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Re: Notice of Availability of the Draft Resource Management Plan and Draft Environmental Impact Statement for the North Dakota Field Office [L16100000.DP0000 LX.SS.E0900000] (88 Fed. Reg. 3757 (Jan. 20, 2023)).

Dear Ms. Germann and Ms. Braun:

On January 20, 2023, the Bureau of Land Management ("BLM") announced the proposed revisions to the North Dakota Resource Management Plan entitled "*Notice of Availability of the Draft Resource Management Plan and Draft Environmental Impact Statement for the North Dakota Field Office*" (88 Fed. Reg. 3757) (hereinafter the "North Dakota RMP Proposal"). On April 4, 2023, State Director Sonya Germann extended the comment deadline for the North Dakota RMP Proposal by 30 days until May 22, 2023.

The State of North Dakota ("North Dakota" or the "State") respectfully submits these comments in response to the North Dakota RMP Proposal. The reasonable development of the natural resources on public lands located in North Dakota is an essential feature of the Federal Land and Policy Management Act ("FLPMA"), the Mineral Leasing Act ("MLA") and the resource management plans ("RMPs") that are developed under those statutes. That includes the 1988 BLM RMP for North Dakota that we have relied on substantially to provide affordable energy security to the nation.

North Dakota has serious concerns with BLM's preferred Alternative B and Alternative C in the North Dakota RMP Proposal. As set forth herein, Alternatives B and C would withdraw large portions of public lands in North Dakota from mineral development. Alternatives B and C would also effectively strand significant acreage of State and private lands due to North Dakota's unique

of other minerals. Under both FLPMA and the MLA, BLM does not have authority to impose these blanket surface restrictions, especially for State or private lands or those lands managed by other agencies such as the U.S. Forest Service (“USFS”) and the U.S. Army Corps of Engineers (“Corps”). BLM’s North Dakota RMP Proposal is therefore irreconcilable with Congress’ clear statutory direction in Section 184a of the MLA that the federal government cannot preempt a State’s sovereignty over State, private, and State Trust Lands.

Alternatives B and C also proposes to unlawfully and selectively elevate conservation and other social and scientific values in violation of FLPMA’s multiple use mandate. Under both FLPMA and the MLA, BLM does not have authority to promote conservation over mineral development or management.

Finally, Alternatives B and C are based on significantly flawed assumptions regarding the future development of mineral resources in North Dakota. As shown herein, there will be continuing demand for both fluid and solid mineral development in North Dakota over the next 20 years. Restricting the development of minerals under Alternatives B and C will not change existing demand, and will only result in increased environmental impacts by forcing State and private minerals to be developed in a less efficient manner.

For these reasons as explained in detail in these comments, BLM must adopt Alternative A in the North Dakota RMP Proposal due to the significant legal and technical issues associated with Alternatives B and C. If BLM does not adopt Alternative A to the North Dakota RMP Proposal, BLM must substantially rework, revise, and repropose the preferred Alternatives B and C in the North Dakota RMP Proposal to comply with the requirements of the Administrative Procedures Act (“APA”), FLPMA, and the MLA. Additionally, BLM’s North Dakota RMP Proposal must be modified to comply with the preliminary injunction recently issued in *State of North Dakota v. U.S. Dept. of Interior et al.*, 1:23-cv-00004 (D.N.D.), which found that BLM has failed to timely hold quarterly oil and gas lease sales under the MLA and ordered BLM to resume quarterly leasing and work through its existing backlog of pending nominated oil and gas parcels in the State. 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).

Any action taken by BLM must be consistent with the U.S. Constitution, must not conflict with the statutory cooperative federalism framework of FLPMA, the MLA, and U.S. Supreme Court precedent. BLM must respect (and not impair) the regulatory authority over State and private mineral resources and water resources that resides with North Dakota.

I. North Dakota’s Interest in the North Dakota RMP Proposal.

North Dakota has effectively partnered with 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. North Dakota is blessed with abundant natural resources that are of great importance to its citizens and that also benefit the entire nation. North Dakota is proud of its strong record of responsible stewardship. North Dakota agrees with the Administration’s broad emphasis on using resources wisely and efficiently.

