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## YATES PETROLEUM CORPORATION'S COMMENTS

### DRAFT ORDER OF THE SECRETARY OF THE INTERIOR OIL AND GAS AND POTASH DEVELOPMENT WITHIN THE DESIGNATED POTASH AREA, EDDY AND LEA COUNTIES, NEW MEXICO

<http://www.blm.gov/nm/st/en/info/potash.html>

AUGUST 10, 2012

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August 10, 2012

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Re: 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, Yates Petroleum Corporation submits the following comments concerning the proposed Secretarial Order, ("Draft Order"), published on July 12, 2012 at <http://www.blm.gov/nm/st/en/info/potash.html>, purporting to provide the rules for concurrent development of oil and gas and potash in the designated Potash Area in Eddy and Lea Counties, New Mexico. Yates has been and continues to be a member of the Joint Industry Technical Committee ("JITC") which was formed to engage in field studies to determine the safe distance between potash mining operations and oil and gas operations so as to allow for certainty and increased oil and gas and potash development in the Potash Area. It is important to point out that the formation of the JITC was a breakthrough of significant proportions, because for decades, the oil and gas industry, and Yates specifically, were constrained to protect their lease rights by challenging BLM's improper implementation and application of the 1986 Order in favor of the potash industry. The potash industry often intervened in these challenges, and as a result, a condition of non cooperation and adversarial relationships existed with the oil and gas industry on one side and the BLM and the potash industry on the other side.

Following decades of litigation in which the oil and gas industry's factual, scientific, technical, economic and legal assertions were largely vindicated, the parties came together in a deliberate and thoughtful effort to resolve the remaining scientific and technical issues which the litigation had not resolved. This new spirit of cooperation was motivated by a number of factors, including the technological advances in drilling, coupled with the interest of the potash industry in obtaining approval of its H.B. In Situ Mine project, and the publication of a Sandia safety study which was admittedly incomplete, but which, if accepted would have impaired both potash and oil and gas operations in the Potash Area, and the general weariness of litigation, the parties were finally able to come together in a new spirit of cooperation to do the important scientific

and technical work necessary to establish the safe parameters of concurrent development oil and gas and potash in the Potash Area. Yates continues to support the scientific and technical work of the JITC.

Yates opposes the process by which the Draft Order was published. In January 2012, you told the JITC that you intended to write a new Secretarial Order and you challenged the JITC with a goal of outlining a new order. The JITC accepted your challenge, and by April the JITC had prepared a Consensus Document encompassing the accords reached by the JITC. Yates specifically supports the Consensus Document presented to you by the JITC, and asserts that the proposed Secretarial Order unacceptably varies from the Consensus Document, as well as the provisions of the 1986 Order and the body of law interpreting and implementing the 1986 Order which the Consensus Document specifically sought to support and preserve. Yates' comments herein are submitted in recognition of the fact that any order is ultimately a legal document and that the terms and provisions of such document must be interpreted and applied in light of accepted legal principles. If you elect to promulgate an unnecessary order at this time, Yates asserts that such order must adopt the specific and agreed upon provisions of the Consensus Document and implement the intentions stated therein.

Yates asserts that the promulgation of any order is premature at this time and that the Draft Order is not scientifically or technologically based or supportable. Yates respectfully urges you to withdraw the Draft Order and to allow the JITC to complete its important scientific work, and thereafter to promulgate, in an orderly and thoughtful process soliciting the participation of all affected industry members and the public, a rule that is scientifically supportable and rationally based.

**I. YATES PETROLEUM CORPORATION'S HISTORY HAS RESULTED IN AN EXTENSIVE BODY OF SCIENTIFIC, ECONOMIC, TECHNOLOGICAL, GEOLOGIC, AND REGULATORY KNOWLEDGE WHICH MAKES YATES UNIQUELY QUALIFIED TO COMMENT ON THE DRAFT ORDER**

Yates' history in the Potash Area is long, continuous and distinguished. In fact, Yates was the party who first discovered potash while it was drilling a well in Eddy County, New Mexico. Indeed, the Yates geologist responsible for that well was named Mr. McNutt, and the potash bearing formation is named after Mr. McNutt. Yates has participated in many hearings addressing issues relating to concurrent development in the Potash Area, and as a result, Yates understands the meaning and interpretation of terms and provisions of the 1986 Order, and its predecessor rules, the New Mexico Oil and Gas Division ("NMOCD") Rule 111-P, and its predecessor rules, as well as the science, technology, engineering, and economics associated with concurrent development issues.

As early as 1951, S.P. Yates testified before the NMOCD regarding casing design for shallow wells in the Potash Area. His testimony, along with the testimony of many engineers, geologists, potash miners, and U.S.G.S. and state employees led to the adoption of the original NMOCD R-111, as well as the withdrawal of the 1939 Order, 4 F.R. 1012, Feb. 6, 1939, and the promulgation of the 1951 Order. In 1939, when potash was a strategic mineral utilized in the manufacture of gun powder, the Secretary issued an order creating the Potash Area consisting of 42,685.18 acres, withdrawing those lands from oil and gas development, and preserving the area for potash

development. By 1951 oil and gas had become strategic minerals, and the potash industry sought to develop a mine in and around an existing, producing oil and gas field. Accordingly both industries, working in conjunction with the USGS and NMOCD established completely new rules for concurrent development of both resources. The result was the 1951 Order,<sup>1</sup> issued simultaneously with NMOCD R-111, which restored the designated Potash Area to oil and gas leasing and development, and stated that its purpose was to establish the rules of "concurrent development of oil and gas and potash resources" in the Potash Area. NMOCD R-111 provided the rules for drilling, and required a 100' safety pillar between an actively producing well and areas of second mining. The potash industry developed the mine at issue in 1951(Southwest Potash), and in many instances mined much closer than 100 feet to actively producing oil and gas wells. Yates was instrumental in the promulgation of NMOCD R-111, and its associated wellbore casing and cementing design requirements, as well as the 1951 Order.

The Secretary promulgated new orders in 1965<sup>2</sup>, 1975,<sup>3</sup> and 1986<sup>4</sup>. Yates participated through the New Mexico Oil and Gas Association ("NMOGA") in submitting comments regarding policy and proposed language in 1973, prior to the promulgation of the 1975 Order. The 1965, 1975 and 1986 Orders contained no major changes from the 1951 Order other than increasing the officially designated Potash Area and, in 1975 and 1986, establishing an "enclave" policy. All of the orders since 1939 have been promulgated after a lengthy and involved study period and process in which the Secretary sought extensive scientific and economic comments from the affected industries, as well as all appropriate divisions within BLM. Yates participated in all of these processes.

