September 16, 2024

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Submitted via email: BLM_NPRA_SpecialAreas@blm.gov

Re: American Petroleum Institute's Comments on the RFI: Special Areas in the National Petroleum Reserve in Alaska

Dear Ms. McIntosh,

The American Petroleum Institute ("API") appreciates the opportunity to provide these comments in response to the Bureau of Land Management's ("BLM") request for information ("RFI") regarding the need to: identify additional significant resource values for existing special areas; modify the boundaries or management of existing special areas; or identify public lands that may qualify for designation as new special areas in the National Petroleum Reserve in Alaska ("Petroleum Reserve" or "NPR-A").[1] The oil and natural gas industry has a 50-year track record of safe and responsible energy development on the North Slope of Alaska while protecting the Alaskan environment and wildlife. These comments and recommendations on BLM's RFI reflect that experience and perspective.

API is a nationwide, non-profit trade association that represents all facets of the oil and natural gas industry, which supports 10.3 million U.S. jobs and nearly eight percent of the U.S. economy. API's nearly 600-member companies include large integrated companies, as well as exploration and production, refining, marketing, pipeline and marine businesses, and service and supply firms, including some that operate within the Petroleum Reserve. API was formed in 1919 as a standards-setting organization, and API has developed more than 700 standards to enhance operational and environmental safety, efficiency, and sustainability.

API's members are dedicated to meeting environmental requirements while economically developing and supplying energy resources for consumers. Our members have a substantial interest in the effective environmental stewardship of natural resources. All segments of the oil

[1] Special Areas Within the National Petroleum Reserve in Alaska, 89 Fed. Reg. 58,181 (July 17, 2024).

and natural gas industry are subject to extensive permitting and regulatory requirements at local, state, and federal levels for activities such as exploration, drilling, and production from oil and gas wells, refining crude oil, transporting crude oil or refined product, and operating filling stations. Protecting environmental resources is important, and API and our members remain committed to working with federal, state, and local regulators to ensure that environmental programs relating to oil and natural gas development are protective, clear, administrable, and legally sound.

In Alaska, the oil and natural gas industry has a history of safe, effective, and environmentally responsible development spanning five decades. Oil and natural gas operations on federal lands in Alaska are subject to extensive environmental reviews and have been conducted with an impressive track record of environmental protection. The development of Alaska's oil and natural gas resources has produced enormous economic, social, and scientific benefits while simultaneously reducing environmental impacts and protecting Alaska's natural resources. This record of experience and knowledge proven by a half-century of responsible development on the North Slope, along with continuing industry innovations, provides a sound basis for the future safe and responsible exploration and development of the Petroleum Reserve.

API opposes the RFI because it appears that BLM is embarking on this initiative as part of a larger effort to fundamentally transform management of the Petroleum Reserve to increase restrictions on oil and gas exploration and production, diminish transparency, and upset longstanding balances that allow for both economic development and environmental protections. While it is currently unclear, due to a lack of explanation, how BLM will use the information submitted, it appears to be a unilateral administrative attempt to significantly increase Special Areas within the Petroleum Reserve in order to expansively apply a presumption that oil and gas activities should not be permitted in those areas. This effort is contrary to law because Congress clearly envisioned that oil and gas exploration and production would occur in Special Areas and restricted BLM's authority to impose maximum protection measures therein. This effort is also unnecessary as BLM recently determined that Special Areas do not need to be expanded. Furthermore, BLM's existing mitigation authority and stipulations on oil and gas activities are sufficient to protect subsistence, recreational, fish and wildlife, and historical or scenic values without designating new or expanded Special Areas. It would be inappropriate and unlawful for BLM to use RFI responses as a pretext for unilateral imposition of additional restrictions on oil and gas development in the Petroleum Reserve. At a minimum, any review and revision of Special Areas should occur through the development and approval of a holistic Integrated Activity Plan ("IAP") with review pursuant to the National Environmental Policy Act ("NEPA"), as has been BLM's historic practice.

I. Overview of Management of the Petroleum Reserve

Located on the North Slope of Alaska, the Petroleum Reserve includes approximately 23 million acres of federal mineral estate. Originally established in 1923 as the Naval Petroleum Reserve No. 4, it was subject to the Secretary of the Navy's authority to develop and operate the reserves "in his discretion, directly or by contract, lease, or otherwise, and to use, store,

exchange, or sell the oil and gas products thereof . . . for the benefit of the United States."[2] However, for most of its early history, the Petroleum Reserve experienced limited exploration and development.

