Mr. Edward O. Kassman, Jr.
Geologic Resources Division
National Park Service
P.O. Box 25287
Denver, CO 80225

**Re: RIN 1024-AD78 NPS. *General Provisions and Non-Federal Oil and Gas Rights*, proposed rule published in the Federal Register on October 26, 2015 (80 Fed. Reg. 65572).**

Submitted Via Regulations.gov

Dear Mr. Kassman:

On October 26, 2015 the National Park Service ("NPS") issued a proposed rule entitled "General Provisions and Non-Federal Oil and Gas Rights; Proposed Rule" (80 Fed. Reg. 65571, the "Proposed Rule"). This Proposed Rule would modify service-wide regulations governing the exercise of non-federal oil and gas rights on NPS units, under 36 CFR part 9, subpart B (9B regulations). API, the Independent Petroleum Association of America, Western Energy Alliance, and the American Exploration & Production Council ("the Associations") join in submitting these comments to the proposed rule.

The API is a national trade association representing over 640 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. API member companies are leaders of a technology-driven industry that supplies most of America's energy, supports more than 9.8 million jobs and 8 percent of the U.S. economy, and since 2000, has invested nearly $2 trillion in U.S. capital projects to advance all forms of energy, including alternatives.

The Independent Petroleum Association of America represents thousands of independent oil and natural gas explorers and producers, as well as the service and supply industries that support their efforts. Independent producers drill roughly 95 percent of American oil and natural gas wells, and produce about 54 percent of American oil and more than 85 percent of American natural gas.

The Western Energy Alliance represents over 450 companies engaged in all aspects of environmentally responsible exploration and production of oil and natural gas in the West. Alliance members are independents, the majority of which are small businesses with an average of fifteen employees.

The American Exploration & Production Council ("AXPC") is a national trade association representing 31 of the largest US independent natural gas and crude oil exploration and production companies - Leaders in finding and developing secure energy supplies throughout North America. Our members are "independent" in the sense that they do not have

petroleum refining or retail marketing operations and therefore are not "fully integrated". The mission of AXPC is to work constructively for sound energy development and for environmental and related public policies that encourage responsible exploration, development and production of natural gas and crude oil to meet consumer needs and fuel our nation's economy.

The Associations ask that the National Park Service ("NPS") carefully consider the concerns discussed in this letter. The imposition of additional regulations on non-federal oil and gas development within the National Park System is unnecessary, and will only result in duplicative layers of regulatory oversight. We believe that the record shows that the present 9B regulations have equipped the NPS to carry out its responsibilities under 54 U.S.C. § 100101 in a manner that achieves a balance between the purposes for which units in the National Park System are managed with the valid existing rights of a modest number of owners of mineral rights under surface lands within National Park System units. Under those regulations, an operator must obtain NPS approval of a proposed plan of operations before commencing non-federal oil and gas operations in an NPS unit. 36 C.F.R. § 9.32(b). Among other things, the plan of operations must show that the operator is exercising a bona fide property right to non-federal oil and gas in an NPS unit and provide detailed information on the proposed operation, how access to the site of operations will be achieved, mitigation measures planned, reasonable alternatives to what the operator proposes, a description of foreseeable environmental impacts from the proposed operations, and a performance bond. *Id.* § 9.36(a).

This information is supplemented by information the operator is required to submit to appropriate agencies of the state within which the operation is being planned. See 36 C.F.R. § 9.36(a)(15). This combination of regulation and oversight is acknowledged by NPS in its notice, where NPS states that it coordinates and consults with state and other federal agencies. In publishing this proposed rule, NPS indicates that additional regulation is necessary because state oil and gas commissions have a different mission, suggesting that they do not adequately address environmental concerns. This contention is incorrect. In each of the states in which the Federal Register notice identifies NPS units within which oil and gas operations occur the states in question have adopted regulations that protect the environment through extensive rules governing those operations. These rules address a variety of issues, such as drilling, development, and production activities; setbacks; ground water protection measures; financial assurance requirements; spill reporting; and reclamation requirements. Furthermore, NPS' existing regulations likewise provide NPS or the operator to request to supplement and modify the plan if there is a change in circumstances, 36 C.F.R. § 9.40, and authorize NPS to enforce the approved plan, with the power to suspend operations or to revoke approval for cause 36 C.F.R. § 9.51 – actions that are subject to an appeal, 36 C.F.R. § 9.49.

The notice of the proposed rule identifies some 534 nonfederal oil and gas operations across units of the National Park System. The Associations acknowledge the importance of the National Park System and that NPS has a responsibility "to conserve the scenery, natural and historic objects, and wild life in the System units." 54 U.S.C. § 100101. Enabling statutes passed by Congress for the establishment of particular units however may contain language that prevent the Secretary of the Interior from acquiring rights to oil and gas without the consent of the owner, or without first determining that uses arising from the mineral estate would be detrimental to the purposes for which the unit in question was established.

