State Enforcement of Federal Oil and Gas Leases Issued Pursuant to the Mineral Lands Leasing Act of 1920: Third Party Beneficiaries or Implied Rights of Action

Donald Salcito

The energy crisis in the United States has produced strong public suspicion that domestic natural gas and oil producers are holding down production and sales to force prices up.[1] A full one-fourth of all natural gas produced in the United States comes from land leased by the federal goverment[2] under terms obligating the leaseholders to exercise due diligence in development and marketing.[3] In February 1977, in response to allegations of resource hoarding,[4] the Department of Interior, under Secretary Cecil Andrus, ordered several initial investigations.[5] These preliminary studies indicated that the output of four out of the five fields studied was thirty-six percent below the maximum potential production rate, and that many readily drillable gas reservoirs

1. *A Surplus of Suspicion*, TIME, February 21, 1977, at 60; *Facing Double Trouble*, TIME, February 28, 1977, at 47; *'Hidden Gas': Fresh Doubts*, NEWSWEEK, February 28, 1977, at 66; *The Energy Problem*, April 18, 1977, *reprinted in The President's Energy Program*, SENATE COMM. ON ENERGY AND NATURAL RESOURCES, 95th Cong., 1st Sess., Publication No. 95-16, at 2 (Comm. Print 1977).

2. *A Surplus of Suspicion*, *supra* note 1, at 61. At least 14% of all domestic oil produced in 1963 was produced on federal land. *Id.* The Department of the Interior is authorized to administer such leases under the Mineral Lands Leasing Act of 1920, 30 U.S.C. §§ 181-287 (1976).

3. *See* PUBLIC LAND LAW REVIEW COMMISSION, LEGAL STUDY OF THE FEDERAL COMPETITIVE AND NONCOMPETITIVE OIL AND GAS LEASING SYSTEM, pt. III, Form No. 3120-19, § 2(j), at 1228, and Form No. 3120-7, § 2(j), at 1232 (1969). [hereinafter cited as STUDY OF LEASING OPTIONS]; 43 C.F.R. § 3107.3-1 (1978).

4. Certain gas utilities in the northeast, armed with United States Geological Survey data, charged that leaseholders in the Gulf of Mexico area could have produced eight trillion more cubic feet of gas, which is one-third of current United States consumption. *'Hidden Gas': Fresh Doubts*, *supra* note 1, at 66.

5. *Id. See Allegations of Withholding of "Behind-the-Pipe" Natural Gas Reserves, Hearings Before the Subcomm. on Oversight and Investigations of the House Comm. on Interstate and Foreign Commerce*, 95th Cong., 1st Sess. 2 (1977); *Natural Gas Supplies: Declining Deliverability at Bastian Bay Field, La., Report by the Subcomm. on Oversight and Investigations of the Comm. on Interstate and Foreign Commerce*, 94th Cong., 1st Sess. (1975); *Natural Gas Supplies: Declining Deliverability at Garden City, La., Report by the Subcomm. on Oversight and Investigations of the Comm. on Interstate and Foreign Commerce*, 94th Cong., 1st Sess. (1975).

remained untapped.[6] This less than maximum output may indicate federal lease violations. Two types of lease violations may occur: oil producers may "sit on reserves" by not pumping wells they know are capable of producing, or they may not drill diligently enough to locate reserves on lease land.[7] Both of these violations not only breach express conditions of leases requiring development to be regulated in the public interest,[8] but also tend to keep supply low and demand high.[9]

The ramifications of these violations are especially important to American energy consumers in light of the energy crisis.[10] Domestic oil consumption far exceeds domestic production.[11] A radical decline in mineral fuel production has led to shortages of available energy[12] and to significantly higher fuel costs.[13] The United States, however, may well have a sufficient supply of energy to meet future needs if undeveloped reserves are utilized.[14] Therefore, private companies must

---

6. *Facing Double Trouble, supra* note 1, at 47. Andrus announced that these results raised enough questions to warrant a full scale investigation of production practices. *Id.*

7. *See generally Allegations of Withholding of "Behind-the-Pipe" Natural Gas Reserves, supra* note 5.

8. *See* Sample lease terms for oil and gas leases in STUDY OF LEASING OPTIONS, *supra* note 3, at 1228, 1231-32.

9. *See Allegations of Withholding of "Behind-the-Pipe" Natural Gas Reserves, supra* note 5, at 1-2. *See also Natural Gas Supplies: Declining Deliverability at Bastian Bay Field, La., supra* note 5, at 1-2. They also deprive the government of royalty revenue. *See* 30 U.S.C. § 223 (1976); 43 C.F.R. §§ 3103, 3108.2-.3 (1978).

10. *See The President's Energy Program, supra* note 1, at 1. This problem has been compounded recently by the crisis in Iran. For example, Standard Oil Co. of California has recently reported "very tight" crude oil supplies, about 10% short of its daily needs, due partially to the present turmoil in Iran. Wall St. J., Feb. 6, 1979, at 11, col. 1. The Iran crisis is so acute that the Energy Department recently stated it will consider restricting the availability of fuel sales, possibly by imposing full-fledged gasoline rationing. *See id.* at 4, col. 3.

11. Since reaching its peak in 1956, oil and gas production in the United States has declined approximately 50%. At the same time internal consumption has doubled. Lay, *National Energy Policy at the Crossroads,* 19 ROCKY MTN. MIN. L. INST. 19, 22 (1974). *See* W. DUPREE, JR. & J. CORSENTO, U.S. ENERGY THROUGH THE YEAR 2000, at 16 (1972), which predicts oil consumption will more than double by the year 2000. *See The President's Energy Program, supra* note 1, at 3, in which Mr. Carter warned that if the American people do not act, energy consumption will increase 33% by 1985. *See generally* FEDERAL ENERGY ADMINISTRATION, NATIONAL PETROLEUM PRODUCT, AND SUPPLY AND DEMAND 1976-1978 at 97-152 (1976); FEDERAL ENERGY ADMINISTRATION, PROJECT INDEPENDENCE REPORT 153-99 (1974).

12. Energy Crisis: Statement by the President Announcing Intention to Deal with the Crisis, 13 WEEKLY COMP. OF PRES. DOC. 91 (Jan. 24, 1977).

13. The average price per barrel of crude oil at the well has risen in New York from $5.60 in 1973 to $12.22 in 1975, and in Pennsylvania from $5.62 to $12.15. U.S. DEP'T OF INTERIOR, BUREAU OF MINES, MINERAL INDUSTRY SURVEYS: ANNUAL PETROLUEM STATEMENT: 1974 (1976). Prices have risen as the United States has become increasingly dependent upon the Organization of Petroleum Exporting Countries [OPEC] for its supply. The United States spent $3.7 billion six years ago for imported oil, $36 billion in 1976, and in 1977 it was estimated at $45 billion. *The President's Energy Program, supra* note 1, at 3.

14. *See* Lay, *supra* note 11, at 24-25 (the United States has enough oil and natural gas to last 80 to 90 years at current consumption rates and enough coal to last 650 years, according to the United States Geological Survey). Recently a Standard Oil of California spokesman reportedly stated:

> It is absolutely imperative to maximize domestic oil and gas supplies during the next 10 to 15 years as we develop alternate energy sources. Much more oil and gas can be found in the United States and much more oil can be recovered in existing fields. What is

be urged to aggressively develop these resources.[15]

The public lands are one possible area for development.[16] In 1976, over 87 million acres of public and acquired land leased under the Mineral Lands Leasing Act of 1920 [M.L.L.A.][17] yielded 167 million barrels of petroleum and 998 billion cubic feet of natural gas.[18] Although the exact amount of oil and gas on public lands is unknown, this large yield may portend even larger development in the future.[19] The importance of the public lands to the future energy supply augments the seriousness of allegations that gas and oil are not being produced to their greatest potential by holders of federal leases.[20] One possible reason that federal leaseholders may be violating the lease is the lack of adequate federal enforcement, management, and personnel.[21]

This Note will examine a possible solution to the current oil and gas problem. The proposed solution is to give the states the power to enforce federal leases issued pursuant to the M.L.L.A. and thus, act as an added enforcement arm to the Secretary of the Interior. The states may pursue this solution in two ways.

First, states should be allowed to enforce leases under a third party beneficiary theory. This theory should apply because the states are the intended beneficiaries of every federal oil and gas lease issued pursuant to the M.L.L.A. This Note will examine the legislative history of the Act as well as lease provisions in order to demonstrate the requisite intent to benefit the states. The concept of third party beneficiary con-

---

> needed is a program which stresses both domestic energy development and energy conservation . . . .

Wall St. J., Oct. 14, 1977, at 20, col. 3. President Carter, in a recently televised address, may have added credibility to these statements since he proposed to phase out price controls on domestically produced crude oil, arguing that decontrol will spur domestic production. *See* Wall St. J., April 6, 1979, at 3, col. 1.

15. *See* authorities cited in note 14 *supra*.

16. Public lands for the purpose of this article shall be defined as all land federally owned and subject to the Mineral Lands Leasing Act. *See* 30 U.S.C. § 181 (1976).

17. Act of Feb. 25, 1920, ch. 85, 41 Stat. 437 (codified as amended at 30 U.S.C. §§ 181-287 (1976)).

18. U.S. DEP'T OF INTERIOR, BUREAU OF LAND MANAGEMENT, PUBLIC LAND STATISTICS, tables 73 & 74, at 104-05, and tables 77 & 78, at 107-08 (1976).

19. *See* Wall St. J., Oct. 14, 1977, at 20, col. 3.

20. *See* PUBLIC LAND LAW REVIEW COMMISSION STUDY REPORT, No. 21, v. 9, at 48 (1970).

21. 121 Cong. Rec. S1242 (daily ed. Jan. 30, 1975) (statement by Sen. Jackson), *reprinted in* COMMITTEE ON ENERGY AND NATURAL RESOURCES, 95TH CONG., 2D SESS., LEGISLATIVE HISTORY OF THE FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976 at 64 (1978) [hereinafter cited as LEGISLATIVE HISTORY OF F.L.P.M.A.]. The Department of the Interior classified this situation as "alarming" and described the lack of enforcement power as follows:

> The Bureau's present capabilities to enforce the lawful use of natural resources lands which it administers is almost non-existent. Unlike other Federal agencies . . . , the Bureau generally lacks authority to require persons using its land to follow rules and regulations which have been issued for the proper use and management of these Federal lands.

S. REP. No. 94-583, 94th Cong., 1st Sess. 58 (1975), *reprinted in* LEGISLATIVE HISTORY OF F.L.P.M.A., *supra*, at 123.

tracts will then be discussed to show the applicability of the concept to federal oil and gas leases.

The second theory by which states may enforce maximum recovery of oil and gas from federal lands is an implied right of action under the M.L.L.A. Such an implied right of action might be found for the following reasons: the states are the intended beneficiaries of the M.L.L.A.; Congress implicitly intended that the states should enforce the act because of the nature of their relationship to the land; providing the states with such a cause of action is consistent with the underlying purpose of the statute; and finally, such a cause of action is traditionally not a question of state law. As with the third party beneficiary theory, the discussion of the implied right of action theory will include analysis of such factors as the nature of the M.L.L.A., the royalty provisions in the act, its legislative history, contract law as it relates to intended beneficiaries of federal acts, and congressional intent to provide the states with such a favored status.

