

**Minority Report
to
Royalty Policy Committee
In Response to Majority Report & Recommendations
of the Sodium/Potassium Subcommittee
Scheduled for RPC Presentation on September 7, 2000**

Subcommittee Draft Regulations

The Sodium/Potassium Subcommittee (Subcommittee) of the Royalty Policy Committee was formed several years ago to attempt a revision of 30 CFR ' 206.301. The subcommittee approached royalty valuation from a process standpoint, that is, how a royalty product is made determines how it will be valued for royalty computation purposes. This methodology is the major point of disagreement. The State of Colorado disagrees with this approach and files this Minority Report.

The subcommittee draft royalty valuation regulations (Subcommittee draft) contain 22 sections. The subcommittee draft addresses three general subjects:

1. Valuations
2. Allowances
3. Administration

The subcommittee draft falls into the following principal and sub-categories:

Definitions	Draft ' 206.101
Valuations	Draft ' ' 206.101 through 206.107
Allowances	(a) Transportation: Draft ' ' 206.108 through 206.110 (b) Packaging: Draft ' ' 206.111 through 206.113, and (c) Reagent: Draft ' ' 206.114.
Administration	Draft ' ' 206.116 through 206.123

The administrative provisions codified by the subcommittee draft address the following concerns:

1. When royalties are due, ' 206.116;
2. Marketable Condition, ' 206.115
3. Point of royalty measurement, 206.117;
4. Record keeping, ' ' 206.118 and 206.119;
5. MMS valuation guidance, ' 206.121; and
6. Confidentiality, ' 206.122

Mineral Leasing Act

The Federal Mineral Lands Leasing Act is found in 30 U.S.C. ' ' 181-287. It contains general provisions (' ' 181-196), coal leasing provisions (' ' 201-209), phosphate leasing provisions (' ' 211-214), oil and gas leasing provisions (' ' 223-237), oil shale leasing provisions (' ' 241-242), sodium leasing provisions (' ' 261-267), sulphur leasing provisions (' ' 271-276), and potash leasing provisions (' ' 281-287). The Mineral Leasing Act, as it is popularly called, was originally enacted in 1920. It has several amendments but has maintained its original concept, that is, imposing the royalty due for the minerals extracted and marketed on the product sold, for more than 70 years. This has been the traditional royalty approach to mineral exploitation in the United States.

The sodium provisions were part of the original Act while potassium was added in 1927. The Mineral Leasing Act specifies the method of sodium royalty valuation, 30 U.S.C. ' 262¹:

All leases under this section shall be conditioned upon the payment by the lessee of such royalty as may be fixed in the lease, not less than 2 per centum of the quantity or gross value of the output of sodium compounds and other related products at the point of shipment to market@[Underscoring added.]

¹The entirety of 30 U.S.C. ' 262 appears in the Appendix to this Minority Report.

The potassium section states, 30 U.S.C. ' 283²:

A[A]ll leases to be conditioned upon the payment by the lessee of such royalty as may be fixed in the lease, not less than 2 per centum of the quantity of gross value of the output of potassium compounds and other related products, except sodium, at the point of shipment to market@[Underscoring added.]

Lease Language

We recognize that lease language may vary, however, most leases follow the language of the Mineral Leasing Act. Typical sodium leases provide:

PRODUCTION ROYALTIES - Lessee shall pay lessor a production royalty of X percent of the gross value of the output of the leased deposits at the point of shipment to market. Such production royalty is due the last day of the month next following the month in which the minerals are sold or removed from the leased lands.
[Underscoring added.]

Minority Objection to Subcommittee Draft

The subcommittee draft adopts an unduly complicated methodology of royalty valuation that is predicated, not on the product sold as specified in the Mineral Leasing Act and in typical leases, but on the method or process whereby the product is produced. So far as the Mineral Leasing Act is concerned, the method or process by which a mineral product is produced is completely irrelevant.

This regulation flaw was enunciated, again, as late as last year by the United States Court of Appeals for the District of Columbia in *National Mining Ass'n. v. U.S. Dept. of Interior*, 177 F.3d 1 (D.C. Cir. 1999).³ In *National Mining*, the D.C. Circuit held regulations promulgated by a federal agency (Office of Surface Mining, Reclamation and Enforcement, Department of the Interior) was required to comply with the plain meaning of the federal statute which they purported to implement. Since the OSM regulations

²The entirety of 30 U.S.C. ' 283 appears in the Appendix to this Minority Report.

³Most judicial challenges to federal regulations are instituted in the D.C. Circuit. Consequently, that Court of Appeals is very familiar with regulation propriety.

challenged on appeal did not, they were held to be invalid and unenforceable. The draft regulations in the subcommittee draft are likewise illegal and, therefore, fatally defective.

