

**COMMENTS OF NEW MEXICO OIL CONSERVATION DIVISION ON PROPOSED
ORDER OF THE SECRETARY OF THE INTERIOR**
Issued July 12, 2012

Effect of BLM's Designation of a "Development Area" on Included Non-Federal Lands

The most problematic area of the proposed Secretarial Order is Paragraph 6.e.(2) concerning "Development Areas." Subparagraph (2)(a) states that a Development Area "may include . . . non Federal lands." Subparagraph (2)(b) imposes two sweeping restrictions on development within a Development Area: (1) that drilling must occur in Barren Area or Drilling Island "in most cases," and (2) that it must be pursuant to a unit agreement or communitization agreement.

Read literally, these provisions indicate that the Department of the Interior (DOI) is proposing to prohibit the owners of the mineral fee or leasehold interests in non-federal lands that it decides to include in a Development Area from developing the oil and gas resources underlying their lands except in accordance with the drilling restrictions and unitization requirements of Subparagraph 6.e.(2)(b), even if drilling on the uncommitted tracts is authorized by State authority. It is unclear whether DOI actually intends to impose these restrictions on non-federal tracts not voluntarily committed to a federal unit, and, if that is the intent, whether DOI has that authority.

Intent of the Order

There are at least two reasons to suppose, notwithstanding the literal language of the proposed Order, the DOI does not intend to impose development restrictions on uncommitted, non-federal lands. The first reason is found in the provisions of Sections 1 and 3 of the proposed order, as follows:

Section 1 Purpose and effect. This Order . . . provides procedures and guidelines for fostering more orderly co-development of oil and gas and potash deposits *owned by the United States* [emphasis added].

Section 2 Order Revised and Superseded. . . . [T]he following provisions will apply to concurrent operations in prospecting for, developing, and producing oil and gas and potash deposits *owned by the United States* [emphasis added].

The second reason for concluding that these restrictions are not intended to apply to uncommitted, non-federal lands is that the existing practice with regard to formation of exploratory federal units is to exclude such tracts. Exclusion of such lands is not specifically mandated by existing BLM rules concerning federal units codified at 43 CFR 3180 (rules referenced in Subparagraph 6.e.(2)(b) of the proposed order), but is consistent with established practice.

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Authority of DOI

Congress probably has Constitutional power, under the “property of the United States” clause and the supremacy clause, to limit development of State or private lands in proximity to federal lands where necessary and proper for the protection of federal lands. However, agency regulations only preempt applicable State law if Congress has authorized the agency to adopt rules relating to the subject matter and Congressional intent to preempt is stated or can be inferred. It would seem to be a stretch to find authority to regulate use of non-federal lands in the Mineral Leasing Act. Whether such authority may be found in or inferred from the Federal Land Management Policy Act (the other statutory source of authority cited in the proposed order) has not been investigated for the preparation of this memorandum.

Of course, another possible interpretation of the proposed order is that it would prohibit a lessee who holds federal leases within a Development Area from developing those federal leases unless it secures commitment of included non-federal lands. DOI doubtless has the authority to impose such a requirement if permitted by applicable lease stipulations. In New Mexico, however, since there is no compulsory process for including lands in an exploratory unit, [See NMSA 1978 Section 70-2-17, as amended, limiting compulsory pooling to a single spacing or proration unit, and NMSA 1978, Section 70-7-1 (the Statutory Unitization Act), expressly excluding “what the industry understands as exploratory units”], this would make the federal lessee’s ability to develop its federal leases dependent upon its ability to secure voluntary commitment of included non-federal lands.

Assuming DOI has authority to limit independent development of adjacent, non-federal lands, it is not clear what enforcement mechanisms are available to it if the New Mexico Oil Conservation Division (NMOCD) permits such independent development. NMOCD is not obligated by New Mexico law to deny an application for permit to drill (APD) on State or private land because the tract has been included in a federally designated Development Area. Unless those lands are also within a potash lessee’s designated “life of mine reserves” (LMR), or NMOCD otherwise makes its own factual determination that granting the APD would cause undue waste of potash, NMOCD is probably not even authorized to deny an APD for that reason.

