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Mineral Resources: Oil and Gas and Oil Shale

Clyde O. Martz

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MINERAL RESOURCES (OIL AND GAS AND OIL SHALE)

*Clyde O. Martz**

INTRODUCTION

SUCH direction as the Public Land Law Review Commission gave to oil and gas and oil shale development of public land resources was confined to a net five pages or 1.7% of its 289-page *Report*.¹ Of its 137 black letter recommendations, only two pertain to oil and gas. One of these, No. 47,² suggested that existing federal systems for exploration, development and production of mineral resources on the public lands should be modified; the other, No. 49,³ recommended competitive sale of exploration permits and leases whenever competitive interest can reasonably be expected. Two recommendations related to oil shale. One of these, No. 51,⁴ called for enactment of legislation to authorize government acquisition of outstanding claims or interests in public land oil shale subject to a judicial determination of value, *i.e.*, condemnation authority to settle title conflicts, presumably where it has first been determined that the private claim is valid under existing law and a public interest exists in adding the private interest to the vast aggregate oil shale inventory of the United States. The other, No. 52,⁵ recommends that some oil shale public lands be made avail-

* Attorney at Law, Denver, Colorado; A.B., 1941, University of Nebraska; L.L.B., Harvard University; Member of the Colorado and American Bar Associations. Mr. Martz was formerly a Professor of Law at the University of Colorado and Assistant Attorney General of the United States for Land and Natural Resources

1. PUBLIC LAND LAW REVIEW COMM., ONE THIRD OF THE NATION'S LAND: A REPORT TO THE PRESIDENT AND TO THE CONGRESS (1970). [Hereinafter cited as REPORT].

2. *Id.*, 124.

3. *Id.*, 132-33.

4. *Id.*, 134.

5. *Id.*, 135.

able for experimental commercial development by private industry with cooperation of the federal government in some aspects of that development. Four other recommendations relate to general mineral resource administration, as follows:

Recommendation 46: Congress should continue to exclude some classes of public lands from future mineral development.⁶

Recommendation 53: Restrictions on public land mineral activity that are no longer relevant to existing conditions should be eliminated so as to encourage mineral exploration and development, and long standing claims should be disposed of expeditiously (relating in main, from text discussion, to coal, geothermal resources and alien ownership restrictions).⁷

Recommendation 54: The Department of Interior should continue to have sole responsibility for administering mineral activities on all public lands, subject to consultation with the department having management functions for other uses.⁸

Recommendation 55: In future disposals of public lands for nonmineral purposes, all mineral interests known to be of value should be reserved with exploration and development discretionary in the federal government and a uniform policy adopted relative to all reserved mineral interests.⁹

All of these recommendations, and most of the supporting text is general; nowhere is found the specificity of recommendation that would permit direct implementation of the Commission Report, legislatively or administratively, unless it be in Recommendation 49 pertaining to the competitive sale of exploration permits or leases. In context competitive leasing appeared to be only one aspect of the total Commission evaluation of oil and gas administration. By reason of its appearance in a black letter recommendation, and more specific language, however, it may be distorted in importance; it has already been cited to the Congress, as a position statement of the Commission, in support of Senator Jackson's competitive leasing

6. *Id.*, 123.

7. *Id.*, 135.

8. *Id.*, 136.

9. *Id.*

amendment to the Alaskan Native Land Claims settlement bill (S. 1830).¹⁰

For evaluation of the work product of the Commission it is appropriate at the outset to identify problem areas and policy issues raised by three relevant contract studies, secured by the Commission, by testimony at eleven public hearings of the Commission and by recent land decisions and litigated cases. Consideration will then be given to the Commission's analysis of some of such problems and issues, largely in its textual observations and to its failure to consider or respond to others. Thereafter we can pinpoint matters of general agreement and those of conflict and urge implementation of that which is sound.

