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1985

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6-11-1985

### Leases for Other Minerals: Recent Developments

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#### Citation Information

Cope, Thomas F., "Leases for Other Minerals: Recent Developments" (1985). *Public Lands Mineral Leasing: Issues and Directions (Summer Conference, June 10-11)*.  
<https://scholar.law.colorado.edu/public-lands-mineral-leasing-issues-and-directions/13>

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Thomas F. Cope, *Leases for Other Minerals: Recent Developments*, in PUBLIC LANDS MINERAL LEASING: ISSUES AND DIRECTIONS (Natural Res. Law Ctr., Univ. of Colo. Sch. of Law 1985).

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LEASES FOR OTHER MINERALS:  
RECENT DEVELOPMENTS

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PUBLIC LANDS MINERAL LEASING:  
ISSUES AND DIRECTIONS

A Short Course Sponsored by the  
Natural Resources Law Center  
University of Colorado School of Law

June 10-11, 1985



## LEASES FOR OTHER MINERALS:

### RECENT DEVELOPMENTS

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- Federal Mineral Leasing (Non-Oil and Gas) Institute (Rocky Mtn. Min. L. Fdn. 1971).
- Jones, The Development of Outer Continental Shelf Energy Resources, 11 Pepperdine L. Rev. 9 (1983).
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- I. Introduction: E Pluribus Unum?
- A. Leasing v. Location
1. Location of mining claims is the generally applicable method for acquiring rights to Federal minerals. (30 U.S.C. § 22 (1982) ("Except as otherwise provided, all valuable mineral deposits . . . shall be free and open to exploration and purchase . . .").)
  2. Leasing acts establish more or less narrow exceptions to the general rule of location.
  3. There is no generally applicable leasing act; instead, there is a patchwork of legislation reflecting the concerns of the moment.
    - a. The Mineral Lands Leasing Act of 1920 (the "MLLA"), the most comprehensive act, only authorizes leasing of coal, phosphates,

sodium, potassium, sulfur (in Louisiana and New Mexico only), oil, gas, oil shale, and gilsonite, and only in onshore public domain lands. (30 U.S.C. §§ 181-287 (1982).)

- b. The MLLA itself is the product of a number of amendments (E.g., Mineral Leasing Act Revision of 1960, Pub. L. No. 86-705, 74 Stat. 781 (1960), amended by Combined Hydrocarbon Leasing Act of 1981, Pub. L. No. 97-78, 95 Stat. 1070 (1981) (bitumen, native asphalt (including gilsonite) and tar sand).) and acts incorporating the MLLA by reference. (Act of Apr. 17, 1926, ch. 158, 44 Stat. 301 (1926), amended by Act of July 16, 1932, ch. 498, 47 Stat. 701 (1932) (sulfur in Louisiana and New Mexico); Act of Feb. 7, 1927, ch. 66, 44 Stat. 1057 (1927) (potassium).)
- c. Other legislation has been enacted to authorize leasing of lands or minerals not covered by the MLLA, such as the Mineral Leasing Act for Acquired Lands (30 U.S.C. §§ 351-359 (1982).), the Outer Continental Shelf Lands Act (43 U.S.C. §§ 1331-1343 (1982).), the Geothermal Steam Act of 1970 (30 U.S.C. §§ 1001-1025 (1982).), and a dozen or so acts of local applicability (see generally ALM2d § 7.02.).

4. As a result, Federal mineral leasing is needlessly complex.

B. Regulations: Many or Few?

1. The first regulations under the MLLA were commodity-specific, with separate regulations for oil shale (47 L.D. 224 (1920).), oil and gas (Id. 437, 552.), coal (Id. 489.), phosphate (Id. 513.), and sodium (Id. 529.).
2. Since then, the Department has moved toward greater uniformity, with fewer separate sets of regulations. Separate regulations now exist only for oil and gas (43 C.F.R. Group 3100 (1984).), geothermal resources (Id. Group

3200.), coal (Id. Group 3400.), and solid minerals other than coal and oil shale (Id. Group 3500.).

