

How the hoarding of our public lands and minerals was allowed to happen.

Suspended leases have accumulated on federal lands largely as the result of three main causes. First, BLM rarely exercises its discretion to reject lease suspension requests and routinely grants suspensions that are not warranted or required by law. Second, BLM rarely evaluates the status of actively suspended leases to determine whether suspensions should be lifted, allowing suspensions to remain in place long after the circumstances that originally justified the suspension no longer exist. Third, BLM lease suspension orders and decisions are almost wholly insulated from public review, so unwarranted and unjustified suspensions are rarely challenged. Because lease suspension requests are almost always granted, exempt from public review, and rarely lifted, suspended leases now occupy millions of acres of federal public lands and minerals.

1. BLM routinely grants lease suspensions that are not warranted or legally justified.

Depending on the circumstances, BLM may be required to grant, or may have discretion to reject, an application for a lease suspension. BLM is required to grant a suspension, or a *de facto* suspension exists, where federal agency action, or inaction, prohibits a lessee from having timely access to a lease, and the associated delay is not part of the ordinary course of lease development. *See Hoyl v. Babbitt*, 129 F.3d 1377, 1380, 1384 (10th Cir. 1997); *Atchee CBM, LLC, et. al* 183 IBLA 389, 413 (2013) (“A *de facto* suspension will be recognized where BLM unjustifiably delays action on an APD or Sundry Notice, or otherwise acts or fails to act in an appropriate manner, preventing the lessee from undertaking operations and production on his lease.”). Otherwise, BLM “is not required to grant a suspension, but has the authority to do so in the exercise of [its] informed discretion after making the necessary finding that the suspension is in the interest of conservation.” *Prima Oil & Gas Co. Amerac Energy Corp.*, 148 IBLA 45, 45 (1999).

Federal courts and the IBLA have identified important circumstances where the BLM can and should deny lease suspension requests under its discretionary authority. Most notably, a suspension request based on agency inaction or delay should only be granted where the delay is abnormal or does not apply evenhandedly to other leases. *See Hoyl*, 129 F.3d at 1384 (“...§ 39 is an equitable provision which prevents a lease from lapsing for lack of diligent development when the Secretary takes action regarding a lease which does not apply evenhandedly to leases in other areas.”); *see also Harvey E. Yates Co. et al.*, 156 IBLA 100 (2001) (“...an *abnormal* delay in processing an APD because of the time necessary to comply with environmental laws may warrant suspension of production and operations on an oil and gas lease...”) (emphasis added).

The IBLA recently applied this rule in *Vaquero Energy, Inc.*, 185 IBLA 233 (2015) to hold that the BLM had improperly granted a suspension based on foreseeable delays in drilling permit processing. In *Vaquero*, an oil and gas company filed a suspension request based on permitting delays caused by environmental review under the ESA. *Id.* at 234. More specifically, sixty-two days before lease expiration, the company filed two drilling permit applications, and then, within forty days of lease expiration, the company filed a suspension request. *See id.* The BLM rejected the suspension request, “observing that 2 months did not allow sufficient time to process the APDs and comply with the ESA,” and “the timeframe for complying with the ESA was clearly stated in the

stipulations attached to the lease agreement.”¹ *Id.* In response, the company argued that the BLM should have granted the request because its lease had unique consultation requirements under the ESA. *Id.* at 234-35. Yet, by express stipulation, the company “was clearly apprised of the special circumstances and timing requirements posed by the presence of threatened and endangered species.” *Id.* at 237. Because the company was aware of the unique permitting delays associated with its lease, the BLM properly exercised its discretion to deny the “last-minute” suspension request. *Id.* (“Lessees and/or operators are responsible for timely filing required plans and necessary applications and cannot reasonably assume the Secretary will grant a suspension of operations...merely to relieve them of the consequences of their poorly timed decisions and actions.”).

In a similar case, BLM properly denied a lease suspension request where a coal lease² was due to expire before the NEPA review required for development could be completed. *Hoyl v. Babbitt*, 129 F.3d 1377, 1384(10th Cir. 1997). In *Hoyl*, a coal mine lessee sought a suspension to cure problems with mine plans and allow the BLM to conduct environmental review under NEPA. *Id.* at 1381-82. BLM needed to prepare an EIS for the coal mine, but the lease would have expired before the agency could complete the required environmental review. *Id.* at 1382-83. In general, on any federal coal lease, an EIS must be prepared before a mine can be developed. *Id.* at 1383. Although federal agency action prevented the lessee from timely developing the lease, preparation of an EIS was a measure that applied evenhandedly to coal leases in other areas, so the decision to grant the suspension was discretionary. *Id.* at 1384. *See also Prima Oil & Gas Co.*, 148 IBLA 45 (1999) (“When the lessee’s inability to commence drilling prior to lease expiration cannot be attributed to any order, delay, or inaction by any Federal agency, the Secretary of the Interior is under no obligation to grant a suspension, but has the authority to do so in the exercise of his informed discretion after making the necessary finding that he suspension is in the interest of conservation.”).