CURRENT PROBLEMS

The Commission secured the following comprehensive studies of problems and issues in the oil and gas and oil shale areas:

(1) *Legal Study of the Federal Competitive and Noncompetitive Oil and Gas Leasing Systems* (in three volumes) prepared by the Rocky Mountain Mineral Law Foundation under the direction of Joseph R. Geraud, Project Director for the Foundation, and Jerry L. Haggard, Project Officer for the Commission (herein referred to as Leasing Study).

(2) *Study of Energy Fuel Mineral Resources* (in three volumes) prepared by Abt Associates, Inc. of Cambridge, Massachusetts under the direction of Edward M. Miller, Principal Investigator for Abt, and Frank H. Skelding, Project Officer for the Commission (herein referred to as Energy Fuel Study).

(3) *Legal Study of Oil Shale on Public Lands* prepared by the University of Denver College of Law under the supervision of Gary L. Widman, Project Director, and Jerry L. Haggard, Project Officer for the Commission (herein referred to as Oil Shale Study).

10. 116 CONG. REC., S. 11,427 (July 15, 1970).

The *Leasing Study* is an exhaustive, objective and scholarly text on public domain oil and gas leasing laws, regulations and practices. It will take its place, when available by publication, among the best research tools available to the public land oil and gas practitioner. It is well organized, adequately documented with statutes, cases and land decisions and contains analysis and data not readily available from other sources. Following an introductory survey in Part I, Part II contains a comprehensive analysis of all phases of public land oil and gas leasing, Part III contains a comparative analysis of oil and gas leasing systems of selected states and Canadian Provinces and selected forms currently in use for federal oil and gas leasing. Chapter XII of Part II identifies fifteen problem areas¹¹ and Chapter XIII sets out alternate solutions for each.

The *Energy Fuel Study* comprehends oil and gas, oil shale, coal and geothermal steam. Although it contains a short 20-page part on legal aspects, its principal thrust is economics. It contains compendium data on supply and demand, production on federal and fee lands, unit agreements, withdrawals and acreage pricing; it appends monographs on the energy economy, oil and gas, oil shale, coal, geothermal steam, and a case study of Navajo Reservation practices. Notwithstanding the mass of data assembled in the study, Part III on problems and alternative solutions showed an incredible lack of understanding of the oil and gas mining business.¹² It is oriented towards maximizing economic returns to the United States without incentive for exploration and development.¹³ It assumes fungibility of oil and gas deposits, even in wildcat lands,

11. Lands Available for Leasing; The Federal Records System, Acreage Limitations, Descriptions in Lease Applications; Maximum and Minimum Lease Acreages, Filing and Priority of Noncompetitive Lease Applications, Simultaneous Filing System vs. Competitive Bidding, Competitive Leases, Principal Lease Terms, Right of Way Leasing Act, Cancellation of Leases, Conservation, Reserved Mineral Estates, Acquired Land Stipulations and Subdivision of Leases by Assignment.
12. ABT ASSOCIATES, INC., ENERGY FUEL MINERALS at §§ 3-3, 3-4 on effects of joint leasing of commingled minerals; §§ 3-17 on first refusal rights for acquisition of adjacent lands; 3-28, 29 on public disclosure of drilling information; 3-94, 95 on royalty bidding, (PLLRC Study Report). [Hereinafter cited as ENERGY FUEL STUDY].
13. See also ENERGY FUEL STUDY at § 3-18 on competitive leasing; at §§ 3-30 to 3-35 on removal of lands from state conservation laws to increase production and encourage higher bonus payments; at §§ 3-116 to 3-118 on checkerboard leasing.

that would permit lease applicants to pay for leases on the basis of their prospective productivity.¹⁴ It further assumes that the industry can absorb substantial additions to lease costs without impairing development incentives.

The *Oil Shale Study*, like the *Leasing Study*, is a well ordered and well documented treatment of oil shale history, containing analyses of land status, disposition policies, impact of water and air quality control, state conservation laws, internal revenue code incentives and deterrents and oil import controls. Particularly outstanding is its examination of unsolved legal questions, enumeration of problems and proposals for alternative solutions. It has also assembled withdrawal orders, policy statements, regulations and source materials useful to attorneys in public or private oil shale practice.

