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October 9, 2015

U.S. Department of the Interior
Director (630), Bureau of Land Management
Attention: 1004-AE15
20 M Street SE
Room 2134LM
Washington, DC 20003

Submitted via Federal eRulemaking Portal: <http://www.regulations.gov>

Re.: Proposed Revisions to Onshore Order No. 3, Site Security

Dear Director Kornze:

Western Energy Alliance and the Independent Petroleum Association of America (“IPAA”) (together, the “Associations”), appreciate the opportunity to comment on the proposed changes to Bureau of Land Management (“BLM”) Onshore Order No. 3, which would be codified in the Code of Federal Regulations through modifications to 43 C.F.R. Part 3160 and the addition of new Part 3170.¹ While recognizing the need to keep regulations current with modern technology and industry standards,² the Associations are concerned that the proposed rule change would result in substantial changes to the way domestic onshore oil and gas operations are conducted, leading to an unwarranted increase in costs and burdens to domestic oil and natural gas producers. These costs would be incurred largely without a concomitant benefit to the federal government or the public at large and create further disincentives for oil and natural gas producers to invest in development on federal public and tribal lands.³ Moreover, some of these revisions would require physical changes with impacts to the environment and socio-economic impacts that have not been adequately analyzed in the Environmental Assessment for the proposed rule.

¹ 80 Fed. Reg. 40767 (July 12, 2015).

² *Id.*

³ The Associations submitted comments to the Office of Management and Budget addressing the paperwork burdens associated with the proposed rule changes on August 12, 2015, with a copy to Director Kornze.

In addition to Western Energy Alliance and IPAA, the following oil and natural gas trade associations sign in support:

American Exploration and Production Council
Montana Petroleum Association
New Mexico Oil and Gas Association
North Dakota Petroleum Council
Oklahoma Independent Petroleum Association
Utah Petroleum Association
West Slope Colorado Oil and Gas Association

Executive Summary of Associations' Comments

First and foremost, the Associations object to BLM's proposal to expand the applicability of all portions of 43 CFR Part 3160 to state and fee tracts that are committed to federally approved units and communitization agreements.⁴ This proposed change would require that operators secure federal drilling authorizations ("APDs") and comply with other portions of Part 3160 that are currently inapplicable to state and fee parcels for all wells drilled in unit participating areas and areas communitized with federal or tribal minerals, regardless of whether the wellbore will in fact penetrate federal minerals. There is no authority in the Federal Land Policy and Management Act ("FLPMA") or the Mineral Leasing Act of 1920, as amended, ("MLA") for such federal jurisdiction over state and fee minerals.

The Associations also disagree with the proposed changes to commingling and allocation approvals ("CAA"), which, as written, would have the nonsensical result of prohibiting approval of unit participating areas and communitization agreements that contain a mixture of federal, tribal, fee and/or state minerals. Obviously, if there is unity of ownership, a communitization agreement is unnecessary. This provision makes no sense. Even if the commingling approval provision is amended to cure this fundamental defect, concerns remain. The Associations object to the retroactive application of this provision. Retroactive application will create a substantial and unjustified workload for operators and BLM staff, result in the invalidation of numerous existing commingling approvals, create environmental impacts that have not been contemplated or analyzed, and undermine the utility of federal units, the purpose of which is to maximize production yield in the most efficient, cost effective and environmentally sensitive manner. For the existing CAAs that would be invalidated, many operators would have to completely revise their gathering and metering procedures and facilities, resulting in substantial new surface disturbance and significant cost. Similarly, BLM's proposal to prohibit off-lease measurement and require single facility measurement points ("FMP") for all leases (both new and existing) would result in significant costs for operators and require new environmental disturbance, all without a demonstrable benefit to the public. This is completely contrary to BLM and the public's demand for industry to minimize its footprint. Finally, the Associations question the utility of requiring operators to submit new site facility diagrams for existing facilities, particularly when weighed against the burden this would create for operators and BLM.

⁴ 80 Fed. Reg. 40800 (containing proposed language amending 43 C.F.R. § 3161.1, *Jurisdiction*).

Many of these problems could be avoided by changing the language of the proposed rule so that its provisions are applicable only to *new* facilities and not retroactive to existing facilities. This would appropriately balance BLM's understandable need to improve production and royalty verification with the fiscal and operational needs of the regulated community. It would also limit the number of new surface disturbing activities and environmental impacts that the proposed rule would cause.

BLM states that the proposed rule will work together with forthcoming changes to Onshore Order No. 4, *Measurement of Oil*, and No. 5, *Measurement of Gas*.⁵ However, BLM only recently published proposed changes to Order No. 4 and has not yet published proposed changes to Order No. 5, which are closely related to the matters addressed by the proposed rule. Accordingly, it is impossible to assess the impacts of the proposed rule without reviewing BLM's proposed changes to Onshore Order Nos. 4 and 5.⁶ BLM should refrain from finalizing the proposed changes to Onshore Order No. 3 to allow for additional comment on that proposal only after the proposed changes to Onshore Order Nos. 4 and 5 can be fully reviewed. Only then can the regulated community appropriately evaluate and provide comment on the proposed changes in each of these interrelated rules.

I. The Associations and the Regulated Community

A. The Associations

Western Energy Alliance represents over 450 members involved in all aspects of environmentally responsible exploration and production of oil and natural gas in the West. The Alliance represents independent oil and gas producers, the majority of which are small businesses with an average of fifteen employees.

IPAA represents 9,000 independent oil and natural gas producers and service companies across the United States. Independent producers develop 95 percent of domestic oil and gas wells, produce 68 percent of domestic oil and produce 82 percent of domestic natural gas. A recent analysis has shown that independent producers are investing 150 percent of their domestic cash flow back into domestic oil and natural gas development, borrowing funds to enhance their already aggressive efforts to find and produce more domestic energy. IPAA is dedicated to ensuring a strong, viable domestic oil and natural gas industry, recognizing that an adequate and secure supply of energy is essential to the national economy.

The other trades represent members nationwide or in their respective states. Together, the Associations' member companies have valid existing leases, current oil and natural gas production, and plans for future leasing, exploration, and production activities on federal and Indian lands and will be directly affected by the proposed rule change.

⁵ 80 *Fed. Reg.* 40767.

⁶ For example, we note that the proposed rule contains a definition of the term "Production Measurement Team," yet fails to utilize that term anywhere in the proposed rule. *See* proposed 43 C.F.R. § 3170.3. We presume that this term relates to matters that will be addressed in changes to Onshore Order Nos. 4 and 5, but have no way to evaluate the proposal because we do not know how the term ultimately will be used.

B. *Snapshot of the Regulated Community*

A 2013 study prepared by SWCA Environmental Consultants analyzing the economic impacts of oil and natural gas development on public lands in the western United States found that the economic impacts of the twenty NEPA documents under development at the time of the study would result in 120,905 jobs, \$8 billion in wages, \$27.5 billion in associated economic activity, and \$139 million in government revenue.⁷ When considering all oil and natural gas development occurring in the West, including federal, state, and fee lands, it is estimated that the industry supports 268,110 American jobs that pay \$20.7 billion in annual wages to working families while generating over \$84.3 billion in annual economic impact and \$17 billion in taxes to local, state and federal governments.⁸ For example, in Colorado, a state that ranks 6th in the nation for natural gas production and 7th for oil production, over 51,000 Coloradans work in the oil and gas sector at an average salary (\$81,000) 40% higher than the state's median household income.

As recognized in the Federal Register preamble for this rule, of the 6,628 domestic firms involved nationwide in oil and natural gas development, 99 percent are defined as “small businesses” by the Small Business Administration (“SBA”).⁹ Of the 10,160 firms involved nationwide in drilling and other support functions, 98 percent are SBA “small businesses.”¹⁰ Similarly, BLM notes that the vast majority of transporters and purchasers of oil and natural gas from federal and Indian leases similarly qualify as SBA “small businesses.” Thus, oil and natural gas production and its associated small businesses are essential to providing well-paying jobs to western families, many of which are located in rural communities that do not otherwise provide substantial employment opportunities, and generating much-needed funds for all levels of government.