During the energy crisis of the 1970s, Congress enacted the Naval Petroleum Reserve Production Act ("NPRPA")[3] in 1976 to authorize the Secretary of the Interior to develop the Petroleum Reserve "in a manner consistent with the total energy needs of the Nation."[4] The primary purpose of the legislation was to reorient the purpose of the Petroleum Reserve and to further promote the exploration for oil and gas resources. With respect to exploration activities, Congress instructed that:

> [a]ny exploration within the Utukok River, the Teshekpuk Lakes areas, and other areas designed by the Secretary of the Interior containing any significant subsistence, recreational, fish and wildlife, or historical or scenic value, shall be conducted in a manner which will assure the maximum protection of such surface values to the extent consistent with the requirements of this Act for the exploration of the reserve.[5]

As Congress explained when enacting this provision, "'maximum protection of such surface values' is not a prohibition on exploration-related activities within such areas, it is intended that such exploration operations will be conducted in a manner which will minimize the adverse impact on the environment."[6]

In 1980, after receiving a comprehensive study regarding the utilization and development of the Petroleum Reserve, Congress passed an appropriations bill that authorized development and production of the area.[7] Recognizing that "we can no longer delay efforts which would increase the domestic supply of oil and gas,"[8] Congress amended the NPRPA to mandate that the Secretary of the Interior conduct "an expeditious program of competitive leasing of oil and gas in

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[2] Pub. L. No. 243, 41 Stat. 812, 813 (1920) (codified as amended at 10 U.S.C. § 8722 (2018)).

[3] Pub. L. No. 94-258, 90 Stat. 303 (1976).

[4] H.R. Rep. No. 94-81(I), at 1 (1975); *Sovereign Iñupiat for a Living Arctic v. Bureau of Land Mgmt.*, 701 F. Supp. 3d 862, 879 (D. Alaska 2023), *review pending*, No. 23-3627 (9th Cir.) ("*SILA v. BLM*") (recognizing that "[t]he NPR-A was set aside by Congress to be a petroleum reserve to help meet the Nation's need for oil and gas.") (citation omitted).

[5] 90 Stat. at 304 (codified at 42 U.S.C. § 6504(a)).

[6] H.R. Conf. Rep. No. 94-942, at 21 (emphasis added) (1976). Until recently, BLM echoed this statement of Congressional intent and recognized that "[m]aximum protection of designated special areas does not imply a prohibition of exploration or other activities." National Petroleum Reserve in Alaska Designation of Special Areas, 42 Fed. Reg. 28,723, 28,723 (June 3, 1977).

[7] Department of the Interior Appropriations Act for Fiscal Year 1981, Pub. L. No. 96-514, 94 Stat. 2957 (Dec. 12, 1980).

[8] 126 Cong. Rec. 29,489 (1980) (statement of Sen. Stevens).

the [Petroleum Reserve]."[9] To this end, for initial leasing efforts, Congress exempted the first two oil and gas lease sales from the requirements of NEPA and made exploration or production on those leases subject to the maximum protection requirement in Special Areas.[10] Subsequent lease sales are subject to NEPA and Congress authorized BLM to mitigate certain adverse impacts associated with expanded activities in the Petroleum Reserve:

> [a]ctivities undertaken pursuant to this Act shall include or provide for such conditions, restrictions, and prohibitions as the Secretary deems necessary or appropriate to mitigate reasonably foreseeable and significantly adverse effects on the surface resources of the National Petroleum Reserve in Alaska.[11]

Accordingly, in conjunction with the leasing program, BLM can impose appropriate mitigation measures for leasing-related activities within the Petroleum Reserve irrespective of whether there is a Special Area designation.

Consistent with Congress' overarching directive to expeditiously explore and develop the Petroleum Reserve's oil and natural gas resources, the NPRPA exempts the Petroleum Reserve from application of the environmental protection requirements of the Wilderness Act and the Federal Land Policy and Management Act's ("FLPMA") mandates for sustained yield and multiple-use management.[12] As a result, the NPRPA is a dominant-use statute with the overarching goal of increasing domestic oil production while mitigating the impacts associated with exploration and production.[13]

Since taking over management of the Petroleum Reserve, BLM has recognized that the NPRPA and its implementing regulations are to "balance energy development with environmental protection and subsistence values."[14] Indeed, the U.S. Court of Appeals for the Ninth Circuit has held that "[t]he [NPRPA] did not give the Secretary the discretion not to lease; instead, the Secretary was given the discretion to provide rules and regulations under which leasing would be conducted and was to develop restrictions necessary to mitigate adverse impact on the NPR-A."[15] And, other courts have concluded that "[a]lthough Congress directed 'maximum protection' be accorded to significant surface values in [Special Areas] while

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[9] 94 Stat. at 2964 (codified at 42 U.S.C. § 6506a(a)).

[10] 42 U.S.C. § 6506a(n)(2).

[11] *Id.* § 6506a(b). As another mitigation measure, Congress directed that 50 percent of all receipts from sales, rentals, bonuses, and royalties be paid to the State of Alaska to fund public services with priority given to "subdivisions of the State most directly or severely impacted by development of oil and gas leased under this Act." *Id.* § 6506a(l).

[12] *Id.* § 6506(c).

[13] BLM, *National Petroleum Reserve in Alaska Integrated Activity Plan Record of Decision* at 3 (Apr. 2022) ("2022 ROD").

[14] Proposed Rulemaking Authorizing Oil and Gas Leasing in the National Petroleum Reserve-Alaska, 46 Fed. Reg. 37,725, 37,725 (July 22, 1981).

[15] *Kunaknana v. Clark*, 742 F.2d 1145, 1149 (9th Cir. 1984) (citation omitted).

undertaking oil and gas activities in the NPR-A, it still clearly envisioned that [Special Areas] would be developed for oil and gas production."[16] Until recently, BLM has generally managed the Petroleum Reserve consistent with the objectives that Congress established.

