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INDEPENDENT PETROLEUM ASSOCIATION OF NEW MEXICO

August 12, 2012

Honorable Kenneth L. Salazar
Secretary of the Interior
Department of the Interior
1849 C Street, N.W.
Washington, D.C. 20240

RE: IPANM's Comments
Proposed Order of the Secretary of the Interior
Oil, Gas and Potash Leasing and Development Within the Designated Potash Area of Eddy and Lea Counties, New Mexico

Dear Mr. Secretary:

Pursuant to 77 F.R. 41442, the Independent Petroleum Association of New Mexico ("IPANM") submits the following comments concerning the proposed Secretarial Order regarding concurrent operations for oil and gas and potash in the designated Potash Area in Eddy and Lea Counties, New Mexico. The proposed Secretarial Order ("Draft Order") was published in 77 Federal Register 41442 on July 13, 2012.

A. **COMPLETE SANDIA STUDY:** It is, and has been, the understanding of IPANM that before the 1986 Order, as defined below, would be revised, the Bureau of Land Management ("BLM") would await completion of Phase II of the study by Sandia National Laboratories ("Sandia") to determine the distance mining could safely be conducted from an oil and gas well bore (the "Sandia Study"). The Joint Industry Technical Committee ("JITC"), of which Sandia is a technical member, has commenced the scientific work recommended by Sandia, and the JITC has not yet completed the work to determine this distance. The Secretary must allow the JITC to complete this study and allow science to drive a change in policy in the designated Potash Area. Federal decision making and establishment of Departmental policy must follow scientific evidence, and it is premature to change policy in the Potash Area without the completion of the Sandia Study. IPANM requests the Secretary to

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withdraw the Draft Order pending completion of the Sandia Study which sets forth the distance between mining operations and oil and gas drilling where the respective operations can safely proceed in relation to one another.

B. <u>DEFACTO WITHDRAWAL</u>: In the 1930's the Secretary withdrew certain lands from entry and leasing for purposes other than potassium. Several years later the Secretary realized the folly of the withdraw decision and reinstated the lands to the public domain and open for entry for other purposes, including oil and gas leasing. The Secretary has issued a series of Orders over the years to deal with concurrent development of potassium and oil and gas resources from the Potash Area, which has grown in size to 497,002.03 acres, more or less. The Draft Order is more akin to a withdrawal than an order providing for concurrent development. IPANM makes this statement because the Draft Order's directive to BLM is to deny APDs in ALL 497,002.03 acres, unless BLM determines one of three exceptions apply (Section 6, Paragraph e (1)). None of the exceptions are mandatory and each provides significant discretion on the part of the Authorized Officer of BLM and permission from the nearest potash lessee. The existing 1986 Order protects only areas known to contain sufficient mineralization of potassium so as to be capable of being mined at a profit. The Draft Order extends protection to the entire area. This is a defacto withdrawal.

The Draft Order is a substantial change in the administration of concurrent development within the Potash Area. The 1986 Order only protects the areas known to contain sufficient potassium mineralization of sufficient grade and thickness to be mined and marketed at a profit (defined therein as "enclave"). The Draft Order extends protection to the entire Potash Area of 497,002.03 acres. Not only is it a departure from the concept of what needs to be protected, it affirmatively denies ALL oil and gas drilling within the Potash Area with three limited exceptions which are set out below. However, none of the limited exceptions provide any measure of practical assurance to a federal oil and gas lessee that it will be able to drill and produce oil and gas resources. Again, the Draft Order appears to be a step toward the policy of the 1930s in withdrawing the acreage from oil and gas exploration and drilling. The Draft Order fails to recognize the importance of continuing BLM's policy in its Resource Management Plan for the Potash Area of multiple use allowing both potash mining and oil and gas development under the existing 1986 Order, which provides for concurrent development. *See* FLPMA Section 103 (c).

C. <u>ENCOURAGE DRILLING</u>: BLM has represented for many years that the Potash Order should be rewritten to provide it with clear instructions in the administration of issuing permits to drill oil and gas wells in the Potash Area, with the thought that the Potash Order, when rewritten, would provide significant drilling opportunities for oil and gas companies. The Draft Order does not accomplish the goal of providing opportunities for more oil and gas drilling in the Potash Area. In fact, the Draft Order states it is the policy "to deny approval of most applications for permits to drill oil and gas wells from surface locations within the Designated Potash Area." Section 6, Paragraph e. (1). This is not going to achieve more oil and gas drilling and production as the exceptions to the policy are limited to Drilling Islands, Barren Areas if drilling will

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not affect active or planned mining in the area, and a single well if both BLM and the nearest potash lessee approve the drilling. We discuss Drilling Islands below. As for the requirement to secure approval from the nearest potash lessee, we point out that the Potash Area is very large and many areas prospective for oil and gas are many miles from the nearest potash mine and nearest potash lease. Giving potash lessees a veto on every application for permit to drill ("APD") is a defacto unlawful delegation of governmental authority. Without the potash company's consent, BLM is instructed by the Draft Order to deny the APD. This policy is not consistent with the stated purpose of fostering more orderly co-development of both resources.