These reports collectively present 105 problems and suggest as many as five alternatives to each; eliminating overlaps, some 70 problems need some sort of legislative or administrative policy or procedural change and approximately 250 alternatives. Seeking to maintain objectivity of the studies, the Commission precluded the reporters from expressing preference in position and required them to include analyses of alternatives no matter how absurd the alternatives appear to be. The result may have been that the merit of problem analyses was obscured by laborious and repetitive discussions of advantages and disadvantages of various alternatives.

Nonetheless, the three studies identify various problems in the following areas:

1. Diversity of leasing regulations and procedures that stem from multiple leasing authorities, *e.g.*, Mineral Leasing Act of 1920, Right of Way Leasing Act of 1930, Acquired Land Leasing Act of 1947, Federal Property and Administrative Services Act of 1949, Implied Powers of Secretary of Interior, and Indian Lands Lease Leasing Regulations.¹⁵

2. Varying tenure systems for different minerals, creating uncertainties that deter development. When the different

14. See also ENERGY FUEL STUDY at §§ 3-98 to 3-110 on changes for royalty and filing fees.

15. 30 U.S.C. § 22; 30 U.S.C. §§ 301-306; 30 U.S.C. § 351; 40 U.S.C. § 471.

minerals are physically commingled, it may not be clear what legal categorization will be given particular minerals or how particular minerals will be extracted without making the recovery of other minerals in the same tract difficult or impossible.

3. Unbridled administrative discretion to withdraw lands from leasing, reject all competitive bids, determine retroactively the extent of known geological structures, terminate leases for administrative errors and impose stipulations, sometimes retroactively, regarding development and surface use.

4. Administrative gamesmanship in requiring technical compliance with regulations on descriptions of acreage, filing statements of interest and powers of attorney, payment of rentals and execution of application forms on penalty of loss of priority or administrative cancellation of issued leases.

5. Acreage limitations that prevent acquisitions for bona fide exploration, encourage subterfuge and serve no recognized national objective.

6. Simultaneous drawings that encourage speculation in lease acquisitions and raise barriers to the leasing of lands for bona fide exploration and development.

7. Absence of sufficient authority in Secretary, of the kind normally possessed by landowners, to waive inadvertent breaches of lease provisions, to reinstate leases inadvertently lost for late rental payments, to permit extraction of all bituminous substances and to correct administrative errors.

8. Absence of public records system upon which prospective lessees and assignees can rely to determine availability of land for leasing, its KGS status, the scope of lease burdens and the validity of existing leases.

9. Imponderable and irresolvable uncertainties as to the title and validity of unpatented oil shale locations, by reason of strained applications of discovery, assessment work, abandonment and possessory principles of the Mineral Location Act of 1872 to lands and deposits withdrawn from competitive

entry by statute or executive order and now immune from either government contest or conflicting locations.¹⁶

10. Absence of policy permitting and protecting acquisition of suitable public land oil shale resources for bona fide experimentation and commercial development.

POLICY QUESTIONS

Implicit in the various alternatives suggested in the study reports, and explicit in statements and testimony presented at Commission hearings, are five broad policy questions. Such questions are:

1. Should leasing procedures and lease terms be directed toward maximization of bonus, rental and royalty yields to the United States or to the encouragement of exploration and development of national resources?

2. Should the trader (sometimes branded the "speculator") be eliminated from the land acquisition process, through competitive bidding, compulsory drilling requirements and high filing and rental fees? On the pro side it is argued that the trader keeps land out of development, obtains overrides and bonuses from the driller that might otherwise inure to the United States and increases exploration and drilling costs to bona fide operating parties. Against that position is a long standing policy that the public lands be open to all citizens regardless of economic means, and considerable evidence that the so-called trader performs a useful function in assembling acreage, developing preliminary geological data, securing drilling commitments through farmouts or sales and promoting wildcat drilling that leads to discovery of new reserves.

3. Should the resource developer be required to bear larger shares of costs of protecting virgin ecology and air and water quality or should society bear this cost as the price of discovering and maintaining adequate mineral reserves?

