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December 7, 2023

Tracy Stone-Manning
U.S. Department of the Interior, Director (630)
Attention: 1004-AE95
Bureau of Land Management
1849 C Street, NW, Room 5646
Washington, DC 20240

RE: Comments on BLM's Proposed Rulemaking on the Management and Protection of the Natural Petroleum Reserve in Alaska, 88 Fed. Reg. 62025 (September 8, 2023); RIN 1004-AE95

Dear Director Stone-Manning:

The Bureau of Land Management's (BLM) proposed rule to shift management of the National Petroleum Reserve in Alaska (Petroleum Reserve) to give maximum protection to surface values contravenes the very reason Congress first designated the lands as a national petroleum reserve, then transferred the lands to the U.S. Department of the Interior's (DOI) jurisdiction: to develop the underlying federal oil and gas resources for our nation's energy and security needs. Western Energy Alliance (the Alliance) appreciates the opportunity to comment on the rule, but does not believe the rule is necessary nor, as written, within BLM's statutory authority.

The proposed rule disregards the fact that existing and evolving best practices developed for Alaska's tundra habitat benefit and protect the environment, native species and their habitats, and subsistence. Instead of working with local experts and the companies exploring for and developing the Petroleum Reserve, BLM's rule would impose significant delay and burdens on future infrastructure permits necessary for exploration and commercial development of valid existing leases. The proposed rule would disregard Congress's direction that all lands within the Petroleum Reserve be managed first and foremost for oil and natural gas development, with an eye toward balancing protection of surface resources. Congress has not authorized BLM to manage any portion of the Petroleum Reserve solely for the "maximum protection" of surface resources.

The Alliance is the leader and champion for independent oil and natural gas companies in the West. Working with a vibrant membership base for over 50 years, the Alliance stands as a credible leader, advocate, and champion of industry. Our expert staff, active committees, and committed board members form a collaborative and welcoming community of professionals dedicated to abundant, affordable energy and a high quality of life for all. The majority of independent producers are small businesses, with an average of fourteen employees.

The Alliance is a strong advocate for access to federal lands for energy development, providing testimony to Congress regarding the Federal oil and gas program on a regular basis, and routinely commenting on BLM's lease sales across the West. Additionally, the Alliance is an active advocate in the

courtroom, supporting BLM's decisions to lease federal lands for oil and natural gas development and challenging BLM when it fails to provide statutorily required access to federal lands, among other issues.

Executive Summary

The proposed rule misconstrues Congress's direction to manage the Petroleum Reserve for the exploration of oil and natural gas resources. Instead, BLM seeks to imbed this Administration's ideal that surface values are more important than exploring for and developing our nation's energy needs. The proposed rule directs management of the Petroleum Reserve toward mitigation and preservation, and disrupts the decades-old balance between resource development and environmental protection. Under the proposed rule, BLM could entirely block oil and gas development on existing leases by simply *considering* such lands for "Special Area" designation. The rule makes clear that *proposed* lands will be managed with the same protections as *designated* lands despite Congress's direction otherwise.

While BLM states that the proposed rule "would not affect existing leases" in the Petroleum Reserve[1] and that it "would have no effect on existing activities,"[2] BLM also proposes "heightened (*i.e.*, maximum) protection from the impacts of all oil and gas activities in Special Areas"[3] which "may involve conditioning, delaying action on, or denying some or all aspects of proposed activities . . . ."[4] On its face, BLM's statement regarding protecting existing lease rights appears disingenuous.

Congress recognized that certain lands within the Petroleum Reserve contain significant surface resource values and thus gave the Secretary of the Interior authority to designate such lands for protection of such surface values. However, Congress conditioned that such protection is only after actual designation, and "*to the extent consistent with the requirements of this Act for the exploration of the reserve*."[5] The rule, however, ignores this Congressional direction. Instead, it proposes a series of burdensome and costly provisions designed to unduly delay or outright stop federal lessees from developing their valid and existing lease rights.

BLM's proposed rule violates the Naval Petroleum Reserves Production Act of 1976 (Petroleum Reserves Act),[6] is contrary to the Federal Land Policy Management Act (FLPMA) and the National Environmental Policy Act (NEPA), among others, and stands to violate contracts between leaseholders and the United States by precluding actual development of valid existing leases. Further, the proposed rule violates federal guidance on collaboration with affected parties and fails to fully analyze its likely impacts.

The Alliance requests that at a minimum, BLM perform actual consultation with interested stakeholders and prepare a NEPA analysis of the proposed rule to fully understand the potential impacts of the rulemaking. Ultimately, the Alliance requests BLM rescind the proposed rule because its mechanisms

[1] 88 Fed. Reg. 62026.
[2] *Id.* at 62029.
[3] *Id.*
[4] *Id.* at 62040.
[5] 42 U.S.C. § 6504(a).
[6] 42 U.S.C. § 6501.

are arbitrary, capricious, contrary to law and not based on a realistic understanding of the Petroleum Reserve.

History of the National Petroleum Reserve in Alaska

In 1923, President Warren Harding designated approximately 23 million acres as the Naval Petroleum Reserve Number 4 to serve as an emergency oil supply and ensure oil resources for our nation's defense.[7] In 1944, the Department of the Navy initiated a decade-long oil exploration campaign in the Petroleum Reserve.[8] In 1976, Congress transferred the Petroleum Reserve from the Navy to the U.S. DOI through the National Petroleum Reserves Production Act of 1976 (Petroleum Reserves Production Act). Through the Petroleum Reserves Production Act, Congress directed DOI to "commence further petroleum exploration of the reserve . . . ."[9] Subsequently, the Department of the Interior and Related Agencies' Fiscal Year 1981 Appropriations Act directed that the secretary "shall conduct an expeditious program of competitive leasing of oil and gas in the Reserve in accordance with this Act."[10]

Through these Acts, Congress designated approximately 23 million acres in Alaska for the development of oil and natural gas resources. Congress directed exploration, then leasing and development for oil and natural gas resources.