MINERAL LAND LEASING ACT OF 1920

In August of 1919, Senator Reed Smoot of Utah introduced a bill to the Committee on Public Lands providing for a federal public land leasing system.[22] After lengthy discussion and debate, Congress enacted the bill into law as the Mineral Lands Leasing Act of 1920.[23] The Act established an extensive leasing system for the development of minerals under the public lands.[24] It applies to most federally owned lands,[25] including land acquired by the United States subsequent to the enactment of the M.L.L.A.[26]

The purpose of the Act is to promote oil, gas, and other mineral development in the public domain[27] through private enterprise,[28] and

22. S. 2775, 66th Cong., 1st Sess., 58 CONG. REC. 3886, 4054-57 (1919).

23. Mineral Lands Leasing Act of 1920, ch. 85, 41 Stat. 437 (codified as amended at 30 U.S.C. §§ 181-287 (1976)).

24. 30 U.S.C. § 181 (1976). Regulations governing federal oil and gas leasing can be found at 43 C.F.R. §§ 3100-3109.5-2 (1978) (governing leasing), and 30 C.F.R. §§ 221-221.67 (1978) (operating regulations).

25. *See* 30 U.S.C. § 181 (1976). The Act is subject to a few exceptions, such as lands acquired under the Appalachian Forest Act, 16 U.S.C. §§ 480, 500, 513-519, 521, 552, 563 (1976), lands within incorporated towns and villages, national parks and monuments, and lands within naval petroleum and oilshale reserves. *See* 30 U.S.C. § 181 (1976).

26. *See* 30 U.S.C. §§ 351-352 (1976).

27. *See* California Co. v. Udall, 296 F.2d 384, 388 (D.C. Cir. 1961); S. 2775, 66th Cong., 1st Sess., 58 CONG. REC. 3886 (1919).

28. Harvey v. Udall, 384 F.2d 883, 885 (10th Cir. 1967) (quoting SENATE SUBCOMM. OF THE COMM. ON INTERIOR AND INSULAR AFFAIRS, THE INVESTIGATION OF OIL AND GAS LEASE PRACTICES, 84th Cong., 2d Sess. 2 (1957)). To further encourage exploration and development of oil and gas reserves, the Congress amended the Act in 1954 and 1960. These amendments were adopted in response to the dangerous decline in domestic production. *See* H.R. REP. No. 2238, 83d Cong., 2d Sess. 1, *reprinted in* [1954] U.S. CODE CONG. & AD. NEWS 2695, 2695-96; S. REP. No. 1549, 86th Cong., 2d Sess. 1, 2, *reprinted in* [1960] U.S. CODE CONG. & AD. NEWS 3313, 3314-

"to obtain for the public a reasonable financial return on assets that 'belong' to the public."[29] This purpose was carried into effect soon after the Act's passage.[30] Production in the oil fields increased rapidly, and new claim stakes and validation notices blossomed overnight.[31]

Although the public is the general beneficiary of the Act,[32] the states were intended to be the direct beneficiaries.[33] Some benefits the states receive include royalty payments on all oil and gas produced from the leased lands.[34] It is arguable that through these benefits Congress intended the states to be third party beneficiaries of every lease issued pursuant to the M.L.L.A.[35] The law governing federal oil and gas leases substantiates this theory.

The Federal Mineral Lease

A federal oil and gas lease[36] issued pursuant to the M.L.L.A. provides that the lessee must comply with the provisions of the Act, the regulations thereunder, and the lease.[37] The leases are controlled by the Secretary of the Interior[38] and rent for a nominal fee.[39] Each lease requires the lessee to pay the rent and royalties from the lease to the United States.[40] Fifty percent of the money collected by the United States Treasury from public land sales, bonuses, royalties, and rentals

---

15. These amendments were intended to remove obstacles to exploration and spur greater activity in locating and developing resources. The increased production of Middle East oil and the decreased production of domestic fields helped spur the passage of these amendments. *Id.* at 3315.

29. California Co. v. Udall, 296 F.2d 384, 388 (D.C. Cir. 1961).

30. J. ISE, THE UNITED STATES OIL POLICY 352-53 (2d reprint 1928).

31. *See id.* at 355 (quoting OIL & GAS J., March 5, 1900, at 94).

32. During discussion of the legislation in the House of Representatives, the bill was said to benefit the "whole country in general, and the West in particular," 59 CONG. REC. 2711 (1920) and to mean "homes and occupations for millions of people and vast benefits to the entire nation." *Id.* at 2712. The congressional intention to benefit the public has been implemented through the many provisions in the leases and regulations promulgated under the M.L.L.A. The rate of prospecting and developing, and the quantity and rate of production from the land are subject to control in the public interest by the Secretary as provided in the leases. STUDY OF LEASING OPTIONS, *supra* note 3, pt. III, Form No. 3120-19, § 4, at 1229, and Form No. 3120-7, § 4, at 1234. Also, the Secretary may revoke or change a drilling production lease in order to protect the public interest. 43 C.F.R. § 3105.1 (1978).

33. The statute provides that the states would receive 50% of the receipts from sales, bonuses, royalties, and rentals from the leases. 30 U.S.C. § 191 (1976).

34. *Id.*

35. *See* text & notes 82-100 *infra.*

36. Under the M.L.L.A. there are two types of oil and gas leases, competitive and noncompetitive. 30 U.S.C. § 226 (1976). A competitive lease is issued if the land to be leased is within a producing oil and gas field. These leases are given to the highest bidder by competitive bidding. *Id.* § 226(b). A noncompetitive lease is issued if the land to be leased is not within a producing oil and gas field. The first qualified applicant is entitled to the lease without competitive bidding. *Id.* § 226(c). *See* Barnhill, *The Mineral Leasing Act: A Guide*, 33 ROCKY MTN. L. REV. 267, 271 (1961).

37. *See* STUDY OF LEASING OPTIONS, *supra* note 3, pt. III, Form No. 3120-19, § 7, at 1229, and Form No. 3120-7, § 7, at 1235.

38. *See* 30 U.S.C. § 226(a) (1976).

39. *See id.* § 223.

40. *See* STUDY OF LEASING OPTIONS, *supra* note 3, pt. III, Form No. 3120-19, § 2(d), at 1227, and Form No. 3120-7, § 2(d), at 1231; 30 U.S.C. § 226 (1976).

is paid each year to the state from which the respective fees were collected.[41] An additional forty percent of the money collected from such property goes into the reclamation fund,[42] which indirectly benefits these same states.[43] The sole exception to this scheme is Alaska which receives a full ninety percent.[44]

The leases specifically provide that the lessee must exercise reasonable diligence in drilling for and producing oil and gas[45] to achieve maximum ultimate recovery.[46] One of the primary purposes of this lease is to maximize revenues for the lessor.[47] But royalty revenues, the cream of the leasing system, are assessed only upon production.[48] Since the states receive these revenues, they have a strong economic interest in enforcing compliance of the leases' due diligence clause. The substantive law providing states with an appropriate vehicle for such enforcement derives from contract law.

THE THIRD PARTY BENEFICIARY THEORY

The question of state third party beneficiary rights arising out of federal mineral leases is novel. The novelty of this approach may be attributed, perhaps, to a relatively recent phenomenon, the energy crisis. Yet the mineral lease is the basic contract of the petroleum industry,[49] and the government's contractual rights and obligations as a mineral lessor of public lands are no different from those of any other lessor.[50] Since a federal oil and gas lease is a contract,[51] federal courts

---

41. *See* 30 U.S.C. § 191 (1976).

42. *Id.*

43. *Hearings on § 1901, Outer Continental Shelf Act, Before the Senate Comm. on Interior and Insular Affairs*, 93d Cong., 1st Sess. 152 (1973) (statement of Sen. Malone).

44. *See* 30 U.S.C. § 191 (1976). Alaska receives 90% of such receipts because it is not a "reclamation state" and therefore not a beneficiary of expenditures from the reclamation fund. *See* PUBLIC LAND LAW REVIEW COMMISSION, USERS FEES AND CHARGES FOR PUBLIC LANDS AND RESOURCES 84 (1969).

45. *See* STUDY OF LEASING OPTIONS, *supra* note 3, pt. III, Form 3120-19, § 2(j), at 1228 and Form 3120-7, § 2(j), at 1232. Actual drilling operations must be conducted in a serious effort to find oil or gas, given existing knowledge of geologic and other pertinent facts. 43 C.F.R. § 3107.2-2 (1978). Actual drilling operations include the physical drilling, testing, completing, or equipping of a well for production. *Id.* § 3107.2-1.

46. *Cf.* 30 C.F.R. § 221.18 (1978) (requiring the lessee to comply with the terms of the lease and the Secretary's regulations); *id.* § 221.4 (calling for the maximum ultimate recovery of oil and gas).

47. *See* Standard Oil Co. v. Hickel, 317 F. Supp. 1192, 1195 (D. Ala. 1970), *aff'd*, 450 F.2d 493 (9th Cir. 1971); Marathon Oil Co., 81 Interior Dec. 447, 452 (1974); Atlantic Richfield Co. v. Marathon Oil Co., 81 Interior Dec. 457, 461 (1974).

48. *See* 30 C.F.R. §§ 221.48-221.52 (1978); 43 C.F.R. §§ 3103.3-4-3103.36 (1978).

49. S. GLASSMIRE, LAW OF OIL AND GAS LEASES AND ROYALTIES 55 (2d ed. 1938).

50. Standard Oil Co. v. Hickel, 317 F. Supp. 1192, 1197 (D. Alas. 1970), *aff'd*, 450 F.2d 493 (9th Cir. 1971); United States v. General Petr. Corp., 73 F. Supp. 225, 234 (S.D. Cal. 1946), *aff'd sub nom.* Continental Oil Co. v. United States, 184 F.2d 802 (9th Cir. 1950).

51. Standard Oil Co. v. Hickel, 317 F. Supp. 1192, 1197 (D. Alas. 1970), *aff'd*, 450 F.2d 493 (9th Cir. 1971). *Accord*, Marathon Oil Co. v. Kleppe, 407 F. Supp. 1301, 1306 (D. Wyo. 1975); Marathon Oil Co., 81 Interior Dec. 447, 450 (1974).

have generally applied the legal rules applicable to contracts between private parties.[52] A well-established principle of contract law allows a third party to enforce certain contractual rights.[53] This principle has been applied in other areas where the government, pursuant to congressional acts, contracted for the benefit of third parties.[54]

In government contracts, where third parties claim a right under a contract that incorporates a federal statute or is made pursuant to a federal statute, the intent to benefit test is generally utilized.[55] That test gives a third party the right to enforce the contract if

> recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and either (a) the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary; or (b) the promise manifests an intention to give the beneficiary the benefit of the promised performance.[56]

Government contracts made pursuant to or incorporating federal statutes are presumably entered into to implement statutory objectives.[57] Therefore, legislative history can be used to determine the government's intention in making contractual promises pursuant to a federal statute.[58] Whenever a federal statute evinces a congressional

---

52. *See* Marathon Oil Co. v. Kleppe, 407 F. Supp. 1301, 1306 (D. Wyo. 1975); Standard Oil Co. v. Hickel, 317 F. Supp. 1192, 1197 (D. Alas. 1970), *aff'd*, 450 F.2d 493 (9th Cir. 1971).

53. Dillon v. AFBIC Dev. Corp., 420 F. Supp. 572, 581 (D. Ala. 1976); Lemon v. Bossier Parish School Bd., 240 F. Supp. 709, 713 (W.D. La. 1965), *aff'd*, 370 F.2d 847 (5th Cir.), *cert. denied*, 388 U.S. 911 (1967); RESTATEMENT (SECOND) OF CONTRACTS, § 133 (Tent. Draft No. 3, 1976).

