The Changing Legal Landscape for the Disposition of Federal Oil Shale Resources

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Abstract

As it has several times in the last century, the skyrocketing price of oil in 2005 generated renewed interest in developing the vast oil shale resources of the Green River Formation of Colorado, Utah, and Wyoming. As a result, the 109th Congress considered several pieces of oil shale legislation and eventually included provisions in the omnibus "Energy Policy Act of 2005" addressing activities related to eventual leasing and development of federal oil shale resources. Among other things, the Energy Policy Act directed the Department of Interior to make lands available for oil shale research and development activities, expedite a review of the environmental impacts of commercial-scale oil shale development, promulgate regulations establishing a commercial oil shale leasing program, and consult with potentially-affected parties before considering whether to offer federal oil shale resources in a commercial lease sale. In addition, the bill amended existing law to increase tenfold the acreage a company can hold in a state under commercial oil shale leases and created several new administrative bodies, such as an Office of Petroleum Reserves within the Department of Energy and an inter-agency Oil Shale Task Force. This paper will describe these measures in detail, explain where they came from, and evaluate how they changed the legal landscape applicable to the leasing and development of federal oil shale resources.

Introduction

Management and disposition of federal oil shale resources have evolved from the traditional location and patent system under the mining laws of the late-19th Century to a modern leasing system under the Mineral Leasing Act. This evolution likely reflects the period perception that the vast shale resources of the Green River Formation are a potential source of domestic oil, as well as our growing awareness of the need to assess and mitigate the impacts of oil shale development activities on the landscape and communities of the region. After discussing the pre-leasing location and patent system, this paper will summarize provisions of the Mineral Leasing Act applicable to federal oil shale resources. It will then detail the oil shale provisions of the Energy Policy Act of 2005, including measures calling for administrative actions that might lead to commercial leasing, measures amending the Mineral Leasing Act, measures creating new administrative and consultative bodies, and several miscellaneous provisions. Finally, it will discuss the legislative provisions in the Senate and the House in 2005 that led to the Energy Policy Act, as well as subsequent unsuccessful attempts to enact amendments to the Act that would have reduced royalties or mandated large-scale commercial leasing.

Pre-Leasing Regime

This paper is primarily focused on the disposition of oil shale resources by lease, and it is not intended to provide a detailed treatise on the pre-leasing regime. Nonetheless, a brief discussion of the way federal oil shale resources might have been obtained prior to legislative imposition of a leasing system serves as a useful background.[1]

Prior to 1920, federal oil shale resources were subject to general mining laws of location and discovery. In this system, the federal government essentially gave away valuable mineral deposits -- including oil shale deposits -- to whomever first located them. Cliffs Synfuel Corp. v. Norton, 291 F.3d 1250, 1252 (10th Cir. 2002). This system was premised on a policy of encouraging exploration of valuable mineral deposits in the western united States. Id. The 1872 Mining Law, 30 U.S.C. § 22, provided that citizens could enter and explore the public domain in search of minerals and, if they discovered "valuable mineral deposits," they could obtain title to the land on which such deposits are located. Andrus v. Shell Oil Co., 446 U.S. 657, 658 (1980).

There were two potential property interests in oil shale resources under the mining laws: claims and patents. A mining claimant gains indefinite and exclusive right to possession and enjoyment of minerals on public land if she discovers a valuable mineral deposit and locates a mining claim on public land. Del Webb Conservation Holding Corp. v. Tolman, 44 F.Supp.2d 1105, 1110 (D. Nev. 1999); Cameron v. United States, 252 U.S. 450, 456 (1920). There are five elements, each of which must be satisfied, in order to sustain a mining claim on federal lands: The claimant must (1) locate and (2) discover a (3) valuable (4) mineral deposit on (5) lands open to mineral entry. James B. Martin, Note, *Andrus v. Shell Oil Co.: Portent for the Future?*, 11 Envt'l L. 721, 722-23 (1981).

Once a "locator" of a mining claim performs at least $500 worth of labor or improvements on the claim, he or she may not only extract the minerals in the claim, but also may purchase the land itself. 30 U.S.C. § 29. The fee for purchasing -- and thereby "patenting" -- mining claims is modest: $5.00 per acre for lode claims, and $2.50 per acre for placer claims. Id. Before a patent is issued, an applicant must show that at the time of the application "the claim is valuable for minerals;" claims that have been fully worked out do not qualify for patent. Best v. Humboldt Placer Mining Co., 371 U.S. 334, 336 (1963). Until title was obtained through this patenting process, however, the locator must perform at least $100 annually in assessment work or installation of improvements in order to retain a claim. 30 U.S.C. § 28. A party who locates a claim but does not carry it through to patent does not lose his or her mineral claim, though he or she does take the risk that the claim will no longer support the issuance of a patent.

There was considerable uncertainty at the turn of the century as to whether oil shale was patentable under the mining laws. According to the U.S. Supreme Court, that uncertainty related to whether oil shale was a "mineral" under the mining law, and not whether or not it was "valuable." Andrus v. Shell, 446 U.S. at 664. In 1896, the Secretary of Interior held that petroleum claims were not subject to location under the mining laws, concluding that only lands "containing the more precious metals. . . gold, silver, cinnabar, etc." were open to entry. Id. (*citing* Union Oil Co., 23 L.D. 222, 227). In 1897, however, Congress enacted the Oil Placer Act, thereby authorizing entry under the mining laws to public lands "containing petroleum or other mineral oils" and putting to rest any doubt about oil as a mineral. Ch. 216, 29 Stat. 526 (1897) (superseded 1920). However, because oil shale, strictly speaking, contained kerogen and not oil, its status remained problematic. See Andrus v. Shell, 446 U.S. at 665 n.7.