3. After considering the matter for several years (47 Fed. Reg. 13,472 (1982).), the Department has apparently decided to return to the older approach of more, but commodity-specific, regulations (50 Fed. Reg. 14,512 (1985)).

#### C. Lease Forms

1. In the past numerous different lease forms were used for leasing different minerals under different acts.
2. BLM has recently proposed a master form of lease with alternate provisions to be selected, depending upon the mineral and leasing act involved. (48 Fed. Reg. 19,240 (1983).). It would be used for all minerals other than oil and gas (including combined hydrocarbon leasing), oil shale, and geothermal resources.

## II. Changes in Regulations

#### A. Amendment of Regulations Covering Leasing of Solid Minerals Other Than Coal and Oil Shale, 49 Fed. Reg. 17,892 (1984).

1. The regulations were amended to authorize specifically the issuance of prospecting permits for hardrock minerals under Reorganization Plan No. 3 of 1946. (49 Fed. Reg. at 17,902 (codified at 43 C.F.R. Part 3510 (1984).))
2. The definition of "valuable deposit" for the purpose of entitling a prospecting permittee to a preference right lease was amended to bring it into conformity with the "prudent man" test of Castle v. Womble, 19 L.D. 455, 457 (1894), thereby dispensing with considerations of marketability. (49 Fed. Reg. 17,892-93, 17,900 (codified at 43 C.F.R. § 3500.0-5(j) (1984)).)
3. The term "chiefly valuable"--one of the criteria for issuance of a sodium, sulfur, or potassium preference right lease--was defined,

thus removing considerable uncertainty in the law, by making it clear that the comparison is one of mineral versus non-mineral values. (49 Fed. Reg. 17,893, 17,900 (codified at 43 C.F.R. § 3500.0-5(k) (1984)).) If there is no "significant conflict" with non-mineral values, the question is simply whether a "valuable deposit" was discovered. (Id.)

- B. Revision of Regulations Covering Leasing of Solid Minerals Other Than Coal and Oil Shale, 50 Fed. Reg. 14,512 (1985) (proposed Feb. 1, 1985).
1. 43 C.F.R. Group 3500 would be organized on a mineral-specific basis, as follows:
    - a. Part 3500 - General provisions
    - b. Part 3510 - Phosphate
    - c. Part 3520 - Sodium
    - d. Part 3530 - Potassium
    - e. Part 3540 - Sulfur
    - f. Part 3550 - Asphalt in Oklahoma and Gilsonite
    - g. Part 3560 - Hardrock Minerals
    - h. Part 3570 - Special Leasing Areas
  2. Noncompetitive leasing of gilsonite would be eliminated in favor of a competitive leasing system. 50 Fed. Reg. 14,512 (1985).
  3. Leasing of silica sand and other nonmetallic minerals in Nevada under 43 C.F.R. § 3563.1 (1984) and of sand and gravel in Nevada under id. § 3563.2 would be eliminated. (See generally ALM2d § 7.03[6], [7] (1984).)
    - a. Leases under § 3563.1 were granted pursuant to the authority of Executive Order No. 5015, which has since been rescinded.



