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## Report from the Royalty Policy Committee: The Past, Present, and Future of the Royalty Policy Committee

Monte Mills

Prepared for the Rocky Mountain Mineral Law Foundation Special Institute on Federal and Indian Oil & Gas Royalty Valuation and Management: Panel: Report from the Royalty Policy Committee October 24, 2018 ~ Houston, Texas

On January 21, 1982, David F. Linowes, Chairman of the Commission on Fiscal Accountability of the Nation's Energy Resources (Commission), transmitted the Commission's comprehensive report to then-Secretary of the Interior James Watt and the White House.<sup>1</sup> The Commission, chartered by Secretary Watt in July 1981 and comprised of legal, scientific, and fiscal experts, was specifically tasked to explore "allegations of massive irregularities in royalties" and "theft of oil" from federal and Indian lands and had spent months studying the management of royalties paid on the development of mineral resources from federal and Indian lands.<sup>2</sup> The Commission focused primarily on oil and gas royalties but took a broad view of its specific charges, noting that its work aimed to promote the "prudent management of the country's energy resources" and "help to strengthen th[e] faith" of the public in "the competence and accountability of government."<sup>3</sup>

The issues to be studied by the Commission were not new. According to a 1981 report by the Comptroller General of the United States, government audit reports dating back to 1959 highlighted the failures of the federal royalty collection system.<sup>4</sup> In a 1979 study, the Government Accountability Office (GAO) pointed out that although the federal government had collected over \$1B in royalty revenues in 1977, the failures of the accounting and collection procedures made it impossible to confirm whether additional royalties were due and resulted in late payments totaling over \$350 million that year alone.<sup>5</sup> After its own intense study of these matters, the Commission confirmed that the federal "royalty management system need[ed] a thorough overhaul." In a damning assessment of the current state of that system, the Commission concluded that, with regard to paying royalties, "the industry is essentially on an honor system."<sup>6</sup>

The Commission's 1982 report also made several recommendations to address those challenges.<sup>7</sup> While many of these recommendations focused on technical aspects of the royalty assessment, valuation, and collections system,<sup>8</sup> the Commission also recommended that the Secretary of the Interior "appoint a formal advisory committee . . . consisting of representatives of States and Indian tribes and related organizations and Departmental officials, to develop . . . a plan for carrying out

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<sup>1</sup> U.S. Department of the Interior, Report of the Commission, Fiscal Accountability of the Nation's Energy Resources, David F. Linowes, Chairman, Jan. 1982, p. v-vi [hereinafter Linowes Commission Report].

<sup>2</sup> *Id.* at x.

<sup>3</sup> *Id.* at xii.

<sup>4</sup> Comptroller General of the United States, *Oil and Gas Royalty Collections--Longstanding Problems Costing Millions*, AFMD-82-6, Oct. 1981, available at <http://archive.gao.gov/f0902b/116872.pdf>; see also Statement of John F. Simonette, Associate Director, Accounting and Financial Management Division, before the Senate Committee on Energy and Natural Resources, Aug. 11, 1981, available at <https://www.gao.gov/assets/100/97778.pdf>.

<sup>5</sup> Government Accountability Office, *Oil and Gas Royalty Collections—Serious Financial Management Problems Need Congressional Attention*, FGMSD-79-24, Apr. 13, 1979, available at <https://www.gao.gov/assets/130/126216.pdf>.

<sup>6</sup> Linowes Commission Report *supra* n. 1, at 15.

<sup>7</sup> *Id.* at 237-67.

<sup>8</sup> See, e.g., *id.* at 237-47 (recommending various improvements for internal controls, valuation, and auditing).

[an] expanded policy of Federal/State/Indian cooperation on a comprehensive basis.”<sup>9</sup> Although the Commission called for that initial advisory committee to complete its work within nine months,<sup>10</sup> that recommendation would be carried out over the next three and a half decades of work by what became the Royalty Policy Committee (RPC), which was most recently re-chartered by Secretary Ryan Zinke in March 2017.<sup>11</sup>

This paper briefly reviews the RPC’s history, contextualizes the challenging issues on which the RPC has focused, and updates that history and context with the Committee’s work since it was reinstated in 2017.

## II. History: From Linowes to Zinke.

Though not formally established until the mid-1990s, the Royalty Policy Committee grew out of the work of the Linowes Commission and the reforms that the Commission report instigated. The evolution of those reforms provide helpful context for understanding the role of the Committee as it came into existence and its work through the present day.

In conjunction with the 1982 report of the Linowes Commission, Secretary of the Interior James Watt announced sweeping reform of the federal government’s approach to oversight and collection of royalties from oil, gas, and coal developed on federal and tribal lands.<sup>12</sup> Central to that effort was the establishment of a Mineral Management Board and Minerals Management Service, which would take over functions that had previously been exercised by the Conservation Division of the United States Geological Survey.<sup>13</sup> In addition, Secretary Watt called for a legislative task force to develop new royalty management legislation.<sup>14</sup>

Watt also moved to develop “an Advisory Commission composed of Federal, State and Indian representatives, to assist in implementing the Commission’s recommendations and in improving the levels of cooperation among the various governments.”<sup>15</sup> In announcing that intention, Watt noted that this initiative tracked the Commission’s recommendations and provided the first iteration of a royalty advisory committee to analyze and assist with royalty policy issues.<sup>16</sup>

Notice of the Advisory Committee on Minerals Accountability was first formally published in November 1982 and its purpose was to tackle the specific issues of state and tribal cooperation identified in the Linowes Commission report.<sup>17</sup> As chartered, the Advisory Committee was comprised of representatives from States and Indian tribes, as well as the Department of the

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<sup>9</sup> *Id.* at 255.

