



***Bureau of Land Management
Protest Resolution Report***

**North Dakota Proposed
Resource Management Plan
and Final Environmental
Impact Statement**

January 6, 2025

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Acronyms

Term	Definition
ACEC	Area of Critical Environmental Concern
APA	Administrative Procedure Act
APD	application for permits to drill
BLM	Bureau of Land Management
BMP	best management practice
CAA	Clean Air Act
CEQ	Council on Environmental Quality
CFR	Code of Federal Regulations
CSU	controlled surface use
EIS	Environmental Impact Statement
EJ	environmental justice
EO	Executive Order
EPA	U.S. Environmental Protection Agency
FEIS	Final Environmental Impact Statement
FLPMA	Federal Land Policy and Management Act
GHG	greenhouse gas
GIS	geographic information system
HAP	hazardous air pollutant
LEC	Lignite Energy Council
MLA	Mineral Leasing Act
MMPA	Mining and Minerals Policy Act
NACoal	North American Coal, LLC
ND	North Dakota
NDCC	North Dakota Century Code
NDDEQ	North Dakota Department of Environmental Quality
NDFO	North Dakota Field Office
NDPSC	North Dakota Public Service Commission
NEPA	National Environmental Policy Act
NMA	National Mining Association
NSO	no surface occupancy
OSM	Office of Surface Mining Reclamation and Enforcement
PRMP	Proposed Resource Management Plan
PSC	Public Service Commission
RMP	Resource Management Plan
SC-GHG	social cost of greenhouse gases
SEIS	Supplemental Environmental Impact Statement
SMCRA	Surface Mining Control and Reclamation Act
TL	timing limitation
U.S.C.	U.S. Code
USFS	U.S. Forest Service
UUD	unnecessary and undue degradation
WORC	Western Organization of Resource Councils

Introduction

The Bureau of Land Management (BLM) North Dakota Field Office released the North Dakota Proposed Resource Management Plan (PRMP) and Final Environmental Impact Statement (FEIS) on August 9, 2024. The BLM received seven unique protest letter submissions during the subsequent 30-day protest period, which ended on September 9, 2024.

The planning regulations at 43 Code of Federal Regulations (CFR) 1610.5-2 outline the requirements for filing a valid protest. The BLM evaluated all protest letters to determine which protest letters were complete and timely, and which persons have standing to protest. All seven letters were complete and timely and were from parties who had standing to protest. One letter from the U.S. Environmental Protection Agency (EPA) stated it was not intended to be a protest letter; this letter is not considered further in this report. The remaining six protest letters contained valid protest issues. The BLM documents the responses to the valid protest issues in this protest resolution report. The protest decision is recorded in writing along with the reasons for the decision in this protest resolution report.

After careful review of the report by the BLM's Assistant Director for Resources and Planning, the Assistant Director concluded that the BLM followed the applicable laws, regulations, and policies and considered all relevant resource information and public input. The Assistant Director addressed the protests and issued a Protest Resolution Report to protesting parties and posted the report on the BLM's website; no changes to the North Dakota PRMP/FEIS were necessary. The decision was sent to the protesting parties by certified mail, return receipt requested. Consistent with the BLM Delegation of Authority Manual (MS-1203 Delegation of Authority), resolution of protests is delegated to the BLM Assistant Director for Resources and Planning whose decision on the protest is the final decision of the U.S. Department of the Interior (43 CFR 1610.5-2(b)).

The report is divided into sections each with a topic heading, excerpts from individual protest letters, a summary statement of the issues or concerns raised by the protesting parties, and the BLM's response to the protests.

Protesting Party Index

Letter Number	Protestor	Organization	Determination
PP-ND-ND-EIS-24-01	Eric Delzer	North Dakota Petroleum Council	Denied
	Kathleen Sgamma	Western Energy Alliance	
PP-ND-ND-EIS-24-02	Jason Bohrer	Lignite Energy Council	Denied
PP-ND-ND-EIS-24-03	Christopher Friez	North American Coal, LLC	Denied
PP-ND-ND-EIS-24-04	Katie Sweeney	National Mining Association	Denied
PP-ND-ND-EIS-24-05	Nathan Svihovec	State of North Dakota	Denied
	Doug Burgum	State of North Dakota	
	Paul Seby	State of North Dakota	
PP-ND-ND-EIS-24-06	Melissa McCoy	U.S. Environmental Protection Agency	This letter was not intended to be a protest letter and is not addressed further in this report.
	Laura Margason	U.S. Environmental Protection Agency	
PP-ND-ND-EIS-24-07	Morgan O'Grady	Western Environmental Law Cener	Denied
	Shannon Straight	Badlands Conservation Alliance	
	Randi Spivak	Center for Biological Diversity	
	Scott Skokos	Dakota Resource Council	
	Nathaniel Shoaff	Sierra Club	

Federal Mineral Estate Management in Split Estate Situations

State of North Dakota

Nathan Svihovec, Doug Burgum, Paul Seby

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

Western Environmental Law Center

Morgan O'Grady

Issue Excerpt Text: The RMP/EIS impermissibly omits surface lands managed by other agencies from the decision area. See EIS at 1-5. This includes surface lands managed by the Bureau of Reclamation, Army Corps of Engineers, National Park Service, and National Forest System lands. *Id.* Notably, BLM does not quantify the excluded mineral estate, nor the planning area itself, leaving the public to speculate about the acres implicated by this omission. BLM has both the authority and legal responsibility to make a decision for all BLM mineral estate within the exterior boundaries of the planning area, regardless of surface ownership, in order to comply with its obligations under the Federal Land Policy and Management Act to prevent unnecessary or undue degradation of public lands. While the U.S. Forest Service has a right to decide whether minerals underlying the surface estate it controls may be leased and developed, this is a right of refusal, not a right to decide what minerals are available in the first instance. 30 U.S.C. § 226(h); 43 C.F.R. § 3101.7-1. The latter task is within BLM's exclusive purview under FLPMA. Only BLM has the authority to determine whether federal minerals underlying USFS surface estate are available for development under a resource management plan. With that authority comes the obligation to determine, through the land use planning process, which areas within the planning area (which here includes minerals beneath USFS lands), are open to development. See, e.g., 43 U.S.C. §1712(a); 43 C.F.R. § 1601.0-5(n)(2); 30 U.S.C. § 226(a); BLM Land Use Planning Handbook H- 1601-1 at 13; see also, definition of "Planning Area" and "Decision Area", *id.* at 14. This statutory obligation is made all the more urgent by the ongoing climate crisis because BLM's abdication of this responsibility effectively passes the buck and falsely contracts the planning area in a way not contemplated or allowed by FLPMA. BLM must amend the decision area to include the fluid mineral estate within the entirety of the planning area.

State of North Dakota

Nathan Svihovec, Doug Burgum, Paul Seby

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

agencies.” Proposed RMP, Volume 1 at 2-11 (emphasis added). For example, the Proposed RMP seeks to unlawfully impair tens of thousands of mineral acres of State Trust Lands by both stranding those lands from development where federal minerals are not leased, and imposing surface occupancy conditions that make it unfeasible to develop the minerals located on those State Trust Lands. The State holds title to the mineral, and in many cases also the surface, estates of these lands. The Proposed RMP would do the same to large amounts of State and private lands. The State collects revenue from the use and management of State Trust Lands, including oil and gas development, to support its public education system. See N.D.C.C. § 15-01-02. The State further collects revenue from oil and gas development on State and private lands to support education and its general fund. BLM, however, does not have legal authority under FLPMA or the MLA to regulate or impair these private and State lands, especially State Trust Lands.

State of North Dakota

Nathan Svihovec, Doug Burgum, Paul Seby

Issue Excerpt Text: Congress defined “public lands” in FLPMA as “any land and interest in land owned by the United States within the several States and administered by the Secretary of the Interior through the Bureau of Land Management, without regard to how the United States acquired ownership[.]” 43 U.S.C. § 1702(e). This definition does not authorize BLM to regulate surface operations on lands owned entirely by private individuals or the State. The plain language of the Property Clause limits Congress’ authority to make needful regulations pertaining to “Property of the United States.” U.S. Const. art. IV, sec. 3, cl. 2. Recognizing that Congress’ constitutional authority rests in governing federal land, a U.S. Circuit Court of Appeals has rejected the argument that federal jurisdiction extends to adjoining State Trust Lands under broad mandates in federal land management statutes. *Utah Native Plant Soc’y v. U.S. Forest Serv.*, 923 F.3d 860, 866-67 (10th Cir. 2019) (“[T]he Property Clause’s plain language is not self-executing and does not itself grant [a federal land management agency] authority over [] State lands adjacent to the [National Forest].”) Tellingly, FLPMA also draws clear distinctions that demonstrate that the BLM’s authority is limited to federal interests. Section 1712(c)(8) recognizes that federal land planning should consider state air, water, noise, or other pollution standards that are applicable to federal lands. 43 U.S.C. § 1712(c)(9). Section 1732(b) also recognizes the role of States in managing wildlife resources as a function of their traditional state police powers. 43 U.S.C. § 1732(b); *Def. of Wildlife v. Andrus*, 627 F.2d 1238, 1249-50 (D.C. Cir. 1980) (“It is unquestioned that the States have broad trustee and police powers over wild animals within their jurisdictions[.]”) (citation omitted). As noted in the comments herein, the Proposed RMP would unlawfully impair and block the development of State and private mineral resources in the State by stranding those interests and making economic development without waste impossible.

State of North Dakota

Nathan Svihovec, Doug Burgum, Paul Seby

Issue Excerpt Text: 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). The Proposed RMP is irreconcilable with Congress’ clear statutory determination that the federal government cannot preempt the State’s sovereignty over private, State, and State State Trust Lands. BLM’s interpretation of its jurisdiction also disregards Section

184 of the MLA and its implementing regulations that requires the State's consent to enforce federal terms of conditions on State Trust Lands. See 30 U.S.C. § 184a; 43 C.F.R. § 3181.4(a).

State of North Dakota

Nathan Svihovec, Doug Burgum, Paul Seby

Issue Excerpt Text: Another example of the interference due to proximity directly impacting the development of State-owned mineral interests is Section 16 in Township 148 North, Range 95 West, McKenzie Dunn County, North Dakota, which consists of 469.49 acres of mineral interest owned by North Dakota. This particular interest is situated in a very productive area of the Bakken Oil Field. Due to the restrictions placed by the Backcountry Conservation Area on the surrounding acreage by the federal government, the land and minerals, granted to North Dakota through the Enabling Act at statehood, will not be developed. The impact of these federal restrictions is contrary to the intent for which the United States granted Trust Lands to North Dakota. Restricting federally-owned lands that are within the vicinity of State-owned Trust Lands deprives the State of the ability to continue to utilize these assets to maintain the Common Schools Trust Fund and consequently erodes the value of the lands in question. Finally, the Proposed RMP disproportionately focuses on conservation and maintaining air quality at the expense of other uses of BLM-managed lands in violation of FLPMA's multiple use mandate and stated principal and major use for mineral development.