In addition, Yates has participated in numerous hearings at state administrative levels, in which Yates has presented detailed and significant scientific, economic, engineering, geologic and regulatory testimony regarding all issues relating to concurrent development of oil and gas and potash in the Potash Area. The first two such hearings occurred before the NMOCD in *Yates Petroleum Corp.*, Case Nos. 10448 and 10449, NMOCD Orders NO. R-9654-C, 9655-C, (January 20, 1994), and Case Nos. 10446 and 10447, Order No. R-9650-B, 9651-B, (February 10, 1994) ("Flora and Graham Cases"). Yates also participated in *Yates Petroleum Corp.*, Case Nos. 10490, NMOCD Order NO. R-9990, (October 18, 1993), ("Snyder Ranch Case"), in which the NMOCD approved Yates' APD on fee lands in the Potash Area when all parties owning potash and oil and gas interests underlying a particular lease reached an agreement on extraction of the minerals. These cases will be discussed in some detail, *infra* at pp.7-10.

Yates also participated in numerous federal administrative hearings in which months of evidence was presented on every scientific, technological, engineering, and economic issue associated with concurrent development issues as well as the proper interpretation and application of the provisions of the 1986 Order. As a result, Yates has developed an extensive body of knowledge as to each of these issues and concerns. The largest case in which Yates participated arose out of the 1991-1992 submission by

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<sup>1</sup> 16 F.R. 10669, Oct. 16, 1951, ("1951 Order")

<sup>2</sup> 30 F.R. 6692, May 11, 1965, ("1965 Order")

<sup>3</sup> 40 F.R. 51486, Nov. 5, 1975, ("1975 Order")

<sup>4</sup> *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).

Yates Petroleum Corp. and Pogo Producing Co. of 78 APDs for low pressure Delaware wells in the Potash Area, and BLM denied all of the APDs. Yates and Pogo appealed to the IBLA, which appointed an ALJ to consider the contested matters. *Yates Petroleum Corporation*, GFS(MIN) 76, 131 IBLA 230 (1994). The resulting hearing was the longest hearing in the history of the IBLA, and resulted in a transcript of 15,275 pages. Presentation of evidence commenced in August 1996, and concluded in March 1997. The parties to the hearing were Pogo, Yates, BLM, IMC Kalium Potash Company, (the predecessor to Mosaic) and Potash Association of New Mexico ("PANM"), of which the main participant was Mississippi Potash (predecessor in interest to Intrepid Potash Company). In addition the Trona Industry Committee of the Wyoming Mining Association participated with other parties as amici. Six years after the close of evidence, the ALJ issued a comprehensive 247 page decision discussing in detail the evidence presented, and determining in pertinent part that BLM failed to follow the 1986 Order in processing the APDs. *Yates Petroleum Corp.*, IBLA 92-612, Order, July 7, 2003 ("ALJ Decision").

At the hearing, Yates and Pogo relied on a scientific study they had caused to be conducted as a result of the NMOCD decision in the Flora and Graham Cases to establish that concurrent operations can safely occur. Yates also developed significant evidence and detailed information relating to potash and oil and gas economics, and the result of the evidence presented by Yates and Pogo was a conclusion from Judge McDonald that the economic parameters utilized by BLM to map known potash ore bodies were unduly low and that there was little if any appreciable evidence that any potash was being mined at the low levels used by BLM to preclude drilling. These issues will be discussed in more detail, *infra*, at pp. 7-10.

All parties appealed various aspects of the ALJ Decision to the IBLA, which affirmed the ALJ Decision in all regards. *IMC Kalium Carlsbad, Inc.*, et. al., 170 IBLA 25, 51 (2006). Potash Association of New Mexico ("PANM") appealed the IBLA Decision to the District Court, which dismissed the appeal on jurisdictional grounds. *Potash Ass'n of New Mexico v. DOI*, No. CIV 06-1190, MCA/ACT, Mem. Op. D.N.M. Aug. 29, 2008, affirmed *Potash Ass'n. of New Mexico v. U.S. Dep't. of Interior*, No. 08-2260 (10<sup>th</sup> Cir. March 2, 2010).

Yates also participated in another federal administrative appeal arising out of an unsuccessful appeal by Intrepid Potash to the IBLA, in what has become known as the "Caper Case." The Caper case arose following BLM's approval of 16 APDs submitted by Yates for Delaware oil wells in an area mapped as not containing known commercial potash ore. Yates drilled 5 of the 16 wells, when Intrepid Potash opposed the approvals of the remaining 11, and appealed the approval to the IBLA. The IBLA upheld the BLM decisions in *Intrepid Potash - New Mexico, LLC*, 176 IBLA 110, (2008). The United States District Court dismissed Intrepid's appeal on jurisdictional grounds in *Intrepid Potash - New Mexico, LLC v. U.S. Dep't. of the Interior*, No. 09-cv-01135 RB-RLP, (U.S.D.C.N.M., May 10, 2010). The basis of Intrepid's opposition to the approval of the APDs was Intrepid's theory that electric wireline logs (e-logs) from oil and gas wells can be utilized to determine thickness and grade of potash mineralization. In the early 1990s, geologists working for Yates studied this precise question and concluded that e-logs from oil and gas wells could not be utilized for these purposes. In connection with the Caper case, Yates retained the services of Dr. Donald Hill, Ph.D., the preeminent petrophysicist in the world on these issues. He reviewed Intrepid's proposals and actual core hole results and determined that the technology advanced by Intrepid is not viable.

In yet another federal case, Yates and Pogo were the high bidders on a 5,280 acre potash lease in competitively auctioned by the BLM in 1992. The BLM rejected Yates and Pogo's bid on the grounds of bad faith and awarded the lease to IMC Kalium Carlsbad, Inc. (predecessor to Mosaic Potash). On appeal, the IBLA reversed BLM's decision and ordered the lease awarded to Yates/Pogo. IMC appealed to the U.S. District Court which reversed the IBLA Decision. Yates/Pogo appealed to the Tenth Circuit which reversed the District Court, confirmed the appropriateness of deferring to the IBLA over the local office of the BLM, and affirmed the IBLA Decision awarding the lease to Yates/Pogo. *IMC Kalium Carlsbad, Inc. v. Interior Board of Land Appeals*, 206 F.3d 1003, (2000).

In addition to the federal cases, Yates has participated in additional scientific studies, policy reviews and made recommendations with respect to earlier proposed orders, review of and recommendations regarding the H.B. In Situ mining project, and Yates has entered into agreements with potash companies allowing for concurrent development of some of its resources in the Potash Area.