- b. Sand and gravel formerly leased under § 3563.2 would henceforth be disposed of under the Materials Act. (30 U.S.C. §§ 601-604 (1982); see generally ALM2d ch. 21.)
- 4. Leasing of leasable and hardrock minerals within the White Mountains National Recreation Area, pursuant to the Alaska National Interest Lands Conservation Act (16 U.S.C. §§ 460mm-2 to -4 (1982).), would be implemented by proposed Subpart 3575.
- 5. Proposed regulations for phosphate, sodium, potassium, and sulfur would implement the provisions of section 302(b) of FLPMA (43 U.S.C. § 1732(b) (1982).) and 43 C.F.R. Part 2920 (1984), by authorizing the issuance of exploration licenses, which will allow the licensee to gather data on known but unleased deposits. 50 Fed. Reg. at 14,526 (to be codified at 43 C.F.R. Subpart 3514), 14,531 (to be codified at id. Subpart 3524), 14,536-37 (to be codified at id. Subpart 3534), 14,541 (to be codified at id. Subpart 3544) (1985).
- 6. The preamble to the proposed rulemaking mentions other possible changes, and, although comments are requested, no such changes have been made in the proposed regulations. 50 Fed. Reg. 14,512 (1985).
  - a. The acreage holding limitations for potassium and hardrock leases may be increased.
  - b. The royalty rate for asphalt leased in Oklahoma may be increased from the present minimum of \$0.25/ton.

### III. Proposed Royalty Reduction Guidelines

#### A. Background

- 1. Section 39 of the MLLA provides that the Secretary, "for the purpose of encouraging the greatest ultimate recovery of coal, oil, gas, oil shale, gilsonite, phosphate, sodium, potassium and sulphur, and in the interest of conservation of natural resources is authorized to . . . reduce the royalty . . . when-

ever in his judgment it is necessary to do so in order to promote development, or whenever in his judgment the leases cannot be successfully operated under the terms provided therein." (30 U.S.C. § 209 (1982).)

2. Regulations exist for reduction of royalties below the rate specified in the lease for coal (43 C.F.R. § 3485.2(c) (1984).), tar sand under combined hydrocarbon leases (*Id.* §§ 3140.1-4(c)(3), 3141.5-3(b).), and phosphate, potassium, sodium, and sulfur (*Id.* § 3503.3-2(d).); similar regulations for oil shale, gilsonite, and hardrock minerals are to be proposed during 1985.
3. Applications of royalty reductions under these regulations are evaluated in accordance with Departmental guidelines.

B. Royalty Reduction Guidelines for Federal Coal, Phosphate, Potassium, Sodium, Sulphur, and Tar Sand Leases, 50 Fed. Reg. 6,062 (1985) (proposed Feb. 7, 1985).

1. All pending applications are suspended until the final guidelines are published.
2. Lease operating income analysis will replace discounted cash flow analysis, which was used under the 1980 guidelines.
  - a. A royalty reduction will be granted only if lease operating costs exceed net lease sales both on a test-period and projected-period basis, and only to the extent necessary to cause lease operating costs to equal net lease sales (*i.e.*, lease operating income = 0) during the test-period or projected-period, whichever reduction is less. In no event, however, will the royalty be reduced to zero.
  - b. Generally, the applicant must submit 12 months of verifiable financial data pertaining to the operation of which the lease is a part. Use of data from a mine "in close proximity" will be "discouraged," although allowed under the regulations.

3. Normally, royalty reductions will be effective for 1 year only, but they can be granted for up to 3 years (5 years for tar sand), with annual certifications that the conditions that gave rise to the reduction are continuing.

#### IV. Interagency Agreement with Forest Service

##### A. Background

1. Sometimes agencies other than the Interior Department participate in the leasing decision.
  - a. Consent of an agency having jurisdiction over the land is required for issuance of prospecting permits and leases under the Mineral Leasing Act for Acquired Lands (30 U.S.C. § 352 (1982); 43 C.F.R. § 3501.2-6(a) (1984).) or section 402 of Reorganization Plan No. 3 of 1946. (5 U.S.C. app. 1031 (1982).), and may be conditioned upon stipulations required by that agency.
  - b. An agency for whose benefit lands have been withdrawn, reserved, or segregated will be consulted, but the agency can only make recommendations and propose stipulations. (43 C.F.R. § 3501-3.2(a), (b)(1) (1984).)
2. Introduction of a second agency into the leasing process will likely result in additional delay in processing lease applications, such as that which led to Mountain States Legal Foundation v. Andrus, 499 F. Supp. 383 (D. Wyo. 1980) (several years delay in acting on lease applications covering 1,000,000 acres of National Forest land constituted a withdrawal and required compliance with FLPMA).

