

Editor's note: 85 LD. 171; Appealed – dismissed without prejudice, Civ. No. LV-78-141 RDF (D. Nev. Nov. 15, 1979); reversed, Ct. CL No. 12-78 (July 1, 1981), 654 F.2d 81

FOOTE MINERAL CO.

IBLA 77-41 Decided April 17, 1978

Appeal from decision of the Director, U.S. Geological Survey, GS-5 mining, setting aside decision of the Area Mining Supervisor and remanding case for recalculation of royalty.

Affirmed as modified.

1. Mineral Leasing Act: Generally--Mineral Leasing Act: Lands Subject to--Potassium Leases and Permits: Generally--Sodium Leases and Permits: Generally--Words and Phrases

"Other related products." "Other associated deposits." When sodium or potassium brines are covered by leases conveying the exclusive right to mine and dispose of sodium compounds and other related products or potassium compounds and other associated deposits, the leases convey the exclusive rights to all minerals dissolved in the brine, including lithium.

2. Mineral Leasing Act: Generally–Mineral Leasing Act: Lands Subject to–Mining Claims: Lands Subject to–Mining Claims: Locatability of Mineral: Leasable Compounds–Mining Claims: Specific Mineral(s) Involved: Generally–Multiple Mineral Development Act: Generally–Potassium Leases and Permits: Generally–Sodium Leases and Permits: Generally–Words and Phrases

"Leasing Act minerals." The Multiple Mineral Development Act, 30 U.S.C. § 524 (1970), reserved all leasing act minerals to the United States, and no rights to deposits of leasing act minerals are open to location under the mining laws under 30 U.S.C. § 525 (1970). "Leasing Act minerals" is defined as "all minerals which, upon Aug. 13, 1954, are provided in the mineral leasing laws to be disposed of thereunder." 30 U.S.C. § 530 (1970). Because leases for sodium, potassium, and "other related products" are authorized pursuant to 30 U.S.C. §§ 262, 282 (1970), "other related products" along with sodium and potassium fall within the category of leasing act minerals which include lithium which is dissolved in a sodium or potassium brine.

3. Mineral Leasing Act: Royalties–Potassium Leases and Permits: Royalties–Sodium Leases and Permits: Royalties–Words and Phrases

"Gross value at the point of shipment to market." The royalty rate for products mined and disposed of under sodium and potassium leases must be imposed on the "gross value of the sodium (or potassium) compounds and other related products at the point of shipment to market," which means the gross value of a refined product for sale in an established market, and in general, no deductions may be allowed for costs incurred in developing a product to a marketable condition except for the price of reagents which are chemically combined with the product sold from the lease.

4. Administrative Procedure: Hearings—Hearings—Rules of Practice: Hearings

A request for a hearing will be denied in the absence of an assertion of fact which, if proved true, would entitle appellant to the relief sought.

5. Administrative Authority: Estoppel—Estoppel—Federal Employees and Officers: Authority to Bind Government—Mineral Leasing Act: Royalties

The Government is not estopped from collecting royalty payments which are owed, even if it has accepted improper payments in the past.

6. Mineral Leasing Act: Royalties

The statute of limitations for filing claims on behalf of the Government in a Federal court need not be invoked in an administrative adjudicative proceeding to determine royalties due to the United States under mineral leases.

APPEARANCES: Kenneth D. Hubbard, Esq., and Randy L. Parcel, Esq., Holland and Hart, Denver, Colorado, and John H. Ross, Esq., Vice President and General Counsel, Foote Mineral Co., Exton, Pennsylvania, for appellant; Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for the U.S. Geological Survey.

OPINION BY ADMINISTRATIVE JUDGE RITVO

Foote Mineral Company appeals from the September 17, 1976, decision of the Acting Director, U.S. Geological Survey (Survey),

requiring that royalty be paid for lithium products developed from brines near Silver Peak, Nevada, leased by appellant under sodium and potassium leases. The decision rejected appellant's contentions that no royalty was due because lithium is a mineral locatable under the mining laws, 30 U.S.C. § 21 et seq. (1970). The decision found that appellant had been paying royalty on the basis of production costs without regard to the gross value or proceeds received for the minerals produced from the leased deposits. The Director determined that appellant had produced lithium carbonate having a total gross value of \$20,754,037 from 1966 to 1973, and that the royalty paid should have been \$622,621.11, but only \$173,001.69 was paid, leaving a deficit of \$449,619.42 in the absence of allowable deductions. The December 5, 1974, decision of the Area Mining Supervisor which was considered by the Director on appeal would have imposed the full deficit of \$449,619. The Director, however, set this decision aside and remanded the case for recomputation of the royalty, allowing a deduction for soda ash reagent, disallowing a deduction for lime reagent, and limiting the amounts required to those which accrued after November 1, 1967.