The first such effort occurred in late 1990 early 1991, when the District office of BLM attempted to effectuate a change in the 1986 Order. Yates actively opposed this change. On February 12, 1991, the Secretary proposed a new Order (the 1991 proposed Order) which, according to its own terms, would adopt, at the federal level, NMOCD Order R-111-P and an alleged "industry agreement" attached to the NMOCD Order and would establish "a new management frame work for potash and oil and gas reserves." (56 F.R. 29, pg. 5697 (Feb. 12, 1991)). The proposed 1991 Order stated that it would revoke the 1986 Order and all previous Orders. As the *Yates Petroleum* ALJ Decision stated, the proposed 1991 Order would have significantly lowered the standards for designating commercial ore under the 1986 Order, and essentially result in an unlawful delegation to the potash industry by the BLM of its duty to designate enclaves and to manage issues relating to concurrent development in properly designated enclaves in the Potash Area. ALJ Decision, pp. 41-43. As a result of the efforts of Yates and other oil and gas industry members, the 1991 proposed Order was not issued.

Yates also provided to the BLM detailed comments opposing a proposed Multiple Minerals Development Plan for the Waste Isolation Pilot Plant ("WIPP") area on October 15, 1991. Yates urged that the BLM proposal constituted a misinterpretation of the 1986 Order and a misapplication of Secretarial policy. The plan was never implemented.

In July 2008, Intrepid Potash, through its sister corporation, HB Potash, LLC, filed a notice of intent to apply for approval to construct solution mining facilities and to conduct solution mining activities in portions of the former Eddy Potash mine in Eddy County. Yates, along with BOPCO, OXY and Devon Energy, retained a geologist, an engineer and a hydrologist to conduct a scientific study and review of the proposed in situ mining plan to ascertain the effect of the plan, if any, on concurrent development of oil and gas and potash in the affected area, as well as to ascertain the effect of the plan on water resources in the affected area. Asserting that too many aspects and probable effects of the in situ proposal remained unstudied, the Oil and Gas Stakeholders submitted their comments in opposition to the BLM's proposal that the in situ proposal be approved pursuant to an EA and issuance of a FONSI. Ultimately, the BLM retreated from its determination to approve the in situ proposal without a full EIS, and caused an EIS to be prepared. The Oil and Gas Stakeholders submitted additional scoping

comments with regard to the EIS, supported by the work of the scientific consultants. The EIS studied and addressed the concerns raised by the Oil and Gas Stakeholder consultants, and after making appropriate modifications to the in situ proposal, the BLM approved the in situ mining proposal, with the support of the Oil and Gas Stakeholders.

Yates entered into one of the first agreements with a potash company for concurrent development of the resources on the affected leases. In 2000, Yates and Pogo negotiated an agreement with the predecessor to Intrepid, Mississippi Chemical, to allow Yates and Pogo fully develop leases in two contiguous sections of state lands in the Secretarial Area that Mississippi planned to mine. The agreement provided a 1320' corridor through the middle of the sections, and required no safety buffer between open mine workings and wells to be drilled. It was agreed that the wells could be drilled right up to the edge of mine workings. Yates has entered into several concurrent development agreements with both Intrepid and with Mosaic since that time.

Yates and other oil and gas stakeholders have participated in two studies conducted by Sandia National Laboratories, and Yates specifically, has contributed to Sandia, the BLM, and the Oil and Gas Stakeholders the science and economics it developed in connection with the NMOCD Flora and Graham cases, the Yates/Pogo ALJ case and the Caper case. These studies will be discussed in more detail, *infra*, at pp. 10 and 20.

As a result of the extensive scientific, technological, economic and engineering studies Yates has caused to be conducted, coupled with months and months of presentation of testimony on such issues, Yates is uniquely qualified to address these issues in the these comments. Yates is similarly singularly and uniquely qualified to address the legal issues relating to the development of, interpretation and implementation of federal policy and the meaning of language utilized in the 1986 Order as well as the Draft Order. Yates emphasizes that it supports the JITC and the Consensus Document submitted by the JITC. At first review, the Draft Order appears to adopt and implement a number of the provisions set forth in the Consensus Document. Upon further scrutiny, however, it becomes apparent that the Draft Order adopted the recommendations of the Consensus Document in such a manner as to essentially eviscerate the stated intention of the Consensus Document "to result in *more* orderly development of *both* mineral resources throughout the SPA." Consensus Document at p. 3 (Emphasis added). A comparison of the Draft Order to the Consensus Document and the various interim comments and drafts discloses that the Secretary systematically removed each and every Consensus Document provision that would have fostered "more orderly development of oil and gas reserves within the SPA," and replaced it with provisions seeking to limit oil and gas development within the Potash Area pursuant to the unfettered discretion of the BLM. Consensus Document p. 3. Yates asserts therefore that the Draft Order failed to adopt the Consensus Document in such significant measure as to have rendered the important and considered work of the JITC in arriving at the Consensus Document effectively meaningless. In addition to trivializing the work of the JITC and giving short shrift to the extent of the breakthrough between the two industries and the BLM reflected in the JITC, the Draft Order is not legally supportable in a number of regards. The Draft Order is premature and it is not rationally based. Yates respectfully urges you and to allow the JITC to complete its important scientific work, and thereafter to promulgate, in an orderly and thoughtful process soliciting the participation of all affected industry members and the public, a rule that is scientifically supportable and rationally based. For these reasons, Yates submits these

comments in support of the Consensus Document, urging immediate withdrawal of the Draft Order as improvidently proposed.

## II. HISTORY AND PROCESS LEADING TO THE PUBLICATION OF THE DRAFT ORDER

The Draft Order must be read in the context of the historical process, including the litigation, as well as the administrative and scientific work, and drafts of 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 Bureau of Land Management (“BLM”) asserting that the BLM had not properly administered concurrent development issues in accordance with the provisions of the 1986 Order. 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 set forth above in the ALJ Decision and the subsequent IBLA, District Court and Tenth Circuit Decisions affirming the ALJ Decision, the Caper Decisions, and the Lease Appeal. The decisions resulting from the litigation 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. The Consensus Document seeks to preserve that body of law. In addition, the NMOCD Flora and Graham and Snyder Ranch cases contributed significantly to the process which has led ultimately to the proposal of the Draft Order.

