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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

STATE OF WYOMING and	)
STATE OF MONTANA	)
	)

Petitioners,	)	
	)	
and	)	
	)	
STATE OF NORTH DAKOTA and STATE OF TEXAS	)	
	)	
Petitioners-Intervenors,	)	
	)	
v.	)	Case No. 16-cv-00285-SWS
	)	
UNITED STATES DEPARTMENT OF THE INTERIOR, *et al*.	)	
	)	
Respondents,	)	
	)	
and	)	
	)	
WYOMING OUTDOOR COUNCIL, et al.	)	
	)	
Intervenor-Respondents.	)	

JOINT OPENING BRIEF OF THE STATES OF NORTH DAKOTA AND TEXAS

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INTRODUCTION

The U.S. Department of Interior's Bureau of Land Management's ("BLM") Waste Prevention, Production Subject to Royalties and Resource Conservation Rule ("Final Rule"), 81 Fed. Reg. 83,008 (Nov. 18, 2016) (to be codified at 43 C.F.R. pts. 3100, 3160, 3170), is unlawful and arbitrary and capricious because:

- BLM seeks to usurp the sovereign authority to regulate oil and gas operations on non-federal lands of the States of North Dakota's and Texas and displace the States' comprehensive legislative and regulatory programs preventing waste from those operations;
- BLM is exceeding its authority under the Mineral Leasing Act ("MLA") and related statutes, which are limited to the management of federal and tribal mineral interests, by asserting jurisdiction to impose comprehensive air emission regulations on significant state and private mineral interests;
- BLM reversed, without explanation, its long-standing position that BLM has very limited authority over state and private mineral interests that have been pooled with federal mineral interests, asserting for the first time full regulatory authority over non-federal interests;
- the Final Rule will not meaningfully reduce "waste" from federal and tribal mineral interests (the alleged purpose of the Final Rule), as BLM's own flawed analysis reveals that the increased royalties (i.e., avoided "waste") will only be

one percent to three percent of the cost of the Rule, with each dollar of additional royalties coming at a cost of twenty to thirty-eight dollars; and

- the Final Rule's comprehensive regulation of air emissions from oil and gas operations upends the congressionally-mandated cooperative federalism under the Clean Air Act ("CAA"), unlawfully depriving states of their primary role to implement and enforce air emission regulations, conflicting with the states' comprehensive air quality programs, and supplanting the authority and jurisdiction of the U.S. Environmental Protection Agency ("EPA") under the CAA.

SUMMARY OF THE CASE

A. Status of the Case

On June 15, 2017, BLM issued an administrative order postponing the effective dates for certain compliance obligations in the Final Rule that were slated to go into effect in January 2018, pending its review of the Final Rule to determine its consistency with Executive Order No. 13873, 82 Fed. Reg. 16093 (March 31, 2017) ("E.O. 13873"), with the potential outcomes including suspending, revising, or rescinding the Final Rule. Waste Prevention, Production Subject to Royalties, and Resource Conservation; Postponement of Certain Compliance Dates, 82 Fed. Reg. 27430 (June 15, 2017) (to be codified at 43 C.F.R. pt. 3170) ("BLM

Postponement Order").[1] On June 27, 2017, this Court extended the briefing schedule in light of BLM's actions and plans.

BLM's September 1, 2017 status report stated that it had drafted a proposed rule to extend the compliance dates postponed in the BLM Postponement Order by six months. (*See* Federal Respondents' Report on the Status of the Proposed Rulemaking to Suspend Certain Provisions of the Waste Prevention Rule). According to BLM, this proposed rule is going through Executive Branch review, and will be published for a thirty-day comment period when that review is complete. BLM also stated that it was working on a proposed rule to revise the Final Rule in accordance with E.O. 13873.

B. BLM's Expansion of Jurisdiction to State and Private Mineral Interests

The Final Rule is the BLM's first foray into the business of promulgating and enforcing comprehensive air quality regulations primarily over operations on non-federal lands under the guise of preventing "waste" (i.e., natural gas produced from federal or Indian lands that, but for its emission into the air, would be subject to federal royalties). BLM imposes these air quality regulations not only on

[1] As described in North Dakota's Supplemental Status Report, BLM's Postponement Order has been challenged by several Respondent-Intervenors in this case in two separate actions filed in the Northern District of California and subsequently consolidated: *Sierra Club v. BLM*, No. 3:17-cv-03804-EDL (N.D. Cal. 2017) and N.D. Supplemental Status Report, *California v. BLM*, 3:17-cv-03885-EDL (N.D. Cal. 2017).

operations on federal and tribal lands, but also on any private or state mineral interests with which the federal interests have been pooled (or "communitized"), however minimal the federal interests. Because of North Dakota's and Texas's "split estate" regimes that pool significant amounts of private surface mineral interests with minor federal non-surface mineral interests, a significant portion of the Final Rule's obligations in North Dakota and Texas fall on private, not public, mineral interests.

BLM imposes the requirements of the Final Rule on all private oil and gas operations in a pooled or communitized unit that includes even a small percentage of federal mineral interests, without regard to the volume of federal minerals involved or even if they are being extracted at all. Final Rule, 81 Fed. Reg. at 83,039. Even though only eighteen percent of North Dakota's oil and gas production is from federal and tribal lands, the Final Rule would extend BLM's jurisdiction to approximately thirty-two percent of the communitized, or pooled, oil and gas mineral interests in North Dakota. (Helms Declaration ¶¶ 9, 12–13). A similar impact would exist in Texas, as over 400,000 acres of federal land within Texas are regularly leased for oil and gas production.[2] Therefore, a major impact of the Final Rule in North Dakota and Texas will be on state and private mineral

[2] *See* U.S. Dep't of Interior, Bureau of Land Management, *Total Number of Acres Under Lease As of the Last Day of the Fiscal Year*, https://www.blm.gov/sites/blm.gov/files/oilandgas_ogstatistics_t3totalacresunderleaselastdayfiscal.xlsx.

interests and North Dakota's and Texas's authority to regulate them, not the federal mineral interests over which BLM has jurisdiction.

Communitization, unitization, and pooling are administrative tools that can be implemented through legislative, regulatory, or contractual means to address and coordinate different ownership interests in the same geographic formation or reservoir of mineral interests.[3] Using these tools, federal mineral interests are often developed jointly with private and local interests, particularly in states such as North Dakota and Texas, where private mineral interests dominate and there are relatively few large tracts of federal land. Both North Dakota and Texas encourage and give their regulators the authority in some circumstances to require the communization or pooling of individual spacing units by statute. *See* N.D. CENT. CODE § 38-08-07 (2017); *see also* Mineral Interest Pooling Act, TEX. NAT. RES. CODE § 102 et seq. (2017). The North Dakota legislature's intent for these and

[3] "Although the terms 'pooling' and 'unitization' are frequently used interchangeably, more properly 'pooling' means the bringing together of small tracts sufficient for the granting of a well permit under applicable spacing rules whereas 'unitization,' or, as it is sometimes described, 'unit operation,' means the joint operation of all of some part of a producing reservoir." HOWARD R. WILLIAMS & CHARLES J. MEYERS, OIL AND GAS LAW § 901 (1959). "Communitization, or pooling as it is usually called where nonfederal lands are involved, is the agreement to combine small tracts for the purpose of committing enough acreage to form the spacing and proration unit necessary to comply with the applicable state conservation requirements." LEWIS C. COX, JR., LAW OF FEDERAL OIL AND GAS LEASES § 18.01 (1986). A "spacing unit" is "the area in each pool which is assigned to a well for drilling, producing, and proration purposes in accordance with the [North Dakota Industrial Commission]'s rules or orders." N.D. ADMIN. CODE § 43-02-03-01.49 (2017).

related provisions includes promoting the economic development of the state's natural resources in a manner that "will prevent waste" and so that "the correlative rights of all owners [will] be fully protected." N.D. CENT. CODE § 38-08-01. Therefore, state and private mineral interests in North Dakota have, over time, been pooled or communitized with small federal mineral interests, effecting approximately fourteen percent of the spacing units in the state, with the aim of coordinating development and production activities to prevent waste. (Helms Declaration ¶ 9).

Because of the close relationship between pooling and spacing regulation, communitization or pooling clauses did not begin to appear in Texas oil and gas leases until the late 1920s and early 1930s, when state oil and gas conservation agencies were beginning to impose minimum spacing and acreage requirements before a permit to drill an oil or gas well would be issued.[4] 16 TEX. ADMIN. CODE § 3.37 (2017). In Texas, such communitization or pooling lease provisions may be

[4] The Railroad Commission of Texas adopted an applicable "Rule 37" in 1919, but its constitutionality was not established until 1935. *See Brown v. Humble Oil & Ref. Co.*, 83 S.W.2d 935 (Tex. 1935). It currently provides that, "[n]o well for oil, gas, or geothermal resource shall hereafter be drilled nearer than 1,200 feet to any well completed in or drilling to the same horizon on the same tract or farm, and no well shall be drilled nearer than 467 feet to any property line, lease line, or subdivision line; provided the commission, in order to prevent waste or to prevent the confiscation of property, may grant exceptions to permit drilling within shorter distances than prescribed in this paragraph when the commission shall determine that such exceptions are necessary either to prevent waste or to prevent the confiscation of property." 16 TEX. ADMIN. CODE § 3.37 (1982).

restricted to exclusively, or combinations of, oil, gas, condensate gas, or even various depths of production, and address both vertical and horizontal wells. All such leases, and particularly compulsory pooling, are subject to Texas Rail Road Commission (RRC) regulation and review according to a fair and reasonable standard. The provision of communitization or pooling in Texas is explicitly "for the purpose of avoiding the drilling of unnecessary wells, protecting correlative rights, or preventing waste," and generally limited to not "exceed 160 acres for an oil well or 640 acres for a gas well." TEX. NAT. RES. CODE § 102.111.

North Dakota and Texas have "split estate" property ownership structures and histories that results in oil and gas spacing units (a spacing unit is the property allocated to a well or group of wells) frequently pooled with a combination of federal, state, and private mineral ownership. North Dakota has numerous federal mineral interests that were originally associated with small farms scattered across the state that went into foreclosure during the Great Depression. (Helms Declaration ¶ 12). The federal government retained the mineral rights to these tiny tracts when it resold the surface to private owners (hence the "split estates"). Those scattered small federal mineral estates with no surface estate have now largely been communitized or pooled with surrounding state and private land. *Id*. Accordingly, only five percent of North Dakota oil and gas production is from federal lands, while approximately fourteen percent of state or private lands are

pooled with minor federal mineral estates that have no surface estate. *Id*. at ¶ 9. Even the handful of large tracks of federal mineral ownership or federal Indian trust responsibility (the Dakota Prairie Grasslands and the Fort Berthold Indian Reservation) are interspersed with a checkerboard of private and state ownership. [5] *Id*. at ¶ 16.

