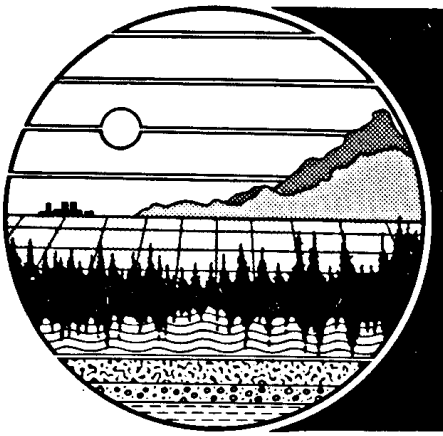

LANDS DIRECTORATE

DIRECTION GÉNÉRALE DES TERRES

THE ADMINISTRATION OF FEDERAL SUBSURFACE RIGHTS IN CANADA

WORKING PAPER No. 35

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The Administration of Federal Subsurface Rights in Canada

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PREFACE

The value of Canada's land resources can be found both at its surface as well as underground. Commonly, the surface and subsurface rights to a parcel of land are separated as is their respective administration.

As part of its mandate, Environment Canada is charged with the responsibility of undertaking research and providing advice on the nation's land resource. The Land Use Policy and Research Branch of Lands Directorate contributes substantially towards this departmental objective through a wide range of land use analyses, land planning and federal land research. It also represents Environment Canada on the Treasury Board Advisory Committee on Federal Land Management (TBAC/FLM), a Cabinet created Committee established in 1974 to oversee the federal government's land acquisition, use and disposal under the 1973 Federal Land Management (FLM) Principle.

In support of the foregoing departmental and interdepartmental roles, a summary statement of the federal roles and responsibilities with respect to the administration of subsurface rights was prepared. It was designed to contribute to the general knowledge base on the federal administration of subsurface resource and thereby aid in the management of the nation's land resources.

ABSTRACT

The practice of separating the surface and subsurface rights of a land parcel is well established in Canada. This paper provides a summary statement on the administration of subsurface rights held by the federal government. The departments reviewed are: Energy, Mines and Resources; Indian Affairs and Northern Development; and Environment (Parks Canada).

ACKNOWLEDGEMENT

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INTRODUCTION

The practice of separating the surface and subsurface rights of a land parcel is well established in Canada. Surface rights can be bought, sold, held and used as an entity entirely separate from the subsurface rights. Conversely, subsurface rights can be bought, sold or held without reference to the ownership of the surface rights. The Federal Land Services Division, of the Land Use Policy and Research Branch, Environment Canada has compiled this summary statement on the administration of subsurface rights held by the federal government with a view to clarifying federal roles and responsibilities[1].

The first section of the summary statement provides a general profile of the administrative role adopted by the federal government with respect to subsurface mineral rights associated with the Canadian land mass. Subsequent sections provide more detailed descriptions of the departments involved in the administrative process. The departments reviewed are: Energy, Mines and Resources; Indian Affairs and Northern Development; and Environment (Parks Canada).

1. It should be noted that the holder of any federal mineral rights cannot search for, win and take the minerals without the permission to enter upon the property from the surface owner or otherwise complying with laws and regulations established to protect the surface owner. Personal communication, EMR.

ADMINISTRATIVE OVERVIEW

The administration of federal subsurface rights is primarily the responsibility of Energy, Mines and Resources (EMR), although two other departments are directly involved in subsurface land administration relative to their specific mandates. Indian Affairs and Northern Development (DIAND) has the jurisdiction for mineral rights in Yukon and Northwest Territories and on Indian Reserves whereas the Department of the Environment's (DOE) Parks Canada is responsible for the management of National Parks, National Historic Parks and sites, and certain Canal lands as well as the former Admiralty, Ordnance and Dominion lands.

In general, the practice of making mineral rights available only by way of a terminable grant has been accepted for federally-owned mineral rights. Energy, Mines and Resources and, Indian Affairs and Northern Development have adopted similar "policies" for the administration of subsurface rights within their respective jurisdictions. Both departments retain the title to these subsurface or underrights and make them available to the public. In contrast, Environment Canada (Parks) does not permit the exploitation of subsurface land rights under National Park holdings as it is contrary to the National Parks Act, and National Park Policy.

