December 16, 2014

Neil Kornze
Director (630), Bureau of Land Management
Mail Stop 2134 LM
1849 C St. N.W.
Washington, D.C. 20240

Attn: OMB Control Number 1004-AE24

Re: Comments on BLM Proposed Rule, "Competitive Processes, Terms, and Conditions for Leasing Public Lands for Solar and Wind Energy Development and Technical Changes and Corrections," 79 Fed. Reg. 59,022 (Sept. 30, 2014) and 79 Fed. Reg. 69,387 (Nov. 21, 2014)

Dear Director Kornze:

On September 30, 2014, the Bureau of Land Management ("BLM") issued a proposed rule entitled "Competitive Processes, Terms, and Conditions for Leasing Public Lands for Solar and Wind Energy Development and Technical Changes and Corrections."[1] Although not apparent from its title, the proposed rule would significantly alter the BLM regulatory process under 43 C.F.R. Part 2880 for issuing, administering, and transferring rights-of-way ("ROWs") for oil and natural gas pipelines authorized under the Mineral Leasing Act, 30 U.S.C. § 185, particularly those pipelines that are 10 inches in diameter or larger. It would also amend the regulations at 43 C.F.R. Part 2800 governing the issuance and maintenance of ROWs for transmission lines of 100 kV or greater, which will affect the operations of many oil and gas companies.

We are providing these comments on behalf of four major oil and gas industry associations. The American Petroleum Institute ("API") is a national trade association that represents over 600 member companies involved in all aspects of the oil and natural gas industry. API's members include producers, refiners, suppliers, pipeline operators, and marine transporters, as well as service and supply companies that support all segments of the industry. The U.S. oil and natural gas industry supports 9.8 million U.S. jobs and more than 8 percent of the U.S. economy. Certain API members also own or operate transmission lines on BLM-managed lands.

The Association of Oil Pipe Lines ("AOPL") is a national trade association that represents owners and operators of oil pipelines across North America and educates the public about the vital role oil pipelines serve in the daily lives of Americans. AOPL members bring crude oil to the nation's refineries and important petroleum products to our communities, including all grades of gasoline, diesel, jet fuel, home heating oil, kerosene, propane, and biofuels. AOPL members operate approximately 90% of the energy liquids pipeline miles in the United States.

[1] 79 Fed. Reg. 59,022.

The Interstate Natural Gas Association of America ("INGAA") is a trade association that advocates regulatory and legislative positions of importance to the interstate natural gas pipeline industry in North America. INGAA is comprised of 25 members, representing the vast majority of the interstate natural gas transmission pipeline companies in the United States. INGAA's members operate approximately 200,000 miles of pipelines, and serve as an indispensable link between natural gas producers and consumers.

The Independent Petroleum Association of America ("IPAA") is the national association representing the thousands of independent crude oil and natural gas explorer/producers in the United States. It also operates in close cooperation with 44 unaffiliated independent national, state and regional associations, which together represent thousands of royalty owners and the companies which provide services and supplies to the domestic industry. IPAA is dedicated to ensuring a strong, viable domestic oil and natural gas industry, recognizing that an adequate and secure supply of energy is essential to the national economy.

We are collectively concerned about the limited opportunity BLM provided oil and gas stakeholders to meaningfully comment on this proposed rule. While the title of the proposal mentions only solar and wind ROWs and other "technical changes and corrections," a substantial overhaul of the regulations governing the issuance and administration of oil and gas ROWs on public lands is buried at the end of the 63-page proposal. BLM engaged in no outreach to the oil and gas industry before proposing its rule, and industry had no reason to anticipate BLM's proposed rulemaking. Accordingly, upon discovery of its scope, API, INGAA, and others promptly requested that BLM extend the comment deadline until March 2015. On November 21, 2014, BLM agreed to a minimal 15-day extension of time to file comments, until December 16, 2014. Notwithstanding BLM's refusal to grant the greater public review and comment period warranted by its extensive proposal, we offer the following comments, but reserve the right to supplement these comments prior to issuance of any final rule.

