# Public Lands Foundation

# Comments

# "Fluid Mineral Leases and Leasing Process" Proposed Rule

# 43 CFR Parts 3000 - 3180

# Attention: 1004-AE-80

# Submitted to www.regulations.gov

These comments are submitted by the Public Lands Foundation (PLF) in response to a request from the Bureau of Land Management (BLM) for review of a Proposed Rule on Fluid Mineral Leases and Leasing Process under the 43 CFR Parts 3000-3180 regulations. The Proposed Rule was published in the Federal Register on July 24, 2023, and comments were required to be submitted to the BLM no later than September 22, 2023.

The Public Lands Foundation is a national membership organization that advocates and works to ensure the retention of America's Public Lands in public hands, professionally and sustainably managed for responsible common multiple use and enjoyment. The public lands that we focus on are those that are managed by the BLM.

The BLM employees who contributed to this Proposed Rule deserve congratulations. These revisions are long overdue and represent a needed update and improvement to regulations and practices, many of which are over fifty years old. The proposed regulations provide a reasonable adjustment to fees and bonding requirements. They also incorporate legislative and judicial mandates of the past decade.

## General Comments

The first paragraph in the Background section of the Supplementary Information for the Proposed Rule states, ". . . the onshore program, historically, has failed to provide the Federal government with a fair return; exposed the Federal Government to significant reclamation-related liabilities; lacked adequate cost recovery mechanisms; and encouraged speculative leasing and wasteful development practices." We disagree with this broad-brush characterization. Certainly, cost-recovery has lagged and the Federal government is potentially exposed to reclamation-related liabilities. However, to focus on a fair return to the Federal government for leasing and development of oil and gas resources on the public lands ignores the original purpose of the Mineral Leasing Act of 1920 to provide incentives to industry to explore, discover and develop oil and gas resources on public lands. One hundred years later, the need for such incentives has declined and the Inflation Reduction Act has provided authority for changes in royalty rates, rentals, and minimum bids for oil and gas leasing on the public lands.

The PLF strongly supports changes to fees and cost-reimbursement actions of the BLM that ensure the cost of administering the oil and gas leasing program of the Federal Government is paid by those industries and companies that use and benefit from it. Many of these fees were established in 1988 and have not been adjusted since. We also support increasing bond amounts, unchanged since the 1950s, for oil and gas activities on federal lands so that liabilities associated with abandoned or poorly managed locations and facilities do not become the responsibility of the American taxpayer.

In a broad sense, we fully support three of the four objectives of the Proposed Rule:

- Reduce taxpayer exposure to reclamation-related liabilities,
- Provide for adequate cost recovery, and
- Encourage diligent development of federal oil and gas resources.

Regarding the fourth objective, "directing oil and gas leasing to appropriate locations," we offer qualified support. In the Proposed Rule, the application of the five criteria for the competitive leasing process in Section 3120.41 is vague, is not a transparent process, and is prone to subjective manipulation during the review process. In addition, the BLM currently lacks the technical expertise and resources needed to appropriately and adequately identify either traditional or non-traditional oil or gas potential and as a result, may eliminate lands that are rich in oil and gas resources, or in contrast, may direct the industry to lands that have no oil and gas potential.

In support of the concept that BLM currently directs oil and gas leasing to appropriate locations, we offer the following:

BLM's current practice of advancing lands for oil and gas leasing involves first, removing from consideration certain parcels subject to legislative mandates, withdrawals, and those parcels identified as no leasing areas in the land use planning process. The planning process also delineates various surface management practices such as avoidance, timing, and set-back distances to protect sensitive and publicly identified resources on parcels available for oil and gas leasing. Potential lessees are made aware of these requirements by lease stipulations and stipulations attached during the Application for Permit to Drill (APD) approval process.