### A. THE LITIGATION AND STUDIES REGARDING THE SAFETY ISSUE REQUIRE THAT THE SAFETY WORK OF THE JITC BE COMPLETED PRIOR TO PROMULGATION OF A NEW ORDER

The Federal Register notice of publication of the Draft Order, 77 F.R. 41442, makes it clear that fundamental basis for the proposal of the Draft Order is the alleged safety issue. The Federal Register notice fails to address the extensive body of law or work that has been done with respect to safety, and the fact that many tribunals and scientific studies have urged the completion of specific field studies, consistently with the studies outlined by the NMOCD in the Flora and Graham hearings. Most important, the Federal Register notice completely fails to acknowledge that, in a breakthrough of historic proportions, the industries had finally come together to conduct the scientific work that had been recommended by so many tribunals, laboratories and scientists, when the Secretary interrupted the work and demanded the promulgation of a new Order without waiting for the science which was on the verge of actually being completed for the first time ever.

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The first cases addressing the important scientific issues were the NMOCD Flora and Graham Cases. This was the first tribunal in which Yates presented significant scientific and technological testimony regarding the safety of concurrent development of oil and gas and potash in the Potash Area. This case is discussed in detail because the decision analyzed and outlined the precise scientific work that needed to occur in order to resolve the important safety issues. It is noteworthy that the very study outlined by the NMOCD in 1994 was the precise study the oil and gas and potash industries had finally come together in the JITC to conduct in a breakthrough of cooperation following years of litigation, when the Secretary of the Interior interrupted their work to issue an ultimatum to arrive at a new and as yet unscientifically supportable order in 2012. Following the presentation of Yates' testimony, the NMOCD found as follows:

(19) If oil and gas operations make potash mining unsafe, then potash will not be mined and may be wasted. This was not proved however and there is a need for direct surface measurements of methane gas in and around existing wells within the potash area.

(20) Additional safety issues such as subsidence were argued from a theoretical perspective by both sides but there were no direct surface field measurements in areas where potash mining has already caused some subsidence. Subsidence is a primary factor in defining buffer zones.

(21) To adequately address the extent of buffer zones and the effective radius of pillars around wells, there is a need for examining new information and exploring new technologies relating to subsidence.

(22) Although there have been no documented cases of oil and/or gas migration in New Mexico potash mines due to oil and gas operations, mine safety is a paramount issue because methane in a mine can cause a reclassification of that mine to "gassy" requiring use of special procedures and equipment the cost of which would render future mining uneconomic resulting in waste of potash.

(23) There is a need to investigate methane monitoring which could be implemented adjacent to or within producing oil and gas wells to evaluate the potential for methane migration from the producing wellbore into adjacent rock formations.

Order No. R-9650-B/R-9651-B, pp. 4-5. The NMOCD concluded that it should contract with the New Mexico Bureau of Mines and Mineral Resources, which "should seek technical assistance from Yates Petroleum Corporation and oil and gas and potash entities, New Mexico Tech and its subdivisions, and notably, the New Mexico State Land Office, the United States Department of Energy and the United States Bureau of Land Management" to develop and provide to NMOCD "technical and economic information from which the Commission may design a joint operating plan for both oil and gas and potash development. The Commission plan should also serve to establish a procedure for future joint resource development in other areas." *Id.*, p. 5, ¶24. The NMOCD instructed that the following areas should be studied to develop the necessary technical and economic information:

- 1) explore the economics of directional drilling incorporating such possible incentive factors as: a) increased allowables; b) wider well spacing units such as 80 acres; c) decreased royalty rates on directionally drilled Delaware wells; d) unitization and its effect on field development, spacing patterns and field drainage;
- 2) measure methane (if present) at the surface casing of plugged wells within the potash area which have produced or encountered shows of oil and gas;
- 3) measure methane (if present) and evaluate wells within potash mine workings as they relate to safety concerns;
- 4) explore avenues of oil/potash cooperation in developing additional ore body information;
- 5) quantify the subsidence potential over potash mines and its effect on the integrity of well casing;
- 6) examine the role of mining plans in scheduling of potash and petroleum extraction;
- 7) explore new technology which can help define LMRs and the buffer zone;
- 8) evaluate old and new cementing practices and recommend appropriate operating practices;
- 9) examine the "confidentiality issues" and find a way to promote cooperation in the use of this information in the LMR designation process;
- 10) examine wells which have been drilled near potash mine workings within the potash enclave and their effect upon potash mining;
- 11) confer periodically with the Director of the Oil Conservation Division as to the progress of the above investigations. If additional studies are needed, they will be negotiated as supplementary contracts.

While the NMOCD sought to conduct a safety study funded by all industries, BLM and the State of New Mexico, neither the BLM nor the State were able to provide funding, and the industries could or would not cooperate in such a study. Nonetheless, because of the potential liability to Yates and potential safety concerns, Yates and Pogo Producing Company did fund such a study before determining to go forward with further litigation. Yates retained the scientists the NMOCD sought to retain (Drs. Teufel and Hazlett) in order to perform a gas migration and subsidence study, and as a result of their scientific work, Yates determined to go forward requesting expanded oil and gas operations in the Potash Area.

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Yates presented the Teufel/Hazlett Study contemplated by the Flora and Graham Decision as well as months of additional evidence on safety in the federal ALJ hearing in *Yates Petroleum Corp.* After hearing those months of safety evidence, the ALJ concluded:

In simple terms, it can be said that the odds that something will go significantly wrong while drilling and operating an oil and gas well in the Potash Area in accord with API and other recognized practices are very small because considerable thought and effort have been expended to assure that nothing will.

ALJ Decision, p. 203. The Administrative Law Judge also concluded: "The lease stipulations contained in the 1986 Order "call upon BLM to identify and require measures which will protect both potash deposits and mining operations from infiltration from each well." *Id.* Most important to any understanding of the alleged safety issues is the fact that in all of the Yates cases, neither the U.S. District Court, the ALJ, nor the IBLA found in favor of the potash industry and the BLM on the hazards the potash industry and the BLM claimed are associated with oil and gas drilling in the Potash Area. The ALJ recognized that safety hazards could be prevented by the use of wellbore and casing designs that would allow for safe concurrent development, and held that the BLM had a duty to implement such practices that would allow concurrent development to go forward except in those instances where it determined that infiltration of hydrocarbons could not be prevented. ALJ Decision, p. 203. The ALJ and IBLA considered the claims of the potash industry and the BLM as to safety hazards, and held that the lease stipulations contained in the 1986 Order "call upon BLM to identify and require measures which will protect both potash deposits and mining operations from infiltration from each well." This was the precise work in which the JITC was engaged when the Secretary issued his ultimatum demanding the promulgation of a new order.

