



December 12, 2024

Via Electronic Mail:

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Via Certified Mail:

Tracy Stone-Manning, BLM Director
United States Department of the Interior
Bureau of Land Management
1849 C St. NW, Room 5665
Washington, DC 20240

Re: Appeal of Bureau of Land Management State Director's Response to the State of North Dakota Governor's Consistency Review Finding for the North Dakota Proposed Resource Management Plan and Environmental Impact Statement

Dear Director Stone-Manning,

Pursuant to the Bureau of Land Management's consistency review requirements (43 CFR 1610.3-2(e)), Governor Doug Burgum of the State of North Dakota hereby appeals the Bureau of Land Management State Director's Response to the State of North Dakota Governor's Consistency Review Finding for the North Dakota Proposed Resource Management Plan and Environmental Impact Statement dated November 8, 2024 (the "**State Director's Response**")¹.

The State Director's Response is procedurally deficient and fails to either acknowledge or meaningfully consider the issues in Governor Doug Burgum's Consistency Review of and Recommended Changes to the United States Department of Interior, Bureau of Land

¹ As confirmed by the Certified Mail Tracking No. in the State Director's Response, North Dakota received the State Director's Response on November 12, 2024.

Management's Proposed Resource Management Plan Amendment for North Dakota, submitted on October 9, 2024 (the "**Consistency Review**"). The State Director's Response continues a pattern by the State Director of the Bureau of Land Management – Montana/Dakotas State Office (the "**State Director**") of disregarding concerns expressed by the State of North Dakota (the "**State**" or "**North Dakota**") regarding the Proposed Resource Management Plan and Final Environmental Impact Statement, North Dakota Field Office, published in August 2024 (the "**Proposed RMP**"), and specifically its significant and irreconcilable inconsistencies with longstanding State, local, and federal policies, plans, and programs. *See* Notice of Availability of the Proposed Resource Management Plan and Final Environmental Impact Statement for the North Dakota Resource Management Plan Revision, 89 Fed. Reg. 65,391; *see also* North Dakota Proposed Resource Management Plan and Final Environmental Impact Statement, Vols. 1-4 (available at <https://eplanning.blm.gov/eplanning-ui/project/1505069/570>).

I. Director Stone-Manning Must Recuse Herself from this Matter.

As a threshold matter, North Dakota respectfully requests that Director Stone-Manning recuse herself from this matter because of her substantial involvement with non-governmental organizations directly adverse to North Dakota's interest in the Proposed RMP.

Director Stone-Manning was previously the Senior Advisor for Conservation Policy for the National Wildlife Federation, something she acknowledged on her required Public Financial Disclosure Report (OGE Form 278e) in March of 2021.² Further, on November 26, 2024, the Wilderness Society announced that beginning in February 2025, Stone-Manning will begin serving as president of the Wilderness Society. The Wilderness Society is well-known for its advocacy

² Available at: <https://wordpress.bidennoms.com/wp-content/uploads/2021/06/Stone-Manning-Tracy-final278.pdf> (last visited Dec. 12, 2024).

and litigation aim at preventing the balanced development of public lands, as well as characterizing such prohibitions as “victories.”³ This advocacy includes intervening in litigation to defend Department of Interior/BLM public land management rules that are being challenged by North Dakota. *See e.g. State of North Dakota et al. v. U.S. Dep’t of Interior, et al.*, Case No. 1:24-cv-124 (D. N.D.) (North Dakota’s challenge to BLM’s recently promulgated “Conservation and Landscape Health Rule” to which the Wilderness Society intervened in Defense of BLM).

Under the section 101 of the Ethics in Government Act of 1978 (5 U.S.C. App. 101), high ranking government employees, including Director Stone-Manning, are required to file a financial disclosure report. Under the STOCK Act, Pub. L. 112-105, § 17 (Post-employment negotiation restrictions), any individual required to file a financial disclosure report under the Ethics in Government Act “may not directly negotiate or have any agreement of future employment or compensation unless such individual, within 3 business days after the commencement of such negotiation or agreement of future employment or compensation, files . . . a statement, signed by such individual, regarding such negotiations or agreement.” Director Stone-Manning was required to file such a disclosure regarding her future employment with the Wilderness Society. Under the STOCK Act, the filing of that statement requires that Director Stone-Manning “recuse . . . herself whenever there is a conflict of interest, *or appearance of a conflict of interest*, . . . with respect to the subject matter of the statement.” Pub. L. 112-105, § 17(b).

