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A Primer on the Federal Onshore Oil and Gas Leasing Reform Act of 1987 and Its Regulations

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A PRIMER ON THE FEDERAL ONSHORE OIL AND GAS LEASING REFORM ACT OF 1987 AND ITS REGULATIONS

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On February 25, 1920, Congress enacted the Mineral Leasing Act (MLA) which was designed to facilitate the exploration and development of certain minerals valuable for energy or fertilizer owned by the United States.¹ For the next sixty-seven years this Act served as the major backdrop for leasing of federally owned minerals. Due to perceived inadequacies in the MLA, Congress amended the MLA by enacting the Federal Onshore Oil and Gas Leasing Reform Act of 1987 (Reform Act) on December 22, 1987.² Additional provisions were included in the Reform Act to regulate operations on oil and gas leases. Congress intended that the Reform Act bring certainty and increase the efficiency of leasing federal oil and gas lands.

It remains to be seen whether the Act fulfills Congress' expectations, but the Reform Act and the regulations promulgated thereunder³ should go a long way towards rectifying the shortcomings of the MLA. This article will briefly summarize the oil and gas structure of the MLA and the events leading to the Reform Act. It will then examine the 1987 Amendments and analyze the impact of these changes. Since the Reform Act necessitated a major overhaul of the leasing and lease operation regulations, this article discusses these changes and attempts to give the reader a working knowledge of both the Reform Act and the new regulations.

1. Ch. 85, 41 Stat. 437 (1920) (codified as amended at 30 U.S.C. §§ 181-287). The short title is set out in section 44 which was added to the MLA by the Federal Onshore Oil and Gas Leasing Reform Act of 1987. The original minerals subject to the MLA were oil and gas, coal, oil shale, phosphate and sodium. 41 Stat. at 437.

2. Pub. L. No. 100-203, 101 Stat. 1330-256 (codified at 16 U.S.C. § 3148 (Supp. V 1987), 30 U.S.C. § 187a-b, 188, 199, 195, 226, 226-3 (Supp. V 1987)). Congress enacted this law as Subtitle B, sections 5101-5113, of Title V of the Omnibus Budget Reconciliation Act of 1987. Some of the problems included: fraud or abuse in the noncompetitive system, projected increases in revenues, and industry frustration with the unreliability of the present system.

3. The Department of the Interior proposed regulations to implement the Reform Act on March 21, 1988, 53 Fed. Reg. 9214. After receiving public comment, Interior issued final regulations on June 17, 1988, 53 Fed. Reg. 22,814 (codified at 43 C.F.R. §§ 3000-3130, 3160-3180, 3200, 3280 (1988)). Each publication, called a "rulemaking", consists of a "Preamble" containing explanatory material and responses to public comment, and the actual regulations, or rules, which will then be codified in Title 43 of the Code of Federal Regulations. The Bureau of Land Management is the Interior agency responsible for administering the regulations.

I. BACKGROUND

As originally enacted, the MLA contained eleven sections of general applicability and eight sections applicable only to oil and gas leasing. Since that time but prior to the Reform Act, Congress amended or added several general provisions and effectively reduced the oil and gas provisions to two in 1935.⁴ To place the Reform Act in context, we will briefly summarize the general provisions as they apply to oil and gas leases, the new provisions and the evolution of the eight oil and gas sections.⁵

The MLA contained five basic provisions dealing with the general authority to lease lands and the protection or reservation of certain existing property rights. The MLA's authority to lease public domain lands is contained in section 1.⁶ This section excludes certain lands, such as national parks, from leasing, sets the citizenship standards entities must meet to qualify to hold a lease interest, reserves helium to the United States and defines oil. Section 27 also addresses lessee qualifications by providing an acreage limitation on statewide lease holdings⁷ and remedies for unlawful interests.⁸

Coupled with the authority to lease public lands, the MLA is the exclusive authority to dispose of the enumerated minerals, including oil and gas, while at the same time preserving valid mining claims.⁹ Minerals reserved by the United States when the surface was patented are subject to both the law allowing the reservation and the MLA.¹⁰ The United States retains the authority to use or dispose of the surface of the leased lands through section 29 of the MLA. This section also requires all leases to contain a reservation to allow joint and several use of easements and rights of way on the leased premises.¹¹

In addition to the general authority to lease lands, the MLA grants general rulemaking and implementation authority to the Secretary of the Interior.¹² The Secretary is also authorized to specify the method of attestation and to prescribe forms needed for the submission of information.¹³ Although the MLA gives the Secretary general rulemaking authority, it also requires several provisions be included

4. Act of August 21, 1935, ch. 599, 49 Stat. 674, 676 (codified at 30 U.S.C. §§ 185, 221, 223, 226 (1982)).

5. These summaries are not intended to provide the reader with the legislative background of each section. Congress has amended most sections several times. The reader is referred to the appropriate section in the United States Code for a listing of the amendments, if any, to each section.

6. 30 U.S.C. § 181 (1982).

7. *Id.* §§ 184(d)-(e).

8. *Id.* §§ 184(g)-(j). The remedies for unlawful interests include protection for bona fide purchasers. Section 27 also sets out antitrust provisions. *Id.* § 184(k).

9. Mineral Leasing Act (MLA) § 37, 30 U.S.C. § 193 (1982).

10. MLA § 34, 30 U.S.C. § 182 (1982).

11. 30 U.S.C. § 186.

12. MLA § 32, 30 U.S.C. § 189 (1982). The Secretary's authority is limited by a specific preservation of the states' rights to tax lessees. *Id.*

13. MLA § 33, 30 U.S.C. § 190 (1982).

in all leases and provides for the inclusion of other provisions in the public interest.¹⁴

In the event that a lessee breaches a lease provision, section 31 authorizes cancellation through judicial proceedings or adoption of appropriate lesser remedies.¹⁵ Administrative cancellation of oil and gas leases is available in certain circumstances,¹⁶ and leases can be automatically terminated if annual rentals are not timely paid.¹⁷ This section also sets forth the procedures to reinstate a terminated lease.¹⁸

The original MLA contained no provisions for judicial review of the Secretary's actions under the Act. Thus, the administrative decisions and actions were subject to the general judicial review process.¹⁹ In 1960,²⁰ Congress established a statute of limitations of ninety days to challenge the Secretary of the Interior's final decisions related to oil and gas leases.²¹

The royalties due the United States are addressed in sections 35, 36 and 39. Section 35 provides for the distribution of royalty and other revenue to various federal accounts and the states.²² The United States is also authorized to take either oil or gas royalty in kind instead of in money.²³ Due to the depressed economic conditions of the early 1930's, Congress added section 39 which provides the Secretary of the Interior authority to reduce, waive or suspend rent and minimum royalty and to reduce royalty in certain circumstances.²⁴ This section also gives the Secretary authority to suspend operations and production in the interest of conservation. Also added during the 1930's was a provision allowing the conversion of wells to water wells in certain instances.²⁵

The MLA set out the method for conducting oil and gas leasing in sections 13 through 20. Sections 13,²⁶ 14,²⁷ 15,²⁸ and 20²⁹ provide for

14. MLA § 30, 30 U.S.C. § 187 (1982). Congress later added section 30A which contains provisions for the transfer of oil and gas leases, 30 U.S.C. §187a, and section 30B which contains provisions for the relinquishment of oil and gas leases, 30 U.S.C. §187b. Congress amended the authority of the Secretary of the Interior to disapprove assignments in the Reform Act. This amendment is discussed below. Transfers and relinquishments of other leases are addressed in section 30 of the MLA.

15. 30 U.S.C. § 188(a).

16. *Id.* § 188(b). Congress amended this authority in the Reform Act, as discussed below.

17. *Id.*

18. 30 U.S.C. §§ 188(c) - (j).

19. *E.g.*, 5 U.S.C. §§ 701-706.

20. Mineral Leasing Action Revision of 1960, Pub. L. No. 86-705, 74 Stat. 790, (codified at 30 U.S.C. §§ 184, 187a, 226, 226-2, 241 (1982)).

21. 30 U.S.C. § 226-2 (1982).

22. 30 U.S.C. § 191 (1982). Collection of oil and gas royalty is further addressed in the Federal Oil and Gas Royalty Management Act of 1982, 30 U.S.C. § 1701-1757 (1982).

23. MLA § 36, 30 U.S.C. § 192 (1982).

24. Act of February 9, 1933, ch. 45, 47 Stat. 798 (codified as amended at 30 U.S.C. § 209 (1982)).

25. Act of June 16, 1934, ch. 557, 48 Stat. 977 (codified as amended at 30 U.S.C. § 229a (1982)).

26. 30 U.S.C. § 221 (1982) (expired by its own terms on December 31, 1938).

27. *Id.* § 223.

28. *Id.* § 224.

29. *Id.* § 229.

noncompetitive leasing under a prospecting permit-preference right lease system. Lands within a known geologic structure (KGS) of a producing oil or gas field were authorized to be leased only under a competitive leasing system.³⁰ These sections provided the basic two-tiered leasing system that was in place until the enactment of the Reform Act. The prohibition against waste³¹ and the method for converting existing oil placer mining claims to leases³² were also dealt with in the 1920 MLA.

Following the oil glut of the late 1920's, Congress radically amended the oil and gas leasing process in 1935.³³ Sections 13 and 20 were rendered inoperative and sections 14 and 15 were limited to existing permits. All new leasing was thereafter subject to section 17. The 1935 amendment established the basic oil and gas leasing process that was followed for the next fifty-two years. Although Congress enacted substantial revisions of section 17 in 1946³⁴ and 1960,³⁵ two fundamental principles were to remain unchanged. First, leases were issued for a set term and for so long thereafter as oil or gas was produced in paying quantities.³⁶ Second, noncompetitive leases were issued to the first qualified applicant and competitive leases were only issued for lands within a KGS.³⁷ It was the problems with these leasing systems that led to the major changes incorporated in the new Reform Act.

The 1960 amendment³⁸ established the format of section 17 as it exists today: subsection (a) established the general discretion of the Secretary of the Interior to issue oil and gas leases;³⁹ subsection (b), later (b)(1), described the KGS competitive leasing process and royalty;⁴⁰ subsection (c) set the noncompetitive leasing process and royalty;⁴¹ subsection (d) set the annual rent at not less than 50 cents per acre and a minimum royalty of one dollar per acre;⁴² subsection (e) set the lease primary terms and provided a two-year drilling extension;⁴³ and sub-

30. MLA § 17, 30 U.S.C. § 226d-e (1982) (omitted).

31. MLA § 16, 30 U.S.C. § 225 (1982).

32. MLA §§ 18-19, 30 U.S.C. §§ 227-228 (1982) (§ 227 has been omitted).

33. Act of August 21, 1935, 30 U.S.C. § 221 (1982).

34. Act of August 8, 1946, ch. 916, 60 Stat. 950 (codified as amended at 30 U.S.C. §§ 181, 184, 187a, 187b, 188, 193, 205, 209, 225-226, 226b, 226c (1982)).

35. Mineral Leasing Act Revision of 1960, 30 U.S.C. §§ 226-2 (1982).

36. 30 U.S.C. § 226(e) (1982). This provision was not changed by the 1987 Reform Act.

37. *Id.* §§ 226(b)(1), (c) (1982). Provisions of the MLA as they existed prior to enactment of the Reform Act are indicated by a reference to the 1982 edition of the United States Code.

38. *See supra* n. 20.

39. 30 U.S.C. § 226(a) (1982).

40. 30 U.S.C. § 226(b)(1) (1982). Congress designated the KGS paragraph as (b)(1) when it added paragraph (b)(2) for leasing in special tar sand areas in the Combined Hydrocarbon Leasing Act of 1981, Pub. L. No. 97-78, 95 Stat. 1070 (codified at 30 U.S.C. § 226(b)(1) (1982)). In this law, Congress also added paragraph (k) to section 17 for conversion of oil and gas leases in special tar sand areas to combined hydrocarbon leases. 30 U.S.C. § 226(k) (1982).

41. 30 U.S.C. § 226(c) (1982).

42. *Id.* § 226(d).

43. *Id.* § 226(e).

sections (i) through (m) contained provisions for relief from expiration,⁴⁴ for drainage agreements,⁴⁵ for conflicting claims,⁴⁶ for lease exchanges⁴⁷ and for unit and communitization agreements, drilling contracts and subsurface storage agreements.⁴⁸

Even with the major revisions contained in the 1960 amendments, the seeds of its own destruction lay within section 17.⁴⁹ The first was the limitation of competitive leasing to land only within a KGS.⁵⁰ The KGS concept was part of the original 1920 MLA, but KGS had never been defined by Congress. Rather, Congress gave the Secretary of the Interior broad authority "to fix and determine" the KGS boundary lines.⁵¹ The Secretary exercised this authority, but it tended to be exercised in a narrow fashion.⁵²

For reasons which may never be satisfactorily explained, the Secretary through the Department of the Interior was unable to establish KGSs in a manner evoking confidence, particularly in Congress.⁵³ The most publicized example was the Fort Chaffee litigation. In that case the United States Court of Appeals for the Eighth Circuit found that the Secretary's practice of establishing a KGS by merely drawing the boundary around the well spacing units which adjoined the unit containing a producing well violated the statute.⁵⁴ The controversy was exacerbated by the fact that highly productive areas within the Arkoma Basin surrounded Fort Chaffee.⁵⁵ A later controversy involving several tracts of land in the Amos Draw area of Wyoming included allegations that the recipients of noncompetitive leases resold them for amounts ranging from fifty to 100 million dollars.⁵⁶

As the oil and gas leasing program reeled from allegations of KGS mismanagement and resulting loss of competitive bid revenue, the noncompetitive leasing component was being severely criticized for generating excessive speculation and encouraging fraud.⁵⁷ The noncompetitive leasing process had two components: (1) the traditional "over-the-counter" system where leases were issued to the first qualified applicant who properly filed the lease with the Bureau of Land

44. 30 U.S.C. § 226(i) (Supp. V 1987); *see infra* note 66.

45. *Id.* § 226(j); *see infra* note 66.

46. *Id.* § 226(k); *see infra* note 66.

47. *Id.* § 226(l); *see infra* note 66.

48. *Id.* § 226(m); *see infra* note 66.

49. For a complete overview of the problems, abuses and perceptions that led to the Reform Act and of its legislative history, *see* Beneke, *The Federal Onshore Oil and Gas Leasing Reform Act of 1987: A Legislative History and Analysis*, 4 J. MIN. L. & POL'Y 11 (1988).

50. 30 U.S.C. § 226(b)(1) (Supp. V 1987).

51. 30 U.S.C. § 189 (1982). *See* 58 CONG. REC. 7,645 (1919) (remarks of Rep. Sinnott).

52. S. Rep. No. 412, 99th Cong., 2d Sess. 5 (1986).

53. S. Rep. No. 188, 100th Cong., 1st Sess. 2 (1987); H.R. Rep. No. 378, pt. 1, 100th Cong., 1st Sess. 7-8 (1987).

54. *Arkla Exploration Co. v. Texas Oil & Gas Corp.*, 734 F.2d 347 (8th Cir. 1984), *cert. denied*, 469 U.S. 1158 (1985).

55. *Arkla Exploration Co. v. Watt*, 562 F. Supp. 1214, 1218-19 (W.D. Ark. 1983).

56. S. Rep. No. 188, 100th Cong., 1st Sess. 2-3 (1987).

57. *Id.* at 3; H.R. Rep. No. 378, pt. 1, 100th Cong., 1st Sess. 8 (1987).