We support BLM's efforts to clarify and simplify the regulatory process for obtaining, maintaining, and reclaiming pipeline and transmission ROWs and to achieve a fair return for the use of the public lands. However, certain aspects of the proposal would frustrate those goals and may serve to chill, rather than encourage, responsible oil and gas pipeline development on BLM-managed lands. Additionally, several of the proposed regulations are inconsistent with BLM's statutory, regulatory, and Secretarial delegations of authority, and should be modified accordingly. Therefore, BLM should revise its proposed rule consistent with the comments below.

I. The scope of BLM's proposal is overbroad with regard to oil and gas pipelines.

Several of the proposed regulatory requirements would apply to all pipelines. While the merits of those ubiquitous proposals are unclear as explained *infra*, particularly concerning is BLM's proposal to impose additional onerous procedural requirements for pipelines as small as 10 inches in diameter. This proposed threshold is based on the summarily stated and unsupported assumption that such pipelines "are all generally large-scale operations that require additional steps to help protect public land." 79 Fed. Reg. at 59,023, 59,054. BLM provides no basis for this 10-inch diameter bright line standard.

Oil and gas companies recognize that all pipelines regardless of size, pressure, and commodity transported require appropriate planning and steps to manage risk. For this reason, each company goes to great lengths to ensure the safety and reliability of its operations, minimizing the potential for adverse environmental outcomes. However, 10-inch pipelines rarely constitute "large-scale operations." BLM provides no record foundation or reasoned basis for categorically subjecting 10-inch pipelines to the increased pre-application, planning, and review requirements of the proposed rule. Apart from the conclusory remark cited above, BLM has offered no reason why such pipelines pose an increased risk to the welfare of the public lands. We are also concerned that the proposed regulations would needlessly saddle the agency with excess regulatory burden, increasing demand for limited administrative resources and lengthening processing times for all pipeline ROW applications. Accordingly, while we agree that the BLM should focus its regulatory efforts on projects of significance, setting the threshold at pipelines of 10 inches in diameter does not achieve that purpose.

Instead, BLM should propose criteria for determining whether a pipeline would in fact constitute a "large-scale operation," and thus be subject to the proposed additional regulations. Relevant factors BLM might consider in making such a determination include the length of the pipeline project, whether the project consists of gathering lines, the degree to which the surrounding area is already developed, and the economic value of the project, in addition to the diameter of the pipe. Other agencies, such as the Federal Energy Regulatory Commission, use project costs as an effective indicator of project significance. See 18 C.F.R. §§ 157.201-157.218. Criteria such as these are more appropriate for determining whether a project is significant such that additional regulatory safeguards are warranted.

Consequently BLM should amend proposed § 2804.10 to remove all references to pipelines 10 inches in diameter or greater and instead propose for public comment some meaningful, project-related criteria for determining the applicability of the proposed regulations.

II. BLM may not refuse to process an otherwise valid application simply because the applicant may have an alleged or actual "unpaid debt" to the federal government.

Under proposed § 2884.21(b), BLM would not process a ROW application if the applicant "has unpaid debts to the federal government." Refusing to process applications due to unpaid government debts is tantamount to a *de facto* suspension or debarment without adherence to Departmental regulations or due process. DOI's existing regulations permit suspension or debarment only under certain prescribed circumstances and subject to procedural requirements. *See* 2 C.F.R. Parts 180 and 1400 (nonprocurement). The proposed regulation would impermissibly conflict with or nullify those regulations and their corresponding protections. Proposed § 2884.21 is also inconsistent with BLM's oil and gas leasing regulations at 43 C.F.R. Part 3160, which contain no analogous categorical preclusion of applicants with debts to the federal government.

It is also unclear what types of "debts" would bar consideration of a ROW application under proposed § 2884.21. Of course, BLM cannot consider routine fees that may be due or pending for processing as unpaid "debts" to the federal government. But under the proposal, BLM may be prohibited from processing an application in cases where the applicant is engaged in a valid dispute with any federal agency, even over the very existence of a debt, including a validly

disputed debt that has no relation to the sought after ROW. Companies routinely engage in good faith disagreements with agencies such as the Internal Revenue Service or the Department of Defense, some of which may require contested proceedings and potentially months or years to reach resolution. Barring the consideration of a ROW application during the pendency of such an unrelated appeal would unfairly disadvantage companies that choose to exercise their basic appeal rights under applicable federal regulations and the Administrative Procedure Act ("APA").