Director Stone-Manning is certainly free to make whatever decisions she wishes regarding her professional future, but having now made the decision to lead an organization with a very defined advocacy position with respect to the management and development of public lands that

³ *See e.g.* 10 conservation and public lands victories from 2024 (available at <https://www.wilderness.org/articles/blog/10-conservation-and-public-lands-victories-2024> (last visited Dec. 12, 2024)).

is openly adverse to the interests of North Dakota, it would be both inappropriate and unlawful under the STOCK Act for Director Stone-Manning to continue to rule on, or be involved in, disputes between North Dakota and BLM, including the one at hand. Director Stone-Manning must recuse herself from any consideration of this appeal.

II. The State Director Failed to Adequately Respond to the Governor's Identified Inconsistencies with State Laws, Policies, Programs, and Plans.

The State Director's Response is not an earnest attempt to comply with the federal regulations regarding the consistency review requirements. In dismissing all of the Governor's Consistency Review recommendations, the State Director did not seriously evaluate them, largely refused to consider any balancing of North Dakota's interest in the Proposed RMP, and did not attempt to adequately explain why each of the Governor's recommendations was rejected, instead often offering blanket denials to many of the Governor's objections. The State Director's Response also glossed over the unique nature of land and mineral ownership in North Dakota, as well as many other issues raised in the Consistency Review. To that end, North Dakota is reattaching the Consistency Review to this appeal as **Exhibit 1** (along with the Exhibits to the same as **Exhibit 2**), and reasserting all matters raised within.

In responding to this appeal, including all issues in the Consistency Review, the State Director must do more, including making affirmative findings of whether the Governor's Consistency Review recommendations "provide for a reasonable balance between the national interest and the State's interest" and publish those findings in the Federal Register, including "the reasons for his/her determination to accept or reject such Governor's recommendations." 43 C.F.R. § 1610.3-2.

A. The Proposed RMP interferes with the North Dakota Constitution's policy of supporting public services with funds from federal mineral development – and will

unlawfully block development of State and Private Minerals in North Dakota that are Communitized with existing Federal mineral interests.

The State Director's Response fails to adequately consider or substantively respond to the effect of the Proposed RMP on the unique "split estate" land ownership framework in the State. *See* Consistency Review, Sections I.A.1 through 3. North Dakota has a unique history of land ownership that has resulted in a significant portion of the State consisting of split estate lands that will be adversely affected by the Proposed RMP.

Unlike many western states that contain large blocks of unified federal surface and federal mineral ownership, the surface and mineral estates in North Dakota were at one time more than 97% private and state owned as a result of the railroad and homestead acts of the late 1800s. However, during the depression and drought years of the 1930s, numerous small tracts in North Dakota went through foreclosure.

The federal government, through the Federal Land Bank and 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 of 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 North Dakota. 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 the Bureau of Land Management. 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 United States Forest Service ("USFS") or the Bureau of Indian Affairs ("BIA"). 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 – and the royalties, bonuses, and tax revenue will be drastically affected by the Proposed RMP. *See* Consistency Review at pp. 24-25 (discussing the Proposed RMP's impact on communitized mineral interests in North Dakota).

The State Director's Response claims that the Proposed RMP will not impair valid existing leases and completely misses the point that the Proposed RMP will have a significant impact on future exploration and development, which will interfere with the State's right and ability to regulate mineral development on State and private lands, and will drastically affect royalties, bonuses, and tax revenue. Consistency Review, at pp. 4-6.

The Proposed RMP would effectively exercise an unlawful federal veto over North Dakota's authority to regulate the development of natural resources in the State. *See* North Dakota Century Code (“NDCC”) § 54-17.5-01 (the North Dakota legislature declaring it to be an essential government function and public purpose to “foster, to encourage, and to promote the development, production, and utilization of natural resources of oil and gas in the state in such a manner as will prevent waste.”). As set forth in the Consistency Review and in North Dakota's comments on the Proposed RMP, the anticipated loss in State revenue from royalties and taxes for oil and gas alone is estimated to be \$34 million per year. Consistency Review, at p. 6. In addition, the most egregious closure under the Proposed RMP is to the minerals under Fort Union that can be developed with horizontal drilling resulting in no impact to the historic site. *Id.*⁴ The closure of

⁴ The State Director's claim that the Fort Union Trading Post would “continue to be open to leasing” because the NSO stipulation requiring a 3.5 mile buffer would still allow development with horizontal drilling is also incorrect. **Exhibit 3**, hereto is a spacing oil and gas development map which shows that attempting to drill into the Fort Union area from 3.5 miles away would interfere with existing wells and conflict with established spacing requirements, resulting in waste and damage to correlative rights. Further, **Exhibit 4**, hereto shows that there is no 3.5 mile visible impact area to even be preserved due to existing private and commercial impacts nearby.