Management;⁵⁸ and (2) the simultaneous (SIMO) system, also known as "the lottery", where a lease was issued to the qualified applicant whose application was selected first through a random process.⁵⁹

While a large amount of attention was focused on the allegations of KGS mismanagement and SIMO fraud, a third concern developed over the environmental impacts of oil and gas leasing. Several groups challenged both the form and quality of the environmental analysis conducted by the Forest Service and the Bureau of Land Management (BLM).⁶⁰ Several lawsuits⁶¹ did not clarify the issue, except for wilderness-quality lands, and, as always when resource conflicts become heated, agreement among the factions does not seem feasible.

II. INTRODUCTION TO THE REFORM ACT

A. General

Responding to the public outcry concerning the shortcomings of the MLA, Congress passed the Reform Act in 1987. The Reform Act's chief method of dealing with the problems of known geological structures and noncompetitive bidding focuses on a total restructuring of the bidding process and the abolition of the known geological structure differentiation between leasable lands.⁶² The Reform Act utilizes an oral auction method of competitive bidding for all lands deemed leasable without tract evaluation and sets a fixed minimum bid price per acre.⁶³ Only leasable lands which are not bid on at the auction or that receive bids below the fixed minimum bid are eligible for noncompetitive leasing.⁶⁴

Other important changes in the MLA, as amended by the Reform Act, include: an increase in the minimum annual rental price and minimum royalty per leased acre,⁶⁵ the ascension of the Secretary of Agriculture to a position equal to the Secretary of the Interior with regard to leasing National Forest System Lands,⁶⁶ the formulation of exten-

58. See generally 43 C.F.R. §§ 3111.1-1 to 3111.1-5 (1987).

59. See generally 43 C.F.R. §§ 3112.0-5 to 3112.7 (1987). The majority of oil and gas leases issued under the MLA were issued through the lottery. See Tables 38 and 39, Public Land Statistics - 1987, U.S. Department of the Interior, Bureau of Land Management (March 1988).

60. See H.R. Rep. No. 378, pt. 1, 100th Cong., 1st Sess. 8, 10 (1987).

61. *Sierra Club v. Peterson*, 717 F.2d 1409 (D.C. Cir. 1982); *Park County Resource Council v. USDA*, 817 F.2d 609 (10th Cir. 1987); *Conner v. Burford*, 605 F. Supp. 107 (D. Mont. 1985), *aff'd in part, rev'd in part*, 848 F.2d 1441 (9th Cir. 1988), *cert. denied sub nom. Sun Exploration and Production Co. v. Lujan*, 109 S.Ct. 1121 (1989); *Bob Marshall Alliance v. Hodel*, 685 F. Supp. 1514 (D. Mont. 1986), *aff'd in part, rev'd in part*, 852 F.2d 1223 (9th Cir. 1988) *cert denied sub nom. Kohlman v. Bob Marshall Alliance*, 109 S.Ct. 1340 (1989).

62. The Reform Act was enacted as part of Title V in the Omnibus Budget Reconciliation Act of 1987, 30 U.S.C. § 226 (Supp. V 1987). The amendments of section 17 of the MLA, 30 U.S.C. § 226, were all contained in section 5102 of the Reform Act.

63. 30 U.S.C. § 226(b)(1) (Supp. V 1987).

64. *Id.* §§ 226(b)(1)-(c).

65. *Id.* § 226(d).

66. *Id.* § 226(h). Section 5102(d)(1) added new subsections (f), (g) and (h) to section 17 of the MLA. The existing subsections (f) through (k) of section 17 were renumbered as subsections (i) through (n) *Id.* §§ 226(i)-(n).

sive new regulations to carry out the auction process,⁶⁷ and the establishment of tough civil and criminal enforcement authority for the Attorney General dedicated to reducing the likelihood of fraud during the leasing process.⁶⁸ Congress also provided for test sales as a means to help evaluate the new procedures and for recognition of pending lease offers.⁶⁹ The Reform Act requires approval of surface operations by the appropriate Secretary, approval of drilling permits by the Secretary of the Interior, reclamation of disturbed areas and bonding adequate to ensure reclamation of disturbed surface lands.⁷⁰ Lastly, the new law

67. Sections 5107(a) and (b):

(a) REGULATIONS. - The Secretary shall issue final regulations to implement this subtitle within 180 days after the enactment of this Act. The regulations shall be effective when published in the Federal Register.

(b) TREATMENT UNDER OTHER LAW. - The proposal or promulgation of such regulations shall not be considered a major Federal action subject to the requirements of section 102(2)(C) of the National Environmental Policy Act of 1969.

Pub. L. No. 100-203, 101 Stat. 1330-256, 1330-259 (1987).

68. MLA § 41, 30 U.S.C. § 195 (Supp. V 1987). Congress had added section 42 to the MLA in the Mineral Leasing Act Revision of 1960. The Senate Committee on Interior and Insular Affairs, when reviewing the bill that became the 1960 statute, considered adding a section 41 as well but decided against it. S. Rep. No. 1549, 86th Cong., 2d Sess. (1960), reprinted in 1960 U.S. CODE CONG. & ADMIN. NEWS 3313, 3322-23. Congress failed to renumber section 42 prior to enactment and, since that time, the MLA has had a section 40 and a section 42 but no section 41.

69. Section 5107(c):

(c) TEST SALE. - The Secretary may hold one or more lease sales conducted in accordance with the amendments made by this subtitle before promulgation of regulations referred to in subsection (a). Sale procedures for such sale shall be established in the notice of sale.

Pub. L. No. 100-203, 101 Stat. 1330-256, 1330-260 (1987); and section 5106:

(a) Notwithstanding any other provision of this subtitle and except as provided in subsection (b) of this section, all noncompetitive oil and gas lease applications and offers and competitive oil and gas bids pending on the date of enactment of this Act shall be processed, and leases shall be issued under the provisions of the Act of February 25, 1920, as in effect before its amendment by this Act, except where the issuance of any such lease would not be lawful under such provisions of other applicable law.

(b) No noncompetitive lease applications or offers pending on the date of enactment of this Act for lands within the Shawnee National Forest, Illinois; the Ouachita National Forest, Arkansas; Fort Chaffee, Arkansas; or Elgin Air Force Base, Florida; shall be processed until these lands are posted for competitive bidding in accordance with section 5102 of this subtitle. If any such tract does not receive a bid equal to or greater than the national minimum acceptable bid from a responsible qualified bidder then the noncompetitive applications or offers pending for such a tract shall be reinstated and noncompetitive leases issued under the Act of February 25, 1920, as in effect before its amendment by this subtitle, except where the issuance of any such lease would not be lawful under such provisions of other applicable law. If competitive leases are issued for any such tract, then the pending noncompetitive application or offer shall be rejected.

(c) Except as provided in subsections (a) and (b) of this section, all oil and gas leasing pursuant to the Act of February 25, 1920, after the date of enactment of this Act shall be conducted in accordance with the provisions of this subtitle.

Pub. L. No. 100-203, 101 Stat. 1330-256, 1330-259 (1987).

70. 30 U.S.C. § 226(g) (Supp. V 1987).

sets minimum acreage limitations to obtain approval of assignments of leases.⁷¹ This summary provides the basic framework of the Reform Act. The provisions will be discussed in greater detail in the following sections.

B. Rules/Interim Sales

After establishing the basic framework of the Reform Act, Congress addressed the method of implementing the changes to the MLA. The Reform Act directs the Secretary to develop and issue final regulations to implement the new statute within six months of the December 22, 1987, effective date.⁷² The process of developing the new regulations within the prescribed time frame could not have been accomplished had an environmental review under the National Environmental Policy Act of 1969 (NEPA) been necessary. Accordingly, the Reform Act states that the process of writing the regulations does not constitute a major Federal action, and is therefore not subject to NEPA.⁷³

The required rulemaking resulted in amending the existing regulations of the Bureau of Land Management for competitive and non-competitive onshore oil and gas leasing on Federal land and for the management of operations on Federal onshore oil and gas leases.⁷⁴ The initial proposed rules were printed in the *Federal Register* on March 21, 1988, with comments due on an accelerated thirty-day basis. This was done so that suggested changes could be incorporated into a final set of rules within the statutorily set time frame.⁷⁵ The final set of rules and regulations, containing an extensive preamble, appeared in the *Federal Register* on June 17, 1988, a mere two days before the deadline; and were immediately effective.⁷⁶

71. *Id.* § 187a.

72. 30 U.S.C. § 226(b)(1) (Supp. V 1987); *see supra* note 69.

73. 30 U.S.C. § 226(b)(1)(B) (Supp. V 1987); *see supra* note 69. In contrast, the Forest Service, which did not issue final regulations until March 21, 1990, concluded that its regulations were categorically excluded from preparation of written environmental analysis as defined in 40 CFR § 1508.4 (1990). 55 Fed. Reg. 10,423, 10,445 (March 24, 1990).

74. The regulations of the Bureau of Land Management for management of its oil and gas responsibilities under the MLA are generally set out in Title 43 of the Code of Federal Regulations at Group 3100. Regulations concerning lease issuance and lease terms are set out in 43 C.F.R. §§ 3100.0-3 to 3109.3; noncompetitive leasing in 43 C.F.R. §§ 3110.1 to 3110.9-4; competitive leasing in 43 C.F.R. § 3120.1 to 3120.7-3; and lease operations in 43 C.F.R. §§ 3160.0-1 to 3165.4. The regulations are supplemented by the Forest Service at 36 C.F.R. §§ 228.100 to 228.116 (1990) governing (1) its review of national forest lands pursuant to section 17(h) of the MLA to determine whether it objects to leasing, (2) its review of plans of operation and (3) its inspection and enforcement of lease operations. Readers should be aware that the Reform Act and the BLM regulations in 43 C.F.R. §§ 3100.0-3 to 3120.7-3 are not applicable to Indian lands. The BLM regulations in 43 C.F.R. Part §§ 3160.0-1 to 3165.4 are also applicable to operations on Indian leases. However, some of the revisions to 43 C.F.R. §§ 3160.0-1 to 3165.4 adopted to implement the Reform Act were limited to operations on Federal lands. *See infra* Part IV.

75. 53 Fed. Reg. 9214 (March 21, 1988).

76. 53 Fed. Reg. 22,815 (June 17, 1988) (codified at 43 C.F.R. § 3100 (1987)).

In an effort to work out potential snags in the proposed rules before going final, the Bureau of Land Management took advantage of a provision in the Reform Act allowing the Secretary to hold several sales prior to issuance of regulations.⁷⁷ The Bureau of Land Management held eight interim sales under this authority.⁷⁸ Different sale procedures were attempted and auctioneers with varied backgrounds worked the test sales.⁷⁹ The results of those sales helped the developers of the regulations observe their handiwork in advance of having to react to the multitude of comments received.

The Forest Service, which had no existing regulations for management of oil and gas lease activity on national forest land, issued its proposed rulemaking on January 23, 1989, and its final rulemaking on March 21, 1990.⁸⁰ These regulations implement the responsibilities of the Forest Service under all applicable laws, not just the Reform Act.⁸¹ The Forest Service did not issue these regulations in a vacuum but intended to incorporate oil and gas management into the existing forest management regulatory system in Title 36 of the Code of Federal Regulations.⁸²

Congress directed the Secretary to file an annual report for five years which sets out the number of acres leased both competitively and noncompetitively, the amount of revenue received via bonus bids, filing fees, rentals and royalties, and the resulting amount of production.⁸³ From this information Congress will be able to make an assessment of the new leasing system and compare that system with the one in place for the prior fifty-two years.⁸⁴ This information should also highlight any new problem areas or weak spots in the Reform Act and enable Congress to make the necessary changes or corrections. The first report indicates that the Reform Act's purpose of causing more land to be leased competitively is being achieved.⁸⁵

77. Section 5107(c), *see supra* note 69.

78. The following BLM State Offices held the sales: Wyoming (2), Montana (2), Colorado, Utah, New Mexico and Eastern States.

79. *See* Proposed Preamble, 53 Fed. Reg. 9,214, 9,218 (1988). Wyoming, Montana and Colorado followed the procedure of posting a list of parcels and then auctioning each off at the sale. Colorado, Utah and Eastern States posted a list of parcels for the filing of minimum bid nominations. Parcels receiving nominations were then auctioned off. If a parcel did not receive a minimum bid nomination, BLM considered it to have passed the competitive sale screen and it became available for noncompetitive leasing.

80. 36 C.F.R. §§ 228.100 to 228.116 (1990), 54 Fed. Reg. 3,326 (January 26, 1989) (Proposed Preamble), and 55 Fed. Reg. 10,423 (March 21, 1990) (Final Preamble).

81. Proposed Preamble, 54 Fed. Reg. at 3,326; Final Preamble, 55 Fed. Reg. at 10,423 and 10,424.

82. Final Preamble, 55 Fed. Reg. at 10,425.

83. Section 5110, Pub. L. No. 100-203, 101 Stat. 1330-256, 1330-261 to 1330-262 (1987).

84. *Id.*; S. Rep. No. 188, 100th Cong., 1st Sess. 7 (1987). This information is to be collected over a five-year study period.

85. The first report shows that 280,491 acres were leased competitively in fiscal year 1987 and 2,217,189 acres were leased competitively during the three quarters of fiscal year 1988 subject to the Reform Act. However, the total bonus bids for this two million plus acres was only \$44,361,422 as compared to \$46,865,854 for the KGS tracts in fiscal year 1987. ONSHORE OIL AND GAS LEASING REPORT, FISCAL YEAR 1988.

C. Grandfather Provision

A major concern of those holding pending applications at the time of the Reform Act's December 22, 1987, enactment date centered on whether or not the new law would act to eliminate their offers. As the courts have recognized, Congress has no obligation to preserve pending lease applications when it changes the law.⁸⁶ With the exception of four specially designated areas, all pending noncompetitive oil and gas lease offers and competitive bids were to be processed under the MLA as "in effect before its amendment" by the Reform Act.⁸⁷ This provision protected lease applications pending on the date of enactment and at the same time facilitated a smooth transition into the new competitive leasing process. Thus, pending noncompetitive offers are not subject to the increased minimum rent but remain subject to rejection if BLM determines the land within a KGS.⁸⁸ The KGS process continues for this limited purpose notwithstanding Congress' effort to bury it once and for all. As a final point of truly limited interest, BLM treats noncompetitive offers filed on December 22, 1987, to be "pending on the date of enactment" of the Reform Act and therefore to be grandfathered.⁸⁹

III. THE LEASING PROCESS

A. Competitive Leasing

1. Statutory Provisions

The difficulties in determining the boundaries of a KGS and the arguments attendant to their final determination once announced, which on occasion led to extensive litigation,⁹⁰ led to the adoption of an all competitive bidding system that is not based on the evaluation of the value of the lands proposed for lease.⁹¹ This all competitive bidding requirement constitutes the single greatest change in the MLA as a result of the Reform Act.

86. *E.g.*, *Justhiem Petroleum Co. v. Department of the Interior*, 769 F.2d 668 (10th Cir. 1985) (noncompetitive offers pending on date of enactment of the Combined Hydrocarbon Leasing Act of 1981 must be rejected).

87. Section 5160, Pub. L. No. 100-203, 101 Stat. 1330-256, 1330-259 (1987). The four exceptions are Shawnee National Forest, Illinois; Ouachita National Forest, Arkansas; Fort Chaffee, Arkansas (*see supra* note 74 and accompanying text); and Elgin Air Force Base, Florida. Leases are not to be issued for any noncompetitive offers pending on the date of enactment of the Reform Act unless and until the parcel is posted for competitive sale and fails to receive a qualifying bid.