Consequently, BLM should remove proposed § 2884.21 from the proposal.

III. Corporate name changes and mergers should not provide occasion for BLM to rewrite the terms of existing ROW contracts.

A. *Mergers and acquisitions are not assignments*.

Under proposed § 2887.11(a)(2), BLM "may" treat corporate mergers and acquisitions as ROW assignments, subjecting them to BLM approval under the assignment regulations at 43 C.F.R. Subpart 2887, and in turn to the same requirements as new ROW grants. This is inappropriate for two reasons.

First, the proposed rule is unclear as to *which* mergers or acquisitions constitute assignments and which do not. The proposed language only indicates that a merger or acquisition "may require an assignment." The regulated community must be informed of the rules of the game in advance, and should not have to rely on the uncertainty of an unbounded BLM determination. See FCC v. Fox Television Stations, Inc., ___ U.S. ___, 132 S. Ct. 2307, 3317-18 (2012) (excessively vague regulations raise due process concerns because "regulated parties should know what is required of them so they may act accordingly").

Second, BLM has provided no rationale for applying the assignment regulations outside the realm of traditional assignments (where one entity assigns its ROW to a different entity) to encompass mergers and acquisitions (where one company merges into another but no assignment actually occurs). While notice to the agency and verification of the merged/acquiring company's acquisition of a ROW through merger may be appropriate for record update purposes, BLM offers no explanation or reasoning for establishing its ability to "modify the grant…or add bonding and other requirements, including terms and conditions, to the grant…when approving the assignment." There is no need for BLM to approve an assignment for the simple reason that no assignment occurs in connection with a merger or acquisition. BLM offers no basis for its suggestion that additional ROW terms and conditions are needed when a merger or acquisition occurs. Additionally, BLM's oil and gas regulations do not treat the transfer of oil and gas leases via merger or acquisition as lease assignments. See 43 C.F.R. § 3106.8-3. BLM offers no explanation for this disparate treatment. Accordingly, BLM should remove the first sentence of proposed § 2887.11(a)(2).

B. *Corporate name changes should not provide occasion for BLM to redraft the terms of a ROW.*

Proposed § 2887.11(b) concedes that "changes in the [ROW] holder's name…do not constitute an assignment." Yet proposed § 2887.11(i) effectively subjects corporate name changes to the same requirements as for an assignment. Like the assignment regulations, proposed § 2887.11(i)(2) requires BLM approval of a name change, and allows the agency to unilaterally "modify the grant…or add bonding and other requirements, including additional terms and conditions, to the grant" whenever a company changes its name. Consistent with existing oil and gas leasing regulations, a name change should not occasion any action from a ROW holder or from BLM apart from notification to the agency. See 43 C.F.R. § 3106.8-2. Requiring a company to apply for BLM approval to preserve its ROWs in the event of a name change would impose undue and unnecessary regulatory burden on an otherwise routine business operation that is unrelated to the operation of the ROW.

BLM should remove proposed § 2887.11 from the proposal, or at a minimum remove proposed § 2887.11(i)(2) from the proposal, and amend § 2887.11(i)(1) to require notice to the agency rather than the submission of an application requesting BLM permission to change a company's name.

IV. BLM should clarify that the assignment and other provisions of the proposed rule would not apply to existing ROWs.

We read the proposed regulations as not affecting pre-existing ROW agreements. BLM should make clear that the new regulations would apply prospectively only. Otherwise, the proposed rule raises issues concerning breach of contract, unconstitutional takings, and fundamental fairness. For example, because proposed § 2887.11 would give BLM substantial discretion to unilaterally amend the terms and conditions of ROW agreements any time there is a merger, acquisition, or corporate name change – regulatory authority that did not exist when existing ROWs were applied for and granted – the proposed regulations would appreciably devalue BLM-issued ROWs.