State of North Dakota

Nathan Sinovac, Doug Burgum, Paul Seby

Issue Excerpt Text: The PSC may approve surface disturbance over federal subsurface coal. The Proposed RMP fails to consider that surface disturbance may still occur over subsurface federal coal interests. The Cooperative Agreement between North Dakota and U.S. Department of the Interior states that: 7. The Commission may approve and issue permits, permit renewals, and permit revisions for surface disturbances associated with surface coal mining and reclamation operations, and disturbance of the surface may commence without need for an approved mining plan on lands where: (a) The surface estate is non-Federal and non-Indian; (b) The mineral estate is Federal and is unleased; (c) The Commission consults with the Bureau of Land Management through OSM in order to ensure that actions are not taken which would substantially and adversely affect the Federal mineral estate; and (d) The proposed surface disturbances are planned to support surface coal mining and reclamation operations on adjacent non-Federal lands and this is specified in the permit, permit renewal, or permit revision. 30 CFR §934.30. The privately owned surface areas above federal subsurface coal are typically disturbed by mining activities. These areas are used to support mining and are used as soil and overburden stockpile sites, sediment ponds and haul road corridors. Therefore, based on the Cooperative Agreement to which BLM is a party, BLM cannot close federal subsurface coal leasing nor prevent surface disturbance on privately owned land that is overlying federal coal.

Summary:

Protestors claimed that the BLM violated the Federal Land Policy and Management Act (FLPMA), the National Environmental Policy Act (NEPA), and the Cooperative Agreement between the State of North Dakota and the U.S. Department of the Interior by closing Federal subsurface mineral leasing on split-estate lands (areas where the BLM administers Federal subsurface minerals but the surface is owned by someone other than the BLM). Protestors stated that the closure of Federal subsurface mineral leasing on split-estate lands elevates resource protection over mineral development and unlawfully impairs and blocks the development of State and private mineral resources, which is a violation of FLPMA's multiple-use mandate. Protestors stated there was no discussion about BLM mineral estate under surface management by other Federal agencies. Protestors also stated the BLM

violated NEPA's consistency mandate and Section 184 of the Mineral Leasing Act (MLA) by failing to obtain the State's consent and by placing restrictions on federally owned land in the vicinity of State-owned land.

Response:

Section 103(e) of FLPMA defines public lands as any lands and interest in lands owned by the United States and administered by the BLM. The mineral estate is an interest owned by the United States. The BLM has an obligation to address this interest in its planning documents and BLM planning decisions apply to all public lands, even when the only public land interest is the mineral estate (i.e., "split-estate") (43 CFR 1601.0-7). In addition, it is BLM policy for RMPs to identify areas subject to constraints for mineral leasing and identify specific lease stipulations that will be employed to accomplish resource condition objectives (BLM Handbook H-1601-1, pp. C-23–C-24).

The MLA requires that the "Secretary of Interior...shall regulate all surface-disturbing activities conducted pursuant to any lease issued under this chapter, and shall determine reclamation and other actions as required in the interest of conservation of the surface resources." This requirement applies to all Federal mineral leases, regardless of surface ownership. The section of the MLA cited by protestors (Section 184) does not prevent the BLM from managing Federal mineral estate beneath State-owned lands or require the BLM to seek State approval for decisions not to lease or apply stipulations to Federal mineral leases; rather, it grants the State authority to consent to development plans and unitization on State lands for the purpose of conserving mineral resources (North Dakota PRMP/FEIS Appendix M, p. M-47).

Therefore, while the BLM does not have the legal authority in split-estate situations to regulate how a surface owner manages his or her property, the agency does have the statutory authority to take reasonable measures to avoid or minimize adverse environmental impacts (e.g., applying a lease stipulation) that may result from federally authorized mineral lease activity. All BLM-permitted actions on split-estate lands would be subject to the same stipulations and management direction in the North Dakota PRMP/FEIS as leased Federal mineral estate on Federal surface lands (North Dakota PRMP/FEIS Appendix K, pp. K-1–K-2).

As noted in North Dakota PRMP/FEIS Appendix K, "two areas of concern have consistently arisen from this split-estate land issue: Does the BLM have the statutory authority to regulate how private surface owners use their property, and does the BLM have the authority to condition and regulate a federal mineral development, such as federal oil and gas leases[?] These two concerns have been addressed in the resolution of two RMP protests in 1988 on split-estate lands (North Dakota RMP and Little Snake RMP) and two Washington Solicitor's Opinions (April 1 and 4, 1988). The conclusion states: In summary, while the BLM does not have the legal authority in split estate situations to regulate how a surface owner manages his or her property, the agency does have the statutory authority to take reasonable measures to avoid or minimize adverse environmental impacts that may result from federally authorized mineral lease activity" (North Dakota PRMP/FEIS Appendix K, p. K-2).

The Cooperative Agreement between North Dakota and the U.S. Department of the Interior (30 CFR 934.30 State-Federal Cooperative Agreement and authorized by Section 523(c) of the Surface Mining Control and Reclamation Act [SMCRA]) allows the State of North Dakota to regulate surface coal mining and reclamation operations on Federal lands within North Dakota consistent with the State and Federal acts and the Federal lands program.

While management within the North Dakota PRMP/FEIS does apply to BLM-administered lands and minerals in the planning area, it does not apply to State or private lands or minerals, nor does it make decisions on surface lands managed by other Federal surface management agencies. For example, for

Federal minerals under U.S. Forest Service (USFS) lands, USFS stipulations would apply to the surface estate. However, the BLM has the statutory authority to take reasonable measures to avoid or minimize adverse environmental impacts that may result from federally authorized mineral lease activity, including applying stipulations to the development of those Federal minerals in order to prevent or mitigate impacts on other resources and resource values. The BLM must comply with the requirements of NEPA, the National Historic Preservation Act, the Endangered Species Act, the Clean Water Act, and other applicable laws regarding surface resources. While FLPMA establishes guidelines for the management, protection, development, and enhancement of public lands, it does not prioritize between uses and does not mandate that every use be available on every acre. Adverse impacts, such as economic loss, may occur in certain situations for the overall health of the public lands and resources. Additionally, the BLM considers a variety of management alternatives as required by FLPMA to meet the multiple-use mandate, and these alternatives can include closing areas to mineral leasing to protect resource values or other uses in these areas. All alternatives within the North Dakota PRMP/FEIS are designed to meet FLPMA's multiple-use mandate (North Dakota PRMP/FEIS, p. M-43). The BLM decision would not preclude the authority of the State of North Dakota to manage, permit, and bill for use of State trust lands accordingly to meet its fiduciary responsibility.

The North Dakota PRMP/FEIS establishes lease stipulations for split-estate lands in compliance with statutes, regulations, and BLM policy that govern land and mineral management. Accordingly, this protest issue is denied.

Coal and Mineral Leasing Restrictions

North Dakota Petroleum Council

Eric Delzer, Kathleen Sgamma

Issue Excerpt Text: The BLM's justification for these closures appears to be based on outdated assessments of resource potential and environmental impact. Modern oil and gas extraction techniques have significantly reduced the environmental footprint of development activities. Technologies such as pad drilling, which allows multiple wells to be drilled from a single location, minimize surface disturbance and reduce the overall impact on surrounding ecosystems. Additionally, the development of these areas would already be managed with stringent environmental safeguards to ensure that water resources and other critical habitats are protected. Rather than a blanket closure to any leasing and development, the BLM has imposed lease stipulations to protect other resource values. As detailed below, the Associations find these stipulations excessive but also wish to remind the BLM that the requirements of the Energy Policy Act of 2005, as well as the Energy Policy Conservation Act Amendments of 2000, require federal land management agencies to use the least restrictive means necessary to protect other resource values.

North Dakota Petroleum Council

Eric Delzer, Kathleen Sgamma

Issue Excerpt Text: The Associations believe that the RMP should prioritize avenues for oil and gas activities to avoid and mitigate wildlife and habitat impacts over overly broad applications of NSO, CSU, and TL stipulations. The Associations again remind the BLM that the requirements of the Energy Policy Act of 2005 and the Energy Policy Conservation Act Amendments of 2000 require federal land management agencies to use the least restrictive means necessary to protect other resource values. The current approach in Alternative D exceeds the scope necessary to limit environmental impacts, which are already addressed through permitting processes and industry best practices. The Associations strongly urge the BLM to reconsider the scale of the proposed NSO,

CSU, and TL stipulations in Alternative D. A more balanced approach that recognizes the effectiveness of modern mitigation measures and the operational realities of oil and gas development would allow for responsible resource extraction while protecting environmental values. This approach would support the continued viability of oil and gas projects in North Dakota, ensuring that the state remains competitive in the national energy market.

North Dakota Petroleum Council
Eric Delzer, Kathleen Sgamma

Blanket closure to a principal use of public lands is not the least restrictive means. Moreover, blanket closure is inconsistent with the BLM's own Land Use Planning Handbook. The Land Use Planning Handbook provides that areas should only be closed to leasing when "other land or resource values cannot be adequately protected with even the most restrictive lease stipulations." BLM Handbook H-1601, App.Cat 24. The BLM should consider a more nuanced approach that allows for responsible development while addressing environmental concerns through targeted mitigation measures that are consistent with its own stated policies.

Lignite Energy Council
Jason Bohrer

Issue Excerpt Text: In the May 2023 LEC Comments, the LEC expressed concerns that the Alternatives in the Draft RMP/EIS sought to restrict federal leasing and surface coal mining in conflict with Congressional directives to promote the exploration and development of coal resources. See May 2023 LEC Comments, Section I. These concerns remain. As previously voiced, mining has always been an anticipated and necessary use of public lands and interests, and it has long been the policy of the federal government to foster and encourage mineral development. Despite the concerns previously raised by LEC, BLM continues to treat surface coal mining as an impact and not a valid and necessary resource to be managed. This is evidenced by the restrictions imposed in Alternative D. LEC protests the manner in which the Proposed RMP/EIS seeks to restrict leasing and development as it continues to be inconsistent with the Mining and Minerals Policy Act of 1970 ("MMPA"), Federal Land Policy and Management Act ("FLPMA"), the Surface Mining Control and Reclamation Act ("SMCRA"), the Administrative Procedure Act ("APA"), the National Environmental Policy Act ("NEPA"), and other various federal laws, regulations, and policies. For example, Alternative D over doubles the acres deemed unacceptable for leasing when compared to Alternative A. Under Alternative A, "the coal screening results from the 1988 North Dakota RMP would continue to be applied. It identifies 435,800 acres as unacceptable for coal leasing." Proposed RMP/EIS at 3-270. However, "Alternative D would manage approximately 1,037,800 acres as unacceptable for further consideration for coal leasing." *Id.* at 3-271. This increased restriction lacks a rational basis and demonstrable benefits. There is no rational basis to justify such departure from Congress's directive to promote mineral development; nor can there be, as Congress's statutory directives remain the governing authority.

Lignite Energy Council
Jason Bohrer

Under Alternative D, areas unacceptable for further consideration of federal coal leasing would include areas outside 4 miles from coal mine permit boundaries. Proposed RMP/EIS at 3-214. The BLM acknowledges that "[w]hile no reduction in emissions or coal production from existing mines would result from Alternative D, this Alternative would preclude the development of future mines using federal coal." Proposed RMP/EIS at 3-214. Under Coal Screen 3, the BLM appears to treat air and climate as a resource and acknowledges that under the multiple-use screen, "existing data showed no air quality standards were exceeded based on the national ambient air quality standards under the Clean Air Act." Despite the acknowledged lack of exceedances, BLM goes on to apply "an air resources criterion that limits future federal coal leasing to lands near existing mines and

infrastructure.” Appendix F, at F-5. The above information speaks for itself. There is no rational basis for adoption of a 4-mile setback from approved federal mine permit boundaries to preclude federal leasing.

