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December 7, 2023

The Honorable Tracy Stone-Manning
Director, Bureau of Land Management
U.S. Department of the Interior
1849 C Street NW, Room 5646
Washington, DC 20240

Attn: 1004-AE95

Subject: Comments on the Proposed Rule: Management and Protection of the National Petroleum Reserve in Alaska

Dear Director Stone-Manning:

ConocoPhillips Alaska, Inc. (CPAI) provides the following comments on the proposed new rule for management of the National Petroleum Reserve-Alaska (NPR-A),[1] and more detailed comments in the enclosure. CPAI opposes the proposed rule in its current form but supports the idea of an updated rule that addresses the leasing program, the Integrated Activity Plan process, and subsistence protections.

CPAI holds 156 federal NPR-A leases, including 82 leases in areas designated as "Special Areas." CPAI currently produces oil from the NPR-A through wells located on drill sites in the Greater Mooses Tooth and Colville River units, and we plan additional NPR-A production in the future from the Willow development in the Bear Tooth Unit, which will have three drill sites when construction is complete.

The proposed rule would not directly affect those already-authorized operations on CPAI's leases, but it would significantly and adversely affect future proposals for new activities and developments and impermissibly conflict with existing leases, in which BLM has granted a right to build infrastructure and produce oil, subject to reasonable regulations. The proposed rule therefore conflicts with existing lease rights and, if finalized in its current form, would violate those leases.

As proposed, the rule would also constitute a major policy change for the NPR-A that is unsupported by, and directly conflicts with, the Naval Petroleum Reserves Production Act of 1976, as amended. Aside from rendering the rule unlawful, this policy change would drive investment away from the NPR-A, which is the

[1] "Management and Protection of the National Petroleum Reserve in Alaska," 88 Fed. Reg. 63025 (Sept 8, 2023).

opposite of what Congress intended when it directed the Secretary of the Interior to adopt an expeditious program of private oil and gas leasing for the NPR-A. There is room to update the existing regulations and provide a clear regulatory structure for future NPR-A management without contravening the authorizing statute.

CPAI's view, based on over 50 years of Alaska North Slope experience, is that significant additional public process, and re-proposal of a lawful rule, is required to update the existing regulations in a manner that will be durable. More process is required to gather the information legally required for a properly balanced rule that is consistent with the Congressional intent, and to foster the public support necessary to sustain a rule over time. Despite characterization of the rule as merely "administrative," it is undoubtedly more than that. The proposal is a major federal action that would create new (and unlawful) standards and would affect leaseholders and their investments as well as the very fabric of North Slope communities and their economies.

CPAI appreciates the opportunity to comment on the proposal, and we provide detailed comments in the enclosed document. We also join with the NPR-A Working Group, the Inupiat Community of the Arctic Slope, the North Slope Borough, and the Alaska Congressional delegation in seeking the required additional public engagement and process on the proposed rule.

Sincerely,

Erec Isaacson, President
ConocoPhillips Alaska, Inc.

ConocoPhillips Alaska, Inc.

Detailed Comments on Proposed Rule

For Management and Protection of the National Petroleum Reserve in Alaska (NPR-A)

December 7, 2023

1. Existing leases grant leaseholders the right to produce oil.

All existing NPR-A leases, issued over the past four decades, contain the following (or substantially similar) language:

> This lease is issued granting the exclusive right to drill for, mine, extract, remove and dispose of all the oil and gas . . . together with the right to build and maintain necessary improvements thereupon[.[1]]

This language is clear about two key rights: (1) the right to extract, remove and dispose of oil and gas, *i.e.*, the right to produce; and (2) the right to build and maintain necessary improvements on the land, *i.e.*, the right to construct infrastructure. These two rights are inextricably joined because infrastructure is necessary for production.

Leases acquired from BLM are investments. At the December 14, 2016 lease sale, for example, BLM received high bids totaling $18,813,588.93 for 145 tracts.[2] Each of the leases awarded to a high bidder secures for the leaseholder the opportunity to further invest in exploration, and to produce and sell the oil if economic quantities are found. It is the right to produce from those leases that justifies the investment.