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. *Id.* Lastly, based on the Mineral Tracker evaluation (Exhibit 4 to the Consistency Review), 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. *Id.* The combined economic effect on the State from these closures will be devastating.

Additionally, the reduction in future exploration and development activity under the Proposed RMP will have significant impacts on the funds received by the State for the support of public services, including using the proceeds from coal and oil and gas leasing to support the State's education system, in addition to significant impacts on employment opportunities related to mineral development. As stated in the Consistency Review, if the Bureau adopts the Proposed RMP, the anticipated loss in State revenue from royalties and taxes for oil and gas alone is estimated to be \$34 million per year and could lead to the termination of more than 12,000 coal-related jobs in the State. *See Consistency Review*, at p. 3.

The criteria used by the State Director to determine the categories for development of potential oil and gas resources makes flawed assumptions. The State Director continues to disregard the wealth of geologic data and technical expertise from North Dakota's Department of Mineral Resources and from the Industrial Commission of North Dakota (the "NDIC") as submitted in the Consistency Review (*See e.g.*, pp. 9-11, 26-30) regarding the resource development potential for areas in western North Dakota, particularly in and around Slope County. BLM's preferred alternative in the Proposed RMP will close acreage to fluid mineral leasing within areas where active petroleum generation and migration systems are present in western North Dakota without a rational basis, undoubtedly inhibiting future exploration and development

activity.⁵

The State Director has refused to make any revisions to the Proposed RMP based on these concerns raised in the Consistency Review, instead stating dismissively that revising the RMP will “not impair valid existing leases,” will recognize “valid existing rights,” and will not “make decisions on State or private lands or minerals.” However, this ignores the drastic effects that closure and restrictions of federal minerals will have on communitized State and Private minerals. State Director’s Response at 1.

The Proposed RMP further argues that closing federal coal acreage for leasing will not adversely affect potential future coal-hosted Rare Earth Element and Critical Mineral (“**REE-CM**”) development, because REE-CM are treated as locatable minerals and could be extracted without requiring a coal lease. *See* Proposed RMP at 3-215. In reality, an operator who is mining coal for REE-CM and incidentally mining coal would likely want to also combust the coal for power generation, since it is already mined. The Proposed RMP would allow mining federal coal to extract minerals but would not allow it to be combusted afterwards. The exact methods and economics of REE-CM extraction from coal are in accelerated development and, to some degree, proprietary (with national security implications), but a scenario where operators are forced to re-

⁵ *See e.g.* Red River Petroleum System (Slope County area) publications: Nesheim, T.O., 2017, Oil and gas potential of the Red River Formation, Southwestern North Dakota: North Dakota Department of Mineral Resources Geo News, Vol. 44, No. 1, pp. 13-15; Nesheim, T.O., 2017, Stratigraphic and geochemical investigation of kukersites (petroleum source beds) within the Ordovician Red River Formation, Williston Basin: AAPG Bulletin, v. 101, no. 9, p. 1445–1471. DOI: 10.1306/11111616075; Nesheim, T.O., 2017, Stratigraphic Correlation and Thermal Maturity of Kukersite Petroleum Source Beds within the Ordovician Red River Formation: North Dakota Geological Survey, Report of Investigation No. 118; Gelman, S.E., 2023, Modeling the maturation history of the stacked petroleum systems of the Williston Basin, USA: Marine and Petroleum Geology, vol. 155. DOI: 10.1016/j.marpetgeo.2023.106390; 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, v. 107, no. 6 (June 2023), pp. 989–1013. DOI:10.1306/11122222010.

bury mined, processed, and benefacted (“cleaned”) federal coal after REE-CM extraction is a clear example of arbitrary resource management. Further, REE-CM extraction may require combustion. The primary reason coal has received international attention as a possible source of REE-CM is its inherent ability to be easily combusted, and mineral matter is quickly and economically concentrated in its ash, which can then be processed as mineral ore.⁶

Additionally, selling incidentally produced coal for thermal uses would necessarily invoke coal leases as it could still be sold for uses other than thermal power generation (*e.g.*, leonardite). Leonardite and other uses for coal that do not involve combustion are fairly niche markets compared to broad historical and contemporary use of coal in heating and electrical power generation. *See* Proposed RMP at p. M-123; and transcript from March 1, 2023, public hearing held by the BLM in Dickinson, North Dakota regarding the Proposed RMP. Thus, the Proposed RMP effectively closes another large swath of federal coal in North Dakota for REE-CM development, which is now up to 98.6% of its 4,071,600 acres. Proposed RMP at p. 1-5. The BLM already treats 85.9% of federal coal in North Dakota as “unacceptable for coal leasing” (435,800 acres) or “outside of coal development potential” (3,061,900 acres). Proposed RMP at 2-4. The Proposed RMP will close an additional 515,300 acres (Proposed RMP at 3-81), bringing the total area in these two designations (that is, effectively closed for coal leasing) upwards, to 4,013,000 acres - 98.6% of 4,071,600 acres of federal coal in North Dakota. The State Director may argue this acreage is not closed for REE-CM development because these resources are treated separately