<sup>10</sup> *Id.*

<sup>11</sup> U.S. Department of the Interior, Royalty Policy Committee Charter, March 29, 2017, *available at* [https://www.doi.gov/sites/doi.gov/files/uploads/2017\\_signed\\_charter\\_royalty\\_policy\\_committee\\_03\\_29\\_17.pdf](https://www.doi.gov/sites/doi.gov/files/uploads/2017_signed_charter_royalty_policy_committee_03_29_17.pdf).

<sup>12</sup> Department of the Interior, *Secretary Watt Overhauls Mineral Royalties Management System*, Jan. 21, 1982, *available at* [https://www.bia.gov/sites/bia.gov/files/assets/public/press\\_release/pdf/PR\\_Sec\\_Watt\\_Overhauls\\_Mineral\\_Royalites\\_Mgmt\\_System\\_01-21-82.pdf](https://www.bia.gov/sites/bia.gov/files/assets/public/press_release/pdf/PR_Sec_Watt_Overhauls_Mineral_Royalites_Mgmt_System_01-21-82.pdf).

<sup>13</sup> *Id.*; Secretarial Order 3071, January 19, 1982, republished at 47 Fed. Reg. 4,751 (Feb. 2, 1982).

<sup>14</sup> Department of the Interior *supra* n. 12, at 2.

<sup>15</sup> *Id.*

<sup>16</sup> *See id.*; Linowes Commission Report *supra* n. 1, at 255.

<sup>17</sup> Office of the Secretary, Creation of Advisory Committee on Minerals Accountability, 47 Fed. Reg. 53,952 (Nov. 30, 1982).

Interior, industry, and one at large member.<sup>18</sup> Over the course of the next year, the Advisory Committee met on a monthly basis to develop recommendations intended to implement better cooperation, among other topics. For example, the Advisory Committee recommended a single payor approach for lease management,<sup>19</sup> a recommendation that the Department of the Interior then proceeded to pursue through formal rulemaking.<sup>20</sup>

Although the Advisory Committee was short-lived and its efforts resulted primarily in the single payor proposal, the concept it represented continued. In August 1985, Interior Secretary Don Hodel incarnated the next predecessor of the Royalty Policy Committee when he signed into existence the Royalty Management Advisory Committee (RMAC).<sup>21</sup> Unlike the smaller and temporary Advisory Committee established by his predecessor, Secretary Hodel called for a 31 member RMAC that would advise the Department on the whole range of royalty management issues.<sup>22</sup> Secretary Hodel also expressly created the RMAC under the authority of the Federal Advisory Committee Act (FACA), which requires certain findings regarding the role of the committee and its service in the public interest.<sup>23</sup> As an initial charge, Secretary Hodel asked the RMAC to address certain “items of immediate concern,” including the systems and databases used in royalty management, certain auditing activities, regulations regarding the valuation of resources produced from federal and tribal lands.<sup>24</sup>

After a nomination and appointment period, the RMAC quickly set to work on its task and, at its first meeting in January 1986, the RMAC asked Secretary Hodel to delay the development of Interior regulations regarding valuation until the RMAC could review those issues and make recommendations.<sup>25</sup> The Secretary agreed and made the draft regulations that Interior had been working on available to both the RMAC and the public for additional review and comment.<sup>26</sup> The RMAC then developed separate working panels to review the rules related to coal, oil, and gas, along with the transportation and processing rules for each.<sup>27</sup> After developing and reviewing detailed recommendations from each task force, the RMAC was “unable to approve the reports of both the oil and the gas panels for transmission to the Secretary,” because, according to the terms of the RMAC’s charter, a vote of two-thirds of the RMAC was required for such approval.<sup>28</sup> The RMAC did vote to approve and forward to the Secretary recommendations regarding coal valuation.<sup>29</sup> Despite the lack of a formal RMAC recommendation on oil and gas valuation, Interior still relied

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<sup>18</sup> *Id.* at 53,953.

<sup>19</sup> Department of the Interior, Minerals Management Service, Intent to propose Rulemaking to Require the Designation of a Single Payor for Each Federal and Indian Lease, 49 Fed. Reg. 47,624 (Dec. 6, 1984).

<sup>20</sup> *See, e.g.*, 50 Fed. Reg. 43,645 (Oct. 29, 1985); 51 Fed. Reg. 12,435 (Apr. 21, 1986).

<sup>21</sup> Minerals Management Service, Establishment of a Royalty Management Advisory Committee, 50 Fed. Reg. 32,773 (Aug. 14, 1985).

<sup>22</sup> Department of the Interior, Secretary Hodel Establishes Royalty Advisory Committee, Aug. 7, 1985, *available at* [https://www.bia.gov/sites/bia.gov/files/assets/public/press\\_release/pdf/idc-022579\\_508.pdf](https://www.bia.gov/sites/bia.gov/files/assets/public/press_release/pdf/idc-022579_508.pdf).

<sup>23</sup> 50 Fed. Reg. at 32,773-74.

<sup>24</sup> 50 Fed. Reg. at 32,774.

<sup>25</sup> Minerals Management Service, Revision of Gas Royalty Valuation Regulations and Related Topics, 52 Fed. Reg. 4,732 (Feb. 13, 1987).

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*; *see also* Minerals Management Service, Amendment to the Charter of the Royalty Management Advisory Committee, 51 Fed. Reg. 37,497 (Oct. 22, 1986) (amending the RMAC charter to require “approval of either 18 Committee members or a two-thirds majority,” in order to avoid “moderate absenteeism [that] could render the Committee ineffective”).