The record establishes that the leases held by appellant were issued in 1963, 1964, and 1968, respectively, after appellant or its predecessor in interest submitted proofs of discovery of valuable potassium and sodium brine deposits, made in explorations included under prior prospecting permits. These leases convey to the lessee

either "the exclusive right and privilege to mine and dispose of all the sodium compounds and related products" or "the exclusive right and privilege to mine and dispose of all the potassium and associated deposits" in the leased lands. Although appellant claims that it produces neither sodium nor potassium products from the brines, it does produce lithium products from the brines.

On the basis of the above uncontroverted facts, the issue relating to the locatability or leasability of lithium in brine can be more precisely delineated. Thus, we may appropriately ask whether, under the mineral leasing laws, the leases in question confer the exclusive right to develop the lithium as an "other related product" of sodium or an "associated deposit" of potassium. If not, may rights to develop the lithium be appropriated under the general mining laws pursuant to the Multiple Mineral Development Act, 30 U.S.C. § 521 *et seq.* (1970), even though the sodium and potassium deposits are under lease?

Appellant argues that royalty may not be imposed on lithium in a sodium or potassium brine because lithium is not expressly listed in the mineral leasing laws, because lithium is physically and chemically different from sodium or potassium, and because lithium is not a by-product of any sodium or potassium production. While these contentions involve a number of factual assertions which appellant has offered to prove, the meaning of "other related products" and

"associated deposits" is initially a matter of statutory construction and thus raises a legal rather than a factual issue.

The sodium provisions of the Mineral Leasing Act allow for issuance of leases only for land known to contain valuable deposits of sodium compounds or upon which a permittee had discovered a valuable deposit of such compounds. 30 U.S.C. §§ 261, 262 (1970). However, the Act provides for royalty not only on sodium compounds but on "sodium compounds and other related products," 30 U.S.C. § 262 (1970), and the leases appropriately grant the exclusive rights to the deposits of sodium and other related products. The Potassium Act provides for a royalty on "potassium compounds and other related products, except sodium," 30 U.S.C. § 282 (1970), and the potassium leases convey the exclusive rights to deposits of potassium and other associated deposits. The issue, then, turns on whether or not the lithium is a related or associated product of the sodium or potassium deposits.

[1] As originally enacted, the sodium sections provided for a minimum 12-1/2 percent royalty on "production." Mineral Leasing Act of February 25, 1920, § 24, 41 Stat. 447. The December 11, 1928, amendments lowered the minimum royalty to 2 percent on "sodium compounds and other related products." Act of December 11, 1928, 45 Stat. 1019. These amendments were made so that the provisions would parallel the provisions in the 1927 Potassium Act, discussed infra. See

H.R. Rep. No. 1003, 70th Cong., 1st Sess. 2 (1928) (to accompany H.R. 10885). Although the original statutory language referred to "production" rather than "other related products," it is nevertheless clear as a practical matter that the Act intended sodium leases to convey rights to develop all minerals dissolved in sodium brines. Under the original Act, only brines or deposits that were once brines could be leased, because the Act provided that the sodium compounds for which permits and leases could be issued were "dissolved in and soluble in water, and accumulated by concentration." ^{1/} Because brines often contain dissolved minerals in addition to sodium, the lessee as a practical necessity would need to secure the rights to mine and dispose of the other minerals in the brine if he wished to develop the sodium. If such rights were to exist, they could only exist under the lease because no mining claim could then have been located on land in a lease or permit or on land known to be valuable for leasing act minerals until the enactment of the Multiple Mineral Development Act of August 13, 1954, 30 U.S.C. § 521 *et seq.* (1970). See Joseph E. McClory, 50 I.D. 623 (1924). Thus, in order to give effect to the intent to lease brines, we must conclude that sodium leases included the right to develop otherwise locatable minerals dissolved in the brine.

^{1/} The 1928 amendments eliminated this phrase because there appeared to be no good reason for limiting the state in which sodium compounds could be found. H.R. Rep. 1003, *supra*, 1-2.

The 1927 Potassium Act provided for a minimum 2 percent royalty on "potassium compounds and other related products, except sodium." The exception for sodium ensured that sodium would still be subject to the 12-1/2 percent minimum royalty which was in effect until the 1928 amendments. The fact that sodium was expressly excluded provides an additional clue as to the scope of "other related products." Sodium, like lithium, is a different chemical element from potassium, but if Congress did not think that sodium could be an "other related product" of potassium in a physical and chemical sense, there would have been no need to expressly exclude it in order to maintain its differing royalty rate. The express exclusion of sodium manifests the legislative view that sodium would otherwise be deemed an "other related product" of potassium where the two elements existed in the same deposit.