From this remaining inventory of available federal lands, BLM relies on knowledgeable industry interests to identify and nominate parcels for leasing. This process has served the American people and BLM well in avoiding unnecessary evaluation efforts associated with lands of little or no interest to industry. The BLM does not have the breadth of expertise lodged within oil and gas companies, nor does it have the point-of-view associated with financial, logistical, and business influences that drive oil and gas companies to nominate federal land parcels for oil and gas leasing. Furthermore, the practice of BLM directing oil and gas development stifles innovation and exploration that can only come from those entities that are motivated by the reward of discovering and extracting oil and gas resources. The best approach is for the BLM to manage all of its resources in a multiple-use context and react to requests from industry for access to federal oil and gas resources. We offer specific comment on the leasing process in our section-specific comments that follow.

**Section-specific Comments**

Where no comments are offered, we either support or have 'no comment' on a specific section.

**Section 3000.130: Fiscal terms of new leases**

The Proposed Rule discussion indicated the BLM considered proposing new fixed filing fees for Federal communitization agreements (CA), Federal participating area applications, and royalty rate reduction applications, but it ultimately declined to propose these fees due to the low value and the public benefit related to these items. On the contrary, Federal CAs and participating area applications provide for agreement dictated oil and gas production allocations and royalties from Federal lands which are clearly of high value and public benefit by virtue of the Federal royalty received. Under Section 3105.21(d), a designation of successor operator for a CA must include a processing fee found in the fee schedule. It would follow that if BLM is asking for a processing fee for a CA successor operator in a CA, the BLM should also be asking for a processing fee for the approval. Consequently, Federal CA and participating applications should be included in the fixed fee table. Additionally, royalty rate reductions can provide for extended well life and subsequent additional Federal royalty which otherwise would be lost by premature abandonment. As a result, royalty rate reductions provide high value and public benefit and should also be included in the fixed fee table.

The fixed fee table proposes a fee of $1,200 for final application for Federal unit agreement approval. Unit approval is a two-step process which includes (1) Unit Designation and (2) Final Unit Approval. The great majority of the BLM work is done through step (1) where an application for designation of an area as logically subject to development under a unit agreement along with the determination of the depth of a test well is filed by a proponent. Geologic information, including the results of any geophysical surveys, and any other available information showing that unitization as necessary and advisable in the public interest must be furnished. This designation process requires a spectrum of technical and administrative staff. If the unit operator applicant receives an approved unit designation approval but does not go through with final approval, the initial cost for designation work completed will not be recovered since the fixed fee is only for the final application. The BLM may be better served to amend this fee to read "Federal unit designation approval" only. In addition, this $1,200 fee for the unit designation approval appears to be undervalued and should be in the $2,500 - $3,000 range.

Additionally, Plans of Development (PODs) are required under the model form of Federal exploratory unit agreements. Section 10 of the unit agreement provides the plan shall (a) specify the number and locations of any wells to be drilled and the proposed order and time for such drilling; and (b) provide a summary of operations and production for the previous year. These PODs are a large workload to BLM offices which manage unit agreements. The approval of these PODs is high in value and benefit to the public and should be included in the fixed fee table.

It is not clear that the Designation of successor operator for Federal agreements in the fee table includes unit, communitization, and gas storage agreements. Consequently, this action should be amended to read "Designation of successor operator for unit, communitization, and gas storage agreements."

The fixed fee table does not include a fee for requests for subsequent well operations which are submitted on Sundry Notices (Form 3160-5). Sundry notices are a significant workload for many BLM offices that manage oil and gas operations on Federal lands and can be valuable and are a benefit to the public. These requests include, but not limited to, commencing operations to re-drill, deepen, perform casing repairs, plug-back, alter casing, recomplete in a different interval, perform water shut off, commingling production between intervals and/or conversion to injection. If there is additional surface disturbance, the Sundry Notice request shall include a surface use plan of operations. A subsequent report on these operations also will be filed on Form 3160-5. Although Sundry Notice requests include a wide range of actions that would be difficult to specifically apply a fixed fee to, a nominal fee should be applied to Sundry Notice submissions. There may be cause to not charge a fee for any "subsequent" reports submitted through the Sundry Notice process.

**Section 3101.12: Surface use rights**

The BLM should exercise care and wisdom when applying lease stipulations regarding underserved communities. Considering E.O. 14035, these communities are not often found in proximity to public lands and in those cases of public lands near or adjacent to these communities, local land use planning regulations and BLM's land use planning process should provide sufficient guidance for appropriate lease stipulations.