Lignite Energy Council
Jason Bohrer

Goals and Objectives to reduce GHG emissions. Even though the WORC case is in another district court, it has set precedent for BLM’s coal program. Further, there is a need for consistency in the Eastern Montana/Dakotas District Office since the authorized office for signing the ND RMP is the same as for the Miles City Field Office RMP for which the case directly applied. Proposed RMP/EIS at Appendix M, M-40. BLM justifies restrictions on surface coal mining by relying on a federal district court case from a state other than North Dakota, that is outside of the Eighth Circuit. As such, WORC has no binding, precedential effect on the North Dakota RMP/EIS. Thus, BLM’s apparent reliance on and interpretation of WORC is misplaced. First, the holdings in WORC specifically relate to the separate Buffalo and Miles City RMPs. They do not govern nor establish precedent over the ND RMP. Second, WORC directs the BLM to follow NEPA by considering climate in the coal screening process. The Court did not force the BLM to implement a climate screen in its RMPs nor did the Court direct the BLM to avoid all effects on climate. Third, notably, the Court did not invalidate the aforementioned federal statutory directives aimed at promoting development of federal minerals. The Proposed RMP/EIS’s coal screening and land use process hinders furtherance of these Congressional directives.

North American Coal, LLC
Christopher Friez

Issue Excerpt Text: The BLM is directed by Congress in FLPMA, the MMPA, and other federal laws and regulations to “use and observe . . . principles of multiple use” that will achieve the best “combination of balanced and diverse resource uses,” including “minerals” development. 43 U.S.C. §§ 1712(c)(1), 1702(c). Alternative D goes against these directives by unlawfully and arbitrarily restricting federal coal leasing. The Proposed RMP/EIS indicates that one of the RMP’s four main purposes is to “provid[e] opportunities for responsible mineral and energy development on BLM-administrated lands,” yet its proposed alternative arbitrarily limits federal coal mining to within a 4-mile development area of currently approved mine permits.

North American Coal, LLC
Christopher Friez

Issue Excerpt Text: The Proposed RMP/EIS’s Alternative D, as it relates to the future of federal coal leasing and development in North Dakota, is contrary to and inconsistent with Congressional intent and statutory authority. NACoal protests the Proposed RMP/EIS’s restrictions on surface coal mining, which directly conflict with Congressional directives to promote the exploration and development of coal resources. Federal regulations governing the management of mineral resources encourage and promote mineral development in a responsible and balanced manner as a key component of meeting America’s energy, economic, and security needs. The MMPA, FLPMA, and the National Materials and Mineral Policy, Research and Development Act of 1980 are just a sample of the many federal laws directing administrative agencies to manage federal lands and federal mineral interests with a recognition of “the Nation’s need for domestic sources of minerals . . . from the public lands.” 43 U.S.C. § 1701(a)(12). The Proposed RMP/EIS’s targeted coal screening and land use planning processes stand in the way of the BLM’s ability to adhere to these Congressional directives, and instead seem to further broad climate change priorities that were never contemplated by those underlying statutes, and are clearly outside the scope of BLM’s jurisdiction and authority. See *Department of Transportation v. Public Citizen*, 541 U.S. 752, 770 (2004). Such action is no longer free of judicial scrutiny, as the Supreme Court’s recent decision in

Loper Bright Enterprises v. Raimondo struck down the application of Chevron deference to administrative agency decisions. See Loper Bright Enterprises v. Raimondo, 144 S. Ct. 2244 (2024), Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984). BLM’s choices here are thus subject to review by federal courts who would compare the Proposed RMP/EIS against the clear statutory authority on federal coal leasing and development, and would likely find BLM to be in error.

North American Coal, LLC
Christopher Friez

Issue Excerpt Text: Congress has specifically directed the BLM to use its leasing process to ensure “the mining of all coal which can be economically extracted,” 30 U.S.C. § 201(a)(1), and to pursue “maximum economic recovery,” 30 U.S.C. § 201(a)(3)(C), of federally owned coal. Instead, the Proposed RMP/EIS’s preferred alternative essentially imposes what would be a “no-coal” policy that limits future leasing to four miles from any existing federally approved mine permit boundary. Not only would such action sterilize large amounts of federal coal, but it would also stand plainly inconsistent with the authorizing statutes governing federal coal leasing.

North American Coal, LLC
Christopher Friez

Issue Excerpt Text: NACoal fails to understand the BLM’s irrational and arbitrary intent to preclude all future federal coal mining in this area over the next 20-year planning period. Under the Federal Coal Leasing Program and other statutes and regulations, the BLM and numerous other state and federal agencies, have plenty of opportunity to examine an individual mining project in the future. Instead, BLM is arbitrarily deciding today, without consideration of the present facts or the future beneficial uses this valuable resource could have, that this area’s federal coal should not be mined, period. BLM hides behind its broad reference to greenhouse gas emissions, refuses to consider the other benefits of coal, but then the agency says that the North Dakota lignite industry will cease to exist in the next two decades, and therefore no further federal coal mining is necessary and the federal coal within the 4-mile development zone will be sufficient to fulfill all existing lignite contracts in the State. This finding and conclusion stands in direct contradiction with the statutory directives from Congress.

North American Coal, LLC
Christopher Friez

Issue Excerpt Text: In its responses to several NACoal comments and other comments, BLM states that Western Organization of Resource Councils, et al. v. BLM “set precedent for the BLM coal program as a whole...”, and elsewhere in its response “set a precedent for the BLM to consider climate as a multiple use coal screen.” 4:20-cv- 00076-GF-BMMM, 2022 WL 3082475 (D. Mont. Aug. 3, 2022) (“WORC III”); Proposed RMP/EIS, Appendix M at M-33, 35, 37. While BLM must abide by judicial decisions, no legislation or policy supports a position that federal district court orders from a district court within a different judicial circuit bind BLM on the ND Proposed RMP/EIS. North Dakota lies within the Eighth Circuit. Montana is in the Ninth Circuit. A decision from a district court located in a different circuit is not binding authority on North Dakota resources. Allowing a Montana district court case to become the standard BLM decisional outcome for the entire BLM coal program is at odds with common sense and legal precedent, especially to the extent such a decision is inconsistent with clear directives from Congress. The individual planning areas managed by BLM have different characteristics that must inform different types of management decisions. As BLM acknowledges and stated in its response to comments - it must consider site-specific factors in its management decisions for individual RMPs. Id. In any event, the WORC III decision did not require BLM to limit coal leasing within its planning areas across the board and did not make climate a multiple use screen for coal. Instead, it informed BLM as to how

the NEPA Environmental Impact Statement should be applied to the Buffalo and Miles City RMPs. The rest of the Court’s decision, including its analysis and discussion, or “dicta,” do not amount to binding requirements on the Buffalo and Miles City RMP or any other BLM management decision, particularly one that falls well outside of the case’s jurisdiction. The Court’s explicit order in WORC III was that the BLM offices falling under that decision “complete ... new coal screening and NEPA analyses. BLM shall consider no coal leasing and limited coal leasing alternatives and must disclose the public health impacts, both climate and non- climate, of burning fossil fuels from the planning areas [emphasis added]” WORC III at *8. Similarly, in an earlier installment of the case, the Court “required BLM to consider an alternative that “modified or foreclosed the amount of acreage available for coal development” and “decrease the amount of extractable coal available for leasing.” WORC III at *6 (citing *W. Org. of Res. Councils v. U.S. Bureau of Land Mgmt.*, No. CV 16-21-GF-BMM, 2018 WL 1475470 (“WORC II”) at *9.).

North American Coal, LLC
Christopher Friez

Issue Excerpt Text: By implying that the Air and Climate Coal Screen is required to be part of the Proposed Alternative D and implemented by the Proposed RMP/EIS, BLM mischaracterizes the real meaning of the District Court of Montana’s holdings. The actual wording of the Court’s decisions means that in the instance of the Buffalo and Miles City RMPs, BLM was required to have considered an alternative that limited mine expansion under the NEPA process and considered limiting coal leasing based on concerns regarding climate change within the NEPA process - not adopt the alternative in the Final Buffalo and Miles City RMPs. While BLM received a series of defeats in the WORC line of cases based on its NEPA analysis, WORC II and III never required BLM to withdraw its managed lands from coal leasing or create a “Climate” resource and then implement a coal screen based on climate. If the anti-coal lease policy that the BLM is attempting to establish really stems from the WORC III decision then BLM is misinterpreting the holdings of that case. The Court ordered BLM to abide by NEPA and simply consider climate in its coal screening process. BLM is certainly not required to avoid any and all effects on the climate. While BLM may have a legitimate interest in avoiding the invalidation of its decisions, the WORC III decision is not precedential on BLM’s other RMPs besides, other than the Buffalo and Miles City RMPs, and at any rate the ND Proposed RMP/EIS goes beyond what was even addressed in the WORC series of cases by limiting coal leasing in North Dakota in an arbitrary fashion.

North American Coal, LLC
Christopher Friez

Issue Excerpt Text: The BLM’s FEIS and the Proposed RMP are presented to the public in an unwieldy set of four volumes of analysis and material, making it difficult to distinguish the Proposed RMP from the environmental analysis of all alternatives, including the Proposed Alternative D. Given this, NACoal will address several issues with the BLM’s NEPA process within this Protest, as well. BLM’s arbitrary limitation on more than one million acres from future coal leasing is not directed by any statute or regulation BLM must follow. A rational basis for the screen is not articulated nor has BLM provided any data in support of the screen. Instead, as noted in BLM’s response to NACoal’s and the State of North Dakota’s comments, BLM is relying on its mistaken interpretation of a nonbinding case for a separate RMP with different site-specific circumstances. Moreover, the screening does not accomplish its stated goal to protect resources of high value, in particular the Air and Climate resources. Given this, the overarching question is why would BLM choose to institute a screen that has no land use management purpose or result? Clearly, BLM has made a clear error in instituting the Air and Climate Coal Screen in the Proposed RMP/EIS Alternative D.

*State of North Dakota**Nathan Svihovec, Doug Burgum, Paul Seby*

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

*State of North Dakota**Nathan Svihovec, Doug Burgum, Paul Seby*

Issue Excerpt Text: The Proposed RMP Conflicts with FLPMA’s and the MLA’s Statutory Requirements. Mineral Leasing Act. The MLA sets forth a framework to award leases at the request of a qualified applicant or on its own motion and requires BLM to conduct a comprehensive evaluation that achieves “the maximum economic recovery of the coal. 30 U.S.C. 201(3)(C). To further this goal, BLM, “upon determining that maximum economic recovery of the coal deposit or deposits is served thereby, may approve the consolidation of coal leases into a logical mining unit.” 30 U.S.C. 202a. A logical mining unit is an area of land in which the coal resources can be developed in an efficient, economical, and orderly manner as a unit with due regard to conservation of coal reserves and other resources. *Id.* Of the four Alternatives considered in the 1987 EIS accompanying the 1988 North Dakota RMP, the preferred Alternative was based upon balanced multiple use and intended to maximize production of mineral resources and opportunities for recreation, and consolidation of surface lands into a manageable pattern. Alternative C - 1987 RMP EIS at pg. 17. The Proposed RMP’s restriction on coal leasing within 4 miles of an existing permit area and within state designated drinking water protection areas, does not comply with the MLA requirement of encouraging the maximum economic recovery of coal within a logical mining unit. The Proposed RMP will result in stranded federal and private coal resources as operators alter efficient mining practices to accommodate federal requirements, adversely impairing previously designated logical mining units.