Importantly, and relevant to the proposed rule, Congress made clear that any special designations for the protection of surface resources should be consistent with the purposes of the Petroleum Reserves Production Act—that is, consistent with the development of the Petroleum Reserve's oil and natural gas reserves.[11]

In designating the Petroleum Reserve, Congress did allow that some portions of the Reserve may warrant greater surface protection than others. Congress stated:

> Any exploration within the Utukok River, the Teshekpuk Lake areas, and other areas designated by the Secretary of the Interior containing any significant subsistence, recreational, fish and wildlife, or historical or scenic value, shall be conducted in a manner which will assure the maximum protection of such surface values to the extent consistent with the requirements of this Act for the exploration of the reserve.[12]

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[7] *See* BLM: National Petroleum Reserve in Alaska, https://www.blm.gov/programs/energy-and-minerals/oil-and-gas/about/alaska/NPR-A (last visited Nov. 27, 2023).
[8] John C. Reed, *Exploration of Naval Petroleum Reserve No. 4 and Adjacent Areas Northern Alaska, 1944-53: Part 1, History of the Exploration*, Geological Survey Professional Paper 301, 1958, at Foreword, https://www.blm.gov/sites/default/files/documents/files/PublicRoom_Alaska_HistoryoftheNPR-4.pdf.
[9] 42 U.S.C. § 6504(c).
[10] 42 U.S.C. § 6506a(a).
[11] *See, e.g.,* 42 U.S.C. § 6504(a) (instructing that any protection of surface resources shall be "consistent with the requirements of this Act for the exploration of the reserve"); 42 U.S.C. § 6506a(b) (mitigation may be required for "significantly adverse effects on the surface resources").
[12] 42 U.S.C. § 6504(a).

Of note, Congress stated that such lands warranting greater protection must first be designated by the secretary.

In 1980, Congress enacted the Alaska National Interest Lands Conservation Act of 1980 (ANILCA). ANILCA designated national parks, national wildlife refuges, national monuments, wild and scenic rivers, recreational areas, national forests, and conservation areas, including Denali National Park, Gates of the Arctic National Park and Preserve, Misty Fjords National Monument, and the Yukon Flats and Yukon Delta National Wildlife Refuges. In total, ANILCA provides special protection to over 157,000,000 acres of federal land in Alaska. Additionally, ANILCA gives the secretary a process for designating Alaskan wilderness and allows flexibility in managing such characteristics before designation.[13]

Had Congress intended for Petroleum Reserve lands to be managed for the benefit of surface values—including wilderness or other designations—it could have included such lands in ANILCA. It did not, and instead specifically excluded the Petroleum Reserve from certain provisions therein through the 1981 Appropriations Act. There, Congress exempted the Petroleum Reserve from section 603 of FLPMA, which provides guidance on conducting wilderness reviews and how to manage lands pending Congressional designation. Congress directed that the Petroleum Reserve is exempt from wilderness designation or management and provided no further ability to manage lands in the Petroleum Reserve for wilderness characteristics, despite having done so in ANILCA.[14]

Congress also exempted the Petroleum Reserve from section 202 of FLPMA, making the Petroleum Reserves Production Act a dominant-use statute, exempting FLPMA's requirements for multiple use and sustained yield and the need to prepare a resource management plan.[15] Throughout the Petroleum Reserves Production Act, it is clear that Congress intended that the lands first designated as Naval Petroleum Reserve Number 4 would remain open to oil and natural gas leasing and be managed for such development.

The proposed rule exceeds Congressional authority under the Petroleum Reserves Production Act
BLM manages the Petroleum Reserve pursuant to the Petroleum Reserves Production Act, FLPMA, and other authorities, for the purpose of exploration for and development of federal oil and natural gas resources. Congress made clear that exploration and development is first and foremost the priority within the Petroleum Reserve.[16] Provisions in the proposed rule that seek to override BLM's directive for exploration and production in favor of surface value protection conflict with statute and Congressional

[13] 43 U.S.C. § 1784. ("Notwithstanding any other provision of law, section 603 of [FLPMA] shall not apply to any lands in Alaska. However, in carrying out his duties . . . the Secretary may identify areas in Alaska which he determines are suitable as wilderness and may, from time to time, make recommendations to the Congress for inclusion of any such areas in the National Wilderness Preservation System, pursuant to the provisions of the Wilderness Act. In the absence of congressional action relating to any such recommendation of the Secretary, the [BLM] shall manage all such areas which are within its jurisdiction in accordance with the applicable land use plans and applicable provisions of law.")
[14] *Compare* 43 U.S.C. § 1784, *supra* note 13, *with* 42 U.S.C. § 6506a(c) ("Land Use Planning; BLM Wilderness Study.—The provisions of . . . section 603 of [FLPMA] shall not be applicable to the Reserve.").
[15] 42 U.S.C. § 6506a(c).
[16] Conversely, through the ANILCA, Congress designated over 157,000,000 acres for varying levels of federal protection. Petroleum Reserve lands were noticeably not included in the ANILCA's protection measures.

mandate and is arbitrary, capricious, an abuse of discretion, and not in accordance with law under the Administrative Procedure Act.[17]

The proposed rule misrepresents and re-interprets provisions of the Petroleum Reserves Production Act. It alleges:

- "Congress sought to strike a balance between exploration and 'the protection of environmental, fish and wildlife, and historical or scenic values;'"[18]
- Congress directed the secretary to "'promulgate such rules and regulations as he [or she] deems necessary and appropriate for the protection of such values within the reserve;'"[19]
- "Congress intended that BLM would provide for heightened (*i.e.*, maximum) protection from the impacts of all oil and gas activities in Special Areas, but provide for lesser protection (mitigating reasonably foreseeable significant impacts) elsewhere throughout the Reserve;"[20] and,
- "BLM must . . . 'take any action necessary to prevent unnecessary or undue degradation' of all BLM-administered public lands, including within the [Petroleum Reserve]."[21]

In fact, Congress explained from the start that "[a]ny exploration within the Utukok River, the Teshekpuk Lake areas, and other areas *designated* by the Secretary of the Interior containing any significant subsistence, recreational, fish and wildlife, or historical or scenic value, shall be conducted in a manner which will assure the maximum protection of such surface values *to the extent consistent with the requirements of this Act for the exploration of the reserve*."[22] These lands must be (1) designated by Congress or the secretary and (2) managed consistent with the objective for exploration of the Petroleum Reserve. Management that precludes oil and natural gas exploration or development is inconsistent with the Petroleum Reserves Production Act.

Significantly, when Congress transferred the Petroleum Reserve from the Navy to Interior, it did identify the Utukok River and Teshekpuk Lake areas as special areas, but in that same sentence Congress made clear that those same lands were still available for exploration and development.

Further, in the 1981 Appropriations Act, Congress specifically directed the secretary to (1) "conduct an expeditious program of competitive leasing of oil and gas," (2) through the leasing process, provide "conditions, restrictions, and prohibitions as . . . necessary or appropriate to mitigate reasonably foreseeable and *significantly adverse* effects on the surface resources," and (3) Congress further directed BLM that it could not designate or manage lands as wilderness.[23] Any "balance" must recognize

[17] *See* 5 U.S.C. § 706(2).
[18] 88 Fed. Reg. 62026.
[19] *Id.* (partially quoting 42 U.S.C. § 6503(b)).
[20] *Id.* at 62029.
[21] *Id.*
[22] 43 U.S.C. § 6504(a) (emphasis added).
[23] 43 U.S.C. §§ 6506a(a), (b), and (c).

the intent of the Naval Petroleum Reserve Number 4 as a source of oil and natural gas for our nation's energy needs.

Throughout the proposed rule's preamble, BLM cites to conference committee reports in order to justify its reinterpretation of the Petroleum Reserve's guiding statues. Where the Petroleum Reserves Production Act itself is clear, however, such citation is not necessary nor is it appropriate. As the Supreme Court has made clear, when "Congress has directly spoken to the precise question at issue," an agency "must give effect to the unambiguously expressed intent of Congress."[24] Thus, courts will not affirm an agency's interpretation of a term when Congress provided a precise meaning in statute.[25] Nor will courts defer to BLM's references to conference committee reports to interpret the meaning of clearly explained statute.

BLM does not have Congressional authority or the administrative discretion to re-interpret a century of managing the Petroleum Reserve for the purpose of oil and natural gas exploration and development. Congress has not authorized BLM to change the Petroleum Reserve's management goals, nor has it provided BLM the authority to "balance" surface value protection above exploration and development. BLM must revise the proposed rule to be consistent with the Petroleum Reserves Production Act.

The proposed rule violates FLPMA

The rule's goal to place protection of the surface resources above the development of the Petroleum Reserve's hydrocarbon resources violates FLPMA. The proposed rule states that it "would revise the framework for designating and assuring maximum protection of Special Areas' significant resource values, and would protect and enhance access for subsistence activities throughout" the Petroleum Reserve.[26] If finalized as written, BLM could designate any and all of the lands within the Petroleum Reserve as special areas to preclude new leasing, and where there are already valid existing leases in place, BLM could delay or deny development of those leases. Indeed, as currently written, the proposed rule would allow BLM to close lands for development where it is merely considering lands for "special area designation." The proposed rule's maximum protection standard violates FLPMA.

Because Congress exempted the Petroleum Reserve from certain requirements of FLPMA,[27] the NPRPA is a dominant-use statute and does not require consideration of multiple use and sustained yield. However, understanding FLPMA's multiple use mandate provides some context for the proposed rule. FLPMA calls for balance in land management. Through FLPMA, Congress directed that "the public lands be managed in a manner which recognizes the Nation's need for domestic sources of minerals, food, timber, and fiber from the public lands[.]"[28] FLPMA requires BLM to balance multiple uses rather than elevate one use to the exclusion of others.[29] Courts have expressly recognized that one use that BLM

[24] *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842-43 (1984).
[25] *Am. Civil Liberties Union v. FCC*, 823 F.2d 1554, 1568 (D.C. Cir. 1987); *see also, e.g.*, *Time Warner Ent. Co. v. FCC*, 56 F.3d 151, 190 (D.C. Cir. 1995).
[26] 88 Fed. Reg. 62025.
[27] 42 U.S.C. § 6506a(c).
[28] 43 U.S.C. § 1701a)(12).
[29] *See Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 58 (2004) ("'Multiple use management' is a deceptively simple term that describes the enormously complicated task of striking a balance among the many competing uses to which land can be put . . . ."); *see also* 43 U.S.C. § 1702(c) (FLPMA requires BLM to manage "the public lands and

must balance with others includes "the nation's immediate and long-term need for energy resources."[30] Here, the proposed rule's maximum protection standard for special areas violates FLPMA as it provides anything but a balance of land use and places surface protection above all else.

