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U.S. House of Representatives
Committee on Natural Resources
Subcommittee on Fisheries, Wildlife, Oceans & Insular Affairs

Oversight Hearing: Oil and Gas Activities within the National Wildlife Refuge System
Tuesday, May 20, 2014

Chairman Fleming, Ranking Member Sablan, members of the Committee, it's an honor to speak with you today regarding this important issue. Thank you for the invitation.

I am Davis Powell from Shreveport, Louisiana. I speak today as a member of the Board of Directors of the Louisiana chapter of the National Association of Royalty Owners (NARO). NARO has members in all 50 states and educates and advocates for the rights of an estimated 8.5 to12 million citizens who receive royalty income from the production of their private property – their oil and natural gas minerals.

The average NARO member is 60 years old, a widow and makes less than $500 per month in royalty income. About 70 percent of the mineral estate in the lower 48 states is owned by individual citizens. In 2012, it was estimated that roughly 77 percent of oil and 81 percent of natural gas produced onshore was produced on private property.

Of all the wells ever drilled around the world, the vast majority have been drilled in the United States – a nation that values private ownership of minerals and that also encourages both risk and the pursuit of profit.

The United States is the only former colony that upon achieving independence, awarded the ownership of minerals to private citizens instead of to the state. This uniquely American model was suggested by Thomas Jefferson. His concept has helped make us a strong nation and it today is enabling America's rise to become the world's dominant energy producer.

It is our understanding that the Government Accountability Office recommended that the U.S. Fish and Wildlife Service improve management and oversight of oil and gas operations on the Refuge System and clarify the Service's permitting authority of non-Federal oil and gas operations through further regulations.

This has resulted in the Service issuing an Advanced Notice of Proposed Rulemaking and Notice of Intent to Prepare an Environmental Impact Statement. On April 22nd of this year, NARO submitted comments in response to the Advanced Notice. We appreciate the opportunity to elaborate on those comments here today.

It is our belief that if the Service were to continue the process of further regulating oil and gas activity on its lands, then the following four basic tenets should drive the Service's rulemaking and this Subcommittee's oversight of it:

The first is that it is a well-established point of law in all jurisdictions of the United States that the rights of the mineral estate are dominant over the rights of the surface estate. The law's recognition of the mineral estate as dominant has been found essential, lest it be subrogated to any other property rights thereby risking its devaluation.

Existing Service regulations also recognize this fact and maintain that Service operations should not be "applied so as to contravene or nullify rights vested in holders of mineral interests

on refuge lands." 50 C.F.R. § 29.32. The Service's manual states that it must "[p]rovide for the exercise of non-federal oil and gas rights while protecting [USFWS] resources to the maximum extent possible." 612 FWS Manual 2.4.B.

Supplemental information presented for the proposed rulemaking acknowledges that, "subject to State and Federal law, the mineral rights owners have the legal authority to develop oil and gas reserves." It is this group of people that NARO represents. Just as the Service has the authority to manage the public surface estate, NARO members have a dominant legal authority to access and develop their private sub-surface estate.

Second, the Service may not unreasonably restrict access to the mineral estate in a way that makes the development thereof uneconomic or unprofitable.

Courts have held that federal agencies cannot impose stipulations or conditions of approval (COAs) that violate this tenant. See *Utah v. Andrus*, 486 F. Supp. 995, 1011 (D. Utah 1979); see also *Conner v. Burford*, 848 F.2d 1441, 1449-50 (9th Cir. 1988). Concurrent with courts' decisions discussing the dominance of the mineral estate is a requirement that a holder of mineral rights adhere to the accommodation doctrine, which provides that a mineral owner or lessee may "use as much of the surface as reasonably necessary to extract and produce the minerals" as long as that use is reasonable. *Merriman v. XTO Energy, Inc*., 407 S.W.3d 244, 248-49 (Tex. 2013).

Therefore, the Service must be held to a reasonable set of regulatory management controls that does not unduly burden private mineral owners. An excessive fee structure for access onto, or across, federally owned lands will negatively affect the value of the sub-surface estate and the economic viability of development of that estate.

