

B. Entitlement to a Research Lease

Sections 3172.2 and 3171.3.—These two sections specify the criteria on which lessees are to be selected. Their principal defect is that they appear designed to exclude from participation those who have privately acquired reserves.

For example, parts (d) and (f) of Section 3173.3 require that the applicant's "need" for leased lands for research and production, and its "need" for the minerals to be produced, are criteria to be taken into account in the awarding of leases. The implication is clear that the possession of privately owned reserves is to be a bar to the acquisition of a federal leasehold under these Regulations.

The basic aim of these Regulations, to stimulate research and enable participation of those who have no access to suitable reserves, does not require that companies holding reserves be excluded. Indeed, to exclude them is inconsistent with the objective of fostering technological development. The criterion of "need" for reserves should therefore be eliminated.

There is a separate and novel problem inherent in part (f), which requires that an applicant's "need" for the minerals to be *produced* from the leasehold be taken into account. To the extent that an applicant's "need" for minerals to be produced raises the same questions as its "need" for reserves in place, part (f) is merely cumulative of part (d).

Although it is difficult to conceive how an applicant could "need" reserves of minerals and yet not "need" the minerals produced, it is possible that an applicant's "need" for produced minerals is meant to introduce a separate criterion, under which the Department would attempt to evaluate the desirability of the ultimate use to which the applicant would put the minerals. Such a criterion would be unavoidably arbitrary.

For example, a mineral may be assumed to be needed if it is consumed by the producer in its existing operations. But, is the extent of those operations or the extent of his other reserves of similar minerals to be taken into account? Is "need" established by a program to expand such operations? What ratio of present reserves to project consumption will establish "need"?

Similarly, is "need" to be established by an intention to diversify into the production of a new mineral or by the intention to produce a mineral solely for sale to others? Since the minerals which will be *produced* under a research and development proposal will not be oil shale, but rather principally crude oil, is an applicant's "need" for crude oil to be taken into account, or only its "need" for this kind of reserve of crude oil? The same question is obviously present as to the other minerals, such as the sources of alumina which are sometimes found in the deposit.

It is apparent that the criterion of "need" for produced minerals cannot be administered unless an elaborate definition is given to the concept of "need." But, such a definition could only be framed in the light of the public interest that the application of the criterion is intended to protect.

The fundamental difficulty with part (f) is that no public interest relevant to these Regulations is involved in the applicant's "need" for produced minerals. The only relationship between the concept of "need" and the leasing process that we are able to discern is the remote possibility that leasing may result in undue concentrations of reserves in the hands of a few. But that problem cannot arise under these extremely limited Regulations, which will dispose of, at most, a small fraction of the public domain reserves. Moreover, for purposes of these Regulations, or of successor regulations of more general effect, a limitation on the acreage an applicant can acquire is a more effective and administrable bar to concentration of reserves than any contrived concept of "need" could be.

The proposal that a criterion of "need" be applied to lease applications is one of many instances in these Regulations where the absence of a procedure for contesting a determination is significant. In the absence of a fair procedure, the potential for arbitrary administration of so vague a standard is unnecessarily aggravated.

C. The Right to a Commercial Production Lease

Section 3172.2 (a) and (b).—Part (a) of this section provides that the Secretary shall designate the research term of the lease, which is not to exceed ten (10) years. Although the Regulations are not clear, it is apparent that as a practical matter the designation must be made at the commencement of the research lease term. However, if the period designated is less than ten years, no reason appears why the term should not be extended to ten years solely upon a showing that the lessee has been and is diligently pursuing a substantial program of research.