*State of North Dakota**Nathan Svihovec, Doug Burgum, Paul Seby*

The Proposed RMP restricts coal leasing to within 4 miles of an existing permit area and within state designated drinking water protection areas. During discussions between the State and BLM officials on May 17, 2023, BLM indicated that the restriction was required by the recent *Western Organization of Resource Council v. BLM* decision in the United States District Court for the District of Montana (the “Montana District Court Ruling”). See *Western Organization of Resource Council v. BLM*, 2022 WL 3082475 (D. Mont. Aug. 3, 2022); *Western Organization of Resource Council v. BLM*, CV 16-21, Not. Rep. F. Supp. (D. Mont. Mar. 3, 2018). The State disagrees with this assertion. First, the Montana District Court Ruling is not preclusive in North Dakota as it is from another, non-binding District Court. Second, the Montana District Court Ruling only found that BLM failed to consider a reasonable range of alternatives for coal leasing, including “lower end” alternatives that would more significantly restrict coal leasing. See *Western Organization of Resource Council v. BLM*, 2022 WL 3082475 at *5-6. What the Montana District Court Ruling specifically did not require, however, was a specific 4-mile buffer. As set forth in North Dakota’s previous comments on the draft RMP, the 4-mile buffer does not comply with FLPMA’s or the MLA’s requirement for mixed use development,

nor is it based on a reasoned BLM policy. BLM’s decision to drastically reduce coal leasing opportunities in the Proposed RMP is simply not consistent with FLPMA or the MLA.

North Dakota Petroleum Council
Eric Delzer, Kathleen Sgamma

Issue Excerpt Text: The Proposed RMP under Alternative D imposes severe restrictions on oil and gas development, particularly through the closure of low-potential areas and state-designated drinking water source protection areas to future leasing. The closure of these areas limits the potential for future production and exploration, restricting access to resources that could become economically viable with advances in technology. The 213,100 acres proposed to be closed to fluid mineral leasing comprise 44% of the available acres across North Dakota. Furthermore, 53% of the remaining acres would be subject to further stipulations such as NSO, CSU, and TL provisions. This leaves only 3% of the BLM-administered mineral acres available for lease under standard terms and conditions. These restrictions are inconsistent with the Mineral Leasing Act and could significantly negatively impact North Dakota’s economic vitality and the broader energy security of the United States. The Mineral Leasing Act (MLA) was enacted to promote the orderly development of mineral resources on public lands, ensuring that these resources contribute to the nation’s energy supply and economic stability. The proposed closures under Alternative D contradict the MLA’s intent by unnecessarily restricting access to lands with potential for oil and gas development. The 213,100 acres targeted for closure, while deemed to have “low potential” by the BLM, may still hold significant untapped resources. Advances in extraction technology, particularly in hydraulic fracturing and horizontal drilling, have demonstrated that previously overlooked areas can become economically viable. By preemptively closing these areas, the BLM could be stifling future development opportunities and failing to consider the potential long-term value of these resources.

National Mining Association
Katie Sweeney

Issue Excerpt Text: b. Failure to Comply with Statutes Governing Federal Coal Development (Chapter 1, sections 1.3, 1.5 and response to comments) Several statutes reflect congressional intent to prioritize the efficient development of domestic coal reserves to meet America’s energy, economic, and security needs while ensuring adequate protection of the environment. As discussed below, the NDFO adoption of preferred alternative flouts congressional intent as expressed in the Federal Land Policy and Management Act (FLPMA), the Mining and Minerals Policy Act of 1970 and the Mineral Leasing Act (MLA).

Summary:

Protestors alleged that the BLM violated the Energy Policy Act, the Energy Policy Conservation Act Amendments, the Mining and Minerals Policy Act (MMPA), FLPMA, the SMCRA, the APA, the BLM Land Use and Planning Handbook, the MLA, and NEPA by:

- Justifying coal and mineral leasing restrictions on outdated assessments of resource potential and environmental impact; and
- Excessively and arbitrarily restricting oil and gas development, not treating it as a necessary use of public lands and interests, and not using the least-restrictive means necessary to protect other resource values.

Protestors also claimed that the BLM violated additional Congressional Directives (i.e., National Materials and Mineral Policy, Research and Development Act of 1980, and 43 CFR 3420.1-4) by not pursuing “maximum economic recovery” of federally owned coal and inconsistently completing the coal screening analysis, treating air and climate as a resource, and inappropriately applying a 4-mile

setback from approved Federal mine permit boundaries and State-designated water protection areas. Finally, protestors objected to the North Dakota PRMP/FEIS incorporating decisions from the *Montana District Court Western Organization of Resource Councils (WORC), et al. v. BLM* (4:20-cv-00076-GF-BMMM 8/3/2022) decision, stating that it has no binding authority or precedential effect on North Dakota resources.

Response:

The BLM’s planning regulations require the North Dakota Resource Management Plan (RMP)/Environmental Impact Statement (EIS) to be consistent with the purposes, policies, and programs of Federal laws and regulations applicable to BLM-administered lands and minerals (43 CFR 1610.3-2(a); North Dakota PRMP/FEIS Section 1.5, pp. 1-6–1-7). The RMP should also be consistent with approved or adopted plans, policies, and programs that are being implemented by other land managers and government agencies in North Dakota, to the extent possible.

Protestors cite a number of energy laws and regulations they allege were violated in the North Dakota PRMP/FEIS. The Energy Policy Act of 2005 (42 U.S. Code [U.S.C.] 149 15961–15991) is a sweeping statute with many provisions that declare a commitment to competition in wholesale power markets, strengthened the Federal Energy Regulatory Commission’s regulatory tools to ensure fair competition, and provided for the development of a stronger energy infrastructure. While this act granted the Federal Energy Regulatory Commission the authority to oversee mandatory reliability standards for the nation’s electricity grid, it also directed the commission to expand and modernize the nation’s electricity grid. In addition, while this act did seek to increase coal as an energy source, it also required an assessment of coal resources on Federal lands. In the North Dakota PRMP/FEIS, the BLM meets the requirements of the Energy Policy Act, as well as the Energy Policy Conservation Act of 1975 as amended, by utilizing the least-restrictive means necessary to protect other resource values. As discussed below, the BLM utilized the appropriate coal screens when determining lands available and unavailable to coal leasing. The North Dakota PRMP/FEIS was developed to be consistent with all Executive Orders (EO), Secretarial Orders, Congressional Directives (i.e., National Materials and Mineral Policy, Research and Development Act of 1980, and 43 CFR 3420.1-4), and administration priorities currently in effect (North Dakota PRMP/FEIS Section 1.5, pp. 1-6–1-7).

Federal coal is governed by the MLA, 30 U.S.C. 181 et seq. and its implementing regulations at 43 CFR Part 3400; the SMCRA, 30 U.S.C. 1201 et seq.; and by FLPMA, 43 U.S.C. 1701 et seq. and its implementing regulations at 43 CFR 1600 et seq. One aspect of coal leasing governed under these regulations is land use planning (43 CFR 3420.1–4(d); 43 CFR 1610.7-1) and the review of Federal lands for suitability for coal leasing (43 CFR 3461). These regulations identify certain lands as unsuitable for surface mining or surface mining operations because they contain significant values that conflict with coal development. Therefore, areas within the North Dakota Field Office planning area were eliminated from further consideration for coal leasing through application of the coal screens where protection or use of the noncoal resource would be precluded by surface coal mining and where the noncoal resource or use is of greater value than coal (North Dakota PRMP/FEIS Appendix F, Section F.3.2, *Coal Screening Process, Screen 2 through Unsuitability*, pp. F-3–F-5).

The BLM acknowledges that mining, including coal, has long been an anticipated and necessary use of public lands and interests in North Dakota. In developing the alternatives for the North Dakota PRMP/FEIS, the BLM aimed to balance the directives of the laws that intend the BLM to make some land available for leasing, including the *WORC v. BLM* court decision (4:20-cv-00076-GF-BMMM 8/3/2022) and Administrative Goals and Objectives to reduce greenhouse gas (GHG) emissions and consider climate as part of Coal Screen 3. In response to public comments received on the North Dakota Draft RMP/EIS, the BLM added additional context regarding the WORC decision and how the permit boundary criterion under Alternative B.1 was developed to Appendix F, *Coal Screening*

Process, under the Air and Climate – Limited Expansion (Existing mine permit boundaries) subsection (North Dakota PRMP/FEIS Appendix F, pp. F-5–F-6). Furthermore, there is a need for consistency in the Eastern Montana/Dakotas District Office because the authorized office for signing the North Dakota RMP is the same as for the Miles City Field Office RMP, to which the WORC decision directly applied.

Section 102(a)(7) of FLPMA declares that it is the policy of the United States that management of the public lands be based on “multiple use” and “sustained yield.” Section 103(c) of FLPMA defines “multiple use” as the management of the public lands and their various resource values so that they are utilized in the combination that will best meet the present and future needs of the American people. FLPMA’s multiple-use policy does not require that all uses be allowed on all areas of the public lands. Through the land use planning process, the BLM evaluates and chooses an appropriate balance of resource uses that involves tradeoffs between competing uses and the BLM has discretion to allocate the public lands to particular uses and to employ the mechanism of land use allocation to protect for certain resource values, or, conversely, develop some resource values to the detriment of others, short of unnecessary and undue degradation (UUD). In the North Dakota PRMP/FEIS, the BLM followed all applicable policies to assess coal resources and make management decisions in accordance with FLPMA, NEPA, and the BLM Land Use Planning Handbook and does not prioritize any one resource use to the detriment of all other uses, as demonstrated by the allocations and management decisions within the North Dakota PRMP/FEIS.

The closure or restriction of public lands to mineral leasing does not constitute a withdrawal under FLPMA (as defined by Section 103(j) of FLPMA). The North Dakota PRMP/FEIS does not create withdrawals; however, some alternatives recommend areas for withdrawal to the Secretary of the Interior and Congress. Withdrawal actions are a separate process from the RMP/EIS, and there is no requirement that the Secretary of the Interior or Congress act on them. Although the North Dakota PRMP/FEIS does add restrictions to mineral development (North Dakota PRMP/FEIS Section 2.1.4, p. 2-7), the analyses under Alternatives B and D demonstrate there is enough Federal coal contained within the 4-mile development area around the existing mine permit boundaries to provide sufficient leasable Federal coal to extend the life of each mine beyond the life the RMP (20 years). Only under Alternative B.1 is the reasonably foreseeable development of pending Federal coal leases constrained. North Dakota PRMP/FEIS Section 3.5.1, *Social and Economic Conditions* (pp. 3-243–3-292) was updated to include a description of the environmental and socioeconomic cost from lost Federal coal leases; however, the Proposed Plan (Alternative D) does not excessively or arbitrarily restrict mineral development.