16. See *Ickes v. Virginia-Colorado Dev. Corp.*, 295 U.S. 639 (1935).

4. Should resources be preserved in public ownership until they are needed, and can be economically extracted and commercially used, or should they be made available to those who are willing to develop the technology necessary for their ultimate utilization? This issue must be met in the development of a national policy for oil shale and geothermal resources and in deciding on the retention or disposition of naval petroleum and oil shale reserves.

5. Should federal lands be subordinated to state conservation regulations, to achieve uniformity within jurisdictional areas, or should they be maintained as a federal enclave with special rights, privileges and obligations in developers thereof? The *Energy Fuel Study* suggested, by way of illustration, that federal lands might be exempted from market demand proration¹⁷ and thereby increase their yields over those obtained on contiguous state and fee lands in market demand proration states.

COMMISSION'S RESPONSES TO PROBLEM AND POLICY ISSUES

As heretofore indicated, the Commission made no direct response to specific problems raised in the study reports. It failed, perhaps by design, to commit its members to any set of suggested alternatives or to suggest specific changes in present laws or regulations. At the same time it succeeded quite well, by way of textual discussion of fuel resources matters, in providing policy guidelines for the ultimate solution of many specific problems. From the Commission's statement as a whole, the following five-point policy appears: First of all a preference for mineral exploration and development over other uses on much of the public land,¹⁸ it being significantly stated by the Commission that the "development of a productive mineral deposit is ordinarily the highest economic use of land." Secondly, use of the private sector wherever possible for mineral exploration, development and production.¹⁹ Third,

17. ENERGY FUEL STUDY, §§ 3-34, 3-35.

18. REPORT, 122.

19. *Id.*

while sensitive to a need for environmental protection, it favored limiting environmental controls to those that lessen adverse impacts of mining without deterring exploration and development of public lands.²⁰ Fourth, it appeared to favor elimination of barriers to acquisition of mineral rights, with secure mineral titles in those directly interested in mineral exploration and development. Finally, it favored maximization of yield to the United States from mineral development consistent with other stated policies. This position was implicit but unstated in textual discussions.

Within the framework of these policies the Commission met specific problem and policy questions in various ways. Recounting the points heretofore listed, here are the results:

1. Regarding consolidation of multiple leasing authorities, no recommendation was made; the *Report* would leave diverse leasing laws and departmental procedures unchanged.

2. With respect to varying tenure systems and commingled minerals, it first recommends a specific enumeration of the minerals covered by the leasing and location laws and disposition of all other minerals on the pattern of the Materials Act of 1947, *i.e.*, sale of severable deposits separate from the land.²¹ This would remove uncertainties as to the applicable entry procedures for deposits like dawsonite, nahcolite, certain deposits of common occurrence and other leasing act compounds. It also recommends extending leases to all leasable minerals unless excluded by the administrator in accordance with legislative guidelines;²² and "a simple, comprehensive procedure . . . for allocating development rights to all intermixed minerals occurring in the same tract of land."²³ It makes no suggestion, however, as to how the latter may be accomplished. The *Energy Fuel Study* may have deterred the Commission from making more specific recommendations, in that it suggested a number of problems that might arise in a single tenure system for minerals, among which were: price of leases that would include coal and non-fuel minerals as well

20. *Id.*, 122-123.

21. *Id.*, 134.

22. *Id.*, 133.