The proposed rule would improperly restrict any impacts from oil and natural gas development

In fact, proposed Section 2361.10, Protection of Surface Resources, makes clear that BLM would be able to restrict surface activities within the Petroleum Reserve. As the preamble explains, "[t]he proposed rule would establish new standards and procedures for managing and protecting surface resources in the [Petroleum Reserve] from the *reasonably foreseeable and significantly adverse effects of oil and gas activities*."[31] This statement alone crystalizes BLM's anti-oil and natural gas development stance. Whereas FLPMA recognizes that there will be impacts from oil and natural gas development and allows for such necessary impacts, the proposed rule instead characterizes any and all impacts from oil and gas development activities as "reasonably foreseeable and significantly adverse."

Contrary to the proposed rule, but according to Congressional direction and existing law, FLPMA mandates that BLM prevent *unnecessary or undue degradation* of public lands.[32] Preventing unnecessary or undue degradation does not mean preventing all adverse impacts upon the land. ("FLPMA prohibits only unnecessary or undue degradation, not all degradation.")[33] As the Interior Board of Land Appeals has explained:

> Congress thus recognized that the mere act of approving oil and gas development does not constitute unnecessary or undue degradation under FLPMA, and that *something more than the usual effects anticipated from such development, subject to appropriate mitigation, must occur for degradation to be "unnecessary or undue*."[34]

To qualify as unnecessary or undue degradation, a lessee's operations must be "conducted in a manner that does not comply with applicable law or regulations, prudent management and practice, or reasonably available technology, such that the lessee could not undertake that action pursuant to a valid existing right."[35] FLPMA recognizes that some public lands will not be preserved or protected in their

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their various resource values so that they are utilized in the combination that will best meet the present and future needs of the American people").

[30] *Theodore Roosevelt Conservation P'ship v. Salazar*, 744 F. Supp. 2d 151, 157 (D.D.C. 2010).

[31] 88 Fed. Reg. 62032 (emphasis added).

[32] 43 U.S.C. § 1732(b).

[33] *Theodore Roosevelt Conservation P'ship v. Salazar*, 661 F.3d 66, 78 (D.C. Cir. 2011). *See also* BLM, Instructional Memorandum No. 92-67 (Dec. 3, 1991) ("'Unnecessary and undue degradation' implies that there is also necessary and due degradation. For example, if there is only one route of access possible for development of an existing oil and gas lease, and that route presents the likelihood of some degradation of public lands or resources, such degradation may be considered necessary for the management of the oil and gas resource. . . . As another example, the RMP/EIS or site-specific environmental document may identify mitigation which would result in excessive expenditures of money or unusual technological requirements to achieve compliance. Otherwise, there would be some degree of degradation of public lands or resources. If the mitigation would render the proposed operation uneconomic or technologically infeasible so that a prudent operator would not proceed, such degradation may also be considered necessary for the management of the oil and gas resource.").

[34] *Intrepid Potash – New Mexico, LLC*, 176 IBLA 110, 123 (2008) (emphasis added).

[35] *Colorado Envtl. Coal.*, 165 IBLA 221, 229 (2005).

natural condition. Specifically, Congress directed BLM to manage the public lands "in a manner . . . that, *where appropriate*, will preserve and protect *certain* public lands in their natural condition."[36] FLPMA does provide that use of public lands may be subject to conditions to "minimize adverse impacts on . . . resources and values . . . ."[37] But FLPMA does not allow BLM to outright deny access to public lands based on reasonable foreseeable impacts of oil and natural gas development that Congress foresaw when authorizing and amending the Petroleum Reserves Production Act.

The proposed rule would improperly create *de facto* wilderness

The Petroleum Reserves Production Act specifically exempts the Petroleum Reserve lands from wilderness designation,[38] yet the proposed rule recognizes "wilderness characteristics" as one of the considerations for designating a special area.[39] While BLM does not outright state that it is protecting for wilderness characteristics throughout special areas within the Petroleum Reserve, its proposed maximum protection standard within special areas is *de facto* wilderness.

In exempting the Petroleum Reserve from wilderness designation, Congress directed BLM that the lands within the boundaries would not be considered for protection as wilderness, nor would they be managed to protect wilderness characteristics. Yet proposed revisions for management of special areas within the Petroleum Reserve would do just that: manage the lands as *de facto* wilderness by not allowing new leasing, and not allowing any new infrastructure on the lands.

Through the proposed rule BLM is improperly attempting to create *de facto* wilderness without going through the necessary process to designate wilderness—because Congress specifically told BLM it could not do so. The Petroleum Reserve was designated for the exploration and production of oil and natural gas resources, not for the protection of wilderness characteristics. Instead, Congress designated approximately 9,100,000 acres of wilderness in Alaska through the ANILCA. If Congress wanted BLM to manage lands within the Petroleum Reserve, it would have given BLM such authorization. In this instance, BLM cannot create *de facto* wilderness where Congress specifically restricted that ability.

The proposed rule would improperly constitute *de facto* withdrawal

Under FLPMA, minerals exploration and production, including oil and natural gas development, is one of the principal uses of the public lands.[40] The proposed rule, however, removes the ability for any development of these resources within special areas, whether designated or merely considered for designation. Indeed, the proposed rule would remove these lands from the ability to be offered for federal lease, constituting a *de facto* withdrawal under FLPMA.[41]

Especially under the Petroleum Reserves Production Act, BLM cannot prioritize alternative uses of lands over mineral development without a more thorough evaluation and process. In order to withdraw lands

[36] *See* 43 U.S.C. § 1701(a)(8) (emphasis added).
[37] 43 U.S.C. § 1732(d)(2)(A).
[38] 42 U.S.C. § 6506a(c).
[39] *See* 88 Fed. Reg. 62041, Proposed Section 2361.20(e)(4) (explaining that the Utukok River Uplands Special Area will be managed to assure maximum protection of "[i]mportant wilderness values."
[40] 43 U.S.C. § 1702(l).
[41] *See* 43 U.S.C. §§ 1702(j) (defining "withdrawal"), 1714(l)(1) (referencing withdrawals resulting from closure of lands to leasing under the MLA).

from leasing, Congress requires the Secretary of the Interior follow a number of procedures, including providing the public notice of its intent to withdraw through publication in the Federal Register.[42] Further, a withdrawal cannot exceed 20 years in duration and can be denied by Congress.[43]

BLM's proposed rule to remove leasing as an option for large amounts of lands within the Petroleum Reserve circumvents FLPMA's withdrawal procedures and is unauthorized.

