Industry to BLM: Lease sales are not optional

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The oil and gas industry is fed up with delays in the Obama administration's leasing process for public lands.

In a lawsuit filed yesterday, the Western Energy Alliance slammed the Bureau of Land Management for failing to hold lease sales four times a year, as specified in federal law (*Greenwire*, Aug. 11).

The legal action was driven in part by the "keep it in the ground" movement, an environmental campaign designed to halt fossil fuel development and subsequent greenhouse gas emissions on public lands. The effort has raised the profile of lease sales, and activists have taken credit for several delays and cancellations — though several others have been the result of administrative issues or logistics.

"Notwithstanding the bluster of special interest groups that disregard the contribution independent producers make to domestic prosperity and national security, the overlooked point is that the 'Keep It in the Ground' approach is inconsistent with controlling law," Mark Barron, a BakerHostetler attorney representing the Western Energy Alliance, said in a statement. "With this lawsuit, we seek to ensure that Congress's explicit legal directive — not cute lobbying slogans — drives federal land administration."

At issue are the Mineral Leasing Act and its provision governing quarterly lease sales for oil and gas on public lands. In yesterday's complaint to the U.S. District Court for the District of New Mexico, industry lawyers list a slew of examples of state offices that have failed to meet that standard. The New Mexico state office, for example, held just two lease sales in fiscal 2015, while the Montana/Dakotas office will hold no more than two during fiscal 2016.

"The failure to hold lease sales according to the Mineral Leasing Act's mandate unnecessarily delays — and can completely halt — development of certain federal minerals," the complaint says. "Alliance members have had to wait years in many cases for leases to be finally offered for sale."

According to the industry group, leasing delays not only keep drillers off public lands, but also make it impossible to develop leases on private land that can be accessed only through neighboring BLM minerals. All of those delays, the group added, ultimately affect royalty payments received by the federal government and taxpayers.

While BLM officials declined to comment on the suit, environmentalists came out swinging, accusing industry of trying to cut off the "keep it in the ground" movement by interfering with BLM's review process.

"It's a testament to the progress that we're making in actually keeping oil and gas in the ground," said Jeremy Nichols, climate and energy director for WildEarth Guardians. "Industry is right to be afraid."

Legal debate

Much of the legal debate centers on the Mineral Leasing Act's provision governing lease sales.

"Lease sales shall be held for each State where eligible lands are available at least quarterly and more frequently if the Secretary of the Interior determines such sales are necessary," a 1987 update to the law says. Related BLM regulations similarly specify that state offices will hold lease sales "at least quarterly if lands are available for competitive leasing."

But BLM's history shows the agency has frequently rescheduled or canceled lease sales for reasons as varied as snowstorms, lack of industry interest, pending tribal consultation or overwhelming public interest. The "keep it in the ground" movement has pushed that last category, drumming up interest in leasing events once considered bureaucratic and boring.

So is that legal? Many environmental groups say yes, arguing that the law gives BLM broad discretion over which lands are considered eligible for each cycle.

"WEA's lawsuit ignores the part of that sentence that the BLM conducts these quarterly sales only when lands are eligible and available," said Michael Saul, a senior attorney for the Center for Biological Diversity.

There are plenty of reasons BLM can decide lands simply aren't available, even if they're listed as "open" for the area's resource management plan (RMP), Saul said. A BLM leasing handbook notes that lands are "considered available for leasing when all statutory requirements have been met, including compliance with the [National Environmental Policy Act], appropriate reviews have been conducted, and lands have been allocated for leasing in the RMP."

"A lease can be deferred when BLM determines that they don't have enough information or haven't completed sufficient review under the National Environmental Policy Act," Saul said.

John Leshy, Interior's top lawyer during the Clinton administration, said the MLA provision has for decades been interpreted to afford the agency discretion over whether any leases are offered for sale.

"I think it's just kind of a Hail Mary kind of lawsuit, and I'll be surprised if the courts take it seriously," he said.

