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SUBMITTED VIA REGULATIONS.GOV, HARD COPY, AND USB FLASH DRIVE

Tracy Stone-Manning
U.S. Department of the Interior, Director (630)
Bureau of Land Management
1849 C St. NW, Room 5646
Washington, DC 20240

Attn: 1004-AE80

Re: Comments on the Bureau of Land Management’s Proposed Rule on Fluid Mineral Leases and Leasing Process

Dear Director Stone-Manning,

Thank you for the opportunity to comment on the Bureau of Land Management’s (BLM’s) proposed rule on fluid mineral leases and leasing process. As published in the Federal Register (2023-14287), the BLM is proposing to revise its oil and gas leasing regulations, including codifying provisions of the Inflation Reduction Act (IRA)1 pertaining to royalty rates, rentals, and minimum bids, and updating the bonding requirements for leasing, development, and production, along with addressing provisions related to idled wells pursuant to the Infrastructure Investment and Jobs Act (IIJA).2 We strongly support this long-overdue rulemaking and your efforts to secure critical reforms to the federal onshore oil and gas program.

For decades, the onshore oil and gas program has maintained an entrenched, institutional preference for development above all other uses of public lands, fostering both an unsustainable and unpredictable revenue stream for American taxpayers and harm to public lands and resources. As a result, the Government Accountability Office (GAO), the Department of the Interior’s Office of Inspector General (OIG), and numerous other parties have repeatedly urged the Department of the Interior (DOI) to make fundamental changes to the onshore program. Indeed, new regulations are necessary to address issues that have long plagued the program and over which the Interior Secretary has existing authority to take action. Equally important is codifying the recent changes in law so implementation will be durable and sustainable throughout ongoing and future leasing activities.

At the outset, we encourage the BLM to proceed as expeditiously as possible with the rulemaking process. The final rule is needed to reflect the new requirements of the IRA pertaining to onshore

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oil and gas leasing and to ensure public awareness of the amended statutory provisions, such as the law’s fiscal changes and the elimination of noncompetitive leasing. Particularly as new onshore oil and gas lease sales continue to be held in conformance with the provision in the IRA that tethers the issuance of wind and solar rights of way to offering some acreage for oil and gas leasing, it is essential that revision to the BLM’s oil and gas regulations be finalized promptly following the conclusion of the public comment period.

We emphasize that this rulemaking improves program administration, providing clarity and efficiency to the oil and gas leasing process. Implementation of the various provisions of the rule will, appropriately, be subject to future process under the National Environmental Policy Act (NEPA).³

Turning to our substantive comments, we support many of the actions that the BLM has included in its proposed rule. To ensure the success of the current rulemaking process, to improve program administration, and to bring the BLM’s stewardship of our public lands and minerals even closer in line with the public’s interest in—and the agency’s mandate for—safeguarding and preserving public lands, waters, and fish and wildlife, we also respectfully request that the BLM take into account our recommendations for both refining and improving several of the agency’s proposed regulatory changes.

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³ 42 U.S.C. §§ 4321–4370m-12
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I. Discussion of Key Issues Addressed in the Proposed Rule

a) Lands Available for Competitive Bidding

i) Affirming the Interior Department’s statutory discretion to identify lands available for oil and gas leasing

We agree that the proposed modification to section 3120.11 is necessary to comply with 30 U.S.C. § 226(a) and (b). It is also important for accurately reflecting the Interior Secretary’s statutory authority to identify lands available for leasing, particularly regarding lands open to competitive bidding.

Despite being required to manage public lands for multiple uses and sustained yield under the Federal Land Policy and Management Act (FLPMA), the BLM has historically administered the onshore program as if leasing and development are to take precedence.

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over all other multiple uses.\textsuperscript{5} This has resulted in wasteful and antiquated leasing practices that have significantly harmed communities, taxpayers, and public lands, waters, and fish and wildlife. As of 2016, nearly 200 million acres, which make up ninety percent of western public lands and minerals under the BLM's jurisdiction, were available for oil and gas leasing.\textsuperscript{6} However, many of these areas have low or no oil and gas drilling potential.\textsuperscript{7} These lands could instead serve important purposes such as outdoor recreation, fish and wildlife conservation, and watershed protection.\textsuperscript{8} The prioritization of oil and gas over other uses of public lands has persisted, despite federal court rulings stating that oil and gas development is not the primary use of public lands and that other valid uses such as recreation, fish and wildlife conservation, and renewable energy development must also be considered.\textsuperscript{9}

With the IRA having brought about several important changes to the onshore program and the BLM now initiating this rulemaking in order to advance further updates, we thank the BLM for properly codifying the discretion explicitly granted in the Mineral Leasing Act (MLA) over the leasing program.

We recommend that the BLM expand upon this update by defining the terms “eligible” and “available” for purposes of determining where “eligible lands are available” for

\textsuperscript{5} See, e.g., Testimony from Michael Nedd, Deputy Director, Operations, BLM, to the U.S. House Committee on Natural Resources, Subcommittee on Energy and Natural Resources 4 (Mar. 12, 2019) [Ex. 1 at App. 0003–09] (asserting that leasing is "required by the Mineral Leasing Act"); Memorandum from DOI Inspector General, to Robert Abbey, Director, BLM 6 (Dec. 29, 2009) ("Kent Hoffman [Utah's Deputy State Director for Lands and Minerals] and the BLM USO Natural Resource Specialist both commented that BLM is required by law to hold a quarterly lease sale.").

https://www.blm.gov/sites/default/files/congressional_testimony_documents/congressional_20190312_Policies%20and%20Priorities%20of%20BLM.pdf. This is a misinterpretation of Interior's authority. The Mineral Leasing Act endows the Interior Secretary with initial discretion over whether to lease certain lands for oil and gas development. 30 U.S.C. § 226(a) ("All lands subject to disposition under this Act which are known or believed to contain oil or gas deposits may be leased by the Secretary." (emphasis added)). Only if the Secretary then determines that lands are "to be leased" must BLM hold quarterly lease sales, id. § 226(b)(1)(A), and then only where "eligible lands are available," id., thus committing the discretion to lease and what to lease to the Secretary, subject to other applicable public land laws.

\textsuperscript{6} The Wilderness Society (TWS), Open for Business (and not much else): How public lands management favors the oil and gas industry (2016), [hereinafter Open for Business] [Ex. 2 at App. 0011–14], https://www.wilderness.org/sites/default/files/media/file/Report-Open%20for%20Business.pdf.

\textsuperscript{7} See, e.g., National Wildlife Federation (NWF), Rocky Mountain Wild (RMW), and Trout Unlimited (TU), Little Potential for Development, High Development for Harm: How Speculative Leasing for Oil and Gas Threatens Public Lands, Waters, Fish and Wildlife (2022) [hereinafter Little Potential] [Ex. 3 at App. 0016–53], https://storymaps.arcgis.com/stories/1a259c9c5b634b708762b27dda5a8df52.


https://www.doi.gov/node/11113. ("As a general matter, the Utah RMPs exclude a relatively small proportion of potentially available BLM lands from oil and gas drilling. By way of example, the Utah RMPs provide BLM with the discretion to lease the large majority of lands that it identified as having 'wilderness characteristics' for oil and gas development. Likewise, the Utah RMPs provide BLM with the discretion to allow oil and gas development on parcels in the immediate proximity of National Park units and a number of other sensitive landscapes, including lands that have wilderness characteristics, and lands that have other values that may not be consistent with oil and gas development (e.g., hiking, biking, river rafting and other recreational activity that is prevalent in the region.").)

\textsuperscript{9} See, e.g., N.M. ex rel. Richardson v. BLM, 565 F.3d 683, 710 (10th Cir. 2009) ("It is past doubt that the principle of multiple use does not require BLM to prioritize [oil and gas] development over other uses;") Nat’l Mining Ass’n v. Zinke, 877 F.3d 845, 872 (9th Cir. 2017) ("Nor does [multiple use] preclude the agency from taking a cautious approach to assure preservation of natural and cultural resources.").
In doing so, the BLM should establish that eligible lands are available for leasing and may be offered only when consistent with statutory requirements, including multiple use, sustained yield, and conservation mandates to expressly ensure that, moving forward, the BLM’s decisions regarding lands offered for lease are grounded in the agency’s obligations under FLPMA.

b) Oil and Gas Bonding Requirements

We fully concur with the BLM that “current minimum bond amounts are outdated, expose the Federal Government to significant financial risks in the event of bankruptcies, and delay ‘complete and timely’ reclamation and restoration of lease tracts, which can cause or exacerbate a range of environmental issues, including methane leaks, surface and groundwater contamination, interference with agricultural activities, and degraded fish and wildlife habitat.” For these reasons, we wholeheartedly support the BLM’s long-overdue action to reform the onshore program’s bonding and reclamation regulations.

i) Increasing minimum bond amounts required for both individual lease bonds and statewide bonds to reflect inflation and the minimum coverage that is required for operations on federal public lands

In order to reflect the full costs associated with plugging and properly reclaiming modern wells, the BLM must fundamentally increase bonding requirements. The MLA mandates that bonds be set at the amount necessary to ensure “complete” and “timely” reclamation of federal well sites. The agency’s proclivity to require the minimum bond amount clearly necessitates that action be taken to raise the minimum amounts required under individual lease and statewide bonds. Minimum bond amounts have not been increased in more than 60 years, as the BLM notes in the preamble to the proposed regulation, which naturally results in a situation where operators are not encouraged to quickly reclaim their wells after operations cease because reclamation costs vastly outweigh the value of the bonds they have posted.

(1) The new minimum amounts of $150,000 for individual lease bonds and $500,000 for statewide bonds that the BLM has proposed have our full support. We appreciate the BLM’s decision to base these sums on the average cost of plugging an orphaned well, which the BLM has determined to be $71,000. The $71,000 figure is roughly in line with the median cost needed for plugging a well and reclaiming the surface around the well, which has been found to be $76,000.13 It is slightly below the average of GAO’s low-cost ($20,000) and high-cost ($145,000) reclamation scenarios.14 The new minimum amounts of $150,000 and $500,000, for individual lease and statewide bonds, respectively, reflect the same amounts that have

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11 Id. § 226(g).
13 Daniel Raimi et al., Decommissioning Orphaned and Abandoned Oil and Gas Wells: New Estimates and Cost Drivers, 55 Envtl. Sci. & Tech. 10224, 10226 (2021) [Ex. 7 at App. 0128–134], https://pubs.acs.org/doi/epdf/10.1021/acs.est.1c02234. At 88 Fed. Reg. 47,562, 47,565, the BLM states that the $35,000 to $200,000 per well range is for “plugging costs alone.” However, at 47, 581, the BLM attributes this range to “the cost to plug a well and reclaim the surface.” (emphasis added). We ask the BLM to clarify this discrepancy and ensure consistency in what the $71,000 average per well cost represents.
14 GAO, supra note 12 at 6.
previously been proposed in legislation, including S. 2177, Oil and Gas Bonding Reform and Orphaned Well Remediation Act, as introduced by Sen. Bennet (D-CO) in June, 2021,\textsuperscript{15} and H.R. 2415, Orphaned Well Cleanup and Jobs Act, as introduced by Rep. Leger Fernández (D-NM-3) in April, 2021.\textsuperscript{16} The amounts also correspond to those that were included in the Senate Energy and Natural Resources Committee’s reported budget reconciliation bill text, which was made public in December 2021,\textsuperscript{17} as well as the original text of the IRA,\textsuperscript{18} which was modified after being reviewed by the Senate Parliamentarian to remove provisions relating to federal onshore oil and gas bonding.

(2) We are in favor of the BLM proposing that the new minimum amount of $150,000 for an individual lease bond be intended to cover the estimated plugging and reclamation costs for two wells, and the new minimum amount of $500,000 for a statewide bond be intended to cover the estimated plugging and reclamation costs for seven wells. We support the BLM’s proposal, as outlined in the preamble to the proposed regulation, to raise the minimum amount of an individual lease bond to be sufficient to cover the cost of reclaiming two wells and the minimum amount of a statewide bond to be sufficient to cover the cost of reclaiming seven wells. We do note, however, that the requirements that a minimum individual lease bond cover up to two wells and a minimum statewide bond cover up to seven wells—and that the bond amounts be increased based on the number of wells above these median numbers—are not explicitly proposed in 43 CFR Subpart 3104. Therefore, we ask that the BLM include these requirements as part of the substantive changes that are being proposed. In fact, subsection 3104.50(b) gives the authorized officer the \textit{discretion} to increase the minimum bond amount for all bond amounts. This subsection should be clarified to require the authorized officer to raise the minimum bond amount when it is determined that the operator poses a risk due to factors, including, but not limited to: operator lease violations; uncollected royalties; or new analysis showing the cost of reclamation has increased from earlier reviews.

(3) We recommend that, as a part of this rulemaking, the BLM include provisions from IM 2019-014, Oil and Gas Bond Adequacy Reviews, which expired on September 30, 2022,\textsuperscript{19} in its regulations, so that periodic bond reviews would then become a regular and expected part of doing business on federal oil and gas leases. In this way, there will be less resistance or controversy when higher amounts for individual lease and statewide bonds become necessary.

We do note, however, that the previously imposed IM notably lacks any provision for increasing bond amounts based on the numbers of wells covered under a bond, which is an essential factor that the authorized officer must be required to consider. While the new minimum bond amounts have been based on the median number of wells under each kind of bond, it should be acknowledged that these minimum amounts would not be intended to cover the cost of reclaiming more wells. The requirements that a minimum individual lease bond cover up to two wells and a minimum statewide bond cover up to seven wells—and that the bond amounts be increased based on the number of wells above these median numbers—are not explicitly proposed in 43 CFR Subpart 3104. Therefore, we ask that the BLM include these requirements as part of the substantive changes that are being proposed. In fact, subsection 3104.50(b) gives the authorized officer the \textit{discretion} to increase the minimum bond amount for all bond amounts. This subsection should be clarified to require the authorized officer to raise the minimum bond amount when it is determined that the operator poses a risk due to factors, including, but not limited to: operator lease violations; uncollected royalties; or new analysis showing the cost of reclamation has increased from earlier reviews.

\textsuperscript{15} Oil and Gas Bonding Reform and Orphaned Well Remediation Act, S. 2177, 117th Cong. (2021).
\textsuperscript{17} See H.R. 5376, 117th Cong. § 70262(f) (as reported by S. Comm. on Energy and Natural Res., Dec. 2021). \textit{available at https://www.democrats.senate.gov/imo/media/doc/Title%20VII%20Committee%20on%20Energy%20and%20Natural Resources.pdf.}
\textsuperscript{19} Instruction Memorandum 2019-014, Oil and Gas Bond Adequacy Reviews, \textit{https://www.blm.gov/policy/im-2019-014.}
bonds would be adequate to reclaim only a relatively small percentage of the total number of wells that are covered under these bonds. As the GAO has pointed out, “[a]s wells are added to a bond, the total associated reclamation cost increases even if the bond value does not.”20 As a result, GAO has recommended that the BLM consider increasing bond amounts based on each additional well covered and then decreasing bond amounts as wells are reclaimed. For this reason, it is essential that the number of wells above the base number covered by a bond be one of the factors that enables the authorized officer to increase the bond amount accordingly.

In addition, we encourage the BLM to include in its regulations that, in determining the lease bond amount to be posted, the authorized officer take into account a number of variables which should include, but not be limited to, well depth, the presence of other resources, the number of wells, the number of low-producing or inactive wells on the lease or held by the lessee or operator elsewhere, the financial capability of any responsible party to carry out the reclamation, the anticipated condition of the well site, the extent of reclamation and remediation to be required, and compliance with applicable laws. For statewide bonds, the regulations should state that the authorized officer must also consider several other variables, including, but not limited to, the number and nature of the lessee’s or operator’s operations in the state and the varying decommissioning costs in different states,21 as well as the financial health of the lessee.

(4) We firmly believe that the final regulations should provide that the new minimum amounts for individual lease and statewide bonds will be adjusted annually for inflation, based on the methodology contained in the proposed regulation. BLM’s onshore bonds have not been updated for inflation in the more than 60 years since they were each first set by rule, which is why such significant increases are required now. Without the regulatory requirement that the federal bonding rates be adjusted regularly and annually by inflation factors—consistent with provisions in several states’ regulations, such as Wyoming22—it is extremely unlikely that BLM will require higher amounts when setting bonds in the future. To ensure that the minimum bonding rates for individual leases and statewide leases do not quickly become obsolete and inadequate for covering the reclamation costs for two and seven wells, respectively, we encourage the BLM to establish by rule that adjustments accounting for inflation will occur annually. We also note that, in addition to adjusting for inflation, successfully ensuring that bond amounts are adequate depends on the BLM actually conducting, as noted above, regular adequacy reviews and then adjusting the bond amount requirements accordingly.

**ii) Eliminating the use of nationwide bonds and unit operator bonds**

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20 GAO, supra note 12, at 17.
21 Raimi et al., supra note 13, at 10227, table 2. Table 2 shows that, in New Mexico, plugging and site remediation costs combined come to a median of $132,319 and a mean of $171,652 (and these are in 2019 dollars; if adjusted to 2022 dollars to compare to the BLM figures, that would mean a median of $151,468 and a mean of $196,493). Therefore, if the BLM used the average New Mexico cost in 2022 dollars and multiplied by the median statewide number of wells, the New Mexico statewide minimum should be closer to $1.372 million per statewide bond ($196,493*7=$1,372,000). In that case, the new statewide minimum bond of $500,000 would be far too low for New Mexico.
22 055-3 Wyo. Code R. § 3-4 - Bonding Requirements (Forms 8, 8A, 8E and 8F).
We commend the BLM for proposing to eliminate the nationwide bonding option. The BLM notes in the proposed rule that nationwide bonds are administratively inefficient given the amount of coordination they require. Because of the agency's administrative burden in managing nationwide bonds, nationwide bonds have lagged behind statewide bonds for bond increases and reviews, putting taxpayers at serious risk of having to pay the astronomical costs associated with cleaning up the median of 35 wells that are covered by a single, insufficient nationwide bond. The elimination of nationwide bonding has previously been proposed in S. 2177, *Oil and Gas Bonding Reform and Orphaned Well Remediation Act*, as introduced by Sen. Bennet (D-CO) in June 2021.23 Taking action to reduce reclamation-related liabilities is crucial for minimizing taxpayer exposure.

In addition, it is important to note, as indicated above, that the costs of plugging and reclamation of oil and gas wells can differ based on the landscape. Therefore, the BLM is wise to prohibit the use of nationwide bonds to cover all the wells owned by one company throughout the country. Instead, the BLM should, as proposed, limit the scope of blanket bonds to only cover wells in a single state.