The Associations believe that the result of the proposed rule would be to add another disincentive to development of federal and tribal oil and natural gas resources. This is because the cost to comply with many of the new requirements would be substantial and, in many cases, cost prohibitive, particularly in the current low price environment and in the context of the higher costs and uncertainties of developing federal oil and gas. As outlined in detail in the Associations' comments to the Office of Management and Budget (“OMB”), the proposed rule would require that operators track and compile substantial amounts of new information. Many operators do not currently have systems in place to track the information required by BLM and would have to create new recordkeeping procedures and modify sophisticated automated software systems used to track field production. Similarly, many existing field operations do not have systems that would enable compliance with the proposed rule's commingling and off-lease measurement provisions, requiring that operators retrofit and substantially modify field

⁷ *Economic Impacts of Oil and Gas Development on Public Lands in the West*, prepared by SWCA Environmental Consultants for Western Energy Alliance, April 2012, updated January 2013, available at: <http://www.westernenergyalliance.org/wp-content/uploads/2013/06/Final-Combined-Econ-Impacts-of-OG-Dev-on-Fed-Lands-in-the-West.pdf>

⁸ *Western Oil and Natural Gas Employs America*, prepared by John Dunham & Associates for Western Energy Alliance, 2014, available at: <http://www.westernenergyalliance.org/employsamerica>

⁹ 80 *Fed. Reg.* 40,792.

¹⁰ *Id.*

infrastructure to comply. As to transporters and purchasers of oil and natural gas, industries that are not currently regulated under Onshore Order No. 3, identifying the required information, developing procedures to track and report these data, training personnel on new procedures, and altering current recordkeeping systems and procedures will be an enormous undertaking, all without a substantial concomitant benefit to the public.

C. BLM Failed to Conduct Adequate Outreach with the Regulated Community

In spite of the substantial impact the proposed rule change would have on the regulated community, BLM engaged in very little public outreach or discussion with oil and natural gas operators, transporters and purchasers prior to releasing the proposed rule. The operations and facilities that will be affected by these sweeping changes in procedures are predominately located in the western states, where 90 percent of federal public lands and a majority of tribal lands are located. Nevertheless, BLM chose to hold its only public forums on the proposal over two consecutive days in Washington, D.C., which prevented many interested parties from meaningfully participating. While BLM provided a webcast of the proceedings, it was scheduled for the convenience of BLM, on the East coast, and not the regulated entities in the West. The BLM forums began at 8:30 a.m., ET, outside of normal working hours for individuals in the western states and, thus, prevented adequate participation by knowledgeable people working in the field.¹¹

Further, and as discussed in more detail *infra*, the rule also expands regulatory authority to two entirely new industries not normally regulated by BLM—transporters and purchasers of oil and natural gas—but BLM failed to engage in any direct outreach with these industries.

BLM should conduct outreach meetings in the affected western states at the time it issues draft Onshore Order Nos. 4 or 5 that include addressing the relationship between those proposals and proposed Onshore Order No. 3. In order to have meaningful outreach, BLM needs to include the public and elected state, county and local officials in these meetings. The BLM should include additional outreach and consultation with affected tribes on these three interrelated rules. Subsequent to the outreach meetings, BLM should provide an additional comment period for Onshore Order 3, within which the regulated community and the public can comment on the proposed rule in the context of the proposed changes to Onshore Order Nos. 4 and 5. The contents of the proposed rule and Onshore Order Nos. 4 and 5 are interrelated, complicated, and highly technical. As such, BLM should provide a reasonable time for comment on the suite of proposed changes as a whole, rather than in the piecemeal fashion BLM has undertaken.

II. BLM’s Rationale for the Proposed Rule Is Not Supported

A. There is a Disconnect in BLM’s Rationale and the Regulatory Changes Proposed

BLM provides its rationale for change in the preamble: “[t]he changes proposed as part of this proposed rule would allow the BLM to strengthen its policies governing production verification and accountability by updating Order 3’s requirements to address changes in technology and

¹¹ IPAA, the American Exploration and Production Council, and America’s Natural Gas Alliance did submit a comment letter dated May 31, 2013 on the proposed revisions to Onshore Orders 3, 4, and 5.

industry practices that have occurred in the 25 years since Order 3 was issued and to respond to recommendations made by the Government Accountability Office (GAO) with respect to BLM's production verification efforts."¹² The Associations agree that over the last 25 years much has changed in the industry including the incredible success of hydraulic fracturing and horizontal drilling and the advent of the digital age, but are not convinced that this proposal is appropriately focused on modernization and new technologies. As explained below, we question whether BLM has adequately considered management and electronic efficiencies that might lower agency and industry costs.

We have reviewed the GAO Reports cited in the proposal¹³ and note that of the 36 GAO recommendations identified in the 2010 Report¹⁴ (some of which do not apply to Onshore Order 3 or BLM, but rather to off-shore oil and gas management) Interior has already addressed 28 according to the 2015 GAO Report¹⁵. GAO describes the bureau's progress as "considerable" and "significant."¹⁶ The key remaining recommendations in the 2015 GAO Report are that BLM timely complete the revisions to Onshore Order Nos. 3, 4 and 5 and conduct a review of the BLM Instruction Memorandum 2013-152¹⁷ on commingling to evaluate its efficacy. First, given the significant progress made by BLM, we question whether a rule of this breadth is necessary. As we discuss in greater detail, some of the provisions of Onshore Order No. 3 overreach when they seek to regulate existing facilities and existing commingling agreements. Moreover, BLM has not conducted the GAO-recommended review of its 2013 commingling guidance, due to "competing priorities and limited resources,"¹⁸ but instead, as discussed in detail below, BLM proposes a new regulation that is not in conformity with the 2013 guidance reviewed by GAO, does not address the concerns identified by the GAO and, indeed, makes no sense. Second, as previously noted, although Onshore Order No. 3 is directly related to Onshore Orders 4 and 5, neither of those rules has been published for comment. It is inappropriate to require that the public comment on Onshore Order No. 3 without knowing the contents of Onshore Order Nos. 4 and 5.

¹² 80 *Fed. Reg.* 40768.

¹³ *Id.* at 40769.

¹⁴ "Oil and Gas Management, Interior's Oil and Gas Production Verification Efforts Do Not Provide Reasonable Assurance of Accurate Measurement of Production Volumes," GAO-10-313 (March 2010). We would add that GAO frequently compares and contrasts on and off-shore management, but requirements that may work for off-shore operations may not work for onshore operations. The number and size of wells differ significantly and the financial wherewithal of operators in the off-shore environment (Exxon, Total, and BP) is many magnitudes greater than the resources of onshore small business operators. BLM should not adopt off-shore requirements that are financially infeasible onshore.

¹⁵ "Oil and Gas Resources, Interior's Production Verification Efforts and Royalty Data Have Improved, but Further Actions Needed," GAO-15-39, (April 2015), Appendix I. at 35-48. Included in the 2015 progress report from the GAO is an assessment of progress on the U.S. Department of the Interior's Royalty Policy Committee, "Mineral Revenue Collection from Federal and Indian Lands and the Outer Continental Shelf," (December 17, 2007), cited by BLM as a rationale for the proposed rule. *Id.* at 40769

¹⁶ *Id.* at 31.

¹⁷ *Id.* at 22, n.46 citing BLM, "Reviewing Requests for Surface and Downhole Commingling of Oil and Gas Produced from Federal and Indian Leases," IM-2013-152 (July 3, 2013).

¹⁸ *Id.* at 22.