88. MEMORANDUM FROM ASSISTANT SOLICITOR, BRANCH OF ONSHORE MINERALS, DIVISION OF ENERGY AND RESOURCES, OFFICE OF THE SOLICITOR TO ASSOCIATE SOLICITOR, DIVISION OF ENERGY AND RESOURCES, DATED DECEMBER 24, 1987, SUBJECT: "THE FEDERAL ONSHORE OIL AND GAS LEASING REFORM ACT OF 1987".

89. *Id.*

90. *E.g.*, *McDonald v. Clark*, 771 F.2d 460 (10th Cir. 1985); *Bender v. Clark*, 744 F.2d 1424 (10th Cir. 1984); *Arkla Exploration Co. v. Texas Oil & Gas Corp.*, 734 F.2d 347 (8th Cir. 1984); *McDade v. Morton*, 494 F.2d 1156 (D.C. Cir. 1976), *aff'd*, 353 F. Supp. 1006 (D.D.C. 1973); *Udall v. King*, 308 F.2d 650 (D.C. Cir. 1962); *Angelina Holly Corp. v. Clark*, 587 F. Supp. 1152 (D.D.C. 1984).

91. 30 U.S.C. § 226(b)(1)(A) (Supp. V 1987).

Before enactment of the Reform Act the only competitive oil and gas leasing on lands subject to the MLA occurred on lands which were (1) within a known geological structure of a producing oil or gas field,⁹² (2) within a special tar sand area,⁹³ or (3) within a favorable petroleum geological province in Alaska.⁹⁴ KGS leases were limited in size to 640 acres.⁹⁵ Now available lands outside special tar sand areas must be leased by competitive sale and the maximum lease size is 2,560 acres.⁹⁶ Lease sales will be held for each state where eligible lands are available no less than quarterly and more often if the Secretary so desires.⁹⁷ Notice in the specified form of tracts available for sale must be posted at the Bureau of Land Management Office undertaking the issuance of leases and at the local office of the land management agency such as the Forest Service at least forty-five (45) days before the bid day.⁹⁸ All bids are oral at auction.⁹⁹ The Secretary must accept the highest bid for each parcel without evaluation so long as it is not less than the national minimum acceptable bid.¹⁰⁰

The concept of a national minimum acceptable bid is new. Formerly, BLM would award competitive oil and gas leases based on the highest "acceptable bid" (fair market value).¹⁰¹ The initial national minimum acceptable bid is \$2 per acre as set by the statute through December 22, 1989.¹⁰² After the initial two-year period, the national minimum acceptable bid may be raised, but not lowered, by the Secretary through a rulemaking process.¹⁰³ In order for the Secretary to raise the national minimum bid he must justify the action by finding that it will both enhance financial returns to the United States and promote more efficient management of oil and gas resources on federal lands.¹⁰⁴ However,

92. 30 U.S.C. § 226(b)(1) (1982).

93. *Id.* § 226(b)(2). Congress did not amend this provision in the Reform Act. See *supra* note 40.

94. Alaska National Interest Lands Conservation Act, 16 U.S.C. §§ 3148(c)-(e). Section 3148 authorized an oil and gas leasing program under the MLA for certain land in Alaska below the North Slope but section 3148(c)-(e) required competitive oil and gas leasing within a favorable petroleum geological province (FPGP). Congress deleted the FPGP provisions in section 5105 of the Reform Act, thus returning the oil and gas leasing program in Alaska to the same system as in the lower 48.

95. 30 U.S.C. § 226(b)(1) (1982).

96. 30 U.S.C. § 226(b)(1)(A) (Supp. V 1987). The maximum acreage in Alaska is doubled to 5,760.

97. *Id.* The Office of the Solicitor has advised the Director that the quarterly sale requirement is mandatory but that the Secretary may determine the size of the sale consistent with the purposes of the Reform Act. The sale does not, however, have to be held within the state where the land is located. MEMORANDUM OF ASSISTANT SOLICITOR, ONSHORE MINERALS, DIVISION OF ENERGY AND RESOURCES, OFFICE OF THE SOLICITOR, TO DIRECTOR, BUREAU OF LAND MANAGEMENT, DATED DECEMBER 15, 1989, SUBJECT: " 'ELIGIBLE' AND 'AVAILABLE' LAND UNDER THE FEDERAL ONSHORE OIL AND GAS LEASING REFORM ACT OF 1987."

98. 30 U.S.C. § 226(f) (Supp. V 1987).

99. 30 U.S.C. § 226(b)(1)(A) (Supp. V 1987).

100. *Id.*

101. 43 C.F.R. § 3120.5(b) (1987).

102. 30 U.S.C. § 226(b)(1)(B) (Supp. V 1987).

103. *Id.*

104. *Id.*

the Secretary must further clear an implicit congressional hurdle by notifying two key energy committees ninety days in advance of his intention to raise the minimum bid.¹⁰⁵ Finally, Congress declared that the regulation process of changing the national minimum acceptable bid is not a major Federal action subject to the requirements of the National Environmental Policy Act.¹⁰⁶

Two areas of the MLA that remain unaffected by the shift to all competitive bidding are the primary lease term and the royalty to be paid upon production of oil and gas. The Reform Act retained the primary term for competitive leases at five years¹⁰⁷ and the royalty rate at no less than a 12.5 percent in kind or in value of the production removed or sold from the lease.¹⁰⁸

An improvement for lessees focuses on the new requirement for the Bureau of Land Management to process bids after the oral auction within a set time period. Leases must be issued within sixty days of receipt of complete payment of the bonus bid and the first lease year's annual rental.¹⁰⁹ Prior to amendment the MLA placed no time requirement on the processing of leases leading on occasion to complaints about bureaucratic red tape.

2. Identification of Parcels for Sale

Before holding a lease sale, BLM must determine what eligible lands are available for leasing and which available lands should be placed in lease parcels for sale.¹¹⁰ Lands are open to leasing in the first instance by statute¹¹¹ and then by application of the various planning, environ-

105. *Id.* The specific congressional committees are the Committee on Energy and Natural Resources in the United States Senate and the Committee on Interior and Insular Affairs in the House of Representatives.

106. *Id.* Simply put, Congress relieved the Secretary from the requirement of preparing an environmental impact statement when he proposes or adopts a change to the national minimum acceptable bid.

107. 30 U.S.C. § 226(e) (1982). The Reform Act also did not affect the various lease extensions available to oil and gas leases. *E.g.*, 30 U.S.C. §§ 187a, 226(e), (j) and (m) (Supp. V 1987), nor did it affect the various relief from expiration and suspension provisions, 30 U.S.C. §§ 209, 226(i) (1982); *see generally* Solicitor's Opinion M-36953, 92 I.D. 293 (1985).

108. 30 U.S.C. § 226(b)(1)(B) (Supp. V 1987). Congress did not change the exclusion from royalty of production which is used on the lease or which is unavoidably lost. *See Gulf Oil Co. v. Andrus*, 460 F. Supp. 15 (C.D. Cal. 1978).

109. 30 U.S.C. § 226(b)(1)(B) (Supp. V 1987).

110. Neither the Reform Act nor the regulations define "available" or "eligible." The preamble to the final Reform Act rulemaking, 53 Fed. Reg. at 22,828 (June 17, 1988), states that "available means any lands subject to leasing under the Mineral Leasing Act." The Office of the Solicitor has advised the Director of this and recommended that he should adopt regulations to define these terms. MEMORANDUM FROM ASSISTANT SOLICITOR, ONSHORE MINERALS, DIVISION OF ENERGY AND RESOURCES, OFFICE OF THE SOLICITOR, TO DIRECTOR, BUREAU OF LAND MANAGEMENT, DATED DECEMBER 15, 1989, SUBJECT: "ELIGIBLE" AND "AVAILABLE" LAND UNDER THE FEDERAL ONSHORE OIL AND GAS LEASING REFORM ACT OF 1987." Similarly, the Forest Service does not define these terms or use the word "eligible." Instead, it refers to lands as "legally unavailable," 36 C.F.R. § 228.102(b) (1990), and as "administratively available," 36 C.F.R. § 228.102(d) (1990).

111. These lands are set out at 43 C.F.R. § 3100.0-3. and at 36 C.F.R. 228.102(b) (1990).

mental and resource protection laws. The Reform Act did not change the Secretary's discretion to decide whether a lease should be issued at all; it only changed the method by which the Secretary carries out his decision.¹¹²

Lands which are open to leasing are then divided into Federal lands administered by agencies other than BLM and public lands, *i.e.*, lands (and oil and gas interests reserved to the United States) which are administered by BLM. The former are available for leasing after review, and usually consent, by the surface managing agency.¹¹³ Public lands may only be leased after BLM has completed the requisite analyses under such laws as the National Environmental Policy Act of 1969 ("NEPA"),¹¹⁴ the National Historic Preservation Act¹¹⁵ and the Endangered Species Act.¹¹⁶ In some instances, BLM will include a special stipulation in a lease to ensure compliance with the particular statute when actual operations are proposed. BLM's long-term program is to comply with these laws at the leasing stage through its land use planning process.¹¹⁷

The Forest Service has established a two-part process for parcel identification modeled after the BLM system.¹¹⁸ First, the legally available, or "eligible," national forest lands are analyzed either in a forest plan, plan amendment or plan revision, or in a document prepared under

112. 30 U.S.C. § 226(a). *See* *Burglin v. Morton*, 527 F.2d 486, 488 (9th Cir. 1975), *cert. denied*, 425 U.S. 973 (1976); *McTiernan v. Franklin*, 508 F.2d 885, 887 (10th Cir. 1975); *Duesing v. Udall*, 350 F.2d 748, 750 (D.C. Cir. 1965); *cert. denied*, 383 U.S. 912 (1966); *see* *Udall v. Talman*, 380 U.S. 1, 4 (1964); *United States ex. rel. McLennan v. Wilbur*, 283 U.S. 414 (1931). Congress did not amend section 17(a) in the Reform Act, and nowhere in the legislative history of the Reform did Congress suggest that it modified the Secretary's discretion in any way.

113. 43 C.F.R. § 3101.7 (1988). The regulation is general except for specific recognition of the Forest Service in 43 C.F.R. § 3101.7(c) (1988).

114. 42 U.S.C. §§ 4321-4370 (1982 & Supp. V 1987).

115. 16 U.S.C. §§ 470 to 470w-6 (1982).

116. *Id.* §§ 1531-1544.

117. Before issuing oil and gas leases, BLM must consider whether the environmental impacts of leasing and possible development should be analyzed in an environmental impact statement ("EIS") and whether the impacts on statutorily protected resources such as historic properties and endangered species must be analyzed. *See generally* Mansfield, *Through the Forest of the Onshore Oil and Gas Leasing Controversy Toward a Paradigm of Meaningful NEPA Compliance*, 24 LAND & WATER L. REV. 85 (1989). Whether or not to prepare an EIS has generated considerable controversy. *See, e.g.*, *Bob Marshall Alliance v. Hodel*, 852 F.2d 1223 (9th Cir. 1988), *cert. denied sub. nom.* *Kohlman v. Bob Marshall Alliance*, 109 S.Ct. 340 (1989); *Conner v. Burford*, 848 F.2d 1441 (9th Cir. 1988), *cert. denied sub. nom.*, *Sun Exploration and Production Co. v. Conner*, 109 S.Ct. 1121 (1989); *Park County Resource Council v. U.S. Department of Agriculture*, 817 F.2d 609 (10th Cir. 1987); *Sierra Club v. Peterson*, 717 F.2d 1409 (D.C. Cir. 1983); *see generally* Mansfield, *supra*. This controversy obviously transcends the Reform Act although it is reflected in section 5111 where Congress directed a study by the National Academy of Sciences and the Comptroller General (General Accounting Office) of the manner in which oil and gas are considered in land use plans. Separate studies are not under way. BLM's efforts to comply with the various environmental and resource planning laws center on the resource management plan, 43 C.F.R. § 1600 (1988). The specific oil and gas procedures are set out in BLM Manual Section 1624.2.

118. *Cf.* 36 C.F.R. § 228.102 (1990) *with* BLM Manual 1624.2.

the National Environmental Policy Act.¹¹⁹ Lands that clear this analysis are “administratively available” for leasing and are subject to specific parcel identification.¹²⁰ When specific parcels are under consideration for leasing, the Forest Service will determine that the environmental effects of leasing have been adequately analyzed and that leasing is consistent with the applicable forest plan.¹²¹ As part of this review, the Forest Service must conclude that operations and development could be allowed somewhere on the parcel, a provision which replaced the controversial proposal to reserve the right in every lease to prohibit all activities.¹²² These various decision points are subject to the Forest Service appeal rules but there is no specific coordination between a Forest Service parcel identification decision and the 45-day notice requirement of the Reform Act.

One of the questions concerning the Reform Act is the ability of BLM to identify areas of oil and gas interest, given the assumed proclivity of the oil patch operators to play their cards close to the vest. BLM has attempted to provide several avenues for industry participation but of course cannot eliminate entirely the public nature of the process.

BLM has adopted four principal systems for parcel identification.¹²³ The first system concerns lands in existing leases. When a lease terminates, expires, is canceled or is relinquished, BLM will recycle the parcel for competitive sale.¹²⁴ As part of the recycle, BLM must deter-

119. 36 C.F.R. § 228.102(c) (1990). The Forest Service noted in the preamble that an environmental impact statement is not always necessary before oil and gas leasing. Final Preamble, 55 Fed. Reg. at 10,425 and 10,426.

120. 36 C.F.R. § 228.102(d) (1990). The forest plan itself does not have to address oil and gas leasing in order for the Forest Service to conduct a consistency review. Final Preamble, 55 Fed. Reg. at 10,430.

121. 36 C.F.R. § 228.102(e) (1990). This should not be taken as a guarantee that all proposed lease activity will be approved. The Forest Service maintains that it has always had the authority to disapprove specific operations. Final Preamble, 55 Fed. Reg. at 10,430 and 10,433.

122. 36 C.F.R. § 228.103 (1990). The Forest Service allows appeal of decisions on forest plans, projects and other activities that are set out in a “decision document.” 36 C.F.R. Part 217. A “decision document” is a written decision following analysis pursuant to the National Environmental Policy Act. 36 C.F.R. § 217.2 (1990). If parcel review does not require additional environmental analysis, then there will be no appealable decision. The Forest Service recently amended the appeal regulations to require publication of notice of appealable decisions in local newspapers in addition to other required notice. 55 Fed. Reg. 7,892 (March 6, 1990).

123. 43 C.F.R. § 3120.1-1 (1988). The regulation also provides three additional methods for parcel identification. The first involves lands administered by the General Services Administration (GSA). *Id.* § 3120.1-1(b). When federal land is declared excess under the Federal Property and Administrative Services Act of 1949, 40 U.S.C. §§ 471 *et seq.*, but is determined to have value for oil and gas, GSA retains federal ownership and delegates leasing authority to BLM. The second method involves the sale pursuant to 30 U.S.C. § 184(h)(2) (1982) of a cancelled interest in a lease when there are remaining, valid interests which are not subject to cancellation. *Id.* § 3120.1-1(c). The third category involves land closed to leasing but subject to loss of the federal resource due to drainage from adjacent non-federal land. *Id.* § 3120.1-1(d). *See* 40 Op. Atty. Gen. 41 (1941). None of the lands in these three categories revert to noncompetitive leasing if the parcel fails to attract a qualifying bid.