**We also support the proposal to eliminate the unit operator bonding option.** Requiring that all unit operator bonds be converted to statewide bonds should simplify program administration.

**iii) Adding a provision related to surface owner protection bonds, in part incorporating the existing bonding requirements set out in Onshore Order 1**

The development of federal oil and gas has a history of causing damage to split estates where the surface estate overlying the federal minerals is privately owned. Because landowners deserve compensation for the impacts that can occur to buildings, water resources, vegetation, and other surface estate resources, we support the BLM’s proposal to clarify the surface owner protection bond as a financial assurance requirement.

Wyoming, Colorado, and New Mexico are among the states whose legislatures have recently passed laws that protect surface owners on split estates by implementing heightened notice provisions, required surface use agreements, and increased surface damage bonds. Under the Wyoming Surface Owner Protection Act,24 prior to drilling, mineral developers must now provide written notice, entering into negotiations for a surface use agreement with each surface owner. If the parties cannot agree on the terms of the surface use agreement, then the mineral developer must post a bond of at least $2,000 per well site to cover damages before accessing the mineral estate. In Colorado, before beginning any operations with heavy equipment on a surface owner's property where that surface owner is not a party to a surface use agreement with the operator, the operator must submit financial assurance to protect the surface owner from unjustified crop loss or land damage caused by oil and gas operations. Operators are required to post financial guarantees totaling $4,000 for each well on unirrigated land, $10,000 for each well on irrigated land, and an overall state-wide blanket bond of

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23 *Oil and Gas Bonding Reform and Orphaned Well Remediation Act*, *supra* note 15.
24 020-7 Wyo. Code R. § 7-4 - Surface Owner Protection.
Finally, the New Mexico Surface Owners’ Protection Act (SOPA), passed in 2017, requires operators to pay damages to surface owners in the event that they cause any loss of land value, agricultural production or income, use, access, or improvements. Oil and gas companies are required by SOPA to give surface owners written notice of non-surface disturbing activities at least five business days in advance and of surface disturbing activities at least 30 days in advance. The operator must first post financial assurance or a bond in the amount of $10,000 per well location.

Based on the above examples, we note that the BLM’s proposed minimum surface owner protection amount of $1,000 is too low to provide the appropriate and necessary level of compensation that landowners should receive. Therefore, we strongly urge the BLM to amend the final regulation to reflect a higher minimum surface owner protection bond amount, above the currently proposed amount of $1,000. We recommend a minimum of $10,000 per well, plus an additional $2,000 per acre of disturbed land for minimum surface owner protection bonds.

**iv) Providing a phase-in period within which bonds held prior to promulgation of the final rule must meet the increased minimum bond amounts, and within which nationwide and unit bonds must be converted into statewide bonds**

We concur with the BLM that all oil and gas activity occurring on federal public lands—both current and future—should be subject to the new bonding requirements. It is important to reform the federal bonding system in order to reduce the burden on taxpayers due to future reclamation-related liabilities. However, it is also crucial that this rulemaking address the existing issue of 84 percent of the bonds that the BLM currently holds (as of 2018) being insufficient to cover reclamation costs under even GAO’s estimated “low-cost” scenario. Requiring that all bonds conform to the new standards is critical for ensuring “complete and timely” reclamation and restoration of all current and future lease tracts. Therefore, we support the BLM’s proposal for a phase-in period during which nationwide bonds and unit operator bonds must be converted to statewide bonds and individual lease and statewide bonds held prior to the final rule must satisfy the increased minimum bond amounts.

We agree that the phase-in period should be as brief as possible, to bring agency practices into compliance with MLA requirements, and to safeguard the public interest by reducing the risk to taxpayers from inadequate bonds. We respectfully ask that the BLM not offer any extensions to these deadlines. Furthermore, given the phase-in process that has been proposed, we want to emphasize how urgently the BLM needs to codify in regulation its policy for bond adequacy reviews. As noted above, regular bond adequacy reviews and sufficient review requirements must be included in the final rule text, so that the BLM can guarantee that oil and gas wells on federal lands will be fully plugged and well sites adequately reclaimed.

Lastly, we encourage the BLM to amend the final regulations to specify that the phase-in period will be overridden in the event of application for lease transfer or assignment, meaning that a lease may be approved for transfer or assignment only if the new
operator posts financial assurance in the amount determined to be necessary following the review for bond adequacy, which shall be no less than either $150,000 for an individual lease bond or $500,000 for a statewide bond. Bond requirements for transfers or assignments would, therefore, be set without respect to the transition phase-in requirements, as if the lease involved were a new lease.

c) Leasing Preference Criteria

i) Incorporating preference criteria into the agency’s oil and gas regulations to assist with the consideration and selection of lease sale parcels

We applaud the BLM’s proposal to incorporate preference criteria into its oil and gas regulations. While both FLPMA28 and the MLA29 authorize the use of preference criteria in leasing, “to prevent unnecessary or undue degradation” and “for the safeguarding of the public welfare,” the BLM itself notes in the preamble to the proposed regulation, that, historically, the agency has not employed nationwide criteria that are designed to eliminate conflicts with other uses and resources and maximize taxpayer returns, when selecting sale parcels.

According to the BLM, less than a quarter of the 40.3 million acres of industry-nominated public lands offered for lease between 2013 and 2022 were purchased at competitive auction. As a result, a considerable amount of public agency time and resources are spent both evaluating parcels that go unleased and administering leases that go undeveloped. Furthermore, because the vast majority of federal public lands are open to leasing,30 sale parcels that are nominated for leasing are frequently in conflict with sensitive cultural, fish and wildlife, and recreational resources. Consequently, due to the lack of a systematic and routine process that can identify or predict such conflicts, parcels are often offered and leased in areas that host these important values.

We were encouraged by the leasing changes announced by the BLM last year, notably the use of deferral criteria to select which parcels would be offered in the June 2022 oil and gas lease sales,31 and the required application and use of leasing evaluation criteria that were outlined in IM 2023-007, Evaluating Competitive Oil and Gas Lease Parcels for Future Lease Sales. The minimum leasing “preference” criteria that the BLM now proposes to codify in its regulations match those that the agency has already been considering in its leasing decisions for more than a year. We have observed that these standards have played a crucial role in assisting the BLM conserve certain public lands, ensure the American taxpayer receives a fair return, and meet the BLM’s other statutory obligations.

We appreciate that the BLM has identified fish and wildlife habitats, habitat connectivity areas, cultural resources, recreation resources, oil and gas development potential, and proximity to existing development as the minimum criteria that the agency will consider in its leasing decisions. We also fully support and appreciate the BLM including the

30 See, e.g., Open for Business, supra note 6.
requirement that, in determining whether lands should be offered for lease, the agency “will evaluate the Secretary’s obligations to manage public lands for multiple use and sustained yield and to take any action required to prevent unnecessary or undue degradation of the lands and their resources.” To this end, we encourage the BLM to consider explicitly identifying in its regulations additional criteria. Such additional criteria should include, but not be limited to, surface and groundwater resources, environmental justice communities, and lands and waters with identified conservation values. This last criterion should include monuments, parks, wild and scenic rivers, wilderness areas, congressionally designated conservation areas, administratively designated lands and waters (e.g., areas of critical environmental concern, wilderness study areas, approved acquisition areas for National Wildlife Refuges,32 critical habitat, and recreation management areas), and administratively identified lands with important conservation values (e.g., lands with wilderness characteristics, intact landscapes, and connectivity zones).

Additionally, we want to highlight the BLM’s specific request for comment on whether the preference criteria or other portions of the proposed rule should be expanded, or new provisions added, to discuss analysis of greenhouse gas emissions and related decision-making based on the analysis. While our comments provided here do not offer specific recommendations concerning the analysis of greenhouse gas emissions, some of the groups signed onto this letter have submitted additional letters that provide comments directly related to the analysis of greenhouse gas emissions for use in decision-making regarding federal onshore oil and gas leasing and permitting.

It is critical that the BLM use the most precise and current data to determine the “preference” with which nominated lands are given for leasing, so that the evaluation criteria be applied with the greatest rigor. We would like to draw attention to the fact that the sources of information that BLM offices are expected to rely on when applying and using the preference criteria to guide leasing decisions are not specified in the proposed rule. Because a large number of the BLM’s resource management plans (RMPs) have not been updated in over 20 years, many BLM lease sales are tied to outdated RMPs that do not identify necessary criteria for identifying “preferred leasing areas” or “exclusion areas” and do not consider the impacts of modern drilling techniques such as fracking. It is, therefore, critical that BLM Offices conduct additional research and planning in the event that new information becomes available or pertinent environmental, social, or economic conditions change beyond what is described in the relevant land use plan. Further, we encourage the BLM to incorporate the identification of “eligible” and “available” fluid mineral leasing areas into the agency’s land use planning processes.

Therefore, we urge the BLM to include a list of minimum data and information sources in its regulations, that BLM offices must refer to when using the preference criteria:

(1) **Development Potential**: The BLM should work to reduce speculative leasing in the federal oil and gas program when determining whether land is available or a nominated lease parcel might be made available for lease. The BLM should limit leasing to only those lands that have been identified in a current land use plan as

32 An approved refuge acquisition boundary is a map depicting the boundary line(s) enclosing the land that the U.S. Fish and Wildlife Service has the authority to acquire in whole or in part. 343 FW 5.6(A)(1).
“preferred leasing areas” having a high potential for oil and gas development (and a low potential for conflict with other resources and uses). By “current land use plan,” we mean “a document developed through a formal planning process to guide the management of activities and uses of public lands and that has been approved, amended, or recertified within the past ten years.” The BLM should defer leasing on lands that have been determined to have low or no development potential for oil or gas, in order to prevent those public lands from being held up in nonproducing oil and gas leases that prevent management of other resource values and offer little benefit to taxpayers. The BLM should refer to the reasonably foreseeable development scenario (RFD) available for the applicable land use management plan when evaluating a nominated parcel’s development potential. Any parcels that are adjacent to or overlap lands with low or no development potential, are covered by an RFD that does not assess and specifically identify oil and gas development potential, or are on lands that are covered by an outdated RFD should not be made available for lease or should be deferred from leasing until such time that the RFD has been updated.

(2) **Fish & Wildlife Habitat:** The BLM should reword the preference criterion to read (italics denote added text and strike-through denotes deletions): "The presence of or potential for adverse impacts to important fish and wildlife habitats and species or connectivity areas, giving preference to lands that would not impair the proper functioning of such habitats, species or corridors . . . ." This clarification assures that, in applying this criterion, the BLM would consider special status species (flora and fauna) and imperiled vegetative communities, as well as off-site adverse effects from oil and gas operations on species and habitats (e.g., effects on sage-grouse leks which are felt at least 3 to 5 miles away from oil and gas infrastructure). This clarification is consistent with the BLM direction to conserve sensitive species and recover species listed under the Endangered Species Act.

In the context of this regulation, the BLM should define important species to include, but not necessarily be limited to: threatened, endangered, proposed, and candidate species; Bureau Sensitive Species; Species of Greatest Conservation Need identified in State Wildlife Action Plans; big game crucial habitat (e.g., winter range and corridors); and species of significance for Indigenous Peoples.

To determine whether a lease parcel overlaps or adversely affects important habitats and species, the BLM should use the most current and accurate data layers available, including, for instance, those from the relevant BLM offices and

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33 Any parcels overlapping lands that are covered by an outdated RFD should not be made available for lease while the outdated RFD is in effect. As proposed in the End Speculative Oil and Gas Leasing Act (S. 1622, 118th Cong.), DOI should review and update all RFDs not less frequently than every 15 years.

34 Among other things, this clarification will ensure that special status plant species, which are the majority of special status species, are not excluded from this criterion. For example, in 2020, BLM offered a lease (NM-2020-08-0221) that overlapped one third of the critical habitat for Gypsum wild-buckwheat (*Eriogonum gypsophilum*). [D.J. Manier et al., Conservation buffer distance estimates for Greater Sage-Grouse—A review, at 14 (2014) [Ex. 8 at App. 0136–153].](http://dx.doi.org/10.3133/ofr20141239)


36 BLM Manual 6840.

programs, U.S. Fish and Wildlife Service, National Oceanic and Atmospheric Administration, U.S. Geological Survey, relevant state agencies, NatureServe, state Natural Heritage Programs, and the International Union for Conservation of Nature. In the event new habitat or species trends and/or population information becomes available, the BLM should conduct further analyses and planning to supplement that information available in the current land use plan. To avoid conflicts with important habitats and species and incorporate Traditional Ecological Knowledge into land management decisions, the BLM must also ensure opportunities for Tribal consultation, input from local, state, and other federal agencies, and participation from stakeholder groups and the public. Any parcels that would result in adverse, unavoidable, or more than de minimis impacts to important habitats and species, or would diminish habitat intactness or connectivity, should not be made available for lease or should be deferred from leasing.

Some species are imperiled because water bodies or wet areas on which they depend are depleted or polluted. In considering whether leases will adversely affect habitats and species, the BLM must, among other things, consider how oil and gas operations that consume water will affect water bodies and mesic habitats used by important species, taking into account changing environmental conditions. Due to the ongoing drought in the Western United States, the BLM must address the direct and cumulative impacts of oil and gas leasing and development on both water quantity and quality and the impacts of that water use on the surrounding environment. The BLM must ensure there are opportunities for Tribal consultation, input from state and other federal agencies, and participation from stakeholder groups and public awareness when determining the water-resource effects of energy development. Any parcels that would adversely affect important water or wet habitats (e.g., would cause aquifer drawdown, affect the quantity or quality of surface water or the makeup and functionality of nearby streams and rivers, or cause overdraft that could affect nearby wells) should not be made available for lease or should be deferred from leasing.

(3) Cultural Resources: Before determining whether a nominated lease parcel overlaps land with cultural resources, the BLM should confirm that the parcel under consideration for lease as well as all surrounding lands have been previously inventoried for cultural resources, and that meaningful Tribal consultation has taken place. Any parcels overlapping lands where complete inventory of the types of resources that may be present are unknown should not be made available for lease or should be deferred from leasing.

When evaluating a nominated lease parcel that overlaps land with sensitive cultural values, the BLM should consider the negative effects such leasing would have on the cultural resources. Any parcels overlapping lands where the underlying RMP does not provide adequate protections for Indigenous cultural sites (as determined through robust and ongoing consultation with impacted Tribes) should not be made available for lease or should be deferred from leasing.
(4) **Recreational Resources:** When considering whether a nominated lease parcel overlaps land with recreational resources, the BLM should ensure that the parcel proposed for lease as well as all surrounding lands have been recently inventoried for recreational resources and that appropriate outreach and consultation with regional recreation advocates and interest groups has occurred. Any parcels adjacent to or overlapping lands where impacts would be in direct conflict with the recreational experience, cause visual impairment to the landscape or cause other impairments such as access conflicts, or where a current and comprehensive inventory of recreational resources has not been conducted should not be made available for lease or should be deferred from leasing.

When evaluating a nominated lease parcel in proximity to any recreational resource of national, state, or local significance, the BLM should take into account the potential adverse effects of leasing on or adjacent to such recreation sites, including, but not limited to: the views of surrounding landscapes; the socioeconomic impacts to regional recreation economies; and the safety of visitors to the recreation sites at risk. The BLM must also ensure opportunities for state agencies, county public land officials, stakeholder groups, and the public to provide input on recreation assets. Any parcels overlapping lands where oil and gas development would negatively impact the recreational experience and/or the local recreation economy should not be made available for lease or should be deferred from leasing.

(5) **Proximity to Existing Development:** The BLM should aim to minimize impacts to intact public lands and healthy ecosystems when considering whether land is available for lease or a nominated lease parcel should be offered for lease. The BLM should aim to accomplish this by focusing new leasing in areas with existing leases and infrastructure and should verify with the appropriate state agency that development operations that are actively occurring on nearby lands are likely to continue in the future. The BLM must also confirm that leasing and development activities on such lands are not in conflict with important habitat, migration, or cultural or recreational resource values, and are not causing adverse impacts to human health or public safety. The BLM must ensure opportunities for Tribal consultation, input from state and other federal agencies, and participation from stakeholder groups, impacted communities, and the general public in determining impacts to the environment and public health from existing development. Any parcels in areas where development is not actively occurring or expected to continue in the future on nearby lands, where leasing and development on such lands are in conflict with other public lands uses, or where building on existing infrastructure in an area that is already heavily developed would worsen impacts to human health and safety should not be made available for lease or should be deferred from leasing.

(6) **Impacts on Communities and Environmental Justice:** The BLM should consider the proximity of potential lease parcels to Tribes, minority populations, and communities experiencing disproportionately high and adverse health,
environmental, climate, and other cumulative impacts, and give preference to parcels where oil and gas development would have the least impacts on those communities, even if—and often especially when—a parcel is in close proximity to existing development. Risk assessment and geospatial tools to identify environmental justice communities and evaluate potential impacts already exist and are available to the BLM for the purpose of prioritizing potential lease parcels.

To provide clarity, the final rule should use a term consistent with the existing guidance on environmental justice to define heavily impacted communities. We recommend the term “overburdened and underserved communities,” as used in Executive Order 14096, Revitalizing Our Nation’s Commitment to Environmental Justice for All, which President Biden issued in April, 2023. The BLM states that it took the term “underserved communities” from Executive Order 14035, which defines such communities as “populations sharing a particular characteristic, as well as geographic communities, who have been systematically denied a full opportunity to participate in aspects of economic, social, and civic life.” Executive Order 14035’s intent is to promote diversity, equity, and inclusion in the federal workforce, not to address environmental justice concerns, so the term “underserved communities” does not adequately capture the fact that such communities are frequently overburdened with environmental stressors and cumulative environmental impacts. For this reason, we suggest using the term “overburdened and underserved communities” and defining that term consistent with Executive Order 14096 and the relevant environmental justice guidance.

38 See Exec. Order No. 14096, 88 Fed. Reg. 25,251, 25,253 (Apr. 26, 2023) (implementing a “government-wide approach to environmental justice” and requiring each agency to “identify, analyze, and address historical inequities, systematic barriers, or actions related to any Federal regulation . . . that impair the ability of communities with environmental justice concerns to achieve or maintain a healthy and sustainable environment”); Council on Environmental Quality, Environmental Justice Guidance under the National Environmental Policy Act at 9 (Dec. 10, 1997) [Ex. 9 at App. 0155–194], (“Agencies should consider the composition of the affected area, to determine whether minority populations, low-income populations, or Indian tribes are present in the area affected by the proposed action, and if so whether there may be disproportionately high and adverse human health or environmental effects on minority populations, low-income populations, or Indian tribes.”).