54. Dillon v. AFBIC Dev. Corp., 420 F. Supp. 572, 581 (D. Ala. 1976) (prospective home buyers were third party beneficiaries of real estate agent's nondiscrimination agreement with governmental agencies and therefore entitled to enforce it). *See* Harlib v. Lynn, 511 F.2d 51, 55-56 (7th Cir. 1975) (applying third party contract rules to lessees of a low income, federally subsidized housing project); Feldman v. United States Dep't of Hous. & Urban Dev., 430 F. Supp. 1324, 1328 (D. Pa. 1977) (discussing third party contract rules in connection with tenants of a federally financed apartment project).

55. *See* Martinez v. Socoma Co., 11 Cal. 3d 394, 401-02, 521 P.2d 841, 844-45, 113 Cal. Rptr. 585, 589-90 (1974) (plaintiffs were merely incidental beneficiaries of a contract and therefore had no right to recovery); Shell v. Schmidt, 126 Cal. App. 2d 279, 290-91, 272 P.2d 82, 89 (1954), *cert. denied*, 348 U.S. 916 (1955). In *Shell*, a contractor had an agreement with the government to meet certain specifications in the construction of homes for veterans in exchange for priority for building material. Veterans who had purchased homes from the contractor were held to be third party beneficiaries of the contract and were allowed to enforce the agreement. *See also* Bailey v. Iowa Beef Processors, Inc., 213 N.W.2d 642, 645-46 (Iowa 1973), *cert. denied*, 419 U.S. 830 (1974) (plaintiffs were not intended beneficiaries of a consent decree entered into pursuant to the Clayton Antitrust Act, 15 U.S.C. §§ 12, 13, 14-21, 22-27 (1976)).

56. *See* RESTATEMENT (SECOND) OF CONTRACTS § 133, Comment (a) at 7 (Tent. Draft No. 4 1968).

57. *See* Note, *Martinez v. Socoma Companies: Problems in Determining Contract Beneficiaries' Rights*, 27 HASTINGS L.J. 137, 150 n.99 (1975).

58. *See* Weinberger v. New York Stock Exch., 335 F. Supp. 139, 144 (S.D.N.Y. 1971); Jones, *Legal Protection of Third Party Beneficiaries: On Opening Courthouse Doors*, 46 U. CIN. L. REV. 313, 343 (1977); Note, *supra* note 57, at 150-51 & nn.99-100. *Cf.* Lemon v. Bossier Parish School Bd., 240 F. Supp. 709, 713 (W.D. La. 1965), *aff'd*, 370 F.2d 847 (5th Cir.), *cert. denied*, 388 U.S. 911 (1967) (black parents were allowed to assert a third party beneficiary interest arising out of a federal contract intended to prohibit discrimination against a local school board); Shell v. Schmidt, 126 Cal. App. 2d 279, 290, 272 P.2d 82, 87 (1954), *cert. denied*, 348 U.S. 916 (1955) (a

recognition that certain persons will receive a benefit in order to effectuate a statutory scheme, such persons are arguably intended beneficiaries.[59] This result is demonstrated in *Lemon v. Bossier Parish School Board*,[60] where eight black children were held to be the intended beneficiaries of a United States government contract with a local school board.[61] The government had contracted with the school system to provide education for the children of military parents stationed at Barksdale Air Force Base.[62] The contract provided that the children's education would be the same as that provided to Louisiana children in accordance with Louisiana laws which prohibited segregation.[63] The school system, however, placed the eight black children in all-black schools.[64] Their parents brought an action on behalf of their children claiming they were third party beneficiaries of the government contract.[65] The court read the contract in light of state law, prevailing civil rights laws, and the intent of Congress in passing the Civil Rights Act.[66] Since the goal of the statute was to protect children of Air Force parents from discriminatory education in segregated state schools, the court reasoned that they were the intended beneficiaries of both the statutes and the contract and thus could maintain a third party beneficiary action.[67]

---

contract provision, sketchy or ambiguous by itself, could be interpreted by looking at the congressional purpose if it were made pursuant to a federal statute). Legislative intent has been used to deny a cause of action in various circumstances. The author of Note, *supra* note 57, at 151 n.103 cites the following as examples: Control Data Corp. v. IBM Corp., 306 F. Supp. 839, 845-48 (D. Minn. 1969), *aff'd*, 430 F.2d 1277 (8th Cir. 1970) (competitors are not intended beneficiaries of consent decrees made pursuant to § 7 of the Clayton Act); City & County of San Francisco v. Western Air Lines, Inc., 204 Cal. App. 2d 105, 120, 22 Cal. Rptr. 216, 225 (1962) (carriers are not intended beneficiaries of assurances made pursuant to the Federal Airport Act of 1946); Bailey v. Iowa Beef Processors, Inc., 213 N.W.2d 642, 646 (Iowa 1973), *cert. denied*, 419 U.S. 830 (1974) (employees are not third party beneficiaries of an agreement resulting in a consent decree made pursuant to § 7 of the Clayton Act). The court looks to the statute's purpose to determine whether third parties were intended to be benefitted. *See* Shell v. Schmidt, 126 Cal. App. 2d 279, 290, 272 P.2d 82, 89 (1954), *cert. denied*, 348 U.S. 916 (1955); Note, *supra* note 57, at 150-52. In United States *ex rel.* Johnson v. Morley Constr. Co., 98 F.2d 781, 788-89 (2d Cir. 1938), the Veterans Administration contracted with the Morley Construction Company to erect a hospital. Morley then entered into a subcontract with one Giamberardino to "furnish all unskilled labor." *Id.* at 788. The workmen, however, were paid wages below the prevailing rate, violating both a federal statute and an executive order requiring all public contracts or subcontracts for public buildings to pay the prevailing rate. *Id.* One of the workmen brought suit against Giamberardino for the difference between his wages and the prevailing rate, based on a third party beneficiary claim. *Id.* The court, acknowledging the lack of any decisions on point, granted relief. *Id.* at 789.

59. *See* Note, *supra* note 57, at 151; text & notes 60-81 *infra*.

60. 240 F. Supp. 709 (W.D. La. 1965), *aff'd*, 370 F.2d 847 (5th Cir.), *cert. denied*, 388 U.S. 911 (1967).

61. *Id.* at 714-15.

62. *Id.* at 713. The contract provided that a school system receiving school construction loans under 20 U.S.C. § 636 (1976) agreed to educate such children. 240 F. Supp. at 713.

63. *See* 240 F. Supp. at 712. The Louisiana laws did not allow segregation in the school system. *Id.* at 713.

64. *See id.* at 711.

65. *Id.* at 713.

66. *Id.*

67. The court noted that the contract required the defendants to provide education for fed-

Contracts between federal administrative agencies and private parties may also create enforceable interests on behalf of third persons. In *Weinberger v. New York Stock Exchange*,[68] for example, the plaintiff brought an action against the New York Stock Exchange [N.Y.S.E.] for an alleged breach of an agreement between the exchange and the Securities and Exchange Commission [SEC].[69] The agreement required the N.Y.S.E. to comply with the provisions and rules of the Securities Exchange Act of 1934 and to enforce compliance by its members.[70] In *Weinberger*, the plaintiff alleged that the N.Y.S.E. violated section 6 of the Act, and hence the agreement, because it failed to promulgate or enforce rules regulating general partners of member firms.[71] He claimed that as an investor, he was a third party beneficiary of the SEC's agreement with the N.Y.S.E. and therefore entitled to damages for the contract breach.[72] The court held that federal policy made an investor more than an incidental beneficiary; the statute and contract were intended for his direct benefit, as well as for the public welfare.[73] Therefore, the court granted him an independent claim for relief based upon the contract.[74]

Applying the rules established by the federal courts, the focus of judicial inquiry is whether the government, as the promisee, intended to directly benefit a specific third party.[75] When a contract is drafted pursuant to a congressional command, courts determine whether the party asserting the contract right was directly intended to benefit from the contract by reading the contract in conjunction with the statutory purpose.[76] By applying such reasoning third parties have successfully enforced a government labor contract,[77] a real estate nondiscrimination

---

eral children on identical terms as they provide to other children in the school district, in accordance with state law. Louisiana laws providing for segregated schools were declared unconstitutional and the federal Constitution prohibits segregation. Therefore, black children have a right to attend desegregated schools, and the defendants "by their contractual assurances have afforded rights to these federal children as third-party beneficiaries." *Id.*

68. 335 F. Supp. 139 (S.D.N.Y. 1971). *Weinberger* was the first case to explicitly uphold the availability of such a claim in the securities area. *See* Lank v. New York Stock Exch., 405 F. Supp. 1031, 1039 n.14 (S.D.N.Y. 1975).

69. *See* 335 F. Supp. at 141. Pursuant to the Securities Exchange Act of 1934, 15 U.S.C. § 78(a)(3), (d), (f) (1976), each national securities exchange registering with the SEC must file an agreement. *See* 335 F. Supp. at 141.

70. *See* 335 F. Supp. at 141.

71. *Id.*

72. *See id.* at 140.

73. *See id.* at 144.

74. *See id.*

75. *See* text & notes 57-74 *supra.*

76. *See* Harlib v. Lynn, 511 F.2d 51, 55-56 (7th Cir. 1975); United States *ex rel.* Johnson v. Morley Constr. Co., 98 F.2d 781, 788-89 (2d Cir. 1938); Dillon v. AFBIC Dev. Corp., 420 F. Supp. 572, 581 (D. Ala. 1976); Weinberger v. New York Stock Exch., 335 F. Supp. 139, 144 (S.D.N.Y. 1971); Note, *supra* note 57, at 151.

77. United States *ex rel.* Johnson v. Morley Constr. Co., 98 F.2d 781, 788-89 (2d Cir. 1938).

agreement,[78] an education contract,[79] a security exchange agreement,[80] and a sewage disposal agreement in a pollution suit.[81]

Therefore, a state attempting to assert a third party contractual interest in a federal oil and gas lease issued pursuant to the M.L.L.A. must show that it was intended to be a beneficiary of the lease. To prove intent, a state may show that Congress intended the state to benefit from the M.L.L.A. Since a lease's purpose should be parallel to that of the Act, a court could use the legislative intent behind the Act to determine the government's intent in issuing the lease. The legislative history of the M.L.L.A. clearly shows that the states were the intended beneficiaries of the Act. A discussion of that intent follows.

Congressional Intent to Benefit the States Through the M.L.L.A.

Although federal lands have traditionally been retained in public trust to provide the maximum benefit to the general public,[82] legislative history also indicates that the states were intended to benefit directly from M.L.L.A. leases.[83] Section 35 of the Act provides the states with

---

78. Dillon v. AFBIC Dev. Corp., 420 F. Supp. 572, 581 (D. Ala. 1976).

79. Lemon v. Bossier Parish School Bd., 204 F. Supp. 709, 713 (W.D. La. 1965), *aff'd*, 370 F.2d 847 (5th Cir.), *cert. denied*, 388 U.S. 911 (1967).

80. Weinberger v. New York Stock Exch., 335 F. Supp. 139, 144 (S.D.N.Y. 1971).

81. *See* Ratzlaff v. Franz Foods, 468 S.W.2d 239, 241 (Ark. 1971). In *Ratzlaff*, Franz Foods, a chicken processing company, contracted with the city to use the sewage system for disposal of its waste products. Under the contract, certain waste products were prohibited from entering the system. Franz Foods failed to comply with the restrictions, causing the pollution of Ratzlaff's land. Ratzlaff sued Franz, asserting rights as a third party beneficiary of the government contract. The court noted that Ratzlaff was an intended beneficiary of the contract and thus allowed the action. *Id. See generally* Note, *The Third Party Beneficiary Concept Is Available as a Theory of Recovery in Pollution Cases*, 3 TEX. TECH. L. REV. 385, 385-89 (1972).

