

## Hurst, Hyla (Strickland)

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**From:** Karl Gawell [karl@geo-energy.org]  
**Sent:** Tuesday, September 19, 2006 1:57 PM  
**To:** MRM Comments  
**Cc:** Karlgawell@aol.com; Kermit\_Witherbee@blm.gov  
**Subject:** Attn: RIN 1010-AD32

September 19, 2006

Minerals Management Service  
Minerals Revenue Management  
via e-mail to: mrm.comments@mms.gov.

"Attn: RIN 1010-AD32"

Dear Director Burton,

These comments on the Minerals Management Service (MMS) proposed rule implementing the Energy Policy Act of 2005 (EPACT) geothermal provisions, 71 Fed. Reg. 41,542, (July 21, 2006) are submitted on behalf of the membership of the Geothermal Energy Association.

First, we commend the MMS' proposed rules for clearly recognizing the tri-part goals established by law for geothermal royalty regulations and administration. As the proposed rules note on 41519, the John Rishel Steam Act Amendments included in EPACT 2005, as passed by Congress (hereinafter also referred to as the Rishel Amendments), states: "In issuing any final regulation establishing royalty rates under this section, the Secretary shall seek—

- (1) to provide lessees a simplified administrative system
  - (2) to encourage new development; and
  - (3) to achieve the same level of royalty revenues over a 10-year period as the regulation in effect on the date of enactment of this subsection."
- (EPACT, Section 244(c))

We also appreciate the fact that the MMS has largely based its proposed rules on the recommendations of the Royalty Policy Committee (RPC). We believe that makes for a good foundation, given the work and range of viewpoints that were included in that process. The MMS should recognize, as did the RPC, that potential savings that will accrue to the government as well as developers (see pg 41524 of MMS draft regulations.) The RPC states on page 11 of its report that one of the advantages of the new system would be to "reduce otherwise significant audit costs for government (currently netback projects require approximately 2000 man hours and cost up to \$129,000 per audit for a 3 year cycle)."

In addition, we have several comments on the proposed rules that follow.

### Values Proposed by the Royalty Policy Committee Appear Inflated in the Draft Rule

We believe that some values, in particular the direct use fee schedule, have been significantly increased from those recommended in the MMS Royalty Policy Committee's Geothermal Valuation Subcommittee Report of May 2005. It's not clear whether some further analysis has indicated that the proposals of the RPC were somehow an underestimate in value, or whether MMS has some other justification for the changes. In the case of the direct fee schedule, the changes noted in the draft rulemaking do not appear to justify the changes in the schedule.

### Royalty on Byproducts

We also believe that the proposed rules are simply wrong and would reverse the intent of Congress regarding royalties on byproducts. Congress amended the law to narrow the scope of any royalty on byproducts to those which would otherwise have to pay a royalty if they were produced on the public lands. Congress intended to address the inequity of the law

and encourage development of risky but potentially valuable processes to produce minerals from geothermal power plants.

The draft rule would reverse the intent of Congress. It ignores the plain language in the statute that narrowed the language of the Steam Act regarding royalties on byproducts. The proposed rule apparently relies on authority in the Federal Land Policy and Management Act (FLPMA) to argue that a royalty is required on all minerals produced from the federal lands.

However, since no royalty is required for many of the minerals produced from public lands (see Mining Law of 1872) the proposed rule applies this royalty only to those minerals produced as byproducts of geothermal processes. This is contrary to the intent of law, and amounts to nothing more than an unjust royalty that will cripple any new development in this area contrary to the intent of Congress.

The industry presented testimony on the record before the House and Senate Committees that considered the legislation supporting the need for this change. The industry expressed their dissatisfaction with the Steam Act's by-product provision because it worked to create a disincentive for producing minerals from geothermal leases.