42 The CEQ uses the term “disadvantaged communities” in its guidance for implementing Executive Order 14008 and the Justice40 Initiative because that term is used in the Executive Order but notes that community members and advocates sometimes prefer the use of “overburdened and underserved communities.” CEQ, Interim Implementation Guidance for the Justice40 Initiative, M-21-28, at 2 n.4 (July 20, 2021) [Ex. 11 at App. 0241–253]. This guidance was issued prior to Executive Order 14096, however, which uses the preferred term “overburdened and underserved communities.” Nonetheless, the CEQ guidance provides helpful definitions of “Community” and “Disadvantaged” that BLM could adapt into a definition of “overburdened and underserved communities.” See id. at 2–3.
We also note that the inclusion of leasing preference criteria in the BLM’s regulations inherently necessitates provisions related to how the criteria will be applied and subsequently used to guide leasing decisions. The BLM states in the preamble to the proposed regulation that the agency “does not intend that parcels must meet all five of the preference criteria in order to be available for leasing, and the term ‘preference’ should not be interpreted to mean ‘absolute.’”

We are concerned with the apparent latitude this statement provides to individual BLM offices in applying the criteria. Our concern is that offices might not actually defer parcels from leasing that are in conflict with other important public lands values or that do not provide a fair return to taxpayers.

We have already observed several issues arising from the level of discretion afforded to individual BLM offices in applying the leasing evaluation criteria since it was first implemented via IM 2023-007. Notably, even though it would not be in the best interest of the public, some BLM state offices have continued to consider parcels found to have “low preference” for leasing for inclusion in lease sales. While these offices have stated in NEPA documents that decisions to include “low preference” lands are being made to “further the intent” of section 50265 of the IRA, the BLM has not, to date, explained why offering “low preference” lands is a “necessary” prerequisite for the agency to issue a right-of-way for wind or solar development as required by section 50265 of the IRA.

For example, in the BLM Wyoming Second Quarter 2023 Federal Oil and Gas Lease Sale, the BLM offered 89,707 acres that had been found to have low preference for leasing on the basis of development potential, 91 percent of which ultimately were not purchased in the competitive auction or were purchased for only the minimum lease bid. As a result, minimal taxpayer returns were generated from the offering of these parcels for oil and gas; and yet the BLM has still not provided the public with evidence for why including those parcels was a decision made pursuant to section 50265 of the IRA.

Therefore, we encourage the BLM to establish in regulation that lands nominated for lease found to conflict with any of the established preference criteria have “low preference” for leasing, and that a low preference rating shall signify that those lands should be immediately deferred from leasing. If the BLM finds that it must offer for lease at least one or more “low preference” parcels to allow the agency to issue wind or solar rights-of-way, the BLM should offer the minimum amount of acreage necessary to comply with section 50265 of the IRA. In this instance, the BLM Office should be required to clearly demonstrate how the inclusion of specific parcels in a particular lease sale is in the best interest of the public, what information the agency has considered in taking a hard look at the impacts of leasing those parcels, and how the

43 See, e.g., BLM New Mexico, Draft Environmental Assessment for 2023 Second Quarter Competitive Lease Sale at 145 (May 2023) [Ex. 12 at App. 0255–425].
44 BLM Wyoming, Competitive Oil & Gas Lease Sale Results – Thursday, June 29, 2023 [Ex. 13 at App. 0427–429].

BLM has calculated the offering of the specific parcels to be necessary in order for the BLM to issue a right-of-way for wind or solar development.

d) Fiscal Rates and Fees

i) Raising the federal onshore royalty rate, rental rates, and minimum lease bid consistent with section 50262 of the Inflation Reduction Act

The IRA’s long-overdue statutory increases to the federal onshore royalty rate, rental rates, and minimum lease bid will help to ensure fairer returns to taxpayers for the leasing and drilling that occur on public lands. Before President Biden signed the IRA into law, the program’s fiscal framework had remained unchanged for decades, which resulted in these important rates and fees failing both to provide a fair return to taxpayers for the use and development of publicly owned resources and to discourage speculators from hoarding undeveloped leases. The BLM’s codification of the new royalty rate, rental rates, and minimum lease bid in the agency’s oil and gas regulations is essential to ensure consistency between the rules and the amended statutory provisions.

We do note, however, that the BLM has not established in its proposed rule a higher royalty rate for federal onshore oil and gas leases that would go into effect beginning on August 17, 2032. While the IRA’s first-ever statutory increase to the onshore royalty rate provided a long-overdue update to the percentage of proceeds that oil and gas operators are required to pay to taxpayers for the private development of public lands, it is important to acknowledge that the new rate of 16.67 percent is still well below the rate that is charged for drilling in federal waters (18.75 percent), as well as the rates that are imposed by leading oil and gas producing states including Texas (20-25 percent), Colorado (20 percent), and New Mexico (18.75-20 percent). The Interior Secretary has always had the authority to require a higher royalty rate for onshore oil and gas leases above the current rate under the MLA. However, this authority had not been used for over a century until the Interior Department announced that competitive leases sold in the June 2022 lease sales would require an increased royalty rate of 18.75 percent. It is estimated that taxpayers lost more than $13.1 billion between 2012 and 2021 alone due to the federal government charging only the minimum rate of 12.5 percent rather than a more fiscally appropriate rate of 18.75 percent.

Federal rules that affirmatively require, rather than simply permit, a more robust royalty rate to go into effect are, therefore, prudent for ensuring that federal and state taxpayers receive a fair return from the oil and gas development that occurs on

46 See, e.g., The Wilderness Society (TWS), Land hoarders: Oil and gas companies are stockpiling your public lands (Dec. 2015) [hereinafter Land hoarders] [Ex. 16 at App. 0682–689], https://www.wilderness.org/articles/blog/land-hoarders-oil-and-gas-companies-are-stockpiling-your-public-lands.
47 See e.g., Royally Losing, supra note 45 at 3.
50 Royally Losing, supra note 45 at 1.
federal public lands.

For these reasons, we encourage the BLM to consider establishing in its regulations that a new minimum royalty rate of not less than 18.75 percent will be required for all leases issued beginning on and after August 17, 2032. This percentage rate reflects the same royalty rate for onshore oil and gas leases that has previously been proposed in legislation, including S. 624, *Fair Returns for Public Lands Act*, as introduced by Sen. Rosen (D-NV) and Sen. Grassley (R-IA) in March, 2021, and H.R. 1517 *Ending Taxpayer Welfare for Oil and Gas Companies Act of 2021*, as introduced by Rep. Katie Porter (D-CA-45) in March, 2021. The Congressional Budget Office has previously found that raising the royalty rate for onshore parcels to this level would generate greater revenue in net federal income with negligible impact to production, especially in states that already charge a higher royalty rate than the federal government. We also note that the requirement of an increased royalty rate of 18.75 percent in the June 2022 lease sales did not deter oil and gas companies from acquiring new leases in the places where the industry has always demonstrated a strong interest to develop, with all of the leases offered in the sales in New Mexico, Oklahoma, and North Dakota, as well as two-thirds of the leases offered in Wyoming, selling at competitive auction.

### ii) Requiring that the federal onshore base rental rates and minimum lease bid will be adjusted annually according to the change in the Implicit Price Deflator for Gross Domestic Product since the previous adjustment

As noted above, the updates to the federal onshore base rental rates and minimum lease bid that were secured in the IRA are important for providing taxpayers with a fair return for the leasing and drilling that occurs on public lands. However, without being regularly reviewed and—as necessary—increased for market alignment, the new terms will eventually fall below the fair market rate. While the Interior Secretary has always had the authority to raise rental rates and require a higher minimum lease bid above the minimum statutory amounts, that authority has never been exercised. As a result, the BLM has short-changed taxpayers by failing to take action to address the issue of inflation, which has significantly devalued the onshore program's minimum rates and fees. As an example, under the previous rental rates, it is estimated that taxpayers lost roughly $330 million in rental revenue from federal onshore oil and gas leases in the past decade.
We thank the BLM for implicitly acknowledging this issue in the proposed rule, and for that reason we strongly support the proposal that the fiscal terms for new leases be adjusted annually according to the change in the Implicit Price Deflator for Gross Domestic Product since the previous year. We also ask that the BLM affirmatively state in the final rule that the amounts of the rental rates and minimum lease bid are still to be considered minimum levels even after being annually adjusted for inflation, and that the Interior Secretary maintains the discretion to require terms above those minimum amounts, as larger economic trends necessitate. We encourage the BLM to require in its regulations that the agency will annually assess onshore oil and gas fiscal terms for alignment with all relevant factors currently affecting market rates, including—but not limited to—inflation.

iii) Establishing a new filing fee for Expressions of Interest consistent with section 50262 of the Inflation Reduction Act

The IRA’s enactment of a new $5 per-acre fee that must be submitted with all Expressions of Interest (EOIs) for onshore oil and gas leases was another important modification to the federal oil and gas program. Since the passage of the Federal Onshore Oil and Gas Leasing Reform Act (FOOGLRA) in 1987, the BLM has used an “informal” lease nomination process, which allows any member of the public to nominate any parcel of public land for oil and gas leasing, and, up until last year, free of charge and anonymously. These allowances previously led to a significant amount of speculation within the onshore program. For instance, between 2011 and 2020, over 110 million acres of public lands were nominated for leasing, which is a land mass larger than the state of California. During that time, only 11.4 million acres of leases received bids, highlighting the fact that most lease nominations were speculative in nature, aided by the free and anonymous ticket of admission.

Therefore, we strongly support the BLM codifying in its regulations that all EOIs must be submitted with a nonrefundable filing fee of $5 per-acre in order to be considered for inclusion in upcoming onshore oil and gas lease sales. We agree with the proposal that requires anyone submitting an EOI to provide their name and address, thus putting an end to anonymous submissions. We also propose that the final rule include a provision requiring that the EOI fee, along with other fixed fees, be adjusted for inflation on an annual basis.

We note that the preamble to the proposed regulation states that “the BLM would not charge a new fixed fee under this rule for processing a document that the BLM received before the effective date of the rule.” However, since the EOI filing fee has been required since the President signed the IRA on August 16, 2022, we request that the BLM specify in the final rule that this fee will be charged for all EOIs received since that date. EOIs submitted without the fee will not be considered for inclusion in upcoming and future oil and gas lease sales. Additionally, we strongly encourage the BLM to establish in the final rule that the agency will consider only EOIs submitted with the $5 per-acre filing fee and with the submitter’s name and address identified. This would effectively

60 Id.
prohibit the continued consideration of speculative lease nominations submitted anonymously before the passage of the IRA.

**iv) Soliciting feedback to improve section 3103.41 – Royalty Reductions**

We appreciate the BLM acknowledging that changes to the agency's current process for administering royalty reductions are needed. As the BLM includes in the preamble to the proposed regulation, GAO has found that the BLM's decisions to grant royalty relief during the COVID-19 pandemic were not made efficiently and equitably across the states. Some BLM State Offices ultimately "rubber-stamped" the royalty relief applications received during this time\(^{61}\) because of the agency not having established in advance whether royalty relief was needed to keep applicants' wells operating, not having determined the extent to which royalty relief itself would keep oil and gas companies from shutting down their wells at the time, and not having evaluated the amount of royalty revenue that would be forgone by the federal government. GAO has reported that the royalty rates for the leases that were approved for royalty relief between March 24 and June 11, 2020, were reduced from the former minimum BLM rate of 12.5 percent to an average of less than 1 percent for the 60 days of royalty relief that the BLM’s temporary guidance provided. GAO has conservatively estimated that the federal government lost roughly $4.5 million in royalty revenue between May and June 2020.\(^{62}\)

The onshore royalty relief issues that arose during the COVID-19 pandemic are not the only instances of problems that have been documented concerning the BLM’s administration of royalty reductions. As recently as June 2, 2023, the DOI OIG issued a report detailing how the BLM does not analyze effective royalty rates for oil and gas, which means that the overall effect of royalty relief and other allowances and deductions cannot be fully assessed.\(^{63}\) Therefore, we urge the BLM to codify in its regulations additional standards that should apply to royalty reductions. We recommend that the BLM take action to improve the royalty rate reduction process by amending the final rule to provide specific criteria for: lowering the rate; setting a limit on the lower end of the reduced rate; and limiting the period for the reduction to apply. We also encourage the BLM to include in the regulation that reduced royalties shall be provided to assignees only on a case-by-case basis, after the authorized officer applies the criteria for reducing royalties and provides clear documentation for the decision.

e) Noncompetitive Leasing

i) **Removing all references to and allowances for noncompetitive leasing from the Code of Federal Regulations, consistent with section 50262 of the Inflation Reduction Act**


For decades, noncompetitive leasing hindered the federal oil and gas program, resulting in the issuance of public lands leases that were rarely developed yet still burdened other uses of such lands by limiting land use planning options and discouraging conservation designations. For this reason, we have celebrated the IRA’s elimination of this wasteful and speculative leasing practice, and we now thank the BLM for updating its leasing regulations to reflect the statutory requirement that all federal oil and gas leases are to be issued only if purchased at competitive auction. The BLM’s inclusion of the elimination of noncompetitive leasing as part of its rulemaking is essential for ensuring that no BLM Office issues a noncompetitive oil and gas lease in error.

f) Public Participation

Engaging the public is a critical component of federal oil and gas program decision-making affecting public lands. DOI has committed to “creating a more transparent, inclusive, and just approach to leasing and permitting that provides meaningful opportunity for public engagement.” The proposed rule takes positive steps toward fulfilling Interior’s public engagement mandate.

i) Providing meaningful opportunities for public participation and engagement

Public participation is central to the leasing process, particularly in reducing inequalities among disadvantaged populations. According to the Executive Order on Further Advancing Racial Equity and Support for Underserved Communities Through The Federal Government, underserved communities often face significant barriers and legacy exclusions in engaging with agencies and providing input on Federal policies and programs that affect them. Agencies must increase engagement with underserved communities by hosting culturally and linguistically appropriate listening sessions, outreach events, or requests for information. These opportunities should be inclusive, well-publicized, conveniently scheduled for diverse stakeholders, and address barriers for individuals to participate in the engagement process, such as the accessibility of physical spaces, virtual platforms, presentations, systems, training, and documents.

Yet, for many years, the BLM provided few, if any, opportunities for public input prior to leasing, asserting the erroneous presumption that the act of leasing public land did not cause environmental impacts and, therefore, did not trigger the public participation requirements of NEPA. Even after federal courts initially rejected this line of reasoning, the BLM has still at various times put procedures in place that have

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67 Id. at 14.
69 Id.
significantly minimized meaningful public participation in the leasing process.71

Therefore, we fully support the proposed rule requiring public processes with set
minimum timeframes for comment periods: at least 30 days for a scoping period; at
least 30 days for public comment on draft NEPA documents; and providing the list of
lands to be offered for competitive lease sale in a notice at least 60 days before a
competitive auction, with at least 30 days for protest. These measures will not only
enable consistent public participation in the leasing process but will also lead to a more
effective and more efficient leasing process.72

The BLM should also consider specifying in the rule that all comment periods close at
11:59:59 PM (local time) on the final day of the comment period. Historically, some BLM
offices have closed comment periods at earlier times, creating inconsistencies among
lease sale processes.

We recommend that the BLM address several additional issues pertaining to public
participation in the final rule:

(1) The BLM should make clear—and require—that final NEPA compliance documents
will be made publicly available at the time the Notice of Competitive Lease Sale is
posted. This will ensure that BLM state offices do not delay providing the final
documents, making them available at the outset of the protest period.

(2) Additionally, as discussed below in these comments, the BLM should require
documentation of lease suspensions, which should be made publicly available on the
BLM’s automated lease tracking system. Lease suspensions can unnecessarily tie up
public lands that could be put to other important uses. We encourage the BLM to
require NEPA analysis, including an opportunity for public comment, before
deciding whether to approve a suspension request.

(3) We also ask the BLM to consider making information accessible to communities
with limited English proficiency—a key environmental justice principle. Adaptive
and innovative approaches to assisting environmental justice communities are vital.73 For example, Executive Orders 14096 and 12898 and related guidance
provide for the translation of public documents to overcome linguistic barriers.74 To
enable such communities with environmental justice concerns to meaningfully
engage in lease sales (and in this rulemaking), we urge the BLM to translate key
documents and critical information into Spanish, Diné, and other languages easily
understood by residents, as appropriate. The BLM should also provide information
in accessible formats for those without reliable internet access, along with providing

71 See, e.g., Instruction Memorandum 2018-034, Updating Oil and Gas Leasing Reform – Land Use Planning and Lease
72 See, e.g., National Research Council, Public Participation in Environmental Assessment and Decision Making 226
(Thomas Dietz and Paul C. Stern, eds., 2008) [Ex. 29 at App. 0905–1227].
73 CEQ, Environmental Justice Guidance under the National Environmental Policy Act at 13 (listing numerous steps
agencies should consider when developing “adaptive” and “innovative” strategies to engage environmental justice
communities with linguistic barriers).
74 88 Fed. Reg. at 25,254; Executive Order No. 12898 § 5-5(b), 59 Fed. Reg. at 7,632; DOI, Environmental Justice Strategic
Plan at 11; CEQ, Environmental Justice Guidance under the National Environmental Policy Act at 9, 13.
translators at public meetings.

(4) We recommend that the BLM provide schedules for making and updating data and information related to oil and gas leasing and operations occurring or proposed to occur on public lands available to the public. To engage in the oil and gas leasing process and operations effectively, organizations, communities, businesses, and individuals should have clear and detailed information on oil and gas leasing and operations occurring or proposed to occur on our public lands, as well as information that impacts the approval of development and production activities. That authoritative data should come from the agencies that approve those activities. Much of this information is spatial in nature and it should be available in a format that both GIS users and non-GIS users can easily access and understand. Ultimately, providing this information benefits not only the public and impacted communities, but also the BLM and leaseholders by ensuring consistent, transparent, and accessible tracking of leases and permits.75

g) Tribal Consultation

i) Ensuring robust Tribal consultation

Tribal consultation is critical to an informed NEPA and oil and gas leasing process. DOI has rightfully committed to providing robust and “enhance[d] opportunities for Tribal and environmental justice community engagement in the NEPA and decision-making process.” To honor this commitment, during lease sale processes, the BLM should fully consult and engage Tribal nations, both those recognized by the United States as sovereign nations and those that are not currently recognized as such. We appreciate the BLM keeping open the opportunity for government-to-government consultation throughout this rulemaking process. The right of Indigenous Peoples to give or withhold “free, prior and informed consent” to projects and policies affecting their lands and people must be honored, as stated in the United Nations Declaration on the Rights of Indigenous Peoples, which the United States has supported for more than a decade. The incorporation of these bottom-up principles is an important and necessary step to address the history of public lands in the United States.

