 1094, 1106 (D.C. Cir. 1976) (an agency cannot set a fee greater than "a reasonable approximation of the attributable costs . . . expended to benefit the recipient").

⁴⁵ The court in Nevada Power noted that: "We do not imply that Interior may never require an applicant to bear all of the costs of processing an application. We emphasize that before assessing any costs, Interior must give thorough consideration to the 304(b) factors." 711 F.2d at 925 n.6.

⁴⁶ The right-of-way regulations address one aspect of this problem by providing that during processing, the authorized officer may change a category determination and place an application in Category V at any time that it is determined that the application requires the preparation of an environmental impact statement. 43 C.F.R. § 2808.2-2(b).

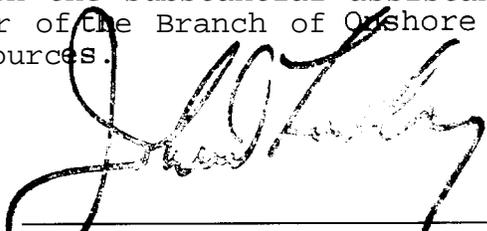
Index. In this way, fees can be increased so as not to lose ground to inflation, without the need for a new rulemaking.⁴⁷

BLM has considerable flexibility in designing a regulatory framework, but the case law makes clear that it must ensure that genuine consideration is given to each of the FLPMA reasonableness factors. The factors must be applied as objectively and systematically as reasonably possible so that similarly situated applicants are treated in a similar fashion. It is incumbent on BLM to preserve the record of its consideration of the factors so that this Office or the courts may review the rationale to ensure the cost recovery fees are legally justified.

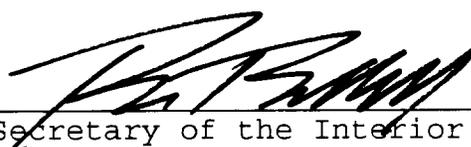
VI. CONCLUSION

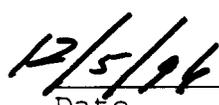
BLM has authority under applicable statutory and case law to recover costs of minerals document processing for a greater number of categories than it has proposed. Because it has this authority and because the Departmental Manual and OMB policy require that costs be recovered where possible, BLM should take steps to initiate cost recovery for such items, or obtain necessary exemptions pursuant to the Departmental Manual.

This Opinion was prepared with the substantial assistance of Barbara Fugate and Sharon Allender of the Branch of Onshore Minerals, Division of Mineral Resources.



John D. Leshy
Solicitor

I concur:  _____
Secretary of the Interior

 _____
Date

⁴⁷ See 60 Fed. Reg. 57071 (Nov. 13, 1995) (to be codified at 43 C.F.R. § 2803.1-2(d) (2)(i)) (BLM right-of-way rental schedules to be adjusted annually based on Consumer Price Index for All Urban Consumers (CPI-U)); 60 Fed. Reg. 41034 (Aug. 11, 1995) (proposed regulatory amendments of Minerals Management Service to increase filing fees for processing Outer Continental Shelf right-of-way applications, etc., and index those fees to CPI-U).