

MINING, MINERAL LEASING AND ENERGY PRODUCTION
ON ARMY LANDS AND SURPLUS ARMY LANDS.

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TABLE OF CONTENTS:

BACKGROUND:.....2

CONCLUSIONS:.....2

PART ONE - FEDERAL LAND IN GENERAL

 I. The two types of authority over Federal lands - jurisdiction and property
 law.....4

 II. Two types of Federal
 property.....4

PART TWO - THE PUBLIC DOMAIN

 I. Laws pertaining to mineral exploration, extraction, and sale on the public domain.6

 A. The Mineral Acts - locatables.....6

 B. The Materials Act of 1947 and salables (a.k.a salesables).....7

 C. Legislation affecting military lands withdrawn from the public domain8

 1. The Surface Resources Act.....8

 2. Removal from Federal Property and Administrative Services Act of
 19499

 3. United States Code, Title 43, Section 58.....10

 D. The Army Regulation.....11

 II. Leasing Minerals on the Public Domain - Leasables.....11

 A. Federal Statutes.....11

 B. DOD Implementing Regulations.....12

 C. Army Implementing Regulations.....13

PART THREE - ACQUIRED LAND

 I. Mineral Sales on Acquired Lands.....15

 A. The Federal Land Policy and Management Act.....15

 B. Base Realignment and Closure.....15

 C. The DoD regulations.....16

 D. The Army Regulation.....16

 II. Mineral Leasing on Acquired Lands.....17

 A. Mineral Leasing Act for Acquired lands.....17

 B. DOD Implementing Regulations.....19

 C. The Army Regulations.....19

PART FOUR - ENERGY PRODUCTION

I. AR 405-30	
II. Title 10 U.S.C. 2689.....	20
III. Title 10 U.S.C. 2394.....	21
IV. Title 10 U.S.C. 2483.....	21
V. Revenue.....	22

LEGAL OPINION

MINING, MINERAL LEASING, AND ENERGY PRODUCTION ON ARMY LANDS AND SURPLUS ARMY LANDS.

BACKGROUND:

The Commanding General of this Major Subordinate Command (MSC) received a letter from a law firm proposing, on behalf of a Corporation:

to research, explore, develop, and produce minerals at certain AAPs with large land bases and associated underlying minerals with potential for oil, gas, and other mineral and/or aggregate development.

The letter added that "the concept could apply to installations that have been or will be closed or realigned."

The Corporation would provide the expertise and advance the initial capital to explore and develop the natural resources. From the proceeds of the developed resources, the Corporation would receive a share to recover its capital outlays and expenses, and the Army's share could help offset operations, maintenance, and environmental clean-up expenses.

There are two principle questions which must be addressed. The first question is under what circumstances may military controlled lands[non-civil works] be purchased for mineral exploration and extraction. The second question is under what circumstances may one use, without purchasing, military controlled land for mineral exploration and extraction.

CONCLUSIONS:

- The MSC has no authority to dispose of minerals on any property under its control, whether withdrawn from the public domain or acquired
- There is no statutory or regulatory authority for the removal of certain hardrock minerals known as locatables, such as diamonds or gold on acquired lands or lands withdrawn from the public domain for military use.

- The Bureau of Land Management of the Department of the Interior may issue leases at its discretion and with Army consent of a class of minerals known as leasables. The list of permissible leasables for acquired versus public domain lands is not precisely coextensive. Leasable materials include coal, potassium, sodium, phosphate, oil shale, native asphalt, tar sands, oil, and gas. This list is not all inclusive. It should be noted that the Bureau of Land Management has 515 pages of regulations regarding leasable minerals in 43 CFR sections 3000-3873.3.
- A third class of minerals known as saleables have been removed from the list of leasable minerals and on Army lands may be purchased with installations consent through the Army Corps of Engineers. This includes common sand and gravel.
- Pursuant to 43 CFR 3153.3 agencies of the Department of Defense may issue permits for geophysical exploration.
- Surplus MSC public domain lands return to the public domain unless The Department of the Interior determines they are unsuitable due to improvements. Acquired lands may be disposed of under the General Services Administration Federal Property Management Regulation only after the Interior determines that there are no minerals suitable for disposition under the mining and mineral leasing statutes.
- The Department of the Interior is responsible for collecting the revenues and royalties from mineral leasing and mining activities. Half goes to the State, the other half to the U.S. treasury. Revenue from salesables or saleables is disposed of in the same manner as sales of public lands.
- Title 10 U.S.C. 2394, "Contracts for energy or fuel for military installations," provides that a Secretary of a military department may enter into contracts of up to 30 years for the provision and operation of energy production facilities on real property under the Secretary's jurisdiction or on private property and the purchase of energy produced from such facilities. Whether this includes mining for oil and gas is doubtful since there is no expressed intent to override the mineral laws.
- Section 2689 of Title 10, P.L. 97-214, promulgated in 1982, provides that the Secretary of a military department may develop, or authorize the development of, any geothermal energy resource within lands under the Secretary's jurisdiction for the use and benefit of the Department of Defense: however, AR 405-30 limits the authority to lease to BLM.