124. *Id.* § 3120.1-1(a) (1988).

mine whether the lands remain available, and eligible, either on its own if the lands are public land or by referral to the surface managing agency. If a parcel is not posted for sale within one year of lease cessation, the land becomes subject to the second and third systems.¹²⁵

The second system involves the filing of a noncompetitive lease application at the time the land is subject only to competitive leasing.¹²⁶ While this may sound inconsistent, the regulations make clear that the land must be posted for competitive sale before the noncompetitive application may be processed.¹²⁷ Once the noncompetitive application is filed, BLM determines whether the land is available, prepares the appropriate lease parcels and stipulations and posts the land for sale. Only if the parcel receives no qualifying bid at the sale will BLM process the noncompetitive application. The purpose of the system is evidently to encourage identification of lands for competitive sale by providing an early priority date for the noncompetitive lease application in the event the parcel does not receive a qualifying bid at the sale.¹²⁸ Consistent with this purpose, this system does not apply to a parcel during the first year after lease cessation when BLM is likely to recycle it nor does it apply to lands contained in parcels posted for sale.¹²⁹

The third and fourth systems of parcel identification are informal. The third allows BLM to post parcels for sale at its discretion such as when it believes there is leasing interest.¹³⁰ Under the fourth, the public may submit informal expressions of interest for land to be posted for sale.¹³¹ BLM has indicated that it will keep confidential all informal expressions of interest.¹³²

3. How Sales Are Conducted

The first step in the actual sale process is the posting of a Notice of Competitive Lease Sale at least forty-five days prior to the sale in the appropriate BLM State Office as well as at the surface managing agency if the list includes parcels of Federal land other than public land.¹³³ The Notice specifies when and where the sale will be held and must include copies of all stipulations applicable to each prospective

125. *Id.* § 3110.1(a)(i).

126. *Id.* § 3120.1-1(e).

127. *Id.* § 3110.1(a)(1).

128. *See id.* § 3110.2(a) ("Offers for lands available for noncompetitive offer . . . as specified in §§ 3110.1(a)(1) and 3110.1(b) of this title, shall receive priority as of the date and time of filing.")

129. *Id.* § 3110.1(a)(i)-(ii).

130. *Id.* § 3120.1-1(f).

131. *Id.* § 3120.1-1(e).

132. *See* Final Preamble, 53 Fed. Reg. 22,829 (1988) ("The identity of filers of expression of interest will be kept confidential.")

133. 43 C.F.R. §§ 3120.4-1(a), 3120.4-2 (1988). The Forest Service rules do not coordinate posting the sale notice with parcel identification. *Cf.* 36 C.F.R. 228.102(e) (1990) with 36 C.F.R. 228.115(a)(1) (1990). This could cause some confusion because posting the sale notice is normally the trigger for protests to BLM pursuant to 43 C.F.R. 3120.1-3 (1988).

lease.¹³⁴ The Notice will generally contain bidding and payment requirements as a matter of BLM policy.¹³⁵ The Notice must also specify the time on the first business day after the auction when parcels which received no qualifying bids at the sale become available for noncompetitive application.¹³⁶ BLM fulfills the tract description requirement by providing a narrative description of each parcel in the Notice which in turn will lead members of the public to the tract books or land plats that depict both leased and unleased land.¹³⁷

Once the Notice is posted, members of the public may protest the entire sale or the sale of specific parcels.¹³⁸ If BLM denies the protest, the affected party may appeal to the Interior Board of Land Appeals ("Board").¹³⁹ Normally, implementation of a decision is suspended during the thirty-day appeal period and, if the appeal is filed, during the pendency of the appeal.¹⁴⁰ These suspensions delay the final agency action subject to judicial review until the agency completes its administrative review.¹⁴¹ However, for Reform Act competitive sales, BLM has provided that no action, neither lease sale nor lease issuance, is suspended by the filing of an appeal.¹⁴² BLM does allow the State Director to suspend sale of specific parcels during the pendency of a protest or appeal but provides that only the Assistant Secretary, Land and Minerals Management, may suspend an entire sale for "good and just cause after reviewing the reason(s) for an appeal."¹⁴³ The decision by the Assistant Secretary whether or not to suspend the sale does not affect the jurisdiction of the Board to decide the substantive issues on appeal.¹⁴⁴ Although the Board may not suspend the sale, it has ordered issuance of leases after the sale suspended while it considers the appeal.¹⁴⁵ The Board did not explain how its order is compatible with the statutory requirement to issue a lease within sixty days¹⁴⁶ and the issue did not arise as the Board decided the case timely.¹⁴⁷

At the sale, each parcel is subjected to oral bidding as required by the Reform Act.¹⁴⁸ The winning bid is the highest bid at or above the

134. *Id.* §§ 3120.4-1(b)-(c).

135. *See* Final Preamble, 53 Fed. Reg. 22,829-30 (1988).

136. 43 C.F.R. § 3120.6 (1988).

137. *See* Final Preamble, 53 Fed. Reg. 22,829-30 (1988).

138. 43 C.F.R. § 4.450-2 (1988).

139. *Id.* § 4.410(a).

140. *Id.* § 4.21(a).

141. 5 U.S.C. § 704 (1982) ("[A]gency action . . . is final for the purposes of this section whether or not there has been presented or determined an application . . . , unless the agency otherwise requires by rule and provides that the action is meanwhile inoperative, for an appeal to superior agency authority.").

142. 43 C.F.R. § 3120.1-3 (1988).

143. *Id.*

144. *Cf.* Blue Star, Inc., 41 IBLA 333 (1979).

145. Southern Utah Wilderness Alliance, Order IBLA 89-234 (February 27, 1989).

146. *See supra* note 109 and accompanying text.

147. Southern Utah Wilderness Alliance, 108 IBLA 318 (April 28, 1989).

148. 43 C.F.R. §§ 3120.1-2(b), 3120.5-1(a) (1988); *see supra* note 99.

national minimum acceptable bid¹⁴⁹ which is made by a qualified bidder.¹⁵⁰ No bid may be withdrawn and each constitutes "a legally binding commitment to execute the lease bid form and accept a lease," including the obligation to make the various payments described below.¹⁵¹

After making the high bid, the winning bidder must submit certain payments and must execute the lease bid form. The payments required on the date of sale are the minimum bid, the first year's annual rent and an administrative fee of \$75.¹⁵² The winning bidder must pay the balance of the bonus, if any, within 10 working days.¹⁵³ The bidder may, of course, pay it all at the sale. Failure to complete payment of the bonus results in rejection of the bid and forfeiture of the payments made at the sale.¹⁵⁴ Although not specified in the regulations, BLM has recourse to the civil penalty provisions of the Federal Oil and Gas Royalty Management Act if the winning bidder fails to make any payment.¹⁵⁵

The lease bid form, which must be executed when the payments are made on the day of the sale, is the actual lease offer and execution of it constitutes the bidder's certification of its qualifications to hold the lease.¹⁵⁶ BLM awards the lease to the "highest responsible qualified bidder."¹⁵⁷ If BLM determines that a bidder is not qualified, notwithstanding execution of the lease bid form, it must reject the bid.¹⁵⁸ If a bid is rejected for any reason, the parcel must be reoffered competitively.¹⁵⁹

One area that bears watching will be the reaction of BLM and the Board of Land Appeals to high bidders who, while qualified, violate a mandatory procedure. Priority in competitive leasing is determined

149. *Id.* § 3120.5-1(a). The statutory national minimum acceptable bid of \$2 per acre. *Id.* § 3120.1-2(c). As noted above, this cannot be changed until December 22, 1989; see *supra* notes 101-106 and accompanying text.

150. 43 C.F.R. § 3120.5-1(b) (1988). See 43 C.F.R. §§ 3102.1 to 3102.5-3 for lessee qualifications.

151. 43 C.F.R. § 3120.5-3(a) (1988).

152. 43 C.F.R. § 3120.5-2(b) (1988). Payments must be made in the form set out in 43 C.F.R. § 3103.1-1 (1988), which is applicable to all payments made to BLM. *Id.* § 3120.5-2(a) (1988). Payments in cash are not acceptable for security reasons. See Final Preamble, 53 Fed. Reg. 22,818 (1988).

153. 43 C.F.R. § 3120.5-2(c) (1988). The actual payment period could exceed ten working days if, for example, a company were the high bidder for a tract on the first day of a two-day sale. The three "at-the-sale" payments are due on the day of the bidding but the remainder of the bonus is not due until eleven days later — the second sale day plus ten working days.

154. 43 C.F.R. § 3120.5-3(a) (1988).

155. 30 U.S.C. § 1719(a) (1982) ("Any person who - (1) after due notice of violation . . . fails or refuses to comply with any requirements of . . . any mineral leasing law, any rule or regulation thereunder, shall be liable for a penalty . . .").

156. 43 C.F.R. § 3120.5-3(a) (1988). See 43 C.F.R. §§ 3102.1 to 3102.5-3 (1988) for lessee qualifications.

157. 43 C.F.R. §§ 3120.5-1(b), 3120.5-3(b) (1988).

158. 30 U.S.C. § 226(b)(1)(A) (Supp. V 1987) ("highest responsible qualified bidder").

159. 43 C.F.R. § 3120.5-3(c) (1988).

by the amount bid. In the past, the Department of the Interior has forgiven violations where it gave the bidder no competitive advantage.¹⁶⁰ In noncompetitive leasing, however, priority is determined by the order in which a lease offer is filed. Failure to comply with a specific regulatory requirement will result in loss of priority for the lease and rejection if there is an intervening qualified applicant.¹⁶¹ The United States Court of Appeals for the Tenth Circuit observed: "[t]his distinction between noncompetitive and competitive offers is a valid one and justifies the difference in treatment accorded the classes by the Secretary."¹⁶²

Not all violations at a competitive sale may be forgiven, however. The United States Court of Appeals for the District of Columbia Circuit suggested that some deficiencies, such as lack of a signature on a sealed bid, are too substantive to be cured even though a lower bid will be accepted.¹⁶³ The Board of Land Appeals, in ruling that failure to submit the required one-fifth of the amount bid at the sale cannot be cured, stated: "waiver of the requirement . . . would be so prejudicial to the conduct of lease sales that it cannot be permitted."¹⁶⁴ With the increasing number of competitive sales under the Reform Act, the Board will have new opportunities to apply this standard.

The Mineral Leasing Act for Acquired Lands authorizes the leasing of future interests of oil and gas owned by the United States.¹⁶⁵ BLM has included these interests in the new sale process by posting them for sale following receipt of a noncompetitive offer.¹⁶⁶ The lease becomes effective when the oil and gas vests in the United States.¹⁶⁷ However, BLM has eliminated all payments prior to the effective date of the lease.¹⁶⁸ Because BLM must issue the future interest lease to the highest responsible qualified bidder, without regard to ownership of any present interest,¹⁶⁹ BLM requires the winning bidder to treat the ownership and existence of the future interest lease in the same manner as it treats the ownership and existence of any present interest it may acquire.¹⁷⁰

160. *E.g. North American Coal Corp.*, 74 Interior Dec. 209 (1967).

161. *E.g., KVK Partnership v. Hodel*, 759 F.2d 814 (10th Cir. 1985); *Brick v. Andrus*, 628 F.2d 213 (D.C. Cir. 1980).

162. *Ballard E. Spencer Trust Inc. v. Morton*, 544 F.2d 1067, 1070 (10th Cir. 1976).

163. *Superior Oil Co. v. Udall*, 409 F.2d 1115, 1119-20 (D.C. Cir. 1969), *vacated as moot*; *Superior Oil Co. v. Hichel*, 421 F.2d 1089 (D.C. Cir. 1969); *compare Chevron Oil Co. v. Andrus*, 588 F.2d 1383, 1388 (5th Cir. 1979) (implying this portion of *Superior Oil* is dicta).

164. *Sarkeys, Inc.* 26 IBLA 141, 143 (1976); *accord Dolton H. Simmons*, 85 IBLA 297 (1985).

165. 30 U.S.C. § 354 (1982).

166. 43 C.F.R. §§ 3110.9-1, 3110.9-2 (1988). The regulations for competitive leasing of future interests, 43 C.F.R. § 3120.7 (1988), do not explain how to initiate leasing of these interests. Presumably, any appropriate procedures in 43 C.F.R. § 3120.1-1 (1988) could be used in addition to the filing of a noncompetitive offer.

167. 43 C.F.R. § 3120.7-2(b) (1988).

168. *Id.* § 3120.7-1(a).

169. *See* Final Preamble, 53 Fed. Reg. 22,831 (1988).

170. 43 C.F.R. §§ 3120.7-2(a)(1) and (2) (1988).

The system described above calls for a one-step competitive sale process. BLM conducted half of its test sales, however, by the nomination-auction process.¹⁷¹ In the final rules BLM made this two-step competitive sale process an option of the BLM Director which requires a notice in the *Federal Register* with an opportunity for public comment of at least thirty days.¹⁷² BLM will use the one-step sale process until a future Director makes this election.¹⁷³

The nomination process would begin after identification of lease parcels. BLM would then post a List of Lands Available for Competitive Nomination.¹⁷⁴ Nominations would have to contain certain information, meet certain filing requirements, and be accompanied by the national minimum acceptable bid, the first year's rent, and the \$75 fee.¹⁷⁵ Parcels receiving a nomination would be posted for sale¹⁷⁶ where the nomination would be announced as the first oral bid.¹⁷⁷

If the nominator is not the winning bidder, its payments would be refunded.¹⁷⁸ If two or more nominations are received for a parcel, this would be shown on the sale notice.¹⁷⁹ If no higher bids were made at the sale, all payments would be refunded and the parcel recycled for a future competitive sale since all nominations for a parcel are accompanied by an equal amount of money.¹⁸⁰ If no nomination were received for a parcel, the parcel would be available for noncompetitive leasing for the two-year period.¹⁸¹

BLM received several comments suggesting that the nomination system was not consistent with the Reform Act.¹⁸² BLM concluded otherwise, apparently based on the lack of definition of "lease sale" in the Reform Act and the opportunity for "oral bidding" after a nomination is received.¹⁸³

B. Noncompetitive Leasing

1. Statutory Provisions

Whatever lands do not receive the national minimum acceptable bid become subject within thirty days to issuance of leases noncompetitively.¹⁸⁴ Indeed, such rejected lands may only be leased noncompeti-

171. See *supra* Part II.B.

172. 43 C.F.R. § 3120.3 (1988).

173. See Final Preamble, 53 Fed. Reg. 22,829 (1988).

174. 43 C.F.R. § 3120.3-1 (1988).

175. *Id.* §§ 3120.3-2 to 3120.3-4.

176. *Id.* § 3120.3-5.

177. *Id.* § 3120.5-1(a).

178. *Id.* § 3120.3-7.

179. *Id.* § 3120.3-5.

180. *Id.* § 3120.5-1(c).

181. *Id.* § 3120.3-6.

182. See Final Preamble, 53 Fed. Reg. 22,829 (1988).

183. 30 U.S.C. § 226(b)(1)(A) (Supp. V 1987).