The State of North Dakota is ranked 3rd in the United States among all states in the production of oil and gas. North Dakota 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 B will result in severe adverse economic impacts to the State, in addition to the significant interference with North Dakota's 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. North Dakota'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.

North Dakota 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.

A. North Dakota's Unique Split Estate Land Ownership.

Mineral ownership of North Dakota 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 North Dakota 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.

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 rule. 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 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 10. 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.

II. The North Dakota RMP Proposal is Not Consistent with Federal Law.

As set forth below, BLM's North Dakota RMP Proposal is not consistent with FLPMA and the MLA because it would unlawfully impair North Dakota's sovereign right to regulate its own State and private resources, including minerals and water rights.

A. The North Dakota RMP Proposal Would Unlawfully Close Lands Subject to an Existing Preliminary Injunction in North Dakota.

On July 7, 2021, the State of North Dakota filed suit against the Department of the Interior (“Interior”), the Secretary, BLM, and multiple BLM officials challenging their cancellation of quarterly oil and gas lease sales in North Dakota. *See State of North Dakota*, 1:21-cv-00148. North Dakota's case was later consolidated with North Dakota'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 North Dakota'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 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 North Dakota’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 North Dakota 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 North Dakota RMP Proposal 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 North Dakota RMP Proposal Alternatives B, and C will effect all 811 North Dakota parcels 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 current North Dakota RMP Proposal, and the effects on these nominated parcels is unknown absent BLM providing that data.

B. The North Dakota RMP Proposal Violates FLPMA and the MLA Because it Seeks to Regulate Non-Federal Lands.

The North Dakota RMP Proposal 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*.” North Dakota RMP EIS, Volume 1 at 2-11 (emphasis added).

For example, the North Dakota RMP Proposal seeks to unlawfully impair all of the 2.6 million 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. North Dakota holds title to the surface and mineral estate of these lands. The North Dakota RMP Proposal would do the same to large amounts of State and private lands. North Dakota collects revenue from oil and gas development on State Trust Lands to support its public education system. *See* N.D.C.C. § 15-01-02. North Dakota 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, BLM’s North Dakota RMP Proposal would unlawfully impair and block the development of State and private mineral resources in North Dakota by stranding those interests and making economic development without waste impossible. *See* Attachment A hereto (showing how BLM proposes to impose NSO requirements on substantial amounts of private surface lands thereby severely impairing development of these lands as well as development of adjacent North Dakota State Trust Lands).

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.

43 C.F.R. § 3181.4(a).

BLM’s North Dakota RMP Proposal is irreconcilable with Congress’ clear statutory determination that the federal government cannot preempt the State’s sovereignty over private, State, and 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 North Dakota RMP Proposal 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 of the Interior 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.

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 of North Dakota 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 North Dakota, 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.” North Dakota RMP Proposal EIS, Volume 1 at 3-181. Despite this limited jurisdiction, and as set forth in these comments, BLM’s North Dakota RMP Proposal 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. *See* Attachment A, *supra* at Section II.B.i.

D. The North Dakota RMP Proposal Unlawfully Elevates “Conservation” as a “Use” in Violation of FLPMA.

The North Dakota RMP Proposal lists “conservation” as a use and identified BLM’s role in the RMP Process. *See* North Dakota RMP EIS, 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.”). This is especially problematic in Alternative B (BLM’s preferred Alternative). *See id.* at ES-2 (“Alternative B is the most proactive in promoting conservation and recovery of threatened and endangered and other special status species, as well as protecting 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 pronounced that it did not authorize BLM to elevate conservation as a principal or major use of lands under FLPMA.

More recently, on April 3, 2023, BLM issued a proposed rule that appears to be a revised iteration of the Planning 2.0 Rule already rejected by Congress. *See* Conservation and Landscape Health, 88 Fed. Reg. 19583. Like the Planning 2.0 Rule, BLM’s new proposed rule would again attempt to elevate conservation considerations in RMP planning. However, BLM cannot rely on this proposed rule which is not yet finalized, and still subject to a likely veto under the Congressional Review Act from Congress. In the interim, the efforts by BLM to advance conservation for land management determinations in the North Dakota RMP Proposal are unlawful.