The proposed rule violates NEPA

In issuing the proposed rule, BLM circumvented NEPA. Instead of performing an environmental impact statement (EIS) based on the magnitude of impacts of the proposed changes on the management of the Petroleum Reserve, or even preparing and environmental assessment (EA), BLM instead issued a categorical exclusion based on a self-determination that the proposed rule is "of an administrative, financial, legal, technical, or procedural nature."[44] Yet the breadth and scope of the proposed rule and its intent to change the management framework of the Petroleum Reserve indicates otherwise.

BLM performed an EIS for the 2013 Petroleum Reserve Integrated Activity Plan (IAP) and another EIS for the 2020 IAP, which it subsequently issued a revised record of decision for in 2022 that relied on the initial analysis of the 2020 EIS but chose a different alternative as its preferred alternative in order to provide additional restrictions on development.[45] Importantly, both the 2013 and 2020/2022 IAPs provide management decisions for the Petroleum Reserve. Here, where BLM is intending to upend those planning decisions, it cannot simply rely on a categorical exclusion. BLM must prepare an EA at minimum or an EIS to support any final rule.

NEPA is a procedural statute promulgated to ensure that an agency makes a fully informed and well-considered decision.[46] The Council on Environmental Quality (CEQ) promulgated regulations implementing NEPA, which are binding on all federal agencies.[47] The CEQ regulations reaffirm that NEPA requires federal agencies to ensure fully informed decision-making and provide for public participation in environmental analysis and decision-making.[48] Here, the scope of the proposed changes to management of the Petroleum Reserve indicates that BLM's use of a categorial exclusion does not provide a fully-informed decision. BLM must do more under NEPA.

The proposed rule violates valid existing lease rights

The proposed rule alleges it will not affect valid existing leases, yet the majority of the management changes discussed would result in delay or outright denial of permits requested by existing leaseholders. BLM explains that the proposed rule would not result in a taking of private property[49] in order to justify

[42] 43 U.S.C. § 1714(b)(1).
[43] 43 U.S.C. § 1714(c)(1).
[44] 88 Fed. Reg. 62038 (citing 43 C.F.R. § 46.215).
[45] In 2022 BLM issued a new record of decision, replacing the 2020 IAP Record of Decision. Yet even in issuing the 2022 record of decision, BLM recognized the full NEPA process, including analysis and public comment.
[46] *See Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 558 (1978).
[47] 40 C.F.R. §§ 1500-1518.4.
[48] *Id*. § 1500.1(b)-(c).
[49] 88 Fed. Reg. 62038. Here, BLM states that "[t]his proposed rule would not *affect* a taking of private property . . . ." (emphasis added). Ironically, BLM's use of "affect" here is telling. According to Merriam-Webster, "*Affect* is

its use of a categorical exclusion and in order to justify its simplistic goal of updating BLM's management framework for the Petroleum Reserve. Yet the fact that BLM acknowledges that it would "delay or deny proposed activities" based on reasonably foreseeable effects on surface resources is a sure sign that the proposed rule will result in a regulatory taking, breaching valid existing lease rights.

The preamble provides mere summary statements in an effort to acknowledge existing lease rights:

- "The proposed rule would not affect existing leases in the [Petroleum Reserve]."[50]
- "[O]il and gas development is continuing in the [Petroleum Reserve], and this proposed rule would have no effect on existing activities."[51]
- The proposed rule "recognizes and is consistent with valid existing rights, including oil and gas leases."[52]

The preamble clarifies that the proposed rule would entirely prohibit new infrastructure on approximately 8.3 million acres of the Petroleum Reserve, would only allow "essential" infrastructure on approximately 3.3 million acres, and would permit infrastructure on the remaining approximate 10.8 million acres.[53] "Essential", in this context, is proposed as the "infrastructure . . . necessary for development and production on a valid existing onshore or offshore lease and no other feasible and prudent option is available."[54] This standard is subjective and provides no explanation on how BLM will determine what is feasible or prudent and whether economics, technical feasibility, or human safety will be a factor in determining what is "essential" for those circumstances where essential infrastructure would even be considered.

BLM makes clear that it is only *considering* an exception to "essential" infrastructure requests from existing lease holders, and only for those certain lands. As BLM explains, such exception—if implemented in the final rule—would apply in the case of a valid existing lease where "no practicable alternatives exist that would have less adverse impact on significant resource values of the Special Area."[55] Generously, BLM explains that this exception "is necessary to accommodate the rights of current leaseholders."[56]

Yet BLM fails to actually recognize the significance of valid existing lease rights. Existing lessees with leases in the Petroleum Reserve hold legally protected interests in federal oil and gas leases that

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usually a verb meaning 'to produce an effect upon,' . . . *Effect* is usually a noun meaning 'a change that results when something is done or happens" . . . ." 'Affect' vs. 'Effect', https://www.merriam-webster.com/grammar/affect-vs-effect-usage-difference. Whereas the proposed rule may not *affect* a taking of private property (lease rights), provisions of the proposed rule will *effect* a taking of lease rights.