When Texas joined the Union in 1845, it did not relinquish control of its public lands.[6] Thus, Texas is the only U.S. sovereign to control its own public lands. All federal lands in Texas were acquired by purchase (*e.g.*, military bases) or donation (*e.g.*, national parks).[7] Additionally, because Texas's territorial waters originated as an independent republic, Texas owns territory far beyond its coastline—significantly more than other coastal states. *United States v. Louisiana*, 363 U.S. 1, 50 (1960), *supplemented sub nom.*, 382 U.S. 288 (1965). All of these lands (and the oil and gas deposits beneath them) are managed by the State. But the nearly three million acres of federal land in Texas are split-estate lands overlaying oil and gas formations, and mineral interests held by Texas and private citizens are subject to many scattered pooling or communitization agreements. Across Texas, over 400,000 acres of federal land are regularly leased for oil and

[5] North Dakota oil and gas regulation also applies on the Fort Berthold Indian Reservation pursuant to a 2008 agreement with the Tribe, and is jointly administered by the State, Tribe, and federal government. Helms Declaration ¶ 17.
[6] H.R.J. Res. 8, 28th Cong. (1845); J. Res. 1, 29th Cong. (1845).
[7] Texas' public lands were significantly enlarged by the U.S. Submerged Lands Act of 1953 and the resolution of the ensuing Tidelands Controversy.

gas development,[8] producing 273,000 barrels of oil and 38,250 million cubic feet of natural gas monthly.[9] Most of the Texas oil and gas leases executed in the last forty years include pooling provisions in the standard leases.[10] These leasehold and mineral interests, and the oil and gas produced therefrom, are subject to Texas regulation through its RRC.

BLM has "leveraged" the scattered small federal mineral interests to impose, through the Final Rule, its jurisdiction on any state or private mineral interests in North Dakota and Texas that have been communitized or pooled (frequently in accordance with North Dakota or Texas law) with even a minimal federal interest. Even in circumstances where the federal mineral ownership is very small relative to other mineral ownership interests within the spacing unit, *all* the oil and gas operators within the unit will be subject to the entirety of the Final Rule. Final Rule, 81 Fed. Reg. at 83,039. For example, in North Dakota, spacing units typically sized at 1,280 acres have been drawn into the ambit of the Final Rule because of the presence of one acre of Federal interests. (Helms Affidavit ¶ 10).

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[8] *See* U.S. Dep't of Interior, *supra* note 2.

[9] *See* Texas Railroad Commission, *Texas Monthly Oil & Gas Production* (Sept. 29. 2017, 11:45 AM), http://www.rrc.state.tx.us/oil-gas/research-and-statistics/production-data/texas-monthly-oil-gas-production/.

[10] Lee, Austin T., "Pooling and Unitization," *Lexis Practice Advisor*, April 2017, *available at* https://www.bracewell.com/sites/default/files/news-files/Pooling%20and%20Unitization.pdf.

Thus, BLM's Final Rule would regulate extensive oil and gas operations on state and private surface and mineral estates over which BLM has no jurisdiction.

C. BLM's Displacement of North Dakota's and Texas' Oil and Gas Laws and Regulations

Under the guise of preventing the "waste" of federal and tribal mineral resources, the Final Rule imposes detailed air emissions restrictions on the venting and flaring of natural gas, restrictions that are otherwise generally issued and administered by the states and EPA under the Clean Air Act, including mandatory monitoring systems, detailed equipment specifications, a prohibition on venting, gas capture requirements and documentation requirements. Final Rule, 81 Fed. Reg. at 83,023. BLM's Final Rule would displace North Dakota and Texas from their role as the primary regulator over state, private, and (by agreement) tribal mineral interests that are pooled with any federal mineral interests, and instead place that authority in the hands of the BLM. Preventing the "waste" of the state's oil and gas resources is a central purpose of North Dakota's and Texas's oil and gas laws. *See* N.D. CENT. CODE § 38-08-01; TEX. NAT. RES. CODE § 102.111. North Dakota and Texas have comprehensive oil and gas regulations, administered by the North Dakota Industrial Commission (NDIC) and Texas RRC respectively. N.D. ADMIN. CODE § 43-02-03, and 16 TEX. ADMIN. CODE § 3. As part of its laws and regulations governing oil and gas production, North Dakota imposes stringent venting and flaring restrictions on oil and gas production operators. (Helms

Declaration ¶ 19); *see* N.D. CENT. CODE § 38-08-06.4; *see also Vogel v. Marathon Oil Co*., 2016 ND 104 (N.D. May 16, 2016) (describing North Dakota's "comprehensive regulatory scheme" for venting and flaring under the authority of the NDIC)). The Texas RRC has similarly adopted detailed regulations regarding the minimization, safe release, and flaring of gases. 16 TEX. ADMIN. CODE § 3.32. Thus, state and private mineral interests in North Dakota and Texas are subject to comprehensive regulations to both prevent economic waste and to protect the environment.

States would have to petition BLM for a variance to regain sovereignty over non-federal mineral interests on a piecemeal basis, a determination that is at BLM's discretion to grant. Final Rule, 81 Fed. Reg. at 83,036. Even if states obtain a variance, BLM still claims the authority to separately enforce these rules against non-federal mineral interests, and applicable state laws must give way to the requirements of BLM's Final Rule if they conflict. *Id*. at 83,013. Therefore, the Final Rule effectively displaces North Dakota's regulatory program governing air emissions from approximately fourteen percent of non-federal oil and gas mineral interests in North Dakota, with similar effects in Texas.

The provisions of the Final Rule also directly conflict with current North Dakota laws and regulations. (Helms Declaration ¶¶ 22–23). For example, the NDIC has implemented gas capture regulations, which utilize declining allowable

flared percentages. *See id*. at ¶ 23. While BLM claims it modeled its gas capture off the North Dakota system, Final Rule, 81 Fed. Reg. at 83,023, it imposed entirely different targets with different percentages and different dates that are not supported by the record. (Helms Declaration ¶ 23). The two sets of rules also have different approaches to when venting may be allowed. *Id*. at ¶ 22. While the Final Rule allows venting in certain specified circumstances, North Dakota regulations do not, except when authorized by the NDIC upon application and after notice and comment. *See* N.D. CENT. CODE § 38-08-06.4(6); *see also* N.D. ADMIN. CODE § 43-02-03-60.2.

The Final Rule also imposes extensive new requirements associated with the Application for Permit to Drill (APD) and detailed "Waste Management Plan" that must be submitted to BLM. Final Rule, 81 Fed. Reg. at 83,078. The BLM's current processing time for APDs in North Dakota ranges from six to nine months, while the State processes the equivalent application in an average of twenty-three days. (Helms Declaration ¶ 25). North Dakota currently requires all operators—federal, private and tribal—to prepare a Gas Capture Plan with content that is similar, but not identical, to the BLM's Waste Management Plan and, unlike the BLM, requires operators to review and update their Plan and performance under that Plan annually and submit a report to the NDIC. *See* N. D. Indus. Comm'n,

Order 24665 Policy/Guidance Version 102215, adopted pursuant to NDIC Order 24665; *see also* Helms Declaration ¶ 23.

The Texas Commission on Environmental Quality (TCEQ) also administers Texas' comprehensive and robust air quality programs, including the Texas Clean Air Act (TEX. HEALTH & SAFETY CODE § 382.055 (2017); 30 TEX. ADMIN. CODE § 101.1 *et seq.*).[11] In addition, the Texas RRC regulates the exploration, production, and transportation of oil and gas, something it has done since 1919. The RRC's primary responsibility is to conserve natural resources, prevent waste, protect the correlative rights of different interest owners, protect the environment, and ensure the safety in areas such as flaring and venting of natural gas. RRC oversees all oil and gas wells in Texas, as well as those who own wells or engage in drilling. TEX. NAT. RES. CODE § 81.051. The RRC (1) prevents the waste of natural resources, (2) protects the rights of different interest owners, (3) prevents pollution, and (4) provides safety. It accomplishes these goals through permitting and reporting requirements; field inspections, testing programs, and monitoring activities; and through remedial programs regarding abandoned wells and sites. The RRC also administers Texas' oil and gas regulations, found at 16 TEX. ADMIN. CODE §§ 3.1–3.107. These regulations cover the drilling, producing, and plugging of wells;

[11] *See*, *e.g.*, Air Pollution Control Air Permit Reviewer Reference Guide, TCEQ (Jan. 2011), http://www.tceq.texas.gov/assets/public/permitting/air/Guidance/NewSourceReview/airpoll_guidance.pdf.

surface equipment removal; inactive wells; directional drilling; hydraulic fracturing; well spacing; operations to increase ultimate recovery; maintenance of pressure and the introduction of gas, water, and/or other substances into producing formations; disposal of saltwater and oil field wastes; and other operations. Texas has its own venting and flaring rules on oil and gas production, and while subject to specific measurement requirements, generally allows venting and flaring "to the air for periods not to exceed 24 hours in one continuous event or a total of 72 hours in one calendar month". 16 TEX. ADMIN. CODE § 3.32(f)(1)(C). Exceptions may be granted by the RRC on a showing of necessity of release. *Id*. at § 3.32(f)(2). Because the Final Rule applies to, *inter alia*, "[s]tate or private tracts in a federally approved unit or communitization agreement," Final Rule, 81 Fed. Reg. at 83,079, and because of Texas' statutory self-regulation, the Final Rule directly effects Texas' authority over its unique split-estate situation and a significant number of oil and gas units and mineral interests held by the State and various private citizens located in the nearly three million acres of federal lands within its borders.

ARGUMENT

I. BLM Is Not Entitled to *Chevron* Deference

The Final Rule is only entitled to deference under *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984), to the extent that it falls within the responsibilities entrusted to BLM by Congress. *City of Arlington, Texas*

v. FCC, 133 S. Ct. 1863, 1882 (2013) (quotation omitted). Delegation is antecedent to deference, and "there may be reason to hesitate before concluding that Congress" intended to delegate rulemaking authority to a federal agency. *King v. Burwell*, 135 S. Ct. 2480, 2488–89 (2015). Therefore, "a precondition to deference under *Chevron* is a congressional delegation of administrative authority." *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649 (1990). "Deference in accordance with *Chevron* . . . is warranted only 'when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.'" *Gonzales v. Orego*n, 546 U.S. 243, 255–56 (2006) (quoting *United States v. Mead Corp*., 533 U.S. 218, 226–27 (2001)).

As set forth below in Section II.A, the Final Rule does not stand upon any such clear statement from Congress. Rather, BLM has ventured well outside its role as steward of federal lands and minerals, displaced North Dakota's and Texas' sovereign authority, seeks to exercise jurisdiction over state mineral and private mineral interests, and attempts to compete with and displace EPA and the states to become a general environmental regulator. BLM has neither the authority nor the expertise to promulgate comprehensive air emission regulations. *See infra* Section

IV.[12] Accordingly, BLM is not exercising the expertise and authority it has been granted by Congress and no deference is owed to its decisions. Further, as discussed in Section III below, BLM has, without meaningful explanation, significantly changed its long-standing view of its limited jurisdiction over non-federal interests, thus losing any deference it might have been shown. *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016). Lastly, because it "alters the federal-state framework by permitting federal encroachment upon a traditional state power" it is also not appropriate "to extend *Chevron* deference" to BLM. *Solid Waste Agency v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 172–73 (2001).