"Mineral production from geothermal sites should be treated the same as mineral production elsewhere on the federal lands. It is sadly ironic that under the existing law a federal lessee producing metals from the fluid used in a geothermal plant would have to pay the federal government a royalty on the mineral (in addition to a royalty on the power), but producing that same metal by open pit mining on the public lands would not be subject to a royalty. There is significant potential to produce minerals from geothermal sites that should be encouraged. Doing so will not only help the economy and national security but will reduce the overall environmental impacts of mineral production." (Statement of Karl Gawell, Executive Director of the Geothermal Energy Association, Before the House Committee on Resources, March 19, 2003)

In a July 17, 2003 Press Release on the introduction of geothermal leasing legislation that would later become the Rishel Amendments, Representative Jim Gibbons noted that among its many provisions, the bill would: "Address a disparity in existing law that discourages mineral production from geothermal sites. Many geothermal sites have the potential to produce valuable minerals, and this bill would facilitate this development by providing fair royalty terms for such mineral production."

If FLPMA requires a royalty on all minerals produced from geothermal wells, then it should do so as a requirement upon all minerals produced from the public lands. If MMS and BLM wish to propose a royalty on all minerals produced from the public lands, then, and only then, should it consider imposing a royalty on such mineral production from geothermal leases.

#### Specific Comments

Rental and royalty payments: - the proposed rule requires that a lease produce, or pay in lieu of fees (218, 303 - 307). But it's not clear that the strict rules regarding crediting of rentals against royalties applies in this case, which means that lessees could be penalized by having to pay both rentals and royalties during those times when they are paying in lieu fees because of production cessations or other problems. This does not seem fair or appropriate. The intent of Congress was to provide credit for a royalty, but it appears the proposed rule - which allows lessees to take the credit only in the year paid - goes beyond the law, is too strict, and will have the unforeseen consequence of imposing financial burdens when companies can least afford additional costs.

MMS Section 206.351, definitions - Given the clear language of Section 224 (a) of the statute, "gross proceeds from the sale of electricity," the definition of gross proceeds in the regulations should specify that all station usage power (including auxiliary load) and wheeling and transmission charges are not included.

MMS Sections 206.353 and 206.354 - The proposed rule would eliminate the one-time refund of royalties based on the royalty value of actual dismantlement costs of the transmission line or plant in excess of income from salvage. It justifies this with the statement that the provision has never been used. Given that geothermal power production is relatively

new and geothermal plants last for many years, the age of geothermal plants is generally such that no plant or transmission line has yet been dismantled. However, this proposed elimination will impose a potentially significant financial impact in the future and remove the incentive intended to ensure such actions are taken, which are clearly in the public interest. The provision allowing the one-time refund should not be eliminated.

MMS 218.303 - The law allows rentals to be deducted from royalties once production is achieved, which is a new benefit encouraging production. BLM should be clear that this applies from the date of enactment of the Rishel Amendments.

MMS 206.351 definition of direct use. Both MMS and BLM have definitions for direct use, a term that is defined in EPACT, both agree that the statutory definition meant to include the term "generation" however the two bureaus have defined direct use to include generation in two slightly different ways. See 43 C.F.R. § 3200.1. We suggest that the agencies agree on one definition.

Thank you for your consideration of our views, comments and questions. Please feel free to contact us if you have any questions or need additional clarification. We believe implementation of the EPACT geothermal provisions will assist in bringing new, domestic geothermal energy to the country. We have enclosed a copy of our comments on the BLM portion of the new regulations, since there are areas of overlap between the two rulemakings.

Sincerely,

Karl Gawell  
Executive Director

Enclosure

September 19, 2006

Director (630)  
Bureau of Land Management  
via e-mail to [comments\\_washington@blm.gov](mailto:comments_washington@blm.gov)

"Attn: RIN 1004-AD87"

Dear Director Clarke,

The Geothermal Energy Association respectfully submits these comments on behalf of its member companies to the proposed rule "Geothermal Resource Leasing and Geothermal Resources Unit Agreement" published in the Federal Register on July 21, 2006 (71 Fed. Reg. 41,542). The proposed rule is intended to implement significant changes to the Geothermal Steam Act required by the enactment by Congress of the Energy Policy Act of 2005 (EPACT).