**Section 3101.13: Stipulations and information notices**

Paragraph (a) should read as follows:

The BLM may consider the sensitivity and importance of potentially affected resources and any uncertainty concerning the present or future condition of those resources and will assess whether a resource is adequately protected by stipulation along with consideration for the restrictiveness of the stipulation on operations.

**Section 3103: Diligent drilling obligations under Federal oil and gas leases**

The BLM seeks comment on the diligent development of Federal leases if at the end of the fifth year of the lease term, the lessee: (a) has established actual production in paying quantities on the lease; (b) has established allocated production in paying quantities on the lease; (c) has filed a complete Application for Permit to Drill; (d) has extended the lease term by committing it to an oil and gas agreement, 43 CFR 3107.30; (e) has filed a Notice of Intent to undertake geophysical exploration. In addition, the BLM is considering requiring the lessee to provide notice to the BLM of how and when the lessee met the diligent development obligation, and a provision increasing the rent if the lessee has not satisfied the diligent development obligation by the end of the fifth lease year. Under this provision, the lease would be subject to a supplemental escalating rental rate of an additional $1 per acre, or fraction thereof, for each lease year between the sixth and tenth lease years until the diligent development obligation is met. The BLM solicits comments as to whether the increased rental rates prescribed by the IRA may render a diligent development obligation unnecessary.

The concept of diligent development on Federal leases may unduly influence the fine balance of incentivizing development versus stifling development. This new concept may involve obstacles,

unanticipated complexities, and administrative tracking challenges. Although under different regulations, the BLM has the responsibility to review diligent development of Indian Lands and in our estimation, this program has not been overtly successful. Pertaining to the supplemental escalating rental rate, let's look at an example of a 1,000-acre Federal lease that runs its entire 10-year term without development. Under current regulations, the lessee pays $17,500 total rental. Under the IRA, the lessee pays a total of $66,000 in rental. Under the diligent development concept, the lessee would pay a total of $75,000 in rental. Although we understand the large differences in lease acreage, it is evident in our example that the IRA provides a $48,500 incentive over current regulations to develop the lease, however, the supplemental escalating royalty rate only provides an additional $9,000 incentive over the last five years of the lease term to develop the lease over and above the IRA requirements. This may not be the needed incentive that the additional escalating royalty rate is seeking. In summary, the BLM should look cautiously, critically and thoroughly at requirements for diligent development on Federal leases and any proposed escalating rental rates may very well render the diligent development obligation unnecessary.

**Section 3103.41: Royalty reductions**

The BLM has solicited feedback to improve the royalty rate reduction (RRR) section of the Proposed Rule. RRR requests are driven by economics. In reviewing a RRR request, the BLM must undertake a simplified economic analysis which presents challenges. Most of the economic data required in the RRR request must come from the operator. The operator has multiple opportunities to manipulate their economic data to make it appear that a RRR is needed. In addition, the BLM lacks the authority to complete a thorough review of operator financial data. Consequently, the BLM must do a critical review of the economic data submitted for reasonableness and should clearly enumerate the costs that are allowed for the economic evaluation. Any lease that has an approved RRR must be closely monitored on a regular periodic basis to ensure that the RRR still applies. If situations change and the RRR is no longer appropriate, the BLM must clearly define under what circumstance/criteria RRRs terminate and when.

**Section 3104.10: Bond obligations**

The BLM is requesting commenters to provide information on additional alternatives for bonding that the BLM might consider. Additionally, the BLM is requesting comments on whether it should propose to adjust the minimum bond amounts by inflation. Currently, the BLM is not proposing this in the rule; however, the BLM would prefer to have a method to adjust minimum bond amounts by inflation factors. The BLM requested comments on if and how it should adjust minimum bond amounts in the future.