[50] *Id.* at 62026.
[51] *Id.* at 62029.
[52] *Id.* at 62038.
[53] *Id.* at 62035.
[54] *Id.*
[55] *Id.* at 62036.
[56] *Id.*

constitute real property rights, and which are binding and enforceable contractual arrangements that govern the rights and obligations between them and the United States.[57]

Valid existing lease rights override subsequent land use proposals such as special areas, lands with wilderness characteristics, and other land use or resource designations. Indeed, federal courts and the Interior Board of Land Appeals (IBLA) have consistently held that operators may develop their existing leases within later designated areas of special emphasis if BLM issued the leases prior to the special designation. [58] Federal courts have interpreted valid existing rights to mean that federal agencies cannot impose stipulations or conditions of approval that make development on existing leases either uneconomic or unprofitable.[59] Further, BLM cannot prohibit lessees from developing their leases.[60] Only Congress has the right to completely prohibit development once a lease has been issued.[61]

To the extent that the proposed rules would constrain or prevent exploration and development activities on valid existing leases, or the necessary infrastructure thereto, such limitation could constitute a breach of contract or a regulatory taking in violation of the Fifth Amendment to the U.S. Constitution, subjecting the United States to substantial contract damages or payment of just compensation. As the Supreme Court established in *Pennsylvania Coal Co. v. Mahon*, "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[62] The Court further explained that, in the context of a coal lease, "[t]o make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it."[63]

Here, where BLM proposes "maximum protection" of all lands within special areas—designated or just under consideration—such proposed rules significantly alter the regulations in place at the time the leases were issued, and impose substantial costs and burdens on lessees in some circumstances while outright denying lessees use of their valid existing property rights in other circumstances. Thus, BLM's statements that the proposed rule would not affect valid existing lease rights appears to be mere lip service. BLM must ensure that any changes to the management of surface resources within the Petroleum Reserve actually respects valid existing lease rights.

The economic analysis relies on flawed assumptions

The economic analysis is flawed because it relies on inaccurate assumptions that the proposed rule will not affect valid existing leases and that it will not have an adverse impact on energy supplies and thus production of oil and natural gas resources within the Petroleum Reserve. BLM's analysis is wrong. As

[57] *W. Watersheds Project v. Haaland*, 22 F.4th 828, 831 (9th Cir. 2022) (An oil and gas lessee "has a significantly protectable interest. . . ."); *Union Oil Co. v. Morton,* 512 F.2d 743, 747 (9th Cir. 1975) (a lease granted under the MLA "convey[s] a property interest enforceable against the Government").
[58] *See, e.g., Colorado Environmental Coalition v. Bureau of Land Management*, 932 F. Supp. 1247, 1251 (D. Colo. 1996); *Colorado Environmental Coalition*, 135 IBLA 356, 359-360 (1996); *SUWA*, 100 IBLA 63 (1987); *Utah Wilderness Coalition*, 91 IBLA 124, 125, 130 (1986).
[59] *See Utah v. Andrus*, 486 F. Supp. 995, 1011 (D. Utah 1979).
[60] *Nat'l Wildlife Fed.*, 150 IBLA 385, 403 (1999).
[61] *W. Colorado Congress*, 130 ILA 244, 248 (1994).
[62] *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).
[63] *Id.* at 414.

expressed throughout the Alliance's comments, the Alliance believes the proposed rule will have substantial impacts on the ability for existing leaseholders to develop their rights and will further restrict the ability for future development, as additional acres will be improperly closed to leasing.

Importantly, restrictions on land use in the proposed rule will reduce royalties and other economic benefit to local communities, the State of Alaska, and the federal treasury. BLM must recognize and properly analyze the economic impact its proposed rule will have on local communities, the State of Alaska, the federal treasury, and lease holders.

BLM's rejection of reasonable requests for extension of time is arbitrary and capricious and an abuse of discretion in violation of the APA

As explained in the Alliance's October 25, 2023 letter requesting an extension of the public comment period for this proposed rule, the Alliance believes that further extension of the comment period is warranted. Despite BLM extending the public comment period by 10 days[64] and then by an additional 20 days,[65] the Alliance reiterates that BLM has not appropriately allowed the public to meaningfully participate in the public hearing process, nor have BLM's deadlines and tight extensions allowed the public to meaningfully review the underlying scientific, commercial, and economic data necessary for a proposed rule of this magnitude.

Based on BLM's thorough review of the public process for the 2020 Integrated Action Plan and 2022 record of decision,[66] it appears that BLM is relying on that public comment process to support its proposed management decisions here. Additionally, based on Congressional and media reports, it is apparent that BLM has not provided sufficient or meaningful opportunity for local communities and interested parties within the State of Alaska to consult with BLM on the proposed rule.

The Alliance requests BLM reconsider its denial of substantive additional time for comments or, in the alternative, provide a second comment period to allow affected parties to be able to provide additional thoughtful and substantive comments.

Specific comments on the proposed rule

The Alliance provides the additional section-by-section review in brief.

Section 2361.1 Purpose

The Alliance is concerned that the proposed purpose misconstrues the actual Congressional purpose of the Petroleum Reserves Production Act and violates FLPMA. The preamble states that the main purpose of the proposed rule is "to provide standards and procedures to . . . provide for such conditions, restrictions, and prohibitions as [the Secretary] deems necessary or appropriate to mitigate reasonably foreseeable and significantly adverse effects on the surface resources of the [Petroleum Reserve]."[67]

[64] 88 Fed. Reg. 72985 (Oct. 24, 2023).
[65] *Id.* at 80237 (Nov. 17, 2023).
[66] *See Id.* at 62027-28.
[67] *Id.* at 62031.

Congress, however, made clear that the purpose of the Act was for DOI to commence petroleum exploration.[68]

Additionally, the proposed purpose would include a statement regarding "assuring maximum protection of significant resource values in Special Areas . . . ."[69] While this second statement includes that such protection should be consistent with the provisions of the Petroleum Reserves Production Act, the purpose is not clear that the main purpose of the regulations is to implement the Petroleum Reserves Production Act and its goal of exploration and production of oil and natural gas within the Petroleum Reserve.