82. *See generally* THE PUBLIC LAW REVIEW COMMISSION, ONE THIRD OF THE NATION'S LAND 33-40 (1970) [hereinafter cited as P.L.L.R.C. STUDY]. In addition to this general public interest, certain groups have also held specific interests in these lands. *See id.* at 37. Historically, the public lands served as a frontier for the individualist. *See id.* at 33. In modern times they serve to preserve areas of national importance such as national parks, monuments, or wilderness areas. *See id.* at 34; Klein, *Embargo Aftermath*, Wall St. J., Sept. 7, 1978, at 1, col. 6. The public living and working on and near the public land enjoys fishing, hiking, and other recreational activities. In addition, many individuals derive their incomes from this land. *See* P.L.L.R.C. STUDY, *supra*, at 36.

History and congressional intent not only reflect concern for the public, but also indicate that the states were generally intended beneficiaries of federal land policy. *See id.* Contiguous nonfederal oil and gas lands are especially prone to such damage since a federal oil or gas lessee might deplete or damage an oil pool already being developed by a nonfederal lessee. Such a situation occurred in Texas Oil & Gas Corp. v. Phillips Petr. Co., 277 F. Supp. 366 (W.D. Okla. 1967), where the Oklahoma Corporation Commission was held to have authority to force a pooling and separation agreement on a federal lessee. *Id.* at 369. This case supports the proposition that the states have an interest in these lands and that the M.L.L.A. permits the states to exercise state police power over federal oil and gas leases to protect their interests as long as that power is not preempted by Congress. *See id.* at 369-70. *See also* Berger & Mounce, *Applicability of State Conservation and Other Laws to Indian and Public Lands*, 16 ROCKY MTN. MIN. L. INST. 347, 353 (1970).

Another benefit the states receive is financial support to improve their roads, schools, and the police departments which regulate the public lands. *See* 30 U.S.C. § 191 (1976).

83. *See* 59 CONG. REC. 2711 (1920); 58 CONG. REC. 7648-49, 7772-77 (1919). *See also* text & notes 84-100 *infra*.

royalty payments from all producing oil and gas wells leased pursuant to the M.L.L.A.[84] This section was inserted in the Act specifically to benefit the states.

Congressional history provides two cogent reasons supporting this conclusion. First, the public lands are immune from state taxation while held in federal ownership.[85] The federal government may waive this immunity,[86] but it has not done so in regard to federal oil and gas lands. The tax immunity status of federal lands has sometimes caused great financial hardships to state and local governments.[87] The property taxes ordinarily imposed to meet community needs, particularly in the maintenance of schools and the building of roads, cannot be levied on such land.[88] In order to compensate the communities for the inability to tax these lands, Congress adopted a policy providing the states a percentage of the royalties imposed on the minerals extracted from that land.[89]

---

84. 30 U.S.C. § 191 (1976). *See* text & notes 39-40 *supra*.

85. *See* Van Brocklin v. Tennessee, 117 U.S. 151, 175 (1886) ("whether the property of the United States shall be taxed under the laws of a State depends upon the will of its owner, the United States").

86. *Id.*

87. *See* 58 CONG. REC. 7772-73 (1919).

88. *See id.*

89.
> I will tell the Senator very frankly that the people of the West who believe in building up the States never would have consented to such a bill had it not been provided that a portion of the proceeds of these royalties should go directly to the States . . . because of the fact that you are taking away from them their sovereign power of taxation . . . .

58 Cong. Rec. 4172 (1919). *See id.* at 7772-73. At the time the M.L.L.A. was enacted the national forests were the only areas permanently reserved in federal ownership. *Id.* at 7773. See P.L.L.R.C. STUDY, *supra* note 82, at 235. The M.L.L.A. followed the policy of reserving the land permanently in federal ownership and also adopted the policy, utilized in the Forest Act, 16 U.S.C. §§ 471-531 (1976), of compensating the states for the revenues they would have received by taxation if such lands were in private ownership. *See* P.L.L.R.C. STUDY, *supra* note 82, at 236. 16 U.S.C. § 500 (1976) provides in part:

> Twenty-five per centum of all moneys received during any fiscal year from each national forest shall be paid, at the end of such year, by the Secretary of the Treasury to the state in which such national forest is situated, to be expended as the state legislature may prescribe for the benefit of the public schools and public roads of the county or counties in which the national forest is situated . . . .

In Representative Mondell's memorandum discussing the royalty provision in the M.L.L.A., 30 U.S.C. § 191 (1976), he argued that the royalty provision in the Forest Act was to compensate the states for the loss of revenue dollars. *See* 58 CONG. REC. 7772 (1919). *See* P.L.L.R.C. STUDY, *supra* note 82, at 236. The function of royalties in the M.L.L.A., argued Mondell, is to "afford the States and their communities the funds necessary to avert disaster which the bill without such a provision would bring." 58 CONG. REC. 7774 (1919). In conformity with that purpose, Congress amended § 35 of the Mineral Land Leasing Act of 1920 by increasing the direct royalty payment to the States from 37½% to 50%. *See* 30 U.S.C. § 191 (1976); S. REP. No. 94-583, 94th Cong., 1st Sess. 63-64 (1975), *reprinted in* LEGISLATIVE HISTORY, *supra* note 21, at 128-29. The increase was a response to the energy boom which would place strains on the economies of those states having oil and gas fields and other energy sources. *See id.* Another factor in the increase was the awareness by the government that the affected communities will "require a higher percentage of the mineral revenues from Federal lands if they are to meet the sudden surge in growth pressures which had heretofore increased only incrementally." In short, § 35 of the Act, 30 U.S.C. § 191 (1976), was included for the purpose of providing the states in which federal oil and gas lands are located compensation for lost tax revenue. In the Federal Land Policy and Management Act of 1976, codified at various sections of Title 43 of U.S.C. (1976), Congress directly addressed this issue. The Act stated, "the Federal Government should . . . provide for payments to compensate

The second reason section 35 was included in the Act is that the payments provide the western states with a substantial quid pro quo for their cooperation in passing the Act. This is evidenced by the history and political considerations of public land law policy. Royalty payments were demanded by western states for their cooperation in passing the Act.[90] Such a demand was not uncommon, and in fact occurred quite often in the years prior to the passage of the M.L.L.A.[91] Thus, by 1919, when the House of Representatives was debating the M.L.L.A., the precedent of providing the states with a royalty as a means of procuring their cooperation was established. In this case, the federal government granted the states a percentage of the proceeds from the resources taken from public lands within their territorial borders. And, although the historical opposition to this tradeoff arose again,[92] it was evident that without a royalty provision it would be impossible to secure the passage of the M.L.L.A.[93]

The Act's passage, however, was far from cut and dried. The western states containing most of the public land initially opposed the bill.[94]

States and local governments for burdens created as a result of the immunity of Federal lands from State and local taxation." *Id.* § 1701(a)(13).

90. 58 CONG. REC. 4172 (1919) (statement of Sen. Smoot that without the royalty provision there would be no bill).

91. The controversy over public land control may have begun as early as October 30, 1779, when Congress requested the states to surrender to the federal government all claims to the unsettled country between the Appalachian Mountains and the Mississippi River. *See* 121 CONG. REC. S.1231 (daily ed. Jan. 30, 1975); P. GATES, HISTORY OF PUBLIC LAND LAW DEVELOPMENT 3 (1968). *See generally* T. ABERNETHY, WESTERN LANDS AND THE AMERICAN REVOLUTION (1959). In debate before the constitutional convention, complex and pressing questions arose concerning these ceded lands. Among these questions was whether the act of cession required the lands to be administered for the benefit of all the states, or whether only those newly formed states should receive the benefit. *See* P. GATES, *supra*, at 5-10. The western states desired the latter, the eastern states proposed the former. *See id.* at 8-11. *Cf.* Miller, *The Historical Development of Oil and Gas Laws of the United States*, 51 CALIF. L. REV. 506, 514 (1963) (the East v. West conflict arose again in the oil and gas area). Heated controversies arose over this issue, *see* P. GATES, *supra*, at 9, and in 1833 there was an attempt to placate the states by the Clay Distribution Bill. *See id.* at 9-12. The debates may be followed in CONG. GLOBE, 22d Cong., 1st Sess. 214, 322, 328, 329, 347, 370 (1841), or in the *Register of Debates*, 22d Cong., 1st Sess. (1830). The Clay Bill, a compromise between all the interests involved, provided for federal government control of public land sales. The sale proceeds were to go to the states with a 12½% bonus from the federal government. *See* R. WELLINGTON, THE POLITICAL AND SECTIONAL INFLUENCE OF THE PUBLIC LANDS 39 (1914). The bonus was provided to the western states as a means of soliciting their votes in favor of the bill. *See* P. GATES, *supra*, at 12. Although President Jackson vetoed the bill, *see id.* at 17, it helped set the stage for the theory of granting pecuniary rewards to the states in the form of royalties plus bonuses.

The public land states won a limited victory by the passage of the Newlands Act of 1902, ch. 1093, § 1, 32 Stat. 388 (current version codified at 43 U.S.C. §§ 371-616w (1976)), which provided that five percent of the money derived from the sale of public land would be paid directly to the state in which it was sold. The states gained another victory when Congress passed the Potassium Deposits Act, Pub. L. No. 49, 40 Stat. 297 (1917), which provided that all income from royalties and rentals in the mining of potassium on public lands should go into the reclamation fund. After the completion of projects financed with the reclamation funds, 50% of the remainder was to be given to the states from which the royalties and rentals had come. *See id.* § 10.

92. See, for example, the arguments advanced in opposition to the Clay Distribution Bill and the arguments advanced in opposition to the Ferris Bill, H.R. 16136, 63d Cong., 2d Sess. (1914).

93. 58 CONG. REC. 4172 (1919). *See* P. GATES, *supra* note 91 at 741.

94. *See* 58 CONG. REC. 4273, 4774-78 (1919) (speeches by Senators Phipps and King). West-

The old arguments advanced in opposition to the Ferris Bill,[95] advocating that the discoverer of minerals be given a patent to the land, were again advanced.[96] The western states, as in their opposition to the Ferris Bill, again opposed a bill that would maintain federal ownership of the land.[97] At times, western reaction ran so strong that it produced proposals of cession of the public lands to the states.[98]

Section 35 of the M.L.L.A. eventually resolved the controversy. But the major debate concerning this section centered around the percentage of the royalties and rentals the states would receive rather than

---

ern sentiment was probably best summed up by Senator King: "The leasing system has always proven a failure. It has its birth under Tyrannous governments, and has been abandoned and liberty has been increased. Government landlordism is a wrong system; it is an anachronism." *Id.* at 4171.

