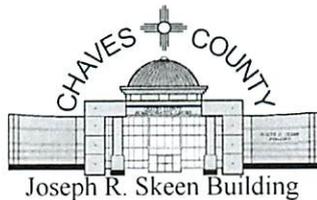


COUNTY MANAGER

Stanton L. Riggs
PO Box 1817
Roswell, NM 88202-1817
575-624-6602
FAX 575-624-6631
Email: sriggs@co.chaves.nm.us



COMMISSIONERS

James W. Duffey · District 1
Kim Chesser · District 2
Kyle D. “Smiley” Wooton · District 3
Richard C. Taylor · District 4
Greg Nibert · District 5

August 29, 2012

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

RE: Chaves County’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, Chaves County, New Mexico (“County”) 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. The comment period was extended to August 31, 2012, as announced by letter from the Bureau of Land Management, New Mexico State Office dated August 16, 2012. The County appreciates the opportunity to provide the following comments which would not have been possible without the granting of the extension.

A. COORDINATION: Before the 1986 Order, as defined below, is revised, the Secretary of the Interior and/or the Bureau of Land Management (“BLM”) are required to coordinate with local governments impacted by the proposed rule. The County is such an entity. The Federal Land Policy and Management Act (“FLPMA”) requires federal land use planning, including the Draft Order, to be coordinated with State and local governments. FLPMA Section 202 (c) (9). The Draft Order was not only published without public meetings and involvement, it was published without any coordination with the State of New Mexico, Chaves, Eddy and/or Lea Counties. The Draft Order if implemented will have significant ramifications for the State and local governments and a significant impact on non federal lands in and around the Potash Area. FLPMA requires the Secretary to make his plans consistent with State and local plans to the maximum extent, consistent with FLPMA. The Secretary’s failure to coordinate and to review BLM resource management plans, county land use plans, and the State’s need for oil and gas

revenue must require the Secretary to abandon the Draft Order and not allow it to go into effect, at least until these deficiencies are addressed through meaningful public involvement, as discussed below, and local coordination. So that our intent is clear, Chaves County demands that the Secretary coordinate with it prior to finalizing the Draft Order.

B. LACK OF PUBLIC PARTICIPATION: The County 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. The Secretary has not held any public meetings or hearings on the Draft Order. Such meetings should have been held in at least Carlsbad and Hobbs to secure appropriate public input into the need for the significant revisions to the rules providing for concurrent development of both potassium and oil and gas resources from the designated potash area. *See* FLPMA Section 103 (d). 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. There has been no consultation or coordination with the County, the State of New Mexico, or our sister counties, Lea County 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). 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 Chaves, 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 45 day (originally 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 the existing Carlsbad Resource Management Plan that recognizes the development of both resources in the Potash Area.

C. DEFACTO WITHDRAWAL: 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. The County points out that 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 and will reduce the number of wells drilled resulting in adverse consequences to the County and its citizens.

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). The Draft Order violates Section 1714 of FLPMA as the Secretary has not followed the withdrawal procedures set forth therein and considered the "the economic impact of the change in use on individuals, local communities, and the Nation." FLPMA Section 204 (c) (2).

D. STATE AND COUNTIES NEED MORE DRILLING: BLM has represented for many years in meetings in Roswell and Carlsbad 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 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.

The Secretary should complete Phase II of the study by Sandia National Laboratories (“Sandia”) before revising the 1986 Order. Phase II of the Sandia Study should 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. The County requests the Secretary to 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.

A review of the Draft Order discloses that the process for approving an APD under the Draft Order is unduly and unnecessarily cumbersome. 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. 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. BLM will thereafter determine whether a specific plan of development is necessary or advisable for a particular Drilling Island, and BLM will approve an operator or successor operator of a Development Area and/or Drilling Island. 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 co-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 resolve the matter in a

forced pooling action.¹ However, the OCD lacks statutory authority to force unitize for exploratory purposes.

E. 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, several of which are headquartered in Chaves County, 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 operatorship, increased bonding and essentially requiring expensive horizontal or deviated well bores to penetrate prospective oil and gas formations from Drill Islands. The Secretary should 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.

F. POLICY AND PURPOSE: 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. 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.

¹ The County is aware that the 1986 Order contained mandatory unitization provisions, but those provisions were never applied or enforced. In contrast, the County’s reading of the documents associated with the proposal of the Draft Order and the County’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.

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 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.

G. DEFINITIONS: The County 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 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, the County 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 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, the County 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 the County 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 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.)

H. GENERAL PROVISIONS: The County 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 THE COUNTY 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 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.

It appears 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 it was not the intent of the Consensus Document to manage the impact of oil and gas operations on marginal or non-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.

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 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.

The provision allowing the AO to vary the Buffer Zones should 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 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:

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 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. The provision should 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

Chaves County demands coordination. The County 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 does not encourage oil and gas development. Any new order should encourage and allow increased access to oil and gas underlying enclaves, and to provide certainty to the 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. 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 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, Chaves, Eddy and Lea Counties, and affected citizens and stakeholders, save and except a handpicked select group.

Respectfully Submitted,
County of Chaves, State of New Mexico

A handwritten signature in dark ink, reading "Kyle D. Smiley Wooton". The signature is written in a cursive, flowing style.

Kyle D. Smiley Wooton,
Chairman of the Board of Commissioners