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UNITED STATES DISTRICT COURT FOR THE DISTRICT OF WYOMING

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

MEMORANDUM IN SUPPORT OF STATE OF NORTH DAKOTA'S UNOPPOSED MOTION TO INTERVENE AS PETITIONER

The State of North Dakota ("North Dakota") respectfully submits this Memorandum in Support of its Motion to Intervene pursuant to Federal Rule of Civil Procedure 24 and Local Rule 83.6(e)[1] as a Petitioner in order to protect its several sovereign interests in administering the laws and regulations that define and implement North Dakota's authority for regulating oil and gas production and air quality.

INTRODUCTION

On November 18, 2016, the Department of the Interior ("DOI"), Bureau of Land Management ("BLM") published in the Federal Register its final rule entitled "Waste Prevention, Production Subject to Royalties, and Resources Conservation: Final Rule," 81 Fed. Reg. 83,008 (Nov. 18, 2016) ("Final Rule"). On November 18, 2016, the States of Wyoming and Montana petitioned this Court for judicial review of the Final Rule. *See* Petition for Review of Final Agency Action. ECF No. 1.

North Dakota seeks intervention in this matter because 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. 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. Virtually all federal management of North Dakota's oil and gas producing region consists of some form of split estate, and 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. The Final Rule will significantly and adversely impact

[1] Pursuant to Local Rule 83.6(c), this brief follows the formatting and length requirements in Fed. R. App. P. 32(a)(7).

North Dakota, because the Final Rule displaces North Dakota's sovereign authority, and it improperly asserts BLM regulatory authority over vast stretches of State- and privately-owned minerals—solely because they are interspersed with a small number of federal tracts.

As set forth in greater detail below, disposition of this litigation in Respondents' favor would frustrate and impede North Dakota's several sovereign interests in administering its distinct oil and gas program, its air quality programs, and the orderly development of North Dakota's natural resources. Implementation of the Final Rule harms North Dakota's several interests in administering its laws and regulations for waste prevention by displacing North Dakota's laws and regulations and substituting them with a federal program that is inconsistent with (by being in parts duplicative, less stringent, and more stringent than) the State's comprehensive regulatory program. Furthermore, neither Wyoming nor Montana, as distinct sovereign entities with separate laws and regulations, can adequately represent North Dakota's distinct sovereign authority and interests in protecting North Dakota's natural resources, its air quality, its economy, and the well-being of its citizens. North Dakota satisfies the requirements for intervention under Rule 24(a).[2]

ARGUMENT

I. North Dakota Is Entitled to Intervene As A Matter of Right.

Federal Rule of Civil Procedure 24(a)(2) states in pertinent part:

> Upon timely application anyone shall be permitted to intervene in

[2] In a similar case involving judicial review of a BLM Final Rule regulating hydraulic fracturing on federal and Indian lands, this Court granted North Dakota's timely Motion to Intervene where North Dakota demonstrated that it had legally-cognizable interests that would be impaired by disposition of the action and its interests were not adequately represented by existing parties. *See* Order, *Wyoming v. Dep't of Interior, et al.*, No. 2:15-cv-00043 (D. Wyo. April 22, 2015). For the same reasons, North Dakota respectfully requests that the Court grant its Motion to Intervene as a Petitioner as of right pursuant to Fed. R. Civ. P. 24(a)(2), or alternatively to intervene permissively under Fed. R. Civ. P. 24(b)(1)(B).

> an action … when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Thus, a party seeking intervention of right must demonstrate that (1) its application is timely; (2) it has a cognizable interest in the property or transaction; (3) its interest would be impaired by disposition of the action; and (4) its interests are not adequately represented by existing parties. These Rule 24(a)(2) factors "are not rigid, technical requirements" under the Tenth Circuit's "somewhat liberal line in allowing intervention." *Id.* (citing *WildEarth Guardians v. U.S. Forest Serv.*, 573 F.3d 992, 995 (10th Cir. 2009) and *San Juan County v. United States*, 503 F.3d 1163, 1195 (10th Cir. 2007) (*en banc*)). North Dakota satisfies each of these four requirements.

A. North Dakota's Application for Intervention Is Timely.

Fed. R. Civ. P. 24(a) requires that a motion to intervene be timely filed. A court will determine a motion's timeliness "in light of all the circumstances, including the length of time since the applicant knew of his interest in the case, prejudice to the existing parties, prejudice to the applicant, and the existence of any unusual circumstances." *Utah Ass'n of Counties v. Clinton*, 255 F.3d 1246, 1250 (10th Cir. 2001) (citation omitted).

North Dakota submits its Motion to Intervene within one week after the publication of the Final Rule in the Federal Register and the filing of this case. By any measure, this Motion is timely. Respondents have not yet responded to the Petition and the Court has not yet issued any substantive orders or schedules. Granting North Dakota's motion will not cause any delays or prejudice any party or the Court.

Petitioners do not object to North Dakota's participation in this case, and counsel for

Respondents has not yet entered an appearance. Thus, North Dakota's motion satisfies the timeliness requirement under Rule 24(a)(2).

B. North Dakota Has Significant Legally-Cognizable Interests That Are Directly Affected By This Litigation.

North Dakota clearly has a cognizable interest in the lands, natural resources and air quality within its state borders, as well as its regulatory programs involving the same or similar subject matter as the Final Rule, which are adversely impacted by the Final Rule. North Dakota also participated in the BLM rulemaking by submitting comments on the proposed rule.

As such, North Dakota has "an interest relating to the property or transaction that is the subject of the action[.]" Fed. R. Civ. P. 24(a)(2). This interest element serves as "a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process." *WildEarth Guardians*, 604 F.3d at 1198 (quoting *San Juan County*, 503 F.3d at 1195). As the Tenth Circuit has clarified, the relevant interest is not whether an intervenor-applicant has an interest in the litigation, but is instead "measured by whether the interest the intervenor claims is *related to the property that is the subject of the action*." *Utah Ass'n of Counties*, 255 F.3d at 1250 (citation omitted) (emphasis in original).

Further, when a federal agency's decision places a state's "sovereign interests and public policies at stake, [the Court] deem[s] the harm the State stands to suffer as irreparable if deprived of those interests without first having a full and fair opportunity to be heard on the merits." *Kansas v. United States*, 249 F.3d 1213, 1227 (10th Cir. 2001).

i. North Dakota's Sovereign Oil and Gas Regulatory Interests.

A significant portion of North Dakota consists 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. Helms Decl. ¶ 12. However, during the depression and draught years of the 1930s, numerous small tracts in North Dakota went through foreclosure. *Id.* 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. *Id.* 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. *Id.* This resulted in a very large number of small, federally-owned mineral estate tracts scattered throughout western North Dakota. *Id.* Those federal mineral estates impact more than 30% of the oil and gas spacing units for development in the State—all of which will be subject to the Final Rule. *Id.* While North Dakota contains 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, even within those areas, North Dakota owns all water rights, and federal mineral ownership is interspersed with a "checkerboard" of private and state mineral or surface ownership. *Id.* ¶ 13. Therefore, virtually all federal management of North Dakota's oil and gas producing region consists of some form of split estate. *Id.*

North Dakota is the second largest oil producing state in the country with an annual production of approximately 350 million barrels of oil. Helms Decl. ¶ 8.

Only one-sixth of the oil produced in North Dakota is from Indian lands and another five percent of oil production within the State is from federal lands. Helms Decl. ¶ 9. However, at least 2,832 of the spacing units within North Dakota have well bores that contain federal minerals, all of which are now subject to the Final Rule. Helms Decl. ¶ 10. Based on its unique land configuration, North Dakota has significant, legally-cognizable and protectable interests in

enforcing its laws and regulations over oil and gas facilities within its state boundaries.

The North Dakota Legislature declared it to be in the citizens of North Dakota'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 (emphasis added).

The North Dakota Industrial Commission ("NDIC") 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 Program; and all other operations for the production of oil and gas. Helms Decl. ¶ 5.

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, *inter alia*, "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 directly preempts 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.

North Dakota also has distinct and significant economic interests that are adversely impacted by the Final Rule. 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. *52nd Biennial Report for the Biennial Period of July 1, 2013 through June 30, 2015*, North Dakota Department of Revenue at 16.[3] The additional regulatory requirements imposed by the Final Rule threatens to substantially reduce the extent and amounts of royalties to be paid to mineral owners and the taxes paid to the State of North Dakota. Helms Decl. ¶ 23.

ii. North Dakota's Sovereign Air Quality Regulatory Interests.

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 Clean Air Act ("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; and best available control technology determinations under the CAA's New Source Review

[3] Available at https://www.nd.gov/tax/data/upfiles/media/52nd%20Biennial%20Report_with%20Bookmarks.pdf?20160602161614.

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). Glatt Decl. ¶ 3.

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, that 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. . . .").

C. Disposition of this Action May Impair or Impede North Dakota's Ability to Protect Its Sovereign Interests.

Disposing of this litigation in Respondents' favor "may as a practical matter impair or impede [North Dakota's] ability to protect [its] interests." Fed. R. Civ. P. 24(a)(2). An intervenor-applicant "must show only that the impairment of its substantial legal interest is *possible* if intervention is denied." *Utah Ass'n of Counties*, 255 F.3d at 1253 (citation omitted) (emphasis added). "This burden is minimal." *Id.*

The Final Rule will impair North Dakota's sovereign interests by impeding or replacing North Dakota's right to primacy of administration and enforcement of its oil and gas and air quality programs. The Final Rule will also diminish North Dakota's revenues from oil and gas

activities in the State.

First, the Final Rule adversely impacts North Dakota's sovereign ability to regulate the State's highly productive oil and gas industry. 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. Because virtually all federal management of North Dakota's oil and gas producing region consists of some form of split estate, the Final Rule suddenly places vast stretches of State and private minerals under federal regulatory authority. BLM is unlawfully seizing North Dakota's traditional regulatory authority over non-federal minerals in a communitization agreement. Therefore, the Final Rule unquestionably places North Dakota's "sovereign interests and public policies at stake," *Kansas*, 249 F.3d at 1227, as it deprives North Dakota of its sovereign authority over myriad State- and privately-owned minerals, placing them instead under the control of the federal government.

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. It is North Dakota citizens who have the strongest interest in waste prevention activities and air emission events associated with oil and gas extraction, because it is the people who live and work in North Dakota that rely on the effective and sustainable management of North Dakota's land and air on a daily basis. 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 diminishes the revenue the State receives from its robust oil and gas industry. Helms Decl. ¶¶ 14, 23.

The Final Rule contains many provisions that are duplicative of North Dakota's oil and gas regulations. Helms Decl. ¶ 19. As a result of this duplication, operators will be required to

obtain permits from both North Dakota and the BLM to operate an oil and gas production facility. Operators applying for drilling permits generally wait between nine months and 1.5 years before receiving a permit from BLM. Helms Decl. ¶ 22. As a result of this delay in receiving federal permits, operators will need to postpone production activity in North Dakota even if the operators possess the relevant state permits. Helms Decl. ¶ 18. This delay will frustrate and interfere with North Dakota's regulatory role and authority, while also hurting the State's economy and citizens.

The Final Rule's provision allowing an *operator* to obtain a variance if state regulations are deemed equal to or more protective than BLM's rules does not mitigate these harms. Helms Decl. ¶ 21. Rather, it imposes an immediate injury through the imposition of a new requirement by requiring an operator to request federal permission, despite the State's expertise in its laws and regulations and State primacy to enforce its programs. And there is no assurance that any such variances will be granted, or on what terms. The variance procedure simply does not eliminate the direct harm to the North Dakota's interests that the Final Rule imposes.

Second, the Final Rule adversely impacts North Dakota's sovereign ability to regulate the State's effective air pollution control program. 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 regulation. North Dakota has exercised its air-regulating primacy for several decades and by delegation from EPA has carried out EPA's direct implementation role of permitting and enforcement. Glatt Decl. ¶¶ 3, 4, 6. This statutory delegation cannot be revoked (or diminished) by the Final Rule promulgated by the BLM, a separate and distinct federal agency with no statutory or other legal authority to do so. *See* 5 U.S.C. § 706(2)(A), (C) (requiring a reviewing court to set aside agency action not in accordance

with law or in excess of statutory jurisdiction).

The regulation of air quality is solely within the purview of EPA and North Dakota as an EPA-authorized state under the authority granted by Congress in the CAA, 42 U.S.C. §§ 7401-7671q. *See, e.g.*, 42 U.S.C. § 7410 (providing for SIPs) for the attainment and maintenance of established NAAQS); *see also* EPA Order 1110.2 (Dec. 4, 1970) (making EPA's Air Pollution Control Office responsible for "the conduct of programs for the definition, prevention, and control of air pollution," and developing a "systematic Federal-state-local regulatory program for stationary source emissions supported by research and development activities, combined with Federal-state-local air quality monitoring, Federal grants to air pollution control agencies, technical assistance, and manpower training"). Thus, the Final Rule harms North Dakota by subjecting the State to duplicative, conflicting, and preempting air quality-related regulation implemented in excess of the BLM's statutory authority.

In sum, the Final Rule places North Dakota's "sovereign interests and public policies at stake," and "the harm [North Dakota] stands to suffer [i]s irreparable if deprived of those interests without first having a full and fair opportunity to be heard on the merits." *Kansas*, 249 F.3d at 1227. This goes beyond the "minimal" burden required for a party seeking intervention, *Utah Ass'n of Counties*, 255 F.3d at 1253, as it shows not just "that the impairment of [North Dakota's] substantial legal interest is *possible* if intervention is denied"—if intervention is denied, that impairment is inevitable.

D. North Dakota's Sovereign Interests Are Not Adequately Represented by Existing Parties.

A movant may satisfy Rule 24(a)(2)'s fourth requirement by demonstrating only that representation "may be inadequate." *Utah Ass'n of Counties*, 255 F.3d at 1254 (citing *Sanguine, Ltd. v. U.S. Dept. of Interior*, 736 F.2d 1416, 1419 (10th Cir. 1984)). "The possibility that the

interests of the applicant and the parties may diverge 'need not be great' in order to satisfy this minimal burden." *Utah Ass'n of Counties*, 255 F.3d at 1254 (citing *Natural Res. Defense Council v. U.S. Nuclear Reg. Comm'n*, 578 F.2d 1341, 1346 (10th Cir. 1978)). "Merely because parties share a general interest in the legality of a program or regulation does not mean that their particular interests coincide so that representation by the agency alone is justified." *Am. Horse Prot. Ass'n, Inc. v. Veneman v*, 200 F.R.D. 153, 159 (D.D.C. 2001).

While the States of Wyoming and Montana appear to share the State of North Dakota's overall concerns with the legal defects of the Final Rule, Wyoming and Montana do not and cannot represent North Dakota's sovereign interests in its separate and distinct state laws and regulatory structure, or its economic interests. The North Dakota oil and gas regulatory program and related regulatory schemes pertain exclusively to North Dakota and cannot be implemented by Wyoming, Montana, or any other sovereign state. North Dakota has specific and independent objectives of protecting its oil and gas and environmental regulations, and its ability to utilize those regulations to best provide for the safety and economic well-being of its citizens. North Dakota specifically developed its venting and flaring regulations in order to account for specific and unique geographic, geologic, and ecologic occurrences within its borders. Helms Decl. ¶ 20. Moreover, beyond their differing interests and objectives in this case, North Dakota and Petitioners may disagree about issues during the course of litigation, especially the nature of any potential remedy or the terms of any potential settlement of the case. *See NRDC v. Castle*, 561 F.2d 904, 906-08, 912-13 (D.C. Cir. 1997) (interest in implementation of settlement sufficient grounds for intervention as of right). North Dakota therefore satisfies the "minimal burden" of showing that Federal Respondents' representation "may be inadequate."

E. North Dakota Has Article III Standing to Participate in this Proceeding.

North Dakota has standing to participate in this action under Article III of the United States Constitution. *See Deutsche Bank National Trust Co. v. Federal Deposit Insurance Corp*., 717 F.3d 189, 194 (D.C. Cir. 2013). Indeed, for the reasons set forth above, the State satisfies the following constitutional standing requirements: (1) an injury-in-fact, "defined as harm that is concrete and actual or imminent, not conjectural or hypothetical;" (2) the injury is "fairly traceable to the governmental conduct alleged;" and (3) "it [is] likely that the requested relief will redress the alleged injury." *Massachusetts v. E.P.A*., 549 U.S. 497, 517 (2007). As a state, North Dakota is entitled to "special solicitude." *Massachusetts v. E.P.A*., 549 U.S. at 520. In *Massachusetts v. EPA*, the Supreme Court also recognized that a state government possesses an "'interest independent of and behind the titles of its citizens, in all the earth and air within its domain'" that gives them each a "special position and interest." *Id.* at 518-19 (quoting *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237 (1907)). The Supreme Court noted: "It is of considerable relevance that the party seeking review here is a sovereign State and not . . . a private individual." *Id.* at 518.

In an almost identical case, this Court granted North Dakota's Motion to Intervene where North Dakota demonstrated that it had legally-cognizable interests that would be impaired by disposition of the action, and that North Dakota's interests were not adequately represented by other state petitioners. *See* Order, *Wyoming v. Dep't of Interior, et al.*, No. 2:15-cv-00043 (D. Wyo. April 22, 2015). As a result, North Dakota was afforded standing to intervene to protect and advance its own sovereign interests. Here, for the same reasons, this Court should find that North Dakota has a right to intervene, because of North Dakota's interest in not incurring harm from additional and duplicative regulations, its interest in preserving tax revenue, its interest in

the economic welfare of its citizens, and its interest in preserving its authority to regulate oil and gas production and air quality in accordance with its sovereign authority and local priorities. North Dakota respectfully requests that the Court follow its own precedent and grant North Dakota's Motion to Intervene as a Petitioner as of right pursuant to Fed. R. Civ. P. 24(a)(2).

II. In the Alternative, the Court Should Grant North Dakota Permissive Intervention Pursuant to Federal Rule of Civil Procedure 24(b).

Alternatively, this Court should allow North Dakota to intervene permissively in this action under Federal Rule of Civil Procedure 24(b), which provides in relevant part:

> Upon timely application, anyone may be permitted to intervene in an action . . . when an applicant's claim or defense and the main action have a question of law or fact in common.

Fed. R. Civ. P. 24(b)(1)(B). North Dakota satisfies these requirements for permissive intervention.

As demonstrated herein, North Dakota's motion is timely because it is filed within one week of Petitioner's Petition for Review of Final Agency Action. North Dakota's claims also share questions of law and fact in common with the Petitioner's, as all the State's are challenging the legal validity of the Final Rule. North Dakota has been actively involved in regulating venting and flaring from oil and gas production facilities in its borders for decades. Glatt Decl. ¶ 4. The State will present factual and legal arguments related specifically to the Final Rule's adverse impacts on North Dakota, which will contribute to the full development of the issues presented and will demonstrate why North Dakota is entitled to the requested relief. The direct and threatened harm to North Dakota's interest provide a further basis to meet the minimal requirements of Rule 24(b). North Dakota therefore satisfies the requirements under Rule 24(b) and requests that this Court grant it permissive intervention in this matter.

CONCLUSION

The Court should grant North Dakota's Motion to Intervene as of right as a petitioner pursuant to Fed. R. Civ. P. 24(a)(2). In the alternative, The State should be granted permissive intervention pursuant to Fed. R. Civ. P. 24(b).

Respectfully submitted this 23rd day of November, 2016.

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ATTORNEYS FOR PROPOSED PETITIONER-INTERVENOR STATE OF NORTH DAKOTA

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF WYOMING

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

DECLARATION OF L. DAVID GLATT IN SUPPORT OF STATE OF NORTH DAKOTA'S UNOPPOSED MOTION TO INTERVENE AS PETITIONER

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 ("Department"). I have been employed by the Department since 1983, and I have continuously served as the Chief of the EHS since 2004.

3. The State of North Dakota, through the Department, implements and enforces the State's various environmental regulatory programs, including federal Clean Air Act ("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).

4. 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." CAA§ 110(b)(1).

5. 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 has 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). The Final Rule interferes with and displaces the Department's regulation of air emissions, as delegated to it by Congress and the EPA.

6. The Department 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, preempts 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.

7. The Final Rule applies to, *inter alia*, "State or private tracts in a federally approved unit or communitization agreement." 81 Fed. Reg. 83079. 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 displaces 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 preempts 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 foreclosing the State's ability to do so.

8. 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 Department 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.

9. Moreover, the BLM's attempt to regulate methane 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 November 22, 2016.

L. David Glatt

The foregoing Declaration of L. David Glatt was subscribed and sworn before me by L. David Glatt on November 22, 2016.

Witness my hand and official seal.

MARY GEBHARDT
Notary Public
State of North Dakota
My Commission Expires Mar 12, 2022

Mary Gebhardt
Notary Public

My commission expires: 3-12-22

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF WYOMING

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

DECLARATION OF LYNN D. HELMS IN SUPPORT OF STATE OF NORTH DAKOTA'S UNOPPOSED MOTION TO INTERVENE AS PETITIONER

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

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

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

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

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

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

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

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

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

7. In my current position, I am familiar with the Final Rule promulgated by the Bureau of Land Management ("BLM") entitled "Waste Prevention, Production Subject to Royalties, and Resources Conservation: Final Rule," 81 Fed. Reg. 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, 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 more than 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.

11. Thirty two percent of the Bakken spacing units contain federal minerals and will have at least one well impacted by the Final Rule. Over the next 20 years, increased density drilling to recover incremental oil and gas is planned by working interest owners of North Dakota oil and gas leases to increase the number of Bakken wells in each spacing unit from one well to between four and 32 wells.

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. 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 (cross-hatched 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.

13. 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.

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

15. 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. 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. 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. Using the attached hypothetical spacing unit to illustrate, the Final Rule imposes federal requirements and permitting timelines on all owners in the west half of the spacing unit. This prevents the NDIC from regulating the orderly development of the spacing unit for prevention of waste and from pooling and protecting the correlative rights of the various owners in the spacing units. Therefore, the Final Rule impedes on the NDIC's ability to perform its function.

16. 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

17. The Final Rule applies to, *inter alia*, "State or private tracts in a federally approved unit or communitization agreement." 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.

18. 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 preempts North Dakota laws and regulations. Such differences will cause delays in the orderly development of oil and gas resources in North Dakota.

19. 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 public hearing. *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.

20. Furthermore, the NDIC has implemented flaring reduction regulations, which utilize declining allowable flared percentages of 20% from April 1, 2016 to Dec. 31, 2017; 15% from Jan. 1, 2017 to Dec. 31, 2017; 12% from Jan. 1, 2018 to Jan. 1, 2020; and 7–9% thereafter. The final rule contains substantially different gas capture percentage requirements and time frames.

21. The Final Rule contains a provision allowing *operators* to seek a variance from the BLM from the requirements of the Final Rule provided that North Dakota demonstrates to the BLM's satisfaction that the North Dakota Program is at least as protective as the Final Rule. This is unduly burdensome on operators, and it diminishes and displaces North Dakota's regulatory role and traditional authority and expertise over its own oil and gas resources.

22. 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 nine months and 1.5 years before receiving a permit from BLM. By imposing additional permitting requirements, BLM will frustrate and interfere with North Dakota's regulatory role and authority.

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 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.

24. 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 January 17, 2018 and ratchets up over time, eventually imposing a "capture target" of 98% beginning January 1, 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.

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

Executed on November 23rd, 2016.

Lynn D. Helms

The foregoing Declaration of Lynn D. Helms was subscribed and sworn before me by Lynn D. Helms on November 23rd, 2016.

Witness my hand and official seal.

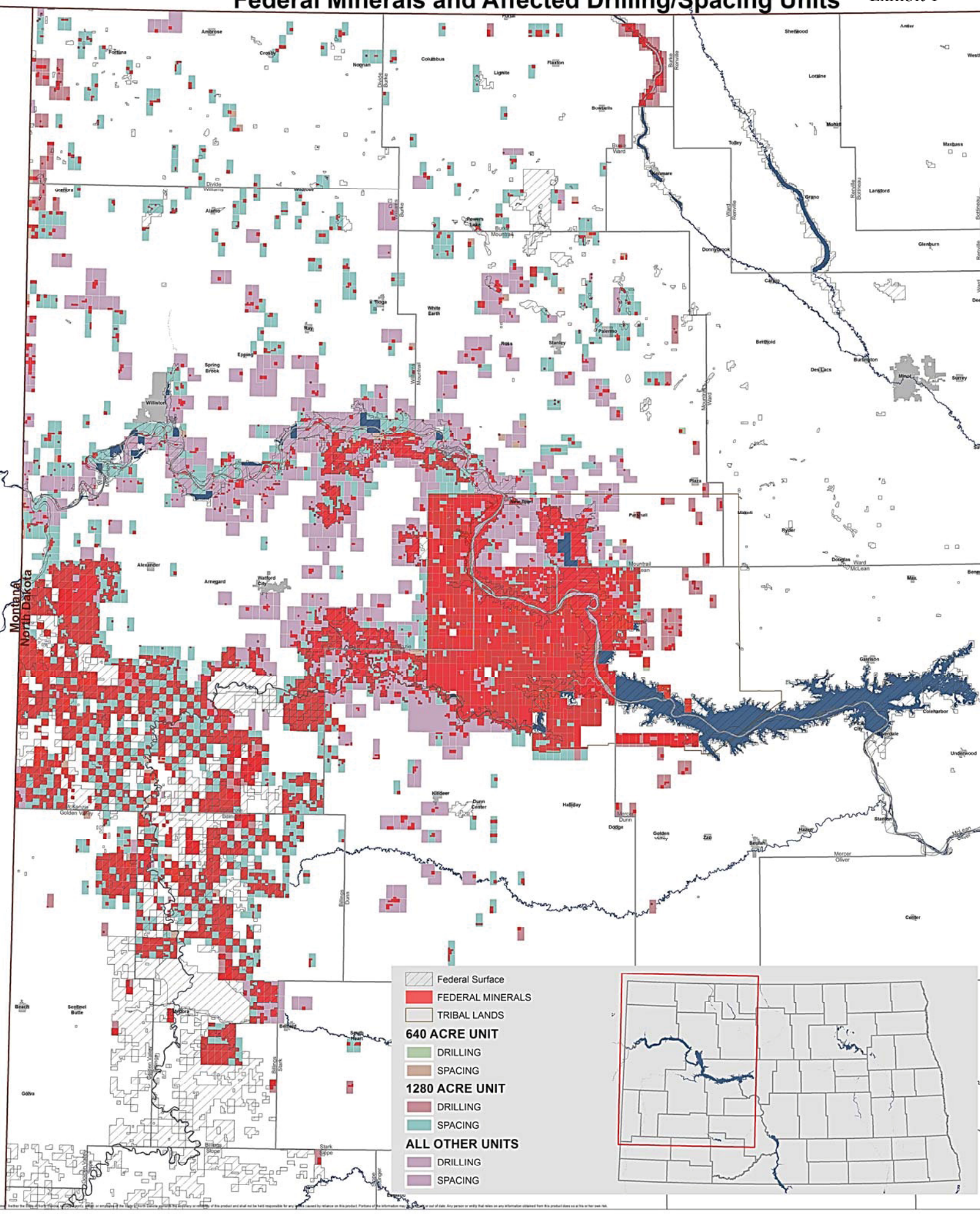
TRUDY HOGUE
Notary Public
State of North Dakota
My Commission Expires June 19, 2020

Notary Public

My commission expires: June 19, 2020

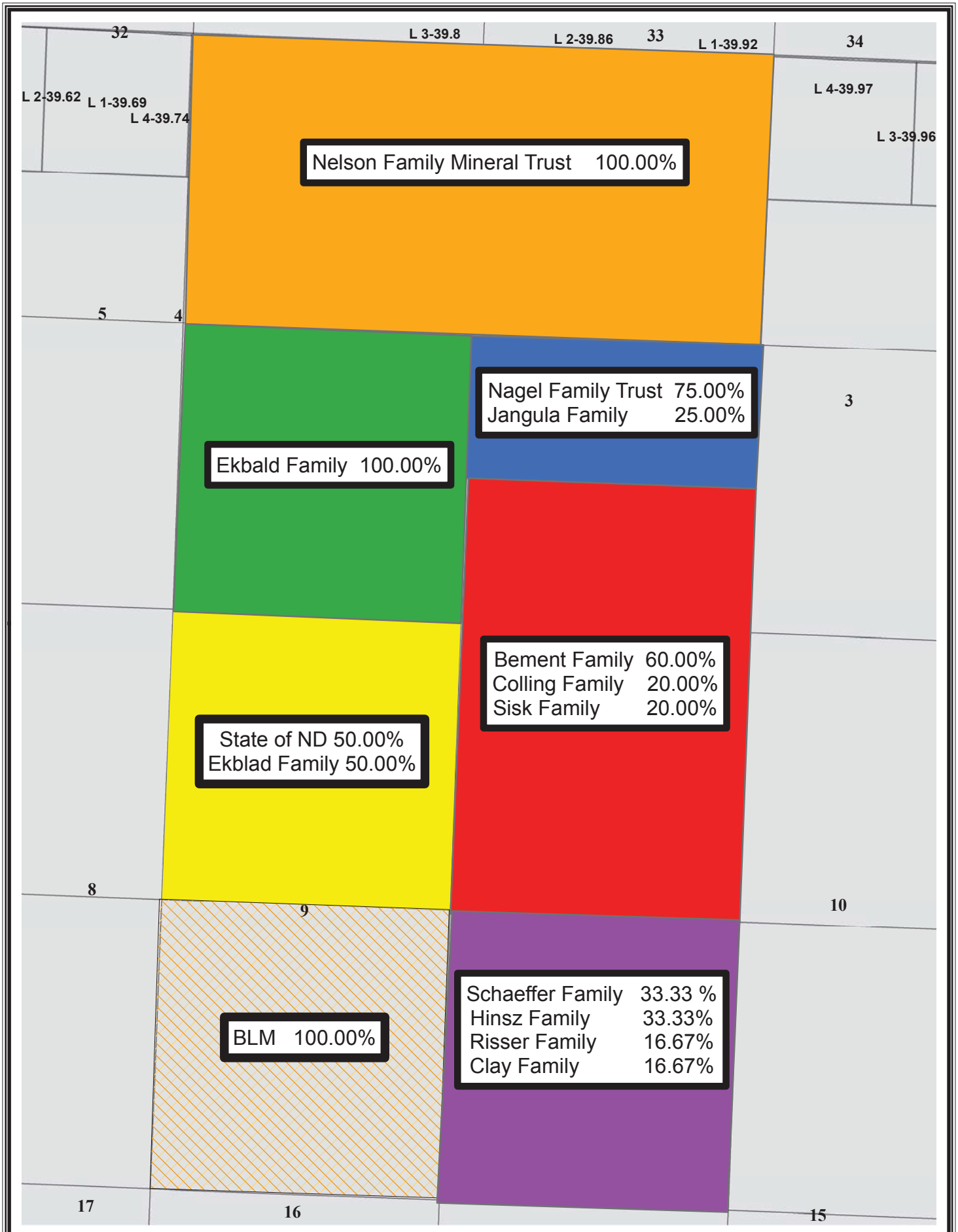
Northwest North Dakota
Federal Minerals and Affected Drilling/Spacing Units

Exhibit 1



T155N, R100W Sections 4 and 9

Exhibit 2



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UNITED STATES DISTRICT COURT FOR THE DISTRICT OF WYOMING

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

STATE OF NORTH DAKOTA'S [PROPOSED] PETITION FOR REVIEW

The State of North Dakota respectfully petitions the Court for review of final agency action under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701- 706, and this Court's Local Civil Rule 83.6.

On November 18, 2016, the Department of the Interior ("DOI"), Bureau of Land Management ("BLM") published in the Federal Register its final rule regulating venting and flaring of natural gas from oil and natural gas production facilities on federal and Indian lands. *See* "Waste Prevention, Production Subject to Royalties, and Resources Conservation: Final Rule," 81 Fed. Reg. 83008 (Nov. 18, 2016) ("Final Rule").

1. The BLM's issuance of the Final Rule constitutes a final agency action subject to review by this Court. 5 U.S.C. §§ 551(13), 704.

2. The APA requires courts to hold unlawful and set aside any final agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706(2)(A). Additionally, the APA requires courts to hold unlawful and set aside any final agency action that is "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2)(C).

3. The Final Rule exceeds the statutory authority granted to the BLM under the Federal Land Policy and Management Act, 43 U.S.C. §§ 1701-84, and the Mineral Leasing Act, 30 U.S.C. §§ 181-287.

4. The Final Rule regulates air quality, which is solely within the purview of the U.S. Environmental Protection Agency ("EPA") and EPA-authorized state and Tribal programs under the authority granted by Congress in the CAA, 42 U.S.C. §§ 7401 *et seq*. 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), wherein the nation's air quality will be protected "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. . . ."). BLM cannot regulate air quality because it lacks the Congressionally-delegated authority to do so. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) (holding that an administrative agency's power to promulgate regulations is limited to the authority delegated to it by Congress).

5. The Final Rule unlawfully seizes State regulatory authority over non-federal minerals when State and federal tracts are combined through communitization agreements. 43 C.F.R. § 3217.11.

6. This Court has jurisdiction over this petition pursuant to 28 U.S.C. § 1331 (federal question) and 5 U.S.C. §§ 701-706 (the APA).

7. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(e) because DOI and BLM are departments of the United States government; Sally Jewell and Neil Kornze are officers of the United States; and the actions complained of relate to public lands located in the District of Wyoming and elsewhere.

Respectfully submitted this 23rd day of November, 2016.

/s/ *Paul M. Seby*
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