In consideration of the WORC decision, the BLM took climate into account when determining the range of management alternatives as required by FLPMA to meet the multiple-use mandate. This included closing areas to mineral leasing (including coal) to protect resource values or other uses in these areas. No alternative within the North Dakota PRMP/FEIS proposes closing the entire planning area to mineral development, and the BLM designed all proposed alternatives to align with FLPMA’s multiple-use mandate. In addition, Section 1.2.2 of the North Dakota PRMP/FEIS (p. 1-2) notes that one of the four main purposes of revising the RMP is to “provide opportunities for mineral and energy development.” The assertion by protestors that other resource values are being elevated over “mineral exploration and production” is not supported. The multiple-use mandate defined in 43 U.S.C. 1702(c) directs the BLM to consider a wide range of resources and values in the management of public lands, including treating air and climate as a resource even if an alternative does not affect air quality or GHGs. The BLM’s consideration of climate as a multiple-use screen is consistent with the decision in WORC. The 4-mile development area around the approved Federal mine plans under Alternatives B and D was based on climate considerations in addition to proximity to existing mine infrastructure, long-range mine plans as provided in Lease by Application documents, and future

areas of interest provided by the mines, and through consideration of a reasonably foreseeable development scenario.

The coal screening process used in the analysis of the North Dakota PRMP/FEIS was applied consistently with 43 CFR 3420.1-4. See North Dakota PRMP/FEIS Appendix F, Section F.2, *Regulatory Overview* (pp. F-1–F-2) for the regulations that guide the BLM coal screening process and how it was updated to further clarify the surface owner consultation screen between the Draft EIS and the FEIS. The BLM considered public input and acknowledged that impacts may occur on non-Federal surface owners, where Federal coal is not leased; however, the BLM has no obligation to lease Federal coal for the benefit of individual private surface owners. The socioeconomic analysis (North Dakota PRMP/FEIS Section 3.5, pp. 3-249–3-292) notes that total economic contributions of coal development would not be affected, as it is anticipated that the reduction in Federal coal production would be replaced by an increase in non-Federal coal production. None of the alternatives propose an end to future Federal coal leasing.

The North Dakota PRMP/FEIS is consistent with the purposes, policies, and programs of Federal laws and regulations applicable to BLM-administered lands and minerals within the planning area. Accordingly, this protest issue is denied.

FLPMA – Consistency with State and Local Plans

Lignite Energy Council

Jason Bohrer

Issue Excerpt Text: The criteria for development and revision of an RMP requires the BLM to “coordinate the land use inventory, planning, and management programs of other Federal departments and agencies and of the States and local governments within which the lands are located.” 43 U.S.C. § 1712. However, the Proposed RMP/EIS continues to contain no meaningful discussion or consideration of the NDPSC’s existing management and regulatory program over coal mining. In response to this concern, the BLM stated: BLM has the authority to lease federal coal under the Mineral Leasing Act. The State then has an approved SMCRA program to regulate mining and reclamation operations. No restriction BLM puts on a coal lease prevents the state from implementing SMCRA or State regulations. Proposed RMP/EIS at Appendix M, M-133. The issue is not that the Proposed RMP/EIS prevents the NDPSC from implementing its program under SMCRA. The issue is that because the BLM has failed to meaningfully consider the NDPSC’s regulatory framework for overseeing and managing impacts from surface coal mining, the Proposed RMP/EIS does not adequately factor existing mitigation, minimization, and avoidance of impact measures already required by the State to protect resources. The result is the Proposed RMP/EIS’s assessment of impacts is arbitrary and it presumably grossly exaggerates the scope of potential impacts attributed to coal mining by failing to account for an entire existing regulatory regime designed to promote the management of resources and responsible development of coal. Not only has the Proposed RMP/EIS failed to account for the mitigation that stems from the State’s existing regulatory framework over coal mining, but it also appears the BLM more broadly seeks to expand its authority. The Proposed RMP/EIS unnecessarily duplicates oversight by imposing additional regulatory requirements over various subject matter that falls within the purview of other State agencies. Proposed RMP/EIS, at Table 2-2 (proposing various requirements to govern air quality, wildlife, soils, reclamation etc.).

State of North Dakota

Nathan Svihovec, Doug Burgum, Paul Seby

Issue Excerpt Text: The State possesses police power to regulate its natural resources. See, e.g., *Wall v. Midland Carbon Co.*, 254 U.S. 300, 313-16 (1920) (upholding the State’s police power to

regulate natural gas). The State exercises this authority by regulating oil and gas activity on fee, State, and federal land in the State, through the North Dakota Industrial Commission (“NDIC”). See North Dakota Century Code (“NDCC”) Chapter 38-08 et seq.; North Dakota Administrative Code (“NDAC”) Chapter 43-02-03. The fee/fee/fed policy correctly recognizes that on non-federal lands “In fee/fee/federal situations, the BLM often has limited jurisdiction.” Proposed RMP Volume 1 at 3-204. Despite this limited jurisdiction, and as set forth in these comments, the Proposed RMP would effectively strand State and private mineral resources, blocking or impairing them from developments by closing or applying NSO stipulations to BLM lands interspersed with State and private lands. Where these BLM lands cannot be developed, the entire spacing unit those BLM lands are subject to also either cannot be developed, or cannot be developed economically without waste.

State of North Dakota

Nathan Svihovec, Doug Burgum, Paul Seby

Issue Excerpt Text: The Proposed RMP directs BLM to “[a]cquire and perfect federal reserved water rights necessary to carry out BLM-administered land management purposes” and states that “[i]f a federal reserved water right is not available, then acquire, perfect, and protect water rights through state law.” Proposed RMP at 2-18. While the Proposed RMP recognizes that BLM should perfect water rights according to North Dakota law, the Proposed RMP has a focus on managing “surface water and groundwater quality on BLM-administered lands to protect, maintain, improve, and/or restore the chemical, physical, and biological integrity of waters to protect beneficial uses” and to “[p]rotect, restore, and maintain the chemical, physical, and biological (ecological) services of surface water and groundwater to support resource management needs and all associated beneficial use standards.” Id. at 2-17. However, under State law, these conservation goals are not recognized as a beneficial use of the State’s sovereign waters. The State’s Constitution, Article XI, § 3 states: “All flowing streams and natural watercourses shall forever remain the property of the state for mining, irrigating and manufacturing purposes.” The Proposed RMP does not comply with the State’s sovereign right to regulate its waters because it would assert jurisdiction over State managed and permitted water through the permitting conditions and stipulations in the Proposed RMP that target the State’s waters through NSO stipulations designed around conservation of State waters. However, it is inappropriate and contrary to the State’s sovereign right to regulate State waters to impose stipulations on waters inconsistent with the State’s beneficial use standards.

State of North Dakota

Nathan Svihovec, Doug Burgum, Paul Seby

Issue Excerpt Text: In 2011, the Board adopted the name “Department of Trust Lands” as the common reference for the office of the Commissioner. Prior to that time, it was informally called the “State Land Department.” The North Dakota Department of Trust Lands is the administrative arm of the Board, serving under the direction and authority of the Board. The Department manages approximately 2.6 million mineral acres with their approximate 8,700 associated oil and gas leases, and over 700,000 surface acres with their approximate 4,400 associated agricultural leases. Revenues generated from these leases, along with payments received from other income sources such as oil & gas lease bonus payments and easements granted for pipelines, roads, and well pads, are deposited into 13 permanent trust funds and invested to provide long-term income for trust beneficiaries. For example, most of the land managed by the North Dakota Department of Trust Lands is associated with the Common Schools Trust Fund. The sole beneficiaries of the assets held in the Common Schools Trust Fund, including the land and all revenue generated from these assets, are the common schools of the State and those funds are therefore utilized to advance significant State and federal goals of expanding primary education. Thus, the State of North Dakota is federally mandated to manage Trust Lands in a manner consistent with the fiduciary intent of the Enabling Act. The Proposed RMP impairs the North Dakota Department of Trust Land’s ability and fiduciary

responsibility to manage Trust Lands in the best interest of the trusts’ beneficiaries as established by the Enabling Act and fails to equally consider all policies of FLPMA in several ways.

State of North Dakota

Nathan Svihovec, Doug Burgum, Paul Seby

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

State of North Dakota

Nathan Svihovec, Doug Burgum, Paul Seby

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

State of North Dakota

Nathan Svihovec, Doug Burgum, Paul Seby

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

Summary:

Protestors state that the BLM violated FLPMA by failing to be consistent with State and local plans and regulations, specifically the NDCC’s fee/fee/fed regulations, the North Dakota Public Service Commission (NDPSC) regulatory framework, and the Constitution of North Dakota. Protesters also claim that the North Dakota PRMP/FEIS infringes on State laws and regulations that NDDEQ enforces and contradicts the Enabling Act on State Trust lands with split estates. Protestors allege that the North Dakota PRMP/FEIS does not account for mitigation, minimization, and avoidance measures already required by the State to protect environmental and natural resources and imposes stipulations on the State of North Dakota’s sovereign waters that are inconsistent with the State’s beneficial use standards.

Response:

Section 202(c)(9) of FLPMA requires that “land use plans of the Secretary under this section shall be consistent with state and local plans to the maximum extent he finds consistent with Federal law and the purposes of this Act.” However, BLM land use plans may be inconsistent with State, local, and Tribal plans where it is necessary to meet the purposes, policies, and programs associated with implementing FLPMA and other Federal laws and regulations applicable to public lands (43 CFR 1610.3-2(a)).

In accordance with this requirement, the BLM has considered State, local, and Tribal plans that are germane to the development of the North Dakota PRMP/FEIS and the BLM worked closely with State, local, and Tribal governments during preparation of the North Dakota PRMP/FEIS. Section 4.2 of the North Dakota PRMP/FEIS (pp. 4-1–4-4) describes the consultation and coordination that has occurred throughout the development of the North Dakota PRMP/FEIS.

The relationship of the North Dakota PRMP/FEIS to other policies, plans, and programs can be found in Section 1.5 (North Dakota PRMP/FEIS p. 1-6). County, State, and other Federal agency plans that were consulted, as applicable, during the North Dakota RMP/EIS planning effort are listed in the Analysis of the Management Situation for the North Dakota PRMP/FEIS (BLM 2020), which can be found on the North Dakota PRMP/FEIS ePlanning site: <https://eplanning.blm.gov/eplanning-ui/project/1505069/570>. Chapter 7 of the Analysis of the Management Situation outlines specific mandates and authorities that were considered during the planning process. Mitigation, minimization, and avoidance measures that are already required by these plans were considered in the development of the North Dakota PRMP/FEIS. Appendix B, *Stipulations and Allocations Applicable to Fluid Mineral Leasing*, and Appendix D, *Design Features and Best Management Practices*, outline requirements and design features needed to meet statutory requirements for environmental protection and to comply with resource-specific goals and objectives outlined in the North Dakota PRMP/FEIS.

The management within the North Dakota PRMP/FEIS only applies to the decision area, which is limited to Federal lands and Federal mineral estate managed by the BLM in North Dakota. The BLM is mandated by Section 202 of FLPMA to develop, maintain, and revise land use plans for public lands. Section 103(e) of FLPMA defines public lands as any lands and interest in lands owned by the United States. The BLM must comply with the requirements of NEPA, the National Historic Preservation Act, the Endangered Species Act, the Clean Water Act, and other applicable laws regarding surface resources. While FLPMA establishes guidelines for the management, protection, development, and enhancement of public lands, it does not prioritize between uses and does not mandate that every use be available on every acre. Adverse impacts, such as economic loss, may occur in certain situations for the overall health of the public lands and resources. The BLM decision would not preclude the authority of the State of North Dakota to manage, permit, and bill for use of State Trust lands accordingly to meet its fiduciary responsibility.