The Department has long held that when lithium "is recoverable from brines of sodium or potassium, which are leasable under the Mineral Leasing Act, the lithia production is governed by and included in the general lease terms." Letter from Max Edwards, Assistant to the Secretary and Legislative Counsel, to Senator Howard W. Cannon (March 29, 1962). For example, lithium has been obtained since 1938 from the hot sodium and potassium brines at Searles Lake, California, pursuant to sodium or potassium leases.

As an example of a recent consideration of a similar problem, we note that the Geothermal Steam Act, December 24, 1970 (84 Stat. 1569),

30 U.S.C. § 1007 (1970), defines "associated geothermal resources" as including "any mineral or minerals (other than oil, hydrocarbon gas, and helium)."

The dissent stresses that the lithium from the lease should be locatable because the sodium or potassium is worthless. However, we must point out that the leases were issued on the basis of claims by appellant's predecessor that it had discovered a valuable deposit of sodium or potassium. If that was so then, and the lithium was also covered in the lease as a related or associated product, we do not comprehend how it falls out of the lease even if the sodium and potassium later become "worthless." We must remember that a lease once issued remains valid for its term even if there is no development, unless the lease provides otherwise and the Department enforces such a provision.

While we must conclude that the term "other related products" embraces otherwise locatable minerals dissolved in a sodium or potassium brine in order to give practical effect to the sodium and potassium leasing provisions, this conclusion is also directed by elementary rules of statutory construction. Meaning and effect must be given to every word of a statute, and if "other related products" were not construed to include otherwise locatable minerals dissolved in a sodium or potassium brine, the term would be mere surplusage. See 2A Sutherland, Statutes and Statutory Construction, § 46.06

(4th ed. C. D. Sands 1973). Accordingly, when a lease grants the exclusive rights to sodium or potassium and other related or associated products, it conveys the rights to all minerals dissolved in a potassium or sodium brine deposit.

[2] Appellant contends that section 5 of the Multiple Mineral Development Act, 30 U.S.C. § 525 (1970), opened such minerals to location. 2/ To hold that section 5 allows mining claimants to appropriate rights that have already been exclusively granted under sodium or potassium leases would raise obvious constitutional problems. Again, we must bear in mind that the leases were issued to appellant's predecessor on applications filed pursuant to earlier prospecting permits which required discovery of valuable deposits of sodium or potassium to sustain the issuance of a lease. To hold that the leases, which are presumed valid when issued and which grant the right to exploit lithium, leave the lithium subject to later independent location would indeed create a situation uncertain and dangerous to the lessee.

2/ 30 U.S.C. § 525 (1970) provides as follows:

"Subject to the conditions and provisions of this chapter, mining claims and millsites may hereafter be located under the mining laws of the United States on lands of the United States which at the time of location are—

"(a) included in a permit or lease issued under the mineral leasing laws; or

"(b) covered by an application or offer for a permit or lease filed under the mineral leasing laws; or

"(c) known to be valuable for minerals subject to disposition under the mineral leasing laws; to the same extent in all respects as if such lands were not so included or covered or known."

Furthermore, it is a simple tautology to state that section 5 did not open to location any deposit reserved under section 4 which reserved "all Leasing Act minerals." 30 U.S.C. § 524. ^{3/} Section 11 provides: "Leasing Act minerals' shall mean all minerals which, upon August 13, 1954, are provided in the mineral leasing laws to be disposed of thereunder." 30 U.S.C. § 530 (1970). As we have held above, the potassium and sodium leasing provisions clearly provide for the disposition of other related products of the sodium and potassium compounds. It necessarily follows that such other related products were reserved by 30 U.S.C. § 524 (1970) and were thus not open to location under 30 U.S.C. § 525 (1970). Because "other related

^{3/} 30 U.S.C. § 524 (1970) provides as follows:

"Every mining claim or millsite--

"(1) heretofore located under the mining laws of the United States which shall be entitled to benefits under sections 521 to 523 of this title; or

"(2) located under the mining laws of the United States after August 13, 1954, shall be subject, prior to issuance of a patent therefor, to a reservation to the United States of all Leasing Act minerals and of the right (as limited in section 526 of this title) of the United States, its lessees, permittees, and licensees to enter upon the land covered by such mining claim or millsite and to prospect for, drill for, mine, treat, store, transport, and remove Leasing Act minerals and to use so much of the surface and subsurface of such mining claim or millsite as may be necessary for such purposes, and whenever reasonably necessary, for the purpose of prospecting for, drilling for, mining, treating, storing, transporting, and removing Leasing Act minerals on and from other lands; and any patent issued for any such mining claim or millsite shall contain such reservation as to, but only as to, such lands covered thereby which at the time of the issuance of such patent were--

"(a) included in a permit or lease issued under the mineral leasing laws; or

"(b) covered by an application or offer for a permit or lease filed under the mineral leasing laws; or

"(c) known to be valuable for minerals subject to disposition under the mineral leasing laws."

products" included lithium which is dissolved in a sodium or potassium brine, no rights to the lithium may be appropriated under the general mining laws when the lithium is dissolved in a leasable sodium or potassium brine deposit or in such a deposit which is already subject to a lease.