Regulation of oil and gas operations within NPS units also confronts the well-established principle of common law that when an individual owns the minerals of a parcel but not the

surface, the mineral rights owner is entitled to reasonable use of the surface to recover the minerals. As the National Park System has expanded over the years from lands retained by the federal government in the West to include units created through the acquisition of surface lands from private interests, there are many instances where mineral interests are retained by private owners or were previously severed from the surface estates acquired. This is reflected in the non-federal oil and gas operations noted in the notice of the proposed rule, most of which occur in states such as Texas, the southeast or the Ohio Valley, where establishment of NPS units followed settlement and the private ownership and use of both surface and mineral estates by many decades or more. Private inholdings are found within the majority of NPS units, even in those carved out of federal lands in the West, commonly where mining claims were patented within the boundaries of a NPS unit established subsequent to the initial prospecting and patenting. In lands capable of oil or natural gas production, a similar sequence obtains, that of a NPS unit established after severance of the mineral estate and establishment of oil or natural gas production from that estate. In these situations mineral estate owner's reasonable use of the surface to recover the minerals is a legal right that must be balanced with all interests involved.

A number of states have established a doctrine of "reasonable use", and the Colorado case of *Gerrity Oil & Gas Corp. v. Mangess*, 946 P.2d 913, 926–28 (Colo. 1997), provides a useful exposition of this doctrine:

> [s]evered mineral rights lack value unless they can be developed. For this reason, the owner of a severed mineral estate or lessee is privileged to access the surface and "use that portion of the surface estate that is reasonably necessary to develop the severed mineral interest." *Notch Mountain Corp. v. Elliott*, 898 P.2d 550, 556 (Colo. 1995); see also *Rocky Mountain Fuel Co. v. Heflin*, 148 Colo. 415, 422, 366 P.2d 577, 580 (1961) (the severed mineral owner's right of access includes the "rights of ingress, egress, exploration, and surface usage as are reasonably necessary to the successful exploitation of [the mineral] interest."). The right to use the surface as is reasonably necessary, known as the rule of reasonable surface use, does not include the right to destroy, interfere with or damage the surface owner's correlative rights to the surface.

In a severed mineral situation at common law, neither the surface owner nor the severed mineral rights holder has any absolute right to exclude the other from the surface, which may create tension between competing surface uses. In the case of NPS units, this tension, or potential tension is acknowledged, and has been addressed by the 9B regulations. In this situation of potential conflict, the 9B regulations have facilitated advance planning through the process for approval of plans of operations and the posting of bonds along with assurance of compliance with other relevant federal, state, and in some circumstances even local regulations. This approach has enabled regulated operations on private minerals to result in only minimal or temporary disruption to resources on the NPS units, to prevent unnecessary environmental contamination, and to mitigate other adverse effects as well as reclamation. In a context of valid and pre-existing mineral rights these measures achieve a balance between uses and purposes. It is a balance equivalent to that reached in contexts unrelated to mineral rights, such as the passage of public highways or utility rights-of-way through unit boundaries, or commercial activities validly conducted on private inholdings.

The activities arising from ownership and use of valid existing mineral rights on NPS units that are described in the proposed rule are activities that can and have been managed effectively under 9B regulations and appropriate other federal, state or local regulations and

permits. This does not mean that impacts to the surface can and occasionally do occur, but just as is the case with operations and impacts from operations on non-federal surface, an array of remedies is available under the existing suite of laws and regulations to address, mitigate and remedy the impacts. While NPS has presented information in the notice of the proposed rule of the occurrence of certain incidents attributable to oil and gas operations, NPS has not provided information to indicate that problems are systematic or that existing regulatory schemes of which the 9B regulations are an important part are failing either the National Park System of the public.

Overly burdensome restrictions on the rights of leaseholders to access or otherwise develop mineral rights could also constitute an unconstitutional taking of private property rights. *See, e.g.*, *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 104 (1978). Oil and gas leases confer property rights. NPS may subsequently impose reasonable conditions on such rights but cannot render development economically infeasible. If NPS renders operations on existing leases uneconomic, those lessees may have takings claims against the United States for significant compensation. While the proposed rule states that these regulations are not intended to result in takings, they may do just that, despite what NPS may intend.

In addition to these comments, the Associations urge that any decision document arising from this rulemaking effort make clear that NPS does not seek and will not attempt to regulate oil and gas operations that fall outside the boundaries of NPS units. The proposed rule would establish an exemption process for oil and gas rights that are accessed from a surface location outside a park boundary, but this process presumes that NPS has authority to regulate operations on these locations in the first instance. Such regulation, however, would exceed NPS's responsibility for conservation within the National Park System.

To conclude, the 9B regulations have functioned effectively to achieve a regulatory balance between the objectives for which NPS units have been established, and the valid existing mineral rights and derivative uses that may be found within the boundaries of those units. The regulations authorize a process that emphasizes planning, consultation, preparedness, financial assurance, and mitigation, and equip responsible NPS personnel with the tools to assure that these outcomes are recognized by operators and achievable in practice. The Associations believe that it is imperative that any modifications to 9B regulations continue to be informed by the principles under which 9B regulations have been administered to maintain a balance for the future between the rights and interests recognized at law and present in situations of mineral inholdings within NPS unit boundaries,

Thank you for considering these comments.

Very truly yours,

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