Earlier this year, BLM published a final rule that, for the first time in more than 40 years, revised the regulations for management of the Petroleum Reserve.[17] In doing so, BLM adopted a regulatory framework with unlawful changes including an express presumption against development in the Petroleum Reserve, an area that Congress designated for the explicit purpose of enhancing domestic oil and gas production. BLM also abandoned utilization of its longstanding IAP process, improperly excluded the new regulations from NEPA review, and ignored its Alaska Native consultation obligations. In response, five lawsuits have been filed by municipal and state governments, Alaska Native organizations, and holders of existing leases to challenge BLM's promulgation of the NPR-A final rule. Notwithstanding the initiation of this litigation, BLM published the RFI two weeks later in what appears to be a biased effort to solicit general public recommendations for new Special Areas, for the expansion of existing Special Areas, and for additional protective restrictions within Special Areas. BLM has not provided a transparent or satisfactory explanation regarding the purpose, applicable procedural process, or intended result associated with this RFI. Taken at face value, this RFI appears to be an administrative attempt by BLM to generate cherry-picked justifications for classifying expansive areas of the Petroleum Reserve as off-limits to oil and gas development in clear contravention of explicit Congressional directives.

II. Comments in Response to BLM's RFI

A. BLM Should Not Act on the RFI until the Legal Challenges to the NPR-A Final Rule Are Resolved.

BLM's solicitation of information for the purpose of updating Special Areas within the Petroleum Reserve is both premature and unnecessary. BLM's NPR-A final rule went into effect on June 6, 2024, and notwithstanding pending court review of the underlying regulations, one month later, BLM announced this RFI seeking to expand or designate new Special Areas within the Petroleum Reserve. The RFI appears to be another step in BLM's recent administrative efforts to undermine and ignore Congress's directives for oil and gas development in the Petroleum Reserve, to reduce transparency and public involvement in major NPR-A decision-making, and to codify regulatory restrictions that unlawfully convert the Petroleum Reserve to wilderness preservation. BLM should abandon this RFI process until litigation on the underlying NPR-A final rule is resolved. At the very least, BLM should refrain from taking any action to expand Special Areas or impose new restrictions until a specific proposal has been made, the proposed revisions have been published for public notice and comment, and the potential revisions have been evaluated through the typical IAP and NEPA processes.

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[16] *SILA v. BLM*, 701 F. Supp. 3d at 880 (citation omitted).

[17] Management and Protection of the National Petroleum Reserve in Alaska, 89 Fed. Reg. 38,712 (May 7, 2024) ("NPR-A final rule").

As BLM is aware, the NPR-A final rule is currently subject to six complaints in five lawsuits brought by North Slope Alaska Native organizations, state and local governments, and holders of existing leases in the Petroleum Reserve.[18] These lawsuits all allege that BLM's rulemaking is an unlawful exercise of administrative authority that is contrary to the statutory directives that Congress established in the NPRPA and that BLM failed to follow the requisite procedures when promulgating the regulations. Given the significant deficiencies alleged in the litigation, BLM's hasty attempt to implement the NPR-A final rule and expand Special Areas through this RFI is contrary to law and the public interest as articulated in the NPRPA. BLM should take no further action on this RFI until the litigation on the underlying final rule is resolved.

Moreover, additional modifications to Special Areas are unnecessary at this time. In the recently promulgated NPR-A final rule, BLM has stated that it is required to evaluate Special Areas at least every 10 years.[19] BLM has also stated that the last evaluation of Special Areas occurred as part of the 2013 Integrated Activity Plan. This is incorrect. In the 2020 Integrated Activity Plan, BLM evaluated all five Special Areas and made modifications to three of the areas.[20] In 2022, BLM reevaluated this IAP and determined that the NEPA analysis therein remained adequate. Notwithstanding, BLM's 2022 Record of Decision adopted a management regime for the Petroleum Reserve and its Special Areas that reestablished the measures approved in 2013.[21] Given that two evaluations of Special Areas have occurred in the past four years, BLM has not articulated a rational explanation for pursuing the goals of this RFI at this time.

B. If BLM Adds or Modifies Special Areas or Revises the Management of Any Special Areas, It Must Proceed Through Notice and Comment Rulemaking or the Public IAP Process.

API and its members oppose BLM's disregard for public processes and local public comments in its attempt to dramatically change the administration of the Petroleum Reserve. In its press release for this RFI, BLM Director Tracy Stone-Manning stated that "[w]e have a responsibility to manage the western Arctic in [a] way that honors the more than 40 Indigenous communities that continue to rely on the resources from the Reserve for subsistence."[22]

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[18] Complaint, *Voice of the Arctic Iñupiat v. BLM*, Case No. 3:24-cv-00136-SLG (D. Alaska June 28, 2024); Complaint, *North Slope Exploration, LLC v. U.S. Dep't of the Interior*, Case No. 3:24-cv-00143-SLG (D. Alaska July 3, 2024); Complaint, *State of Alaska v. BLM*, Case No.3:24-cv-00144-SLG (D. Alaska July 3, 2024); Complaint, *ConocoPhillips Alaska, Inc. v. Dep't of the Interior*, Case No. 3:24-cv-00142-SLG (D. Alaska July 5, 2024); Complaint, *North Slope Borough v. BLM*, Case No. 3:24-cv-00145-SLG (D. Alaska July 5, 2024); Complaint in Intervention of Alaska Oil and Gas Association, *State of Alaska v. BLM*, Case No.3:24-cv-00144-SLG (D. Alaska Aug. 2, 2024).