95. H.R. 16136, 63d Cong., 2d Sess. (1914) introduced at 51 CONG. REC. 7464 (1914) (amended version appears at 51 CONG. REC. 15594-95 (1914)). The Ferris Bill was an important bill that foreshadowed the M.L.L.A. Backed by the Wilson administration, the bill attempted to completely revise the law applying to coal, oil, gas, phosphate, potassium, and sodium mining. Representative Ferris of Oklahoma, then chairman of the House Committee on Public Lands, introduced the bill which provided for a mixture of sale and leasing. *See* P. GATES, *supra* 91, at 741. Many arguments were advanced in opposition to the Ferris Bill. The extreme position was attributed to the "states righters" who had considerable strength at this time. *See* J. ISE, *supra* note 30, at 327. This group, composed primarily of westerners, contended that the public land and all its resources belonged to the people of the states where the lands were located. *See* 51 CONG. REC. 14945, 14947-48 (1914) (statement by Rep. Thompson). The extreme view was expressed by Rep. Taylor of Colorado. Taylor declared that the bill was in violation of the moral, legal, and constitutional rights of the western states and in contravention of the enabling act by which they were admitted into the union. *See id.* at 14946 (statement by Rep. Taylor as reported by Rep. Thomson of Ill.). Other opponents feared that federal control meant centralization, bureaucracy, and absentee control, more commonly known as "absentee landlordism." *See id.* at 14953 (statement by Rep. Mondell). "As an abstract proposition I do not believe that any central government anywhere on earth is or ever will be constituted so that it can wisely and continuously control a great landed estate lying 2,000 miles away from the seat of government." *Id.* at 14952.

The primary objection to the bill's leasing system came from the states and communities in which the resources were found. Their opposition centered around the disposition and proposed use to be made of the rents and royalties. *See id.* at 14954-56. They feared that they would "not obtain any considerable part of the cream of the values taken from them in the way of royalty." *Id.* at 14951, 14953, 14955. They argued that since the bill provided that all the rents and royalties paid under its provisions became part of the reclamation fund, the bill would deprive the states of the five percent royalty they would otherwise receive from the sales of those lands. *See id.* at 14954. Moreover, the states and communities argued that the leasing of lands would deprive them of the opportunity to tax the land, since it remained in federal ownership. *See* J. ISE, *supra* note 30, at 330.

96. Miller, *supra* note 91, at 514.

97. *Compare* 51 CONG. REC. 14945-53 (1914) *with* 58 CONG. REC. 7772-75 (1919). The bitter struggle over mineral rights developed out of the controversial issue of public land withdrawal. *See* J. ISE, *supra* note 30, at 310. Such withdrawals provoked heated criticism and antagonism from westerners who were alarmed at federal landlordism. For a thorough discussion see *id.* at 310-23; P. GATES, *supra* note 91, at 732, 738.

On December 13, 1906, the House passed a resolution requesting that the Secretary of the Interior list all land withdrawals since July 1, 1906, and to state reasons for the withdrawals. 41 CONG. REC. 354 (1906). Westerners were against the withdrawal because withdrawn lands were closed to oil and agricultural entry. J. ISE, *supra* note 30, at 326. Their attempts to restore entry failed, however, making it increasingly clear to westerners that the only practical solution was to adopt a federal leasing system. *See id.* at 343; P. GATES, *supra* note 91, at 741.

98. *See* J. ISE, *supra* note 30, at 327. Many earlier bills were introduced to open the land up for development. *See, e.g.*, H.R. Res. 108, 63d Cong., 1st Sess., 50 CONG. REC. 1730 (1913) (Rep. Raker); S. 60, 63d Cong., 1st Sess., 50 CONG. REC. 2369 (1913); S. 475, 63d Cong., 1st Sess., 50 CONG. REC. 129 (1913).

whether they would receive one.[99] Section 35 was, as the public land states had hoped, adopted for the express purpose of providing the states with royalties for "the construction and maintenance of public roads and for the support of public schools or other public educational institutions, as the legislature of the state may direct."[100]

Summary of Third Party Beneficiary Theory

The terms of every federal lease issued pursuant to the M.L.L.A. provide that the lessee must exercise diligence in drilling and producing to achieve the maximum ultimate recovery of oil and gas thereby maximizing public revenues.[101] When a lessee does not exercise such diligence the lease agreement is breached.

Contract law governing federal oil and gas leases provides that an intended third party beneficiary can enforce a lease made for his bene-

99. At one point in the congressional hearings Rep. Thomas stated that there should be no royalty at all. Representative Smoot, who introduced the bill, replied that it "would be impossible to secure the passage through Congress of a measure of that kind." 58 CONG. REC. 4172 (1919). The only other mention of this issue was in a speech by Sen. Mondell who stated: "The only question that ever ought to be raised in this connection is as to what portion of the rents and royalties that will be received by the government [are] necessary to compensate the states." *Id.* at 7772. *See* J. ISE *supra* note 30, at 330.

The argument over this issue remained a constant source of debate. For example, in 1962, a bill was introduced in the Senate to amend § 35 of the Mineral Lands Leasing Act of 1920. S. 898, 87th Cong., 2d Sess. (1962). The bill sought to change the disposition of proceeds of sales, bonuses, royalties, and rentals received under the M.L.L.A., and proposed to raise the percentage of royalties paid to the states to a straight 90%. Senator McGee, one of the bill's sponsors, stressed the need for more funds for school financing at the hearings on the bill. He argued that these royalty payments were used for education, which in non public land states is financed by property taxation. Since there is less property to tax in public land states, the increase had to come from the M.L.L.A. *See Proposed Amendment to the Mineral Leasing Act of 1920: Hearing on S. 898 Before the Subcomm. on Public Lands of the Comm. on Interior and Insular Affairs*, 87th Cong., 2d Sess. 1 (1962) (statement of Sen. McGee).

100. Mineral Lands Leasing Act, ch. 85, § 35, 41 Stat. 450 (1920) (current version at 30 U.S.C. § 191 (1976)). Although the bill was a victory for the public land states, not all these states were pleased. Some still felt that the land should have been ceded to the states. A passage appearing in a Colorado publication sums up the western attitude:

> The bill is a complete reversal of the original land policy of the United States. . . . The rights of the West, and particularly state rights, have been jeopardized by the enthusiastic federal control school which seemed to take the lead in proclaiming federal over state rights. . . . There has never been a measure more bitterly fought out along technical lines with apparent determination on the part of the Administration to give no quarter and to allow no liberality in phrasing, and the bill as now completed, while a complete defeat for states' rights advocates, practically results in confiscation of many properties. . . . It will help the West though, to open some of this, even under a lease.

J. ISE, *supra* note 30, at 352 (quoting THE COLORADO SCHOOL OF MINES MAGAZINE, March 5, 1920, at 44).

In 1976, Congress amended § 35 of the M.L.L.A. by increasing the royalty payment to the states and providing guidelines for spending it. Federal Land Policy and Management Act of 1976, Pub. L. No. 94-259, § 317, 90 Stat. 2771 (amending 30 U.S.C. § 191 (1976)). Under the amended provision, the state legislatures may use the money as they wish. They must, however, give priority in their spending to the subdivisions of the state "socially or economically impacted by development of minerals leased under the Act." *Id.* § 317(b), *reprinted in* LEGISLATIVE HISTORY OF THE F.L.P.M.A., *supra* note 21, at 38.

101. *See* text & notes 45-47 *supra*.

fit.[102] Since federal government leases made pursuant to a federal statute are presumably executed to effectuate the statutory purpose,[103] the particular statute's legislative history can be used to determine the intended beneficiaries of the lease.[104]

The congressional history of federal land management[105] and the specific congressional history of the M.L.L.A.[106] indicate that the purpose of the M.L.L.A. was to promote the wise development of public resources[107] and to reap a reasonable financial return on those resources.[108] This purpose is now carried out through a system of leasing having as one of its primary objectives revenue maximization for the lessor.[109] This objective is achieved by charging rent and royalties on federal oil and gas leases.[110] In passing the M.L.L.A., Congress intended that these rents and royalties would directly benefit the state in which the federal oil and gas lease property is located.[111] This specific and direct congressional intent to benefit the states through federal leases arguably creates an intended third party beneficiary right to enforce a lease in favor of the states.

The third party beneficiary theory is not, however, the only means by which a state may enforce its interest. In a closely analogous way, a state may protect its right, as well as the national interest, by asserting an implied right of action to directly enforce the M.L.L.A.

THE IMPLIED RIGHT OF ACTION THEORY

A statute may imply a private cause of action in certain circumstances where a defendant has violated a public law passed for the special benefit and protection of the plaintiff's class.[112] This doctrine originated in England in 1854 with the case of *Couch v. Steel*,[113] where the court allowed a ship's seaman to maintain a private action against the vessel's owner. The plaintiff was injured due to the owner's breach of a statute passed to benefit British seamen.[114] In *Couch*, Lord Campbell recognized that such an action had not been cognizable under the

102. *See* text & notes 36-47 *supra*.
103. *See* text & notes 57-81 *supra*.
104. *See id.*
105. *See* text & notes 83-84 *supra*.
106. *See* text & notes 83-99 *supra*.
107. *See* 58 CONG. REC. 4272 (1919) (statement by Sen. Walsh).
108. *See* text & notes 36-45 *supra*.
109. *See* California Co. v. Udall, 296 F.2d 384, 388 (D.C. Cir. 1961); Standard Oil Co. v. Hickel, 317 F. Supp. 1192, 1195 (D. Alas. 1970), *aff'd*, 450 F.2d 493 (9th Cir. 1971).
110. *See* text & notes 36-48 *supra*.
111. *See* text & notes 83-99 *supra*.
112. *See, e.g.*, J.I. Case Co. v. Borak, 377 U.S. 426, 432 (1964); Shields v. Atlantic Coast Line R.R., 350 U.S. 318, 324 (1956); Bell v. Hood, 327 U.S. 678, 684 (1946).
113. 118 Eng. Rep. 1193, 1197 (Q.B. 1854).
114. *Id.* at 1196-97.

common law. He nevertheless inferred a right of action from the statute and justified it by stating: "where a statute enacts, or prohibits a thing for the benefit of a person, he shall have a remedy upon the same statute for the thing enacted for his advantage, or for the recompence of a wrong done to him contrary to said law."[115]

The United States Supreme Court recognized the implied right of action doctrine in *Texas & Pacific Railway v. Rigsby*.[116] Rigsby, a railroad employee injured in the course of his employment, brought suit for damages based upon the Federal Safety Appliance Act [F.S.A.A.].[117] The Court implied a right of action under the Act since Congress specifically passed the F.S.A.A. to benefit employees involved in such accidents, and the employee was a member of the protected class.[118] The Court broadened the doctrine in 1933 to include any person contemplated by a statute, in addition to those especially benefited.[119]

Once the Court established the doctrine, courts frequently found an implied right of action in a variety of statutes.[120] Unfortunately,

115. *Id.* at 1196. *See* Bell v. Hood, 327 U.S. 678, 684 (1946), where the Court stated that, "where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief."

116. 241 U.S. 33, 36-37 (1916). The implied right of action doctrine in the federal courts may have been presaged in Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), where Chief Justice Marshall stated: "The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right." *Id.* at 163. Seventy-one years later the Supreme Court in Pollard v. Bailey, 87 U.S. (20 Wall.) 520 (1874), noted in dictum that "[a] general liability created by statute without a remedy may be enforced by an appropriate common law action." *Id.* at 527. *See* Note, *Implied Rights of Action to Enforce Civil Rights: The Case for a Sympathetic View*, 87 YALE L.J. 1379, 1382 & n.25 (1978).

117. 45 U.S.C. §§ 1-46 (1976) (originally enacted as Act of March 2, 1893, ch. 196, 27 Stat. 531).

118. *See* Texas & Pac. Ry. v. Rigsby, 241 U.S. 33, 39 (1916).

119. In Fairport, P. & E. R.R. v. Meredith, 292 U.S. 589 (1933), the Court concluded that travelers at railroad crossings were included within the protections of the Railroad Safety Appliance Act, and, therefore, the statute implied a cause of action against violators. *Id.* at 596; *accord*, Shields v. Atlantic Coast Line R.R., 350 U.S. 318, 324 (1956) (a non-employee of the railroad, who boarded cars to unload cargo, was a member of the class of employees for whose benefit the Federal Safety Appliance Act was passed and thus was entitled to a cause of action).

