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The Oil Shale Saga: Where Do We Stand?

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The Public Lands During the Remainder of the 20th Century:
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Natural Resources Law Center
University of Colorado School of Law
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- I. The Oil Shale Resource: The Green River Formation
- A. Formed by deposition in lakes
 - B. Remarkably uniform bedding
 - C. High percentage of organic material yields oil on destructive distillation, as a consequence of chemical/physical conditions of deposition. John Ward Smith, "Geochemistry of Oil Shale Genesis in Colorado's Piceance Creek Basin" (1974).
 - D. Areal extent and oil yield potential
 - 1. 2,600 square miles in Colorado, 4,700 square miles in Utah, 9,200 square miles in Wyoming.
 - 2. 600 billion barrels, 25 gallons of oil per ton of rock; 80 billion barrels recoverable under present conditions. Duncan and Swanson, "Organic-Rich Shale of the United States and World Land Areas", U.S.G.S. Circular 523 (1965).
 - 3. "Multi-mineral" area, depositional center, Piceance Creek, Basin, Colorado -- deposits up to 1,900 feet thick.
- II. Early Recognition of the Potential National Importance of the Oil Shale Resource.
- A. Green River Formation was depicted on Hayden's (Dept. of Interior) Atlas of Colorado, 1881.
 - B. Detailed field mapping by U.S.G.S., 1913-1919.
 - C. Classification in 1916 of most of Green River Formation as mineral land, valuable "as a source of petroleum and nitrogen," in view of:
 - 1. Dwindling proven oil reserves.
 - 2. Increasing oil demand, price.
 - 3. Examples of commercial shale oil industries in Scotland and other countries.
 - 4. Predictable geology.
 - D. Establishment of Naval Oil Shale Reserves, December 1916.
 - E. Government Encouragement of private activity.
 - 1. Annual Reports; statements as to need for shale oil; promotional tour of David T. Day of Bureau of Mines; preliminary views as to patentability.

2. Bureau of Mines research.
3. Executive Branch decision in 1916 not to withdraw oil shale from mining location, in order to provide incentive for private development of experimental plants.

F. The Result: A "Boom" in location of oil shale claims, 1916-1920.

G. Inclusion of oil shale in the Mineral Lands Leasing Act of 1920.

1. 1918 Legislative Compromise: "Oil Shale" and "Savings Clause" are added to leasing bills.
2. Congressional awareness that success in commercial operations was uncertain.

III. Patenting of Oil Shale Claims, 1920-1930.

A. Instructions of May 10, 1920, 47 L.D. 548, occasioned by first oil shale patent application to arrive in Washington.

B. Acceptance of thin, lean, outcrops or beds for discovery.

1. Early patent applications.
2. Freeman v. Summers, 52 L.D. 201 (1927), accepting lean, thin exposures for discovery.

C. The first phase of assessment-work-default challenges.

1. Emil Krushnic, 52 L.D. 282 (1927), holding automatic forfeiture of oil shale mining claims upon any default in performance of annual work in view of MLLA of 1920 withdrawal.
2. Wilbur v. Krushnic, 280 U.S. 306 (1930), holding that 1872 Mining Law gave U.S. no interest in annual work performance and MLLA of 1920 did not amend the law, reserving decision on whether assertion of a challenge prior to resumption of work would make a difference.

D. Reservation of oil shale in Homestead Act patents.

IV. Congressional Review of Oil Shale Patenting, 1930-1931.

A. Attacks in press by Chief of Field Division.

B. Moratorium on issuance of patents.

- C. Senate Hearings, primarily on Freeman v. Summers, conducted by Senator Walsh.
- D. House Hearings.
- E. Resumption of patenting with concurrence of Senate Committee; Congressional awareness of lack of present marketability.
- F. Layman v. Ellis, 52 L.D. 714, (1929) (implying that sand and gravel had to satisfy a present marketability test to be valuable).

V. Phase II of Assessment Work Challenges, 1930-1935.

- A. Instructions, 53 I.D. 131 (1930); Federal Shale Oil Co., 53 I.D. 213 (1930), holding that U.S. could invalidate a claim where a challenge was made during an assessment-work default. Thousands of oil shale claims challenged and declared invalid for defaults.
- B. Moratorium on assessment-work contest proceedings starting in 1933, upon trial court reversal of Virginia-Colorado Development Corp. (53 I.D. 666 (1932)).
- C. Ickes v. Virginia-Colorado Development Corp., 295 U.S. 634 (1935), ruling, on question reserved in Wilbur v. Krushnic, that the Secretary of the Interior lacked authority to challenge oil shale claims for nonperformance of annual work, a matter of concern only for rival claimants.