B. *BLM Should Address Its Limited Capacity to Administer the New Requirements*

The Associations question whether BLM currently has or can easily add the staff necessary to implement the proposed rule. We fear that adding the significant, additional workload required by the new rule to the already under-staffed field offices would lead to further backlogs of BLM leasing and permitting. Many field offices already struggle to process lease parcel nominations, APDs, National Environmental Policy Act (“NEPA”) documents, unit applications, right-of-way requests, *etc.*, in a timely manner. The wait times associated with processing of these oil and gas documents continue to challenge industry and BLM and have been the subject of several critical congressional oversight hearings. Many BLM state and field offices have struggled in recent years to fill vacancies, particularly in the highly technical and skilled areas required to manage oil and gas resources. Indeed, the 2015 GAO report notes that BLM has struggled to find and retain qualified petroleum engineers and measurement staff to conduct verification inspections.¹⁹

While the recent decline in oil prices may provide BLM with some relief from the high number of oil and gas-related authorization requests that BLM has received in prior years, we are concerned that this temporary reduction in leasing and permitting will be offset by an increasing list of proposed new regulations that BLM will have to administer, including the proposed changes to Onshore Order No. 3, the anticipated proposals for Orders 4 and 5, the currently stayed hydraulic fracturing rule, the proposed royalty rate and bond increase, and the proposed venting and flaring rule/ Onshore Order 9. Each of these rules will require a high level of training to administer, likely requiring the services of additional petroleum engineers. It is unlikely in the current climate that BLM will be provided with additional funding to train or hire qualified staff to manage implementation of these rules. The impacts of not enough BLM staff and poorly trained staff will fall on industry and will likely result in a continuation of the poor performance of the federal oil and gas onshore program.²⁰

We propose that BLM consider how to address implementation of Order No. 3. First, BLM should make the proposed rule applicable only to *new* facilities. This would create a more manageable implementation universe, but still address the remaining issues identified by GAO. Second, BLM should consider consolidating experienced, trained oil and gas staff in one or two field offices per state, rather than trying to manage oil and gas from every field office in a state. For example, the Colorado BLM State Office is consolidating its trained oil and gas staff in two field offices to better manage oil and gas in the state. This allows scarce resources (knowledgeable staff) to be used more effectively, would encourage BLM consistency, a key issue identified in the GAO report, and support better decisions. Third, has BLM adequately considered in this Order how technology can be better used to reduce paperwork and the need for BLM staff to do work that could be more efficiently done electronically? For example, GAO recommended in the 2010 Report that BLM develop a Remote Data Acquisition for well production to monitor gas in real time as BLM Amarillo does in the helium program. While we

¹⁹ GAO-15-39, at 18.

²⁰ Congressional Research Service, “U.S. Crude Oil and Natural Gas Production in Federal and Non-Federal Areas,” (April 1, 2015) (“Oil production has fluctuated on federal lands over the past five fiscal years, but has increased dramatically on non-federal lands. . . . Overall, annual U.S. natural gas production rose [21%] since FY2010, while production on federal lands fell by about 31% over the same time period.”) at 1.

express no opinion at this time as to whether this proposal is advisable, we note that BLM completely ignored the GAO's recommendation on this matter. The Associations believe that BLM should more seriously consider development of systems that streamline implementation of measurement and site security measures *before* implementing new measures that BLM is ill-equipped to add to its workload.

III. Expansion of Federal Regulatory Reach

The proposed rule would fundamentally change the reach of federal onshore regulations; making *all* of 43 CFR Part 3160 applicable to non-federal tracts committed to federal units and communitized areas. Currently, only a subset of the regulations found in 43 CFR Part 3160 applies to non-federal tracts committed to federal units and communitization agreements. However, the proposed rule would amend 43 CFR § 3161.1 to state that “all of the regulations in this part [*i.e.*, all of the Part 3160 regulations] apply to [among other categories] State or fee tracts committed to a federally approved unit or communitization agreement.”²¹ Accordingly, under the proposed rule, all of Part 3160 would apply to state and fee tracts included within federal units or communitization agreements, regardless of whether a wellbore in fact penetrates federal or tribal minerals. On that precise point, the proposed rule contradicts BLM guidance issued as recently as July 2015²². While the Associations agree that selected provisions in 46 CFR Part 3160 related to commingling and allocation must be applicable to non-federal and non-tribal tracts committed to federal units and communitized areas, we strongly object to BLM's proposal to make the *entirety* of Part 3160 applicable to such lands.

In spite of the unprecedented change that this expansion of regulatory authority would have, the Federal Register preamble contains *no* discussion of this impact. In fact, the preamble is completely silent as to the proposed amendment to 43 CFR § 3161.1 and contains no substantive discussion of this change in any of the analyses or examples. The only time this change is identified in the preamble is in the recitation of the proposed language, with no context or analysis. There was no BLM outreach to the states, regulated community or the public on this expansive new view of federal regulation of *non-federal* minerals.

Several key provisions related to onshore operations are contained within Part 3160, including the requirement that operators obtain federal APDs prior to commencing operations.²³ Similarly, BLM's new hydraulic fracturing rule, was recently preliminarily enjoined from enforcement by the Federal District Court of Wyoming, would also be located in Part 3160.²⁴ The proposed extension of these requirements to non-federal lands represents an unjustified and legally unsupported expansion of federal regulation that would have an enormous impact to onshore oil and gas operations throughout the county. One member of the Associations estimates that this change would expand federal regulation to over 1.2 million acres of state and fee land in the Williston Basin of North Dakota and Montana alone. BLM does not have the legal authority to expand its jurisdiction to state and fee lands as proposed.

²¹ 80 *Fed. Reg.* 40800 (containing proposed language amending 43 C.F.R. § 3161.1, *Jurisdiction*).

²² BLM Instruction Memorandum 2015-124 (July 17, 2015).

²³ 43 C.F.R. §3162.3-1.

²⁴ *See* 43 C.F.R. § 3162.3-3 (State of Wyoming v. United States, Case No. 2:15-CV-043-SWS (Sept. 30, 2015)).

A. *The Proposed Rule Violates Basic Principles of Federalism and is not Authorized in the MLA or FLPMA*

As recognized by the Supreme Court, states have “traditional and primary power over land and water use.” *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng’rs*, 531 U.S. 159, 174 (2001). Under their “health, safety and welfare” authority, states have enacted numerous statutes and regulations governing oil and natural gas development within their boundaries that reflect state priorities about the manner in which development should occur. Under the proposed rule, these state priorities and goals would be undermined and replaced by BLM decision making on numerous aspects of oil and natural gas development, including the fundamental issue of whether to issue an APD for development on state and fee lands. As such, the proposed rule interferes with the states’ sovereign interests and ability to exercise permitting authority over development of state and fee mineral interests. This is a clear violation of state regulatory authority over its lands and mineral resources.

Moreover, the MLA by its own terms does not apply to state or fee land.²⁵ The MLA provides generally for the leasing of oil and gas and other specified minerals on available *federal lands*. 30 U.S.C. § 189. Indeed, the MLA expresses a clear congressional intention to allow state regulation of certain specified aspects of federal oil and gas operations.²⁶ Neither does FLPMA²⁷ provide for federal control over fee or state oil and gas operations—its focus is the management of “*federal lands*.” Like the MLA, FLPMA also recognizes and respects the role of states in certain aspects of land management and environmental regulation. In FLPMA’s land use planning section, Congress directs that BLM land use plans “be consistent with State and local plans to the maximum extent [the Secretary of the Interior] finds consistent with Federal law and the purposes of this Act.”²⁸ Indeed, rather than federal regulation of state and fee minerals, there is a strong record of the federal government acceding to state management of federal oil and gas development. “The long history of comity and cooperation among federal, state, and local governments in respect to oil and gas operations on federal lands has averted many potential regulatory conflicts. The federal government has acquiesced in the state’s exercise of jurisdiction over matters relating to the location of wells, well spacing, the establishment of drilling units, and limiting the rate of development and production.”²⁹ The Order 3 proposal would disrupt this comity and is not authorized by law.

In spite of the fact that the proposed amendment to 43 CFR § 3161.1 would have substantial implications on the relationships between states and the federal government, BLM elected not to conduct a federalism analysis as required by Executive Order 13132.³⁰ To justify this decision, BLM found:

²⁵ 30 U.S.C. §§ 181-263.