E. The North Dakota RMP Proposal Creates Large-Tract Withdrawals in Violation of FLPMA.

Alternative B recommends several large tracts of lands to be withdrawn from locatable mineral entry. *See* North Dakota RMP Proposal EIS at 2-38 (Recommending “13,100 acres for withdrawal from locatable mineral entry.”); *see id.* at 3-112 (Table 3-64 recommending approximately 35,000 acres be withdrawn); *id.* at 3-177 (“Under Alternative B, 8,300 acres would be recommended for withdrawal to protect known or proposed bighorn sheep crucial habitat, Doaks Butte, the Schnell Ranch SRMA, and the Mud Buttes ACEC.”).¹ However, the Secretary’s FLPMA authority to withdraw federal land in amounts over 5,000 acres 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

¹ Confoundingly, the North Dakota RMP Proposal EIS also states that “[t]here are no FLPMA withdrawals in the planning area. North Dakota RMP Proposal EIS at 3-173.

withdrawal authority, the provision's unconstitutionality under *Chada*, makes the entire large tract withdrawal provision invalid. The large tract withdrawals contemplated under Alternative B are left to Congress, not BLM. Accordingly, the Secretary lacks the authority to propose or make the recommended withdrawals in Alternative B.

F. The North Dakota RMP Proposal 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 North Dakota RMP Proposal, 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 North Dakota has identified multiple existing leases and areas that appear to be impacted in the North Dakota RMP Proposal. *See* Attachments B, C, and D hereto illustrating impaired leasing areas.

G. The North Dakota RMP Proposal Improperly Relies on Executive Order 13990 and the Social Cost of Greenhouse Gases.

The North Dakota RMP Proposal EIS 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 “2016 GHG Guidance noted that NEPA does not require monetizing costs and benefits.” North Dakota RMP Proposal EIS, 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.*

The North Dakota RMP Proposal 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.*; *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 3-21 – 3-22) 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.

H. The North Dakota RMP Proposal Seeks to Obtain Water Rights in Violation of North Dakota Law.

The North Dakota RMP Proposal 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.” North Dakota RMP Proposal EIS at 2-17. While the North Dakota RMP Proposal EIS recognizes that BLM should perfect water rights according to North Dakota law, Alternative B 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.*

However, under North Dakota law, these conservation goals are not recognized as a beneficial use of North Dakota's sovereign state waters. North Dakota'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.”

BLM's Alternative B does not comply with North Dakota'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 North Dakota RMP Proposal that target North Dakota's waters through NSO stipulations designed around conservation of State waters. However, it is inappropriate and contrary to North Dakota's sovereign right to regulate State waters to impose stipulations on waters inconsistent with the State's beneficial use standards.

I. The North Dakota RMP Proposal is Not Governed by the District of Montana’s Decisions in *Western Organization of Resource Council v. BLM*.

During discussions between North Dakota and BLM officials on May 17 2023, BLM indicated that Alternative B’s proposal restrict coal leasing outside of existing mining permit area (Alternative B.1) or within 4 miles of an existing permit area (Alternative B) was required by the recent *Western Organization of Resource Council v. BLM* decision in the United States District Court for the District of Montana. 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).

North Dakota disagrees with those assertions. First, the decision in the *Western Organization of Resource Council v. BLM* cases are not preclusive in North Dakota as they are from another, non-binding District Court. Second, those decisions 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 these court decisions specifically did not require, however, was a specific 4-mile buffer. As set forth in the North Dakota PSC’s comments, 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 Alternative B is simply not consistent with FLPMA or the MLA.

III. North Dakota State Agency Specific Comments.

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

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 includes 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 Alternative B to the North Dakota RMP Proposal.

First, the North Dakota RMP Proposal seeks to 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 block 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. *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).