Safety was the subject of the Sandia Gas Migration Study in which Sandia was tasked with ~~develop[ing]~~ a technically sound analysis of potential risks and risk resolutions associated with the concurrent development of both oil & gas and potash production within the [Secretary=s Area], with respect to issues of potential gas migration from well bores toward underground potash mines.<sup>@</sup> Both affected industries expended considerable resources and time researching, preparing papers, making presentations with geologists, engineers providing comments, and preparing reports for the purpose of answering the important questions posed by the studies, and Yates contributed the science and technical expertise and body of knowledge it developed in the Yates/Pogo ALJ case as well as in the NMOCD Flora and Graham case. Sandia acknowledged that its 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 Potash Area, (these further studies are referred to herein as "Phase II" of the safety studies). (August 31, 2009 Letter from Sandia National Laboratories (Brian Ehgartner) Linda Rundell, New Mexico BLM State Director). The work to determine such safe distances as indicated by the Sandia Study as well as the work outlined by the NMOCD in the Flora and Graham cases is ongoing and has not been completed. The Sandia gas migration study, which did not address the critical issue of gas migration, acknowledged that its conclusions were incomplete and that

additional work must be done, and that such additional work should include field studies of wells in mines and other field studies to determine the safe distance between mining and oil and gas operations.

Inasmuch as the safety concerns have constituted the underpinnings of the Secretarial Orders since 1951, and inasmuch as the important safety work is nearing its completion, the promulgation of a new Order at this time defies logic. The ALJ and NMOCD findings disclose that in both cases the potash industry failed to establish that all oil and gas drilling constitutes a hazard to mining operations and that oil and gas drilling should be precluded in the Potash Area. The Sandia gas migration study, mentioned in Federal Register notice of publication (77 F.R. at 41443) acknowledged that it was incomplete and that more studies are required.<sup>5</sup> The results of the completed study should inform Secretarial policy. As it is, the provisions of the Draft Order are largely written in spite of the fact that the science is ongoing, and it is anticipated that the completed study will allow for significantly expanded safe concurrent development of both oil and gas and potash in the Potash Area.

Safe production of the oil and gas reserves in the Potash Area is economically important and in the best interest of the United States. An independent study of the untapped petroleum resources conducted by the Petroleum Resource Recovery Institute at New Mexico Tech in 2009 reflects the following with respect to existing plays only:

Primary recovery = 1.4 billion BOE = \$40-\$86 billion  
(Barrels Oil Equivalent)

Secondary recovery = 318 million BOE = \$16-\$32 billion

**Projected State and Federal Revenue**

Federal Government: \$2.5-\$5.2 billion (excluding State of New Mexico MMS royalty shares)

State of New Mexico: \$7.5-\$15.8 billion (including MMS royalty shares, state royalty and taxes other than Ad Valorem)

Lea and Eddy Counties: \$1.4-\$3.0 billion

In addition, the Petroleum Resource Recovery Study projects that there are equivalent potential reserves in new plays which have not been explored. In comparison, all of the potash mines in the Secretarial Area paid \$8,137,835.02 in federal royalties in 2008 from all mining activity in the Secretarial Area. The provisions of the Draft Order will make the development and production of these resources much more difficult than is the current practice.

<sup>5</sup> It is noteworthy that the Sandia Gas Migration Study conclusions are also refuted by many studies prepared by the DOE in connection with the certification of the Waste Isolation Pilot Plant Repository. (See 63 F.R. 27354, et.seq. and studies cited therein.) In addition and both the potash industry and the oil and gas industry criticized its conclusions which were based solely on computer modeling and bear no resemblance to the actual conditions in the field.

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The Draft Order is not supported by any new science. The Draft Order is not supported by any new facts mandating additional and extreme measures limiting oil and gas production and development in the Potash Area. The Draft Order may waste valuable oil and gas resources and will cause the loss of valuable oil and gas revenues to the state and federal government. The Secretary should await the imminent completion of valid and tested science, and thereafter base the determination of Secretarial policy on such science.

**B. THE ADMINISTRATIVE PROCESS LEADING TO THE PROPOSAL OF THE DRAFT ORDER**

This is not the first time this administration has indicated its intentions to promulgate a new Secretarial Order. In 2009, a group of ten oil and gas stakeholders (“Stakeholders”) consisting of lessees of the majority of the federal oil and gas minerals in the Potash Area traveled to Washington to meet with officials of the Department of the Interior (“DOI”) and the Bureau of Land Management (“BLM”) as well as the Congressional delegations from New Mexico, Texas and Oklahoma. Yates participated in these trips. The Stakeholders made the trip after having been informed that the Secretary of the Interior planned to promulgate an entirely new secretarial order withdrawing the Potash Area from oil and gas development, replacing the 1986 Order. The Stakeholders met with Deputy Secretary Ned Farquahar, among others, along with then Congressman Harry Teague. Rep. Teague sought from Mr. Farquahar the following specific assurances, which Mr. Farquahar gave Rep. Teague:

- No rule change will be made by the Secretary before the scientific studies now under way are completed and finalized after peer review.
- Any change in policy will be based on defensible and validated science, including the gas migration and subsidence studies conducted for WIPP.
- That all stakeholders, including the State of NM, be given a fair and complete opportunity to be involved in any consideration of a change of rules.
- And, finally, that until that all occurs, the Secretary will allow the BLM to continue to manage the Secretarial Potash Area under the 1986 Order, and continue to allow the concurrent development and permitting of both potash and oil and gas development.

The Stakeholders followed the 2009 visit with a trip in 2010 to report that the oil and gas and potash industry was forming a JITC to conduct Phase II of the safety studies as recommended by Sandia National Laboratories and technical and scientific consultants for the two industries. Following the 2010 trip, the JITC drafted Phase II of the scientific work, and began establishing the parameters of their work together. Ultimately the JITC tasked itself to explore the safety issues associated with drilling near mines and mining near producing wells. The JITC planned to engage in field studies of wells in mines, new casing designs, monitoring systems, as well as gas migration attempt to shorten the required setbacks under the current rules.

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The JITC was proceeding with its work in accordance with the assurances promised by Mr. Farquahar and consistently with the representations made by the Stakeholders to the DOI, BLM and Congressional delegations when the work was interrupted by the Secretary.

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 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."

1. 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."
2. 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.

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

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

5. 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."

6. 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."

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

8. 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.

9. 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.

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). 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 an anti-oil and gas development manner that is not rationally based or scientifically supportable.

In addition, the process which has led to the proposal of the Draft Order has been inexplicably and unnecessarily fast tracked in a manner that has discouraged public involvement as well as the involvement of companies and entities that will be directly affected by the promulgation of a new order. 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 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. The Draft Order is contrary to the existing Carlsbad Resource Management Plan that recognizes the development of both resources in the Potash Area. All of these entities and issues should be considered before rushing the promulgation of a new Secretarial Order.