Pertaining to additional alternatives for bonding that the BLM might consider, we offer the following:

The Wyoming Oil and Gas Commission (WOGCC), who manages oil and gas operations on State and fee lands in Wyoming, invokes an interesting approach whereby the operator is given a choice to either secure a bond on an individual well by well basis or can choose one blanket bond for multiple wells. Under the well by well option, the operator currently pays $10 for each foot of the

well bore for a single well with the bond amount adjusted every three years based on the Wyoming consumer price index or actual plugging costs. Under the second option, a $100,000 blanket bond for multiple wells is submitted regardless of the depths or lengths of the wellbores. The WOGCC may impose additional bond amounts as it deems necessary.

While we don't fully support this approach in its entirety, the BLM should consider this well by well approach that may alleviate the current question of whether the existing bonds cover all the existing wells drilled. While the BLM may determine a different dollar amount per foot, this well by well approach should be in the mix for consideration.

In regards to whether the BLM should adjust the minimum bond amounts by inflation, it is important to remember that this is an approximation of funds needed for plugging and reclamation. While adjusting exact prices (gas/oil price) for inflation on a yearly basis makes sense, the adjustment of a bond approximation for inflation on a yearly basis is questionable. For example, the average annual inflation rate from 1960-2022 was 3.8 percent. A yearly adjustment of a proposed lease bond of $150,000 at 3.8 percent, for example, would result in an increase of $5,700 or $157,500. Again, with the understanding that this bond is only an approximation, does this yearly increase make sense? In addition, the BLM can increase bond amounts as needed under Section 3104.50. The BLM may be better served to review bond amounts every 3-5 years and adjust at those times for inflation using the total inflation that occurred from the previous review period.

The Proposed Rule updates and revises the bond obligations of the oil and gas lessee, operating rights owner, and operators and requires the submittal of a surety or personal bond. This section further states that surety bonds must be issued by a qualified surety company approved by the Department of the Treasury. Personal bonds appear to provide for cashier's checks, certified checks, or negotiable Treasury securities. However, it is unclear as to whether a corporate guarantee instrument would be an acceptable bond. The solar and wind energy regulations that were updated and finalized on December 19, 2016, also addressed the bonding requirements for solar and wind energy authorizations on the public lands. Section 2801.5(b) of the solar and wind energy right-of-way regulations defined acceptable and unacceptable bond instruments. The solar and wind energy regulations specifically addressed unacceptable bond instruments and stated "the BLM will not accept a corporate guarantee as an acceptable form of bond instrument". We recommend that the BLM review the bonding requirements and language of the solar and wind energy regulations in Section 2801.5(b) and the bonding requirements and language for oil and gas leases and operations included in this section of the Proposed Rule for consistency, especially any language regarding whether corporate guarantees are an acceptable or unacceptable bond instrument.

**Section 3104.40:** Surface owner protection bonds

Surface Owner Operator Bonds should be sufficient to cover the cost of all surface reclamation. Often times initial seeding efforts fall short of full reclamation objectives. Therefore the bond should be held until those objectives are reached.

**Section 3105.21:** Communitization Agreements – where filed
Since we commented earlier in reference to Section 3000.130 that communitization agreement approval should be included in the fixed fee schedule, we would add (b)(4) as follows: "An application to form a communitization agreement must include the processing fee found in the fee schedule in Section 3000.120 of this chapter."

**Section 3107.22:** Cessation of production
In order to help clarify this section, the last sentence should be amended as follows: "If these reworking or drilling operations fail to result in production in paying quantities, the lease will expire by operation of law, effective as of the date paying production ceased."

**Subpart 3107:** Extension for Terms of Agreements
The title of this section is misleading. The language of this section can be easily interpreted to mean the extension of agreement terms as opposed to the extension of leases within agreements. A better title would be "Extension of Leases Within Agreements."

**Subpart 3107:** Other Types
This title is innocuous and should be amended to read "Other Extension Types."

**Section 3120.30:** Nomination process.
The BLM is proposing to update the process by which it formally nominates parcels for sale at a competitive auction. The BLM is considering using this process for certain BLM state offices or for future lease sales and requests comments on whether the regulations should retain this process and, if so, what changes to the formal nomination process should be made.