[19] 43 C.F.R. § 2361.30(b)(1).

[20] BLM, *National Petroleum Reserve in Alaska Integrated Activity Plan and Environmental Impact Statement* at 2-4 to 2-5, 2-59 to 2-60 (2020) ("2020 IAP").

[21] 2022 ROD.

[22] Press Release, BLM Welcomes Input on Special Areas in Alaska's Western Arctic (July 12, 2024), https://www.blm.gov/press-release/blm-welcomes-input-special-areas-alaskas-western-arctic.

However, BLM has repeatedly failed to honor reasonable requests from Alaska Native entities on the North Slope, including those that reside within the Petroleum Reserve, regarding the management of oil and gas, wildlife, and other resources. BLM has also disregarded the concerns raised by the State of Alaska, leaseholders, and other local stakeholders regarding the appropriate and lawful regulatory framework for the Petroleum Reserve.

If BLM proceeds with any modifications to existing Special Areas, designation of new Special Areas, or new final or interim measures applicable to any Special Areas, it must first propose and notice such changes for public review and comment since those changes have the "force and effect of law."[23] BLM's recent NPR-A final rule and associated regulations are conspicuously vague on this issue, requiring BLM to "[p]rovide the public and interested stakeholders with notice of, and meaningful opportunities to participate in, the evaluation process,"[24] provide the public "the opportunity to recommend lands" for designation as special areas and for new measures,[25] and provide only "public notice" that interim measures have been imposed.[26] Under the IAP process, all such changes—except "interim" measures, which BLM has never (until recently) claimed the authority to impose because they are not allowed by the NPRPA—were accomplished with a proposal for public review and comment as well as NEPA review. BLM must adhere to its established public process when making any management modifications within the Petroleum Reserve.

With the current RFI, BLM has solicited recommendations for changes to Special Areas and associated measures through a private format in which the recommendations received from the public are not made publicly available. If there is no public notice and comment on any changes BLM makes based on the recommendations it receives, then the public will be entirely deprived of the right to: (1) review and provide input on such changes (including BLM's supporting rationale) before they are made final; and (2) review the recommendations BLM received that formed the basis for BLM's recommendations (much less provide comment on any such recommendations, as the now-supplanted 43 C.F.R. § 2361.1(d) required). BLM's approach here is particularly problematic given that it claims to have the authority to implement "interim measures" to protect resource values on lands that are being considered, but not yet designated, as Special Areas. This is contrary to the NPRPA and the requirements of the Administrative Procedure Act ("APA").

Given the significant implications for oil and gas exploration and production, modifications to Special Areas should not be considered or implemented on an ad hoc basis. Instead, consistent with its longstanding practice, BLM should only consider revisions to the management of the Petroleum Reserve and Special Areas through the IAP process in conjunction with review pursuant to NEPA. By using the IAP process to address Special Areas, BLM would ensure that any modifications receive a comprehensive evaluation, including the preparation of an EIS, consideration and analysis of a range of alternatives, public review and comment,

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[23] *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 96 (2015); 5 U.S.C. § 553.

[24] 43 C.F.R. § 2361.30(a)(2) (emphasis added).

[25] *Id*. § 2361.30(b)(3) (emphasis added).

[26] *Id*. § 2361.30(b)(4).

consultation with affected Alaska Native communities, and issuance of a record of decision. More importantly, continued use of the IAP process would allow for holistic review and management of the Petroleum Reserve in a way that properly balances oil and gas activities with appropriate subsistence and environmental protections. Furthermore, such an approach would provide stakeholders with a comprehensive proposal for the management of the Petroleum Reserve which, in turn, allows appropriate review of the management framework and the proper scope of evaluation of areas available for leasing, modification of Special Areas, lease stipulations, required operating procedures, and any other management measures.

Should BLM decide to consider changes to Special Areas or related measures, the RFI is only a first step. BLM also must either follow the IAP's public process or engage in formal public notice-and-comment rulemaking. Indeed, BLM believed rulemaking was necessary to "codify" the existing Special Areas and identify the "significant resource values" associated with those areas. Any modifications to those "codified" Special Areas and associated values and measures similarly requires that those modifications first be proposed and noticed for public review and comment.[27]

C. Expansion of Special Areas Is Not Necessary to Provide Subsistence or Environmental Protections.

In the NPRPA, Congress authorized BLM to designate Special Areas to protect lands containing significant subsistence, recreational, fish and wildlife, or historical or scenic value from impacts associated with exploration of the Petroleum Reserve. Based on its NPR-A final rule, it appears that BLM now intends to utilize Special Areas, either through the expansion of existing areas or the designation of new areas, as the primary means to provide protection to subsistence, wildlife, and other resources from all oil and gas activities. This is a misguided attempt to alter the purpose and application of Special Areas as expressed in the NPRPA.

