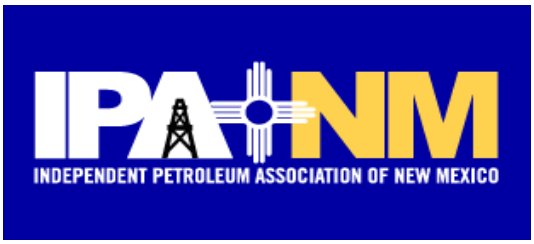


2596 South Lewis Way | Lakewood, CO 80227 | Tel: 303.292.2021

September 22, 2023

VIA SUBMISSION THROUGH REGULATIONS.GOV

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

Attention: Fluid Mineral Leases and Leasing Process, 88 Fed. Reg. 47,562 (July 24, 2023),
RIN 1004-AE80, Docket ID: BLM-2023-0005-0003

Dear Director:

On behalf of Mountain States Legal Foundation and the Independent Petroleum Association of New Mexico, we are writing to supply comments on the Bureau of Land Management's (BLM) proposed revisions to its oil and gas leasing regulations, 88 Fed. Reg. 47,562 (July 24, 2023) (Proposed Rule).

Mountain States is a non-profit, public-interest law firm in Lakewood, Colorado. Since its founding in 1977, Mountain States has fought to protect and restore those rights enshrined in the Constitution of the United States of America through *pro bono* litigation. We protect individual liberty, the right to own and use property, the principles of limited and ethical government, and the benefits of the free-enterprise system. Mountain States has fought for farmers, ranchers, recreationists, mineral-interest owners, and other Americans working the land against encroachments upon their rights by the federal government and public-interest groups that advocate for a bigger, unlawful role for federal executive-branch actors. For decades, Mountain States has represented its clients in litigation over the sorts of procedural and property rights violations that will result from the codification of the Proposed Rule.

The Independent Petroleum Association of New Mexico (IPANM) is a non-profit 501c(6) that serves as the voice of independent oil and gas producers in New Mexico. IPANM was formed in 1978 with the mission to preserve and advance the interests of independent oil and gas producers, while educating the public to the importance of oil and gas to the State of New Mexico and all our lives. The association has over 350 members who support the return of a responsible, balanced, and robust federal leasing program, while also ensuring the continued safe extraction of the abundant natural resources on federal lands in New Mexico.

The Proposed Rule is an attempt to achieve through bureaucratic obfuscation what the BLM and Department of the Interior cannot do directly: prohibit new and even already-authorized oil and gas development on federal lands. Among other things, the Proposed Rule improperly expands the scope of agency discretion and delegates that discretion to other entities in ways that contradict the letter and spirit of the statutes from which the BLM and the Interior derive any their alleged authority.

GENERAL COMMENTS

In general, we support government efforts to simplify, streamline, and rationalize administrative processes. In that vein, we take no position on some elements of the Proposed Rule, and we even support other elements. The Proposed Rule's efforts to streamline filing and recordkeeping requirements, for example, might be useful reforms to the oil and gas development process. We are very worried, however, that such reforms serve only as a smokescreen obscuring the many problematic provisions in the Proposed Rule. For example, the Proposed Rule improperly expands the scope of the Interior's statutorily defined authority while impermissibly delegating some aspects of the authority to sub-agencies Congress never entrusted with such responsibilities. The BLM has suffused the Proposed Rule with vague and subjective judgments that will cause substantial uncertainty. It repeatedly places a thumb on the scales ***against*** oil and gas development, heavily constraining the areas available for leasing and running roughshod over FLPMA's multiple-use framework. In short, we think the Proposed Rule represents a clandestine attempt to eliminate the opportunity for oil and gas exploration, constrain existing oil and gas development, and shrink existing development even further. The BLM's clear intent is to end oil and gas development on federal lands in the United States. But the BLM and the Interior cannot do that.

SPECIFIC COMMENTS

§ 3000.5 – Definitions

Two definitions stand out as particularly troubling.

Person: There is no need to create a new regulatory definition of person for this section. "Person" is a term with an existing, statutorily defined meaning set by Congress in the Federal Oil and Gas Royalty Management Act, 30 U.S.C. § 1702, and providing a new, conflicting definition would serve only to sow confusion.

Surface management agency: The existing definition of the term "surface management agency" in Section 3000.5 limits the definition to "any Federal agency *outside the Department of the Interior* with jurisdiction over the surface overlying federally-owned minerals" (emphasis added), while the new definition in the Proposed Rule would expand the term to refer to "any Federal agency, other than the BLM, having management responsibility for the surface resources that overlay federally owned minerals." This expansion of the term to include other bureaus within the Interior (*e.g.*, the Fish and Wildlife Service) conflicts with the surface-managing agency "consent provisions" of the Mineral Leasing Act for Acquired Lands (MLAAL), 30 U.S.C. § 352, which provides that "[n]o mineral deposit covered by this section shall be leased except with the consent of the head of the executive department, independent establishment, or instrumentality

having jurisdiction over the lands containing such deposit . . . ." Only the head of the executive department (*i.e.*, the Secretary of the Interior) possesses the statutorily delegated authority to make such decisions, and she may not further delegate that position of public trust to the head of a sub-bureau who does not fulfil the requirements found in the Act.