We appreciate the considerable efforts by the Bureau of Land Management to accurately implement the intent of the John Rishel Steam Act Amendments included in EPACT, hereinafter referred to as the Rishel Amendments. Nonetheless, we believe there are some serious issues that have not been properly addressed in the proposed rule.

More Aggressive and Accountable Leasing Procedures Needed

Our nation is in a serious energy crisis which Congress recognized when it enacted EPACT. Congress sought to encourage the development of a diverse supply of domestic energy and gave particular attention to geothermal energy. Geothermal energy is a clean reliable source of renewable energy - available consistently whether the wind blows or the sun shines. The GAO in a recently issued report, "Renewable Energy: Increased Geothermal Development Will Depend on Overcoming Many Challenges," GAO-06-629 (May

2006) (GAO Report) provides estimates (n.7, Table 2 at 13) of the potential electricity generation from geothermal. These estimates indicate that the potential for geothermal power over the next decade is between 3,100-12,000 Megawatts. The Rishel Amendments were made a part of EPACT to modernize the leasing process and to address a serious multi-decade delay in leasing federal geothermal resources. The large backlog in geothermal lease applications was due, in part, to the fact that under the 1970 Geothermal Steam Act leasing was a discretionary act. In passing EPACT, Congress identified two hurdles to greater geothermal development:

- Regulatory restrictions and processes on federal land;
- The greater financial burden that the geothermal industry must face (S. Rep. no. 78, 109th Cong., 1st Sess. (2005)). We do not believe that the proposed rule approaches the issue of lease delay with the same focus as did Congress in the Rishel Amendments.

First, we have serious concerns about the approach taken in the proposed rules towards the frequency of lease sales and the accountability of the lease nomination processing. BLM must adopt more aggressive and accountable leasing procedures than those proposed in the proposed regulations. Under the Rishel Amendments, leasing is a mandatory requirement, and the law establishes a minimum requirement for lease sales at least every two years in any state with pending nominations. Congress even repeats this leasing command several times in the same paragraph of the law. The Title of Section 222 is "Competitive Lease Sale Requirements," the title of subsection (b) is "competitive lease sale required," and the language of the specific lease sale provision, (b)(2), is the mandatory shall (The Secretary shall hold a competitive lease sale at least once every 2 years...). The statutory two-year leasing schedule provides a minimum frequency for leasing and does not establish a cap that would prevent more frequent leasing. A more frequent leasing timeline is important when considered in light of the two-year window for the geothermal production tax credit. Leases must be issued more frequently if we are to move to the development stage with new projects.

BLM's rules should establish as the standard, regular quarterly lease sales in any state where there are nominations received by BLM. Institution of regular, quarterly lease sales of geothermal resources would go far in addressing the geothermal leasing backlog and to adding significant energy resources into the grid. In addition, the regulations should require the processing of all lease nominations within 6 months.

If necessary to address environmental or other issues, lease stipulations should be used to allow leasing within the above-described quarterly or bi-annual timeframe. It is important to recognize that from a development perspective geothermal development is more akin to the development of minerals than to oil and gas development. Indeed, geothermal resources are designated a mineral in several states due to this similarity. For both geothermal and mineral development, the rights to develop the land need to be secured before significant exploration can occur because of the risk and capital cost involved. For oil and gas, exploration is typically conducted before a developer bids on a lease. For this reason, we believe that the regulations for geothermal leasing should allow a greater use of stipulations to allow leasing (and exploration of the geothermal resource under categorical exclusion), even if the lease stipulations make future development of the leasehold totally contingent upon subsequent permitting or National Environmental Policy Act processes. The GAO Report identified the lengthily review process (environmental and cultural issues) for the approval of leases and permits as a hurdle to the development of geothermal resources, and the new rules should seek to address this identified problem.