A review of the Draft Order discloses that the process for approving an APD under the Draft Order is unduly and unnecessarily cumbersome. When an APD was submitted under the 1986 Order, the BLM made the determination of whether the APD should be approved or denied under either the enclave policy of the 1986 Order or, if the APD was not in an enclave, whether the APD could be approved under the lease stipulations. In stark contrast to the 1986 Order, the Draft Order requires upon submission of an APD, the BLM will first determine whether to establish a Development Area, and if so, what lands will be included in such Development Area. The BLM will then issue a notice to all oil and gas and potash lessees within the Development Area informing them that future drilling will occur, under most circumstances, from a Barren Area or Drilling Island within the Development Area, and be managed under a unit or communitization agreement. Unit and communitization agreements will be negotiated between lessees. The BLM will thereafter determine whether a specific plan of development is necessary or advisable for a particular Drilling Island, and the BLM will approve an operator or successor operator of a Development Area and/or Drilling Island. The BLM will determine the appropriate location, size and shape of a Development Area, if any as well as the associated Drilling Island. The consideration of all of these issues will include consideration of factors necessary to allow effective extraction of oil and gas resources, applicable and available oil and gas technology, applicable geology so as to minimize the loss of potash ore while considering do-development of both resources, long term exploration and mining plans provided by the potash industry, and whether a Barren Area may be the most appropriate area for a Drilling Island. Finally, BLM is mandated to consider the requirements of the Secretarial Order which include mandatory Buffer Zones and the policy of the order precluding drilling in the entire Potash Area if such drilling would "impact" potash resources in any manner whatsoever, whether or not such resources are commercial. BLM may find it necessary to acquire additional information in order to consider all of the foregoing factors, and the acquisition of such additional information will necessarily result in additional delay.

In order to obtain approval of a proposed location, the oil and gas lessee may find it necessary to establish the existence of a Barren Area by drilling coreholes. With regard to the unitization process, while federal units are voluntary, rather than compulsory, the New Mexico Oil Conservation Division ("OCD") must approve such units. If the parties do not agree to voluntarily participate, the Draft Order must conclude that OCD will

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resolve the matter in a forced pooling action.[1] However, the OCD lacks statutory authority to force unitize for exploratory purposes and IPANM believes the OCD has informed BLM of this fact in a letter dated this month (IPANM does not have a copy of the letter, but in discussions with Ms. Jamie Bailey, the OCD Director, she has advised us that such a letter was sent).

D. UNLAWFUL LEASING RESTRICTION: Section 6, Paragraph c.(3) limits the ability of citizens of the United States to acquire a potassium lease as the bidder must "intend to develop the potash resources ...." This prohibits citizens from securing a potassium lease for investment purposes. This proposed order is not the place to bury a provision that limits the rights of citizens of the United States to bid on, acquire, and assign a potassium lease. The Mineral Leasing Act of 1920 permits any citizen to acquire and hold mineral leases. Any high bidder at a competitive potassium lease sale and who pays the bonus bid must be able to secure a potassium lease unfettered by any constraints. Therefore, this provision should be deleted from the Draft Order.

E. NO INDUSTRY INVOLVEMENT: BLM did not involve IPANM or other industry oil and gas associations such as New Mexico Oil and Gas Association and Permian Basin Petroleum Association in the development of this policy or proposed change in policy. IPANM recognizes BLM has been meeting with a Joint Industry Technical Committee ("JITC") which includes several representatives from oil and gas companies that hold oil and gas leases within the Potash Area. IPANM believes BLM chose the JITC members. Any representations by oil and gas company representatives on the JITC were representations of the individual or of the company they represent and were not and cannot be attributed to any industry association and specifically IPANM. While IPANM supports the comments of the Joint Committee Comments by the oil and gas representatives on the JITC, IPANM must challenge the very basis on which the Draft Order was prepared and address issues the Joint Committee cannot address as it was part of the process.

In the event the Secretary determines to move forward with implementing the Draft Order, notwithstanding IPANM's above comments, IPANM has the following specific comments regarding provisions of the Draft Order.

F. SMALL INDEPENDENT OIL AND GAS COMPANIES NOT CONSIDERED: The Draft Order does not consider the substantial negative impact it will have on the ability of small independent oil and gas companies to explore for, drill and produce oil and gas from their federal oil and gas leases within the Potash Area. The Draft Order essentially prevents smaller companies from the opportunity to develop their resources by the provisions providing for forced unitization, consolidation of

[1] IPANM is aware that the 1986 Order contained mandatory unitization provisions, but those provisions were never applied or enforced. In contrast, IPANM's reading of the documents associated with the proposal of the Draft Order and IPANM's understanding of the JITC discussions concerning the Draft Order leads to the conclusion that the unitization provisions of the Draft Order will be implemented and enforced, thereby adding to the increasingly cumbersome process of obtaining approval of an APD under a new order.

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operatorship, increased bonding and essentially requiring expensive horizontal or deviated well bores to penetrate prospective oil and gas formations from Drill Islands. IPANM encourages the Secretary to consider the impact on small producers and to incorporate changes into the Draft Order that allow small producers to explore for, drill, produce and market their oil and gas resources held under existing federal oil and gas leases. IPANM further asserts that single well, state wide and nation wide bonds are sufficient as the Potash Area does not involve different reclamation or plugging and abandonment expenses as other areas in Southeastern New Mexico. IPANM is concerned the increased bonding requirements is simply to keep small independent producers out of the Potash Area.