Despite these legal standards, however, the BLM routinely grants “last-minute” lease suspensions based on permitting delays caused by ordinary NEPA review, as well as other suspensions that are neither warranted nor legally required. A review of lease suspensions granted in several western states disclosed numerous examples of unjustified lease suspensions.

- In Colorado, COC-77607, 67608, and 67609 were granted suspensions for NEPA review associated with a drilling permit application. Although the associated APD was received by the BLM approximately 35 days before lease expiration, and a suspension request letter was filed only four days after the APD, BLM granted a suspension “due to an unforeseeable administrative delay.” *See Harvey E. Yates Co., et. al*, 156 IBLA 100 (2001) (“...a BLM delay in approving an APD does not equate to an order suspending drilling or production.”).³

¹ Although the cited decisions almost always involve the BLM denying a lease suspension request, this is because (1) standing and (2) a lack of transparency make it far less likely that a non-lessee party will challenge a suspension decision in court.

² *AMCA Coal Leasing, Inc.*, 145 IBLA 125, 133 (“Although most of the cases have involved oil and gas leases, the same principles have been recognized as applicable to coal leases.”) (citations omitted)

³ We recognize that agency guidance materials provide that suspensions should not be granted for APDs filed within 30 days of lease expiration. *See* BLM Manual H-3160-10, § .2.C. However, given the volume of suspensions granted for APDs filed within months of lease expiration, and the foreseeability of agency delays related to permit processing, suspension requests should generally also be rejected for APDs filed within 6 months of lease expiration. *See* BLM, “Average Application for Permit to Drill (APD) Approval Timeframes: FY2005-FY2014” *available at*

- Similarly, in Utah, UTU-75121 was suspended based on a Notice of Staking received approximately thirty-five (35) days prior to lease expiration. The suspension request preceded the NOS, and, in the order granting the suspension, dated after the end of the primary term of the lease, BLM required that the operator submit an APD within 30 days of completing an onsite inspection of the lease. *See* BLM Manual 3160-10, § .3.31.A.3 (“The applicant requesting the suspensions should include evidence that activity has been attempted on the lease (such as filing a Notice of Staking or an APD) *and the activity has been stopped by actions beyond the operator’s control.*”).
- Also in Utah, UTU-66798 was granted a suspension based on the existence of neighboring unleased federal lands. However, a review of adjacent lands at the time of suspension, in March 1999, shows that all adjacent federal lands were subject to authorized oil and gas leases at that time. Had the suspension not been improperly granted, the lease would have long since expired.

2. **BLM does not adequately monitor or evaluate suspended leases to determine whether suspensions are still justified.**

Under some circumstances, a lease suspension that is no longer warranted will lift automatically, by operation of law, in the absence of any affirmative agency order providing notice to the lessee. *See Savoy Energy, L.P.*, 178 IBLA 313, 321 (2010) (holding that a lease suspension will terminate by automatically, by operation of law, when a lessee conducts “lease activity” on a suspended lease, including, for example, road construction, site preparation, well repair, or drilling); BLM Manual 3160-10, § .3.31.C.2 (1987) (providing that a suspension will terminate “automatically” where the suspension was granted for a delay related to a drilling permit, and the permit has been granted or denied, at lease where the suspension was granted for an indefinite period of time). As a matter of practice, however, BLM almost always affirmatively terminates lease suspensions by order, and sets an effective date for termination. *See, e.g., Atchee CBM, LLC, et al.*, 183 IBLA 389, 393 (2013) (BLM affirmatively lifted suspensions where suspension orders were dependent on lessee obtaining drilling permit); *Savoy Energy*, 178 IBLA at 317 (2010) (BLM affirmatively lifted a lease suspension when it found that “the reasons for granting the Suspension no longer [applied].”) *Southern Utah Wilderness Alliance*, 177 IBLA 89, 94-96 (2009) (BLM affirmatively lifted suspensions where suspension orders each stated that “the suspensions would remain effective until BLM completed the appropriate NHPA review.”).

