

November 20, 2008

BLM Issues Final Rule for Oil Shale Leasing Program

On November 18, 2008, the U.S. Department of the Interior (“DOI”), Bureau of Land Management (“BLM”) issued a final rule establishing a commercial leasing program for the development of oil shale resources and associated minerals on 16,000 square miles of federal land in Colorado, Wyoming and Utah. Last year, Congress effectively prevented DOI from issuing a final rule through the appropriations process for fiscal year 2008, however, Congress did not renew this prohibition, thus allowing DOI to move forward with the issuance of the rule.

Under the Energy Policy Act of 2005 (“EPAAct”) and other statutory authorities, the Secretary of the Interior is authorized to establish regulations for a leasing program to encourage the development of oil shale resources. The American Association of Petroleum Geologists estimates that the world’s total oil shale resources contain 2.6 trillion barrels of oil and that the United States holds more than 50% of the total supply, or between 1.5 and 1.8 trillion barrels of oil. Although the organic material found in oil shale deposits differs from conventional crude oil, this material can be processed and refined to produce synthetic crude oil.

The final rule establishing BLM’s oil shale leasing program is detailed and should be examined carefully by any party interested in seeking a lease for development or exploration.

The Final Rule

The final rule incorporates most of the provisions of BLM’s proposed rule issued on July 23, 2008, (see Sutherland’s Legal Alert dated July 28, 2008, “[BLM Releases Proposed Rule for Oil Shale Leasing Program](#)”) but contains two significant changes. First, the final rule adopts a framework for production royalty rates that differs from the rate structures outlined in the proposed rule. Second, the final rule adjusts the leasing process so that there are no minimum lease acreage requirements. This Legal Alert provides a brief overview of these two substantive changes, as well as a discussion of ongoing political opposition to implementation of the leasing program.

Production Royalty Framework

In its proposed rule, BLM set out three options it was considering for the oil shale leasing program’s production royalty framework. The final rule adopts a variation of one of the proposed options. The royalty rate will be 5% through the first five years of commercial production and then will increase by 1% annually beginning in the sixth year of production until reaching a maximum of 12.5% in the thirteenth year. By establishing an initial 5% royalty rate for oil shale leases, BLM hopes to account for the relatively high start-up costs associated with new infrastructure and the production cost disparity between oil shale and conventional crude oil production. However, BLM expects that by raising the royalty rate incrementally each year, the United States will be guaranteed a fair rate of return, as required by EPAAct.

Minimum Lease Acreage

As originally contemplated by BLM in the proposed rule, oil shale leases would be at least 160 acres. However, due to concerns that a minimum bid requirement of \$1,000 per acre may preclude smaller companies from participating in the oil shale lease program, BLM decided to remove the minimum lease

© 2008 Sutherland. All Rights Reserved.

This communication is for general informational purposes only and is not intended to constitute legal advice or a recommended course of action in any given situation. This communication is not intended to be, and should not be, relied upon by the recipient in making decisions of a legal nature with respect to the issues discussed herein. The recipient is encouraged to consult independent counsel before making any decisions or taking any action concerning the matters in this communication. This communication does not create an attorney-client relationship between Sutherland and the recipient.

1

size requirement. However, other restrictions — including a maximum lease size of 5,760 acres per lease, annual rent payments of \$2 per acre and minimum payments of \$4 per acre in lieu of production after the tenth year of the lease — remain the same as originally proposed.

Potential Opposition

Although BLM was permitted to proceed with its final regulations on the oil shale leasing program, several members of Congress remain opposed to the rule. In particular, Colorado legislators Sen. Ken Salazar (D), Rep. John Salazar (D) and Senator-Elect Mark Udall (D) have all expressed opposition to the final rule, noting specifically concerns about lost state revenues from the initial 5% production royalty rate, which is significantly lower than the 12.5% rate in place for conventional oil and gas development. The three legislators pledged in September that they would pursue legislative action to halt the implementation of the leasing program when Congress reconvenes in January.



If you have any questions regarding this Legal Alert, or the services we provide, please feel free to contact any of the attorneys listed below or the Sutherland attorney with whom you regularly work.

Jacob Dweck	202.383.0775	jacob.dweck@sutherland.com
Gerald D. Higdon	713.470.6134	jerry.higdon@sutherland.com
Susan Lafferty	202.383.0168	susan.lafferty@sutherland.com
Gerald J. Pels	713.470.6135	gerry.pels@sutherland.com
Dena E. Wiggins	202.383.0499	dena.wiggins@sutherland.com
Daron T. Threet	202.383.0483	daron.threet@sutherland.com
Nathaniel J. Teti	202.383.0868	nathaniel.teti@sutherland.com