ANALYSIS:

PART ONE - FEDERAL LAND IN GENERAL

I. The two types of authority over Federal lands - jurisdiction and property law.

The first hurdle to overcome in analyzing the proposal is determining what law to apply. The starting point for analyzing any problem affecting Federal agencies is the Constitution. There are two independent provisions in the Constitution regarding Federal power over property. Article I, § 8, cl.17, the Enclave clause, grants Congress exclusive legislative jurisdiction over "all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings." However, the Property, Clause Art. IV, §3, cl.2, governs the management and disposition of real property.

The Court in Commonwealth of Virginia v. Reno, 955 F.Supp. 571(1997), wrote, "Separate and distinct from the Enclave Clause, the Property Clause, on its face, permits the federal government to buy, sell, regulate, and manage all federally-owned real property, irrespective of state consent." The Property clause, Art. IV, §3, cl.2, provides, "The Congress shall have the power to dispose of and make all needful Rules and Regulations respecting the Territory or other property belonging to the United States;..."

II. Two types of Federal Property

Federal property falls into two classes, the public domain and acquired lands. Mineral law has developed along two lines depending upon whether the land is a part of the public domain or was acquired for specific purposes. The court in Texas Oil and Gas v. Department of the Interior, 683 F.2d 427(1982), stated, "Public domain lands, or public lands, means lands claimed by the United States as part of its national sovereignty" - land which has been in Federal ownership since the original colonization, treaty, or purchase from other sovereigns. As the name suggests acquired land is land which has been acquired from the state or private owners for a specific purpose.

The Code of Federal Regulations definitions are:

CITE: 43CFR3000.0-5

g) Public domain lands means lands, including mineral estates, which never left the ownership of the United States, lands which were obtained by the United States in exchange for public domain lands, lands which have reverted to the ownership of the United States through the operation

of the public land laws and other lands specifically identified by the Congress as part of the public domain.
(h) Acquired lands means lands which the United States obtained by deed through purchase or gift, or through condemnation proceedings, including lands previously disposed of under the public land laws including the mining laws.

Patented lands reacquired by the United States are not by mere force of the reacquisition restored to the public domain, absent legislation. They remain in the class of lands acquired for special uses, such as parks and national monuments. Rawson v. United States, 225 F.2d 855 (1955)

The distinction between the public domain and acquired land is important to the analysis of mineral purchase and mineral leasing. The Corporation has proposed to both purchase and lease. Though the legal opinion indicates that the Corporation inquired about purchase or lease of surplus property, the letter to our Commander suggests an interest in non-excess property as well.

The Court in Texas Oil & Gas Corp V. Andrus, 498 F. Supp. 668, 670 (1980) wrote concerning the distinction between the public domain and acquired lands:

[Acquired lands are] lands which are acquired by the United States through purchase or other transfer from a state or private individual, usually for dedication to a particular use. In contrast to such acquired lands are "public domain" lands, which are owned by the United States by virtue of its sovereignty. The distinction between these types of federal real estate is important in that, as a matter of historical perspective, it was the basis for the evolution of the present statutory scheme through which the Congress has delegated responsibility to the Secretary of the Interior for the leasing of federal lands for mineral development

A Department of the Interior Web site, <http://www.blm.gov/eso/pages/faqs.html>, states:

Public Land [the public domain] is undeveloped land with no improvements, usually part of the original Public Domain established during the western expansion of the United States. The BLM is responsible for **managing** the country's Public Lands, **mostly located in the 11 Western**

States and in Alaska. There are some scattered parcels in the East.

There are no Public Lands managed by the BLM in Connecticut, Delaware, Georgia, Indiana, Iowa, Kentucky, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, North Carolina, Pennsylvania, Rhode Island, South Carolina, Tennessee, Vermont, Virginia and West Virginia. There are a few scattered parcels in Alabama, Arkansas, Florida, Illinois, Louisiana, Michigan, Minnesota, Missouri, Mississippi, Ohio, and Wisconsin

Only public lands identified as excess to the public's and Government's needs, or more suited to private ownership, are sometimes offered for sale. According to BLM:

BLM does not offer much land for sale because of the congressional mandate in the Federal Land Policy and Management Act of 1976, which directs that the Federal Government will generally **retain** these lands in public ownership. However, the BLM does occasionally sell parcels of land where our land use planning finds disposal is appropriate.

PART TWO - THE PUBLIC DOMAIN

I. Laws pertaining to mineral exploration, extraction, and sale on the public domain.

A . The Mineral Acts - locatables.

As stated in Cameron v. United States, 252 U.S. 450, 460, the cornerstone of federal legislation dealing with mineral lands is the Act of May 10, 1872, 17 Stat. 91, 30 U. S. C. § 22(Mining Act), which provides in § 1 that citizens may enter and explore the public domain; and, if they find "valuable mineral deposits", they may obtain title to the land on which such deposits are located by application to the Department of the Interior. The Secretary of the Interior is "charged with seeing that valid claims [are] recognized, invalid ones eliminated, and the rights of the public preserved.

As Marathon Oil Co. V. Lujan, 751 F. Supp. 1454, (U.S. Dist. Ct. Dist. CO, 1990) made clear:

In enacting the Mining Law of 1872, Congress declared that "all valuable mineral deposits in lands belonging to the United States" are "free and open to exploration and purchase, and the lands in which they are found to occupation and purchase." *30 U.S.C. § 22*. Congress, however, provided that "no location of a mining-claim shall be made until the discovery of the vein or lode within the limits of the claim [is] located." *30 U.S.C. § 23*. The mining law sets up a legal blueprint by which private parties can discover, own, extract, and market valuable minerals including oil shale from public lands.

