Land & Water Law Review

Volume 6
Issue 1 *Symposium: An Analysis of the Public Land Law Review Commission Report*

Article 21

1970

Comments on the Report of the Public Land Law Review Commission from the Viewpoint of an Independent Oil Operator

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LAND AND WATER
LAW REVIEW

VOLUME VI 1970 NUMBER 1

COMMENTS ON THE REPORT OF THE PUBLIC LAND LAW REVIEW COMMISSION FROM THE VIEWPOINT OF AN INDEPENDENT OIL OPERATOR

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Scope of Paper

The emphasis of these brief comments will be on those aspects of the *Report*[1] that relate to the acquisition of oil and gas leases on the public lands and the exploration for, and the production of, oil and gas under such leases. There will be a few comments on the Outer Continental Shelf, Alaska, or oil shale simply because the costs of the operations involved in these areas are prohibitive for the average independent.

Unity and Diversity of Opinions Within the Oil Industry

It should be understood at the outset that there are no clear-cut differences of opinion in the oil and gas industry between the majors and the independents on many segments of the *Report*. Viewpoints differ among the majors, and the independents are not all of one mind. For example, an independent who is basically a lease broker may have thoughts different on the suggested principles of reform in the *Report* from the thoughts of an independent who is basically a driller.

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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].

It does appear generally that the oil and gas industry would be united in endorsing certain, rather vague, policy positions taken by the Commission in the introductory portion of Chapter Seven, "Mineral Resources."[2] Those positions are:

A. "Public land mineral policy should encourage exploration, development, and production of minerals on the public lands."[3] This statement and its context give strong support to the industry's constant plea for a national policy that encourages development of reserves of oil and gas in the United States. The need for a reliable domestic supply of energy fuels is clearly set forth in the *Report*.

B. "Mineral exploration and development should have a preference over some or all other uses on much of our public lands."[4] It is important to note that the reasoning underlying this policy position is based upon the premise that the development of a valuable mineral deposit is ordinarily the highest economic use of land and that a "use preference is warranted" because the welfare of the nation is dependent upon an assured mineral supply.[5] It would have been helpful if, in striving to strike the balance between the goals of conservation of the environment and mineral development, the Commission had placed additional stress upon the need for the industrial and populated areas of the United States to have an abundant supply of the least polluting energy fuel. Natural gas, which causes less dirt and noxious odors, has so many advantages over other types of energy fuels in protecting the environment of the populated areas, that the discovery and development of natural gas should be encouraged to the maximum.

C. "The Federal Government generally should rely on the private sector for mineral exploration, development, and production by maintaining a continuing invitation to explore for and develop minerals on the public lands."[6] This policy, which is very similar to that contained in the General Mining Law[7] and expressed in the preamble to the Mineral Leasing

2. *Id.*, 121.
3. *Id.*
4. *Id.*, 122.
5. *Id.*
6. *Id.*
7. 30 U.S.C. § 22 (1964).

Act,[8] certainly does not split the majors from the minors. If Congress and the administrative branches adhere to this position in drafting and enforcing the forthcoming laws and regulations, an adequate mineral supply will almost certainly be developed by the private sector. Because the majors are now emphasizing exploration in Alaska, on the outer continental shelf, and in foreign coutries, the independents are the ones primarily concerned with this invitation to explore in the eleven western public land states of the lower forty-eight states.

It is also believed that the oil and gas industry would be united in backing all the recommendations that would simplify leasing and development transactions and promote safety of titles and security of investments. Among these recommendations made by the *Report* are (i) that mining claims be located by legal subdivision and be registered in the land office to be valid[9] and (ii) that there be no powers in the governmental administrators to modify lease operational and payment requirements unilaterally under only regulatory authority.[10]

Because of the substantial investments by United States citizens in foreign countries, it is also recommended that the restrictions on alien ownership of public lands should be removed except when required by explicit foreign policy considerations of general applicability to all transactions of aliens.[11] The reasoning underlying the removal of the restrictions of alien ownership would also seem to lead to a recommendation that all anti-trust provisions contained in the Mineral Leasing Act should be removed. Recommendation 23,[12] which would grant the public land agencies the right to terminate a federal lease for a lessee's violation of an environmental control measure at a distant point on non-public lands seems to be a punishment that does not fit the crime and would cloud titles. The administrators of the public lands simply do not now constitute a proper or qualified forum to decide upon such matters.