⁶ *See* Seredin and Dai (2012) and Thomas et al. (2024); Seredin, V.V., & Dai, S., 2012, Coal deposits as potential alternative sources for lanthanides and yttrium: *International Journal of Coal Geology*, vol. 94, p. 67-93; Thomas, B. S., Dimitriadis, P., Kundu, C., Vuppaladiyam, 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.

as locatable minerals, but this argument does not recognize that economic development of these resources may require combusting the coal. The Proposed RMP would prevent that over an additional 513,300 acres of land in North Dakota. Proposed RMP at 3-81.

B. The Proposed RMP is inconsistent with North Dakota's State Trust Lands ownership.

The Proposed RMP would interfere with the State's prudent management of its State Trust Lands, as required by law. North Dakota's Enabling Act provided land grants to the State "for the support of common schools," as well as colleges, universities, the state capitol, and other public institutions through the grant of approximately 706,600 surface acres and nearly 2.6 million mineral acres. Act of February 22, 1889, Ch. 180, 25 Statutes at Large 676. State Trust Lands are managed by the Board of University and School Lands and its agent, the North Dakota Department of Trust Lands. Under the Enabling Act, the grant of State Trust Lands was given in trust and required the State, as trustee, to maintain the permanency of the assets acquired through the grant. Specifically, the State regulates coal and oil and gas development on all State-owned lands and collects proceeds from development on these lands for designated public purposes, including using proceeds from coal and oil and gas leasing to support our education system. *See* N.D. Const. art. IX, § 1 and NDCC § 15-01-02. The entire grant of land to the State through the Enabling Act for educational purposes was in trust and the express terms of the grant required the State, as trustee, to maintain the permanency of the funds acquired through the grant. Any action by BLM in the Proposed RMP which therefore inhibits the development of State and private mineral resources thus permanently impairs North Dakota's ability to continue to receive the State funds that would otherwise be obtained through mineral development in the State. Consistency Review at pp. 4-8.

The Proposed RMP potentially strands entire sections of State Trust Lands within the decision area that are currently leased or will foreseeably be leased for coal, oil, or other mineral

development. As discussed throughout this appeal, the State Director has failed to adequately consider the “checkerboard” nature of federal mineral ownership with private and state mineral or surface ownership throughout the State, pursuant to which virtually all federal management of North Dakota’s oil and gas producing regions consists of some form of split estate. The Proposed RMP will effectively end future oil and gas development on federal lands in North Dakota within the newly restricted areas, which is in direct conflict with the mandate for the State to maintain the permanency of the assets acquired through the grant of State Trust Lands. That is because the Proposed RMP will impair communitized oil and gas interests on State Trust Land (as well as State and private mineral interests). *See* Consistency Review at pp. 24-25. The State Director does not meaningfully respond to these impairments, instead again dismissively repeating the (unsupported) assertion that revising the RMP will “not impair valid existing rights” while failing to analyze how communitized oil and gas interests will be impaired. State Director’s Response at 1.

The Proposed RMP will also block development of coal in subsurface lands recently found to be open and appropriate for leasing by the USFS by the sole nature of their vicinity to closure areas in the Proposed RMP. *Id.* at 26-28. The State Director dismisses these concerns by citing to the Proposed RMP’s reasonably foreseeable development scenario (State Director’s Response at 2), while never addressing North Dakota’s specific comments criticizing those development scenarios and the flaws with BLM’s predictions (*See* Consistency Review at pp. 29-30).

As a result, the Proposed RMP will impede mineral leasing on State Trust Lands within the decision area in direct conflict with State law, which requires State trust lands to be managed in a way that maintains the permanency of the trusts benefiting public institutions as set out in the Enabling Act. The Proposed RMP directly conflicts with that requirement. Consistency Review at

7-8.

Additionally, the Proposed RMP will further result in stranded State and private coal resources as operators alter efficient mining practices to accommodate federal requirements, adversely impairing previously designated logical mining units. *See e.g.* Consistency Review at p. 22 (describing stranded coal resources due to the unsupported restriction on coal leasing within 4 miles of an existing permit area); *id.* at 31 (describing a lack of rational basis for eliminating coal leasing on a blanket level without examining mineral and surface use effects in a fact-specific inquiry at the implementation level). The State Director does not address these issues other than to reassert her comments that the Proposed RMP that there “is enough federal coal available within the 4-mile area around the existing mine permit boundaries to meet the needs of the RFD without constraining development.” State Director’s Response at 2. Again though, the State Director never addresses the Governor’s assertion that the Coal RFD Scenario is flawed itself and significantly underestimates reasonable development scenarios in North Dakota.