II. BLM Lacks Jurisdiction to Impose the Final Rule on Private Oil and Gas Interests

A. BLM Does Not Have the Authority to Regulate State or Private Mineral Interests

BLM is an agency of limited jurisdiction: it has the authority granted to it by Congress and no more. The "[d]etermination of whether the [BLM] acted within

[12] BLM and EPA (together with the states) do not "share" air emissions regulatory authority; it is quite clear that BLM is not an air regulator. Even if that were the case, *Chevron* deference is not warranted unless the agency issuing the rule is the primary agency with responsibility, which BLM does not have for regulating air emissions. *Gonzales*, 546 U.S. at 266 (rejecting an effort by the Attorney General to assert *Chevron* deference in a decision that required medical judgment); *Del Grosso v. Surface Transp. Bd.*, 811 F.3d 83, 84 (1st Cir. 2016); *Proffitt v. FDIC*, 200 F.3d 855, 860 (D.C. Cir. 2000); *Rapaport v. U.S. Dep't of Treasury, Office of Thrift Supervision*, 59 F.3d 212, 216 (D.C. Cir. 1995).

the scope of its authority requires a delineation of the scope of the agency's authority and discretion, and . . . whether on the facts, the agency's action can reasonably be said to be within that range." *Wyoming v. U.S. Dep't of the Interior*, 136 F. Supp. 3d 1317, 1328 (D. Wyo. Sept. 30, 2015) (citing *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1574 (10th Cir. Dec. 20, 1994)). BLM definitely acted outside of the prescribed statutory range, using the Final Rule to unlawfully expand its jurisdiction over significant state and private mineral interests in North Dakota and Texas.

Congress has delegated authority to BLM to manage federal oil and gas interests and the management of *public* lands. *Boesche v. Udall*, 373 U.S. 472, 476 (1963). Federal lands include "all land and interests in land owned by the United States which are subject to the mineral leasing laws, including mineral resources or mineral estates reserved to the United States in the conveyance of a surface or nonmineral estate," 30 U.S.C. § 1702 (2016), but do not include state or private mineral estates. The BLM has authority to "prescribe necessary and proper rules and regulations and to do any and all things necessary to carry out and accomplish the purposes of the [the MLA]," 30 U.S.C. § 189 (2016), which are "to promote the orderly development of oil and gas deposits in publicly owned lands of the United States through private enterprise." *Geosearch, Inc. v. Andrus*, 508 F. Supp. 839, 842 (D. Wyo. 1981). BLM's authority under the MLA to "use all reasonable

precautions to prevent waste of oil or gas developed in the land," 30 U.S.C § 225 (2016), does not grant or even imply the authority to impose detailed regulations on the extraction of state or privately owned minerals.

No federal statute confers jurisdiction over private mineral interests on BLM. While BLM mentions a laundry list of statutes, "including the MLA, the [Mineral Leasing Act for Acquired Lands (MLAAL)], [Federal Oil and Gas Royalty Management Act (FOGRMA)], [Federal land Policy and Management Act (FLPMA)], the [Indian Mineral Leasing Act (IMLA)], the [Indian Mineral Development Act (IMDA)]," Final Rule, 81 Fed. Reg. at 83019, as potential legal authorities for the Final Rule, it cannot point to any statute that actually confers upon it the authority to regulate private minerals.

The absence of a statutory provision expressly prohibiting BLM from regulating non-federal mineral interests does not mean that it has the discretion to seize that jurisdiction. To the contrary, a court "[does] not presume a delegation of power [to an agency] simply from the absence of an express withholding of power[.]" *Chamber of Commerce of U.S. v. NLRB*, 721 F.3d 152, 160 (4th Cir. June 14, 2013); s*ee also Am. Bar Ass'n v. FTC*, 430 F.3d 457, 468 (D.C. Cir. Dec. 6, 2005) ("Plainly, if we were to presume a delegation of power from the absence of an express withholding of such power, agencies would enjoy virtually limitless hegemony, . . .") (internal quotation marks and citation omitted); S*ierra Club v.*

EPA, 311 F.3d 853, 861 (7th Cir. Nov. 25, 2002) ("Courts will not presume a delegation of power based solely on the fact that there is not an express withholding of such power.") (internal quotation marks and citation omitted).

The Final Rule reaches beyond this authority to regulate any state or private mineral interest which has been pooled with a federal interest, however minute or even inactive that federal interest might be. Final Rule, 81 Fed. Reg. at 83,039. This over-reaching is evident at the national level, with BLM conceding that less than twenty-five percent of the vented and flared gas reported to the Office of Natural Resources Revenue came from exclusively federal or tribal interests, while over seventy-five percent was from wells extracting minerals with mixed ownership (some combination of federal, Indian, private and state minerals). Final Rule, 81 Fed. Reg. at 83,015. The effect is even greater in North Dakota, where only 5.2% of the oil and gas production comes from federal lands and 12.8% from Indian; but because there are numerous small federal and tribal non-surface mineral interests scattered throughout the state that are communitized with the surrounding private and state mineral interests, the Final Rule would cover an additional fourteen percent of North Dakota's oil and gas production. (Helms Declaration ¶¶ 9, 12–13). Similarly, in Texas, the Final Rule would cover a significant portion of the state's oil and gas production. BLM does not have the statutory authority to impose comprehensive regulations over these state and

private mineral interests, and its attempt to do so through the Final Rule is unlawful.

B. BLM's Final Rule Exceeds Its Limited Authority over Communitized Units

BLM's limited authority under the MLA to regulate state and private oil and gas interests in pooled or communitized units derives from 30 U.S.C. § 226(m) (2016) and from the consent of owners and lessees. This limited authority exists to protect the federal government as a fellow owner of mineral interests, not to usurp state sovereignty or exercise general jurisdiction over pooled state and private mineral interests. Federal law authorizes the communitization of federal mineral resources with resources of different ownership when it is determined to be in the public interest. *See* 30 U.S.C. § 226(m).

However, section 226(m) does not provide broad authorization for BLM to impose comprehensive federal regulations similar to those applicable to federal mineral interests on non-federal interests: "Any plan authorized by the preceding paragraph which includes lands owned by the United States may, in the discretion of the Secretary, contain a provision whereby authority is vested in 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 plan." *Id*. Thus BLM's authority in pooled arrangements is limited to rates of development and production for purposes of avoiding the "waste" of federal mineral interests,

similar to the rights of any participant in communitized arrangements, and is not a grant of general regulatory authority over the state and private mineral interests in the communitized units.

BLM's implementing regulations for section 226(m) have maintained a sharp distinction between its general supervisory authority over federal leases and its much more limited authority with respect to the private and state leases that may be pooled with federal interests. Purely federally-owned mineral interests are subject to a wide range of detailed federal regulations. 43 C.F.R. § 3161.1(a) (2016) ("[A]ll operations conducted on a Federal or Indian oil and gas lease by the operator are subject to the regulations in this part."). Pooled state or private minerals interests, by contrast, are subject only to "[r]egulations in this part relating to site security, measurement, reporting of production and operations, and assessments or penalties for noncompliance with such requirements." 43 C.F.R. § 3161.1(b). The contrast between these two provisions confirms BLM's limited involvement in non-federal mineral interests, which are subject to "security, measurement, reporting of production and operations," but not to broader or more detailed BLM regulations that would vitiate any distinction between federal and non-federal mineral interests.

Similarly, 43 C.F.R. Part 3180 states "[a]ll unit agreements on Federal leases are subject to the regulations contained in Part 3160 of this title, Onshore Oil and

Gas Operations," but "[a]ll unit operations on non-Federal lands included within Federal unit plans are subject [only] *to the reporting requirements of Part 3160* of this title." 43 C.F.R. § 3180.0-1 (1983) (emphasis added). In short, BLM's own regulations, until the Final Rule, recognize BLM's limited authority over oil and gas operations on non-federal lands, and BLM cannot leverage a minor federal mineral estate to impose full federal regulatory authority over surrounding private estates, and regulate them as if they were federally owned.[13]

The BLM Manual makes the same distinction between federal and Indian leases on the one hand, and non-federal leases in a communitization agreement on the other: "All drilling and completion, certain reworking, and all abandonment operations on BLM supervised leases in approved communitization agreements

[13] The Eighth Circuit decision in *Froholm v. Cox*, 934 F.2d 959, 964–65 (8th Cir. 1991) provides no support for BLM's position. Although that decision says in dicta that "[p]ursuant to this statute, regulations have been promulgated directing the BLM to manage all aspects of said unit agreements," the case itself dealt with the original decision to enter into unit agreements, which—unlike the management of the drilling operations—are governed by comprehensive federal statutory provisions and related regulations. *Froholm*, 934 F.2d at 963. That case does not reach the issue of whether BLM may impose detailed operating requirements and environmental regulations on non-federal private interests in communitized units. *See* U.S. Const. art. IV, § 3, cl. 2, *Kleppe v. New Mexico*, 426 U.S. 529 (1976) , likewise provide no support for BLM's position: "The Property Clause is a grant of power only over federal property." *Kleppe*, 426 U.S. at 537–38. BLM cannot rely on the Property Clause to exercise sovereignty, and displace North Dakota's sovereignty over private oil and gas operations on private lands.

must be approved in advance by the authorized officer."[14] Contrast that with, "[s]uch operations on non-BLM supervised lands need no BLM approval and should be accepted for the record only." 43 C.F.R. § 3160-9 (2011).

This purpose of communitization is not to enable federal control of non-public lands, but rather to address the problem "that mineral deposits don't always follow plat lines," and that uncoordinated development "often yielded frantic, duplicative, and crazy-quilt exploration activities in what amounted to a single oil and gas field." *Entek GRB, LLC v. Stull Ranches, LLC*, 763 F.3d 1252, 1254 (10th Cir. Aug. 14, 2014). This is the legislative intent underlying North Dakota's and Texas' own pooling statutes, which has been the primary legal driver for the efforts to communitize state, private, and federal mineral interests in their respective states. *See* N.D. CENT. CODE §§ 38-08-07 ("When necessary to prevent waste, to avoid the drilling of unnecessary wells, or to protect correlative rights, the commission shall establish spacing units for a pool.") and TEX. NAT. RES. CODE § 102.011 ("the commission[] for the purpose of avoiding the drilling of unnecessary wells, protecting correlative rights, or preventing waste, shall establish a unit and pool all of the interests in the unit within an area."). The waste prevention provisions in the unitization agreements exist to prevent waste in the

[14] Bureau of Land Management, *BLM Manual 3160-9*, Q, *available at* http://www.blm.gov/style/medialib/blm/wo/Information_Resources_Management/policy/blm_handbook.Par.26234.File.dat/3160-9-Communitization%20Manual.pdf.

form of duplicative operations and inefficient management of the oil field, for the equal benefit of all the owners—public and private. State and private mineral interests that are pooled with federal interests in the normal course to encourage the efficient development of oil and gas resources do not give up their sovereign state or private status as a consequence.

C. The Final Rule Exceeds BLM's Authority to Prevent Waste

BLM attempts to present the Final Rule as a simple exercise of its authority to prevent waste of federal minerals—"[t]his final regulation aims to reduce the waste of natural gas from mineral leases administered by the BLM," and that the Final Rule will "boost royalty receipts for American taxpayers" because venting and flaring is depriving American taxpayers of royalty revenues by preventing this waste. Final Rule, 81 Fed. Reg. at 83009. However, not only does the Final Rule affect primarily non-federal mineral leases that are not administered by BLM, it will not meaningfully boost royalty payments to the federal purse.