Mineral Leasing Act of 1920

Congress altered the location and discovery program with the enactment of the Mineral Leasing Act of 1920 (MLA). 41 Stat. 437, *as amended*, 30 U.S.C. § 181 *et seq.*; see Hickel v. Oil Shale Corp., 400 U.S. 48, 51 (1970) (observing that the MLA "completely changed the national policy over the disposition of oil shale lands"). This Act withdrew oil shale and other minerals from the general mining law and provided that thereafter, these minerals would be subject to disposition only through leases.[2]

Congress resolved uncertainties about whether shale was subject to location when it included in the MLA a specific withdrawal of "oil shale. . . in lands valuable for such minerals" from disposition under the general mining law. 30 U.S.C. § 181; see also Andrus, 446 U.S. at 366. Moreover, the MLA included oil shale as a "mineral" that was subject to the Act, 30 U.S.C. § 21a, and specifically authorized the Secretary of Interior to lease federal oil shale deposits. 30 U.S.C. § 241(a) (2004). These sections thus withdrew from location all oil, gas, and petroleum lands under federal ownership and placed them within the exclusive jurisdiction of the Department of the Interior to be administered by the Secretary. Thomas v. Union Pac. R. Co., 139 F.Supp. 588, 596 (D. Colo. 1956), *aff'd* 239 F.2d 641. The MLA also included a "savings clause" that protected valid oil shale claims that had been properly located prior to passage of the Act. See 30 U.S.C. § 193.

Prior to amendments contained in the Energy Policy Act of 2005, oil shale leases under the MLA were limited in size to 5,120 acres and no one person or company could acquire more than one lease. Id. Annual rents were set at $0.50 per acre, to be credited each year against the royalties accruing for that year. Id. Under the MLA, leases were also to be conditioned upon the payment of a royalty rate "of not less than 12.5% in amount or value of the production removed or sold from the lease." 30 U.S.C. § 226(b)(1)(A). The MLA provided that "[f]or the purpose of encouraging the production of petroleum products from shales," the Secretary was given the discretion to waive the payment of any rental or royalty during the first five years of an oil shale lease. 30 U.S.C. § 241(a) (2004). In addition to this authority to waive the first five years' royalty for oil shale leases, the MLA authorized the Interior Secretary to reduce, waive, or suspend royalties in order to promote development or if the lease cannot be "successfully operated" under current lease terms. 30 U.S.C. § 209. The MLA also provided that royalties were to be shared with the state in which the lease lies. In 1976, the state's share of oil shale royalties was increased from 37.5% to the current rate of 50% of the royalty collected. P.L. 94-579, Sec. 317 (Oct. 21, 1976) (*codified as amendment to* 30 U.S.C. § 191).[3]

The MLA also included an unusual provision authorizing the issuance of "off-site leases" in two circumstances. 30 U.S.C. § 241(c).[4] First, the Interior Department could issue an off-site lease to the holder of *Federal Prototype Tract C-a* -- a lease issued to Gulf Oil Company and Standard Oil Company as part of the Prototype Leasing Program in 1973[5] -- "additional lands necessary for the disposal of oil shale wastes and the materials removed from mined lands, and for the building of plants, reduction works, and other facilities connected with oil shale operations." 30 U.S.C. § 241(c)(1). The MLA authorized the issuance of only one of these offsite leases, not to exceed 6,400 acres, and provided that the offsite lease could not serve more than one federal oil shale lease. Id. The MLA also provided for the issuance of one 320-acre offsite lease to a party who has the right to develop oil shale on non-Federal lands. Id. at § 241(c)(2). Before such an offsite lease may be issued, the Interior Department must consult with the Governor and State, local, and tribal officials in order to coordinate planning processes, minimize duplication of permits, avoid delays, and anticipate and mitigate likely impacts. Id. at § 241(d)(1). Finally, the Interior Department must seek a recommendation from the Governor of the affected state as to whether or not to lease such lands, what alternative actions are available, and what special conditions should be added to mitigate impacts. Id. at § 2419d)(3).

Energy Policy Act of 2005

During the summer of 2005, Congress considered various versions of omnibus energy legislation, an effort culminating in President George W. Bush's signing of the Energy Policy Act of 2005. See H.R. 6, Pub. L. 109-58, 119 Stat. 728 (*enacted* Aug. 8, 2005). The Act contained various provisions intended to enact policies addressing potential domestic energy sources, including one section specifically addressing federal oil shale resources. See id. at Title III, Sec. 369 (*largely codified at* 42 U.S.C. § 15927). Section 369 of the Energy Policy Act declared that it is the policy of the United States to look at developing oil shale resources in order to reduce oil imports; that development of oil shale "should be conducted in an environmentally sound manner, using practices that minimize impacts;" and that development of shale and other unconventional fuels should emphasize sustainability, "taking into account affected States and communities." Sec. 369(b) (*codified at* 42 U.S.C. § 15927(b)(1)-(3)).

To that end, Section 369 contained provisions that addressed procedures for leasing of federal oil shale resources, provisions that amended the MLA in part, and provisions that established various administrative and consultative bodies. These are discussed below, in turn.[6]

A. Leasing Provisions

Section 369 of the Energy Policy Act contained several provisions intended to gather information on the propriety of conducting a commercial leasing program for federal oil shale resources. First, the Act directed the Interior Department to "make available for leasing such land as the Secretary considers to be necessary to conduct research and development activities" for oil shale and tar sands resources within 6 months of the Act's passage. Sec. 369(c) (*codified at* 42 U.S.C. § 15927(c)). The Act directed that prospective public lands within Colorado, Utah, and Wyoming were to be made available for research and development leasing. Id. The BLM had already initiated a research, development, and demonstration (RD&D) leasing program in November 2004, when it solicited comments on the contents of oil shale RD&D leases, should it decide to offer them. See 69 Fed. Reg. 67935 (November 22, 2004). The BLM made federal lands of Colorado, Utah, and Wyoming available to prospective lessees in June 2005 when it solicited nominations for 160-acre tracts pursuant to its oil shale RD&D leasing program. 70 Fed. Reg. 33753 (June 9, 2005). Accordingly, the BLM has satisfied the direction contained in Section 369(c).