²⁶ 30 U.S.C. § 187 (“none of these provisions shall be in conflict with the laws of the State in which the leased property is situated.”) *See also* 30 U.S.C. § 189 (“nothing in this act shall be construed or held to affect the rights of States or other local authority to exercise any rights which they may have. . .”).

²⁷ 43 U.S.C. §§ 1701-1782.

²⁸ *Id.* at § 1712(c)(9).

²⁹ Mathew Bender, “Law of Federal Oil and Gas Leases,” Vol. 2 § 24.03[3][a] (2014).

³⁰ Executive Order 13132, *Federalism*, August 4, 1999.

[T]he proposed rule would not have significant Federalism effects. A Federalism assessment is not required. This proposed rule would not change the role of or responsibilities among Federal, State, and local governmental entities. It does not relate to the structure and role of the states and would not have direct, substantive, or significant effects on states.³¹

BLM's statement is simply not correct. The proposal would have "direct, substantive or significant effects on states." BLM must perform a federalism assessment as required by Executive Order 13132 and fully discuss and evaluate the way in which the proposed rule change would impact the roles and responsibilities of state and federal governments vis-à-vis development of state and fee parcels.

B. The Federal APD Requirement and the Hydraulic Fracturing Rule

The proposed expansion of the application of the entirety of 3160 to state and fee wells would upend the existing working relationship between states and BLM. The requirement that operators obtain federal APDs for non-federal wells committed to federal units and communitization agreements would be in addition to state permits operators are already required to obtain in order to drill state and fee wells. Current BLM policies require that, when drilling state or fee wells that are committed to federal units or communitization agreements, operators submit copies of state-approved permits to BLM. Instead of embracing this efficient practice, the proposed rule would require time-consuming, duplicative federal permitting efforts.

Not only does BLM lack the legal authority under either the MLA or FLPMA to impose such a requirement on fee and state-owned minerals, the proposed requirement would have a negative practical impact. The proposal would fundamentally change the way in which operators plan for development given the incredibly long lead times it takes BLM to process APDs, to say nothing of the enormous increased workload to BLM.³² This requirement also would undermine several memoranda of understanding ("MOU") BLM has entered into with state oil and gas regulatory bodies delegating downhole permitting authority for federal leases to the states.³³ Moreover, this proposal is directly contrary to BLM Instruction Memorandum No. 2015-124, (issued by BLM in the same month as this proposal), which specifically states that "in situations where a proposed well will not penetrate federal or Indian minerals, a federal APD is not required."³⁴ BLM does not explain why the lawful, common-sense and settled policy reflected in the IM and in the MOUs with states should be changed.

³¹ 80 *Fed. Reg.* 40793.

³² "Average Application for Permit to Drill (APD) Approval Timeframes: FY 2005-2014," http://www.blm.gov/wo/st/en/prog/energy/oil_and_gas/statistics/apd_chart.html

³³ See, e.g., July 10, 2009 Memorandum of Understanding ("MOU") among the Colorado Oil and Gas Conservation Commission ("COGCC"), BLM, and the Forest Service August, amending and reaffirming July 22, 1991 MOU between COGCC and BLM, granting the COGCC primary jurisdiction over downhole regulation of matters involving federal lands and minerals in Colorado; Memorandum of Understanding among Wyoming Oil and Gas Conservation Commission and BLM, 1999.

³⁴ BLM Instruction Memorandum No. 2015-124, (July 17, 2015).

Further, the financial costs of complying with the federal APD requirement alone would be consequential to operators. As of October 1, 2015, a federal APD will require a \$9,500 filing fee, plus the time and costs for archaeological and biological surveys and the time to complete the surface use plan of operations and drilling plan required by the regulations and Onshore Oil and Gas Order No. 1. Not only would this new burden be costly and onerous, but it would often fall on operators who generally do not operate on federal lands and therefore do not have the staff or expertise to efficiently comply with the regulations pertaining to federal drilling permits. For example, there are isolated, small tracts of severed federal minerals in a number of eastern states. A communitization agreement would be required for a well drilled in a state spacing unit containing such a tract and, therefore, a federal APD would be required under this proposed rule. A single example provided by a member of the Associations with operations in Arkansas illustrates the expansive effect of BLM's proposal. The operator has leasehold interests in a 640 acre section that contains a 40 acre tract of federal minerals. Under current regulations, a federal APD would only be required for the two wells in the section that penetrate the federal tract. However, under the proposed rule, federal APDs would be required for nine additional wells to be located solely on fee or state lands. The time needed to complete this required permitting would significantly delay revenue to 283 private royalty owners and payment of production taxes to the state. Preparing a federal APD would be, for many operators in the eastern states, a one-off process which would be more time-consuming than it would be for an average operator in the public lands states where some economies of scale can be developed.

Similarly, if implemented, BLM's new hydraulic fracturing rule would be located in Part 3160. Under the proposed changes to Onshore Order No. 3, if the hydraulic fracturing rule were to go into effect, all of its numerous requirements would be applicable to state and fee tracts contained within federal unit participating areas or communitized areas. Accordingly, any time a unit participating area or communitized area contains any quantum of federal minerals, no matter how small, the operator would have to comply with the hydraulic fracturing rule, even in cases where the wellbore is located completely on state or fee tracts and does not penetrate federal minerals. This federal regulatory over-reach is unsupported by law and would have a negative impact on the cooperative working relationship between BLM and the states and impose unwarranted costs on industry.

VI. Commingling and Off-Lease Measurement

A. The Proposed Rule would Effectively Prohibit Communitization Agreements

As drafted, the proposed rule would radically change the way in which small or fractionalized mineral tracts are developed under communitization agreements and federal unit participating areas. By doing so, the proposed rule would violate the MLA, thwart the conservation programs of western states, and inhibit the development of Indian leases in violation of BLM's trust responsibilities to the tribes. When Congress amended the Mineral Leasing Act of 1920 to allow for the communitization of federal and Indian leases, it was, in effect, recognizing the importance of the state conservation statutes for spacing of oil and natural gas wells and the desirability of pooling disparate ownerships to more efficiently develop small federal and Indian

tracts.³⁵ But BLM’s proposal appears to prohibit “commingling” of production from separate ownerships and would, thus, eviscerate the communitization agreement and federal unit provisions of the MLA. Moreover, this change was not included in the GAO’s recommendations and would conflict with existing practice and IM 2013-152.

BLM outlines the procedures for authorizing communitization agreements at 43 C.F.R § 3105.2-3(a) and in BLM Manual 3160-9, *Communitization*. BLM will authorize a communitization agreement in cases where a drilling and spacing unit contains a combination of federal, tribal, state and/or fee leases. BLM’s current practice is to accept simple one-page ratification or an applicant “self-certification” statement that all the signatures of the necessary parties have been received. The communitization agreement affirmatively permits commingling of production from multiple leases and sets forth the allocation method for the well. Communitization agreements are very commonly used to develop highly fractionalized Indian allottee minerals and patchwork tribal minerals, which are often combined with state or federal mineral tracts within a single drilling unit. Similarly, communitization agreements are required any time an isolated tract of federal minerals is located in a drilling and spacing unit. However, the language of the proposed rule would prohibit BLM from approving communitization agreements in these cases.

Proposed section 3170.3 defines “commingling” as:

Commingling, for production accounting and reporting purposes, means combining production from multiple leases, unit [participating areas], or [communitized areas],³⁶ or combining production from one or more leases, unit [participating areas], or [communitized areas] with production from State, local governmental, or fee properties before the point of royalty measurement. Combining production from multiple wells on a single lease, unit [participating area], or [communitized area] before measurement is not considered commingling for production accounting purposes. Combining production downhole from different geologic formations on the same lease, unit [participating areas], or [communitized area] is not considered commingling for production accounting purposes.

