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COMMENT ON THE COAL LEASE FORFEITURE DECISION: THE HYPOTHETICAL CASE OF *UNITED STATES v. PEABODY COAL CO.*

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In February of 1973 Secretary of the Interior, Rogers Morton, announced a moratorium on federal coal leasing,¹ pending development of a plan to determine the size, timing, and location of future coal leases and their role in a national energy policy. A pause for thought was well advised: the leasing program has been denounced as environmentally and fiscally unsound,² "badly flawed,"³ and demonstrably inadequate.⁴ In the future, federal coal leases will be an integral part of any national energy policy: the Northern Plains' Fort Union Formation alone contains 40 percent of the estimated coal reserves in the United States, and 85 percent of that is publicly or Indian owned.⁵ Coal, specifically federally controlled coal, is the key to Project Independence, the self-sufficiency energy program announced by the President at the height of the 1973-74 oil embargo.⁶

Unaffected by Secretary Morton's moratorium were the federal leaseholders who, with foresight or plain good luck, secured their leases in earlier days under looser regimes. In this category are 463 leases accounting for 15 billion tons of publicly owned coal under 680,854 acres.⁷ These vast reserves represent approximately 35 times the amount of coal produced in the United States in 1973.⁸ The Peabody Coal Company was especially successful in these early

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1. 1 U.S. Dep't of the Interior, Draft Programmatic Environmental Statement on Proposed Federal Coal Leasing in the United States of America I-1 (1974).

2. U.S. Comptroller General, Report on Administration of Regulations for Surface Exploration, Mining and Reclamation of Public and Indian Coal Lands to the House Conservation and Natural Resources Subcommittee, B-148623, Aug. 10, 1972; U.S. Comptroller General, Report on Improvements Needed in Administration of Federal Coal-Leasing Program to the House Conservation and Natural Resources Subcommittee, B-169124, March 29, 1972.

3. Council on Economic Priorities, *Leased and Lost: A Study of Public and Indian Coal Leasing in the West 3* (1974) [hereinafter CEP Report].

4. T. Box, *Rehabilitation Potential of Western Coal Lands 105-06* (1974).

5. CEP Report, at 2.

6. 10 Weekly Comp. of Pres. Docs. 64 (Jan. 19, 1974).

7. *Id.*, at 2-3.

8. *Id.*, at 4.

sweepstakes, winning 49 leases covering 174,352 acres,⁹ an area almost three times the acreage of the second largest leaseholder (El Paso Natural Gas Co.) and nearly four times the size of the District of Columbia.¹⁰

Being first is by no means irrelevant under the law, whether one is first on the scene, first on the draw, or first in line for federal coal leases. Peabody and the other early leaseholders no doubt lay claim to vested rights, not easily undone retroactively. On the other hand, the early leasing, however favorable it may have been to the lessees, was not without legal obligations, notably those under the Mineral Lands Leasing Act of 1920.¹¹ Section 27 of the Act, in particular, should be of contemporary interest to Peabody and perhaps a few others. It reads, in pertinent part, as follows:

if any lands or deposits subject to the provisions of this chapter shall be . . . possessed, or controlled by any device . . . or in any manner whatsoever, so that they form a part of or are in any wise controlled by any combination in the form of an unlawful trust, with consent of the lessee . . . or form the subject of any contract or conspiracy in restraint of trade in the mining or selling of coal . . . the lease, option, or permit shall be forfeited by appropriate court proceedings.¹²

The lease forfeiture procedures are spelled out elsewhere in the Act.¹³

Stripped of nonessentials, section 27 mandates a forfeiture proceeding if the deposits under lease are in any way "controlled" by an "unlawful trust" or "form the subject of any contract or conspiracy in restraint of trade in the mining or selling of coal." The provision was the brainchild of the former Senator from Wisconsin, Robert La Follette.¹⁴ Its purpose seems quite clearly to deprive antitrust offenders of government support under the coal leasing program.

This Comment will (1) summarize the antitrust litigation that put Peabody in jeopardy of losing its leases under section 27, and (2) criticize the decision of the Justice Department to forego a test case, thus drastically narrowing by administrative fiat the coal lease forfeiture provisions of the Mineral Lands Leasing Act of 1920.

9. *Id.*, at 10, which contains a table of the top 15 leaseholders.

10. The acreage comparisons are borrowed from the letter of John Leshy, Natural Resources Defense Council, to Kent Frizzell, Solicitor, U.S. Dep't of the Interior, May 16, 1974. While acreage is not necessarily an accurate gauge of the value of the underlying coal deposits, neither is it irrelevant since every lease issued prior to the moratorium has been at industry's request. CEP Report, at 4.