The final rule should honor the unique historic and current connections of Tribes to public lands by ensuring traditional cultural properties, landscapes, and sacred sites on public lands are identified and protected to the maximum extent possible under federal law.76 We appreciate the inclusion of cultural resources as an evaluation criterion, as

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75 We do note that the BLM has taken steps toward data transparency with the creation of the Mineral and Land Records System (MLRS) and Geospatial Business Platform (GBP Hub). However, the data’s availability and usability vary by platform and by state. For example, the MLRS data is available on an interactive map but not available for download, making it unavailable for independent analysis. The GBP Hub for Colorado provides the most comprehensive statewide data related to oil and gas leasing and includes the federal mineral estate, lands closed to fluid mineral leasing, and oil and gas potential. At the time these comments were prepared, no other BLM state offices were providing this comprehensive data through the GBP Hub and many state offices provide no data at all even though this data exists and is utilized internally when BLM staff perform actions related to oil and gas leasing and operations.

discussed above, in the BLM’s leasing parcel preference determinations. We urge the
BLM to ensure state offices initiate consultation with Tribes and ensure leasing is not
occurring in areas with sensitive or important cultural resources.

h) Idled & Inactive Wells

i) Implementing new reporting and operational requirements for operators of
temporarily abandoned and shut-in wells

Long-term well abandonment on public lands, which leads to orphaned wells, has been
a persistent issue for years. Because current regulations allow for wells that have been
“turned off” ostensibly just temporarily to sit unused and unclaimed for long periods of
time, companies are essentially allowed to indefinitely defer closure and reclamation.
GAO has identified long-inactive wells as those most at risk of becoming orphaned,
potentially costing $46 to $333 million to clean-up.\(^77\) While the BLM has recently
reported there to be an estimated 15,000 wells on public lands that are already known
to be orphaned,\(^78\) there are very likely to be thousands more at risk of becoming
orphaned due to the extended length of time that they have been left either abandoned
or shut in.\(^79\)

For these reasons, we strongly support the BLM’s inclusion of new reporting and
operational requirements for operators of temporarily abandoned and shut-in wells in
the proposed rule. Indeed, requiring operators to notify the BLM if they want to leave a
well inactive for a defined temporary amount of time and then receiving BLM approval
if they want to leave the well inactive for a longer period of time are important steps
towards improving the monitoring of well abandonment and shut-in status. In addition,
we agree that limiting the amount of time a well may be left dormant is essential for
ultimately lessening the likelihood that inactive wells will become orphaned. We also
highly recommend that the BLM add regulatory language to require that a mandatory
bond adequacy review take place when an operator provides notice for a well to be
temporarily abandoned or shut-in.

While we understand that the BLM considers the maximum length of time that a federal
well may be left idle to be no more than four years, consistent with the definition
provided for “idled wells” in the IIJA, we consider four years far too long for a well to be
allowed to remain in either temporarily abandoned or shut-in status. Most state oil and
gas programs determine “idled wells” to be those that have been left inactive for much

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\(^77\) GAO, supra note 12 at 18.

\(^78\) See, e.g., KUNC, “Feds tap $33 million to plug orphaned wells on public lands” (May 26, 2022) [Ex. 30 at App. 1229]
(“[Laura] Daniel-Davis, the Interior Department’s principal deputy assistant secretary for land and minerals,] estimates
there are about 15,000 [orphaned] wells on federal lands”), https://www.kunc.org/regional-news/2022-05-26/feds-tap-
33-million-to-plug-orphaned-wells-on-public-lands.

\(^79\) See, e.g., National Wildlife Federation (NWF) and Public Land Solutions (PLS), Inactive Oil and Gas Wells on Federal
/media/Documents/PDFs/Press-Releases/2021/03-17-21_Inactive-Oil-and-Gas-Wells-on-Federal-Lands-and-Minerals-
Report.
shorter lengths of time. In addition, recently proposed legislation such as S. 2177, *Oil and Gas Bonding Reform and Orphaned Well Remediation Act*, as introduced by Sen. Bennet (D-CO) in June 2021, has provided for the total period of time during which wells may be inactive to not be longer than two years.

Therefore, we urge the BLM to finalize regulations that prohibit operators from delaying permanent abandonment of temporarily abandoned and shut-in wells for more than two years. We are in favor of the BLM’s proposal to require yearly interval checks for shut-in wells, though we note the need to amend the proposed timeline to ensure that operators are required to permanently abandon their well, resume production in paying quantities, or provide the BLM with a detailed plan for future beneficial use within two years of inactivity.

In addition, to encourage operators to move forward with plugging and reclaiming idled wells, or alternatively to bring the wells back into production, we recommend that the BLM amend the final regulation to require the use of idled well bonds. Idled well bonds are already required by some states, including Wyoming, in order to create a financial incentive for operators to avoid delaying remediation, reclamation, and permanent closure of their wells.

### i) Bad Actors

We appreciate the BLM taking action in the proposed rule to limit the ability to lease and develop public lands for oil and gas to those entities that are actually responsible and qualified, as required under the MLA. Historically, the BLM has neither routinely nor systematically scrutinized the compliance records or development intentions or capabilities of participants in the oil and gas leasing process. Consequently, industry actors with a history of violating the terms of federal leases and permits, including reclamation requirements, have been able to freely nominate, bid upon, and purchase leases. Continuing to allow for irresponsible actors to exploit public lands in this way would further the massive waste of public resources and undermine the efficacy of other important reforms in the BLM’s proposed rule, such as updating bonding amounts to ensure proper plugging of wells and site reclamation and limiting leaseholders’ ability to continuously suspend leases. Irresponsible industry actors engage in harmful practices, including environmental violations, poor labor standards, abandoning wells without proper remediation, defrauding the public, and hoarding public lands without development. Requiring those

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81 Oil and Gas Bonding Reform and Orphaned Well Remediation Act, S. 2177, 117th Cong. (2021).
82 055-3 Wyo. Code R. § 3-4 - Bonding Requirements (Forms 8, 8A, 8E and 8F).
83 E.g., Center for Western Priorities, *2022 Spills Tracker* [Ex. 33 at App. 1359], [https://westernpriorities.org/resource/2022-spills-tracker/](https://westernpriorities.org/resource/2022-spills-tracker/)
87 E.g., Land hoarders, *supra* note 46, at *1.
who take advantage of leasing public lands to show that they are indeed qualified and responsible actors is, therefore, vital for fixing the oil and gas leasing program.

i) Reducing speculation and waste by addressing unqualified and irresponsible prospective bidders and lessees

The BLM has broad authority to limit participation in the leasing process to “responsible qualified” bidders and, at minimum, cannot issue leases to companies that are violating “reclamation requirements and other standards . . . for any prior lease.”88 Historically, failed compliance records or development intentions and resource capabilities of participants in the oil and gas leasing process have not been properly scrutinized, which allows speculators and bad actors to freely obtain new leases.89

Thus, we applaud the BLM for proposing measures in the rule to prevent actors with a history of violating the terms of federal oil and gas leases from purchasing or otherwise acquiring new leases. Such action will help to curb the decades of abuse that have been perpetuated by those taking advantage of the privilege of leasing public lands, by restricting bidding in lease sales and confining the holding of leases to qualified and responsible parties under the law.

The BLM has rightly defined “qualified bidder” to mean “any person in compliance with the laws and regulations governing a bid” and defined “qualified lessee” as any person in compliance with the laws and regulations governing the leases. We fully support the proposed rule defining “responsible bidder” to mean those who have not defaulted on the payment of winning bids for BLM-issued oil and gas leases, are capable of fulfilling the requirements of federal onshore oil and gas leases, including well plugging and site reclamation, and do not have a history of noncompliance with applicable statutes and regulations or with the terms of a BLM-issued oil and gas lease. We also fully support the definition of “responsible lessee” as any person who has not defaulted on previous winning bids, is capable of fulfilling the requirements of federal onshore oil and gas leases, and does not have a history of noncompliance with applicable statutes or the terms of a BLM-issued oil and gas lease.

We recommend that the BLM consider several additional measures to address the problem of bad actors holding oil and gas leases. First, the final rule should state explicitly in the definitions of responsible bidder and responsible lessee that such parties who have held oil and gas leases must not have a history of failing to make timely payments, must not operate a significant number of inactive wells, must not have repeated or ongoing environmental or labor violations, and must not have violated federal or state reclamation requirements on other leases. We also recommend that the BLM codify in the final regulations that, prior to issuing to an entity a new lease or approving the assignment of an existing lease to a new entity, the authorized officer be required to ensure that the company or individual is not in violation of any of these requirements. The BLM should also require that the list of “Entities in Noncompliance

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j) Diligent Development

According to the most recent report, ninety percent of public lands and minerals managed by the BLM in the Western United States have been authorized for oil and gas leasing, despite the fact that the majority have little to no potential for oil or gas development. As a consequence, speculative leasing on public lands has been a longstanding issue in the federal oil and gas program. As of FY22, more than 11.3 million acres, comprising nearly half of the total public lands acreage that oil and gas companies have under lease, were sitting idle. The ability of the oil and gas industry to hold onto millions of acres of public lands under lease without developing them has been a significant issue since FY01. When lands are leased for oil and gas development, they often cannot be managed for other uses, such as fish and wildlife habitat or recreation. For example, wilderness-quality lands have been found to be nearly three times less likely to be managed to protect wilderness characteristics if they are overlapped by oil and gas leases, even if those leases are undeveloped.

The IRA implemented long overdue measures to curb speculative leasing and promote more diligent development practices by increasing the annual rental rates and minimum bid for onshore oil and gas leases, as well as by eliminating the practice of noncompetitive leasing. Given the amount of public lands that remain open to leasing and the standard lease term for public lands leases remaining set at an initial period of ten years, however, it is prudent for the BLM to propose additional regulatory changes to further encourage the industry’s diligent use of publicly owned resources.

i) Adding a new section to 43 CFR Subpart 3103 – Fees, Rentals, and Royalty, to further promote development of leases by specifying the steps that must be taken to meet diligent development obligations

The BLM has historically taken limited action to dissuade companies from holding federal oil and gas leases without utilizing the oil and gas resources associated with them. As noted above, as of FY22, the industry held leases covering more than 11.3 million acres of public lands that were not in production. Given the long, documented history of companies stockpiling public lands leases, it is highly likely that a significant portion of these lands have been leased and subsequently retained by private entities.

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90 BLM, Manual H-3120-1 – Competitive Leases (P), App. 4, Page 1 (Feb. 18, 2013).
91 See, e.g., Open for Business, supra note 6.
92 See, e.g., Little Potential, supra note 7.
94 Center for Western Priorities, Wilderness Workshop, & Colorado Wildlands Project, “No harm, no foul” doesn’t exist in oil and gas leasing (Feb. 2022) [Ex. 39 at App. 1582–1583], https://storymaps.arcgis.com/stories/haa3a7b6346047d3a1466ef9e1a4fd.
95 BLM, supra note 93 (Total Number of Acres Leased & Total Number of Producing Acres on Federal Lands).
that have no intention of ever extracting oil or gas but rather are posturing for investors or seeking to generate profit by selling their leasing rights to production companies. As the BLM notes in the preamble to the proposed regulation, there are significant opportunity costs when oil and gas leases are not developed, in terms of public agency time and resources being wasted as well as public lands not being managed for other revenue-generating uses and resources.

For these reasons, we strongly support the BLM's proposal to include in the final rule a new requirement that companies holding federal onshore oil and gas leases must have completed at least one of five specified steps by the end of the fifth year of the lease term in order to have met the obligations of diligent development. We do note, however, the need for the BLM to amend the final regulations to ensure that a lessee's failure to meet at least one of the five specified steps by the end of the fifth year of the lease term will carry a consequential action. Therefore, we recommend that the BLM establish in the regulation that the lessee must provide notice of how and when the lessee met the diligent development obligation; and that, if the lessee has not satisfied the diligent development obligation by the end of the fifth lease year, the lessee be subject to an increased annual rental rate.

ii) Updating 43 CFR Section 3165.1 – Relief from Operating and/or Producing Requirements, to encourage diligent development of leased lands and ensure lease suspensions are justified and tied to an end date

Existing regulations pertaining to lease suspensions have been poorly enforced by the BLM, resulting in leaseholders who are intent on holding leases without diligent development ultimately manipulating the suspension process. It is, therefore, critical that the BLM take action to demand diligence from holders of federally owned minerals, to ensure that the public is protected from the costs of leaseholder speculation. As stated in the preamble to the proposed rule, "leases that are not diligently developed can limit the BLM's ability to manage public lands for other uses and resources and fulfill its multiple-use and sustained-yield missions."

For this reason, we support several of the BLM's proposed updates to its policies related to lease suspensions, which take necessary action to encourage the diligent development of leased lands and ensure lease suspensions are justified and time-limited. Notably, we thank the BLM for clarifying that the agency will not approve a suspension request based on an application for permit to drill (APD) filed less than 90 days before the expiration of a lease. Indeed, lessees and operating rights owners should

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98 See, e.g., Land hoarders, supra note 46; see also GAO, "OIL AND GAS LEASE MANAGEMENT—BLM Could Improve Oversight of Lease Suspensions with Better Data and Monitoring Procedures" (June 2018) [Ex. 42 at App. 1591–1632], https://www.gao.gov/assets/gao-18-411.pdf.
100 GAO, supra note 98.
not assume the BLM will grant a suspension merely to relieve them of their obligations of diligence and timeliness when complying with these and related requirements.\textsuperscript{101} We also urge the BLM to strengthen this provision by prohibiting the granting of suspensions based on APDs filed in the last six months of a lease term.\textsuperscript{102}

In addition, we support the BLM’s proposal in Section 3165.1(d) to limit requested suspensions to one year. To prevent the abuse of open-ended one-year extensions, however, we encourage the BLM to amend the final regulation to allow for only one extension that may be permissible if the circumstances justifying the original suspension continue, and to state that there is a strong presumption against any additional extensions except in those situations where the lessee or operator is prevented from operating or producing due to force majeure, that is, matters beyond the lessee’s or operator’s control.

Given that suspensions can be neglected and abused by both industry and the government agency responsible for overseeing them, we do not support the BLM’s proposal in Section 3165(e) allowing directed suspensions to exceed one year. While short-term suspensions may provide relief in extraordinary circumstances to ensure leaseholders who have timely applied to develop their leases are not stymied by events beyond their control, long-term suspensions often do not further the public interest or properly conserve natural resources. Rather, long-term suspensions encumber public lands by making them unavailable for other uses and for other potential leaseholders, as well as fail to provide taxpayers with a fair return for the lease of public lands. For these reasons, we urge the BLM to amend the final regulation to ensure that, as is the case with requested suspensions, directed suspensions are limited to one year and that extension of directed suspensions is also strongly disfavored, to promote diligent management of federal mineral resources.

Lastly, we strongly encourage the BLM to set forth, as part of this rulemaking, a plan for revising the agency’s existing guidance pertaining to lease suspensions after new regulations for the onshore oil and gas program are in place. We recommend that, at minimum, such guidance provide detailed information concerning the respective circumstances when suspensions are appropriate and when suspensions are not appropriate.

\textit{iii) Adjusting the valid period of time for approved APDs to reduce the cost to the American public and encourage diligent development of leased lands}

We agree that it is reasonable to expand APD terms from two to three years and eliminate APD extensions, which have long rewarded land speculation, hampered diligent development, and increased costs to the public. However, we strongly encourage the BLM to set a time limit of one year for any extension exceptions that are granted beyond the initial APD term. In addition, we recommend the ability to extend an APD based solely on the submission of a drilling plan be eliminated, as this allowance


\textsuperscript{102} We note that this requirement would still give leaseholders 9.5 years out of a 10-year lease term to file an application to drill—which is entirely reasonable for a diligent operator.
undermines the goal of diligent development and risks further waste of public lands and resources.\textsuperscript{103}

\textit{iv) Adding a sentence to section 3106.20 – Qualifications of Transfers, to specify that, “Only qualified and responsible lessees may own, hold, or control an interest in a lease”}

As noted above, we are in full agreement that the BLM’s oil and gas regulations be updated to specify that all participatory actors in the federal onshore oil and gas program should be both “qualified” and “responsible” to own, hold, or control an interest in a lease. \textit{We also recommend that, in order to more robustly strengthen the BLM’s oversight of whether potential transferees are responsible and qualified, the BLM codify the policies and procedures that the authorized officer is required to follow with regard to approving and overseeing lease transfers.}

Currently, the only publicly available information concerning how the BLM handles federal onshore oil and gas lease interest transfers can be found in a document entitled, “Information and Procedures for Transferring Oil and Gas Lease Interests.”\textsuperscript{104} While the BLM states in this document that the agency does not recognize the rights of the “transferee” until the BLM approves the transfer, the public has little insight into what the BLM takes into consideration in actually approving lease transfers. The transferee must certify a list of basic criteria when requesting transfer approval,\textsuperscript{105} but it is not apparent how the BLM confirms compliance with these criteria as a part of the approval process. Further, there is no information communicated to the public regarding how—or even if—the BLM determines that the lease transfer is in the best interest of the public, including the ability of the transferee to diligently explore for and develop oil and gas resources on the lease. For these reasons, we strongly urge the BLM to amend the final regulations to include a procedure for implementing the necessary guidelines for approving lease assignment applications and overseeing the secondary leasing market.

At minimum, we note the need for the BLM to examine and certify the transferee’s or assignee’s financial viability before approving the transfer or assignment. Therefore, we urge the BLM to amend the final regulation at 43 CFR Section 3106.60 to clarify that the authorized officer must ensure that, following the review for bond adequacy which is to take place prior to the authorized officer approving any transfer or assignment request, the assignee or transferee is capable of providing financial assurance in the amount determined to be necessary per the review. The BLM should also include in the regulations the requirement that the assignee’s or transferee’s bond be in place prior to the approval of the assignment or transfer. These actions are required to guard against

\textsuperscript{103} We also strongly urge the BLM to undertake, in the near future, a much-needed and long overdue overhaul of all its oil and gas permitting regulations, similar to this much-needed reform of its leasing regulations.