C. The Proposed RMP is inconsistent with North Dakota Energy Policy.

As set forth in the Consistency Review, the Proposed RMP interferes with the State’s “all-of-the-above” energy strategy in several ways. Again, the State Director has not given any meaningful response to these issues raised in the Consistency Review, and merely refers to its inadequate response to Issue #1, above. State Director’s Response at 4.

The State has consistently recognized that federal mineral resources play a vital role in its comprehensive energy policy. In 1919, the North Dakota legislature created the NDIC to conduct and manage, on behalf of the State, certain utilities, industries, enterprises, and business projects established by State law, and to promote the safe development of the State’s natural resources. NDCC 38-12-02. NDIC’s Mineral Resources, Oil and Gas Division (the “**Division**”), regulates the

drilling, production, and plugging of oil and gas wells, as well as the restoration of drilling production sites, and “all other operations for the production of oil and gas” in North Dakota. NDCC § 38-08-04. The Division’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. *Id.* at § 38-08-01. By withdrawing and closing significant areas of land to future exploration and development, the Proposed RMP takes the power to effectively and efficiently regulate mineral resources away from the NDIC. Governor’s Consistency Review at pp. 24-25.

The State Director brushes these concerns aside without meaningfully addressing them, claiming that Communitization Agreements “are generally not automatically affected” while simultaneously admitting that “the RMP can influence future management decisions” and “shape the context in which those leases are developed and managed moving forward.” State Director’s Decision at 8. This comment is wholly insufficient in two key ways. First, it ignores that the Proposed RMP will impact existing State and private minerals pooled with federal minerals in these communitization agreements, usurping the State’s sovereign authority to regulate those resources and harming their future develop. Second, it wholly ignores the 213,000 supposedly “low development” potential areas that the RMP would close, which the State Director dismissively claims “there are currently no producing wells and no anticipated economically productive formations” and the closure will only result in the reduction “of a federal equivalent” of three oil and gas wells over the next 20 years. State Director’s Decision at 1-2. Yet this fails to address the Governor’s Consistency Review’s factual dispute, based on the North Dakota

Geological Survey, which indicates that there is much higher potential for development than BLM has estimated. Consistency Review at pp. 27-28. The most egregious example of which, is the closure of minerals under Fort Union that alone will result in the prevention of 5 wells from being drilled resulting in losses over 40 years of \$14.2M in taxes and \$3.9M in State/Federal royalties. *Id.*; *see also* North Dakota's Protest Letter (Sept. 9, 2024) at 16 (available at <https://eplanning.blm.gov/eplanning-ui/project/1505069/510>) ("Protest Letter").

Further, the State Director's assertion that it has added a provision to the Proposed RMP/Final EIS to provide for oil and gas leasing when the NDIC establishes a spacing unit that includes unleased federal minerals does not alleviate the waste that will be caused by these unnecessary obstructions. Because unleased federal mineral parcels within a spacing unit or Communitized Area can't be penetrated by a wellbore, all or a portion of one or more wellbores will be prohibited in such spacing units until a drainage analysis is conducted. This results in waste and delayed full development of the spacing unit or Communitized Area, thus thwarting the State's energy policy and economic contributions from oil and gas. In addition, such Communitized Areas require royalties be paid on federal minerals even though they are not contributing to production from the Communitized Area, further damaging correlative rights and creating unnecessary delays.

The State Director's Response also fails to adequately address the State's concerns regarding the Proposed RMP's interference with the State's development of its lignite reserves. The State legislature has declared that it is an essential government function and public purpose to foster and encourage the wise use and development of the State's vast and unique lignite coal resources to maintain and enhance the economic and general welfare of North Dakota. NDCC § 54-17.5-01. North Dakota has the second-largest known reserves of lignite in the world with an estimated 26.5 billion tons of recoverable resources. *See* Exhibit 1 to the Consistency Review, at pg. 6. The State's lignite reserves would last more than 800 years at the current rate of

consumption. *Id.* The lignite industry contributed more than \$104 million in tax revenues to the State and local jurisdictions in 2023. *Id.* at 7. Further, the State's lignite reserves are uniquely promising for the production of important rare earth elements (gallium and germanium) and North Dakota is currently a semi-finalist for funding allocated by the U.S. DOE to build the first commercial extraction plant for coal-hosted critical minerals in the U.S. Consistency Review at p. 34 (citing the Protest Letter at 25-36, 35).