120. In the following circumstances courts have inferred the existence of a civil remedy despite the lack of any specific provision in the statute for federal jurisdiction over private actions: J.I. Case Co. v. Borak, 377 U.S. 426, 431-33 (1976) (Securities Exchange Act of 1934, 15 U.S.C. § 78n(A) (1976) held to create a private remedy for any person harmed by false and misleading proxy statements); Gomez v. Florida State Emp. Serv., 417 F.2d 569, 576-78 (5th Cir. 1969) (remedy implied under the Wagner-Peyser Act of 1933, 29 U.S.C. §§ 49-49k (1976), for the benefit of migrant workers who claimed they had been inadequately paid and subjected to intolerable living conditions); Fitzgerald v. Pan Am. World Airways, Inc., 229 F.2d 499, 501-02 (2d Cir. 1956) (civil action implied by the Federal Aviation Act of 1938); Fagot v. Flintkote Co., 305 F. Supp. 407, 410-11 (E.D. La. 1969) (Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-219 (1976) implied a private remedy to an employee discharged for giving information to the Department of Labor resulting in sanctions against the employer).

Ironically, the statute that gave birth to the implied action doctrine in the federal courts, the Federal Safety Appliance Act, no longer provides a basis for implied causes of action. *See* Moore v. Chesapeake & Ohio Ry., 291 U.S. 205, 215-16 (1934); Jacobson v. New York, N.H. & H.R.R., 206 F.2d 153, 156 (1st Cir. 1953), *aff'd per curiam*, 347 U.S. 909 (1954).

courts have been inconsistent in their use of the doctrine,[121] inevitably causing confusion.[122] Much of the confusion may be attributed to the Supreme Court, which until recently had not developed a consistent and definitive test.[123]

J.I. Case Co. v. Borak[124] began the movement to establish a more modern test.[125] In *Borak*, the Court granted a corporate stockholder a private right of action against the J.I. Case Co. for the use of false and misleading proxy statements in violation of section 14(a) of the Securities Exchange Act of 1934.[126] The *Borak* Court examined the purpose of the Act[127] and concluded that private enforcement would be a useful supplement to the Securities and Exchange Commission's actions because limited resources would not allow the commission to independently examine each proxy statement.[128] Since Borak was part of the class intended to be benefited by the Act, he was allowed to bring suit to "effectuate the purpose of the Act."[129] The Court's holding that Congress had impliedly authorized a private action[130] temporarily es-

121. *Compare* Brown v. Bullock, 194 F. Supp. 207, 224 (S.D.N.Y.), *aff'd*, 294 F.2d 415 (2d Cir. 1961) (the cause of action is implied unless evidence is to the contrary) *with* Consolidated Freightways, Inc. v. United Trucking Lines, Inc., 216 F.2d 543, 545 (9th Cir. 1954) (cause of action denied unless expressly stated in statute).

122. Note, *Implied Private Actions Under Federal Statutes—The Emergence of a Conservative Doctrine*, 18 WM. & MARY L. REV. 429, 433-34 (1976).

123. Prior to Cort v. Ash, 422 U.S. 66, 78 (1975), there was no definitive test for determining an implied private cause of action. Much of the confusion developed from Texas & Pac. Ry. v. Rigsby, 241 U.S. 33 (1916), where the court held that the "principal object" of the Act was the protection of railroad workers, *see id.* at 39, and, therefore, that the common law doctrine of statutory tort gave rise to the private right of action. *See id.* Some lower courts viewed the criterion established in *Rigsby* as that of the "statutory tort" doctrine and thus used it as the only prerequisite to an implied private right of action. *See, e.g.*, Howard v. Furst, 140 F. Supp. 507, 510 (S.D.N.Y.), *aff'd*, 238 F.2d 790 (2d Cir. 1956), *cert. denied*, 353 U.S. 937 (1957) (criminal statute enacted for benefit of class implies private right of action in class member absent evidence to contrary); Kardon v. National Gypsum Co., 69 F. Supp. 512, 513-14 (E.D. Pa. 1946) (disregard of statutory command is actionable unless contrary legislative intent very clearly appears). Commentators often agree with the statutory tort analysis for determining implied causes of action. *See* 2 L. LOSS, SECURITIES REGULATION 942-43 (2d ed. 1961); Morris, *The Relation of Criminal Statutes to Tort Liability*, 46 HARV. L. REV. 453, 453 (1933). This view was not challenged by the Supreme Court until the 1950's and 1960's when it added the criteria of legislative intent on the effectuation of the statutory purpose. Note, *supra* note 117, at 1383.

124. 377 U.S. 426 (1964).

125. *See* Note, *supra* note 122, at 432. However, in T.I.M.E., Inc. v. United States, 359 U.S. 464, 469-70 (1959) and Montana-Dakota Util. Co. v. Northwestern Pub. Serv. Co., 341 U.S. 246, 249-52 (1951), the Court refused to imply a private right of action where there was no evidence of a congressional intent to create such a right, and where such a right would interfere with the functioning of the administrative agency charged with enforcing the statute. Thus, prior to *Borak* the Court looked to congressional intent in some cases.

126. *See* J.I. Case Co. v. Borak, 377 U.S. 426, 437-38 (1964). The issue in the case was whether § 27 of the Securities Exchange Act of 1934 authorized a federal cause of action for damages in favor of a corporate stockholder for a proxy statement containing false and misleading statements.

127. "The purpose of § 14a is to prevent management or others from obtaining authorization for corporate action by means of deceptive or inadequate disclosure in proxy solicitation." *Id.* at 431.

128. *Id.* at 432.

129. *Id.*

130. *Id.* at 432-33.

tablished a test requiring a plaintiff to show, as an added factor to the *Rigsby* requirement, that his cause of action would help to carry out the purpose of the act he brought suit under.[131]

The *Borak* test soon proved ineffective because of its susceptibility to various applications and interpretations.[132] The problem with the test was its failure to include the legislative intent to imply a right of action as one of its criteria.[133] The Court recognized this problem and reformulated the test to include an inquiry into the legislative intent in *National Railroad Passenger Corp. v. National Association of Railroad Passengers [Amtrak]*.[134]

In *Amtrak*, the plaintiff sought to enjoin discontinuation of certain passenger trains of a private railway by relying upon the Rail Passenger Service Act of 1970.[135] The Court looked to the legislative hearings and found that although the original draft of the Act would have allowed "any person adversely affected or aggrieved" to institute proceedings, the clause was deleted before the Act was passed.[136] Therefore, the Court found that Congress did not intend to create a private cause of action.[137]

One final factor is currently necessary for the plaintiff to claim an implied right of action. This component was added in *Cort v. Ash*,[138]

131. *Id.* "We, therefore, believe that . . . it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose." *Id.* at 433.

132. *Compare* Gomez v. Florida State Emp. Serv., 417 F.2d 569, 576 (5th Cir. 1969) *with* 27 Puerto Rican Migrant Farm Workers v. Shade Tobacco, 352 F. Supp. 986, 993 (D. Conn. 1973). *See* Note, *supra* note 122, at 433.

133. *See* Note, *supra* note 122, at 433-34.

134. 414 U.S. 453, 457-58 (1974). The importance of legislative intent as a factor was foreshadowed in two earlier Supreme Court cases: Hewitt-Robins, Inc. v. Eastern Freight-Ways, Inc., 371 U.S. 84, 89 (1962); Montana-Dakota Util. Co. v. Northwestern Pub. Serv. Co., 341 U.S. 246, 261 (1951) (Frankfurter, J., dissenting). *See* Note, *supra* note 122, at 434 n.28.

135. 45 U.S.C. §§ 501-645 (1976).

136. 414 U.S. at 459-60. The clause was deleted after the Secretary of Transportation, who was the primary administrative officer responsible for the implementation of the Act, sent a letter to Congress objecting to allowing such an action. The Court in *Amtrack* quoted from a letter from the then Secretary of Transportation: "Sanctions are normally imposed by the government. Consequently, I would be opposed to permitting 'any person' to seek enforcement of section 307." *Id.* at 460. Thereafter, the committee redrafted the bill according to the Secretary's recommendations. *Id.*

137. *Id. Amtrak* was followed in Securities Investor Prot. Corp. v. Barbour, 421 U.S. 412, 420 (1975). There the Court found that "there is no extrinsic evidence that Congress intended to allow an action such as that before us." *Id.* Recent lower federal court cases finding implied private rights of action have stressed that private action should be consistent with the purposes of the statute. *See, e.g.*, Stewart v. Travelers Corp., 503 F.2d 108, 110-14 (9th Cir. 1974); Farmland Indus., Inc. v. Kansas-Nebraska Natural Gas Co., 349 F. Supp. 670, 680 (D. Neb. 1972), *aff'd*, 486 F.2d 315 (8th Cir. 1973); Fagot v. Flintkote Co., 305 F. Supp. 407, 413-14 (E.D. La. 1969). Similarly, several cases denying an implied right of action have stressed the importance of legislative intent. *See, e.g.*, Holloway v. Bristol-Myers Corp., 485 F.2d 986, 1002 (D.C. Cir. 1973); Jordan v. Montgomery Ward & Co., 442 F.2d 78, 81 (8th Cir. 1971); Colligan v. Activities Club of N.Y., Ltd., 442 F.2d 686, 692 (2d Cir. 1971).

138. 422 U.S. 66 (1975). *Cort v. Ash* has been followed in two subsequent Supreme Court cases. Santa Fe Indus., Inc. v. Green, 430 U.S. 462, 478 (1977); *see* Piper v. Chris-Craft Indus., Inc., 430 U.S. 1, 37-41 (1977).

where the Court attempted to summarize the elements necessary for an implied right of action.[139] The final factor addresses the question: "is the cause of action one traditionally relegated to state law"?[140] Thus, as the law now stands, there are four analytical steps to the process of determining a private right of action based upon a statute. First, the plaintiff must be one of the class for whose special benefit the statute was enacted.[141] Second, the legislature must have intended implicitly or explicitly to create such a remedy.[142] Third, the action must be consistent with the underlying purpose of the statute.[143] Finally, the cause of action must not be one traditionally relegated to the states so that it would be inappropriate to infer a cause of action based solely on federal law.[144] This four-factor test has been applied in two Supreme Court cases[145] and by many lower federal courts.[146]

Using the four-factor *Cort* test, a state could bring an implied right of action under section 35 of the M.L.L.A. to enforce the due diligence clause of federal oil and gas leases. In such a suit, the first *Cort* factor, requiring the state to prove that it is the special beneficiary of the Act,[147] is evident in the Act's legislative history.[148] Section 35 provides the states with the rents and royalties from the leases issued pursuant to the Act.[149] When a federal lessee violates the Act and the lease by failing to diligently produce oil and gas, a state having federal oil and gas lands within its boundaries is harmed due to the loss of royalty reve-