The Service must not develop regulatory management tools and fees that provide a regulatory avenue to develop in theory but which creates an economic firewall to development in reality.

It is important to note that expenses incurred in the development of oil and gas minerals come in many forms. A monetary fee charged by the surface estate owner would be another such expense. All of the other costs incurred by the oil and gas developer as a result of requirements by the surface estate owner also should be taken into consideration when calculating a fair and reasonable fee structure. These other costs could include the cost and time of preparation of Environmental Impact Statements and reports unique to the federal surface estate, rights-of-way fees for pipelines and roads, and lease maintenance and operational drilling and service costs associated with lengthy application processes.

The third basic tenet which NARO feel should be considered in this process is that the Service may not unreasonably restrict oil and gas development to the point of requiring a "no net impact" on the environment as it seeks to mitigate surface impacts.

The National Environmental Policy Act (NEPA) "does not require agencies to elevate environmental concerns over other appropriate considerations." *Citizens' Comm. to Save Our Canyons v. U.S. Forest Serv*., 297 F.3d 1012, 1022 (10th Cir. 2002). Instead, NEPA is a procedural statute and does not mandate particular results. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). As explained by the Interior Board of Land Appeals (IBLA), "NEPA does not bar actions which affect the environment, even adversely. Rather, the process assures that decision-makers are fully apprised of likely effects of alternative courses of action so that selection of an action represents a fully informed decision." Biodiversity Conservation Alliance, 174 IBLA 1, 13-14 (2008) (citing the *Vermont Yankee* U.S. Supreme Court case).

As the IBLA observed in *Oregon Natural Resources Council*, NEPA does not direct that federal agencies prohibit action even where environmental degradation is inevitable. 116 IBLA 355, 361 n.6 (1980). NEPA only mandates a full consideration of the environmental impact of a proposed action before undertaking it. *Nat'l Wildlife Federation*, 169 IBLA 146, 164 (2006).

As the Service undertakes its proposed rulemaking, it must ensure that it allows for a balanced review of oil and gas development proposals and assesses any negative impacts of mitigation proposals on state and private mineral rights.

The Service may not improperly elevate environmental concerns over other appropriate considerations or seek to create a set of regulations that restricts all environmental impacts on the subject lands. Any environmental NEPA analysis must also include the economic impacts to the orderly development of oil and gas within a refuge. This includes a socioeconomic analysis that details the negative impacts any restrictions will have on state and private mineral development and the impacts to local and state economies and taxes.

Fourth, the Service must not attempt to regulate surface activity on non-federal lands adjacent to refuges.

The proposed rule making states that "one of the major goals of the Service in this proposed rulemaking is to ensure that operators conduct their operations in a way that minimizes impacts to natural and cultural resources when operating on a refuge, such as locating operations away from sensitive habitats for endangered and threatened species, other priority wildlife resources, …"

One of the best ways to accomplish this goal is to encourage operators to access the sub-surface estate from adjacent non-federal surface estates when profitable and economic to do so.

Therefore, the Service should not attempt to regulate activity that does not use the Service's surface estate.

Today, in many instances where non-federal land is adjacent to the lower-48 refuges, horizontal drilling technology permits the development of much of the non-federal mineral estate without disturbing the federal surface estate. Activity originating on non-federal surface estate and accessing the non-federal subsurface estate should be explicitly exempted from this proposed rulemaking.

In conclusion, NARO wishes to emphasize that the Service must:

- recognize the rights of the mineral estate are dominant over the rights of the surface estate;
- allow economic and profitable access to, and development of, the mineral estate;
- balance environmental concerns with the economic development of oil and gas minerals; and
- forego any attempt to regulate surface activity on non-federal lands adjacent to refuges.

NARO looks forward to working with the Service as it strives to improve management and oversight of oil and gas operations on the Refuge System and with Congress as it performs proper oversight of the Service's efforts.

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