The SMCRA of 1977 (Public Law 95-87) established the Office of Surface Mining Reclamation and Enforcement, which has the statutory role to promote and assist its partner states and Tribes in establishing and maintaining a stable regulatory environment for coal mining consistent with the SMCRA and administered primarily through state programs, or by the Office of Surface Mining Reclamation and Enforcement. Under the SMCRA, the State of North Dakota has primary responsibility, known as “primacy,” to administer its regulatory programs for mining and reclamation. The North Dakota PRMP/FEIS does not alter the State’s regulatory authority under the SMCRA. The BLM is not attempting to regulate non-Federal minerals. The possibility of indirect impacts on the development of non-Federal minerals due to the management decisions for Federal minerals is discussed in Section 3.3.2 (North Dakota PRMP/FEIS pp. 3-203–3-209) and does not preclude the BLM’s administration of Federal minerals or otherwise contradict MLA or FLPMA direction to apply management as appropriate.

In addition, the BLM coordinates with the State of North Dakota on water quality issues and other potential issues. The BLM follows North Dakota’s regulations on water quality as well as water rights and water use. As discussed in the Section 3.2.3 of the North Dakota PRMP/FEIS (pp. 3-68–3-84), the BLM will follow North Dakota’s lead on these issues if it is in accordance with the Clean Water Act. If a project is proposed, the BLM will strive to meet or exceed water quality regulations but will not conflict with the State’s quality standards. Changes were made in Section 3.2.3 between the Draft RMP/EIS and the PRMP/FEIS to address concerns by the North Dakota Department of Water Resources, including clarifications on State water permitting regulations and standards (North Dakota PRMP/FEIS pp. 3-70 and 3-73).

The BLM will address and discuss any remaining inconsistencies between the North Dakota PRMP/FEIS and relevant local, State, and Tribal plans that cannot be resolved in the Record of Decision for the North Dakota PRMP/FEIS planning effort. The BLM satisfied FLPMA’s consistency requirements in preparation of the North Dakota PRMP/FEIS. Accordingly, this protest issue is denied.

FLPMA – Multiple Use

North American Coal, LLC Christopher Friez

Issue Excerpt Text: It is true that BLM is directed to manage public lands “on the basis of multiple use and sustained yield.” 43 U.S.C. § 1701(a)(7). However, the Proposed RMP/EIS’s Proposed Alternative does not attempt to restrict or end coal mining in favor of some other use that it has determined to be higher or better. The Proposed RMP/EIS simply favors non-use. In so doing, it is notable that the Proposed RMP/EIS does not create better environmental and economic outcomes for the planning area. In fact, the Proposed RMP/EIS’s extensive data shows that its proposed actions on federal coal leasing will actually have no positive impact on greenhouse gas emissions nor other environmental outcomes, as private coal will simply “fill in” for the federal coal that is left behind. Thus, the proposed action is not supported by the BLM’s multiple-use directives nor any other statutory authority or Congressional directive and is improper. Such action is the definition of arbitrary - in taking this action, the BLM would preclude the leasing of vast amounts of federal coal on the basis of reducing greenhouse gas emissions, yet it readily admits that the plan will not result in any reduction of those emissions.

National Mining Association Katie Sweeney

Issue Excerpt Text: In response to NMA’s and similar comments, BLM merely states that FLPMA or the MLA require identification of certain lands as unsuitable for surface coal mining or surface

mining operations because they contain significant values that conflict with coal development. Therefore, BLM asserts, areas were eliminated from further consideration for coal leasing where protection or use of the noncoal resource would be precluded by surface coal mining and where the noncoal resource or use is of greater value than coal. While it is true that FLPMA does not require leases be granted, it does require a balancing test to determine if multiple uses can coexist. That balancing test is appropriately articulated in BLM's 2006 "Energy and Non- Energy Minerals Policy Statement."³⁸ The policy indicates that except for Congressional withdrawals, public lands shall remain open and available for mineral exploration and development unless withdrawal or other administrative actions are clearly justified in the national interest. Furthermore, the policy states that BLM land use planning and multiple-use management decisions will recognize that, with few exceptions, mineral exploration and development can occur concurrently or sequentially with other resource uses. For the reasons articulated in section II.a. of this protest letter concerning impacts to reliable and affordable electricity, ending future federal coal leasing in North Dakota is not in the national interest. ii. Mineral Leasing Act The NMA's comment on the draft RMP and EIS similarly raised concerns about BLM's compliance with the MLA. In the MLA, the primary statute that governs the leasing of federal coal, Congress recognized the importance of this critical resource. In fact, the MLA is subtitled "an act to promote the mining of coal..." and mandates that "no mining operating plan shall be approved which is not found to achieve the maximum economic recovery of the coal within the tract."³⁹ BLM rebuffs the NMA's arguments, once again asserting that neither the MLA or FLPMA require that leases within the allocation area be granted. In this protest, the NMA reiterates its MLA argument and points to the BLM's 2006 policy as articulating how BLM can comply with FLPMA and the MLA without ending future coal leasing.

State of North Dakota

Nathan Svihovec, Doug Burgum, Paul Seby

Issue Excerpt Text: As BLM is well aware, FLPMA is a land use planning and management statute which "established a policy in favor of retaining public lands for multiple use management." *Lujan v. National Wildlife Federation*, 497 U.S. 871, 877 (1990). "Multiple use management" describes the task of striking a balance among the many competing uses to which land can be put, "including, but not limited to, recreation, range, timber, minerals, watershed, wildlife and fish, and [uses serving] natural scenic, scientific and historical values." *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 58 (2004) (citing to 43 U. S. C. § 1702(c)). A second management goal, "sustained yield," requires BLM to control depleting uses over time, so as to ensure a high level of valuable uses in the future. *Id.* (citing to 43 U.S.C. § 1702(h)). "To these ends, FLPMA establishes a dual regime of inventory and planning. Sections 1711 and 1712, respectively, provide for a comprehensive, ongoing inventory of federal lands, and for a land use planning process that 'project[s]' 'present and future use,' § 1701(a)(2), given the lands' inventoried characteristics." *Id.* Under these mandates, "FLPMA identifies 'mineral exploration and production' as one of the 'principal or major uses' of public lands." *WildEarth Guardians v. Bernhardt*, 502 F. Supp. 3d 237, 241 (D.D.C. 2020) (citing to 30 U.S.C. § 1702(l) ("The term 'principal or major uses' includes, and is limited to, domestic livestock grazing, fish and wildlife development and utilization, mineral exploration and production, rights-of-way, outdoor recreation, and timber production.")) (emphasis added)). FLPMA clearly directs the Secretary to promote "mineral exploration and production" during RMP development. 30 U.S.C. § 1702(l). FLPMA does not authorize BLM to promote "conservation" as a principle or major "use" of public lands. In 2016, BLM attempted to promulgate a rule promoting "conservation" as a use of public lands. See *Resource Management Planning, Final Rule* (81 Fed. Reg. 89580 (Dec. 12, 2016) ("Planning 2.0 Rule"). However, on March 27, 2023, President Trump signed a resolution from Congress under the Congressional Review Act that vetoed BLM's Planning 2.0 Rule. Through this veto, Congress clearly spoke that it did not authorize BLM to elevate conservation as a principal or major use of lands under FLPMA.

*State of North Dakota**Nathan Svihovec, Doug Burgum, Paul Seby*

Issue Excerpt Text: The Proposed RMP states that these “needs” provide opportunities for mineral and energy development, contribute to conservation and recovery of threatened and endangered species and special status species, provide recreation opportunities and access to BLM-administered lands, and manage for other social and scientific values through conservation. However, “conservation” is not a principal use under FLPMA. As such, these needs are also inconsistent with FLPMA’s multiple use mandate discussed above and do not provide a valid or reasoned justification for BLM to substantially depart from the existing 1988 North Dakota RMP for coal resources. The Proposed RMP further restricts federal coal leasing to all areas outside 4 miles from the current surface coal mining permit boundaries as of September 9, 2022, as well as within state designated drinking water protection areas. Notably, the Proposed RMP effectively closes 94.7 percent of North Dakota’s federal coal to leasing under Coal Screen 3. This leaves only approximately 58,600 federal acres available for leasing. Proposed RMP, Volume 1 at ES-3 and 3-214. This, on its face, is contrary to FLPMA’s directive to promote mineral development. The Proposed RMP does not reflect FLPMA’s multiple use mandate and would amount to a near-prohibition of federal subsurface coal leasing in the decision area in a long-term RMP. Accordingly, the North Dakota PSC is strongly opposed to the Proposed RMP.

*State of North Dakota**Nathan Svihovec, Doug Burgum, Paul Seby*

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

*State of North Dakota**Nathan Svihovec, Doug Burgum, Paul Seby*

Issue Excerpt Text: The Proposed RMP purports to rely on SC-GHG estimates based on “Section 5 of Executive Order 13990” which directs agencies to “capture the full costs of greenhouse gas emissions as accurately as possible, including by taking global damages into account.” *Id.* at 22; see also Executive Order 13990, Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis, 86 Fed. Reg. 7037 (Jan. 25, 2021). However, Executive Order 13990 is not binding law, and cannot contradict the statutory mandates that govern BLM’s actions. Further, by its own terms Executive Order 13990 states that it “shall be implemented in a manner consistent with applicable law.” 86 Fed. Reg. at 7042. Similarly, Executive Order 13990 notes that “[t]his order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States.” *Id.* at 7043. The goal stated in Executive Order 13990 “that agencies capture the full costs of greenhouse gas emissions as accurately as possible” does not alter existing NEPA or FLPMA requirements and does not create any enforceable rights, particularly where BLM seeks to rely on the goals from Executive Order 13900 to justify withdrawing lands that FLPMA’s multiple use mandate would otherwise require to be managed otherwise. Similarly, the 2016 GHG Guidance for which BLM relies on in incorporating its SC-GHG estimates (see EIS at 3-22 - 3-23) notes that “[t]his guidance is not a rule or regulation, and . . . does not change or substitute for any law, regulation, or other legally binding requirement, and is not legally enforceable.” The new 2023 GHG guidance contains identical language. As guidance documents, BLM cannot rely on either Executive Order 13990 or the

2016/2023 GHG Guidance documents to circumvent its multiple-use and sustained yield mandates under FLPMA to promote the development of mineral resources as a principal and major use of public lands.

State of North Dakota

Nathan Svihovec, Doug Burgum, Paul Seby

Issue Excerpt Text: The BLM’s selection of Alternative D would provide no real benefit, but would cause major environmental, human health, and socio-economic harms. As discussed throughout, careful review of the Proposed RMP fails to show why the BLM selected Alternative D. Moreover, the BLM’s sole focus on sustaining the ecological integrity of habitats for all priority plant, wildlife, and fish species (Proposed RMP, Volume 1 at ES-2-3) to the exclusion of all other issues is far beyond the statutory mandates that apply under the FLPMA, the MLA, and other federal land management statutes. As such, the BLM impermissibly violated the “major questions” doctrine as articulated by the United States Supreme Court in *West Virginia v. Environmental Protection Agency*, -- U.S.--, 142 S. Ct. 2587 (2022). While the BLM could consider ecological integrity as part of its analysis, its reliance on that issue to the exclusion of all other issues violates the major questions doctrine. Congress has not charged the BLM with authority to regulate the ecological integrity of habitats, and the BLM’s myopic focus on this issue shows a fundamental lack of comprehension of its controlling statutory authority.