The State Director's Response does not address the State's specific concerns regarding the Proposed RMP's potential inhibition on the State's production of its lignite reserves, instead referring back to its determinations on reasonable development scenarios. State Director's Review at 3-4. This lack of a substantive response to a uniquely positioned portion of North Dakota's diversified energy strategy is not sufficient.

Lastly, the State Director's Response fails entirely to respond to the State's concerns regarding the development of geothermal resources. Consistency Review at 10. As set forth in the Consistency Review, it is the State's policy to encourage and promote the optimal use of geothermal resources in a way that protects the correlative rights of all owners, to prevent contamination and pollution of surface and ground water sources, and "to avoid creation of secondary hazards of a geologic nature." NDCC 38-19-01. The Proposed RMP will discourage or prevent exploration, thereby preventing production, thereby preventing the discovery of additional geothermal resources and frustrating North Dakota's policy to promote those same resources. Consistency Review at p. 10.

D. The Proposed RMP is inconsistent with the North Dakota Department of Environmental Quality's supremacy within the State.

The North Dakota Department of Environmental Quality (the "NDDEQ") has been designated by the North Dakota Legislature as the primary state environmental agency pursuant to

NDCC § 23.1-01-01. Consistent with the principles of cooperative federalism established by Congress in most environmental statutes, North Dakota has been granted primacy by the U.S. Environmental Protection Agency (EPA) to implement the federal Clean Air Act, Clean Water Act, Safe Drinking Water Act and Resource Conservation and Recovery Act at the State level. The Proposed RMP would arrogate the State's sovereign ability to plan for and regulate the orderly development and use of all mineral resources (both State and federal) in a manner that protects the environment by allowing BLM to displace North Dakota and assume for itself the role of regulator for the implementation and enforcement of applicable pollution control laws, including air, water, and waste requirements. This seizure of power by BLM is inconsistent with the Congressionally established cooperative federalism framework, implemented by EPA, that recognized the State's legal primacy to implement and enforce the environmental laws relevant to surface coal mining and land quality, abandoned mine reclamation, water quality, air quality, underground injection wells and other environmental resources in North Dakota.

The State Director's Response claims, without legal support, that the Federal Land Management Policy Act (FLMPA) gives BLM the authority to upset the cooperative federalism framework established by Congress and deprive North Dakota of its supremacy in the implementation and enforcement of key environmental laws in North Dakota (a supremacy also explicitly recognized by EPA). State Director's Review at 4. Yet the State Director does not address how FLPMA grants BLM authority to usurp North Dakota's statutory authority to regulate surface coal mining and land quality, abandoned mine reclamation, water quality, air quality, underground injection wells and other environmental resources in North Dakota.

E. The Proposed RMP conflicts with the North Dakota Geological Survey's protection of paleontological specimens.

As stated in the Consistency Review, the North Dakota Geological Survey (the "NDGS"),

within the Department of Mineral Resources, are the experts on paleontological and geological resources within the State and is responsible for preserving specimens of fossils for public inspection. NDCC 54-17.4-09. Under the Proposed RMP, 960 acres would be recommended for withdrawal to allegedly protect the Mud Buttes ACEC. Proposed RMP at 3-201. As discussed in the Consistency Review, this overly restrictive withdrawal threatens to result in negative impacts to precious paleontological specimens. Consistency Review at p. 12. The State Director's Response merely states that the Mud Buttes Area of Critical Environmental Concern will remain "open to research and scientific study by qualified paleontologists through a Paleontological Research Use Permit." This makes the Bureau the experts, not the NDGS, which is entirely inconsistent with the State's policies regarding the protection and preservation of its paleontological resources.

The NDGS is currently required to obtain a Paleontological Research Use Permit in order to collect, survey, and/or document paleontological specimens on BLM lands in North Dakota, which requirement would not change under the Proposed RMP. However, there is no assurance that the Bureau's permit procedures under the Proposed RMP would not change the review process for Paleontological Resource Use Permits within the 960 acres in a way that would make it difficult or impossible for qualified paleontologists to continue to obtain those permits in that area, or that the standards under the permit review process will not be applied so stringently that they are used to reject future research permit applications.

F. The Proposed RMP conflicts with the Public Service Commission's supremacy over utility services within the State, the development of coal operations, and attending to abandoned mines.

The North Dakota legislature has empowered the North Dakota Public Service Commission (the "PSC") with resource planning responsibilities, including the development of a

“least-cost” plan for electrical generation service for retail customers. NDCC §§ 49-05-04.4 and 49-05-17. The exclusion of certain coal resources under the Proposed RMP would conflict with the PSC’s supremacy in determining appropriate generation services for the State and would unnecessarily restrict the PSC’s assumptions regarding ratemaking and generation resource planning, and the State Director did not consider the Proposed RMP’s impact on the PSC statutory authority, and the *prior planning made under that authority*, for future coal development and generation mixes within the State. Consistency Review at pp. 12-13.