For example, the North Dakota RMP Proposal will close 103,918 acres of BLM subsurface to fluid mineral leasing. These 103,918 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 under Alternative B, thus impairing USFS lands includes:

- 2,000 acres incidental to Steep Slopes.
- 45,800 acres incidental to Sensitive Soils.
- 2,900 acres incidental to Badlands.
- 359 acres incidental to Water Resources and not designed to directly protect the water resource.
- 8,259 acres BLM subsurface closed for Fish and Aquatic Species.
- 15,600 acres BLM subsurface closed for Paleontology Resources.
- 14,000 acres within 22 miles ephemeral streams closed to leasing

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.

Second, the North Dakota RMP Proposal seeks to 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 North Dakota RMP Proposal, BLM has proposed to add NSO stipulations to 159,500 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 41,000 more acres of surface estates.

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).

BLM's North Dakota RMP Proposal does not provide adequate data for North Dakota to complete a parcel-by-parcel analysis to determine which USFS managed surface lands are directly impacted. However, based on the decision area totals North Dakota believes that USFS managed surface estates are directly impacted by BLM's surface restrictions. At a minimum, BLM must develop maps or tables that directly compare their restrictions to USFS 2020 ROD stipulations by parcel.

The North Dakota RMP Proposal contains no explanation as to why BLM is attempting to require additional surface disturbance requirements and contradict the recent decisions by the USFS that such surface disturbance requirements are not necessary. Nor does the North Dakota RMP Proposal explain how the USFS should deal with these contradictory requirements. Lastly, BLM's North Dakota RMP Proposal also lacks defined criteria for operators to obtain a modification or waiver of a restriction where these requirements differ. The NDIC's position is that the recently promulgated USFS RMP should control and be given precedence over the North Dakota RMP Proposal where there are conflicts.

Third, the Reasonably Foreseeable Development ("RFD") Scenario for Oil and Gas Development (May 2022) understates future potential development as a result of several flawed assumptions:

1. That the Bakken-Three Forks is the only target for high and medium potential development.
2. That any acreage outside of a five-mile buffer from oil and gas fields that had been active in the last 10 years has a low development potential. No technological or regulatory changes will impact the viability or rate of Bakken or Three Forks development in the next 20 years. Negating the impact of technological advancements is overly pessimistic and is contrary to past experience, which has shown that advancements in drilling and completions techniques can dramatically increase the viability of oil and gas development opportunities.
3. That BLM did not consider resources in other oil and gas bearing formations. Twenty different formations have commercially produced oil and/or gas within North Dakota. In 2006, the Bakken-Three Forks came into prominence following the discovery of the Parshall Field in western North Dakota. Following discovery of the Parshall Field (2007-present), more than 680 oil and gas wells have been drilled, completed, and produced oil and gas from North Dakota rock units other than the Bakken-Three Forks Formations. This

includes approximately 280 new productive non-Bakken/Three Forks wells drilled during the past 10 years (2013-present). Exploration and development in formations other than the Bakken-Three Forks has been ongoing and is expected to continue.

Fourth, BLM's North Dakota RMP Proposal has not adequately explored the potential for geothermal development in North Dakota. Deep Earth Energy Production is developing a geothermal facility just a few miles north of the North Dakota border in southern Saskatchewan, Canada. The DMR-Geological Survey has also recorded temperatures up to 300 F in 13,000-foot-deep oil wells in the Interlake Formation in McKenzie County. Neither of these potential resources appears to have been addressed in the North Dakota RMP Proposal. Separately, the removal of lithium from formation waters or from produced waters is actively being pursued in southeastern Saskatchewan by Prairie Lithium and companies are currently investigating its potential in North Dakota.

Fifth, as explained above, the North Dakota RMP Proposal is seeking to withdraw lands that are already proceeding through the leasing process – expressions of interest have been received by BLM, and BLM has been sitting on processing those nominated lands for several years. BLM does not provide a basis for removing these lands that have already been found suitable for development under the 1988 North Dakota RMP and the recent Corps and USFS RMPs. Further, this raises significant legal concerns for North Dakota – BLM has been ordered by a North Dakota Federal District Court to proceed with leasing in North Dakota, including working through the backlog of previously nominated lands. *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). BLM has been found to have been deficient in processing long-pending lands for quarterly lease sales in North Dakota, and BLM cannot collaterally attack that existing preliminary injunction order by withdrawing lands from the North Dakota RMP Proposal that it is under a legal obligation in North Dakota to proceed with leasing.