Although agency guidance requires that the BLM “monitor [suspended leases] on a regular basis to determine if [the] conditions for granting the suspension[s] are extant,” the BLM rarely evaluates the status of existing suspended leases to determine whether suspensions should remain in place or be lifted. *See* BLM Manual 3160-10, § .3.31.C.2 (1987). When a lease is suspended, the BLM is required to update the electronic lease file to identify the effective date of the lease suspension and remove the lease expiration date, but the agency is not required to schedule a future time to check-in and evaluate the circumstances of the suspended lease. *See* BLM Manual H-3103-1 (1995) at p.

http://www.blm.gov/wo/st/en/prog/energy/oil_and_gas/statistics/apd_chart.html (showing that, in FY 2014, BLM needed an average of 94 days to process complete APDs, and operators took an average of 133 days to cure deficiencies in their initial APD submissions). *See Harvey E. Yates Co. et al.*, 156 IBLA 100 (2001) (“...an *abnormal* delay in processing an APD because of the time necessary to comply with environmental laws may warrant suspension of production and operations on an oil and gas lease...”) (emphasis added).

62. As a consequence, suspensions frequently remain in place long after the circumstances that originally justified the suspension have passed. A review of BLM records in several western states disclosed numerous examples of lease suspensions left in place long after the circumstances that originally justified the suspensions were no longer in place, and the suspensions were no longer warranted.

- In Wyoming, for example, WYW-097254, WYW-108053, WYW-113997, and WYW-106143 were suspended effective June 1, 1994 based on a neighboring unleased lands justification. Because of an ACEC designation, the neighboring unleased lands were closed to leasing on August 8, 1997, and the underlying justification for the suspensions therefore no longer applied. However, it took more than six years after the designation for the suspensions to be terminated for three of the leases (WYW-108053, WYW-113997, WYW-10613), and the suspension for WYW-097254 appears to still be in place.
- Also in Wyoming, WYW-124831 was suspended in January 2001 based on timing limitations that prohibited activity on the lease from February through July of each year. In its suspension request, the lessee claimed that, despite holding an APD, “there was not a sufficient amount of time available to locate and mobilize drilling equipment, much less drill and complete the subject well, prior to the imposition of the timing limitations.” BLM granted the suspension, noting that the lease was due to expire in March 2001. In the order granting the suspension, BLM provided that the suspension would terminate “automatically” on “the first day of the month following the date that activity is allowed on the lease...” Under this provision, the suspension should have lifted on August 1, 2001, when the lessee held an APD and timing limitations no longer restricted drilling activity on the lease. Of course, if timely (or automatically) lifted, the lease would have long since expired. In a similar case in Wyoming, the most recent suspension order for WYW-117668 provided it would “automatically terminate on October 1, 2001,” yet the suspension appears to still be in place.
- Similarly, in Utah, UTU-64921, 70849, 70887, 70888, 70889 and 71401 were suspended on account of unleased lands in September 1998. The order granting the suspension provided that the suspension would terminate “one year after the effective date of the newly issued leases resulting from the lands being offered in a competitive lease sale.” In the fall of 2005, the adjacent unleased lands were leased, effectively filling in the “gaps” of adjacent unleased lands. Yet, the BLM failed to timely lift the suspensions, and the leases have since been granted new suspensions related to litigation. Had BLM timely lifted the suspensions, the leases would have expired before their subsequent suspensions.
- Also in Utah, UTU-75121, discussed above, was suspended in July 2006 and the suspension was set to terminate “ninety (90) days after the first of the month in which [the suspension applicant] is notified of a decision not to approve the submitted APD.” On May 5, 2014, BLM notified the applicant that the APD was not approved, but the agency failed to lift the suspension thereafter. Had BLM timely lifted the suspension, the lease would have since expired.

- In Colorado, COC-065227 was suspended effective July 1, 2011, with approximately 2 months remaining of its primary term.⁴ The suspension order provided that the suspension would last no later than August 30, 2012, yet the suspension still remains in place. Of course, had the suspension been timely lifted, the lease would have since expired. Similarly, the suspension order for COC-066242 was granted until September 1, 2014, and, if timely lifted, the lease would have since expired.⁵
- In *Savoy Energy*, 178 IBLA 313, 315 (2010), three federal oil and gas leases were suspended by BLM order, effective September 1, 2003. Under the terms of the suspension order, the lease suspensions should have terminated no later than November 30, 2006. *Id.* at 319-20. Yet, BLM did not affirmatively lift the suspensions until more than two years later, after the lessee requested confirmation that the suspension was still in effect, in March 2009. *Id.* at 317.