CPAI currently holds the rights to produce oil under 156 leases of federal lands in the NPR-A.

2. The Proposed Rule would Conflict with Lease Rights

If issued as a final rule, the proposed rule would conflict with prior existing rights under current leases. For example, proposed subsection 2361.40(c)(3) provides:

> The Bureau may approve new permanent infrastructure related to existing oil and gas leases only if such infrastructure is essential for exploration or development activities and no practicable alternatives exist which would have less adverse impact on significant resource values of the Special Area, but only if necessary to comport with the terms of a valid existing lease. [Emphasis added.]

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[1] This clause is based on Federal Oil and Gas Lease Form AK 3130-1 (November 2008).

[2] 2016 National Petroleum Reserve in Alaska Lease Sale Bid Recap Summary (blm.gov) (visited Nov. 28, 2023).

There are no terms in NPR-A leases that constrain infrastructure to only that deemed to be "essential" and for which no other "practicable" alternatives exist. Moreover, "practicability" is an entirely ambiguous term that is not defined in the regulation, and it is unknown what BLM will or will not approve based on what it deems "necessary to comport" with a lease.

The preceding subsection, proposed subsection 2361.40(b), provides that BLM "must . . . take such steps as are necessary to avoid the adverse effects of proposed oil and gas activities"[3] and this "includes, but is not limited to, conditioning, delaying action on, or denying proposals for activities, either in whole or in part."[4] That indicates BLM will not approve infrastructure for production, and there is nothing in the proposed rule that identifies when BLM will approve infrastructure and production. These provisions, in conjunction with other parts of the proposed rule, constrain the rights of NPR-A leaseholders in a manner that undermines and directly conflicts with the terms of the leases.

CPAI recognizes the appropriateness of reasonable regulations and mitigations to ensure protection of surface resources and for other purposes. Our Willow development is subject to 261 environmental protection measures. The concept of being "subject to regulation" is embedded in the leases themselves, subject to limits, as follows:

> Rights granted [in this lease] are subject to . . . the Secretary of the Interior's regulations and formal orders in effect as of lease issuance, and to regulations and formal orders hereafter promulgated when not inconsistent with lease rights granted or specific provision of this lease.

Current regulations, which were already in effect when existing leases were issued, provide examples of what BLM might require to provide "maximum protection" of surface resources in designated special areas:

> Maximum protection measures shall be taken on all actions within the . . . Teshekpuk Lake special areas, and any other special areas identified by the Secretary as having significant subsistence, recreational, fish and wildlife, or historical or scenic value. . . . Maximum protection may include, but is not limited to, requirements for:
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> (1) Rescheduling activities and use of alternative routes,
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> (2) types of vehicles and loadings,
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> (3) limiting types of aircraft in combination with minimum flight altitudes and distances from identified places, and
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> (4) special fuel handling procedures.[5]

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[3] Proposed section 2361.40(b).

[4] *Id.*

[5] 43 CFR § 2361.1(c).

This regulation provides concrete examples of the methods BLM may require during the permitting process to protect against avoidable harm to surface resources, without conflicting with the rights to construct infrastructure and produce oil. However, the proposed rule would fundamentally alter this provision by creating a new presumption *against* infrastructure and production. Specifically, the proposed rule requires that BLM "will presume that those activities [leasing or new infrastructure] should not be permitted unless specific information available to the Bureau clearly demonstrates that those activities can be conducted with no or minimal adverse effects on significant resource values."[6]

A presumption against permitting infrastructure violates existing leases, which grant the right to construct infrastructure.