ENERGY, MINES AND RESOURCES

The Energy Mines and Resources Act (1966-67) states that the Department of Energy, Mines and Resources (EMR) has jurisdiction over energy, mines and minerals, water and other resources not already assigned to other federal departments and agencies.

The policy of Energy, Mines and Resources respecting the administration of all mineral rights under its jurisdiction is to retain title to these underrights and make them available to the public by lease, permit or other form of terminable grant.[2]

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2. Ibid.

The Public Lands Division, Land Management Branch of the Canada Oil and Gas Lands Administration (COGLA), is the unit directly responsible for the management of federal subsurface mineral rights.[3] This division handles requests for transfers of mineral rights, arranges the sale of leases for requested mineral rights, issues mineral leases and renewals, establishes lease conditions, ensures payments of royalties and conducts annual reassessments of leased land. EMR through COGLA is also responsible for the management of oil and gas resources on the Canada Lands -- the North and offshore regions. Discussion of the administration of offshore development, however, is beyond the scope of this report.

As federally-owned mineral rights frequently underlie widely dispersed land parcels, the Public Lands Division generally utilizes the lease form of terminable grant. Here, a lease is defined as a license to search for, win and take certain designated minerals.[4] Conditions of a lease include a fixed term, fixed annual rent and specified work requirements. In addition, a lease states that the lessee may not enter on and use the specified land without written permission from the surface owners.

Requests to lease federal subsurface rights may be submitted by any interested party, for example by a provincial government, a private corporation, or an individual. Upon receipt of an application, the Public Lands Division proceeds to confirm federal ownership of the mineral rights in question. If the surface rights are still retained by another federal department, then that department would be contacted for their agreement in the posting of mineral rights. If the initial contact had been directed to the department retaining the subsurface rights, they would automatically contact EMR who would subsequently deal with the party making the request.

In the event the owner of the subsurface rights is unknown or the title is clouded, verification is undertaken through the appropriate registry. In the western provinces, Crown grants and transfers are registered in a district land titles office. Once registered, a certificate of title is issued in the name of the owner and, with occasional exceptions, such certificate can be used as

3. COGLA is under the joint responsibility of both the ministers of Energy, Mines and Resources and Indian Affairs and Northern Development.
4. Personal communication, EMR.

evidence of the owner's legal title to a specific interest in the land described in the certificate. In western Canada registration access is much more centralized, whereas in eastern Canada, title searches must be conducted through the general municipal registries. Upon confirmation of federal subsurface ownership, a request to lease is formally recorded. Disposal by means of leases is conducted by public tender following their advertisement.

By consulting the Public Lands Division property files the number of requests for leases may be determined. Over time, 1250-1300 leases have been issued by EMR. If between the time the initial request is made and the sale date (this can be a period of time exceeding two years) the intended lessee decides the parcel of land is no longer required, he will not bid. If no other bids are submitted for that particular parcel, the land is restored to the inactive file. In 1982, 389 active leases were on record in the Public Lands Division property files.

Costs associated with leasing subsurface rights include a lease fee, a lease rental, a cash bonus and royalties. The lease fee is a fixed charge of $100.00 which is paid only once to cover administrative processing. The lease rental is calculated at a value of $5/hectare and is paid annually. The cash bonus is the value the lessee has placed on the land at the time of bidding. This cash bonus is paid for the right to exploit the minerals. The lessee will determine the amount of a proposed bid according to the potential use and value he could derive from a given parcel, which results in a wide range of bids for the same parcel. In the succeeding years of the lease term, rental fees are submitted annually while royalties are paid on a monthly basis. The royalties are a percentage of production. As well, federal royalty rates tend to fluctuate generally in accordance with provincial rates over the duration of the term.

The 'sales of leases' are held on a periodic basis. The timing of such sales is determined according to the volume of requests received.

Between 1966 and 1982 there were approximately ten sales, each of which included approximately 70 parcels of land. It should be noted that a number of these parcels were additional to those requested. If a sale is scheduled, EMR will include a number of unrequested proximal parcels which may be of potential interest.

The Public Lands Division of EMR has adopted a passive management strategy and acts primarily in response to external inquiry. As a result, information recorded in the Division's property files is not actively maintained although details are recorded when a title search has been conducted and mineral rights established.