BLM fails to appreciate that Congress contemplated and specifically authorized oil and gas development in Special Areas.[28] Congress also explicitly precluded BLM from establishing "wilderness" areas in the Petroleum Reserve.[29] Instead of this newfound focus on Special Areas, BLM should recognize that it has typically imposed protective measures of various types in various areas without the need to designate Special Areas. For example, every lease issued by BLM includes a variety of stipulations, many of which impose specific protections for biologically sensitive areas.[30] In addition, BLM also imposes required operating procedures during the permitting process which include more specific protections tailored each proposed project. Separately, oil and gas activities in the Petroleum Reserve have to comply with numerous resource-specific statutes and regulations including, but not limited to, the Clean Air Act, Clean Water Act, Endangered Species Act, Marine Mammal Protection Act, Migratory Bird

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[27] *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (the APA "makes no distinction . . . between initial agency action and subsequent agency action undoing or revising that action.").

[28] *SILA v. BLM*, 701 F. Supp. 3d at 880.

[29] 42 U.S.C. § 6506a(c).

[30] *See*, *e.g.*, 2022 ROD, Appendix A.

Treaty Act, etc. Finally, when contemplating oil and gas activities, lessees routinely include project modifications or design features that are intended to minimize effects to subsistence, environmental, and other resources. Accordingly, contrary to BLM's intent communicated through this RFI, expanding the footprint of Special Areas is not necessary as a mechanism to protect surface and resource values in the Petroleum Reserve.

D. Unilaterally Establishing New Special Areas and/or Expanding Existing Special Areas In an Effort to Prevent Oil and Gas Development Is Contrary to Congressional Policy, Increases Uncertainty, and Discourages Investment.

BLM's unilateral attempt to generate purported justifications for the increase and expansion of Special Areas through this RFI process is directly contrary to Congress' mandated use of the Petroleum Reserve and unlawfully stifles private investment in domestic energy production in Alaska. As noted above, the overarching purpose of the NPRPA is to incentivize and expedite private oil and gas leasing, exploration, and production in the Petroleum Reserve.[31] Congress has repeatedly and expressly reiterated this objective.

As BLM is aware, in 1980, Congress amended the NPRPA through an appropriations bill that authorized private development and production in the Petroleum Reserve.[32] Recognizing that "we can no longer delay efforts which would increase the domestic supply of oil and gas,"[33] the 1980 amendment mandated "an expeditious program of competitive leasing of oil and gas" in the Petroleum Reserve.[34] That legislation "was passed as part of an effort to combat the difficulties caused by the energy crisis."[35] BLM cannot utilize this RFI in an attempt to override clear Congressional intent and directives for use of the Petroleum Reserve.

Through the NPRPA, Congress sought to incentivize exploration efforts by private industry because the pre-existing federal program was limited and expensive,[36] and Congress planned to eventually phase out the federal exploration program.[37] In order to attract investment, the applicable regulatory regime must provide a reasonable level of predictability so that investors have a reasonable assurance of being able to recover their investment. Congress clearly and intentionally established a leasing program and management framework within the Petroleum Reserve with these goals in mind in order to attract private investment. With this RFI, and the preceding NPR-A final rule, BLM is signaling that it will seek to establish new Special Areas, expand existing Special Areas, and attempt to increase the protective measures that apply to significant resource values within Special Areas. In doing so, BLM would be placing large,

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[31] *ConocoPhillips Alaska, Inc. v. Alaska Oil & Gas Conservation Comm'n*, 660 F. Supp. 3d 822, 834 (D. Alaska 2023).

[32] 94 Stat. at 2964-65.

[33] 126 Cong. Rec. 29,489 (statement of Sen. Stevens).

[34] 42 U.S.C. § 6506a(a).

[35] *Wilderness Soc'y v. Salazar*, 603 F. Supp. 2d 52, 57 (D.D.C. 2009).

[36] *See* S. Rep. No. 96-985, at 34 (1980).

[37] H.R. Rep. No. 96-1147, at 32-33 (1980).

additional portions of the Petroleum Reserve off limits to further oil and gas development which will discourage private investment in energy production and increase investment-related risks and uncertainties in an area specifically set aside for petroleum development purposes. BLM's efforts here are unlawful and contrary to the specific directives of the NPRPA and the limits placed on BLM's authority for the management of the Petroleum Reserve.

E. BLM Cannot Circumvent the Statutory Exemption of the Petroleum Reserve from Wilderness Protection and Multiple-Use, Sustained-Yield Management Mandates.