\textsuperscript{105} BLM, Transfer of Operating Rights (Sublease) in a Lease for Oil and Gas or Geothermal Resources, \textit{https://www.blm.gov/sites/blm.gov/files/3000-003a.pdf}.
bankruptcy of lessees and operators and the on-the-ground repercussions that can result, such as wells becoming orphaned.\textsuperscript{106}

\textbf{k) Nominations Process}

We appreciate the BLM’s proposal to refine the process by which lands are nominated or otherwise included in lease sales, as well as the BLM specifically requesting comment on this process. Indeed, the way in which lands are nominated and made available for leasing is an essential component of the leasing process. Speculation and the wasteful stockpiling of public lands, as discussed above—which result in harm to the public and loss of revenue—along with environmental degradation, stem in large part from decisions concerning what lands are put on the table for leasing through the nominations and selection process. Thus, clearly defining this process is critical to fixing the broken leasing system.

Under the MLA, DOI may choose to lease “where eligible lands are available.”\textsuperscript{107} The BLM retains discretion to determine what lands qualify as eligible and available.\textsuperscript{108} The MLA does not define or discuss a nomination process for leasing those lands. Likewise, the IRA leaves to DOI the full discretion to determine a process for soliciting EOIs, if the agency chooses to do so: “The Secretary shall assess a nonrefundable fee against any person that, in accordance with procedures established by the Secretary to carry out this subsection, submits an expression of interest in leasing land available for disposition under this section for exploration for, and development of, oil or gas.”\textsuperscript{109} As such, the agency may determine the process for nominating or choosing lands to be leased, including by EOIs—a process that DOI itself created in regulation.

FOOGLRA did not alter DOI’s vast discretion over management of federally owned fluid minerals and public lands. As one commentator noted at the time, “nowhere in the legislative history of the [1987 amendments] did Congress suggest that it modified the Secretary’s discretion in any way.”\textsuperscript{110} Instead, Congress enacted FOOGLRA to address concerns that leasing procedures under the MLA as originally enacted allowed the vast majority of leases to be sold noncompetitively, depriving the public of a fair return on its investment.\textsuperscript{111} Those amendments were not intended to displace the Secretary’s general discretion over oil and gas leasing in Section 17(a) of the MLA.\textsuperscript{112} Thus, the “MLA, as amended by the Reform Act of 1987, continues to vest the Secretary with considerable discretion to determine which lands will be leased.”\textsuperscript{113} FOOGLRA leaves DOI the full discretion to determine a process for soliciting EOIs, if it chooses to do so, and leaves DOI with broad discretion in defining the leasing, including any nominations, process.

\textsuperscript{106} See, e.g., Public Citizen, Private Profits, Public Risks: How Wall Street Buyout Firms are Funding Oil and Gas Drilling on Public Lands and Threatening to Leave Taxpayers With a $380 Million Cleanup Bill (Aug. 2023) [Ex. 43 at App. 1634–1689], \url{https://www.citizen.org/article/private-profits-public-risks/}.


\textsuperscript{108} W. Energy All. v. Biden, No. 21-CV-13-SWS, 2022 U.S. Dist. LEXIS 171160, at *45 (D. Wyo. Sep. 2, 2022). (**‘Eligible’ and ‘available’ are not defined by Congress in the MLA, which necessarily delegates the matter to the agency.” (citation omitted)).

\textsuperscript{109} See Inflation Reduction Act of 2022, H.R. 5376, 117th Cong. § 50262(d) (emphasis added).


\textsuperscript{113} W. Energy All., 709 F.3d at 1044.
i) **Implementing a single nominations process**

Rather than retaining both a formal nominations process and an expression-of-interest (informal) process, we strongly recommend that the BLM implement a single nominations process that combines the two. By exercising its authority at the front end over what public lands it will consider for leasing, the BLM would reduce land speculation, save public agency time and resources, and create greater certainty for all parties.

Currently, the BLM does not accept formal nominations, instead relying on “informal” expressions of interest. As also mentioned earlier in our comments, doing so has led to considerable land speculation and inefficiencies. Instead of the BLM, in the first instance, prescribing what lands can be nominated, the agency has largely shunted to industry the responsibility to identify and establish the scope and scale of lands considered for leasing—even though such lands have, at times, been otherwise ineligible for leasing for a host of reasons. Then, it has been left to the BLM and to the public, on the back end, through commenting and protests, to attempt to eliminate lands with various conservation and other conflicts. Were the BLM to employ a more efficient process whereby, on the front end, the agency itself identified what lands can be nominated or selected, the BLM would save considerable time and resources. Following passage of the IRA last year, this alternative process would ultimately also save industry money because it would lessen the risk of companies and individuals expending the nonrefundable $5 per-acre EOI fee on lands that the BLM might later determine are not available for leasing.

Therefore, we propose that the BLM fold EOIs and formal nominations into a single nominations process. Under this process, the BLM would initially identify lands for nominations in a particular state by posting a List of Lands for Competitive Nominations (“List”). The BLM would determine this List, before undertaking NEPA analysis, based on land eligibility (see discussion, above, about defining the term “eligible”) and other factors, such as those identified in the agency’s oil and gas leasing preference criteria. The process would then proceed as currently set forth in the “Expressions of Interest” portion of the proposed rule, with parties able to submit EOIs only for lands on the List, and the BLM then undertaking scoping, conducting NEPA review on lands receiving EOIs, posting a Notice of Competitive Lease Sale, and providing a protest period. Under this proposal, we recommend eliminating “Available” from the title of the List because lands do not become “available” until they have undergone NEPA review, which would occur—as currently proposed for the EOI process—after parcels have received EOIs.

In Part II, below, we offer more specific details on this recommendation, along with an alternative recommendation should the BLM choose to retain both a formal nominations process and an informal EOI process.

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ii) Adding a new section to the regulations, 43 CFR Subpart 3120.42 – Agency Inventory of Leasing, to provide that periodically the BLM will calculate the amount of acreage for which EOIs have been submitted and the number of acres offered for lease

We commend the BLM on aiming to regularly calculate the amount of acreage for which EOIs have been submitted and the acreage offered for lease in order to comply with the IRA’s requirements for issuing wind and solar right-of-way permits. It is critical that the BLM accurately and consistently track these amounts to ensure not only that the agency is able to issue wind and solar rights-of-way, but also so that the agency is not unnecessarily offering lands for lease that should be prioritized for other uses.

To this end, we have several recommendations. The proposed regulation provides only that “the BLM will from time to time calculate, for the preceding 1-year period, the acreage for which expressions of interest have been submitted to the BLM and the sum total of acres offered for lease.” This provision, as currently stated, does not provide the certainty, clarity, and durability necessary to ensure the BLM is properly adhering to its various statutory mandates when complying with the “tethering provisions” of the IRA requiring a certain amount of acreage be offered for oil and gas leasing in order for the BLM to be able to issue wind and solar right-of-way (ROW) permits. Instead, we encourage the BLM to consider codifying and requiring some of the calculation process set forth in IM 2023-006, Implementation of Section 50265 in the Inflation Reduction Act for Expressions of Interest for Oil and Gas Lease Sales, while retaining adequate discretion to revise the process in the future.

From IM 2023-006, the BLM should consider including in the rule the direction that: “During the final month of each quarter, the BLM will evaluate EOIs received in that and (if necessary) prior quarters to ensure the EOIs meet all applicable requirements . . . and tabulate the associated acreage . . . . [T]he BLM will count EOIs received in the third month of each quarter among those received in the first month of the following quarter.” The BLM should clarify in the final regulation that “the one-year period refers to the year before the wind or solar energy right-of-way is issued.”

Further, as explained above, the BLM should require that, before offering for lease any parcel that receives a low preference designation (or, as we suggest, will be deferred from the respective lease sale), the agency must demonstrate that doing so is necessary to allow issuance of wind or solar ROW permits to comply with the IRA’s tethering provisions. By directing that calculations be performed on a quarterly basis (rather than leaving it unclear in the rule when to run such calculations), the BLM will better be able to determine what amount of public land acreage needs to be offered in order to allow wind and solar ROW permit issuance on an ongoing basis. The rule should specify that parcels receiving a low preference for leasing designation (which, again, as we recommend, would be deferred) should be offered for lease only if necessary to comply with the IRA’s tethering provisions to allow wind or solar ROW issuance based on the quarterly calculations.

II. Section-by-Section Comments on Specific Provisions in the Proposed Rule
While we have offered discussion of the priority issues being addressed in the proposed rule in Part I of this letter, the following comments concern specific sections of the proposed regulations.

**43 CFR Part 3000 – Minerals Management: General**

a) **43 CFR Part 3000 – General**

1) **Section 3000.0-5 Definitions**

   Although the proposed rule states that there is “no significant change” from the existing regulations, it does update 43 CFR 3000.5 with much-needed organization and clarification. For instance, the rule would alphabetize the definitions, update the definition of “Act” to include the acronym “MLA” for the Mineral Leasing Act of 1920, replace the term “Service” with “ONRR” due to the reorganization of the former Minerals Management Service, and change the current definition of “Proper BLM office” to remove the reference to the Bureau of Land Management. The proposed rule also includes a new definition for “properly filed,” to be a document or form that has been delivered to the appropriate office with all necessary information and payments, and includes a number of ways of meeting this definition, including electronic filing. Finally, the proposed rule includes a definition that clarifies the current definition of “surface managing agency” to ensure that the definition encompasses both non-DOI agencies as well as other DOI agencies with which the BLM must collaborate in managing the surface resources that cover federally owned minerals.

   More significantly, the proposed rule includes a definition for “acreage for which expressions of interest have been submitted” to mean land that is identified in an “Expression of Interest” received by the BLM, that has not been proposed for leasing in any pending sale or other EOI pending BLM disposition, and for which the BLM may lawfully issue an oil and gas lease. To align with the MLA’s provision that lands offered for lease be eligible and available, we recommend that the BLM clarify in this definition that (in addition to the other parts of the proposed rule) it means “acreage that is identified in an expression of interest on land eligible and available for leasing” received by the BLM. This clarification is important to ensure that the BLM accurately determines which EOI’s have been properly submitted, i.e., are eligible and available for leasing, and that the acreage in EOIs submitted for lands that are not eligible and available should not be considered “acreage for which expressions of interest have been submitted.”

   The proposed rule also defines “acres offered for lease” to include all acres that the BLM has offered for oil and gas leasing, regardless of whether EOI’s have been submitted for those particular acres. This sensible approach is appreciated for its conformance with the discretion that the Interior Secretary maintains for identifying the lands to be made available for leasing, and ought to prevent confusion and legal disputes in the future.
   The method by which the BLM will internally monitor its leasing progress for the purposes of the IRA should be made more transparent with these definitions.

   The proposed rule would also include a definition for “Person” that unifies “person” and “entity” by defining “person” as: “any individual or entity, including a partnership, association, state, political territory, or private, public, or municipal corporation.” This explanation follows accepted legal precedent.
**ii) Section 3000.120 Fee Schedule for Fixed Fees**

We support the new schedule of fees, and, incidentally, appreciate the revisions the BLM has proposed to clarify and amend certain outmoded terms and stylizations, such as using “questions” in place of section headings. The list of fixed fees in the proposed rule includes but is not limited to: formal lease nominations; competitive leasing applications; leasing under rights-of-way; lease consolidations; assignment and transfer of record title or operating rights; lease reinstatements; geophysical exploration permits; and name changes, corporate mergers, or transfers to heirs to include corporate dissolutions and sheriff's deeds. Additionally, the IRA requires a nonrefundable filing fee of $5 per-acre, or fraction thereof, for EOLs, which the BLM has implemented, as noted in the proposed rule. According to 30 U.S.C. 191, this fee is not a cost-recovery fee, and the money it generates is deposited in the Treasury as a miscellaneous receipt. In addition, the proposed regulations would include new fixed filing fees for the following actions to reimburse the BLM for its reasonable processing costs: designation of successor operator; unit agreement applications; subsurface storage agreement applications; unit agreement expansion applications; and formal lease nominations.

We support the BLM’s decision to adopt recommendations from a recent 2021 GAO report, *Oil and Gas Leasing: BLM Should Update Its Guidance and Review Its Fees* in establishing this new schedule of fees. Given the agency’s considerable resource constraints, the recovery of reasonable costs from the industry seems prudent. The use of fixed filing fees for selected actions seems reasonable and administratively efficient. If the BLM keeps the formal nominations process (which we recommend combining into a single nomination process, as discussed in Part I and below), we ask the BLM to clarify in the final rule whether the $125 formal lease nomination fee is required for each nomination (which could cover several parcels) or for each parcel nomination—we recommend the latter to further discourage speculation.

In addition to the fees already included in the proposed rule, we encourage the BLM to also consider imposing fees on processing communitization agreements, federal participating area applications, and royalty rate reduction applications. We strongly urge the BLM to include in its regulations a requirement that all of the fixed fees associated with onshore oil and gas leases be adjusted annually for inflation.

**iii) Section 3000.130 Fiscal Terms of New Leases**

The BLM’s proposed rule adds a new section that adopts the fiscal terms made by the IRA to increase the minimum lease bid and base rental rates. We support the BLM’s proposal to require an annual inflation adjustment to these fiscal terms.

As discussed in Part I, above, we recommend that the BLM consider including in its regulations that a minimum royalty rate of not less than 18.75 percent will go into effect for all leases issued beginning on August 17, 2032.

*43 CFR Part 3100 – Oil and Gas Leasing*
b) 43 CFR Subpart 3100 – Onshore Oil and Gas Leasing: General

i) Section 3100.3: Authority

To accord with the discretion afforded the Interior Secretary under the MLA, 30 U.S.C. § 226(a), that lands “may be leased,” we recommend amending proposed section 3100.3(a)(1) to state: “Oil and gas in public domain lands and lands returned to the public domain under 43 CFR 2370 are may be subject to lease under the Mineral Leasing Act of 1920 . . . .” Additionally, as currently proposed, section 3100.3(a)(2) relies solely on the sub-header—Exceptions—to indicate what the provisions in section 3100.3(a)(2) mean. For clarity, before subsection 3100.3(a)(2)(i), the BLM should consider inserting language to the effect of: “The following lands are not subject to lease.”

ii) Section 3100.5: Definitions

The BLM has proposed to revise this section so that the terms in subpart 3100 are adequately defined and arranged alphabetically with embedded definitions removed, resulting in distinct definitions for each term. The proposed rule would add new definitions for “competitive lease sale,” “exception,” “modification,” “oil and gas agreements,” “qualified bidder,” “qualified lessee,” “responsible bidder,” “responsible lessee,” and “waiver.”

The definitions of the terms “qualified lessee,” “qualified bidder,” and “responsible bidder” should lessen the serious “bad actor” problem discussed in Part I, above. In addition, we support the new definition for “responsible lessee” to help ensure that any person who has defaulted on previous winning bids, is not capable of fulfilling the requirements of onshore federal oil and gas leases, or has a history of noncompliance with applicable statutes or the terms of a BLM-issued oil and gas lease would not be eligible to obtain a new federal onshore oil and gas lease.

Relative to stipulations, the proposed rule adds new definitions for the terms “exception,” which would mean a limited exemption, and “waiver,” which would mean a permanent exemption, for a particular site within a leasehold. The inclusion of these terms should make the application of stipulations more understandable.

The proposed rule modifies the definition of an operating right (working interest) to include obligations the holder has under the terms of the lease, such as “the obligation to plug and abandon all wells that are no longer capable of producing, reclaim the lease site, and remedy environmental problems.” We wholeheartedly support this revision in light of the historical problem involving orphaned and abandoned wells on federal public lands, as discussed in Part I, above. In addition, we believe that the definition of “operator” should be revised to explicitly state that the operator holds “operating rights” and thus has the same obligations to plug wells and remediate the well sites.

We also agree that the term “record title” should be revised to encompass the lessee’s obligations under the lease. We concur that the obligations to perform and the ultimate responsibility to uphold the terms of the lease, including those pertaining to well operations and abandonment, should be included in the lessee’s interest, also known as the record title.
The BLM proposes to split out the definitions for "assignment" and "sublease" from the current definition of "transfer" in the existing regulations. A greater understanding of the differences among assignment and transfer of ownership, title, and operating rights of oil and gas leases is long overdue. According to a recent analysis by Accountable.US, only 21 major oil companies—via 300 subsidiaries—hold close to half of all currently authorized federal onshore oil and gas leases. Furthermore, transfers and assignments are frequent as oil and gas wells reach the "end of life" stage, when wells are more often abandoned and orphaned, making it crucial that the BLM has regulations in place to guarantee transfers and assignments are done in a manner that protects the environment and the public welfare.

In contrast to the helpful and clear definitions of several important terms that the proposed rule supplies, it does not define when "eligible lands are available" for leasing pursuant to the MLA, 30 U.S.C. § 226(b)(1)(A). We strongly urge the BLM to define the terms "eligible" and "available" to provide much-needed clarity. Defining and codifying these terms in regulation will help avoid future disputes and provide greater certainty for the public and prospective bidders and leaseholders. As stated in Part I, above, we also encourage the BLM to require that lands "eligible" and "available" for leasing be identified in current lands use plans, so that the BLM may exercise greater care in identifying appropriate locations for mineral energy development.

The MLA leaves it to the discretion of the Secretary of the Interior to determine when eligible lands are available for leasing. In a 1989 memorandum, the Interior Department’s Office of the Solicitor offered an interpretation of the key terms. Lands are "eligible" for leasing when they are not barred from leasing by statute or regulation. Lands are "available" when they are both "open to leasing in the applicable resource management plan" and "all statutory requirements and reviews have been met, including compliance with the National Environmental Policy Act (NEPA)." The 1989 memo "strongly recommend[ed]" that the BLM "give these terms specific meaning, preferably in the regulations." The agency has followed the memo’s definitions consistently for over three decades, and the U.S. District Court for the District of Wyoming has recently upheld this interpretation of the MLA as reasonable. The BLM, however, has never formalized this interpretation in regulation. We note, therefore, that the agency now has an opportunity to do just that, providing clarity for all parties from the nominations process through the lease sale.