Additionally, the other mechanisms BLM proposes to meet its new "maximum protection" priority for Special Areas will make it impossible for leaseholders to benefit from NPR-A lease rights. Assuring "maximum protection" is proposed to involve a nine-part process (subsections (a) through (i) of proposed section 2161.40) erecting barriers to production, with no direction to leaseholders about how to get past the barriers. The barriers include a requirement to "document and consider any uncertainty concerning the nature, scope, and duration of potential adverse effects on significant resource values of Special Areas and . . . ensure that any actions . . . to avoid, minimize, or mitigate such effects account for and reflect any such uncertainty."[7] This appears to be an unprecedented requirement that would paralyze future permitting. Another barrier is the requirement to "mitigate any residual adverse effects that cannot be avoided or minimized, including compensatory mitigation"[8] with no explanation for how this would work, what circumstances would justify compensatory mitigation, what standards would be applied, and, most importantly, what legal authority justifies the imposition of compensatory mitigation in the first place. In contrast, the compensatory mitigation requirements administered by the Corps of Engineers and the EPA under the Clean Water Act are the subject of an entire regulatory part of the Code of Federal Regulations.[9]

CPAI has been fighting to retain its lease rights and will continue to do so. The Federal District Court for the District of Alaska recently recognized that "ConocoPhillips, as the lessee, has the right and the responsibility to fully develop its oil and gas leases in the NPR-A subject to reasonable restrictions and mitigation measures imposed by the federal government."[10] The proposed rule is not a reasonable restriction or mitigation measure because the proposed rule would create an unprecedented level of uncertainty about permit approval. Leases may expire while BLM "delays action" to "document uncertainty" or denies a permit on the grounds that the proposed infrastructure is not "practicable" or "essential." The proposed rule disrupts the process for obtaining BLM approval for infrastructure to

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[6] Proposed section 2361.40(c).

[7] Proposed Section 2361.40(e).

[8] Proposed section 2361.40(f)(6).

[9] See, *e.g.*, 33 CFR Part 332 (Compensatory Mitigation for Losses of Aquatic Resources).

[10] *Center for Biological Diversity v. Bureau of Land Management*, Case No. 3:23-cv-00061 SLG, p.20 (D. Alaska Nov. 9, 2023).

produce oil from existing leases, and therefore conflicts with existing leases and cannot be applied to them.

Curiously, the preamble to the rule states: "[t]he proposed rule would not affect existing leases in the NPR-A."[11] Similarly, the economic analysis states that "[t]he proposed rule would not affect existing oil and gas leases."[12] The proposed regulations themselves, however, are inconsistent with those statements. If BLM moves to final adoption of anything resembling the proposed rule, it must fix the internal conflict in documents comprising the proposed rule, and also fix the conflict that would otherwise arise with existing leases, by clearly limiting the rule's application to leases adopted after the date on which the rule becomes effective. Other legal problems identified below would still need to be addressed, but limiting the rule to future leases only would address one of the obvious legal problems caused by purporting to unlawfully subject existing leases to a new rule that violates the terms of those leases or otherwise makes it impossible for lessees to perform under those leases.

3. **The proposed rule would <u>not</u> assure maximum protection "<u>to the extent consistent with the requirements of the NPRPA</u>."**

BLM has specifically solicited feedback on the "maximum protection" issue:

> The BLM seeks feedback on whether this proposed rule would ''assure the maximum protection'' of significant resource values in Special Areas ''to the extent consistent with the requirements of [the Naval Petroleum Reserves Production Act of 1976] for the exploration of the reserve.'' See 42 U.S.C. 6504(a).[13]

BLM's treatment of the "maximum protection" issue conflicts with the governing statute, deviates from over 40 years of administrative practice, and runs counter to federal court decisions. BLM must reconsider its approach to the "maximum protection" issue to have a defensible and durable rule.

The statutory requirement for "maximum protection" in NPR-A Special Areas first appeared in 1976, when only exploration was authorized (not production) and when only the government was involved (not private industry). The requirement for maximum protection is stated in 42 USC § 6504(a) and states, in relevant part, as follows:

> Any exploration within the Utukok River, the Teshekpuk Lake areas, and other areas designated by the Secretary . . . shall be conducted in a manner which will assure the <u>maximum protection</u> of such surface values <u>to the extent consistent with the requirements of this Act</u> for the exploration of the reserve.

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[11] 88 Fed. Reg at 62026. *See also* 88 Fed. Reg. at 62037.

[12] Economic Analysis For Proposed Regulation: Management and Protection of the National Petroleum Reserve in Alaska at page 5.