VI. Interior's Response to Virginia-Colorado.

- A. The Shale Oil Co., 55 I.D. 287 (1935), broadly applying Interior's interpretation of Virginia-Colorado that its assessment work cancellations had been ineffective.
- B. Responses to inquiries from Congress, claimowners, and their counsel, to the effect that prior assessment work cancellations were null and void (1935-1960).
- C. Patenting of oil shale claims known to have been previously declared invalid for assessment-work defaults, 1935-1960.
- D. Efforts to obtain legislation requiring that assessment work be performed, 1936-1943.

- VII. Interior's Support of Legislation Enacted in 1956 To Facilitate Patenting of Oil Shale Claims Where Surface Patents Remained Outstanding, Act of July 20, 1956, 70 Stat. 592, 30 U.S.C. § 122.
- VIII. Hamilton v. Ertl, 146 Colo. 80, 360 Pac.2d 660 (1961), holding that failure of a co-owner of an oil shale claim to pay share of assessment work transferred ownership to owners who did the work, pursuant to 1872 Mining Law, 30 U.S.C. § 28.
- IX. Interior Refusal To Patent Oil Shale Claims and Resulting Litigation, 1961-1986.
- A. Colorado Contest No. 260, initiated in 1961, challenging 35 claims in 5 pending patent applications on numerous grounds including lack of value.
- B. February 1962. Suspension of Contest 260, summary rejection of 18 patent applications for 257 claims, on basis that pre-1935 assessment work cancellations had become final and were effective to nullify the claims.
- C. April 17, 1964 decisions.
1. Union Oil Co. of California, 71 I.D. 169 (1964), affirming 1962 rejection of certain patent applications where no issue existed as to adequacy of personal jurisdiction in the assessment-work contests, and providing for submission of evidence as to personal jurisdiction in other contests.
 2. Secretarial announcement that all oil shale claims would be challenged for lack of value and other alleged defects and that major resources would be committed to the challenges. Interior spends about \$100,000,000 by 1986 on the challenges.
- D. September 1964. Test discovery contests (Colo. Nos. 359, 360), "Winegar/Shell") initiated, against claims never declared invalid for assessment-work default.
- E. Oil Shale Corp. v. Udall, 255 F. Supp. 606 (D. Colo. 1964) (in "Tosco") (denial of motion to dismiss complaint seeking review of Union Oil).
- F. Supplemental Decision, Union Oil Co. of California, 72 I.D. 313 (1965), holding personal jurisdiction partly lacking, partly valid, in pre-1935 assessment-work contests.

1. Additional suits for judicial review filed, U.S. District Court for District of Colorado ("Bohme"), "Weber", "Energy Resources" cases).
 2. Suits stayed in 1967 to await final ruling in TOSCO.
- G. 1966 District Court ruling in TOSCO, 261 F. Supp. 954, reversing Union Oil, 71 I.D. 169, on ground that Krushnic and Virginia-Colorado had held that Interior lacked subject matter jurisdiction over assessment work.
- H. Larson v. Utah, Utah 081587 (B.L.M., June 6, 1967), holding that Freeman v. Summers controlled oil shale discovery issues.
- I. Contest hearing in Winegar/Shell test discovery contests, June-November 1967.
- J. United States v. Coleman, 390 U.S. 599 (1968), holding building stone mining claim invalid for lack of sufficient profitability.
- K. Tenth Circuit decision in TOSCO, 406 F.2d 759 (1969), upholding District Court reversal of Union Oil, 71 I.D. 169, for absence of subject matter jurisdiction in the assessment-work contests.
- L. Hearing Examiner decision in Winegar/Shell test discovery contests, following Freeman v. Summers (April 17, 1970).
- M. Supreme Court decision in TOSCO, 400 U.S. 48 (December 1970), distinguishing Krushnic and Virginia-Colorado, holding that the Secretary had subject matter jurisdiction to invalidate claims where there was not "substantial compliance" with work requirements (discussing both the \$100 annual requirement and the \$500 patenting requirement), and remanding for further proceedings, including the bringing of any additional charges deemed appropriate).
- N. Institution of suits by United States in 1972 to invalidate two oil shale patents as mistakenly issued. One suit settled by monetary payment; the other decided adversely to the Secretary, in United States v. Eaton Shale Co., 433F. Supp. 1256 (D.Colo. 1977).