The Act also addressed potential commercial leasing of federal oil shale resources. The Act directed the Interior Department, within 18 months of enactment, to complete a Programmatic Environmental Impact Statement (PEIS) for a commercial leasing program for oil shale and tar sands resources, focusing on the most geologically promising lands within Colorado, Utah, and Wyoming. Sec. 369(d)(1) (*codified at* 42 U.S.C. § 15927(d)(1)). The agency announced the initiation of the scoping period for this PEIS in December 2005, and accepted public comments until the end of January 2006. See 70 Fed. Reg. 73791 (Dec. 13, 2005). Additionally, the BLM held public scoping meetings at seven locations in the three-state region during the winter of 2006. The BLM ultimately received comments from 4,735 individuals, organizations, and government agencies, including 9 state agency divisions, 10 federal agencies, 11 local government organizations, and more than 60 other organizations.[7] The PEIS will evaluate decisions regarding which public lands might be open for commercial leasing, and under what constraints. It will also attempt to analyze the environmental, social and economic issues associated with alternative approaches to leasing. This, it must be noted, is no small task, given that shale-development technologies that might prove economically viable or that might have acceptable environmental and social impacts are yet to be demonstrated, on either federal RD&D leases or on private land. Accordingly, it appears that the analysis in the PEIS is likely to be hypothetical and incomplete, pending further advances in the collective understanding of shale oil extraction technologies. At this writing, the BLM has estimated that a Draft PEIS will be available for public review in Spring 2007.

Because the BLM currently lacks rules that might govern a commercial leasing program for federal shale resources, the Act also directed the Interior Department to adopt regulations. Specifically, the Act directed that final regulations "establishing such program" be published within six months of the agency's completion of the PEIS discussed above. Sec. 369(d)(2) (*codified at* 42 U.S.C. § 15927(d)(2)). The BLM published an advance notice of proposed rulemaking in August 2006 and accepted comments on issues to be addressed in these regulations through October 25, 2006. See 71 Fed. Reg. 50378 (Aug. 25, 2006) and 71 Fed. Reg. 56085 (Sept. 26, 2006). The BLM specifically sought public comment on royalty rates; diligence requirements; royalty determination points; small-tract leasing; and advice on how it should establish fair market value when converting preference right acreage to commercial leases. Id. At this writing, the BLM has projected that draft commercial leasing regulations will be available for public review in Summer 2007.

Finally, the 2005 Energy Policy Act set out a process by which the Interior Department is to consider whether to embark on commercial leasing of federal oil shale resources. Within six months of the agency's publication of a set of final regulations establishing a commercial leasing program, the Interior Secretary is to consult with the Governors of states with significant federal oil shale or tar sands resources, with representatives of local governments, with interested Indian tribes, and with interested members of the public, "to determine the level of support and interest in the States in the development of tar sands and oil shale resources." Sec. 369(e) (*codified at* 42 U.S.C. § 15927(e)). The Act continued:

> If the Secretary finds sufficient support and interest exists in a State, the Secretary may conduct a lease sale in that State under the commercial leasing program regulations.

Id. The Act added that "evidence of interest" is not to be limited to nominations by potential lessees. Id. This "new federalism" called for in the Energy Policy Act is cognizant of the legacy of past oil shale busts, and the fact that states and local governments should be entitled to opt out of commercial leasing if they deem the resulting development to be sufficiently inconsistent with public sentiment and state and local policies.

Importantly, Section 369 of the Energy Policy Act did not mandate that the Interior Department hold a commercial lease sale for oil shale resources. To the contrary, the bill only provided the Interior Department with the authority to hold a sale, and then only if sufficient support for and interest in a sale is found in a state. The Act states that Interior "may" hold a lease sale, "if" sufficient support and interest are found. Sec. 369(e) (*codified at* 42 U.S.C. § 15927(e)). Interior Secretary Dirk Kempthorne acknowledged in his confirmation hearing that Section 369 gave the Interior Department "discretion" to develop and execute a commercial leasing program, "based on the findings of the programmatic EIS and based on the results of consultation with state and local governments."[8] Notwithstanding repeated statements by BLM staff that have been carried in local media outlets, the Energy Policy Act of 2005 does not mandate that a commercial lease sale be held.[9] Elsewhere in the Energy Policy Act -- in fact, over 2,500 times -- Congress *did* include mandatory language directing that administrative officials "shall" do something -- "shall convene," "shall carry out," "shall develop," or "shall provide." In fact, in Section 369(e), Congress directed that the Secretary "shall" consult with Governors, locally-elected officials, Indian tribes, and members of the public. Thus Congress could have required a commercial lease sale by saying that the Secretary "shall" or "must" conduct one, but it instead chose to use permissive language, saying that he "may" do so. Words in a statute are to be given their ordinary meaning, and where the statute says that the Secretary "may" hold a commercial lease sale, it does not mean that he "must" do so, as Secretary Kempthorne properly recognized.[10]