A ROW is a valid contract between the government and the grantee; the government is bound by the terms of the contract no less than a private party, and may not materially amend the terms of its contracts after the fact. See Mobil Oil Exploration & Producing Southeast, Inc., v. United States, 530 U.S. 604 (2000). Government imposition of new conditions on existing contracts may breach the contract, entitling the contract holder to legal damages. See id., Century Exploration New Orleans, LLC v. United States, 110 Fed. Cl. 148, 163 (2013); Amber Res. Co. v. United States, 68 Fed. Cl. 535 (2005), aff'd, 538 F.3d 1358 (Fed. Cir. 2008).[2] Accordingly, BLM should avoid promulgating regulations that would substantially modify or insert new terms into existing ROW contracts that were not contemplated at the time they were

[2] If application of the new regulations would significantly diminish the value of the contract or render the ROW valueless, then the proposed regulations may constitute a taking in violation of due process. See Century Exploration New Orleans, LLC v. United States, 103 Fed. Cl. 70 (Jan. 24, 2012); Devon Energy Corp. v. United States, 45 Fed. Cl. 519 (Dec. 21, 1999).

signed. See also Landgraf v. Usi Film Prods., 511 U.S. 244, 264 (1994) ("retroactivity is disfavored in the law").

BLM should modify its proposal to clarify that the proposed regulations will not apply retroactively to existing ROW agreements, but only to ROW agreements entered into after the effective date of any final rule.

V. BLM should not be able to solicit competitive interest in an applied-for ROW where there is no competing application.

BLM's existing regulations provide that the agency may issue pipeline ROWs competitively only if it receives "competing applications for the same pipeline." See 43 C.F.R. § 2884.18; 79 Fed. Reg. at 59,024, 59,036, 59,038, 59,054. The proposal would revise existing § 2884.18(c) to instead allow the agency to "offer lands through a competitive process on [its] own initiative." That is, BLM could receive a unique application for a ROW, then solicit competitive interest in that ROW area and ultimately issue the ROW to someone other than the original applicant.

Such a result would be unfair, particularly in light of BLM's proposed increases to the regulatory burden, expense, and time associated with applying for a ROW. See, e.g., proposed §§ 2884.10, 2884.12, 2884.21. If an applicant spends the time and money necessary to scope, identify and apply for a ROW, BLM should not be able to offer the project to someone else who did not make the same investment in developing the proposal. By allowing potential competitors a "free ride" on the efforts of original ROW applicants, proposed § 2884.18 would chill the development of necessary pipeline infrastructure. It would also serve to delay the timely construction of needed oil and gas pipeline infrastructure.

If BLM is concerned about its authority to issue ROWs competitively in locations that are not the subject of *any* existing ROW applications, BLM should instead include a provision to that effect in the rule. Otherwise, BLM should consider competitive factors only where two or more applications are received for the same specific area or project. As written, proposed § 2884.18(c) is overbroad and could be used to achieve inequitable and undesirable results, and create undue delay in processing ROW applications. Accordingly, BLM should strike the last sentence of proposed § 2884.18(c).

VI. The cost recovery provisions exceed the scope of BLM's authority.

Much of BLM's proposal focuses on updating and augmenting the cost recovery provisions of the existing ROW regulations. We understand that the agency may recoup the reasonable costs it incurs in processing ROW applications and administering pipeline projects. However, the proposed cost recovery provisions of the proposed regulations go too far – as a matter of both law and policy – and could impose excessive charges on the regulated community and create new administrative delays.

A. *BLM may not recover costs on behalf of non-DOI federal agencies*.

In a number of places, the regulations purport to authorize BLM to recover costs for *all* federal agencies, including non-DOI agencies. See, e.g., proposed §§ 2884.12, 2885.24 (requiring

