



State of Utah

GARY R. HERBERT
Governor

GREG BELL
Lieutenant Governor

Office of the Governor
PUBLIC LANDS POLICY COORDINATION OFFICE

KATHLEEN CLARKE
Director

May 28, 2013

Neil Kornze
Principal Deputy Director
Bureau of Land Management
U.S. Department of Interior
Mail Stop 2143LM
1849 C Street N.W.
Washington, D.C. 20140

Re: Proposed Rule
Oil Shale Management – General
78 Federal Register 18547

Dear Principal Deputy Director Kornze:

The State of Utah has reviewed the proposed regulations concerning the general management of the oil shale leasing program published on March 27, 2013. This publication date is subsequent to the Record of Decision for the allocation of lands for commercial leasing of oil shale and oil sands. The state had previously requested that these regulations be published within the time available for review and comment on the allocation proposal. The BLM had made both the allocation proposal and the royalty and other general provisions proposal available simultaneously during the process which culminated in the 2008 decisions. As a result of the BLM's process in 2008, the BLM, the state, and the public benefitted by the transparency provided by a contemporaneous review of all factors related to a viable commercial leasing program. None of that benefit is available today.

In addition to the BLM's segregation of substantive issues, the BLM did not consult with the Governors of the states involved in the generation of the current draft regulations, as it did in 2008. Rather than coordinating with the states, the BLM chose to simply publish these proposals in the Federal Register. This segregation of the topics, and failure to consult with the Governors of the states most involved, is a further manifestation of the breakdown in the accepted and authorized review process occasioned by the settlement of a lawsuit between environmental advocates and the BLM - a settlement which did not include the expertise of the states or the opinion of the general public.

As a result of this friendly settlement agreement, the BLM is proposing to 1) make alterations to the existing commercial royalty rate, 2) consider alterations to the process for

awarding a lease by inserting a new, vague, and unnecessary requirement for an analysis of “unacceptable environmental risk,” 3) make amendments to the process for conversion of a Research and Development Lease to a commercial lease, and 4) set out the requirements for a Plan of Development for an oil shale or oil sands lease.

Commercial Viability

As an initial matter, in addition to proposing amendments to the validly adopted, existing regulatory commercial leasing process, as a result of simple dissatisfaction with the results of the previous comprehensive oil shale allocation and leasing decisions voiced by environmental activists, the BLM continues to prop up the rationale for its draft proposals and its decision to reduce the availability of lands for commercial leasing, upon a fundamental factual inaccuracy. The BLM states:

Although there are entities conducting activities on other oil shale lands in the United States, the BLM does not have data showing that oil shale development is commercially viable at this time. Thus, even though the existing royalty rate might be appropriate for the oil shale industry when it comes into being, at present the BLM is faced with uncertainty.
(78 FR 18550)

The BLM does have, within its possession, data which demonstrates that oil shale development is commercially viable. This data has been submitted to the BLM on numerous occasions, including by the State of Utah as part of its comments upon the recent proposal to amend the allocation of lands for the leasing of oil shale.

Though oil shale companies are not yet operating in Utah, it is not true that oil shale isn't commercially viable. It has been demonstrated to be commercially viable. An accurate description of the commercial viability of oil shale development would reflect that oil shale is being developed commercially (on the order of thousands of barrels daily) currently in Brazil, Estonia and China. With consistently high oil prices, oil shale has been shown to be both technically and economically feasible. Enefit's 140 retort process is a commercially viable technology which is commercially operating – not just in the U.S. Enefit's process in Utah uses standard mining and retort technologies, with less usage of water than many other mature resource development techniques. In Estonia, the break-even price for oil shale versus oil, based on the new Enefit 280 plant including a return on investment, is about \$60 - \$65 a barrel. Petrobras of Brazil, likewise, has a commercially operating oil shale production plant.

Royalty Provisions

The BLM must adjust these inaccurate statements, and use information reflecting the viability of the technology as part of an analysis of royalty rates, including the current royalty rate. Enefit, in particular, is bringing its operation to Utah, which gives the BLM all the information it needs to evaluate environmental effects, including water usage, and to analyze its operations to determine a viable royalty rate for similar operations.

The state encourages a serious review of the royalty rate provision, but respectfully requests the current rate be included in the mix. The current draft proposal does not contain the option to

retain the current royalty rate. The BLM has not identified any particular issue or difficulty with the current rule, only stated simply that “pursuant to the settlement agreement, the BLM is proposing to remove the royalty rate currently in section 3903.52(b),” and to replace it with one of several identified options. Any agreement to settle litigation which involves subsequent public review processes, particularly a settlement which did not benefit from a full disclosure of the facts, cannot, and does not, control the BLM’s ability to make proper policy in the establishment of a viable commercial leasing program for oil shale.

The Energy Policy Act of 2005 requires creation of a commercial oil shale leasing program. The final program must provide for a royalty rate structure that encourages reasonable investment in the product, along with providing a good Return on Investment for the states and the United States. The current rate, with a base rate of five percent for 5 years, followed by an escalation of one percent per year up to a maximum of twelve and one-half percent does precisely that. The current rate provides certainty to the industry as it plans to move into commercial operations. As an alternative, should the BLM desire one, the option of setting a royalty rate based on the estimated fair market value of the tract to be leased has merit. The sliding scale proposal is fraught with too much uncertainty to allow for proper economic planning for an operation, and should be discarded as a viable alternative. Similarly, establishing a high royalty rate, without allowances for the initial years of the economics of any commercial operation is a disincentive to proper economic planning, and should be discarded.