11. 30 U.S.C. §§ 181-287 (1970).

12. 30 U.S.C. § 184(k) (1970).

13. 30 U.S.C. § 184(h) (1) (1970).

14. See note 26, *infra*.

THE ANTITRUST LITIGATION

Consideration of the possible loss of coal leases no doubt was far from the minds of the participants when discussions began in the mid-1960's looking toward the acquisition of the Peabody Coal Company by the Kennecott Copper Corporation, an integrated giant and number one producer in the highly oligopolistic copper industry. An agreement providing for the acquisition was signed in March of 1967, and the transaction was closed approximately one year later. In August of 1968, the Federal Trade Commission issued a complaint alleging the Kennecott-Peabody merger violated section 7 of the Clayton Act.¹⁵

Following six years of litigation, the theory of the FTC staff was vindicated. Reversing its examiner,¹⁶ the Commission in May of 1971 ruled that Kennecott was a substantial potential entrant into the coal industry, and thus the merger substantially lessened competition in violation of section 7.¹⁷ In September of 1972, the Tenth Circuit Court of Appeals affirmed, finding that "it was reasonable for the Commission to conclude that Kennecott would use its immense resources to gain for Peabody, already the number one producer in the industry, an even larger share of a market which promises to be a concentrated one in a relatively short time."¹⁸ The court concluded also: "The combined financial and other resources of the merging companies resulted in a merged company with a real potential to accelerate the already remarkable trend toward oligopoly."¹⁹ The acquisition, for these reasons, presaged a substantial lessening of competition in the coal industry. A divestiture was ordered.

Condemnation of the merger in the courts seemed, by definition, to spell an end to Peabody's coal leases. Were not the deposits under lease, by reason of the merger agreement, perforce controlled by an "unlawful trust" within the meaning of section 27? Did not the deposits leased from the Federal Government now "form the subject" of a contract or conspiracy "in restraint of trade in the mining or selling of coal?" Did not section 27 call for mandatory action ("shall be forfeited") to invalidate the leases?

In response to an inquiry in June of 1973,²⁰ the Department of Interior pointed out that Kennecott was seeking review of the dives-

15. 15 U.S.C. § 18 (1970). The complaint is set out at 78 F.T.C. 744 (1971).

16. The initial decision of the hearing examiner is set out at 78 F.T.C. 750 (1971).

17. 78 F.T.C. 913 (1971).

18. *Kennecott Copper Corp. v. FTC*, 467 F.2d 67, 78 (10th Cir. 1972), *cert. denied*, 416 U.S. 909 (1974).

19. *Id.*, at 79.

20. Letter from the author to the Hon. Rogers Morton, Secretary of the Interior, June 8, 1973.

titute decision in the Supreme Court and that therefore any action on the leases would be "premature."²¹ Certiorari was denied on April 1, 1974.²² Shortly thereafter, the Department of Justice advised Interior that it had decided against a proceeding to cancel the leases.²³ The principal justification was that the cancellation provisions became operative only upon a demonstration of Sherman Act violations as distinguished from the Clayton Act violations condemned by the *Kennecott-Peabody* case.

CRITICISM

There is a plausible though hardly compelling basis for the decision not to seek cancellation of the Peabody leases: section 7 of the Clayton Act is generally acknowledged as reaching incipient monopolies and trade restraints beyond the scope of the Sherman Act.²⁴ The use of the language in section 27—"unlawful trust" and "any contract or conspiracy in restraint of trade"—closely parallels the language of the Sherman Act.²⁵ An arguable case can be made that the legislative history confirms that the Congress intended to enforce the coal lease forfeiture provisions against Sherman Act offenders only.²⁶ The *Kennecott-Peabody* decision was explicitly a Clayton

21. Letter from Kent Frizzell, Solicitor, U.S. Dep't of the Interior to the author, July 5, 1973.

22. 416 U.S. 909 (1974).

23. Reported in letter from Roland G. Robinson, Jr., Acting Solicitor, U.S. Dep't of the Interior to John Leshy, Natural Resources Defense Council, June 14, 1974.

24. See *Brown Shoe Co. v. United States*, 370 U.S. 294, 318 n. 32 (1962).

25. Section one of the Sherman Act condemns "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce. . . ." 15 U.S.C. § 1 (1970). Section two makes criminal the conduct of "[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize. . . ." *Id.* § 2.