Further, the discussion concerning this section indicates that currently the BLM oil and gas regulations establish two separate processes for leasing public lands: (1) the informal process, which primarily relies on EOIs from the public; or (2) the formal nomination process. (The regulations at 53 FR 22829 state that ''… the final rulemaking provides administrative flexibility to allow for either informal EOIs or a formal nomination process to determine the lands offered competitively''). The BLM believes that aspects of this formal nomination process could be used as a possible mechanism to implement the recommendations from the DOI's November 2021 ''Report on the Federal Oil and Gas Leasing Program,'' including ''carefully consider[ing] what lands make the most sense to lease in terms of expected yields of oil and gas, prospects of earning a fair return for U.S. taxpayers, and conflicts with other uses'' and ''evaluat[ing] operational adjustments to its leasing program that will avoid nomination or leasing of low potential lands.''

However, the formal nomination process has been rarely used and the BLM does not have the level of technical expertise required to adequately analyze leases for expected yields of oil and gas. In addition, the informal expressions of interest process fully considers possible lease conflicts with other uses. As a result, option (2), the formal nomination process should be eliminated from the Proposed Rule.

**Section 3120.41:** Process

Paragraph (f) of this section lists five (5) criteria BLM should consider, "when determining whether to offer lands in an Expression of Interest at lease sales." The criteria are:

1. The proximity to oil and gas development,
2. The presence of important fish and wildlife habitats or connectivity areas,
3. The presence of historic properties, sacred sites, and other high value leasing lands,
4. The presence of recreation and other important uses or resources, and
5. The potential for oil and gas development.

Criterion #1, "The proximity to oil and gas development," is ambiguous. The actual closeness or nearness to oil and gas development can be interpreted differently depending on the reviewer. As a result, this specific criterium should be used with caution.

Criterion #2, "The presence of important fish and wildlife habitats or connectivity areas," is a traditional multiple-use resource issue with a long history of BLM attention as shown in stipulations with set-back distances and timing restrictions for nesting raptors, set-back distances from streams and wetland areas, seasonal activity restrictions for big game winter ranges, to name a few.

Criterion #3, "The presence of historic properties, sacred sites, and other high value leasing lands," also has garnered BLM attention, especially for sites containing properties on or eligible for the National Register of Historic Places and sacred sites identified to the agency through consultation with Native American Tribes. However, the term, "other high value leasing lands," is unclear. Does it mean lands valuable for oil and gas resources? If that is the intention, then it duplicates criteria #5. If it means an undefined category of resource attributes or characteristics, the phrase should be revised with more specificity, such as, "visual qualities or 'rare' vegetation types. These characteristics are often in the "eye of the beholder" and lack specific or definitive governing legislation or regulation. The BLM should limit this category of lands to those identified through the land use planning process, which is reinforced by public participation and input.

Criterion #4, "The presence of recreation and other important uses of resources," is also vague and subject to inconsistent interpretation. BLM should rely on approved land use plans for this determination.

Criterion #5, "The potential for oil and gas development," is vague and open to interpretation and manipulation. The BLM does not currently have the same required level of resources or expertise that industry enjoys in order to adequately identify lands with high potential for oil and gas development for future leasing purposes. Additionally, criterion #1, in a broad, non-technical sense, identifies oil and gas potential. Consequently, this criterion should be eliminated.

Upon the application of these criteria, under what circumstances would an EOI parcel be rejected? For example, if the parcel is not in proximity to oil and gas development and includes the presence of recreation and other important uses or resources, would the parcel be rejected?

Furthermore, the presence of resources in criteria # 2 – 4 should not automatically eliminate a parcel from leasing. Applying multiple-use principles, BLM should seek to develop, with the cooperation of industry, new and amended surface practices that reduce the impact of oil and gas activities upon these resources.

We suggest two additional criteria for paragraph (f):

1. Lands with other mineral resources, such as coal, trona, rare earth elements, etc., considering the possibility of joint development and existing mineral location rights.
2. Land Use Planning decisions and allocations, as discussed above.

The Proposed Rule indicates all these criteria are to be applied upon receipt of an Expression of Interest (EOI) and before an environmental analysis or public review under the National Environmental Policy Act (NEPA) occurs. If, through the application of these criteria, a nominated parcel is rejected, the nominee appears to have no appeal rights and the public has no opportunity to review and comment on BLM's rationale and decision regarding the fate of the nominated parcel. Any action by BLM to advance or reject an EOI nominated parcel may be a decision of a federal agency requiring a NEPA analysis. If the BLM wishes to apply these criteria in the manner proposed, then the resulting decision should be included in a NEPA analysis and included as part of the public review and comment period on the draft document.