The Energy Policy Act was unusual in that Section 369 also contained Congressional direction concerning matters to be addressed in the Interior Department's commercial leasing regulations for federal oil shale resources. First, the Act specifically directed Interior to establish royalty rates, rentals, bonuses, fees, and other payments that would encourage development of oil shale and tar sands resources while also ensuring a fair return to the United States. See Sec. 369(o) (*codified at* 42 U.S.C. § 15927(o)). Elsewhere, the Act directed Interior to include in its regulations work requirements and milestones "to ensure diligent development of the lease." Sec. 369(f) (*codified at* 42 U.S.C. § 15927(f)). These provisions are unusual because royalties and diligence requirements are typically left to the discretion of the Secretary. In the Energy Policy Act, however, Congress saw fit to provide explicit sidebars on this discretion, eliminating the possibility that royalties would be set at a level that would not ensure a fair return to the treasury, for example. Finally, the Energy Policy Act was uncommon in that it implicitly gave state and local governments, Indian tribes, and the members of the public the ability to prevent a commercial sale of federal oil shale resources. See Sec. 369(e) (*codified at* 42 U.S.C. § 15927(e)). After consultation with these parties, if the Interior Department does not find that sufficient support for and interest in a commercial lease sale exists, then it may not offer commercial leases -- state and local government support is an explicit precondition to leasing. Thus the Act effectively gave state and local governments the ability to veto Interior Department attempts to initiate a commercial lease sale. By providing explicit direction on these subjects generally left to the discretion of the Interior Department, Congress evidenced its distaste for subsidies that might result in less than a fair return for the substantial federal oil shale resources, provisions that might encourage speculative leasing rather than diligent development, and leasing against the will of residents of a state.

In 1983, the BLM issued draft regulations that would have established a commercial oil shale leasing program. See 48 Fed. Reg. 6510 (Feb. 11, 1983). While the BLM did not adopt final regulations at the time, the proposed rules are instructive here because they dealt specifically with these topics. As to royalty rates, the 1983 draft regulations would have set the rate equal to that applicable to conventional oil and gas resources -- 12.5%.[11] Compare id. at 6516 (*proposed* § 3923.5(a)) with 30 U.S.C. § 226(b)(1)(A). As to diligence, the 1983 draft regulations would have required production of minimum amounts from the lease, or, in lieu of actual production, payment of a minimum royalty. See 48 Fed. Reg. at 6517 (*proposed* § 3923.6). The 1983 draft regulations also would have established a Regional Oil Shale Team, to be made up of the BLM state director for Colorado, Utah, and Wyoming, and the governor of each state. 48 Fed. Reg. at 6512-6513 (*proposed* § 3900.3). This body would have held public meetings, provided recommendations to the BLM as to what lands to include in a lease sale (if any), and assessed "market interest" for oil shale leasing. Id. The Team would have been specifically directed to consider the environmental and socio-economic impacts of leasing and whether or not leasing would achieve a reasonable balance between national, state and local interests. Id. All of these measures were deemed necessary in 1983 to discourage speculative leasing, to ensure diligent production from the lease, and to certify that leasing went forward with the knowledge and blessing of state and local governments. Importantly, these same matters appear to have been addressed in the Energy Policy Act out of similar concerns.

B. Amendments to Mineral Leasing Act

The Energy Policy Act also contained amendments to the Mineral Leasing Act that increased the size of federal leases, raised rents, and dramatically increased the amount of federal oil shale lands that a lessee might hold in a state.

First, the Act increased the maximum size of individual federal oil shale leases by 640 acres (one square mile) -- from 5,120 acres up to 5,760 acres. See Sec. 369(j)(2)(E) (*codified as amendment to* 30 U.S.C. 241(a)(2)). Next, the Act raised rents from $0.50 per acre to $2.00 per acre. See Sec. 369(j)(2)(F) (*codified as amendment to* 30 U.S.C. § 241(a)(4)). Finally, the Act increased tenfold the amount of acreage that a single person or company can hold under oil shale lease in a state. Previously, the MLA limited companies to holding just one oil shale lease in a state, or 5,120 acres. The Energy Policy Act significantly increased that limit, amending the MLA to allow a single company to hold up to 50,000 acres of oil shale leases in one state. Sec. 369(j)(2)(G)(ii) (*codified as amendment to* 30 U.S.C. 241(a)(4)).

C. Establishment of Administrative and Consultative Bodies

The Energy Policy Act created new administrative bodies to address oil shale, tar sands, and other unconventional fuels. First, the Act established a Task Force "to develop a program to coordinate and accelerate the commercial development of strategic unconventional fuels. . . in an integrated manner." Sec. 369(h)(1) (*codified at* 42 U.S.C. § 15927(h)). The Task Force is to be composed of the Secretaries (or designees) of the Departments of Energy, Interior and Defense, the Governors of affected States, and representatives of local governments in affected areas, and it is to make recommendations deemed appropriate to promote the development of domestic unconventional fuel resources. Id. at Sec. 369(h)(2), (3). The Task Force is also to make recommendations with regard to initiating partnerships to share information with the Province of Alberta, home of substantial tar sands development, or other nations containing oil shale resources. Id. at Sec. 369(h)(4). Finally, the Task Force was directed to submit to the Congress and the President an initial report by February 2006, and annual reports thereafter, documenting progress in developing unconventional fuel resources. Id. at Sec. 369(h)(5)(A), (B).