Contrary to the narrow focus of the State Director’s Response, it is not just about the potential constraint of Federal coal leasing. The Proposed RMP takes away the PSC’s authority and power to determine the appropriate balance of future energy generation for the State – and the State Director makes no effort to explain how the Proposed RMP will not harm existing generation decisions already made by the PSC, instead claiming its RFD will meet coal demands. State Director’s Review at 6. This logic suffers from the same fatal flaw in that the State Director also never responded to North Dakota’s dispute that the RFD represents a reasonable forecast.

The Proposed RMP further takes away the PSC’s authority and power to regulate surface coal mining and reclamation operations, as confirmed under the Cooperative Agreement entered into between the Department of the Interior and the State, pursuant to which the PSC is the primary authority over the development of non-federal surface coal mining operations and reclamation within the State. Consistency Review at 13 (citing 30 C.F.R. § 934.10 (1980)). The State Director’s Response merely states that the Proposed RMP will not affect the availability of nonfederal coal but, again, the State Director is completely underestimating the impact of the “checkerboard” of private, state, and federal mineral and surface ownership throughout the State, and the effect that checkerboard has on the development of coal mining and reclamation activities throughout the State. Consistency Review at p. 25. Coal mines in these areas of mixed

“checkerboard” ownership need to have a contiguous pattern allowing for consistent economic production. *Id.* As just one 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. *See* Protest Letter at 23. 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. The State Director’s Review fails to address these conflicts with existing PSC authority to regulate surface coal mining and reclamation options in North Dakota.

G. The Proposed RMP conflicts with the State’s Interstate Mining Compact Statute.

As described in the Consistency Review, the Proposed RMP directly conflicts with the express policies of the Interstate Mining Compact (and North Dakota’s enrollment therein) because the State Director did not adequately consider the significance of federal coal production to the State’s economy and failed to incorporate “due consideration for the rights and interests of those engaged in mining, those using or proposing to use these resources for other purposes, and the public” consistent with North Dakota’s interstate mining compact. Consistency Review at pp. 14-15 (citing N.D.C.C. 38-20-01).

The State Director’s Response points to the Proposed RMP’s Social and Economic Consideration Analysis as proof that it has adequately considered the socioeconomic repercussions of the Proposed RMP on the State’s economy. However, the Proposed RMP admits that “[t]he geographic extent of the study area was further refined to include the counties that contain Bureau administered surface lands and minerals in the area of western North Dakota that represents the most active mineral and energy development.” Proposed RMP at p. 3-243. By significantly minimizing the study area, the State Director’s Response dramatically underestimated the socioeconomic impacts that the Proposed RMP will have on North Dakota’s communities,

including employment. *See* Consistency Review at p. 3, and Exhibits 1 and 2 to the Consistency Review.

Additionally, the analysis uses a static input-output model, IMPLAN, which “utilizes information on regional economic conditions for the model year and does not include adjustments to these connections for future years. As such, the reliability of forecasts may be decreased for future year impacts, particularly for economic sectors with a high degree of volatility, as can be seen in the energy sector.” Proposed RMP at p. 3-248. The State Director’s Response is adamant that the Proposed RMP will not have any negative impacts on the State’s economy, yet admittedly relies on unreliable forecasting technology. Again, the State Director’s Response makes a blanket statement that the Proposed RMP is not anticipated to constrain Federal coal leasing over the planning period based on the Coal RFD but fails to adequately consider the comments that were submitted demonstrating how the Proposed RMP will limit future growth and the economic benefits that come from that development. *See* Proposed RMP at M-83, M-84; Consistency Review at 3-6, and Exhibits 1 and 2 to the Consistency Review.

III. Inconsistencies with Federal Laws, Regulations, Policies, and Programs

The State Director arbitrarily chose not to respond to several of the State’s claims identified as “Inconsistencies with Federal laws, regulations, policies, and programs,” simply stating “[t]he BLM responded to the issues in this section that are relevant to the State of North Dakota’s plans, policy, or programs. The remaining comments presented in the Governor’s letter are outside of the scope of the Governor’s consistency review, and because the BLM is still in a pre-decisional phase with the Record of Decision expected to be issued in January 2025 some of them are not relevant.” However, several of the sections to which the State Director chose not to respond in fact contain explanations and discussions as to the inconsistencies with North Dakota policies and programs,

including those set forth below. Under 43 CFR 1610.3-2(e), the State Director was required to provide a substantive response to these inconsistencies. This appeal re-raises all off these below issues, and all of the same issues in the Consistency Review for the Director's consideration.