<sup>29</sup> *Id.*

upon the work of the RMAC to promulgate amendments to its then-existing oil and gas valuation regulations.<sup>30</sup> Interior also moved forward with new coal valuation regulations, which also drew upon the work of the RMAC.<sup>31</sup> These initiatives eventually resulted in the adoption of new valuation rules for oil<sup>32</sup> and gas,<sup>33</sup> and further development of valuation rules for coal.<sup>34</sup> As discussed *infra*, despite the RMAC's extensive work on valuation issues, those matters continued to be the focus of additional advisory and rulemaking efforts in the decades that followed.<sup>35</sup>

Beyond valuation issues, the RMAC also established panels to work on funding guidelines under the Federal Oil and Gas Royalty Management Act of 1982, database and systemic issues, and production auditing and accounting system issues.<sup>36</sup> Due to the requirements of FACA, the RMAC had to be re-established every two years and, up until its last charter expired in 1995,<sup>37</sup> successive Secretaries of the Interior maintained the RMAC as “invaluable to the Department in providing input and advice,” and providing “a formal mechanism for soliciting the viewpoint of representatives interested in and knowledgeable regarding royalty-related policies.”<sup>38</sup>

In 1994, Secretary Bruce Babbitt restructured and renamed the Outer Continental Shelf (OCS) Advisory Board to more broadly reflect Interior's royalty management mandate.<sup>39</sup> The newly named Minerals Management Advisory Board would incorporate subcommittees on OCS and scientific issues as advisory groups, including, after its 1995 creation, the Royalty Policy Committee (RPC).<sup>40</sup> The RPC was initially comprised of 28 members representing states, the Western Governors Association, the Western States Land Commissioners Association, tribal interests, industry, public interests, and ex-officio representatives from various federal agencies.<sup>41</sup> The first meeting of the RPC took place on September 12, 1995, and focused on “streamlining reporting for production and royalties on Federal and Indian mineral leases.”<sup>42</sup> Like the RMAC before it, the RPC quickly developed subcommittees to focus on specific issues, including appeals, settlements, and alternative

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<sup>30</sup> *See id.*; Minerals Management Service, Revision of Oil Product Valuation Regulations and Related Topics, 52 Fed. Reg. 1,858 (Jan. 15, 1987).

<sup>31</sup> Minerals Management Service, Revision of Coal Product Valuation Regulations and Related Topics, 52 Fed. Reg. 1,840 (Jan. 15, 1987).

<sup>32</sup> Minerals Management Service, Revision of Oil Product Valuation Regulations and Related Topics, [Draft] Final rule, 52 Fed. Reg. 30,827 (Aug. 17, 1987).

<sup>33</sup> Minerals Management Service, Revision of Gas Royalty Valuation Regulations and Related Topics, [Draft] Final rule, 52 Fed. Reg. 39,794 (Oct. 23, 1987).

<sup>34</sup> *See* Minerals Management Service, Revision of Coal Product Valuation Regulations and Related Topics, 53 Fed. Reg. 26,942 (July 15, 1988); Minerals Management Service, Revision of Coal Product Valuation Regulations and Related Topics, Final Rule, 54 Fed. Reg. 1,492 (Jan. 13, 1989).

<sup>35</sup> *See, e.g.*, Office of Natural Resources Revenue, Repeal of Consolidated Federal Oil & Gas and Federal & Indian Coal Valuation Reform, Final Rule, 82 Fed. Reg. 36,934 (Aug. 7, 2017).

<sup>36</sup> *See, e.g.*, Minerals Management Service, Royalty management Advisory Committee: Meeting, Notice of Meeting, 51 Fed. Reg. 17,108, 17,108-09 (May 8, 1986).

<sup>37</sup> Minerals Management Service, Reestablishment of the Royalty Management Advisory Committee, 58 Fed. Reg. 37,748 (July 13, 1993).

<sup>38</sup> Minerals Management Service, Royalty Management Advisory Committee; Meeting, Notice of Meeting, 58 Fed. Reg. 58,705, 58,706 (Nov. 3, 1993).i

<sup>39</sup> Department of the Interior, Outer Continental Shelf Advisory Board; Notice of Renewal/Revision, 59 Fed. Reg. 49,251 (Sept. 27, 1994).

<sup>40</sup> Department of the Interior, *Interior Establishes Royalty Policy Committee, Names members and Sets First Meeting for Denver*, Aug. 1, 1995, available at <https://www.boem.gov/BOEM-Newsroom/Press-Releases/1995/50055.aspx>.

<sup>41</sup> *Id.* at 2.

<sup>42</sup> Minerals Management Service, Meeting of the Royalty Policy Committee of the Minerals Management Advisory Board, Notice of Meeting, 60 Fed. Reg. 43,475 (Aug. 21, 1995).

dispute resolution; royalty reporting and production accounting; auditing; as well as other subcommittees focused on valuation and other issues.<sup>43</sup> As noted by background information in a 2007 report prepared by one of those subcommittees for the RPC, a number of royalty-related developments occurred over the succeeding years, with the work of the RPC and its subcommittees often playing a central role in the review and consideration of those issues by MMS and Interior.<sup>44</sup> Like the RMAC, this version of the RPC was organized pursuant to FACA and, as a result, was re-chartered every two years until the expiration of its charter in 2014.<sup>45</sup>