[13] 88 Fed. Reg. at 62037.

When Congress authorized leasing to private industry in 1980, it incorporated the "maximum protection" standard with the following language in 42 USC § 6506a(n)(2):

> *Provided further,* That any exploration or production undertaken pursuant to this section shall be in accordance with section 6504(a) of this title.

Even if the "maximum protection" requirement extends to all leases in special areas[14], it is important to recall that it applies only "to the extent consistent with the requirements of this Act." In the proposed rule, BLM drops this important qualification and refers to maximum protection as if it is an unqualified requirement that applies in isolation from the rest of the governing statute. But it is not isolated; it is tied to and subject to the Congressional mandate for a leasing program, which reads in relevant part: "The Secretary shall conduct an expeditious program of competitive leasing of oil and gas in the Reserve in accordance with this Act."[15]

In the more than 40 years since that mandate became effective, BLM has not changed its regulatory definition of "maximum protection."[16] Under that longstanding interpretation and application, "maximum protection" is not in opposition to oil and gas leasing or production. Thus, in the Integrated Activity Plans (IAPs) for the NPR-A, BLM has consistently allowed leasing, exploration, and production in designated Special Areas, where the maximum protection standard applies. Indeed, 82 of CPAI's 156 existing NPR-A leases are located in designated Special Areas, and BLM has never previously indicated that permitting for infrastructure and production might be prohibited or excessively burdened on those leases.[17]

Federal courts have upheld BLM's historical approach, rejecting arguments that oil and gas leasing, exploration, and production should be restricted in designated Special Areas. Most recently, the Federal District Court for the District of Alaska rejected the argument that production should be restricted in the Teshekpuk Lake Special Area (TLSA):

> Although Congress directed 'maximum protection' be accorded to significant surface values in the TLSA and other Special Areas while

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[14] Read in context, it is natural to conclude that the maximum protection standard was adopted for private industry production (as opposed to government exploration) only for the first two lease sales, which is what 42 USC § 6506a(n)(2) addresses and what the "provided further clause" relates to. After the first two lease sales, which were exempted from NEPA compliance, future lease sale and subsequent production were to be subject only to NEPA and to the Secretary's new authority to "provide for such conditions, restrictions, and prohibitions as the Secretary deems necessary or appropriate to mitigate reasonably foreseeable and significantly adverse effects on the surface resources" under 42 USC § 6506a(b).

[15] 42 USC § 6506a(a).

[16] 43 CFR § 2361.1(c).

[17] This assumes the maximum protection standard applies to more than just the first two lease sales, which CPAI does not concede.

> undertaking oil and gas activities in the NPR-A, it still clearly envisioned that the TLSA would be developed for oil and gas production.[18]

That authoritative ruling on the statute aligns with the court's prior recognition, in another case, that Congress's intent in enacting the NPRPA was "to increase domestic oil supply as expeditiously as possible"[19] and "advance private oil and gas development on the NPR-A.[20] The proposed rule, which purports to restrict leasing and production under the guise of "maximum protection" is out of compliance with the governing statute and the court decisions. Although "maximum protection" has a place in the system designed by Congress, it does not have co-equal status with energy development, as is made clear in both the plain language of the statute and case law.

The history of court decisions on these points goes back over a decade. In 2006, in a case challenging the leasing and development of special areas in the NPR-A, one court summarized the relationship between "maximum protection" and "competitive leasing" as follows:

> The Court agrees that allowing development in the TLSA fails to provide "maximum protection" in the absolute sense. But that is not the test. The test is, as Intervenors argue, one of relativity; the degree of protection must be consistent with NPRPA. One of the stated objectives of NPRPA is the "expeditious program of competitive leasing of oil and gas in the Reserve." 42 U.S.C. § 6506a(a). Thus, the Secretary must necessarily balance the leasing of the lands in TLSA with the protection of the environment.[21]

In other words, the maximum protection requirement does not preclude or discourage leasing, infrastructure or production. The requirement calls for extra protective methods for engaging in oil production in a manner that protects the surface values in Special Areas. This focus on methods is plain from the legislative history of the statute:

> "[M]aximum protection of such surface values" is not a prohibition of exploration-related activities within such areas [but instead is intended to ensure] that such exploration operations will be conducted in a manner which will minimize the adverse impact on the environment.[22]

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[18] *Center for Biological Diversity v. Bureau of Land Management*, Case No. 3:23-cv-00061 SLG, p.20 (D. Alaska Nov. 9, 2023) (emphasis added).