³⁵ 30 U.S.C. § 226(m)(“When separate tracts cannot be independently developed and operated in conformity with an established well-spacing or development program, any lease, or a portion thereof, may be pooled with other lands, whether or not owned by the United States, under a communitization or drilling agreement . . .”).

³⁶ The proposed rule utilizes the acronym “CA” to refer to mean “communitized area.” However, this conflicts with common industry and BLM usage, which use the acronym “CA” to mean “communitization agreement.” *See, e.g.*, BLM IM 2015-125, using “CA” as an acronym for “Communitization Agreement.” The confusion caused by use of the acronym “CA” in the proposed rule is compounded by the fact that the proposed rule also defines “communitization agreement,” but does not include an acronym for this term, instead referring to communitization agreements by full identification and “communitized areas” by acronym “CA”. BLM should correct this confusion in acronym usage by eliminating the acronym “CA” from the proposed rule and instead using the terms “communitized area” and “communitization agreement.”

“Communitization agreement” is defined as:³⁷

Communitization agreement means an agreement to combine a lease or a portion of a lease that cannot otherwise be independently developed and operated in conformity with an established well spacing or well development program, with other tracts for purposes of cooperative development and operations.

“Communitized area” is defined as “the area committed to a BLM approved communitization agreement.”³⁸

Under these definitions, BLM would be required to authorize commingling by granting a CAA in order to authorize a communitization agreement or establish a federal unit participating area that includes a combination of federal, tribal, state, and/or fee leases. However, proposed section 3173.14(a) would permit BLM to “grant a CAA only if”:

- (1) The proposed commingling includes production *from only*:
 - (i) *Federal leases, unit [participating area], or [communitized area] with 100 percent Federal mineral ownership and the same fixed royalty rate and revenue distribution; or*
 - (ii) *Indian tribal leases, unit [participating areas], or [communitized areas] wholly owned by the same tribe and with the same fixed royalty rate;*

(Emphasis added).

The first clause of proposed section 3170.3’s definition of “commingling” states that “commingling” under the rule would include “combining production from multiple leases,” an action that is necessary to authorize a communitization agreement or establish a federal unit participating area. This leads to the nonsensical result that a communitization agreement could not be approved and a unit participating area could not be established unless there is 100% consistent federal or tribal ownership in the drilling and spacing unit, which, if true, would obviate the need for a communitization agreement in the first place. While informal conversations with BLM officials have indicated that this was not the “intent” of the rule, which seems supported by the fact that the proposal conflicts with IM 2013-152 and IM 2015-124, the proposed sections 3170.3 and 3173.14 simply state that commingling, which is a prerequisite to a communitization agreement and establishment of a federal unit participating area, is prohibited for any tracts with anything other than unitary ownership.

The proposed rule must, at a minimum, be amended to make clear that a CAA is not required for BLM approval of communitization agreements or to establish federal unit participating areas. We suggest that the first sentence of proposed section 3170.3’s definition of “commingling” be amended to make clear that “multiple leases” with a combination of federal, tribal, state and/or fee ownership can be combined together to create communitized areas and unit participating areas, in conformity with the MLA.

³⁷ Proposed § 3170.3.

³⁸ *Id.*

B. *A Retroactive Change to CAAs is Unjustified*

Even if the CAA requirements are revised as suggested to conform to the MLA, BLM's proposal to make the new CAA requirements retroactive and applicable to existing CAAs is unjustified and unworkable. Current BLM policy outlined in IM 2013-152 prohibits commingling from leases and communitized areas unless there is unitary ownership and a consistent royalty rate in the commingled leases, but applies only to *new* commingling requests. Although BLM issued this new guidance more than two years ago, it has not scheduled or completed an internal review to assess the overall effectiveness of the new guidance. As pointed out in the 2015 GAO report, "[u]nder federal standards for internal controls, internal control monitoring should assess the quality of performance over time and ensure that findings of audits and other reviews are promptly resolved."³⁹ According to the GAO report, BLM did not conduct this review within one year of issuance as required by the federal standards controls because "competing priorities and limited resources hindered their ability to schedule and complete the review."⁴⁰

In spite of the fact that BLM has performed *no* internal review of the efficacy of the 2013 commingling guidance, BLM is now attempting to codify these changes in the CFR and greatly expand their reach by making the new rule retroactively applicable to existing CAAs. In contrast to IM 2013-152, which applies only to new commingling requests, the proposed rule would apply to all CAAs, and operators would need to submit applications for approval of existing CAAs as well as new CAAs. BLM states that applying the rule retroactively is justified because "operators are sometimes unaware of existing commingling approvals or the provisions in the approvals . . . [and] many approvals have involved allocation methods that are difficult or impossible to inspect and verify for a variety of reasons" including "lack of a well-defined allocation method," are "overly complex" or contain an "unverifiable allocation method []." ⁴¹

However, BLM's stated justification for making the rule retroactive as to existing CAAs does not stand up to scrutiny. BLM itself estimates that of the approximately 10,541 existing CAAs, 9,837 of them would comply with the new requirements.⁴² Thus, it is difficult to determine why every operator with an existing CAA must re-apply for approval when BLM itself estimates that the vast majority of existing CAAs already comply with the new requirements. This is particularly true given that BLM estimates that re-application for existing CAAs would take the regulated community approximately 80,000 hours to complete.⁴³ Although not examined in the preamble, we estimate that the time required for BLM to process all of these CAA re-applications would take a similar amount of time. To the extent BLM's intent in making the rule retroactive is to make operators aware "of existing commingling approvals or the provisions in the approvals,"⁴⁴ mandating re-application is not an efficient or proper way to achieve this goal. BLM, as the regulator, should be maintaining these records and in a position to share this

³⁹ GAO-15-39, p. 21.

⁴⁰ *Id.*

⁴¹ 80 *Fed. Reg.* 40784.

⁴² 80 *Fed. Reg.* 40791.

⁴³ 80 *Fed. Reg.* 40798.

⁴⁴ 80 *Fed. Reg.* 40791.

information with operators rather than requiring a duplicative and unnecessary exercise of re-application that burdens operators and BLM field office staff.

As to the 335 existing CAAs that BLM estimates would be terminated because they do not meet the new criteria,⁴⁵ operators would be forced to completely revise the way in which production from wells within these CAAs is metered and allocated.⁴⁶ This would require operators to change infrastructure and metering facilities to comply with the proposed rule's prohibition on multiple party ownership within a single CAA, a process that would likely be cost-prohibitive for many properties. For example, several members of the Associations have specifically designed several large-scale gathering and processing operations to minimize surface impacts by centralizing processing at one location that serves multiple wells and leases. Because the gathering systems collect commingled production from properties with mixed federal, tribal, state and fee ownership, which is then piped to central off-lease facilities for processing and measurement, this would be prohibited under the proposed rule.⁴⁷ In order to comply with the new rule, the operators would either have to install separate lines to keep federal or tribal production segregated from state or fee production until measurement at the central processing facility, or obtain and install individual separation and measurement equipment on each lease, unit participating area or communitized area. Both of these options are largely unworkable.

First, the surface and environmental disturbance that would be required would be substantial, particularly as to producing fields that have already undergone revegetation and restoration.⁴⁸ One operator estimates that to make these changes to one field, several hundred miles of new gathering lines would need to be constructed, which is no small undertaking.⁴⁹ This is

⁴⁵ 80 *Fed. Reg.* 40791.

⁴⁶ Proposed 43 CFR § 3173.14-2(b) contains two exceptions to the prohibition on commingling from leases, communitized areas and unit participating areas with non-unitary ownership: one for "low volume properties" and a second for "topographic or other environmental considerations that make non-commingled measurement physically impractical or undesirable, in view of where additional measurement and related equipment necessary to achieve non-commingled measurement would have to be located." However, neither the rule itself nor the Federal Register preamble contains any guidance as to how to determine if an operation qualifies for an exception. Thus, field offices will be without guidance on how to evaluate whether a property qualifies as "low volume" and whether non-commingled measurement is "impracticable" or "undesirable" in light of competing environmental concerns. The BLM's suggestion in the preamble that properties with a rate of return of less than 10% would justify the "low volume property" exception is not useful. No prudent operator would drill or produce a well with a rate of return of less than 10%. BLM must clarify these exceptions in order to provide some certainty to the regulated community.