The Public Lands Division assumes a more active role when leasing activity moves into a new area. In these circumstances, EMR will examine the surrounding region to determine the availability of federal land for leasing purposes. Any parcels identified will be included in an upcoming sale. The Division is additionally responsible for establishing lease conditions and ensuring that royalty payments are submitted. A further responsibility is the annual reassessment of existing leases for changes in royalty payments.

An estimate of EMR revenues derived from Public Lands' federal subsurface rights between September 1966 and December 1982 has been tabulated[5]. Out of the approximate total of $19 million collected from September 1966 to December 1982, EMR estimates that $11 million of that amount was collected in the last five years. It is anticipated that in the next five years, revenues from federal subsurface rights will equal or exceed the amount collected to date. The significant increase in dollar value for royalties has resulted in the escalating revenues. It should be noted that these amounts represent the total revenue derived from oil, gas and mineral production. The percentage of this total contributed by mineral production is negligible as the only producing lease in the provinces is potash in Saskatchewan. A gypsum lease in Ontario was granted in 1964 on a 21-year term but it has yet to produce royalties.

In order to further illustrate the nature of subsurface transactions dealt with by EMR, two examples have been selected for review - the Sarnia Airport in Ontario and the Suffield Block in Alberta.

EMR's involvement in leasing the subsurface mineral rights beneath Sarnia airport to Bluewater Oil and Gas Ltd. is typical of its role in a number of the requests directed to the department.

On August 15,1978, Bluewater Oil and Gas Ltd. contacted Transport Canada requesting a gas lease. Transport Canada subsequently advised EMR that they had no objection to the parcel of land being posted at the next lease sale. The

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5. Personal communication, EMR.

land was put up for public tender and three bids were submitted. As Bluewater Oil and Gas Ltd. placed the highest bid, the company was granted the lease. The lease for about 130 hectares (320 acres) for a 10 year period was issued on August 13, 1981.

The Suffield Block is a military training area held by the Department of National Defence (DND) in Alberta. The site is comprised of about 260 000 hectares (640 000 acres) of which the federal government holds mineral rights to about 903 hectares (2 230 acres). The remainder of the mineral rights are owned primarily by the Province of Alberta and are presently leased to the Alberta Energy Company Ltd. (AEC) for development.

DND was approached by AEC requesting a lease for access to the federal mineral rights. The request was transferred to EMR for processing. In the negotiations that followed, EMR served as an advisory group in the preparation of the agreement between DND and AEC. The Suffield Access Operating Agreement was drawn up specifying the access rights of drilling and operating natural gas and oil wells in the Suffield Block.

It was recommended by the Resource Management Branch of EMR that a lease be granted by DND to AEC without the customary public tender process. This recommendation was based on a number of factors: a) for the purposes of a unit operation, AEC was entitled to a gas lease which, according to the Public Lands Oil and Gas Regulations, the Minister could issue directly; b) negotiations regarding the land were with AEC; c) the volume of requests submitted by AEC during the two year period from the initial request to the final agreement with DND; and d) DND's preference to deal exclusively with AEC.

INDIAN AFFAIRS AND NORTHERN DEVELOPMENT

A distinct division of responsibilities regarding the administration of mineral rights exists within Indian Affairs and Northern Development (DIAND). Since 1968 the Branch of Indian Minerals of the Indian and Inuit Affairs Program, DIAND has been responsible for the management and direction of the mineral resources on Indian lands. The Mining Management and Infrastructure

Directorate of the Northern Resources and Economic Planning Branch, Northern Affairs Program, which includes DIAND's Regional Offices in Yellowknife and Whitehorse is responsible for the administration of mineral rights in both the Northwest Territories and Yukon.

Indian Lands

A request for a mineral or oil and gas lease on an Indian reserve may be channelled through either DIAND or the particular Indian band whose land it concerns. DIAND may be approached through the Directorate of Indian Minerals of the Reserves and Trust Branch in Ottawa or through one of its two field directorates located in Calgary and Toronto. Regardless of the initial contact, the field directorates are consulted for both technical advice and support.

"Before any mineral development on Indian lands can take place, the Indian Band(s) for which the land is set aside, must make an appropriate surrender of the minerals and the mining rights in connection therewith".[6]

Once the Indian band has approved the surrender of its mineral interests, the mineral rights may then be administered according to the provisions of the Indian Act, Indian Oil and Gas Act, the Indian Oil and Gas Regulations and the Indian Mining Regulations. Such regulations provide for the disposal of mineral rights by public tender or by negotiated agreement. The appropriate Directorate of Indian Minerals conducts negotiated agreements in consultation with the Band Council; negotiated agreements are subject to the approval of the Band Council.