23. *Id.*, 134.

as oil and gas might be so high as to deter oil and gas exploration on much of the potential petroleum bearing land of the west, especially in Wyoming.²⁴ In also suggesting that advantages of consolidation might readily be lost by the anticipated practice of lessees to farm out development of those minerals in which they have no active interest, the *Energy Fuel Study* overlooks the fact that priorities and development relationships in commingled minerals could there be established by private contract. Here lies an excellent illustration of the premise earlier stated that the analysis of alternatives in the study report may have clouded more than clarified the issues before the Commission. In response the Commission only stated that "a mineral explorer can be expected to develop any commercially valuable deposit he may find."²⁵

3. The Commission recognized the problems of unbridled administrative discretion, raised by all the study reports, and recommended curtailment thereof in various ways. In the first place, it was of the opinion that Congress should prescribe guidelines for exercise of administrative discretion in certain stated situations; it did not require subordination of administrative discretion to legislative guidelines, however, as a matter of course. Guidelines were recommended for exercise of discretion against issuance of prospecting permits and leases on lands open to exploration;²⁶ for prescribing standards for rehabilitation of worked over land;²⁷ and for prescribing the content of exploration, development and production plans.²⁸ As a corollary the Commission took the position that operating and payment obligations of operator should be established at the outset of the lease term, should be stated in lease provisions within statutory guidelines and should only be reviewed retroactively within limits prescribed by law.²⁹ It recommended that the Secretary give reasons for rejecting competitive bids, though his discretion, as exercised, may not be subject to administrative or judicial review.³⁰ If changes of this

24. ENERGY FUEL STUDY, §§ 3-3 to 3-4.

25. REPORT, 133.

26. *Id.*, 132.

27. *Id.*, 132.

28. *Id.*

29. *Id.*

30. *Id.*

nature were effected, even in the limited areas specified, progress would be made toward uniformity in discretionary acts and predictability of administrative results. Unfortunately the Commission provided no blueprint for guidelines in this nebulous area that would bridle, but not repress, responsible administrative discretion. Guidelines are a statement of an ideal; they already appear in many of public land acts but are loosely construed in administration. If they employ rules of reasonableness, they have little effect on administrative activity; if they employ absolutes, they nullify administrative action.

4. No recommendation was made regarding elimination of what is often called gamesmanship in lease administration. The lease applicant, though aided by the statutory guidelines recommended in certain limited situations, must still act in technical conformity with all applicable regulations, and gets no relief from losses that result either from administrative error or from his own inadvertent mistakes. As pointed out in the *Leasing Study*,³¹ lease applicants may lose priority because of errors in description of land available for leasing, failure to include in lease application all contiguous lands, failure to identify all parties in interest, failure to file powers of attorney where necessary in time provided and filing application under wrong leasing authority; and leases, once issued, may be terminated for inadvertent failure to pay delay rental on time, administrative error in the issuance of the lease and inadvertent violation of chargeability limitation through double chargeability rules or otherwise. Since administrative officers in the department cannot estop the government, by authorizing correction of such errors, variances from prescribed regulations cannot be ignored even when acts of government officers thereafter recognize the continuation of a lease, or transfers are made to bona fide purchasers. In no other area of leasing activity is a leasing authority given so much discretion as is the Department of the Interior and yet have insufficient authority to right mistakes that have been

31. ROCKY MTN. MIN. L. INST., FEDERAL COMPETITIVE AND NONCOMPETITIVE OIL AND GAS LEASING SYSTEMS 177-216 (PLLRC Study Report). [Herein after cited as LEASING STUDY].

made or permit salvage of rights by corrective compliance with law.

5. The Commission purported to favor reduction of acreage limitations but under circumstances where the effect will be to increase restrictions quantitatively and limit access for exploration of undeveloped acreage. Its continuation of acreage limitations did not rest upon historical fear of monopolization of public mineral resources; rather it was believed to prevent acquisitions of acreage for speculative purposes alone. In brief, the Commission, in this area, recommended that all producing acreage be released from acreage limitations;³² that limits be set for aggregate nonproducing acreage without regard to state lines³³ and that the retention of non-producing acreage be conditioned upon specific exploration and development requirements.

Chargeability problems in the past have arisen in the quest for wildcat acreage and are not alleviated by the exemption of proven acreage. If anything, the recommendation of the Commission only evidences antipathy for the trader or middle man, *i.e.*, the landman who acquires acreage, screens it and makes it available for development, and may actually reduce competition in acreage acquisition and lease development.