As set forth above, 30 U.S.C. ' 262⁴ requires royalty payment of a royalty of not less than 2 per centum of the quantity or gross value of the output of sodium compounds and other related products at the point of shipment to market; . . .@Neither this sodium provision nor the potassium provision of the Mineral Leasing Act makes reference to a primary product, intermediate product or derivative product as set forth in the subcommittee draft. Likewise, the Act does not call for royalty computation on a lease product at any time other than at its point of shipment to market. The subcommittee draft, through its definitions (draft section 206.101), establishes a new language for royalty computation. As a part of this creative process, it proposes to legislate a new method of calculating a lessee's royalty payment obligation to the United States. This proposal creates a liability standard not authorized by the Mineral Leasing Act; in fact, the draft regulations are directly at odds with it. For more than 80 years the Mineral Leasing Act specifically focuses on the lease product's value and concomitant properties at the point of shipment to market, not the process or processes that precede shipment.

Conclusion

The Royalty Policy Committee should not approve the draft regulations as prepared by the Sodium Subcommittee. They embody impermissible modifications to substantive federal law governing the mineral leasing of federal lands, the Mineral Leasing Act, adopted by Congress.

⁴The potassium portion of the Mineral Leasing Act, 30 U.S.C. ' 283, similarly provides in pertinent part for a royalty as may be fixed in the lease, not less than 2 per centum of the quantity of gross value of the output of potassium compounds and other related products, except sodium, at the point of shipment to market@See Appendix.

Appendix

30 USCS ' 262

' 262. Leases to permittees; surveys of lands; royalties and annual rentals

Upon showing to the satisfaction of the Secretary of the Interior that valuable deposits of one of the substances enumerated in section 23 hereof [30 USCS ' 261] have been discovered by the permittee within the area covered by his permit and that such land is chiefly valuable therefor, the permittee shall be entitled to a lease for any or all of the land embraced in the prospecting permit at a royalty of not less than 2 per centum of the quantity or gross value of the output of sodium compounds and other related products at the point of shipment to market; the lands in such lease to be taken in compact form by legal subdivisions of the public land surveys or, if the land be not surveyed, by survey executed at the cost of the permittee in accordance with regulations prescribed by the Secretary of the Interior. Lands known to contain valuable deposits of one of the substances enumerated in section 23 hereof [30 USCS ' 261] and not covered by permits or leases shall be subject to lease by the Secretary of the Interior through advertisement, competitive bidding, or such other methods as he may by general regulations adopt and in such areas as he shall fix, not exceeding two thousand five hundred and sixty acres. All leases under this section shall be conditioned upon the payment by the lessee of such royalty as may be fixed in the lease, not less than 2 per centum of the quantity or gross value of the output of sodium compounds and other related products at the point of shipment to market, and the payment in advance of a rental of 25 cents per acre for the first calendar year or fraction thereof, 50 cents per acre for the second, third, fourth, and fifth calendar years respectively; and \$1 per acre per annum thereafter during the continuance of the lease, such rental for any one year to be credited against royalties accruing for that year. Leases under this section shall be for a period of twenty years, with preferential right in the lessee to renew for successive periods of ten years upon such reasonable terms and conditions as may be prescribed by the Secretary of the Interior unless otherwise provided by law at the expiration of such period: Provided, That nothing in this Act shall prohibit the mining and sale of sodium compounds under potassium leases issued pursuant to the Acts of October 2, 1917 (Fortieth Statutes at Large, page 297), and February 7, 1927 (Forty-fourth Statutes at Large, page 1057) [30 USCS ' ' 281 et seq.], nor the mining and sale of potassium compounds as a by-product from sodium leases taken under this section: Provided further, That on application by any lessee the Secretary of the Interior is authorized to modify the rental and royalty provisions stipulated in any existing sodium lease to conform to the provisions of this section. (Feb. 25, 1920, ch 85, ' 24, 41 Stat. 447; Dec. 11, 1928, ch 19, 45 Stat. 1019.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

References in text
Amendments

References in text:

This Act, referred to in this section, is Act Feb. 25, 1920, ch 85, 41 Stat. 437, popularly known as the Mineral Leasing Act of 1920, and appears generally as 30 USCS ' 181 et seq. For full classification of this Act, consult USCS Tables volumes.

The Acts of October 2, 1917", referred to in this section, formerly appeared as 30 USCS ' 141-152, prior to its repeal by Act Feb. 7, 1927, ch 66, ' 6, 44 Stat. 1058.