Only a small fraction of the benefits claimed by BLM have anything to do with the prevention of waste from either private or public mineral estates, though the entirety of the burden will be borne by the states and private parties. Assuming for the moment that BLM's cost-benefit analysis is accurate, which North Dakota and Texas do not, BLM estimates that the total benefits from the Final Rule will be $209–403 million per year, as against a projected cost of $110–275 million per

year (using a three percent discount rate). Final Rule, 81 Fed. Reg. at 83,013–14. Yet, BLM estimates that the increased royalty payment to both the federal government and tribes will be $3–13 million.[15] *Id*. Thus, the economic value of the "waste" BLM claims to avoid with the Final Rule is only approximately one to three percent of the total benefits it asserts will be provided by this rule, with each dollar of royalty savings achieved imposing approximately twenty to thirty-eight dollars in costs.

On the other hand, $189–247 million in claimed benefits, or sixty to ninety percent of the total benefits, are attributable by BLM to reducing the estimated "social cost of methane," a controversial calculation that takes into account alleged *global* benefits of the Final Rule that purport to flow to all citizens of the world, and has nothing to do with increasing royalties (*i.e.*, preventing "waste") from federal public lands. *Id*.[16] Even these highly speculative "benefits" that are completely unrelated to preventing "waste" of federal interests are almost entirely

[15] Even these projections are not solely royalties going to the federal coffers: this figure includes estimated increases in state and tribal royalties as well. However, North Dakota has estimated that the Final Rule will significantly decrease its revenue from royalties and oil extraction taxes. Helms Declaration ¶ 30. Therefore, BLM overstates the even minimal increases in royalties it claims the Final Rule will generate.

[16] On March 28, 2017, President Trump issued an Executive Order expressly withdrawing the technical documents on calculating the "social cost of carbon" used by BLM in this rulemaking as no longer representing governmental policy. Executive Order 13873 of March 28, 2017, Promoting Energy Independence and Economic Growth, 82 Fed. Reg. 16093, 16095 (March 31, 2017).

tied to claimed methane reductions from private, not federal, operations. *See* Final Rule, 81 Fed. Reg. at 83,013–14. This demonstrates that the Final Rule has little or nothing to do with the prevention of waste from mineral interests owned by the United States. BLM should not be allowed to defend its effort to seize jurisdiction over state and private mineral interests in the name of preventing the "waste" of federal mineral interests by relying on highly speculative benefits that have nothing to do with the prevention of "waste" nor public lands.

D. The Final Rule's Impact on State and Private Interests Is Not "Incidental"

Conceding that it does not have jurisdiction over non-federal mineral interests, BLM attempts to defend its overreach by claiming that it is "incidental." Final Rule, 81 Fed. Reg. at 83,039. However, the burdens BLM seeks to impose on state and private mineral interests, and its intrusion on North Dakota's and Texas' sovereignty, are not incidental at all. To the contrary, under the Final Rule, the "incidental" presence of minor and even dormant federal mineral interests is being used by BLM to fully regulate significant and operating state and private interests. At the national level, BLM estimates that over seventy-five percent of vented and flared gas it seeks to regulate comes from mixed ownership (i.e., communitized) minerals and less than twenty-five percent came from extracting solely federal or Indian minerals, demonstrating that controlling state and private

emissions are at the heart of the Final Rule, and it is the federal interests that are incidentally regulated. Final Rule, 81 Fed. Reg. at 83,015.

Almost all of the costs of the Final Rule ($114–279 million annually), will be borne by the non-federal sector, a burden that is not "incidental." Further, as discussed above, the claimed increase in royalties is only one to three percent of the total annual benefits claimed by BLM, with approximately twenty to thirty-eight dollars in costs being imposed on non-federal interests for every dollar of avoided economic "waste" claimed by BLM. Thus a demonstrably "incidental" increase in royalties to the federal government will be funded by a vastly disproportional burden on the non-federal interests that BLM claims are only "incidentally" regulated by the Final Rule. Accordingly, BLM's effort to defend this Final Rule by claiming that it has only an "incidental" extra-jurisdictional impact should be rejected.

III. BLM's Unexplained Change in Its Understanding of Its Jurisdiction Is Arbitrary and Capricious

BLM, without any meaningful explanation, changed its long held position that it has no authority to generally regulate state and private mineral interests in pooled or communitized units. The Administrative Procedure Act (APA) requires a court to "hold unlawful and set aside agency action, findings, and conclusions found to be—(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A) (1966). "Unexplained inconsistency"

between agency actions is "a reason for holding an interpretation to be an arbitrary and capricious change." *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005). The Supreme Court addressed the application of the APA to agency policy changes in *FCC v. Fox Television Stations, Inc*., 556 U.S. 502 (2009). In *Fox*, the Court held that a policy change complies with the APA if the agency (1) displays "awareness that it is changing position," (2) shows that "the new policy is permissible under the statute," (3) "believes" the new policy is better, and (4) provides "good reasons" for the new policy, which, if the "new policy rests upon factual findings that contradict those which underlay its prior policy," must include "a reasoned explanation . . . for disregarding facts and circumstances that underlay or were engendered by the prior policy." *Fox*, 556 U.S. at 515–16 (emphasis omitted). When changing agency policy, "the agency must at least 'display awareness that it is changing position' and 'show that there are good reasons for the new policy,' [and] must also be cognizant that longstanding policies may have 'engendered serious reliance interests that must be taken into account.'" *Encino Motorcars*, 136 S. Ct. at 2126 (quoting *Nat'l Cable & Telecomm. Ass'n*, 545 U.S. at 981–982). "When an agency claims to discover in a long-extant statute an unheralded power to regulate a significant portion of the American economy, the Court typically greets its announcement with a measure of skepticism." *Util. Air Regulatory Grp. V. EPA*, 134 S. Ct. 2427, 2444 (2014)

(quotation omitted). BLM has not offered any rational explanation for its sudden about-face, and the Final Rule should therefore be viewed with a full measure of skepticism.

Until the Final Rule was promulgated, the BLM had consistently and publicly taken the position that it had no general authority to regulate private parcels that have been unitized or communitized with federal or tribal mineral interests. BLM recognized its authority was limited to that expressly granted to it by contract in the unitization agreement signed by the owners, or to the extent that such authority is directly relevant to its proprietary interests in the federal minerals. *See* Onshore Oil and Gas Operations; Implementation of the Federal Oil and Gas Royalty Management Act of 1982, ("FOGRMA Implementation"), 49 Fed. Reg. 37,356, 37,357 (Dec. 6, 1984) (to be codified at 43 C.F.R. pt. 3160); Onshore Oil and Gas Operations; Federal and Indian Oil and Gas Leases; Onshore Oil and Gas Order Number 1, Approval of Operations ("Order No. 1"), 72 Fed. Reg. 10308 (March 7, 2007) (to be codified at 43 C.F.R. pt. 3160); 43 C.F.R. § 3161.1. The Final Rule completely reverses that position, asserting comprehensive federal jurisdiction over state and private mineral interests that have been pooled or communitized with federal mineral interests, regardless of the relative size of the federal mineral interests (or whether operations are even occurring at such minimal federal interests).

In 1984, in the preamble to a regulation that establishes the scope of its mineral leasing regulations, BLM wrote:

> Since all committed leases within a communitized area or unit participating area share in the total production from the unitized tract or participating area regardless of the ownership of the mineral estate where the wells are located, [BLM] must have ***some limited authority*** to obtain needed data and to inspect [nonfederal] and non-Indian sites to assure that the Federal and Indian interests are protected. This limited authority is spelled out in the formal agreement, i.e., unit, communitization, or gas storage. ***If the agreement fails to provide such limited authority to the Bureau, . . . these regulations do not apply to operations on private or State lands***.

FOGRMA Implementation, 49 Fed. Reg. at 37,357 (emphasis added). In this statement, BLM was not only establishing limitations on its jurisdiction through regulation, but also describing its understanding of the statutory limits of its own delegated authority. BLM reiterated that its jurisdiction was limited as recently as 2007, when it revised Order No. 1. The original draft had applied the order to communitized leases as well as federal leases, but in response to public comments, BLM determined that this was not "appropriate":

> One commenter did not think it appropriate for the Order to apply to operations within a unit or communitized area on private minerals or private surface. ***We agree.*** While the site security, measurement, and production reporting regulations apply to unitized wells drilled on private minerals (43 CFR 3161.1), ***it is not appropriate for the BLM*** or the [Forest Service] to exercise authority over surface operations conducted on privately owned lands just because those lands are contained within a unit or communitized area. The BLM only requires a copy of the permit to be provided for non-Federal wells within a unit or communitized area and wording in the ''Scope'' section of the Order is revised to make this clear.

Id. at 10312–13 (emphasis added). BLM attempts to distinguish this precedent by claiming that "the cited passage from the preamble to Order 1 did not address the scope of the BLM's regulatory authority with respect to non-federal tracts in federally-approved units and communitized areas; rather, the passage addressed what was 'appropriate' in light of the jurisdictional limitations contained in 43 C.F.R. § 3161.1." [17] Final Rule, 81 Fed. Reg. at 83039. This argument is not supported by the text of Order No. 1. Nothing in the Order No. 1 Federal Register notice qualifies the statement "it is not appropriate," and the most natural reading of the language is in keeping with previous findings that BLM had only limited jurisdiction over private minerals. Nor is there any obvious reason why BLM would have the authority to revise section 3161.1 in the Final Rule but not in Order No. 1–both were promulgated through notice and comment and codified in the Code of Federal Regulations. If BLM found it inappropriate to modify the jurisdictional reach prescribed in 43 C.F.R. § 3161.1 for Order No. 1, but not inappropriate for the Final Rule, it certainly did not explain why.

Thus, BLM has, until now, consistently stated that BLM's authority over private minerals communitized with federal minerals is "limited" and that it "is not

[17] The actual effect of the conclusion that Order No. 1 should not apply to private minerals was that operators on private interests did not need to file federal APDs but could instead simply provide a copy of their state permit. Order No. 1, 72 Fed. Reg. at 10313. This is enormously important as a practical matter, in light of the long delays in the APD process.

appropriate for the BLM" to regulate such minerals outside specific categories that clearly relate to BLM's proprietary interest in collecting royalties. This jurisdictional understanding is codified in the regulations, where BLM applies only a limited subset of its regulations to pooled state or privately owned mineral interests. *Compare* 43 C.F.R. § 3161.1(a) ("All operations conducted on a Federal or Indian oil and gas lease by the operator are subject to the regulations in this part.") *with* 43 C.F.R. § 3161.1(b) ("Regulations in this part relating to site security, measurement, reporting of production and operations, and assessments or penalties for noncompliance with such requirements are applicable to all wells and facilities on State or privately-owned mineral lands committed to a unit or communitization agreement which affects Federal or Indian interests, notwithstanding any provision of a unit or communitization agreement to the contrary."). Unlike the Final Rule, the regulations previously applied to state and private minerals all reasonably relate to the BLM's interests as a part owner, and are not attempts to replace the states as general regulators.