Following expiration of the RPC's charter in 2014, there was some legislative support for reconstituting it in order to provide additional input to and oversight of Interior's royalty management and policy-making activities. The Certainty for States and Tribes Act, introduced in 2016 by then-Congressman Ryan Zinke, for example, would have directed the Secretary of the Interior to reestablish the RPC and empowered the RPC to review and assess the impacts on states and tribes of any regulations and policies developed by Interior.<sup>46</sup> There was bi-partisan support for the re-constitution of the RPC; however, various dissenting members of the House Natural Resources Committee expressed concern over "the makeup and powers of the RPC" as represented in the legislation.<sup>47</sup> In testimony on the bill, the Department of the Interior went further, calling reestablishment of the RPC "duplicative and unnecessary" in light of a variety of other advisory bodies working with the Department.<sup>48</sup> Like dissenting legislators, the Department also expressed concern over the power and scope of the RPC as envisioned by the legislation, noting that the bill's authorization of RPC review of Interior policies "could be broadly interpreted to apply to internal policies related to exploration, development, production, and valuation of Federal or Indian minerals."<sup>49</sup> Ultimately, the bill failed to pass and the RPC remained unchartered and dormant from 2014 until 2017.

Former Congressman Ryan Zinke was sworn in as Secretary of the Interior on March 1, 2017.<sup>50</sup> As presaged by his legislative efforts to reinstitute the RPC, within a month of his swearing in, Secretary Zinke issued a new charter for the RPC.<sup>51</sup> Also perhaps unsurprisingly, the 2017 RPC charter took a broader view of the RPC's duties, charging the newly reformed Committee with advising "on current and emerging issues related to the determination of fair market value, and the collection of

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<sup>43</sup> Minerals Management Service, Notice and Agenda for Meeting of the Royalty Policy Committee of the Minerals Management Advisory Board, 61 Fed. Reg. 22,071, 22,071-72 (May 13, 1996).

<sup>44</sup> See The Subcommittee on Royalty Management, *Report to the Royalty Policy Committee: Mineral Revenue Collection from Federal and Indian Lands and the Outer Continental Shelf*, at 11-12, Dec. 17, 2007; see, e.g., Minerals Management Service, Delegation of Royalty Management Functions to States, 62 Fed. Reg. 43,067, 43,076 (Aug. 12, 1997); Minerals Management Service, Proposed Rules: Establishing Oil Value for Royalty Due of Federal Leases, and on Sale of Federal Royalty Oil, 62 Fed. Reg. 3,603, 3,742, (Jan. 24, 1997).

<sup>45</sup> See, e.g., Department of the Interior, Royalty Policy Committee (RPC) Notice of Renewal, 77 Fed. Reg. 22,799 (Apr. 17, 2012).

<sup>46</sup> H.R. 5259, 114th Cong., Rept. in House, Nov. 22, 2016.

<sup>47</sup> House Rept. 114-833, 114th Cong., 2d Sess., at 11-12 (Nov. 22, 2016).

<sup>48</sup> Statement of Amanda Leiter, Deputy Asst. Secretary, Land and Minerals Management, Department of the Interior, before the House Natural Resources Committee, Subcommittee on Energy & Mineral Resources, at 4-5 (June 16, 2016) (citing the State and Tribal Royalty Audit Committee, or STRAC, the U.S. Extractive Industries Transparency Initiative (USEITI) Advisory Committee, various Bureau of Land Management Resource Councils, and internal Interior advisory bodies).

<sup>49</sup> *Id.* at 4.

<sup>50</sup> U.S. Department of the Interior, *Secretary of the Interior: Secretary Ryan Zinke*, <https://www.doi.gov/whoweare/secretary-ryan-zinke>, last visited Sept. 19, 2018.

<sup>51</sup> Royalty Policy Committee Charter *supra* n. 11, at 3.

revenue from energy and mineral resources on Federal and Indian lands,” as well as “the potential impacts of proposed policies and regulations related to revenue collection from such development, including whether a need exists for such regulatory reform.”<sup>52</sup> That sentiment was echoed in the RPC’s first meeting by Secretary Zinke’s Energy Policy Advisor, Vincent DeVito, who served as the Designated Federal Official (DFO) of the Committee and noted that the newest version of the RPC would be authorized to “examine every financial aspect at the Department of the Interior – not only royalty policies.”<sup>53</sup>

In addition to a new approach to the RPC’s scope, the 2017 charter also rebalanced the make-up of the RPC, with 20 members (plus ex-officio federal agency representatives), including 12 members (six each) drawn from states receiving more than \$10M in annual royalty revenues and “various mineral and/or energy stakeholders in Federal and Indian royalty policy.”<sup>54</sup> The remaining eight members (four each) would be drawn from Indian Tribes engaged in energy-related activities and those representing academia and public interest groups.<sup>55</sup> As with earlier advisory committees, the mix of state, tribal, industry, and other interests aims to provide a broad-based perspective on royalty policy issues to better advise the Secretary on those matters.

Thus, while taking different forms, serving different functions, and tackling different issues, broad-based advisory committees like the RPC have supported the royalty management functions of the Department of Interior for much of the last four decades. Though arising as recommendations for reform in response to the findings of the Linowes Commission, the issues facing these advisory committees have remained remarkably consistent across those years, especially as they relate to the challenges of ensuring proper valuation and collection of royalty revenues from oil, gas, and coal. The next section of this paper provides some context and background on those and related challenges, which remain on the agenda of the present-day RPC.

### **III. Context: The (Ongoing) Challenge of Valuation and Other Issues.**

The historic and continuing role of royalty advisory committees, including the RPC, in issues of royalty valuation provides a central example of the challenges posed by long-standing and contentious royalty management issues.

