Wayne Stenehjem (admitted *pro hac vice*)
Attorney General
David Garner (admitted *pro hac vice*)
Hope Hogan (admitted *pro hac vice*)
Assistant Attorneys General
500 N. 9th Street
Bismarck, ND 58501
Phone: (701) 328-2925
ndag@nd.gov

Paul M. Seby (admitted *pro hac vice*)
Special Assistant Attorney General
Greenberg Traurig, LLP
1200 17th Street, Suite 2400
Denver, CO 80202
Phone: (303) 572-6584
Fax: (303) 572-6540
sebyp@gtlaw.com

Robert J. Walker (Wyo. Bar No. 7-4715)
Hickey & Evans, LLP
1800 Carey Street, Suite 700
Cheyenne, WY 82003
Phone: (307) 634-1525
Fax: (307) 638-7335
rwalker@hickeyevans.com

*Counsel for Petitioner-Intervenor State of North Dakota*

**UNITED STATES DISTRICT COURT FOR THE DISTRICT OF WYOMING**

| | | |
|---|---|---|
| STATE OF WYOMING,<br>STATE OF MONTANA, and<br>STATE OF NORTH DAKOTA,<br><br>Petitioners,<br><br>v.<br><br>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,<br><br>Respondents. | ) | Case No. 16-cv-00285-SWS |

**MEMORANDUM IN SUPPORT OF NORTH DAKOTA'S MOTION FOR PRELIMINARY INJUNCTION**

**TABLE OF CONTENTS**

# TABLE OF AUTHORITIES

**Cases**

**Statutes**

**Rules**



**Regulations**

**Other Authorities**

Pursuant to Federal Rule of Civil Procedure 65, the State of North Dakota respectfully requests the Court issue an order enjoining the November 18, 2016 final rule of the Department of the Interior's 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").

## INTRODUCTION

The Final Rule runs roughshod over North Dakota's sovereign interests in administering its distinct regulatory programs governing oil and gas production and air quality within its borders and, unless enjoined, will frustrate and impede North Dakota's several sovereign interests in administering its distinct oil and gas program, its air quality program, and the orderly development of North Dakota's natural resources. The Final Rule will irreparably harm North Dakota's interests by transferring regulatory authority and enforcement powers over almost half of the oil and gas units in North Dakota from the North Dakota Industrial Commission ("NDIC") to the BLM. Virtually none of the affected units within North Dakota are on federal land.

There is a substantial likelihood that North Dakota will succeed on the merits because the Final Rule is "arbitrary, capricious, and . . . not in accordance with law." 5 U.S.C. § 706(2)(A). In the Final Rule, the BLM seeks to extend its authority far beyond the authority delegated to it in the statutes it relies on and in contradiction to its longstanding understanding of its own jurisdiction and historic practice. Moreover, even under the BLM's own calculations, the costs imposed by the Final Rule will be $110–279 million per year, while the "waste" that is prevented will only result in additional royalties of $3–10 million per year, a tenth of the cost of the Final Rule. 81 Fed. Reg. at 83,013–14.

The Final Rule is set to go into effect on January 17, 2017. In light of the significant sovereign state interests at stake in this litigation, North Dakota—along with the States of

Wyoming and Montana (collectively, "State Petitioners")—sent a letter to the Secretary of Interior and Director of the BLM on December 2, 2016, asking the agency to delay implementation of the Final Rule until the validity of the Rule could be adjudicated by this Court. *See* Exhibit A, December 2, 2016 Letter from State Petitioners to the Secretary of Interior. State Petitioners have not received a response, but North Dakota is hopeful that the Department of Interior and BLM will appreciate and acknowledge the Final Rule's significant adverse effect on state sovereignty and economic interests. Given that the Final Rule is set to go into effect in little over a month, North Dakota is compelled to seek a preliminary injunction to halt the implementation of the Final Rule until this Court has an opportunity to resolve North Dakota's pending petition for review.

## BACKGROUND

### A. The Requirements of the Final Rule

The Final Rule is the BLM's first foray into the business of promulgating and enforcing air quality regulations, in direct competition with state programs and with the U.S. Environmental Protection Agency ("EPA"). The BLM imposes these air quality regulations not only on federal and tribal land, but also on any private or state land where the federal government holds a split-estate interest, however minimal. The Final Rule fills thirteen small-print, single-spaced pages of the Federal Register, 81 Fed. Reg. 83,077–89, with an additional seventy pages or so of summary and explanation, but the regulations it imposes can be divided into three categories.

First, the Final Rule imposes detailed air emisisons restrictions on the venting and flaring of natural gas that are otherwise generally issued and administered by the states and EPA under the Clean Air Act ("CAA"), including mandatory monitoring systems, detailed equipment specifications, a prohibition on venting, and a gas capture requirement that is modeled off North

Dakota law but is arbitrarily phased in on a completely different schedule that disrupts North Dakota's regulatory requirements. 81 Fed. Reg. at 83,023; Exhibit B, Declaration of Lynn D. Helms, Director, North Dakota Industrial Commission ("Helms Decl."), ¶ 23. The BLM's decision that it needed to promulgate these regulations is odd, since venting and flaring are already subject to comprehensive state regulations and 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," 81 Fed. Reg. at 83,017 (referencing the EPA final rule, "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")); *see North Dakota, et al. v. EPA*, No. 16-1242 (D.C. Cir. 2016) (pending action for judicial review of the Methane Rule). Even the BLM admits that the Final Rule is largely redundant with existing state regulatory regimes. *Id*. at 83,018. Complying with this third, unwarranted layer of regulation is particularly harmful, imposing costs that will adversely affect North Dakota's revenues and economy.

The Final Rule requires, among other things, new federal permits and permissions, *see e.g.* 43 C.F.R. §§ 3179.8 and 3179.401, which is a substantial impediment to oil and gas development in North Dakota, given both the inability of the BLM to process permits and sundry notices promptly and the BLM's already huge administrative backlog. Helms Decl. ¶¶ 28–30. The administrative burden imposed by the Final Rule will exacerbate the problem and frustrate North Dakota's development of its oil and natural gas resources.

Second, the Final Rule requires extensive new paperwork to be submitted with the Application for Permit to Drill ("APD"). 81 Fed. Reg. at 83,078. Each applicant must file a "Waste Management Plan" which includes a long and detailed list of required paperwork, all of

which must be approved by the BLM before an APD will be granted. 81 Fed. Reg. at 83,078. The BLM's current processing time for APDs in North Dakota ranges from six to nine months, Helms Dec. ¶ 25, while the State processes the equivalent application in an average of 23 days. *Id.* 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 perform under that Plan annually and submit a report to the NDIC. *See* NDIC Order 24665 Policy/Guidance Version 102215, adopted pursuant to NDIC Order 24665, *see also* Helms. Decl. ¶ 23. These state requirements do not impede oil and gas development because the State is able to process and approve them within weeks rather than months or years. *Id*. at 25.

Finally, the Final Rule redefines the royalty obligations of lessees to charge royalties on a broader range of natural gas that is lost during operations. 81 Fed. Reg. at 83,079–80.

**B. The Scope of the Final Rule**

In North Dakota, the Final Rule will operate primarily on private and state lands, encompassing more than 30% of the communitized spacing units in the State. Helms Decl. ¶¶ 12–13.[1] North Dakota has a unique land composition and split-estate configuration that results in a typical oil and gas spacing unit consisting of a combination of federal, State, and private mineral ownership. Only five percent of North Dakota oil and gas production is from federal lands. *Id*. ¶ 9. Even the handful of large tracks of federal mineral ownership or trust responsibility, the Dakota Prairie Grasslands and the Fort Berthold Indian Reservation, are interspersed with a checkerboard of private and state ownership. *Id.* ¶ 16. North Dakota oil and

[1] 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 [NDIC]'s rules or orders." N.D. Admin. Code § 43-02-03-01.49.

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. *Id.* ¶ 17.

