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Key Issues Confronting Industry in Federal Oil and Gas Leasing and Permitting – A Series

Topic 1: BLM Discretion to Lease

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It is important to conduct due diligence before developing new formations on lands that may contain legacy—and potentially expiring—federal oil and gas leases. New federal leasing is currently further complicated by BLM's policy to defer any lease parcel that receives a lease protest or negative comment letter. New leasing in areas where the BLM is updating amending many of the federal land use plans in key development areas can also create headaches for operators. These challenges will be addressed in a series of articles over the course of the next several months.

Each article in the series will address one of the multiple issues facing oil and gas companies in acquiring, maintaining, extending, suspending, and hopefully exploring and developing federal minerals. This first article addresses the legal landscape and contours of BLM's discretion to offer lands for lease.

The system of federal oil and gas leasing established by the Mineral Leasing Act (30 U.S.C. §§ 181, *et seq*.) and implemented by the BLM contains a very strict and detailed regulatory scheme. Complicating these issues, BLM issues Instruction Memorandum, Handbooks, Manuals, Notices to Lessees, state-specific IMs, and other policy statements. These statutes, regulations, and policies are further interpreted by the Interior of Board of Land Appeals and the federal courts.

Section 226 of the MLA states that the Secretary of the U.S. Department of the Interior, through BLM, "may" lease public lands for oil and gas. 30 U.S.C. §226. The language "may" means that the Secretary and BLM are granted full authority to determine which lands are to be leased by the federal government. The U.S. Supreme Court has held that this discretion is unfettered and the Secretary cannot be forced to lease public lands for oil and gas. *Udall v. Tallman*, 380 U.S. 1, 4 (1965).

BLM determines which lands are available for oil and gas leasing through its development and implementation of resource management plans, as dictated by the Federal Land Policy and Management Act, 43 C.F.R. §§ 1701-1785, *et seq*. Therefore, even if certain lands are open for

lease, BLM can refuse to lease particular lands for oil and gas, even if there are no sensitive resources and the lands are within an existing oil and gas field.

If BLM refuses to lease certain lands, the Administrative Procedures Act mandates that any BLM refusal to lease—a final decision—cannot be arbitrary and capricious. While BLM's decision to lease is completely discretionary, if BLM refuses to lease, it must provide a rational basis for its decision that is supported by an analysis adequately documented in an administrative record. Accordingly, in the instance where one could challenge BLM's decision as arbitrary and capricious, there is a way to challenge BLM decisions to refuse to lease public lands.

For more information, please contact Bill Sparks or Bret Sumner.

Upcoming articles in this series will address:

- Lease Protests
- BLM's issuance of federal leases and refunds
- Suspensions of Operations and/or Production
- Lease Terminations
- Class I and Class II Reinstatements
- Drilling-over Extensions & Diligent Development
- Leases in extended term with no well capable of production
- No production, but Leases in extended term with a well capable of production