Appellant argues that the opposite result is directed by United States v. Union Carbide Corp., A-7345 (June 16, 1974), aff'd as modified, 31 IBLA 72, 84 I.D. 309 (1977), in which a particular compound was held to be locatable even though it had a sodium ion in its molecular structure. Appellant also cites Wolf Joint Venture, 75 I.D. 137 (1968), in which a particular compound was held to be leasable because it was held to be a sodium compound, not because the mineral in question was physically associated with another leasable mineral, oil shale. Appellant further points out that in these cases, hearings had been held and expert testimony taken on the physical and chemical nature of the substances, and urges that we undertake a similar procedure here. However, these cases involved the question of whether the mineral deposit itself was sodium, a fact not in issue here because appellant concedes that the brines contain sodium and potassium, and that the leases it holds were issued on the basis of the discovery of these brines. Those cases did not involve consideration of whether the mineral in question was an "other related product" in a deposit which was conceded to be sodium already subject to outstanding leases. Thus, those cases provide no authority for the resolution of the issue now before us.

The Solicitor contends that the Multiple Mineral Development Act did not open to location any minerals which were physically associated with deposits of leasable minerals, citing a Solicitor's Opinion titled Mining Claims – Rights to Leasable Minerals, 75 I.D. 397 (1968). Appellant challenges the application of this opinion to the instant case, but even if it were applicable, appellant argues that the lithium would still be locatable so long as the development of the lithium would not damage the sodium or potassium. Appellant has offered to prove that the sodium and potassium are not damaged by development of the lithium.

Assuming, arguendo, that appellant's development of the lithium does not "damage" the sodium or potassium, it appears that application of the rule in the Solicitor's Opinion would still bar the location of the lithium because the development of the lithium necessarily involves processing the sodium or potassium brine. However, the Solicitor's Opinion is more appropriately invoked in those situations where the mineral lease does not convey the rights to the physically associated material. In the instant case, we do not hold the lithium to be nonlocatable merely because it is physically associated with sodium or potassium; we hold it nonlocatable because the rights to the lithium belong to the holder of the rights to a sodium or potassium deposit. ^{4/} Because the lithium is produced pursuant to

^{4/} While otherwise locatable minerals may be rendered nonlocatable because they are physically associated with leasable minerals, it does not always follow that an otherwise locatable mineral can be

appellant's sodium and potassium leases, royalty must be paid for the lithium.

The dissent's allusion to the concept that Materials Act minerals, such as sand, gravel, and clay, pass with a valid mining claim, without payment of royalty, is not helpful. Such mineral materials are not leasable minerals and are not reserved in a mining patent under the Multiple Mineral Development Act. A successful mineral locator gains title not only to the mineral on which his location is based, but to all other minerals, locatable or not, within the limits of his claim, except those that are reserved under the Multiple Mineral Development Act. It is only in relation to leasable minerals that the problem of reconciling leasing and location arises.

fn. 4 (continued)

developed pursuant to a lease for the leasable mineral. Unless such authority is conferred by a phrase like "other related products," the result may be that neither of the commingled deposits can be developed in the absence of special legislation. This conclusion is based on the analysis of the history of the Uraniferous Lignite Act of 1955, 30 U.S.C. § 541 *et seq.* (1970), appearing in *Solicitor's Opinion, supra*, 400-402. That Act authorized the development of commingled deposits of lignite (a form of coal which is leasable) and uranium. The fact that the Act followed the Multiple Mineral Development Act is significant; Congress specifically adopted this Department's view that neither the mining laws, including the Multiple Mineral Development Act, nor the mineral leasing laws authorized the disposal of commingled deposits of locatable and leasable minerals. H.R. Rep. No. 1478, 84th Cong., 1st Sess. 2 (1955). This report stated: "Neither the mining laws of the United States, as amended, nor the mineral leasing laws provide for disposal of either mineral where one is host to the other." This analysis of the Multiple Mineral Development Act carries great authority as it is a ratification by the legislature of a contemporaneous interpretation of the effect of that Act by the agency charged with its implementation. Under this interpretation, if the sodium or potassium leases did not convey the rights to develop the lithium, no mineral from the brine could be developed in the absence of special legislation.

Accordingly, we reject appellant's demand for refund of royalty already paid, and we turn our attention to what royalty is due.