[19] *ConocoPhillips Alaska, Inc. v. Alaska Oil & Gas Conservation Comm'n*, No. 3:22-CV-00121-SLG, 2023 WL 2403720, at *19 (D. Alaska Mar. 8, 2023).

[20] *Id*, at *29 (D. Alaska Mar. 8, 2023) (emphasis added).

[21] *Nat'l Audubon Soc'y v. Kempthorne*, No. 1:05-CV-00008-JKS, 2006 WL 8438583, at *15 (D. Alaska Sept. 25, 2006) (emphasis added).

[22] H.R. Conf. Rep. No. 94-942, at 21 (emphasis added)

In sharp contrast to these applicable and binding legal authorities, BLM, in the proposed rule, treats maximum protection as a requirement isolated from and independent of oil and gas leasing and production. It is plain from the proposed rule, as explained above, that BLM's proposal would change divert the purpose and meaning of "maximum protection" away from what Congress intended. Indeed, national environmental groups and the media describe the proposed rule as an action to shut down oil and gas activities in special areas. For example, the Wilderness Society had this to say about the proposed rule:

> Thank you . . . Secretary Haaland for taking a monumental step[.] We applaud your decision to set aside 13 million more acres for conservation in the Western Arctic[.[23]]

And the New York Times described the proposed rule this way:

> Mr. Biden has since announced a prohibition on drilling in 13 million acres of the wilderness in the National Petroleum Reserve Alaska[.[24]]

Congress did not intend the NPR-A to be a wilderness area in which oil production is prohibited, and federal courts would not uphold a regulation that strays so far from the underlying statute. BLM must therefore retract the proposed "maximum protection" provisions of the proposed rule. If BLM wishes to update the current regulations applying the "maximum protection" standard (which CPAI believes is unnecessary), then BLM must re-propose a rule that aligns with longstanding practice, case law, and the statute.

4. The public benefits of NPR-A oil production.

Despite Congress enacting the NPRPA with the primary purpose of expeditiously increasing domestic production of oil and gas, the proposed rule is entirely silent about both this purpose and the benefits of domestic oil and gas production. The benefits from production in the NPRPA are enormous. The NPRPA, as amended, requires that 50 percent of all sales, rentals, bonuses, and royalties on leases issued in the NPR-A are paid to the State of Alaska, which then distributes those proceeds primarily to the North Slope communities via a long-established grant program. Since 1999, nearly $250,000,000 has been distributed to North Slope communities through this program. When more production comes online from Willow starting in 2029, about $80 to $120 million more is expected to be available for distribution *annually*.[25]

North Slope communities use oil production revenue streams for public sewer, water, heat, sanitation, schools, clinics, hospitals, emergency services, local government infrastructure, wildlife and fisheries management, environmental health, workforce development, social and cultural programs and much

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[23] A Message from The Wilderness Society, E&E News, October 18, 2023.