In addition, the Draft Order will significantly affect the interests of small, independent oil and gas lessees in the Potash Area. 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 operatorship, and essentially requiring expensive horizontal or deviated well bores to penetrate prospective oil and gas formations from Drill Islands. Yates 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.

It is important that no new facts have occurred and no new science has been developed that would demand promulgation of a new Secretarial order at this time, particularly on such a fast track, and particularly without providing a meaningful opportunity for participation from all affected parties and governmental entities. Promulgation of the Draft Order will likely increase, rather than decrease litigation in the future, and promulgation of the Draft Order will decrease rather than increase oil and gas production in the Potash Area. The process by which the Draft Order was proposed constitutes an unjustified interruption to the progress of concurrent development in the Potash Area, and a new Order is not supported by a rational basis at this time. Millions of dollars, hundreds of thousands of hours of human time, countless scientific studies and advances in technology have led to this precise moment in time where the parties have finally been able to come together to answer the safety questions consistently with the findings and conclusions of every tribunal that has considered the real evidence and the hard facts surrounding concurrent development. The demand for a new Secretarial order at this time is not only ill-conceived and premature, it is not rationally based by any fact or scientific conclusion.

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### **III. THE DRAFT ORDER SIGNIFICANTLY DEPARTS FROM THE PROVISIONS OF THE 1986 ORDER AND THEREBY SUBSTANTIALLY DEPARTS FROM THE INTENT OF THE JITC AS REFLECTED IN THE CONSENSUS DOCUMENT.**

#### **A. POLICY AND PURPOSE OF THE DRAFT ORDER COMPARED TO THE 1986 ORDER**

The Consensus Document clearly and emphatically affirmed its commitment to preserve the precedential value of the cases interpreting the 1986 Order as well as to preserve every provision of the 1986 Order that could be preserved and to add only the limited and explicit provisions required by the JITC. In that regard, the entire thrust of the 1986 Order was to allow drilling in the Potash Area subject to certain exceptions for drilling in areas containing known commercial ore ("enclaves.") Accordingly, the 1986 Order contained the enclave policy which stated: "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 [the provisions of this Order.] 1986 Order, §III.E.1. The 1986 Order contained two exceptions to the enclave policy, namely the drilling island provision and the provision allowing drilling from barren areas within enclaves. With respect to areas mapped as inferred and indicated, the 1986 Order allowed drilling subject to the application of the lease stipulations.

In contrast and directly contrary to the stated intent of the JITC in the Consensus Document, the thrust of the Draft Order is to preclude drilling in the entire Potash Area, regardless of the commerciality of the potash, with no rational basis, no change in facts, and no scientific support for this unprecedented increase in restrictions on production of the important federal oil and gas resources. It is reasonably predictable that the Draft Order will be interpreted and implemented 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. In contrast to the 1986 Order, the Draft Order 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 6.e.(1), p.5]. Additionally, unlike the language of the 1986 Order, the Draft Order does not affirmatively mandate that any APD be allowed. 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. The policy statement should be rewritten so as to state: "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 the provisions of this Order," and thereby accurately reflect the stated intent of the JITC to manage the impact of oil and gas production on *commercial* potash reserves.

No other Secretarial policy is justifiable in these circumstances. In view of the imminent probability that the completed science will establish that increased concurrent operations of both oil and gas and potash can safely occur, there is no compelling factual reason for the Secretary to place greater restrictions on drilling in areas not containing known commercial potash reserves, especially when such areas may never

be mined. The annual areal extent of potash mining is very small (ranging from 200-600 acres per year per mine); yet, the Draft Order unnecessarily and unsupportably purports to preclude drilling in the entire 449,000 acres of the Potash Area. The Draft Order thus precludes production of known oil and gas resources in favor of “protecting” in perpetuity potash resources of speculative thickness and grade. A great deal of the entire 449,000 acres will never be mined, but the Draft Order would as a matter of policy preclude drilling in the entire area in perpetuity, regardless of whether such acreage will ever be mined. The United States District Court criticized implementation of such a policy in *Intrepid Potash - New Mexico, LLC v. U.S. Dep’t. of the Interior*, No. 09-cv-01135 RB-RLP, (U.S.D.C.N.M., May 10, 2010). The Court held that while the stipulations allowed the authorized officer to make determinations relating to hazards based on its opinion about a possible source of peril, the stipulations did not allow BLM to “pile inference upon inference so as to base its decision-making on a *possible* source of peril, danger, duress or difficulty to a *possible* future activity directed at extracting a *possible* potash deposit which *might* be discovered in the future.” *Id.* at 14-15 (emphasis in original).

In addition, the language of the “purpose” of the Draft Order must be addressed. The language of the purpose 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 proposed 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 drilling is not mandated anywhere in 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.

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**B. DEPARTING FROM THE INTENT OF THE CONSENSUS DOCUMENT, THE DEFINITIONS CONTAINED IN THE DRAFT ORDER SUBSTANTIALLY DEPART FROM THE ACTUAL TERMS AS WELL AS THE STATED INTENT AND POLICY EMBODIED IN THE 1986 ORDER.**

**Section 4. (d). Definition of Co-Development:**

The definition of “co-development” is an unnecessary and substantial departure from the provisions of the 1986 Order. The Consensus Document does not contain a definition of “co-development,” and its inclusion by the Secretary is especially alarming in view of the fact that the Federal Register Notice of Publication touts “co-development” as the “foundation” for the Draft Order. The Consensus Document made it crystal clear that the “foundation” for the Draft Order was to be the 1986 Order, subject to the few modifications and additions contained in the Consensus Document so as to allow for *increased* concurrent development.

The import of the addition of the definition of “co-development” is that “co-development” is intended to change the meaning of “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.” “Co-development” is defined in the Draft Order as:

The concurrent development of oil and gas and potash resources within the Designated Potash Area. Co-development is a cooperative effort between industries under the guidelines of this order, as regulated by the BLM to support production of potash and oil and gas from the lands within the Designated Potash Area. *Co-development may require that the development of the resources occur at different times and from different places.*

Emphasis added. The italicized language embodies a concept that has been labeled as “staged operations.” Throughout the litigation involved in the Potash Area, the potash industry has argued that all oil and gas drilling constitutes a hazard and thus, that potash mining should be allowed to proceed first, and after all potash mining has been completed, oil and gas development can occur. This theory is a creative interpretation that finds no support or basis in the 1986 Order. In the ALJ hearing, Yates and Pogo presented abundant evidence refuting the alleged hazard and staged operations in each and every respect.