The NPRPA specifies the legal framework that applies to the Petroleum Reserve and designated Special Areas. Notably, while BLM must assure the "maximum protection" of areas containing "significant subsistence, recreational, fish and wildlife, or historical or scenic value," BLM is only authorized to implement such measures "to the extent consistent with the requirements of this Act for the exploration of the reserve."[38] Accordingly, BLM does not have discretion to unilaterally expand Special Areas or to impose management measures therein that are contrary to the NPRPA's objectives for "an expeditious program of competitive leasing of oil and gas in the Reserve in accordance with this Act."[39]

BLM cannot reach to other statutory provisions in an effort to circumvent the directives of the NPRPA for management of the Petroleum Reserve. Indeed, contrary to BLM's apparent objectives with this RFI, in the NPRPA, Congress explicitly prohibited BLM from establishing any wilderness areas within the Petroleum Reserve.[40] Similarly, the NPRPA exempts the Petroleum Reserve from FLPMA's requirement that BLM develop land use plans that provide for multiple use, sustained yield, and other management criteria.[41] Accordingly, BLM has always recognized that the NPRPA is a "dominant-use statute."[42] And, FLPMA states that "where a tract of such public land has been dedicated to specific uses according to any other provisions of law it shall be managed in accordance with such law."[43]

Similarly, BLM's effort to unilaterally expand Special Areas in the Petroleum Reserve is contrary to Congressional directives in the Alaska National Interest Lands Conservation Act ("ANILCA"). ANILCA, which was enacted after the Special Area statutory provisions in the NPRPA, contains a "no more" clause that prohibits both the additional withdrawal of public lands within the State of Alaska and the further study of federal lands in Alaska for consideration as conservation system units, national recreation areas, national conservation areas, or similar purposes absent Congressional approval.[44] As Congress made clear in passing ANILCA:

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[38] 42 U.S.C. § 6504(a) (emphasis added).

[39] *Id.* § 6506a(a).

[40] *Id.* § 6506a(c).

[41] *Id*.

[42] 2022 ROD at 3.

[43] 43 U.S.C. § 1732(a) (emphasis added).

[44] 16 U.S.C. § 3213.

> This Act provides sufficient protection for the national interest in the scenic, natural, cultural and environmental values on the public lands in Alaska, and at the same time provides adequate opportunity for satisfaction of the economic and social needs of the State of Alaska and its people; accordingly, the designation and disposition of the public lands in Alaska pursuant to this Act are found to represent a proper balance between the reservation of national conservation system units and those public lands necessary and appropriate for more intensive use and disposition, and thus Congress believes that the need for future legislation designating new conservation system units, new national conservation areas, or new national recreation areas, has been obviated thereby.[45]

BLM's apparent efforts to administratively increase Special Areas, which include a presumption prohibiting the permitting of oil and gas activities, run contrary to ANILCA's "no more" clause.

In the NPRPA, Congress mandated an expeditious program of competitive leasing of oil and gas within the Petroleum Reserve and included provisions incentivizing the leasing of lands for that purpose.[46] The NPRPA also curtailed the application of FLPMA within the Petroleum Reserve, and ANILCA established that the need for additional conservation designations for public lands within Alaska has been obviated. BLM cannot circumvent these clear expressions of Congressional intent and delegated authority through unilateral regulatory action.

F. BLM Has Failed to Provide the Requisite Criteria to Inform Proposals for Designation or Expansion of Special Areas.

In the RFI, in part, BLM solicits suggestions from the general public on whether to add significant resource values to existing Special Areas or to designate new Special Areas based on newly identified significant resource values. BLM has failed to provide any technical or scientific criteria that can be used to support or evaluate any such proposals.

The NPR-A final rule added a regulatory definition of "significant resource value" in an attempt to clarify the basis for designating Special Areas. BLM defined "significant resource value" as:

> Any surface value, including subsistence, recreational, fish and wildlife, historical, scenic, or other surface value that the Bureau identifies as significant and supports the designation of a Special Area.[47]

There are two significant overarching issues with this definition that BLM must address before taking any action in response to this RFI. First, Congress explicitly identified the resource values that could be considered when contemplating the designation of Special Areas, and it did not give BLM discretion to consider any "other surface value" beyond

[45] 16 U.S.C. § 3101(d) (emphasis added).

[46] 42 U.S.C. § 6506a.

[47] 43 C.F.R. § 2361.5 (emphasis added).

those specifically identified in the NPRPA.[48] Second, other than its own purported ability to identify significance, BLM has provided no guidance, explanation, or criteria to inform the determination of whether a particular resource value is actually "significant" pursuant to the NPRPA.

Given these deficiencies, BLM cannot proceed with any action in response to this RFI. Without any explanation or minimum criteria for what is sufficient to constitute "significant" for a resource value, there is no objective ability, even as informed by the best available scientific information, to determine whether a particular resource value is adequate to support the designation, expansion, or perpetuation of a Special Area. Furthermore, given the significant ramifications that BLM has unilaterally and unlawfully applied to Special Areas via the NPR-A final rule, this omission must be addressed and resolved before BLM proceeds with any further action.

G. As Determined in 2020, the Colville River Special Area Should Be Eliminated.

In addition to seeking information about the expansion of Special Areas or the enhancement of protective measures within existing Special Areas, BLM should also consider revisions to existing Special Areas. For example, in 2020, based on an evaluation of the best available science, BLM recommended removing the Colville River Special Area. The Secretary of the Interior subsequently approved that decision.[49] In 2022, BLM reversed that decision without explanation or citation to additional scientific justification. In accordance with this RFI, BLM should reevaluate the removal of the Colville River Special Area because it is no longer necessary.