G. **LACK OF PUBLIC PARTICIPATION:** IPANM is disturbed by the Secretary's determination to fast track this Draft Order, having only received input from a select group of oil and gas companies. This Draft Order, if implemented, will have an effect on many oil and gas companies, county, municipal and state government, and many individuals whose livelihoods are dependent upon the extraction of both potassium and oil and gas resources. These stakeholders should be given more than 30 days to comment on and should be allowed to participate in meaningful discussions with the Secretary or his designate. IPANM is aware of a number of people, including the Governor of New Mexico and/or the Secretary of Energy, Mineral and Natural Resources Department, who may be requesting an extension of time to provide comments. IPANM encourages the Secretary to grant an extension of 120 or so days to encourage additional comment on this most important issue. There has been no consultation or coordination with the State of New Mexico, Lea County, New Mexico and/or Eddy County, New Mexico. The economic impact to the State should be fully investigated before the Draft Order is finalized. In fact, this Draft Order represents a major federal action that requires full adherence to the National Environmental Policy Act, including appropriate Environmental Impact Statements, Environmental Analysis and the like. Part of the process involves public participation which has been wholly omitted or avoided. Specifically, the Draft Order fails to analyze and provide a detailed statement of how the Draft Order affects the "maintenance and enhancement of long-term productivity" of the Potash Area. *See* NEPA Section 102 (c) (iv). IPANM asserts the Draft Order will significantly affect the ability of oil and gas producers to explore for, drill and produce oil and gas resources from the Potash Area and such decrease in oil and gas activity will have a dramatic adverse economic effect to Eddy and Lea Counties, the State of New Mexico and the United States as a whole, not to mention the people whose employment is directly tied to drilling and development of oil and gas in this part of New Mexico. The Draft Order fails to consider and weigh the long-term benefits of creating a potash preference against the short term (and long-term) benefits of the existing policy of concurrent development of both resources from the Potash Area as required by the Federal Land Policy & Management Act. *See* FLPMA Section 202 (c) (7). In addition, Section 202 (f) requires the Secretary to provide State and local governments, as well as the public, the opportunity to comment upon and participate in the formulation of plans and management of the public lands. No public hearings were held and a 30 day comment period is not participation in the formulation of the Draft Order, particularly by State and local governments. *See* FLPMA Section 103 (d). The Draft Order is contrary to

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the existing Carlsbad Resource Management Plan that recognizes the development of both resources in the Potash Area.

H. <u>PRIOR HISTORY IMPORTANT</u>: The Draft Order must be read in the context of the process and documents which preceded its publication. The Federal Register notice of publication of the Draft Order states "there has been a long history of conflict between the potash and the oil and gas industries." In fact, the Federal Register notice misses the important fact that the lengthy litigation associated with the administration of the Potash Area was commenced by two oil and gas companies against the BLM asserting it had not properly administered concurrent development issues in accordance with the provisions of the order entitled "*Oil, Gas and Potash Leasing and Development Within the Designated Potash Area of Eddy and Lea Counties, New Mexico,*" 51 Fed. Reg. 39,425 (Oct. 28, 1986) ("*1986 Order*"), *corrected*, 52 Fed. Reg. 32,171 (Aug. 26, 1987). This litigation culminated in the issuance of a number of decisions interpreting the 1986 Order and concluding and affirming that BLM had not properly administered concurrent development of oil and gas and potash resources in the Potash Area as follows: *Potash Ass'n. of New Mexico v. U.S. Dep't. of Interior*, No. 08-2260 (10th Cir. March 2, 2010) ("Tenth Circuit Decision"); *Potash Ass'n. of New Mexico v. U.S. Dep't. of Interior*, No. CIV 06-1190, MCA/ACT, Memorandum Opinion and Order, D.N.M. Aug. 29, 2008, "District Court Decision"); *IMC Kalium Carlsbad, Inc.*, 170 IBLA 25 (Sept. 7, 2006) ("IBLA Yates Decision II"); *Yates Petroleum Corp.*, IBLA 92-612, Order, July 7, 2003 ("ALJ Decision"), *Yates Petroleum Corporation,* GFS(MIN) 76, 131 IBLA 230 (1994) ("IBLA Yates Decision I"); *Intrepid Potash-New Mexico, LLC,* 176 IBLA 111 (2008) ("Yates IBLA Decision III"); and *IMC Kalium Carlsbad, Inc. v. Babbitt*, 32 F. Supp. 2d 1264 (D.N.M. 1999), <u>rev'd</u>, *IMC Kalium, Carlsbad, Inc. v. Interior Board of Land Appeals*, 206 F.3d 1003 (10th Cir. 2000). The foregoing decisions establish a significant body of law and facts regarding the proper interpretation of the 1986 Order, BLM's improper application of the 1986 Order, the specific meaning and definitions of terms contained the 1986 Order and terms utilized as a matter of custom and practice in the respective industries, as well as resolving important factual issues relating to the safety of concurrent development of oil and gas and potash resources, the economics of potash production and reserves in the Potash Area, and technology and engineering associated with drilling and production of oil and gas wells in the Potash Area.

1. Sandia Studies: Representatives from both the oil and gas and potash industries as well as the BLM have participated in two studies conducted by Sandia National Laboratories. The first study, "Evaluating the Use of Oil and Gas Well Logs for Potash Reserve Identification in Southeastern New Mexico," August 24, 2009, concluded that oil and gas well logs cannot be utilized for purposes of accurately determining the thickness and grade of potash mineralization in the Potash Area. The second study, "Geomechanical Analyses to Investigate Wellbore/Mine Interactions in the Potash Enclave of Southeastern New Mexico," SAND 1009-4795, August 2009, was incomplete, did not study gas migration, and recognized that further studies were required in order to determine the safe distance between mining and oil and gas operations in the

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Potash Area. The work to determine such safe distances is ongoing and has not been completed. Notwithstanding the fact that such work is ongoing and incomplete, and notwithstanding the fact that there is not a single instance of a safety hazard attributable to oil and gas drilling in the Potash Area,[2] the Draft Order wrongfully and inaccurately *assumes* the existence of a safety hazard associated with concurrent operations for oil and gas and potash in the Potash Area. *See* 77 Federal Register 41443.