184. 30 U.S.C. § 226(b)(1)(A) (Supp. V 1987).

tively for two years after the competitive lease sale.¹⁸⁵ Should the two-year noncompetitive period go by without either the land being leased or having a lease application for the land filed, then the lands will return to the general inventory of lands subject to leasing only under the new competitive system.¹⁸⁶

Congress thus preserved a noncompetitive component in the oil and gas leasing program, but limited it to the two-year period after a parcel fails to receive a qualifying bid at a sale. This removes land availability and eligibility as an issue in the noncompetitive leasing system (unless significant new information is developed after the sale), since BLM reviewed the land prior to posing it for competitive sale. The focus of noncompetitive leasing then is on applicant priority and lease offer requirements. The MLA's basic format for issuing noncompetitive leases prior to the Reform Act remains unchanged. Noncompetitive leases are issued to the first qualified person to make written application for lease of the lands not sold at oral auction.¹⁸⁷ The Reform Act added an application fee provision of not less than \$75 as established by regulation.¹⁸⁸ The Reform Act's sixty-day lease issuance requirement for competitive bid winners applies to noncompetitive leases as well. The sixty days begins to run from the date when the Secretary identifies the first qualified responsible applicant.¹⁸⁹

The Reform Act did not affect the primary term and royalty rate for noncompetitive leases. The primary term remains ten years and for so long thereafter as oil or gas is produced in paying quantities.¹⁹⁰ The royalty rate of a flat 12.5 percent in kind or in value of the production removed or sold from the lease also remains in effect.¹⁹¹ When a noncompetitive lease expires or is terminated, cancelled or relinquished, the lands revert to the general inventory to be re-leased under the competitive system.¹⁹²

2. How BLM Determines Noncompetitive Priority

Section 17(c) of the MLA, both before and after the Reform Act, authorizes issuance of noncompetitive oil and gas leases for the "person first making application for the lease who is qualified to hold a

185. *Id.*

186. Pub. L. No. 100-203, 101 Stat. 1330-256, 1330-257 (1987) (codified at 30 U.S.C. § 226(c)(2)(A) (Supp. V 1987)). The recycle provision is not explained in any of the congressional committee reports but was apparently an effort by Congress to ensure that if new drilling activity causes high interest in an area, unleased Federal land will not be locked into noncompetitive leasing merely because it received no bids at a time when interest was low.

187. 30 U.S.C. § 226(c)(1) (Supp. V 1987). Congress did not change the Secretary's ultimate discretion to decide whether to issue a lease to anyone. 30 U.S.C. § 226(a) (1982).

188. 30 U.S.C. § 226(c)(1) (Supp. V 1987).

189. *Id.* See 43 C.F.R. §§ 3102.1 to 3102.5-3 (1988) for lessee qualifications.

190. 30 U.S.C. § 226(e) (1982).

191. See *supra*, notes 113 and 123.

192. 30 U.S.C. § 226(c)(2)(B) (Supp. V 1987).

lease under this Act."¹⁹³ However, in neither version of section 17(c) did Congress prescribe how to determine the "first" applicant. This leaves the method to the discretion of the Secretary.¹⁹⁴

In the past, BLM used the Secretary's discretion to establish two noncompetitive leasing systems: (1) the over-the-counter system¹⁹⁵; and (2) the simultaneous system.¹⁹⁶ BLM, not expecting the problems that caused development of the simultaneous system and heeding the admonition of the Committee on Interior and Insular Affairs,¹⁹⁷ retained only the over-the-counter system in its new regulations.¹⁹⁸

The basic principle of the new regulations is the same as the old over-the-counter system: priority is determined as of the date and time of filing, with simultaneous filings determined by drawings.¹⁹⁹ BLM adopted two modifications to reflect the changes made by Congress in the Reform Act. First, as an exercise of the Secretary's discretion to establish procedures,²⁰⁰ BLM allows noncompetitive offers to be filed when the land is still subject to competitive leasing only.²⁰¹ From the noncompetitive perspective, the sole purpose of such a filing is to obtain priority in the event the parcel receives no qualifying bid at the sale. Noncompetitive offers may be larger than competitive parcels. For example, outside Alaska, the regulations allow a 10,240-acre noncompetitive lease offer compared to a 2,560-acre competitive parcel.²⁰² Thus, the noncompetitive applicant may receive priority for only a portion of the offers in the event some, but not all, subdivided competitive parcels receive qualifying bids.

By the second modification, BLM considers all noncompetitive offers filed on the first business day after the sale to be filed simultaneously.²⁰³ This provision is obviously designed to carry out the advice of the Committee on Energy and Natural Resources that "where there is a substantial activity or interest in particular lands, the Secretary of the Interior will determine an orderly means of prioritizing applicants."²⁰⁴

193. Compare 30 U.S.C. § 226(c) (1982) with 30 U.S.C. § 226(c)(1) (Supp. V 1987).

194. 30 U.S.C. § 189 (1982); *Thor-Westcliffe Development, Inc. v. Udall*, 314 F.2d 257, 259 (D.C. Cir. 1963), *cert. denied*, 373 U.S. 951 (1963) ("This [discretion in 30 U.S.C. § 189 to issue rules], of course, does not mean that the Secretary is permitted to grant a lease to one other than 'the person first making application.' It does mean that the Secretary is to determine who that first person is.")

195. 43 C.F.R. §§ 3111.1 to 3111.3-5 (1987).

196. *Id.* §§ 3112.0-5 to 3112.7.

197. "The Committee notes that under no circumstances shall this program be implemented in the form of a simultaneous lease drawing." H.R. REP. NO. 378 pt. 1, 100th Cong., 1st Sess. 12 (1987).

198. 43 C.F.R. §§ 3110.1 to 3110.9-4 (1988).

199. Compare 43 C.F.R. § 3111.1-1(b)(1987) with 43 C.F.R. § 3110.2(a) (1988). The regulations in 43 C.F.R. § 1821.2-3(a) (1988) define when documents are considered simultaneously filed as delivery or receipt by a BLM office at the same time or in accordance with an opening order. The regulator goes on to specify a public drawing to determine priority. 43 C.F.R. § 1821.2-3(b) (1988).

200. See *supra* note 194.

201. 43 C.F.R. § 3110.1 (1988); see *supra* Part III.A.2.

202. *Id.* § 3110.3-3(d).

203. *Id.* § 3110.2.

204. S. REP. NO. 88, 100th Cong., 1st Sess. 5 (1987).

The provision that offers will not be available for public inspection on this day²⁰⁵ is also a result of expecting a "land office" business on the first day of noncompetitive availability.²⁰⁶

BLM did not change the remaining priority principles such as curable defects²⁰⁷ and loss of priority for a bounced check until proper payment is made.²⁰⁸ The new regulations also specify that BLM may request supplementary maps for acquired land without the applicant losing priority.²⁰⁹ Otherwise, the regulations continue the policy that an offer that does not meet the requirements of the regulations will be rejected, with a corresponding loss of priority.²¹⁰ However, the new regulations also provide that priority reattaches as of the date a deficient application is corrected, provided no intervening offer has established priority.²¹¹ This regulation impliedly recognizes that an offer can be corrected, rather than rejected, if not filed in accordance with the regulations, although the priority date changes.²¹²

3. How the New Regulations Affect Filing a Noncompetitive Offer

For the most part, the regulations describing how a noncompetitive offer is filed, what it must contain and how it is processed are the same rules that previously applied to over-the-counter lease offers.²¹³ One change made as a result of the Reform Act requires applicants to describe lands in offers during the remainder of the month in which the competitive sale was held by the parcel number used on the Notice of Competitive Lease Sale.²¹⁴ Filing an offer in this manner is considered acceptance of all stipulations identified in the Notice as applicable to the particular parcel.²¹⁵ Filing a noncompetitive offer prior to the competitive sale also constitutes acceptance of the stipulations iden-

205. 43 C.F.R. § 3110.2 (1988).

206. See Final Preamble, 53 Fed. Reg. 22,824 (1988).

207. 43 C.F.R. § 3110.4(b) (1988) referencing 43 C.F.R. § 3103.2-1(a) (minor rental errors) and § 3110.3-3(c) (minor acreage errors).

208. *Id.* § 3110.4(a).

209. *Id.* § 3110.5-3(e).

210. *Id.* § 3110.7(d).

211. *Id.* § 3110.4(b), referencing that those defects which are curable with no loss of priority are set out at 43 C.F.R. §§ 3103.2-1(a) and 3110.3-3(c).

212. *Id.* § 3111.4(b). In the past, there has been some confusion on this. While it may seem a matter of semantics, rejection of an offer entails a refund of the annual rent and loss of the filing fee. If BLM allows correction, the original payment remains in effect.

213. These similarities include lease issuance and effective dates (34 C.F.R. § 3110.3-2 (1988)), lease offer size (*Id.* § 3110.3-3), lease offer form (*Id.* §§ 3110.4(a) and 3110.7(e)), number of copies, signature and fee (*Id.* § 3110.4(a)), offers limited to either acquired land or public domain land (*Id.* § 3110.4(c)), compliance with lessee qualifications (*Id.* § 3110.4(d)), land descriptions (*Id.* §§ 3110.5-2 to 3110.5-5), conflicting offers and terminated leases (*Id.* § 3110.7(a) and (b)) and acceptance (*Id.* § 3110.7(c)). BLM only adopted substantial revision to the rules for describing acquired lands (*Id.* § 3110.5-3) in the Reform Act rulemaking. Otherwise, these rules continue the pre-Reform Act provisions.

214. 43 C.F.R. § 3110.5-1 (1988).

215. *Id.* § 3101.1-3.

tified for the parcel in the Notice of Competitive Lease Sale.²¹⁶ Another change prohibits withdrawal of a post-sale offer for 60 days in order to prevent the filing of offers merely to tie up the land while seeking a buyer of the lease.²¹⁷

As a further result of the Reform Act, ownership of the present rights to the oil and gas is no longer a prerequisite to obtain a future interest lease.²¹⁸ The noncompetitive future interest lease terms and conditions are the same as for competitive leases.²¹⁹

C. Other Provisions

Congress amended the oil and gas leasing process in a variety of ways in addition to the method of lease issuance. In this section we summarize these amendments and the corresponding regulations.

Prior to the Reform Act annual rentals under the MLA were not less than fifty cents per acre for each year of the lease payable in advance.²²⁰ A minimum royalty of \$1 per acre in lieu of rental was payable at the expiration of the lease year after discovery of oil or gas in paying quantities on the leased lands.²²¹ The Reform Act amends the MLA to require annual rentals of not less than \$1.50 per acre for each of the first five years of the lease and not less than \$2 per acre per year for each year thereafter.²²² The minimum royalty due upon discovery of oil and gas in paying quantities is now to be no less than the rental rate otherwise required for that lease year.²²³

BLM adopted the minimum rentals specified in the Reform Act for new leases (\$1.50 per acre for the first five years, \$2 thereafter).²²⁴ BLM retained in the regulation the opening paragraph requiring, among other things, payment of rent on or before the anniversary date.²²⁵ For

216. *Id.* The only recourse is to withdraw the offer. This automatic acceptance rule means that BLM will consider the stipulations to be part of the lease contract when issued without obtaining the acceptance of the applicant by signature on the stipulations. See Final Preamble, 53 Fed. Reg. 22,827 (1988).

217. 43 C.F.R. § 3110.6 (1988). See Final Preamble, 53 Fed. Reg. 22,827 (1988).

218. See Final Preamble, 53 Fed. Reg. 22,827 (1988).

219. Compare 43 C.F.R. § 3110.9-3 (1988) with 43 C.F.R. § 3120.7-2 (1988).

220. 30 U.S.C. § 226(d) (1982).

221. *Id.*

222. 30 U.S.C. § 226(d) (Supp. V 1987). Congress deleted the sentence requiring that annual rentals be paid in advance. The deletion appears to be inadvertent. The bills reported by the two congressional committees retained the advance payment requirement but set different minimum rental amounts. H.R. REP. NO. 378, 100th Cong., 1st Sess. 2 (1987); S. REP. NO. 188, 100th Cong., 1st Sess. 5, 44 (1987). The Conference Committee report describes the compromise on the minimum rent but does not mention the advance payment provision. H.R. REP. NO. 495, 100th Cong., 1st Sess. 780 (1987), reprinted in 1987 U.S. CODE CONG. & ADMIN. NEWS 2313-1526. However, section 31 (b) of the MLA, 30 U.S.C. § 188(b), still requires payment of rental on or before the anniversary date in order to avoid automatic termination of the lease.

223. 30 U.S.C. § 226(d) (Supp. V 1987).

224. 43 C.F.R. § 3103.2-2(a) (1988).

225. *Id.* § 3103.2-2. (Note ellipses where this regulation is amended, 53 Fed. Reg. 22,832 (1988).)

offers pending on the date of the Reform Act, BLM retained the per acre rent at \$1 for noncompetitive offers and at \$2 for competitive offers.²²⁶ BLM lowered the rent increase from \$3 per acre to \$2 per acre for the second five years of a lease issued pursuant to the old simultaneous leasing system.²²⁷ Finally, BLM eliminated the rent increase when lands in a noncompetitive lease are included within a KGS.²²⁸ As far as the royalty rate is concerned, BLM adopted a flat rate of 12.5 percent for both new competitive and noncompetitive leases.²²⁹ The regulations specifically note that the new lower competitive royalty rate does not affect competitive offers or competitive leases existing on the date of the Reform Act.²³⁰ The new regulations also restate that minimum royalty shall be at the same rate as the rent for Reform Act leases.²³¹

For acquired National Forest lands, the Bureau of Land Management (BLM) may only issue leases with the "consent" of the Secretary of Agriculture and subject to conditions that he may prescribe.²³² No similar statutory authority existed for public domain National Forest land although BLM only issued leases after consultation with the Forest Service.²³³ In the Reform Act, Congress enhanced this consultation role by prohibiting BLM from issuing a lease for public domain national forest land "over the objection of the Secretary of Agriculture."²³⁴ At most, this provision puts public domain national forest land on an equal footing with acquired national forest land insofar as oil and gas leasing is concerned.²³⁵ BLM recognizes the role of the Forest Service in the revised regulations.²³⁶

Another area of the MLA affected by the Reform Act concerns lease cancellations. Section 31(b) of the MLA authorizes the Secretary to cancel an oil and gas lease administratively after thirty days notice for

226. 43 C.F.R. § 3103.2-2(b) (1988).

227. *Id.* § 3103.2-2(b)(1).

228. *Id.* § 3103.2-2(b)(2).

229. *Id.* § 3103.3-1(a)(1).

230. *Id.* §§ 3103.3-1(a)(1)(i)-(ii).

231. *Id.* § 3103.3-2(a)(2).

232. 30 U.S.C. § 352 (1982). This consent is not limited to the Secretary of Agriculture but applies to any Federal agency which manages acquired land that is open to mineral leasing. *Id.*

233. 43 C.F.R. § 3101.7 (1987). Other public domain lands require consent of the surface managing agency in order to lease. *See, e.g.*, 43 U.S.C. § 158 (1982) (Secretary of Defense may bar leasing on military lands if inconsistent with military use).

234. 30 U.S.C. § 226(h) (Supp. V 1987). *See supra* note 66.

235. We say "at most" because the "objection" language was adopted by the Conference Committee as a modification of the "consent" requirement in the House version and to replace the "consultation" requirement in the Senate version. H.R. REP. NO. 493, 100th Cong., 1st Sess. 779 (1987) *reprinted in* 1987 U.S. CODE & ADMIN. NEWS 2313-1245, 2313-1525. The House Committee intended its consent provision "to be identical to the Secretary of Agriculture's authority, pursuant to the Mineral Leasing Act for Acquired Lands, over leasing in acquired national forest lands." H.R. REP. NO. 378, 100th Cong., 1st Sess. 13 (1987). Modifying "consent" to "objection" may not have lessened this authority, but it certainly did not increase it.

