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November 13, 2006

The Honorable Wayne Allard
United States Senate

The Honorable Ken Salazar
United States Senate

Subject: *Department of Interior—Royalty-in-Kind Oil and Gas Preferences*

This responds to your request for our opinion regarding the Secretary of Interior's authority, under section 342(j) of the Energy Policy Act of 2005, to "grant a preference" in the disposal of royalty oil or gas received by the United States. 42 U.S.C. § 15902(j)(1). The purpose of section 342(j) is to provide "additional resources to any Federal low-income energy assistance program." *Id.* In this regard, you ask whether section 342(j) provides sufficient authority for the Secretary to provide such programs with oil and gas at a discount to fair market value.

The Department of Interior maintains that section 342(j) of the Energy Policy Act does not permit such oil and gas sales at a discount to fair market value. Although not necessarily the only reading of the provision, we agree with Interior that this is the better reading of section 342(j). As we explain below, the issue posed presents a close question of statutory construction. In our, and Interior's view, the phrase "grant a preference" in section 342 does not mean to grant a discount to fair market value where the same section requires sales or transfers to be at not less than market value and there is no indication that Congress intended "preference" to include a discount to fair market value.¹

¹ Our practice when rendering opinions is to obtain the views of the relevant federal agency to establish a factual record and to elicit the agency's legal position on the subject matter of the request. GAO, *Procedures and Practices for Legal Decisions and Opinions*, GAO-06-1064SP (Washington, D.C.: Sept. 2006). In this instance, Senator Salazar's office provided us with a copy of a legal memorandum from the Office of the Solicitor, Department of the Interior, on the issue addressed in this opinion. Memorandum from Associate Solicitors, Divisions of Mineral Resources and General Law, Office of the Solicitor, Department of the Interior, to the Director, Minerals Management Service, Dec. 28, 2005 (Solicitor's Memo) (concluding that (continued . . .)

BACKGROUND

The United States leases federal lands containing oil and gas deposits under two specific programs: the Mineral Land Leasing Act of 1920 (MLLA)² governs land deposits and the Outer Continental Shelf Lands Act of 1953 (OCSLA)³ governs lease of oil and gas deposits from offshore or submerged lands.

The MLLA authorizes the Secretary of the Interior to lease oil and gas deposits, and certain federal lands containing oil and gas deposits, to U.S. citizens, associations, corporations, or municipalities. 30 U.S.C. § 181. Lessees must pay the United States a royalty of at least 12.5 percent of the value of the oil or gas removed or sold from the leased land. 30 U.S.C. § 226(b)(1).⁴ As an alternative to collecting cash royalty payments, the Secretary may take a percentage of the value of royalties in actual barrels of oil or volumes of natural gas, a so-called “royalty in kind” or “royalty oil and gas.” 30 U.S.C. § 192. MLLA authorizes the Secretary to sell to the public royalty oil and gas accruing to the United States under such leases except when, in the Secretary’s judgment, it is desirable to retain the oil and gas for the use of the United States, such as filling the nation’s Strategic Petroleum Reserve. *Id.* Under MLLA, the Secretary must “grant preference” to refineries not having their own source of supply for crude oil, but sales to such refineries must be “at not less than the market price.” *Id.*

Similarly, the OCSLA authorizes the Secretary of the Interior to lease oil and gas deposits from offshore or submerged lands on the outer continental shelf off the United States. 43 U.S.C. §§ 1335, 1337. Like their onshore counterparts, offshore oil and gas lessees must pay the United States a royalty of not less than 12.5 percent, which the Secretary also may demand in kind. 43 U.S.C. §§ 1335, 1337, and

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section 342(j) does not provide the Department with the authority to receive less than fair market value for the royalty gas or oil). Through informal discussions, we confirmed that the December 28, 2005, memorandum continues to represent the Solicitor’s interpretation of section 342(j).

² MLLA is codified, as amended, in scattered sections of title 30 of the United States Code.

³ 43 U.S.C. §§ 1331–1356a.

⁴ *See also* 43 C.F.R. part 3100. *See generally* Department of the Interior, Bureau of Land Management, *The Federal Onshore Oil and Gas Leasing System*, available at www.blm.gov/nhp/300/wo310/oandg/docs/LeasingBrochure.pdf (last visited Oct. 27, 2006).

1353(a)(1).⁵ OCSLA also authorizes the Secretary to sell royalty oil and gas to the public or to transfer such oil or gas upon request to the Secretaries of Defense or Energy or the Administrator of the General Services Administration for federal use. 43 U.S.C. § 1353. Royalty oil or gas sold under OCSLA must not be sold for more than its regulated price or, if no regulated price applies, must not be sold at less than its fair market value. *Id.*

Section 342 of the Energy Policy Act of 2005⁶ governs Interior's program on oil and gas royalties in kind. It applies to all royalties accepted in kind under any federal oil or gas lease or permit under section 36 of MLLA (30 U.S.C. § 192), section 27 of OCSLA (43 U.S.C. § 1353), or any other federal law governing leasing of federal land for oil and gas development. 42 U.S.C. §§ 15902(a). It requires the Secretary to sell royalties taken in kind at not less than fair market value. 42 U.S.C. §§ 15902(b)(3)(A).