In May 2011, the Department of the Interior, acting through the recently empowered Office of Natural Resources Revenue (ONRR), which took over from the scandal-plagued MMS in 2010,<sup>56</sup> announced it would be reviewing the valuation standards for Federal oil and gas, and Federal and Indian coal.<sup>57</sup> In doing so, ONRR noted that the valuation standards for Federal gas had been in place, with minor revisions, since the 1988 rules developed in conjunction with the RMAC.<sup>58</sup> The

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<sup>52</sup> *Id.* at 1.

<sup>53</sup> Department of the Interior, *Summary of Proceedings: Royalty Policy Committee Inaugural Meeting*, 3 (Oct. 4, 2017), available at [https://www.doi.gov/sites/doi.gov/files/uploads/rpc\\_-\\_oct\\_2017\\_committee\\_mtg\\_-\\_mtg\\_summary\\_v2.pdf](https://www.doi.gov/sites/doi.gov/files/uploads/rpc_-_oct_2017_committee_mtg_-_mtg_summary_v2.pdf).

<sup>54</sup> *Id.* at 2-3.

<sup>55</sup> *Id.*

<sup>56</sup> See Kathleen C. Schroder and Peter J. Schaumberg, *The Office of Natural Resources Revenue: There’s a New Sherriff in Town!*, 30 ABA NAT. RES. & ENV. (Winter 2016).

<sup>57</sup> Office of Natural Resources Revenue, Federal Oil and Gas Valuation, Advance Notice of Proposed Rulemaking, 76 Fed. Reg. 30,878 (May 27, 2011); Office of Natural Resources Revenue, Federal and Indian Coal Valuation, Advance Notice of Proposed Rulemaking, 76 Fed. Reg. 30,881 (May 27, 2011).

<sup>58</sup> 76 Fed. Reg. at 30,879; see *supra* Section II.

agency also called out the RPC's 2007 report on royalty management issues, which included specific recommendations regarding gas valuation standards.<sup>59</sup> Similarly, the rules for valuing Federal oil had been updated in 2000, with only minor amendments in the intervening decade.<sup>60</sup> Rules for valuing both Federal and Indian coal had not been updated since the 1989 rules, which were also developed based on the initial work of the RMAC.<sup>61</sup> Therefore, ONRR published notice of its intent to develop new rules regarding valuation for each of these resources and solicited public input and comments.<sup>62</sup>

Despite ONRR's reliance on the previous work and recommendations of the RPC and RMAC, the agency did not rely on the RPC for input regarding the development of proposed rules for valuing Federal oil and gas and Federal and Indian coal. In fact, after holding a series of public meetings and compiling comments in response to their initial notices, the ONRR moved forward with publishing proposed rules in January 2015, less than a year after the RPC's then-most-recent charter had expired.<sup>63</sup> Once again in the proposed rule, however, the ONRR relied upon the 2007 RPC recommendations as support for revising the valuation standards.<sup>64</sup> According to ONRR, the proposed rule would help meet those recommendations by aiming to "improve the current regulations to ensure greater clarity, efficiency, certainty, and consistency in production valuation."<sup>65</sup> The proposed rules "would not alter the underlying principles of the current regulations," but did propose certain other changes, including changing the valuation techniques and standards for non-arm's-length sales of gas and coal and the development of a "default provision" that would authorize the Secretary to exercise discretion to "establish the reasonable value of production" using a variety of factors and information.<sup>66</sup>

These proposed rules generated significant interest and comment, particularly as it related to coal valuation and the proposed "default provision." In publishing the final consolidated valuation rule, the ONRR explained that it had received nearly 200,000 petition signatures and over 1,000 written pages of comments from more than 300 commenters.<sup>67</sup> Like the prior comments on the proposed rule, those comments were split between industry and other interests, a polarization that was exemplified by the responses to the proposed "default provision," that would grant the Secretary of the Interior discretion to assign value to certain resources for royalty purposes. Whether for oil, gas, or coal, ONRR noted that, in publishing the final rule, industry commenters were nearly uniformly opposed to the "default provision," which they viewed as creating uncertainty and unpredictability in

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<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> 76 Fed. Reg. at 30,881; *see supra* Section II.

<sup>62</sup> *Id.*; 76 Fed. Reg. at 30,878.

<sup>63</sup> Office of Natural Resources Revenue, Consolidated Federal Oil & Gas and Federal & Indian Coal Valuation Reform, Proposed Rule, 80 Fed. Reg. 608 (Jan. 6, 2015).

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 609-10.

<sup>67</sup> Office of Natural Resources Revenue, Consolidated Federal Oil & Gas and Federal & Indian Coal Valuation Reform, Final Rule, 81 Fed. Reg. 43,338 (July 1, 2016). The petition signatures focused on coal and, according to ONRR were split between those desirous of keeping coal in the ground and those seeking to expand coal mining and development. *Id.* ONRR also noted that the Department of the Interior had also launched a comprehensive review of its coal leasing program, which was a separate initiative more directly focused on that policy divide *Id.*; *see also* Bureau of Land Management, Notice of Intent to Prepare a Programmatic Environmental Impact Statement to Review the Federal Coal Program and to Conduct Public Scoping Meetings, 81 Fed. Reg. 17,720 (March 30, 2016).

the calculation of royalty payments.<sup>68</sup> Conversely, however, public interest groups commented that the “default provision” should be mandatory, not discretionary, in order to ensure that the Secretary could fulfill his or her duty to ensure appropriate royalty values by dictating valuation for royalty purposes.<sup>69</sup> Despite the divide over this provision and other valuation requirements, ONRR adopted the final valuations rules, which were scheduled to take effect on January 1, 2017, with initial reporting due by the end of February 2017.<sup>70</sup> According to ONRR’s projections, the rules would result in an additional cost of nearly \$80M for industry but would also reap over \$60M in additional Federal royalty revenue and nearly \$18M in royalty revenue for states.<sup>71</sup>