2. **Joint Industry Technical Committee:** Prior to 2012, the JITC was formed consisting of representatives from several oil and gas companies, both of the existing potash companies, technical consultants, the BLM and Sandia representatives. The BLM spearheaded the formation of this committee and emphasized that they wanted "new oil and gas people" to participate, indicating that persons who had participated in the litigation from the oil and gas industry would not be welcome to participate in the JITC meetings. The JITC was in the process of defining the parameters of its scientific work when the Secretary interrupted such work in early 2012 to insist that the JITC provide a document that would reflect any accords the two industries could reach as to provisions to be included in a new Secretarial Order, and that such document must be provided by April 2012. The technical consultants did not participate in the JITC process of providing proposed order provisions to the Secretary. BLM added additional oil and gas company representatives (from companies that had not participated in litigation, scientific studies or historical policy discussions) to the JITC that made recommendations to the Secretary. As a result of BLM's earlier insistence on new oil and gas people, the potash industry and BLM sent representatives to the JITC who had a deep institutional knowledge and understanding of the meaning of terms and the significance of the concepts that would be included in the Draft Order, but BLM discouraged oil and gas from utilizing experienced people. The JITC meetings were not open to the public and the meetings were not publicized. The work performed and any agreements reached by the JITC did not involve any oil and gas industry organization such as IPANM and New Mexico Oil and Gas Association although it appears that the Potash Association of New Mexico was represented.

3. **Consensus Document:** Ultimately, following several months of negotiations, the JITC drafted a "Consensus Document" recommending that the 1986 Order remain substantially in place, and that the specific items on which the JITC agreed be included in the new order substantially tracking the 1986 Order. The Consensus Document stated:

> The Committee recognizes that the 1986 Secretarial Order has been the subject of lengthy litigation and interpretation, resulting in language that is understood by all parties. Accordingly, it is the

[2] It is noteworthy that there are 89 wellbores within open mine workings in the Potash Area, and that in each instance, the potash industry deemed concurrent operations safe and encroached on producing oil and gas wells within distances of 100 feet or less.

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> desire of the Committee to retain as much of that clarified language as possible so as to minimize future litigation aimed at interpreting the new Order. With minimal changes to the existing Order, management of the SPA under the revised Order will be facilitated by mutual cooperation between these two industries under the auspices of the local BLM using Instructional Memoranda and other means. Members of the Committee from both industries have pledged their mutual cooperation in support of the local BLM as an immediate priority to develop those means.

In addition, the Consensus Document stated that "in order to preserve our consensus, only the concepts that the Committee recommends to be directly addressed in the new Order will be included in [the] presentation [to the Secretary]. In addition, we will highlight the importance that the Committee places on being given ample opportunity to review drafts of the new Order so that we ensure that our consensus concepts are preserved as the revised Order is crafted." Clearly, it was the intent of the Committee that the 1986 Order be modified **only** to the extent necessary to include the items on which the Committee had reached consensus, and that otherwise, the 1986 Order and the body of law interpreting the 1986 Order would remain in effect.

The Consensus Document specifically recommended only the following additions to the 1986 Order, stating that the proposed additions "represent the entirety of what the Joint Industry Technical Committee recommends for inclusion into a new Secretarial Potash Order for the management of co-development of oil & gas and potash within the Secretarial Potash Area:"

(i) APDs in barren areas and enclaves would continue to be managed and approved consistently with the **1986 Order**. The Consensus Document proposed a new definition of "barren area" as areas "proven to contain potash quality values lower than the BLM's applicable thickness and cutoff grade for commercial potash."

(ii) Oil and gas operators would be given the right to define enclaves and barren areas to allow for APDs to be routinely processed consistently with the provisions of the **1986 Order**, and would also be given access to existing data sufficient to allow the oil and gas operators to classify the potash in a particular area.

(iii) Drill islands would be established consistently with the provisions of the **1986 Order** so as to allow drilling of all new vertical, directional and horizontal wells to support the development of oil and gas resources from an associated Development Area. Development Areas would be established to allow for development of oil and gas resources from drill islands, utilizing unitization and communitization requirements as appropriate. In forming a Development Area,

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the BLM would consider current oil and gas technology in consideration of the areal extent of the Development Area.

(iv) All active potash operators, relevant stakeholders and other interested parties would be given notice of an APD.

(v) All future potash leasing would be limited to those parties whom the BLM determines have an "identifiable, substantial and genuine interest developing the potash resources and who intend to develop the potash resource in accord with the applicable diligence stipulations."

(vi) The JITC would be established with a "long-term role to study how concurrent development of potash and oil and gas can be safely performed in proximity to each other."

(vii) The BLM would select an outside technical institute to act as science advisor to the JITC and to the BLM.

(viii) BLM would be required to update potash resource maps to reflect enclave, indicated, inferred, unknown and barren areas, and that areas where insufficient data exists to classify the potash mineralization be defined as unknown areas.

(ix) Safety buffers of ¼ mile for oil wells and ½ mile for gas wells will not be changed at this time, and specific language will be added to the order to allow BLM to vary the buffers in the future on recommendations from the JITC with input from the science advisor.

IPANM believes the intent of the Consensus Document was to continue to allow drilling as provided by the 1986 Order in barren areas and from drilling islands within properly designated enclaves. In addition to those rights provided to oil and gas lessees under the 1986 Order, the Consensus Document would allow for the creation of drilling islands and associated development areas in enclaves, indicated areas, inferred areas and unknown areas so as to allow for "effective oil and gas development while managing impact on potash." (Consensus Document, definition of Drill Island at page 4). The intent of the Consensus Document was to allow for "more orderly development of both mineral resources throughout the SPA." (Consensus Document at page 3).