The Director's decision specifically ruled on only two claimed deductions: (1) the costs of lime reagent, and (2) the cost of soda ash reagent, leaving to the Area Mining Supervisor the determination whether other deductions may be allowed. The Director allowed a deduction for the cost of the soda ash reagent, but the deduction for lime reagent was disallowed. Appellant protests the disallowance of the cost of the lime reagent and other expenses including plant operations, transportation to point of shipment to market, and packaging costs.

The Solicitor has moved for dismissal of the appeal with respect to the royalty issue on the ground that appellant has not been adversely affected because the Director had remanded the case to the Area Mining Supervisor to recompute the royalty by taking allowable deductions into account. However, the Director made a specific ruling as to the deductibility of the costs of the lime reagent and the soda ash reagent, and by appealing the disallowance of a deduction for the cost of the lime reagent, appellant has raised an issue which is ripe for our review. Thus, we are called upon to determine whether the disallowance of this deduction is consistent with the pertinent statutory and lease provisions. This necessarily entails a discussion of the general principles which govern the allowance of deductions. Accordingly, this motion is denied.

[3] The terms of the leases and the statutory provisions require the stated royalty rate to be applied to "the quantity or gross value of the output of sodium [or potassium] compounds and other related products [or associated compounds] at the point of shipment to market." 30 U.S.C. §§ 262, 282 (1970). (Emphasis added.) The Department has long interpreted this provision in general to preclude allowance of deductions for plant operations costs and other costs incurred in developing a salable product, and no deduction has been allowed for transportation costs incurred by the lessee where the product had not reached the point of shipment to market. See, e.g., United States Potash Co., A-17518 (February 28, 1934). The "point of shipment to market" not only states the physical location at which the gross value must be determined; it also indicates the required condition of the product when its gross value is determined. Clearly, a product cannot be ready for shipment to market unless it has been processed to a marketable state. This concept won judicial approval when a court upheld the Secretary's determination that the royalty rate must be imposed on the gross value of a "refined product suitable for an established market." United States v. Southwest Potash Corp., 352 F.2d 113 (10th Cir. 1965), cert. denied, 383 U.S. 911 (1966). That case involved a direct sale of raw potash ore produced under a Federal potassium lease, and the court upheld the Department's determination that the proper royalty base was the price that would have been received had the ore been processed to a product salable in the normal market rather than the

actual price paid for the raw ore. The Department exercised this authority under lease provisions which paralleled a regulation now codified at 30 CFR 231.61. Virtually the same provision appears in appellant's leases. Therefore, as a general rule, the statutory provision precludes the Department from allowing deductions for expenses incurred in developing a marketable product from the leased deposits. ^{5/}

However, the Department has long recognized a difference between "primary" and "secondary" products for the purpose of determining the proper royalty base. Where the lessee markets a "secondary" product, the royalty is based on the gross value of the primary product used in making the secondary product, not on the gross value of the secondary product which is marketed. See, e.g., letter from Oscar L. Chapman, Assistant Secretary, U.S. Department of the Interior, to John T. Burrows, President, Union Potash & Chemical Co. (November 9, 1940). While a "primary" product is a refined product, it is not a chemical combination of a leasehold mineral with a purchased reagent; generally, those products which are chemical compounds of purchased

^{5/} The rule precluding allowance of deductions for expenses incurred in developing a marketable product draws added support from the fact that under the provisions of the leases, royalty may be "paid in value" or "taken in kind" at the election of the Government. The leases provide: "When taken in kind royalty products shall be delivered in merchantable condition at the point of shipment without cost to the lessor * * *." Because the United States could take 3 percent of the finished products without any cost, there is no reason for allowing deductions when royalty is paid in value rather than taken in kind.

reagents with minerals extracted under the lease are called "secondary" products.

In the instant case, the Director determined that appellant produces and sells lithium carbonate from a brine containing lithium chloride and other minerals. A purchased lime reagent is added to the brine to precipitate the minerals other than lithium. Soda ash is then added and becomes chemically combined with the lithium to produce lithium carbonate. These determinations are not controverted by appellant. Because the lithium carbonate is a chemical compound of purchased soda ash with lithium from the lease, the Director properly treated the lithium carbonate as a secondary product and allowed a deduction for the soda ash reagent. However, the Director properly denied the deduction of the cost of the lime reagent because it did not become chemically combined with a mineral from the lease which was later sold. The cost of the lime reagent is properly treated as any other processing expense for which no deduction may be allowed.

In support of its contention that these expenses may be deducted from the royalty base, appellant has cited a number of Federal and State court decisions which have allowed deductions of the type appellant presses here. However, the royalty provisions in the leases in each of those cases differed in at least one essential characteristic from the Federal statutory lease provision imposing royalty on the "quantity or gross value of the output of sodium or potassium compounds and other related products at the point of shipment to market."

30 U.S.C. §§ 262, 282 (1970). (Emphasis added.) Indeed, this particular value has been recognized as "somewhat unusual." United States v. Southwest Potash Corp., supra at 118 (Seth, J., concurring specially).