Because DOI’s authority to regulate development of uncommitted, non-federal lands is doubtful, it would seem to be especially important that DOI make its intent clear in the final Order as to whether or not it is attempting to control development of such lands, and, if so, how that control will be implemented.

Potential for Conflict between DOI and NMOCD Regulatory Frameworks

NMOCD’s Rule 111-P generally prohibits oil and gas drilling within, or within a buffer zone surrounding, areas designated by a potash lessee as LMR, without the permission of the potash lessee. NMOCD Order R-111-P, Ordering Paragraph G.3. However, OCD reserves the right to make exceptions to this requirement. NMOCD Order R-111-P, Finding Paragraph (20).

The proposed order [Subparagraph 6.g.(5)(b)] provides that a *federal* potash lessees may protest to NMOCD applications for permits to drill oil and gas wells on *federal* lands, but that “BLM will exercise its prerogative to make the final decision about whether to approve the drilling of any proposed well on a federal oil and gas lease.” This provision is problematic in several respects.

This provision expressly applies only to APDs for wells on federal lands, so it does not affect OCD’s processing of APDs on non-federal lands, even those where drilling would appear to be limited or precluded by Subparagph 6.e(2)(b) discussed above.

Since such APDs on federal lands are filed initially with BLM, any protest before NMOCD would occur only after BLM had approved the APD. In any event, no issue would be presented by BLM’s denial of an APD that NMOCD might approve, because a BLM-approved APD is indisputably necessary for drilling on or into federal lands.

The problematic area would be NMOCD denial of a BLM-approved APD. Potash lessee protests of proposed oil or gas wells on federal lands could involve two distinct situations; (1) where all of the potentially affected potash deposits are also on federal land, or (2) where there is a potential for waste of State-owned or privately owned potash deposits.

In the first situation, where all of the potentially affected deposits of both minerals are on federal land, it might well be preferable for both NMOCD and the industries if USDOI would simply pre-empt the State regulatory plan. The proposed order is designed to implement a federal plan for protecting the respective rights of federal lessees of both minerals and conserving federally owned resources. The plan is different from that mandated under R-111-P. The federal plan does not involve consideration of LMR, and it defines a buffer zone as only a zone measured from mine workings [Proposed order Paragraph 4.c(1)], whereas Order R-111-P also requires consideration of buffer zones measured from LMR boundaries. These two regulatory plans are far from being entirely compatible. NMOCD recognizes that BLM may find NMOCD participation useful because of NMOCD’s established hearing process, and NMOCD would like to cooperate. However, NMOCD can conduct hearings and make judgments only in accordance with its controlling statute and adopted rules. If the proposed order is adopted with the existing provisions that allow potash owners to challenge federal APDs before NMOCD even where the potash to be protected is on federal lands, NMOCD will need to consider adopting new rules to co-ordinate its regulatory scheme with BLM’s in such cases.

Different considerations are involved where the potash rights to be protected relate to deposits located on State-owned or privately owned lands. BLM’s mission does not include the prevention of waste of State-owned or privately owned deposits of oil and gas or potash, and its authority to pre-empt State laws and rules designed to protect those rights is questionable. Accordingly, the proposed order properly preserves the right of potash owners to challenge federal APDs based on potential waste of State or privately owned potash deposits. In such situations the proposed order’s provision reserving the “final say” to BLM may not be appropriate. *See generally, California Coastal Com'n v. Granite Rock Co.*, 480 US 572 NMOCD understands why USDOI would likely be reluctant to omit or modify that assertion. If,

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however, a situation arises involving conflicting determinations by State and federal authority that cannot be otherwise adjusted, it may present a question only a federal court can resolve.

Respectfully submitted,

NEW MEXICO OIL CONSERVATION DIVISION



Jami Bailey
Director

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