The Supreme Court has also observed that an agency changing long-standing positions "must also be cognizant that longstanding policies may have 'engendered serious reliance interests that must be taken into account.'" *Encino Motorcars*, 136 S. Ct. at 2126 (citations omitted). North Dakota and Texas have long relied on BLM's long-standing position to cooperate with BLM in fostering

the efficient development of mineral interests. North Dakota and Texas have enacted statutes that may require private and state parties to pool their interests, including with federal mineral interests (as authorized by federal law), or authorize regulators to order such pooling agreements. *See* N.D. CENT. CODE §§ 38-08-07, 38-08-08. *See also* TEX. NAT. RES. CODE § 102 *et seq.* The vast majority of spacing units in North Dakota are pooled in accordance with these statutory directions and requirements. (Helms Affidavit ¶13). Under BLM's new (and unlawful) expansion of its jurisdiction, the enactment and long-standing implementation of these state pooling statutes effectively results in the forfeiture by private and state mineral interests of their rights (and obligations) under state law. Further, according to BLM, by advancing communitization and pooling policies aimed at furthering the reasonable and efficient development of their state's natural resources, North Dakota and Texas were also giving up their sovereignty over the regulation of such pooled mineral interests.

In response, BLM has adopted a "cooperate with the federal government at your own risk" approach. ("The fact that States and private parties have chosen to enter into unitization or communitization agreements whereby State or private oil or gas is commingled with Federal or Indian oil or gas, and produced concurrently with Federal or Indian oil or gas, does not deprive the BLM of its authority to impose . . ."). Final Rule, 81 Fed. Reg. at 83039. BLM is using state laws that

have long encouraged and even required cooperation between state, private, and federal mineral interests to avoid waste to justify BLM's over-reach and usurpation of North Dakota and Texas sovereignty and assert, for the first time, full regulatory authority over state and private mineral interests.

BLM hardly acknowledges this change of policy, much less explains it. *See* Final Rule, 81 Fed. Reg. 83008. It instead brushes aside its long history of taking the position that it has only limited regulatory authority over private minerals, even when they have been communitized with federal minerals, instead characterizing such intrusion as "incidental" and then taking the position that BLM may exert any authority over private property that cannot be shown to be expressly forbidden by the MLA and other relevant statutes. Final Rule, 81 Fed. Reg. at 83039. Therefore, BLM's abrupt, radical, and unexplained change of policy and resulting effort to exercise jurisdiction over a broad swathe of state and private mineral interests is not due any deference, and is a violation of the APA.

IV. BLM Does Not Have the Authority to Impose Comprehensive Air Emission Regulations.

In the guise of regulating "waste," BLM is imposing comprehensive air emission regulations outside of the congressionally-mandated framework of the CAA. BLM has no statutory authority to issue such air quality regulations, which have been entrusted by Congress to the states and EPA. 42 U.S.C. § 7407 (2017). Whatever jurisdiction BLM has to manage federal mineral interests as a land

management agency, does not extend to establishing comprehensive air emission requirements for sources of air emissions operating on state or private mineral interests. There is no dispute that large sections of the Final Rule functionally operate as air regulations that come under the CAA: BLM admits EPA recently adopted regulations under the CAA which cover *exactly* the same activity, "emissions of methane and VOCs from new, modified and reconstructed oil and gas wells and production equipment." Final Rule, 81 Fed. Reg. at 83,017 (referring to EPA's Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources; Final Rule, 81 Fed. Reg. 35,823 (June 3, 2016) ("Methane Rule")).

Congress has not delegated authority to BLM to regulate air emissions from new and existing sources extracting state or private minerals. Congress expressly parceled out the authority to regulate air emissions between EPA and the states through the CAA. *See generally* 42 U.S.C. § 7410 (2017). Congress established very specific procedural requirements under the CAA designed to preserve the role of the states in the protection of their own air quality. *See generally* 42 U.S.C. § 7410; *Ariz. Pub. Serv. Co. v. EPA*, 562 F.3d 1116, 1123 (10th Cir. Apr. 14, 2009).

Congress established in the CAA a comprehensive federalist system for protecting air quality and regulating air emissions in which states play a central role. *Bell v. Cheswick Generating Station*, 734 F.3d 188, 190 (3d Cir. Aug. 20,

2013). "The CAA uses a cooperative-federalism approach to regulate air quality." *US Magnesium, LLC v. EPA*, 690 F.3d 1157, 1159 (10th Cir. Aug. 6, 2012). The CAA provides that "[e]ach State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State." 42 U.S.C. § 7407(a). "Thus, it employs a 'cooperative federalism' structure under which the federal government develops baseline standards that the states individually implement and enforce". *Bell*, 734 F.3d at 190. The CAA made the states and EPA "partners." *Gen. Motors Corp. v. United States*, 496 U.S. 530, 532 (1990).

EPA sets standards under the CAA, such as for the concentration of certain pollutants in ambient air, which are then implemented, administered, and enforced by the states through State Implementation Plans ("SIPs") prepared by the states and approved by EPA. *See generally* 42 U.S.C. § 7410. In this "experiment in cooperative federalism," *Michigan v. EPA*, 268 F.3d 1075, 1083 (D.C. Cir. Oct. 30, 2001), the CAA establishes that improvement of the nation's air quality will be pursued "through state and federal regulation," *BCCA Appeal Group v. EPA*, 355 F.3d 817, 821–22 (5th Cir. Oct. 28, 2003); *see also* 42 U.S.C. § 7401(a)(3) (2017) ("air pollution prevention . . . and air pollution control at its source *is the primary responsibility of States and local governments*" (emphasis added); 42 U.S.C. § 7407(a) ("Each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State. . . ."). Therefore, North

Dakota and Texas, not even EPA, have the primary CAA authority in their states, regulating air emissions through SIPs tailored to their specific needs, meeting national goals set through the Clean Air Act, all of which has been approved by EPA. (Declaration of Glatt ¶ 6–7). North Dakota and Texas have been exercising this authority since the 1970s.

BLM's Final Rule seeks to impose air emissions requirements outside of the cooperative federalism framework mandated by Congress and seize powers and responsibilities that Congress expressly delegated to, or reserved for, the states and EPA. The Final Rule would impose a national air emission regulatory regime implemented and enforced by BLM that was developed expressly ignoring some of the factors required by the CAA and without the formal participation of the states, as contemplated by Congress. For example, the Final Rule establishes requirements on "new" sources of air emissions that go beyond what EPA promulgated in its 2016 Methane Rule for the exact same new sources, asserting that while EPA was limited by the CAA to setting emission standards based on the best system of emission reduction that has been "adequately demonstrated," BLM was not so constrained and has the "flexibility to require a suite of best management practices to achieve waste reduction." Final Rule, 81 Fed. Reg. at 83063. Thus BLM asserts it has the authority to promulgate and enforce air emission regulations for new sources that are more stringent than what EPA is

authorized to promulgate under the CAA and that may be included in an EPA-approved SIP. BLM claims it can impose requirements that do not meet the "adequately demonstrated" criterion because the two agencies have "different statutory authorities," but BLM does not specify the statutory language that gives it such authority. *See generally*, Final Rule, 81 Fed. Reg. 83008. Thus, BLM is asserting an unspecified organic authority to regulate air emissions that is parallel to, and that can be more stringent than, that exercised by EPA and the states under the CAA.

BLM even imposed requirements on sources of air emissions that BLM itself concedes go beyond what EPA could impose under the CAA. BLM imposes the requirements of the Final Rule on "existing" sources of air emissions from the oil and gas operations, while the equivalent rule promulgated by EPA (i.e., the EPA Methane Rule) applies only to "new" sources. Final Rule, 81 Fed. Reg. at 83019; *see* Methane Rule, 81 Fed. Reg. 35,823. Under the Clean Air Act, requirements applicable to "new" sources generally do not apply to "existing" sources, a recognition by Congress that imposing the newest requirements may force existing sources to engage in uneconomic retrofits or shut down. 42 U.S.C. § 7475 (2017) (more commonly known as "CAA § 111"); *United States v. DTE Energy Co.*, 711 F.3d 643, 644–45 (6th Cir. Mar. 28, 2013) ("[S]ources already in existence when the program was implemented do not have to obtain a permit

unless and until they are modified."). "To ease the initial burden of complying with the CAA, existing sources of pollution . . . were excused from compliance with the PSD provisions, sparing the immediate expense of retrofitting these sources with modern pollution controls." *United States v. Westvaco Corp.*, 675 F. Supp. 2d 524, 526–27 (D. Md. Dec. 3, 2009).

Existing sources are regulated under a different provision of the CAA § 111(d), which preserves a greater role for the states. "Finally, § 111(d) of the CAA required States to develop plans to control *existing* sources of pollution." *Id*. at 530. "These '§ 111(d) plans' were to be developed after EPA published its final guidelines for controlling designated pollutants." *Id*. "Under section 111(d) of the CAA, EPA is required to establish guidelines to be used by the states in regulating existing sources of air pollution." *State of N.Y. v. Reilly*, 969 F.2d 1147, 1149 (D.C. Cir. Jul. 14, 1992). BLM is well aware of this CAA framework, observing that EPA has promulgated the new source performance standard for emissions from new oil and gas operations under CAA § 111(b), and has begun the process for promulgating existing source guidelines for oil and gas operations under section 111(d), which will ultimately be implemented by the states. Final Rule, 81 Fed. Reg. at 83019. "This rulemaking would then be followed by State development and adoption of State plans containing enforceable performance standards for

sources, State plan approvals by EPA, and subsequent implementation by industry to meet compliance deadlines established in the State plans." *Id*.

BLM is dissatisfied with this process mandated by Congress under the CAA: "Given the length of this process and the uncertainty regarding the final outcomes . . . the BLM has determined that it is necessary and prudent to update and finalize this regulation at this time." *Id*. After listing each of the congressionally-mandated steps that EPA and the states must go through to regulate existing sources of air emissions from oil and gas operations, BLM concludes:

> Clearly, it will be many years before existing sources in this sector are subject to binding requirements under CAA section 111(d), and it is not yet evident what shape those requirements will take. Given the substantial uncertainty surrounding the timing and content of any EPA regulation of existing oil and gas sources, the BLM has both the authority and the obligation to act now to rein in the ongoing waste of large quantities of public and Indian natural gas.

Id. at 83,037. Thus, BLM takes upon itself the authority, found in no statute, to impose air emissions requirements on existing oil and gas operations, openly rejecting the process established by Congress that must be taken by EPA and for which Congress has given primacy to the states.

BLM has no authority to override the CAA and impose air emissions requirements on new sources that go beyond those established by EPA, or exercise air emissions authority over existing sources that not even EPA can exercise. "The Clean Air Act is no less an exercise of the legislature's 'considered judgment'

concerning the regulation of air pollution because it permits emissions *until* EPA acts." *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 426 (2011). The reason for this principle is that "[a]long with the environmental benefit potentially achievable, our Nation's energy needs and the possibility of economic disruption must weigh in the balance, [and] [t]he Clean Air Act entrusts such complex balancing to EPA in the first instance, in combination with state regulators." *Am. Elec. Power Co.*, 564 U.S. at 427. It is not within BLM's authority to disagree with the balance struck by Congress, EPA, and the states.