applicants and ROW holders to pay fees "to cover the costs to the Federal Government…before the Federal Government incurs them"). In the preamble, BLM relies on Secretarial Order ("S.O.") 3327 as the source of its authority to recover costs on behalf of all federal agencies. See 79 Fed. Reg. at 59,023, 59,033, 59,035-36, 59,054; see also id. at 59,026 (indicating that the new cost recovery provisions "codify[] the cost recovery authority delegated by Secretarial Order 3327"). However, S.O. 3327 only delegates authority to BLM to recover costs on behalf of other *DOI* agencies. See S.O. 3327, Delegation of Authority for Cost Reimbursable Authority (Apr. 5, 2013). In the preamble, BLM acknowledges but disregards this limitation. See 79 Fed. Reg. 59033 ("Secretarial Order [3327] delegated the Secretary's authority under FLPMA to receive reimbursable payments to the bureaus and offices of the Department of the Interior. [In the proposed regulations,] [t]his definition has been expanded to include other Federal agencies."); see also id. at 59035-36 (acknowledging that S.O. 3327 only grants authority to recover costs incurred by DOI agencies). Because S.O. 3327 does not authorize BLM to recover costs incurred by non-DOI agencies, BLM must modify its proposal to reflect this limitation.

Additionally, as a practical matter, attempting to recover costs purportedly incurred by non-DOI agencies could prove unworkable, increasing costs and delay. Because cost recovery under the proposal would occur *prior to* application processing and approval, there is substantial risk that the applicant could become embroiled in an administrative morass that may result from suboptimal inter-agency coordination or disagreements regarding each agency's cost recovery requirements, payment amounts, or administrative functions, in the attempt to get its application processed by BLM. BLM acknowledges that inter-agency administrative processes for cost recovery coordination may not yet be in place, and that the new regulations would "require more coordination…between federal agencies." Id. at 59036, 59054. Subjecting applicants to a regulatory regime that depends on undefined and undeveloped inter-agency processes, requiring the involvement of entities that are not bound by BLM's regulations or S.O. 3327 is unfair, likely would cause undue delay, and may subject applicants to double-charging for administrative fees. Accordingly, BLM should revise the proposed rule to clarify that BLM will recover costs only on behalf of DOI agencies and bureaus.

B. *BLM may not recover costs on behalf of non-federal entities*.

Proposed § 2884.10(b)(4) and (c)(2) would require potential applicants "to pay the reasonable costs…associated with" holding a pre-application meeting with state agencies, Tribes, and local governments "to facilitate coordination of environmental and siting issues and concerns." To the extent these provisions could be interpreted as requiring a potential applicant to pay costs incurred by non-federal entities, or authorizing BLM to recover costs on behalf of non-federal entities, they would exceed the scope of BLM's cost recovery authority. BLM should either remove these provisions from its proposal or clarify that compliance with BLM's regulations is not contingent on reimbursing any entity other than a DOI agency for costs properly associated with processing a ROW application or monitoring a pipeline project.

C. *BLM must publish proposed fee schedules for comment before their implementation*.

The existing regulations identify the fee amounts BLM will charge for processing ROW applications and monitoring projects, subject to annual adjustment for changes in the IPD-GDP.

See 43 C.F.R. §§ 2884.12, 2885.24. The proposal would remove these fee amounts from the regulations. Instead, BLM would maintain a separate fee schedule that it would revise periodically. See proposed §§ 2884.12, 2885.24. While we have no issue with removing the fee schedule from the regulations, BLM must continue to observe APA-compliant notice and comment procedures before finalizing any changes to the fee schedules. The amount of the fees the government charges applicants are "substantive" for the purposes of the APA, and therefore must be subject to public notice and comment prior to finalization. See Shalala v. Guernsey Mem. Hosp., 514 U.S. 87, 100 (1995); Sprint Corp. v. FCC, 315 F.3d 369, 374 (D.C. Cir. 2003); 5 U.S.C. § 553. BLM should revise proposed §§ 2884.12(c) and 2885.24(b) to clarify that any proposed modification to the fee schedules other than adjustments for changes in the IPD-GDP will be published in the Federal Register for public comment before implementation.

VII. BLM may encourage, but should not prescribe a mandatory, set pre-application process.

Under current BLM regulations, the so-called "pre-application" process is entirely voluntary. See 43 C.F.R. § 2884.10 (recommending that potential applicants notify BLM of their intent to submit an application and encouraging them to have a pre-application meeting with BLM to discuss the proposal). Proposed § 2884.10 would make these recommendations mandatory, and additionally would require applicants to pay for and hold additional pre-application meetings and consultations. BLM should refrain from imposing such mandatory requirements on those who have not yet submitted a ROW application to BLM and not yet subjected themselves to BLM's jurisdiction.