### iii) Section 3100.40: Public Availability of Information

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117 Id.
118 Id.
119 See, e.g., BLM Instruction Memorandum 2010-117 (2010); BLM Manual MS-3120.11 (2013); BLM Handbook H-3101-1, § I.A.1; BLM Instruction Memorandum 2018-034 n.6 (2018); Br. of United States as Amicus Curiae, W. Energy All. v. Zinke, No. 17-2005, 2017 WL 1383853, at *2 (10th Cir. Apr. 12, 2017) (explaining to court in 2017 that lands become available when they are “selected for lease at BLM’s discretion after compliance with all relevant statutory requirements”).
We strongly encourage the BLM to include language in the final rule requiring that the names and addresses of the nominator, lessee, operating rights holders, and operators be made public through the BLM’s automated lease tracking system. By making it clear to nominators, lessees, operating rights holders, and lessees that their identities will be made public through the automated lease tracking system rather than the current system, which requires paper requests, the BLM will have less administrative work to do while also ensuring a more transparent and open onshore leasing process.

c) 43 CFR Subpart 3101 – Issuance of Leases

i) Section 3101.12: Surface Use Rights

The revision to this section more accurately reflects the Interior Secretary's multiple use mandate as stated in FLPMA and is in line with Executive Orders that stress the significance of taking Tribal concerns and environmental justice into account. The proposed rule specifies that the authorized officer may demand and specify reasonable measures to avoid, minimize, or mitigate negative impacts on other resource values, land uses or users, federally recognized Tribes, and underserved communities. Such reasonable measures may include, but are not limited to, “relocation or modification to the siting or design of facilities, timing of operations, specification of interim and final reclamation measures, and specification of rates of development and production in the public interest.” We strongly support this improved language and also recommend that the final rule add to this list of reasonable measures: “extracting less than the entire leased resource.” This measure is an important tool for the BLM to demonstrate that the agency has made clear that it has at its disposal and is squarely within its statutory purview, if and when needed, to “avoid, minimize, or mitigate adverse impacts to other resource values” and to adhere to its conservation mandate under FLPMA to prevent unnecessary and undue degradation of the lands.

Additionally, we concur with the clarification that the BLM may require the relocation of facilities over 800 meters (instead of 200 meters, as included in the current regulations) and may impose a 90-day moratorium on new surface disturbing operations in any lease year (as opposed to the 60-day limit in the current regulations). These changes will better protect the public's resources and are realistic given the improvements in oil and gas production technology, such as increased distance for laterals and directional drilling.

ii) Section 3101.13: Stipulations and Information Notices

By incorporating language that states that in developing lease stipulations, the BLM “may” consider potentially affected resources and any uncertainty regarding the past or future condition of those resources, the proposed rule makes more explicit the FLPMA requirement that federal lands be managed for multiple uses and that resources be protected. The regulation also requires that the BLM assess whether a resource is adequately protected by a stipulation “without regard for the restrictiveness of the stipulation on operations.” These are positive additions to the regulations and will help ensure compliance with applicable legal standards. However, we recommend that the

121 43 U.S.C. §§ 1702(c), 1702(b), 1712(c)(1).
122 43 U.S.C. §§ 1702(c), 1702(b), 1712(c)(1).
consideration of affected resources and potential uncertainty be made mandatory by
substituting “shall” or “must” for “may” in the final regulation text in order to remove
any uncertainty. In addition, the last sentence of subsection (c), stating that
“Information notices may not be a basis for denial of lease operations,” undermines the
BLM’s management authority. Information notices are intended to convey “certain
operational, procedural, and administrative requirements” related to lease
management, and the BLM should retain the flexibility to use them in managing
leasehold operations. Thus, we recommend this sentence be stricken.

**iii) Section 3101.14: Modification, Waiver, or Exception**

This section makes important changes to the regulations relating to lease stipulations
and public participation that we strongly support overall. The BLM proposes to change
the standards by which the authorized officer determines whether to make
amendments, waivers, or exceptions to the terms of a federal onshore oil and gas lease.
The proposed regulations introduce a new standard that would apply to leases when
“the circumstances that justified [the stipulation’s] inclusion in the lease have changed
sufficiently to render the specific protections provided by the stipulation no longer
justified.” We concur that the current standard, which states that “proposed operations
would not cause unacceptable impacts,” is highly subjective and has occasionally been
overused, which has negatively impacted the state of public lands and resources. If the
authorized officer determines that a change to a lease term or stipulation is substantial
or a stipulation involves a matter of significant public concern, the proposed rule also
mandates a period of public review of at least 30 days.

The proposed rule states that the BLM must provide prospective lessees with a chance
to accept any new or modified terms in circumstances that arise prior to the issuance of
a lease. If the prospective lessee rejects the added or modified clause, the BLM may
reject the bid and place the lands up for sale in the subsequent Notice of Competitive
Lease Sale. Additionally, the BLM must reject the bid and include the land in the
following Notice of Competitive Lease Sale if the changed stipulation(s) increases the
value of the parcel. We recommend that the BLM change inclusion in the next lease sale
to a discretionary action, amending the provision such that the BLM “may include the
lands in the next Notice of Competitive Lease Sale.”

The proposed rule also specifies that if a stipulation is mandated by a BLM land use plan
or a surface management agency land management plan but is unintentionally left out of
a lease, the BLM may terminate the lease if the lessee refuses to accept the stipulation.
At the same time, the regulation allows lessees to reject other post-leasing stipulations.
We note that the first sentence in subsection (c) is overly broad and in tension with the
second sentence. If left unchanged, the first sentence risks sowing confusion and conflict
in the future. We also urge the BLM to be more specific about the situations in which the
lessee must consent to post-leasing requirements—well within the BLM’s statutory
authority—such as when significant resource impacts and conditions become available
or when additional or modified stipulations are required by law.

d) 43 CFR Subpart 3102 – Qualifications of Lessees

i) Section 3102.20: Non-U.S. Citizens
This section acknowledges that non-citizens may not be able to lease or bid on federal property. For instance, leases may only be obtained and held by non-citizens through stock ownership or a controlling stock interest in a present or potential lessee that is incorporated under U.S. or state law, and only in the event that the U.S. has reciprocity with the lessee’s country of citizenship. However, the language of the proposed rule only mentions that the Committee on Foreign Investment in the United States (CFIUS), an interagency committee, is tasked with reviewing specific foreign investment-related transactions and specific real estate transactions by foreigners to assess their potential impact on U.S. national security.

We recommend more stringent language in the regulations that would require prospective non-U.S. citizen bidders, lessees, or interest holders to submit to the BLM a certification of compliance with federal foreign ownership laws and procedures, including the final rule from the Office of Investment Security, Department of the Treasury, implementing the provisions relating to real estate transactions in section 721 of the Defense Production Act of 1950, as amended by the Foreign Investment Risk Review Modernization Act of 2018, prior to the approval of a lease.

**ii) Section 3102.51: Compliance**

By redefining “alien stockholders” as “non-U.S. citizens who own stock,” the proposed rule would be consistent with the earlier changes and provide a clearer definition of who is eligible to hold an interest in a federal oil and gas lease. Additionally, the BLM would change the section to emphasize that oil and gas lessees, operating rights holders, and operators—rather than the American public—are primarily responsible for meeting reclamation obligations.

The proposed language makes it clear that section 17(g) noncompliance is brought about by a person’s failure to act promptly upon receiving a notice of noncompliance with reclamation requirements or other standards—it would not depend on a particular follow-up action (assessment, civil penalty, or bond collection by the BLM). This would allow the BLM flexibility in how the agency responds to a person’s failure to comply, while clearly stating when noncompliance with 17(g) begins. The revised language would enable the BLM to quickly identify those entities who are not in compliance and prevent them from obtaining further federal onshore oil and gas leases, including by assignment or transfer. Instead of the current minimum of 100 or 130 days, the BLM would add a person to the list of people who are not complying with reclamation obligations in a minimum of 30 days.

By reducing the amount of time it takes to add noncompliant persons to the list of entities who are ineligible to hold a federal oil and gas lease, this section would improve the BLM’s ability to implement the MLA’s requirements, which forbid the issuance of leases to noncompliant individuals. We concur that reducing this window from 100–130 to 30 days is a positive change to the administration of the oil and gas leasing program, and, thus, we support the proposed rule change.

To ensure that only responsible qualified bidders are awarded leases, the BLM should

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affirmatively require in the rule the publication and regular updating of the list of entities in noncompliance with reclamation requirements of Section 17(g) of the MLA.

**iii) Section 3102.52: Certification of Compliance**

The section requiring certification of compliance with section 17(g) should explicitly state that any false certification is subject to the criminal penalties contained in 18 U.S.C. Section 1001.

e) 43 CFR Subpart 3103 – Fees, Rentals, and Royalty

i) **Section 3103.22: Annual Rental Payments**

As required by the IRA for all new oil and gas leases issued in the ensuing ten years, the proposed rule sets rentals at $3 per acre, or fraction thereof, for lease years 1 and 2, $5 per acre, or fraction thereof, for years 3 through 8, and $15 per acre, or fraction thereof, thereafter. For competitive leases that have been reinstated, the rental rate is $20 per acre, or any fraction thereof as prescribed by the IRA. Finally, the proposed rule mandates that the rental rate increase by an additional $10 per acre, or fraction thereof, as required by the IRA, each time a specific lease is reinstated. We support these increases because they more fairly compensate taxpayers and reflect the value of public lands more accurately. We urge the BLM to carry out the regular rate increases outlined in other sections of these comments.

ii) **Proposed New Section – Diligent Development**

The preamble to the proposed regulation states that the BLM is considering adding a new requirement for diligent development obligations under federal onshore oil and gas leases. The BLM has proposed adding a section to its regulations that outlines the actions that must be taken to fulfill diligent development obligations in order to further encourage lease development. The BLM has set forth the following examples of how a lessee could fulfill the diligent development obligation: if, at the end of the fifth year of the lease term, the lessee has (1) established actual production in paying quantities on the lease; (2) established allocated production in paying quantities on the lease; (3) filed a complete APD; (4) extended the lease term by committing it to an oil and gas agreement; or (5) filed a Notice of Intent to undertake geophysical exploration.

It is essential for the BLM to ensure careful development on federal onshore oil and gas leases, particularly in order to prevent speculative ventures on federal lands and to guarantee the orderly development of publicly owned oil and gas resources. Given that leased lands are frequently not then available for other uses, there are substantial opportunity costs associated with lands under lease that are not diligently developed.

For these reasons, we strongly support requiring the lessee to meet specific development milestones and to provide notice to the BLM of the development status of the lease. However, we believe that the proposed rule’s list of alternatives is overly lenient and promotes speculative ventures. While on the contrary, requiring lessees who have not achieved real milestones to pay increased rental fees by the fifth year of the lease is a wise public policy move that should promote careful development or, otherwise, require lease termination.
iii) Section 3103.31: Royalty on Production

In the IRA, Congress increased the minimum rate for royalty on production from federal oil and gas leases to 16.67 percent. This amount is set for a period of ten years from the date of enactment of the IRA and then becomes the floor or base amount.

Leases that were issued prior to the IRA's passage will have a rate that is specified in the lease or any applicable regulations at the time of the lease's issuance. The proposed rule would raise the royalty rates to 16.67 percent for leases issued on or after the IRA's effective date and for the following 10 years. The royalty rate on leases issued after 2032 (the ten years following the IRA's passage) will be at least 16.67 percent. The minimum royalty rate for right-of-way leases will be 16.67 percent.

For leases that have been reinstated, the royalty rate is the rate used to determine royalties for new leases at the time of reinstatement plus 4 percentage points, plus an additional 2 percentage points for each subsequent reinstatement, and, in accordance with the IRA, in no event will the reinstated lease have royalties at a rate lower than 20 percent.

We strongly urge the BLM to amend the final regulations in order to require that new leases issued beginning on and after August 17, 2032, carry a minimum royalty rate of no less than 18.75 percent to more closely align with the rates imposed for drilling in federal waters and for oil and gas operations taking place on several states’ lands. We also encourage the BLM to include in its regulation a procedure for reviewing the royalty rate before the ten-year period is up, to determine if a rate greater than 18.75 percent is, in fact, necessary for providing the public with a fair return on its resources.

iv) Section 3103.41: Royalty Reductions

In keeping with the mandate in FLPMA that the public should receive a fair return on its resources, additional standards should apply to royalty reductions. The BLM can improve the royalty rate reduction process by amending the rule to provide specific criteria for lowering the rate and to provide a limit on the lower end of the reduced rate, and to set a particular period for the reduction to apply. The regulations should require the justification for royalty rate reductions on a case-by-case basis, applying the criteria for reducing royalties, and require clear documentation. The listing of required documentation contained in subsection (b) is helpful. While applying to “end-of-life” OCS leases, the BOEM regulations at 30 CFR 203.50–203.55 provide a framework that could be incorporated into the onshore royalty relief program.

v) Section 3103.42: Suspension of Operations and/or Production

Given the prevalence of suspended leases and the difficulties that arise in tracking the status of such leases on public lands, we concur in setting a one-year limit on suspensions as provided by section 3165.1 of the proposed rule. The BLM should also set a limit on the number of successive suspensions, e.g., one additional suspension per lease. Suspensions should be documented and the documentation should be made publicly available on the BLM’s automated lease tracking system, which should assist the BLM in tracking the location of suspended leases and the amount of time that operations or production has been suspended.
We are concerned that changes proposed in sections 3103.42(e) and (g), specifically changing “terminating” to “lifting,” will be interpreted by leaseholders and others to require affirmative action to end a suspension. That would be a dramatic shift from existing regulation and practice.\textsuperscript{124} A suspension lifts automatically by operation of law (i.e., without any required administrative action by the BLM) when certain regulatory events occur or “as otherwise stated [by the BLM] in the [lease suspension] approval letter.”\textsuperscript{125} The BLM should avoid any change that would increase the administrative burden on the agency itself to manage suspensions. There is clear evidence that the agency already has difficulty monitoring and managing suspensions.\textsuperscript{126}

The final rule must clearly acknowledge that a lease suspension may “lift” automatically by its own terms without any action by the BLM. For example, when a suspension is granted for a one-year term, that suspension automatically expires one year later and without any affirmative action or decision by the BLM.\textsuperscript{127}

We also urge the BLM to articulate a clear intent to revise guidance and policy, including the Suspension Handbook and Manual, as part of this rulemaking process.

f) 43 CFR Subpart 3104 – Bonds

We support the key provisions in the proposed rule on bonding, \textit{i.e.}, revising minimum bonds for the first time since 1951 (statewide bonds) and 1960 (individual lease bonds), no longer authorizing nationwide and unit operator’s bonds, and adding surface owner protection bonds, as covered in more detail in Part I, above. These provisions will help to ensure that taxpayers do not incur the substantial costs of well plugging and remediation on orphaned well sites in the future and facilitate more efficient program administration. The proposed modifications also assist in addressing the numerous flaws in the BLM’s bonding requirements that have been identified in numerous GAO reports, including GAO-19-615, \textit{Bureau of Land Management Should Address Risks from Insufficient Bonds to Reclaim Wells}, published in September 2019.\textsuperscript{128} The changes are also consistent with the findings of the Interior Department’s November, 2021 \textit{Report on the Federal Oil and Gas Program}, which noted that bond amounts have not been increased in 60 years and which observed that most states “require significantly higher bonds than the Federal Government.”\textsuperscript{129}

The preamble to the proposed regulation notes that, “currently, the BLM uses Instruction Memorandum 2019-014, \textit{Oil and Gas Bond Adequacy Reviews}, to review existing federal bond amounts and request increases to the bond amount based on the potential risk or

\begin{itemize}
  \item \textsuperscript{124} See 43 C.F.R. § 3165.1(c) (suspensions terminate as stated by the authorized officer in the approval letter).
  \item \textsuperscript{125} \textit{Id.; Savoy Energy L.P.}, 178 IBLA 313, 319–20 (2010). There are no statutes, regulations, or BLM policy guidance stating that the BLM is obligated to give lessees prior notice that the lease suspensions will lift. See 30 U.S.C. § 181 et seq.; 43 C.F.R. § 3000.0-5 et seq.; BLM Manual 3160-10 Suspension of Operations and/or Production (1987).
  \item \textsuperscript{126} GAO, \textit{supra} note 98.
  \item \textsuperscript{127} As discussed below, proposed changes to Section 3108.21 further muddy these waters by suggesting, or at least creating potential disagreement, about what constitutes notice of when “a lease suspension is lifted.” The proposed rule must make clear that suspensions lift automatically by their own terms and without any affirmative action by the BLM officials when conditions in the suspension approval decision are met. Suspension decisions, which under the proposed rules and contemporary suspension guidance are supposed to include termination dates, constitute all the notice necessary to alert leaseholders when the obligation to pay annual dues resumes.
  \item \textsuperscript{128} GAO, \textit{supra} note 12.
  \item \textsuperscript{129} Leasing Report, \textit{supra} note 66, at 7.
\end{itemize}
liability posed by the operators. A similar policy has been in place for the past decade; see Instruction Memorandums 2013-151, 2010-161, 2008-122, and 2006-206." However, the proposed regulation text does not require periodic bond reviews. Additionally, as we have noted in Part I, above, IM 2019-014 expired on September 30, 2022.

Therefore, we strongly recommend that the final rule require regular bond adequacy reviews at least every five years, given the changes in reclamation costs and technology over time. The regulations should also require that bonds be adjusted for inflation at least every three years.

In addition, although it is not a part of the BLM’s proposed rule, we believe it is essential for the BLM to work with the Bureau of Indian Affairs (BIA) in creating a rulemaking that aligns with BLM’s proposed oil and gas rule. Many BIA regulations cross-reference BLM’s statewide and nationwide bonds, and so we urge this coordinated effort to ensure that Tribal minerals and communities are also protected from oil and gas industry malpractice. Since a rulemaking could take an extensive amount of time, we encourage the BIA to release interim guidance or policy in the meantime.

i) Section 3104.20: Lease Bond

The proposed rule establishes a minimum lease bond amount of $150,000, which is intended to cover no more than two wells. We urge the BLM to establish in its regulations that an individual lease bond must be increased if it is to cover more than two wells. In addition, the regulations should state that, in determining the lease bond amount to be posted, the authorized officer must take into account a number of variables including, but limited to, the well depth, the presence of other resources, the number of wells, the number of low-producing or inactive wells on the lease or held by the operator, the capability of any responsible party to carry out the reclamation, the anticipated condition of the well site, the extent of reclamation and remediation to be required, and the compliance with applicable laws. The BLM should ensure that, when determining the initial bond amount and bond adequacy during the periodic bond review process, consideration of these factors be required and documented.

ii) Section 3104.30: Statewide Bonds

The proposed rule would establish a minimum lease bond amount of $500,000, which is intended to cover no more than seven wells. We urge the BLM to establish in its regulations that a statewide bond must be increased if it is to cover more than seven wells. In addition, the regulations should state that, in determining the lease bond amount to be posted, the authorized officer must take into account a number of variables including, but limited to, the well depth, the presence of other resources, the number of wells, the number of low-producing or inactive wells on the lease or held by the operator, the capability of any responsible party to carry out the reclamation, the anticipated condition of the well site, the extent of reclamation and remediation to be required, and the compliance with applicable laws. For statewide bonds, the regulations should state that the authorized officer must also consider a number of other variables, including, but not limited to, the number and nature of the lessees’ operations in the state and the varying decommissioning costs in different states, as well as the financial health of the lessee. The BLM should ensure that, when determining the initial bond amount and bond adequacy during the periodic bond review process, consideration of
these factors be required and documented.