8. 30 U.S.C. § 181 (1964).
9. REPORT, 126.
10. *Id.*, 133.
11. *Id.*, 136.
12. *Id.*, 81.

It does appear, however, that there are two important areas under the Mineral Leasing Act where the independent's viewpoint will differ from that of the major oil company. One of these areas is the "simultaneous filing" leasing procedure and the other is "acreage limitations". These two problems are not necessarily separate ones and have many inter-related considerations.

THE SIMULTANEOUS FILING LEASING SYSTEM

The independent lease broker or small oil company would tend to prefer the present "lottery" system, without extensive change, and the major would tend to prefer an all-out "bid" style leasing system. This paper distrusts the use of the terms "competitive" and "non-competitive" when applied to the two present styles of leasing systems for the public lands. In truth, the present "non-competitive" or "lottery" system is a very competitive business, and the proposed "competitive" or "bid" system actually may tend to discourage competition by removing the independents as a class of competitors.

Recommendation 49, "Competitive Exploration Rights," states, "competitive sale of exploration permits or leases should be held whenever competitive interest can reasonably be expected."[13] The Commission sees a "competitive interest" in the public lands (i) which are located around producing wells, or (ii) which previously were leased, or (iii) where there are good prospects for success.[14] Recommendation 49 would, therefore, be opposed by most independents because it greatly enlarges the amount of land subject to the bid system, *e.g.,* the entire State of Wyoming could be classified for "bid" style leasing because there are good prospects for success in that State. The independents fear that the resources of manpower, finances, research, etc., which by definition are available only to the majors, will enable the majors to control most or all of the oil and gas leases on the public lands. This will tend to eliminate the independents from the industry and not be an "invitation to explore" to much of the private sector.

13. *Id.,* 132.
14. *Id.*

The present lottery system does give the independent a chance to win in the drawing and increase his land holdings into an appropriate wildcat drilling block.

The Rocky Mountain Oil and Gas Association, after much discussion and debate, has adopted the position that it is opposed "to extending the competitive leasing system" beyond the present "known geologic structure" concept. It is convinced that any abuses (*e.g.*, "dummy filers") can be eliminated administratively.

The present system may also actually enhance the governmental revenues because of the lottery aspects. For example, under a bid system, it is doubtful that many small tracts (*e.g.*, 80 acres) would justify the detailed seismic or other studies necessary to make a sizeable formal bid. Under the present system, such tracts do get into the private sector in a quick and easy transaction and the government does realize some revenues. The General Accounting Office in a recent study has, however, stated that the government revenues would be increased by making all leasing by bid.

There is also a fear that the proposed bid style system will move at a very slow pace. If the Bureau of Land Management and the United States Geological Survey have to determine the suitability of lands for leasing, determine the appropriate leasing unit, and judge between bids, which may vary as to bonuses, royalties, development covenants, etc., time delays within the bureaucratic machinery are certain. These methods, which are recommended,[15] will involve sizeable evaluation efforts by the United States Geological Survey and private parties. If we are to encourage the exploration of the public lands, we should not build in additional time delays in the administration of the public lands and we should not create a system which possibly leads to an early abandonment of producing wells because of high royalties.

Another attraction of the present system is that, by the Commission's own finding, it has proven workable for the United States and the oil and gas industry over an extended

15. *Id.*, 134.

period of time. The education and administration required to develop a new workable system would, in and of itself, involve substantial delays at a time when new fuel supplies are needed.

The fear that the majors will dominate all land holdings if a bid style system is adopted may be an unreasonable one on behalf of the independents. Although no current studies appear on the matter, it does seem that the present bidding systems for wildcat leases offered by the states of Colorado, Montana, and New Mexico do not necessarily foreclose the independent from land acquisitions. However, in the discussion[16] on the Outer Continental Shelf leasing procedure, the Commission itself sees a real danger that a bid style leasing system is to the prejudice of the independent. If a bid style system is to be adopted, many questions remain to be answered. Will the bids be oral or sealed? Will bidding be limited to bonus or will royalties, rents, development covenants, etc., be weighed?