The purpose for the establishment of the Colville River Special Area in 1977 was to protect peregrine falcon nesting sites.[50] Subsequently, in 1999, the Colville River Special Area was expanded to 2.44 million acres for the protection of peregrine falcons and other raptors. In the 2020 IAP, BLM determined that the best available science regarding raptor nesting data no longer supported the location of the protected resource.[51] Specifically, BLM noted that peregrine falcon nests outside of the Special Area "are now common and possibly the result of an expanding population."[52] Accordingly, this previously identified resource value is no longer "significant" with respect to that geographic area within the Petroleum Reserve. Furthermore, BLM extended the Colville River Special Area protections for raptors to the entire Petroleum Reserve, so the associated protections are no longer unique to that Special Area. In 2022, BLM determined that the NEPA analyses in the 2020 IAP remained adequate,[53] yet reinstated the

[48] *See* 42 U.S.C. § 6504(a) (to be designated, Special Areas must contain "any significant subsistence, recreational, fish and wildlife, or historical or scenic value.").

[49] BLM, *National Petroleum Reserve in Alaska Integrated Activity Plan Record of Decision* at 4 (2020).

[50] 42 Fed. Reg. at 28,723.

[51] 2020 IAP at 3-142.

[52] *Id*.

[53] BLM, *Determination of NEPA Adequacy, National Petroleum Reserve in Alaska Integrated Activity Plan 2020 Final Environmental Impact Statement Evaluation* (Apr. 25, 2022).

Colville River Special Area. BLM should remove this Special Area as it is no longer serving its designated purpose.

H. BLM's Continued Presumption Against Oil and Gas Activity in Special Areas Is Contrary to the Requirements of the NPRPA.

BLM continues to mistakenly believe that it can apply a regulatory presumption against leasing and new infrastructure on lands in Special Areas that are allocated as available for those activities. The NPR-A final rule requires that, "[o]n lands with Special Areas that are allocated as available for future oil and gas leasing or new infrastructure, the authorized officer will presume that proposed oil and gas activities should not be permitted unless specific information available to the authorized officer clearly demonstrates that those activities can be conducted with no or minimal adverse effects on significant resource values. . . ."[54] This presumption is directly contrary to the requirements of the NPRPA and applicable case law.

In part, the NPRPA requires that any exploration within Special Areas "shall be conducted in a manner which will assure the maximum protection of such surface values to the extent consistent with the requirements of this Act for the exploration of the reserve."[55] As Congress explained:

> [i]t is the intention of this provision to immediately authorize the Secretary to require that the exploration activities within these designated areas be conducted in a manner designed to minimize adverse impacts on the values which these areas contain. While "maximum protection of such surface values" is not a prohibition of exploration-related activities within such areas, it is intended that such exploration operations will be conducted in a manner which will minimize the adverse impact on the environment.[56]

Previously, when designating the Utukok River Uplands, Teshekpuk Lake, and Colville River Special Areas, BLM explicitly endorsed and adopted this statement of congressional intent—"[m]aximum protection of designated special areas does not imply a prohibition of exploration or other activities."[57] Instead, BLM stated that "steps to minimize adverse impacts on existing resource values will be required and implemented."[58]

BLM's presumption against permitting oil and gas activities in Special Areas is plainly contrary to law. While BLM is authorized to assure the "maximum protection of . . . surface values," BLM impermissibly focuses solely on that phrase and excludes the remainder of the

[54] 43 C.F.R. § 2361.40(f) (emphasis added).

[55] 42 U.S.C. § 6504(a) (emphasis added).

[56] H.R. Conf. Rep. 94-942, at 21 (emphasis added).

[57] 42 Fed. Reg. at 28,723 (emphasis added).

[58] *Id*. (emphasis added).

statutory provision.[59] BLM fails to appreciate that its ability to impose measures to maximally protect surfaces values is constrained by the obligation that such measures must be "consistent with the requirements" of the NPRPA. Indeed, in its contemporaneous Conference Report, Congress explicitly stated that "maximum protection" is not a prohibition of activities within Special Areas, and BLM subsequently concluded that it does not even "imply a prohibition" of exploration or other activities. And, in prior IAPs, BLM has explained that "[d]esignation of lands as a Special Area carries with it no specific restrictions on activities."[60] Furthermore, the courts have already found that imposing "no activity" as "maximum protection" in Special Areas is an "impossibility," because "that action in itself would violate § 6504(a), which expressly contemplates some level of activity within [Special Areas], and Congressional intent as contained in the legislative history."[61] More recently, a court concluded that "[a]lthough Congress directed 'maximum protection' be accorded to significant surface values in the [Teshekpuk Lake] and other Special Areas while undertaking oil and gas activities in the NPR-A, it still clearly envisioned that [Special Areas] would be developed for oil and gas production."[62] BLM's presumptive prohibition is flatly precluded by the plain language of the statute, governing legal authority, Congressional intent, and BLM's own prior practice.

I. Maximum Protection Measures within Special Areas Must Be Tailored to Each Specific Significant Resource Value and Only Apply in the Part of the Special Area Where the Resource Value Is Located.