I. <u>DEPARTURE FROM THE CONSENSUS DOCUMENT</u>: In contrast to the intent of the JITC as reflected in the Consensus Document, the Draft Order essentially eviscerates the 1986 Order and ignores the Consensus Document in a pro-potash, anti-oil and gas development manner so as to produce three undesirable results as follows:

The Draft Order significantly increases BLM's unfettered and discretionary authority over the Potash Area;

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The Draft Order significantly decreases the likelihood that any APD will be approved anywhere in the Potash Area; and

Through the use of ill-conceived "policy" statements and definitions, the Draft Order completely removes any likelihood that any aggrieved oil and gas operator could successfully challenge the denial of any APD for any proposed location anywhere in the Potash Area.

These issues will be developed in more detail below. It is unfortunate that the Draft Order discourages cooperation between the industries (which has been better the past 5 years than any time prior thereto), technical innovation, and development of much needed domestic oil and gas reserves.

IPANM therefore provides the following specific comments to the Draft Order.

J. <u>POLICY AND PURPOSE OF THE DRAFT ORDER:</u> It is reasonably predictable that BLM will interpret and implement the Draft Order in such a manner as to be more restrictive of oil and gas exploration and development in the Potash Area than is the current practice under the 1986 Order. The Draft Order affirmatively and unequivocally states that it is the "policy of the Department of the Interior to deny approval of most applications for permits to drill oil and gas wells from surface locations within the Designated Potash Area..." [Draft Order Section 6, Paragraph e. (1), p.5]. The 1986 Order limited application of this policy to properly designated enclaves, stating that "it is the policy of the Department of the Interior to deny approval of most applications for permits to drill oil and gas test wells from surface locations **within the potash enclaves** established in accordance with Part D, item 1 of this Order." (Section III, Paragraph E.1 1986 Order) (emphasis added). The Draft Order expands this policy to deny APDs within the *entire* Potash Area. IPANM asserts this stated policy is not in the best interest of the United States and is contrary to the existing record of safe operations by both industries within the Potash Area.

1. Potash Preference: Under the Draft Order, the Department of the Interior is free to determine that development of potash mineralization is a priority over development of oil and gas mineralization in the Potash Area. The negative effect of this anti-oil and gas policy statement is especially exacerbated by the fact that no provision of the Draft Order affirmatively requires or mandates the BLM to form a Development Area or a Drilling Island or approve an APD in any area of the Potash Area (whether or not enclave). BLM can justify its denial on the stated policy to deny APDs in the Potash Area. Essentially, the wording of the policy of the Draft Order would allow the BLM to deny every APD in the Potash Area under the policy and effectively preclude all further drilling in the Potash Area – even in known barren areas. Unlike the language of the 1986 Order, the Draft Order does not affirmatively mandate that any APD be approved. The 1986 Order mandated approval of APDs in barren areas. The 1986 Order mandated approval of APDs from drill islands in enclaves. The 1986 Order required

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approval of APDs under the lease stipulations when the drilling of the well would not unduly waste potash or cause a hazard to or unduly interfere with mining operations being conducted for the extraction of potash deposits. The Draft Order does not mandate the approval of any APDs, and the policy statement would support the denial of an APD in any area, including barren and unknown areas, all of which represents a radical departure from the provisions and hard-fought and hard-won protections of the 1986 Order.

2. **Purpose Must be Changed:** Therefore, the language utilized in the "purpose" of the Draft Order must be addressed. Section 1 sets the tone for the entire order, and the language contains the non-specific term "fostering" as applied to concurrent development of both resources. The Draft Order states:

> This Order revises and supersedes the Order of the Secretary of the Interior dated October 28, 1986 (51 FR 39425), and provides *procedures and guidelines* for *fostering* more orderly co-development of oil and gas and potash deposits owned by the United States within the Designated Potash Area." (Emphasis added)

In contrast, the language of the 1986 Order more strongly states: "This order revises the rules for concurrent operations in prospecting for, development and production of oil and gas and potash deposits owned by the United States within the designated Potash Area..." This quoted language became most important in the presentation of the oil and gas case in the various *Yates Petroleum* cases before the ALJ and the IBLA, as the parties repeatedly argued that the purpose set forth in the 1986 Order reflected an intention and an underlying policy determination by the Secretary to allow for concurrent development of both oil and gas and potash and that all of the provisions of the 1986 Order should be interpreted consistently with and in the context of the purpose of concurrent development of both resources.

In contrast to the language of the 1986 Order and the intent of the JITC as reflected in the Consensus Document, the language of the proposed order is consistent with the notion that virtually unfettered discretion resides in the BLM, which is not mandated to do anything, and which can, but need not, allow for concurrent operations anywhere within the Potash Area. It is recommended that the purpose be redrafted to be consistent with the language of the 1986 Order, which mandated, rather than simply fostered, concurrent development.

K. **DEFINITIONS:** IPANM requests the following definitions in the Draft Order be changed or omitted as follows:

1. **Section 4. (d). Co-Development:** This definition is completely unnecessary and it is damaging. The comments contained in the Federal Register

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135 F.R. 41433 announcing the publication of the Draft Order stated: "the draft Secretary's Order is built on a foundation of 'co-development.' This new term is used to describe concurrent development of potash and oil and gas from the Designated Potash Area through a cooperative effort between the industries under this draft Secretary's Order."

The import of the addition of the definition of "co-development" is that "co-development" is intended therefore to define "concurrent development" as utilized in the 1986 Order. There is a body of law interpreting the meaning of "concurrent development" under the 1986 Order, and that body of law is consistent with the intent of the JITC as reflected in the Consensus Document, rejecting any notion of staged development. The ALJ Decision rejected both the "staged development" concept and the notion that the Potash Area was in effect a potash reserve requiring the protection of all potash in perpetuity until it is developed, and instead, read and applied the term "concurrent development" as it is plainly meant—namely, simultaneous development of both resources. The definition of "co-development" as set forth in the Draft Order would completely modify the definition of concurrent development as interpreted under the 1986 Order and would allow BLM to establish a potash reserve in the entirety of the Designated Potash Area. It is significant that the comments in the Federal Register state the term "co-development" is the "foundation" of the new Order. If BLM views the definition as foundational to the Order, the term becomes the embodiment of the Secretarial policy contained in the Order.