[The Federal Land Policy and Management Act of 1976 ("FLPMA"), as amended, also specifies conditions under which the Secretary of the Interior or an authorized delegate ("the Secretary") may withdraw or segregate lands from the operation of some or all of the public land laws, including mining laws. Kosanke V. United States DOI, 144 F.3d 873(1998)]

In American Colloid Co. V. Hodel, 701 F. Supp. 1537(U.S. Dist. Ct. Wyoming, 1988), the Court wrote, "Congress has clearly expressed its intention that the **Department of Interior** be vested with primary jurisdiction to resolve applications for mineral patents." Further more, in Marathon Oil Co. V. Lujan, 751 F. Supp. 1454, (U.S. Dist. Ct. Dist. CO, 1990) the court wrote,

" ...[T]he Secretary of Interior of the United States,...the Director, Bureau of Land Management of the Department of the Interior,...[and]Department of the Interior... a United States agency, are charged with administration of the laws relating to the possession, purchase, and patenting of mineral lands in the public domain 30 U.S.C. @@ 21 through 54."

The Mining Law of 1872 was based on two principles, that mineral rights and title to land could be acquired by making a discovery of valuable minerals thereon, and minerals on the land must be continually developed to retain title to the claim. This type of mineral category is called **locatable** minerals. Lands in national forests are locatable; however, except where specifically authorized by law, lands in national parks and national monuments are not.. Minerals found on military reservations, [See AR 405-30, 1.5C] and on acquired lands are not locatable. The Mining Law of 1872 allowed a miner to obtain title to the land and rights to all minerals including coal, oil, and gas. Royalties are not required from mineral production from locatable claims.

Title 30 USC Section 611 "was intended to remove common types of stone from the coverage of the mining laws and to place the disposition of such materials under the Materials Act of 1947, 61 Stat. 681, 30 U.S.C. @ 601 et seq., which provides for the sale of such materials without disposing of the land on which they are found." Coleman, 390 U.S. at 604.

B. The Materials Act of 1947 and salables (a.k.a salesables)

The Materials Act of 1947, as amended, established a type of mineral category, **salable** minerals. Under this Act, deposits of common varieties of sand, stone, gravel, pumice, pumicite, cinders, clay and petrified wood made subject to disposition through a sales process. Title 30 U.S.C. 603 states that moneys received from the sale of minerals under that Chapter [sand, stone, gravel, pumice, pumicite, cinders, and clay] shall be disposed of in the same manner as proceeds from the sale of public lands. Title 30 U.S.C. 602 provides that saleables are sold to the highest qualified bidder.

Title 43 CFR 3600 contains regulations regarding saleables. See 43 CFR 3600.0-4, "Policy":

It is the policy of the Bureau of Land Management to permit the disposal of mineral material resources under the Bureau's jurisdiction at **fair market value** while ensuring that adequate measures are taken to protect the environment and minimize damage to public health and safety during the authorized exploration for and the removal of such minerals. No mineral material shall be disposed of if the Secretary determines that the aggregate damage to public lands and resources would exceed the benefits to be derived from the proposed sale or free use.

C. Legislation Affecting Military Lands withdrawn from the public domain.

1. The Surface Resources Act

The published Legislative History of the 1955 Surface Resources Act [amendment to the Mining Act which made common varieties of gravel and stone non-locatable] is available in the Law Library. Senate report No 857, dated August 13, 1955 gives a clear indication of the objectives of Congress in declaring that military lands would be subject to the jurisdiction of the Secretary of the Interior. The report states that two bills were pending. However:

In view of the urgent necessity of enacting legislation designed to control rapidly expanding military control of public lands, the

committee limited its consideration of withdrawal legislation to public lands use by the military departments. The committee fully intends to consider the more comprehensive type of withdrawal legislation during the next session of the 85th Congress.

Legislative History, page 2228.

The drafters of the Legislative History further stated:

[the bill] deals with defense agency acquisition and use of the public lands and associated resources of the United States for defense purposes. The broad purpose and objective of the bill is to return from the executive branch to the Congress - to the extent that such lands are involved - the responsibility imposed by the Constitution on the Congress for the management. ...[T]he bill's provisions would remove whatever doubts may exist, if any, as to the laws which govern the disposal of and exploration for any and all minerals, including oil and gas in public lands of the United States heretofore or hereafter withdrawn or reserved by the United States for the use of Defense agencies.

The Legislative History continues under the heading "Mineral Resources In Defense Lands:"

Finally the reported bill would accomplish the ... objective by declaring that all mineral in withdrawn or reserved public lands except lands withdrawn or reserved specifically as naval petroleum, naval oil shale or naval coal reserves - are **under the jurisdiction of the Secretary of the Interior**, and that no disposition thereof, or exploration therefor, shall be made except under the applicable public-land mining and mineral leasing laws...

2. Removal from Federal Property and Administrative Services Act of 1949.

There is a discussion of the promulgation of the Federal Land Policy and Management Act (FLPMA) amending the **Federal Property and Administrative Services Act of 1949 (FPASA)** in Sierra Club v. Watt, et al, 608 F. Supp. 305 (1985).