Both the Federal Land Policy and Management Act ("FLPMA") and the Mineral Leasing Act ("MLA") grant the Secretary the authority to consider and approve "applications" for ROWs, and only contemplate "applicants" and "grantees" (or ROW holders). See 43 U.S.C. §§ 1761-1771; 30 U.S.C. § 185. Neither statute contemplates regulating the activities of "pre-applicants" or asserting BLM jurisdiction over anything that happens before an application is filed. Neither statute contemplates the establishment of prescriptive requirements on those who have not yet submitted an application for a ROW, and who therefore have no business with DOI regarding that application. In other words, there is no privity between those who have not submitted an application and the agency on which to base the assertion of regulatory jurisdiction.

Moreover, the subject of public outreach and meetings is expressly addressed in the MLA, which authorizes the DOI Secretary to establish, via regulation, procedures "to give Federal, State, and local government agencies and the public adequate notice and an opportunity to comment upon right-of-way *applications*…." 30 U.S.C. § 185(k) (emphasis added). There is no indication that the Secretary is authorized to also prescribe by regulation procedures for notice and comment on *pre*-applications, or to require a potential pre-applicant to pay for meetings and BLM expenses associated with required pre-application meetings before it even submits an application for the agency's consideration.

As with the existing BLM ROW program, other federal natural resource and land use programs reflect a policy of *encouraging* applicants to consult with other governmental entities and affected stakeholders before submitting an application. Such programs include the Bureau of Ocean Energy Management's Offshore Renewable Energy Program and the Federal Energy Regulatory Commission's program for issuing certificates of Public Convenience and Necessity

to pipeline applicants. See, e.g., 30 C.F.R. Part 585; 18 C.F.R. Part 157. As BLM recognizes, pre-application consultation may lead to better applications and assists in avoiding or minimizing potential land use conflicts and other issues at early stages. However, each of those natural resource and land use programs – including BLM's current ROW program – stops short of attempting to impose prescriptive regulatory requirements on those who have not yet submitted an application. Absent specific Congressional authorization, the agencies simply lack the authority to prescribe the behavior of those with whom they have no relationship. Compare 18 C.F.R. § 157.21(b) (making FERC's pre-application process for pipelines voluntary) with 18 C.F.R. § 157.21(a) (making the same pre-application process mandatory for LNG terminals in response to express Congressional direction); see FERC Docket No. RM05-31-000; Order No. 665 (issued Oct. 7, 2005) (explaining that Sec. 311(d) of the Energy Policy Act of 2005 compels the Commission to make the pre-application consultation process mandatory for LNG terminals and associated facilities). BLM lacks such Congressional authorization in the context of its proposal to mandate consultation.

Additionally, BLM offers no explanation for the presumed need to make the currently voluntary pre-application process mandatory. BLM's ROW proposal would uniquely compel one-size-fits-all pre-application activities, even where they may not make sense for a particular project or where a project may not actually proceed to the application phase. For example, mandating two pre-application meetings for minor projects with smaller scopes and minimal resource impacts would be burdensome and unnecessary. Accordingly, BLM should maintain the voluntariness of pre-application recommendations and remove all mandatory language from proposed § 2884.10.

VIII. Provisions allowing BLM to refuse to consider a ROW application are improper and impermissibly vague.

Proposed § 2884.10(d) would allow BLM to refuse to "accept" an application under certain circumstances. Absent the submission of an incomplete application, BLM is required to consider and decide each application on its merits. See 43 C.F.R. §§ 2884.11, 2884.23.

The denial of an application is an agency action subject to administrative appeal. See id. at § 2884.23(b). While BLM's refusal to accept an application under the proposed regulations would constitute a *de facto* denial, it is not clear that the applicant would have the right to administratively appeal that denial to the State Director or the Interior Board of Land Appeals, or what standards would apply to such review. Such denial of administrative due process would also be inconsistent with the Secretary's review authority delegated to the Office of Hearings and Appeals as well as the right to administrative review provided by § 554(c) of the APA.