Although the new valuation rules were scheduled to take effect on January 1, 2017, industry interests did not wait to file lawsuits to challenge them.<sup>72</sup> The plaintiffs in those suits also reached out to the newly-elected Trump administration and asked for the new valuation rules to be reevaluated and postponed.<sup>73</sup> Citing legal concerns over the “default provision” in particular, the ONRR agreed and postponed the rule after its effective date but just prior to the first reporting deadline.<sup>74</sup> The agency then sought public comment on a proposal to entirely repeal the 2016 valuation rule.<sup>75</sup> Despite the recent re-chartering of the RPC, the advance notice of proposed rule-making did not mention whether the advisory committee would have a role in considering the possibility of a repeal.<sup>76</sup>

Shortly after that notice was published, the States of California and New Mexico and their respective Attorneys General filed a lawsuit alleging that the federal Administrative Procedures Act (APA) did not allow the agency to postpone a rule that had already gone into effect.<sup>77</sup> Both the complaint and the judge’s eventual ruling declaring that the postponement violated the APA noted that the root of the 2016 valuation rule was the RPC’s 2007 report on royalty management reform.<sup>78</sup>

After receiving comments in response to the proposal to repeal the 2016 valuation rule, both in response to that proposal and “in other public forums,” ONRR published a final rule in July 2017 repealing the rule in its entirety.<sup>79</sup> The final rule justified that decision on the basis of three primary reasons. ONRR sought to support the first two of these reasons—defects in the rule that might burden Federal and Indian lessees and direction from President Trump, via Executive Order 13,783,<sup>80</sup> to remove barriers to and burdens upon domestic energy production—through revised economic predictions of the impact of repealing the rule. These predictions anticipated an increase

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<sup>68</sup> See, e.g., 81 Fed. Reg. at 43,340 (gas), 43,351 (oil), 43,355 (coal).

<sup>69</sup> See, e.g., *id.* at 43,341.

<sup>70</sup> *Id.* at 43,348.

<sup>71</sup> *Id.* at 43,367.

<sup>72</sup> *Cloud Peak Energy, Inc. v. United States Dep’t of the Interior*, Case No. 16CV315-F (D. Wyo.); *American Petroleum Inst. v. United States Dep’t of the Interior*, Case No. 16CV316-F (D. Wyo.); *Tri-State Generation and Transmission Ass’n, Inc., Basin Electric Power Cooperative, and Western Fuels-Wyoming, Inc., v. United States Dep’t of the Interior*, Case No. 16CV319-F (D. Wyo.).

<sup>73</sup> Office of Natural Resources Revenue, Postponement of Effectiveness of the Consolidated Federal Oil & Gas and Federal & Indian Coal Valuation Reform 2017 Valuation Rule, 82 Fed. Reg. 11,823 (Feb. 27, 2017).

<sup>74</sup> *Id.*

<sup>75</sup> Office of Natural Resources Revenue, Federal Oil & Gas and Federal & Indian Coal Valuation, 82 Fed. Reg. 16,325 (Apr. 4, 2017).

<sup>76</sup> *Id.*

<sup>77</sup> See Complaint, *Becerra v. U.S. Dep’t of Interior*, Case No. 17-cv-02376-EDL (N.D. Cal. filed Apr. 26, 2017).

<sup>78</sup> *Id.* at 5-6; *Becerra v. U.S. Dep’t of Interior*, Case No. 17-cv-02376-EDL, 2017 WL 3891678, at 1 (N.D. Cal. Aug. 30, 2017).

<sup>79</sup> Office of Natural Resources Revenue, Repeal of Consolidated Federal Oil & Gas and Federal & Indian Coal Valuation Reform, 82 Fed. Reg. 36,934 (Aug. 7, 2017).

<sup>80</sup> 82 Fed. Reg. 16,093 (March 28, 2017).

in industry revenue of over \$70M as compared to the losses predicted if the revised valuation rule would have remained in place.<sup>81</sup> As for the third primary reason supporting repeal of the rule, the agency noted the following:

... on March 29, 2017, the Secretary of the Interior (Secretary) announced that he will reestablish the Royalty Policy Committee (RPC) under the Federal Advisory Committee Act. The RPC will advise ONRR on current and emerging issues related to the determination of fair market value and the collection of royalties from energy and natural resources on Federal and Indian lands. The RPC will be composed of Federal representatives and stakeholders from energy and mineral interests, academia, public interest groups, States, Indian Tribes, and individual Indian mineral interest owners. The RPC will provide a forum for engaging with key stakeholders and the public on many of the same issues we attempted to address in the 2017 Valuation Rule. ONRR expects that further internal assessment and analysis combined with consultations facilitated by the RPC's reestablishment will lead to the development and promulgation of a new, revised valuation rule that will address the various problems that have now been identified in the rule we are repealing.<sup>82</sup>

Thus, aside from the potential economic burdens associated with the revised valuation rule, on which public comments were divided when those rules were promulgated, the RPC was highlighted as a basis for repealing the rule even though it had been the RPC's 2007 recommendations that sparked the reform effort in the first place.

While differences between the make-up and charge of the 2007 RPC versus the current RPC can certainly explain why the committee may have supported both adoption and repeal of a reformed valuation rule, the saga of the valuation issue demonstrates the challenges that the RPC faces in working to fulfill its advisory role. Like valuation, many of the royalty management issues on which the RPC advises are long-standing matters of significant and serious disagreement, often with real-world economic impact on governments and producers.<sup>83</sup> The current iteration of the RPC is enmeshed in these issues, as demonstrated by its meetings and discussions thus far.