"Although a mineral surrender by a Band provides full authority to the Department to manage the mineral rights, the Band is consulted and its consent is sought before proceeding with any disposition of mineral rights. There is a continuing effort by the Department to encourage Bands to become more involved in the management of their mineral resources."[7]

Unless otherwise specified in the call for tenders or in a negotiated agreement, the royalties obtained from mineral development are paid to the Receiver General of Canada, as specified by the Regulations. These royalties, as well as rental fees and bonus monies, are then deposited in the Band's revenue or capital account and subsequently dealt with pursuant to the Indian

6. Mineral Surrenders, report by Marlene Desjardins, Indian Mineral Office, DIAND, May 1984, p. 2.
7. Ibid.

Act. An individual Indian who is the holder of a Certificate of Possession or a Location Ticket, may be entitled to some or all of the revenues derived from mineral activity. The Band Council must agree to this allotment of revenues as the Reserves are created for the use and benefit of the Band.

The Lands Directorate of Reserves and Trusts retains two separate registers which contain information regarding Indian reserves. The Reserve Land Register pursuant to Section 21 of the Indian Act, is a record of particulars relating to Certificates of Possession, Certificates of Occupation and other transactions respecting lands in a reserve. The Surrendered Lands Register contains information pertaining to any lease or other disposition of surrendered lands. There are approximately 1000 oil and gas leases currently on file. It is anticipated that all Indian Lands Registry records of Indian reserves north of 60 will be computerized by 1988, at which time all subsurface rights will be related to surface interests granted.

Of fundamental importance in the management of mineral resources of Indian lands are the conditions of various federal-provincial agreements relating to the ownership and development of natural resources. The following paragraphs briefly describe the historical agreements affecting Indian entitlements on subsurface rights.

The 1924 Agreement (Ontario Lands Agreement) provided that the federal government would collect the monies generated by mineral development on Indian reserves in Ontario. These monies were to be divided 50-50 with the Province of Ontario, with the federal portion re-directed to the band concerned. In several cases, however, the Ontario government has waived its share of funds. In addition, mineral rights on some Indian reserves (eg., Treaty No.3) were not subject to the 1924 Agreement. The 1924 Agreement is currently being reviewed with the departmental aim being that the Indian people receive all the benefits from mineral development.

In the western provinces the Resource Transfer Agreements of the 1930s form the key pieces of legislation regarding Indian Reserves and their subsurface mineral rights.

The principal action of these agreements was a general transfer by the Government of Canada (with certain exceptions) to the Provinces of its interests in all Crown lands, mines, minerals and royalties derived therefrom within each province.

Subsequent to the 1930 Resource Transfer Agreements and supplemental

transfers by Orders-in-Council during the 1930s, all remaining lands held by the federal government were either reserved for Indian reserves, reserved for departmental use, reserved for National Parks or were lands which were held as security against Soldier Settlement loans or outstanding liens (seed grain or fodder relief). In general, the Indian bands in the three western provinces of Manitoba, Saskatchewan and Alberta receive 100 percent of the benefits from mineral activity on Indian lands.

In 1943, the British Columbia Indian Reserve Mineral Resources Act and an associated Agreement were passed. The Agreement established the management procedures of gold and silver resources for both Indian bands and the Province, but did not, however, resolve the question of ownership of mineral rights. The terms of this Agreement have been under re-negotiation since 1945 and are still being reviewed.

The 1959 and 1958 Agreements for Nova Scotia and New Brunswick established provincial ownership for mines and minerals with the provision that the mining regulations made under the Indian Act would apply to the mineral development and that any benefits realized from the mineral development would accrue to the Indian bands concerned. Elsewhere, no treaties were made with the Maritime Indians nor were agreements made with Indians in the Province of Quebec.