##### B. Interagency Agreement dated June 19, 1984, between Bureau of Land Management and Forest Service. (49 Fed. Reg. 37,440 (1984)).

1. The Agreement applies to leasing of Federal minerals in or adjoining the National Forest System.

2. It provides for coordination of environmental analyses under NEPA and in development of stipulations.
3. The Agreement contains the following timetable for processing lease applications:
  - a. The BLM will forward an application to the FS within 15 days after receipt.
  - b. The FS will make its recommendation or consent decision within 60 days thereafter, or advise the BLM when it will make its decision, together with the reasons for its delay.
  - c. The BLM will either issue a lease or reject the offer within 60 days after receiving the FS's recommendation or consent decision.

#### IV. Oil Shale Leasing

##### A. Background

1. Oil shale is leasable under the Mineral Lands Leasing Act (30 U.S.C. § 241 (1982).) and the Mineral Leasing Act for Acquired Lands. (Id. § 352.)
2. However, by Executive Order No. 5327, all Federal lands containing oil shale deposits were "temporarily withdrawn from lease or other disposal and reserved for the purposes of investigation, examination and classification." (Exec. Order No. 5327 (Apr. 15, 1930); 53 I.D. 127 (1930).)
  - a. Executive Order No. 5327 was subsequently modified to allow leasing of oil and gas (Exec. Order No. 6016 (Feb. 6, 1933).) and sodium (Exec. Order No. 7038 (May 15, 1935).) in withdrawn lands.
  - b. The "temporary" withdrawal continues to be effective. (Mecham v. Udall, 369 F.2d (10th Cir. 1966).)
  - c. Oil shale leasing is thus limited to lands where the withdrawal has been revoked.

## B. Prototype Oil Shale Leasing Program

1. In 1971 a limited program for competitive leasing was announced. Six tracts were offered for lease in 1974 and four leases were issued, two in Colorado (Tracts C-a and C-b) and two in Utah (Tracts U-a and U-b). See generally ALM2d § 20.20[2][b] (1984).
2. Because there was little significant development by 1981, it was decided to offer one or two additional tracts in Colorado for lease (Tracts C-11 and C-18).
  - a. A supplemental EIS concerning the leasing of those tracts has been prepared. (Bureau of Land Management, Final Supplemental Environmental Impact Statement for the Prototype Oil Shale Leasing Program (1983).)
  - b. The Regional Oil Shale Team unanimously endorsed the leasing of Tract C-11, and the governor of Colorado has concurred in the leasing of one tract. The BLM has therefore called for expressions of interest from industry in July of 1984 as to further prototype leasing. (49 Fed. Reg. 29,279 (1984).)

## C. Federal Oil Shale Management Program

1. The BLM has simultaneously begun to develop a permanent oil shale leasing program. (See generally ALM2d § 20.20[2](c).)
2. Regulations have been proposed and a draft EIS prepared. (Procedures for the Management of Federally Owned Oil Shale Resources, 48 Fed. Reg. 6,510 (1983) (to be codified at 43 C.F.R. Group 3900) (proposed Sept. 7, 1982); Bureau of Land Management, Draft Environmental Impact Statement on the Federal Oil Shale Management Program (1983).)

## D. Outlook for Commercial Development

1. Numerous times during the past half-century, commercial development of oil shale was thought

to be "just around the corner," once a slight increase in crude oil prices would make oil shale economic.

2. The crude oil price increases of the past decade seemed to make development technologically and economically feasible.
3. However, with falling crude oil prices and decreased levels of Federal support in recent years, oil shale development once again seems to be an idea whose time has not yet come.