In 1976, Congress enacted the Federal Land Policy and Management Act [*309] (FLPMA), 43 U.S.C. §§ 1701-1784 (Supp. 1983), to provide "the first

comprehensive, statutory statement of purposes, goals and authority for the use and management of about 448 million acres n1 of federally-owned lands administered by the Secretary of Interior through the Bureau of Land Management." S. Rep. No. 583, 94th Cong., 1st sess. 24 (1975). n2 FLPMA reflected a major change in federal policy. Previously, the lands held by the Bureau of Land Management (BLM) (and its predecessor the General Land Office) were viewed as only temporarily within the custody of the United States and it was expected that their ultimate destiny was private ownership. n3 Under FLPMA, however, BLM lands [**3] were to be held in permanent federal ownership unless, as a result of land use planning, the disposal of a particular parcel would serve the national interest. FLPMA § 102(a)(1), *43 U.S.C. § 1701(a)(1)*.

The Legislative history for the Surface Resources Act documents the removal of minerals from the coverage of FPASA:

Section 5 would amend in two particulars the Federal Property and Administrative Services Act of 1949 (63 Stat. 377), as amended.

First, it would except from the real property-disposition provisions of the 1949 act, minerals in withdrawn or reserved public domain lands which the Secretary of the Interior determines are suitable for disposition under the public land mining and mineral leasing laws.

Second, it amends the 1949 act to provide that only those withdrawn or reserved public domain lands surplus to the needs of Federal agencies found by the Secretary of the Interior - with the concurrence of the Administrator of General Services - not suitable for restoration to public land status by virtue of their having been substantially changed in character by improvements, or otherwise, would hereafter be subject to the real property disposition provisions of the amended 1949 act...

[O]nly when determined by the Secretary to be not suitable for mining or mineral leasing purposes

would the mineral estate pass with the title to the surface estate being disposed of **under surplus** property provisions; the other would reverse the roles of the Secretary and the Administrator so as to provide that the Secretary would make an initial judgment of the nature with which his Department is most familiar - suitability of lands for public land uses, a traditional Interior function - and if the Administrator concurs in a finding of nonsuitability, the lands would be disposed of as surplus.

3. United States Code, Title 43, Section 158.

In 1958, Congress acted again with a provision focused on Defense lands. United States Code, Title 43, Section 158, "Mineral Resources on withdrawn lands; disposition and exploration", states:

All withdrawals or reservations of public lands for the use of any agency of the Department of Defense, except lands withdrawn or reserved specifically as naval petroleum, naval oil shale, or naval coal reserves, heretofore or hereafter made by the United States, shall be deemed to be subject to the condition that all minerals, including oil and gas, in the lands so withdrawn or reserved are under the **jurisdiction of the Secretary of the Interior** and there shall be no disposition of, or exploration for, any minerals in such lands except under the applicable public land mining and mineral leasing laws: Provided, That no disposition of, or exploration for, any minerals in such lands shall be made where the Secretary of Defense, after consultation with the Secretary of the Interior, determines that such disposition or exploration is inconsistent with the military use of the lands so withdrawn or reserved.

HISTORY: (Feb. 28, 1958, P.L. 85-337, § 6, 72 Stat. 30.)

D. The Army Regulation:

AR 405-30, Paragraph 5.c., states that "Exploration or extraction of certain hard rock minerals known as locatable is not allowed, because it could lead to a patent.

AR 405-30, 1.5D states "Salesables. These materials are disposed of under AR 405-90." Turning to AR 405-90, Paragraph 6-8, entitled gravel, sand, and stone, states the authorized office of the BLM will dispose of such materials on withdrawn public lands under 30 USC 601. This includes grants of free use permits to the Army under 43

CFR part 3620. If any Public Domain lands are deemed unsuitable for return, BLM will notify GSA of the mineral interests in such property which are not suitable for disposition under the mining and mineral leasing laws. Paragraph 5-5.a.

II. Leasing Minerals on the Public Domain - Leasables

A. Federal Statutes

Under the Mineral Leasing Act of 1920, lands previously open to location and patent became available solely on a lease basis. However, previously located valid claims which were in existence on February 25, 1920 are protected by *30 U.S.C. § 193*, which allows such claims to continue so long as in compliance with the laws under which they were initiated. Marathon Oil Company V. Lujan and Department Of The Interior, 751 F. Supp. 1454(1990). The Mineral Leasing Act of 1920, as amended(30 U.S.C. 181-287), established another type of mineral category, **leasable** minerals. Under this Act, deposits of coal, potassium, sodium, phosphate, oil shale, native asphalt, tar sands, oil, and gas on the public domain were made subject to disposition through a leasing process. This leasing process allowed the United States to maintain title to the land and establish the type of lease, the duration of the lease, acreage limitation, and royalty and rental terms. Subsequent legislation also established reclamation standards and requirements on federal lease properties. This Act applied only to the public domain. See The Mineral Leasing Act of 1920, as amended and supplemented (30 U.S.C. 181-287), including the Act of February 7, 1927 (30 U.S.C. 281-287), the Act of April 17, 1926 (30 U.S.C. 271-276), and the Act of June 28, 1944 (58 Stat. 483-485),

Title 30 U.S.C. § 191 provides:

All money received from sales, bonuses, royalties, and rentals of the public lands under the Federal Oil and Gas Royalty Management Act of 1982[30 U.S.C. 1701 ET seq.] and rentals under the Geothermal Steam Act of 1970 shall be paid into the Treasury of the United States; 50 per centum thereof shall be paid by the Secretary of the Treasury . . . to the State, 40 percent to the Reclamation fund, and the remainder to miscellaneous receipts.