Even in such circumstances where the federal mineral ownership is 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 Final Rule. 81 Fed. Reg. at 83,039. The BLM made the deliberate choice to impose these regulations on *all* mineral interests that have been unitized or communitized with a federal mineral interest, however small the federal interest may be: "While the BLM agrees that the regulation of State and private minerals is under the jurisdiction of the States, the BLM does not agree that States' jurisdiction over State and private minerals precludes the BLM from promulgating a waste prevention regulation that has incidental impacts on State and private minerals unitized or communitized with Federal or Indian minerals." 81 Fed. Reg. at 83,039. The regulation of State and private property interests is hardly "incidental," however; the BLM estimates that 75.2% of vented and flared gas it seeks to regulate came from mixed ownership wells. 81 Fed. Reg. at 83,015. The Final Rule displaces North Dakota from its role as primary regulator and instead places some or all of that authority in the hands of the BLM.

Even where North Dakota is allowed to continue enforcing its own laws, those laws must give way to the Final Rule when they conflict, and the BLM reserves the right to bring its own enforcement actions, 81 Fed. Reg. at 83,035, preventing North Dakota from effectively working with operators to resolve violations when it has no authority to bind the BLM to a settlement.

## STANDARD OF REVIEW

Preliminary injunctions are intended to "preserve the relative position of the parties until a trial on the merits can be held." *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981). "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of

equities tips in his favor, and that an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). "A plaintiff satisfies the irreparable harm requirement by demonstrating a significant risk that he or she will experience harm that cannot be compensated after the fact by monetary damages." *RoDa Drilling Co. v. Siegal*, 552 F.3d 1203, 1210 (10th Cir. 2009). Those elements are fully satisfied here.

## ARGUMENT

### A. North Dakota will suffer irreparable harm if the Final Rule is not enjoined before it goes into effect on January 17, 2017.

North Dakota's irreparable harm in this case rests on three independent bases: (1) the Final Rule deprives North Dakota of its sovereign authority, interests, and policies—and deprivation of these interests during the pendency of this action is irreparable; (2) North Dakota will suffer irreparable economic loss because the Final Rule will immediately harm the State's budget by depressing oil and gas production and associated tax revenues; and (3) even if it is successful on the merits of its challenge to the BLM Rule, North Dakota will not be able to recover economic damages from the federal government to compensate the State for its loss of revenue during the pendency of this action.

#### 1. North Dakota will suffer irreparable injury to its sovereign interests in regulating oil and gas development within its borders.

It is well-established in the Tenth Circuit that a federal agency's temporary infringement on a state's sovereignty constitutes irreparable harm. *Kansas v. United States*, 249 F.3d 1213, 1227–28 (10th Cir. 2001). When a federal agency's decision places a state's "sovereign interests and public policies at stake, [the Tenth Circuit] deem[s] the harm the State stands to suffer irreparable if deprived of those interests without first having a full and fair opportunity to be heard on the merits." *Id.* at 1227.

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 general public realize and enjoy the greatest possible good from these vital natural resources." N.D. Cent. Code § 38-08-01 (emphasis added). The BLM has arrogated for itself the right to balance these policies, both on federal lands and on State and private lands 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 Ch. 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 Decl. ¶ 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). Because the Final Rule applies to "State or private tracts in a federally approved unit or communitization agreement," 81 Fed. Reg. at 83,079, and because of North Dakota's unique split-estate 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 Decl. ¶¶ 18, 20.

The provisions of the Final Rule directly conflict with current North Dakota law and regulation. *Id*. ¶¶ 22–23. For example, the NDIC has implemented gas capture regulations, which utilize declining allowable flared percentages. *See id*. ¶ 23. The BLM modeled its own targets off the North Dakota system, 81 Fed. Reg. 83,023, but prepared an entirely different schedule with different percentages and different dates. Helms Decl. ¶ 23. The two sets of rules also have different approaches to when venting may be allowed. *Id*. ¶ 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*, 249 F.3d at 1127.

**2. The variance provisions in the BLM Rule do not cure BLM's interference with North Dakota's sovereign governance.**

The BLM recognizes the federalism problems created by the Final Rule, but the discretionary variance procedure the BLM adopted is completely inadequate to address it. *See* 81 Fed. Reg. at 83,035. Under the Final Rule, a state must seek and obtain BLM approval for a variance by demonstrating that its own regulations are "equally or more effective," *id*, but this does not ameliorate the interference with North Dakota's sovereign interests and authority.

First, the variance provision places the burden on North Dakota to "[d]emonstrate how the State, local, or tribal regulation(s) perform at least equally well in terms of reducing waste of oil and gas, reducing environmental impacts from venting and or flaring of gas, and ensuring the safe and responsible production of oil and gas, compared to the particular provision(s) from which the State or Tribe is requesting the variance." 43 C.F.R. § 3179.401(a)(iv). Second, the BLM "may approve the request for a variance, or approve it with one or more conditions, only if

the BLM determines that the State, local or tribal regulation(s) or rule(s) would perform at least equally well." *Id.* at § 3179.401(b).

Instead of the BLM being required to comply with North Dakota regulations—as is the case right now—the variance requirement forces North Dakota to comply with BLM regulations. The variance provision offers no deference to North Dakota regarding the appropriate type and level of protection necessary, and there is no option allowing North Dakota to demonstrate that its rules are superior to the Final Rule's for the context of that State. Nor is there a mechanism for North Dakota to administer all or part of any aspect of the Final Rule.

By requiring North Dakota to meet the BLM's regulations, the variance provision fails to mitigate the Final Rule's encroachment on North Dakota's sovereign authority. Rather than improve consultation and coordination with the states, the BLM presumes authority to evaluate and pass judgment on the adequacy of North Dakota's regulations.

Even where the BLM does grant variances, it retains the right to bring enforcement actions, including enforcement actions against operators on private mineral leases that have been unitized with a unit that has only a small federal interest. *Id*. This strips the State of its 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 the State's operations because, in practice, operators are much more reluctant to work with state officials to resolve violations when they are faced with the prospect of a federal enforcement action. The power to reach a full and final settlement is vital to obtaining voluntary cooperation.

**3. North Dakota will suffer irreparable injury to its sovereign interests in regulating air quality within its borders.**

The North Dakota Department of Health ("NDDH") has jurisdiction to administer North Dakota's comprehensive and robust air-quality programs, which include N.D. Admin. Code §

23-25-01 *et seq.*, and federal CAA programs to implement the New Source Performance Standards, s*ee e.g.*, N.D. Cent. Code § 23-25-03; State permitting programs for stationary sources under Titles I and V of the CAA, s*ee id.* § 23-25-04.1; State Implementation Plans ("SIPs") for National Ambient Air Quality Standards ("NAAQS"), *see id.* § 23-25-03.6; *see also, United States v. Minnkota Power Coop., Inc.*, 831 F. Supp. 2d 1109, 1127 (D.N.D. 2011). Exhibit C, Declaration of L. David Glatt, Chief of the Environmental Health Section of the North Dakota Department of Health ("Glatt Decl."), ¶ 7. In particular, "the State of North Dakota exercised its authority to [make technology determinations] in accordance with the Clean Air Act," and when EPA disagrees there is a formal dispute resolution process which places on EPA the burden of proving that North Dakota's determinations are arbitrary and capricious, while the Final Rule dictates the control technologies to be used without consideration of state policy. *Minnkota Power Co-op., Inc.*, 831 F. Supp. 2d at1129; *see* Glatt Decl. ¶¶ 7, 11. Under the CAA regime, states may exercise genuine policy discretion in determining how best to meet the NAAQS, not merely add additional regulations on top of the regulations already imposed by a federal agency.

Venting and flaring emissions at oil and gas production facilities are subject to regulation under the North Dakota's air pollution control laws and regulations. Glatt Decl. ¶¶ 9–10. Venting and flaring activities create emissions of Volatile Organic Compounds ("VOCs"), carbon monoxide, and nitrogen dioxide, all of which are regulated pollutants under North Dakota's air quality regulations. Since 1970, the NDDH has administered North Dakota's air quality laws and regulations, which includes regulation of stationary sources that directly emit—or have the potential to emit—100 tons per year or more of any air contaminant subject to

regulation. North Dakota's permitting requirements apply to all new and modified oil and gas production facilities. N.D. Admin Code § 33-15-14; Glatt Decl. ¶ 10.

North Dakota has exercised its air-regulating primacy for five decades and by delegation from EPA has carried out EPA's direct implementation role of permitting and enforcement. Glatt Decl. ¶¶ 14–21. The Final Rule directly regulates venting and flaring at oil and gas production facilities, and thus directly impinges on North Dakota's primary, delegated authority to administer such regulations.

**4. North Dakota will suffer irreparable harm to its economic interests.**

Oil and gas extraction and related industries have provided significant economic opportunities to the citizens of North Dakota, as well as significant tax revenue for the State economy, which will be impaired if the Final Rule is allowed to go into effect. There is no possibility of money damages from the BLM to compensate North Dakota for its lost revenue or North Dakota's citizens for their lost jobs and opportunities.

While economic loss—on its own—does not ordinarily constitute irreparable harm because such losses may be later recovered through money damages, *Crowe & Dunley, P.C. v. Stidham*, 640 F.3d 1140, 1157 (10th Cir. 2011), this rule does not apply to a state alleging economic harm because "such a stringent test could never be met." *Oklahoma ex rel. Oklahoma Tax Comm'n v. Int'l Registration Plan, Inc.*, 264 F. Supp. 2d 990, 996 (W.D. Okla. 2003). When a state alleges economic harm occasioned from the loss of tax or royalty income, the appropriate test is "whether the financial loss is temporary or not." *Id*. The unique economic hardship results because a state's revenue shortfalls "impact not only the funds available to spend in that year but also impact the amount budgeted in future years" and "[t]he impact on critical state services from any significant revenue shortfall may thus have a pervasive impact spreading over several years." *Id*.

North Dakota collected $6,048,792,082 in oil and gas taxes in the years 2013–2015, and $4,068,542,204 in the years 2011–2013. Office of the State Tax Comm'r, 52nd Biennial Report at 16 (2015). This represents more than half of the total net collections. *Id*. Increased sales tax, income tax, and other taxes during that period were also driven by the oil and gas boom and strong local economy. *Id*. Under the North Dakota Constitution, 30 percent of this revenue is deposited in a "rainy day" fund, the Legacy Fund, $1.860 billion in the 2013-15 biennium. *Id*. at 23. 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 diminishes the revenue the State receives from its oil and gas industry. Helms Decl. ¶¶ 26–27.

The Final Rule threatens to damage the oil and gas industry, and therefore the economy of North Dakota and its revenue base, in several ways. First and most straightforwardly, it imposes numerous expensive equipment requirements that conflict with state law and EPA regulation. Even where the BLM's requirements are not more restrictive, the additive compliance with a third set of regulations on the same topic is time consuming and expensive.

Second, it will increase the already unmanageable permitting delays for oil and gas leases on federal and tribal lands. Helms Decl. ¶¶ 28–30. Each year, North Dakota collects more than $90 million in royalties from the production of oil and gas on federal and Indian lands. *Id*. ¶ 27. 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. *Id*. Lengthy and unpredictable permitting times delay this revenue and often dissuade prospective operators from attempting to drill at all. The imposition of the additional regulatory requirements under the Final Rule threatens the extent and amounts of royalties to be paid to mineral owners and the taxes paid to the State of North Dakota. *Id*. ¶ 26. This lost

revenue will not be limited to federal and tribal leases, however. 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. *Id*.

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 waste minimization plans on more than 900 wells already permitted by the NDIC and on an additional 100 to 250 wells per month over the next 10 to 12 years. *Id*. ¶ 28. This delay will result in approximately one-half the rate of development and, in turn, result in decreased royalties and taxes in the amount of $150 million in the current fiscal year (2017), which runs from July 1, 2016 through June 30, 2017. *Id*. ¶ 30. The anticipated loss in royalties and taxes to North Dakota is estimated to be $550 million over the next biennium and $18 billion over the next 30 years. *Id*. 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. *Id.* ¶ 31. As a result, like the court's finding in *Oklahoma Tax Commission*, North Dakota will suffer unique economic harm because the tremendous losses of revenue from taxes and royalties will directly impact funding for the provision of "critical state services." 264 F. Supp. 2d at 997.

In addition, 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 the BLM will restrict production on new wells under section 3179.11 of the Final Rule. Helms Decl. ¶ 32. There are currently 20 companies with significant oil and gas operations on federal and Indian lands in North Dakota. *Id*. 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. *Id*.

The displacement of numerous oil and gas operations due to implementation of the Final Rule will also result in the loss of employment. *Id*. ¶ 33. 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. *Id*. 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. *Id*. 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. *Id*.

These costs will begin to accrue as soon as the Final Rule goes into effect, or earlier as operators seek to come into compliance or evaluate the economics of potential new development. No compensation from the BLM can be obtained for these losses. The threat of unrecoverable economic losses is sufficient to warrant the issuance of a preliminary injunction. *Iowa Utils. Bd. v. FCC*, 109 F.3d 418, 426 (8th Cir. 1996) ("threat of unrecoverable economic loss, however, does qualify as irreparable harm"). North Dakota's challenge to the Final Rule is brought under the APA, which allows a party to challenge final agency action and seek "relief other than money damages." 5 U.S.C. § 702. Because the APA does not afford North Dakota—or any other petitioner—a mechanism for recovering economic damages caused by the BLM Rule following a successful adjudication of the merits of petitioners' claims, those damages are considered to be "irreparable" as a matter of law. *Chamber of Commerce v. Edmondson*, 594

F.3d 742, 770–71 (10th Cir. 2010) ("[i]mposition of monetary damages that cannot later be recovered for reasons such as sovereign immunity constitutes irreparable injury").

Because the State of North Dakota will suffer irreparable harm prior to receiving a "full and fair opportunity to be heard on the merits," it is imperative that this Court immediately issue a preliminary injunction prohibiting the implementation of the Final Rule until the merits of North Dakota's (and the other petitioners') Petitions are resolved. *Kansas*, 249 F.3d at 1227–28.

**B. The Balance of Harms Weighs in Favor of North Dakota**

The key question in the balance of harms inquiry is whether "the threatened injury to the movant outweighs the injury to the other party under the preliminary injunction." *Kikumura v. Hurley*, 242 F.3d 950, 955 (10th Cir. 2001). As discussed above, the implementation of the Final Rule will cause North Dakota tremendous harm to its sovereign interests, the interests of its citizens, and to the North Dakota treasury. In contrast with the considerable harm that will befall North Dakota if the Final Rule is implemented, the BLM will suffer no harm from preservation of the status quo until the resolution of Petitioners' claims on the merits.

Venting and flaring is already heavily regulated by North Dakota and other petitioners and by the EPA, and the BLM's new regulations are, at best, an incremental improvement. 81 Fed. Reg. at 83,018. Many requirements are completely redundant. *Id*; Glatt Decl. ¶ 18. Briefly delaying these BLM regulations will not cause any significant environmental harms. Nor is the BLM the federal agency that has been entrusted by Congress with the responsibility to regulate air quality in the first place, especially on private mineral leases on private land.

The lost royalties to the BLM from an injunction are miniscule. The BLM estimates that it will receive additional royalties of $3–10 million per year from the Final Rule, 81 Fed. Reg. 83,014, which is a drop in the bucket compared to the total royalties paid to the BLM for oil and gas leases. Even minor permitting delays or brief shutdowns could easily result in lost royalty

revenue greater than this amount. And the BLM could use the extra implementation time to work on its current backlog of pending applications and notices so that it is ready to handle the new paperwork that will be generated by this rule.

**C. North Dakota has a Reasonable Likelihood of Success on the Merits.**

North Dakota has a reasonable likelihood of succeeding on the merits because the Final Rule is "arbitrary, capricious, and . . . not in accordance with law." 5 U.S.C. § 706(2)(A). "Although the courts use a bewildering variety of formulations of the need for showing some likelihood of success all courts agree that plaintiff must present a prima facie case but need not show a certainty of winning." *Planned Parenthood Ass'n of Utah v. Herbert*, 828 F.3d 1245, 1252 (10th Cir. 2016) (quotation omitted). "[T]he essential function of judicial review is a determination of (1) whether the agency acted within the scope of its authority, (2) whether the agency complied with prescribed procedures, and (3) whether the action is otherwise arbitrary, capricious or an abuse of discretion." *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1574 (10th Cir. 1994).

**1. BLM has no statutory authority to regulate state and private land and mineral interests or to promulgate the air quality regulations.**

"Determination of whether the [BLM] acted within 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. 2015) (citing *Olenhouse*, 42 F.3d at 1574).

The Final Rule far exceeds the BLM's delegated statutory authority to protect federal surfaces or lease federal minerals and impermissibly encroaches on North Dakota's primary authority to regulate oil and gas development within its boundaries and on the EPA and the State's primary authority to administer air quality regulations through the CAA. As recognized

by the Supreme Court, states have "traditional and primary power over land and water use." *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 174 (2001). Furthermore, when an agency seeks to "bring about an enormous and transformative expansion" in its authority to make "decisions of vast 'economic and political significance,'" it must point to a clear statement from Congress. *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427, 2444 (2014) (citing *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000)). Nothing approaches a clear statement from Congress that it intended the BLM to regulate state and private land and mineral interests or to promulgate the air quality regulations.

The BLM is the federal agency responsible for managing federal lands and minerals that do not fall under the responsibility of another agency, and Congress has delegated to the Secretary of Interior responsibility to "issue regulations necessary to implement the provisions of this Act *with respect to the management, use, and protection of the public lands.*" 43 U.S.C. § 1733 (emphasis added). The BLM has similar authority over federal minerals and may "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, 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). 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, but do not include private mineral estates. These statutes, and others cited by the BLM, do not grant it authority to impose environmental regulations on private property. The BLM is not a substitute

for the EPA (or the States), or a competitor with federal or state environmental regulators; instead, it has a different, important role as the manager of our public lands.

The absence of a statutory provision that says "the BLM is not a regulator of private land" does not mean that it has the discretion to assign itself that role. 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. 2013). *See also Am. Bar Ass'n v. FTC*, 430 F.3d 457,468 (D.C. Cir. 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. 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 BLM applies the Final Rule to split estates and private interests that have been unitized or communitized with federal minerals, but historically the BLM had taken the position that it has no general authority to regulate private parcels that are have been unitized or communitized with federal or tribal mineral interests, except for the authority that is expressly granted to it by contract in the unitization agreement signed by the owners or to the extent that this authority is directly relevant to its proprietary interests. In 1984, in the preamble to a regulation that establishes the scope of the BLM mineral leasing regulations, the agency 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***.

49 Fed. Reg. 37,357 (1984) (emphasis added). It is clear from the language of this preamble that the BLM was describing how it understood an existing limitation on its jurisdiction. The BLM has since expanded this more limited understanding of its jurisdiction to encompass a limited subset of regulations that it will apply to state or privately owned mineral interests, but all of those regulations reasonably relate to the BLM's interests as a part-owner and are not attempts to replace the states as general regulators. *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.").

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, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016), quoting *National Cable & Telecommunications Assn. v. Brand X Internet Services*, 545 U.S. 967, 981–982 (2005). And "[w]hen 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." *Utility Air Regulatory Group*, 134 S. Ct. at 2444 (quotation omitted). The division of regulatory authority between the states and the BLM under the MLA and related statutes has been a longstanding, generally accepted understanding for

decades, and the BLM's recent foray into the regulation of private lands should be "greet[ed] with a measure of skepticism." *Id.*[2]

When considering and adopting the Final Rule, the BLM acknowledged that it is the states, not the BLM that are the regulators of oil and gas developments on private land, but decided to apply its new regulations anyway: "While the BLM agrees that the regulation of State and private minerals is under the jurisdiction of the States, the BLM does not agree that States' jurisdiction over State and private minerals precludes the BLM from promulgating a waste prevention regulation that has incidental impacts on State and private minerals unitized or communitized with [f]ederal or Indian minerals." 81 Fed. Reg. at 83,039. But the BLM does not seek to impose "incidental impacts," on private owners, it plans to impose regulations on them and punish them if they do not comply.

The BLM argues that imposing these regulations is permissible because their purpose is to prevent waste of federal oil and gas. 81 Fed. Reg. at 83,033. However, the Final Rule largely does not prevent waste but instead regulates how it should be handled—for example, flaring rather than venting. Even where the Final Rule does prevent waste, it imposes expenses and compliance obligations that are wildly out of proportion to the market value of the federal gas being lost, especially on units where the federal interest is a tiny percentage of the total. At most, this argument would justify the provisions imposing royalties for lost natural gas, royalties that would only apply up to the percentage interest actually held by the United States. 43 C.F.R.

[2] In *Norfolk Energy, Inc. v. Hodel*, 898 F.2d 1435, 1440 (9th Cir. 1990) the Ninth Circuit held that "BLM now has authority to regulate nonfederal and non-Indian lands in federally approved oil and gas units, regardless of the language of the unit agreements." This decision came before the cases cited above which require a stronger showing when an agency breaks from long tradition, and its reasoning was based on an almost boundless deference to the agency that is at odds with current law.

§ 3103.3-1 ("Royalty on production will be payable only on the mineral interest owned by the United States.")

**2. BLM has no statutory authority to issue air quality regulations.**

When Congress enacted the CAA, it established a comprehensive system for regulating air quality. *Bell v. Cheswick Generating Station*, 734 F.3d 188, 190 (3d Cir. 2013). "Congress enacted the law in response to evidence of the increasing amount of air pollution," but chose to design an air pollution control regime that preserved for the states their central role in regulating their own air quality. *Id*. 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. By promulgating the Final Rule under irrelevant general statutes that deal with federal lands and mineral leasing, rather than the CAA, the BLM attempts to free itself from the detailed legal requirements imposed by Congress and seizes powers and responsibilities that were formally delegated to or reserved for the states.

Because Congress so clearly delegated the authority to administer the CAA and regulate air quality and emissions to the EPA and the states, BLM is not entitled to *Chevron* deference when it steps into that area. "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). Although parts of the Final Rule, such as the provisions governing royalties, do fall within the BLM's delegated powers, others, such as the "equipment requirements for pneumatic controllers" 43 C.F.R. § 3179.201, or whether "the

storage vessel has the potential for VOC emissions equal to or greater than 6 tpy based on the maximum average daily throughput for a 30-day period of production," 43 C.F.R. § 3179.203, were unambiguously delegated elsewhere—*not* to the BLM.

The CAA made the States and *EPA* "partners in the struggle against air pollution." *Gen. Motors Corp. v. United States*, 496 U.S. 530, 532 (1990). As to stationary sources of emissions, the CAA contains several programs under which EPA sets standards, such as for the concentration of certain pollutants in ambient air, which are then implemented and administered by the states through SIPs prepared by the states. *See generally* 42 U.S.C. § 7410. In this "experiment in cooperative federalism," *Michigan v. E.P.A.*, 268 F.3d 1075, 1083 (D.C. Cir. 2001), the CAA establishes that improvement of the nation's air quality will be pursued "through state and federal regulation," *BCCA Appeal Group v. E.P.A.*, 355 F.3d 817, 821-22 (5th Cir. 2003); *see also* 42 U.S.C. § 7401(a)(3) ("air pollution prevention . . . and air pollution control at its source *is the primary responsibility of States and local governments*" (emphasis added); and 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. . . .").

The Final Rule, however, ignores North Dakota's extensive air quality regulations and instead applies BLM standards that were developed without considering the factors required by the CAA and without the formal participation of the states, except as ordinary commenting parties, in the rulemaking process. And 75.2% of the vented and flared gas the BLM seeks to regulate came from mixed ownership wells, not from the federal and tribal minerals that it is the BLM's responsibility to manage. 81 Fed. Reg. at 83,015.

The Final Rule upends the scheme developed by Congress for air quality regulation and will be a substantial impediment to North Dakota regulatory authority. Glatt Decl. ¶¶ 15, 18.

**3. The Final Rule is arbitrary and capricious because its costs outweigh the market value of the royalties the federal government would obtain.**

The BLM states that it seeks to achieve two basic purposes that it seeks to achieve through the Final Rule. First, it will "enhance our nation's nation gas supplies, boost royalty receipts for American taxpayers, tribes, and States," and second, it will "reduce environmental damage from venting, flaring, and leaks of gas." 81 Fed. Reg. at 83,009. The regulation of emissions, and emissions from private mineral interests on private land, fall outside the BLM's jurisdiction, and taken as a regulation of waste, the Final Rule is arbitrary and capricious because the market value of the wasted natural gas is extremely low relative to the cost of the Final Rule.

Even taking the BLM's numbers at face value, the costs of compliance will vastly outweigh the additional government revenue that will be collected. *Id*. at 83,013–14. The BLM estimates that it will receive additional royalties of $3-$10 million per year from the Final Rule, *id.* at 83,014, and the costs imposed by the Final Rule will be $110-$279 million per year, *id*. at 83,013. Thus, even using the BLM's numbers, the cost of compliance is at least ten times the potential government revenue. The actual market value of the natural gas that the Final Rule would preserve, and the additional royalties that will be collected by the government, is simply not very high, even under the BLM's exaggerated estimates, and the costs of compliance in terms of capital expenditure and time wasted complying with bureaucratic demands is very large. The total production in fiscal year 2015 on federal oil and tribal oil wells was valued at $20.9 billion, with $2.3 billion in royalties, *Id*. at 83,009. The "waste" of federal resources that is BLM's jurisdictional hook to apply this rule is completely *de minimus*.

The BLM's royalty estimates, on their face, are not plausible. First, nowhere in the Federal Register, in pages and pages of estimates and cost benefit analysis, does the BLM state the assumptions it is using regarding the price of natural gas, or attempt to analyze how this rule

might play out under a range of market scenarios—a striking omission. Instead the notice footnotes to a technical appendix. *See id*. at 83,014. The technical appendix evaluates the values of natural gas prices at various discount rates, but not at different prices: instead it prefaces its discussion with a statement that "at a $4/Mcf price of natural gas, this volume has a sales value of . . . ."[3] In a different section of the report not referenced in the Federal Register, there is a discussion of projected natural gas prices: "Natural gas prices in 2015 have been among the lowest in recent years, ranging from $2.56/Mcf to $3.32/Mcf, though not as low as prices in the first half of 2012. At the time we prepared this analysis, the natural gas price was below $2.00/Mcf. The EIA's long-term price projections are $3.79/Mcf in 2015, $3.80/Mcf in 2016, $3.91/Mcf in 2017, $5.02/Mcf in 2020, $5.61/Mcf in 2025, and $5.85/Mcf in 2030, with an annual growth rate from 2013 to 2040 of 2.8%." *Id*. at 42. It is not entirely clear which numbers BLM is using, but it is clear that the BLM is relying for its purported royalty benefits on a belief that the natural gas prices will double in the near further—an assumption that the BLM does not go out of its way to highlight or discuss. The uncertainty about future prices should also be taken into account on the cost side, because improving gas capture depends in large part in midstream operators, not subject to the Final Rule, expanding their own pipeline infrastructure, which is much more likely to occur if prices recover, and the cost and availability of capital to operators for new equipment is highly dependent on the current price of oil and gas.

A second reason the royalty and production benefits are likely exaggerated is that maximizing royalties is the one area where the interest of private operators and the interests of

[3] Regulatory Impact Analysis for: Revisions to 43 C.F.R. § 3100 (Onshore Oil and Gas Leasing) and 43 CFR 3600 (Onshore Oil and Gas Operations) Additions of 43 C.F.R. 3178 (Royalty-Free Use of Lease Production) and 43 C.F.R. 3179 (Waste Prevention and Resource Conservation) at 3, available at https://www.blm.gov/style/medialib/blm/wo/Communications_Directorate/public_affairs/news_release_attachments.Par.11216.File.dat/VF%20Regulatory%20Impact%20Analysis.pdf.

the federal government are aligned. If there are convenient and cost-effective mechanisms for capturing marketable natural gas that would otherwise be lost, then operators have every reason to adopt them.

To the extent that this Final Rule is based on the BLM's responsibility for preserving the public's natural gas resources, it is arbitrary and capricious because it imposes huge costs to save only a very small amount of revenue and because many of the provisions of the Final Rule do not accomplish this purpose at all. If preserving royalty revenue were the BLM's aim, a more narrowly tailored regulation would better serve that purpose without the attendant problems and costs.

Virtually all of the purported benefits of the Final Rule are found in the emission reductions, which the BLM has no authority to impose, and especially no authority to impose on non-federal interests. The BLM estimates that the total benefits from the Final Rule are $209–403 million per year. *Id*. at 83,014. Out of this, $189–247 million is attributable to the estimated social cost of reducing methane. *Id*. But the BLM has no authority to regulate methane emissions.

## CONCLUSION

For the reasons set forth herein, the State of North Dakota respectfully moves the Court to grant its Motion for Preliminary Injunction.

Respectfully submitted this 5th day of December, 2016.

/s/ *Paul M. Seby*
Paul M. Seby (admitted *pro hac vice*)
Special Assistant Attorney General
Greenberg Traurig, LLP
1200 17th Street, Suite 2400
Denver, CO 80202
Phone: (303) 572-6584
Fax: (303) 572-6540

sebyp@gtlaw.com

Wayne Stenehjem (admitted *pro hac vice*)
Attorney General
David Garner (admitted *pro hac vice*)
Hope Hogan (admitted *pro hac vice*)
Assistant Attorneys General
500 N. 9th Street Bismarck, ND 58501
Phone: (701) 328-2925
ndag@nd.gov

Robert J. Walker (Wyo. Bar No. 7-4715)
Hickey & Evans, LLP
1800 Carey Street, Suite 700
Cheyenne, WY 82003
Phone: (307) 634-1525
Fax: (307) 638-7335
rwalker@hickeyevans.com

**ATTORNEYS FOR PETITIONER-INTERVENOR STATE OF NORTH DAKOTA**

Exh. A

STATE OF NORTH DAKOTA
OFFICE OF ATTORNEY GENERAL
STATE CAPITOL
600 E BOULEVARD AVE DEPT 125
BISMARCK, ND 58505-0040
(701) 328-2210 FAX (701) 328-2226
www.ag.nd.gov

Wayne Stenehjem
ATTORNEY GENERAL

December 2, 2016

Sally Jewell
Secretary of the Interior
U.S. Department of the Interior
1849 C Street NW
Washington, DC 20240

Neil Kornze
Director
Bureau of Land Management
1849 C Street NW Room 5665
Washington, DC 20240

Dear Secretary Jewell and Director Kornze:

On November 15, 2016, you issued a final regulation entitled "Waste Prevention, Production Subject to Royalties, and Resources Conservation" on behalf of the U.S. Department of Interior ("DOI") and the Bureau of Land Management ("BLM"). 81 Fed. Reg. 83,008 (Nov. 18, 2016) ("Final Rule"). The Final Rule, which is set to go into effect on January 17, 2017, imposes new and sweeping federal requirements at oil and gas production facilities that unlawfully displace state authority. For the reasons outlined below, we write to respectfully ask that you immediately extend the effective date of the Final Rule by at least 9 months to allow for appropriate judicial review of the Final Rule.

As you know, the Final Rule was immediately challenged in the U.S. District Court for the District of Wyoming by the States of Wyoming and Montana, *State of Wyoming, et al. v. U.S. Department of Interior, et al.*, Case No. 16-cv-00285-SWS (filed Nov. 18, 2016). On November 23, 2016, the State of North Dakota moved to intervene, and North Dakota's intervention was granted during a status conference on November 30, 2016. For purposes of this letter, the three states will be referred to as "State Petitioners."

Although the State Petitioners promptly filed their actions challenging the Final Rule, it will necessarily take some time for the District Court to resolve the merits of the State Petitioners' case. The DOI and BLM must first lodge and serve the administrative record. The parties then will have some time from the lodging of the administrative record to complete briefing on the merits. Once briefing has been completed, the District Court will likely schedule a hearing. Even under a fairly aggressive schedule, the pending challenges will likely not be fully briefed and argued for at least 9 months.

Under the January 17, 2017, implementation schedule set by the DOI and BLM, the Final Rule will become effective well before the District Court has the opportunity to resolve the merits of the pending challenges to the Final Rule. Absent the Court

granting preliminary injunctive relief—which has been requested by Wyoming and Montana, and will be separately requested by North Dakota on or before December 5, 2016—this schedule will cause immediate and irreparable harm to the State Petitioners.

The Final Rule will impair the State Petitioners' sovereign interests by impeding or replacing their right to primacy of administration and enforcement of their lawful oil and gas and air quality regulatory programs. The Final Rule explicitly asserts BLM regulatory authority over "State or private tracts in a federally approved unit or communitization agreement." 81 Fed. Reg. at 83,079. In doing so, the Final Rule suddenly places vast stretches of state and private minerals under federal regulatory authority, thereby unlawfully displacing traditional state regulatory authority over non-federal lands and minerals.

The Final Rule adversely impacts the State Petitioners' sovereign abilities to administer their effective air quality control programs. The State Petitioners' statutory authority cannot be revoked (or diminished) by the Final Rule because the BLM is a federal agency with no statutory or other legal authority to do so. The regulation of air quality is solely within the purview of U.S. Environmental Protection Agency and the states under authority granted by Congress in the federal Clean Air Act, 42 U.S.C. §§ 7401–7671q.

The Final Rule also contains many provisions that are duplicative of the State Petitioners' various oil and gas regulations. This duplication will require operators to obtain permits from both the states and the BLM to operate oil and gas production facilities, which will introduce additional delay, costs, and uncertainty into the process. The Final Rule's provision allowing an operator to obtain a variance when state regulations are equal or more protective than BLM's does not mitigate these harms, and there is no assurance that any such variances will be granted, or on what terms. The end result runs roughshod over the State Petitioners' successful waste prevention programs, which were developed carefully and over the course of decades based on each state's own circumstances and expertise.

Given the gravity of constitutional and statutory issues implicated by the State Petitioners' claims—and to avoid these hardships—the U.S. District Court should be granted an opportunity to resolve the pending challenges to the Final Rule. We ask that you immediately act to extend the effective date of the Final Rule by at least 9 months. A federal regulation of this scope and significance demands a thorough judicial review before imposing costly and disruptive burdens on the State Petitioners and their citizens.

Please contact Liz Brocker in the North Dakota Attorney General's Office at (701) 328-2213 if you have any questions or wish to arrange further discussions with respect to this letter.

Sincerely,

Wayne Stenehjem
North Dakota Attorney General

Peter K. Michael
Wyoming Attorney General

Tim Fox
Montana Attorney General

Exh. B

**UNITED STATES DISTRICT COURT FOR THE DISTRICT OF WYOMING**

| | | |
|---|---|---|
| STATE OF WYOMING,<br>STATE OF MONTANA, and<br>STATE OF NORTH DAKOTA,<br><br>Petitioners,<br><br>v.<br><br>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,<br><br>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 and property, public and private, 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. One-sixth of the oil production in North Dakota is from Indian lands and another five percent 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. Thirty-two percent of the Bakken spacing units contain federal minerals and will have at least one well impacted by the Final Rule.

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 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 (Exhibit 2) to illustrate, the Final Rule imposes federal requirements and permitting timelines on all owners in 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, all the oil and gas operators within the unit must, as a practical matter, conduct operations in accordance with the rules and guidelines pertaining to the development of federal minerals. 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 private, state, federal, or trust minerals committed to a federal CA 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

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

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.

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 waste minimization plans on more than 900 wells already permitted by the NDIC and on an additional 100 to 250 wells per month over the next 10 to 12 years.

29. Based on my understanding of BLM's current drilling permit approval times, and the fact that more permits will have to be re-processed than BLM approved in fiscal year 2015, 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. This delay will result in approximately one-half the rate of development and, in turn, result in decreased royalties and taxes in the amount of $150 million in the current fiscal year (2017), which runs from July 1, 2016 through June 30, 2017, anticipated loss of royalties and taxes to North Dakota of $550 million over the next biennium, and $18 billion over the next 30 years. This estimate takes into account North Dakota's oil extraction tax.

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 December 5th, 2016.

Lynn D. Helms

The foregoing Declaration of Lynn D. Helms was subscribed and sworn before me by Lynn D. Helms on December 5th, 2016.

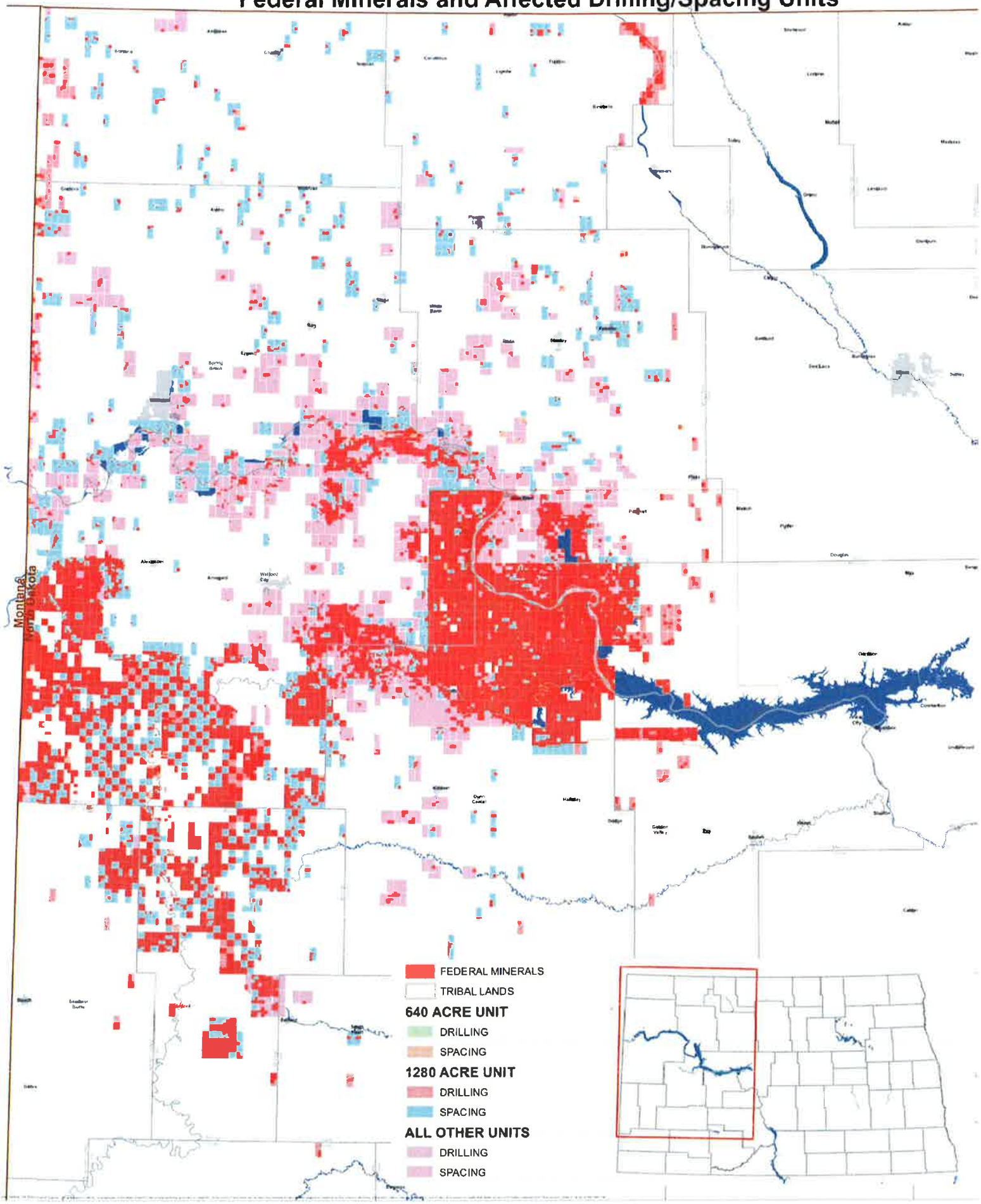
Witness my hand and official seal.

DERRICK BECKER
Notary Public
State of North Dakota
My Commission Expires Sept. 20, 2019

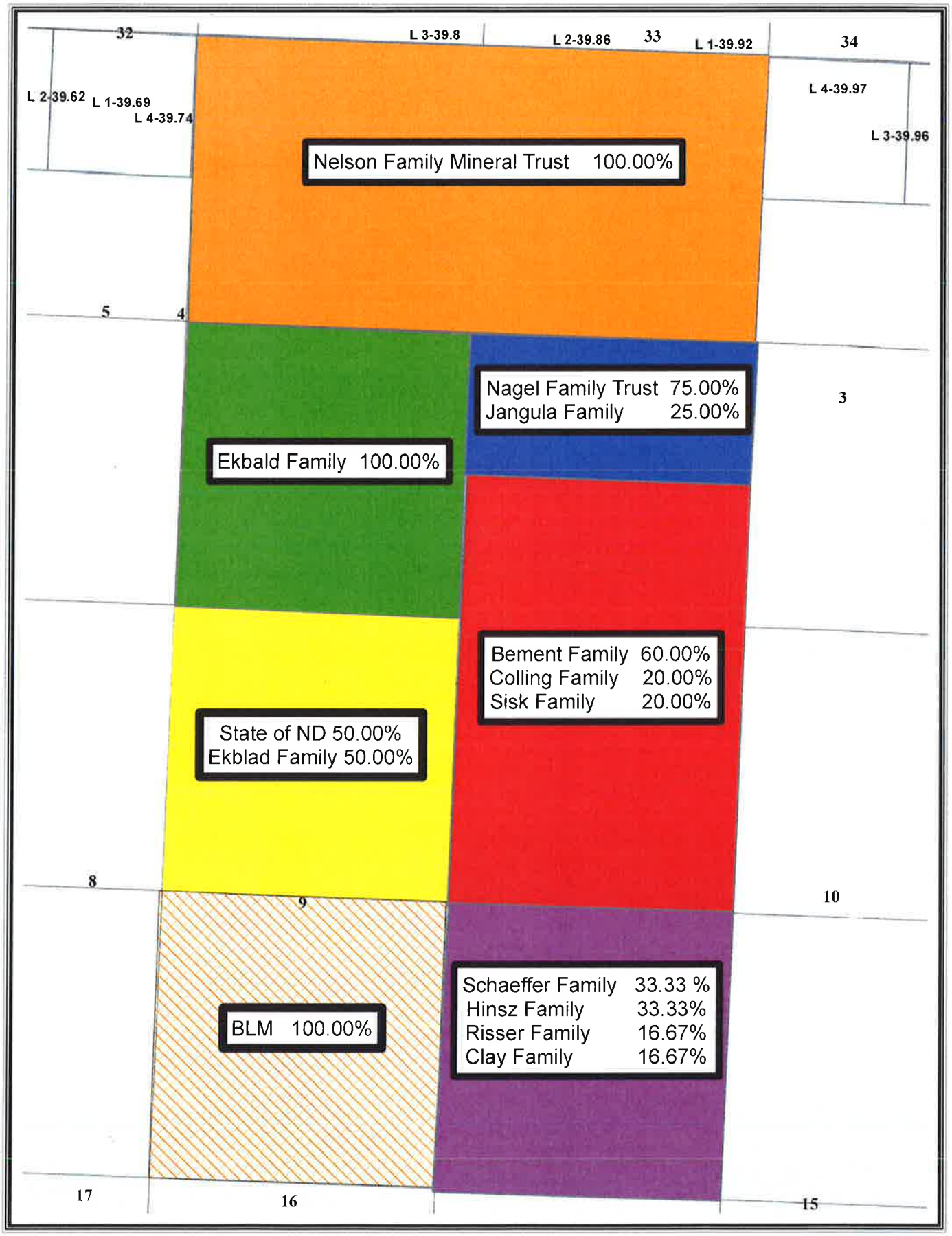
Notary Public

My commission expires: Sept. 20, 2019

# Northwest North Dakota
# Federal Minerals and Affected Drilling/Spacing Units



# T155N, R100W Sections 4 and 9



Exh. C

**UNITED STATES DISTRICT COURT FOR THE DISTRICT OF WYOMING**

| | | |
|---|---|---|
| STATE OF WYOMING,<br>STATE OF MONTANA, and<br>STATE OF NORTH DAKOTA,<br><br>Petitioners,<br><br>v.<br><br>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,<br><br>Respondents. | ) | Case No. 16-cv-00285-SWS |

**DECLARATION OF L. DAVID GLATT IN SUPPORT OF STATE OF NORTH DAKOTA'S MOTION FOR PRELIMINARY INJUNCTION**

I, L. David Glatt, state and declare as follows:

1. My name is L. David Glatt. 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 Chief of the Environmental Health Section ("EHS") of the North Dakota Department of Health ("NDDH" or "Department"). I have been employed by the NDDH since 1983, and I have continuously served as the Chief of the EHS since 2004. I have a bachelor's degree in biology and a master's degree in environmental engineering from North Dakota State University.

3. As Chief of the EHS of the NDDH, I oversee and implement the EHS's functions and responsibilities, which include coordinating communications with the EPA regarding State programs and related environmental issues, monitoring and enforcing compliance with state and federal environmental laws and regulations; and carrying out environmental laboratory analyses.

4. 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. 83008 (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, *see North Dakota, et al. v. EPA*, No. 16-1242 (D.C. Cir. 2016), which, as the BLM acknowledges, is intimately linked to the Final Rule. My conclusion is that the Final Rule harms the State of North Dakota by interfering with and displacing the Department's regulation of air emissions, as delegated to it by Congress and the EPA.

**Background on the NDDH and its Regulation of Air Quality**

5. The federal Clean Air Act ("CAA") declares that "[a]ir pollution control at its source is the primary responsibility of State and local governments." 42 U.S.C. § 7401(a)(3).

6. In accordance with that important goal, the State of North Dakota, through the NDDH, has exercised air quality primacy since 1970, when it first enacted its comprehensive air quality program, *see* N.D. Cent. Code §§ 23-25-1 *et seq.*, and North Dakota implemented its first EPA-approved State Implementation Plan in 1972. Under its rightfully delegated authority, the NDDH administers, implements, and enforces the federal CAA, 42 U.S.C. §§ 7401 *et seq.*, as amended, in the State of North Dakota.

7. The NDDH implements and enforces the State's various environmental regulatory programs, including federal CAA programs to implement the New Source Performance Standards ("NSPS"). *See e.g.*, N.D. Cent. Code § 23-25-03. The Department also oversees State permitting programs for stationary sources under Titles I and V of the CAA. *See Id.* § 23-25-04.1. Additionally, the Department develops and administers state implementation plans ("SIPs") for National Ambient Air Quality Standards ("NAAQS"), *see id.* § 23-25-03.6, and is the technical expert agency that makes all best available control technology ("BACT") determinations under the CAA's New Source Review provisions. *See id.* § 23-25-01.1; *see also, United States v. Minnkota Power Coop., Inc.*, 831 F. Supp. 2d 1109, 1127 (D.N.D. 2011) (upholding a BACT determination by the Department for lignite-fueled EGUs for nitrogen-oxide emissions based upon detailed consideration of the unique characteristics of North Dakota lignite coal).

8. North Dakota has for decades been aggressive in achieving the first stated purpose of the CAA: "to protect and enhance the quality of the Nation's air resources so as to protect the public health and welfare and the productive capacity of its population." 42 U.S.C. § 7410(b)(1).

**The NDDH's Regulation of Venting and Flaring**

9. Venting and flaring emissions at oil and gas production facilities are subject to regulation under the North Dakota's air pollution control laws and regulations. *See* N.D. Cent. Code §§ 23-25 *et seq.*; N.D. Admin Code 33-15 *et seq.*

10. Venting and flaring activities at oil and gas production facilities create emissions of Volatile Organic Compounds ("VOCs"), carbon monoxide, and nitrogen dioxide, all of which are regulated pollutants under North Dakota's air quality regulations. Since 1970, the NDDH has implemented North Dakota's Air Pollution Control laws and regulations, which includes

regulation of stationary sources that directly emit—or have the potential to emit—100 tons per year or more of any air contaminant subject to regulation. The NDDH's permitting requirements, which apply to all new and modified oil and gas production facilities, are found in N.D. Admin Code § 33-15-14.

11. The NDDH is the technical expert agency that makes all best available control technology ("BACT") determinations under the CAA's New Source Review provisions regarding air emissions at oil and gas production facilities. *See* N.D. Cent. Code § 23-25-01.1; *see also, Minnkota Power*, 831 F. Supp. 2d at 1127.

12. The NDDH has evaluated the Final Rule and finds that the Final Rule improperly regulates air emissions and grants the BLM regulatory authority to establish air quality control methods that conflict with those already established by EPA and the State of North Dakota under the Clean Air Act. In doing so, the Final Rule interferes with the Department's air quality regulatory program, displaces North Dakota's proper authority over sources of air emissions within its borders, and conflicts with North Dakota's authority to develop and administer its SIPs.

**The Final Rule Harms the State of North Dakota and its Comprehensive Air Program**

13. North Dakota's air pollution control laws and regulations establish conditions of operation to ensure compliance with air quality rules, regulations, and emission requirements. After an air permit is issued to a source, the operator of that source is held to the state- and federally-enforceable conditions of operation established in the permit. The NDDH's EPA-approved New Source Review program has always considered EPA and North Dakota air quality requirements when reviewing permit applications, drafting proposed permit conditions, and

ultimately issuing permits to sources. Prior to the Final Rule, the NDDH did not consider *any* BLM air quality regulations because the BLM does not have authority to regulate air quality.

14. By imposing requirements that are additional to, duplicative of, and conflicting with North Dakota's air quality program, the Final Rule creates confusion—both at the State level as well as among the sources—as to who the proper regulatory authority is. This disrupts the entire North Dakota air quality program and interferes with North Dakota's "primary responsibility" to control air pollution, not just at oil and gas production facilities, but at all sources it regulates under its delegated authority. *See* 42 U.S.C. § 7401(a)(3).

15. Moreover, by unlawfully imposing a third-party regulator of air emissions, the Final Rule interferes with the practical, carefully-developed partnership between North Dakota and the EPA, which was established through the CAA's framework of cooperative federalism, and has flourished over the last five decades.

16. The NDDH now must consider BLM air-quality requirements when reviewing permit applications, drafting proposed permit conditions, and ultimately issuing permits to sources, particularly if it wishes to be eligible for a variance so that State laws apply. This will require an additional expenditure of time and resources as part of the NDDH's BACT determinations of whether oil and gas production facilities are regulated, in whole or part, under the Final Rule. As a result, the Final Rule effectively eliminates North Dakota's ability to exercise its prowess and authority to consider crucial air quality factors in the BACT process, such as control technologies and costs. These are considerations that the NDDH has the proper expertise and authority to take into account. The Final Rule interferes with and diminishes that authority.

17. Additionally, the Final Rule interferes with the NDDH's development of permit conditions. For example, the NDDH will now be required to evaluate the Final Rule's record-keeping and reporting requirements when reviewing permit applications, drafting proposed permit conditions, and ultimately issuing permits to sources. This will require an additional expenditure of time and resources as part of the NDDH's permitting process. As a result, the Final Rule effectively eliminates North Dakota's ability to exercise its prowess and authority to consider crucial air quality factors in the permitting process. These are considerations that the NDDH has the proper expertise and authority to take into account. The Final Rule interferes with and diminishes that authority. In addition, from a practical standpoint, the Final Rule will harm the NDDH's ability to timely review, consider, and issue air quality permits for oil and gas production facilities located under federal leases or that involve federal minerals.

18. The Final Rule is unnecessarily additive to the NDDH's air-quality regulations. The NDDH must now expend time and resources to master and administer another, duplicative set of regulations on top of the standards it already administers. The NDDH will have to allocate resources to work with a third-party agency, after investing decades in cultivating a partnership with EPA. This will harm the NDDH's efficient administration of its permitting, source status characterization, and the enforcement decisions and prosecutorial discretion over which it has proper authority and expertise.

19. The Final Rule applies to "State or private tracts in a federally approved unit or communitization agreement." 81 Fed. Reg. 83,079. This severely prejudices the State of North Dakota, where it is typical for oil and gas spacing units to consist of a combination of federal, state, and private mineral ownership. Because of North Dakota's unusual land ownership and split estate 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 therein. The Final Rule interferes with the Department's regulation of air emissions from these traditionally State-regulated sources. In doing so, the BLM is imposing air quality requirements on sources otherwise regulated by the State, fundamentally diminishing the State's ability to do so.

20. By regulating air emissions from oil and gas production facilities, the BLM is improperly becoming a regulator of air emissions—displacing a traditionally and statutory role held by the States—and exercising authority over that which it has no technical or legal expertise. In North Dakota, the NDDH is charged with implementing and regulating State and federal air quality programs, as stated above, while the Public Service Commission is charged with regulating electricity. Moreover, the North Dakota Industrial Commission is statutorily charged with researching, development, and advancing oil and gas production in the State of North Dakota. In promulgating a Final Rule that restricts air pollutant emissions from oil and gas facilities, BLM is not only going beyond its scope as a federal regulatory agency—it is improperly usurping the Department's air regulatory, permitting, and enforcement functions.

21. The BLM's attempt to regulate air emissions from the oil and gas industry circumvents the comprehensive and well-established regulatory regime of the EPA and the States. The EPA has been tasked with developing NAAQS for identified pollutants. 42 U.S.C. § 7409. Once NAAQS are established, States identify areas where NAAQS are in compliance and where they are not. States then develop SIPs to ensure areas continue to attain the NAAQS, or to provide for appropriate steps to come into NAAQS compliance. 42 U.S.C. § 7409. States are left with the discretion and ability to decide who they will regulate and what regulations they will impose, and States are left to consider a wide variety of factors when drafting SIPs, including

impacts on the industries most vital to their economies, as well as impacts on the local environment. As a result, States are in the best position to know what regulations will work best for their citizens, industries, environments, and economies. The Final Rule is an end-run on this fundamental process, and it leaves North Dakota with little to say in regulating air emissions from an industry—the oil and gas industry—that it knows best.

Executed on December 5, 2016.

L. David Glatt

The foregoing Declaration of L. David Glatt was subscribed and sworn before me by L. David Glatt on December 5, 2016.

SHERRI A. JAHRAUS
Notary Public
State of North Dakota
My Commission Expires Oct. 18, 2020

Witness my hand and official seal.

Sherri A. Jahraus
Notary Public

My commission expires: 10-18-2020

**UNITED STATES DISTRICT COURT FOR THE DISTRICT OF WYOMING**

| | | |
|---|---|---|
| STATE OF WYOMING,<br>STATE OF MONTANA, and<br>STATE OF NORTH DAKOTA,<br><br>Petitioners,<br><br>v.<br><br>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,<br><br>Respondents. | ) | Case No. 16-cv-00285-SWS |

**[PROPOSED] ORDER GRANTING NORTH DAKOTA'S MOTION FOR PRELIMINARY INJUNCTION**

This matter comes before the Court on the State of North Dakota's Motion for Preliminary Injunction, filed on December 5, 2016, in the above-captioned case. After considering the Motion and all supporting and opposing documents, the Court HEREBY GRANTS the State of North Dakota's Motion and ORDERS that the final rule of the Department of the Interior's Bureau of Land Management entitled "Waste Prevention, Production Subject to Royalties, and Resources Conservation," 81 Fed. Reg. 83,008 (Nov. 18, 2016), be enjoined from taking effect during the pendency of this appeal.

Dated this _____ day of _____ , 2017.

_____
The Honorable Scott W. Skavdahl
United States District Court Judge