BLM must establish a specific accountability process for every BLM state office and for field offices handling geothermal nominations that requires quarterly publication of a list of the pending lease nominations, the date received, the status of each, and after six months the reason for further delay if the tract has not been put forward for leasing. These procedures should apply to lease applications pending on the date of enactment of the new law as well as new nominations. And, BLM should include in its accountability procedures a list of leases by state and their status. Finally, BLM should also require that all leases relinquished automatically be placed in the next competitive lease sale. (The MOU between the U.S. Forest Service and the BLM should recommend that a similar accountability process be put in place for the Forest Service surface management actions in support of the geothermal

leasing program.)

BLM should not assume that offering one lease or lease area for sale somewhere within a state at least every two years sufficiently meets the directive of Congress, which is what the draft regulations could be misinterpreted as proposing. This inadequate schedule for leasing would undermine the clear intent of Congress and hamper the ability of industry to bring this urgently needed domestic energy resource into production.

Similarly, BLM needs to set specific timeframes for the processing of geothermal permits at the development stage. Again, BLM needs to consider the time constraints imposed by the geothermal production tax credit. In order to obtain the tax credit provided by EPACT, energy must be produced from a geothermal lease within the tight two-year window provided by EPACT.

EPACT directed BLM to establish deadlines for processing Applications for Permit to Drill in the oil and gas development arena - a ten day period to notify an applicant if the permit is complete and then a 30 day period for BLM to complete the processing of the application. Similar, if not identical, deadlines should be put in place for the processing of geothermal applications. EPACT section 225 directed BLM and the U.S. Forest Service to enter into a Memorandum of Understanding that would set up a process for handling applications, and "timelines for the applications process." This is clear evidence that the need for application processing timelines was recognized by Congress as an important mechanism to accelerate the development of public geothermal resources. BLM should also examine the opportunity for additional categorical exclusions from the National Environmental Policy Act. Timelines, along with the accountability process described above, would send a clear message to BLM staff at the headquarters, state and field office level that geothermal energy is a significant source of domestic energy that must be prioritized.

#### The Proposed Rules Give BLM Unduly Broad Discretion in the Management of Leases and Units

In several areas, BLM proposes to give itself broad authority to modify lease terms, unit operating terms (3280.6), require well drilling (3275.21), and impose other mandatory actions upon lessees that could cost them millions of dollars, disrupt lease operations and are, in general, an extraordinarily heavy handed vision of the relationship between the government and the private sector in developing public energy resources. In their entirety, these provisions need to be buffered by careful limitations and restrictions to protect the rights of the lease holder, ensure that lease operations are not disrupted without due cause and justification, and protect against any potential abuse of power by agency officials.

We recognize that several of these provisions reflect the continuing provisions of the Geothermal Steam Act which were unchanged by the Rishel amendments. For example, Section 1007(a) continues to provide for an initial ten year lease period, "The Secretary may readjust the terms and conditions, except as otherwise provided herein, of any geothermal lease issued under this chapter at not less than ten-year intervals beginning ten years after the date the geothermal steam is produced, as determined by the Secretary." And, the provisions regarding royalty readjustment reflect the continuing provisions of Section 1007 (b), "The Secretary may readjust the rentals and royalties of any geothermal lease issued under this chapter at not less than twenty-year intervals beginning thirty-five years after the date geothermal steam is produced, as determined by the Secretary. In the event of any such readjustment neither the rental nor royalty may be increased by more than 50 per centum over the rental or royalty paid during the preceding period."

These existing BLM authorities, however, appear to have been expanded by some new proposed provisions without clear statutory basis. For example, § 3284.9, which purports to give BLM the authority to "set or modify injection or production rates," could be interpreted so broadly that it would undermine the integrity of the lease, making it difficult, if not impossible, for a geothermal developer of federal resources to obtain funding or continue operations.

Moreover, the unbridled use of authorities that allow the Secretary (BLM) to adjust lease terms, royalties or unit agreements could call into question the integrity of BLM's underlying lease and unit agreements provisions, if not its good faith in entering into such contracts, when these provisions could be read to make their terms a nullity.