BLM's implication that it is merely exercising its authority over federal and Indian mineral interests to "rein in the ongoing waste of large quantities of public and Indian natural gas" is belied by the record. Final Rule, 81 Fed. Reg. at 83,037. At the national level, approximately seventy-five percent of the vented and flared gas the BLM seeks to regulate comes from state or private operations, not from the federal and tribal minerals that it is the BLM's responsibility to manage, and the percentages are even more skewed in North Dakota. *Id*. at 83,015. Further, as demonstrated above, the increased royalties BLM claims will be collected because of the rule (i.e., the "waste" avoided) will be only one to three percent of the benefits claimed by BLM's flawed regulatory impact analysis, and the vast majority of air emissions affected by the Final Rule are those from operations on state and private mineral interests. Therefore, whatever authority BLM might have

over air emissions from federal or tribal mineral interests cannot be used as a justification exercising air emissions regulatory authority it does not have over a vast swath of non-federal interests.

BLM's suggestion that it has taken state interests into account through the "variance" process that allows North Dakota or Texas to petition BLM to regain its sovereignty over its air emissions program must also be rejected. At the outset, BLM's unlawful regulatory over-reach cannot be "cured" by a variance process that operates at the sole discretion of the over-reaching agency. BLM cannot establish an unlawful status quo and then attempt to evade the consequences by imposing the burden on the wronged parties to convince BLM of the error of its ways. In any event, the variance process does not put North Dakota or Texas (or private operations in either North Dakota or Texas) in the same position they would be under the CAA. North Dakota or Texas would have to petition BLM for a variance to regain sovereignty over non-federal mineral interests, a determination that is at BLM's discretion to grant. Final Rule, 81 Fed. Reg. at 83,013, 83,035–36. Since the fundamental condition for granting the variance is BLM's determination that the state program is equivalent to the Final Rule (43 C.F.R. § 3179.401(a)(iv) (2017)) it is no variance at all. Rather, BLM is demanding that the state conform to its unlawful regulations. Further, the variance process operates on a piecemeal basis to avoid approving of comprehensive state programs (such as SIPs or state

programs regulating existing sources under CAA § 111(d)), and even then BLM would be second-guessing any EPA reviews or approvals. Final Rule, 81 Fed. Reg. at 83,036.

BLM's Final Rule imposes comprehensive air emission regulations on new and existing sources at oil and gas operations that it does not have the statutory authority to impose; conflict with the long-standing, carefully designed, and comprehensive framework for regulating air emissions established by Congress under the CAA; and unlawfully usurp North Dakota's authority to regulate air emissions from oil and gas operations. The Final Rule centralizes the authority for making and enforcing emissions standards for both new and existing sources (subject to different regulatory schemes under the CAA) squarely with the BLM, and thus deprives North Dakota and Texas of implementation, oversight, and enforcement regulatory authority over private oil and gas operations on private mineral interests.

V. BLM Arbitrarily and Capriciously Downplayed and Rejected North Dakota's and Texas's Federalism Considerations

To ensure that Congress actually intended to interfere with areas that are traditionally within the states' sovereign domain, the Tenth Amendment and concerns of federalism require a "clear statement from Congress" when a federal agency intrudes on state sovereignty. *Solid Waste Agency of N. Cook Cty.*, 531 U.S. at 174; *Bond v. United States*, 134 S. Ct. 2077, 2088–90 (2014); *Gregory v.*

Ashcroft, 501 U.S. 452, 460, 463 (1991). "If Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute." *Gregory*, 501 U.S. at 460 (citation and quotation marks omitted).

The Final Rule is essentially a federal takeover by BLM of an important and historic area of state regulation, setting up a competing, comprehensive system of federal regulation in an area where North Dakota and Texas have already invested massively in successful state programs. In North Dakota and Texas, where oil and gas development are among the primary sources of public revenue, economic activity, and employment, the state interests at stake are of the highest order. BLM, however, capriciously brushes these interests aside:

> The final rule would not have a substantial direct effect on the States, the relationship between the national government and the States, or the distribution of power and responsibilities among the levels of government. It would not apply to States or local governments or State or local government entities. Therefore, in accordance with Executive Order 13132, the BLM has determined that this final rule does not have sufficient Federalism implications to warrant preparation of a Federalism Assessment.

Final Rule, 81 Fed. Reg. at 83,071.[18] This is a remarkably incorrect statement given how the Final Rule explicitly redistributes power among levels of

[18] While there might not be judicial review for failure to prepare a Federalism Assessment pursuant to Executive Order 13132, BLM's casual encroachment into traditional areas of state of authority without adequate justification is reviewable as

government, with BLM leveraging slivers of federal mineral interests into the comprehensive regulation of communitized state and private mineral interests heretofore regulated by North Dakota or Texas, ignores and usurps North Dakota's and Texas' policies and programs aimed at the efficient development of and prevention of waste regarding its oil and gas resources, and completely upsets the framework of cooperative federalism established by Congress under the CAA. Instead of oil and gas operations on federal lands being required to comply with North Dakota regulations—as is the case right now—the Final Rule forces operations on state and private mineral interests to comply with BLM's regulations. A more complete reversal of state-federal relationships implicating federalism could hardly be imagined.

The North Dakota State Legislature has declared that it is policy of North Dakota

> to foster, to encourage, and to promote the development, production, and utilization of natural resources of oil and gas in the state *in such a manner as will prevent waste*; to authorize and to provide for the operation and development of oil and gas properties in such a manner that a greater ultimate recovery of oil and gas be had and that the correlative rights of all owners be fully protected; and to encourage and to authorize cycling, recycling, pressure maintenance, and secondary recovery operations in order that the greatest possible economic recovery of oil and gas be obtained within the state to the end that the landowners, the royalty owners, the producers, and the

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arbitrary and capricious under the APA. *See* Executive Order 13132 of August 4, 1999, Federalism, § 11, 64 Fed. Reg. 43255 (Aug. 10, 1999).

> general public realize and enjoy the greatest possible good from these vital natural resources.

N.D. CENT. CODE § 38-08-01 (emphasis added). Similarly, Texas law provides that the Texas RRC "shall make and enforce rules[] for the *prevention of actual waste* of oil or operations in the field dangerous to life or property." TEX. NAT. RES. CODE § 85.042 (emphasis added). But instead, the BLM has arrogated for itself the right to balance these priorities, not only on federal lands, but on the state and private mineral interests that constitute the vast majority of interests affected by the Final Rule and where the federal government has a minimal interest.

North Dakota has its own comprehensive oil and gas regulations, administered by the NDIC. N.D. ADMIN. CODE § 43-02-03. As part of its laws and regulations governing oil and gas production in the state, North Dakota implements its own stringent venting and flaring restrictions on oil and gas production operators. (Helms Declaration ¶ 19); *see* N.D. CENT. CODE § 38-08-06.4; *see also Vogel*, 2016 ND 104 (describing North Dakota's "comprehensive regulatory scheme" for venting and flaring under the authority of the NDIC). Because the Final Rule applies to "State or private tracts in a federally approved unit or communitization agreement," Final Rule, 81 Fed. Reg. at 83,079, and because of North Dakota's unusual mineral estate ownership situation, the Final Rule interferes with and diminishes state authority over a significant number of oil

and gas units in the state, along with the state and private tracts located therein. (Helms Declaration ¶¶ 18, 20).

Texas also maintains and exercises regulatory authority through a comprehensive and detailed system of oil and gas laws and regulations, including specifically addressing releasing and flaring under the authority of the Texas RRC. *See generally* TEX. NAT. RES. CODE, Oil and Gas; TEX. NAT. RES. CODE §§ 85.042 and 85.046; 16 TEX. ADMIN. CODE § 3, 3.32. Texas, through its regulatory system, encourages efficient production and the minimization of waste. For example, while generally Texas allows for the limited release or flaring of gas in oil and gas production operations (*See* TEX. ADMIN. CODE § 3.32(f)(1)(C)), hydrocarbon gas in the filtered waste stream may be released if eighty-five percent of the hydrocarbon gas in the inlet stream is recovered and directed to a legal use. 16 TEX. ADMIN. CODE § 3.32(f)(1)(D). Despite Texas's statutory self-regulation, because the Final Rule applies to "State or private tracts in a federally approved unit or communitization agreement," Final Rule, 81 Fed. Reg. at 83,079, the Final Rule directly preempts Texas' authority over its unique split-estate situation and a significant number of oil and gas units and mineral interests held by the state and private citizens.

The provisions of the Final Rule directly conflict with current North Dakota and Texas law and regulation. (*See* Helms Declaration ¶¶ 22–23). For example,

the NDIC has implemented gas capture requirements, which use declining allowable flared percentages based on North Dakota's extensive oil and gas experience, including several public hearings. *See id*. at ¶ 23. BLM claims to have modeled its own targets off the North Dakota system, Final Rule, 81 Fed. Reg. 83,023, but imposed an entirely different schedule with different capture percentages and different dates that are not supported by the record and were not even proposed or made available for public comment.[19] (Helms Declaration ¶ 23).

[19] The Final Rule's gas capture requirements deviated significantly from the proposed rule, were not made available for public comment, and not adequately explained, all in violation of the APA. Section 553 of the APA requires that agencies provide "[g]eneral notice of proposed rule making," which shall include "either the terms or substance of the proposed rule or a description of the subjects and issues involved," and "shall give interested persons an opportunity to participate in the rule making through the submission of written data, views, or arguments." BLM's proposed gas capture requirements based on well-by-well flaring volume limits. Waste Prevention, Production Subject to Royalties, and Resource Conservation, 81 Fed. Reg. 6666 (Feb. 8, 2016) (to be codified at 43 C.F.R. pts. 3100, 3160, 3170). North Dakota submitted comments encouraging BLM to adopt a flexible approach based on a percentage of natural gas captured, based on its own experience and regulations, which require an increasing percentage of gas capture over time: eighty-five percent capture through December 31, 2017, eighty-eight percent capture through December 31, 2019, and ninety-one to ninety-three percent thereafter. North Dakota Industrial Commission Order No. 24665 (July 1, 2014). In the Final Rule, BLM adopted North Dakota's suggested approach of using the more flexible and effective gas capture percentage approach. BLM's gas capture requirements in the Final Rule are less stringent than those set by North Dakota through 2022. However, beginning January 1, 2023, the Final Rule requires a gas capture rate of ninety-five percent, and sets a final capture rate of ninety-eight percent beginning January 1, 2016. Final Rule, 81 Fed. Reg. at 83082. BLM did not propose the ninety-five percent and ninety-eight percent gas capture rates, those rates are not a "logical outgrowth" of the proposal, and it did not explain how it arrived at those rates or demonstrate that those capture rates

The two sets of rules also have different approaches to when venting may be allowed. *Id*. at ¶ 22. While the Final Rule allows venting in certain specified circumstances, North Dakota regulations do not, except when authorized by the NDIC upon application and after notice and comment. *See* N.D. CENT. CODE § 38-08-06.4(6); *see also* N.D. ADMIN. CODE § 43-02-03-60.2. Such conflicts unquestionably put the state's "sovereign interests and public policies at stake." *Kansas v. United States*, 249 F.3d 1213, 1227 (10th Cir. May 4, 2001). Nonetheless, BLM would impose its rules on North Dakota and the operators of non-federal mineral interests in the state, not showing any deference to North Dakota's sovereignty, laws or experience, with no option left to North Dakota than to conform to BLM's requirements.