Moreover, the definition of "co-development" states that "co-development is a cooperative effort between the industries under the guidelines of this order, as regulated by the BLM, to support the production of potash and oil and gas from the lands within the Designated Potash Area." The definition is inconsistent with remaining provisions of the draft order because the Draft Order eliminates the consensus provision that would allow the drilling of a well as "prescribed by prior agreement of oil and gas lessees and the potash lessees in a written contract." *See,* Draft Order, Section 6.e.(1)(d), p. 5. Accordingly, while the definition gives lip service to cooperative efforts between the industries, it removes any provision that gives actual effect to such cooperation.

If the word "co-development" must be defined, IPANM requests the definition is "the concurrent development of commercial oil and gas and potash resources with the Designated Potash Area as a result of a cooperative effort between the potash and oil and gas industries, as regulated by the BLM, to support production of both potash and oil and gas from the same lands simultaneously."

2. Section 4 (f) Development area: The definition of "Development Area" completely and unacceptably changes the entire purpose and focus of the Consensus Document. The Consensus Document defined a development area as an area established by the BLM, "in consideration of appropriate current oil and

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gas technology such that wells can be drilled from a Drilling Island capable of effectively extracting oil and gas resources while *managing* the impact on *commercial* potash resources." [Emphasis added]. The Draft Order substitutes the word "limiting" for the word "managing" and completely eliminates the word "commercial." The effect of the changes is to place BLM in the role of **limiting**, rather than managing, the effect of oil and gas development on **all potassium mineralization,** whether or not commercial. This change completely alters the entire philosophy of administration of the Potash Area, as it essentially provides that the thrust of the order is to limit **any** oil and gas drilling that has **any** effect on **any** potash, whether or not that potash is commercial or would ever be produced. By tweaking the two words set forth, the Draft Order eviscerates the intent of the JITC providing for concurrent development of both resources. The definition is inconsistent with the enclave provision of 1986 Order and the body of law that the JITC says it wants to preserve. The 1986 Order stated that the policy of the Department was to deny approval of most APDs for test wells within properly designated enclaves (commercial potash). The 1986 Order allowed for drilling outside of enclaves and their associated buffer zones, and the body of law developed around the 1986 Order plainly so states. This new definition, which is inconsistent with the Consensus Document, would eliminate the enclave policy and say that any oil and gas drilling anywhere in the Potash area that impacts any potash deposits whatsoever can be precluded. If this word must be defined, IPANM requests the order use the definition be as proposed by the Consensus Document.

3. **Section 4 (g) Drilling Island:** The definition of "drilling island" eliminates a provision originally included by the Consensus Document that underscored the commitment to development of both oil and gas and potash. The consensus document contained language that said the purpose of a Drilling Island is to allow drilling of vertical, directional or horizontal wells "to support the development of oil and gas resources from the Development Area." Consistently with the other modifications to the document, the Draft Order removes the quoted language, thus underscoring a policy determination by the Secretary to allow no drilling within the Potash Area. The Consensus Document contained additional language underscoring the notion that the purpose of the document was to allow BLM to "manage" impact on potash associated with oil and gas development. The Consensus Document stated in that regard: "the size and shape of a Drill Island defines the areal extent of wellbore penetrations of the potash formations and is to be as small as practical to allow effective oil & gas development while *managing impact on potash.*" [emphasis added] The Preliminary Draft and comments by the Committee did not carry this language forward, but IPANM requests that it be added into the definition of Drill Island for emphasis.

4. **Section 4(h) and (i) Inferred and Indicated Resources:** Indicated and Inferred Resources were not defined terms in the 1986 Order, or in the Consensus Document, and there is no need to define these terms at all. The terms are pertinent only to the task of properly mapping potash resources, and for

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those purposes, the terms must be defined as they are customarily defined by the Society of Mining Engineers; otherwise, the Potash Area will be subject to the anomaly of being characterized by inferiorly defined mineralization, and the denial of concurrent development of oil and gas based on such inferior definitions. The terms are defined in the Society of Mining Engineers' Handbook as a matter of custom and practice in the industry, and the administrative and judicial decisions that the Committee wants to preserve have consistently adopted, referred to and relied upon the SME Handbook definitions of reserves and resources. These SME Handbook definitions should not be modified from the SME Handbook definitions.

Even more egregious, the definition of "inferred resources" as contained in the draft order allows well logs to be used to define inferred resources. Yates, BOPCO, Devon and OXY spent substantial resources to establish that well logs are not reliable for any purpose in the determination of thickness and grade of potash mineralization, and Sandia agreed when it issued its determinations following the Sandia E-Log Study. The use of well logs in defining inferred resources would, in one fell swoop, undo all of the Sandia Study work and allow the potash industry to expand inferred resources in a manner that is not only not scientifically supported, but in a manner that is absolutely contraindicated by the science—(thus rendering the statement at Section 7.d regarding reliance on science essentially meaningless drivel.)

L. <u>GENERAL PROVISIONS</u>: IPANM requests the Secretary to revise the Draft Order to address the following general provisions.

1. Section 6.d Delineation of Resource Areas: In the introductory paragraph to Section 6.d, ALL potash lessees must submit resource maps of its potash mineralization. The Secretary cannot compel a fee lessee to submit to federal jurisdiction in this regard. The section should be amended to say, "Each federal potash lessee must file annually..... with respect to the Federal, state and fee potash leases which are then held by said federal potash lessee, ..."