236. 43 C.F.R. § 3101.7-1(c) (1988).

failure of the lessee to comply with any lease provision.²³⁷ In the Reform Act, Congress changed the exception to this authority from leases "known to contain valuable deposits of oil or gas"²³⁸ to leases containing a well capable of production in paying quantities or leases previously committed to an approved unit plan or communitization agreement which contains a well capable of production of unitized substances in paying quantities.²³⁹ Leases which fall in the exception categories are subject to cancellation for breach only by judicial action as described in section 31(a).²⁴⁰ Congress made this change to eliminate all statutory requirements for geologic-based criteria as a basis for managing oil and gas leases.²⁴¹ BLM similarly modified its lease cancellation regulation and added a paragraph to recognize the provisions of section 27(h)(1)²⁴² of the MLA regarding improper lease interests.²⁴³ These changes also clarify BLM's authority to cancel administratively any improperly issued lease.²⁴⁴

The Reform Act provides an additional discretionary ground for disapproval of an assignment of an oil and gas lease. Previously, the Secretary only had the discretion to disapprove assignments of separate zones or deposits or assignments that did not follow legal subdivisions.²⁴⁵ The Reform Act retained these grounds but added authority to disapprove assignments of less than 640 acres outside Alaska.²⁴⁶ This authority was provided to allow the Secretary to combat fraudulent subdivision of leases into small parcels by boiler room operators or other "40 Acre Merchants."²⁴⁷

Congress also included its standard sixty-day processing time frame for approval of an assignment that meets all legal criteria.²⁴⁸ Evidently Congress heard clearly the entreaties of constituents in the oil and gas business unhappy with the time lapse between filing the request for approval and eventual approval or denial. Unanswered under the statute, however, is the question of whether or not requests not dealt with

237. 30 U.S.C. § 188(b) (1982).

238. *Id.*

239. Pub. L. No. 100-203, 101 Stat. 1330-256, 1330-259 (1987) (codified at 30 U.S.C. § 188(b) (Supp. V 1987)). Production in paying quantities is defined in the regulations at 43 C.F.R. § 3160.0-5(t) (1988) and production of unitized substances in paying quantities is defined in the unit agreement.

240. 30 U.S.C. § 188a (1988). This paragraph provides the Secretary with authority to fashion appropriate remedies such as liquidated damages for a breach of any MLA lease up to and including cancellation by judicial action.

241. S. Rep. No. 188, 100th Cong., 2d Sess. 5-6 (1987).

242. 30 U.S.C. § 184(h)(1) (1982).

243. 43 C.F.R. § 3108.3(a)-(c) (1988).

244. 43 C.F.R. § 3108.3(d) (1988); *see Boesche v. Udall*, 373 U.S. 472 (1963).

245. 30 U.S.C. § 187a (1982).

246. 30 U.S.C. § 187a (Supp. V 1987). The minimum acreage in Alaska is 2,560 acres. The Reform Act did not affect the mandatory disapproval if the assignee is not qualified or does not post adequate bond.

247. H.R. Rep. No. 378 pt. 1, 100th Cong., 1st Sess. 13 (1987).

248. 30 U.S.C. § 187a (Supp. V 1987); *see supra* notes 109 and 189 and accompanying text.

in the sixty-day time period should be deemed approved or if the government suffers any penalty for its tardiness.²⁴⁹

BLM implemented its new authority to disapprove assignments which subdivide leases into forty-acre parcels (640 acres in Alaska) without criteria to determine how the assignment would "further the development of oil and gas."²⁵⁰ Execution and submission to BLM of a request to approve such an assignment are deemed to be a certification that the statutory standards are met.²⁵¹ BLM may then accept the certification, or it may request submission of additional information.²⁵²

Reflecting the growing concerns over the environment and the hotly contested battles over proposed wilderness areas, the Reform Act added a new section to the MLA. This section prohibits the Secretary from issuing oil and gas leases on any federal lands recommended for wilderness allocation by the surface managing agency. It also prohibits leases within BLM wilderness study areas or congressionally designated wilderness study areas unless exceptions have been granted in the enabling legislation.²⁵³ However, the section further provides that nothing shall affect any authority the Secretaries of Interior and Agriculture may have to issue permits for oil and gas exploration provided the permits are utilized in a fashion that does not require road construction or improvement of the status quo and can be conducted in a manner unlikely to harm the wilderness environment.²⁵⁴ Although the congressional committee reports provide no explanation of exploration permits, the context suggests the Congress was referring to permits for geological and geophysical work which do not require the existence of a lease. This exception is better defined in the appropriation laws²⁵⁵ where Congress for several years had expressly limited the

249. Compare the Freedom of Information Act where Congress provides that failure to meet the time frames for production of documents constitutes exhaustion of administrative remedies. 5 U.S.C. § 552(a)(6)(C) (1982). Actually, Congress addressed the same problem in 1946 by making the approval effective the first of the month after it is filed rather than the date of the BLM decision. 30 U.S.C. § 187a (1982), S. Rep. No. 1392, 79th Cong., 2d Sess. 3 (1946).

250. See Final Preamble, 53 Fed. Reg. 22,821-22 (1988).

251. 43 C.F.R. §§ 3102.5-1(g), 3106.1(b) (1988).

252. *Id.* § 3102.5-3.

253. MLA § 43, 30 U.S.C. § 226-3 (Supp. V 1987). The prohibition is at section 43(a). Congress extended this prohibition to all minerals subject to the MLA and to geothermal resources in section 5 of the Geothermal Steam Act Amendments of 1988.

254. MLA § 43(b), 30 U.S.C. § 226-3(b).

255. *E.g.*, section 307 of the Department of the Interior and Related Agencies Appropriations Act, FY 1989, Public Law No. 100-446, 102 Stat. 1823. Section 307 prohibits use of appropriated funds for processing or issuing permits or leases for leasable minerals, including oil and gas, in the areas described in section 43(a) of the MLA as well as designated wilderness areas. The section contains the following exception for oil and gas exploration:

Provided further, That funds provided in this Act may be used by the Secretary of Agriculture in any area of National Forest lands or the Secretary of the Interior to issue under their existing authority in any area of National Forest or public lands withdrawn pursuant to this Act such permits as may be necessary to conduct prospecting, seismic surveys, and core sampling conducted by helicopter or other means not requiring construc-

types of oil and gas exploration for which permits may be issued using appropriated funds. BLM amended its regulations to reflect this leasing prohibition.²⁵⁶

Finally, the Reform Act requires a study to be done in which oil and gas resources are considered in land use plans developed by the Secretary of the Interior and forest management plans developed by the Secretary of Agriculture.²⁵⁷ The study was to be performed by the National Academy of Sciences and the Comptroller General of the United States in an effort to ensure that potential oil and gas resources are adequately addressed in planning documents along with a balancing review of the social, economic and environmental repercussions of developing those resources with or without stipulations.²⁵⁸ These two entities were unable to cooperate and thus conducting separate studies.

The National Academy issued its report in September 1989.²⁵⁹ The report focused on multiple use lands managed by the Bureau of Land Management and the Forest Service. Overall, the Academy concluded that the agencies' planning processes have proven adequate to deal with issues related to oil and gas exploration and development on most federal lands. The Academy therefore focused its recommendations on the controversial areas, many of which are in the Rocky Mountain states, where there has been little or no exploration.

The report contained four core recommendations and five supplemental ones. The core recommendations addressed land availability issues: (1) planning should analyze reasonably foreseeable development; (2) national and local unsuitability criteria should be developed and applied during planning; (3) where surface values are high, leases should only authorize exploratory drilling at specified locations; and (4) leases should reserve to the government the right to prohibit lease activity based on unacceptable impacts, with direct acquisition and development costs reimbursed to the lessee.²⁶⁰ The supplemental recommendations covered such diverse issues as lease configuration, lease duration, public participation and planning coordination.²⁶¹ The core

tion of roads or improvements of existing roads or way, for the purpose of gathering information about the inventorying of energy, mineral, and other resource values of such area, if such activity is carried out in a manner compatible with the preservation of the wilderness environment . . .

Id. at 1824. This provision was dropped from the fiscal year 1990 Appropriations Act, Pub. L. No. 101-121, 103 Stat. 701 (1990).

256. 43 C.F.R. §§ 3100.0-3(a)(2)(vii)-(x), (b)(2)(viii)-(ix) (1988). The Forest Service also reflected this statutory prohibition in the regulations at 36 C.F.R. § 228.102(b) (1990).

257. Land use plans are prepared by the Bureau of Land Management pursuant to the Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701-1784 (1982). Forest management plans are prepared by the Forest Service pursuant to the Forest and Rangeland Renewable Resources Act of 1974, 16 U.S.C. § 1601 (1982).

258. Lease stipulations are specified measures added to the standard lease form to address resources or other concerns known or suspected to be present on the leased land. 43 C.F.R. § 3101.1-3 (1988).

259. LAND USE PLANNING AND OIL AND GAS LEASING ON ONSHORE FEDERAL LANDS, NATIONAL ACADEMY OF SCIENCES (National Academy Press 1989).

260. *Id.* at 107-124.

261. *Id.* at 124-130.

recommendations are obviously controversial and will require careful Congressional consideration. In a brief minority statement, James A. Barlow, Jr., of Barlow & Haun, Inc., noted that the report had little input from industry and that the recommendations would lead to rules under which industry could not function.²⁶²

IV. LEASE OPERATIONS

In a series of amendments which were not the focus of the Reform Act but which may have long-lasting consequences, Congress provided a statutory framework for the regulation of lease operations. The new provisions were set out as paragraphs (f) and (g) of section 17 of the MLA.²⁶³ They originated in the House bill and were revised in the Conference Committee.²⁶⁴ However, neither the House nor Conference Committee report provides much explanation as to why Congress felt these provisions were necessary or what problems they were intended to redress.²⁶⁵ As a result, the new provisions should be seen as an adoption of the existing system for regulation of lease operations, with changes limited to the specific statutory requirements.

A. *Permits to Drill and Notice*

1. Statutory Provisions

First and foremost, the Reform Act recognizes that the Secretary of the Interior, and the Secretary of Agriculture for national forest land, regulates all surface-disturbing activities on a lease and determines the appropriate reclamation standards and resource conservation measures.²⁶⁶ These responsibilities are carried out through analysis and approval by the appropriate Secretary of a plan of operations for surface-disturbing activities as part of the consideration of an application for permit to drill.²⁶⁷ The new feature in this statutory rendition of the administrative process developed by the Department of the Interior during the more than sixty-five years of experience under the MLA is approval of a plan of operations on national forest land by the Secretary of Agriculture before the Secretary of the Interior may approve an application for a permit to drill. Prior to the Reform Act, the Secretary of Agriculture had only a consultative role.

The Reform Act also adds a notice requirement which in many instances will be merely red tape while in others may provide useful information to the public.²⁶⁸ At least thirty days before issuing a permit to drill or substantially modifying the terms of an oil and gas lease,

262. *Id.* at 131.

263. 30 U.S.C. §§ 226(f)-(g) (Supp. V 1987); *see supra* note 66.

264. H.R. REP. NO. 378, 100th Cong., 1st Sess. (1987); H.R. REP. NO. 495, 100th Cong., 1st Sess. (1987), *reprinted in* 1987 U.S. CODE CONG. & ADMIN. NEWS 2313-1245.

265. *Id.*

266. 30 U.S.C. § 226(g) (Supp. V 1987).

267. *Id.*

268. *Id.* § 226(f).

the Secretary of the Interior must post notice to the public in the appropriate local office of the Bureau of Land Management and of the land management agency, if different, such as the Forest Service.²⁶⁹ The Reform Act then specifies the content of the notice as “terms or modified lease terms and maps or a narrative description of the affected lands” but if inclusion of a map is not practicable one must be made available to the public.²⁷⁰

2. Approval of a Permit to Drill

Unlike the new leasing regulations, BLM did not need to develop a whole new system to regulate lease operations. For many years the Department of the Interior has required, in one form or another, an operator to submit an application for permit to drill (APD) for approval prior to conducting lease operations.²⁷¹ These regulations are supplemented by more detailed instructions for preparation of an APD in Onshore Order No. 1 and for drilling operations in Onshore Order No. 2.²⁷² BLM made no exception for Indian lands in the revised description of the APD components. BLM merely had to blend the Reform Act requirements and terminology into these regulations. The Forest Service did not have regulations in place and had to develop its own, which follow the BLM system for permits to drill.²⁷³

The APD must be submitted directly to BLM which will then distribute it to any affected surface management agency.²⁷⁴ Prior to the Reform Act, BLM specified that an APD include a drilling plan which described both surface and subsurface components.²⁷⁵ Onshore Order No. 1 then specified the content of the “surface use program.” The revised BLM regulations and the Forest Service regulations separate

269. *Id.*

270. *Id.*

271. *E.g.*, 30 C.F.R. § 221.21(b) (1981) originally issued at 7 Fed. Reg. 4,132 (June 2, 1942). The most recent complete revision of the oil and gas operating regulations was proposed by the U.S. Geological Survey in 1981 and adopted by the Minerals Management Service in 1982 as 30 C.F.R. §§ 221.1 to 221.73 (1982). When management of mineral lease operations was transferred to BLM, these regulations became 43 C.F.R. §§ 3160.0-1 to 3165.4, 48 Fed. Reg. 36,583 (August 12, 1983) where they are now set out. These regulations contain such elements as objectives and definitions, jurisdiction and responsibility in §§ 3160.0-1 to 3161.3, requirements for lessees and operators in §§ 3162.1 to 3162.8, noncompliance, assessments and penalties in §§ 3163.1 to 3163.6, orders, notices and surface authority in §§ 3164.1 to 3164.4 and relief and appeals in §§ 3165.1 to 3165.4. The APD regulation is set out at 43 C.F.R. § 3162.3-1 (1988).

272. 43 C.F.R. § 3164.1 (1988). Onshore Orders are adopted through a rulemaking process but are only indexed at *id.* § 3164.1(b). They are designed to provide specific instructions for particular requirements. The Orders indicate whether noncompliance is minor or major and provide abatement periods in order to apply the remedy rules at *id.* 3163.1. Onshore Orders 1, 2, 3 (Site Security), 4 (Oil Measurement) and 5 (Gas Measurement) have been adopted and Onshore Order No. 6 (H2S Operations) has been proposed.

273. 36 C.F.R. §§ 228.104 to 228.108 (1990). These regulations state that the Chief of the Forest Service may issue, or cosign with the BLM Director, Onshore Orders and notices to lessees. 36 C.F.R. § 228.105 (1990).

274. *See* Final Preamble, 53 Fed. Reg. 22,832-33 (1988).

275. 43 C.F.R. §§ 3162.3(d)-(e) (1987).

these into a "drilling plan" and a "surface use plan of operations"²⁷⁶ and describe generally the contents of each.²⁷⁷ A surface use plan of operations must be provided for subsequent operations which will cause additional surface disturbance.²⁷⁸ The revised BLM rules retain the flexibility which allows an operator to include more than one well in either or both plans.²⁷⁹ The Forest Service also includes in its regulations a list of very general requirements for the protection of various resources, such as wildlife and wetlands.²⁸⁰

The rules do not contain specific terms and conditions governing surface reclamation, although the Forest Service does set out some general principles.²⁸¹ In response to a comment on this point, BLM noted in the rulemaking preamble that reclamation standards are more properly addressed on a site-specific basis.²⁸²

The rules recognize, and the preamble emphasizes, that the Forest Service will adopt its own rules governing surface operations on National Forest lands.²⁸³ As discussed above, these regulations contain a process similar to the one in the BLM regulations. However, the Forest Service is exercising its own approval authority of the surface use plan up to and including an appeal of the decision under the Forest Service appeal regulations.²⁸⁴ The intent of the Forest Service to strike an independent course could not be made clearer than the following statement from the preamble:

If there is a conflict between the rights conveyed by an oil and gas lease and a subsequently adopted forest land and resource management plan, the authorized Forest officer may choose to enforce that forest plan, recognizing that this may subject the government to appropriate legal action by the lessee, or the officer may choose to enforce the forest plan that was in effect when the lease was issued.²⁸⁵

276. 43 C.F.R. § 3162.3-1(d) (1988); 36 C.F.R. § 228.106(a) (1990).