Even when BLM offers a variance, it places the burden on North Dakota and Texas to demonstrate that the state program is essentially equivalent to BLM's requirements, which is no variance at all. *See* 43 C.F.R. § 3179.401(a)(iv). Even where BLM may grant such "variances," it retains the right to bring enforcement actions, including against operators on private mineral leases that have been unitized with a unit that has only a small federal interest. *Id*. This strips North

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were achievable. These rates are significantly higher than those suggested by North Dakota and, based on North Dakota's experience, are not achievable. North Dakota would have so commented if given the opportunity. BLM's imposition of unachievable gas capture rates about which it did not provide the public an opportunity to comment and for which it did not provide a meaningful explanation was arbitrary and capricious in violation of the APA.

Dakota and Texas of the authority to exercise prosecutorial discretion and to focus enforcement on its key priorities, an important aspect of sovereign government power. Moreover, it is a significant impediment to effective enforcement because operators are much more reluctant to work with state officials to resolve violations when they are faced with the prospect of "over-filing" by a federal enforcement agency.

BLM's failure to recognize that the Final Rule disrupts our federal system of government and usurps the sovereignty of North Dakota and Texas is arbitrary and capricious. BLM cannot articulate the "clear Congressional intent" authorizing the Final Rule's intrusive effect on state sovereignty because there is none. *See Bond*, 134 S. Ct. at 2089 ("when legislation 'affect[s] the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.'") (quoting *United States v. Bass,* 404 U.S. 336, 349 (1971)).

CONCLUSION

For the reasons set forth above, the Final Rule should be vacated as unlawful and arbitrary and capricious.

Respectfully submitted this 2nd day of October, 2017.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of **NORTH DAKOTA'S AND TEXAS'S JOINT OPENING BRIEF** was served via CM/ECF to the parties listed below on October 2, 2017.

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UNITED STATES DISTRICT COURT FOR THE DISTRICT OF WYOMING

STATE OF WYOMING, STATE OF MONTANA, and STATE OF NORTH DAKOTA, Petitioners, v. UNITED STATES DEPARTMENT OF THE INTERIOR; SALLY JEWELL, in her official capacity as Secretary of the Interior; UNITED STATES BUREAU OF LAND MANAGEMENT; and NEIL KORNZE, in his official capacity as Director of the Bureau of Land Management, Respondents.	)	Case No. 16-cv-00285-SWS

DECLARATION OF LYNN D. HELMS IN SUPPORT OF STATE OF NORTH DAKOTA'S MOTION FOR PRELIMINARY INJUNCTION

I, Lynn D. Helms, state and declare as follows:

1. I am over 21 years of age and am fully competent and duly authorized to make this Declaration. The facts contained in this Declaration are based on my personal knowledge and are true and correct.

2. I am employed as the Director of the North Dakota Industrial Commission ("NDIC") Department of Mineral Resources ("DMR"). I have been employed by NDIC since July 20, 1998, and I have continuously served as the Director of DMR since July 1, 2005.

3. The North Dakota Legislature declared it the public's interest "to foster, to encourage, and to promote the development, production, and utilization of natural resources of oil and gas in the state in such a manner as will prevent waste; to authorize and to provide for the

operation and development of oil and gas properties in such a manner that a greater ultimate recovery of oil and gas be had and that the correlative rights of all owners be fully protected; and to encourage and to authorize cycling, recycling, pressure maintenance, and secondary recovery operations in order that the greatest possible economic recovery of oil and gas be obtained within the state to the end that the landowners, the royalty owners, the producers, and the general public realize and enjoy the greatest possible good from these vital natural resources." N.D. Cent. Code § 38-08-01.

4. The NDIC has continuing jurisdiction and authority over all persons' public and private property as necessary to control the oil and gas resources of the state. N.D. Cent. Code § 38-08-04. The NDIC regulates all operations for the production of oil or gas. N.D. Cent. Code § 38-08-04(2).

5. The DMR's Oil and Gas Division has jurisdiction to administer North Dakota's comprehensive oil and gas regulations, found at North Dakota Administrative Code Chapter 43-02-03. These regulations include regulation of drilling, producing, and plugging of wells; the restoration of drilling and production sites; the perforating and chemical treatment of wells, including hydraulic fracturing; the spacing of wells; operations to increase ultimate recovery, such as cycling of gas; the maintenance of pressure and the introduction of gas, water, and/or other substances into producing formations; the disposal of saltwater and oil field wastes through the North Dakota Underground Injection Control ("UIC") Program; and all other operations for the production of oil and gas.

6. As Director of the DMR, I manage and direct all responsibilities of the Oil and Gas Division and the DMR Geological Survey. These responsibilities include administration of the North Dakota Hydraulic Fracturing Program and the North Dakota UIC Program. These

responsibilities also include regulation of the drilling, producing, and plugging of wells; the restoration of drilling and production sites; the shooting and chemical treatment of wells, including hydraulic fracturing; the spacing of wells; operations to increase ultimate recovery such as cycling of gas, the maintenance of pressure, and the introduction of gas, water, or other substances into producing formations; disposal of saltwater and oil field wastes through the North Dakota UIC Program; and all other operations for the production of oil and gas.

7. In my current position, I am familiar with the Final Rule promulgated by the Bureau of Land Management ("BLM") entitled "Waste Prevention, Production Subject to Royalties, and Resources Conservation: Final Rule," 81 Fed. Reg. 83,008 (Nov. 18, 2016) ("Final Rule"). North Dakota participated in the BLM rulemaking by submitting comments on the proposed rule. In addition, North Dakota challenged the EPA final rule establishing New Source Performance Standards for methane emissions at oil and natural gas facilities, which is intimately related to this Final Rule. *See North Dakota, et al. v. EPA*, No. 16-1242 (D.C. Cir. 2016). The Final Rule interferes with the State of North Dakota's regulation of oil and gas, and will impair and impede on oil and gas production in North Dakota. North Dakota's regulatory role and authorities are also diminished and displaced by the Final Rule.

Oil and Gas Production in North Dakota

8. The State of North Dakota is ranked second in the United States among all states in the production of oil and gas. North Dakota produces approximately 350 million barrels of oil per year and 400 billion cubic feet of natural gas per year.

9. Approximately 12.8% of the oil production in North Dakota is from Indian lands and another approximately 5.2% of oil production within the State is from federal lands.

10. North Dakota has at least 2,832 spacing units with well bores that contain federal

minerals. The Final Rule will apply to each of these spacing units (each spacing unit is typically comprised of 1,280 acres). Thirty-two percent of the Bakken spacing units contain federal minerals and will have at least one well impacted by the Final Rule. That includes the approximately 18% of production from federal and Indian lands, and 14% from State or private land that contains some federal mineral estates without federal surface estates.

11. Over the next 20 years, working interest owners of North Dakota oil and gas leases plan to increase the drilling density from one well per spacing unit to as many as 32 wells to recover incremental oil and gas.

12. North Dakota has a unique history of land ownership that has resulted in a significant portion of North Dakota consisting of split-estate lands that will be adversely affected by the Final Rule. Unlike many western states that contain large blocks of unified federal surface and mineral interest ownership, the surface and mineral estates in North Dakota were at one time more than 97% private and state owned as a result of the railroad and homestead acts of the late 1800s. However, during the depression and drought years of the 1930s, numerous small tracts in North Dakota went through foreclosure. The federal government—through the Federal Land Bank and Bankhead Jones Act—foreclosed on many farms, taking ownership of both the mineral and surface estates. Many of those surface estates were later sold to private parties, but some or all of the mineral estates were retained by the federal government. This resulted in a very large number of small, federally-owned mineral estate tracts, without corresponding federal surface estates, scattered throughout western North Dakota.

13. Those federal mineral estates impact more than 30% of the oil and gas spacing units established for development in North Dakota—all of which will be subject to this Final Rule. The enormous amount of split-estate lands affected by the Final Rule can be seen on the

attached map, *see* Exhibit 1, by comparing federal surface management/ownership (crosshatched areas), to the federal mineral ownership (red areas) within well spacing units (gray areas), to the private- and state-mineral ownership (uncolored areas) in the area around the confluence of the Yellowstone and Missouri Rivers in Williams and McKenzie counties. Using the attached hypothetical spacing unit to illustrate, the Final Rule imposes federal requirements and permitting timelines on all owners in the west half of the spacing unit. This prevents the NDIC from regulating the orderly development of the spacing unit for prevention of waste and from pooling and protecting the correlative rights of the various owners in the spacing units.

14. Due to North Dakota's unique history of land ownership discussed above, it is typical for oil and gas spacing units in North Dakota to consist of a combination of federal, state, and private mineral ownership. A diagram of a hypothetical spacing unit with private, state, and federal mineral ownership is attached as Exhibit 2. Even in circumstances where the federal mineral ownership is small relative to other mineral ownership interests within the spacing unit, the Final Rule will subject operators of wells that develop private and state minerals within the communitized spacing unit to federal permitting, waste minimization plan, gas capture, gas venting, and production restriction rules and requirements.

15. In order to comply with the additional obligations imposed by the Final Rule, operations on spacing units that contain federal minerals will be substantially delayed, as discussed below. In the context of shared development within a spacing unit, this delay adversely affects the development of all minerals within the unit, including state and private oil and gas minerals. This delay substantially frustrates North Dakota's efforts to produce nonfederal minerals within a spacing unit. N.D. Cent. Code § 38-08-01 requires the NDIC to support the development, production, and utilization of oil and gas while preventing waste of

these resources and protecting the correlative rights of all owners. Therefore, the Final Rule impedes on the NDIC's ability to perform its function.

16. In North Dakota, there are a few large blocks of federal mineral ownership or trust responsibility where the federal government manages the surface estate through the U.S. Forest Service or Bureau of Indian Affairs. These are on the Dakota Prairie Grasslands in southern McKenzie and northern Billings Country as well as on the Fort Berthold Indian Reservation. *See* Exhibit 1. However, even within those areas, the State of North Dakota owns all water rights, and federal mineral ownership is interspersed with a "checkerboard" of private and state mineral or surface ownership. Therefore, virtually all federal management of North Dakota's oil and gas producing region consists of some form of split estate.

17. In order to provide the taxation and regulatory certainty required for long-term oil and gas investment on Fort Berthold Indian Reservation, the three affiliated Tribes and the State of North Dakota entered into a tax and regulatory agreement in 2008, which was amended in 2013. Under the 2008 agreement, the State provided the same oil and gas regulation as it had traditionally provided on private, state and other federal lands in North Dakota. The regulation included well spacing, well permitting, inspection, and enforcement. Under the 2013 agreement, North Dakota has shared jurisdiction with Tribe and federal authorities in those areas. The Final Rule displaces the State and Tribe from exercising their regulatory roles under the agreement by assigning final approval of drilling permits, waste prevention, and variances on any well that penetrates federal or trust minerals to the sole authority of the BLM Authorized Officer.

18. Given North Dakota's unique land ownership situation, the Final Rule will have far-reaching adverse impacts on North Dakota's ability to administer its oil and gas regulatory program.

Impact of the Final Rule on North Dakota's Regulatory Program

19. The NDIC has regulated the flaring of gas for more than three decades under N.D. Cent. Code. 38-08-06.4, the rules promulgated thereunder, and commission orders issued under that authority.

20. The Final Rule applies to, *inter alia*, "State or private tracts in a federally approved unit or communitization agreement." 43 C.F.R. § 3178.2(4). Given North Dakota's unusual land ownership and split-estate situation, the Final Rule therefore displaces State authority over a significant number of oil and gas units in the State, along with the State and private tracts therein.