The proposed rule rescinds the use of nationwide bonds and requires that all existing nationwide bonds be replaced with statewide bonds. We strongly support the elimination of the nationwide bond type to address the BLM’s coordination problems noted in the preamble to the proposed regulation, as well as to ensure better program administration.

**iii) Section 3104.40: Unit Operator’s Bond**

The elimination of the unit operator’s bond and replacement with lease or statewide bonds should improve administrative efficiency. We support the elimination of this bond type.

**iv) Section 3104.40: Surface Owner Protection Bond**

We support the BLM’s proposed introduction of a surface owner protection bond as a sensible public policy that should lessen surface owner concerns and conflicts with oil and gas operators. As we have detailed in Part I, above, a number of states have enacted legislation to safeguard surface owners. Given the extent of potential harm to buildings, water quality, vegetation, and other surface estate resources, and based on what western oil-producing states are requiring, we urge the BLM to increase the minimum surface owner protection bond amount from the $1,000 minimum level specified in the proposed rule. We recommend a minimum of $10,000 per well, plus an additional $2,000 per acre of disturbed land for minimum surface owner protection bonds. We also strongly encourage the BLM to expand the coverage of the bond, which now requires indemnification of the surface owner against “the reasonable and foreseeable damages to crops and tangible improvements.” The bond should also cover impacts to water supply and quality, vegetation, soil, and domesticated animals such as cattle and sheep, as well as adverse impacts to use and access by the surface owner.

In addition, the BLM should clarify in policy and practice that its surface owner protection bond requirements do not in any way preempt state policy or law requiring surface owner protection bonds (commonly called “split estate bonds”). The Wyoming Oil and Gas Conservation Commission (WOGCC) and other state regulatory agencies have applied state legal requirements for surface owner protection bonds to federal wells; however, at times their authority to do so has been in doubt. We request that the BLM issue a policy memorandum requiring federal permitting of oil and gas wells adhere to state laws including split estate statutes. We do not believe this requires the BLM to change its regulations or implement new permitting requirements. Rather, it merely requires BLM guidance to clarify that operators developing federally owned minerals must adhere to all requirements of state law, as they do with environmental quality, oil and gas permitting, and other issues.

**v) Section 3104.70: Default**

The proposed rule gives a defaulting lessee six months to post additional financial (bond) security. We suggest that this opportunity should be granted for a shorter period of time, such as three months. In all other circumstances, we contend that a bond defaulting obligor should not be allowed to continue operating the lease and we
propose that every instance of default should trigger the lease’s cancellation process. We also recommend that, in the event of default, the lease should be subjected to cancellation under the provisions of 43 C.F.R. § 3108.30. In addition, the bond obligor should be prohibited from acquiring new federal oil and gas leases and should be referred to the Department’s Suspension and Debarment Program under 2 C.F.R. Part 1400.

We recommend changing “may” to “shall” so that the provision reads: “Failure to comply with these requirements shall . . . .” Also, no new leases should be issued to persons or companies in default. In other words, there should be no compliance period in these circumstances, or, at minimum, new leases should be cancelled if the lessee does not come into full compliance within the three months. Moreover, we urge that all of a defaulting lessee’s leases, not just those covered by a specific bond, should be cancelled if a company does not come into compliance.

vi) Section 3104.90: Bonds Held Prior to [EFFECTIVE DATE OF THE FINAL RULE]

The new federal oil and gas lease and statewide bond amounts must, in our opinion, be applicable to bonds that are active and outstanding as of the regulation’s start date. To safeguard the public interest, bonds should be converted as soon as possible to the new minimum amounts. The BLM must, however, be able to manage the phase-in requirement for current bonds in an efficient manner. Therefore, we support the phase-in timeframes outlined in the proposed regulation.

g) 43 CFR Subpart 3105 – Cooperative Conservation Provisions

i) Section 3105.10: Cooperative or Unit Agreement

We agree that, given the limited resources at the BLM’s disposal, parties requesting approval of a cooperative or unit agreement, a unit expansion, or the designation of a successor operator should be required to pay a processing fee.

h) 43 CFR Subpart 3106 – Transfers by Assignment, Sublease, or Otherwise

i) Section 3106.10: Transfers, General

We do not object to the clarification of the existing requirement that, for transfer purposes, operating rights may only be divided with respect to legal subdivisions, depth ranges, and formations within the boundaries of a federal lease.

ii) Section 3106.20: Qualifications of Transfers

It is essential that all assignees of record title and transferees of operating rights be subject to the qualifications required by law and regulation. Therefore, we commend the plain statement in the proposed regulation: “Only qualified and responsible lessees may own, hold, or control an interest in a lease.”

iii) Section 3106.30: Fees
We support the fee requirements of the proposed regulations with respect to transfers, assignments, the transfer of overriding royalties, and payments made out of production. Such fees are appropriate given the BLM’s limited resources.

\textit{iv)} Section 3106.60: Bond Requirements (for Transfers and Assignments)

The section-by-section description contained in the preamble to the proposed regulation states, “The purpose of this section is to ensure the new lessee or operating rights owner obtains a bond equivalent in coverage to the assignor’s or transferor’s bond before approval of the assignment or transfer.” However, the proposed regulation text should be clarified to make this requirement explicit by plainly stating that the assignee’s or transferee’s bond must be in place prior to the approval of the assignment or transfer.

The section-by-section also states, “The BLM’s practice is to ascertain the adequacy of such bond before approving the assignment.” Again, the regulation should make explicit that a review of the adequacy of the new bond must be made prior to approving any transfer or assignment. Moreover, the new minimum amounts for bonds set forth in the proposed regulations should be applied upon transfer or assignment without respect to the transition phase-in requirements provided for in section 3104.90, as if the lease involved were a new lease. The regulation should clearly state that an assignment or transfer should not be approved if the authorized officer determines that the new operator is not capable of providing financial assurance in the amount determined to be necessary following the review for bond adequacy, which shall be no less than either $150,000 for an individual lease bond or $500,000 for a statewide bond.

Furthermore, we strongly advise that the BLM be required to examine and certify the transferee’s or assignee’s financial viability before approving the transfer or assignment. This will help to guard against bankruptcy of lessees and operators and the resulting on-the-ground repercussions, such as wells becoming orphaned.

\textit{v)} Section 3106.72: Continuing Obligation of an Assignor or Transferor

We concur with the proposed rule’s provision that, whether or not known at the time of the assignment or transfer, the assignor or transferor is still liable for lease obligations that existed prior to the authorization of the assignment or transfer. The regulation should also mandate the maintenance of financial assurances by the lessee or sublessee, or transferor or assignor, for a suitable amount of time after the transfer or assignment to ensure the continued protection of the federal resource: (1) during the transition to an assignee or transferee; and (2) in the event of a latent issue that was not reasonably identified at the time of the transfer or assignment and for which the transferee, assignee, or transferee refuses to accept responsibility. The regulation as proposed makes this discretionary on the part of the authorized officer, but it should be mandatory and a prerequisite of approval of the transfer or assignment. This should be done to ensure the protection of federal resources and, specifically, to address any potential latent issues.

Finally, we also note that the definition of the term “transfer” (at section 3100.5) encompasses “any conveyance of an interest in a lease by assignment, sublease or otherwise.” Thus, the references to “transferee of operating rights” and “operating
rights holder” in subsection (b) seem overly restrictive since the definition of transfers can involve more than operating rights. At the very least, these definitional issues should be clarified. One remedy would be to change the language in subsection (b) to delete the references to “operating rights” and make it clear that in the case of the transfer of any interest in a lease, the transferor must maintain financial assurances subsequent to the approval of the transfer and that all transferors should be required to maintain financial assurances for a predetermined suitable period after a transfer is approved.

**vi) Section 3106.73: Lease Account Status**

We strongly support the proposed clarification that, in order for a transfer or assignment to be approved, the lease account must not be in default with respect to any of the following: royalty payments; lease obligations such as rent and minimum royalty; or production reporting to the Office of Natural Resources Revenue (ONRR).

**vii) Section 3106.76: Obligations of Assignee or Transferee**

The purpose of this section is to describe the obligations that an assignee of record, lessee, sublessee, or transferee of operating rights assumes following the BLM’s approval of an assignment or transfer. The section-by-section analysis of the proposed regulation’s preamble states that the assignee or transferee “assumes the responsibility for complying with all lease obligations in existence and that a purchaser exercising reasonable diligence should have known existed at the time of transfer” by requesting approval of the assignment or transfer and taking the assignor’s or transferor’s place. This entails, as stated in the regulatory text, plugging and abandoning all wells that can no longer produce, reclaiming the lease site, and resolving all environmental problems that existed at the time of transfer or assignment. We support and concur with these requirements.

Additionally, we agree with the proposed rule’s clear language that the transferee or assignee is responsible for plugging and abandoning any wells that are no longer capable of producing.

The regulation should also mandate the maintenance of financial assurances by the assignee of record and the transferor of operating rights for a suitable amount of time after the transfer or assignment to ensure the continued protection of the federal resource: (1) during the transition to a new lessee or operator; and (2) in the event of a latent issue that was not reasonably identified at the time of the transfer or assignment and for which the transferee or assignee refuses to accept responsibility. The regulation makes this discretionary on the part of the authorized officer, but it should be mandatory and a prerequisite of approval of the transfer or assignment. This should be done to ensure the protection of federal resources and, specifically, to address any potential latent issues.

**i) 43 CFR Subpart 3107 – Continuation and Extension**

**i) Section 3107.10: Extension by Drilling**
We support the clarification in paragraph (a) that the BLM will not grant a drilling extension for a lease when in its extended term.

j) 43 CFR Subpart 3108 – Termination by Operation of Law and Reinstatement

i) Section 3108.21 – Automatic Termination

While there may be circumstances when a lessee does not receive notice that the obligation to pay rentals accrued and deserves relief, the preamble to the proposed rule includes a misleading example that may result in conflict and confusion if left uncorrected. Specifically, the preamble notes that the proposed rule would add a new paragraph (c) to Section 3108.21 that incorporates caselaw providing that Congress intended the automatic termination provision of 30 U.S.C. § 188 not to apply in cases “where a lessee had no way of knowing that the obligation had accrued, e.g., where a lease suspension is lifted or where the lease account reverts from a royalty to a rental status.” The proposed rule must make clear that, by in large, suspensions lift automatically by their own terms and without any affirmative action by BLM officials. Suspension decisions, which under the proposed rules and contemporary suspension guidance are supposed to include termination dates, constitute all the notice necessary to alert leaseholders when their obligation to pay annual dues resumes.

43 CFR Part 3120 – Competitive Leases

k) 43 CFR Subpart 3120 – Competitive Leases

i) Section 3120.11: Lands Available for Competitive Bidding

We applaud the proposed revision to this section that updates the introductory paragraph from “All lands available for leasing shall be offered” to “All lands eligible and available for leasing may be offered.” This conforms the regulatory text with the language of the MLA and acknowledges the broad discretion of the Secretary of the Interior, subject to statutory requirements such as conservation mandates, to identify lands available for oil and gas leasing.

ii) Section 3120.12: Requirements

The proposed regulation states, “Each BLM State Office will hold sales at least quarterly if eligible lands are available for competitive leasing.” We emphasize again that the Secretary has broad discretion to determine whether lands are “eligible” and whether they are “available” and that the regulations should define these terms. Therefore, it is possible that lease sales will not be held on a quarterly basis if there are no lands that are “eligible” or “available.”

According to the section-by-section description, “The proposed rule adds a new paragraph (c) to codify existing policy and strengthen the bidder registration process.” The MLA provides that leases may be issued only to a “responsible qualified bidder” (30 U.S.C. 226(b)(1)(A)). Ensuring that bidders are both “responsible” and “qualified” is essential to the administration of an effective onshore oil and gas leasing program.

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130 See 88 Fed. Reg. at 47,587 (emphasis added) (citing Husky Oil Company of Delaware Depco, Inc., 5 IBLA 7 (1972)).
Along with the criteria that the BLM proposes to include in section 3100.5 to define “responsible qualified bidders,” we also urge the BLM to take the financial viability of bidders into account so that the problem of bankruptcies and orphaned wells, with concomitant taxpayer liability, can be avoided.

**iii) Sections 3120.30—3120.33: Nomination Process; General; Filing of a Nomination for Competitive Leasing; Parcels Receiving Nominations**

As discussed in Part I, above, we agree that the BLM should determine which lands may be nominated for leasing by producing a List of Lands for Competitive Nominations (“List”), but we urge the BLM to use a single nominations process, which would include EOIs. We suggest that the regulations provide for this nominations process by omitting currently proposed sections 3120.30 through 3120.33 and instead making them part of a single nominations process with proposed section 3120.41. This could be accomplished by combining sections under a header titled “Nomination and Expressions of Interest Process.” This section would require the Director to accept EOIs through nominations as part of the competitive process and require each BLM state office to publish a “List of Lands for Competitive Nominations,” which would be the only lands for which parties may submit EOIs. Section 3120.41(a) would be amended to add the italicized language: “A party submitting an expression of interest in leasing land available for disposition under section 17 of the Mineral Leasing Act and included on a List of Lands for Competitive Nominations . . . .” The rest of the sections under the header “Expressions of Interest” would remain the same as proposed (but with our recommendations in these comments regarding the preference criteria).

Amending the final rule in this manner is consistent with other amendments the BLM has proposed in the rule. For example, the BLM has already proposed eliminating many of the existing sections that comprise the formal nomination process. The BLM already exercises its authority to eliminate parcels for which parties submit EOIs before conducting NEPA analysis for various reasons. Under our proposed changes, acreage not included in any one List of Lands for Competitive Nominations for a specific lease sale would not mean the BLM could not offer that acreage in a future lease sale—the agency would simply be exercising its discretion not to make that land open for nomination in the particular lease sale before it. Because our recommended changes are in line with what is contained within the proposed rule and are well within the BLM’s authority under the MLA and the IRA, the BLM may amend the final rule accordingly without the need to provide further public comment on these changes.131

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131 See Nuvio Corp. v. FCC, 473 F.3d 302, 310 (D.C. Cir. 2006) (explaining that the initial notice of a proposed rulemaking “need not specify every precise proposal which [the agency] may ultimately adopt” but “must be sufficient to fairly apprise interested parties of the issues involved”); United Steelworkers of Am. v. Schuylkill Metals Corp., 828 F.2d 314, 317–18 (5th Cir. 1987). The dispositive question in assessing the adequacy of notice under the Administrative Procedures Act (APA) is whether the final rule is a “logical outgrowth” of the agency’s earlier request for comment. See, e.g., Mid Continent Nail Corp. v. United States, 846 F.3d 1364, 1373–74 (Fed. Cir. 2017); Tex. Office of Pub. Util. Counsel v. FCC, 265 F.3d 313, 326 (5th Cir. 2001); Nat. Res. Def. Council, Inc. v. EPA, 824 F.2d 1258, 1283 (1st Cir. 1987); Sierra Club v. Castle, 657 F.2d 298, 352–53 (D.C. Cir. 1981). The logical outgrowth doctrine recognizes that a certain degree of change between a notice of proposed rulemaking and a final rule is inherent to the APA’s scheme of rulemaking through notice and comment. See Int’l Harvester Co. v. Rinkelhaus, 478 F.2d 615, 632 n.51 (D.C. Cir. 1973). “A final rule is a logical outgrowth of a proposed rule only if interested parties should have anticipated that the change was possible, and thus reasonably should have filed their comments on the subject during the notice-and-comment period.” Veterans Justice Grp., LLC v. Sec’y of Veterans Affairs, 818 F.3d 1336, 1344 (Fed. Cir. 2016) (citation omitted) (internal quotation marks omitted). Courts have consistently upheld final rules as logical outgrowths where, as here, the notice “expressly asked for comments on the
The BLM would determine the List of Lands for Competitive Nominations based on the agency’s determination of lands that are eligible for leasing as well as the agency’s initial assessment of the preference criteria listed in section 3121.30(f), along with its multiple use and sustained yield mandates. The BLM would still conduct further screening and analysis as laid out in the proposed rule using the preference criteria during scoping and the NEPA review process for nominated parcels. Regardless, we recommend that the BLM make clear in the regulation that, in developing the List, the BLM must document that it has taken into account its public welfare mandate under the MLA and the requirements to manage public lands for “multiple use and sustained yield” and “avoid unnecessary or undue degradation” pursuant to FLPMA.

Alternatively, if the BLM elects to maintain the nominations process and the EOI process as two separate and distinct processes, we recommend several changes. Section 3120.30 should now directly implement what is currently referred to in existing regulations as a “formal” nominations process, instead of stating that it may be implemented only after receiving comments during a 30-day period. Leaving it unchanged would keep in place the same impediment created by the current regulation, which is that the BLM must hold a 30-day comment period at some point again in the future if the agency decides to implement a “formal” nominations process. Requiring yet another 30-day comment period before being able to implement a “formal” nominations process erects an unnecessary barrier. Indeed, agency practice has demonstrated that the BLM has not used a “formal” nominations process, in part because it is unable to do so without this additional process. Because the BLM has specifically asked the public in this rulemaking to comment on the nominations process, the agency should consider this comment period on the proposed rulemaking to constitute the requisite comment period on a “formal” nominations process as set forth in existing regulations. Doing so would allow the BLM the flexibility to use a “formal” nominations process—what the agency is now proposing to call simply a “nomination process”—at any point in the future without first needing to receive comment on whether to do so.

The BLM should make clear in the regulation that, in each instance of employing the nominations process, the agency must document that it has taken into account both its public welfare mandate under the MLA and its obligation to manage public lands for “multiple use and sustained yield” and to “avoid unnecessary or undue degradation” under FLPMA, and has utilized and applied the leasing preference criteria listed in section 3121.30(f) when determining the “List of Lands Available for Competitive Nominations.” As such, section 3120.31 should be revised for clarity to read, for example, as follows:

As part of the competitive process required by the Act and consistent with managing public lands for multiple use and sustained yield and avoiding unnecessary or undue degradation, the Director may accept nominations of certain parcels from a List of Lands Available for Competitive Nominations or accept Expressions of Interest. A List of Lands Available for Competitive

particular issue or otherwise made clear that the agency was contemplating a particular change.” GSX Transp. Inc. v. Surface Transp. Bd., 584 F.3d 1076, 1081 (D.C. Cir. 2009); Mid Continent Nail Corp. v. United States, 846 F.3d 1364, 1374 (Fed. Cir. 2017) (“Courts applying the logical outgrowth doctrine have also permitted agencies to drop critical elements of proposed rules even if a resulting final rule effectively abandons an agency’s initial proposal.”).
Nominations must be made in accordance with instructions and on a form approved by the Director. Those parcels receiving nominations may be included in a Notice of Competitive Lease Sale, unless the parcel is withdrawn by the BLM.