#### **IV. Present: The Current RPC and its Future.**

Following an introductory meeting in October 2017, the current RPC began its substantive work in February 2018 at a meeting in Houston. There, the Committee heard reports and recommendations from three subcommittees that had been established: Tribal Affairs (subsequently renamed Tribal Energy); Fair Return and Value; and Planning, Analysis, and Competitiveness.<sup>84</sup> “Work Groups”

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<sup>81</sup> 82 Fed. Reg. at 36,951.

<sup>82</sup> *Id.* at 36,934. The final rule also predicted a net decrease in Federal royalty revenue of over \$55M and over \$15M less in state royalty revenue.

<sup>83</sup> In addition to the valuation issues, the RPC has also been cited in conflicting actions with regard to the venting and flaring of methane gas. *Compare* Bureau of Land Management, Waste Prevention, Production Subject to Royalties, and Resource Conservation, Final Rule, 81 Fed. Reg. 83,008, 83,017 (Nov. 18, 2016) (citing the 2007 RPC report as influencing a final rule regarding methane venting and flaring) *with* Bureau of Land Management, Waste Prevention, Production Subject to Royalties, and Resource Conservation; Recission or Revision of Certain Requirements, 83 Fed. Reg. 7,924 (Feb. 22, 2018) (proposing repeal or revision of that rule).

<sup>84</sup> U.S. Department of the Interior, Agenda, Royalty Policy Committee Meeting, Feb. 28, 2018, *available at* [https://www.doi.gov/sites/doi.gov/files/uploads/rpc\\_feb\\_2018\\_agenda\\_02\\_20\\_18.pdf](https://www.doi.gov/sites/doi.gov/files/uploads/rpc_feb_2018_agenda_02_20_18.pdf).

were also established within each of the latter two Subcommittees to focus on specific aspects of the broader Subcommittee charge, including audit, coal, and payor handbook groups in the Fair Return and Value Subcommittee, and non-fossil renewables, onshore oil and gas, off-shore oil and gas, coal, Alaska, and studies groups in the Planning, Analysis, and Competitiveness Subcommittee.<sup>85</sup>

Although only working for a few months, these work groups presented a number of recommendations for RPC consideration at the February 2018 meeting. In addition to the internal matter of renaming the Tribal Energy Subcommittee, the RPC considered 16 recommendations during the meeting, six from the Fair Return and Value Subcommittee and 10 from the Planning Analysis, and Competitiveness Subcommittee.<sup>86</sup> Of the six recommendations regarding Fair Return and Value, most focused on suggestions to tweak specific aspects of valuation, such as the calculation of costs for the “boosting” of gas during transport or the use of arm’s-length sales for coal.<sup>87</sup> In addition, that Subcommittee proposed consideration of developing an index pricing method for valuing gas that would improve upon the index methods proposed in the 2016 valuation rule.<sup>88</sup> Finally, the Subcommittee suggested developing a payor handbook that could be continually updated and provided an update from the auditing workgroup.<sup>89</sup> Although not as comprehensive as the development of a “new, revised valuation rule,”<sup>90</sup> each of the Subcommittee’s recommendations focused on specific aspects of valuation, some of which had been considered in the 2016 valuation rule.

The Planning, Analysis, and Competitiveness Subcommittee took a slightly different approach to its work. For example, the Subcommittee’s onshore oil and gas workgroup presented four recommendations, each of which focused on the processing and timeliness of leases and other energy-related approvals, including the Federal government’s review of such approvals under the National Environmental Policy Act (NEPA).<sup>91</sup> In discussion of those recommendations, the work group pointed out that administrative burdens posed by these reviews and bureaucratic processes were discouraging additional production from Federal lands and, therefore, diminishing the potential royalty returns that could be generated.<sup>92</sup> Similarly, the offshore workgroup proposed lowering the royalty rate for future offshore lease sales in order to lower costs to producers and increase interest in those sales.<sup>93</sup> Citing the economic burdens on producers looking to develop more marginal offshore resources, the workgroup also suggested clarifying the process for allowing royalty relief in those areas and opening up additional acreage for production.<sup>94</sup> Ultimately, the members of the RPC did not object to any of the recommendations proposed at the February 2018 meeting.<sup>95</sup>

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<sup>85</sup> See, e.g., Department of the Interior, Summary of Proceedings: Royalty Policy Meeting of Feb. 28, 2018, at 2, attached to Memorandum re: Royalty Policy Committee Recommendations, March 2018, *available at* [https://www.doi.gov/sites/doi.gov/files/uploads/rpc\\_-\\_feb\\_2018\\_committee\\_mtg\\_with\\_memo.pdf](https://www.doi.gov/sites/doi.gov/files/uploads/rpc_-_feb_2018_committee_mtg_with_memo.pdf).

<sup>86</sup> *Id.* at 2-3.

<sup>87</sup> *Id.* at 8-9.

<sup>88</sup> *Id.* at 7-8.

<sup>89</sup> *Id.* at 7, 9-10.

<sup>90</sup> 82 Fed. Reg. at 36,951.

<sup>91</sup> Summary of Proceedings *supra* n. 84, at 25-26.

<sup>92</sup> *Id.* at 11.

<sup>93</sup> *Id.* (“A 12.5% [offshore] royalty rate would increase production and would increase royalty collections due to higher production.”)

<sup>94</sup> *Id.* at 26.

<sup>95</sup> *Id.* at 23-27.