The BLM requests comments addressing whether or how the preference criteria should be applied when the Federal surface lands are administered by another Federal agency. For example, in National Forest System lands, the Forest Service typically prepares a pre-leasing NEPA analysis that the BLM subsequently relies upon when making its leasing determination. The BLM should honor the leasing and surface use practices on lands administered by other federal agencies as they are submitted by those agencies.

**Section 3120.52:** Posting timeframes

Paragraph (e) of this section states, "The BLM will make available the final NEPA compliance documents prior to issuing a lease from the lease sale." The BLM should issue the final NEPA documents prior to the lease sale to allow protests to be lodged before leases are sold. The BLM could then withhold the protested parcel(s) until the protest is resolved, offering them in the current or later sale depending on resolution of the protest; rather than issuing a lease and then having to hold it during the protest resolution process.

**Section 3162.3-4:** Well abandonment

The BLM requests comments on whether a temporary abandonment should trigger a bond review in addition to the adequate and detailed justification for the abandonment. A bond review is unnecessary since the rule allows BLM to increase a bond amount anytime when determined appropriate, however, initial as well as periodic on-site inspections should be scheduled to ensure environmental surface compliance.

**Section 3165.1:** Relief from operating and/or producing requirement
The BLM requests comments on the best approach for making determinations on lease suspensions that would reduce the cost to the American public and encourage diligent development of leased lands.

For federal lessees, the Mineral Leasing Act (MLA) and associated regulations provide the option to suspend operations "in the interest of conservation" under Section 39 of the MLA, or due to occurrence of events beyond the reasonable control of a lessee (*force majeure*) under Section 17 of the MLA. In addition to their different triggering events, Section 39 and Section 17 suspensions also carry contrasting benefits and obligations. In the event a Section 39 suspension is granted, operations and production obligations are both suspended, the lessee is relieved of its obligation to pay rental and minimum royalty during the suspension period, and the lease term is extended for the length of the suspension. A Section 17 suspension operates to suspend operations or production, and will stop the lease from continuing its term, but will not suspend the lessee's obligation to pay rentals and royalties.

The authors of the MLA recognized that lease suspensions should be separated into two distinct categories and indefinite suspensions without some financial return to the federal government was not in the public's interest. As a result, the obligation to continue paying royalty and rental payments in Section 17 suspensions is appropriate, and in the public's interest. In addition, the relief of any financial obligations in Section 39 suspensions is also appropriate since these suspensions usually involve a government cause.

We also agree with the following four recommendations from the 2018 GAO report: "OIL AND GAS LEASE MANAGEMENT - BLM Could Improve Oversight of Lease Suspensions with Better Data and Monitoring Procedures" which supports the best approach for making determinations on lease suspensions that would reduce the cost to the American public and encourage diligent development of leased lands.

1. As BLM updates or replaces its database, the Director of BLM should include a data field to record the reasons for suspensions.

2. The Director of BLM should develop official agency procedures for monitoring oil and gas lease suspensions, including when to conduct monitoring activities.

3. The Director of BLM should require cognizant officials in headquarters and state offices to conduct top-level reviews of field offices' monitoring of oil and gas lease suspensions, as well as of official lease files and databases to ensure they are current and complete.

4. As BLM updates or replaces LR2000, the Director of BLM should ensure the development of mechanisms, such as standardized summary reports on lease suspensions, to assist cognizant officials in headquarters and state offices with oversight of field offices' monitoring efforts.

We offer the following additional recommendation:
5. The BLM should do everything it can to avoid indefinite long-term suspensions.

**Section 3171.14:** Valid Period of Approved APD

The PLF agrees with the BLM that the final rule should adopt Option #1 of the Proposed Rule (no APD extensions and a term of three instead of two years).

Thank you for the opportunity to provide comments on this Proposed Rule.

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