§ 3101.12 – Surface Use Rights

The proposed changes to this section would place new, onerous restrictions on lessees' uses of their leases, and would afford nearly limitless discretion to the BLM to impose "such reasonable measures as may be required and detailed by the authorized officer to avoid, minimize, or mitigate adverse impacts to other resource values, land uses or users, federally recognized Tribes, and underserved communities." The BLM has so vaguely and broadly described this alleged "authority" that it could let the BLM to prohibit all surface-disturbing activities associated with any federal oil and gas lease. It is unmoored from the law, and it places what is essentially a cloud of title over every federal oil and gas lease, since the BLM may at any time place such significant restrictions on the exercise of their rights under the lease as to render it essentially worthless.

This would be troubling enough if it only applied to newly issued leases, but the Proposed Rule extends it to existing leases as well. The Proposed Rule contains no protections for rights lessees may hold under pre-existing contracts and would create strong incentives for regulatory abuse. Despite its immense power, the United States government is legally obligated to comply with the terms of the contracts it enters into, *see Mobil Oil Expl. & Producing Se., Inc. v. United States*, 530 U.S. 604, 607–08 (2000) ("When the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals."), and the proposed revisions to this provision would, in many cases, constitute a material breach of contract or even a taking under the Fifth Amendment, *see Solenex v. Haaland*, 626 F. Supp. 3d 110, 124–26 (D.D.C. 2022) (reversing cancellation of federal oil and gas lease because, in part, the government's actions in cancelling the lease were a unilateral breach of contract with the lessee).

Mountain States represented Solenex LLC to victory over the Interior in the *Solenex* case we cite for this proposition; and if the BLM and the Interior expect to exercise some alleged "inherent authority" to break their contracts, then we stand ready to challenge them. The government cannot issue leases and then refuse to allow lessees to exercise any of their rights associated with those leases, and the BLM and the Interior do not have any "inherent authority" to breach contracts and cancel leases.

§ 3101.13 – Stipulations and Information Notices

The proposed changes to this section also would supply the BLM limitless discretion to require vaguely described stipulations that could essentially destroy all value in a lease. They would give the BLM broad authority to "consider the sensitivity and importance of potentially affected resources," and any "uncertainty concerning the present or future condition of those resources," and then use those considerations to determine "whether a resource is adequately protected by stipulation *without regard for the restrictiveness of the stipulation on operation.*" This demonstrates a blatant disregard for the principle of multiple use underlying America's entire system of public land management. Under the Proposed Rule, BLM officials ideologically

opposed to oil and gas development (or simply having a personal grudge against a particular lessee) would be able to offer to lease eligible lands for oil and gas development, only to subject the leases to such restrictive stipulations that development is constructively prohibited. This section constitutes nothing more than a charade to meet the minimum acreage requirements for lands offered for oil and gas leasing under Section 50265 of the Inflation Reduction Act.

§ 3101.51 – General Requirements

The proposed revisions to this section would grant surface-managing agencies expanded authority beyond that provided in the existing rules to veto federal oil and gas lease sales. It also would expand the scope of federal entities that would be authorized to exercise that "veto" authority, impermissibly sub-delegating the Secretary of the Interior's authority to determine which public-domain lands should be offered for lease to officials Congress never intended to wield such authority.

While federal law does require the BLM seek consent from other agencies when offering up for lease lands acquired under 30 U.S.C. § 352, no such requirement exists in the Mineral Leasing Act or other cited statutes. The proposed revisions to this regulatory section improperly import MLAAL consent requirements into the process for Mineral Leasing Act leases, significantly expanding the scope of the BLM's authority and raising substantial barriers to oil and gas leasing never contemplated—let alone ordered or authorized—by Congress.

§ 3101.52 – Action by the Bureau of Land Management

This section of the Proposed Rule is troubling for the same reasons as the previous section. It provides that "[t]he authorized officer will not issue a lease on lands to which the surface managing agency objects or withholds consent." Like § 3101.51, this provision means that regardless of whether the lands are acquired or public-domain lands, the BLM will not lease lands when a surface-management agency objects to leasing or withholds its consent. This is an improperly broad veto authority granted to surface-managing agencies for public domain lands, and like the previous section, it suffers from the excessively broad definition of the term "surface managing agency" for acquired lands.