The Act created within the Department of Energy the "Office of Petroleum Reserves," which was directed to "work closely with the Oil Shale Task Force." Sec. 369(i)(2) (*codified at* 42 U.S.C. § 15927(i)). Specifically, the Office of Petroleum Reserves is to coordinate a new domestic strategic fuel development program, evaluate the importance of domestic unconventional fuel sources to the security of the country, promote federal actions to facilitate the development of strategic fuels, make recommendations for federal actions to assist in development of unconventional fuels, and "coordinate and facilitate appropriate relationships between private industry and the Federal Government to promote sufficient and timely private investment to commercialize strategic fuels for domestic and military use." Id. at Sec. 369(i)(1)(A)-(E). As with the Task Force, the Office of Petroleum Reserves was to submit to the Congress an initial reports by February 2006, and then annual reports thereafter, documenting its progress in carrying out the provisions of Section 369(i). Id. at Sec. 369(i)(3).

The Act also called for various policy reports and assessments. First, it directed the Energy Department to identify technologies for developing oil shale and tar sands that are ready for demonstration at a commercially-representative scale and that have a high probability of leading to commercial production of these resources. Sec. 369(l)(1) (*codified at* 42 U.S.C. § 15927(l)). For each technology deemed ready for commercial demonstration, the Department was authorized to provide technical assistance, assistance in meeting environmental and regulatory requirements, and cost-sharing assistance. Id. at Sec. 369(l)(2). Next, the Act called on the Energy Department to conduct a national assessment of oil shale and tar sands resources, in order to evaluate and map the actual deposits of the resources in the Green River Region of Colorado, Utah, and Wyoming as well as the Devonian shales east of the Mississippi River and any remaining deposits. Sec. 369(m) (*codified at* 42 U.S.C. § 15927(m)). Finally, the Act called on the Energy Department to update the 1987 technical and economic assessment of domestic heavy oil resources prepared by the Interstate Oil and Gas Compact Commission. Sec. 369(p) (*codified at* 42 U.S.C. § 15927(p)).

D. Miscellaneous Provisions

Section 369 contained a few miscellaneous provisions addressing topics such as fuel procurement, land exchanges, water rights, and permitting and review authority. First, the Act added a new provision to the armed forces' procurement statute requiring the Defense Department to develop a strategy to use fuel produced from coal, oil shale, and tar sands to meet military needs when it is determined that it is in the national interest. Sec. 369(q) (*codified at* 10 U.S.C. § 2398a). The Act gave the Defense Department authority to enter into contracts for the purchase of this unconventional fuel, and added that fuel covered by this section must meet "such standards for clean fuel produced from domestic sources" as may be established by the Defense Department in consultation with the Department of Energy. Id. Additionally, the Act directed the Defense Department to carry out a "comprehensive assessment of current and potential locations in the United States for the supply of covered fuel to the Department." Id.

As to land exchanges, the Act directed the Interior Department to "consider the use of land exchanges where appropriate and feasible to consolidate land ownership and mineral interests." Sec. 369(n) (*codified at* 42 U.S.C. § 15927(n)). The Secretary is to identify public lands containing shale or tar sands in the Green River Formation and is to give priority to implementing land exchanges within the Piceance Creek, Uintah, and Washakie geologic basins. Id. at Sec. 369(n)(2). The Act made clear that land exchanges carried out under this section must be implemented in accordance with Section 206 of the Federal Land Policy and Management Act, 43 U.S.C. § 1716. Id. at Sec. 369(n)(3).

Likely recognizing the potential conflict between water supplies vital to western states and the substantial quantities of water likely to be needed for oil shale development, the Act clarified Congressional intent that nothing in Section 369 "preempts or affects any State water law or interstate compact relating to water." Sec. 369(r) (*codified at* 42 U.S.C. § 15927(r)).

Finally, the Act provided that the Interior Department is to be the lead agency for the purpose of coordinating federal approvals regarding a request to develop a proposed oil shale or tar sands project. Sec. 369(k)(1) (*codified at* 42 U.S.C. § 15927(k)(1)). To the extent practicable, the Interior Department is to coordinate the federal authorizations with any tribal, state, or local agency responsible for conducting separate permitting and environmental reviews. Id. Interior officials were to issue regulations to implement this direction, if necessary, by February 2006. Id. at Sec. 369(k)(2).

Other Legislation in 109th Congress

Section 369 of the Energy Policy Act was the result of a compromise between competing stand-alone bills in the House of Representatives and the Senate that Congress began considering in the spring of 2005. This section discusses these early iterations of the oil shale language that was ultimately enacted, as well as some unsuccessful legislative efforts to disrupt the bipartisan balance struck in Section 369.[12]

A. Precursors to the Energy Policy Act of 2005

In May 2005, Senators Ken Salazar (D-CO) and Orrin Hatch (R-UT) introduced bills that addressed activities regarding the disposition of federal oil shale resources. Though neither of these bills passed the Senate, several provisions in each were ultimately enacted with the passage of the Energy Policy Act.

On May 20, Senator Salazar introduced S. 1092, the "Oil Shale Development Act of 2005." S. 1092, 109th Cong. (2005). This bill would have directed the Interior Department to make federal lands available for research and development leasing, though it would have required this to occur within 1 year of its enactment as compared to the 6-month provision in the Energy Policy Act. Compare S. 1092, Sec. 2(b)(1) with Sec. 369(c). This bill also contained language that eventually became Section 369(d) of the Energy Policy Act, directing the Interior Department to prepare a Programmatic Environmental Impact Statement analyzing potential commercial development within 18 months of its enactment. Compare S. 1092, Sec. 2(c) with Sec. 369(d)(1). Some provisions of S. 1092 were not ultimately included in the Energy Policy Act. For example, the bill would have dictated specific requirements for applications to obtain an RD&D lease, requiring the owner or operator to submit a plan of operations, develop an environmental protection plan, and undertake diligent research and development activities. S. 1092, Sec. 2(b)(3)(E). The bill would also have directed the Secretary to ensure that RD&D was "environmentally sound," that it provided an appropriate return to the public, and that it proceeded only with an adequate bond, surety, or other financial arrangement to ensure reclamation. S. 1092, Sec. 2(b)(3)(A)-(C). Finally, the bill would have required the Interior Department to submit a report to Congress, concurrent with the PEIS, that included an analysis of technologies and RD&D programs as well as whether leases should be offered competitively, the size of the leases, the use and distribution of bonus bids, the appropriate royalty rate, the maximum number of leases and maximum acreage that an individual should be entitled to hold, the infrastructure needed to support an oil shale industry, and the demand for and availability of water with respect to development of oil shale. S. 1092, Sec. 2(d)(2)(A)-(B).