Another subsection, section 342(j), permits the Secretary, in the sale of royalty oil and gas, to "grant a preference to any person, including any Federal or State agency, for the purpose of providing additional resources to any Federal low-income energy assistance program." 42 U.S.C. § 15902(j). It is this subsection which is at issue here. Under the Low-Income Home Energy Assistance Program (LIHEAP),⁷ the federal government provides block grants to states, the District of Columbia, U.S. territories, and Indian tribes to assist low-income households that pay a high proportion of household income for home energy needs. 42 U.S.C. § 8621. Grantees provide assistance through payments to eligible households, energy suppliers, and weatherization providers. The question before us is whether section 342(j) authorizes the Secretary to sell royalty-in-kind oil or gas at a discount to fair market value.

DISCUSSION

As noted above, section 342(b)(3)(A) clearly states that the Secretary may not sell or dispose of any royalty production taken in kind for less than the market price. Thus, we need to examine whether the phrase "grant a preference" or the term "preference" means a discount to fair market value and supersedes the specific provision precluding sale at not less than fair market value.

⁵ See also 30 C.F.R. parts 256, 260. See generally B-205877, Mar. 16, 1982; Department of Interior, Minerals Management Service, *Leasing Oil and Natural Gas Resources—Outer Continental Shelf*, available at www.mms.gov/ld/PDFs/GreenBook-LeasingDocument.pdf (last visited Oct. 27, 2006).

⁶ Pub. L. No. 109-58, title III, subtitle E, § 342, 119 Stat. 594, 697 (Aug. 8, 2005), codified at 42 U.S.C. § 15902.

⁷ The Low-Income Home Energy Assistance Act of 1981, Pub. L. No. 97-35, title XXVI, 95 Stat. 357, 893 (Aug. 13, 1981), as amended, is codified at 42 U.S.C. §§ 8621–8630.

Neither section 342(j) nor other sections of the Energy Policy Act define the phrase “grant a preference” or the term “preference.” Nothing in the Act indicates that “preference” means a discount to fair market value. There is little legislative history except for a floor statement by Senator Salazar, who offered his interpretation of the provision when the conference report was being considered. 151 Cong. Rec. S9269 (July 28, 2005) (statement of Senator Salazar). Senator Salazar described section 342(j) as authorizing

“the Secretary of Interior [to] begin a demonstration program that would provide royalty in kind natural gas to low-income energy consumers at below market cost. In order to do so, the Secretary could enter into agreements with natural gas distribution companies to provide them natural gas at below market value as long as they guarantee [that] such gas will be delivered to low-income energy consumers. In practice, the transfer would occur through accounting mechanisms, not the actual exchange of natural gas molecules.”

Id. Obviously, Senator Salazar deemed the preference to be a discount to fair market value because he states it would provide natural gas to consumers “at below market costs.” The problem is that the language of the statute does not say “price preference,” but only “preference,” and another provision of the same section of the statute specifically requires disposal at not less than fair market value. The Supreme Court has found that while floor statements provide an individual member’s reasons for offering an amendment or supporting particular legislation, they do not necessarily represent the meaning and purpose of the lawmaking body collectively. *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 474 (1921).

In the absence of some indication to the contrary, Congress is usually deemed to use words in their common, ordinary sense. B-303495, Jan. 4, 2005, *citing Mallard v. United States District Court*, 490 U.S. 296, 300–01 (1989). One measure of the common, ordinary meaning of words is a standard dictionary. *Id.* *Black’s Law Dictionary*, for example, defines “preference” as “the act of favoring one person or thing over another.” *Black’s Law Dictionary* 1197 (7th ed. 1999). Similarly, the *Merriam-Webster’s Collegiate Dictionary* defines “preference” as “the power or opportunity of choosing.” *Merriam-Webster’s Collegiate Dictionary* 916 (10th ed. 2001). These definitions lead us to read “preference” as a priority in access or the choosing or favoring of one person over another. We acknowledge that preference could also mean choosing or favoring one person over another by offering one person a lower price. With respect to this situation, however, there is a specific provision requiring sales or transfers to be at not less than market value, which we cannot ignore.

We looked at other laws that deal with the United States selling or transferring something of value to see how Congress has commonly used the term “preference” in enacting other preference provisions.⁸ The Taylor Grazing Act, for example, directs that “preference shall be given in the issuance of grazing permits . . .” 43 U.S.C. § 315b. This provision has been interpreted as granting a priority in access to grazing permits. The Supreme Court described preference claims under the Taylor Grazing Act as “first” or “second” or as “higher” or “lower” priority claims. *Public Lands Council v. Babbitt*, 529 U.S. 728, 733–35 (2000). In other words, those “who bring themselves within a preferred class set up by the statute and regulations are entitled as of right to permits as against others who do not possess the same facilities for economic and beneficial use of the range.” *Red Canyon Sheep Co. v. Ickes*, 98 F.2d 308 (D.C. Cir. 1938). The Secretary sets grazing fees for these permits without regard to preference rights. *See* 43 U.S.C. § 315b; 43 C.F.R. § 4130.8-1.