Appellant asserts that if it sold the brine directly without incurring plant operation costs and the like, the price received would be lower because the purchaser would have to bear these costs, and the royalty would be less. The conclusion appellant draws from this hypothetical situation is simply incorrect. Such a sale would be most unusual, although it may sometimes occur. ^{6/} United States v. Southwest Potash Corp., supra, makes clear that even if appellant sold the brine directly, the Department could properly hold the royalty base to be the price that would be received if the brine were processed to a refined product salable in the normal market, rather than the actual price paid for the raw brine.

[4] Appellant has requested a hearing pursuant to 43 CFR 4.415, and asserts that there are controverted issues of fact involved in the questions of the locatability of the lithium deposits and the allowance of deductions from the royalty base. For the Board of Land Appeals to exercise its discretion under 43 CFR 4.415 and order a

^{6/} Such a sale of brine did occur in one of the cases cited by appellant, Parnell, Inc. v. Giller, 372 S.W.2d 627 (Ark. 1963), distinguished from the instant case because the royalty rate was applied at the wellhead rather than at point of shipment to market. However, the court noted the unusual nature of such a sale.

hearing, an appellant must allege facts which, if proved, would entitle it to the relief sought. Rodney Rolfe, 25 IBLA 331, 83 I.D. 269 (1976). The Department has not disputed any factual assertion by appellant which is relevant to the disposition of this appeal, and we find that appellant has raised no material issues of fact. With respect to the locatability of the lithium, our decision rested on a fact not controverted by appellant: that the lithium is dissolved in brines containing sodium and potassium. Our conclusion rests on the application of the relevant statutes to this fact, and appellant has asserted no fact that would lead to a contrary result. With respect to the royalty issue, no controverted issues of fact have been developed because the case is being remanded to the Area Mining Supervisor to determine whether any of appellant's claimed deductions may be allowed in a manner consistent with this decision and Departmental precedents. Disallowance of the deduction for the cost of the lime reagent does not involve any controverted issue of fact for which a hearing would be warranted. Accordingly, appellant's request for a hearing is denied.

[5] Appellant asserts that Survey is estopped from collecting the royalties which accrued prior to the time when Survey determined that appellant was incorrectly computing its royalty. The royalty rates are stated in the leases, and both the leases and the statute require that the applicable royalty rate be applied to the gross value of the sodium or potassium and other related products at the

point of shipment to market. Acceptance of royalty on any other basis is contrary to statute and beyond the authority of this Department under the mineral leasing laws. Thus, the Government is not estopped from demanding royalty payments owed by lessees, even if it has accepted improper royalty payments in the past. Atlantic Richfield Co. v. Hickel, 432 F.2d 587, 591 (10th Cir. 1970), aff'g Sinclair Oil and Gas Co., 75 I.D. 155 (1968); Gulf Oil Corp., 21 IBLA 1 (1975). Appellant asserts that in Atlantic Richfield, the court recognized that the doctrine of equitable estoppel may affect the Government, but appellant ignores the following holding of the Court: "* * * an administrative determination running contrary to law will not constitute an estoppel against the federal government." Id. at 592. We fail to discern any issue of fact relating to the question of estoppel.

[6] The original decision which had been appealed to the Director sought to impose full royalties which were due from 1966. The Director remanded the case to limit the royalties to those which became due from November 1, 1967, on the theory that the statute of limitations precluded collection of royalties which became due more than 6 years prior to the letter of October 31, 1973, notifying appellant that the royalty calculations had been in error. Appellant contends that no royalty can be collected for more than 6 years prior to December 5, 1974, when the full amounts due had been determined. We therefore cannot escape from ruling on the propriety of applying the statute of limitations in the instant case.

28 U.S.C. § 2415(a) (1970) provides as follows:

Subject to the provisions of section 2416 of this title, and except as otherwise provided by Congress, every action for money damages brought by the United States or an officer or agency thereof which is founded upon any contract express or implied in law or fact, shall be barred unless the complaint is filed within six years after the right of action accrues or within one year after final decisions have been rendered in applicable administrative proceedings required by contract or by law, whichever is later. Provided, That in the event of later partial payment or written acknowledgment of debt, the right of action shall be deemed to accrue again at the time of each such payment or acknowledgement. [Emphasis added.]

Although the Director had applied the statute in a fashion, we are not convinced that its application is at all warranted in this case in its present posture. We therefore hold that appellant owes the royalties which accrued after 1966 and we modify the Director's decision accordingly.

As the Solicitor has pointed out in his brief, the statute is concerned with the filing of claims for money damages by the United States in district courts. Generally, a statute of limitations operates directly on the remedy only but does not affect the merits of the controversy or the underlying right to recover. United States v. Studivant, 529 F.2d 673 (3d Cir. 1976). Thus, when one remedy is barred by a statute of limitations, other remedies may still be available against which the statute of limitations cannot be interposed.