2. Section 6.e.1.d Drilling from a Development Area: This provision on page 5 of the Draft Order must be read in conjunction with the new definition of Development Area discussed above. The original definition of Development Area contained in the Consensus Document defined Development Areas in pertinent part as "areas within the Secretarial Potash Area established in consideration of appropriate current oil and gas technology such that wells can be drilled from a Drill Island capable of effectively extracting oil & gas resources while *managing* the impact on *commercial* potash resources." [Emphasis Added.] Thus it appears to IPANM the JITC contemplated that Development Areas could be allowed throughout the Potash Area, including in those areas where commercial potash existed, and that concurrent operations would be effectively managed by the establishment of Development Areas and Drilling Islands. The

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Draft Order changed the definition of Development Area to require BLM to *limit* rather than manage the impact of oil and gas operations on *all* potash resources. The Consensus Document would have allowed for Development Areas to be located throughout the Potash Area regardless of the thickness and grade or commerciality of the potash mineralization underlying a Development Area. While purporting to distinguish between grades and thicknesses of potash mineralization, the Draft Order does not recognize such distinctions as relevant or pertinent for purposes of allowing concurrent development.

IPANM believes the intent of the JITC was that the new order would continue to allow drilling as authorized by the 1986 Order and allow drilling through the new mechanism of Development Areas and Drilling Islands. The Draft Order does not accomplish this purpose because it does not mandate that the BLM approve any Development Areas or Drilling Islands, and indeed, it establishes a policy that APDs are to be denied throughout the Potash Area whenever they impact any potash mineralization of any nature and in any manner whatsoever. The Draft Order should be amended to reflect the JITC intent in this regard.

3. **Section 6.e.1.d Drilling from a Drilling Island or Single Well Site by Agreement:** The Consensus Document allows for the approval of agreed upon drilling from either a drilling island or a single well site. The BLM has now removed the agreement provision and the Drilling Island provision. The import of this change is that the BLM will not honor agreements between the potash and oil and gas lessee, but will allow a joint recommendation for a single well site, which will only be approved in the discretion of the BLM. The BLM has taken off the table entirely any option that the potash lessee and oil and gas lessee could agree to a Drilling Island. As a practical matter the Draft Order will have the effect of potash lessees never agreeing to drilling of any well because they have nothing to gain by cooperation. Any existing incentive to cooperate has been gutted by the Draft Order purpose to deny all APDs in the Potash Area.

4. **Section 6.e.(2)(d)(i) Development Area Configurations:** This section authorizes BLM to determine the shape and size of a Development Area, which in and of itself is not objectionable, but the Draft Order changed the purpose of such determinations by inserting the now familiar term "limiting" in place of "managing" and deleted the term "commercial". The provision now reads: "The appropriate locations, shape and size of a Development Area and associated Drilling Island to allow effective extraction of oil and gas resources while limiting the impact on potash resources." Once again, the JITC apparently believed that the substantive limitations on the designation of Development Areas would be in those areas containing commercial potash, and that even in such areas, Development Areas would be allowed, but they would be configured in such a manner as to manage the impact of oil and gas operations on commercial potash. It appears to IPANM that the intent of the Consensus Document was clearly not to manage the impact of oil and gas operations on marginal or non-

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commercial potash resources. This provision would now allow BLM to configure a Development Area so as to *limit* the impact of oil and gas operations in Indicated, Inferred and Unknown Areas, and even in Barren Areas if any potash mineralization is affected thereby. It is suggested that paragraph (i) be re-written to state:

> The appropriate location, shape and size of a Development Area and associated Drilling Island to allow for the maximum ultimate recovery of oil and gas resources as required by 43 C.F.R. Section 3160.0-5, while managing the impact on commercial potash resources.

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5. **Section 6.e(3) Buffer Zones:** The Consensus Document and subsequent comments provided by the JITC recognize that the dimensions of a buffer zone may be variable. The Draft Order attempts to establish buffer zones with less flexibility. A significant body of law on the proper interpretation and application of the 1986 Order requires safety determinations to be made on a well by well basis. In addition, this provision essentially codifies the buffer zone provision of the LMR provision of the State Oil Conservation Division Rule R-111-P in a manner contrary to the body of law which held that denials of APDs under the 1986 Order could not be predicated on the existence of an LMR.

Numerous oil and gas wells have been mined through as potash mines advanced into areas of oil and gas production. The IBLA was submitted a photograph of a miner standing beside a wellbore in a potash mine. There has not been any incident of gas leaking into a mine as a result of oil and gas wells, even in areas where mining has proceeded through existing wells. The Draft Order ignores this fact.

In addition, the Draft Order takes authority for configuring Buffer Zones from the State and local offices of the BLM and places it squarely in the sole discretion of the Director of the BLM. The effect of placing the discretion in the Director is that Buffer Zones and their dimensions are established as a matter of policy and cannot be challenged or changed without action from the Director, and Buffer Zones cannot be adjusted on a well by well basis because the Director will not be involved in the day to day minutia. The Draft Order does say that the Authorized Officer may adjust the Buffer Zones in an individual case "when the facts and circumstances demonstrate that such adjustment would enhance conservation and would not compromise safety." The problem with this language is that it would allow the AO to adjust Buffer Zones in either direction; thus the AO could make them larger in the interest of "conservation" or "safety". Conservation is an undefined term, and this paragraph grants the AO unlimited authority to create very large Buffer Zones if he had a conservation whim, or if he decided to rely on the faulty Sandia Gas Migration Study conclusion that a Buffer Zone of 3/4ths mile was appropriate for all circumstances and wells. If the

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provision allowing the AO to change Buffer Zones stays in the Draft Order, it should read:

> However, the Authorized Officer may adjust the Buffer Zones in an individual case, when the facts and circumstances demonstrate that such adjustment would increase or promote development of both resources consistently with the provisions of this Order and would not constitute a hazard to or interfere with mining operations being conducted for the extraction of potash deposits.