Four days after Senator Salazar introduced S. 1092, Senator Hatch introduced the "Oil Shale and Tar Sand Development Act of 2005."[13] S. 1111, 109th Cong. (2005). This bill would have adopted a more aggressive stance with regard to activities that might lead to oil shale development, and many of these provisions were ultimately not included in the Energy Policy Act. For example, it would have declared it to be the policy of the United States that oil shale and tar sands "should be developed on an accelerated basis." S. 1111, Sec. 2(1)(B). This bill would also have directed the BLM to "develop, implement, and manage comprehensive leasing programs for strategic fuels on Federal land that address all stages of the leasing process from research and development to full commercial leasing," and it would have directed the Interior Department to begin offering both RD&D and commercial leases within 18 months of its enactment. S. 1111, Sec. 102(a), (b)(2). This bill also contained language that would have directed that lessees who obtain RD&D leases be entitled to a preference right lease for a commercial lease of up to 5,120 acres. S. 1111, Sec. 103(1)(C). Though not ultimately included in the Energy Policy Act, this is precisely the course being followed by the BLM in its current RD&D Leasing Program. 70 Fed. Reg. 33753, 33757 (June 9, 2005).[14] Finally, S. 1111 contained proposed amendments to the MLA that would have reduced by up to 50% the amount to be paid in royalties for shale and tar sands leases, based on the price of oil. S. 1111, Sec. 104. Again, none of these measures were ultimately enacted into law.

Other measures from S. 1111 were included in the Energy Policy Act to varying degrees, including Sec. 105 (establishing the Office of Strategic Fuels, which became the Office of Petroleum Reserves in Sec. 369(i) of the Energy Policy Act); Sec. 106 (allowing for cost-shared demonstration technologies, which became Section 369(l)); Sec. 108 (regarding state water rights, which became Sec. 369(r)); and Sec. 109 (authorizing appropriations, which became Sec. 369(s)). This bill was also the source of the provision in Section 369(j)(2)(G) of the Energy Policy Act that increased the acreage that a single company may hold in a state under oil shale lease from 5,120 acres to 50,000 acres, as that language appears in Section 103(1)(B)(i)(II) of S. 1111. Finally, this bill would have established the "Strategic Fuels Task Force," to be constituted much like the Task Force called for in Section 369(h) of the Energy Policy Act, which would have been charged with developing a five-year plan to promote the development of strategic fuels. See S. 1111, Sec. 101(c)(2).

Ultimately, the Senate passed an energy bill on June 28, 2005 that included language representing a compromise between these two bills. See H.R. 6, Sec. 346 (*engrossed amendment as agreed to by the Senate*). The Senate energy bill included the provisions from Senator Salazar's bill, S. 1092, calling for RD&D leasing, and it directed the preparation of a Programmatic EIS analyzing commercial activities within 18 months. It also included the stringent application requirements that would have been applicable to those seeking RD&D leases, as set out in Section 2(b)(3)(A)-(E) of S. 1092. Likewise, the Senate energy bill included provisions from Senator Hatch's bill, S. 1111, increasing tenfold the acreage a company can hold under oil shale leases, establishing an office within the Department of Energy, allowing for cost-shared demonstration technologies, and creating a Task Force.

Meanwhile, the House of Representatives took only three days in April 2005 to consider and pass its omnibus energy bill, H.R. 6, which contained a section seeking to mandate fast-paced commercial leasing of federal oil shale resources. See H.R. 6, Sec. 1018 (*engrossed as agreed to or passed by House*). None of the measures intended to accelerate leasing, however, were ultimately signed into law. First, the House oil shale provisions would have required the Interior Department to develop a commercial leasing program "as soon as practicable" and publish final regulations implementing such a program "by not later than December 31, 2006." Id. at Sec. 1018(b). It also would have required the Interior Secretary to hold the first oil shale lease sale within 6 months of publication of the final regulation. Id. at Sec. 1018(c). Finally, it would have required the Interior Department to "identify and pursue to completion" oil shale land exchanges where they "will allow qualified oil shale developers to have early access" to federal shale resources and to commence commercial development. Id. at Sec. 1018(e)(1). Again, none of these provisions were ultimately enacted into law. The only measure in the original House bill to become law was the requirement that the Interior Secretary prepare a report to Congress on the actions necessary to develop the new oil shale leasing program. Compare H.R. 6, Sec. 1018(d) (*engrossed as agreed to or passed by House*) with Sec. 369(g) of Energy Policy Act.

A conference committee made up of representatives from both the Senate and the House met in July and August 2005 to attempt a compromise on the omnibus energy bills coming out of the two chambers. The committee filed the 567-page Conference Report on the compromise bill, H. Rept. 109-190, on July 27, 2005. In the next two days, full chambers of the House and Senate agreed to the Conference Report. President Bush signed the Energy Policy Act on August 8, 2006.

B. Unsuccessful Attempts to Amend the Energy Policy Act of 2005

Though the Energy Policy Act is less than 18 months old, Congress has seen attempts to disrupt the bipartisan balance struck in Section 369 with regard to disposition of federal oil shale resources. Each time, however, these measures have been rejected.