Barron said the lawsuit makes no attempt to challenge BLM's ability to conduct environmental reviews and meet other statutory obligations. But, he noted, one of those statutory obligations is a quarterly sale, and the Mineral Leasing Act doesn't give wiggle room for BLM to skip one for no reason, or simply because the agency is busy.

"There's no disagreement here," he said. "We're not arguing that they don't have environmental review responsibilities to meet, and there are tools that they can use in order to meet them. They can't cancel sales simply because they don't want to have them or because it's inconvenient for them."

Barron said the lawsuit does not challenge BLM's ability to reassess individual parcels or areas "when circumstances warrant additional time for environmental review," but, he said, simply canceling a sale for a snowstorm or venue limitations without rescheduling violates the MLA's clear mandate.

Leshy acknowledged that the lack of agency communication on changes could be frustrating for industry.

"Usually, good government requires, if you make a decision to change something you said you were going to do, to offer a reason for it," he said. "But I don't think there's any legal requirement in terms of not leasing. If the government had to offer reasoned justifications for every time it decided not to do something, then it would never do anything else."

In congressional testimony earlier this year, BLM Director Neil Kornze stressed that the agency conducts quarterly lease sales for eligible parcels so long as the agency has "satisfied applicable legal requirements." When "from time to time" officials have to postpone a sale for logistical reasons, the affected land is always offered a later sale "for the sake of efficiency," he said in prepared testimony.

Transparency

Part of the problem, Barron said, is that BLM often cancels or delays sales without giving a reason. The Western Energy Alliance's attempt to track down details of the agency's decisionmaking process resulted in another prong of yesterday's lawsuit: a Freedom of Information Act challenge. According to the suit, BLM violated FOIA by failing to provide answers to the group's requests for information about the scheduling process for lease sales.

The group in April filed FOIA requests at nine BLM state offices but received only acknowledgement emails from most. The requests were then consolidated at BLM's headquarters in Washington, D.C., and a FOIA officer noted that the agency had questions about the requests' scope. After some back-and-forth on the issue, the industry group in July appealed to Interior's FOIA Appeals Office, which did not respond.

"As of the date of this filing, no BLM office has provided any response to any request that the Alliance has submitted," Western Energy Alliance lawyers told the court. "Nor has any BLM office provided the Alliance with any estimate of when the Alliance can expect to begin receiving responsive information."

The group slammed the agency for failing to send the information and argued that BLM's failure to respond to the FOIA requests is evidence of deeper transparency problems within the leasing program.

"Upon information and belief, BLM does not maintain any written guidance or policy manual governing the scheduling or timing of oil and gas lease sales," the complaint says, noting a lack of agency guidance on lease sale logistics like venue choice and security.

Activists prep for battle

Despite industry's insistence that the suit does not target BLM's environmental responsibilities, critics assailed it as a "desperate" attempt to undo the progress of the "keep it in the ground" movement.

"A rising chorus of Americans want President Obama to align our country's energy policies and climate goals by ending new fossil fuel leasing on our public lands and oceans — and that has the fossil fuel industry worried," Saul said in a statement. "This baseless lawsuit ignores well-established authority for the president and the Bureau of Land Management to not offer new climate-destroying leases to industry."

Matt Lee-Ashley, a senior fellow at the Center for American Progress, called the suit "one of the silliest" he's seen from the oil and gas industry.

"The oil industry is essentially arguing that federal oil and gas resources are an entitlement program, and that leases should be handed out for less than the price of a Big Mac every 90 days, no matter what," he said in an email. "The BLM can and should be selling oil and gas leases on the terms and schedule that most benefits taxpayers and local communities — not on the schedule of oil companies' quarterly earnings reports."

Environmental groups appear poised to jump into action if needed. Saul of the Center for Biological Diversity and Nichols of WildEarth Guardians both noted that the groups were considering intervening on BLM's side.