The ALJ Decision implicitly rejected the “staged development” concept and also rejected 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 “staged development” of both resources thereby de facto establishing a potash reserve in the entirety of the Designated Potash Area. If BLM views the definition as foundational to the Order, the term becomes the embodiment of the Secretarial policy to preclude drilling in the entire Potash Area until all potash has been mined.

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.

Yates urges the following definition of “co-development”:

“Co-development 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 simultaneously.”

#### **Section 4 (f): Definition of “Development area:”**

The definition of “Development Area” as modified by the BLM 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 potash**, 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 expanded 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 allowed for drilling outside of enclaves, 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. Yates urges that the definition be as proposed by the Consensus Document.

#### **Section 4 (g): Definition of “Drilling Island:”**

The amended 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 added by the Department of the Interior, the Draft Order removes the quoted language, thus underscoring a policy determination by the Department of the Interior 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 it is urged that it be added into the definition of Drill Island.

#### **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 and other oil and gas stakeholders have participated in the Sandia National Laboratories “E-Log Study” which occurred in response to lobbying efforts by Intrepid Potash in 2005-2006 for a drilling moratorium, for a gas migration study and a study determining the technical soundness of using oil and gas electric logs for mapping commercial potash. Intrepid urged that the technical studies would “adequately resolve the safety and waste issues” in the Secretary’s Area. As a result of Intrepid’s lobbying efforts, and at the urging of Senators Cornyn, Hutchinson, Domenici and Bingaman, the Secretary contracted for 2 studies with Sandia National Laboratories and denied the request for a drilling moratorium. The first study (the E-Log Study) was tasked with answering the question of whether e-logs from oil and gas wells provide a technically sound method to measure potash thickness and quality, either to meet current measured reserve standards or future standards. Sandia published its study entitled “Evaluating the Use of Oil and Gas Well Logs for Potash Reserve Identification in Southeastern New Mexico” on August 24, 2009, concluding 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. Sandia specifically stated that oil and gas electric well logs do not provide a “technically sound method to measure potash thickness and quality, either to meet current measured reserve standards or future standards.” Notwithstanding this clear scientific conclusion, the definition of “inferred resources” as contained in the Draft Order improperly allows well logs to be used to define inferred resources. The use of well logs in defining inferred resources would 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, and is therefore not rationally based, thus rendering the statement at Section 7.d regarding BLM’s reliance on science essentially meaningless.

**C. DEPARTING FROM THE INTENT OF THE CONSENSUS DOCUMENT, THE GENERAL PROVISIONS CONTAINED IN SECTION 6 OF THE DRAFT ORDER SUBSTANTIALLY DEPART FROM THE ACTUAL TERMS AS WELL AS THE STATED INTENT AND POLICY EMBODIED IN THE 1986 ORDER.**

**Section 6.d.(9): Delineation of Resource Areas:**

This provision on page 4 of the Draft Order requires potash lessees to annually provide maps of potash resources and three year mine plans, and further requires the BLM to review the information and make revisions to the boundaries of the reserves as indicated on the potash company submittals. This provision has been modified from the 1986 Order by eliminating important language requiring the BLM to make revisions to the boundaries "which are consistent with the data available at the time of such analysis." The thrust of this omission is that the 1986 Order required the BLM to act independently and revise maps based on its own knowledge coupled with information provided by the potash industry, and the 1986 Order provided standards for the BLM's review of the maps submitted by the potash industry. In contrast, the Draft Order merely requires the BLM to accept maps submitted by the potash industry, and does not require the BLM to independently verify the potash industry maps in any manner whatsoever. The Draft Order thus constitutes an abrogation of the BLM's duty to independently manage issues related to multiple minerals development pursuant to FLPMA. This abrogation alone constitutes an extreme departure from the provisions and requirements of the 1986 Order that the Consensus Document sought to prevent, and the additional departures from the 1986 Order contained in the Draft Order exacerbate this departure. If not modified, the Draft Order directs the BLM to "limit," rather than "manage," the impact of oil and gas development on all potash mineralization in the Potash Area. This mapping provision delegates to the potash industry alone and acting without oversight, the duty to map all potash mineralization in the Potash Area. Thus, the potash industry, rather than the BLM, has the ability through the mapping process to effectively preclude all oil and gas operations in the Potash Area. In addition, through the improper and unscientifically supportable use of well logs and novel definitions of indicated and inferred potash resources, the mapping standards have been significantly lowered from the standards that are scientifically accepted. Finally, the oil and gas industry has no enforceable means of challenging the economics utilized by the potash industry in preparing its maps, as the Draft Order does not require or mandate that the information relied upon by the potash industry be provided to the BLM or to an affected oil and gas lessee. All of these changes constitute extreme departures from the provisions of the 1986 Order, which is, on its face even-handed, and the Draft Order would instead allow for manipulation of the fundamental processes and data that are foundational to the management of the Potash Area by one industry to the detriment of the other affected industry. This provision is not consistent with the intent of the Consensus Document.

**Section 6.e.1: Oil and Gas Drilling and Section 6.e.2: Drilling from a Development Area:**

It was the intent of the Consensus Document to increase development of oil and gas resources in the Potash Area. Section 6.e.1 eviscerates that intent. Section 6.e.1 is the section that states when, where and under what circumstances drilling may be allowed in the Potash Area, and it deceptively implies that drilling will be allowed under the three exceptions mentioned. When the provision is read in context, however, it is clear that the BLM is not mandated to allow drilling at any time or at any location in the Potash Area, and that the Draft Order has effectively retreated to pre-1951 policies of

creating a potash reserve. Plainly and clearly, the intent of the Consensus Document was that the BLM would be affirmatively required to form Development Areas and associated Drilling Islands “capable of effectively extracting oil and gas resources while *managing* the impact on *commercial* potash resources.” (Emphasis added.)

The drilling provisions 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 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. The intent of the JITC was that the new order would continue to allow drilling as authorized by the 1986 Order and that it would additionally 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.

This conclusion is buttressed by the unsolicited but consistent changes in the definition of “Drilling Island” contained in the Draft Order. As detailed above, the amended 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 added by the DOI, the Draft Order removes the quoted language, thus underscoring a policy determination by the Department of the Interior to allow no drilling within the Potash Area.

Consistently with the intent of the Consensus Document, Yates strongly urges the addition of a provision stating:

Upon receipt of an APD for a new location outside an existing Drilling Island, Development Area, or Barren Area, the BLM must form a Development Area that supports the development of oil and gas resources from the Development Area and an associated Drilling Island capable of effectively extracting oil and gas resources while managing the impact on commercial potash resources.