Historically, it was not uncommon for Indian reserves to be exchanged for other land parcels by the federal government. An example is the Fort St. John Indian Reserve in British Columbia. Under a Veteran's Land Administration Project, this Reserve was exchanged for three new reserves (without mineral rights included) which were allocated to the Indian Band. On September 19,1978, the St. John Beaver Indian Band filed a legal suit against DIAND stating that DIAND had not acted in the best interests of the Indian Band when they disposed of the original reserve. A federal court case is now in progress. The outcome of this case will undoubtedly set a precedent for future land exchanges which involve Indian reserves as well as other previous land transactions.

Lands in the North

The Mining Management and Infrastructure Directorate of the Northern Resources and Economic Planning Branch issues and administers mining leases,

coal leases and coal licences in the Northwest Territories and coal licences in the Yukon. The Directorate issues second renewals of mining leases for the Yukon. The regional office in Yellowknife issues and administers prospecting permits in the Northwest Territories. The regional office in Whitehorse administers mining leases, (and issues the originals and first renewals of mining leases), issues and administers coal leases and all placer mining rights in the Yukon. All other administrative work on mineral claims is done in the regional offices. Legislation and regulations providing for these activities include: the Canada Mining Regulations, the Yukon Quartz Mining Act, the Yukon Placer Mining Act, and the Territorial Coal Regulations.

Applications for mineral leases in the Northwest Territories are submitted to the Mining Recorders in Yellowknife who forward them to headquarters for processing. Over time, 3100 mining leases have been issued by the Directorate. At present, there are 900 active leases in the Northwest Territories.

ENVIRONMENT CANADA

The mandate of the Department of Environment through Parks Canada, includes responsibility for National Parks, National Historic Parks, National Historic Sites, and certain Canal lands. In addition, Parks Canada has an interest in various administrations of the extant Admiralty, Ordnance and Dominion land holdings. Parks Canada's mandate in respect to National Parks is to preserve land in its natural state in accordance with the National Parks Act, which precludes the exploitation of subsurface rights. This mandate is carried over into the other land holdings and therefore no 'active' administration of subsurface rights is entertained.[8]

Due to the complex nature of the history of the management of lands currently administered by Parks Canada, matters which arise concerning the subsurface rights of these holdings are reviewed on a case by case basis. The Realty Services Division of Parks Canada is responsible for the solving of title problems, researching land transfers, adverse possession claims and where necessary, the issuing of patents.

8. Personal communication, Parks Canada.

National Parks

In British Columbia, Alberta, Saskatchewan and Manitoba, both the surface and subsurface rights of the National Parks created before 1930 are held by Parks Canada in accordance with the 1930 Resource Transfer Agreements for only as long as they are used as Parks. In the event these holdings are no longer used as National Parks, both the surface and subsurface rights revert to the province in which the lands are located.

In eastern Canada, and in western Canada after 1930, Parks Canada jurisdiction respecting the National Parks varies according to a number of criteria:

1. If the National Park lands in question were formerly held by the province and transferred to Canada by agreement, the surface and subsurface rights are held by the federal government in keeping with terms of that agreement and when no longer used for park purposes, these lands including the subsurface rights would be disposed pursuant to that agreement.

2. If the National Park land was previously patented (owned by someone else) and subsequently acquired by Parks, the owner of the lands including subsurface rights and the party to whom these rights would accrue when the land was no longer used for Park purposes, would depend on how Canada acquired the property and the subsurface rights.

3. If the National Park land was previously unpatented land (for example, unpatented former Indian lands) the owner of the subsurface rights would be dependent upon the circumstances of the acquisition by Parks Canada in the beginning.

National Historic Parks are composed of lands which are owned by the federal government while National Historic Sites may or may not be owned by the federal government. In the case of National Historic Parks, the ownership of the associated subsurface rights is dependent upon the acquisition characteristics of the specific land parcel (for example, whether the land was patented or unpatented, the status of title held by the former owner or grantor of the land, and the conditions of the sale and/or the grant to the Crown).

Dominion Lands

Dominion lands are lands which, by the terms of the Rupert's Land Act (1868), were surrendered by the Hudson's Bay Company in the Deed of Surrender (1869). By Order-in-Council, Rupert's Land and the Northwestern Territory were vested in the Government of Canada, to unite with the Dominion of Canada, as the Northwest Territories (1870). Dominion lands were managed and administered until 1936 by the Department of the Interior and thereafter by successor departments. Since June 5, 1979, this responsibility has rested with Environment Canada, specifically with the Parks Canada Realty Services Division.

