LEGAL AUTHORITY FOR ENVIRONMENTAL PROTECTION RELATING TO OIL AND GAS OPERATIONS

I. SUMMARY

- The Secretary of the Interior (Secretary) has broad authority to regulate environmental aspects of oil and gas operations under the Mineral Leasing Act (MLA) and other related and non-related statutes and regulations.
- The principal authority for regulation of oil and gas lease operations is the MLA. It authorizes the Secretary to require environmental protection determined necessary or needful. Section 302 (b) of the Federal Land Policy and Management Act (FLPMA) complements that authority by directing the Secretary to prevent "undue and unnecessary" degradation of public lands.
- In most cases, the Secretary has the same authority for conditioning permits on pre-FLPMA leases as on post-FLPMA leases.

II. DISCUSSION

On occasion, the question arises as to the authority of the Bureau of Land Management (BLM) to condition Applications for Permit to Drill (APD) and related permits in an effort to mitigate adverse environmental impacts. It has been asked if the BLM has the authority to require the same or similar environmental safeguards such as conditions of approval or land use plan decisions on pre-FLPMA leases. In addition, some in industry and elsewhere have argued that the BLM is limited by the "unnecessary and undue" requirements contained in FLPMA to conditions permits. This would be the same or similar standard that is used for mitigation of impacts stemming from mining claims as found in 43 CFR 3809. Also related, the question has been asked, can land use decisions derived from FLPMA based resource management plans or the latest environmental best management practices in current BLM policy and regulations be applied or enforced in the same fashion on pre-FLPMA leases since these leases were issued prior to the passage of FLPMA, which is the statutory authority of the BLM to develop and approve land use plans and related environmental controls?

The following narrative provides a summary of the Secretary's authority and current BLM national policy.

Long before the passage of FLPMA, the broad authority of the Secretary to regulate oil and gas leases was well established in case law. In *Boesche v. Udall*, 332 U.S. 373, the court held the following: "Unlike a land patent, which divests the Government of title, Congress under the Mineral Leasing Act has not only reserved to the United States the fee interest in the leased land, but has also subjected the lease to exacting restrictions and continuing supervision by the Secretary…and he may prescribe, as he has, rules and regulations governing in minute detail all facets of the working of the land, 30 U.S.C. § 189; 30 CFR pt. 221. In short, a mineral lease does not give the lessee anything approaching the full ownership of a fee patentee, nor does it convey an unencumbered estate in the minerals."

The Secretary has broad authority and discretion under the MLA to administer oil and gas leasing and operations of those leases. In *Southern Utah Wilderness Alliance, et al. 127 IBLA 331 (1993)*, IBLA Judge Burski ruled: "…the Secretary has always, since at least the 1933 amendments to the Mineral Leasing Act, had the **authority** to suspend operation and production activities for conservation purposes. See Act of Feb. 9, 1933, 47 Stat. 798, as amended, *30 U.S.C. § 209* (1988). Conservation, as used in this provision, has been expressly interpreted to include the prevention of environmental damage. See *Copper Valley Machine Works, Inc. v. Andrus*, 653 F.2nd 595 (D.C. Cir. 1981)." (emphasis included in the original decision)

Under the earliest oil and gas lease form used under the MLA, that of 1920, section 2(h) the lessee was required "to carry out at the expense of the lessee all reasonable orders and requirements of the lessor relative to prevention of waste and preservation of the property…" Also, section 2(m) required that, in the case of forfeiture, that the premises leased be "in good order and condition" and section 4 authorized surrender and termination of the lease "on consent of the Secretary of the Interior…upon a showing to the Secretary that the public interest will not be impaired; but in no case shall such termination be effective until the lessee shall have made full provision for conservation and protection of the property." See section 2(m) of the lease form prescribed by section 17 of General Land Office (GLO) Circular 672 (March 11, 1920).

Since at least 1936, the granting clauses of all oil and gas leases have expressly provided that lessees are subject to regulations and orders "now and hereafter promulgated." See GLO Circular 1386 of May 7, 1936. This allows the BLM to issue orders for compliance with environmental provisions of current oil and gas operating regulations, onshore orders, notices to lessees, and other issued orders of the authorized officer. The relationship to FLPMA is moot.

Subpart 3162 – Requirements for Operating Rights Owners and Operators, at 43 CFR 3162.1(a) states: "The operating rights owner or operator, as appropriate, shall comply with applicable laws and regulations; with lease terms, Onshore Oil and Gas Orders, NTL's; and with other orders and instructions for the authorized officer. These include, but are not limited to…(and) which protects other natural resources and environmental quality…"

Similarly, 43 CFR 3162.5-1(a) states: "The operator shall conduct operations in a manner which protects the mineral resources, other natural resources, and environmental quality. In that respect, the operator shall comply with the pertinent orders of the authorized officer and other standards and procedures as set forth in the applicable laws, regulations, lease terms and conditions, and the approved drilling plan or subsequent operations plan."