Sixth, the low, moderate, and high potential designations in the North Dakota RMP Proposal are fundamentally flawed because they do not account for available technical data that do not support BLM's designations. The following studies demonstrate that BLM's determination of high, moderate, and low potentials for development are flawed and not based on current data.

- GI-241 Spearfish Production and Drill Stem Test Summary: Stolldorf, T.D., 2020 (Attachment E hereto);
- GI-240 Tyler Production and Drill Stem Test Summary: Stolldorf, T.D., 2020 (Attachment F hereto);
- GI-239 Madison Group Production and Drill Stem Test Summary: Stolldorf, T.D., 2020 (Attachment G hereto);
- GI-238 Bakken Petroleum System Production and Drill Stem Test Summary: Stolldorf, T.D., 2020 (Attachment H hereto);
- GI-237 Birdbear Production and Drill Stem Test Summary: Stolldorf, T.D., 2020 (Attachment I hereto);
- GI-236 Duperow Production and Drill Stem Test Summary: Stolldorf, T.D., 2020 (Attachment J hereto);

- GI-235 Dawson Bay Production and Drill Stem Test Summary: Stolldorf, T.D., 2020 (Attachment K hereto);
- GI-234 Winnipegosis Production and Drill Stem Test Summary: Stolldorf, T.D., 2020 (Attachment L hereto);
- GI-233 Interlake Production and Drill Stem Test Summary: Stolldorf, T.D., 2020 (Attachment M hereto);
- GI-232 Stonewall, Stony Mountain and Gunton Production and Drill Stem Test Summary: Stolldorf, T.D., 2020 (Attachment N hereto);
- GI-231 Red River Production and Drill Stem Test Summary: Stolldorf, T.D., 2020 (Attachment O hereto);
- GI-230 Deadwood and Winnipeg Production and Drill Stem Test Summary: Stolldorf, T.D., 2020 (Attachment P hereto);
- GI-222 Review of Production, Completions, and Future Potential of the lower Tyler Formation – Central Williston Basin, North Dakota: Nesheim, T.O., 2019 (Attachment Q hereto);
- GI-214 Stratigraphic and Structural Relations of the Birdbear Formation (Devonian), Western North Dakota: Bader, J.W., 2018. (Attachment R hereto);
- GI-213 Spatial distribution of elevated oil saturations within the Midale subinterval (Mississippian Madison Group), Burke County – North Dakota: Nesheim, T.O., 2018 (Attachment S hereto);
- GI-210 Review of Hydrocarbon Production from the Stonewall and lower Interlake Formations: Western North Dakota - Williston Basin. Nesheim, T.O., 2018 (Attachment T hereto);
- GI-191 Hydrocarbon Generation Significance of Kukersites, the Prospective Petroleum Source Beds of the Red River Petroleum System – Williston Basin, North America. Nesheim, T.O., 2016 (Attachment U hereto);
- GI-186 Stratigraphic Correlation and Geochemical Analysis of Kukersite (Source Rock) Beds within the Ordovician Red River Formation, Southwestern North Dakota. Nesheim, T.O., Nordeng, S.H., and Bader, J.W. 2015 (Attachment V hereto);
- GI-180 Beaver Creek Anticline, West-Central North Dakota. Nesheim, T.O., 2014. North Dakota Geological Survey, Geologic Investigations No. 180 (Attachment W hereto);
- GI-178 Activation Energies and RockEval Analyses of Kerogenites in the Red River Formation in North Dakota. Nordeng, S.A., 2014 (Attachment X hereto);²

Based on the foregoing North Dakota Geological Survey investigations that constitute Resource Management Planning Studies, North Dakota has identified the following areas of High to Very High Potential that are very likely to see fluid mineral development and an area of Moderate Potential that may see fluid mineral development during BLM's stated 20 year lifetime of the North Dakota RMP Proposal. *See* Map of High, Moderate, and Low Potential Development Areas, Attachment Y hereto.