As was noted in the discussion regarding the Department of Indian Affairs and Northern Development, following the 1930 Transfer Agreement and supplemental transfers by Orders-in-Council during the 1930s, a considerable portion of the lands previously classified as "Dominion lands" had been transferred to the provinces. While the Orders-in-Council of the 1930s had further defined the transfer of lands from federal to provincial jurisdiction, ambiguities exist regarding the ownership of subsurface rights of lands exempted from the 1930 Transfer Agreement. The Orders-in-Council did not specificially state whether the federal government had control of the subsurface rights prior to the transfer of all the Dominion's interests to the Province.

Subsequent Orders-in-Council authorizing the disposal of Dominion lands have commonly utilized the expression "all interests" to describe the federal interests transferred without definition as to what "all interests" included. While the result has been to remove from federal control all rights associated with a given parcel of land, no clarification has been made regarding the ownership of the subsurface rights of those lands still being held by the federal government nor for those lands for which patents were granted in which no reference to either subsurface rights or "all interests" was made.

In the case of National Parks and Indian reserves, the extent of federal administration of the subsurface rights was clearly indicated in the transfer agreement. For other Dominion lands however, ambiguity exists in a clause entitled "General Reservation to Canada" which defined those lands to be retained by the federal government.

If the subsurface rights were not included with "lands" reserved by the federal government, then the subsurface rights of these Dominion land holdings

(except for parcels with mineral rights included in the Certificates of Title) passed to the provinces in the 1930s. If, however, the "General Reservation to Canada" included subsurface rights, then a federal subsurface asset may exist in concert with a surface holding.

When Dominion land holdings were originally transferred by the Department of the Interior (and successors) to various federal departments, a commonly used clause was "saving and excepting the mines and minerals". Thus, while the surface rights were transferred to another department, the mineral rights, if federally held, would have remained with the Department of the Interior and its successors. A recent legal opinion solicited by the Realty Services Division appears to confirm this situation.

Admiralty and Ordnance Lands

Admiralty and Ordnance lands are comprised of lands which were given to the Dominion of Canada by the Imperial (British) government for defence purposes. Generally this land was strategically located along the water fronts of rivers and oceans. Historically, with exceptions, both surface and subsurface rights to these lands were under the jurisdiction of the Department of Militia and Defence (now DND).

From the mid-1920s to the mid-1940s, the Department of Interior (predecessor in administration to Parks Canada) acted as the disposal and leasing agent for surplus Admiralty and Ordnance lands. Administrative responsibility for these lands had been transferred with the provision that while certain lands could be disposed of as the department deemed fit, others were to be available on a "lease-only" basis and would be returned to DND when required.

A few parcels of Admiralty and Ordnance lands were transferred directly from the British government to the Department of the Interior. Generally this occurred in circumstances where it had been determined that the land parcels were not to be used for defence purposes.

In Canada, all federally-owned canal lands are administered by either Parks Canada, the St. Lawrence Seaway Authority or Public Works Canada. All canal lands held by the federal government are located in eastern Canada. Canal lands which are administered by Parks Canada include those bordering the Trent/Severn,

Rideau, Lachine and other canals in Quebec. The subsurface rights associated with canal lands have not been exploited to date.

For canal lands more recently acquired by the federal government (eg., to expand an existing canal system) the ownership of the subsurface rights would be specifically requested to be set out in the Certificate of Title or Deed for the property as is the case now for other land acquisitions carried out by Parks Canada. Subsurface rights have, however, not been actively sought during the course of new canal land acquisitions.

The possible federal ownership and administration of the subsurface rights associated with previously owned and now patented lands is dependent upon the conditions (eg., surface rights only, encumbrances) specified within the Letters Patent, the Certificate of Title or Deed. Parks Canada holds some Certificates of Title which were made out to the Department of Interior for lands which have not been disposed of. By reference to the title, some of these Certificates include mining and mineral rights while others do not.

CONCLUDING REMARKS

Federal subsurface mineral resources constitute one of the major assets of the nation's land resource base. In the federal domain, the administration of such resources is primarily the responsibility of Energy, Mines and Resources. The clarification of subsurface rights is frequently requested only with the disposal of surface rights as the management of these two resources are performed as separate functions. The management of subsurface rights is passive or reactive in nature but does result in an annual generation of several million dollars of revenue for the federal government.

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