B. DOD Implementing Regulations

DoDD 4700.3 contains some useful definitions:

Leasable Minerals. Minerals, such as oil and gas, that are owned by the United States and that have been authorized under statute as potential minerals for extraction under a mineral lease

Locatable Minerals. Minerals, such as gold and silver, that are owned by the United States, that are on public domain lands, that are subject to discovery and claim, and that are not leasable or saleable

Saleable Minerals. Common variety minerals, such as sand, clay, and gravel, that are sold under certain statutory authorities (30 U.S.C. 601 et seq. and 41 CFR 101-47.302-2,

DODD 4700.3 Mineral Exploration and Extraction on DoD Lands, September 28, 1983 establishes policy, assigns responsibilities, and provides procedures for making DoD lands available for mineral exploration and extraction. It applies to DoD-controlled lands **acquired or withdrawn** from the public domain (including Army civil works lands) within the United States and its territories and possessions for which the mineral rights are owned by the United States. There are some stated exceptions:

- a. Mineral leasing of lands situated within incorporated cities, towns, and villages (references (d) and (e)).
- b. Mineral leasing of tidelands or submerged lands (reference (d)).
- c. Certain hard rock minerals known as locatables (30 U.S.C. 22, reference(g)).
- d. A class of minerals composed of sand and gravel known as saleables (30 U.S.C. 601 et seq. and 41 CFR 101-47.302-2, references(h) and (i)).

DOD lands should be made available for mineral exploration and extraction to the maximum extent possible consistent with military operations, national defense activities, and Army civil works activities. DODD 4700.3,D.

The Secretaries of the Military Departments are directed to "review and approve or disapprove requests from **the Department of the Interior (DoI), the federal mineral leasing agency**, to lease DoD lands under 43 U.S.C. 155 et seq., issue regulatory documents implementing this Directive to prescribe procedures relating to the issuance of permits and leases and the approval of plans of operations for mineral exploration and extraction, and formulate a system for maintaining records of land status to assist the DoI in mineral leasing. **The Military Departments may issue permits to parties interested in conducting seismic or other geophysical tests on DoD lands**

As the lead agency for leasing, the DoI is supposed to obtain all necessary cultural and environmental documentation. DoDD 4700.3(F)(2). DoI may request information from the Military Department. The Military Department concerned is directed to

provide title information for acquired lands. On the public domain, Interior records will be used. Id. After the lease is executed, the lessee submits a plan of operations (Application for Permit to Drill for oil and gas or Mining Plan for other minerals) to the DoI for technical review and coordination with the Military Department. However, the **DoI has the responsibility for the collection and disposition of proceeds derived from mineral leasing.**

The Secretary of the Army has been delegated the authority to redelegate "to the lowest possible organizational level" the authority contained in 30 U.S.C. 352 to grant consent to the Secretary of the Interior to lease mineral deposits on lands under the jurisdiction of the Army "subject to such conditions that will ensure the adequate use of lands for the primary purposes for which they were acquired or are being administered." See DoDD 5160.63, §. 4.

C. Army Implementing Regulations

AR 405-30 directs the installation commander to:

- (1) Prepare ROA or justifications for nonavailability for mineral leasing and exploration requests.
- (2) Furnish available environmental and cultural information, through channels, to the BLM on request.

MACOMs are directed to:

- 1) Review reports of availability for mineral leasing and exploration requests.
- (2) Furnish available environmental and cultural information to the Bureau of Land Management (BLM) on request.

Additionally, the Chief of Engineers -

- (1) Coordinates and approves availability determinations for mineral leasing on military lands, under ASA(IL&FM) guidance.
- (2) Issues instructions for mineral leasing.
- (3) Obtains Department of Defense Explosives Safety Board (DDESB) review and approval of plans for

exploration or extraction involving ammunition or explosives contamination.

The paragraph on mineral leasing offers the following:

a. Leasable minerals. ...The statute for public domain lands authorizes the BLM to lease coal, phosphate, sodium, oil, oil shale, native asphalt, solid or semisolid bitumen, and bituminous rock or gas owned by the United States within public domain lands. These authorities do not apply to Army-controlled property if the Army does not consent to exploration or extraction, or if the minerals are within an incorporated city, town, or village, or in tidelands, or submerged lands in acquired lands.

AR 405-30, 1.5.A

Paragraph 1.5.B states that the BLM may also issue leases for development, production, and use of geothermal resources on withdrawn public domain lands with the consent of the Army. However, "Exploration or extraction of certain hard rock minerals known as locatable is not allowed, because it could lead to a land patent." AR 405-30, 1.5C.

There are instances when leasing may be restricted such as classified activities, contamination, and operational incompatibility. Military installations with a nuclear or chemical surety mission will not normally be made available. But, " Exclusions of lands from exploration and extraction and any restrictions on exploration and extraction will be necessary, justified, and based on military or civil works considerations." AR 405-30, 1.6.A. There is a further caveat:

It is also possible, though expensive, to reach some oil and gas by directional drilling from a site off the installation. Since directional drilling involves no surface occupancy, it is normally impossible to justify withholding consent for leasing.

