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November 14, 2023

The Honorable Pete Stauber
Chair, Subcommittee on Energy and Mineral Resources
House Natural Resources Committee
1324 Longworth House Office Building
Washington, D.C. 20515

RE: Responses to Follow Up Questions from the October 25, 2023 Legislative Hearing Before the House Natural Resources Committee, Subcommittee on Energy and Minerals On H.R. 6009.

Chairman Stauber, Ranking Member Ocasio-Cortez,

Thank you for the opportunity to testify at the October 25, 2023, subcommittee hearing. Please find below responses to questions submitted by subcommittee members following the hearing on H.R. 6009.

Responses to Questions from Ranking Member Ocasio-Cortez:

Question 1: The Inflation Reduction Act raised federal royalty rates on publicly owned oil and gas resources to 16.67 percent from 12.5 percent. The Bureau of Land Management's proposed rule, on the "Fluid Mineral Leases and Leasing Process," incorporates this updated rate and would allow the Bureau to raise federal royalty rates after ten years. However, H.R. 6009 would require the Bureau of Land Management to withdraw the proposed oil and gas rule, and prohibit any implementation or enforcement of any substantially similar rule. What are the consequences for federal taxpayers and state and local governments when federal royalty rates are not regularly updated?

Response:

As an initial matter, and as noted in the question, federal law currently dictates a royalty rate of 16.67% and the Proposed Rule would make that a minimum rate after ten years, subject to increase, consistent with the IRA. If BLM is prevented from instituting any rulemaking to impose updated royalty rates, its existing rules will be rendered even more vulnerable to legal challenge because they will be—and will be forced to remain—out of

sync with current federal law. BLM would be put in the unenviable position of having to enforce—permanently—federal law through instruction memoranda, with both being in direct conflict with BLM's existing and updated rules. This raises legal questions and conflicts of law between H.R. 6009 and changes to the Mineral Leasing Act instituted through the IRA, as well as raising serious legal questions about the validity of a resolution which purports, without explication or direct amendment to any existing legal authority, to limit Interior's and BLM's considerable discretion to oversee the federal mineral leasing program. *See, e.g.* 30 U.S.C. § 226(a).

Putting this issue aside and assuming for the sake of argument that H.R. 6009 creates no conflict of law and is an effective proscription on BLM's authority over royalty rates, its practical effect would be to continue the status-quo to the detriment of the federal government, taxpayers, and federal lands. The former royalty rate of 12.5% was more than a century out of date and resulted in decades of losses to American taxpayers and the U.S. treasury, as well as state governments that were likewise shortchanged by BLM's outdated and woefully insufficient royalty rates. H.R. 6009 seeks to perpetuate this practice and to, once again, ensure that the federal government will lag further and further behind state and private property owners, effectively subsidizing the oil and gas industry at the expense of taxpayers.

This is despite ample documentation of the benefits of fair royalty rates at the state level, which demonstrates that higher rates do not lead to significantly reduced production. Similar information at the federal level indicates that the imposition of higher federal royalty rates will only marginally decrease production but will result in substantially higher rates of return for the government and taxpayers. For example, the Government Accountability Office found that increasing federal royalty rates to 22.5% would decrease federal production by less than 2% per year while a more modest (but still higher than current law) increase to 18.75% would have a "negligible" effect on production over ten years. Simultaneously, such increases would result in a substantial net increase in federal royalty revenue.[1] Thus, royalty rates that bring BLM's program into the twenty-first century will not result in any loss of production that is not substantially exceeded by gains in federal revenue.

This net gain exists apart from the fact that oil and gas companies continue to enjoy record profits while leaving the government and taxpayers on the hook to the tune of millions for cleanup after they have abandoned wells on federal lands. State governments are similarly shortchanged by a continuance of the status quo with respect to outdated and undervalued federal royalty rates, as states typically receive approximately half of the revenue from federal oil and gas royalties, rental fees, and bonus bids on federal mineral development within their borders. If the costs associated with the impacts of climate change on federal lands are considered, the disparity between what oil companies are charged to use federal lands and the revenue that passes to federal and state governments is even more glaring. Thus, in addition to attempting to lock in royalty rates more than a

[1] Government Accountability Office (GAO), Oil, Gas, and Coal Royalties: Raising Federal Rates Could Decrease Produciton on Federal Lands but Increase Federal Revenue. GAO-17-540. June 2017.

century out of date, H.R. 6009 would ensure that federal royalty rates continue to result in a lower and lower rate of return for the government while providing an ever-larger subsidy to the companies that make use of public lands without ever having to pay the costs associated with that use.