6. The Commission recommends replacement of simultaneous filing and drawing procedures with competitive sale procedures.³⁴ It reasons that the appearance of simultaneous filings shows a competitive interest in the land and that competitive bidding in such situations will maximize the return to the United States on the one hand and place the property in the hands of the party most interested and best qualified to develop it on the other.

7. Regarding problems that exist because the Secretary has not been clothed with sufficient authority to correct administrative errors and perform acts customarily performed by landowners in comparable situations, the Commission recommended that the Secretary be authorized in limited situ-

32. REPORT, 133.

33. *Id.*

34. *Id.*, 132.

ations to make landowner-type decisions. In particular, it would allow the Secretary to reserve public land tracts for short periods for investigation, and to advertise the same for competitive leasing where a competitive interest can be aroused;³⁵ to employ bonus, royalty and rental variables for competitive bidding to get best results from particular sales;³⁶ and to include all bituminous substances in oil leases except where Secretary expressly excludes some substance. Its recommendations significantly omitted the much needed authorization for the Secretary to protect titles of good faith parties against termination for inadvertent error.

8. Notwithstanding recommendations in each of the underlying studies that public title records be maintained for the protection of entrymen of all kinds,³⁷ and to achieve greater title security for those committing resources to development, the Commission, possibly by reason of Department of Interior opposition, made no recommendation regarding a public records system for leasing.

9. Regarding the impasse that has arisen over the non-patentability and potential contest of oil shale locations dating from times prior to the Leasing Act Withdrawal of 1920,³⁸ the Commission's position was general and nebulous. Under the hard mineral location-patent recommendations, the Commission acknowledged a need to eliminate long dormant claims either by a notice procedure that would clear public lands of those without substance or by authorization for existing claim holders to perfect their claims under revised location provisions suggested.³⁹ These alternatives assume the claims have been determined, or may be determined, to be invalid on the one hand or to be patentable on the other. It suggests no way, by preferential leasing rights, patent rights, or otherwise, for those who have invested in oil shale locations to circumvent contests on bases of insufficiency of original discovery, failure to maintain the claims by assessment work during the withdrawal period, abandonment for non-development or the like.

35. *Id.*, 133.

36. *Id.*, 134.

37. LEASING STUDY, 636 ff.

38. Mineral Leasing Act of 1920, 30 U.S.C. §§ 22, 301-306, 351; 40 U.S.C. § 411.

39. REPORT, 130.

In Recommendation 51⁴⁰ the Commission did urge that legislation be enacted that would authorize legal actions by the government to acquire outstanding claims or interests in public land oil shale presumably by condemnation; as a practical matter such procedure would probably not avoid the necessity of individual title contests on the balance of the unpatented claims.

10. Regarding the need for an oil shale development policy, analyzed at length in the *Oil Shale Study*,⁴¹ the Commission made an equivocal response adding little, if anything, to the already ambivalent position of the Interior Department. It stated that a test lease program was of sufficient importance to warrant emphasis at an early date,⁴² observing that an oil shale program, to be viable, should:

(1) offer for lease tracts sufficiently large to admit amortization of investments required for commercial development;

(2) give weight to industry nominations relating to location and size of tracts, lease duration and size of plan;

(3) not bar the holder of a test lease from eligibility for leases subsequently issued under a general leasing program;

(4) include experimental use of bonuses, royalties and rentals;

(5) provide fixed terms, conditions and royalty payments for the term of the lease; and

(6) not interfere with process patent rights of lessees acquired prior to issuance of the lease.

Such observations provide less guidance to the industry, after five years of hearings and studies, than has appeared in Secretary Udall's five-point program and occasional policy statements from the Department.⁴³

40. *Id.*, 134.

41. UNIVERSITY OF DENVER SCHOOL OF LAW, OIL SHALE ON PUBLIC LANDS, 335-374 (PLLRC Study Report). [Hereinafter cited as OIL SHALE STUDY].