² Summaries of each drill stem test study are attached to these comments. Full DST Maps, production maps, well lists, and GIS data are incorporated by reference to the State of North Dakota's comments and are available at: https://www.dmr.nd.gov/ndgs/Publication_List/gi.asp. Some files may require GIS or other mapping related software to open.

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

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. 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 of 1889.

BLM’s North Dakota RMP Proposal 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 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 2.4 of the North Dakota RMP Proposal 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*.” RMP EIS, Volume 1 at 2-11 (emphasis added). The North Dakota RMP Proposal would impose 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 of 1889.

North Dakota’s interest is 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. Thus, any limitation on

mineral development in adjacent federally-owned tracts will result in an adverse economic impact on North Dakota by blocking the development of Trust Lands.

An example of the federal leasing restrictions directly impacting the development of State-owned mineral interests is Section 16 in Township 148 North, Range 95 West, McKenzie County, North Dakota (*See* Attachment Z hereto). Attachment Z depicts the location 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 on the surrounding acreage by the federal government, the land and minerals, granted to the North Dakota through the Enabling Act at statehood, is not being developed. Under BLM's North Dakota RMP Proposal the minerals under Section 16 might never 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 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. While there are many other State-owned lands and State Trust Lands that would be impacted by this North Dakota RMP Proposal, the value of lost revenue for North Dakota in Section 16 alone is estimated to at least \$50 million.

Another example of where BLM's North Dakota RMP Proposal would impose restrictions on federally owned lands and adversely impact the State's ability to manage State 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, combined with the restrictions on surface locations, have made it impossible for the State's minerals interests to be developed. 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 further example, North Dakota owns 4,000 acres (depicted in Attachment AA hereto) 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 proposed in the BLM's Alternatives B and C, including NSO, 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 North Dakota RMP Proposal, particularly Alternatives B and B.1 as depicted in Attachment BB hereto, would completely decimate the value of North Dakota's coal value in those areas. Though BLM estimates that there is ample leased State and fee lands available to the existing coal mines through 2040, 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 North Dakota RMP Proposal, 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 North Dakota RMP Proposal, 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 rare earth deposits have been proven to be an answer to our nation’s problem in securing critical rare earth 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 North Dakota Industrial Commission have shown the presence of developmental amounts of lithium, and other critical minerals needed to make batteries, cell phones, and other technology. The greatest concentrations of these critical minerals are located in Dunn, Slope, Mercer, and Oliver Counties, the same counties that produce North Dakota’s coal. *See* Attachment CC hereto, 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. The BLM’s North Dakota RMP Proposal would further restrict North Dakota’s and the nation’s ability to develop these critical resources at the time when they are now most needed. 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 is located with BLM-managed fluid minerals and 8,500 acres of surface interest with BLM-managed coal minerals. According to Section 2.4 of the North Dakota RMP Proposal, 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.

Finally, the North Dakota RMP Proposal 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 BLM’s North Dakota RMP Proposal is to significantly deprive the State’s Trust Lands of their value by effectively prohibiting development 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.

C. North Dakota Public Service Commission's Concerns with the North Dakota RMP Proposal.

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 funds appropriated by Congress.

The North Dakota PSC is opposed to BLM's North Dakota RMP Proposal 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 North Dakota RMP Proposal 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. As such, the North Dakota PSC is opposed to Alternative B and urges BLM to adopt Alternative A in the North Dakota RMP Proposal.

i. BLM's North Dakota RMP Proposal has Not Provided Adequate Justification for its Selection of Coal Screens and Inappropriately Applies Restrictions Better Left for Implementation Level Lease Planning.

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.

BLM is required to implement screening procedures to identify designated areas for leasing consideration. 43 C.F.R. § 3420.1-4. 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 North Dakota RMP Proposal in a manner that materially incumbers development of federal coal for future owners.

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-11 and F-12, Screen 2 Unsuitability – Criterion 9, incorrectly indicates that federally designated critical habitat for the whooping crane exists in the decision area and that designated critical habitat for the Dakota skipper exists in Dunn and Oliver Counties. The U.S. Fish and Wildlife Service has not formally designated critical habitat for the whooping crane and Dakota Skipper in North Dakota's coal producing counties. *See* Attachment DD hereto.