Question 2: According to the 2018 United States Geological Survey report, "Federal Lands Greenhouse Gas Emissions and Sequestration in the United States: Estimates for 2005-2014," approximately one quarter of U.S. greenhouse gas emissions come from fossil fuels extracted from federal lands and waters. Given this, do you believe the Bureau of Land Management has the authority to phase down fossil fuel extraction on public lands?

Response:

Yes – BLM clearly possesses the discretion to initiate an organized phase-down of fossil-fuel leasing on federal lands under the authority granted to it via the Interior Secretary under both the MLA and the Federal Land Policy and Management Act (FLPMA). Indeed, under FLPMA, it is clear—in light of the science and the significant portion of U.S. greenhouse gas (GHG) emissions coming from federal lands—that BLM has an affirmative responsibility to implement precisely such a phase-down in order to meet its dual obligations to manage federal resources "without permanent impairment of the productivity of the land and the quality of the environment," and to "take any action necessary to prevent unnecessary or undue degradation of the lands."[2]

Nor does FLPMA's multiple use mandate require—as was suggested during the hearing—that federal fossil fuel production continue to enjoy primacy over other uses of federal public lands. The multiple use mandate neither locks into place oil and gas leasing and production at the expense of other multiple uses, nor does it legally preempt the role of public lands as part of a mosaic of ecological and biological systems critical to ecosystem resilience. Instead, FLPMA directs BLM to give consideration to "the relative values of the resources and not necessarily to the combination of uses that will give the greatest economic return or the greatest unit output," and to manage public lands and resources to "meet the present and future needs of the American people" while "conform[ing] to changing needs and conditions … tak[ing] into account the long-term needs of future generations."[3]

It is abundantly clear that climate change is *already* causing such impairment and degradation to federal lands under BLM's management oversight,[4] and BLM is statutorily

[2] 43 U.S.C. §§ 1702(c), 1732.
[3] 43 U.S.C. § 1702(c).
[4] For example, in 2022, 52% of total acreage burned in wildfires in the United States was on federal land, which is actually slightly lower than the 10-year average of 64%. Congressional Research Service Wildfire Statistics, updated June 1, 2023, available at https://sgp.fas.org/crs/misc/IF10244.pdf. *See also,* Jay, A.K., A.R. Crimmins, C.W. Avery, T.A. Dahl, R.S. Dodder, B.D. Hamlington, A. Lustig, K. Marvel, P.A. Méndez-Lazaro, M.S. Osler, A. Terando, E.S. Weeks, and A. Zycherman, 2023: Ch. 1. Overview: Understanding risks, impacts, and responses. In: Fifth National Climate Assessment. Crimmins, A.R., C.W. Avery, D.R. Easterling, K.E. Kunkel, B.C.

required to *take any action necessary* to prevent further unnecessary or undue degradation of these lands.[5] Thus, BLM has not only the authority, but also an affirmative duty under FLPMA to initiate such a phase-out.

The MLA, as the statute directing BLM's implementation of the federal oil and gas program, provides BLM with substantial discretion over whether, when, and where to offer leases for sale, and, subsequent to lease issuance, gives the agency the ability to manage production. With respect to leasing, the MLA provides that "public lands "*may* be leased" for oil and gas.[6] Courts have repeatedly acknowledged that this permissive language allows BLM broad discretion as to where, when, and, indeed, *whether* to offer leases.[7] The qualifier that lands be "eligible and available" was added to the statute with the passage of the Federal Onshore Oil and Gas Leasing Reform Act of 1987. The concept was not defined in the FOOGLRA, but legislative history indicates that the amendment was in no way intended to cabin the Secretary's existing discretion over when, where, and whether to offer leases for sale.[8] BLM has consistently interpreted these terms in accordance with a 1989 Solicitor's Memo, which reads these terms to *require* necessary environmental review under NEPA as a threshold for availability.[9] That definition has been upheld judicially, underscoring NEPA's critical role in determining whether lands are available for leasing.[10]

Complementing FLPMA and NEPA's directives, the MLA also authorizes BLM to reduce the rate of oil and gas production over a defined period of time, limiting the amount of extraction and GHG pollution that would result. The MLA authorizes the Secretary of the Interior to "alter or modify from time to time the rate of prospecting and development and the quantity and rate of production under such a plan."[11] Likewise, nearly all BLM leases for onshore oil and gas contain a clause which states that "Lessor reserves the right to specify

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Stewart, and T.K. Maycock, Eds. U.S. Global Change Research Program, Washington, DC, USA. https://doi.org/10.7930/NCA5.2023.CH1 (documenting climate change impacts to U.S. lands).