In November 2005, the House of Representatives took up consideration of Senate legislation to reconcile the budget, S. 1932 -- the Deficit Reduction Omnibus Reconciliation Act of 2005. Though the Senate bill contained nothing about federal oil shale resources, the House version contained measures that would have mandated leasing and reduced royalties. See S. 1932, Sec. 6301 (*engrossed amendment as* *agreed to by House*). First, the House language would have amended the Energy Policy Act by mandating that commercial leasing of oil shale and tar sands commence within a year of the Interior Department's adoption of regulations, and it would have removed Secretarial discretion to determine which lands should be offered by mandating that at least 35% of geologically prospective lands in Colorado, Utah, and Wyoming be offered for sale. Id. at Sec. 6301(a). This would amount to nearly 4 million acres of the 11 million-acre Green River Formation.[15] Moreover, the House language would have stated that the Programmatic EIS on commercial leasing called for in the Energy Policy Act "is deemed to provide adequate environmental analysis for all oil shale and tar sands lease sales conducted within the first 10 years after promulgation of the regulation, and such sales shall not be subject to further environmental analysis." Id. This, even though the Interior Department had not yet published notice in the Federal Register that it was preparing the PEIS -- a necessary first step under existing law. See 40 C.F.R. §§ 1501.7, 1508.22 (requiring publication of notice of intent). The House budget reconciliation language would also have repealed Section 369(o) of the Energy Policy Act, which requires that royalties, rents, and other fees be set at a level to ensure a fair return to the federal treasury while also encouraging development. See S. 1932, Sec. 6301(b) (*engrossed amendment as agreed to by House)*. In its place, this bill would have substantially reduced the royalties that could be charged for development of federal resources for by declaring that for the first 10 years of production, lessees would pay between 1 and 3% of the gross value of production; thereafter, the maximum allowable royalty would be 9%. Id. at Sec. 6301(c). Moreover, the House bill would have reduced the royalties to be charged by 80% if the price of oil dropped below $30 per barrel. Id. Finally, the House bill would have provided that one-third of a State's 50% allocation of royalties would be distributed directly to local governments. Id. The Senate did not agree to these provisions in the House budget reconciliation bill, and they were not ultimately signed into law.[16] At the time, the Congressional Budget Office (CBO) analyzed the budgetary ramifications of the House bill and found that any oil shale lease sale held in the next five years would be unlikely to generate significant bonus bids, since the technology that might make development of shale oil economically feasible has not yet been developed. CBO Cost Estimate, "Reconciliation Recommendations of the House Committee on Resources," (Oct. 31, 2005). Specifically, the CBO found:

> Given significant uncertainty surrounding several factors that would be critical to companies' willingness to bid for those leases, however, CBO expects that the potential increase in receipts from winning bids would not be significant over the next five years. We further expect that, over the longer run, increased net receipts from early sales would be offset by foregone receipts from sales that would otherwise occur later.

Id. at 9. According to the CBO, uncertainties confronting potential bidders include the volatility of oil prices and other aspects of the global oil market, the future availability of viable technologies to produce shale oil or mitigate environmental impacts, governmental permitting and regulatory processes, and the infrastructure needed to support operations. Id. at 10.

On June 26, 2006, the House passed a version of the Deep Oceans Energy Resources Act, H.R. 4761, that contained many of the provisions from its version of the budget reconciliation bill considered the previous fall. For example, this bill would have reduced oil shale royalties by 80% if the price of oil dropped below $30 a barrel, and it would have allocated 1/3 of the state's 50% share of royalties to local governments. See H.R. 4761, Sec. 27(b) (*engrossed as agreed to or passed by House*). However, rather than dictating that base royalty rates be set at a certain level, Section 27 of H.R. 4761 would have directed the Secretary to model the royalty schedule for domestic oil shale on the one in effect for the production of oil from oil sands in Alberta, Canada. See id. In Alberta, producers pay a 1% royalty on gross revenue until the point of "project payout," which is defined to include all project costs, including 100% of capital development and operating costs plus an acceptable rate of return. See Oil Sands Royalty Regulation, 1997, Alta. Reg. 185/1997.[17] After project payout is reached, the Alberta royalty regime imposes a uniform 25% royalty payment on net project revenue, which equates to the gross revenue minus all costs. Id. The current royalty structure in Alberta was adopted in 1997, when the price of oil was around $20.00 a barrel, and was intended to enact subsidies that would encourage private investment into oil sands development.[18] In Alberta, the effect of this structure has been that new and expanded projects pay a very low royalty rate until all initial costs have been recovered.[19] Albertans have also found that the 1% royalty rate has served as a powerful incentive to reinvest profits from oil sands into expansion of facilities, which has resulted in poorly-planned industrial sprawl and further delay of revenues collected at the 25% royalty by the Province. Id. These measures were not included in the version of the Deep Oceans Energy Resources Act passed by the Senate, and the Senate is not expected to approve these provisions from the House bill in the remainder of the 109th Congress.

Conclusion

The oil shale resources of western Colorado are no secret. They were discovered over a hundred years ago, and they have seen several failed attempts at exploitation -- due primarily to cost and technical issues. The provisions of the Energy Policy Act of 2005 regarding federal oil shale resources are likely to spur increased activity by administrative agencies and, potentially, increased investment and research by the private sector in the next five years. However, the extent to which these actions might lead to large-scale leasing or commercial development remains to be seen. Notwithstanding the legislative provisions discussed herein, currently-proposed RD&D activities are experimental in nature, will take several years to construct and test, and utilize technology that has never before seen commercial-scale application. Congress wisely, and appropriately, guarded against repeating the mistakes of the past by directing a cautious and informed approach to oil shale development. Only time will tell whether these efforts will produce oil shale technologies that are economically viable, that have acceptable environmental and social impacts, that are economically practicable in current and foreseeable oil-price scenarios, and that are acceptable to state and local governments. In the end, neither the public nor the Congress is likely to support oil shale activities that do not meet these standards.