⁴⁷ See Federal Register preamble, Example 3, 80 *Fed. Reg.* 40784.

⁴⁸ In spite of the fact that the proposed rule would necessitate significant new surface disturbances, particularly in cases where new pipelines and gathering systems would be required, the Environmental Assessment prepared by BLM analyzing the environmental impacts of the proposed rule, DOI-BLM-WO310-2015-003-EA ("EA"), contains almost no discussion of these impacts. The deficiency of the NEPA analysis is discussed *infra* at Section IX.

⁴⁹ The Federal Register preamble contains no discussion of the challenges that would be posed by requiring operators to obtain new rights-of-way for the required pipelines or gathering systems. For example, it can be very challenging for operators to obtain rights-of-way over tribal and individual Indian allottee lands. Many tribes restrict surface pipelines across tribally-owned surface to pipelines that carry production from tribal wells. For individual Indian allottee land, federal regulations require that a majority

particularly troubling because, in many instances, operators have elected to utilize central processing at the request of BLM in order to minimize surface disturbance. Establishing a rule that results in more surface and environmental impact is in direct conflict with the purpose of many recent BLM onshore reforms and obviates many of the efficiencies that are at the very heart of why units are established in the first place. BLM's fundamental lack of recognition of the massive undertaking this would require for many fields is demonstrated by the requirement in the proposed rule that any deficiencies in existing CAAs would have to be remedied within *twenty*⁵⁰ days of notice by BLM that the CAA does not satisfy the new standards. Given the enormous amount of on-the-ground work that may be required, including the possible need to obtain new rights-of-way and approvals for surface disturbing activity, the twenty day requirement is a gross underestimate of the time that would be required for operators to conform existing CAAs to the new rule's requirements.

Secondly, making the changes required to comply with the new rule would render many of these wells uneconomic, particularly in today's low price oil and natural gas environment. Thus, operators may be forced to shut in or plug these wells in rather than make the required infrastructure changes, thereby reducing funds payable to public coffers or Indian tribes in dire need of these funds.

We further question whether BLM has the authority to invalidate existing CAAs. The United States Supreme Court has a well-established ban on statutes and regulations that apply retroactively to affect vested property rights. *See, e.g., Landgraf v. USI Film Products*, 511 U.S. 224, 270 (1994); *Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 45 (2006). A regulation has an impermissible retroactive effect when it "takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past." *INS v. St. Cyr*, 533 U.S. 289, 321 (2001). Because CAAs outline parties' rights and interests under leases, including allocation of payment from production between parties, modification of these agreements under the proposed rule would be impermissibly retroactive.

While it is possible that the new rule, if corrected as discussed above, would result in some increased allocation transparency, given BLM's own assessment that most existing CAAs already comply with the new rule it is very unlikely that the limited utility of the proposed rule would outweigh its burden on the environment, operators and BLM staff.

of the owners of the parcel consent to the issuance of the right-of-way. Many allottee tracts have several dozen or hundred owners, presenting numerous challenges to obtaining consents. Further, in order to obtain new rights-of-way across federal, tribal or allottee land, operators would have to undertake new NEPA analyses and conduct surveys for threatened and endangered species, archeology, and paleontology, in addition to complying with the numerous other statutes and regulations that would be triggered by seeking new authorizations. In short, requiring that operators obtain new rights-of-way will be no small undertaking.

⁵⁰ 80 *Fed. Reg.* 40784.

C. *Off-Lease Measurement*

There are currently no national standards governing off-lease measurement, but current rules require that BLM approve all requests for off-lease measurement and the vast majority of state offices have established criteria for doing so.⁵¹ The proposed rule would permit off-lease measurement only under a rigid, nationally set standard, taking away the ability of individual state offices to approve these operations in a manner that makes sense in the context of the field.

Operators measure gas off-lease for a variety of reasons related to production efficiencies, environmental concerns, and topography. Consolidation of measurement points is often undertaken for environmental and public safety reasons, as it reduces truck traffic and surface disturbance. Further, as to existing off-lease measurement approvals that would not satisfy the new rule's criteria, infrastructure would need to be added and/or modified, leading to environmental damage and significant costs to operators. Applying nationally-set standards for off-lease measurement would take away considerable operational flexibility while at the same time imposing significant burdens for operators.

The proposed rule would apply to new applications for off-lease measurement, as well as existing authorizations, meaning that operators would need to re-apply for authorizations that have already been obtained, resulting in duplication of paperwork already provided to BLM. Given that BLM state offices currently maintain all data related to off-lease measurement approvals, including lease numbers, point of measurement, and other information specifically required by the state office, it is unclear what would be gained under the proposed rule. BLM states that the rule would assist with the accuracy of the follow-up audits it performs, but, given that BLM already collects this data, it is difficult to determine why this new submission is required.

V. **Site Facility Diagrams**

Under current Onshore Order No. 3, operators are already required to submit site facility diagrams to BLM with information intended to assist BLM with verification of production data. These include, among other things, a requirement that diagrams contain: (1) an identification of the header, the vessels, piping, and metering systems located on the site, including valves and any other equipment used in the handling, conditioning, and disposal of oil, gas, and produced water; (2) identification of "which valve(s) shall be sealed and in what position during the production and sales phases and during the conduct of other production activities"; and (3) a description of co-located facilities and the equipment at the facility.⁵² The proposed rule would increase the level of detail currently required under Onshore Order No. 3 by requiring extensive additional data, including information about the make, model and serial number of major facility components powered by production from the lease, including the compressor, separator, dehydrator, heater-treater, or tank heater. In addition, these requirements would apply to both existing and new facilities.

⁵¹ 43 C.F.R. §§ 3162.7-2 (oil) 3162.7-3 (gas).

⁵² Onshore Order No. 3 § III (I).

As detailed in the Associations' comments to OMB, these requirements would create a significant monetary burden for operators. BLM estimates that this requirement would result in an estimated cost to operators of \$63.3 million, spread over three years.⁵³ We strongly question whether BLM's estimate is accurate given the retroactive effect of the rule. Many existing facilities were constructed years ago and have changed hands numerous times. As such, it is extremely unlikely that operators have ready access to the information that must be submitted for existing facilities. It is likely that to obtain this information, operators would have to travel to the field and hope serial numbers are legible on existing equipment.

BLM states that this information "would provide greater consistency in how the volume of oil and gas used royalty free is determined and enable the BLM to more easily verify those volumes."⁵⁴ However, nowhere in the GAO's two detailed reports identifying deficiencies in BLM's current site security and production verification procedures did GAO raise any concerns about current Onshore Order No. 3's facility diagram specifications. In fact, the only mention of facility diagrams in the GAO reports are short references to the fact that existing Onshore Order No. 3 requires that, within 60 days of APD issuance, the operator submit a facility diagram "that accurately reflects the relative positions of the production equipment, piping, and metering systems" and that the accuracy of such diagrams must be verified by engineers or technicians.⁵⁵

While we appreciate BLM's desire to improve production accountability and accurately measure beneficial use of oil and natural gas, it is difficult to determine how all of the information required under the new rule would improve accountability, particularly in light of the fact that no deficiencies with the facility diagrams currently required by BLM have been identified. For example, we do not understand how having the serial number for production equipment, in addition to make and model, would increase BLM's ability to measure production. And the requirement to provide a new site facility diagram any time a facility is modified⁵⁶ will not improve accountability but will discourage modern "best practices." It is common for operators to move equipment to different locations, particularly during the completions period. Many BLM field offices encourage the use of green completions, an operation that requires the one-time use of specific equipment on site.⁵⁷ In these cases, operators would be required to submit new facility diagrams very frequently and often for equipment that is only on site for a few days.