[5] 43 U.S.C. § 1732.

[6] 30 U.S.C. § 226(a) (emphasis added).

[7] *See, e.g. Udall v. Tallman*, 380 U.S. 1, 4 (1965) (Secretary retains "discretion to refuse to issue any lease at all on a given tract"); *Haley v. Seaton*, 281 F.2d 620, 625 (D.C. Cir. 1960) (use of word "may" gives Secretary discretion not to lease).

[8] The Federal Onshore Oil and Gas Leasing Reform Act of 1987, Pub. L. No. 100–203, tit. V, subtitle B, 101 Stat. 1330, 1330–256 (1987) was enacted to address concerns over noncompetitive leasing, thereby shortchanging the public. There is no indication whatsoever that Congress intended to limit the Secretary's existing discretion not to lease. Thomas Sansonetti & William Murray, A Primer on the Federal Oil and Gas Leasing Reform Act of 1987 and its Regulations, 25 Land & Water L. Rev. 375, 388 n.112 (1990).

[9] Memorandum from Office of the Solicitor to BLM Director re: 'Eligible' and 'Available' Land Under the Federal Onshore Oil and Gas Leasing Reform Act of 1987, at 8 (Dec. 15, 1989). The memo defined "eligible" lands as those that are "not barred from leasing by statute or regulation. Lands precluded from leasing, and thus not "eligible," include national parks and wilderness areas, for example. *See* 43 C.F.R. § 3100.0-3 (1988). The memo defined "available" lands as those that "are both "open to leasing in the applicable resource management plan," and "all statutory requirements and reviews have been met, including compliance with the National Environmental Policy Act (NEPA)."

[10] *See Western Energy All. v. Biden*, No. 21-cv-13, 2022 WL 18587039, *9-10 (D. Wyo. Sept. 2, 2022); slip op. at 36-37; *North Dakota v. U.S. Dep't of Interior*, 21-cv-148 (D. N.D. Mar. 27, 2023); *see also* 42 U.S.C. 4332(1) (NEPA directs that "to the fullest extent possible," all of BLM's applicable "policies, regulations, and public laws of the United States … *shall be interpreted and administered* in accordance with [section 101 of NEPA]."

[11] 30 U.S.C. § 226(m).

rates of development and production in the public interest."[12] Pursuant to these authorizations, the BLM clearly is entitled to set a declining rate of production over time that provides for an orderly phase-out of onshore fossil fuel production.

Finally, the MLA reserves to BLM considerable discretion over *how* leases are developed, first through the use of stipulations at the leasing stage and later through BLM's retained discretion over surface use rights following lease issuance, which provide the agency with the ability to further control production through conditions of approval at the drilling stage.

Responses to Questions from Rep. Grijalva:

Question 1: A witness in a previous oversight hearing on the Bureau of Land Management's proposed rule, on the "Fluid Mineral Leases and Leasing Process," claimed that there is no problem with bonding or orphaned wells at a federal level because the Bureau of Land Management (BLM) has only identified 37 orphaned wells on the lands the agency manages, and BLM has only called on bonds 40 times in the past 10 years to reclaim wells. Could you please explain why these numbers do not capture the scope of the problem with unplugged, non producing wells? How do long-term idled and so-called temporarily abandoned wells affect the environment and public health?

Response:

This argument is a red herring and is, as a factual matter, incorrect. The number of wells that BLM had identified as "orphaned" stood at 219 in 2017, as disclosed by the Government Accountability Office in a 2018 report.[13] This discrepancy between the asserted number (37) and the number BLM identified (219) is ultimately of little importance, however, compared to the vast scope of underreporting represented by BLM's estimates.