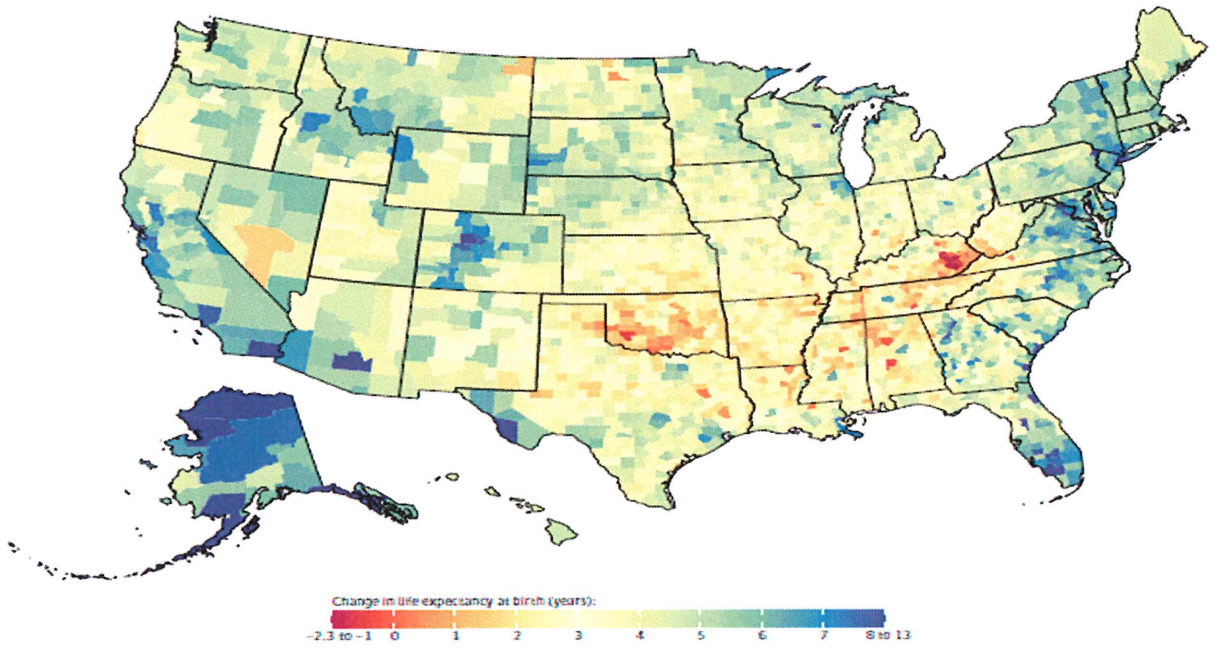
[24] How Has Biden Done on His 2020 Campaign Promises, NYTimes.com Feed (Nov. 8, 2023).

[25] Willow Master Development Plan, Supplemental Environmental Impact Statement, vol. 1, pg. 296, January 2023.

more.[26] The oil and gas related revenues make up more than 90 percent of the North Slope Borough revenues.[27]

Oil revenues, such as the production tax that applies to oil produced in the NPR-A and elsewhere, are important to the State of Alaska as well. These revenues have been used to improve the quality of lives of Alaskans by allowing for continually improving education and health care facilities, high paying jobs, and a thriving economy manifested in such outcomes as healthier and better equipped Alaskans and increased average life spans statewide[28]:

Figure 2. Change in Life Expectancy at Birth by County, 1980 to 2014



Compared with the national average, counties in central Colorado, Alaska, and along both coasts experienced larger increases in life expectancy between 1980 and 2014, while some southern counties in states stretching from Oklahoma to West Virginia saw little, if any, improvement over this same period.

The figure above, from a study that examines life expectancy by county over time, shows that average lifespans across Alaska have increased since 1980, and that the increase on the North Slope has been about 13 years. These life span increases have coincided with oil and gas production -- the Trans-Alaska Pipeline System started flowing oil in 1977 – and it has been oil and gas, primarily, that has provided the revenue streams to improve public health and welfare in Alaska, especially on the North Slope.

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[26] See, for example, April 15, 2021 letter from Harry K. Brower, Mayor, North Slope Borough to Deb Haaland, Secretary, U.S. Department of the Interior.

[27] *Id.*

[28] Inequalities in Life Expectancy Among US Counties, 1980 -2014; Dwyer-Lindgren, L., et al; *JAMA Intern Med.* 2017;177(7):1003-1011. doi:10.1001/jamainternmed.2017.0918, Published online May 8, 2017.

BLM can and should adopt an updated rule that aligns with the leasing program required under the NPRPA and preserves these public benefits by providing a clear permitting approval path for infrastructure and production from leased lands. A leasing program only works and provides the intended public benefits if production is achieved, because production is the success case that pays for every other part of the program.