See, generally, 51 Am. Jur. 2d Limitations of Actions, §§ 21-23 (1970); 53 C.J.S. Limitations of Actions, §§ 6, 7 (1948).

This decision involves the administrative determination of the underlying obligation of the appellant to pay royalty to the United States; such a determination does not automatically trigger a remedy. See, eg, United States v. Southwest Potash Corp., supra at 118. To apply the statute at this stage of the proceedings would lead to a determination of the underlying obligation which would compromise the effectiveness of alternative remedies to which the statute of limitations might not apply. For example, if we were to determine that appellant does not owe royalty due prior to November 1, 1967, this might conceivably preclude any action pursuant to 30 U.S.C. § 188(a) (1970) resulting from appellant's failure to pay the proper royalty during that period. However, if there is no consideration of the statute of limitations in calculating the royalty due, there is some likelihood that 28 U.S.C. § 2415(c) (1970) might be construed as precluding appellant from raising the statute as a defense in a proceeding under 30 U.S.C. § 188(a) (1970). Because the statute of limitations relates to remedies rather than underlying obligations, it need only be considered if the need to pursue remedies arises which necessarily occurs after the underlying obligation has been determined in an adjudicative proceeding. Because the purpose of this proceeding is only to determine the underlying obligation for royalty, the statute of limitations raises no issue within the scope

of this administrative adjudicative proceeding, as contrasted with settlement negotiations or other actions taken to collect the amounts due.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed as modified.

Martin Ritvo
Administrative Judge

I concur:

Joan B. Thompson
Administrative Judge

ADMINISTRATIVE JUDGE STUEBING DISSENTING:

Respectfully, I must agree with the appellant that lithium is a locatable mineral for which, under the circumstances of this case, no royalty accrues to the United States.

With regard to the Federal public lands, the statutes have provided three categories of minerals and prescribed different methods for the disposition of each. The three categories, of course are, the locatables, the leasables, and the salables. The leasables are those specific minerals expressly designated by the Mineral Leasing Act of February 25, 1920, as amended, 30 U.S.C. § 181 et seq. (1970). These include sodium, potash, coal, oil and gas, phosphates and others specifically named in the statutes. The salables are those minerals which can be purchased from the United States under the authority of the Materials Act of July 31, 1947, as amended, 30 U.S.C. § 601 et seq. (1970), and include common varieties of sand, stone, gravel, pumicite, cinders and clay. ^{1/} The locatable minerals are those which may be freely appropriated by the discoverer pursuant to the General Mining Law of May 10, 1872, as amended, 30 U.S.C. § 22 et seq. (1970).

Those minerals which may be freely appropriated under the General Mining Law by qualified claimants without payment of royalty or

^{1/} "Free use" of these materials may also be permitted under this statute in certain circumstances.

purchase price include all minerals which the Congress has not seen fit to designate either as leasable or salable. This is so because the 1872 mining law provided that "all valuable mineral deposits" would come within its purview, ^{2/} and the Mineral Leasing Act, the Materials Act, and the Act of July 23, 1955, 30 U.S.C. § 611 (1970), only carved out those specific exceptions which the Congress intended to eliminate from location.

Lithium is an element, the lightest known metal. As such it is certainly neither sodium or potassium, nor any other Leasing Act mineral, nor is it a common mineral material which is salable under the Materials Act. Thus, it is clearly a locatable mineral, and I doubt that anyone knowledgeable in the laws relating to the disposition of minerals on Federal lands would disagree, were lithium to be mined in isolation from any Leasing Act mineral. ^{3/}

However, because the lithium in this case is extracted from a brine in which sodium and potassium also are present, the majority have concluded that the law relating to sodium and potassium applies, rather than the law relating to locatable minerals, which lithium

^{2/} 30 U.S.C. § 22 (1970). Emphasis added.

^{3/} Lithium is never found uncombined in nature. However, it is extensively produced in the United States from spodumene, an ore which contains no Leasing Act minerals, except, perhaps, negligible amounts of "replacement" by sodium. See A Dictionary of Mining, Mineral and Related Terms, 1968 ed., pp. 648, 1057; and Mineral Facts and Problems, 1970 ed., pp. 1073-1081. Both references are official publications of this Department, of which official notice may be taken pursuant to 43 CFR 4.24(b).

happens to be. This might make a certain kind of sense if the appellant were exploiting potassium and sodium for their commercial value and producing lithium as an incidental by-product; or if appellant, in its pursuit of lithium, found it necessary to destroy the sodium or potassium, or its value. But appellant is doing neither. The record indicates that it is mining ^{4/} only lithium. The sodium and potassium are produced and separated from the brine only as a necessary and unavoidable incident to the extraction and separation of the lithium. The sodium and potassium are not utilized in any manner, but are discarded on the premises by the appellant. Appellant alleges that the sodium and potassium, although undamaged, have no commercial value. Appellant's only apparent interest in the sodium and potassium is that they are there and must be produced if the lithium is to be extracted.