GAO's additional findings in the same report demonstrate that even the 219 "orphaned" wells identified by BLM in 2017 is virtually meaningless as a statistic "because BLM does not systematically track needed data." Moreover, the GAO found that BLM's process to designate a well as "orphaned" can take several years, which means that even assuming a level of data tracking that BLM does not, in fact, implement, there is a several-year lag time in orphaned well designation, which likely results in BLM's under-estimate compounding over time.[14] By way of illustration, the same year BLM identified 219 orphaned wells, GAO found 15,600 *inactive* wells, of which 1,000 had been inactive for 25 years or longer (BLM's own data found only 325 wells that had been inactive for 25 years

[12] *See* U.S. Department of the Interior, Offer to Lease and Lease for Oil and Gas, Form 3100-11 (Oct. 2008).
[13] Government Accountability Office, Oil and Gas Wells: Bureau of Land Management Needs to Improve Its Data and Oversight of Its Potential Liabilities, GAO-18-250, May 2018.
[14] *Id.* at 9, fn 20.

or longer).[15] It is highly likely, if not virtually certain, that the majority of these wells would qualify as "orphaned," were they to be classified by BLM.

In the same report, the GAO also identified nearly 2,300 idled wells "at increased risk of becoming orphaned because they have not produced since June 2008 and have not been reclaimed." The bonds for "a majority of these at-risk wells" were "too low to cover" their anticipated reclamation costs, which, according to the GAO, may exceed $330 million.[16] Even this estimate likely represents only a subset of the true scope of the problem, as revealed by a preliminary analysis conducted as part of the Bipartisan Infrastructure Law's Federal Orphaned Well Program. That analysis indicates that there are **over 130,000 documented orphaned wells in the United States** — nearly two-and-a-half times the amount previously estimated.[17] Thus, the scope of the problem is, so far, undefined, and the only thing that is certain is that BLM's estimations of the number of "orphaned" wells represent nowhere near the total liability for the agency, and, by extension, American taxpayers.

It is also clear that such idled wells—whether or not they have gone through BLM's lengthy process to be declared "orphaned"—are a potent source of GHG gas pollution and a threat to public health. For example, in 2019, methane emissions from abandoned wells were estimated to be equivalent to 7.1 million metric tons of carbon dioxide. Methane is, over the short term (20 years) approximately 81 times as potent as carbon dioxide and approximately 27-30 times as potent over 100 years.

In addition to being a critical source of climate pollution, such emissions have negative impacts on human and environmental health through drinking water pollution and other hazardous air pollutants.[18] Such impacts have been well documented in communities living adjacent to oil and gas infrastructure and include reproductive harms, respiratory and cardiovascular impacts, cancers, and other negative health impacts. It is clear that idled and abandoned wells (not just those wells that have been specifically identified by BLM as "orphaned") pose a considerable liability to the government and taxpayers, and considerable risks to the climate, people's health, and public lands. Thus, focusing solely on wells that have been identified by BLM as "orphaned" is a deliberate effort to mischaracterize and minimize an environmental and public health problem of staggering proportions.

Question 2: What steps does BLM's proposed "Fluid Mineral Leases and Leasing Process" rule take to make the oil and gas industry promptly clean up oil and gas wells at the end of their useful life? How does this shift the burden of environmental cleanup from taxpayers to polluters?

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[15] *Id.* at 15.
[16] 88 Fed. Reg. 47,562, 47,565 (July 24, 2023).
[17] https://www.blm.gov/programs/energy-and-minerals/oil-and-gas/federal-orphaned-well-program.
[18] See, for example, Merrill, M.D., Grove, C.A., Gianoutsos, N.J., and Freeman, P.A., 2023, Analysis of the United States documented unplugged orphaned oil and gas well dataset (ver. 1.1, April 2023): U.S. Geological Survey Data Report 1167, 10 p., https://doi.org/10.3133/dr1167.

Response:

BLM's proposed rule would help ensure cleanup of oil and gas wells in a number of ways—for specifics, please see the comments submitted by the Western Environmental Law Center on behalf of partner groups on BLM's proposed rule.[19] Most importantly, the proposed rule would help shift the cost of idled well clean-up to the entities responsible for their existence by updating bond amounts to catch up with inflation and actual reclamation costs for the first time in more than half a century.