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 BLM's North Dakota RMP Proposal over mineral development, a result not allowed by FLPMA. Despite BLM's North Dakota RMP Proposal 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 1,080,000 acres of future coal leasing, yet disclaims the “accuracy,

reliability, and completeness” of the screen maps F-2 through F-48. 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 cannot proceed with the North Dakota RMP Proposal until this evaluation has been conducted.

ii. Alternatives B and B.1 Will Adversely Affect the Human Environment.

Contrary to BLM’s statements in the North Dakota RMP Proposal, Alternatives B and B.1 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 Alternatives B and B.1 will **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 results 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 is never granted by the U.S. Department of Interior. Approximately 70 acres of reclaimed agricultural land in Section 21 will need to be re-disturbed to achieve a suitable post-mine topography if mining is not authorized

and reclamation is 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 may need to be used to fill the cessation pit in Section 21 to eliminate the highwall adjacent federal coal. Not leasing federal coal in the NW1/4 of Section 20 is providing 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 SW1/4 of Section 24.

Social and Economic Impacts. The North Dakota RMP Proposal applies inconsistent logic in its Social and Economic analysis. North Dakota RMP EIS Volume 1 at 3-226. In its analysis, the North Dakota RMP Proposal 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 and B.1. *Id.* at 3-18. The North Dakota RMP Proposal 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 3-223. The increased social, economic, and environmental costs of mining around the unleased federal coal have not been analyzed in the North Dakota RMP Proposal, 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.

iii. BLM's North Dakota RMP Proposal 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. BLM's proposal to

restrict coal leasing outside of existing mining permit area (Alternative B.1), or within 4 miles of an existing permit area (Alternative B), does not comply with the MLA requirement of encouraging the maximum economic recovery of coal within a logical mining unit. BLM's North Dakota RMP Proposal 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 North Dakota RMP Proposal 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:

(d) 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 insure 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.

iv. BLM's North Dakota RMP Proposal 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 BLM's North Dakota RMP Proposal for Alternative B 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. North Dakota RMP Proposal EIS, 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)).

BLM’s North Dakota RMP Proposal 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 and do not provide a valid or reasoned justification for BLM to substantially depart from the existing 1988 North Dakota RMP for coal resources.

Notably, BLM’s preferred Alternative B effectively closes 98.7 percent of North Dakota’s federal coal to leasing under Coal Screen 3. This leaves only approximately 57,019 federal acres available for leasing.³ Alternative B.1 further restricts federal coal leasing to all areas outside of the current surface coal mining permit boundary, which is 1.5% of federal coal. With 31% of the federal coal in existing coal permit areas already mined, Alternative B.1 leaves only approximately 16,400⁴ acres available for mining. This, on its face, is contrary to FLPMA’s directive to promote mineral development.

In reviewing the action alternatives as they relate to coal, Alternatives B and B.1 do not reflect FLPMA’s multiple use mandate. Alternatives B and B.1 amount to a near-prohibition of federal subsurface coal leasing in the decision area in a long-term RMP. Accordingly, the North Dakota PSC strongly is opposed to BLM’s North Dakota RMP Proposal Alternatives B and B.1.

v. BLM’s North Dakota RMP Proposal Will Adversely Impair Private Coal Interests and Split Estate Ownership in North Dakota.

Alternatives B and B.1 will negatively impact privately owned coal adjacent to federal tracts and create additional waste and GHG emissions. Under BLM’s North Dakota RMP Proposal, 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/ft³. 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.

³ Based on the PSC’s calculation (*See* Attachments EE and FF hereto)

⁴ Based on the PSC’s calculation (*See* Attachment GG hereto)

Further, the North Dakota RMP Proposal Alternatives B and C state that State and private coal development will offset closed federal coal during the 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 North Dakota RMP Proposal 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 North Dakota RMP Proposal 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 North Dakota RMP Proposal, 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 22,255 acres of coal rights are only partially owned by BLM. *See* Attachment HH hereto. The social and economic costs, in addition to possible takings of State and private interests, must be addressed in the North Dakota RMP Proposal before BLM can proceed with any final RMP.

