



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

Topic 2: Navigating Lease Protests and Oppositions to Leasing Decisions

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In our second installment in our series on key issues in federal oil and gas leasing and development, this article discusses BLM’s leasing process, the lease protest procedures, and potential roadblocks and delays facing companies seeking federal oil and gas leases. The first [article](#) addressed BLM’s broad discretion to offer federal lands for lease. As detailed below, BLM’s determination to offer lands for lease merely begins a long process that is rife with potential legal hurdles.

Even if BLM issues a decision to lease, holds a lease sale, and accepts money for lease parcels, BLM may never issue a lease to a qualified high bidder. Lease protests and other opposition to leasing may still delay, prohibit, and cancel parcels that should otherwise be issued as federal oil and gas leases.

In early 2010, former Secretary of the Interior Ken Salazar issued Instruction Memorandum 2010-117 (IM 2010-117) to provide additional guidance for the leasing of federal oil and gas resources. Secretary Salazar issued IM 2010-117 largely in response to complaints by various environmental groups regarding the extent of the Bush Administration’s public lands leasing program and the numerous protests, appeals, and litigation over the issuance of federal leases. Consequently, IM 2010-117 contains detailed procedures for the environmental review of proposed lease parcels, as well as expanded opportunities for public input and protest.

Even though BLM spends years developing resource management plans and determines which lands are available for oil and gas leasing and under what conditions (lease stipulations and lease notices), BLM must still comply with IM 2010-117 and conduct another onerous environmental review under NEPA. Months before a lease sale, BLM issues a draft NEPA document (e.g., a Draft EA) and provides the public the opportunity to comment on BLM’s proposed leasing activities.

IM 2010-117 then requires that BLM post its NEPA compliance documentation (e.g., a Final EA) along with a Notice of Competitive Lease Sale 90 days prior to the lease sale date, which doubles the 45 day notice period otherwise required by regulation pursuant to 43 C.F.R. § 3120.4-2. The posting of the Notice of Competitive Lease Sale begins a 30 day protest period during which interested parties may challenge the propriety of leasing any of the selected federal parcels.

Under this IM, the failure to submit a protest within the 30 day time frame should result in the denial of that late filed protest. The conclusion of the protest period, however, does not necessarily mean that the identified parcels will not be challenged. BLM has repeatedly ignored its own deadlines and considered protests and oppositions to leasing filed well after the conclusion of the 30 day protest period.

Ideally, BLM will resolve all lease sale protests during the remaining 60 days prior to the lease sale. Unfortunately, the 60 day period is frequently inadequate to address all filed protests because many of these protests involve challenges to the sufficiency of BLM's NEPA analysis. IM 2010-117 recognizes that resolving all protests prior to the lease sale may be difficult and it permits BLM to offer all of the selected parcels, even if protested, for competitive bidding at the lease sale.

BLM's failure to properly resolve all protests within 60 days generally complicates the lease issuance process. In the instance where a parcel receives a high bid, BLM reserves the right to reject the high bid after the sale, reject the lease, or take further action that it deems necessary. Thus, according to BLM, it is largely irrelevant that BLM may have already signed the decision record for the EA supporting the lease sale, or that BLM accepted full payment for that lease from the high bidder. BLM has rejected leases when no formal protests were filed, but a member of the public merely submits a comment weeks after the lease sale. The legality of BLM's position is subject to an ongoing legal challenge.

Nevertheless, IM 2010-117 provides that once BLM has resolved all protests to a specific parcel, BLM may issue the lease. BLM's decision to deny a protest and issue a lease, however, does not preclude any future challenges to the issuance of that lease. Rather, the protesting party may appeal that denial of the protest to the Interior Board of Land Appeals (IBLA) and the party may attempt to challenge lease issuance in federal court. BLM has also taken the position that it may still cancel a lease even years after the lease sale based on an appeal.

In sum, all companies seeking to obtain federal leases should be aware of all of these potential challenges in obtaining federal leases.

Upcoming articles in this series will address:

- 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

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