AR 405-30, 1.6.B

There are additional restrictions for separating from hazardous ammunition and explosive activities and contamination. Paragraphs 1.6.C & D. Because of the technical nature of oil and gas leasing, the installation should consult the BLM or the division or district commander in developing the ROA. The installation decides whether and under what conditions minerals may be made available, but the BLM actually leases. The Chief

of Engineers approves both the ROA or justifications for non-availability for military properties. Paragraph 1.7.B,C, &D.

Where surface occupancy is allowed under a lease for gas and oil, a separate procedure, detailed in 43 CFR 3160, is followed to approve the lessee's operations. For surface use:

Before applying to the BLM for approval, the lessee may contact the installation for information to develop a surface use program, which the installation will approve. The installation will provide available information on properties in, or eligible for, the National Register for Historic Places, threatened or endangered species, and critical habitats on the leased area.

The final paragraph states:

1.9 Other mineral leases

As explained in paragraph 5, the BLM may grant leases for other types of minerals. Leases for these minerals are less frequent and procedures are usually more complicated. This regulation also applies to such leases. However, **DAEN-REM will advise MACOMs on specific procedures on each case.**

PART THREE - ACQUIRED LAND

I. Mineral Sales on Acquired Lands

A. The Federal Land Policy and Management Act

As stated previously, the Mineral Act of 1872, creating locatable minerals did not apply to acquired lands. Acquired lands, including **military installations** may be disposed of under the Federal Property and Administrative Services Act of 1949 as amended. Title 40 - Public Buildings, Property, And Works; Chapter 10 - Management And Disposal Of Government Property; Subchapter I - General Provisions; Sec. 471. Congressional Declaration Of Policy states, "It is the intent of the Congress in enacting this legislation to provide for the Government an economical and efficient system for (c) the **disposal of surplus property;**" The Federal Land Policy and Management Act (FLPMA) of 1976 (43 USC sec. 1701, 1761-1771) amends and supercedes the 1949 statute. It establishes public land policy and guidelines for its administration, and

provides for the management, protection, development, and enhancement of the public lands.

The Court has stated, "Condemned land acquired by General Services as surplus under Public Law 85-337, 72 Stat. 27, and successive amendments, simply is not land subject to the general land laws such as are covered by mining, homestead and grazing, and Indian allotment acts." Lewis v. General Services Administration, 377 F.2d 499(1967).

B. Base Realignment and Closure

A second type authority for the disposal of military installations on acquired lands is the collective Base Realignment and Closure laws. The property is first screened for use within the DOD. If there is no need it is declared excess. If it is not needed by any other federal agency, it is declared surplus. After screening under the McKinney act for use as housing for the homeless, it is offered to a local reuse authority and disposed of in accordance with an approved reuse plan. The emphasis is on revitalizing local communities.

C. The DoD regulations

DOD 4165.6 §. 3. Disposal of Real Property. Military Departments shall maintain aggressive review programs to ensure that, after screening with the other DoD Components, real property for which there is no foreseeable requirement is reported promptly to GSA or the Department of the Interior, in accordance with applicable regulations of those Agencies for disposal.

D. The Army Regulation

AR 405-30, 1.5D states "Salesables. These materials are disposed of under AR 405-90." Turning to AR 405-90, Paragraph 6-8, entitled gravel, sand, and stone, states that once disposal is approved in accordance with this regulation, the District Commander [COE] is authorized to dispose of embedded sand, gravel, and stone on acquired land. Presumably this disposal is without disposing of the parcel of land.

II. Mineral Leasing on Acquired Lands

A. Mineral Leasing Act for Acquired Lands.

In 1947, Congress enacted the Mineral Leasing Act for Acquired Lands. Leases on acquired lands are issued under the same conditions as contained in the Mineral Leasing Act of 1920. The Angelina Holly Corporation V. William P. Clark, Secretary Of The Interior, et al 587 F. Supp. 1152 (1984). This Act authorized leasing of coal, potassium, sodium, phosphate, oil shale, native asphalt, tar sands, oil, and gas on lands acquired by the United States. It also **removed other minerals deposits** found on acquired lands like lead, zinc, fluorite, barite, uranium, limestone, clay, and quartz crystals from the locatable mineral category. This Act allowed the United States to maintain title to the land and establish lease terms for all minerals found on acquired land. See The Mineral Leasing Act for Acquired Lands of 1947, as amended (30 U.S.C. 351-359)

Lease holders competitively bid, initially pay a bonus and subsequently, rent for the right to develop these lands. If minerals are found, extracted and sold, the federal government is entitled to a certain percentage of, or royalty on the production. The Minerals Management Service's Royalty Management Program [Department of the Interior], is **responsible for management of all revenues associated with mineral leases.**

The Mineral Leasing Act and the Mineral Leasing Act for Acquired Lands leave to the discretion of the Secretary of the Interior the determination of what oil and gas deposits are to be leased 30 USC §. 352; Pease v Udall, 332 F.2d 62 (9th Cir. 1964).

Initially there was a military exclusion in the Mineral Leasing Act for Acquired Lands. In 1976 Congress removed the exclusion from the statute, making military lands subject to leasing at the Secretary's discretion. Federal Coal Leasing Amendments Act of 1975, @ 12(a), Pub. L. No. 94-377, 90 Stat. 1090 (codified at 30 U.S.C. @ 352 (1976)).