It is important to note from these above regulations that existing lease terms and conditions are but one of many standards and requirements for environmental protection the operator or lessee must follow to obtain compliance. This same section goes on to state that the

environmental reviews associated with approving APDs will be used "in determining any appropriate terms and conditions of approval of the submitted plan."

A now outdated Washington Office Instruction Memorandum 92-67 provided partial guidance at that time to the field primarily on the ability of the BLM being able to require a well relocation of more than 200 meters and/or delay drilling more than 60 days (See 43 CFR 3101.1-2 Surface Use Rights). That instruction seemed to imply that FLPMA and the Section 302 "unnecessary or undue" phrase as the primary justification and authority for the BLM to condition and restrict an APD beyond 200 meter/60 days. Whether or not the old Instruction Memorandum intended FLPMA as the only authority, this interpretation is only partially correct. The Secretary has multiple authorities to base his or her decision to mitigate impacts stemming from oil and gas operations. Examples include the National Historic Preservation Act, the Endangered Species Act, the Clean Water Act, and the Clean Air Act which may result in the BLM placing restrictions on the type and conduct of leasehold operations. It is, therefore, inappropriate to assume the "unnecessary or undue" clause in FLPMA as the only or even primary authority for mitigating environmental impacts anticipated from permitted oil and gas activities.

To underscore the Secretary's and, therefore the BLM's, authority to regulate all oil and gas leases, this was discussed and resolved with issuance of the current Surface Use Rights 43 CFR 3101.1-2. The BLM stated in response to questions on authority (see Federal Register 17341, vol. 53, no. 94, May 16, 1988): "Numerous comments were received on…the authority of the Bureau of Land Management to use the terms and conditions of the standard lease form to control site-specific environmental impacts.…as opposed to lease-specific stipulations to mitigate impacts to specific resource values.…Some comments expressed the view that the measures being established…were greater or less than those provided in existing land use plans…A few comments were of the view that the way the word "reasonable" was used…would limit the Bureau's ability to prescribe adequate mitigation measures.…"

To resolve these identified issues, the BLM stated in the same Federal Register the following: "However, it is appropriate to establish minimum parameters within which the Bureau can specify site-specific mitigating measures which, by regulation, are consistent with the lease rights granted a lease. The final rulemaking provides that the Bureau, at a minimum, can require relocation of proposed operations by 200 meters and can prohibit new surface disturbance for a period of 60 days, and such requirements are consistent with lease rights granted. The authorized officer may grant a lease suspension in appropriate cases if new disturbance is prohibited under this section. Similarly, the authority of the Bureau to prescribe "reasonable," but more stringent, protection measures is not affected by the final rulemaking."

In summary, the Secretary's authority to administer oil and gas leases and mitigate impacts associated with their development is not dependent upon the age or date of lease issuance or its status as pre- or post-FLPMA. The Section 302 "unnecessary and undue" standard may be applied but must be applied along with a number of other statutory and regulatory

authorities and requirements, not the least of which are those pertaining to the MLA as previously described.

However, there are some instances in which the status of a pre-FLPMA lease has special relevance. One example is a pre-FLPMA lease existing in a Wilderness Study Area (WSA). While no new leases may be issued in WSAs, pre-FLPMA leases in WSAs represent valid existing rights that cannot be foreclosed without consent of the lessee. In such cases, activities for the use and development of the lease still need to satisfy the non-impairment criteria, which applies to all WSAs, unless it would unreasonably interfere with the rights established in the mineral lease. Certainly, the BLM could impose stringent mitigation but caution should be exercised to avoid liability for a breach of contract or regulatory taking by so altering the terms of the contract as to deny the lessee its reasonable investment backed expectations. In close cases, consult with your regional or field Solicitor's Office. It should also be noted that a pre-FLPMA lease does not carry with it a valid existing right to obtain access to the lease boundaries across Federal land and, in the absence of "grandfathered" uses, access may not be granted if it would violate the non-impairment standard (see H-8550-1 – Interim Management Policy for Lands Under Wilderness Review, Chapter III.B.1.a).

The other related example is the case where some of the existing leases may not be in compliance with the most recent land use plan decisions. For example, a newly approved land use plan may require all new leases in an area to contain a no surface occupancy stipulation. Existing leases might not have this very restrictive stipulation. Again the BLM could impose stringent mitigation, but caution should be exercised to avoid liability for a breach of contract or regulatory taking by so altering the terms of the contract as to deny the lessee its reasonable investment backed expectations. In close cases, consult with your regional or field Solicitor's Office to maintain consistency with current land use plan decisions.