The Awarding of a Lease

The BLM is proposing to amend the regulations to provide that the issuance of a commercial oil shale lease after an auction is discretionary. Such a requirement does not serve any legitimate governmental purpose, which cannot be met in another manner, and represents a huge disincentive to operators to assemble an economically viable proposal reflecting environmental protection. As authority for this proposal, the BLM cites Title 30, United States Code, section 241(a)(1), which states:

The Secretary of the Interior is hereby authorized to lease ... any deposits of oil shale ... belonging to the United States and the surface of so much of the public lands containing such deposits, or land adjacent thereto, as may be required for the extraction and reduction of the leased minerals, under such rules and regulations, not inconsistent with this chapter, as he may prescribe.

This authorizing statute continues by providing:

241 (a)(3) Leases may be for indeterminate periods, upon such conditions as may be imposed by the Secretary of the Interior, including covenants relative to methods of mining, prevention of waste, and productive development.

The state requests the BLM reconsider emphasizing that a lease may be refused after bids are taken at an auction, and promote instead an alternative which embodies proper and complete planning prior to a lease offering. The Secretary’s statutory authority encompasses the latter, which has the advantage of establishing an efficient and complete leasing process which encourages participation.

Emphasizing to potential operators that the BLM may, for no apparent reason, deny a lease after a great deal of investment in bid preparation, provides only an inducement for minimal preparation, and reflects a commitment to a disorganized, bureaucratic hodge-podge of unrelated conditions, rather than efficient leasing processes. Necessary environmental conditions and stipulations can be analyzed, prepared, and listed as part of the notification that the parcel is available for bid.

The BLM has an obligation under law to create a commercial leasing process which is efficient and allows the bidders to clearly understand the conditions of operation prior to auction. When this is understood to be the accepted practice, legitimate operators will step forward to make substantive proposals. Asking a potential operator to jump through all the hoops, lay a legitimate bid on the line, and then be told the lease is not available for no apparent reason, simply reflects a lack of coherence on the part of the BLM as lessor, and discourages legitimate economic and environmental planning. A process which relies on proper pre-planning does not relieve the obligation for the review and approval of an actual plan of operations for any mining and retorting, pursuant to the conditions imposed by the lease.

The state requests this portion of the proposed regulation be withdrawn, in favor of a reworked proposal which clearly sets out the conditions for a lease offering, sets out the environmental reviews which much precede a lease offering, and sets out the stipulations and conditions which are attached to a lease offering. The state also request that this reworked proposal make clear that, once a parcel is ready to lease, with all the attendant conditions, the lease will issue to the successful bidder. Such a process is entirely consistent with the statutory language for the leasing of oil shale cited by the BLM.

Review of Environmental Risk

The proposed regulatory provisions also provide that a lease shall not issue without a finding by the BLM that “oil shale operations could occur without unacceptable environmental risk.” Again, this particular phrase is proposed because of the terms of the settlement agreement. It is an impressive –sounding phrase which does not add any significant quantum of environmental protection over that which the BLM already possesses, and has all the characteristics of a vague

phrase that the lawyers toss into a settlement agreement in order to facilitate an easy resolution of the litigation. The BLM has no history with such a phrase, nor does it appear in any of the statutory or regulatory authority of the BLM. The BLM is now left to wrestle with its meaning, and again, must not grant any deference to the term because of the settlement.

Unfortunately, lacking any guidance about the direction for interpretation of the phrase, if adopted, the BLM is proposing to shift the burden to the applicant for a lease. If this phrase is to carry any regulatory weight, the BLM is required to give applicants clear direction on the standards for compliance, any information required, and criteria for evaluation, in order to avoid an arbitrary and capricious action. It is incumbent upon the BLM to identify the reasonably foreseeable actions or activities which may be employed in the BLM’s proposed interpretation of the phrase, not leaving the applicant to flounder at guessing the BLM’s needs.

The BLM has already determined that it does not expect to interpret the phrase to require the same type of analysis that the Environmental Protection Agency might use in the context of hazardous or toxic substances. In fact, the BLM correctly points out that between the existing statutory standard of environmental protection required by the Federal Land Policy and Planning Act, i.e., the prevention of any unnecessary and undue degradation, and the requirements of the National Environmental Policy Act, the BLM has plenty of tools available to determine the environmental effects of a proposed operation. The BLM currently has the capability to create and enforce stipulations concerning riparian areas, rare plants, species habitat, and a host of other environmental factors. The BLM may easily use these existing tools to evaluate the effects of Enefit's commercially viable operation on the environment as a ground-truthing exercise to demonstrate an actual need for the settlement terminology, or not.

Other Resource Considerations

Finally, BLM proposes the ability to reject the conversion of a Research and Development Lease to a commercial lease based upon the term "other resource conditions." BLM must provide a clear, unambiguous delineation of all the factors for such a denial, not rely on such vague terminology. The state requests the BLM withdraw this proposal in favor of a rework proposal providing sufficient conditions and rationale for such a denial.

Conclusion

Unfortunately, the current draft regulations are a further extension of the BLM's effort to discourage any investment in this valuable natural resource. The state strongly requests that the BLM withdraw the current proposals, and offer reworked proposals, if necessary, in line with these recommendations. The state appreciates the opportunity to review the draft regulations. Please feel free to contact myself or John Harja with any questions or concerns. I may be reached at (801) 537-9803 or kathleenclarke@utah.gov, while John may be reached at (801) 537-9802 or johnharja@utah.gov.

Sincerely,



Kathleen Clarke
Director