The Alliance requests BLM revert to the original purpose of Section 2361.1 that reflects development of oil and natural gas resources as the overarching use of the Petroleum Reserve.

Section 2361.4 Responsibility

Again, the Alliance is concerned by BLM's continued insertion of a "maximum protection" standard for any lands, even where the lands are designated special areas. The Petroleum Reserves Production Act makes clear that oil and natural gas development is first and foremost the goal for BLM and that surface protection should be balanced within areas with special resources. But the Act also makes clear that special area designation should not ban oil and gas activity.

The current regulation already gives BLM the authority to protect surface values within the Petroleum Reserve. BLM does not need to add additional language regarding surface management and protection. However, if BLM does intend to include a maximum protection standard, it must include a statement that such surface protection must be balanced with the need to develop the Petroleum Reserve's oil and natural gas resources.

Section 2361.5 Definitions

The Alliance believes that the proposed rule's addition of the definition of "significant resource value" in conjunction with the revised definition of "Special Areas" exceeds BLM's statutory authority. As discussed above, the Alliance disagrees with BLM's intent in the proposed rule to designate any lands within the Petroleum Reserve as having a maximum protection standard. Congress reserved these lands for oil and natural gas development and allowed for protection of surface resources "to the extent consistent with the requirements of [the Petroleum Reserves Production Act] for the exploration of the reserve."[70]

BLM's proposed definition of "significant resource value" is vague and would allow BLM to designate lands as having surface resources to support a special area designation if there are any subsistence, recreational, fish and wildlife, historical, or scenic values contained in the near vicinity. This is not what Congress intended when it designated the Petroleum Reserve, and this cannot be supported by the Petroleum Reserves Production, FLPMA, or any other statutory authority.

[68] 42 U.S.C. § 6504(c).
[69] 88 Fed. Reg. 62039.
[70] 42 U.S.C. § 6504(a) (emphasis added).

The Alliance is also concerned by the definition of "infrastructure" within the proposed rule. Here, BLM appears to be allowing temporary infrastructure to support the exploration phase of development, but the definition and further implementation of the term in the proposed rules makes clear that infrastructure supporting commercial development will either be delayed or outright denied. Oddly, BLM allowing a lessee to test for oil and natural gas and prove up resources will give an operator a greater case for a regulatory taking claim when BLM denies commercial approvals.

Finally, the Alliance finds it ironic that the proposed rule defines an IAP as a "land use management plan that governs the management of all BLM-administered lands and minerals throughout the Reserve,"[71] yet in the same proposed rule denies that the IAP carries much weight. While the IAP is a land management tool developed through NEPA with public notice and comment and should carry weight, in subsequent sections of the proposed rule, BLM makes clear that special area designation can and will happen outside of the public process for an IAP and that any new designations will overrule an existing IAP. Further, BLM provides minimal flexibility for land management decisions in an IAP through its maximum protection standard for special areas and authorizations to manage nominated special areas for such maximum protection without actual designation.

BLM is using smoke and mirrors to indicate that an IAP with a full NEPA EIS process has land management authority, yet in reality all of the weight of management decisions is in this proposed rule that is currently only subject to a categorical exclusion.

Congress specifically exempted the Petroleum Reserve from the resource management plan process. It is unclear why BLM is attempting to codify it here through the IAP, and it is further unclear why BLM is attempting to codify the IAP process when it intends to restrict its ability to make land use decisions based on best available science and public participation per NEPA.

BLM must recognize that the Petroleum Reserves were designated for development of petroleum resources. BLM cannot circumvent its statutory authority in creating vague definitions that evade a public process to allow maximum protection of the surface lands.

Section 2361.7 Severability

The Alliance finds the inclusion of a severability clause within the proposed rule as comical. It is clear that this Administration is used to being sued based on overreaching rulemakings. By now, BLM should recognize that where a court finds portions of a rulemaking invalid but other portions valid, the court orders accordingly, as is the case in the multiple iterations of BLM's waste prevention rulemaking. This severability section is not only not necessary but lets the general public know that BLM recognizes that multiple provisions within the proposed rule are overreaching and that it fully expects a court to vacate them. Instead of trying to confuse the public and the courts by drafting a proposed rule that only portions of which can be supported, BLM should work to draft language that is consistent with existing statutory authority.

[71] 88 Fed. Reg. 62039.

Section 2361.10 Protection of Surface Resources

The Alliance is concerned that the proposed section on protection of surface resources is overly broad in scope and overly restrictive on a leaseholder's ability to develop its leases.

As an initial matter, the opening statement of the proposed rule is exceedingly restrictive on leaseholders ability to operate:

> In administering the Reserve, the Bureau must protect surface resources by adopting whatever conditions, restrictions, and prohibitions it deems necessary or appropriate to mitigate reasonably foreseeable and significantly adverse effects of proposed activities. Such conditions, restrictions, or prohibitions may involve conditioning, delaying action on, or denying some or all aspects of proposed activities, and will fully consider community access and other infrastructure needs . . . .[72]

And as BLM makes this reasonable foreseeable calculation, it is to look at:

> any reasonably foreseeable effects of its decision, including effects that are later in time or farther removed in distance, and effects that result from the incremental effects of the proposed activities when added to the effects of other past, present, and reasonably foreseeable actions . . . .[73]

Combining these two sections of the proposed rule, the Alliance is concerned that BLM is creating a rule that would require it to invent analysis for incremental effects of proposed activities when it does not have a developed standard to do so, while legitimizing arguments from anti-oil and natural gas entities and making any decisions to allow development *in the Petroleum Reserve* subject to greater scrutiny and litigation. With this proposed rule BLM will make it impossible for any leaseholder to get a project approved and timely developed without additional delay and cost related to unnecessary litigation.