- O. 1973 District Court decision in TOSCO on remand from Supreme Court ruling that the assessment-work contest decisions had been rescinded in 1935, that the United States was estopped from asserting their validity, and that Interior had adopted a rule that they were null and void. 370 F.Supp. 108. Upon joint motion of the parties, the Court addressed these issues without a remand to Interior for the bringing of additional charges.
- P. Interior Board of Land Appeals ruling in Winegar/Shell test discovery contests, 80 I.D. 370 (1974), reversing Freeman v. Summers and holding claims invalid for lack of value. Action for judicial review filed in U.S. District Court for District of Colorado.
- Q. 1975 ruling by Tenth Circuit in TOSCO, vacating without reversing District Court's 1973 decision, directing remand to Interior for bringing of lack-of-discovery and any other available charges, to be followed by rulings by District Court on all issues, and urging expeditious resolution of the patentability of the claims. Claimowners seek but fail to obtain Supreme Court review.
- R. Tosco patent application cases ("Bohme" contests) remanded to Interior in 1977 by District court, which retains jurisdiction to expedite further proceedings. "Bohme" contests initiated; contest hearing on various charges held in 1978.
- S. January 1977. District Court discovery decision reversing IBLA decision in Winegar/Shell. 426 F. Supp. 1256. Holding that Interior is obliged for various reasons to follow Freeman v. Summers.
- T. Administrative Law Judge decision in Bohme contests on assessment work issues, adverse to claimowners, reserving decision on discovery issues to await final court ruling in Winegar/Shell actions.
- U. 1979 Tenth Circuit decision affirming District Court ruling in Winegar/Shell.
- V. "Bohme I" ruling by IBLA on "substantial compliance" issues, adverse to claimowners in large part, June 1980, 48 IBLA 267.
- W. Supreme Court decision in Winegar/Shell, Andrus v. Shell Oil Co., 446 U.S. 657 (1980), upholding Freeman

v. Summers and 1920 Instructions as reflecting Congressional intent in enacting the MLLA of 1920 and in approving patenting in 1930-1931 review, and on other grounds.

- X. "Bohme II" discovery ruling by IBLA, adverse to claimowners on "thin, lean" outcrops, 51 IBLA 97 (Nov. 5, 1980). Claimowners return to District Court seeking reversal of Bohme I and II.
- Y. District Court reopens additional actions challenging Union Oil decisions of 1964 and 1965, and issues orders requiring expeditious contest proceedings in remaining patent applications, 1980-1982, Interior brings array of charges in Weber, Energy Resources, and Theo Ertl contests. After contest hearings and various decisions by Administrative Law Judges, adverse in part to Interior, IBLA holds virtually all claims invalid for either or both inadequacy of "thin, lean" outcrops for discovery and lack of "substantial compliance" with work requirements following Bohme I and II: 68 IBLA 37 (1982); 74 IBLA 117 (1983), and IBLA 85-27 (1986) respectively. Each decision is challenged by claimowners in District Court.
- Z. May 1, 1985, decision by District Court in Tosco/Bohme actions, ruling in favor of claimowners on all issues decided adversely to claimowners by IBLA and on alternative grounds on all issues, as directed by 1975 Order of Remand from Tenth Circuit. 611 F.Supp. 1130.
 - 1. District Court orders settlement discussions and periodic reports.
 - 2. Government files protective notices of appeal, while settlement negotiations proceed, May 1985 to Spring 1986, in Tosco/Bohme, Weber, Energy Resources, and Theo Ertl cases.
 - 3. Parties file periodic status reports to District Court and Tenth Circuit on settlement negotiations, and defer further litigation.
 - 4. Parties stipulate that Weber, Energy Resources, and Theo Ertl cases are not materially different, in terms of legal issues and relevant evidence, from Bohme cases decided on May 1, 1985. Orders of judgment entered in favor of claimowners in Weber and Energy Resources, November 1985; protective appeals filed.

5. Claimowners and Interior agree on settlement terms, Spring 1986. Interior refers proposed agreement to Department of Justice, which reviews settlement at several ascending levels, and approves the agreement.

X. August 4, 1986, Settlement Agreement.

- A. Covers Bohme, Weber, Energy Resources, and Theo Ertl actions, 525 oil shale claims, approximately 82,000 acres, all in Colorado.
- B. Claimowners to receive patents, reconvey oil, gas and coal to United States.
- C. Certain surface use restrictions imposed; water rights.
- D. Upon issuance of patents, parties to file joint motions to remand Bohme, Weber and Energy Resources appeals for vacation of District Court's May 1, 1985, Tosco/Bohme ruling and related orders in Weber and Energy resources, and to dismiss complaint in Theo Ertl.

