Lease Ban Opens New Front In Coal Policy War

By Keith Goldberg

Law360, New York (January 15, 2016, 7:35 PM ET) -- The beleaguered coal industry will bitterly fight the Obama administration's suspension of coal leasing on public lands while it conducts a multiyear environmental review, but the larger threat to the White House's bold move is the potential rollback or halt of efforts to reform the federal coal leasing program by a new president next year.

The U.S. Department of the Interior said Friday that it will prepare a programmatic environmental impact statement that will review all aspects of the federal coal leasing program, from whether royalty rates are too low, to the program's impact on the environment and climate change. It will be the first overhaul of the program since 1979.

Interior Secretary Sally Jewell said the EIS process would take three years. In the meantime, the DOI will pause its issuing of new, significant coal leases, the latest blow to a U.S. coal industry already staggered by low prices, stiffer environmental regulations and increased competition from cheap natural gas.

“It's been clear the administration has been focused on coal, but trying to suspend the entire leasing program is kind of shocking, and frankly, far in excess of what needs to be done to manage the federal coal program,” said Scot Anderson, the global head of Hogan Lovells' energy and natural resources group.

However, reports issued by the DOI's inspector general and the U.S. Government Accountability Office within the last three years suggest that the DOI's Bureau of Land Management may be undervaluing federal coal leases, and would seem to support repeated claims by environmental groups and their congressional allies that reforms to the program are necessary.

“Government agencies have recognized there are huge problems in the way the coal leasing program has been run,” said Abigail Dillen, Earthjustice's vice president of litigation for climate and energy. “This is something that's long overdue and it's the first step to overhauling a program that needs more oversight and a program that really, needs to be shut down, given the climate imperative to keep our fossil fuels unburned.”

Approximately 41 percent of U.S. coal is mined on federal lands. The leasing moratorium cuts off a key supply line for the coal producers and will put the industry under greater stress.

“A coal mine is like a battleship; it's not a sports car,” Anderson said. “It's a very long-term process that develops over a lot of years — the planning horizon isn't the next six months. This [moratorium] takes
away the ability to address long-term plans."

Given that the coal industry has challenged several environmental regulations crafted by the Obama administration, such as plans to limit carbon emissions from power plants, experts say litigation over the coal leasing pause is likely.

“We are still digesting the details and keeping all options open,” National Mining Association representative Jamie Caswell said Friday.

Potential legal challenges to the moratorium could range from claims the DOI acted arbitrarily and capriciously in violation of the Administrative Procedure Act, to allegations the agency flouted federal public-lands and mineral-leasing laws.

“They’ve taken this unilateral executive action to essentially cancel the coal program,” BakerHostetler attorney Mark Barron said. “The executive branch doesn’t have the unilateral power to abandon mineral production on federal lands.”

But Dillen says the DOI is on solid legal footing.

“There’s very strong law supporting the agency’s authority to take a look at how our public lands are zoned and managed,” Dillen said. “Whether it’s the BLM or the U.S. Forest Service or any DOI agency, they always have discretion to deny a given lease ... and take an environmental review before approval.”

Experts say the DOI, in its defense, can point to the fact that the moratorium doesn’t affect existing coal mining operations on federal lands, leasing on tribal lands or pending leases that have a final record of decision by the BLM approving the operations. Jewell said Friday that current coal mining operations on public lands have at least 20 years of life left in them.

“I think that’s going to be their argument, and that may be their way of defending against the other type of action: the potential for takings actions from those who have leasehold rights,” Barron said.

Challengers may also target the DOI’s use of the so-called social cost of carbon, which estimates the economic damages associated with a rise in carbon emissions, in an evaluation of the climate impacts of federal coal leasing in the programmatic EIS process.

“This will be the first big dispute over that process and how they calculate the social cost of carbon,” said Andrew Wheeler, a principal and team leader of the energy and environment practice at FaegreBD Consulting, who also represents coal giant Murray Energy Corp.

However, supporters and opponents of the DOI’s actions agree that the biggest potential roadblock to President Barack Obama’s plans may come not from a courtroom, but from his successor. The programmatic EIS process will spill into a new presidential administration, and depending on who lands in the White House next year, the coal leasing reforms could be altered or abandoned.

“I would think a new administration, regardless of if it’s a Republican or Democratic [one], would try to revise the EIS instead of jettison it,” Anderson said. “Another administration could simply lift the moratorium.”

That is why Wheeler believes the Obama administration will try to move the process along as quickly as
possible in its last year in office. The current White House could make it harder for the next administration to undo the reforms, and invite challenges from environmental groups over any reversal attempts, Wheeler said.

The administration's moves also have the oil and gas industry looking over its shoulder. Environmental groups, as well as lawmakers like Senator and Democratic presidential candidate Bernie Sanders, have called on the DOI to halt all fossil fuel leasing, and the suspension and revamp of the coal leasing program is the latest sign that Obama intends to burnish his climate legacy before he leaves office.

“The line is very blurry between this action today and the repeated cancellation of oil and gas lease sales around the country, particularly in the last six months,” Barron said. “It seems to me that the Obama administration has fully bought into the 'keep it in the ground' movement.”

While oil and gas generates far more federal revenue than coal, Wheeler expects the administration will take at least some action on reviewing federal oil and gas leasing policy.

“They're calling for a true accounting of the societal costs of taking the fossil fuels out of public lands,” Wheeler said. “If they can assign a dollar amount to what it would cost society to remove coal from the ground, then that calculation could, and eventually would, be applied to oil and natural gas. I don't see how you can start the process for one and not finish it with the other two.”

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