A. The Proposed RMP is inconsistent with FLPMA.

- Stated North Dakota inconsistencies:

The Proposed RMP seeks to unlawfully impair tens of thousands of mineral acres of State Trust Lands by both standing 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. Restrictions placed on federal lands near or adjacent to State and private lands has the effect of reducing the economic viability of developing resources in those areas. If resource development is uneconomical, these areas become far less attractive which would lower the value of both the land and its mineral resources. For example, where federal restrictions reduce the efficiency at which a mineral developer may extract minerals, the developer would be less willing to pay a market value bonus to lease the interest or, in certain circumstances, choose not to develop those state resources at all. This is inconsistent with mandates in both federal and State law and would have a direct adverse effect on the State's ability to carry out its legal duties to ensure permanency of trusts as required in the Enabling Act and in State law. The Proposed RMP would do the same to large amounts of State and private lands. 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.

The Proposed RMP recommends closing the BLM "Low Potential" area to fluid mineral

leasing, which is an area upon which 148 Notices of Interest have been filed between 2007 and 2018.

B. The Proposed RMP is inconsistent with the Mineral Leasing Act.

- Stated North Dakota inconsistency:

Procedurally, the Bureau's decision not to disclose the actual language of the draft RMP Amendment is plainly inconsistent with the Department's land use planning regulation which states the "draft plan and environmental impact statement shall be provided for comment to the Governor of the State involved." 43 C.F.R. § 1610.4-7; see also 43 C.F.R. § 1610.3-2. The Bureau's procedural deficiency not only compromises the consistency review process but undermines meaningful public participation.

The existing AMS does not remotely suggest that the Proposed RMP is consistent with the present management situation in North Dakota and it is clear that the Bureau short-circuited its own land use process by not even noting the existence of the AMS in the Proposed RMP.

C. The Proposed RMP will significantly interfere with sovereign State and local functions under the MLA.

- Stated North Dakota inconsistency:

The MLA respects the State's exclusive jurisdiction over its private, State, and State Trust Lands. The federal government cannot preempt the State's sovereignty over private, State, and State Trust Lands.

D. The Proposed RMP is inconsistent with the coal leasing consultation regulations.

- Stated North Dakota inconsistency:

No consultation has taken place between the Bureau and the Governor's office regarding

the Proposed RMP.

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.

The North Dakota Geological Survey has provided data indicating much higher potential in the low potential designation and closure of 67 Slope County parcels and 7 Bowman County parcels] than BLM asserts.

E. The Proposed RMP is inconsistent with the Bureau's coal screening regulations.

- Stated North Dakota inconsistency:

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.

F. The Proposed RMP is inconsistent with the Bureau's AML Policy.

- Stated North Dakota inconsistency:

The Proposed RMP does not consider the consequences of eliminating the primary funding source which supports the federal AML Program projects in North Dakota.

G. The Proposed RMP is inconsistent with federal investments and programs promoting advanced technologies.

- Stated North Dakota inconsistency:

The State's Protest Letter identified the significant investments that the private sector, the federal government, and the State have made to promote the commercialization of advanced coal technologies in the State. These efforts include carbon capture and sequestration technologies and the development of rare earth elements.

H. The analysis supporting the Proposed RMP is inconsistent with NEPA.

- Stated North Dakota inconsistency:

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. Yet, the BLM fails to explain or adequately justify the 180-degree reversal of decades of policy.

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.

IV. RECOMMENDATIONS AND PROPOSED ACTION

As set forth in the Consistency Review, to resolve the numerous inconsistencies identified above, the State of North Dakota asks that the Director appropriately address the following matters:

- The State Director must provide a meaningful response to all of the inconsistencies set forth in the Consistency Review.
- Substantively, the State Director must also revise its Proposed RMP because it is irreconcilable with State law, local land use laws, and federal law.
- If the Bureau chooses to proceed any further with its land use planning process, it must select the No Action Alternative (Alternative A) from the Proposed RMP as the only existing alternative that remains acceptable because the No Action Alternative is consistent with State and local laws, programs, policies, and plans. As stated in the Consistency Review and in the Protest Letter, the No Action Alternative strikes the most reasonable balance between national and

State interests. The State Director must seriously reconsider the No Action Alternative as its proposed action for the RMP Amendment. The State of North Dakota looks forward to the Bureau's response.

Thank you for your immediate attention to this pressing issue. We are hopeful that a revised plan will be more in line with North Dakota's unique needs and contributions to national priorities.

Sincerely,



Doug Burgum
Governor

cc: Sonya I. Germann, State Director – Montana/Dakotas State Office, sgermann@blm.gov