Rarely is any mineral which is the target of a mining venture found in such an isolated and unadulterated condition that it can be mined without the necessity of extracting any other mineral. For example, a gold dredging operation extracts and discards great quantities of sand, gravel, and clay in the process of separating and recovering small amounts of gold, and an underground mining operation

^{4/} "Mining. a. The science, technique, and business of mineral discovery and exploitation. * * * b. Process of obtaining useful minerals from the earth's crust * * *." A Dictionary of Mining, Mineral and Related Terms, 1968 ed., p. 715. Since there is no "exploitation" by appellant of the sodium and potassium because they are not economically "useful minerals," appellant cannot accurately be said to be engaged in "mining" those minerals.

for a locatable mineral, such as galena, must extract, remove and discard whatever other valueless mineral material happens to be host to—or co-existent with—the object of the venture. Yet I have never heard it asserted that the producer of such locatable minerals must purchase under the Materials Act the sand, rock, gravel or clay extracted and discarded, or that he must obtain a lease and pay royalty under the Mineral Leasing Act because worthless minerals listed in that Act have been encountered and must be extracted as an unavoidable incident of the operation. Yet the majority opinion carries the latter analogy one step further by holding that not only must the producer of a locatable mineral have a lease where the recovery of the locatable mineral involves the incidental extraction of a leasable mineral, the locatable mineral by some magic is transformed legally into a leasable mineral for which royalty must be paid on the same basis as if it were the leasable which was being sold, even though the leasable is worthless and unwanted.

The majority declares that "the issue turns on whether or not the lithium is a related or associated product of the sodium or potassium deposits." My first quarrel with the majority's rationale is the manner in which this issue is postulated. Why are these brines characterized as "the sodium or potassium deposits?" Insofar as value is concerned, it is the lithium which is the predominant mineral. Therefore, the question, more properly posed, should be whether the sodium or potassium are related or associated products

of the lithium deposits. Thus stated, the answer to the question loses its legal significance, as there is no law or regulation which requires the producer of a locatable mineral to pay royalty on related or associated minerals. Even where, as in this case, the producer of a locatable mineral has leases which entitle him to extract and sell certain leasable minerals on a royalty basis, if those leasable minerals extracted have no value and are not sold, there is no basis for the imposition of royalty.

Moreover, the existence of mineral leases for sodium and potassium does not preclude the production of locatable minerals from the same land. It once would have, but Congress cured this impediment in 1954 by enacting the Multiple Mineral Development Act, 30 U.S.C. § 521 et seq. (1970). That legislation made it possible to simultaneously produce locatable and leasable minerals from the same land, each being governed by its respective statute.

Even assuming, arguendo, that, as stated by the majority, the issue could be made to depend on whether the lithium is an "other related product" of sodium, or an "associated product" of potassium, the answer is hardly as clear as the majority perceives it to be. It is essentially a question of statutory construction. There is no doubt that the lithium, magnesium, sodium and potassium are all related as associated by proximity. That is, they co-exist in the same brine. But is mere proximity the relationship which the authors

of the legislation had in mind? Or, as to me seems more plausible, did they intend that the minerals be associated or related generically? A Dictionary of Mining, Mineral, and Related Terms defines "family" as follows: "When a number of genera agree in certain major structural characters, they are grouped together to form a family." As the minerals in question are separate elements, it would seem that although they might have properties which can be compared, it seems unlikely that they could be regarded as having a generic relationship. Even if this could be shown, the record does not reflect it, and such a relationship was not part of the rationale of any of the decisions which hold that appellant must pay royalty on its lithium production.

However, I am not primarily concerned here with the nature of the relationship of the minerals in question. What I am principally concerned with is the incongruity of holding that where a valuable locatable mineral is being mined in an operation which requires the incidental extraction of economically worthless leasable minerals, the legal status of the valuable mineral is controlled by and converted to that of the worthless minerals.

Finally, since the majority is unable to resolve this appeal by holding simply that the extraction of this lithium is governed by the 1872 Mining Law, as I would do, it should accede to appellant's request for a hearing before an administrative law judge. Appellant should have the opportunity to submit evidence on the physical and

chemical properties of the minerals concerned, the nature of the deposit, the methodology of the separation process, etc. If a royalty is to be imposed, appellant should have the opportunity to support its contention that its use of lime is a necessary production cost for which allowance should be made.

Edward W. Stuebing
Administrative Judge