When BLM approves leases or unit agreements it must do so with careful consideration of the terms and the recognition that industry is making investment-backed decisions based on those terms. The lessee is assuming that the terms and conditions of the lease or unit agreement represent a fair and binding agreement between both parties, will be honored by the BLM and, as such, will not be changed without due process and considerable justification.

BLM should state in its regulations that: (1) lease and unit terms will be considered binding absent extraordinary circumstances, and lessees operating under those terms will be given a presumption of operating in good faith and in the public interest; (2) any changes sought to lease and unit operating conditions must bear the burden of proof to demonstrate that the proposed changes are needed, are in the public interest and outweigh any damage to the lessee; (3) BLM officials must promptly communicate to the lessee or unit operator any concerns that may give rise for such a change to lease or unit agreement terms and request their comments before taking further action; (4) any proposal to request such changes to the lease or unit agreement should be approved by the BLM State Director; and (5) the State Director's decision may be appealed to the IBLA and during any such appeal the proposed changes will be deferred unless the State Director, in his/her decision, has declared that failure to impose the proposed changes will present a danger to public health and safety or irreparable harm to the environment.

Similarly, BLM's authority in § 3280.4 to unilaterally require unitization should be circumscribed. BLM's regulations should specify that agency officials should seek to work with and through the existing lease holders, first, in the spirit of cooperative conservation. BLM should not undermine the existing leaseholders without first seeking their cooperation in developing a unit. The regulations should require that BLM attempt to work with the existing lessees, first, and after having done so can demonstrate that such efforts are not likely to succeed before the Bureau can propose unilateral action. Finally, the regulations should stipulate that any proposal to impose unitization should be undertaken only with the review and approval of the State Director.

We cannot say strongly enough how the above-described provisions in the draft rule could undermine the geothermal leasing and regulatory process. These provisions, some of which are admittedly provided for in the statute, must be carefully and thoroughly conditioned in the implementing regulations to avoid undermining the integrity of federal geothermal leases and unit agreements. If not, these proposed rules could have the perverse effect of reducing federal geothermal production. For both the operator and agency's sake these proposals should be modified to apply only in exceptional circumstances where changes are needed and justified as in the public interest. This needs to be reflected in any final rule by cross-cutting limitations and conditions such as those proposed in these comments.

#### BLM Should Consider Additional Provisions to Encourage Development through Leasing

Section 222(e) of the Rishel Amendments authorized BLM to offer leases for sale "as a block" where the agency reasonably expects they could be produced as one unit. The law included this provision to encourage the consolidation of ownership over a single geothermal reservoir and thus facilitate its timely development.

The proposed rules, however, have not addressed the situation of leases being offered adjacent to an area that has already been leased - contiguous resources. This is an issue that was also identified in the GAO Report - fragmented lease holdings that frustrate economically viable projects. The concern, which was also raised at the August 31 listening session in Reno, is this. In order to economically develop a geothermal resource, sufficient control of the resource must be obtained. If the developer does not control a sufficient amount of the geothermal resource, the geothermal resource may not be developed. There are situations where speculators have sought and obtained a geothermal lease with no intention or ability to develop the lease. The holder of the balance of the geothermal resource is held "hostage" by the lack of this contiguous resource. This is a detriment not only to the geothermal developer, but also to the government who seeks to develop its geothermal resources.

We propose that BLM allow in its regulations for parties to nominate and directly obtain a lease where the party can demonstrate to BLM that the parcel(s) being nominated adjoins and is within the same geothermal system where they

already hold valid legal rights for geothermal development provided that (1) and contiguous parcel nominated is less than or equal to 640 acres and (2) they can demonstrate a Valid Discovery of a potentially commercial geothermal system on their existing holdings or the nominated parcel. A "Valid Discovery" should be defined as the successful completion of a slim hole or production well that has been flow tested and meets industry standards for commercial production as provided by a report from an independent, geothermal consultant.