Additionally, as noted above, if the separate nominations and EOI processes are kept as proposed, the BLM should clarify the inconsistency between sections 3120.31 and 3120.33. Section 3120.31 currently states that “[t]hose parcels receiving nominations will be included in a Notice of Competitive Lease Sale, unless the parcel is withdrawn by the BLM.” (emphasis added). Section 3120.33 states that “[p]arcels which receive nominations may be included in a Notice of Competitive Lease Sale.” (emphasis added). We agree with the BLM that any “formal” nominations process should remain competitive and thus the BLM should amend “will” to “may” in section 3120.31.

For Section 3120.32, if kept as proposed, we concur with the requirement that persons nominating parcels for competitive bidding be identified, as a means of enhancing transparency for the public in the management of publicly owned resources.

iv) Section 3120.41: Process

Whether the BLM employs a single nominations process, as we propose, or keeps separate processes, if the BLM is to continue employing its “informal” process, we urge the BLM to establish in the regulation that the agency will first publish a List of Lands Available for Competitive Nominations before accepting EOIs.

If and when determining which EOIs to scope for inclusion in an upcoming oil and gas lease sale, we strongly recommend that the BLM consider only nominations that have been submitted since the IRA on August 16, 2022. If the evaluation of additional public land parcels is needed to comply with section 50265 of the IRA, we ask that the BLM specify in its regulations that the authorized officer shall evaluate only those EOIs that were not submitted anonymously prior to August 16, 2022.

We strongly agree that greater transparency will be achieved by ending the previous practice of allowing EOIs to be submitted anonymously and requiring the entity submitting the EOI to include its name and address.

Paragraph (f) states that, “when determining whether the BLM should offer for lease the lands specified in an expression of interest at lease sales, the BLM will evaluate the Secretary’s obligations to manage public lands for multiple use and sustained yield and to take any action required to prevent unnecessary or undue degradation of the lands and their resources, along with other applicable legal requirements.” The proposed regulation goes on to state that, “at a minimum,” the BLM will consider: “(1) proximity to oil and gas development existing at the time of the BLM’s evaluation, giving preference to lands upon which a prudent operator would seek to expand existing operations; (2) the presence of important fish and wildlife habitats, including wetland habitats, or connectivity areas, giving preference to lands that would not impair the proper functioning of such habitats or corridors; (3) the presence of historical properties, sacred sites, and other high-value leasing lands, giving preference to lands that would not impair the cultural significance of such resources; (4) the presence of recreation and other important uses or resources, giving preference to lands that would
not impair the value of such uses or resources; and (5) the potential for oil and gas development, giving preference to lands with high potential for development.”

The use of preference criteria to determine which lands should be made available for lease is an excellent approach to lease sales that, when robustly applied, will minimize conflicts with other uses of public lands and focus leasing efforts in areas with the greatest energy potential. We strongly support the BLM’s proposal to codify the use of leasing evaluation criteria in part to comply with the FLPMA requirement that leasing decisions be made in conformance with the objectives and goals of applicable land use plans.

As discussed in Part I, above, it is unlikely that the proposed framework will consistently produce the desired results, however, in the absence of regulations defining how application of the leasing evaluation criteria should be used to actually guide and inform leasing decisions. Therefore, we urge the BLM to establish in regulation, as discussed in Part I, above, that lands nominated for lease that are found to conflict with any of the established criteria be determined as having “low preference” for leasing and that a low preference designation shall signify that those lands should be immediately deferred from leasing, unless the authorized officer determines that those lands are necessary to be offered for lease and is able to provide clear documentation for the decision.

Further, environmental justice concerns should be carefully considered in determining which lands should be made available for lease, as discussed in Part I, above. The BLM should consider the proximity of potential lease parcels to Tribes, minority populations, and communities experiencing disproportionately high and adverse health, environmental, climate, and other cumulative impacts and give preference to parcels where oil and gas development would have the least impacts on those communities, even if—and often especially when—a parcel is in close proximity to existing development.

We recommend using the term “overburdened and underserved communities” to refer to environmental justice or such disproportionately impacted communities.

We recommend that for National Forest lands, the BLM coordinate with the Forest Service in applying the preference criteria and using the results of the criteria application to guide and inform leasing decisions. This would be in keeping with the MLA which recognizes the important role of the Secretary of Agriculture in the management of oil and gas development on National Forest System lands. 132

Additionally, where proposed parcels for lease are located within a national park landscape (meaning, the area and resources connected to the park, but beyond its boundaries), we recommend that the BLM coordinate with the National Park Service (NPS) when applying the leasing preference criteria. Examples of where coordination with NPS are of utmost importance for making parcel selection determinations abound. For instance, the very same cave and karst systems found within, and protected by, Carlsbad Caverns National Park are also found throughout the area beyond the park supporting a larger cave and karst system in the broader landscape. Elsewhere, at

Grand Teton National Park, mule deer and pronghorn migrate from southwest Wyoming’s Red Desert to the park and back each year, making coordination with NPS critical for any leasing within or near these ancient migration routes. When leased and developed, these parcels negatively impact the parks, despite oil and gas development occurring beyond the protective boundaries. For these reasons, we encourage the BLM to enshrine a set of mutually agreed-upon principles of coordination with the NPS in applying the leasing preference criteria in areas within a national park landscape.

v) **Section 3120.42: Agency Inventory of Leasing**

This new section of the regulations clarifies the process for complying with section 50265 of the IRA. We support the BLM’s specifying of this methodology in the regulations.

As discussed in Part I, above, we recommend that the BLM consider including direction that: “During the final month of each quarter, the BLM will evaluate EOIs received in that and (if necessary) prior quarters to ensure the EOIs meet all applicable requirements . . . and tabulate the associated acreage . . . . [T]he BLM will count EOIs received in the third month of each quarter among those received in the first month of the following quarter.” The BLM should also clarify that the “one-year period refers to the year before the wind or solar energy right-of-way is issued.”

Further, as explained above, the BLM should then require that, before offering for lease any parcel that receives a low preference designation, the agency must demonstrate that doing so is necessary to allow issuance of wind or solar ROW permits to comply with the IRA’s provisions at section 50265. By directing that calculations will occur on a regular quarterly basis, the agency will better be able to determine, on an ongoing basis, what amount of public lands acreage needs to be offered in order to allow wind or solar ROW permit issuance. The rule should specify that parcels receiving a low preference for leasing designation should be offered for lease only if necessary to comply with the IRA’s tethering provisions to allow wind or solar ROW issuance based on the quarterly calculations.

vi) **Section 3120.52: Posting Timeframes**

As expressed in our comments in Part I, above, we support the regulation that outlines timeframes and opportunities for public participation in the leasing process in a clear and concise manner. The BLM should require that final NEPA compliance documents be made publicly available at the same time as the Notice of Competitive Lease Sale is posted to ensure that the final documents are indeed available at the outset of the protest period. The final rule should also specify that comment periods close at 11:59:59 PM (local time) on the last day of the comment period. Moreover, the BLM should add a provision to the rule requiring that key documents and information be translated into those languages, such as Spanish, that are the primary languages of communities impacted by the particular lease sale.

To provide adequate information to the public and data transparency, as noted in Part I, above, we strongly recommend that the BLM amend the final rule to provide schedules for making data and information available to the public related to oil and gas leasing and development.
vii) Section 3120.63: Award of Lease

We recommend amending subsection (b) to qualify that a “lease will be awarded to the highest responsible and qualified bidder unless contrary to the public interest.” Additionally, subsection (d) provides that the BLM will not issue a lease until it resolves all protests covering the lands to be leased. The provision should be amended to state that the lease will not be issued until all appeals are resolved in addition to the resolution of all protests.

43 CFR Part 3140 – Conversion

l) 43 CFR Part 3140 – Conversion of Existing Oil and Gas Leases and Valid Claims Based on Mineral Locations

i) Section 3240.14 – Other Provisions

Section 3140.14(d)(1) states that the “requirements of 43 CFR part 3180 will provide the procedures and general guidelines for unitization of combined hydrocarbon leases.” We recommend that the rule additionally provide that a lease, or part of a leasehold, having been made part of a unitized area will not be sufficient to extend the primary term of the entire leasehold. If the lessee fails to take actions to extend those portions of the lease outside of the unitized portion of the leased lands, the lease should expire as to those excluded lands. The BLM should update its standard lease form to reflect this change.

43 CFR Part 3160 – Onshore Oil and Gas Operations

m) 43 CFR Subpart 3162 – Requirements for Operating Rights Owners and Operators

i) Section 3162.3-4: Well Abandonment

The proposed regulation provides that no well can be temporarily abandoned for more than 30 days without the prior approval of the authorized officer. The proposed regulation also requires the operator to check the well’s mechanical integrity, isolate any completed intervals, and provide a sufficient and thorough justification for the abandonment. In addition, if the authorized officer determines that the well has a legitimate future beneficial use, the authorized officer may grant a one-year extension from permanent abandonment under the proposed rule. With the exception of extraordinary circumstances, the proposed regulation limits extensions to four years. As discussed below, given the proliferation and history of well abandonment and the great expense to the American taxpayer in addressing the remediation of these sites, we urge the deletion of the “extraordinary circumstances” exception, and we advocate for a two-year limit on temporary abandonment status.

The proposed rule states that the operator must give notice of a well’s shut-in status within 90 days. A shut-in well’s operator is required to demonstrate the well’s mechanical integrity and continued ability to produce oil or gas in quantities sufficient for payment within three years. A new paragraph (d)(3) of the proposed rule would

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require the operator of a shut-in well to take one of the following actions within four years of the well being shut in: (i) permanently abandon the well; (ii) resume production in paying quantities; or (iii) present a plan and timetable for a future beneficial use for the well to the authorized officer. Under the proposed rule, the authorized officer would have the authority to approve additional delays in one-year increments if the operator could attest to the well’s future beneficial use and demonstrate that the operator is making verifiable progress toward returning the well to its original purpose.

The discussion in the proposed rule asserts that these new rules, which include yearly interval checks, would help operators manage shut-in wells and prevent them from ever becoming orphaned. We wholeheartedly agree that these new rules are needed, especially since long-term well abandonment on public lands, which leads to orphaned wells, has been a persistent issue for years. As the BLM notes in the preamble to the proposed regulation, the OIG has found that, “[i]dle wells pose notable financial risk to the U.S. Government and the taxpayer, as idled wells can fall into disrepair creating environmental, safety, and public health hazards.” Because of this, it is crucial that there be careful monitoring of well abandonment and shut-in status.

Even though the proposed regulation takes some steps toward resolving the issue of temporarily abandoned and shut-in wells, these provisions need to be strengthened. First, consistent with provisions in proposed legislation such as S. 2177, Oil and Gas Bonding Reform and Orphaned Well Remediation Act, as introduced by Sen. Bennet (D-CO) in June, 2021, the total period of time during which wells may be temporarily abandoned or shut-in should not be longer than two years.

We also oppose the regulation as it is currently written because it would permit open-ended one-year extensions for putting shut-in wells back into production or permanently plugging them, which encourages poor management practices and will cause environmental issues. Therefore, we urge the BLM to require that, if an operator intends to leave a well inactive for a period of more than 60 days, the operator submit an application for a delay in the remediation, reclamation, and permanent closure of the well, which is to be approved for not more than one year. We encourage the BLM to include allowance in the regulation for no more than one additional delay in the remediation, reclamation, and permanent closure of an inactive well lasting not more than one year, which the authorized officer may approve only if the operator can demonstrate, through test results, that the well is mechanically sound and capable of either production in paying quantities or actively aiding in production in paying quantities. We also note the need for the authorized officer, in approving an application for an additional delay in plugging or resumed production, to be required to: (1) take into consideration whether the operator is making all required royalty, rental, and fee payments on time; (2) review the amount of the financial assurance for the applicable lease; and (3) as necessary, increase the amount of the financial assurance to ensure the complete and timely remediation, reclamation, and permanent closure of the well, if the work were to be performed by the BLM in the event of forfeiture by the lessee.

In response to the BLM’s request for comments on whether a temporary abandonment should trigger a bond review in addition to the adequate and detailed justification for

134 Oil and Gas Bonding Reform and Orphaned Well Remediation Act, S. 2177, 117th Cong. (2021).
the abandonment, we concur, as noted in Part I, above, that a bond review at the time of temporary abandonment would be an excellent requirement. Additionally, we urge the BLM to specify in its regulations that bond review shall also occur when a well is placed in shut-in status. This is in addition to our recommendation that shut-in wells be subject to the same deadlines and requirements as temporarily abandoned wells, in order to streamline administration and avoid confusion.

In addition, as discussed in Part I, above, we ask the BLM to add a subsection (iv) to proposed section 3162.3-4(3) to require the use of idled well bonds. We recommend the following language, modeled after Wyoming’s idled well bond rules: “In the event an operator has a statewide or individual lease bond covering federal wells, the authorized officer may require an increased bond amount of up to fifteen dollars ($15.00) per foot for each idled well taking into account the existing level of bond in place. As wells are removed from idled status, up to fifteen dollars ($15.00) per foot of bonding requirements will be reduced accordingly. An operator may request the authorized officer to set a different bonding level based on an evaluation of the specific well conditions and circumstances. The operator shall submit a written cost estimate to provide plugging, abandonment, and site remediation prepared by a contractor with expertise in well plugging, abandonment, and site remediation. At his discretion, the authorized officer may accept or reject the cost estimate when determining whether to adjust the bonding level. The idled well bond amount will be reviewed annually or upon request of the operator.”

Lastly, while the proposed regulations include definitions of “shut-in” and “temporarily abandoned” wells and reference the IIJA’s definition of “idled well,” we note that clarity in program administration could be increased if the regulations were also to include definitions of the terms “idled,” “orphaned,” and “inactive” wells.

n) 43 CFR Subpart 3165 – Relief, Conflicts, and Appeals

i) Section 3165.1: Relief from Operating and/or Producing Requirements

As stated in Part I, above, we support the proposed rule’s revision of policies pertaining to lease suspensions, which have long been difficult for the agency to manage and monitor, and which have been used as a loophole for leaseholders intent on speculating on federal oil and gas leases rather than diligently developing them.

We recommend that section 3165.1 be revised to provide meaningful opportunity for public review and comment before a final decision is made on a suspension application, to ensure that a requested suspension furthers the public interest and properly conserves natural resources. Therefore, we suggest that subsection (b) be revised to read: “After releasing suspension applications for public review and considering any public comments received, the authorized officer will act on applications submitted for a suspension of operations or production, or both, filed pursuant to 43 CFR 3103.42 …”

As discussed above, we recommend that the BLM strengthen the proposed changes to section 3165(c) by committing not to grant suspensions based on APDs filed in the last six months of a lease term, rather than the 90 days that are in the proposed regulations.
We concur that lease suspensions must be closely monitored and tied to a specific end date, in line with findings reported from GAO in its June 2018 report, *BLM Could Improve Oversight of Lease Suspensions with Better Data and Monitoring Procedures* (GAO-18-411). We support the proposal in section 3165.1(d) that would limit requested suspensions to one year; though, as we raised in Part I, above, this provision may be subject to abuse due to the permissibility of extensions. The final rule should make clear that one extension may be permissible if *force majeure* exists, though it should also include a strong and clearly worded presumption against additional extensions.

In the interest of carrying out the goal of federal mineral policy to ensure the diligent development of federally owned minerals, we strongly urge the BLM to amend the final regulation to provide that directed suspensions will be limited to one year, as is the case with requested suspensions.

In response to the BLM’s stated request in the preamble to the proposed rule on “the best approach for making determinations on lease suspensions that would reduce the cost to the American public and encourage diligent development of leased lands,” we offer two suggestions: (1) the final rule should state unequivocally that a suspension will be automatically lifted when the basis for the suspension is no longer present or when conditions in the approval letter have been met, at which time the running of the lease term resumes and the leaseholder must pay any outstanding rentals and royalties; and (2) the final rule should clearly state that suspension decisions, including any suspension extensions, are subject to NEPA and are to require meaningful opportunity for public comment in determining whether a suspension is in the public interest.

**43 CFR Part 3170 – Onshore Oil and Gas Production**

**o) 43 CFR Subpart 3171 – Approval of Operations**

**i) Section 3171.14: Valid Period of Approved APD**

To lessen the administrative burden of processing APD extensions, the proposed change to increase APD terms from two to three years is reasonable. However, to avoid confusion, we recommend that the BLM omit the word “ordinarily” from subsection (a). The rule should make clear that APD approval is for three years—by including the “notwithstanding” clause, subsection (b) already specifies exceptions to the three-year APD period. We also note that it is more lenient than the majority of state regulations. In order to encourage diligent development, as well as to lessen the administrative burden associated with processing APDs, we advise that the regulation set a time limit of one year for any extensions beyond the initial term of the APD based on the criteria outlined in subsection (b)(1) and (b)(2) of the proposed regulation. In addition, we recommend that (b)(3) be eliminated from the regulation text as it would allow APD extension based only on submission of a drilling plan to the BLM, with no requirement that on-the-ground activity have taken place, undermining the goal of diligent development.

**III. Conclusion**

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135 GAO, *supra* note 98.
This proposed rule addresses many critical and longstanding problems with the federal onshore oil and gas program that, for decades, has harmed the public and public lands. Now, we urge the BLM to finalize the rule expeditiously.

If you have questions about or would like to discuss these comments, please contact Ben Tettlebaum, Director & Senior Staff Attorney at The Wilderness Society, at ben_tettlebaum@tws.org or (720) 647-9568.

Thank you for undertaking this much-needed update to the regulations and for considering our comments.

Respectfully,

Archaeology Southwest  
Audubon Rockies  
Coalition to Protect America’s National Parks  
Conservation Colorado  
Conservatives for Responsible Stewardship  
Evangelical Environmental Network  
Montana Wildlife Federation  
National Audubon Society  
National Parks Conservation Association  
Natural Resources Defense Council  
Nevada Conservation League  
Nevada Wildlife Federation  
New Mexico Voices for Children  
New Mexico Wild  
New Mexico Wildlife Federation  
Public Citizen  
Rocky Mountain Wild  
Runners for Public Lands  
The Nuestra Tierra Conservation Project  
The Wilderness Society  
Upper Missouri Waterkeeper  
West Virginia Rivers Coalition  
Western Colorado Alliance  
Western Organization of Resource Councils  
Wild Montana  
Wilderness Workshop  
Wyoming Outdoor Council