42. REPORT, 135.

43. OIL SHALE STUDY, 150.

With respect to the first policy question, *i.e.*, competitive leasing, the Commission took a middle ground, over dissents of Commissioners Clark, Stoddard and Huff, that competitive leasing should be increased in frequency of use but not displace noncompetitive leasing of wildcat acreage altogether.⁴⁴ It recommended competitive leasing, in the Secretary's judgment, in the general area of producing wells (but not necessarily on a known geologic structure), for lands covered by relinquished or forfeited leases or permits, or where past activity and personal knowledge suggest reasonably good prospect of success. In supporting a competitive leasing amendment to the Alaskan Native Claims Act, advocates of competitive leasing cited the Commission recommendation as approving competitive leasing whenever more than one applicant is interested in the same ground.⁴⁵ It is submitted that the recommendation did not go nearly so far. In each of the three competitive lease situations suggested, a previous activity record on the land or in the area is required; if there is no past activity or personal geological knowledge about the potential of particular acreage, the recommendation would not authorize competitive bidding.⁴⁶

Where competitive leasing is held, the Commission recommends using (i) bonus, rental and royalty variables in bidding, as appropriate, (ii) notices, giving reasons, for the rejection of any successful bid, and (iii) issuance of lease, if not withdrawn from sale, to next qualified bidder. Suggestions in the *Report*, that bidding be on bases other than bonus, has merit if the bidding variable is selected because of unique features in each bid sale; it might also lead to joint venturing between operator and the government if bids on a royalty basis would make the risk of government participation depend upon the success of the venture. If lease recommendations were construed to allow the applicants at any sale to elect between bonus, rental and royalty variables, however, there would be no common denominator for bid comparison and chaos would likely result. Although not discussed in the *Report*, it may be

44. REPORT, 133-134.

45. 116 CONG. REC., *supra*, note 10.

46. *Id.*, at 11,432.

supposed that bonuses were thought to be the proper variable for proven acreage, rentals the proper variable for wildcat leasing without drilling commitments, and royalty the proper variable for oil shale and remote exploration where the government has a public interest in encouraging operations.

The recommendations on competitive leasing eliminate all need for KGS determinations, avoid industry uncertainties as to whether competitive leasing is required for particular acreage and provide an orderly basis for allocation of acreage formerly subject to simultaneous drawings; at the same time, they do not require notice and incur delays of bidding on wildcat acreage where an applicant may be the only party with interest in lease acquisition.

With respect to the policy question whether income to the United States should be increased, or exploration and development of national resources encouraged, if choices between the two must be made, the Commission once more appeared to take a sound middle ground. It provides ways to increase revenue through extension of competitive bidding, through use of rental and royalty variables in lease sales and through imposition of more severe exploration and development obligations on the lessees;⁴⁷ yet in each case the provisions tended to facilitate rather than to obstruct development. The Commission did not adopt alternatives, however, as principally suggested by the *Energy Fuel Study*, that would seek maximization of revenues without regard to impacts upon exploration and development incentives; nor on the other hand did it approve any alternative suggested by the *Oil Shale Study* or *Leasing Study* that royalties, rentals and bonuses be waived as inducements for exploration, that tax incentives be provided for development or government should share more risks of development.

With respect to policy question as to the extent the environment must be protected in mining operations, the Commission showed great sensitivity to environmental problems but recognized necessities for ecological disruptions if mining is to be fostered and protected. In striking a balance between environment and industry, it clearly favored continued miner-

47. REPORT, 133.

al exploration with only such restrictions as can be imposed, to minimize adverse effects, without jeopardy to operations. At a time when environment is heralded as a resource above all other economic and social values, it was comforting to find the Commission keeping the national goals in perspective.

With respect to retention and disposition of noncommercial resources, pending technological development, the Commission again struck a balance between extremes. It favored development in line with its broad policy positions; it generally failed, however, to add meat to the policy skeleton. Recommendation 53⁴⁸ provides that restrictions on public land mineral activity that are no longer relevant to existing conditions should be eliminated for encouragement of mineral exploration and development; its only implementing suggestions, however, were to authorize unitization of coal leases and remove obsolete restrictions upon acquisitions of coal resources by railroad companies.