Or, as an alternative approach, BLM could provide in its regulations for parties to obtain a right of first refusal for lands offered for lease where the party can demonstrate to BLM that the lands being offered meet all of the above conditions. However, we prefer the direct leasing process described in the paragraph above because it would be the best approach to minimize processing costs and uncertainties while achieving commercial production of the resource in an expedited manner. We also believe that by providing such provisions to encourage development, the value of new leases offered for bid in future lease sales will increase in value because developers will know that the leasing rules support development of the resource.

Additional Specific Comments:

- BLM Section 3203.12 - Why must a developer pay a fee per acre just to nominate land? Any per nomination fee should only cover administrative costs, and the funds should be retained by the local BLM office for that specific purpose.
- BLM Section 3203.17 - Same day payment is not practical, nor possible in some cases, since the amount is not known prior to auction. There should be a 5 business day settlement period for bids.
- BLM Section 3207.11, 3207.12 - We object to the inclusion of an inflation adjustment for these payments, which we believe is not authorized by the law.
- BLM Section 3211.17(b)—There is no cap in the regulations under which the royalty rate will be negotiated. This is inconsistent with changes made to the law by the Rishel Amendments which set ranges for royalties (Section 224 (a)(1)) and which govern all federal leases including those being readjusted. This is also consistent with the recommendations of the Royalty Policy Committee, which recommended a specific range for negotiated royalties from existing leases (RPC Report, Page 10.).
- BLM Section 3212.27 - The schedule for a BLM response to a request to modify lease terms should be reduced to 120 days.
- BLM Section 3214.14 (b) - The reference to "other resources" as part of the reclamation effort is ambiguous and open-ended. This reference should be clarified.
- BLM Section 3215.15 - There should be an alternative to obtaining prior approval from BLM for greater than one month production cessation in instances of upset conditions.
- BLM Section 3283.5 - A requirement for the BLM to review all unit agreements every five years is burdensome and potentially unnecessary. Given BLM's limited resources this appears to be a poor allocation of funds, particularly since there does not appear to be any history of problems to justify this priority.
- BLM Section 3283.6 - The term "not reasonably necessary" is too subjective. If the BLM is going to determine proper geothermal operations there should be identified criteria for making such decisions.
- BLM Section 3286 - It appears that the term of a unit agreement differs from the term of a lease. The terms should not conflict but should be consistent with each other. Lease terms should be tied to production like Unit terms.

- In referencing the transition provisions that also apply in the MMS rules, BLM does not define (see 43 C.F.R. § 3200.1) nor use the same transition terms as does MMS. See MMS proposed rule, 30 C.F.R. § 206.351 definitions of Class I, Class II and Class III leases. It might provide clarity if the BLM regulations utilized the same terminology since the two rules have interrelated provisions. See 43 C.F.R. § 3200.7-.8.

#### Questions

- BLM Section 3204.12 - If a developer has a mining claim on acreage with an approved P.O.O., is there the same required 2-year waiting period post competitive lease sale as lands that do not have a mining claim?
- BLM Section 3211.13 - As a point of clarification, since rent is due in advance, but is credited against royalties paid on a producing lease, the royalties paid after the time period will deduct the rent component? Is this correct?
- BLM Section 3212.18 - It is not clear whether the production incentive applies to all classes of leases.
- BLM Section 3281.10, 3281.11 - The language states in Section 3811 (b) that a unit operator is not required to have an interest in the unit area, but Section 3281.10 suggests that the unit operator must have sufficient control of the unit area. This is unclear and appears inconsistent.

Thank you for your consideration of our views, comments and questions. Please feel free to contact us if you have any questions or need additional clarification. We have enclosed a copy of our comments on the MMS portion of the new regulations, since there are areas of overlap between the two rulemakings. We are anxious to see the new geothermal leasing provisions in EPACT implemented by the Department of the Interior. We believe that properly implemented, they will enhance the ability of federal geothermal resources to contribute to the nation's energy supply.

Sincerely,

Karl Gawell  
Executive Director

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