The proposed rule will reduce and restrict oil and natural gas development within the Petroleum Reserve, which could lead to takings claims by leaseholders. Further, local governments and the State of Alaska would be negatively impacted by reduced royalties. BLM must consider lessees' contractual rights as well as economic impacts to the citizens of the State of Alaska.

This section of the proposed rule violates the Petroleum Reserve Production Act and FLPMA, which both support the development of the Petroleum Reserve. Further, the language stands to exceed NEPA's requirement for relying on best available information by requiring an analysis into the future that BLM cannot currently reasonably conduct. As with other provisions of the proposed rule, the Alliance is concerned that BLM has forgotten that these lands are designated as a resource for our nation's energy needs. BLM must rescind or drastically revise this proposed section to be consistent with the Petroleum Reserve Production Act, FLPMA, NEPA, and all other authorizing statutes.

[72] Proposed Section 2361.10(a), 88 Fed. Reg. 62040 (emphasis added).
[73] Proposed Section 2361.10(b)(3), 88 Fed. Reg. 62040.

Section 2361.30 Special Areas Designation and Amendment Process

The Alliance questions BLM's ability to designate special areas based on a subjective review of "significant subsistence, recreational, fish and wildlife, historical, or scenic values . . . ."[74] BLM provides minimal explanation of how special areas will be designated if not within an IAP process and provides minimal explanation of the standards it will review in what is a "significant" resource to support designation.

Equally as concerning is BLM's idea that it believes it can manage lands for special area protection when such lands have not gone through an actual formal designation process. The proposed rule provides that, "[i]f, at any point during the evaluation process, the authorized officer determines that interim measures are required to assure maximum protection of significant resource values in lands under consideration for designation as a Special Area, the authorized officer may implement such measures during the period for which the lands are under consideration."[75] This provision is clearly not allowed.

While BLM is allowed to manage lands for wilderness characteristics until Congress acts on a designation proposal, this is specifically not available in the Petroleum Reserve. Instead, BLM must manage lands as open for development until formal designation otherwise. As an example, in the land use planning context, the IBLA has rejected the argument that BLM must suspend its process granting approvals while it is updating a land use plan.[76] The IBLA has also specifically held that BLM is not required to suspend oil and gas leasing pending a land use plan update.[77] Further, BLM's own Land Use Planning Handbook provides that "[e]xisting land use plans decisions remain in effect during an amendment or revision until the amendment or revision is completed and approved."[78]

Here, Congress specifically told BLM to manage the lands within the Petroleum Reserve for oil and natural gas development. Where the secretary finds significant surface resources, Congress allowed a special designation of those lands and heightened protection for such surface resources, but only to the extent consistent with oil and gas development.

BLM cannot manage lands for the heightened surface use designation without actual designation, and BLM cannot make such designation without following NEPA.

Finally, the Alliance believes that any process to remove lands from designation as a special area should apply a similar process and similar standards as the designation process. BLM should not require a heightened standard to remove lands from designation where they clearly no longer hold the significant resources identified to support designation.

Section 2361.40 Management of Oil and Gas Activities in Special Areas

Instead of declaring special areas as wilderness or some other statutory designation that BLM does not have the authority to create, it wishes to protect certain lands as special areas. And then BLM purports

[74] Proposed Section 2361.30(a), 88 Fed. Reg. 62041.
[75] Proposed Section 2361.30(a)(5), 88 Fed. Reg. 62041.
[76] *See SUWA*, 163 IBLA 14, 28 (2004); *Sierra Club Legal Defense Fund, Inc.,* 124 IBLA 130, 140 (1992).
[77] *See Wyoming Outdoor Council*, 156 IBLA 377, 384 (2002).
[78] H-1601-1, VII. E. at 47.

to create rules for how to manage lands within those special areas. Yet the reality is that BLM is attempting to create *de facto* wilderness where oil and gas development will not be allowed.

The Alliance again reminds BLM that the Petroleum Reserves Production Act, FLPMA, and ANILCA recognize Congress's intent that the Petroleum Reserve be managed to allow oil and gas development. Any ban on development—whether on its face or through interpretation—is contrary to BLM's statutory authority and stands to violate valid existing lease and contract rights. BLM must remove such proposed provisions.

Section 2361.70 Use Authorizations

Consistent with the theme of the proposed rule, this section removes language specifically recognizing that the Petroleum Reserve Production Act authorizes oil and natural gas exploration and development. While nobody disagrees that leaseholders must obtain permits for their proposed development activities, the proposed additional language allowing the authorized officer to add whatever conditions deemed necessary gives too much authority to BLM while also creating too much discretion for a court to second guess whether BLM was protective enough in any conditions of approval.

BLM must recognize its role in supporting the development of our nation's energy resources, and it must recognize its obligation to existing leaseholders who have a contract with the United States and an expectation and right to reasonably and economically develop their lease rights.

The Proposed Rules Will Disincentivize Future Federal Development

The proposed rule contains significant measures designed at impeding, impairing, and outright blocking oil and gas development within the Petroleum Reserve. The proposed rule would prioritize surface resource protection over development in direct conflict with Congressional directive. Further, the proposed rule appears designed to update a management framework that is appropriately modified through the Integrated Action Plan process.

If BLM insists on updating its regulations for the Petroleum Reserve, it must ensure that any revisions are consistent with statutory authority. As provided, the proposed rule is overbroad, illegal, and lacks facts and analysis required by the Administrative Procedures Act.

The Alliance appreciates the opportunity to provide comments on the proposed rule. Please do not hesitate to contact me should you have any questions regarding the Alliance's comments and concerns.

Sincerely,

Kathleen M. Sgamma
President