26. Section 27 was proposed by Senator Robert LaFollette as an amendment to the Mineral Lands Leasing Act on the floor during the Senate debate. Prior to the vote on the LaFollette Amendment, the debate reflected considerable hostility to monopoly in general and Standard Oil in particular. See, e.g., 58 Cong. Rec. 4174, 4249-50, 4590 (1919); *id.*, at 4620 (adopting amendment). There are expressions in the debate favoring the use of the coal forfeiture provisions as a preventive as well as a curative remedy. E.g., *id.*, at 7604: "the purpose [of the LaFollette Amendment] . . . is to prevent combinations. . ." (Sen. Evans); *id.*, at 7785: the LaFollette Amendment contains "provisions against the creation of a monopoly" (Sen. Anderson). But the dominant concern was to prevent use of the federal leasing program to fatten existing monopolies.

The LaFollette Amendment was based substantially on § 8a of the original Alaska Coal Leasing Act (Act of Oct. 20, 1914, Ch. 330, § 8a, 38 Stat. 741, 743 (1913-15)). That Act was debated in Congress at the same time as the Clayton Act, and thus a case can be made that the failure to include Clayton Act language (*i.e.*, "substantially to lessen competition") in the Alaska coal leasing provision was consistent with an intention to limit lease forfeitures to existing monopolies. Also instructive during the Senate debate on the Alaska Act is a colloquy between Senators Borah and Chilton regarding the Poindexter Amendment, which would give the Secretary of the Interior power to cancel leases without invoking the aid of a

Act section 7 case: the gravamen of the Government's objection to the merger was that Kennecott was poised to enter the coal business itself, a position sustained by the Tenth Circuit's conclusion that Kennecott was "a substantial potential competitive force." Kennecott hardly was an established monopolist in a business it had not yet heavily entered. And, from a policy point of view, if the merger was to be undone in any event it is fair to inquire why Peabody should suffer further by the loss of its federal coal leases.

All this is literally true—and dreadfully narrowminded; for a strong case can be made to support a forfeiture. The language of section 27 easily can accommodate the evil in the Peabody-Kennecott merger: the leased lands, as a result, arguably "form the subject" of a contract or conspiracy in restraint of trade "in the mining or selling of coal" since the merger hastened the trend toward oligopoly. Nice distinctions between Clayton Act and Sherman Act violations, moreover, should hardly be refined under legislation with the express purpose of denying the benefits of coal leases to illegal economic combinations. The legislative history discloses an unequivocal intention to supplement the usual antitrust remedies (such as divestiture) with forfeitures²⁷ and offers no firm guidance on whether to draw fine lines between the actual offenses of the Sherman Act and the incipient offenses of the Clayton Act. While a section 7 case in name, the Kennecott-Peabody combination conceivably could be viewed as a section 2 Sherman Act attempt or a conspiracy to monopolize.²⁸

court. Borah believed the Secretary should have the power. Chilton demurred, arguing there were no trusts in Alaska and were not likely to be any soon. Then why worry about the amendment, asked Borah:

If there are no trusts here, if there are no monopolies there, this provision which [Sen. Poindexter] . . . is seeking to have incorporated in the bill could not possibly affect anybody, because it only affects those who have formed a combination or a monopoly. It would not be any embarrassment to anybody carrying on a legitimate business or to those whom the Senator speaks of as developing the matter in its incipient stages.

51 Cong. Rec. 15686 (1914).

Senator Chilton asked: "I should like to ask the Senator whether he thinks the amendment adds anything to the Sherman law." *Id.*

Senator Borah responded: "No," adding, "I think it has about the same effect on the Sherman law as the Clayton bill." *Id.*

It is clear from the context that Senator Borah is denigrating the Clayton bill which was at that time under debate in the Senate. One interpretation of this colloquy is that the coal leasing provisions were not intended to reach incipient conduct thought to be beyond the Sherman Act. Another interpretation is that it was understood that the coal leasing forfeiture provisions could be activated to remedy any conduct condemned by the Sherman or Clayton Acts. On balance, the legislative history seems inconclusive.