Also, section 9(c) of the Reclamation Project Act of 1939 provides that in sales or leases of electric power or power privileges made by the Secretary, preference shall be given to municipalities and other public corporations or agencies and to cooperatives and other nonprofit organizations. 43 U.S.C. § 485h(c). The preference clause requires only that public entities be given a preference over private entities in access to power generated by federal reclamation projects. *Santa Clara v. Andrus*, 572 F.2d 660 (9th Cir. 1978). *See also* B-210656, Aug. 4, 1983. Other laws govern the pricing of these sales or leases. *See* 10 C.F.R. part 903 (identifying such laws).

Interior’s Solicitor has concluded that section 342(j) does not provide the Secretary with authority to sell royalty-in-kind oil or gas at less than fair market value. Letter from R.M. “Johnnie” Burton, Director, Minerals Management Service, to Senator Ken Salazar, Jan. 31, 2006. The Solicitor found that “section 342(j) left unchanged all the provisions requiring sale of [royalty-in-kind] production at not less than the ‘market price’ or ‘fair market value.’” Solicitor’s Memo, at 15. We agree.

We think section 342 should be read as a whole. The better reading is that it does not authorize the Secretary to dispose of royalty-in-kind oil and gas at less than fair market value. Certainly, section 342(j), standing alone without reference to fair market value, might be read as permitting a price preference.⁹ To read section 342(j)

⁸ For a few preference provisions relating to the United States as a procurer of goods or services, see B-297889, B-297889.2, Mar. 20, 2006 (citing preference provisions relating to procurement).

⁹ For example, both sections 342(h) and (i), regarding sales to small refineries and federal agencies, require sales at not less than market price. We are not persuaded, however, that the lack of a similar requirement from section 342(j) compels a construction of section 342(j) as permitting disposal of royalty oil and gas at less than market price. We will not loosely construe such statutory silence as meaning Congress intended to authorize disposal of federal property at less than market price, (continued . . .)

alone, however, would require us to disregard section 342(b), which requires disposal at market price. It is a cardinal principle of statutory construction that a statute ought to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant. *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001), *citing United States v. Menasche*, 348 U.S. 528, 538–39 (1955) (“[i]t is our duty ‘to give effect, if possible, to every clause and word of a statute’” (*quoting Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883))).

We note that section 342(j) also requires the Secretary to submit a report to Congress assessing the effectiveness of granting preferences under section 342(j) and providing specific recommendations on the continuation of the authority to grant preferences. 42 U.S.C. § 15902(j)(2). In implementing section 342(j), the Department of Interior may wish to consult with the Department of Health and Human Services (HHS) on ways to offer an access preference to energy distributors. For example, HHS officials who administer the LIHEAP program explained to us informally that some states which receive LIHEAP block grants negotiate directly with utility vendors to provide discounted utility rates for LIHEAP-eligible households. Interior and HHS may wish to consider, for example, whether granting an access preference in the sale of royalty-in-kind gas to utilities that have offered discounted rates to states may indeed provide additional resources to the LIHEAP program. If, however, the Secretary determines that the section 342(j) preference provision does not effectively provide additional resources for any federal low-income energy assistance programs, the Secretary should report and make recommendations to Congress on legislative reforms to that authority.¹⁰

CONCLUSION

The issue posed presents a close question of statutory construction. The Department of Interior maintains that section 342(j) of the Energy Policy Act of 2005, which permits it to “grant a preference” in royalty oil and gas sales to provide additional resources to any federal low-income energy assistance program, does not permit such oil and gas sales at a discount to fair market value. Although not necessarily the

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particularly where Congress’s constitutional prerogative to dispose of United States property is implicated, U.S. Const. Art. IV, § 3, Cl. 2. The Property Clause of the Constitution grants Congress power “to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.”

¹⁰ For example, we note a bill pending in the House of Representatives, H.R. 5111, 109th Cong. (2006), which would amend section 342(j) to authorize a discount in the sale of royalty-in-kind oil and gas.

only reading of the provision, we agree with Interior that this is the better reading of section 342(j). In our, and Interior's view, the phrase "grant a preference" in section 342 does not mean to grant a discount to fair market value where the same section requires sales or transfers to be at not less than market value and there is no indication that Congress intended "preference" to include a discount to fair market value.

A handwritten signature in black ink, appearing to read "Gary L. Kepplinger". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Gary L. Kepplinger
General Counsel

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DIGEST

Section 342(j) of the Energy Policy Act of 2005, 42 U.S.C. § 15902(j), does not authorize the Secretary of the Interior to dispose of in-kind royalty oil and gas at a discount to fair market value. Section 342(b)(3)(A) requires the Secretary to sell all royalty oil and gas taken in kind at not less than fair market value. We agree with the Department of the Interior that the phrase “grant a preference” in section 342 does not mean to grant a discount to fair market value where the same section requires sales or transfers to be at not less than market value and there is no indication that Congress intended “preference” to include a discount to fair market value.