The focus on decreasing barriers to production as a way to increase royalties continued at the RPC's next meeting in June 2018. There, the Planning, Analysis, and Competitiveness Subcommittee's onshore oil and gas workgroup noted in its presentation that "[t]he group looked at increasing royalties and determined that an increased rate would lead to less revenue, since developers would be driven from development on federal lands. . . [so] the group focused on how to increase competitiveness of federal lands and deliver increased revenue."<sup>96</sup> As a result, the group recommended additional administrative guidance to federal agencies to streamline or exclude NEPA analysis and revision of existing onshore orders governing the terms of development operations.<sup>97</sup> These recommendations led to further discussion among the RPC about whether NEPA issues were within the Committee's scope.<sup>98</sup> While the Committee resolved to engage in further discussion on that question, it was made clear by comments at the meeting that procedural issues causing delays in production (and resulting impacts on royalties) are within the scope of the current RPC but environmental aspects of NEPA or other laws governing energy development on Federal and Indian lands fell outside of the RPC's charter.<sup>99</sup>

Beyond onshore review and approval processes, the RPC also heard updates from other subcommittees and took up recommendations regarding non-fossil renewable, offshore, and tribal energy issues during its June meeting.<sup>100</sup> The Committee adopted all of the subcommittee recommendations and subsequently reported those recommendations to the Secretary.<sup>101</sup>

Perhaps not surprisingly given the conflict and challenges surrounding the topics on which the RPC and its predecessors had previously worked, the current version of the RPC has not avoided criticism or litigation. A number of the public comments submitted to the RPC have highlighted concerns over the representation of industry versus public interests on the Committee.<sup>102</sup> More recently, a coalition of non-profit groups sued the Department of the Interior, Secretary Zinke, and others, alleging that the RPC and its operations are not consistent with the transparency and public participation requirements of FACA and should therefore be invalidated.<sup>103</sup> Notwithstanding these ongoing conflicts, the RPC held its most recent meeting in September 2018 and is scheduled to continue quarterly meetings to receive updates and recommendations from its subcommittees.

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<sup>96</sup> Department of the Interior, Summary of Proceedings: Royalty Policy Meeting of June 6, 2018, at 13, attached to Memorandum re: Royalty Policy Committee Recommendations, June 2018, *available at* [https://www.doi.gov/sites/doi.gov/files/uploads/signed\\_june\\_rpc\\_meeting\\_summary\\_with\\_memo.pdf](https://www.doi.gov/sites/doi.gov/files/uploads/signed_june_rpc_meeting_summary_with_memo.pdf). This determination apparently contradicted the findings of a June 2017 report from the Government Accountability Office, which found that "[r]aising federal royalty rates . . . for onshore oil, gas, and coal resources could decrease oil, gas, and coal production on federal lands but increase overall federal revenue," although the "extent of these effects is uncertain and depends" upon a number of factors. Government Accountability Office, *Raising Federal Rates Could Decrease Production on Federal Lands but Increase Federal Revenue*, GAO-17-540 (June 2017), *available at* <https://www.gao.gov/assets/690/685335.pdf>.

<sup>97</sup> Summary of Proceedings: Royalty Policy Meeting of June 6, 2018, *supra* note 96, at 13-18.

<sup>98</sup> *Id.* at 14.

<sup>99</sup> *Id.*

<sup>100</sup> *See id.* at 6-13, 19-20.

<sup>101</sup> *Id.*

<sup>102</sup> *See, e.g.*, Department of the Interior, Summary of Proceedings: Royalty Policy Meeting of Oct. 4, 2018, at 20, attached to Memorandum re: Royalty Policy Committee Recommendations, Oct. 2017, *available at* [https://www.doi.gov/sites/doi.gov/files/uploads/rpc\\_-\\_oct\\_2017\\_committee\\_mtg\\_-\\_mtg\\_summary\\_v2.pdf](https://www.doi.gov/sites/doi.gov/files/uploads/rpc_-_oct_2017_committee_mtg_-_mtg_summary_v2.pdf); Summary of Proceedings from Feb. 2018 meeting *supra* n. 84, at 16; Summary of Proceedings from June 2018 meeting *supra* n. 95, at 24.

<sup>103</sup> Complaint, *Western Organization of Resource Councils v. Zinke, et. al*, case no. 9:18-cv-00139-DWM (D. Mont. filed Aug. 7, 2018).

## **V. Conclusion.**

The assessment, collection, and management of royalties from energy production on Federal and Indian lands have presented challenges for the Federal government for decades. The work of the Linowes Commission in the early 1980s highlighted significant deficiencies in the government's royalty management program and sparked significant reform. Among that Commission's recommendations for reform was the creation of an advisory committee to assist the Department of the Interior with royalty issues. That recommendation heralded the beginning of almost 40 years of advisory bodies serving in that role, the last 20 of which have mostly consisted of the work of the Royalty Policy Committee.

Despite its long-standing history, however, the RPC continues to wrestle with many of the same issues facing its predecessors. While the then-decade-old work of the RPC helped inform the royalty reform proposals developed by the Department of the Interior under the Obama administration, the more recent re-establishment of the RPC by Secretary Ryan Zinke was also offered as a reason for repealing those reforms. Further, ongoing conflicts over the public and economic interests at stake in royalty management issues will continue to present challenges for the RPC and its work. While these challenges may have intensified in our current era of political and social polarization, they are not new within the arena of royalty management. In fact, as described herein, the complexity and depth of problems identified almost four decades ago in the Federal government's royalty mismanagement led to the formation of an advisory committee to help balance competing interests and resolve such conflicts. While these efforts will continue to pose difficulties for the current RPC, this paper offers a broader context in which to recognize and understand that the existing RPC is neither the first nor the only body to help the Federal government work to overcome them.