5. BLM should fix the process irregularities that have occurred.

Guided by the Administrative Procedure Act, executive orders and common sense, the rulemaking process should follow a regular and transparent process. But with this proposal, an uncommon number of irregularities have occurred. Instead of taking comments at the listening sessions, which have been hastily scheduled and sometimes cancelled, BLM has allowed only written questions to be submitted. And BLM has curated those questions and responded to them only partially. BLM has misleadingly described the proposed rule, which clearly involves consequential policy changes, with minimizing terms such as "administrative" and "editorial." To address the instances of irregularity and lack of transparency, BLM should reset the process to allow more public engagement and to receive the benefit of comment from informed stakeholders who can contribute to a better and more durable final rule.

7. The IAP process should be supported, not supplanted.

The proposed rule deviates from the management framework in the IAP and specifically provides that the IAP is superseded by any contrary provision in the rule or in future actions taken under the rule.[29] In so doing, BLM largely abandons a process that is working. The IAP is highly protective of surface resources in the NPR-A, but it does not preclude oil and gas development. The process that BLM currently uses for NPR-A administration, based on the IAP, allows significant public input to review and influence proposals for development. A final rule should support and align with the IAP process, not supplant or undermine it with a more restrictive rule.

8. The proposed rule must go through the NEPA process.

The BLM did not perform a National Environmental Policy Act (NEPA) analysis for this proposed rule, citing 43 CFR § 46.210(i) as the qualifying categorical exclusion. BLM claims the proposed rule qualifies on the basis of being "administrative, financial, legal, technical, or procedural nature." But the proposed rule is not merely "administrative" or otherwise qualified for a categorical exclusion. Each time a similar level of changes to NPR-A management has been considered in the form of an IAP revision historically, BLM has prepared an environmental impact statement and engaged in an extensive public comment and consultation process. In the two previous NPR-A rulemakings, BLM prepared an environmental assessment. There is no sound basis for BLM evading NEPA review for a proposal with significant socio-economic impacts. Accordingly, BLM must go through the NEPA process for the proposed rule.

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[29] *See* proposed rule sections 2361.6(b)(1) and 2361.30(a)(7).

9. BLM's economic analysis is deficient.

The economic analysis BLM prepared is plainly deficient. The analysis inaccurately characterizes the proposed rule as "administrative" and even "editorial" and glaringly fails to quantify, acknowledge, or discuss the public benefits that flow from NPR-A production such as royalty revenues, production taxes, ad valorem taxes, jobs, grant funds, and contribution to the national domestic energy supply. It is arbitrary and capricious for BLM to release an economic analysis of a proposed rule that changes administration of the NPR-A without seriously engaging in the economic issues and impacts.
The BLM asserts the proposed rule is not a significant regulatory action under EO 12866 section 3(f)(1) which, as updated, provides for a $200,000,000 annual economic impact threshold. The Office of Information and Regulatory Affairs (OIRA), however, stated the rule is a significant regulatory action.[30] The proposed rule is economically significant under 3(f)(1) of EO 12866 because if there is just one instance in which the presumption against infrastructure in a Special Area precludes development that would otherwise move forward (as is clearly intended under the proposed rule), for a modest production site, well over $200,000,000 annually will be prevented from entering the economy. Thus, the economic analysis should have been conducted under Section 6(a)(3)(C) of EO 12866.

Section 6(a)(3)(C) is a more rigorous process including triggering OMB circular A-4 which guides economic analyses for regulatory actions classified as significant under 3(f)(1) of EO 12866. That provision states:

> The use of any resource has an opportunity cost regardless of whether the resource is already owned or has to be purchased. That opportunity cost is equal to the net benefit the resource would have provided in the absence of the requirement. For example, if regulation of an industrial plant affects the use of additional land or buildings within the existing plant boundary, the cost analysis should include the opportunity cost of using the additional land or facilities. To the extent possible, you should monetize any such foregone benefits and add them to the other costs of that alternative.[31]

BLM also used the wrong baseline in its economic analysis. A "*baseline should be the best assessment of the way the world would look absent the proposed action.*"[32] Absent this proposed rule, the NPR-A would be governed by 43 CFR § 2360, in its current form, with the IAP periodically updated to adjust to changing circumstances or new information. The appropriate baseline for this new rule is the existing rule that it replaces. The existing rule does not contain the restrictions in the proposed rule. Using the

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[30] 88 Fed. Reg. at 62037.