XI. "Aftermath" of Settlement.

- A. Internal objections to possible settlement from Interior officials in Colorado as settlement negotiations proceed.
- B. Objections to proposed settlement, circa May-July 1986, by various means. Press accounts of imminence of settlement, late July 1986.
- C. Late July 1986 Congressional dispute, in context of appropriations for Interior, over settlement, patenting.
- D. Interior briefings of press, Senate, House on settlement, August 5-6, 1986.
- E. Oversight Hearings by House Committee on Interior and Insular Affairs, August 12, 1986. Later same day, Rep. Rahall, Chairman of Subcommittee on Mining and Natural Resources, introduces H.R. 5399, to impose oil shale patenting guidelines materially different from court rulings in favor of claimowners.
- F. September 11, 1986, hearing and "mark up" on H.R. 5399, substantially amended.

- G. September 16 - mid October, 1986. "Continuing Resolution", to fund federal government operations as of October 1, 1986, provides for 180 day delay in implementing August 4, 1986, Settlement Agreement if claimowners agree to keep the agreement in effect, and 180 day moratorium on patenting any other oil shale claims.
- H. Colorado Administration, National and Colorado Wildlife Federations, individual Members of Congress, seek to intervene in Bohme, Weber, Energy Resources, and Theo Ertl actions to void the Settlement Agreement and present issuance of patents, raising FLPMA and NEPA issues, September-October, 1986. Tenth Circuit rejects intervention, 804 F.2d 590 (Nov. 4, 1986).
- I. October-November, 1986. Claimowners decline to agree to delay in implementing Settlement Agreement; closings begin with exchanges of patents and reconveyances of oil, gas and coal.
- J. Colorado Administration sues Interior in U.S. District Court for District of Columbia, attacking Settlement Agreement and patents issued thereunder, on FLPMA and NEPA grounds, December 1986. Claimowners file motion in U.S. District Court for the District of Colorado, in Theo Ertl action, to enjoin duplicative litigation in the District of Columbia. Colorado Administration acts to withdraw motion to intervene in Theo Ertl. Interior moves to transfer new action from District of Columbia to Colorado. Transfer granted, January 1987. Colorado moves for preliminary injunction, and Interior files to dismiss.
- K. 1987. In 100th Congress, Rep. Rahall and others introduce H.R. 1039 to amend mining laws respecting patenting of oil shale claims. Hearings held, March 3; amended bill reported to full Committee, which reports bill on March 18. Bill forces election of lease or permanent unpatented status, in either case with significantly increased economic burdens. Floor action scheduled for May 28.

In Senate, Sen. Melcher introduces a bill to impose an indefinite moratorium on oil shale patenting, to await further legislation. No hearings held. Similar provision offered as amendment to supplemental appropriations bill on Senate floor, May 27, 1987; compromise reached, pending patent applications excepted; moratorium only until March 31, 1988. Legislative hearings promised summer 1987.

Interior conducts review of remaining unpatented oil shale claims, reports to Congress, May 28 and 29.

XII. The Oil Shale Leasing Experience.

- A. The 1920 Leasing Regulations, 47 L.D. 424. Issued prior to any oil shale patent, and "designed not to admit the existence of such a thing as a valid claim under the placer laws," according to an April 20, 1920, General Land Office memorandum to the Secretary on the first oil shale patent application to reach Washington.
- B. 1930 withdrawal of oil shale lands from leasing.
- C. Interior rejection, 1963-1965, of petitions to amend 1930 withdrawal so as to permit leasing.
- D. Abortive 1968 lease offering; no bids accepted.
- E. Prototype Leasing Program, leases issued, 1969-1972.
- F. NEPA litigation over leasing, Environmental Defense Fund v. Andrus, 619 F.2d 1369 (10th Cir. 1980).
- G. Piceance Basin Resource Management Plan, BLM, May 1987, prepared in order to comply with FLPMA and NEPA.

XIII. Where Do We Stand?

- A. If all remaining oil shale claims were patented, United States would still own 85-90% of oil shale acreage and resources, including all of the multimineral resource of the center of the Piceance Creek Basin in Colorado, up to 1900 feet thick.
- B. Commercial production of shale oil requires a very large investment in opening a mine, crushing, retorting, refining and transportation, probably in the order of a billion dollars or more. Land or resource values are a minor cost factor. Capital investment requires prospects for a stable economic and regulatory climate over many years.
- C. Patented lands should provide best prospects for initial commercial production of shale oil, since no lease royalty or rental payments are required.
- D. Demonstration of commercial production technology will benefit the United States, in terms of its

propriatorship of 85-90% of the oil shale resource, and in terms of reduced dependence or unstable foreign sources of petroleum.

- E. Could pending legislation prolong uncertainty about Governmental policy respecting shale oil development, and lead to litigation over constitutionality of legislative changes in rights of owners of valid oil shale claims?
- F. The appropriateness of a reasonable legislative deadline to resolve the patentability of remaining oil shale claims in accordance with court interpretations of the 1872 Mining Law and the Mineral Lands Leasing Act of 1920.