Finally, Alternatives B and B.1 attempt to protect resources that have not been characterized in the North Dakota RMP Proposal. The North Dakota RMP Proposal 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 North Dakota RMP Proposal 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.

vi. The North Dakota RMP Proposal Does Not Consider Cumulative Indirect Impacts to Electric and Natural 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.

Load and supply constraints and increasing reliance on natural gas generation has led to scarcity at key times during winter storms such as Uri (2021) and Elliot (2022). These events drive prices high and strain supply to the point that utilities could no longer afford to run the natural gas generators and expose customers to less reliable generation sources in the times of greatest need. In the months following these types of events, the North Dakota 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 North Dakota RMP Proposal 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.

vii. 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 North Dakota RMP Proposal are not accurate and the North Dakota RMP Proposal 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 proposes to add 3,359.7 acres to the permit and Revision No. 8 to BNCR-1101 proposes to add 2,661.04 acres to the permit. The information and maps included in the North Dakota RMP Proposal should be updated to provide accurate and up-to-date permit boundary information.

D. North Dakota Department of Water Resources Concerns with the North Dakota RMP Proposal.

The North Dakota Department of Water Resources (“North Dakota DWR”) was created in 2021 by the North Dakota Legislature. The North Dakota 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 North Dakota 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 North Dakota 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.

BLM’s North Dakota RMP Proposal Alternative B’s stated purpose to appropriate waters for the beneficial use of conservation is in violation of North Dakota’s constitutional water appropriation requirements which do not recognize conservation as a beneficial use. *See* Section II(H), *supra*. As such, BLM must adopt Alternative A, or the North Dakota RMP Proposal must be substantially reworked to be in accordance with State law.

While Alternative A is preferred, the North Dakota DWR is attaching a spreadsheet as Attachment II to these comments noting the minimum necessary language changes in the North Dakota RMP Proposal to avoid infringing on North Dakota’s authority over State water resources. These changes are focused on reflecting North Dakota’s primacy over State water resources to resolve

conflicts with North Dakota's sovereign authority over those resources in the current North Dakota RMP Proposal.

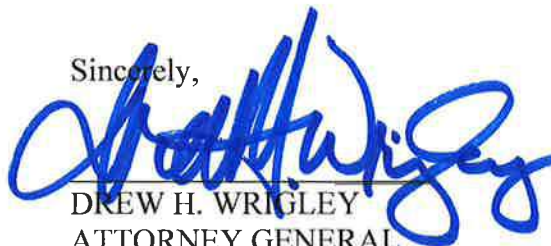
Finally, the North Dakota DWR also has significant concerns that BLM has not considered the impacts of the North Dakota RMP Proposal on North Dakota's existing water delivery projects in development in the State. Large-scale regional water delivery projects require extensive right-of-way grants for the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

These water delivery projects include: the Western Area Water Supply Project, the Southwest Pipeline Project (which includes \$122 million in federal funding to date), the Red River Valley water supply project, and the Northwest Area Water Supply Project (which includes \$176 million in federal funding to date). BLM's proposed surface restrictions in the North Dakota RMP Proposal will significantly impede and restrict North Dakota's ability to develop these projects, which the U.S. Bureau of Reclamation and other federal partners have already invested significant federal funding to advance. The project area maps for these water delivery projects are attached as Attachments JJ, KK, and LL and show the potential areas impacted by BLM's North Dakota RMP Proposal.⁵ The North Dakota RMP Proposal must therefore be revised to specifically recognize these projects, exclude them from surface occupancy stipulation barriers, and provide an avenue for the water delivery projects to move forward. Without specific consideration of these water delivery projects, there is a significant risk that water supplies in the State will be jeopardized to the harm of the public and future federal projects.

IV. Conclusion.

For the reasons set forth in this comment letter, BLM must adopt "Alternative A" in the North Dakota RMP Proposal due to the significant legal and technical issues associated with Alternatives B and C.

Sincerely,



DREW H. WRIGLEY
ATTORNEY GENERAL
STATE OF NORTH DAKOTA

⁵ The map area for the Red River Valley Project is available at <http://www.rrvwsp.com/about/route/> and is incorporated into these comments by reference.