Finally, while current Onshore Order No. 3's facility diagram requirement is not applicable to dry gas production facilities where no liquids are produced or stored, diagrams for these facilities

⁵³ 80 *Fed. Reg.* 40798.

⁵⁴ 80 *Fed. Reg.* 40781.

⁵⁵ GAO 15-39, pp. 7, 9; GAO 10-313, pp. 6, 18.

⁵⁶ 80 *Fed. Reg.* 40807.

⁵⁷ We further note that it is not entirely clear whether the site facility diagram requirement would apply to completions equipment. As written, the definition of "facility" contained in proposed section 3170.3 is expansive, covering all "sites" and "associated equipment" that are "used to process, treat, store, or measure production from or allocated to a Federal or Indian lease, unit, or [communitized area] that is located upstream of or at (and including) the approved point of royalty measurement," as well as "sites" and "associated equipment" that are used to "store, measure, or dispose of produced water that is located on a lease, unit, or [communitized area]." This definition is subject to a variety of meanings, particularly as applied to completion and recompletion equipment and activities and BLM needs to clarify this definition.

would be required under the proposed rule. Because operators of existing dry gas production facilities have not previously been required to produce facility diagrams, these operators would need to draft new diagrams for all such facilities.

While we understand that BLM has a reasonable interest in tracking on-lease beneficial use of oil and natural gas, we do not believe that this interest justifies the burdensome impact the change would have on operators. We believe that a more appropriate way to balance these competing interests would be to eliminate the requirement that revised site facility diagrams be provided to BLM for existing facilities and instead make the proposed facility diagram requirements applicable only to *new* facilities.

VI. Facility Measurement Point Designation

The proposed rule would require operators to apply for facility measurement point (“FMP”) designation for all measurement points on new and existing measurement facilities used to determine royalties. Operators would be required to apply to BLM for approval of such points, which would be granted if the proposed FMP meets specific criteria.⁵⁸ The FMP would then need to be visibly marked, and all required reporting must reference the FMP numbers used to calculate royalty associated with the oil or natural gas. For new measurement facilities, the rule would require the operator to apply for, and BLM to assign, an FMP number *before* any production leaves the lease. For existing measurement facilities, operators would have nine months, eighteen months, or 27 months from the effective date of the final rule within which to apply for BLM approval of its FMP, depending on the production level of the lease, unit participating area, communitized area, or CAA that the measurement facility serves.

First, the Associations believe that BLM’s proposed timeframe for obtaining FMP numbers for existing facilities is unrealistic because the proposed thresholds are too low. The proposed compliance time periods within which operators must apply for FMP designation are tied to the amount of production from the leasehold:

- more than 6,000 Mcf of gas or 40 barrels of oil per month - nine months
- between 3,000-6,000 Mcf or 20-30 barrels of oil per month - 18 months
- less than 3,000 Mcf or 20 barrels of oil per month - 27 months.

However, because the vast majority of wells produce more than 6,000 Mcf or 40 barrels per month,⁵⁹ BLM’s proposed low thresholds for production will require the majority of compliance within the first nine months, not spread evenly over three years as assumed by BLM. This is a particularly important issue because compliance with all other portions of the proposed rule is tied to the date that BLM assigns the FMP. While we believe that BLM should not apply the proposed rule retroactively to require FMP designation for existing facilities, if BLM carries this

⁵⁸ The proposed rule is completely silent as to the site security requirements for units that contain Compensatory Royalty Agreements (“CRA”). Because ONRR receives a royalty under CRAs, production attributable to CRAs is governed by Onshore Order Nos. 3, 4, and 5. However, the proposed rule says nothing about how CRAs would be treated under the proposed rule. BLM must clarify this point or specifically state that the proposed rule does not affect CRAs.

⁵⁹ We estimate that roughly 90-95% of wells on federal and tribal lands produce greater than 6,000 Mcf or 40 barrels per month.

requirement forward, a better approach for determining the timeframes within which operators must apply for FMP designation would be for BLM to review actual production records for existing wells maintained by the U.S. Department of the Interior, Office of Natural Resource Revenue to determine the actual ranges of production for federal and tribal wells, and then divide those ranges into thirds. This way, compliance timeframes would be evenly distributed over the envisioned 27-month period.

Operationally, the requirement that every data point used for royalty calculation be designated as an FMP is overly burdensome when weighed against the limited utility gained by the rule. For example, it is not uncommon for several wells to feed into common locations. If the royalty interest is the same for multiple wells feeding into a common location, then only the common location should be designated as an FMP. Similarly, for fields and operations that do not utilize connected gathering systems, it is not uncommon for operators to measure oil or natural gas sales through a meter located on a third party truck that hauls the product to the point of first sale or processing. This is the case for a member of the Associations with substantial operations on public lands in Colorado. For this operator, the compliance costs associated with retrofitting each location to contain an onsite meter would render development from the leases uneconomic. Accordingly, the act of creating FMP designations for each allocation meter in these instances will add additional administrative burden with limited value to BLM or the operator.

As to new wells, under the proposed rule, operators would be required to obtain approval of an FMP for new measurement facilities *before* any production leaves the facility. Given the long lead times that it takes the majority of BLM field offices to process other required applications, we are very concerned that this requirement would lead to delay in production from leases, costing the operator, the states, tribes and the federal government revenue. Accordingly, if BLM persists in applying the FMP designation requirement retroactively, BLM should give priority to processing and taking action on applications for new measurement facilities, over applications for existing facilities.

As discussed in detail in the Associations' comments to OMB, requiring FMP designation for existing facilities would be a massive undertaking for many operators, requiring a complete analysis of current metering practices, an internal check to ensure that current practices are consistent with the rule, and then the preparation and submission of applications (sundry notices) seeking approval of FMPs. After FMP assignment, because all reporting would have to reference FMP numbers, operators would need to completely revise accounting and reporting software systems to reference metering points by FMP number. One Association member estimates that the burden of upgrading its automated field measurement and accounting systems to include reference to FMP number, as well as lease, unit or communitization agreement number, would take one highly skilled information technology employee a period of four months, exceeding 800 man-hours. This member estimates that this would cost approximately \$120,000, without factoring in the time and cost of training personnel on the changes.⁶⁰ While only 7% of the member company's wells would be directly impacted by the proposed rule, the required reprogramming would impact systems utilized by the whole company.

⁶⁰ The operator would also have to request that the vendor of their accounting software re-program their software to accommodate the proposed 11-character FMP number, as the program is written to limit character identification to 10 characters.

As with many of the other proposed requirements, we believe that the best approach to address BLM's understandable need to standardize points of royalty measurement would be to apply the rule to new measurement facilities only, rather than applying the rule retroactively. As with the other provisions discussed above, this would strike an appropriate balance between achieving BLM's goal of standardizing measurement points, while preventing the onslaught of work this would create for the regulated community and BLM.

VII. De-watering and Hot Oiling, Clean-up, and Completion Operations

The proposed rule contains new recordkeeping requirements for de-watering and hot oiling, clean-up and completion operations. While operators typically do keep records of de-watering operations, the vast majority of operators do not currently track all of the information required by the new rule. For example, most operators do not keep records of the time of the opening and closing of the gauge and it is not readily apparent how this information would assist BLM in tracking royalties. This requirement would not assist BLM, but would require operators to substantially revise their electronic recordkeeping and automated system software to identify this information.

Similarly, most operators do not keep any records of hot oiling, clean-up and completion operations, and no retention of this information is currently required by BLM. The Associations do not understand how this information would assist BLM with measurement of produced oil for royalty purposes because, during such operations, 100% of the oil stays within the production system and is ultimately returned to the tank and then metered prior to sale. Because this information is not generally documented, operators would again have to revise and re-program their automated system software to keep track of these data, in spite of the fact that this information would have no practical utility to BLM.

Neither the 2010 nor the 2015 GAO reports made any reference to de-watering or hot oiling operations. Thus, it is puzzling that BLM elected to include these changes in the proposed rule given that no concerns regarding current BLM policies and regulations addressing de-watering or hot oiling operations have been identified.