In Recommendation 52,⁴⁹ it encouraged some disposition of oil shale lands for experimental commercial development, but in terms so broad that it is hard to say whether any change in existing policy or practice was in fact proposed. It recommended legislation for leasing geothermal resources with fair and reasonable consideration given to equities of holders of asserted prior rights. It leaves details of leases and rights in contained minerals open, however, for future investigation. Perhaps one of its more significant recommendations in this area was a proposal to remove barriers on asset ownership based upon alien status, saying that there should be no such restrictions except where required by explicit foreign policy considerations.

Regarding the question whether federal lands should be brought under state conservation laws to achieve regulation uniformity within particular jurisdictional areas, the Commission, being a federal body, favored the right of sovereignty, preferring a federal enclave, with or without applicable con-

48. *Id.*, 139.

49. *Id.*

servations regulations, and freedom from the requirements of state market demand proration.

EVALUATION OF RECOMMENDATIONS AND POSITION STATEMENTS

What the Commission said, it generally said well. Its policy positions, fostering mineral development, seem to be rational and sound, to be supportable by all segments of government and industry except radical preservationist groups and to provide a foundation for administering a uniform and directional administrative policy for the future. Its recommendations on fuel mineral matters were generally consistent with its stated policies. In broad numbered recommendations, and succinct discussion of background considerations, it took a position or inferred a solution to a substantial number of the identifiable problems raised by the study reports; it took defensible and constructive positions on each of the identifiable policy questions. For these reasons, I think the Commission's work, and its *Report*, deserve a superior rating.

Implementation of its recommendations will nonetheless be difficult because of their generality and the absence of any prepared legislative or administrative material. As policy positions, however, such recommendations generally should be endorsed and their adoption encouraged, except in the following particulars:

1. The recommendations on oil shale are wholly inadequate; they express no policy direction, provide no program for implementation and leave policy and program to further study. Resolution of the unresolved legal problems discussed in the *Oil Shale Study*⁵⁰ need early resolution, a national policy position on oil shale needs expression and procedural guidelines for experimental and commercial development consistent with such policy needs delineation.

2. In its discussion of Recommendation 46, the Commission proposed that mineral examination be made of withdrawal areas sufficient to provide reliable information on the

50. *Id.*, 237-247.

mineralization thereof. It is urged that these examinations be made with dispatch, on notice of withdrawal, in order that determinations can be made as to whether mineral activity should be excluded; it suggests that such surveys would advance the geology of the area and identify the presence of standby reserves; and directed that such examinations be of a kind that would not disturb the surface. Although the objects of the recommendations are praiseworthy, they appear impractical in implementation. The kind of information that could be obtained without coring or disturbing the surface, if not theretofore a matter of common knowledge, would be limited. Private investigations could not be expected without tender of development rights if such investigations were positive. Investigations of the government in confirmation of prior decisions to withdraw lands would be an exercise in futility.

3. Finally for reasons already given, the recommendation of the Commission that acreage limitations be released as to developed acreage but maintained, without regard to state lines, on undeveloped acreage serves no useful purpose. By limiting state-by-state determinations of acreage holdings, and substituting an aggregate in its place, the Commission recommendation would likely reduce allowables below their present levels and aggravate existing problems. The Commission's objective of early development can be assured by competitive leasing, imposition of exploration requirements and elimination of drawings. Holdings of undeveloped acreage for mere speculation could be further restricted by an increase in filing fees and rental payments. None of the study reports demonstrated that there is any relationship, however, between the quantity of acreage held by individual companies and the development rate of such acreage.

With respect to each of the shortcomings noted, a comprehensive discussion of the problems and alternative solutions appears in the several contract studies. These, I am sure, will be used to supplement the Commission Report and provide the grist for legislative programs and administrative improvements. The Commission, and the study teams, deserve

high praise for the contributions they have made. Although the Commission did not do all that could be done to solve present problems and develop viable national mineral policies, its recommendations, if embellished and implemented, will most certainly advance public and private interests in resource development and conservation.