The leasing of these lands is done either on a competitive bidding basis within any "known geological structure of a producing oil and gas field ", 30 U.S.C. § 226(b), or on a noncompetitive basis to the first qualified applicant where the lands are not within a known geological structure ("KGS"). 30 U.S.C. § 226(c). The Angelina Holly Corporation v. William P. Clark, Secretary Of The Interior, 587 F. Supp. 1152(1984). A "known geological structure" is defined by regulation as "technically the trap in which an accumulation of oil or gas has been discovered by drilling and determined to be productive, the limits of which include all acreage that is presumptively productive." 43 C.F.R. § 3100.0-5(a). The Secretary of the Interior is vested with discretion in determining the extent of geologic structures. 30 U.S.C. § 189.

According to the Court in *ARKLA EXPLORATION COMPANY v. James G. WATT*, Secretary of the United States Department of the Interior, and Texas Oil and Gas Corp:

The legislative history indicates that Congress, in enacting the Mineral Leasing Act, intended to encourage exploration and development of areas in which the exploration interest was then relatively small and the risk relatively high. Conversely, Congress intended to promote competition in those areas in which exploration interest was already present and the risks substantially smaller.

Oil and gas deposits which are within acquired lands which have been declared surplus are not subject to leasing under Mineral Leasing Act for Acquired Lands according to an Interior ruling in *Estate of P.A. McKenna*, 74 ID 133(1967).

Title 30 USC § 360, "Authority to manage certain mineral leases", provides that:

Each department, agency and instrumentality of the United States which administers lands acquired by the United States with one or more existing mineral lease shall transfer to the Secretary of the Interior the authority to administer such lease and to collect all receipts due and payable to the United States under the lease. In the case of lands acquired on or before the date of the enactment of this section [enacted Oct. 24, 1992], the authority to administer the leases and collect receipts shall be transferred to the Secretary of the Interior as expeditiously as practicable after the date of enactment of this section [enacted Oct. 24, 1992]. In the case of lands acquired after the date of enactment of this section [enacted Oct. 24, 1992], such authority shall be vested with the Secretary at the time of acquisition.

The provisions of section 6 of this Act [*30 USCS § 355*] shall apply to all receipts derived from such leases where such receipts are due and payable to the United States under the lease in the same manner as such provisions apply to receipts derived from leases issued under the authority of this Act [*30 USCS §§ 351 et seq.*]. For purposes of this section, the term "existing mineral lease" means any lease in existence at the time land is acquired by the United States. Nothing in this section shall be construed

to affect the existing surface management authority of any
Federal agency.

HISTORY: (Oct. 24, 1992, P.L. 102-486, Title XXV, § 2506(b), 106 Stat. 3106.)

B. DOD Implementing Regulations

DODD 4165.6 Real Property Acquisition, Management, and Disposal, September 1, 1987, states at paragraph 2.m "Energy Resources":

The Military Departments shall initiate formal programs to identify potential energy resources (e.g., coal, oil, gas, geothermal steam) on DoD lands.

(1) The Military Departments shall make their land available for mineral exploration and extraction to the maximum extent consistent with military operations, national defense activities, and Army civil works activities in accordance with DoD Directive 4700.3 (reference (z)).

(2) If a commercial oil and gas resource development is located near a DoD installation, the Bureau of Land Management, Department of the Interior, shall be contacted immediately to advise on potential drainage problems. To prevent exploitation of a Government asset and upon the recommendation of the Bureau of Land Management, oil and gas shall be leased by the Department of the Interior under conditions specified by the Military Department concerned.

As previously stated in Part Two, Section II. B., supra, DODD 4700.3, Mineral Exploration and Extraction on DoD Lands(32 CFR 189), provides procedures for making DoD lands available for mineral exploration and extraction on both **acquired or withdrawn** DoD-controlled lands.

C. The Army Regulations

The paragraph of AR 405-30 concerning mineral leasing offers the following concerning acquired lands:

a. Leasable minerals. The mineral leasing statute for acquired lands authorizes the BLM to lease coal, phosphate, sodium, potassium, oil, oil shale, gas, or sulfur owned by the United States within acquired lands.

According to Estate of P.A. McKenna, 74 I.D. 133 (1967) once the Secretary of the Army declares property Surplus, the Secretary of the Interior no longer has jurisdiction to lease the minerals. This case involved land declared Surplus at the former Camp Breckenridge Military Reservation.

30 U.S.C. § 191 provides:

All money received from sales, bonuses, royalties, and rentals of the public lands . . . shall be paid into the Treasury of the United States; 50 per centum thereof shall be paid by the Secretary of the Treasury . . . to the State . . . to be used by such State and its subdivisions, as the legislature of the State may direct giving priority to those subdivisions of the State socially or economically impacted by development of minerals leased under this Act, for (i) planning, (ii) construction and maintenance of public facilities, and (iii) provision of public service; .

PART FOUR ENERGY PRODUCTION

I. AR405-30

IOC has no authority to enter into a joint venture or other contractual arrangement with a private corporation to produce and sell geothermal energy. AR 405-30, paragraph 5.B grants the Bureau of Land Management authority to **lease** lands withdrawn from the public domain with the consent of the Army for development, production, and use of geothermal resources:

5.B Geothermal resources.

b. Geothermal resources. The BLM may also issue leases for development, production, and use of geothermal resources on withdrawn public domain lands with the consent of the Army.