If allowed to proceed with its rule, BLM will implement an effective bonding system that achieves cleanup in two ways: First, appropriate bond amounts create economic incentives for operators to promptly complete plugging and remediation themselves, without BLM needing to be involved, as cleanup is required before the operator can obtain bond release. Second, adequate bond amounts ensure that regulators have access to sufficient resources to complete plugging and remediation in the event the operator either cannot or will not do the work. BLM's elimination of nationwide bonding also helps ensure that bonds are addressed on a lease-by-lease basis, further increasing the likelihood that the operator will clean up idled well sites and that BLM will have the resources to do so if the operator does not, as nationwide binds have historically been even less adequate to cover actual cleanup costs than have per-lease bond amounts.

While bonding is an important feature of regulatory oversight for any industry where a lessee or permittee assumes clean-up obligations, it is critically important in the oil and gas industry, which is inherently subject to boom-and-bust cycles. As a result of fluctuations in international commodity prices, the oil and gas industry is prone to a pattern of drilling many new wells when prices are high, and then experiencing bankruptcies, idlings, and abandonments when prices drop.[20] Sufficient bond amounts protect against these fluctuations by encouraging operators to plug wells promptly in order to free up capital dedicated to servicing the bonds, and by ensuring that regulators are able to complete clean-up in the event of abandonment by operators. Adequate bonding also frees regulators to take appropriate enforcement actions against operators without fear that such actions will lead to additional well abandonments with unfunded clean-up obligations.

Question 3: How does the draft rule help protect public health, especially for overburdened environmental justice communities?

Response:

One important way the Rule addresses the impacts experienced by overburdened and underserved communities living in proximity to oil and gas infrastructure is by clarifying language around setbacks to establish that 800 meters is a floor, not a ceiling. Another way is through BLM's ability to prohibit surface disturbing operations for a

[19] Attached for reference to these responses.
[20] GAO Report at 1.

minimum of 90 days to mitigate or avoid adverse impacts. Nonetheless, the rule can and should go much farther to protect the public health and safety of these disproportionately impacted communities. Some of the ways it should do so are addressed in response to the next question.

Question 4: What are other steps that BLM can take using their current authorities to better protect frontline communities and include them in federal oil and gas program decision-making that affects them?

Response:

Again, for a broader discussion of the many ways BLM could better address the public safety of frontline communities, please see our comments on the proposed rule. Some changes to the proposed rule that would help address these critical issues include:

- Further increases to minimum setback distances and provisions for no drilling within one mile of schools and residences.
- Address subsurface impacts, particularly the impacts and risks that could result from drilling laterals up to three miles from the well site. Setbacks should take these subsurface impacts into account. This could be simply addressed by adopting a minimum distance of three miles from critical infrastructure to account for these risks and would help address groundwater impacts that are insufficiently addressed through existing setbacks.
- BLM should also implement a formal consideration of factors affecting public health and safety in different communities, and provide for the adoption of stipulations or conditions of approval to address specific situations as they arise.
- BLM also needs to clarify in the final rule how its use of preference criteria—in particular its exercise of a preference in favor of development in areas with existing infrastructure—will be implemented in a way that does not result in additional impacts to already overburdened frontline communities.

In terms of public process, BLM could improve the proposed rule in a number of ways. BLM should, for example, clarify that it will, through the rule, adhere to government standards for what constitutes meaningful engagement by federal agencies with those in frontline and "environmental justice" communities, sovereign Tribal nations, and the broader public. BLM should explicitly recognize such existing minimum standards and explain how it will adhere to those standards in the context of the rule.[21] In addition, BLM should incorporate and abide by existing frameworks with respect to meaningful public involvement, meaningful tribal consultation, and engagement with those in frontline communities. These principles are referenced at pp. 55-57 of our attached comments. Our concern is that the rule as currently drafted risks ignoring and excluding the very people

[21] *See, e.g.,* 40 C.F.R. § 1506.6 ("public involvement" provisions of the CEQ implementing regulations for the National Environmental Policy Act); 36 C.F.R. §§ 800.1-800.16 (regulations governing consultation and other components of Section 106 of the National Historic Preservation Act ("NHPA"); IM 2022-059.

and communities who will be most affected by it. BLM can and should do better in its final rule.

Thank you for the opportunity to provide responses to these questions, and to appear before the subcommittee. Please do not hesitate to reach out with any additional questions.

Sincerely,

Melissa Hornbein
Senior Attorney
Western Environmental Law Center