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THE FEDERAL ONSHORE OIL AND GAS LEASING AND REFORM ACT OF 1987

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This article is a shortened version of a presentation given at the "Workshop on the Federal Onshore Oil and Gas Leasing Reform Act of 1987," sponsored by the Rocky Mountain Mineral Law Foundation in Denver, Colorado, on March 18, 1988. The views expressed in the paper are solely those of the author and should not be taken as the views or position of the Department of the Interior.
On December 21, 1987, Congress enacted the Federal Onshore Oil and Gas Leasing and Reform Act. The new amendments make three fundamental changes in the Mineral Leasing Act. The first and most important change is that all land offered for leasing must first be offered competitively. The second major change requires that a plan of operations and reclamation be filed and approved before the operator may commence on-the-ground operations. This second change at first glance appears to be more cosmetic than real because the Congress enacted requirements that had previously been in the Department’s regulations and orders. But this change also shifted authority over surface operations on Forest Service lands from the Bureau of Land Management (BLM) to the Forest Service. The third fundamental change adds to the Mineral Leasing Act extensive provisions for preventing fraud in the sale of Federal oil and gas leases. This includes both civil and criminal penalties. These three changes are the principal focus of this discussion.

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The old system of leasing did have a provision for competitive leasing -- but only for those areas that were within a known geological structure (KGS) of a producing oil field. Under the old system, 7 percent of all land was leased competitively and 93 percent was leased noncompetitively. A major reason leading to these amendments was that much of the land leased noncompetitively was very valuable.

The old system also had problems with the competitive leasing scheme. First and foremost, the very idea of a known geological structure is a legal notion. It has no scientific basis per se, though geologists have done the best they could over the years with this term of art. Nevertheless, litigation on this issue was extensive. See, e.g., Arkla Exploration Co. v. Texas Oil & Gas Corp. 734 F.2d 347 (8th Cir. 1984); Bender v. Clark, 744 F.2d 1424 (10th Cir. 1984). The other problem with the old competitive lease system was the difficulty in placing an accurate value on properties not yet drilled or in production. Where there had been comparable sales in the area, it was easy to determine the minimum bid which the BLM would accept. Where there had been no such comparable sales, the BLM's estimates were as inaccurate as industry's as to the worth of a parcel. See Harold Green v. Bureau of Land Management, 93 IBLA 237 (1986).
Congress attempted to solve all the foregoing problems by abolishing both the competitive and noncompetitive parts of the old system. The competitive part of the new system is different from the old in several important respects. Congress abolished the entire concept of a known geological structure of a producing oil field for all future leases. From now on, all land will be first offered competitively. This includes land that has never before been leased as well as land in expiring leases. Another significant change is that Congress has done away with evaluations by the BLM to determine whether an applicant has offered a minimum acceptable bid. Congress replaced the BLM determination of a minimum acceptable bid with a statutory minimum acceptable bid of $2 per acre for all competitive leases. 30 U.S.C. section 226(b)(1)(B). Another change in the competitive system is that all bidding will be done orally at public auctions held at least quarterly by the BLM. 30 U.S.C. section 226(b)(1)(A). The previous system used sealed bids which were opened on the day of the sale.

Summarizing the competitive part of the statute, all land must be put up for competitive leasing before it may be leased noncompetitively. The Congress has established a minimum acceptable bid of $2 per acre, which may be raised by regulation after 2 years. There will be no more KGS or known geological structure determinations, nor will there by any evaluation of a bid to determine minimum acceptable bids. That has been determined by statute.
Noncompetitive Leasing

As often happens in sales, of course, some items linger on the shelf. If the land put up for lease in a competitive sale receives no bids or receives inadequate bids, then, in no more than 30 days, the land will be available for noncompetitive leasing. In order to obtain the lease, an application must be filed showing the applicant's qualifications along with a $75 filing fee. If the applicant is determined to be the first qualified person to file that application and the land is available for leasing, then that applicant is entitled to the lease.

The old system of noncompetitive or over-the-counter leasing also provided for issuing the lease to the first qualified applicant. This worked well enough when interest in a tract was minimal. To deal with situations where interest in an area was high, BLM developed a system whereby all applications would be considered to have been simultaneously filed and a drawing would be held. Conflicts arose which caused the rules for the drawing to become very complicated -- Byzantine, in fact. To some extent, the Congress intended to do away with the complex system of drawings. See H.R. Rep. No. 100-378 (Pt. 1), 100th Cong., 1st Sess. 12 (1987).
But the problem still remains of how to treat fairly all of those who wish to apply for the same parcel at the same time on a noncompetitive basis. The proposed regulations provide for an informal drawing for all applications submitted on any single day of availability after a competitive sale. See 53 Fed. Reg. 9214, 9217, 9225 (March 21, 1988).