Additionally, the criteria for determining whether BLM will refuse to "accept" an application are impermissibly vague. For example, proposed § 2884.10(d)(1) would allow BLM to refuse even to consider an application if the proposal fails to "avoid[] areas where development could cause significant impacts to sensitive resources and values that are the basis for special designation or protections." This standard is extremely vague. Without specifying the meaning of all these terms, the applicant cannot know what constitutes an "acceptable" application for filing purposes so that the agency will consider it, let alone approve it. As written, proposed § 2884.10(d)(1) would impermissibly reserve to the agency unfettered – and potentially administratively unreviewable – discretion to reject ROW applications. Moreover, the proposal is simply

unnecessary; the existing regulatory process for considering ROW applications provides sufficient environmental safeguards.

The same is true of proposed § 2884.10(d)(2), which allows BLM to refuse an application if "the pre-application meetings described in [§ 2884.10(c)] have [not] been completed *to our satisfaction*." (emphasis added). This provision is similarly vague and purports to give BLM absolute discretion to refuse to consider an application. We cannot discern an objective regulatory standard from the phrase "to our satisfaction." Proposed § 2884.10(d)(2) would purport to reserve to BLM the ability to determine what the regulatory requirements are, however it wishes, at any time, and, because it is an administrative non-action rather than an affirmative denial, potentially exempt that determination from appropriate administrative review. Cf. Schraier v. Hichel, 419 F.2d 663, 666-67 (D.C. Cir. 1969) (BLM may not disregard a lease application on the basis of "illegal procedures or standards"; applicants are entitled to fair opportunity to contract with the government that "is not negated by resort to illegal practices or procedures").

BLM should remove proposed § 2884(d)(1) and (2) from its proposal and, if necessary, amend 43 C.F.R. § 2884.23 to include more specific and clearer circumstances under which the agency would disapprove ROW applications.

IX. The Plan of Development ("POD") requirements should be clarified.

The language of the proposed POD requirements should more clearly identify when a POD is required and clarify that BLM's POD template contains no substantive or binding requirements. Proposed § 2884.11(c)(5) intimates that BLM's POD template contains a binding development schedule and other substantive requirements. BLM should revise § 2884.11(c)(5) as follows:

> The estimated schedule for constructing, operating, maintaining, and terminating the project (a POD). Your POD must address the elements ~~be consistent with the development schedule and other requirements as noted on~~ specified on the POD template for oil and gas pipelines at *http://www.blm.gov;*

Under proposed § 2884.10(d)(3), BLM would refuse to accept an application that is not "accompanied by a…schedule for the submittal of a POD…." Yet proposed § 2884.11(c)(5) requires that a ROW application include a completed POD. BLM thus should delete proposed § 2884.10(d)(3).

Under proposed § 2884.23(6), BLM would deny an application if "the POD required by §§ 2884.10(d)(3) and 2884.11(c)(5) does not meet the development schedule and other requirements as noted on the POD template and the applicant is unable to demonstrate why the POD should be approved." As noted above, proposed § 2884.10(d)(3) does not require a POD. Additionally, the POD template is simply a blank form; it does not prescribe a "development schedule [or] other requirements" for an applicant to "meet." Additionally, it is improper for the regulation to imply that denial is appropriate in the absence of the applicant providing compelling justification why its POD should be approved.

Accordingly, we recommend the following revisions to proposed § 2884.23(a)(6) so that BLM may deny an application if:

> The POD required by ~~§§ 2884.10(d)(3) and~~ 2884.11(c)(5) does not address the elements ~~meet the development schedule and other requirements as noted~~ specified on the POD template ~~and the applicant is unable to demonstrate why the POD should be approved~~."

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We appreciate the opportunity to participate in this important rulemaking process, and respectfully request that BLM carefully consider these comments as it proceeds with this rulemaking process. Please do not hesitate to contact any of our organizations with any questions or to further discuss the proposed rule and associated comments.

Respectfully submitted,

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