Summary:

Protestors claimed that the BLM violated FLPMA’s multiple-use mandate by promoting the prioritization of biological and recreational resource values over mineral development opportunities throughout the planning area, which protestors allege is a shift in policy and was chosen without a thorough explanation of why other reasonable alternatives were not considered. Protesters stated that the management actions under the North Dakota PRMP/FEIS would effectively end coal leasing in North Dakota and restrict the development of existing coal leases, and noted that the BLM social cost of greenhouse gases (SC-GHG) estimates are in violation of FLPMA’s multiple-use mandate. Protesters claim the BLM’s analysis regarding ecological integrity is in violation of the “major questions” doctrine and therefore does not provide rationale for violating FLPMA’s multiple-use mandate.

Response:

Section 302(a) of FLPMA directs the BLM to manage public lands on the basis of multiple use and sustained yield, unless otherwise provided by law (43 U.S.C. 1732(a)). Section 103(c) of FLPMA defines “multiple use” as the management of the public lands and their various resource values so that they are utilized in the combination that will best meet the present and future needs of the American people.

FLPMA’s multiple-use policy does not require that all uses be allowed on all areas of the public lands. Rather, the BLM has broad discretion to allocate the public lands to particular uses and to employ the mechanism of land use allocation to protect for certain resource values, or, conversely, develop some resource values to the detriment of others. Through the land use planning process, the BLM evaluates and chooses an appropriate balance of resource uses, which involves tradeoffs between competing uses.

The BLM considered a variety of management alternatives as required by FLPMA to meet the multiple-use mandate in the North Dakota PRMP/FEIS. FLPMA also directs the BLM to manage public lands in a manner that protects the quality of scientific, scenic, historical, ecological, environmental, air, and atmospheric values that, where appropriate, will preserve and protect certain

public lands in their natural condition to provide food and habitats for fish and wildlife and domestic animals. Pursuant to FLPMA, the North Dakota PRMP/FEIS and its associated alternatives incorporate multiple-use and sustained-yield principles by providing for the “management of public lands and their various resource values so they are utilized in the combination that will best meet the present and future needs of the American people” (30 U.S.C. 1701(c)). These decisions include closing areas to mineral leasing to protect resource values or other uses in these areas, including the consideration of recreation, minerals, ecological integrity, and wildlife and fish. Effects associated with the proposed action on these resources are outlined in North Dakota PRMP/FEIS Chapter 3 *Affected Environment and Environmental Consequences* (pp. 3-1–3-292). No alternative proposes to close the entire planning area to mineral development, and the BLM has designed all proposed alternatives to align with FLPMA’s multiple-use mandate (North Dakota PRMP/FEIS Chapter 2, Section 2.1, *Description of the Alternatives*, pp. 2-1–2-7). Please see Section 2.2 (North Dakota PRMP/FEIS, *Alternatives Considered but Eliminated from Detailed Analysis*, pp. 2-7–2-11) for a more detailed explanation on why certain alternatives were considered but ultimately eliminated from a more detailed analysis. For a description of why Alternative D was chosen as the PRMP, see Sections 2.1.4 and 2.1.5 (North Dakota PRMP/FEIS, p. 2-7).

Federal coal is governed by the MLA, 30 U.S.C. 181 et seq. and its implementing regulations at 43 CFR Part 3400; the SMCRA, 30 U.S.C. 1201 et seq.; and FLPMA, 43 U.S.C. 1701 et seq. and its implementing regulations at 43 CFR 1600 et seq. One aspect of coal leasing addressed in these regulations is land use planning (43 CFR 3420.1–4(d); 43 CFR 1610.7-1) and the review of Federal lands for suitability for coal leasing (43 CFR 3461). Application of the multiple-use screen does not eliminate coal leasing in the planning area. North Dakota PRMP/FEIS Appendix F, *Coal Screening Process*, was updated between the Draft EIS and FEIS to further clarify the multiple-use screen and its application in the North Dakota PRMP/FEIS (Appendix F, Section F.3.3, pp. F-5–F-8) and to add context regarding the WORC case and how the permit boundary criterion under Alternative B.1 was developed (Appendix F, pp. F-5–F-6).

BLM’s inclusion of the SC-GHG estimates does not violate FLPMA’s multiple-use mandate and is consistent with current policy, including the 2023 Council on Environmental Quality (CEQ) GHG Guidance and Secretarial Order 3399, which states that “estimates of SC-GHG can be a useful measure to assess the climate impacts of GHG emission changes for Federal proposed actions, in addition to rulemakings.” The BLM exercised its discretion to evaluate the SC-GHG emissions in the North Dakota PRMP/FEIS (Section 3.2.1, pp. 3-22–3-25), and following this guidance to provide additional context for GHG emissions does not violate FLPMA.

All alternatives considered in the North Dakota PRMP/FEIS, as described in Chapter 2.1, *Description of the Alternatives* (North Dakota PRMP/FEIS, pp. 2-1–2-7), provide an appropriate balance of uses on public lands. In addition, all alternatives allow some level of all uses present in the planning area in a manner that is consistent with applicable statutes, regulations, and BLM policy. The North Dakota PRMP/FEIS satisfies FLPMA’s multiple-use policy. Accordingly, this protest issue is denied.

FLPMA – Unnecessary or Undue Degradation

***Western Environmental Law Center
Morgan O’Grady***

Issue Excerpt Text: Conservations Groups’ Draft-EIS comments also detailed the dissonance between any new commitments of federal land to fossil fuel development and BLM’s statutory mandate under FLPMA to avoid unnecessary or undue degradation (UUD). This is a protective mandate that applies to BLM planning and management decisions, including these RMPs, see *Utah Shared Access Alliance v. Carpenter*, 463 F.3d 1125, 1136 (10th Cir. 2006), and should be

considered in light of BLM’s “multiple use and sustained yield” directive, 43 U.S.C. § 1732(a). Here, the inquiry is whether the agency has taken sufficient measures to prevent degradation unnecessary to, or undue in proportion to, the development the proposed action permits, see *Theodore Roosevelt Conservation Partnership v. Salazar*, 661 F.3d 66, 76 (D.C. Cir. 2011), and it is clear that BLM has not done so in this Final EIS. BLM does not define UUD in the RMP; instead, BLM directs the reader to the relevant regulations. See EIS at M-52. But the regulations do not define the terms in the RMP context, nor do they provide any clarity on what measures BLM will take to prevent UUD in the ND RMP. And although the UUD requirements are distinct from NEPA requirements, as BLM recognizes, see EIS at M-52, BLM must still include in its NEPA analysis an assessment both of what UUD entails in the RMP context and how it will avoid UUD. BLM also does not address how recently promulgated federal rules addressing BLM’s substantive duty to prevent UUD will be implemented, nor how they will prevent UUD. Such an approach is woefully insufficient under FLPMA’s mitigation hierarchy, which directs BLM to avoid, minimize, and mitigate harms associated with oil and gas development. Accordingly, BLM’s failure to detail how it will prevent UUD violates BLM’s substantive obligations under FLPMA.

Summary:

Protestors stated that the BLM violated FLPMA’s mandate to “avoid unnecessary or undue degradation” by continuing to allow fossil fuel development in the planning area and by failing to directly address both what UUD entails in the RMP context and how the North Dakota PRMP/FEIS will avoid UUD.

Response:

Section 302(b) of FLPMA requires that “in managing the public lands the Secretary [of the Interior] shall, by regulation or otherwise, take any action necessary to prevent unnecessary or undue degradation of the lands.”

In developing the North Dakota PRMP/FEIS, the BLM fully complied with its planning regulations (43 CFR 1610), the requirements of NEPA, and other statutes, regulations, and EOs related to environmental quality. In addition, the North Dakota PRMP/FEIS identified appropriate allowable uses, management actions, and other mitigation measures that prevent the UUD of public lands (North Dakota PRMP/FEIS Appendix D, *Design Features and Best Management Practices*, pp. D-1–D-32). RMPs do not authorize any use of the public lands, much less any that would result in UUD. Authorization for the use of public lands would occur during implementation of the North Dakota PRMP/FEIS and would be subject to future, site-specific decision-making and compliance with NEPA.

Congress recognized that, through the BLM’s multiple-use mandate, there would be conflicting uses and impacts on the public land. In the North Dakota PRMP/FEIS, the BLM developed a range of alternatives in order to consider the balance of multiple uses in its management of public lands and the BLM will take actions as required to prevent UUD of the lands in the implementation of actions within the North Dakota PRMP/FEIS. During the planning process, the BLM analyzed environmental impacts of the proposed alternatives, and will apply monitoring and mitigation measures if determined necessary.

The BLM did address issues pertaining to avoiding UUD in the North Dakota PRMP/FEIS including how it will address recent Federal rules (North Dakota PRMP/FEIS Appendix M, p. M-51). In short, the BLM included stipulations and design features for the protection of air resources, including stipulations and design features aimed at reducing methane emissions as a result of oil and gas leasing (North Dakota PRMP/FEIS Appendix B, *Stipulations and Allocations Applicable to Fluid Minerals Leasing*). As mentioned in Appendix B, the BLM uses the Notice to Lessees (North Dakota

PRMP/FEIS Appendix B, LN-14-18, p. B-55) and LN-New Waste Prevention (North Dakota PRMP/FEIS Appendix B, p. B-60) to all Federal surface parcels as mitigation of wasteful flaring practices. During oil and natural gas development activities such as drilling, production, gathering, and processing operations, flaring and venting may occur from a variety of causes such as a lack of gas-delivery infrastructure, process upsets, or other emergency-related safety concerns. To further reduce flaring and venting of natural gas from oil and gas production facilities, various State and Federal laws, regulations, policies, and guidance have been implemented. For example, EPA has issued and amended various regulations, such as the New Source Performance Standard for Crude Oil and Natural Gas Facilities (49 CFR 60, Subpart OOOO and Subpart OOOOa), which impose emission limits, equipment design standards, and monitoring and reporting requirements for oil and gas facilities. Similarly, NDDEQ’s Division of Air Quality established air pollution control and submerged fill and flare requirements. In addition to current rules and regulations, the BLM (i.e., Waste Prevention Rule) and EPA have also published proposed rules in 2022 to supplement current regulations to further reduce emissions (including from venting, flaring, and leaks) associated with oil and gas production on Federal and/or Indian leases. The BLM recently updated its waste prevention rules (see *Federal Register* publication, April 10, 2024: <https://www.federalregister.gov/documents/2024/04/10/2024-06827/waste-prevention-production-subject-to-royalties-and-resource-conservation>) and will require a waste minimization plan for all oil well applications for permits to drill (APD). Therefore, concurrent with planned increases in processing and pipeline capacities in North Dakota, updated laws and regulations, and improved reduction alternatives, flaring and venting are expected to decrease further over time, illustrating how the North Dakota PRMP/FEIS complies with FLPMA’s direction.