§ 3120.11 – Lands Available for Competitive Leasing

The proposed changes to this section alter the introductory sentence from "[a]ll lands available for leasing ***shall be*** offered for competitive bidding" to "[a]ll lands eligible and available for leasing ***may be*** offered for competitive auction." The preamble to the Proposed Rule states an intent to better conform regulations to the text of the Mineral Leasing Act and to "better reflect Interior's statutory discretion to identify lands available for oil and gas leasing," but the altered language would do the opposite. The proposed change would grant the BLM significantly greater discretion in deciding whether to offer land for leasing than the statute allows. It is particularly galling that the BLM and the Interior would state otherwise considering the multiple recent court decisions holding that the government's refusal to hold mandatory quarterly lease sales in each state was unlawful. *See State of North Dakota v. DOI*, No, 21-148, ECF No. 98 (D.N.D. Mar. 27, 2023) (slip. op.); *Louisiana v. Biden*, 622 F. Supp. 3d 267, 293-94 (W.D. La. Aug. 18, 2022); *see also W. Energy All. v. Jewell*, No. 16-912, 2017 WL 3600740, at *8 (D.N.M. Jan. 13, 2017). At

least, any change to the existing regulation should mirror the precise language of the statute: "Lease sales ***shall be held*** for each State where eligible lands are available at least quarterly and more frequently if the Secretary of the Interior determines such sales are necessary."

§ 3120.12 – Requirements

The proposed changes to this section are troubling for similar reasons. They alter the regulatory text from "[a]ll lands available for leasing ***shall be*** offered for competitive bidding under this subpart . . . ." to "[e]ach BLM State Office will hold sales at least quarterly ***if*** eligible lands are available for competitive leasing." The BLM again states its intent is to conform this section with the statutory language, but the proposed language would imbue the BLM with more discretion than the statute does. Nothing in the cited Mineral Leasing Act sections limits leasing to "eligible lands." This provision, particularly coupled with the BLM's proposed new "preference criteria" in this Proposed Rule and the BLM's separately proposed "conservation and landscape health" rule, demonstrates the comprehensive effort the BLM and the Interior are undertaking to end oil and gas development on federal lands.

§ 3120.33 – Parcels Receiving Nominations

Once again, these proposed changes mistake "shall" for "may" in a way that maximizes the BLM's discretion at the expense of both the public and a coherent reading of the Mineral Leasing Act and MLAAL. Once parcels have been nominated for inclusion in a competitive lease sale, the BLM has already determined that those lands are available to be leased. The proposed changes to this section would provide an additional veto point where the BLM would get a second opportunity to exclude parcels from a competitive sale after the fact. And the BLM cannot do that.

§ 3120.41 – Process

Last, but far from least, proposed subsection (f)'s introduction of "preference criteria" that the BLM must consider when selecting lands to offer for lease is a very troubling change to the regulations, and it will insert significant, unlawful and otherwise unreasonable subjectivity and uncertainty into the oil and gas leasing process—in direct opposition to the Proposed Rule's purported rejection of "subjective" criteria in favor of "certainty." The proposed "preference criteria" are either ill-defined or undefined. For example, "important fish and wildlife habitats or connectivity areas" is so broad as to be meaningless. Existing laws such as FLPMA, the Clean Water Act, and the Endangered Species Act already balance multiple uses and protect water bodies and species on lands within the BLM's jurisdiction, and refusing to lease in an area with "important" habitat is unclear and unnecessary. The same is true for "historic properties" under the NHPA and laws protecting specific cultural lands.

Further, the BLM purports to set forth only "minimum" criteria, without any upward limit, stating that it "would consider additional criteria and factors" such as "environmental justice concerns" and "greenhouse gas emissions." This attempt by the agencies to award themselves untethered discretion—not dissimilar from their losing suggestions that they have an "inherent authority" that goes beyond the measures and limits of authority granted to them by Congress—exemplify the agencies' combined spirit of antipathy toward both oil and gas development and the separation of powers required by our Constitution. We stand ready to challenge the agencies.

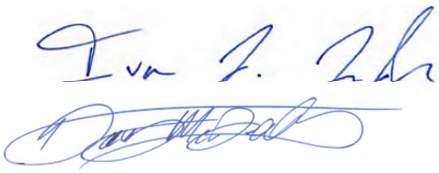
In this instance, the Proposed Rule neither offers any assurances that its minimum criteria will be reasonable—nor could it—nor explains why preference criteria are even needed in the first place. There is no explanation of how these new criteria would interact with existing NEPA review, which already covers these issues, or how any such "preference criteria" analysis conducted prior to NEPA review would avoid improper predetermination of the NEPA process.

CONCLUSION

Ultimately, the Proposed Rule is an attempt to achieve through bureaucratic obfuscation what the BLM and the Interior cannot do directly: prohibit oil and gas development on federal lands. The Proposed Rule both improperly expands the scope of agency discretion and delegates that discretion to new entities in ways that contradict the letter and spirit of the congressionally enacted statutes from which that authority derives. It also invites unreasonable and unreasonably explained administrative decision-making. We respectfully request that you not go forward with the codification of the unlawful proposed regulations as we have described them in this letter.

Thank you for the opportunity to comment on this important matter.

Sincerely,



Ivan L. London
David C. McDonald
Mountain States Legal Foundation
2596 South Lewis Way
Lakewood, CO 80227
ilondon@mslegal.org
dmcdonald@mslegal.org

Jim Winchester
Independent Petroleum Association of New Mexico
P.O. Box 6101
Roswell, NM 88202
505-933-2070
jimwinchester@ipanm.org