27. See, e.g., 51 Cong. Rec. 14684 (1914).

28. The Commission specifically concluded that Kennecott was more than a potential entrant into the coal industry but indeed already was an "actual competitor" to Peabody. See Kennecott Copper Corp., 78 F.T.C. 913, 918 (1971). The ingredients of a Sherman Act

Nor should the decision whether to pursue a forfeiture ignore the unmistakable trend toward concentration among energy industries generally and the coal industry in particular.²⁹ Over the last decade, seven of the top ten noncaptive coal producers were acquired by other companies. Four of the acquisitions were by petroleum companies—Pittsburgh and Midway Coal by Gulf Oil (1963), Consolidation Coal by Continental Oil (1966), Island Creek by Occidental Petroleum (1968), and Old Ben Coal by Standard Oil of Ohio (1968).³⁰ The Federal Trade Commission points out that the coal-oil mergers are especially disturbing because they tend to eliminate competition in the important technological race to convert coal to liquid and gaseous fuels.³¹ Congressional hearings have explored the theory that Consolidation Coal's interest in pursuing coal gasification waned considerably following the merger with Continental.³²

It is undisputed that the nation's present energy needs demand technological innovation and competition—not retardation—from the coal and other energy industries. Upon this general understanding Congress is moving toward the adoption of major energy research and development legislation,³³ which will pump heavy funding into technologies on the threshold of wide scale adoption—coal gasification and liquifaction, stack gas controls for sulfur oxides, oil shale, and superconductors. It is a sad commentary on progress in the field to acknowledge that industries expected to bring to commercial fruition many of the future technologies deemed indispensable have drawn charges of deliberate technological suppression.³⁴

Against this background, one can make a case for more antitrust, not less, for what ails the coal industry. Future federal coal lease-

violation were perhaps present. See *United States v. First Nat'l Bank & Trust Co.*, 376 U.S. 665, 672-73 (1964): "Where . . . the merging companies are major competitive factors in a relevant market, the elimination of significant competition between them constitutes a violation of § 1 of the Sherman Act." See also Cooper, *Attempts and Monopolization: A Mildly Expansionary Answer to the Prophylactic Riddle of Section Two*, 72 Mich. L. Rev. 375 (1973-74).

29. See J. Ridgeway, *The Last Play: The Struggle to Monopolize the World's Energy Resources* 207 (1973).

30. See *Hearings on Concentration by Competing Raw Fuel Industries in the Energy Market and Its Impact on Small Business Before the Subcomm. on Special Small Business Problems of the House Comm. on Small Business*, 92d Cong., 1st Sess., pt. 1, at 12 (1971) [hereinafter cited as *1971 Hearings*].

31. Federal Trade Comm'n, *Economic Report on Corporate Mergers* 311-12 (1969).

32. See *1971 Hearings*, pt. 1, at 15-22.

33. S. 1283, 93rd Cong., 1st Sess. (1973). See *Hearings on S. 357 Before the Senate Comm. on Commerce*, 93d Cong., 1st Sess., ser. 93-22 (1973). [S. 1283 has been enacted as the Federal Nonnuclear Energy Research and Development Act of 1974, Pub. L. No. 93-577, 88 Stat. 1878, Ed.]

34. For a summary, see the testimony of the author in *Hearings on S. 1283 Before the Senate Comm. on Interior & Insular Affairs*, 93d Cong., 1st Sess., ser. 93-13, at 540 (1973).

holders, according to the dogma, should be technological innovators, sensitive to the environment, to price competition, to consumer needs, and to the Indian tribes with which many of them must deal.³⁵ Monopolists, even the "incipient" ones, are known rather to prefer technological sloth, noncompetitive pricing, and environmental and social irresponsibility. The decision to refrain from moving against Peabody under section 27 of the Mineral Lands Leasing Act was more than a close and technical case of deciding whether to prosecute. It was a practical repudiation of the congressionally expressed belief that the benefits of competition are to be insisted upon in the federal coal leasing program.³⁶

How should one choose between the narrower interpretation letting Peabody off the hook and the broader one invalidating the leases? Simply, let the courts decide. The decision not to prosecute is an unreviewable decision, and a final one. It was made, insofar as the public is aware, without benefit of brief, argument, and considered decision. It was made certainly without benefit of judicial assistance. The issue, like other important ones before and since, fell victim to an unsolved administrative kidnapping. It is a cliché, albeit a reliable one, that sometimes the hard cases never get to court.

35. Peabody Coal Company is presently embroiled in a continuing dispute with the Northern Cheyenne Tribe over the legality of leases and exploratory permits for coal development on the reservation. Letter from Steven H. Chestnut, Attorney for the Tribe, to author, Aug. 9, 1974.

36. In addition to § 27, the Mineral Lands Leasing Act contains other measures intended to assure competition in the leasing program. *E.g.*, 30 U.S.C. § 184(a) (1970) (limiting a lessee's leased acreage within one state to 46,080 acres); *id.*, § 202 (forbidding a corporation operating a common-carrier railroad from holding a coal lease or permit).