Pursuant to the NPRPA, BLM must assure the maximum protection of significant surface values only "to the extent consistent with the requirements of this Act for the exploration of the reserve."[63] Congress explained that "'maximum protection of such surface values' is not a prohibition on exploration-related activities within such areas, it is intended that such exploration operations will be conducted in a manner that will minimize the adverse impact on the environment."[64] As BLM has recognized, it must "balance energy development with environmental protection and subsistence values, especially in areas of critical wildlife habitat or

[59] *See*, *e.g.*, *Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 486 (2006) ("Interpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis."); *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-33 (2000) ("It is a 'fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'") (citation omitted).

[60] BLM, *National Petroleum Reserve-Alaska Integrated Activity Plan Record of Decision* at 19 (Feb. 21, 2013) (emphasis added).

[61] *Nat'l Audubon Soc'y v. Kempthorne*, 2006 WL 8438583, No. 1:05-cv-8, at *15 (D. Alaska Sept. 25, 2006) ("maximization of protection of the environment does not mean that a leasing program provide maximum protection, but that to the extent that the leasing program permits development, that development be conducted in a manner that provides maximum protection.").

[62] *SILA v. BLM*, 701 F. Supp. 3d at 880 (citation omitted).

[63] 42 U.S.C. § 6504(a).

[64] H.R. Conf. Rep. 94-942, at 21 (emphasis added).

subsistence use."[65] And, the courts have clearly stated that "[a]lthough Congress directed 'maximum protection' be accorded to significant surface values in the [Teshekpuk Lake] and other Special Areas while undertaking oil and gas activities in the NPR-A, it still clearly envisioned that [Special Areas] would be developed for oil and gas production."[66]

It is contrary to the NPRPA for BLM to presume that oil and gas activities are generally prohibited in Special Areas and then use this RFI to unilaterally expand Special Areas in an effort to preclude development. Instead, BLM's authority to impose maximum protective measures applies only "to the extent consistent with the requirements of the [NPRPA]." To ensure this consistency, BLM must acknowledge that oil and gas activities are allowed in Special Areas. BLM also must recognize that each properly identified significant resource value may be affected differently by contemplated oil and gas activities depending on a variety of factors. Instead of blanket prohibitions, BLM must tailor any protective measure to both the contemplated activity and to the specific significant resource value that warrants protection. For Special Areas that contain multiple significant resource values, BLM must apply the applicable protective measures only in the area where the relevant significant resource value is located. As the NPRPA makes clear, it is the identified "surface values" that receive protection, not the entirety of the Special Area.

J. The Imposition of Interim Measures to Maximally Protect Significant Resource Values on Lands "Under Consideration for Designation" Is Not Authorized by the NPRPA.

In the NPR-A final rule, after the receipt of an internal or external recommendation, BLM authorized the imposition of "interim measures" to assure maximum protection of significant resource values "in lands under consideration for designation as a new or modified Special Area."[67] This regulatory provision is contrary to BLM's statutory authority.

The NPRPA clearly limits BLM's authority to assure the maximum protection of certain surface values to established Special Areas.[68] Congress was explicit that this authority is limited to "exploration with the Utukok River, the Teshekpuk Lake areas, and other areas designated by the Secretary of the Interior containing any significant subsistence, recreational, fish and wildlife, or historical or scenic value."[69] Pursuant to the plain language of the statute, Special Areas first must be "designated" before any purported significant resource values on lands therein can qualify for this protection. It is axiomatic that areas being "evaluated" or "under consideration" for designation are not Special Areas, and BLM cannot prematurely impose maximum protection measures on such lands within the Petroleum Reserve.

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[65] 46 Fed. Reg. at 37,725.

[66] *SILA v. BLM*, 701 F. Supp. 3d at 880.

[67] 43 C.F.R. § 2361.30(b)(4).

[68] 42 U.S.C. § 6504(a).

[69] *Id*. (emphasis added).

This provision is emblematic of BLM's larger misconception, as evident in the NPR-A final rule and this RFI, regarding the proper management of the Petroleum Reserve. While BLM has authority to protect significant resource values and to mitigate significantly adverse effects, these measures only apply to minimize certain impacts of activities conducted or undertaken pursuant to the NPRPA.[70] It is contrary to the statute and Congressional intent for BLM to preemptively preclude oil and gas activities unless operators can demonstrate that no environmental harm will occur. Congress exempted the Petroleum Reserve from any wilderness designation, and explicitly directed that its purpose is to expeditiously provide a domestic supply of oil and gas. Any further action by BLM must be consistent with the constrained scope of authority that Congress granted.

III. Conclusion

API appreciates the opportunity to provide our comments and recommendations in response to BLM's RFI. We remain supportive of a management regime in the Petroleum Reserve that promotes responsible oil and natural gas exploration, development, and production while balancing protections for important environmental resources and local subsistence uses consistent with the purposes of the NPRPA. However, this RFI and the preceding NPR-A final rule evidence a broader effort by BLM to significantly disrupt the leasing, exploration, and production of oil and gas resources that Congress mandated within the Petroleum Reserve. BLM cannot unilaterally and administratively override the requirements of the NPRPA and Congressional intent. While we oppose this RFI, API and our members remain willing to work collaboratively with BLM to ensure that any management measures for the Petroleum Reserve properly reflect the purposes established by Congress.

Sincerely,

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[70] *Id.* §§ 6504(a) & 6506a(b).