3. BLM lease suspension decisions are almost wholly insulated from public review, undermining agency accountability.

Finally, suspension requests and decisions are almost wholly insulated from public review. BLM agency guidance materials provide that lease suspensions are categorically excluded from NEPA review, 516 DM 11.9(B)(4), and lease suspension decisions do not require public notice, Manual H-1790-1 at p. 17 (“...you *may* elect to provide public notification of a decision based on a CX...”)(emphasis added), 19 (“...there is no requirement for...public involvement when reviewing whether extraordinary circumstances apply...”). *See also Center for Food Safety v. Johanns*, 451 F. Supp. 2d 1165, 1175 (D. Haw. 2006) (“There does not appear to be any specific process an agency must follow in determining that a categorical exclusion applies and that an exception to that exclusion does not apply.”). Because public notice is not required, BLM almost never publishes its lease suspension decisions. And, since the lease suspension applicant is usually the only party privy to lease suspension decisions, there is little in the way of agency accountability for unwarranted lease suspensions.

Under current practices and policies, the public typically has no opportunity to review and comment on lease suspension requests from industry. Additionally, because information about existing suspensions is seldom shared, the public usually has no idea that suspended leases are approaching or have passed the end of their suspension terms. Involving the public in suspension requests is critical to ensuring that the public interest is properly weighed against the interests of the oil and gas industry. And providing the public with current information about the status of suspended leases can also aid in the proper administration of those leases and ensure that industry is complying with the terms of suspension agreements.

⁴ The lease had been committed to the Secret Canyon Unit before its suspension, but the Unit never drilled its initial obligation well. The Unit was itself subsequently suspended under § 25 of its unit agreement, but this suspension would not act to suspend COC-065227. *See* Draft BLM Handbook H-3180-1-Unitization, § II(J)(1) (“Suspensions under Section 25 apply onto the unit requirements and will not serve to extend leases that would otherwise expire.”), p. 23 (“Extensions granted for meeting unit drilling requirements do not toll the running of lease terms. Thus, depending on the circumstances, a suspension of operations and/or production pursuant to 43 CFR 3103.4-2 and 43 CFR 3165.1 may also be needed to preserve any committed lease that would otherwise expire.”).

⁵ This suspension was granted under § 17(i) rather than § 39, but the same principles apply to lifting the suspension in this instance.

However, a review of BLM field office NEPA logs showed almost no public documentation of lease suspension documentation. For example:

- A search on LR2000 showed that 52 leases were suspended in Colorado’s Little Snake Field Office from FY 2004 through FY 2010. However, NEPA documentation for the associated suspension orders does not appear on the field office NEPA Register.⁶
- A search on LR2000 showed that 148 leases have been suspended in Wyoming’s Rock Springs Field Office since the beginning of FY 2009. However, NEPA documentation for these associated suspension orders does not appear on the field office NEPA Log.⁷
- A search on LR2000 showed that 25 leases were suspended in Montana’ Billings Field Office from FY 2008 through FY 2015. Yet, NEPA documentation for the associated suspension orders does not appear on the field office NEPA Log.⁸

Conclusion

Reducing the amount of public land and minerals subject to suspended leases should necessarily begin by addressing the three major problems described in this report. Unwarranted suspensions granted for ordinary and foreseeable agency delays “relieve [lessees and/or operators] of the consequences of their poorly timed decisions and actions,” while inadequate agency oversight of suspended leases allows suspensions to remain in place years after the reason for the suspension has passed. *See Vaquero Energy*, 185 IBLA at 237. These failures are precluding land management opportunities that might otherwise confer valuable benefits to the public at the same time as they deprive the public of valuable tax revenue.⁹

⁶ See http://www.blm.gov/co/st/en/BLM_Information/nepa/lisfo.html.

⁷ See <http://www.blm.gov/wy/st/en/info/NEPA/documents/rsfo.html>.

⁸ See <http://www.blm.gov/mt/st/en/info/nepa.html>.

⁹ See, e.g., Bighorn Basin WY PRMP/FEIS at Appendix S—Lands with Wilderness Characteristics, Table S-1 (“Rationale for Not Managing Lands with Wilderness Characteristics for Naturalness, Outstanding Opportunities for Solitude, and Primitive and Unconfined Recreation, by Field Office and Unit.”).