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1 A comprehensive review of historic mining laws and the discovery system is available in John D. Leshy, THE MINING LAW: A Study in Perpetual Motion (Resources for the Future, 1987).

2 A savings clause in Section 37 in the MLA protected valid claims in oil shale and other minerals removed from location by the MLA that were located prior to passage of the Act. See 30 U.S.C. § 193.

3 It may be noted that the federal government has yet to collect any royalties

from a federal oil shale lease. Thus the statutory increase in a state's share of royalties provided an attractive promise, but has not in fact resulted in income to state or local governments to address socioeconomic or environmental impacts of shale development activities.

[4] The provisions authorizing offsite leases were added to the MLA in 1982. See Pub. L. 97-394, Title III, § 318, 96 Stat. 1999 (Dec. 30, 1982).

[5] See Congress of the United States, Office of Technology Assessment, "An Assessment of Oil Shale Technologies, Volume II: A History and Analysis of the Federal Prototype Leasing Program" at 37 (July 1980). See www.wws.princeton.edu/ota/disk3/1980/9582/9582.PDF.

[6] Section 369 of the Energy Policy Act arose from multiple pieces of stand-alone legislation and evolved in the months before passage of the Act. This section discusses Section 369 as enacted; the following section includes a discussion of the earlier iterations of the oil shale language.

[7] A summary of scoping comments submitted on the Programmatic EIS is available online at http://ostseis.anl.gov/documents/docs/OSTS_PEIS_Scoping_Summary_Report060310.pdf. The scoping comments themselves are available for review at http://ostseis.anl.gov/scopingcomments/index.cfm.

[8] Hearing record of Secretary-Designate Kempthorne, Question 171 (Question of Sen. Salazar).

[9] See "Community members speak out on oil shale," Glenwood Post-Independent (Jan. 19, 2006) (claiming the act "calls for commercial leasing by 2008"); "BLM has five area plans in works," Glenwood Post-Independent (March 10, 2006) (saying "the act requires commercial leases to be in place by 2007"); "Oil shale development on track," Aspen Times (March 23, 2006) (claiming the "act calls for commercial leasing in 2007"); "Oil shale leases may be issued as early as 2008," Grand Junction Daily Sentinel (Nov. 10, 2006) (stating that "Congress demanded last year that commercial oil shale leases be available by 2008.").

[10] There is a "strong presumption that the plain language of [a] statute expresses congressional intent," and such a presumption "is rebutted only in rare and exceptional circumstances, when a contrary legislative intent is expressed." Ardestani v. I.N.S., 502 U.S. 129, 135-136 (1991). Here, where Congress has considered and explicitly rejected language that would require the Interior Department to hold a commercial lease sale, see discussion infra p. 13-14, the position that the Energy Policy Act requires commercial leasing is particularly without merit. See American Min. Congress v. U.S. E.P.A., 965 F.2d 759, 765 (9th Cir. 1992) (no deference to agency if its interpretation is contrary to Congressional intent).

[11] The 1983 proposed rules also allowed for a reduction to a lesser rate "if the lessee satisfactorily demonstrates to the Secretary that conditions beyond the lessee's control warrant such a reduction," and "if it is determined that such a reduction is in the public interest." Id. (*proposed* § 3923(5)(d)).

[12] All of the legislation referred to in this section is available by searching for the bill number in the 109th Congress through the Library of Congress at http://thomas.loc.gov/.

[13] S. 1111 was co-sponsored by Senators Robert F. Bennet (R-UT) and Wayne Allard (R-CO).

[14] In the BLM's RD&D Leasing Program, an RD&D lessee will be given the "exclusive right to convert" the 160-acre RD&D lease to a commercial lease and acquire an adjacent 4,960 acres, by showing that it has produced "commercial quantities

of shale oil from the lease." See 70 Fed. Reg. 33753, 33757 (June 9, 2005).

15 Congress of the United States, Office of Technology Assessment, "An Assessment of Oil Shale Technologies," at 89 (June 1980). See www.wws.princeton.edu/ota/disk3/1980/8004/8004.PDF.

16 Because the Congress considered and explicitly rejected language that would have required the Interior Department to conduct a commercial lease sale, the BLM's repeated statements that the Energy Policy Act requires them to offer commercial leases is not entitled to deference. "[I]t would be quite inappropriate to defer to a position that has been abandoned by the policymaking agency itself." Estate of Cowart v. Nicklos Drilling Co., 505 U.S. 469, 480 (1992); American Min. Congress v. U.S. E.P.A., 965 F.2d 759, 765 (9th Cir. 1992) (no deference to agency if its interpretation is contrary to Congressional intent).

17 Available at http://www.canlii.org/ab/laws/regu/1997r.185/20060926/whole.html.

18 For comparison purposes, according to the Energy Department's Energy Information Administration, at the time Congress was considering H.R. 4761 in June 2006, crude oil was selling at $63 per barrel in the United States. See http://tonto.eia.doe.gov/dnav/pet/hist/wtotusaw.htm.

19 Wyonillowicz, *et al*., "Oil Sands Fever: The Environmental Implications of Canada's Oil Sands Rush," Pembina Institute, at 62 (Nov. 2005). Available at http://www.pembina.org/pdf/publications/OilSands72.pdf.