

# Suspensions of federal and Indian oil and gas leases

23 April 2020

With storage pressure and pandemic-reduced demand driving oil prices into freefall, lessees of federal and Indian lands may consider turning to the Bureau of Land Management (BLM) and Bureau of Indian Affairs (BIA) procedures for suspending lease operations and production.

BLM is acutely aware of the current economic challenges facing the oil and gas industry and will soon be announcing a centralized format to receive incoming requests to address specific concerns. Our understanding is that if a company needs to submit a request for relief immediately, then they should work directly with their field or district BLM office.

For federal lessees, the Mineral Leasing Act (MLA) and associated regulations provide the option to suspend operations (i) “in the interest of conservation” under Section 39 of the MLA, or (ii) due to occurrence of events beyond the reasonable control of a lessee under Section 17 of the MLA. Additionally, implementing regulations for the MLA allow lessees to apply for a temporary royalty rate reduction if the lease cannot be successfully operated under its terms.

Section 39 and Section 17 suspensions, in addition to their distinct triggering events, also carry different benefits. In the event a Section 39 suspension is granted, operations *and* production obligations are suspended, the lessee is relieved of its obligation to pay rental and minimum royalty during the suspension period, and the lease term is extended for the length of the suspension. 43 C.F.R. § 3103.4-4(a). A Section 17 suspension operates to suspend operations *or* production, and will toll the lease term, but will not suspend the lessee’s obligation to pay rentals and royalties. *Id.*; 30 U.S.C. § 226(i). Additionally, unlike a Section 39 suspension, Section 17 *only* relieves a lessee of obligations after production from the lease has been established by the lessee (or the lessee demonstrates the lease is producible). *See Savoy Energy*, 178 IBLA 313 (2010). Note that if a lessee has submitted an APD that BLM has not yet acted upon, Section 17 relief likely is available.

BLM has recently issued interim [guidance](#) regarding lease suspensions, noting that the current price of oil and COVID-19 pandemic may qualify an operator for a suspension under Section 17. A Section 17 suspension is characterized as a suspension that occurs due to an event of *force majeure* and is more appropriate for the unprecedented decline in oil price (coupled with the COVID-19 pandemic). According to the BLM Handbook 3160-10, Suspension of Operations and/or Production (BLM Suspension Manual), such suspension is permissible if lessee is prevented from operating or producing from the lease, despite the exercise of care and diligence, by reason of the *force majeure* event. Though the BLM Suspension Manual does not mention

economic or market concerns as ordinarily meriting a Section 17 suspension, it does expressly note the following:

It may be appropriate under certain extraordinary circumstances as determined by Washington Headquarters, such as the sharply declining oil prices in early 1986, to grant a suspension of production to a producible lease (the lease may be either in its primary or extended term) in order to avoid the premature abandonment of the wells and resulting loss of recoverable resources.

*See* BLM Suspension Manual, § 3 (emphasis added).

BLM's internal guidance indicates that a Section 17 suspension should be granted, given the truly extraordinary circumstances of the past several weeks (and the fact that operators are now facing the prospect of abandoning producible leases). Ultimately, the decision of whether to permit suspension is subject to BLM's discretion, and operational impacts of the pandemic (*e.g.*, supply chain and labor disruptions) could also factor into a favorable decision under a Section 17 petition.

While Section 39 of the MLA also permits suspensions, the BLM Suspension Manual notes that Section 39 suspensions are available due to events arising out of BLM action (or other events *necessitating* BLM action). *See* BLM Suspension Manual § 2 ("The major distinction between the two suspensions should be based on judicious determination as to whether or not the hardship is generated by the action of, or need by, the BLM for conservation of natural resources, rather than situations that are simply beyond the control of the lessee/operator."). BLM's existing guidance does not contemplate today's situation. While an operator might reasonably argue that lack of available storage and greatly reduced demand (resulting in negative prices) render suspension necessary to prevent actual waste of hydrocarbons, it would be a novel approach; however, our understanding is that BLM is considering all options given the gravity of the situation. *See Hoyl v. Babbitt*, 129 F.3d 1377, 1385 (10th Cir. 1997) (indicating, in the coal context, that Section 39 suspensions should not be granted simply because no market for the mineral exists).

In the interim, BLM has [directed](#) lessees to the provisions of 43 CFR § 3403.4(b)(1)-(3). Royalty relief is available upon an application demonstrating that the lease cannot be successfully operated (due to the pandemic), and including (i) a self-certification with supporting documentation would otherwise be capable of producing, (ii) a simple economic analysis and (iii) the requested temporary royalty rate.

One issue lessees may encounter, or could be subject to challenge on, is whether the leases they are seeking to suspend were already not in production (or were failing to produce in paying quantities) for other reasons. It will be important to demonstrate, to the extent possible, that recent events *caused* the underlying petition for suspension or relief (rather than pre-existing conditions that resulted in an inactive lease). As the GAO Report found, suspension oversight at the BLM level has been poor historically, and – following the release of the GAO Report – BLM has been engaged in revising policy in order to ensure federal lands are appropriately developed. Thus, new applications for suspension may face somewhat increased scrutiny.

Note that the BLM interim guidance and MLA suspension and relief provisions do not apply to Indian leases. But, for Indian lessees, the procedure is also fairly straightforward. BIA may authorize suspension of a lessee's production or operational obligations (after the primary term) "for economic or marketing reasons," upon application from the lessee. 25 C.F.R. §§ 211.44 (tribal lands), 212.44 (allottee lands). While the current price climate would appear to qualify for a suspension, BIA nevertheless requires (i) an economic analysis and (ii) "the written consent of the Indian mineral owner and a written agreement executed by the parties setting forth the terms

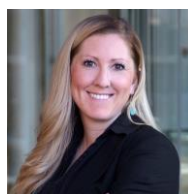
of said agreement.” See BIA Fluid Mineral Estate Procedural Handbook § 4.16, available in the [BIA Handbook](#). Suspension of Indian leases may be approved for up to a period of one year and does not relieve the lessee of the obligation to pay royalties and rentals. Note that, depending on the tribal lands that are leased, BIA may require alternative (or additional) information to grant suspension. See 25 C.F.R. § 211.1(e) (providing that the relevant statutes do not apply to leasing and development of lands held by the Five Civilized Tribes of Oklahoma, Osage, or Wind River Reservation).

Federal and Indian oil and gas lessees should also carefully examine their lease terms and approved unit agreements to determine whether the provisions may permit (or require) suspension on other terms. In any event, oil and gas lessees and operators should evaluate their individual circumstances and consult with their field or district offices before filing any application for suspension and/or a request for royalty relief.

## Contacts



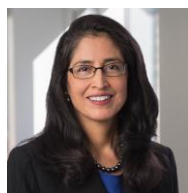
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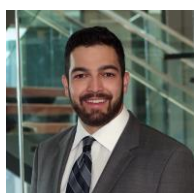
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