VIII. Applicability of Rule to Transporters and Purchasers

Under current Onshore Order No. 3, the information collection and retention requirements apply only to operators; however, under the proposed rule, these requirements would be expanded to apply to all purchasers and transporters of oil and natural gas through the point of first sale. While the Federal Oil and Gas Royalty Management Act ("FOGRMA"), 30 U.S.C. § 1713(a), requires that persons involved in transporting and purchasing oil or natural gas "maintain any records, make any reports, and provide any information that the Secretary may, by rule, reasonably require," the proposed regulations are the first such proposal under the statute and would require transporters and purchasers to create and retain an unreasonable amount of information in a short period of time and, thus, are not consistent with the requirements of FOGRMA.

Under the proposed regulations, transporters and purchasers would be required to “retain all records, including source records, that are relevant to determining the quality, quantity, disposition, and verification of production attributable to Federal or Indian leases” for a period of seven years for federal leases and six years for Indian leases. Specifically, transporters and purchasers, in addition to operators, would be required to produce and retain records containing the FMP number used to calculate the royalty on the oil or gas transported or purchased, as well as the name of the company that created the record. For existing facilities, in the interim period before the BLM assigns an FMP number, transporters and purchasers would be required to produce and maintain records for all oil and gas transported or purchased that identify the name of the operator, the lease, unit participating area, or communitization agreement number, and the well or facility name and number.

Compliance with these new record retention requirements would be unduly burdensome for transporters and purchasers, many of whom are small businesses. Because current rules do not require purchasers and transporters to retain *any* of the information required by the proposed rule, purchasers and transporters would be required to completely revise their recordkeeping systems to include mechanisms to identify and track this information. Many transporters and purchasers track data electronically, so, in many cases, revision of the recordkeeping policies would require substantial revisions to data management systems and processes. Further, and more troublingly, the proposed rule imposes immediate penalties on transporters and purchasers who do not comply with the recordkeeping requirement.⁶¹

In spite of the fact that the proposed regulations would specifically apply to two new categories of trades that were not previously regulated by Onshore Order Nos. 3, 4, or 5, BLM conducted no direct outreach with these industries concerning the proposed regulations. In fact, the preamble to the proposed rule contains *no* discussion of the impact the regulations would have on purchasers and transporters.⁶² While we recommend that these requirements be eliminated from the final rule, if any requirement is maintained, ample implementation time needs to be included before any penalties are assessed. Otherwise, the rule would immediately cause transportation bottlenecks on public and Indian lands, further disrupting a monetary return to taxpayers and Indian beneficiaries.

IX. *BLM’s NEPA Analysis is Deficient*

BLM conducted only a cursory NEPA analysis in conjunction with the proposed rule, which consists of a mere 22 pages and largely ignores or minimizes many of the likely environmental and socio-economic effects of the proposed rule. Environmental Assessment, DOI-BLM-WO310-2015-003-EA (“EA”). In spite of the fact that the proposed rule would necessitate significant new surface disturbance, particularly in cases where new pipelines and gathering systems would be required, the EA contains almost no discussion of these impacts. Similarly, while the proposed rule would have substantial socio-economic impacts to operators, purchasers and transporters, tribal communities, and local governments, the EA contains *no* socio-economic analysis.

⁶¹ 80 *Fed. Reg.* 40787.

⁶² 80 *Fed. Reg.* 40793-40797.

While the EA does concede that some of the proposed changes could have an environmental effect, it describes the potential effects as “minor.”⁶³ For example, in discussing the new surface disturbances that would be necessitated by the invalidation and re-working of existing CAAs, BLM conducts no analysis, stating only that “this could potentially result in more surface disturbance on new leases and some existing leases in order to build facilities, such as oil storage tanks, gas separators, meters, and pits, which could be necessary to store produced water.” Although BLM acknowledges that these activities could impact air, water, soil, vegetative, wildlife and visual resources, it makes no attempt to quantify these impacts and concludes that, because most surface disturbance would occur in areas that have previously been disturbed, the direct and indirect environmental impacts will be “minimal.” *Id.* at 16-20. However, as discussed throughout these comments, because the proposed changes could very likely result in full-field redesign of gathering and processing systems and could include areas that have been reclaimed, we believe it very likely that the environmental effects will be more than “minimal,” and could be “significant.”

Rather than conduct an analysis of these impacts, BLM “passed the buck” of NEPA preparation costs to operators, who will be required to conduct NEPA analyses when they seek BLM-mandated approvals of CAAs or requests for off-lease measurement. BLM acknowledges as much in the EA, stating that the document “only evaluates the types of effects that could be attributed to the construction and operation of facilities in general. Site-specific environmental effects of these externally generated proposals would be evaluated when an operator requests a CAA or approval of off-lease measurement.”⁶⁴ Thus, even in cases where BLM had previously approved commingling or off-lease measurement, operators would be required to undertake additional NEPA analyses, likely at substantial cost and delay.

In spite of the fact that the proposed rule will have significant financial impacts to the regulated community, as detailed herein and in the Associations’ comment letter to OMB, the EA contains *no* socio-economic analysis as required by NEPA. As recognized in the Federal Register preamble, the vast majority of operators are small businesses. The proposed rule would affect operators’ abilities to economically produce oil and natural gas from public and tribal lands, likely leading to a decrease in production in these areas. As to tribal lands, a majority of the populations of which live below the federal poverty line, the proposed rule has potentially far-reaching economic impacts, particularly given the limitations on commingling contained in the proposed rule. The EA contains no discussion of socio-economic impact of the proposed rule on tribes, merely stating that “BLM evaluated possible effects of the proposed rule on federally recognized Indian tribes.”⁶⁵ However, the EA fails to contain any mention of these supposedly evaluated “possible effects.” The EA must be revised to fully evaluate all socio-economic impacts of the proposed rule.

⁶³ EA at p. 15.

⁶⁴ EA at 15.

⁶⁵ EA at 22.

Although the purpose of a NEPA analysis is to involve interested parties and the public substantively in the decision-making process⁶⁶, BLM conducted minimal public scoping related to the EA and proposed rule. As discussed *supra*, the only public scoping BLM conducted were two meetings in Washington D.C. held over consecutive days in 2013.⁶⁷ BLM undertook no direct outreach with trade groups, operators, transporters and purchasers, state and county officials or others that will be directly impacted by the proposed rule. Similarly, BLM's outreach to tribal communities, many of whom will be directly impacted by the proposed rule, was minimal and insufficient. BLM's only consultation with and outreach to tribal communities was through meetings in New Mexico, Oklahoma, and Montana in 2011 and a single webcast in 2013.⁶⁸ BLM must conduct further consultation with affected Tribes and outreach to the regulated community and local and state governments.

X. Conclusion

We believe that a more appropriate approach to revision of Onshore Order No. 3 would be to eliminate the proposed application of all of Part 3160 to state and fee tracts in federal units or communitization agreements and the nonsensical prohibition of unit participating areas and communitization agreements that contain a mixture of federal, tribal and fee leases. We also recommend that BLM change the proposed language of the rule so that the new requirements apply only to new facilities and royalty measurement points. This would strike an appropriate balance between BLM's need to modernize site security and royalty verification procedures and fair consideration of the effect the rule would have on the regulated community.

Sincerely,



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Daniel T. Naatz
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⁶⁶ See e.g. *Baltimore Gas and Electric Co. v. Natural Resources Defense Council*, 462 U.S. 87, 97 (1983)(informing the public is one of the “twin aims” of NEPA.); 40 C.F.R. § 1500.1(b)(“insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken.”)

⁶⁷ We note that the EA optimistically refers to these two meetings as a “series.” EA at 22.

⁶⁸ EA at 22.

American Exploration & Production Council
Montana Petroleum Association
New Mexico Oil and Gas Association
North Dakota Petroleum Council
Oklahoma Independent Petroleum Association
Utah Petroleum Association
West Slope Colorado Oil and Gas Association

cc: