NORTH Dakota | Governor Doug Burgum

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September 9, 2024

Sonya Germann
State Director – Montana/Dakota's District
United States Bureau of Land Management
5001 Southgate Drive
Billings, MT 59101

Re: Protest of the Proposed Resource Management Plan (RMP) and Final Environmental Impact Statement (FEIS) for the North Dakota RMP Revision

Director Germann,

The State of North Dakota submits this protest of the Proposed Resource Management Plan and Final Environmental Impact Statement (RMP and FEIS) for the North Dakota Resource Management Plan Revision issued in August 2024. Since statehood, North Dakota has been a responsible steward of our abundant natural resources. This final decision is in stark conflict with our state's core interests, economy and governance.

This protest reflects the unified voices of more than a dozen state agencies and elected officials who have thoroughly reviewed the proposed RMP. Our collaborative approach seeks to ensure that the BLM's actions are consistent with federal law, sound science and economic realities. North Dakota is committed to upholding its constitutional authority and sovereign right to manage our natural resources in the best interests of our citizens.

We urge the Bureau of Land Management to reconsider its approach, acknowledge the state's substantial contributions to energy production for our national security, and select an alternative that ensures proper resource development and adheres to the principles of multiple use and sustained yield as mandated by federal law.

Thank you for your attention to this critical matter. We look forward to seeing an outcome that respects North Dakota's rights and ensures the continued responsible development of our nation's energy and natural resources.

Regards,

Doug Burgum
Governor

Protest: North Dakota Proposed Resource Management Plan and Final Environmental Impact Statement for the North Dakota Resource Management Plan Revision, August 9, 2024, Notice of Availability: FR Doc. 2024-17402, 89 Fed. Reg. 65391

The State of North Dakota (the "**State**" or "**North Dakota**") hereby protests the Proposed Resource Management Plan and Final Environmental Impact Statement ("**Proposed RMP**"), North Dakota Field Office ("**NDFO**"), issued in August 2024, as described above.

I. Interest of the Protestor

The State has effectively partnered with the Bureau of Land Management (BLM) for decades to meet the challenge of properly regulating mineral development by avoiding waste of such resources in the State, whether under federal or State jurisdiction. The State is blessed with tremendous natural resources that are of great importance to its citizens and that also benefit the entire country. The State is proud of its strong record of responsible stewardship. The State agrees with the Administration's emphasis on using resources wisely and efficiently.

The State is ranked 3rd in the United States among all states in the production of oil and gas. The State produces approximately 400 million barrels of oil per year and 1.1 trillion cubic feet of natural gas per year. Implementation of BLM's preferred "Alternative D" will result in severe adverse economic impacts to the State, in addition to the significant interference with sovereign State functions. For example, the anticipated loss in State revenue from royalties and taxes for oil and gas alone is estimated to be $34 million per year. The impact from this loss is expected to last through the entire 30-year development life of the Bakken. The State's revenues from the gross production tax and oil extraction tax fund various programs through a series of 12 funds that each must reach a maximum before funds can be appropriated to the next fund in the series.

The State is also the 10th largest coal producer in the United States, with an average production of approximately 27.5 million tons per year of lignite coal over the past several years. Nearly all of the lignite coal is used within the State at mine-mouth power generating facilities and the nation's only commercially operating coal gasification plant.

On May 22, 2023, the State submitted its comments on the draft EIS and potential amendment of the existing RMP. Notably, the State set forth several critical concerns. Nonetheless, the BLM improperly and blatantly ignored the State's earlier comments and wholly disregarded the State's primacy over environmental regulation in the State.[1]

On August 9, 2024, BLM issued the above referenced Notice of Availability in which BLM largely disregarded the State's prior comments on the prior draft RMP and EIS. Specifically, BLM ignored several critical State issues, including the primary issues of withdrawing significant quantities of federal land from further oil and gas leasing and from coal leasing and negatively impacting split-estate lands. The Proposed RMP and FEIS, if finalized, will have significant adverse impacts on the State and future of its natural resource-based economy.

[1] 40 C.F.R. § 1501.7(h).

The State files this protest pursuant to 43 C.F.R. § 1610.5-2 on behalf of all divisions of the State, but in particular with respect to the (i) North Dakota Industrial Commission, Department of Mineral Resources, Oil and Gas Division, (ii) Department of Trust Lands, (iii) Public Service Commission, and (iv) Department of Water Resources. The address, telephone number, email address, and other contact information for the State is:

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A. The State's Unique Split Estate Land Ownership

Mineral ownership of State lands upon which oil and gas development has occurred consists of approximately 85% private lands, 9% federal lands, and 6% state lands. Many of the private lands in the State upon which oil and gas development has occurred are split estate lands, with more than 30% of the potential development on private surface involving federal minerals and therefore subject to BLM's proposal.

The State has a unique history of land ownership that has resulted in a significant portion of the state consisting of split estate lands that could be adversely affected by the proposed rule. Unlike many western states that contain large blocks of unified federal surface and federal mineral ownership, the surface and mineral estates in the State 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 the State went through foreclosure.

The federal government, through the Federal Land Bank and the Bankhead Jones Act, foreclosed on many farms taking ownership of both the mineral and surface estates. Many of the surface estates were later sold to private parties with some or all the mineral estates retained by the federal government. This resulted in a very large number of small federally-owned mineral estate tracts scattered throughout western portions of the State. Those federal mineral estates impact more than 30% of the oil and gas spacing units that are typically recognized as a communitized area ("**CA**") by BLM. There are a few large blocks of federal mineral ownership, for which the federal government has trust responsibility and also manages the surface estate through the USFS or the Bureau of Indian Affairs. These are on the Dakota Prairie Grasslands in southern McKenzie County and northern Billings County as well as on the Fort Berthold Indian Reservation. Even within those areas, 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.

B. North Dakota's State Trust Lands Ownership

In 1889, Congress enacted the Enabling Act "to provide for the division of Dakota

[Territory] into two states, and to enable the people of North Dakota, South Dakota, Montana, and Washington to form constitutions and state governments, and to be admitted into the union on an equal footing with the original states, and to make donations of public lands to such states." Act of February 22, 1889, Ch.180, 25 Statutes at Large 676. Section 10 of this Act granted sections 16 and 36 in every township to the new states "for the support of common schools." In cases where portions of sections 16 and 36 had been sold prior to statehood, indemnity or "in lieu" selections were allowed. In North Dakota, this grant of land totaled approximately 2.6 million acres.

In the Enabling Act, Congress expressly provided that these State Trust Lands "shall not be subject to preemption, homestead entry, or any other entry under the land laws of the United States, whether surveyed or unsurveyed, but shall be reserved for school purposes only." *Id.* at Section 11. State Trust Lands are managed through the North Dakota Department of Trust Lands.

The Enabling Act provided further land grants to the State of North Dakota for the support of colleges, universities, the state capitol, and other public institutions. Revenues are generated through the prudent management of trust assets, which assets include approximately 706,600 surface acres and nearly 2.6 million mineral acres. Article IX, Section 2 of the North Dakota Constitution provides that the "net proceeds of all fines for violation of state laws and all other sums which may be added by law, must be faithfully used and applied each year for the benefit of the common schools of the state and no part of the fund must ever be diverted, even temporarily, from this purpose or used for any purpose other than the maintenance of common schools as provided by law." The grant of State Trust Lands was thus given in trust and required the State, as trustee, to maintain the permanency of the assets acquired through the grant.

The following issues constitute the State's protest. The State, its residents, and the environment (as well as many residents of the United States itself) will be harmed by the FEIS's Preferred Alternative and the Proposed RMP. The FEIS did not take a hard look at certain impacts, and did not adequately review the reasonably foreseeable direct, indirect, and cumulative impacts associated with the following resources in Chapter 3 and the associated tables and appendices.

II. Issues Protested: General

As set forth below, the Proposed RMP's proposed Alternative D has many of the same problematic issues as BLM's preferred Alternative B and Alternative C. It is inconsistent with Federal Law, inconsistent with Federal Court orders, and is still a de facto unlawful withdrawal, which impairs existing leasing rights and State trust lands, as described above.

III. Issues Protested: The Proposed RMP is Not Consistent with Federal Law

The State protests the following elements of the Proposed RMP and its referenced appendixes and tables.

A. The Proposed RMP Would Unlawfully Close Lands Subject to an Existing Preliminary Injunction in the State.

On July 7, 2021, the State filed suit against the Department of the Interior ("**Interior**"), the Secretary of the Interior (the "**Secretary**"), BLM, and multiple BLM officials (the "**Federal**

Defendants") challenging their cancellation of quarterly oil and gas lease sales in the State. *See State of North Dakota,* 1:21-cv-00148. The State's case was later consolidated with the State's second challenge to BLM's lease sale cancellations, filed to challenge additional quarterly lease sale cancellations that occurred in 2021 and 2022 after the filing of the State's first case. *See State of North Dakota v. U.S. Dept. of Interior et al.,* 1:23-cv-00004 (D.N.D.). On March 27, 2023, the U.S. District Court in North Dakota entered a preliminary injunction against the Federal Defendants in that consolidated action, finding that the Federal Defendants had failed to timely hold quarterly lease sales under the Mineral Leasing Act ("**MLA**"). *See State of North Dakota,* 1:21-cv-00148, ECF No. 98, Order Granting, in Part, and Denying, in Part, North Dakota's Motion for Preliminary Injunction (March 27, 2023).

Key to the State's challenge and the District Court's holding was a discussion "of whether the Federal Defendants were derelict in their mandatory statutory duties to evaluate federal lands nominated for oil and gas leasing in North Dakota and correspondingly hold lease sales in 2021 and 2022." *Id.* at ¶ 2. The Court found BLM had violated its statutory duty to hold quarterly lease sale, enjoined and restrained BLM from implementing the "unlawful policy to disregard their statutory duty to appropriately plan for and complete their determination of whether nominated land was 'available' and 'eligible' on a timely, quarterly basis", and ordered BLM to (1) Analyze individual parcels nominated for lease sales in the State according to their statutory requirements; (2) Make lawful determinations regarding the nominated parcels' availability and eligibility; (3) Complete those determinations in time for quarterly lease sales, as set forth in statute and regulations; and (4) When there are "available" and "eligible" lands, hold a lease sale in that quarter. *Id.* at ¶ 147. As the District Court observed, the "MLA does not permit the Federal Defendants to 'skip' a quarterly lease sale due to an agency's self-inflicted 'truncated' review period, a nationwide [National Environmental Policy Act ("NEPA")] analysis backlog, focused effort on a nationwide survey of emissions, or speculation that a parcel (let alone all parcels) fails to meet NEPA's requirements." *Id.* at ¶ 83.

Further, the District Court ordered that BLM was "ENJOINED and RESTRAINED from *de facto* withdrawing lands in North Dakota identified for oil and gas development in their respective RMPs without following the statutory procedures for public notice and comment as well as congressional notice, where appropriate. *See* 43 U.S.C. §§ 1714, 1732. See also 5 U.S.C. §§ 705, 706(1)." *Id.* Under the Court's Order, BLM is required to evaluate long-pending nominated lands for inclusion in future quarterly lease sale.

BLM cannot now by dint of the Proposed RMP surreptitiously withdraw these long-pending nominated lands which are subject to a preliminary injunction and for which BLM must make eligibility and availability determinations. Doing so would circumvent the Court's order and findings that BLM has long delayed in its statutory duty to evaluate and include these nominated lands in quarterly lease sales. BLM must provide an accounting of how its Proposed RMP will affect all 811 parcels in the State upon which expressions of interest have been submitted that are listed on their National Fluids Lease Sale System. No nominated parcel GIS layer was included in the Proposed RMP, and the effects on these nominated parcels is unknown absent BLM providing that data.

B. The Proposed RMP Violates FLPMA and the MLA Because it Seeks to

Regulate Non-Federal Lands.

The Proposed RMP seeks to regulate surface activities on non-federal lands, noting that "[s]tipulation decisions (such as applying an [No Surface Occupancy ("NSO")], a controlled surface use [CSU], or a timing limitation [TL]) apply to fluid mineral leasing and development of federal mineral estate underlying BLM-administered surface lands, *private lands, and state trust lands*. Stipulations do not apply to lands managed by other surface management agencies." Proposed RMP, Volume 1 at 2-11 (emphasis added).

For example, the Proposed RMP seeks to unlawfully impair tens of thousands of mineral acres of State Trust Lands by both stranding those lands from development where federal minerals are not leased, and imposing surface occupancy conditions that make it unfeasible to develop the minerals located on those State Trust Lands. The State holds title to the mineral, and in many cases also the surface, estates of these lands. The Proposed RMP would do the same to large amounts of State and private lands. The State collects revenue from the use and management of State Trust Lands, including oil and gas development, to support its public education system. *See* N.D.C.C. § 15-01-02. The State further collects revenue from oil and gas development on State and private lands to support education and its general fund. BLM, however, does not have legal authority under FLPMA or the MLA to regulate or impair these private and State lands, especially State Trust Lands.

i. FLPMA Does Not Authorize BLM to Regulate Non-Federal Lands.

Congress defined "public lands" in FLPMA as "any land and interest in land owned by the United States within the several States and administered by the Secretary of the Interior through the Bureau of Land Management, without regard to how the United States acquired ownership[.]" 43 U.S.C. § 1702(e). This definition does not authorize BLM to regulate surface operations on lands owned entirely by private individuals or the State. The plain language of the Property Clause limits Congress' authority to make needful regulations pertaining to "Property of the United States." U.S. Const. art. IV, sec. 3, cl. 2. Recognizing that Congress' constitutional authority rests in governing federal land, a U.S. Circuit Court of Appeals has rejected the argument that federal jurisdiction extends to adjoining State Trust Lands under broad mandates in federal land management statutes. *Utah Native Plant Soc'y v. U.S. Forest Serv.*, 923 F.3d 860, 866-67 (10th Cir. 2019) ("[T]he Property Clause's plain language is not self-executing and does not itself grant [a federal land management agency] authority over [ ] State lands adjacent to the [National Forest].)"

Tellingly, FLPMA also draws clear distinctions that demonstrate that the BLM's authority is limited to federal interests. Section 1712(c)(8) recognizes that federal land planning should consider state air, water, noise, or other pollution standards that are applicable to federal lands. 43 U.S.C. § 1712(c)(9). Section 1732(b) also recognizes the role of States in managing wildlife resources as a function of their traditional state police powers. 43 U.S.C. § 1732(b); *Def. of Wildlife v. Andrus*, 627 F.2d 1238, 1249-50 (D.C. Cir. 1980) ("It is unquestioned that the States have broad trustee and police powers over wild animals within their jurisdictions[.]") (citation omitted). As noted in the comments herein, the Proposed RMP would unlawfully impair and block the development of State and private mineral resources in the State by stranding those interests and

making economic development without waste impossible.

ii. The MLA Also Does Not Authorize BLM to Regulate Non-Federal Lands.

The MLA also respects the State's exclusive jurisdiction over its private, State, and State Trust Lands by recognizing that development involving both federal interests and State interests requires State consent. For example, Section 184a provides,

> [A]ny State owning lands or interests therein acquired by it from the United States may consent to the operation or development of such lands or interests, or any part thereof, under agreements approved by the Secretary of Interior made jointly or severally with lessees or permittees of lands or mineral deposits of the United States or others, for the purpose of more properly conserving the oil and gas resources within such State.
>
> 30 U.S.C. § 184a.

Section 184a also states that "[s]uch agreements may provide for the cooperative or unit operation or development of part or all of any oil or gas pool, field, or area … and, with the consent of the State, for the modification of the terms and provisions of State leases for lands operated and developed thereunder[.]" *Id.* The Secretary's regulations on the "Inclusion of non-Federal lands" reinforce the MLA provisions:

> Where State-owned land is to be unitized with Federal lands, approval of the agreement by appropriate State officials must be obtained prior to its submission to the proper BLM office for final approval. When authorized by the laws of the State in which the unitized land is situated, appropriate provision may be made in the agreement, recognizing such laws to the extent that they are applicable to non-Federal unitized land.
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> 43 C.F.R. § 3181.4(a).

The Proposed RMP is irreconcilable with Congress' clear statutory determination that the federal government cannot preempt the State's sovereignty over private, State, and State State Trust Lands. BLM's interpretation of its jurisdiction also disregards Section 184 of the MLA and its implementing regulations that requires the State's consent to enforce federal terms of conditions on State Trust Lands. *See* 30 U.S.C. § 184a; 43 C.F.R. § 3181.4(a).

C. The Proposed RMP is Inconsistent with the MLA

Additionally, the areas targeted for closure, while deemed to have "low potential" by the BLM, may still hold significant untapped resources. Advances in extraction technology, particularly in hydraulic fracturing and horizontal drilling, have demonstrated that previously overlooked areas can become economically viable. By preemptively closing these areas, the BLM is stifling future development opportunities and failing to consider the potential long-term value of these resources.

D. The Proposed RMP Violates the FLPMA's Requirement to Manage Under the

Principle of Multiple Use

Federal law provides that the Interior Secretary *"shall* manage the public lands *under principles of multiple use and sustained yield,* in accordance with the land use plans developed by [the Secretary] under section 202 of this Act when they are available, except that where a tract of such public land has been dedicated to specific uses according to any other provisions of law it shall be managed in accordance with such law." FLPMA § 302, Pub. L. No. 94-579, 90 Stat. 2743, (1976) codified at 43 U.S.C. § 1732 (emphasis added).

In enacting FLPMA, Congress specifically declared that "the public lands [shall] be managed in a manner which recognizes the *Nation's need for domestic sources of minerals,* food, timber, and fiber from the public lands *including implementation of the Mining and Minerals Policy Act of 1970."* FLPMA, § 102(a)(12), 43 U.S.C. § 1701(a)(12) (emphasis added).

Finally, Congress specifically directed that management of federal public lands shall "be *on the basis of multiple use and sustained yield* unless otherwise specified by law." FLPMA, § 102(a)(7), 43 U.S.C. § 1701(a)(7) (emphasis added).

Notably, while FLPMA was enacted in 1976, the concept of multiple use of federal public lands prior to FLPMA is reflected in historic management practices of the BLM and its predecessor General Land Office. Moreover, Congress had earlier provided for multiple use of federal lands in the Classification and Multiple Use Act of 1964, Pub. L. 88-607, 78 Stat. 986 (1964) (now repealed).

Next, it is clear that management of federal lands to meet the need for resources is a central purpose of FLPMA, as it specifically discusses resource need in detail:

> The term "multiple use" means the management of the public lands and their *various resource values* so that they are *utilized* in the combination that will best meet the *present and future needs of the American people;* making the most judicious use of the land for some or all of these resources or related services over areas large enough to provide sufficient latitude for periodic adjustments in use to conform to changing *needs and conditions; the use of some land for less than all of the resources;* a combination of balanced and diverse resource uses that takes into account the *long- term needs of future generations for renewable and nonrenewable resources,* including, but not limited to, recreation, range, timber, *minerals,* watershed, wildlife and fish, and natural scenic, scientific and historical values; and harmonious and coordinated management of the various resources without permanent impairment of the productivity of the land and the quality of the environment with consideration being given to the relative values of the resources and not necessarily to the combination of uses that will give the greatest economic return or the greatest unit output.

FLPMA, § 103(c), 43 U.S.C. § 1702(c) (emphasis added).

Finally, as to the resource management plan that gave rise to the FEIS, FLPMA makes it clear that multiple use principles are to be central to the analysis:

> **"Criteria for development and revision**
> In the development and revision of land use plans, the Secretary *shall (1) use and observe the principles of multiple use and sustained yield* set forth in this and other applicable law;"

FLPMA, § 201(c), 43 U.S.C. § 1712(c) (emphasis added).

Thus, it is clear the BLM is mandated to manage the planning area in accord with multiple use and sustained yield principles.

E. The Proposed RMP Creates Large-Tract Withdrawals in Violation of FLPMA.

The Proposed RMP recommends several large tracts of lands to be withdrawn from locatable mineral entry. *See*, for example, Proposed RMP at 3-141 (Table 3-88 recommending approximately 1,900 acres be withdrawn) and 3-201 ("Under Alternative D, 960 acres would be recommended for withdrawal to protect the Mud Buttes ACEC."). However, the Secretary's FLPMA authority to withdraw federal land is limited by Congress. 43 U.S.C. §1714(c)(1).

Congress retained a legislative veto over any such FLPMA large-tract withdrawal. *Id.* The U.S. Supreme Court determined that legislative vetoes are unconstitutional. *INS v. Chada*, 462 U.S. 919 (1983). Since FLPMA's legislative veto provision is integral to the Secretary's limited large-tract withdrawal authority, the provision's unconstitutionality under *Chada*, makes the entire large tract withdrawal provision invalid. The large tract withdrawals contemplated under the Proposed RMP are left to Congress, not BLM. Accordingly, the Secretary lacks the authority to propose or make the recommended withdrawals in the Proposed RMP.

The Proposed RMP recommends closing the BLM "Low Potential" area to fluid mineral leasing. This area contains parcels upon which 148 Notices of Interest have been filed between 2007 and 2018. Closing this area to leasing without processing those parcels and offering them at auction constitutes an unlawful withdrawal of thousands of acres of valid rights through this land use plan update process.

F. The Proposed RMP Violates NEPA Because the Proposed RMP's Alternatives are Inconsistent with Controlling Policy/Legal Objectives

NEPA commands that an agency not consider alternatives inconsistent with its basic policy objectives. *Seattle Audubon Society v. Moseley,* 80 F.3d 1401, 1404 (9th Cir. 1996). Moreover, when an agency ignores a viable alternative (like a middle-ground alternative), such a failure violates NEPA. *See, e.g., Citizens for a Better Henderson v. Hodel,* 768 F.2d 1051, 1057 (9th Cir. 1985) ("a viable but unexamined alternative renders [the] environmental impact statement inadequate.") Finally, a NEPA analysis must include "every reasonable alternative" so as to provide a meaningful analysis and allow for an informed choice from a full range of options. *Protect Our Communities Found. v. LaCounte,* 939 F.2d 1029, 1038 (9th Cir. 2019).

The Proposed RMP represents a dramatic shift in agency policy and practice. It cannot be

disputed that the State has managed North Dakota's coal production for decades to develop natural resources to meet the State's, and the Nation's, energy needs. Such a policy and practice are well-grounded in the law, for FLPMA requires the BLM to develop and manage resources to meet resource needs.[2] Yet, the BLM fails to explain or adequately justify the 180-degree reversal of decades of policy. While a federal agency is allowed to make policy shifts, when it does so it must provide a "reasoned explanation" for doing so. *F.C.C. v. Fox Television Stations, Inc.,* 556 U.S. 502, 515 (2009). Moreover, "of course" the agency "must show that there are good reasons for the new policy." *Id.*

No such reason exists. Further, the BLM failed to adequately consider that federal mineral ownership in the State 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. For all intents and purposes, the Proposed RMP will effectively end oil and gas development on federal lands in North Dakota, which is in direct conflict with the mandate set forth above and is hardly a reasonable alternative.

Thus, a measured examination of the Proposed RMP reveals an inescapable and unavoidable conclusion: the BLM's selection of Alternative D is outcome-motivated and is neither scientifically sound nor legally sufficient. This conclusion is illustrated by the fact that "NEPA does not require that an agency elevate environmental concerns over other appropriate considerations." *Sanjuan Citizens Alliance v. Norton,* 586 F. Supp. 2d 1270, 1280 (0. N.M. 2008) (citing *Baltimore Gas and Electric v. Natural Res. Defense Council,* 462 U.S. 87, 97 (1983)). Yet, that is exactly what the BLM did by selecting the Proposed RMP. When *all other criteria* pointed to a reasonable continuation of coal leasing in the planning area, the BLM let unsound conclusions control the outcome and failed to consider the unique circumstances of the State.

G. The Proposed RMP Violates the MLA by Unlawfully Intruding on Reserved State Police Powers over Oil and Gas Activities.

The MLA includes two savings clauses that demonstrate Congress did not intend for BLM to exercise exclusive federal jurisdiction over oil and gas operations. *See* 30 U.S.C. §§ 187, 189. Section 187 relates to BLM's leasing authority, identifies conditions that each federal lease shall include, and states "[n]one of such provisions shall be in conflict with the laws of the State in which the leased property is situated." 30 U.S.C. § 187. Next, Section 189 of the MLA, in its entirety, reads:

The Secretary is authorized to prescribe necessary and proper rules and regulations and to do any and all things necessary to carry out and accomplish the purposes of this chapter, also to fix and determine the boundary lines of any structure, or oil or gas field, for the purposes of this chapter. Nothing in this chapter shall be construed or held to affect the rights of the States or other local authority to exercise any rights which they may have, including the right to levy and collect taxes upon improvements, output of mines, or other rights, property, or assets of any lessee of the United States.

30 U.S.C. § 189.

[2] See discussion below.

Section 181 of the MLA only applies to "lands containing [oil and gas] deposits owned by the United States." 30 U.S.C. § 181. No specific language in the MLA allows BLM to regulate non-federal land. Notably, Congress did not even make all federal lands subject to federal mineral leasing. Under the MLA, minerals subject to disposition on lands owned by the United States include "national forests" but exclude acquired lands, communities within national parks and monuments, and lands within the naval petroleum and oil-shale reserves. *Id*.

The State possesses police power to regulate its natural resources. *See, e.g., Wall v. Midland Carbon Co.*, 254 U.S. 300, 313-16 (1920) (upholding the State's police power to regulate natural gas). The State exercises this authority by regulating oil and gas activity on fee, State, and federal land in the State, through the North Dakota Industrial Commission ("**NDIC**"). *See* North Dakota Century Code ("**NDCC**") Chapter 38-08 *et seq.*; North Dakota Administrative Code ("**NDAC**") Chapter 43-02-03.

The fee/fee/fed policy correctly recognizes that on non-federal lands "In fee/fee/federal situations, the BLM often has limited jurisdiction." Proposed RMP Volume 1 at 3-204. Despite this limited jurisdiction, and as set forth in these comments, the Proposed RMP would effectively strand State and private mineral resources, blocking or impairing them from developments by closing or applying NSO stipulations to BLM lands interspersed with State and private lands. Where these BLM lands cannot be developed, the entire spacing unit those BLM lands are subject to also either cannot be developed, or cannot be developed economically without waste.

H. The Proposed RMP Unlawfully Elevates "Conservation" as a "Use" in Violation of FLPMA.

The Proposed RMP lists "conservation" as a use and identified BLM's role in the RMP Process. *See* Proposed RMP, Volume 1 at ES-1 ("BLM has identified four specific purposes that describe BLM's distinctive role in the North Dakota landscape: provide opportunities for mineral and energy development on BLM-administered lands, contribute to the conservation and recovery of threatened, endangered, and special status species, provide for recreation opportunities, and manage for multiple other social and scientific values.").

As BLM is well aware, FLPMA is a land use planning and management statute which "established a policy in favor of retaining public lands for multiple use management." *Lujan v. National Wildlife Federation*, 497 U.S. 871, 877 (1990). "Multiple use management" describes the task of striking a balance among the many competing uses to which land can be put, "including, but not limited to, recreation, range, timber, minerals, watershed, wildlife and fish, and [uses serving] natural scenic, scientific and historical values." *Norton v. S. Utah Wilderness All.,* 542 U.S. 55, 58 (2004) (citing to 43 U. S. C. § 1702(c)). A second management goal, "sustained yield," requires BLM to control depleting uses over time, so as to ensure a high level of valuable uses in the future. *Id.* (citing to 43 U.S.C. § 1702(h)). "To these ends, FLPMA establishes a dual regime of inventory and planning. Sections 1711 and 1712, respectively, provide for a comprehensive, ongoing inventory of federal lands, and for a land use planning process that 'project[s]' 'present and future use,' § 1701(a)(2), given the lands' inventoried characteristics." *Id.* Under these mandates, "FLPMA identifies 'mineral exploration and production' as one of the 'principal or

major uses' of public lands." *WildEarth Guardians v. Bernhardt*, 502 F. Supp. 3d 237, 241 (D.D.C. 2020) (citing to 30 U.S.C. § 1702(l) ("The term 'principal or major uses' includes, *and is limited to*, domestic livestock grazing, fish and wildlife development and utilization, mineral exploration and production, rights-of-way, outdoor recreation, and timber production.") (emphasis added)). FLPMA clearly directs the Secretary to promote "mineral exploration and production" during RMP development. 30 U.S.C. § 1702(l).

FLPMA does not authorize BLM to promote "conservation" as a principle or major "use" of public lands. In 2016, BLM attempted to promulgate a rule promoting "conservation" as a use of public lands. *See* Resource Management Planning, Final Rule (81 Fed. Reg. 89580 (Dec. 12, 2016) ("Planning 2.0 Rule"). However, on March 27, 2023, President Trump signed a resolution from Congress under the Congressional Review Act that vetoed BLM's Planning 2.0 Rule. Through this veto, Congress clearly spoke that it did not authorize BLM to elevate conservation as a principal or major use of lands under FLPMA.

I. The Proposed RMP Would Unlawfully Impair Valid Existing Lease Rights.

Pursuant to FLPMA, all BLM actions, including authorization of RMPs, are "subject to valid existing rights." Thus, according to federal statute, BLM cannot terminate, modify, or alter any valid or existing property rights through a land use plan update process. This fundamental principle is found within the applicable statutes, regulations, and BLM policy guidance. As BLM is well aware, BLM's current 1988 RMP in North Dakota has engendered substantial State and private reliance interests.

Congress made it clear that nothing within the statute, or in the land use plans developed under FLPMA, was intended to terminate, modify, or alter any valid or existing property rights. Thus, an RMP update prepared pursuant to FLPMA, after lease execution, is likewise subject to existing rights.

Therefore, through the RMP, BLM cannot revise or restrict valid existing lease rights through imposition of Conditions of Approval for drilling permits or through imposition of lease stipulation provisions from adjacent leases. BLM must make clear in any future RMP revisions that timing limitations, CSU and NSO stipulations, and any other management prescriptions across the planning area are not applied retroactively to existing leases. At this time the State has identified multiple existing leases and areas that appear to be impacted in the Proposed RMP. *See* Attachments A, B, and C hereto illustrating impaired leasing areas.

J. The Proposed RMP Improperly Relies on Executive Order 13990 and the Social Cost of Greenhouse Gases.

The Proposed RMP provides "estimates of the monetary value of changes in [greenhouse gas ("GHG")] emissions that could result from selecting each alternative" under a social cost of GHG ("SC-GHG") analyses, despite noting that "the 2016 and 2023 GHG Guidance both noted that NEPA does not require monetizing costs and benefits." Proposed RMP, Volume 1, at 3-22. This is despite the EIS recognizing that its SC-GHG figures "do not constitute a complete cost-benefit analysis, nor do the SC-GHG numbers present a direct comparison with other impacts

analyzed in this document. The SC-GHG is provided only as a useful measure of the benefits of GHG emissions reductions to inform agency decision-making" and that "there are multiple sources of uncertainty inherent in the SC-GHG estimates." *Id.* at 3-23

The Proposed RMP purports to rely on SC-GHG estimates based on "Section 5 of Executive Order 13990" which directs agencies to "capture the full costs of greenhouse gas emissions as accurately as possible, including by taking global damages into account." *Id.* at 22; *see also* Executive Order 13990, *Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis*, 86 Fed. Reg. 7037 (Jan. 25, 2021). However, Executive Order 13990 is not binding law, and cannot contradict the statutory mandates that govern BLM's actions.

Further, by its own terms Executive Order 13990 states that it "shall be implemented in a manner consistent with applicable law." 86 Fed. Reg at 7042. Similarly, Executive Order 13990 notes that "[t]his order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States." *Id.* at 7043. The goal stated in Executive Order 13990 "that agencies capture the full costs of greenhouse gas emissions as accurately as possible" does not alter existing NEPA or FLPMA requirements and does not create any enforceable rights, particularly where BLM seeks to rely on the goals from Executive Order 13900 to justify withdrawing lands that FLPMA's multiple use mandate would otherwise require to be managed otherwise.

Similarly, the 2016 GHG Guidance for which BLM relies on in incorporating its SC-GHG estimates (*see* EIS at 3-22 – 3-23) notes that "[t]his guidance is not a rule or regulation, and . . . does not change or substitute for any law, regulation, or other legally binding requirement, and is not legally enforceable." The new 2023 GHG guidance contains identical language. As *guidance* documents, BLM cannot rely on either Executive Order 13990 or the 2016/2023 GHG Guidance documents to circumvent its multiple-use and sustained yield mandates under FLPMA to promote the development of mineral resources as a principal and major use of public lands.

K. The Proposed RMP Seeks to Obtain Water Rights in Violation of North Dakota Law.

The Proposed RMP directs BLM to "[a]cquire and perfect federal reserved water rights necessary to carry out BLM-administered land management purposes" and states that "[i]f a federal reserved water right is not available, then acquire, perfect, and protect water rights through state law." Proposed RMP at 2-18. While the Proposed RMP recognizes that BLM should perfect water rights according to North Dakota law, the Proposed RMP has a focus on managing "surface water and groundwater quality on BLM-administered lands to protect, maintain, improve, and/or restore the chemical, physical, and biological integrity of waters to protect beneficial uses" and to "[p]rotect, restore, and maintain the chemical, physical, and biological (ecological) services of surface water and groundwater to support resource management needs and all associated beneficial use standards." *Id.* at 2-17.

However, under State law, these conservation goals are not recognized as a beneficial use of the State's sovereign waters. The State's Constitution, Article XI, § 3 states: "All flowing

streams and natural watercourses shall forever remain the property of the state for mining, irrigating and manufacturing purposes."

The Proposed RMP does not comply with the State's sovereign right to regulate its waters because it would assert jurisdiction over State managed and permitted water through the permitting conditions and stipulations in the Proposed RMP that target the State's waters through NSO stipulations designed around conservation of State waters. However, it is inappropriate and contrary to the State's sovereign right to regulate State waters to impose stipulations on waters inconsistent with the State's beneficial use standards.

L. The Proposed RMP is Not Governed by the District of Montana's Decisions in *Western Organization of Resource Council v. BLM*.

The Proposed RMP restricts coal leasing to within 4 miles of an existing permit area and within state designated drinking water protection areas. During discussions between the State and BLM officials on May 17, 2023, BLM indicated that the restriction was required by the recent *Western Organization of Resource Council v. BLM* decision in the United States District Court for the District of Montana (the "**Montana District Court Ruling**"). *See Western Organization of Resource Council v. BLM*, 2022 WL 3082475 (D. Mont. Aug. 3, 2022); *Western Organization of Resource Council v. BLM*, CV 16-21, Not. Rep. F. Supp. (D. Mont. Mar. 3, 2018). The State disagrees with this assertion. First, the Montana District Court Ruling is not preclusive in North Dakota as it is from another, non-binding District Court. Second, the Montana District Court Ruling only found that BLM failed to consider a reasonable range of alternatives for coal leasing, including "lower end" alternatives that would more significantly restrict coal leasing. *See Western Organization of Resource Council v. BLM*, 2022 WL 3082475 at *5-6. What the Montana District Court Ruling specifically did not require, however, was a specific 4-mile buffer. As set forth in North Dakota's previous comments on the draft RMP, the 4-mile buffer does not comply with FLPMA's or the MLA's requirement for mixed use development, nor is it based on a reasoned BLM policy. BLM's decision to drastically reduce coal leasing opportunities in the Proposed RMP is simply not consistent with FLPMA or the MLA.

M. Alternative D Would Provide No Meaningful Benefit

The BLM's selection of Alternative D would provide no real benefit, but would cause major environmental, human health, and socio-economic harms. As discussed throughout, careful review of the Proposed RMP fails to show why the BLM selected Alternative D.

Moreover, the BLM's sole focus on sustaining the ecological integrity of habitats for all priority plant, wildlife, and fish species (Proposed RMP, Volume 1 at ES-2-3) to the exclusion of all other issues is far beyond the statutory mandates that apply under the FLPMA, the MLA, and other federal land management statutes. As such, the BLM impermissibly violated the "major questions" doctrine as articulated by the United States Supreme Court in *West Virginia v. Environmental Protection Agency,* -- U.S.--, 142 S. Ct. 2587 (2022). While the BLM could consider ecological integrity *as part of* its analysis, its reliance on that issue to the exclusion of all other issues violates the major questions doctrine. Congress has not charged the BLM with authority to regulate the ecological integrity of habitats, and the BLM's myopic focus on this issue shows a fundamental lack of comprehension of its controlling statutory authority.

The Proposed RMP reveals substantial flaws in the BLM's analysis of its Proposed RMP and selected alternatives. The BLM needs to return to the drawing board and adequately consider the environmental consequences identified above.

N. Objection to Visual Resource Management Classifications

The Proposed RMP applies Visual Resource Management ("**VRM**") classifications that impose significant restrictions on surface disturbances essential for oil and gas infrastructure development. These classifications are based on outdated perceptions of visual impact and fail to account for technological advancements that have significantly reduced the footprint of oil and gas operations. The restrictive nature of these VRM classifications is unwarranted and could lead to adverse economic impacts, including delays, increased costs, and potentially halted projects.

The VRM classifications under the Proposed RMP do not adequately reflect the industry's ability to minimize its visual impact. Historically, oil and gas operations were associated with significant surface disturbances, but advances in technology, such as horizontal drilling and the use of multi-well pads, have dramatically reduced the surface footprint of these operations. Multi-well pads allow for the extraction of resources from multiple wells using a single pad, significantly reducing the need for additional infrastructure such as roads and pipelines. Longer laterals—sometimes extending up to three miles—further minimize the environmental and visual impact by reducing the number of surface locations required for drilling.

The introduction of new VRM areas under the Proposed RMP could impose severe limitations on the development of necessary infrastructure for energy projects. High VRM classifications typically restrict surface disturbances, which are essential for the construction of drilling pads, roads, pipelines, and other infrastructure. These restrictions not only impact the timeline for bringing new resources to market but also increase the cost of project development. In some cases, the limitations imposed by VRM classifications could make certain projects economically unfeasible, leading to delayed or canceled developments and potentially resulting in litigation over the restrictions.

The economic impact of these VRM classifications cannot be overstated. The restrictions associated with higher VRM classifications could slow down or even halt new project developments, leading to increased costs and delays. This would have a direct negative effect on local communities, as the economic benefits of these projects—including job creation, public revenues, and investment in local infrastructure—would be diminished or lost entirely.

Given the industry's ability to operate with such a minimal footprint, the BLM needs to apply more flexible VRM classifications that take into account these technological advancements. Flexibility in VRM classifications would allow the industry to continue contributing to the state's economy while ensuring that visual impacts are minimized. This balanced approach would support both economic growth and conservation goals, providing a win-win scenario for all stakeholders involved.

IV. Issues Protested: North Dakota State Agency Specific Comments

A. North Dakota Industrial Commission Comments on the Proposed RMP.

The NDIC was created by the North Dakota legislature in 1919 to conduct and manage, on behalf of the State, certain utilities, industries, enterprises, and business projects established by State law. One of the NDIC's many areas of jurisdiction include overseeing the Department of Mineral Resources, Oil and Gas Division.

The NDIC, Department of Mineral Resources, Oil and Gas Division regulates the drilling and production of oil and gas in North Dakota. The agency's mission is to encourage and promote the development, production, and utilization of oil and gas in the State in such a manner as will prevent waste, maximize economic recovery, and fully protect the correlative rights of all owners to the end that the landowners, the royalty owners, the producers, and the general public realize the greatest possible good from these vital natural resources.

The NDIC, Oil and Gas Division has jurisdiction to administer North Dakota's comprehensive oil and gas regulations found at NDAC Chapter 43-02-03. These regulations include regulation of the 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, or other substances into producing formations; disposal of saltwater and oil field wastes through the North Dakota Underground Injection Program; and all other operations for the production of oil or gas.

The NDIC has significant concerns with the Proposed RMP, as follows:

Closure of Subsurface to Fluid Mineral Leasing

Similar to Alternative B in the draft RMP, the Proposed RMP will close large areas of subsurface for mineral development in the vicinity of USFS managed surface lands which have recently been found to be open for leasing (either with no surface restrictions or with some surface restrictions). The closure of these BLM managed lands effectively blocks the development of the USFS managed lands, despite the USFS having recently determined these lands were appropriate for mineral development in their respective RMPs finalized in the last three years.[3]

For example, the Proposed RMP will close 213,100 acres of BLM subsurface to fluid mineral leasing, which is 44% of the decision area. These 213,100 closed acres are in the direct vicinity of various acres of USFS managed lands under their respective RMPs which have not been closed to development and thus impacts the ability to develop those USFS managed lands. The lands proposed to be closed by BLM, thus impairing USFS lands includes, in part:

- 5,375 acres incidental to Steep Slopes (Proposed RMP, Volume 1 at 3-64)
- 44,000 acres incidental to Sensitive Soils (Proposed RMP, Volume 1 at 3-65)
- 2,700 acres incidental to Badlands (Proposed RMP, Volume 1 at 3-66)

[3] *See* Northern Great Plains Management Plans Revisions, Final Supplemental Environmental Impact Statement for Oil and Gas Leasing (December 2020); *see also* Garrison Dam/Lake Sakakawea Project Oil and Gas Management Plan (June 2020) (showing Corps lands impacted).

- 2,971 acres BLM subsurface closed for Fish and Aquatic Species (Proposed RMP, Volume 1 at 3-156)
- 368 stream miles and 8,158 acres of waterbodies (Proposed RMP, Volume 1 at 3-81)

All of these interests are directly adjacent to USFS managed lands which have not been closed to mineral leasing in the USFS's recent RMP decision. Due to the adjacency of these BLM managed closed lands, it is not economically feasible for North Dakota to develop the USFS managed lands due to the split estate nature of minerals in North Dakota and established spacing units. Essentially, lateral wells cannot be efficiently and economically drilled to allow the development of the USFS lands in the vicinity of these closed BLM subsurface minerals.

This essentially ends oil and gas exploration on federal lands. The provision to allow leasing based on drainage, or new data such as offset well production, geophysical surveys is meaningless since the closure of leasing in these areas prevents these most likely revisions from occurring. The low potential designation and closure of 67 Slope County parcels and 7 Bowman County parcels is refuted by BLM leasing activity in those counties in 2023-2024 during which 19 parcels have been offered and all of them received bids. The North Dakota Geological Survey has provided data indicating much higher potential than BLM asserts.

The most egregious closure is to the minerals under Fort Union that can be developed with horizontal drilling resulting in no impact to the historic site. The closure of those minerals to leasing will prevent 5 wells from being drilled resulting in estimated loss over 40 Years of $14.2M in taxes and $3.9M in State/Federal royalties.

Scope of No Surface Occupancy (NSO) Lease Stipulation

The Proposed RMP would impose significant surface restrictions that either impair the development of adjacent USFS managed surface estates or directly contradicts with the surface requirements of USFS managed surface estates. In the Proposed RMP, BLM has proposed to add NSO stipulations to 130,000 acres of BLM managed surface estates. The USFS' recent Northern Great Plains Management Plans Revisions, completed in 2020, only applied NSO restrictions to 118,500 acres of USFS managed surface estates. Despite managing substantially less surface estates, BLM is proposing to add NSO stipulations to approximately 11,500 more acres of surface estates than the USFS.

Alternative D proposes 72,600 less acres of NSO than under the current plan. The 130,000 acres of NSO in Alternative D are large acreage blocks located in Lost Bridge and Red Wing Creek Fields. The excessive use of NSO in this area to allegedly protect Bighorn Sheep habitat could be mitigated by providing narrow access corridors and using timing stipulations to prevent wildlife impacts.

The Energy Policy Act of 2005 directs that lease stipulations must be "only as restrictive as necessary to protect the resource for which the stipulations are applied." 42 U.S.C. § 15922(b)(3)(C). The use of overbroad lease stipulations throughout the Proposed RMP violates federal statute, and the BLM has not explained why a less restrictive approach would be incapable of protecting these resources.

Based on the Mineral Tracker evaluation at Attachment D hereto, the closure of those minerals to leasing will prevent 220 wells from being drilled resulting in an estimated loss over 40 Years of $852M, broken down to $624M in taxes, $58M in State royalties, and $170M in State/Federal Royalties.

Further, BLM's NSO determinations directly conflict with areas under the USFS jurisdiction, including:

- 48,100 acres BLM subsurface NSO for Badlands (conflicting with recent USFS determinations).
- 52,900 acres BLM subsurface NSO for vegetation (conflicting with recent USFS determinations).
- 58,500 acres BLM subsurface NSO within 3 miles of historic properties (conflicting with recent USFS determinations).
- 18,500 acres within 29 miles of ephemeral streams having NSO designations, conflicting with USFS and Corps determinations).

Reasonably Foreseeable Development

The Reasonably Foreseeable Development ("**RFD**") Scenario for Oil and Gas Development (March 2024) understates future potential development as a result of several flawed assumptions:

1. First, it understates future potential development because of the assumption that no technological or regulatory changes will impact the viability of Bakken or Three Forms Formations development in the next 20 years. Negating the impact of technological advancements is contrary to experience, which has shown that advancements in drilling and completions techniques can dramatically increase the viability of oil and gas development opportunities. Modern oil and gas extraction techniques have significantly reduced the environmental footprint of development activities. Technologies such as pad drilling, which allows multiple wells to be drilled from a single location, minimize surface disturbance and reduce the overall impact on surrounding ecosystems. The NDIC believes that to overlook the potential for future technological development is an overly pessimistic forward-looking statement. Proposed RMP, Volume 1 at 3-210.

2. Second, the BLM assessment of the oil and gas resource potential is hindered by the assumption that foreseeable resource development will follow existing infrastructure and be limited to the Bakken-Three Forks petroleum system. Significant development potential lies in other petroleum systems in the state, notably the Red River Formation and the Madison Group.

   Helms (2023)[4] presented an NDIC assessment of remaining drilling inventory in the Bakken-Three Forks petroleum system that indicates that drillable locations

[4] Helm, L.D., 2023, North Dakota Update: NDPC Annual Meeting, https://www.dmr.nd.gov/dmr/sites/www/files/documents/Oil-and-Gas/NDPCAnnual09212023.pdf, p. 32.

could be diminished in 17–18 years. If technological advancements in drilling and completion efficiencies are implemented as they have been in the past, this timeline could be accelerated and/or inventory could be expanded.

Nesheim (2024)[5] highlights drilling activity in formations other than the Bakken-Three Forks over the last decade. Within the next 20 years, development activity in North Dakota could shift to an increased focus on other oil and gas bearing formations, and the RFD should be adapted to appreciate this potential. Existing infrastructure is not believed to be a significant limitation to future development, and the RFD and associated implications for acreage availability for leasing should more closely reflect the line of moderate potential put forth in Attachment E. Attachment F illustrates the proposed cutoff line for potential future development compared to the most recent RFD.

Lease authorization in low potential development areas should include all available data sets for geologic interpretation.

BLM recognizes that future data or interpretations may alter the scenario for resource development [Table 2-2, item 369: "In low development potential areas leasing may only be authorized to prevent drainage of federal minerals or if the oil and gas development potential categories are revised based on new data or information such as offset well production or geophysical surveys."]. However, additional data or interpretations should be included in these criteria. Depositional and/or diagenetic geologic models/interpretations should also be included in the criteria upon which the decision to allow leasing will be made in the future. Lease authorization in low potential development areas should include all available data sets for geologic interpretation i.e., geologic mapping products not derived solely from geophysical surveys.

BLM acreage in Slope County should be open to fluid mineral leasing.

The Proposed RMP does not appropriately consider the potential of the active petroleum system in the Red River Formation in Slope County, North Dakota. The lack of existing infrastructure in Slope County does not preclude potential future development of the Red River Formation. Nesheim (2017)[6] demonstrated that Slope County is within the portion of the Red River Formation petroleum system where active oil generation is occurring. Camp and others (2023)[7] further substantiates these findings, as does Wheeling (2018).[8] Nesheim (2017) in addition to an NDGS report by Stolldorf (2020)[9] documents that wells in Slope County are producing or

[5] Nesheim, T.O., 2024, Review of Non-Bakken/Three Forks Oil and Gas Drilling Activity in North Dakota Since 2013: North Dakota Department on Mineral Resources, Geo News, vol. 51, no. 2, p. 2-4.
[6] Nesheim, T.O., 2017, Stratigraphic and geochemical investigation of kukersites (petroleum source beds) within the Ordovician Red River Formation, Williston Basin: AAPG Bulletin, vol. 101, p. 1445-1471.
[7] Camp, W.K., Schieber, J., Mastalerz, M., and Nesheim, T.O., 2023, Organic petrology of the Upper Ordovician Red River kukersite tight oil and gas play, Williston Basin, North Dakota, United States: AAPG Bulletin, vol. 107, p. 989-1013. DOI: 10.1306/11122222010.
[8] Wheeling, S.L., 2018, Origin and preservation of organic-rich zones and kukersite beds of the Red River Formation (Upper Ordovician), Williston Basin, North Dakota: PhD Thesis, University of North Dakota, p. 260.
[9] Stolldorf, T.A., 2020, Red River Production and Drill Stem Test (DST) Maps: North Dakota Geological Survey, Geologic Investigations no. 231, p. 4.

have produced oil and gas from the Red River Formation.

The Proposed RMP closes BLM acreage in Slope County to fluid mineral leasing. Proposed RMP, Volume 2, Appendix A, Map 2-14. The assumptions made to support this decision are overly pessimistic of the resource potential of Slope County. BLM acreage in Slope County should be open to fluid mineral leasing.

Deep Geothermal Resource Development Potential

BLM still does not adequately recognize the potential for development of deep geothermal resources in the Williston Basin of North Dakota. There is an active deep geothermal project (DEEP Earth Energy Production Corp.) underway directly along the southern Saskatchewan/northwestern North Dakota border (https://deepcorp.ca/). The initial test well drilled by the DEEP project targeted the Deadwood Formation and encountered brine water at a temperature of 127 degrees C (~261 degrees F) (https://industrywestmagazine.com/features/geothermal-is-saskatchewans-energy-future-in-hot-water/). The company is planning to generate electricity using an Organic Rankine Cycle (ORC) power generator, which is able to generate power from heat sources of 80 to 400 degrees C. The Deadwood Formation extends into western North Dakota where the formation reaches greater depths, higher temperatures (>300 degrees F), and therefore has geothermal potential similar to, or greater than, the DEEP project.

The Proposed RMP assumption of no critical mineral development during the planning period does not incorporate recent advances toward commercialization.

Developing new, domestic sources of critical minerals is perhaps the singular most important national strategic priority for the United States and has been a goal of the current and previous presidential administrations. Securing reliable supplies of these commodities is a bipartisan issue, as they are essential for the manufacture of technologies used in both defense and electrification. Coal has been identified as one of the most promising new sources that could address this strategic vulnerability. Research funded by the U.S. Department of Energy over the past decade has shown that lignite, a type of low-rank "soft" coal, is uniquely promising for its ability to incorporate significant enrichment of many critical minerals, especially the rare earth elements, gallium, and germanium, minerals that were recently subject to export restrictions from China[10] – specifically to U.S. defense manufacturers. Lignite is largely restricted to two U.S. basins, the Gulf Coast Basin and the Williston Basin centered in western North Dakota. The North Dakota Geological Survey (Department of Mineral Resources) released two reports in 2023[11] characterizing two stratigraphic horizons where coals can contain rare earth element concentrations approaching 10 times the threshold the U.S. DOE initially proposed to be promising

[10] U.S. Trade Commission, 2024, Germanium and Gallium: U.S. Trade and Chinese Export Controls. Executive Briefings on Trade, March 2024, https://www.usitc.gov/publications/332/executive_briefings/ebot_germanium_and_gallium.pdf

[11] Moxness, L.D., Murphy, E.C., and Kruger, N.W., 2023, Critical mineral enrichment in lignites beneath the Rhame bed (Paleocene) of the Slope Formation in the Williston Basin of North Dakota: North Dakota Geological Survey Report of Investigation no. 134, p. 267; Murphy, E.C., Moxness, L.D., and Kruger, N.W., 2023, Elevated Critical Mineral Concentrations Associated with the Paleocene-Eocene Thermal Maximum, Golden Valley Formation, North Dakota: North Dakota Geological Survey Report of Investigation no. 133, p. 89.

(300 ppm). New extraction techniques developed by the University of North Dakota, in combination with the elevated critical mineral concentrations identified in North Dakota lignite, have set the stage for realized commercial production. North Dakota is a semifinalist for funding allocated by the U.S. DOE to build the first commercial extraction plant for coal-hosted critical minerals in the U.S., with a decision to be made in 2025.[12] Despite this recent momentum, the analytical assumption of the Proposed RMP is "There is no reasonably foreseeable locatable mineral development" and summarizes the promising recent advances in critical mineral resource characterization and extraction technology as "rare earth minerals are also present". It appears the Proposed RMP may not have been able to incorporate the latest data on coal-hosted rare earth elements and other critical minerals in North Dakota.

The BLM argues that critical minerals are managed as locatable minerals and would not be impacted by sweeping closures of federal coal acreage. This is not correct and is arbitrary because future critical mineral development would likely also be tied to a coal lease.

The Proposed RMP recognizes the importance of keeping acreage open to entry for locatable minerals (under which critical minerals are usually categorized). The Proposed RMP opens 7,700 new acres and only recommends the closure of ~1,000 acres (the Mud Buttes ACEC). Even if Congress or the Secretary enacts this recommendation, 99.7% of federally owned locatable minerals would remain open to entry (361,600 acres). However, the most promising locatable mineral deposits are hosted within coal, introducing significant uncertainty over the nearly 4 million acres which the Proposed RMP does not consider acceptable for coal leasing. The two horizons in southwestern North Dakota where coals contain significant critical mineral enrichment occur in the near subsurface (within 50 ft depth) over approximately 82,400 acres of the Proposed RMP coal leasing decision area, of which the Proposed RMP closes 96.7% to future coal leasing (*see* Critical Minerals Map at Attachment G). BLM argues that closing this acreage to coal leasing does not necessarily preclude the development of coal-hosted locatable minerals, as development would not invoke the Proposed RMP decisions applied to thermal coal leasing as long as the coal is not combusted. Although future critical mineral extraction techniques may not require combustion (the latest research from the University of North Dakota suggests it is most economically extracted from unburnt feedstocks), thermal power generation from the benefacted coal is a logical (and possibly economically necessary) additional revenue stream for a critical mineral extraction operation. Other research groups continue to develop techniques for critical mineral extraction from coal ash,[13] so there are also scenarios where burning the feedstock may be necessary to concentrate the critical mineral content to economic levels. Either of these extraction approaches may be economic at existing coal mines, but the most enriched concentrations found to date occur in Slope, Stark, Dunn, and Morton counties, areas where all or nearly all of the federal coal acreage has been closed in the Proposed RMP.

[12] Grand Forks Herald, 2023, UND awarded $8 million Department of Energy grant to study rare earth material extraction. https:// www.grandforksherald.com/news/local/und-awarded-8million-department-of-energy-grant-to-study-rare-earthmaterial-extraction April 4, 2023; Kurtz, A., 2023, Rare earth elements: North Dakota's diamonds in the rough. https://blogs.und.edu/und-today/2023/04/rare-earth-elements-north-dakotas-diamonds-in-the-rough/ April 20, 2023.

[13] Thomas, B. S., Dimitriadis, P., Kundu, C., Vuppaladadiyam, S. S. V., Raman, R. S., & Bhattacharya, 2024. Extraction and Separation of Rare Earth Elements from coal and coal fly ash: A review on fundamental understanding and on-going engineering advancements. Journal of Environmental Chemical Engineering no. 12, issue 3, pp. 1-33.

In its responses to comments regarding the possible negative effects of the Proposed RMP on a potential new industry, BLM generally addresses these concerns by stating: *"The federal government can dispose of rare earths/critical minerals through the applicable locatable, non-energy leasable, or salable authorities, outside the processes described in 43 CFR Part 3400 §§ 3400-3480 and the RMP decisions applied to thermal coal leasing. When the BLM has more information and a specific project to analyze, an RMP amendment could be completed if it is determined that decision adjustments are necessary to relieve potential speculative policy conflicts. Possible changes to federal laws and regulations in response to developing technologies are outside the scope of the RMP."*

In short, BLM argues closing vast amounts of federal coal acreage will not necessarily negatively impact the future development of coal-hosted critical minerals because they are locatable minerals independent of the coal lease. While true, this fails to consider the logical additional revenue stream of thermal power as a byproduct of critical mineral extraction. Even if workarounds or amendments to the Proposed RMP are possible, as it currently stands, it is difficult to interpret the Proposed RMP as anything other than a new obstacle for a nascent industry of national strategic importance.

The State previously commented on the draft RMP with the hope that BLM would choose an alternative that would allow for maximum regulatory flexibility over the 20-year evaluation period. Alternative D of the RMP is arguably the opposite approach, making only minor changes from the most restrictive alternative in the draft RMP. Should this Proposed RMP take effect, 98.6% of the 4,071,600 acres of federal coal in North Dakota would not be "acceptable to coal leasing" and, indirectly, may effectively also be closed for critical mineral development, as these locatable minerals are likely directly tied to the coal lease. Managing critical minerals as independent from coal may not be the appropriate management practice.

B. The North Dakota Department of Trust Lands Concerns with the Proposed RMP.

The Board of University and School Lands ("**Board**") is established by North Dakota's State Constitution and charged with managing Trust Lands in a way that is in the best interest of the trusts' beneficiaries. The Board is comprised of the Governor, Secretary of State, Attorney General, State Treasurer, and Superintendent of Public Instruction. Under State law, the Board has "[f]ull control of the . . . . management of . . . . [l]ands donated or granted by or received from the United States or from any other source for the support and maintenance of the common schools." N.D.C.C. § 15-01-02.

In 2011, the Board adopted the name "Department of Trust Lands" as the common reference for the office of the Commissioner. Prior to that time, it was informally called the "State Land Department." The North Dakota Department of Trust Lands is the administrative arm of the Board, serving under the direction and authority of the Board. The Department manages approximately 2.6 million mineral acres with their approximate 8,700 associated oil and gas leases, and over 700,000 surface acres with their approximate 4,400 associated agricultural leases. Revenues generated from these leases, along with payments received from other income sources such as oil & gas lease bonus payments and easements granted for pipelines, roads, and well pads, are deposited into 13 permanent trust funds and invested to provide long-term income for trust beneficiaries. For example, most of the land managed by the North Dakota Department of Trust

Lands is associated with the Common Schools Trust Fund. The sole beneficiaries of the assets held in the Common Schools Trust Fund, including the land and all revenue generated from these assets, are the common schools of the State and those funds are therefore utilized to advance significant State and federal goals of expanding primary education. Thus, the State of North Dakota is federally mandated to manage Trust Lands in a manner consistent with the fiduciary intent of the Enabling Act.

The Proposed RMP impairs the North Dakota Department of Trust Land's ability and fiduciary responsibility to manage Trust Lands in the best interest of the trusts' beneficiaries as established by the Enabling Act and fails to equally consider all policies of FLPMA in several ways.

First, the North Dakota Department of Trust Lands has fiduciary obligations to manage State-owned Trust Lands in a manner that is in the best interest of trust beneficiaries. Section 2.3 of the Proposed RMP states that "[s]tipulation decisions . . . . apply to fluid mineral leasing and development of federal mineral estate underlying BLM-administered surface lands, *private lands, and state trust lands*." The Proposed RMP would impair the State's ability to make management decisions involving State Trust Land. Yet BLM is not subject to the same fiduciary responsibilities of the North Dakota Department of Trust Lands, as set forth in the North Dakota State Constitution. Management decisions of BLM may be contrary to the benefit of trust beneficiaries which would be a direct transgression from the purpose of Trust Lands as set forth in the Enabling Act.

North Dakota's real property interests are closely intertwined with the interests of the Federal Government due to the intermixed ownership of State and BLM-managed lands located throughout western North Dakota. There is also a great deal of private fee-owned lands located in these same areas. In many cases, State Trust Lands are completely landlocked by federal lands. (e.g. Sections 16 and 36 of Township 144 North, Range 101 West, Billings County, ND). Prudent and responsible development of mineral resources often requires that several hundred acres of land be set aside in a "unit" in order to reduce the amount of disturbance to the land while increasing efficiency of development of mineral resources. Thus, any limitation on mineral development in adjacent federally-owned tracts will result in an adverse management and economic impact on North Dakota by blocking the development of Trust Lands.

Another example of where the Proposed RMP would impose restrictions on federally-owned lands and infringe on the State's management of Trust Lands is Sections 27 and 34, Township 151 North, Range 95 West, McKenzie County, North Dakota. Like the example above, this is a highly--productive area located in the heart of the Bakken Oil Field. The unleased minerals within these tracts, combined with the BLM's restrictions on surface locations, have made it impossible for the State to develop these mineral interests. Delays and moratoriums caused by federal restrictions not only affect the royalties that would be paid to the applicable trust funds, but also deprive the State the opportunity to invest those royalties which over time would generate a significant rate of return for its beneficiaries.

As a further example, North Dakota owns approximately 3,840 acres across Sections 13, 14, 15, 16, 21, 22, 23, and 24 in Township 141 North, Range 101 West, Billings County, North Dakota. There are several existing legacy wells located on these lands that are currently producing

oil. The area, while further away from the Tier 1 acreage, maintains significant development opportunity using the current horizontal technology with a 1,920-acre spacing unit. The restrictions in the Proposed RMP, including NSOs, restricted drilling times, or the ability to construct pipelines or roads, will adversely impact any significant development in this area. Even if the restrictions are only placed on the surrounding federal-owned lands, the impact of those restrictions together with the NSO would be catastrophic to any future development of those State Trust Lands.

Second, while oil and gas production continue to be an important industry in North Dakota, coal development also remains a critical part of the North Dakota power grid and economy. In Mercer and Oliver Counties, the Department of Trust Lands has approximately 90 active coal leases. The Proposed RMP would completely decimate the value of North Dakota's coal resources near the Proposed RMP area. Though BLM estimates that there is ample leased State and fee lands available to the existing coal mines through 2040, the BLM does not have the authority or basis to determine the sufficiency or adequacy for development in North Dakota, and the North Dakota PSC disputes that these lands will be able to be mined due to the nature of the mines themselves. Due to the intermingled "checkboard" ownership in this area, the development of these resources would be greatly impacted. The mines themselves need to have a contiguous pattern allowing for consistent economic production. For example, under the Proposed RMP, NSO 11-63 would prohibit surface occupancy and use in an authorized federal coal lease existing prior to the time the oil and gas lease was issued. This is an unlawful impairment of existing leases. Further, under the Proposed RMP, many of the State's smaller tracts would again be stranded due to the surrounding federal lands.

Third, along with the concerns about oil, natural gas, and coal, North Dakota's critical mineral deposits have been proven to be an answer to our nation's problem in securing critical minerals. The Energy Act of 2020 defines a "critical mineral" as a non-fuel mineral or mineral material essential to the economic or national security of the United States and which has a supply chain vulnerable to disruption. Recent tests developed by the University of North Dakota Energy & Environmental Research Center and the NDIC have shown the presence of developmental amounts of lithium, and other critical minerals needed to make batteries, cell phones, and other technology. The greatest known concentrations of these critical minerals are located in Dunn, Slope, Mercer, and Oliver Counties, the same counties that produce North Dakota's coal. Elevated Critical Mineral Concentrations Associated with the Paleocene-Eocene Thermal Maximum Golden Valley Formation, North Dakota. In fact, the coal produced in this area has shown a presence of minable content of lithium. Under the proposed RPM, coal would be treated as a waste product when mining critical minerals on BLM subsurface estate. The Proposed RMP would further restrict North Dakota's and the nation's ability to develop these critical resources at the time when they are needed most. The ancient subtropical soils in these areas may hold the key to critical mineral enrichment in the Williston Basin of North Dakota.

In addition to mineral interests, the Department of Trust Lands also manages over 700,000 surface acres. These acres provide multiple avenues of revenue for the trusts including agricultural leasing, encumbrances, and aggregate mining. The Department must retain flexibility in how the lands are managed to ensure that these lands continue to generate revenue to maintain the State's public institutions. Approximately 5,200 acres of surface interest are intertwined with BLM-

managed fluid minerals and 8,500 acres of surface interest with BLM-managed coal minerals. According to Section 2.34 of the Proposed RMP, these lands are subject to restrictions from BLM management which would adversely impair the Department of Trust Land's fiduciary and sovereign obligations to develop these resources.

Through Section 10 of the Enabling Act, sections 16 and 36 of every township in North Dakota were granted to the State for the support of common schools. Section 10 also provided for indemnity selection of certain lands, stating that "were such sections, or any parts thereof, have been sold or otherwise disposed of by or under the authority of any act of Congress, other lands equivalent thereto,…. are hereby granted." In 1915, the State selected lands in Bowman County to compensate for the unavailability of a section 36 in another county. (North Dakota Indemnity School Land Selection, List No. 35. *See* List No. 35 at Attachment H.) The lands selected were in Bowman Co, Township 129 North, Range 106 West, Section 10 for a total of 434.2 acres. (*See* Split Estate exhibit at Attachment I). At the time of selection in 1915, the United States had reserved the oil and gas rights under the Act of July 17, 1914 (38 Stat. 509; 30 U.S.C. sec. 122), resulting in a split estate of State ownership of the surface estate and United States ownership of the oil and gas estate. As previously stated, the Enabling Act expressly provided that State Trust Lands "shall not be subject to preemption, homestead entry, or any other entry under the land laws of the United States. However, the Proposed RMP includes stipulations that directly interfere with the Department of Trust Lands' ability to prudently manage lands where the estate is split with the United States in a manner that is in the best interest of trust beneficiaries. More specifically, the Proposed RMP adds NSO stipulations on State Trust Lands surface estates in direct contradiction to the Enabling Act.

Restrictions on lands managed by the BLM would also interfere with the responsible use of State Trust Land by its mere proximity to those BLM-managed lands. For example, restrictions on a BLM-managed tract containing an NSO stipulation where infrastructure would otherwise take the most direct route, such infrastructure would be forced to go around the BLM tract, disturbing significantly more land in North Dakota than what would have otherwise been disturbed absent restrictions by the Proposed RMP. Another example of the interference due to proximity directly impacting the development of State-owned mineral interests is Section 16 in Township 148 North, Range 95 West, McKenzie Dunn County, North Dakota, which consists of 469.49 acres of mineral interest owned by North Dakota. This particular interest is situated in a very productive area of the Bakken Oil Field. Due to the restrictions placed by the Backcountry Conservation Area on the surrounding acreage by the federal government, the land and minerals, granted to North Dakota through the Enabling Act at statehood, will not be developed. The impact of these federal restrictions is contrary to the intent for which the United States granted Trust Lands to North Dakota. Restricting federally-owned lands that are within the vicinity of State-owned Trust Lands deprives the State of the ability to continue to utilize these assets to maintain the Common Schools Trust Fund and consequently erodes the value of the lands in question.

Finally, the Proposed RMP disproportionately focuses on conservation and maintaining air quality at the expense of other uses of BLM-managed lands in violation of FLPMA's multiple use mandate and stated principal and major use for mineral development.

The effect of the Proposed RMP is to significantly deprive the State's Trust Lands of their value by effectively prohibiting development and prudent use of Trust Lands. Thus, the ability of

the State of North Dakota to achieve income to adequately fund K-12 public education will be permanently harmed. Such an outcome is not consistent with the Enabling Act of 1889. Furthermore, this may be considered a taking in many circumstances.

Production of Critical Minerals Will Be Negatively Affected.

On December 20, 2017, President Donald Trump signed Executive Order 13817, A Federal Strategy to Ensure Secure Reliable Supplies of Critical Minerals. Section 3 of the executive order stated that the United States will further the policy of the federal government to reduce the nation's vulnerability to disruptions in the supply of critical minerals (CMs) by:

- Identifying new sources of CMs.
- Increasing activity at all levels of the supply chain, including exploration, mining, concentration, separation, alloying, recycling, and reprocessing CMs.
- Streamlining leasing and permitting processes to expedite exploration, production, processing, reprocessing, recycling, and domestic refining of CMs (1).

In 2019, the NETL program was expanded to include recovery of CM from coal-based sources, and the program name was changed to Critical Minerals Sustainability.

On September 22, 2020, the U.S. Department of Energy (DOE) Office of Fossil Energy released a financial assistance funding opportunity announcement (FOA), DE-FOA-0002364, entitled "Carbon Ore, Rare Earth and Critical Minerals (CORE-CM) Initiative for U.S. Basins." In the FOA, under section I.B. it states:

> This Funding Opportunity Announcement (FOA) − *Carbon Ore, Rare Earth and Critical Mineral (CORE-CM) Initiative for U.S. Basins* − is focused on expanding and transforming the use of coal and coal-based resources to produce Rare Earth Elements (REE), Critical Minerals (CM) and novel high-value, nonfuel, Carbon-Based Products (CBP), as part of our next generation of domestic U.S. materials. Realizing this potential would enable the U.S. to reduce its dependence on REE and CM imports and establish and advance a new CBP industry. The resulting innovative products would be used not only by consumers, but also by the defense industry.

Further, section I.C. states:

> The vision of the *Carbon Ore, Rare Earth and Critical Minerals* (CORE-CM*) Initiative for U.S. Basins* is to catalyze regional economic growth and job creation by realizing the full potential value of natural resources, such as coal, across basins throughout the U.S. It has been designed to address the upstream and midstream critical minerals supply chain and downstream manufacturing of high-value, nonfuel, carbon-based products, to accelerate the realization of full potential for carbon ores and critical minerals within the U.S basins. U.S. coals and associated by-products and waste streams can be used as feedstocks for domestic production

> of REE and CM to enhance our national and economic security. They can also be used as sources of carbon for production of high-value, nonfuel, CBP.

To this end and to benefit the people and industry of North Dakota, the Energy & Environmental Research Center (EERC) proposed and was awarded a project under this FOA, which became the Williston Basin CORE-CM (WB CORE-CM) Initiative. *See* Final Report at Attachment J hereto. The required cost share was obtained through an award through the NDIC and through four industry sources: North American Coal Corporation, BNI Energy, Minnkota Power Cooperative, and Basin Electric Power Cooperative. The intent of this federal program is to be the first phase of a multiphase program.[14]

On April 24, 2024, the DOE Office of Fossil Energy and Carbon Management issued FOA number DE-FOA-0003077 entitled "Regional Scale Collaboration to Facilitate a Domestic Critical Minerals Future: Carbon Ore, Rare Earth, and Critical Minerals (CORE-CM) Initiative," which is the second phase of CORE-CM program.

Section I.C. states:

> The vision of the Carbon Ore, Rare Earth and Critical Minerals (CORE-CM) Initiative for U.S. Basins is to catalyze regional economic growth and job creation by realizing the full potential value of natural resources, such as coal, across basins throughout the U.S. It has been designed to address the upstream and midstream critical minerals supply chain and downstream manufacturing of high-value, nonfuel, carbon-based products, to accelerate the realization of full potential for carbon ores and critical minerals within the U.S basins. U.S. coals and associated by-products and waste streams can be used as feedstocks for domestic production of REE and CM to enhance our national and economic security. They can also be used as sources of carbon for production of high-value, nonfuel, CBP.

This FOA was also listed on the IWG website.[15] The EERC has teamed with the University of Wyoming in a collaborative proposal to this FOA.

DOE has a strong focus on continuing to explore all the resources in the United States that might contain minable concentrations of REEs and CMs in carbon-based deposits. DOE's plan is to continue with the CORE-CM Initiative to a third phase, which would begin after Phase II is complete (2) and could extend REE and CM investigations well past 2030. Objectives have been clearly stated, which include national and economic security. Issuing funding announcements to continue this work, administrating IWG, of which the Department of Interior is a member, and

[14] National Energy Technology Laboratory. CORE-CM Project Phases. https://netl.doe.gov/resource-sustainability/critical-minerals-and-materials/core-cm/phases (accessed August 22, 2024).

[15] Interagency Working Group on Coal & Power Plant Communities & Economic Revitalization website, https://energycommunities.gov/funding-opportunity/regional-scale-collaboration-to-facilitate-a-domestic-critical-minerals-future-carbon-ore-rare-earth-and-critical-minerals-core-cm-initiative/ (accessed August 22, 2024).

including this work in tax credit provisions would seem to be counter to the desire of BLM rulemaking.

As discussed above, **t**he greatest known concentrations of several critical minerals, including lithium, are located in Dunn, Slope, Mercer, and Oliver Counties, the same counties that produce North Dakota's coal. Under the RPM, coal would be treated as a waste product when mining critical minerals on BLM subsurface estate, and the Proposed RMP would restrict North Dakota's and the nation's ability to develop these critical resources at the time when they are now most needed.

C. North Dakota Public Service Commission's Protest of the Proposed RMP.

The North Dakota Public Service Commission ("**North Dakota PSC**") is a state constitutional agency with varying degrees of authority over, among other things, electric and gas utility regulation, energy transmission and generation siting consistent with minimal impacts on the environment and public welfare, surface coal mining and reclamation, and the elimination of hazards from abandoned mine lands.

The North Dakota PSC's regulation of the coal mining industry began in North Dakota in 1970. After the enactment of the Surface Mining Control and Reclamation Act of 1977 ("**SMCA**"), the State entered into a Federal-State cooperative agreement ("**Cooperative Agreement**") with the U.S. Department of Interior's Office of Surface and Mining. Federal-State Cooperative Agreement. Surface Mining Control and Reclamation Act (Federal Act), Pub. L. 95-87, 30 U.S.C. 1273(c). The Cooperative Agreement authorizes North Dakota PSC regulation of surface mining and reclamation operations on private and Federal lands within North Dakota, consistent with State and Federal Acts and the Federal lands program. In short, the North Dakota PSC is the primary authority over the development of surface coal mining operations and reclamation within the State.

Approximately 144,000 acres have been put under State permit since that time and over 27,000 of those acres have been released completely from performance bond. As of June 30, 2016, a total of 133,527 acres have been permitted, with approximately 78,013 (58%) disturbed by mining activity to date. Of these disturbed acres, approximately 54,094 acres have been backfilled, graded, top-soiled and seeded (or 69% of the lands disturbed have been reclaimed to the point of establishing vegetation). Since 1980, North Dakota's regulatory program has been a partnership effort between the State and the U.S. Department of the Interior's Office of Surface Mining. At present, 64% of program costs are borne by the Department of the Interior. The remaining 36% comes from State funds appropriated by the legislature.

The North Dakota PSC is opposed to the Proposed RMP and EIS due to BLM's abandonment of the multiple use mandate required by FLPMA, the divergence from the established policy in the existing 1988 North Dakota RMP on which the State has long relied to plan environmentally sound mineral development, and the incomplete and flawed analysis by which BLM justifies its proposal. The North Dakota PSC has found that the Proposed RMP and EIS will significantly and adversely restrict the efficient development of coal and frustrate the North Dakota PSC's authority to limit environmental impacts and encourage orderly development in the State.

1. The Proposed RMP has Not Provided Adequate Justification for its Selection of Coal Screens and Inappropriately Applies Restrictions Better Left for Implementation Level Lease Planning.

Federal regulations require the coal screening process to inform major land use planning decisions concerning coal resources. *See* 43 C.F.R. § 3420.1-4(e). FLPMA provides that BLM shall "develop maintain, and when appropriate, revise land use plans." 43 U.S.C.A. § 1712. RMPs are the first tier of land use planning in the two-tiered BLM planning process. *See* Scoping Report, November 2020, Resource Management Plan and Environmental Impact Statement, Prepared by the U.S. Dept. of the Interior Bureau of Land Management. Pg. 7, 1.1. RMPs provides planning-level management strategies that are to be expressed in the form of goals, objectives, allowable uses, management actions, and resource uses. *Id.* RMPs also provide broad direction and guidance for resources. Due to the indefinite period in which a decision area may be subject to a RMP, any first tier planning level strategies should be supported with a high level of certainty. Planning and management decisions for more limited geographic units of BLM-administered lands should be deferred to a more detailed site-specific implementation planning and NEPA analysis where data may be defined and applied.

The screens designated for RMPs are: (1) Identify coal with development potential; (2) Application of unsuitability criteria; (3) Multiple use conflict analysis; and (4) Surface owner consultation. These screens are not an authorization for BLM to materially impair existing mines and elevate conservation in the FLPMA planning process. It is therefore inappropriate for BLM to apply the coal screens in the Proposed RMP in a manner that materially incumbers development of federal coal for future owners.

Appendix F contains a coal screening analysis as required by federal law. 43 C.F.R. § 3420.1-4. The State previously raised concerns that the coal screening process in the draft EIS was inconsistent with the law. However, BLM did not address those concerns in Appendix F or the supporting analysis in the FEIS. Further, BLM did not change screens 2 or 3, only screen 4. In the draft RMP, under Coal Screen 4, BLM sent letters to landowners asking if they were favorable or unfavorable to coal development. If BLM did not receive a response, they removed those acres from leasing consideration. Public comments addressed this approach as being illogical and incorrect to preclude future leasing based upon a present landowner's non-response, or negative response as they may not be the landowner when the leasing action is proposed in the future. BLM responded to these public comments by adding those acres back into leasing consideration.

Coal Screen 2 provides a number of criteria that appear to be adequately substantiated for unsuitability. Areas such as public roadways, public buildings, state parks, national historic trails, incorporated cities, listed historical sites, and other federally designated areas are the type of land uses that are appropriately screened. However, several criterions were applied with incomplete data or require additional verification to their unsuitability. For example, Maps F-25, Screen 2 Unsuitability Criterion 19 Alluvial Valley Floors (without exception) incorrectly identifies 29,488 acres of alluvial valley floor. The alluvial valley floor baseline data required to make these determinations, according to the Surface Mining Control and Reclamation Act, was not evaluated. This includes:

a. Geologic data, including structure and surficial maps, and cross sections.
b. Soils and vegetation data, including a detailed soil survey and chemical and physical analyses, a vegetation map and narrative descriptions of qualitative and qualitative surveys, and land use data, including an evaluation of crop yields.
c. Surveys and data for areas designated as alluvial valley floors because of their flood irrigation characteristics must also include streamflow, runoff, sediment yield, and water quality analyses describing seasonal variations, filed geomorphic surveys and other geomorphic studies.

"Of special importance in the arid and semiarid coal mining areas are alluvial valley floors which are the productive lands that form the backbone of agricultural and cattle ranching economy of these areas. For instance, in the Powder River Basin of eastern Montana and Wyoming, agricultural and ranching operations which for the basis of the existing economic system of the region could not survive without hay production from the naturally subirrigated and flood irrigated meadows located on the alluvial valley floors. (U.S. House of Representatives, Committee on Interior and Insular Affairs, 1976)."

Coal Screen 3 provides that land use decisions may be made to protect other resource values and land uses that are "regionally or nationally important or unique," such as air and water quality, wetlands, and riparian areas. 43 C.F.R. 3420.1-4. This elevates conservation in the Proposed RMP over mineral development, a result not allowed by FLPMA. Despite the Proposed RMP acknowledging that no national air quality standards were exceeded, Coal Screen 3 sets forth a geographic limitation based upon a thinly-deduced reduction of GHG emissions from reduced transportation needs from existing mines and other associated GHG emissions. Rather than careful balancing for multiple use, Coal Screen 3 provides for a dramatic elimination of federal subsurface coal leasing without consideration of whether the human environment may be benefitted by subsurface coal lease development and instead largely bases elimination of future federal coal leasing upon an incorrect assumption of reduced GHG emissions.

There is no rational basis for an RMP level elimination of potential federal coal leasing without ground-truthing and operational understanding of the specific mineral and surface use effects. This type of evaluation can only be done on an implementation level as leases are issued, with appropriate project specific NEPA analyses. As if to demonstrate the need for a fact-specific evaluation, BLM screens up to 1,037,800 acres of future coal leasing, yet disclaims the "accuracy, reliability, and completeness" of the screen maps F-2 through F-46. Coal Screen 2's Criterion 9 and Coal Screen 3, as provided, are perfunctory and will not provide a reasonable analysis of foreseeable effects. A direct study through the coal lease application is, and continues to be, a more technically accurate framework to evaluate Coal Screen 3 and portions of Coal Screen 2. BLM should not proceed with the Proposed RMP until a proper site-specific environmental evaluation has been conducted.

2. The Proposed RMP Will Adversely Affect the Human Environment.

Contrary to BLM's statements, the Proposed RMP will likely lead to an increase in GHG emissions in North Dakota by requiring the development of less efficient State and private coal resources. This will frustrate the North Dakota PSC's interest in efficient mining, limited environmental disturbance, and contemporaneous reclamation.

Increased disturbance and environmental impacts. The added complexity to mining from encumbered federal coal leasing under the Proposed RMP would **increase** environmental impacts as companies bypass federal coal reserves in their mining areas. Mining operations that can operate forward in a logical mining unit with fewer encumbrances are more easily managed for reclamation and result in reduced surface disturbance, coal haul distances, redundant soil and subsoil transportation, linear feet of highwall, and promote contemporaneous reclamation.

Due to the unique "checkerboard" of subsurface federal coal within the State, the avoidance of federal coal leasing prevents efficient use of mining acreage and slows the reclamation, reseeding, and restoration for landowners and wildlife. If total coal production (federal plus non-federal) is the same under all Alternatives (which BLM claims), a more fractured mining operation due to federal coal avoidance will actually increase the cumulative air concentrations of pollutants in North Dakota. Associated impacts from the additional surface disturbance and coal haul distances will have air quality impacts including fugitive dust, increased diesel usage, and increased GHG emissions.

The North Dakota PSC has already observed increased surface disturbance and slowed reclamation from the U.S. Department of Interior's delays in mine plan approval for leased federal coal at the BNI Center Mine, the Coyote Creek Mine, the Coteau Properties Company's Freedom Mine and the Falkirk Mine. Although the mines obtained federal leases and the areas were incorporated into the State-approved mining permit, the U.S. Department of Interior has taken over a decade in some instances to provide mine plan approval to allow commencement of mining. There are currently several tracts that have remained in mine plan abeyance with no clear indication that approval will ever be granted.

For example, BLM took over 10 years to issue BNI Coal a federal coal lease for the NW¼ of Section 20, T142N, R84W, Oliver County in Permit BNCR-9702 which resulted in a cessation of mining on private land in the W½ of Section 21. The North Dakota PSC required that BNI develop a reclamation contingency plan in case authorization to mine federal coal was never granted by the U.S. Department of Interior. Approximately 70 acres of reclaimed agricultural land in Section 21 would have had to be re-disturbed to achieve a suitable post-mine topography if mining was not authorized and reclamation was being delayed on approximately 320 acres because of the U.S. Department of Interior's mine plan approval delay. This has resulted in a need for BNI to construct 3 sediment ponds, diversions, a dragline erection site, access corridors, overburden and soil stockpiles on the private land overlying federal coal in the NW1/4 of Section 20. Furthermore, overburden overlying federal coal in Section 20 was needed to fill the cessation pit in Section 21 to eliminate the highwall adjacent federal coal. Not leasing federal coal in the NW¼ of Section 20 provided no environmental benefit and has resulted in real increased surface disturbance and GHG emissions in North Dakota.

Delayed federal action for approval to mine federal coal in the SW1/4 of Section 24, T143N, R89W at the Coyote Creek Mine in Mercer County has also delayed reclamation on adjacent lands and created a mine-wide subsoil deficit. To reconcile the delayed federal action, additional surface disturbance will be required on private land overlying federal coal to salvage subsoil quality overburden, and an island of private coal located west of the federal coal tract will

become stranded and unlikely to be mined if the federal coal in the SW¼ of Section 24 is not mined.

The Falkirk Mine is currently revising their mine plan in Surface Coal Mining Permit NAFK-8405 because the BLM has delayed leasing federal coal in the NW1/4 of Section 2 and E1/2 of Section 3, T146N, R82W. This federal coal is part of a logical mining unit in Permit NAFK-8405 and in addition to increased environmental harm, this delay has resulted in a cessation pit on privately owned land in S1/2 of Section 2, T146N, R82W where reclamation is being delayed. The Falkirk Mine extended mine plans shows that mining is scheduled to continue at the Falkirk Mine until the year 2060 which is beyond the reasonably foreseeable (RFD) scenario.

Social and Economic Impacts. The Proposed RMP applies inconsistent logic in its Social and Economic analysis. Proposed RMP Volume 1 at 3-243. In its analysis, the Proposed RMP indicates that closing 90.5 percent of the acreage to coal leasing, compared to the "No Action" Alternative, will reduce potential impacts on general and sensitive populations. However, it assumes that coal production and economic impacts will remain the same under Alternatives B, B.1, and D. *Id.* at 3-18. The Proposed RMP indicates that leased federal coal acreage would be reduced, but total coal production is not expected to vary as non-federal coal production would increase to replace federal coal. *Id.* at 3-18. The increased social, economic, and environmental costs of mining around the unleased federal coal have not been analyzed in the Proposed RMP, and it is unclear how potential adverse impacts on populations with environmental concerns would result in the largest reduction of potential adverse impacts on populations with environmental justice concerns if adjacent non-federal lands are mined to replace federal coal.

3. The Proposed RMP Conflicts with FLPMA's and the MLA's Statutory Requirements.

Mineral Leasing Act. The MLA sets forth a framework to award leases at the request of a qualified applicant or on its own motion and requires BLM to conduct a comprehensive evaluation that achieves "the maximum economic recovery of the coal. 30 U.S.C. 201(3)(C). To further this goal, BLM, "upon determining that maximum economic recovery of the coal deposit or deposits is served thereby, may approve the consolidation of coal leases into a logical mining unit." 30 U.S.C. 202a. A logical mining unit is an area of land in which the coal resources can be developed in an efficient, economical, and orderly manner as a unit with due regard to conservation of coal reserves and other resources. *Id.*

Of the four Alternatives considered in the 1987 EIS accompanying the 1988 North Dakota RMP, the preferred Alternative was based upon balanced multiple use and intended to maximize production of mineral resources and opportunities for recreation, and consolidation of surface lands into a manageable pattern. Alternative C – 1987 RMP EIS at pg. 17. The Proposed RMP's restriction on coal leasing within 4 miles of an existing permit area and within state designated drinking water protection areas, does not comply with the MLA requirement of encouraging the maximum economic recovery of coal within a logical mining unit. The Proposed RMP will result in stranded federal and private coal resources as operators alter efficient mining practices to accommodate federal requirements, adversely impairing previously designated logical mining units.

The PSC may approve surface disturbance over federal subsurface coal. The Proposed RMP fails to consider that surface disturbance may still occur over subsurface federal coal interests. The Cooperative Agreement between North Dakota and U.S. Department of the Interior states that:

> 7. The Commission may approve and issue permits, permit renewals, and permit revisions for surface disturbances associated with surface coal mining and reclamation operations, and disturbance of the surface may commence without need for an approved mining plan on lands where:
>
> (a) The surface estate is non-Federal and non-Indian;
>
> (b) The mineral estate is Federal and is unleased;
>
> (c) The Commission consults with the Bureau of Land Management through OSM in order to ensure that actions are not taken which would substantially and adversely affect the Federal mineral estate; and
>
> (d) The proposed surface disturbances are planned to support surface coal mining and reclamation operations on adjacent non-Federal lands and this is specified in the permit, permit renewal, or permit revision.

30 CFR §934.30. The privately owned surface areas above federal subsurface coal are typically disturbed by mining activities. These areas are used to support mining and are used as soil and overburden stockpile sites, sediment ponds and haul road corridors. Therefore, based on the Cooperative Agreement to which BLM is a party, BLM cannot close federal subsurface coal leasing nor prevent surface disturbance on privately owned land that is overlying federal coal.

4. The Proposed RMP Promotes Conservation and Other Non-Codified Uses Over FLPMA's Multiple Use Mandates.

When revising the land use plans, the action alternatives should respond to a problem or opportunity described in the purpose and need statement and advised by the scoping. The needs highlighted in the Proposed RMP are to: (1) provide opportunities for mineral and energy development, (2) contribute to conservation and recovery of threatened and endangered special species status, (3) provide recreation opportunities and improved access to BLM land, and (4) manage for other social and scientific values for conservation purposes. Proposed RMP, Volume 1 at 1-2-1-3. However, FLPMA's "principal or major uses" do not allow elevation of "social and scientific values" for conservation at the planning stage over "mineral exploration and production." *See* 30 U.S.C. § 1702(l) ("The term "principal or major uses" includes, *and is limited to*, domestic livestock grazing, fish and wildlife development and utilization, mineral exploration and production, rights-of-way, outdoor recreation, and timber production) (emphasis added)).

The Proposed RMP states that these "needs" provide opportunities for mineral and energy development, contribute to conservation and recovery of threatened and endangered species and special status species, provide recreation opportunities and access to BLM-administered lands, and manage for other social and scientific values through conservation. However, "conservation" is

not a principal use under FLPMA. As such, these needs are also inconsistent with FLPMA's multiple use mandate discussed above and do not provide a valid or reasoned justification for BLM to substantially depart from the existing 1988 North Dakota RMP for coal resources.

The Proposed RMP further restricts federal coal leasing to all areas outside 4 miles from the current surface coal mining permit boundaries as of September 9, 2022, as well as within state designated drinking water protection areas. Notably, the Proposed RMP effectively closes 94.7 percent of North Dakota's federal coal to leasing under Coal Screen 3. This leaves only approximately 58,600 federal acres available for leasing. Proposed RMP, Volume 1 at ES-3 and 3-214. This, on its face, is contrary to FLPMA's directive to promote mineral development.

The Proposed RMP does not reflect FLPMA's multiple use mandate and would amount to a near-prohibition of federal subsurface coal leasing in the decision area in a long-term RMP. Accordingly, the North Dakota PSC is strongly opposed to the Proposed RMP.

5. The Proposed RMP Will Adversely Impair Private Coal Interests and Split Estate Ownership in North Dakota.

The Proposed RMP will negatively impact privately owned coal adjacent to federal tracts and create additional waste and GHG emissions. Under the Proposed RMP, State and privately owned coal adjacent to closed federal coal will be stranded, creating significant waste and inefficiencies. For example, where mine plan approval has not been granted, BLM typically requires a 20-foot buffer of coal between private and federal subsurface coal. The average coal seam thickness in North Dakota is approximately nine feet thick with a density of 80.3 lbs/ft^3. If a mine is mining private coal along one side of federal that is one-quarter section in size, approximately 19,080 tons of privately owned coal will be left in place. This is not an efficient development of mineral resources. If the federal coal tract encompasses the north half of a section and privately owned coal is mined around all sides of the federal coal, approximately 153,000 tons of privately owned coal will be left in place. Mining around federal coal increases surface disturbance and financially impacts private mineral owners because it is not economically feasible to go back and mine stranded tracts of coal.

Further, the Proposed RMP states that State and private coal development will offset closed federal coal during the Proposed RMP's planning period of 20 years. The development of less efficient State and private coal resources will result in increased and less efficient development of State and private coal resources, ultimately resulting in greater GHG emissions. The Proposed RMP has not provided an analysis of the environmental and economic impacts for the closure of federal coal and the increase in State and private coal mining. Therefore, the EIS must be revised to address the environmental and social cost of not leasing federal coal in a logical mine area.

As such, the Proposed RMP fails to acknowledge adverse effects on State or private held interests on tracts of land where the federal government does not own the entirety of the coal interest. Appendix K of the Proposed RMP, Split Estate Lands, discusses only situations where coal rights are separated from surface ownership and does not address instances in which the federal government owns only a percentage of the coal rights. Within the three major coal producing counties (McLean, Mercer, and Oliver), approximately 19,274 acres of coal rights are only partially owned by BLM and unacceptable for further consideration for leasing under the

Proposed RMP.

Finally, the Proposed RMP attempts to protect resources that have not been characterized in the Proposed RMP. The Proposed RMP has categorically classified all privately owned land overlying federal coal as a potentially high-value conservation resource without site-specific information. BLM authorities are clear in their directives that coal availability for leasing is to be based on protecting specific, high-value conservation value without an adequate assessment of the validity of that assertion. The Proposed RMP does not properly describe or characterize the baseline conditions of the privately owned lands above federal coal to provide a scientific and analytical basis for evaluating the potential impacts of the Alternatives. The Affected Environmental and Environmental Consequences evaluation does not include an analysis or assessment of the private estate overlying federal coal. If an activity or action is not addressed, no impact can be expected or realized. Without further evaluation, it is in violation of FLPMA's multiple use mandate to elevate conservation resource protections over mineral development in the private and split estates overlying federal coal.

6. The Proposed RMP Does Not Consider Cumulative Indirect Impacts to Electric and Natural Gas Customer Rates.

The North Dakota PSC is responsible for the rate regulation for investor-owned utilities. Future restrictions on federal coal and gas leasing will have cost impacts through coal and natural gas electric generation and gas supply. They may also have dramatic impacts on a future where continued operation of existing coal generation may be necessary.

The Proposed RMP fails to consider that rapid expansion of demand is putting considerable stress on the power grids serving North Dakota customers. The North American Electric Reliability Corporation's (NERC) 2023 Long-Term Reliability Assessment (LTRA) recently found that the Midcontinent Independent System Operator (MISO) is at high risk and that the Southwest Power Pool (SPP) was at an elevated risk of capacity deficit. Beginning in 2028, MISO is projected to have a 4.7 GW shortfall if expected generator retirements occur despite the addition of new resources that total over 12 GW.[16] SPP's surplus capacity is also slated to fall dramatically over the next five years, driven by generation retirements and risking peak demand forecasts.

In particular, the SPP is heavily wind-dependent and is susceptible to interrupted gas supplies in winter months. During periods of low wind or extremely cold temperatures, the SPP has struggled to meet demand, as demonstrated during the recent storm events such as Uri (2021), Elliot (December 2022), and Gerri (March 2023). The projections in NERC's 2023 LTRA are not typical and should be viewed by anyone concerned about reliability as a red flag. And those projections are without accounting for the rapid and substantial increase in demand from electrification and *de facto* electrification mandates such as the EPA's New Vehicle Emissions Rule that will result in, at a minimum, a doubling of EV-related annual electricity consumption by the year 2032 from current projections (34 TWh to 68 TWh). Additionally, the growth in data center loads has already led to load growth at a rate that the electric industry is unable to respond to quickly enough to ensure reliability. These loads have already led to congestion and reliability

[16] NERC 2023 Long-Term Reliability Assessment, pg 7. December 2023, https://www.nerc.com/pa/RAPA/ra/Reliability%20Assessments%20DL/NERC_LTRA_2023.pdf

concerns in western North Dakota. The PSC has continued to observe and be forewarned of significant additional data centers in the planning stages that are likely to be even more disruptive.

When coupled with North Dakota's substantial investment into carbon capture and storage, continued investment and operation in the state's coal fleet may not only be useful, but *necessary,* to keep a reliable grid operating — which would necessitate new or expansion of mining. The Proposed RMP undoubtedly would negatively impact future mining and permit selection of effective and efficient mining areas.

Furthermore, during the most recent winter storms, load and supply constraints and increasing reliance and natural gas generation has led to gas scarcity. The extreme weather events drove prices high and strained supply to the point that utilities could no longer afford to run the natural gas generators, or the necessary gas to supply those generators was simply not available, and exposed customers to less reliable generation sources in the times of greatest need. In the months following these events, the PSC saw significant fluctuations in the supply of natural gas and spot pricing. The significant price fluctuations resulted in substantial costs to natural gas heating and electric service that affected billing rates, in some cases, for years. The Proposed RMP is deficient in that it does not address the increased costs associated with limiting federal leasing of coal and natural gas that is passed on to consumers, which will disproportionately impact low-income, rural, and disadvantaged communities and citizens subject to fixed incomes.

When considering the above factors, it is not only important, but necessary that safe, reliable and cost-effective coal generation is not only able to continue operating at its current levels, but permitted the flexibility to expand in order to meet the known shortfalls and needs of the electric grid. It is patently known that current renewable generation backed by natural gas fired generators is not a sustainable or reliable option to ensure continued reliability of the electric grid. If continued or new coal generation is not needed, the market will render the federal coal unnecessary. If it is needed, the Proposed RMP must not arbitrarily close future availability of federal coal as an affordable and reliable fuel source.

7. Existing Information and Maps Relied Upon by BLM Must be Updated.

The boundaries of existing surface coal mining permits in North Dakota that are provided with the Proposed RMP are not accurate and the Proposed RMP has excluded mines that are in reclamation even though there are remaining coal resources. There are also additional revisions that are likely to be granted approval, but are outstanding due to the Applicant Violator System, an automated information system owned and operated by the Office of Surface Mining Reclamation and Enforcement being offline and unavailable. Revision 42 to NAFK-8405 added 3,359.7 acres to the permit and Revision No. 8 to BNCR-1101 added 2,661.04 acres to the permit. The information and maps included in the Proposed RMP should be updated to provide accurate and up-to-date permit boundary information.

D. North Dakota Department of Water Resources Protest of the Proposed RMP.

The North Dakota Department of Water Resources ("**DWR**") was created in 2021 by the North Dakota Legislature. The DWR was previously the Office of the State Engineer, established

in 1905, and the State Water Commission, established in 1937. These entities were created for the specific purpose of fostering and promoting water resources development throughout the State.

The DWR has the authority to investigate, plan, construct, and develop water-related projects, and it serves as a mechanism to financially support those efforts throughout North Dakota. The DWR sustainably manages and develops North Dakota's water resources for the health, safety, and prosperity of North Dakota's citizens, businesses, agriculture, energy, industry, recreation, and natural resources.

The DWR is responsible for *all* appropriation of water resources within North Dakota. BLM is expected to follow relevant NDCC and the State's water appropriation permitting process in all of their actions. *See* NDCC 61-01-01 and 61-04. While BLM responded to comments that they will adhere to State law, the language BLM has included in the Proposed RMP still reflects a desire for BLM to make water-based decisions that are not within BLM's rights. DWR is the ultimate arbiter of water appropriation in North Dakota and will continue to put it to the best responsible use for the people's benefits. Further, the closure of state-designated drinking water source protection areas to future leasing under the Proposed RMP is in direct conflict with the DWR's powers.

The DWR has significant concerns that BLM has not considered the impacts of the Proposed RMP on North Dakota's existing water delivery projects in development in the State. Large-scale regional water delivery projects require extensive right-of-way grants for the pipelines that will affect water delivery, and the current surface occupancy stipulations in the Proposed RMP will likely greatly impair North Dakota's ability to obtain these rights-of-way.

BLM needs to work with the DWR when discussing and identifying land use decisions to avoid infringing on North Dakota's authority over State water resources. Specifically, the BLM needs to make the following changes to the Proposed RMP to reflect North Dakota's primacy over State water resources, to resolve conflicts with North Dakota's sovereign authority over those resources in the Proposed RMP, and to accurately reflect water resources within the State:

- The Proposed RMP incorrectly states that there were limits on the number of new groundwater withdrawal permits starting around 2010. Proposed RMP, Volume 1 at 3-69 and 3-70. The DWR has continued to approve conditional water permit applications, or portions thereof, for industrial use from both surface and groundwater sources in western North Dakota that satisfy the criteria outlined in NDCC Section 61-04-06.
- The Southwest Pipeline Project and the Northwest Area Water Supply Project were not developed specifically for oil and gas development. This is a misrepresentation of those projects. Proposed RMP, Volume 1 at 3-70.
- DWR uses Administrative Consent Agreements with parties that have violated terms of their permit, which can include an agreed-upon fine, and for overages for industrial uses, water depot use typically involves a fine in addition to, not only, the overage being subtracted from subsequent years authorized allocation. Proposed RMP, Volume 1 at 3-70.
- The Proposed RMP improperly frames water use as an "impact" on water resources. Proposed RMP, Volume 1, at 3-83.

- The restriction against surface occupancy and use within 0.5 miles of the ordinary high-water mark for the Missouri River, Lake Sakakawea, and Lake Oahe is an overly restrictive stipulation for development. It is arbitrary and not backed by scientific data. Additionally, this NSO has the ability to affect water intakes along the Missouri River, which would adversely impact water development across the State. Proposed RMP, Volume 3, Appendix B, NSO-New Missouri River.
- The prohibition against surface occupancy and use within perennial or intermittent streams, lakes, ponds, reservoirs, 100-year floodplains, wetlands, and riparian areas is an overly restrictive NSO. Given the ability for the Authorized Officer to waive, modify, and make exceptions to the stipulation, DWR recommends that the stipulation be revised to allow for surface occupancy in these areas. Proposed RMP, Volume 3, Appendix B, NSO-11-70.
- The Proposed RMP stipulations include a prohibition against surface occupancy and use within 0.5 miles of the ordinary high-water mark of identified pallid sturgeon habitat with a potential modification if portions of the leasehold are not within 0.5 miles of the water's edge of the Yellowstone or Missouri Rivers. Though there is not likely a large difference in the horizontal distance between the "ordinary high-water mark" and the "water's edge," it should be specified as to which is the intended benchmark. Additionally, restricting development to no closer 0.5 miles from either of these benchmarks for the purpose of protecting pallid sturgeon habitat is arbitrary, not supported by scientific data, and an overreach with which the DWR does not concur. Development and protection of the environment do not need to be mutually exclusive, as can be shown with DWR's policy as it relates to the construction of pipelines carrying hazardous materials beneath the State's navigable waterbodies. This policy requires the minimum depth-of-burial for pipelines transporting crude oil, natural gas liquids, or any hazardous liquid, as determined by the DWR, must be total calculated scour plus four feet from the bed of the river to the top-of-pipe for pipelines crossing the state's navigable waterbodies. Again, BLM's exclusionary tact is arbitrary and overreaching. Proposed RMP, Volume 3, Appendix B, NSO-New Pallid Sturgeon Habitat.
- The CSU for Riparian Areas, Wetlands, Streams, and Waterbodies contains significant restrictions on the development in those areas. "Prior to surface occupancy and use within 300 feet of riparian areas, wetlands, ephemeral, intermittent, and perennial drainages, and waterbodies, a plan must be approved by the BLM Authorized Officer with design features that demonstrate how actions would maintain or improve the functionality of the resource." The required plan would be required to include mitigation to reduce impacts to neutral or positive. Proposed RMP, Volume 3 at B-31. Additionally, the NSOs and CSUs have significant approval requirements in order to develop in those areas that are prevalent across the State. Proposed The DWR recommends BLM follow typical State permitting processes and best practices in these areas as are followed throughout the rest of the State, as opposed to following arbitrary standards and limitations. Again, the DWR is responsible for all water appropriation in North Dakota.

- Lastly, line 61 of Table 2-2 in the Proposed RMP needs to be removed. Proposed RMP, Volume 1 at 2-19. The DWR has primacy over North Dakota's State water resources and the BLM Authorized Officer should not be allowed to approve development that conflicts with State law or the DWR approval processes.

E. North Dakota Department of Environmental Quality Concerns with the Proposed RMP.

The North Dakota Department of Environmental Quality ("**NDDEQ**") has been designated by the North Dakota Legislature as the primary state environmental agency pursuant to NDCC § 23.1-01-01. Implementation and enforcement of all associated environmental rules is the sole responsibility of the NDDEQ on State- or privately-owned lands. This does not include land within established Tribal reservation boundaries which are the responsibility of the respective tribes and the United State Environmental Protection Agency. In conjunction with the state authorities, the NDDEQ has also been granted federal primacy to implement the Clean Air Act, Clean Water Act, Safe Drinking Water Act and Resource Conservation and Recovery Act at the state level. The BLM cannot infringe on State laws and regulations that NDDEQ is responsible for enforcing.

CONCLUSION & REQUESTED RELIEF

The Proposed RMP and FEIS are both fundamentally flawed. To correct the legal and factual errors, the BLM must reinitiate the decision-making process and do the following to correct its mistakes:

1. Recognize the State's primacy concerning the regulation of State and private minerals, surface coal mining regulation, air quality, and water quality. When the BLM does so, it will provide a meaningful role to the State as a cooperating agency;

2. Address the deficiencies with respect to the following issues in Chapter 3 of the Proposed RMP:
    a. The effects (both social, economic, and health-related) of decreased funding to the coal miners' pension settlement fund,
    b. The need for rare earth elements and critical minerals (Exec. Order 13817),
    c. Immediate impact to coal leasing (provide an honest analysis), and
    d. Otherwise carry out a NEPA-sufficient analysis to address the multiple defects described herein;

3. Prepare a coal screening analysis that complies with BLM regulations. This includes providing calculations and adequate explanations for the use of "proxy" factors in the multiple use screen process and identify the BLM's required analysis of the management situation that was used in preparing the Proposed RMP and FEIS; and

4. Comply with FLPMA's multiple use mandate including advancing rationales that are consistent with the agency's longstanding positions on federal coal leasing and multiple use mandate. The BLM must also provide explanations for its sudden departure if it intends to adopt the Proposed RMP in the Record of Decision.

SUBMITTED this 9th day of September, 2024.