277. 43 C.F.R. §§ 3162.3-1(e)-(f) (1988); 36 C.F.R. §§ 228.106(b)(c) (1990). The Forest Service specifically adopts the surface use program from Onshore Order No. 1, 36 C.F.R. § 228.105(a)(1) (1990), and reprints it as an appendix to 36 C.F.R. part 228 (1990). However, the agencies must still revise Onshore Order No. 1 to recognize that the surface use program is now a separate plan. Final Preamble, 53 Fed. Reg. at 22,832.

278. 43 C.F.R. § 3162.3-2(a) (1988); 36 C.F.R. § 228.106(d) (1990). The preamble to the final rules describes this requirement as a "technical change". 53 Fed. Reg. at 22,834 (1988). BLM is obviously attempting to provide some consistency in the various submissions a lessee must make for conducting lease operations.

279. 43 C.F.R. §§ 3162.3-1(e)-(f) (1988). The Forest Service regulations neither recognize nor prohibit this practice.

280. 36 C.F.R. § 228.108 (1990).

281. *Id.* § 228.108(g).

282. 36 C.F.R. § 228.106(a) (1990); *see* Final Preamble, 53 Fed. Reg. at 22,832 (1988). Onshore Order No. 1, at sections III.G.4.b(10) and V., already requires reclamation generally and reclamation as land is no longer needed. In the event BLM finds it necessary to establish reclamation standards for a particular field or area, it may utilize the Notice to Lessees process at 43 C.F.R. § 3164.2 (1988).

283. 43 C.F.R. § 3164.3(c) (1988).

284. 36 C.F.R. § 228.107(c) (1990).

285. Final Preamble, 55 Fed. Reg. at 10,435.

The fact that the Forest Service recognizes its potential liability provides little solace for lessees in a national forest which is adopting, amending or revising a forest plan.

The revised regulations restate the new requirement to provide thirty days public notice when an APD is filed.²⁸⁶ BLM expressly limited this requirement to "Federal lands"²⁸⁷ which BLM had previously defined as "all lands and interests in lands owned by the United States which are subject to the mineral leasing laws."²⁸⁸ This excludes Indian lands from the public notice requirement, since they are neither owned by the United States nor subject to the Mineral Leasing Act. It includes, however, as both the definition of "federal lands" and the preamble to the final rulemaking make clear, non-federal surface over oil and gas owned by the United States by means of a mineral reservation.²⁸⁹ The notice requirement, as are all the revised lease operation rules, is applicable both to leases issued after the Reform Act and to leases existing when the Reform Act became law.²⁹⁰

The notice is to be posted upon receipt of an APD or Notice of Staking in the BLM office responsible for its approval.²⁹¹ If the surface is managed by a different federal agency, the rules require the BLM authorized officer to "promptly" provide the necessary information to the appropriate office of that agency for posting.²⁹²

Prior to the Reform Act, BLM specified in its rules that it would notify a lessee within thirty days whether an APD was approved, disapproved, or, if delayed, the decision date with reasons for the delay.²⁹³ BLM supplemented this rule in Onshore Order No. 1 where it committed to make every effort to complete processing within thirty days but advised lessees to allow at least the full thirty days when filing an APD.²⁹⁴ Under the Reform Act, this thirty-day processing period is now mandatory. BLM still views the thirty days as a "reasonable period"²⁹⁵ and will now approve, disapprove, or notify the lessee of delay within

286. 43 C.F.R. § 3162.3-1(g) (1988).

287. *Id.*

288. *Id.* § 3160.0-5(c).

289. *Id.*; see Final Preamble, 53 Fed. Reg. at 22,833-34 (1988).

290. See MEMORANDUM FROM ASSISTANT SOLICITOR, BRANCH OF ONSHORE MINERALS, DIVISION OF ENERGY AND RESOURCES, OFFICE OF THE SOLICITOR, TO DIRECTOR, BUREAU OF LAND MANAGEMENT, DATED FEBRUARY 19, 1988, SUBJECT: "PUBLIC NOTICE UNDER THE FEDERAL ONSHORE OIL AND GAS LEASING REFORM ACT OF 1987"; Final Preamble, 55 Fed. Reg. at 10,426.

291. 43 C.F.R. § 3162.3-1(g) (1988), see 53 Fed. Reg. 22,833 (1988). Onshore Order No. 1 provides the Notice of Staking process as an option prior to filing an APD. This process allows much of the surface review to be completed before the complete APD is filed.

292. *Id.* The Forest Service regulations address posting at 36 C.F.R. § 228.115 (1990).

293. 43 C.F.R. § 3162.3-1(f) (1987).

294. Onshore Order No. 1, section III.D. For example, BLM indicates that preparation of an environmental assessment may require a longer period. Also, BLM does not count days when the APD has been returned to the operator for additional information.

295. See Final Preamble, 53 Fed. Reg. at 22,832 (1988).

five working days after the thirty days.²⁹⁶ The Forest Service must approve, disapprove or notify the permit applicant of delay within 3 working days of the close of the 30-day notice period.²⁹⁷

Several commentators on the proposed rules expressed concern over potential administrative delay as a result of the notice requirement, particularly when the APD is filed near the end of the primary term of the lease.²⁹⁸ The suggestion was made to provide an automatic lease suspension when the APD is filed during the final thirty days of the primary term.²⁹⁹ BLM, while appreciating the concern, expects operators to plan sufficiently in advance to allow timely processing and rejected the suggestion.³⁰⁰ This does not, of course, mean that a lessee may never obtain a lease suspension if the APD is not approved in time. The lessee must, however, qualify under the lease suspension regulations.³⁰¹

The basic content of the notice is specified in the Reform Act: (1) terms or modified lease terms; and (2) a map of the affected lands, including leases and potential leases, or a narrative description of the affected lands.³⁰² The APD notice regulation focuses on the second requirement, and adds well identification information.³⁰³ In response to public comment, the final rule repeats the statutory disjunctive and does not require inclusion of both a map and a narrative description in the notice.³⁰⁴

The BLM regulations provide criteria for waiving or modifying a lease stipulation and direct the authorized officer to provide the required 30-days notice if BLM had determined at lease issuance that the stipulation addressed an issue of major concern or if BLM nonetheless considers the change to be "substantial."³⁰⁵ The Forest Service regulations

296. 43 C.F.R. § 3162.3-1(h) (1988).

297. 36 C.F.R. § 228.107(b)(1) (1990). If the decision involved a "decision document," the applicant or any member of the public may appeal under 36 C.F.R. Part 217. See *supra* note 122. The applicant may appeal any decision under 36 C.F.R. Part 251, Subpart C. The new regulations require public notice of any decision, 36 C.F.R. 228.107(c) (1990), without specifying the type of notice. *But see* 55 Fed. Reg. 7,892 (March 6, 1990). This notice is in addition to posting notice of the plan pursuant to the Reform Act. 36 C.F.R. 228.105(d) (1990).

298. See Final Preamble, 53 Fed. Reg. at 22,831-32 (1988).

299. *Id.*

300. *Id.* This is in contrast to the BLM policy between enactment of the Reform Act and issuance of the final regulations. During this period BLM would suspend leases under section 17(i) of the MLA, 30 U.S.C. § 226(i) (Supp. V 1987), if a lessee filed an APD within forty-five days of lease expiration. BLM adopted this policy to give lessees a six-month period to become familiar with provisions of the Reform Act. See MEMORANDUM, FROM ASSISTANT SOLICITOR, BRANCH OF ONSHORE MINERALS, DIVISION OF ENERGY AND RESOURCES, TO DIRECTOR, BUREAU OF LAND MANAGEMENT, DATED FEBRUARY 19, 1988, SUBJECT: "PUBLIC NOTICE UNDER THE REFORM ACT".

301. 43 C.F.R. §§ 3103.4-2, 3165.1 (1988).

302. 30 U.S.C. § 226(f) (Supp. V 1987); see *supra* note 66.

303. 43 C.F.R. § 3162.3-1(g) (1988).

304. See Final Preamble, 53 Fed. Reg. at 22,833 (1988).

305. 43 C.F.R. § 3101.1-4 (1988). The criteria are: "if the factors leading to its inclusion in the lease have changed sufficiently to make the protection provided by the stipulation no longer justified or if proposed operations would not cause unacceptable impacts."

provide no criteria but merely set out the procedure for obtaining a modification.³⁰⁶ BLM uses the APD-notice content regulation to coordinate the thirty-day APD notice with the thirty-day notice of a substantial modification to a lease term. Although these are separate notice requirements, BLM will post them together when approval of the APD requires a substantial modification to a lease term.³⁰⁷ In the event BLM identifies a need to substantially modify a lease term during its review of an APD, a second, albeit partially overlapping, thirty-day notice period would be necessary. The Forest Service does not specifically coordinate the notice periods but merely allows an operator who has submitted a surface use plan to request a stipulation modification.³⁰⁸ The modification of stipulations in the past without public notice has caused some entities, particularly environmental groups, to question the good faith of the agencies. Adherence to these procedures should allay these concerns and focus the debate where it should be—on the propriety of changing the particular stipulation—and thus avoid needless controversy and added delay.

Now that all this notice is provided, the question of its purpose arises. Commentors on BLM's proposed rulemaking argued that the general public had an opportunity to comment during land use planning and environmental analysis prior to lease issuance.³⁰⁹ BLM responded that the Reform Act makes no such distinctions. The purpose of notice is to inform the public at large that drilling activity is being proposed at a particular location. This will allow members of the public to express their concerns to BLM and ultimately to file a protest.³¹⁰ BLM's response to a comment on the effect of moving the well location during the thirty-day notice period demonstrates the public information, rather than adjudicative, purpose of the notice: "[BLM] would have to determine if the affected areas have changed significantly enough to require a [new] 30-day posting period."³¹¹

306. 36 C.F.R. § 228.104 (1990). The regulation recognizes three types of change—a permanent change to the stipulation, termed a modification; a permanent removal of the stipulation, termed a waiver; and a temporary exemption from the stipulation, termed an exception. Any of these could be "substantial" as defined in *id.* § 228.101 (1990).

307. 43 C.F.R. § 3162.3-1(g) (1988); see Final Preamble, 53 Fed. Reg. at 22,833 (1988).

308. Posting is required in 36 C.F.R. § 228.115 (1990). Appeal of a decision on a stipulation may only be taken in conjunction with an appeal of a decision on a surface use plan. 36 C.F.R. § 228.104(d)(2) (1990).

309. See Final Preamble, 53 Fed. Reg. at 22,832 (1988).

310. 43 C.F.R. § 4.450-2 (1988). BLM's rules specify that posting a notice is not subject to appeal. 43 C.F.R. § 3162.3-1(g) (1988). If a protest for approval of an APD is ultimately denied by the State Director, 43 C.F.R. § 3165.3 (1988), the protestant may appeal to the Interior Board of Land Appeals (IBLA). 43 C.F.R. § 3165.4(a) (1988). The approval of the APD is not suspended during review by the State Director, 43 C.F.R. § 3165.3(e) (1988), or during an appeal to IBLA, 43 C.F.R. § 3165.4(c) (1988). The BLM rules do not address third party challenges on National Forest land, but only provide that an appeal from a disapproval is to the "Secretary of Agriculture," which means the Forest Service appeals process. 43 C.F.R. § 3162.3-1(h) (1988). The proposed Forest Service rules provide an opportunity for third party appeals. 54 Fed. Reg. at 3,334 (1988).

311. See Final Preamble, 53 Fed. Reg. at 22,833 (1988).

B. Reclamation

The Reform Act emphasizes reclamation of disturbed land. The Act mandates not only regulation of surface disturbance but directs that the Secretary "shall determine reclamation and other actions in the interest of conservation of surface resources."³¹² Congress thus singles reclamation out among the various conservation measures.

1. Bonds

Although oil and gas lease bonds were referenced in the MLA,³¹³ they were never specifically required as a condition of operations. In the Reform Act, Congress directs that the Secretary, or the Secretary of Agriculture for national forest lands, by rule or regulation, "establish such standards as may be necessary to ensure that an adequate bond . . . will be established prior to commencement of surface-disturbing activities on any lease, to ensure the complete and timely reclamation of the lease tract, and the restoration of any lands or surface waters adversely affected by lease operations after the abandonment or cessation of oil and gas operations on the lease."³¹⁴

Because of the comma placed after "surface disturbing activities on any lease," a question arises whether Congress directed the Secretary to establish standards "to ensure that an adequate bond . . . is established" and "to ensure . . . reclamation" or whether Congress meant that the "bond . . . is established . . . to ensure . . . reclamation." The House Committee Report on the Reform Act legislation, in which this provision originated, indicates that Congress intended this sentence to require standards only for adequate bonds: "Specific provision is made to require . . . the establishment of a bond in an amount adequate to fully reclaim the lease tract, prior to granting drilling permits."³¹⁵ The interpretation is supported by the fact that Congress directed the Secretary to determine appropriate reclamation in the first sentence of this subsection.

Congress thus emphasizes bonding as a principal tool for ensuring surface reclamation and restoration. The statutory standard is "adequate." The Reform Act does not define it and the relevant congressional committee reports do not explain it.³¹⁶ This leaves it up to the

312. 30 U.S.C. § 226(g) (Supp. V 1987).

313. *See, e.g.*, 30 U.S.C. § 187a (1982).

314. 30 U.S.C. § 226(g) (Supp. V 1987). The statute refers to "bond, surety or other financial arrangement," thus giving the Secretary considerable flexibility.

315. H.R. Rep. No. 100-378, 100th Cong., 1st Sess. 13 (1987). BLM did not adopt nationwide reclamation standards but left development of specific reclamation requirements for the site-specific APD stage because of the diverse land surfaces, vegetation, soil and other resources as well as the uniqueness of many surface disturbances. 43 C.F.R. § 3162.3-1(f) (1988). *See* Proposed Preamble, 53 Fed. Reg. at 9,215 (1988). In its proposed rules, the Forest Service set out general standards similar to Onshore Order No. 1. 36 C.F.R. § 228.108 (1990).

316. H.R. Rep. No. 100-378, 100th Cong., 1st Sess. (1987); H.R. Rep. No. 100-495, 100th Cong., 1st Sess. (1987), reprinted in 1987 U.S. Code & Admin. News 2313-1245. The Senate bill did not contain a bonding provision.

agencies to determine whether the existing bonding system is “adequate” or whether changes must be made. As might be expected the setting of the bond amount becomes very important as it must be high so as not to encourage defaults, but not so high as to cause financial hardship to lessees of modest means.

For many years, BLM has required bonds to ensure compliance with all provisions of the MLA, not just surface reclamation and restoration.³¹⁷ Prior to enactment of the Reform Act, BLM had proposed changes to these bonding regulations.³¹⁸ The proposed Reform Act rules included provisions developed by BLM in response to the comments on the earlier proposed rulemaking.³¹⁹ Thus, the final Reform Act rules on bonding include a number of changes which were not the subject of the Reform Act and are thus outside the scope of this article. We will focus only on those rules designed to establish standards to ensure “adequate” bonds.

BLM continues the scope of the bond as “compliance with all of the terms and conditions of the entire leasehold(s) covered by the bond” and to ensure compliance with the MLA.³²⁰ Included within the scope of the bond, although not mentioned in the rule, would be royalty. BLM does provide specific reference to surface reclamation as a purpose of the bond.