## V. Outer Continental Shelf Leasing

### A. Background

1. Disputes over the right to lease offshore oil and gas led to the tidelands litigation, which was decided in favor of the United States. (United States v. California, 332 U.S. 19 (1947); United States v. Louisiana, 339 U.S. 699 (1950); United States v. Texas, 339 U.S. 707 (1950).)
2. In 1953 Congress enacted legislation to share offshore oil and gas with the coastal states.
  - a. The Submerged Lands Act, 43 U.S.C. §§ 1301-1315 (1982), confirmed the states' ownership of land beneath navigable waters within the greater of 3 miles from their coast line or their historic boundaries up to three marine leagues.
  - b. The Outer Continental Shelf Lands Act (the "OCSLA"), 43 U.S.C. §§ 1331-1343 (1982), authorized the Secretary to lease oil, gas, sulfur, and other minerals (now defined to include "geopressured-geothermal and associated resources, and all other minerals . . . .", 43 U.S.C. § 1331(q) (1982).) in the subsoil and seabed of the outer continental shelf (defined as all submerged lands lying seaward of the lands granted to the states under the Submerged Lands Act).

3. The OCSLA was enacted in the context of oil and gas leasing, and thus far its primary importance has been in the leasing of oil and gas.
4. Rights to offshore minerals may also be obtained under the Deep Seabed Hard Mineral Resources Act of 1980, 30 U.S.C. §§ 1401-1473 (1982).
  - a. It governs exploration for and commercial recovery of minerals in the deep seabed, which is defined as the seabed and its subsoil lying outside the outer continental shelf and outside "any area of national resource jurisdiction of any foreign nation, if . . . such jurisdiction is recognized by the United States." (30 U.S.C. § 1403(4) (1982).)
  - b. One of the purposes of the Act was to encourage negotiation and adoption of a comprehensive law of the sea treaty. (30 U.S.C. § 1401(b)(1) (1982).)
  - c. Dissatisfied with the provisions relating to deep seabed mining, however, the United States declined to sign the United Nations Convention on the Law of the Sea on December 10, 1982. (Oxman, The New Law of the Sea, 69 A.B.A.J., Feb. 1983, at 156.)
  - d. Thus the OCSLA became a more attractive vehicle for the exploitation of offshore minerals than the Deep Seabed Hard Mineral Resources Act.

B. Leasing of Nonenergy Minerals under the OCSLA

1. On March 10, 1983, the president proclaimed an Exclusive Economic Zone extending 200 nautical miles offshore from the baseline of the territorial sea of the United States and its territories.
2. The year before, the Secretary had announced his intention to develop a leasing program for minerals other than oil, gas and sulfur

(referred to as "nonenergy minerals"), and later in 1982 the Secretary asserted the Department's jurisdiction under the OCSLA to lease such minerals in the subsoil and seabed of submerged lands up to 200 nautical miles offshore. (47 Fed. Reg. 55,313 (1982), amended by 48 Fed. Reg. 2450 (1983).)

3. In two recent advance notices of proposed rulemaking, MMS has sought comments on developing new regulations for nonenergy minerals separate from the existing regulations, which are primarily concerned with oil and gas. (49 Fed. Reg. 47,871 (1984) (30 C.F.R. Part 251); 50 Fed. Reg. 15,590 (1985) (30 C.F.R. Part 256).)
4. MMS has also proposed a lease form for nonenergy minerals. (48 Fed. Reg. 34,143 (1983).)
5. In a Call for Information, MMS requested comments and information to assist in delineating areas for detailed review and possible leasing. (50 Fed. Reg. 2,264 (1985).)
6. Environmental impact statements are presently being prepared on the leasing of polymetallic sulfide minerals in the area of the Gorda Ridge (48 Fed. Reg. 12,840 (1983).), sand and gravel off Alaska (47 Fed. Reg. 40,490 (1982); 48 Fed. Reg. 15,541, 37,087 (1983).), and cobalt-rich manganese crusts surrounding the Hawaiian Archipelago and Johnston Island (49 Fed. Reg. 8,089 (1984); 50 Fed. Reg. 13,673 (1985).)