Amendments:

1928. Act Dec. 11, 1928, substituted this section for one which read: That upon showing to the satisfaction of the Secretary of the Interior that valuable deposits of one of the substances enumerated in section 23 hereof has been discovered by the permittee within the area covered by his permit and that such land is chiefly valuable therefor the permittee shall be entitled to a lease for one-half of the land embraced in the prospecting permit, at a royalty of not less than one-eighth of the amount or value of the production, to be taken and described by legal subdivisions of the public-land surveys, or if the land be not surveyed by survey executed at the cost of the permittee in accordance with the rules and regulations to be prescribed by the Secretary of the Interior. The permittee shall also have the preference right to lease the remainder of the lands embraced within the limits of his permit at a royalty of not less than one-eighth of the amount or value of the production to be fixed by the Secretary of the Interior. Lands known to contain such valuable deposits as are enumerated in section 23 hereof and not covered by permits or leases, except such lands as are situated in said county of San Bernardino, shall be held subject to lease, and may be leased by the Secretary of the Interior through advertisement, competitive bidding, or such other methods as he may by general regulations adopt, and in such areas as he shall fix, not exceeding two thousand five hundred and sixty acres; all leases to be conditioned upon the payment by the lessee of such royalty of not less than one-eighth of the amount or value of the production as may be fixed in the lease, and the payment in advance of a rental of 50 cents per acre for the first calendar year or fraction thereof and \$1 per acre per annum thereafter during the continuance of the lease, the rental paid for any one year to be credited on the royalty for that year. Leases may be for indeterminate periods, subject to readjustment at the end of each twenty-year period, upon such

conditions not inconsistent herewith as may be incorporated in each lease or prescribed in general regulation theretofore issued by the Secretary of the Interior, including covenants relative to mining methods, waste, period of preliminary development, and minimum production, and a lessee under this section may be lessee of the remaining lands in his permit.@

30 USCS ' 283

Sec. 283. Lands containing valuable deposits not covered by permits or leases; authority to lease; acreage; conditions; renewals; exemptions from rentals and royalties; suspension of operations

Lands known to contain valuable deposits enumerated in this subchapter and not covered by permits or leases shall be held subject to lease by the Secretary of the Interior through advertisement, competitive bidding, or such other methods as he may by general regulations adopt, and in such areas as he shall fix, not exceeding two thousand five hundred and sixty acres; all leases to be conditioned upon the payment by the lessee of such royalty as may be fixed in the lease, not less than 2 per centum of the quantity or gross value of the output of potassium compounds and other related products, except sodium, at the point of shipment to market, and the payment in advance of a rental of 25 cents per acre for the first calendar year or fraction thereof; 50 cents per acre for the second, third, fourth, and fifth years, respectively; and \$1 per acre per annum thereafter during the continuance of the lease, such rental for that year being credited against royalties accruing for that year. Any lease issued under this subchapter shall be for a term of twenty years and so long thereafter as the lessee complies with the terms and conditions of the lease and upon the further condition that at the end of each twenty-year period succeeding the date of the lease such reasonable adjustment of the terms and conditions thereof may be made therein as may be prescribed by the Secretary of the Interior unless otherwise provided by law at the expiration of such periods. Leases shall be conditioned upon a minimum annual production or the payment of a minimum royalty in lieu thereof, except when production is interrupted by strikes, the elements, or casualties not attributable to the lessee. The Secretary of the Interior may permit suspension of operations under any such leases when marketing conditions are such that the leases cannot be operated except at a loss. The Secretary upon application by the lessee prior to the expiration of any existing lease in good standing shall amend such lease to provide for the same tenure and to contain the same conditions, including adjustment at the end of each twenty-year period succeeding the date of said lease, as provided for in this subchapter. In the discretion of the Secretary of the Interior the area involved in any lease resulting from a prospecting permit may be exempt from any rental in excess of 25 cents

per acre for twenty years succeeding its issue, and the production of potassium compounds under such a lease may be exempt from any royalty in excess of the minimum prescribed in this subchapter for the same period.
(Feb. 7, 1927, ch. 66, Sec. 3, 44 Stat. 1057; June 3, 1948, ch. 379, Sec. 9, 62 Stat. 292)

HISTORY: ANCILLARY LAWS & DIRECTIVES

References in text:

¶This Act, referred to in this section, is Act Feb. 7, 1927, ch 66, 44 Stat. 1057, which appears generally as 30 USCS ' ' 281 et seq.. For full classification of this Act, consult USCS Tables volumes.

Explanatory notes:

This section was enacted as a part of Act Feb. 7, 1927, ch 66, and not as a part of Act Feb. 25, 1920, ch 85, 41 Stat. 437, the Mineral Lands Leasing Act, which generally comprises this chapter.

Amendments:

1948. Act June 3, 1948, substituted the sentences beginning ¶Any lease
Leases shall ¶The Secretary of the Interior and ¶The Secretary upon application
for a former second sentence which read: ¶Leases under this Act shall be for a period of 20 years, with preferential right in the lessee to renew the same for successive periods of ten years upon such reasonable terms and conditions as may be prescribed by the Secretary of the Interior, unless otherwise provided by law at the expiration of such period.