Since all Army actions must be in accordance with the Army Regulations, a waiver or amendment of the Regulation would be necessary.

II. Title 10 U.S.C. 2689

Section 2689 of Title 10, P.L. 97-214, promulgated in 1982, provides as follows:

§ 2689. Development of geothermal energy on military lands

The Secretary of a military department may develop, or authorize the development of, any geothermal energy resource within lands under the Secretary's jurisdiction, including public lands, **for the use or benefit of the** Department of Defense if that development is in the public interest, as determined by the Secretary concerned, and **will**

not deter commercial development and use of other portions of such resource if offered for leasing.

Section 2689 was originally enacted in the 1970's as P.L. 95-356, codified at 30 USC 1002a(a). This was later repealed and P.L. 97-214 was enacted. There is no legislative history for 95-356 and the legislative history for P.L. 97-214 reveals little about this provision. [The original enactment excluded public lands administered by the Secretary of the Interior and required submission to the Committees on Armed Services.]

Title 10 U.S.C. 2689, permits the Secretary of the Army to develop geothermal resources within lands under the Secretary's jurisdiction. However, the Secretary of the Army has not delegated this authority to the MACOMS or MSCs. Furthermore the Statute limits development to the "use and benefit of the Department of Defense." A second limitation is that the development not deter commercial development and use of other portions of such resource if offered for leasing. This limitation suggests that Congress still viewed profit making ventures for private corporations as a matter still under the jurisdiction of the Department of the Interior. The Army Regulation AR 405-30 does not reflect the Congressional authorization:

III. Title 10 U.S.C. 2394

Under 10 USC 2394, "Contracts for energy or fuel for military installations" :

(a) Subject to subsection (b), the Secretary of a military department may enter into contracts for periods of up to 30 years--

- (1) under section 2689 of this title; and
- (2) for the provision and operation of energy production facilities on real property under the Secretary's jurisdiction or on private property and the purchase of energy produced from such facilities.

(b) A contract may be made under subsection (a) only after the approval of the proposed contract by the Secretary of Defense.

(c) The costs of contracts under this section for any year may be paid from annual appropriations for that year.

There is no indication that Congress intended to overrule the last 150 years of mineral law. This provision does not grant authority for mineral, oil, and gas extraction. On its face, it does include geothermal production under 2689.

IV. Title 10 U.S.C. 2483

A third provision, 10 USC 2483 has been redesignated as 10 USC 2867. It was enacted as a part of P.L. 98-407 in 1984. The section states:

§ 2867. Sale of electricity from alternate energy and cogeneration production facilities

(a) The Secretary of a military department may sell, contract to sell, or authorize the sale by a contractor to a public or private utility company of electrical energy generated from alternate energy or cogeneration type production facilities which are under the jurisdiction (or produced on land which is under the jurisdiction) of the Secretary concerned. The sale of such energy shall be made under such regulations, for such periods, and at such prices as the Secretary concerned prescribes consistent with the Public Utility Regulatory Policies Act of 1978 (*16 U.S.C. 2601 et seq.*).

Alternate energy sources are those which have not been in common use over the past several years or which are derived from sources which have not been common such as various forms of solar energy, windpower, and biomass (organic materials), municipal solid waste (MSW) and industrial waste for combustion and composting, methane from anaerobic digesters, synthetic fuels such as alcohols from biomass and coal-derived fuels (gaseous, liquid, and solid), and ocean thermal energy conversion.

Cogeneration is the production, within a single system, of both electrical energy and thermal energy (energy that is produced by heat) with the same fuel source. With cogeneration, energy normally lost to the atmosphere is captured and used for a variety of purposes, such as home and water heating.

Though 10 USC 2867 grants the Secretary of a Military Department the authority to sell or authorize sale by a contractor of **electricity** from alternate energy or co-production facilities [geothermal is an alternate energy source] to a public or private utility company, it must be done under "regulations, for such periods, and at such prices as the Secretary concerned prescribes consistent with the Public Utility Regulatory Policies Act of 1978 (*16 U.S.C. 2601 et seq.*)."

The Secretary of the Army has not moved to promulgate such regulations. In fact the Department of Defense has issued Directives that the Military Departments divest of all utilities and utility production facilities if economically feasible. Therefore, it seems unlikely that the Secretary would promulgate such regulations.

V. Revenue

There is no indication that the funds generated under Section 2867 may be used for environmental remediation or disposal. The paragraphs concerning proceeds state:

(b) (1) Proceeds from sales under subsection (a) shall be credited to the appropriation **account** currently available to the military department concerned **for the supply of electrical energy**.

(2) Subject to the availability of appropriations for this purpose, proceeds credited under paragraph (1) may be used to carry out military construction projects under the energy performance plan developed by the Secretary of Defense under section 2865(a) of this title, including minor military construction projects authorized under section 2805 of this title **that are designed to increase energy conservation**.

(c) Before carrying out a military construction project described in subsection (b) using proceeds from sales under subsection (a), the Secretary concerned **shall notify Congress in writing** of the project, the justification for the project, and the estimated cost of the project. The project may be carried out only after the end of the 21-day period beginning on the date the notification is received by Congress.

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September 9, 1999