21. Several provisions of the Final Rule impose restrictions that overlap with—and are different than—North Dakota's oil and gas statutes and regulatory programs. This displaces North Dakota laws and regulations. Such differences will cause delays in the orderly development of oil and gas resources in North Dakota.

22. The Final Rule's venting exceptions are in conflict with North Dakota laws and regulations, which were designed to be protective of North Dakota's natural resources and developed in consideration of North Dakota's unique geographic, geologic, and ecologic occurrences within its borders. While the Final Rule allows venting in certain specified circumstances, North Dakota regulations do not allow explicit exceptions but instead authorize the NDIC to grant exceptions upon application and after notice and comment. *See* N.D. Cent. Code § 38-08-06.4(6); *see also* N.D. Admin. Code § 43-02-03-60.2. It is likely, therefore, that exceptions granted by the BLM will preempt the NDIC's ability to administer its oil and gas regulatory program.

23. Furthermore, the NDIC has implemented flaring reduction goals, which utilize declining allowable flared percentages of 20% beginning April 1, 2016; 15% beginning November 1, 2016; 12% beginning November 1, 2018; and 7–9% thereafter. *See* N.D. Indus. Comm'n Order 24665 Policy/Guidance Ver. 102215 (2014).[1] The Final Rule is duplicative and inconsistent with these goals, and the Final Rule duplicates North Dakota's requirement for gas capture plans, *see id.*, but the required information is not consistent with North Dakota's requirements. This duplication and inconsistency creates a direct conflict with North Dakota's ability to administer its oil and gas regulatory program.

24. The Final Rule provides in section 3179.401 for North Dakota or Tribes to apply for variances from any provision(s) of the Final Rule, requiring demonstration to the BLM's satisfaction that the North Dakota or Tribal Program are at least as protective as the corresponding provision(s) of the Final Rule. *See* 43 C.F.R. § 3179.401. An operator may request that the BLM establish an alternative capture target under section § 3179.8 if certain conditions are met to the BLM's satisfaction. *See* 43 C.F.R. § 3179.8. This is unduly burdensome on the State, Tribes, and operators alike, and it diminishes and displaces North Dakota's regulatory role and traditional authority and expertise over its own oil and gas resources.

25. The Final Rule will cause delays in operator's abilities to conduct oil and gas production in North Dakota. In my observation, operators applying for drilling permits generally wait between six and nine months for approval of an application for permit to drill from the BLM. Operators applying for drilling permits in 2016 waited an average of 23 days for State approval of an application to drill in North Dakota. By imposing additional permitting requirements, BLM will frustrate and interfere with North Dakota's regulatory role and authority.

[1] Available at https://www.dmr.nd.gov/oilgas/GuidancePolicyNorthDakotaIndustrialCommissionorder24665.pdf.

26. The imposition of the additional regulatory requirements under the Final Rule also threatens the extent and amounts of royalties to be paid to mineral owners and the taxes paid to the State of North Dakota. While federal minerals in many states occur in large contiguous blocks of federal minerals, in North Dakota small tracts of federal minerals are interspersed with State- and privately-owned minerals. If permitting is delayed because one or more wells penetrate federal minerals, then development of all wells on the entire multi-well pad will be delayed. North Dakota's federal minerals would therefore not be protected from drainage and correlative rights of North Dakota's mineral owners would not be protected.

27. Each year, North Dakota collects more than $90 million in royalties from the production of oil and gas on federal and Indian lands. Based on oil price projections from the Energy Information Agency, over the next 30 years North Dakota anticipates the collection of more than $6 billion in royalties from federal and Indian lands. The use of the 30-year projection represents the anticipated life of the resource as it is known today.

28. Given my experience and knowledge of North Dakota's oil and gas permitting procedures and understanding of current timelines for permitting oil and gas wells on both federal and non-federal lands, I estimate that compliance with the Final Rule will delay oil and gas development in North Dakota by forcing operators on federal and Indian lands to undertake additional compliance obligations. This delay will result from the need for operators to file and BLM to process waste minimization plans.

29. Based on my understanding of BLM's current drilling permit approval times, implementation of the Final Rule will result in a delay of more than six months for every future oil and gas well drilled within a spacing unit that contains federal or Indian minerals in North Dakota. This nearly doubles the permitting time for these wells.

30. Delays in drilling and gas capture infrastructure caused by the Final Rule are estimated to result in more than $250 million decreased royalties and taxes.

31. Because North Dakota operates on a biennial budget, a single year of decreased revenue at the beginning of the biennium adversely impacts revenue for both fiscal years in that biennium. Likewise, because the state budget for the next biennium relies heavily on actual revenue from the previous biennium, decreased revenue in one year can adversely impact budget projections and corresponding appropriations for four years or more. As such, the decrease in revenue in the current fiscal year will in turn diminish North Dakota's revenue and appropriations for many succeeding years. Because royalty revenue funds are shared with the counties in North Dakota, any decrease in royalty revenue will adversely affect critical funding sources for public services such as health districts, emergency management, human services, roads, schools, and law enforcement.

32. In addition, I estimate that a number of oil and gas operators in North Dakota will be forced to refocus their planned drilling activities to spacing units that do not contain federal lands rather than confront the possibility that BLM will restrict production on new wells under section 3179.11 of the Final Rule. There are currently 20 companies with significant oil and gas operations on federal and Indian lands in North Dakota. The shifting of capital investment to State and private lands and delay or loss of full development on federal and Indian lands will result in significant loss of oil and gas resources and associated revenues estimated at more than

$1 billion over the next two to five years.

33. The displacement of numerous oil and gas operations due to implementation of the Final Rule will also result in the loss of employment. It is estimated that North Dakota will lose more than 1,000 jobs from the relocation of oil and gas operations due to the implementation of the Final Rule. This estimate was derived from a study done by the North Dakota Department of Mineral Resources in conjunction with North Dakota State University Department of Agribusiness and Applied Economics, and the Vision West project. This study looked at the average number of jobs per drilling rig and producing well in North Dakota, and how many of those jobs would be lost as a result of the Final Rule.

34. The Final Rule's flaring restrictions represent an unforeseeable departure from the Proposed Rule. The Final Rule imposes a 2-step restriction on flaring. The Final Rule imposes a so-called "monthly capture target," which starts at 85% beginning 2018 and ratchets up over time, eventually imposing a "capture target" of 98% beginning in 2026. Despite calling them "targets," these rates are mandatory for compliance with the Final Rule. Second, the Final Rule imposes a so-called "monthly flaring allowable," which is factored in to calculate the monthly capture percentage. The "monthly flaring allowable" decreases over time, eventually reducing to an incredibly low 750 Mcf beginning in 2025. This formula is a significant departure from what was offered in the Proposed Rule, which set simple numerical limits on per-well flaring volumes. The NDIC was not notified that this was a foreseeable change; therefore, the NDIC was deprived of the ability to provide meaningfully comment.

35. Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 2, 2017.

Lynn D. Helms

The foregoing Declaration of Lynn D. Helms was subscribed and sworn before me by Lynn D. Helms on October 2, 2017.

Witness my hand and official seal.

Commonwealth of Pennsylvania
NOTARIAL SEAL
JULIE R COHEN, NOTARY PUBLIC
City of Pittsburgh, Allegheny County
My Commission Expires March 8, 2021

Notary Public

My commission expires: March 8, 2021

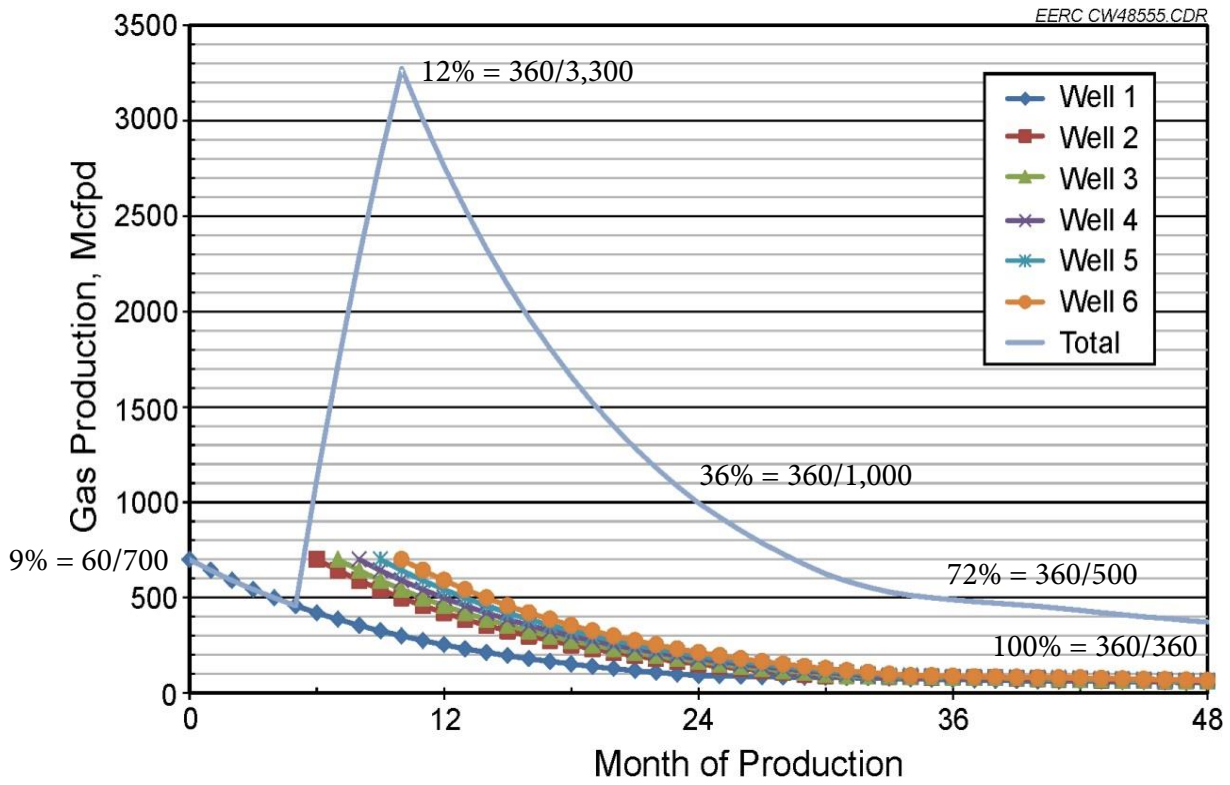
Scenario 1 – Hypothetical Six-Well, 1-month Interval

Exhibit 2

- Initial well producing for 6 months, followed by five additional wells coming online at 1-month intervals.
- Hypothetical decline curve used.

1 well x 1,800 Mcf/month / 30days/month = 60 Mcf/day

6 wells x 1,800 Mcf/month / 30days/month = 360 Mcf/day



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Scenario 2 – Hypothetical Six-Well, 6-month Interval

- Six wells coming online at 6-month intervals.
- Hypothetical decline curve used.

1 well x 1,800 Mcf/month / 30days/month = 60 Mcf/day
2 wells = 120 Mcf/day
3 wells = 180 Mcf/day
4 wells = 240 Mcf/day
5 wells = 300 Mcf/day
6 wells = 360 Mcf/day