Payments Under the New Law

What is this new system going to cost in terms of fees, rentals, and royalties? For filing fees, there is a $75 fee charged for noncompetitive leases and BLM will require a $75 administrative fee for competitive leases in addition to the bonus bid. Rentals will be $1.50 per acre for the first 5 years of either competitive or noncompetitive leases. For the second 5 years, the rental will be $2 per acre. This rental provision applies only to new leases, not to old ones. For old leases, the rental rate is currently $1 to $3 per acre per year and is subject to the Secretary's discretion.

Royalty rates for noncompetitive leases remain fixed at 12.5 percent. The royalty rate for competitive leases shall be not less than 12.5 percent. At least for the time being, it appears that the competitive bidding will be strictly on the basis of bonus bids. The minimum royalty has been set by set by the new amendments at the same amount as the annual rentals.
Grandfather Clause and New Regulations

No new statutory scheme would be complete without a grandfather clause and a new set of regulations. These new amendments are no different. The grandfather clause, found at section 5106 of these amendments, provides that all offers and bids pending on December 22, 1987, shall be processed under the old law. There are a few minor exceptions for military and forest reservations in Illinois, Arkansas, and Florida. But, all pending bids and applications either have been or will be processed.

The Congress also ordered the Secretary to promulgate new regulations within 180 days of the enactment of these new amendments. The Department published proposed regulations at 53 Fed. Reg. 9214 (March 21, 1988) and will publish final regulations by June 17, 1988. As part of the rulemaking, the BLM held six test sales, as also ordered by Congress. 53 Fed. Reg. 6013 (Feb. 29, 1988). Three BLM offices held sales based on nominations of tracts by industry. Those offices are New Mexico, Utah, and Eastern States. Three other offices held sales on everything that was legally and practically available at this time. Those offices are Colorado, Montana, and Wyoming. The results of the test sales will be analyzed and incorporated into the final regulations which will be effective upon publication in the Federal Register.
Lease Operations

We turn now from the leasing side of the new amendments to the operational side -- that is, what happens once the lease is issued and the lessee wants to begin on-the-ground operations. The second major change brought about by the amendments is to make statutory the present regulatory requirement that an application for permission to drill (APD) must be submitted before permission may be granted to enter the land for drilling purposes. See 43 C.F.R. 3163.

There are several important aspects to this statutory change. First, the Secretary must give at least 30 days public notice before approving any APD's. There are no exceptions to this 30-day notice requirement anywhere in the statute. The BLM has already had a case arise where it would have been desirable to issue permission to drill immediately, but because there is no exception to the 30-day notice requirement in the new law, the approval was not possible. The message to operators here is that an APD should be submitted well in advance of the expiration date of the lease in order to avoid expiration because of an untimely application.
Notice Requirement

The manner of giving notice under this section is simple. The notice is posted in "the appropriate local office of the leasing and land management agencies." 30 U.S.C. section 226(f). Essentially, the agency posts a narrative description of the proposed action together with a map of the area to be affected. The new law specifically states that this 30-day public notice requirement is in addition to any other notice required by law.

Forest Service Authority

The new amendments refer to the "appropriate land management agency." This phrase has taken on a new meaning under these amendments. Now under 30 U.S.C. section 226(h), the Secretary of Agriculture has new authority in two important areas. First, the Secretary of Agriculture, specifically, the Forest Service, is explicitly authorized to veto oil and gas leasing on National Forest land. Second, all surface-disturbing activity on National Forest lands must now be approved by the Forest Service before the commencement of drilling activity. The BLM retains approval authority for applications for permission to drill on National Forest lands.
Under the Mineral Leasing Act of 1920, whenever the Interior Department or BLM received an application for a lease in a National Forest, it would ask for a recommendation on whether to lease and under what conditions. While BLM usually followed the Forest Service recommendation, it did not have to.

The new amendments change this practice in a substantial way. The Forest Service now has an absolute veto over oil and gas leasing in National Forests. Moreover, the Forest Service now has complete regulatory authority over all surface-disturbing activities on National Forest lands. However, the BLM still has jurisdiction over the mineral estate. It still issues the oil and gas lease, and the BLM still has regulatory authority over the drilling into the mineral estate. The new law will require a good deal of cooperation between Forest Service and the BLM in order to prevent undue delay in either leasing or approval of drilling operations. There is reason to be optimistic that such cooperation will proceed relatively smoothly since the BLM and the Forest Service have been operating in just this way on acquired lands for many years.

Surface Regulations

The new amendments, in essence, require two things before on-the-ground operations may begin. First, a complete plan of operations must be filed. As a practical matter, this will include a reclamation plan. Second, a bond must be posted which is adequate
to ensure reclamation of the site plus the reclamation of all land and water resources. 30 U.S.C. section 226(g). In all likelihood, BLM's existing regulations for applications for permission to drill and for bonding may prove to be adequate for an interim period or even for the long term. However, the Forest Service currently has no regulations for approving applications for permission to drill, nor does the Forest Service have any bonding program for oil and gas leases at this time. The reason for the lack of Forest Service regulation is clear -- the BLM has always had legal authority over oil and gas operations on National Forest lands until the enactment of this new law. Obviously, the Forest Service will have to promulgate regulations to set operational and reclamation standards. They may be as simple as current BLM regulations or they could be much more stringent along the line of current regulations for the surface mining of coal. Compare 43 C.F.R. 3163 with 30 C.F.R. 700. One presently unresolved question is whether the new statute requires each agency to be responsible for adequate bonding.