ACREAGE LIMITATIONS

Underlying the above quoted Recommendation 49 is the statement that the Commission is "convinced that there should be maximum sizes prescribed for prospecting permits and non-producing leases to promote competition in mineral exploration and eliminate holding areas without development. Limits should apply only to such situations and should not include producing areas where no maximum acreages are believed necessary."[17] The recommendation that individual leases be limited in size and that producing acreage be "non-changeable" would be concurred in by both independents and majors. However, if the acreage limitations on the present state by state basis are to be removed, as is recommended in the discussion on pages 126 and 133 of the *Report,* the independent again fears that the majors would tend to control all of the land because of their greater fiscal strength and staying power.

16. *Id.*, 192.
17. *Id.*, 133.

Again the independent's fears may not be justified. On "fee" and Indian leases there are no applicable acreage limitations, and the independents have not been shut out from land plays or exploration. There is no reason for the major not to be concerned with the dollar size of its lease rental bill, although, by definition, a rental check is not as significant to a major as it is to an independent.

Acreage limitations, in the view of the independent, should be retained on a state by state basis. A basin by basin approach might be more sensible, but it is easy to foresee some technical difficulties and definition problems in adopting such a system. Again, the present acreage limitation has the advantage of being both familiar and workable. Because the limits have been increased over the years, the present limits are not unduly restrictive and this matter is not as controversial within the industry as it was a few years ago.

One benefit from keeping the present acreage limitation rules is that they do encourage unitization in accordance with the policy of the United States and the industry in general. Under the present law and regulations, unitized leases are nonchargeable and thus exempt from the acreage limitation rules. If the acreage limitations are removed, the incentive and encouragement for unitization will also be diminshed.

STATE CONSERVATION LAWS

It is stated the conservation of the mineral resources on the public lands is a federal responsibility and that the Commission opposes change which would make those lands subject to state prorationing programs.[18] This approach contracts with Recommendation 17[19] where it is recommended that state standards for environmental quality should control on the public lands. This opposition to state conservation standards is apparently based upon a distaste for those state regulatory bodies which may use market demand and price levels as factors in making their orders, despite the conservation purposes of such orders. This recommendation overlooks the vast bulk

18. *Id.*, 134.
19. *Id.*, 70.

of the important workload of the average state conservation commission on matters such as spacing, units, secondary recovery operations, exception locations, environmental and water protection, etc. As a practical matter, there is today very little restriction of production due to market demand in the United States and almost none by those eleven western states which contain significant amounts of public lands. Texas and Louisiana, where market demand proration of production is the most severe, have very little public land. Less than 2% of Texas and less than 4% of Louisiana are federally owned. It is the position of the Rocky Mountain Oil & Gas Association that all federal lands should be made subject to the conservation statutes and regulations of the relevant state. The present "cooperation and acquiescence" policy of the United States Geological Survey would be better than a separate active federal regulatory body which would make offsetting wells within a single reservoir constituting a common source of supply subject to different regulatory authorities.

WHAT THE REPORT DID NOT SAY

It is surprising that there are not stronger recommendations made to protect the public in relying upon the federal records and federal administrative action. The *Report* also is rather mild on the need to consolidate and unify into one leasing act all the present 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,[20] and implied powers of the Secretary of the Interior. There really is no need for this multitude of procedures to accomplish the same purpose, *i.e.,* the leasing of public lands for oil and gas exploration and development.

CONCLUSION

The Commission's recommendations relating to oil and gas are very general and full of compromises. The ideas are

20. 30 U.S.C. § 181 (1964); 30 U.S.C. § 186 (1964); 30 U.S.C. § 351 (1964); 44 U.S.C. § 311 (1964).

expressed, not in specifics, but in terms of principles to guide future legislation. The work is just beginning and many problems must be resolved by Congress and all parts of the oil and gas industry. It is obvious that there is more that unites the majors and independents than separates them on public land policy. It is more important to have a total workable, rational Mineral Leasing Act than to win any single, short-term advantage intra-industry. While the *Report* is presently binding upon no one and is very general, let us hope that it will be an instrument of progress for the United States, the public lands, and all segments of the oil and gas industry.