139. Cort v. Ash, 422 U.S. 66, 78 (1975). *See* Note, *supra* note 116, at 1386.
140. Cort v. Ash, 422 U.S. at 78.
141. *See id.* at 78, 80-82; Texas & Pac. Ry. v. Rigsby, 241 U.S. 33, 39 (1916).
142. *See* Cort v. Ash, 422 U.S. at 78, 82-84; National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers, 414 U.S. 453, 458, 460 (1974).
143. *See* Cort v. Ash, 422 U.S. at 78, 84; Securities Investor Prot. Corp. v. Barbour, 421 U.S. 412, 423 (1975).
144. *See* Cort v. Ash, 422 U.S. at 78, 84; Wheeldin v. Wheeler, 373 U.S. 647, 652 (1963). The four-step analysis does not apply if a constitutional right has been violated. *See* Bivens v. Six Unknown Named Agents, 403 U.S. 388, 394-95 (1971).
145. *See* Santa Fe Indus., Inc. v. Green, 430 U.S. 462, 478 (1977); Piper v. Chris-Craft Indus., Inc., 430 U.S. 1, 37-41 (1977).
146. *See, e.g.*, Clark v. Gulf Oil Corp., 570 F.2d 1138, 1150 (3d Cir. 1978); Kipperman v. Academy Life Ins. Co., 554 F.2d 377, 380 (9th Cir. 1977); Lloyd v. Regional Transp. Auth., 548 F.2d 1277, 1284-88 (7th Cir. 1978). In *Clark v. Gulf Oil Corp.*, an illustrative case, Philadelphia natural gas consumers asserted a private cause of action for damages under § 9 of the Natural Gas Act against a natural gas producer for failure to comply with a certificate of public convenience issued by the Federal Power Commission [F.P.C.]. 570 F.2d at 1140. After applying the four *Cort* factors to the facts in question, the court ruled against the plaintiffs. *Id.* at 1150. The court reasoned that the plaintiffs might be among the class for whose benefit the statute was enacted, *id.* at 1146, but they neither proved that the legislative intent was to imply a cause of action, nor that a private cause of action was consistent with the underlying purpose of the legislative scheme. *Id.* at 1146-50. To allow millions of ultimate consumers affected by alledged certificate of public convenience violations to bring private actions, the court reasoned, would disrupt, seriously disable, and possibly destroy the uniform regulatory scheme devised by Congress. *Id.* at 1149. Therefore, the court concluded that no private cause of action existed. *Id.* at 1150.
147. Cort v. Ash, 422 U.S. at 78, 80-82.
148. *See* text & notes 83-100 *supra.*
149. 30 U.S.C. § 191 (1976); *see* text & notes 40-44 *supra.*

nues.[150] Thus, the state should have no difficulty in meeting the first *Cort* factor.

The second factor, whether there is "any indication of legislative intent, explicit or implicit, either to create a remedy or to deny one,"[151] also poses no problem to a state's implied cause of action. Although the legislative history of the M.L.L.A. does not demonstrate an affirmative intention to create a cause of action by the states, such an intent is unnecessary.[152] What must be shown is that there is no "explicit purpose to deny such [a] cause of action."[153] Neutrality on this point is not considered detrimental to the action.[154] Arguably, however, Congress affirmatively acknowledged the states' right to enforce the M.L.L.A. by the broad police power and the power retained by the states under the Act.[155]

Although the United States Constitution empowers Congress to regulate the public lands,[156] including the sanctioning of certain uses and the prohibition of others,[157] the states are not preempted from regulating oil and gas leases on federal lands within their borders.[158] The Constitution merely confers the power on Congress; Congress retains discretion over the manner of its use.[159] Where Congress fails to act by

---

150. *See* text & notes 45-48 *supra.*
151. Cort v. Ash, 422 U.S. at 68-69.
152. *See id.* at 82; Note, *supra* note 122, at 449.
153. Cort v. Ash, 422 U.S. at 82; Note, *supra* note 122, at 449.
154. *See* Cort v. Ash, 422 U.S. at 82. Many courts accept the premise that an implied right of action is reasonable absent express indication to the contrary. *See, e.g.*, Burke v. Compana Mexicana de Aviacion, 433 F.2d 1031, 1033 (9th Cir. 1970); National Ass'n for Community Dev. v. Hodgsen, 356 F. Supp. 1399, 1403-04 (D.D.C. 1973); Fagot v. Flintkote Co., 305 F. Supp. 407, 412 (E.D. La. 1969). In National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers, 414 U.S. 453 (1974), the Supreme Court indicated that such a strong presumption of legislative intent would no longer be acceptable and stressed the principle that if legislation expressly provides a particular remedy courts should not extend the coverage of the act to "subsume other remedies." *Id.* at 458. The Court then noted that this rule reflected the ancient maxim of *expressio unius*, which must yield to clear contrary evidence of legislative intent. *Id.* (citing Neuberger v. Commissioner, 311 U.S. 83, 88 (1940)). This approach was rejected in Cort v. Ash, 422 U.S. 60, 82 (1975) where the Court limited *Amtrak's expressio unius* rule to the facts of that case. The Court did note, however, that "an explicit purpose to deny such a cause of action would be controlling." *Id.* at 82; *see* Piper v. Chris-Craft Indus., Inc., 430 U.S. 1, 38 (1977); Kipperman v. Academy Life Ins. Co., 554 F.2d 377, 380 (9th Cir. 1977); Note, *supra* note 122, at 449-50.
155. See text & notes 156-65 *infra.*
156. *See* U.S. CONST. art. IV, § 3, cl. 2; "Congress shall have power to dispose of and make all needful Rules and Regulations respecting the territory or other property belonging to the United States." Kleppe v. New Mexico, 426 U.S. 529, 535 (1976).
157. *See, e.g.*, Kleppe v. New Mexico, 426 U.S. 529, 540 (1976); McKelvey v. United States, 260 U.S. 353, 359 (1922); Utah Power & Light Co. v. United States, 243 U.S. 389, 405 (1917).
158. *See* Wallis v. Pan Am. Petr. Corp., 384 U.S. 63, 66-67 (1966); Texas Oil & Gas Corp. v. Phillips Petr. Co., 277 F. Supp. 366, 368-69 (W.D. Okla. 1966), *aff'd*, 406 F.2d 1303 (10th Cir.), *cert. denied*, 396 U.S. 829 (1969).
159. Texas Oil & Gas Corp. v. Phillips Petr. Co., 277 F. Supp. 366, 368 (W.D. Okla. 1967), *aff'd*, 406 F.2d 1303 (10th Cir.), *cert. denied*, 396 U.S. 829 (1969); Kirkpatrick Oil & Gas Co., 81 Interior Dec. 162, 165 (1974).

passing legislation[160] or fails to exercise exclusive control,[161] a state may exercise its police power over federal property within the state's borders.[162] Congress left this option open in section 32 of the M.L.L.A.[163] by providing that the Act shall not be construed to affect the states' rights.[164] This section has been interpreted as meaning that Congress does not wish to exercise exclusive power over federal oil and gas leases, and that a state may protect its citizens via the state police power from adverse effects caused by an M.L.L.A. lessee.[165]

Recent legislation provides additional support for the conclusion that Congress affirmatively accepts state enforcement of the M.L.L.A. in the concept of state-federal cooperative agreements. Under the state-federal cooperative agreement concept, Congress sets a broad range of national goals and then gives the states authority to achieve them.[166] An excellent example of such legislation is the Federal Water

160. *See, e.g.*, Kleppe v. New Mexico, 426 U.S. 529, 543-44 (1976); Wilson v. Cook, 327 U.S. 474, 487-88 (1946); Surplus Trading Co. v. Cook, 281 U.S. 647, 650 (1930); Colorado v. Toll, 268 U.S. 228, 230-31 (1925).

161. *See* Texas Oil & Gas Corp. v. Phillips Petr. Co., 277 F. Supp. 366, 369 (W.D. Okla. 1967), *aff'd*, 406 F.2d 1303 (10th Cir.), *cert. denied*, 396 U.S. 829 (1969); Kirkpatrick Oil & Gas Co., 81 Interior Dec. 162, 165 (1974); P.L.L.R.C. STUDY, *supra* note 82, at 37.

162. *See, e.g.*, Kleppe v. New Mexico, 426 U.S. 529, 544-45 (1976); Colorado v. Toll, 268 U.S. 228, 230-31 (1925); McKelvey v. United States, 260 U.S. 353, 358 (1922).

163. *See* 30 U.S.C. § 189 (1976), providing in pertinent part: "Nothing in this chapter shall be construed or held to affect the rights of the States . . . to exercise any rights which they may have . . . ." *See also* Texas Oil & Gas Corp. v. Phillips Petr. Co., 277 F. Supp. 366, 369 (W.D. Okla. 1967), *aff'd*, 406 F.2d 1303 (10th Cir.), *cert. denied*, 396 U.S. 829 (1969).

164. Texas Oil & Gas Corp. v. Phillips Petr. Co., 277 F. Supp. 366, 371 (W.D. Okla. 1967), *aff'd*, 406 F.2d 1303 (10th Cir.), *cert. denied*, 396 U.S. 829 (1969); *see* Wallis v. Pan Am. Petr. Corp., 384 U.S. 63, 69-70 (1966).

165. An illustrative case of a state's use of its police power to protect the state citizenry is Texas Oil & Gas Corp. v. Phillips Petr. Co., 227 F. Supp. 366 (W.D. Okla. 1967), *aff'd*, 406 F.2d 1303 (10th Cir.), *cert. denied*, 396 U.S. 829 (1969). In *Phillips*, the Oklahoma Corporation Commission issued a pooling order on the plaintiff's oil and gas lease granted pursuant to the M.L.L.A. The plaintiff asserted that the forced pooling order was void because the land on which the oil and gas lease was located belonged to the United States. *Id.* at 367-68. Therefore, the plaintiff urged that "exclusive control over said lands resides in the United States Government to the exclusion of the State of Oklahoma." *Id.* at 368-69. The court held otherwise, stating that nothing in the Act should be construed to affect the states' existing rights, including the right to collect taxes upon improvements, mines, output, "or other rights, property, or assets of any lessee of the United States." *Id.* at 369 (quoting 30 U.S.C. § 189 (1976)). The court went on to state that no cases had been found holding that Congress had determined to exercise exclusive power over leasehold interests granted or created pursuant to the M.L.L.A. *Id.* at 370-71. The court cited favorably the earlier case of Wallis v. Pan Am. Petr. Corp., 384 U.S. 63, 69-70 (1966), in which the Supreme Court specifically held that state law applies to such leasehold interests where no significant identifiable federal policy or interest is shown. 277 F. Supp. at 371.

Numerous authorities have stated that *Texas Oil*, *Wallis*, and § 189 of the M.L.L.A. all support the proposition that Congress did not intend to preempt the regulation of oil and gas leases on the public domain. *See* Berger & Mounce, *supra* note 82, at 352-54; Williams, *Relationship Between State and Federal Government with Respect to Oil and Gas Matters*, 19 INST. OIL & GAS L. & TAXATION 239, 246-47 (1968). *See generally* Hubbard, *The Application of State Conservation Laws to Oil and Gas Operations on the Public Domain*, 32 ROCKY MTN. L. REV. 109, 264-85 (1960).