Reclamation Standards

Congress has also added substantial teeth to the enforcement of the new operational and reclamation standards. The Secretary must deny issuance of any new oil and gas leases or approval of assignments of existing leases to anyone who has failed or refused "in any material way" to comply with a reclamation standard promulgated
pursuant to the new amendments. For large companies holding numerous leases, this kind of sanction could be onerous. There are exceptions, of course, for alleged violations for which review is pending. The sanction applies even if the violation was committed by a subsidiary, an affiliate, or an operator under the control of the company.

A review of the sections on notice and reclamation disclose that Congress has required that notice of planned operations must be posted in the appropriate land management office for at least 30 days. In the case of the National Forest, the Forest Service is the appropriate land management agency for determining whether a lease will issue and for approving and enforcing operation, reclamation and bonding plans. Moreover, both BLM and the Forest Service must now promulgate regulations setting forth the performance standards for operation, reclamation, and bonding. Finally, the enforcement sanctions for violation of a performance standard may be quite severe, as they may prohibit the issuance of other Federal oil and gas leases or approval of assignments to the violator, its subsidiary, or affiliates.

Prevention of Fraud

We now come to the last major change brought about by the new amendments -- the prevention of fraud.
Congress was especially concerned about schemes by which noncompetitive leases were being segmented into small parcels each of which was sold for substantial prices. It dealt with this problem in two ways. First, it gave the Secretary of the Interior the discretionary authority to disapprove any assignment of less than 640 acres in the lower 48 states and less than 2,560 acres in Alaska. Assignments of smaller acreages can be approved for reasons relating to production such as spacing requirements -- but the burden is on the applicants to show that that is the case. It is difficult to see how this restriction on assignment of small parcels will hinder legitimate business. See 30 U.S.C section 187B.

The second way that Congress chose to deal with fraud was by enacting a new section 41 of the Mineral Leasing Act called "ENFORCEMENT." This section creates two classes of crimes and civil penalties. The first crime consists of any group of individuals or entities conspiring or in some way scheming to defeat any statutory or regulatory provision of the Mineral Leasing Act. The second class of crime consists of obtaining money or property by means of any misrepresentation regarding Federal oil and gas leases. The penalty for any violation can be severe. The fine can be up to $500,000 per violation and the prison term can be for as much as 5 years. These criminal penalties would, of course, be prosecuted by the Department of Justice, which, in most cases, means the United States Attorney.
There are also lengthy provisions for civil proceedings for acts constituting the same crime. The Attorney General can file suit in a U.S. district court having jurisdiction and seek an injunction, a civil penalty of $100,000, restitution, and a bar to further leasing or activity under the Mineral Leasing Act. If a corporation is guilty of a violation under the Mineral Leasing Act, then so is the officer who authorized it or carried it out. Likewise, the corporation is equally liable for the acts of its officers, employees, or agents unless it can show that it did not know and did not authorize what was going on. None of the remedies are exclusive -- one may be convicted criminally and held liable in a civil action in addition.

One of the unusual features of this enforcement section is the authorization for states to sue in Federal courts on the same basis as the Attorney General of the United States, at least in civil actions. A real incentive for a state to initiate prosecution is that the statute allows retention of any monies the court awards for civil penalties or damages.

Miscellaneous Provisions

There are two sections of the new amendments which call for study and reports. Section 5110 of the new amendments calls for an annual report for 5 years by the Secretary to the Congress on how the new law is working. Section 5111 of the new amendments orders
the Comptroller General and the National Academy of Sciences to conduct a study of just how well oil and gas resources are incorporated into land use plans under BLM's and Forest Service's existing authority. The report must also make recommendations on any improvements which could be enacted into law. The bill which originally passed the House required that extensive land use planning be completed before leases could issue. See H.R. 2851, reprinted at H.R. Rep. 100-378 (Pt. 1), 100th Cong., 1st Sess. 3, 4 (1987). During the Conference Committee, the provision was deleted as a requirement, but was retained as a matter for study.

Finally, another provision of the new law (section 5112) prohibits leasing in wilderness study areas. That section essentially consolidates existing law on wilderness study areas -- that is, no leases may issue for any existing wilderness study areas -- either BLM or Forest Service -- nor may any leases issue in further planning areas. There are two exceptions to this leasing prohibition. If the Congress has specifically allowed the leasing or if a land use plan has released the area from further wilderness study, the leasing is permissible. One example of legislative release may be found in the Wyoming Wilderness Act of 1984, 98 Stat. 2807.