[31] OMB Circular A-4, pg. 19.

[32] OMB Circular A-4, pg. 15.

existing rule as the baseline would reveal a more significant economic impact than BLM has thus far disclosed.

Finally, the economic analysis is deficient because it analyzes something other than the proposed rule. The economic analysis assumes that the rule would not apply to existing leases, but, as explained above, the proposed regulations do apply to existing leases and would cause massive economic impacts because the proposed regulations violate the terms of existing leases and undermine the lessee's ability to develop and produce oil. BLM's revision of the proposed rule must include an entirely new economic analysis.

10. BLM's faulty conclusions with respect to energy supply, federalism, and takings are based on misconception or misrepresentation of the proposed rule.

The BLM's stated position with respect to energy supply, federalism, and takings is generally that the rule would have no effect and therefore no impact. For example, BLM states:

> This proposed rule would not have a significant effect on the Nation's energy supply. It would restate existing statutory standards and establish a procedural framework for ensuring that the BLM meets those standards.[33]

That characterization does not comport with the proposed rule. The proposed rule adds new regulatory standards that do not align with statutory standards and would significantly diminish leasing, exploration, and production from the NPR-A. A more rigorous analysis of energy supply impacts is required.

With respect to federalism, the rule would impact revenue sharing with State and local governments. This was not addressed in BLM's assessment of effects on federalism. A more rigorous analysis of federalism impacts is required.

With respect to takings, the rule, if applied to existing leases, would eliminate all reasonable economic use of existing property rights and constitute a taking. This is not disclosed in the takings analysis included in the proposed rule and only highlights why BLM must, at a minimum, revise the proposed regulations to state that the regulatory changes do not apply to existing leases.

11. Targeted, section-specific comments.

a. Section 1 – Purpose: The purpose section should expressly align with the dominant purpose of NPRPA as stated by Congress and confirmed by the courts, which is oil production via a leasing program, subject to reasonable regulation. This section should include language that is in the current version of 42 USC §2361.0-2, which recites that

[33] 88 Fed. Reg at 62039.

the "objective" of the regulations is to provide environmental protection "to the extent consistent with the requirements of the Act[.]"

b. Section 6 – Effect of Law: This section should provide that this subpart (*i.e.*, the proposed rule) does not apply to leases issued prior to the effective date of the new rule.

c. Section 7 – Severability: This section should be deleted. Courts, not agencies, determine whether regulations survive a legal challenge wholly or in part. BLM should protect against invalidation by adopting a regulation that clearly complies with the statute as interpreted by the courts.

d. Section 10 – Protection of Surface Resources: This section should be substantially revised and pared down to reflect a more balanced approach that encourages exploration and production, in line with Congressional intent. The regulations should confirm that BLM will approve proposals for construction of infrastructure that comply with applicable lease stipulations and regulations. Subsections (b) (3) and (4) should be eliminated because they are redundant of existing processes (if interpreted narrowly), impossible to comply with (if interpreted expansively), impermissibly vague, and inconsistent with the directive for an expeditious program of oil and gas leasing.

e. Section 30 – Special Areas designation and amendment process: This section should be revised to be balanced, not biased in favor of Special Area expansion. New Special Areas should be considered as the best available information warrants, not routinely every five years. Subsection (a)(5) must be deleted, because lands are not to be managed as Special Areas until they have been <u>designated</u> as Special Areas. Subsections (a) (6) and (b) should be deleted, because the NPRPA does not require that the TLSA only grow, not shrink. Subsection (b)(4) should provide for Alaska Native consultation for adding to <u>or</u> subtracting from special areas, not just subtracting.

f. Section 40 – Management of Oil and Gas in Special Areas: This section should be entirely revised or abandoned, in keeping with Sections 2 and 3 of these comments.