BLM concluded that its existing minimum bond levels are “adequate” under the Reform Act.³²¹ In the Reform Act proposed rulemaking, the agency expressly dropped the 1985 proposal to increase these minimums.³²² In the final rulemaking, BLM rejected a comment to require full reclamation in all cases, noting that the Reform Act does not require such coverage, but only directs “adequate” bonding.³²³

BLM’s rationale for its conclusion on adequate bonding is set out in the preamble to the proposed rulemaking.³²⁴ BLM’s primary reason for concluding its bonds are adequate is the consequence of a default on the lessee’s ability to get a new bond and on its credit rating generally. BLM also cites its ability to raise the minimum bond amount when appropriate³²⁵ as well as a lessee’s desire to maintain a good public image and a good working relationship with BLM. Finally, BLM points to

317. *See, e.g.*, 43 C.F.R. §§ 3104.1 to 3104.8 (1971-1987).

318. 50 Fed. Reg. 18,614 (1985).

319. *See* Proposed Preamble, 53 Fed. Reg. at 9,215 (1988).

320. 43 C.F.R. § 3104.1(a) (1988).

321. *See* Final Preamble, 53 Fed. Reg. at 22,821 (1988) (“The regulation language accomplishes the requirement of the law.”). The bonding requirements are as follows: \$10,000 lease bond, 43 C.F.R. § 3104.2, or \$25,000 per state, 43 C.F.R. § 3104.3(a) (1988), or \$150,000 nationwide, *id.* § 3104.3(b).

322. *See* Proposed Preamble, 53 Fed. Reg. at 9,215-16 (1988). *See supra* note 318.

323. *See* Final Preamble, 53 Fed. Reg. at 22,821 (1988).

324. *See* Proposed Preamble, 53 Fed. Reg. at 9,215 (1988).

325. 43 C.F.R. § 3104.5(b) (1988). For example, bond amounts may be increased whenever the operator poses a risk due to a history of violations, uncollected royalty or the cost of plugging existing wells and reclaiming land.

both the statutory penalty of lessee disqualification³²⁶ and the regulatory requirement of bonding the full cost of reclamation for operators who failed to plug a well or reclaim lands completely and timely during the five years prior to submission of an APD.³²⁷

After proposing full-cost bonding, the Forest Service agreed with the BLM approach in its final regulations.³²⁸ The agency surveyed its field offices and found no problems with the BLM bonding system on national forest land during the previous five years.³²⁹ The Forest Service does authorize a bond increase or separate bonds if the authorized Forest officer concludes that the existing BLM bond will not ensure complete and timely reclamation.³³⁰ However, the regulation contains no criteria for determining the absence of the requisite assurance.

2. Disqualification from Leasing

To further aid the Secretary in carrying out his reclamation duties, the Reform Act gives the Secretary a big stick to wield against those lessees and operators who do not comply in any "material" respect with reclamation requirements. That stick takes the form of a total ban on ability of the defaulting entity, and of "any subsidiary, affiliate, or person controlled by or under common control with" the entity, to receive any new oil and gas leases or assignments of oil and gas leases while outstanding cleanup work on a lease remains undone.³³¹

The Secretary must provide the defaulting lessees with adequate notification of the default and an opportunity to cure before instituting the total ban on obtaining future federal leases.³³² Once the entity has cured its reclamation deficiencies, then its privilege to obtain new leases is restored.³³³ If the defaulting lessee has pursued an administrative or judicial appeal from the required reclamation standards, then the Secretary may take this fact into consideration before instituting the total ban.³³⁴

Some initial confusion is caused by the reference to the "reclamation requirements and other standards established under this section."³³⁵ The first impression might lead one to conclude that any violation of a requirement established under section 17(g) for such elements as conservation, drilling permits, and plans of operations could result in a disqualification. The use of "other standards" seems to be a grant of discretion. However, both the House and Conference Committee

326. 30 U.S.C. § 226(g) (Supp. V 1987), *see infra* IV.B.2.

327. 43 C.F.R. § 3104.5(a) (1988).

328. 36 C.F.R. § 228.109 (1990).

329. Final Preamble, 55 Fed. Reg. at 10,438.

330. 36 C.F.R. § 228.109(a) (1990). The Forest Service does not specify when or how it will notify the operator of a decision increasing the bond amount.

331. 30 U.S.C. § 226(g) (Supp. V 1987).

332. *Id.*

333. *Id.*

334. *Id.*

335. *Id.*

reports refer only to reclamation violations.³³⁶ This draconian remedy must be tied to the reclamation standards is specifically authorized by the new subsection since remedies for lease defaults have always been provided in section 31(a) of the MLA.³³⁷

BLM implemented the disqualification provision by amending its oil and gas lessee qualification regulations.³³⁸ The process begins with a certification by a lease offeror or assignee that they have not failed or refused to comply with reclamation requirements on any lease in which they have an interest. The language referencing entities "controlled by or under common control with" is defined by a cross-reference to the definition of this term in the coal management regulations.³³⁹ BLM intends to apply consistent treatment for this provision and for section 2(a)(2)(A) of the MLA.³⁴⁰

The rule defines noncompliance with section 17(g) as the first of either imposition of civil penalties or attachment of a bond for reclamation purposes.³⁴¹ Noncompliance ends when all required reclamation is completed and the United States is fully reimbursed for any money it has spent. The lessee would still be subject to the full-cost bonding requirement for five years.³⁴²

The Forest Service by contrast has incorporated "material" non-compliance into its new inspection and enforcement regulations, which are completely different from the BLM inspection and enforcement regulations.³⁴³ The Forest Service will issue a notice of noncompliance which (1) prescribes corrective measures, (2) advises the operator whether enforcement action for continued noncompliance will be taken pursuant to 36 CFR Part 261, and (3) if the noncompliance appears to be

336. H.R. REP. NO. 378, 100th Cong., 1st Sess. 13 (1987) ("... who has failed to comply with the reclamation requirement for any lease The Committee notes that this provision is directed at repeated and willful violators of the reclamation standards."); H.R. REP. NO. 100-495, 1st Sess. 775, *reprinted in* 1987 U.S. CODE CONG. & ADMIN. NEWS 2313-1521, 2313-1528 ("failing to reclaim a lease").

337. 30 U.S.C. § 188(a) (1982).

338. 43 C.F.R. § 3102.5-1(f) (1988).

339. *Id.* § 3400.0-5(rr).

340. 30 U.S.C. § 201(a)(2)(A) (1982), also known as section 3 of the Federal Coal Leasing Amendments Act of 1976, states in pertinent part:

The Secretary shall not issue a lease or leases under the terms of this Act to any person, association, corporation, or any subsidiary, affiliate, or persons controlled by or under common control with such person, association, or corporation, where any such entity holds a lease or leases issued by the United States to coal deposits and has held such lease or leases for a period of ten years when such entity is not, except as provided for in section 7(b) of this Act, producing coal from the lease deposits in commercial quantities. . . .

The Office of the Solicitor advised BLM that the two statutory provisions should be applied in a consistent manner. MEMORANDUM OF ASSISTANT SOLICITOR, BRANCH OF ONSHORE MINERALS, DIVISION OF ENERGY AND RESOURCES, OFFICE OF THE SOLICITOR, TO ASSISTANT DIRECTOR, ENERGY AND MINERAL RESOURCES, BUREAU OF LAND MANAGEMENT, DATED JANUARY 29, 1988, SUBJECT: "FEDERAL OIL AND GAS LEASE REFORM ACT OF 1987."

341. 43 C.F.R. § 3102.5-1(f) (1988).

342. 43 C.F.R. § 3104.5(a) (1988).

343. *Cf.* 36 C.F.R. §§ 228.112-228.114 (1990) *with* 43 C.F.R. Subpart 3163.

“material,” advises the operator of the consequences of continued non-compliance.³⁴⁴ It is not our purpose here to analyze whether the Forest Service may apply the national forest penalty provisions of 36 CFR Part 261 to oil and gas lessees operating under the Mineral Leasing Act.³⁴⁵ Regarding “material” noncompliance, however, the Forest Service differs considerably from BLM while administering the same statute. Simply put, the Forest Service has interpreted “other standards” as everything applicable to the lease regardless whether it relates to reclamation.³⁴⁶ If the authorized Forest officer believes that noncompliance is “material,” he refers it to the compliance officer for action.³⁴⁷ If the compliance officer finds “material” noncompliance, the lessee is subject to the bar from obtaining new oil and gas leases.³⁴⁸ However, since BLM issues the leases, the Forest Service may go through this whole process only to find BLM will not enforce the “material” noncompliance finding because it does not involve reclamation. In short, the Forest Service has unnecessarily complicated operations on national forest land.

The prohibition on new leases for failure to comply with reclamation requirements is reflected in several regulations. The actual implementation is consistent with all lessee qualifications — the lease applicant’s signature on the offer, lease, assignment or transfer constitutes certification of compliance.³⁴⁹ BLM also made clear that applicants for lease exchanges and lease renewals must be qualified, including compliance with reclamation requirements.³⁵⁰

BLM has provided little indication how it intends to supervise the new disqualification provision, unlike the procedures adopted to implement section 2(a)(2)(A) of the MLA.³⁵¹ The rule does state that leases issued to disqualified entities will be canceled, even if the violation is on appeal.³⁵² Also, BLM has expressly noted that it reserves the right to require information at any time on a lease offeror’s, or assignee’s, qualifications.³⁵³ The extent of inquiry, either from a rival lease applicant or by a list, will most likely be dependent on the number of entities that are disqualified.

344. 36 C.F.R. §§ 228.112(d), 228.113(a)(1) (1990).

345. See Final Preamble, 55 Fed. Reg. at 10,440. To carry this out, the Forest Service added surface use plans to the definition of “operating plan” in 36 C.F.R. § 261.2 (1990). We also are not analyzing other Forest Service rules which do not flow directly from the Reform Act, such as indemnification of the United States for loss or damage, 36 C.F.R. § 228.11 (1990), and the general inspection and compliance process.

346. See 36 C.F.R. § 228.113(b) (1990).

347. *Id.* § 228.113(b)(1) (1990). The compliance officer then has certain procedures to follow, including an informal hearing and a fact-finding conference before issuing a decision. *Id.* § 228.114(a)-(h) (1990). The regulations also provide a mechanism to obtain relief from an adverse decision. *Id.* § 228.113(i) (1990).

348. *Id.* § 228.114(c)(1)(iii) and (j) (1990).

349. 43 C.F.R. §§ 3102.5-1(f), 3102.5-2 (1988).

350. *Id.* §§ 3107.7, 3107.8-3(a).

351. 30 U.S.C. § 201(a)(2)(A) (1982); compare 43 C.F.R. § 3472.1-2(e) (1988).

352. 43 C.F.R. § 3102.5-1(f) (1988).

353. 53 Fed. Reg. at 22,187 (1988).

V. FRAUD PENALTIES

A. *Violation*

The Reform Act adds a totally new section 41 to the MLA intended to give teeth to the drive for integrity in the leasing process of the nation's oil and gas lands.³⁵⁴ Claims of fraud in the lottery system as implemented prior to the Reform Act helped make the new enforcement provisions a reality. The enforcement scheme utilizes both a civil and criminal approach to violations. Section 41 describes two different activities as violations.³⁵⁵ First, the section declares it unlawful to "organize or participate in" any sort of group activity to get around the provisions of the MLA. Second, the section establishes as a violation any effort to benefit financially by means of a false statement, or an omission, of a material fact concerning value of leases, availability of land, ability to obtain leases or the MLA and its regulations. The language describing these violations is somewhat broad, but most likely in reaction to the ingenuity shown over the years by manipulation of the federal oil and gas leasing system. Unfortunately, there is little in the legislative history which explains congressional intent, other than references to the oil and gas fraud.³⁵⁶ Given the numerous enforcement entities as described below, there is the possibility of somewhat uneven application.

Congress specifically noted that if a violator happens to be an employee, officer or agent of the corporation, then the corporation may also be held liable both criminally and civilly unless the corporation is without knowledge of, or did not consent to the actions.³⁵⁷ Likewise, corporations which are charged with violating the Reform Act equally expose the individuals who organized or participated in the illegalities to criminal or civil sanctions.³⁵⁸

B. *By Whom*

The Attorney General of the United States acting through Department of Justice lawyers and the various Offices of the United States Attorney in each district can bring an action either civilly, criminally or both if it appears that any person is or is about to engage in a violation under the section.³⁵⁹ The civil action may be brought in the fed-

354. 30 U.S.C. § 191 (Supp. V 1987). While this section was clearly included to address the fraudulent schemes developed around the simultaneous oil and gas leasing system, the language contains no such limitation.

355. 30 U.S.C. §§ 195(a)(1)-(2) (Supp. V 1987).

356. *See, e.g.*, H.R. REP. NO. 378, 100th Cong., 1st Sess. 15 (1987) ("combat fraud and abuse of the federal oil and gas leasing program"); S. REP. NO. 412, 99th Cong., 2d Sess. 5, 10 (1986) ("stop fraudulent practices with respect to Federal onshore oil and gas leasing engaged in by private parties"); S. REP. NO. 188, 100th Cong., 1st Sess. 7 (1987) ("combat certain unlawful practices").

357. 30 U.S.C. § 195(d)(2) (Supp. V 1987).

358. *Id.* § 195(d)(1).

359. *Id.* §§ 195(b)-(c). Congress assigned no enforcement functions to the Secretary of the Interior, as recognized by BLM in its amended regulations. 43 C.F.R. § 3100.9 (1988).

eral district court where the defendant resides, where the cause of action arose, or where the lands affected are located.

Congress included a somewhat novel approach to federalism in an apparent effort to ensure enforcement when the source of the violation is far from the lands to be leased or under lease.³⁶⁰ Individual states can institute civil suits seeking the identical remedies available to the Attorney General of the United States so long as the suits are filed in federal court, without regard to diversity or amount.³⁶¹ Once a civil suit has been initiated by either the Attorney General or a state, the other may not bring a second action based on the same set of facts.³⁶² However, permission for the non-litigating party to join in the suit can be granted.³⁶³ Notification of the filing of a suit must be given within thirty days to the state if filed by the federal government and vice-versa.³⁶⁴ Any penalties collected in a joint action are to be shared, with the court determining the split.³⁶⁵ Finally, Congress provided that the states shall retain the jurisdiction to enforce their own laws against parties who may violate this section.³⁶⁶ Thus, violators may face additional punishment meted out by judges with state court jurisdiction.

C. Penalties

Congress provides criminal penalties for a knowing violation of the enforcement provisions, which include a fine of not more than \$500,000 and/or imprisonment for up to five years.³⁶⁷ Congress provides civil penalties for any actual or potential violation, which include prohibition from future leasing of federal minerals, temporary restraining orders, permanent injunctions, or civil penalties of up to \$100,000 per violation.³⁶⁸ These penalties are cumulative and in addition to any of the remedies for any criminal or civil laws that may have been broken by the same perpetrators.³⁶⁹

VI. CONCLUSION

The Reform Act has transformed the process for leasing oil and gas on Federal land. The new process appears to be working smoothly and to be accomplishing the goal of increased bonus revenues. Whether the process can withstand an onslaught similar to the oil boom of the 1970s remains to be seen. The Act may have an equally dramatic effect on lease operations. Congress can be expected to review whether the

360. *Id.* § 195(f).

361. *Id.* § 195(f)(1).

362. *Id.* § 195(f)(4).

363. *Id.*

364. *Id.* § 195(f)(2).

365. *Id.* § 195(f)(3).

366. *Id.* § 195(f)(5).

367. *Id.* § 195(b).

368. *Id.* § 195(c).

369. *Id.* § 195(e).

Bureau of Land Management and the Forest Service are utilizing the various enforcement mechanisms for reclamation. Unless these two agencies coordinate their oversight of operations, lessees are faced with the possibility of different implementation depending on the surface managing agency.