IPANM requests that the provision allowing the AO to vary the Buffer Zones be eliminated entirely because it vests virtually unlimited discretion in the AO with essentially no standards or guidelines. Moreover, it is strongly recommended that the policy implications of this provision in the Draft Order be eliminated completely. Accordingly, the recommended language should read as proposed in the Preliminary Draft: "Current buffer zones are ¼ mile for oil wells and ½ mile for gas wells. These offsets will be considered Buffer Zones and will stay in effect until such time as revised distances are adopted by the BLM State Director or other local or state BLM official as delegated. The State Director will base revised Buffer Zones on science, engineering and new technology and will consider comments and reports from the JITC and other interested parties in adopting any revisions."

6. **Section 8(c) Access to Data:** The method by which the potash industry and the BLM prevented federal oil and gas lessees from effectively challenging BLM decisions under the 1986 Order was to maintain as confidential all potash information other than by providing the bare minimum required by the 1986 Order. Not until there was an IBLA Order which required the potash industry and the BLM to provide documents did Yates and Pogo have the supporting documentation to establish the full extent to which the BLM and the potash industry relied on faulty information, economics and science to maintain a strangle hold on drilling in the Potash Area. The Draft Order requires oil and gas lessees to affirmatively establish the absence of commercial potash in order to prevail upon the BLM to establish a Barren Area (in the unlikely event that the BLM may ever be inclined to allow drilling in Barren Areas.) In order to establish the absence of commercial potash, it is necessary to have economic thickness and grade cutoff information from BLM, and it is necessary to have surrounding corehole information sufficient to allow an area to be properly delineated as "barren" (i.e., 3 coreholes within a mile and one-half). The potash industry has been completely unwilling to provide such information historically, because it allowed the oil and gas industry to challenge their designations of enclaves. The Consensus Document would have required the necessary exchange of information, but the Draft Order eliminates that requirement.

The Consensus Document states:

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Should oil and gas operators desire to attempt to acquire adequate data to establish Barren areas in any part of the SPA not currently established as such by sufficient core data, an option will be established in the new Order for oil and gas operators to design and execute a core acquisition plan to establish the area as Enclave of Barren, the Order will specify 1) that this data acquisition option will include sufficient access to existing core data to design the data acquisition plan, 2) that reasonable timeframes will be established to ensure effectiveness of the option and 3) cost-sharing and data management protocols will be established by the local BLM.

The Draft Order allows the BLM to maintain as secret all core data that will be utilized in establishing Barren Areas, if any, and does not require the potash operator to provide such information. Moreover, the provision does not require disclosure of economic thickness and grade information. The early draft of the present Draft Order required BLM to provide the information, and the Draft Order no longer requires the BLM to provide the information, but "encourages" the owner of record to provide the information. There is no requirement that such information be disclosed, thus effectively eviscerating the ability of the oil and gas lessee to acquire the information necessary to fulfill its duty to establish a Barren Area. The Barren Area provision of the Draft Order is effectively rendered meaningless.

If the intention of the Draft Order is to truly "foster" concurrent operations, access to information must be required. Concurrent operations can work only when there is a good faith exchange of information between the two industries. Only with such information can operations be reasonably and responsibly planned so as to avoid interference with the operations of the other lessee. IPANM requests the provision be re-written so as to require exchange of such economic information under appropriate confidentiality agreements that would allow for a determination of whether an area is properly classified as an enclave, barren, indicated or inferred area.

CONCLUSION

It is premature for the Secretary to revise the 1986 Order as the Sandia Study has not delineated the safe distance the respective oil and gas and potash operations may safely proceed in relation to one another. The Draft Order does not provide simplified instructions that allow BLM to approve more oil and gas APDs within the Potash Area. IPANM believes it is critical to the United States and the State of New Mexico to secure additional production of oil and gas resources from the Potash Area as it contains significant proven domestic oil and gas reserves. The Draft Order essentially withdraws the Potash Area from oil and gas leasing, exploration and drilling. It is does not encourage oil and gas development. We believe any new order should encourage and allow increased access to oil and gas underlying enclaves, and to provide certainty to the

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oil and gas lessees about what will be required and allowed in order to develop and produce oil and gas leases within the Potash Area. The Draft Order does not accomplish this desired aim, and instead gives absolute and unfettered discretion to the BLM to deny any APD in the Potash Area for any reason whatsoever, if the APD can be said to impact any potash mineralization whatsoever, whether or not that potash mineralization is commercial. The Order does not require the BLM to establish Development Areas. The Order does not require the BLM to establish Drilling Islands. The Order does not require the BLM to establish Barren Areas. The only requirement of this Draft Order is to require the BLM to *limit* the impact of oil and gas operations on *all* potash mineralization of any thickness and quality whatsoever, without regard to the commerciality of such mineralization. This Draft Order exhibits an extreme and scientifically unsupportable bias against the oil and gas industry and oil and gas operations on federal lands within the designated area. The rush to get the Draft Order finalized has avoided critical and necessary input from the State of New Mexico, Eddy and Lea Counties, and affected citizens and stakeholders, save and except a handpicked select group. Finally, the order creates a monopoly on who may bid on and hold potassium leases. This is in direct conflict with the Mineral Leasing Act of 1920, leasing regulations and anti-trust laws.

Respectfully Submitted,
Independent Petroleum Association of New Mexico

Greg Nibert

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