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### **Section 6.e.1.c: Drilling from a Drilling Island or Single Well Site by Agreement**

Prior to the publication of the Draft Order, comments submitted to the Secretary by the JITC on June 7, 2012 would have allowed for the approval of agreed upon drilling from either a drilling island or a single well site. The BLM has now removed the provision allowing a potash lessee and an oil and gas lessee to establish a Drilling Island by agreement. In addition, the modified provision of this section in the Draft Order specifically eliminated a provision that would have required the BLM to honor existing agreements allowing for concurrent operations. The early draft of the order contained the provision that would have required the BLM to approve Drilling Islands or single well sites "prescribed by prior agreement of the oil and gas lessee(s) and the potash lessees in a written contract." The significance of this specific omission is that the Draft Order would thus abrogate existing contracts allowing for an agreement to drill a single well site or a Drilling Island. Both changes reflect an intention by the Secretary to limit approval and implementation of agreements between the potash and oil and gas lessee for a Drilling Island and/or a single well site. By applying the weakened standard, the Draft Order's provision allowing for a "joint recommendation" for a single well site which may or may not be approved in the discretion of the BLM departs from the intention of the JITC. The BLM has removed entirely any option that the potash lessee and oil and gas lessee could agree to a Drilling Island.

### **Section 6.e.(2)(d)(i): Development Area Configurations**

Contrary to the intentions of the JITC as plainly set forth in the Consensus Document, 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 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." The JITC intended 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. The intent of the Consensus Document was not 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 effective oil and gas development, while managing the impact on commercial potash resources.

### **Section 6.e(3): Buffer Zones**

The Consensus Document and subsequent comments provided by the JITC contained language recognizing that the dimensions of a buffer zone may be variable.

The Draft Order attempts to establish buffer zones with less possibility of flexibility and more as a matter of policy, and it is contrary to a significant body of law on the proper interpretation and application of the 1986 Order which requires safety determinations to be made on a well by well basis.

Most importantly, the one-fourth and one-half mile buffer zones are not based on science, and the JITC was in the process of determining and applying scientifically supportable buffer zones when the Secretary interrupted the JITC work. The Consensus Document acknowledged the importance and commitment to completing this important scientific work and of being able to *readily* incorporate the results of the science into the ultimate order. The Consensus Document specifically provided:

Current language in the 1986 Order establishing  $\frac{1}{4}$  and  $\frac{1}{2}$  mile safety buffer set-backs for oil and gas wells respectively will not be changed at this time. New language will be added in the new Order to allow the BLM to grant generally applied variances from these safety buffer set-backs at a time (or times) in the future based upon recommendations from a Joint Industry Technical Committee including the input of the science advisor (Sandia National Laboratories at the outset).

The Consensus Document provided an additional comment emphasizing the intention of the JITC as follows: “[a]s a side note, this is the only explicitly established element of the proposed new Order that we are building in a mechanism for change in the future.”

In a complete and alarmingly extreme departure from the stated and explicit intention of the Consensus Document, the Draft Order removes from the State and local offices of the BLM the authority for configuring Buffer Zones 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. It is strongly recommended that the policy implications of this provision in the Draft Order be eliminated completely as they are a complete departure from the stated intention of the JITC as reflected in the Consensus Document. Accordingly, the recommended language should read substantially as proposed by the JITC in its June 7, 2012 comments to a preliminary draft of the order.

Current buffer zones are  $\frac{1}{4}$  mile for oil wells and  $\frac{1}{2}$  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. In adopting revisions, the State Director will base revised Buffer Zones on science, engineering and new technology and will [implement recommendations developed] by the Joint Industry Technical Committee and other interested parties in adopting any revisions.

#### **Section 8(c): Access to Data:**

In the 2009 meeting between the Mr. Farquahar and the Oil and Gas Stakeholders, the Oil and Gas Stakeholders stressed the importance of an open and fair exchange of information in increasing trust between the two industries and supporting the ability of all parties to knowledgeably manage all issues relating to concurrent

development in the Potash Area. The Draft Order allows 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 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 unwilling to provide such information historically. The Consensus Document would have required the necessary exchange of information, but the Draft Order eliminates that requirement.

The Consensus Document required that "sufficient core data to be obtained to identify a limited area as either Enclave or Barren so that the rules governing oil and gas development in such areas would then routinely apply." In the June 7, 2012 comments the JITC recommended specific language to be included in the order so as to implement the intention reflected in the Consensus Document. The JITC's recommendation was as follows:

In order for an oil and gas or potash operator to establish and design a core acquisition program for the purpose of proving a Barren Area, those records of core analysis in the area of the planned program that are necessary to design that program will be provided in a timely fashion by the BLM, subject to data management protocols as referenced in section 3.III.E.6.c.

In contrast to the intention of the JITC as reflected in the Consensus Document and subsequent June 7, 2012 comments, the Draft Order does not *require* the BLM to provide the information. Instead the Draft Order *encourages* the *owner of record* to provide the information. This change causes two results which are inconsistent with the Consensus Document: (1) the responsibility for providing information is shifted from the BLM to the potash lessee, and the Draft Order contains no mechanism whatsoever for sanctions should the potash lessee fail to comply, and further contains no provision for BLM oversight to assure the accuracy of any information the potash lessee voluntarily provides, and (2) most importantly, 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 right to establish a Barren Area. The Barren Area provision of the Draft Order is effectively rendered meaningless thereby.

If the intention of the Draft Order is to truly "foster" concurrent operations, more information must be required to be provided. 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. It is recommended that 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.

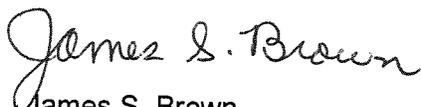
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## CONCLUSION

It is premature for the Secretary to revise the 1986 Order as the JITC has not completed its work to delineate the safe distance the respective oil and gas and potash operations may safely proceed in relation to one another. In addition, the JITC drafted the Consensus Document to preserve rights allowed under the 1986 Order, to clarify when and where drilling may occur, to 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 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 is therefore completely inconsistent with the Consensus Document and renders meaningless the process by which the Secretary purported to consult with the JITC. If the Secretary elects to promulgate an unnecessary order at this time, Yates asserts that such order must adopt the specific and agreed upon provisions of the Consensus Document and implement the intentions stated therein.

Yates asserts that the promulgation of any order is premature at this time and that, in contrast to the 1986 Order and the Consensus Document, the Draft Order is not scientifically or technologically based or supportable. Yates respectfully urges the Secretary to withdraw the Draft Order and to allow the JITC to complete its important scientific work, and thereafter to promulgate, in an orderly and thoughtful process soliciting the participation of all affected industry members and the public, a rule that is scientifically supportable and rationally based.

Sincerely yours,



James S. Brown  
Chief Operating Officer

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