166. An example of such an act is the National Environmental Quality Improvement Act of 1970, 42 U.S.C. §§ 4371-4374 (1976), which establishes a "national policy for the environment" and provides that "the primary responsibility for implementing this policy rests with State and local governments." *Id.* § 4371. Another such act is The Atomic Energy Act of 1954, 42 U.S.C. §§ 2011-2296 (1976), which gives the Atomic Energy Commission (now the Nuclear Regulatory Commission) exclusive control over the licensing of nuclear plants, *id.* § 2021(c), but subjects such

Pollution Control Act.[167] Because of the geographical vastness of the water pollution problem, and recognizing that successful implementation of the Pollution Control Act required the participation of all the states, Congress entrusted the primary role of implementing this Act to the states.[168] This delegation of responsibility reflects the increasing congressional awareness of the "finiteness of Federal bureaucratic resources, and of the need to enlist the states in the effort to solve pressing national problems."[169]

In the Federal Land Policy and Management Act of 1976,[170] an area akin to the M.L.L.A., Congress recently approved the state-federal cooperative approach. In this act the Secretary of the Interior, entrusted by Congress with the general management of the public lands,[171] is specifically authorized to contract with appropriate local officials to secure assistance in enforcing federal laws and regulations relating to public lands and their resources.[172]

The significance of this provision is two-fold. It demonstrates an explicit congressional intent to enlist the states in the enforcement of federal laws on the public lands and, therefore, bolsters the argument that the second *Cort* factor can be met in an M.L.L.A. based action. It also implies that such a cause of action is not inconsistent with the M.L.L.A.'s purpose because it recognizes that the Secretary of the Interior relies on the states to protect national resources lands.

The third element of the *Cort* test requires that the state's private right of action be consistent with the M.L.L.A.'s purpose.[173] As indicated earlier, an important purpose of the M.L.L.A. was to promote the development of oil and gas wells and to maximize public revenues

---

plants to state and local laws that are unrelated to protection against radiation hazards. *Id.* § 2021(k). The Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331-1343 (1976), provides for federal ownership of the lands of the outer continental shelf, but also provides that state laws shall be applicable on such lands to the extent not inconsistent with specific federal laws. *Id.* § 1333(a)(2). *See* Chevron Oil Co. v. Huson, 404 U.S. 97, 100-01 (1971); Rodriguez v. Aetna Cas. Co., 395 U.S. 352, 355-56 (1969). The Coastal Zone Management Act of 1972, 16 U.S.C. §§ 1451-1464 (1976), encourages the states to develop management plans for the protection of their coastal areas and provides that the plans must follow guidelines set forth in the act and must be federally approved. Federal agencies are required to comply with such plans "to the maximum extent practicable." *Id.* § 1456(C)(1)-(2).

167. Act of June 30, 1948, ch. 758, 62 Stat. 1155 (current version Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1567, codified in scattered sections of 33 U.S.C.A. (West Supp. 1978)).

168. *Id.*

169. Walston, *State Control of Federal Pollution: Taking the Stick Away from the States*, 6 ECOLOGY L.Q. 429, 429 (1977).

170. 43 U.S.C. §§ 1701-1782 (1976).

171. *Id.* § 1731(b).

172. *Id.* § 1733(c)(1). Three additional public resources acts provide for a type of state-federal cooperative agreement: The Outer Continental Shelf Lands Act Amendments of 1978; Pub. L. No. 95-372, 92 Stat. 629 (codified in scattered sections of titles 16, 30, and 43 of the U.S.C.); The Surface Mining Control and Reclamation Act of 1977, Pub. L. No. 95-87, 91 Stat. 448 (codified at 30 U.S.C.A. §§ 1201-1328 (West Supp. 1978)); The National Forest Management Act of 1976, Pub. L. No. 94-588, 90 Stat. 2949 (codified at 16 U.S.C. §§ 1600-1614 (1976)).

173. 422 U.S. at 78, 84.

from the rents and royalties collected from federal leases.[174] The public revenues collected go to the state in which the lease is located to compensate them for their inability to tax federal lands.[175] The problem with this system lies in the Secretary's inability to adequately police the leased lands and enforce leases to provide maximum revenues for the states.[176]

The Supreme Court confronted a similar problem in *J.I. Case Co. v. Borak*.[177] In *Borak*, the Court recognized the inability of the SEC to police all violations of the Securities Exchange Act.[178] Private enforcement, however, would provide the necessary supplement to the commission's action and provide a remedy necessary to effectuate the congressional purpose.[179] For this reason, the Court provided the plaintiff a private right of action under section 14(a) of the Securities Exchange Act.[180]

Application of the *Borak* Court's interpretation of the third factor would support a state's right to enforce the M.L.L.A., a result consistent with the Act's purpose. The federal mineral lease includes a due diligence clause to maximize revenues.[181] Section 35 of the Act gives the states those revenues in lieu of tax dollars they would otherwise receive if the land were not federally owned. When the due diligence clause is breached, the purpose of section 35 is frustrated and the states are injured.[182] Since the Secretary of the Interior, in charge of achieving that purpose, lacks the manpower to do so adequately,[183] someone should be allowed to supplement the Secretary's enforcement powers. Clearly, the Act's special beneficiaries, the states, should possess that right.[184]

---

174. *See* text & notes 82-111 *supra*.

175. *See* text & notes 85-89 *supra*.

176. *See* text & notes 1-21 *supra*.

177. 377 U.S. 426 (1964).

178. *Id.* at 432. "The Commission advised that it examines over 2,000 proxy statements annually and each of them must necessarily be expedited. Time does not permit an independent examination of the facts set out in the proxy material . . . ." *Id.* at 432.

179. *Id.* The private remedy for violation of the federal securities laws is well established. *See, e.g.*, List v. Fashion Park, Inc., 227 F. Supp. 906, 911 (S.D.N.Y. 1963), *aff'd*, 340 F.2d 451 (2d Cir.), *cert. denied*, 382 U.S. 811 (1965); Mills v. Sarjem Corp., 133 F. Supp. 753, 762 (D.N.J. 1955); Hawkins v. Merrill, Lynch, Pierce, Fenner & Beane, 85 F. Supp. 104, 121 (W.D. Ark. 1949).

180. 377 U.S. at 432. The attitude of the *Borak* Court is best described in Mr. Justice Harlan's concurring opinion in Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971), where he noted that the Supreme Court inferred the action even though it was "in an area where federal regulation has been singularly comprehensive and elaborate administrative enforcement machinery had been provided." *Id.* at 402 n.4. Thus, he concluded: "The notion of 'implying' a remedy, therefore, as applied to cases like Borak can only refer to a process whereby the federal judiciary exercises a choice among *traditionally available* judicial remedies according to reasons related to the substantive social policy embodied in an act of positive law." *Id.* (emphasis in original).

181. *See* text & notes 45 & 46 *supra*.

182. *See* text & notes 41 & 44 *supra*.

183. *See* text & notes 82-111 *supra*.

184. The implied right of action theory also avoids the problems posed when a state uses its police power to promulgate rules and regulations governing a federal oil and gas lessee. While a state may legislate for the protection of public lands, it must first show that the power is directed

The final element in the *Cort* test is whether the cause of action is traditionally relegated to state law.[185] In the case of an implied action under the M.L.L.A., this element is not at issue. In the Act, Congress specifically provided the district courts with the jurisdiction to enforce lease violations.[186] It did not grant the states jurisdiction over disputes arising under the Act.

Another reason to believe that such claims under the M.L.L.A. would not be held to be traditionally relegated to state law is that although the cause of action asserted by a state would be based on a lease violation, such a lease violation is inextricably bound to the Act and the regulations thereunder.[187] Thus a breach of the lease is a violation of the Act. Congress specifically provided that the appropriate United States District Court has jurisdiction "whenever the lessee fails to com-

---

solely to its own protection. Camfield v. United States, 167 U.S. 518, 525-26 (1897). Additionally, the state's laws must not conflict with federal laws. Kleppe v. New Mexico, 426 U.S. 529, 540 (1976). State-initiated exercise of police power over federal lands has great potential for conflict. The state's parochial interests may not encompass the long-term goals of the public land policy of benefiting the general public. For this reason, the federal government should provide guidance in the national interest. *See* Mills & Woodson, *Energy Policy: A Test for Federalism*, 18 ARIZ. L. REV. 405, 446-47 (1976). However, local conditions invariably differ. An operator of an oil and gas lease may be diligently producing to the level allowed by geological conditions in one state, while in another, an operator producing at the same rate may be stalling. These factual matters should be left to the expertise of the local official who knows the land and its condition.

Under the implied right of action theory, the conflict problems which arise when a state exercises its police power are answered. The states, under this theory, may take advantage of the comprehensive scheme of federal regulations concerning mineral leases and enforce them according to the factual settings of the particular state. In this way the national scheme and goals will be protected as well as the states' particular interests.

The problems which eventually defeated the implied right of action in Clark v. Gulf Oil Corp., 570 F.2d 1138 (3d Cir. 1978), would be inapposite in a cause of action asserted by the states. In *Clark*, the court reasoned that the congressional scheme under the National Gas Act was carefully conceived and developed so that the commission would enforce the Act. *Id.* at 1148. Under the M.L.L.A. the states have the power to police and regulate the federal lessee's conduct. Texas Oil & Gas Corp. v. Phillips Petr. Co., 277 F. Supp. 366, 370 (W.D. Okla. 1967), *aff'd*, 406 F.2d 1303 (10th Cir.), *cert. denied*, 396 U.S. 829 (1969). More importantly though, Congress has specifically authorized the Secretary of the Interior to enlist the states in his task of enforcing and managing the public lands. *See* 43 U.S.C. § 1733(c) (1976). The most important distinction between the problems raised in *Clark* and granting an implied right of action to the states is the very nature and size of the parties involved. In *Clark*, public natural gas consumers sought to enforce a statute. 570 F.2d at 1138. If such a cause of action were allowed, the court recognized the inevitability of numerous and conflicting decisions among the courts and between the courts and the commission which would undermine the uniform scheme devised by Congress. *Id.* at 1149. The almost unlimited size of the class and the geographical distance between potential class members who would have been able to enforce the statute created this problem.

Having the states enforce the M.L.L.A., however, does not involve these problems. The class by itself is limited to the states having federal oil and gas leases located within their jurisdictional borders. Further, since the class would consist of "states" as opposed to "consumers," this class would likely be more aware of the regulatory scheme. Congress must have recognized this fact when it authorized the Secretary of the Interior to enlist state help in public land management, rather than the aid of consumers or users. *See* text & notes 170-72 *supra*.

185. Cort v. Ash, 422 U.S. at 82. This factor may be of little significance in the creation of an implied right of action. Clark v. Gulf Oil Corp., 570 F.2d 1138, 1150 (3d Cir. 1978) (when the remedy requested is not a typical money damage award and the limited money relief requested is fixed pursuant to agency time tables the fourth factor in *Cort* has little relevance).

186. 30 U.S.C. § 188(a) (1976).

187. *See* text & notes 36 & 37 *supra*.

ply with any provisions of this chapter [the M.L.L.A.], the lease, or of the general regulations promulgated under this chapter."[188] The fourth *Cort* factor is thus satisfied, since the cause of action is not one traditionally relegated to state law.

In summary, these four considerations show that an implied right of action should be granted to a state protesting the lack of adequate enforcement of lease provisions by the Secretary. Such a remedy would help effectuate the congressional purpose by protecting those intended to benefit from the revenue provisions of the Act, the states.

Conclusion

As evidenced by the recent energy shortage and by President Carter's proposed energy bill, the problem of our nation's energy is one that affects every aspect of our everyday lives. Further, the Secretary of the Interior lacks the resources to adequately effectuate congressional goals in the regulation of the nation's energy resources on public lands.

This Note was written in light of the recent energy problems. It proposes two new remedies to solve some of the Nation's new problems with respect to federal oil and gas leases. Because the Secretary of the Interior's ability to enforce federal oil and gas leases is limited, this Note proposes that the state in which federal oil and gas leases are located should be empowered to enforce the leases. The two methods the states may utilize to accomplish this goal are the third party beneficiary concept and the implied right of action theory. By the use of these theories a more comprehensive enforcement scheme should be achieved.

188. 30 U.S.C. § 188(a) (1976).