Because the North Dakota PRMP/FEIS would not authorize any uses of the public lands, and the alternatives evaluated in the FEIS comply with all applicable statutes, regulations, and policy, the PRMP will not result in “unnecessary or undue degradation of the lands” under Section 302(b) of FLPMA. Accordingly, this protest issue is denied.

FLPMA – Withdrawals

State of North Dakota

Nathan Svihovec, Doug Burgum, Paul Seby

Issue Excerpt Text: Key to the State’s challenge and the District Court’s holding was a discussion “of whether the Federal Defendants were derelict in their mandatory statutory duties to evaluate federal lands nominated for oil and gas leasing in North Dakota and correspondingly hold lease sales in 2021 and 2022.” *Id.* at 2. The Court found BLM had violated its statutory duty to hold quarterly lease sale, enjoined and restrained BLM from implementing the “unlawful policy to disregard their statutory duty to appropriately plan for and complete their determination of whether nominated land was ‘available’ and ‘eligible’ on a timely, quarterly basis”, and ordered BLM to (1) Analyze individual parcels nominated for lease sales in the State according to their statutory requirements; (2) Make lawful determinations regarding the nominated parcels’ availability and eligibility; (3) Complete those determinations in time for quarterly lease sales, as set forth in statute and regulations; and (4) When there are “available” and “eligible” lands, hold a lease sale in that quarter. *Id.* at 147. As the District Court observed, the “MLA does not permit the Federal Defendants to ‘skip’ a quarterly lease sale due to an agency’s self-inflicted ‘truncated’ review period, a nationwide [National Environmental Policy Act (“NEPA”)] analysis backlog, focused effort on a nationwide survey of emissions, or speculation that a parcel (let alone all parcels) fails to meet NEPA’s requirements.” *Id.* at 83. Further, the District Court ordered that BLM was “ENJOINED and RESTRAINED from de facto withdrawing lands in North Dakota identified for oil and gas development in their respective RMPs without following the statutory procedures for

public notice and comment as well as congressional notice, where appropriate. See 43 U.S.C. §§ 1714, 1732. See also 5 U.S.C. §§ 705, 706(1).” Id. Under the Court’s Order, BLM is required to evaluate long-pending nominated lands for inclusion in future quarterly lease sale. BLM cannot now by dint of the Proposed RMP surreptitiously withdraw these long- pending nominated lands which are subject to a preliminary injunction and for which BLM must make eligibility and availability determinations. Doing so would circumvent the Court’s order and findings that BLM has long delayed in its statutory duty to evaluate and include these nominated lands in quarterly lease sales. BLM must provide an accounting of how its Proposed RMP will affect all 811 parcels in the State upon which expressions of interest have been submitted that are listed on their National Fluids Lease Sale System. No nominated parcel GIS layer was included in the Proposed RMP, and the effects on these nominated parcels is unknown absent BLM providing that data.

State of North Dakota

Nathan Svihovec, Doug Burgum, Paul Seby

Issue Excerpt Text: The Proposed RMP recommends several large tracts of lands to be withdrawn from locatable mineral entry. See, for example, Proposed RMP at 3-141 (Table 3-88 recommending approximately 1,900 acres be withdrawn) and 3-201 (“Under Alternative D, 960 acres would be recommended for withdrawal to protect the Mud Buttes ACEC.”). However, the Secretary’s FLPMA authority to withdraw federal land is limited by Congress. 43 U.S.C. §1714(c)(1). Congress retained a legislative veto over any such FLPMA large-tract withdrawal. Id. The U.S. Supreme Court determined that legislative vetoes are unconstitutional. *INS v. Chada*, 462 U.S. 919 (1983). Since FLPMA’s legislative veto provision is integral to the Secretary’s limited large-tract withdrawal authority, the provision’s unconstitutionality under *Chada*, makes the entire large tract withdrawal provision invalid. The large tract withdrawals contemplated under the Proposed RMP are left to Congress, not BLM. Accordingly, the Secretary lacks the authority to propose or make the recommended withdrawals in the Proposed RMP. The Proposed RMP recommends closing the BLM “Low Potential” area to fluid mineral leasing. This area contains parcels upon which 148 Notices of Interest have been filed between 2007 and 2018. Closing this area to leasing without processing those parcels and offering them at auction constitutes an unlawful withdrawal of thousands of acres of valid rights through this land use plan update process.

Summary:

Protestors claimed that the BLM violated FLPMA’s withdrawal mandate and its court order (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)) to follow statutory procedures in regard to public notice, comment, and congressional notice for withdrawal from Federal leasing sales by withdrawing several large tracts of lands from locatable mineral entry, which is not within the BLM’s regulatory purview.

Response:

43 U.S.C. 1714(c) is related to withdrawals of lands greater than 5,000 acres. The closure or restriction of public lands to mineral leasing through the land use planning process pursuant to Section 202 of FLPMA does not constitute a withdrawal under FLPMA. Withdrawals are pursued in a decision-making process outside of the planning process by the Department of the Interior’s Office of the Secretary pursuant to the procedures and requirements in Section 204 of FLPMA; they are specifically defined by Section 103(j) of FLPMA as follows: “the term ‘withdrawal’ means withholding an area of Federal land from settlement, sale, location, or entry, under some or all of the general land laws, for the purpose of limiting activities under those laws in order to maintain other

public values in the area or reserving the area for a particular public purpose or program; or transferring jurisdiction over an area of Federal land . . . from one department, bureau or agency to another department, bureau or agency” (43 U.S.C. 1702(j)).

The terms “settlement,” “sale,” “location,” and “entry” are all terms contemplating transfer of title to the lands in question, particularly the patenting, or potential patenting, of lands out of Federal ownership into the hands of private parties based on the provisions of the General Mining Law of 1872, as amended, the various Homestead Acts, and other general land law. It is inapplicable to oil and gas leasing occurring under the MLA. A Federal mineral lease sale is not a “sale” of public land under Section 203 of FLPMA, and a closure to leasing is not a “withdrawal” as described in Section 204 of FLPMA.

The BLM is not required to complete the procedures associated with a withdrawal when it proposes to close or restrict public lands in the planning area to mineral leasing in the North Dakota PRMP/FEIS. These proposed land use decisions pursuant to Section 202 of FLPMA to close or restrict mineral leasing in certain areas are not withdrawals. While Alternatives B and D in the PRMP/FEIS may recommend certain areas for withdrawal, this is only a recommendation and there is no requirement that the Secretary of the Interior undertake a decision-making process to withdraw these areas. Withdrawal actions are a separate decision-making process by the Office of the Secretary pursuant to Section 204 of FLPMA and applicable regulations. Per FLPMA, the Secretary of the Interior may make withdrawals, administratively, aggregating 5,000 acres or more for purposes other than military use, for a period of not more than 20 years. Per the ruling in *National Mining Association v. Zinke*, the legislative veto provision is not integral to the authority of the Secretary of the Interior to make withdrawals.

The BLM is not required to complete the procedures associated with a withdrawal when it proposes to close or restrict public lands in the planning area to mineral leasing in the North Dakota PRMP/FEIS. The PRMP/FEIS does not withdraw public lands from mineral development. Accordingly, this protest issue is denied.

NEPA – Best Available Information

North American Coal, LLC Christopher Friez

Issue Excerpt Text: In addition to the several issues presented above with the Air and Climate Coal Screen, to the extent that BLM relied on the Social Cost of Greenhouse Gases (“SC-GHG”) metrics for that decision, conclusions made in reliance on that metric are factually unsound and present a skewed picture of the benefits and drawbacks of federal coal leasing and development. NACoal thus protests any reliance by the BLM on the SC-GHG metric as support for its Proposed Alternative D and the Proposed RMP/EIS.

Summary:

Protestors stated that the BLM violates NEPA by relying on the SC-GHG metric in its analysis, which is contrary to the best available science. Protesters claimed that the SC-GHG metric is factually unsound and presents a skewed picture of the benefits and drawbacks of Federal coal leasing and development.

Response:

NEPA requires the BLM to “ensure the professional integrity, including scientific integrity, of the discussions and analyses in an environmental document” (42 U.S.C. 4332(d)). CEQ’s regulations implementing NEPA further require that agencies use information that is of “high quality information” (40 CFR 1500.1(b)). The BLM NEPA Handbook also directs the BLM to “use the best available science to support NEPA analyses and give greater consideration to peer-reviewed science and methodology over that which is not peer-reviewed” (BLM Handbook H-1790-1, p. 55). Under the BLM’s guidelines for implementing the Information Quality Act, the BLM applies the principle of using the “best available” data in making its decisions (BLM Information Quality Act Guidelines, February 9, 2012).

The SC-GHG calculation is an estimate of monetized damages associated with incremental increases in GHG emissions in a given year. On January 20, 2021, President Joseph R. Biden issued EO 13990, Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis, which establishes an administration policy to, among other things, listen to the science; improve public health and protect our environment; ensure access to clean air and water; reduce GHG emissions; and bolster resilience to the impacts of climate change. Section 5 of EO 13990 emphasizes how important it is for Federal agencies to “capture the full costs of greenhouse gas emissions as accurately as possible, including by taking global damages into account” and established an interagency working group on the SC-GHG, and in 2021 the interagency working group published Technical Support Document: Social Cost of Carbon, Methane, and Nitrous Oxide: Interim Estimates under EO 13990 (North Dakota PRMP/FEIS p. 3-22).

The BLM’s inclusion of SC-GHG is consistent with current policy, including Secretarial Order 3399, which states that “estimates of SC-GHG can be a useful measure to assess the climate impacts of GHG emission changes for Federal proposed actions, in addition to rulemakings.” Use of SC-GHG is also consistent with CEQ guidance issued in January 2023, which recommends reporting SC-GHG when GHG emissions are quantified (North Dakota PRMP/FEIS Appendix M, p. M-147). The 2023 CEQ GHG guidance recommends “that agencies provide additional context for GHG emissions, including through the use of the best available SC-GHG estimates, to translate climate impacts into the more accessible metric of dollars, to allow decision makers and the public to make comparisons, help evaluate the significance of an action’s climate change effects, and better understand the tradeoffs associated with an action and its alternatives.” The BLM exercised its discretion to evaluate the SC-GHG emissions issue being analyzed in the North Dakota PRMP/FEIS and followed CEQ’s guidance to provide additional context for GHG emissions.

Additionally, the BLM does not solely rely on the SC-GHG metric in the decision-making process related to the North Dakota PRMP/FEIS. It is one, among many, scientifically backed tools used to evaluate the potential impacts of each alternative in the North Dakota PRMP/FEIS.

The SC-GHG model is consistent with the best available data and methodologies outlined by CEQ and is consistent with the policies of the BLM. As such, the BLM utilized high-quality information and the best available data in preparation of the North Dakota PRMP/FEIS. Accordingly, this protest issue is denied.

NEPA – Impacts Analysis: Energy***National Mining Association******Katie Sweeney***

Issue Excerpt Text: BLM’s failure to analyze the reliability impacts of the North Dakota RMP and EIS violates the requirement of the National Environmental Policy Act (NEPA) to evaluate both

direct and indirect foreseeable impacts. Uncertainty inherent in predicting the future - as BLM maintains in arguing that it does not have the tools to analyze reliability impacts - cannot serve as an excuse for agencies to completely avoid this obligation. While courts have agreed that the indirect impact analysis is bounded by what is reasonably foreseeable,⁸ they have similarly cautioned against agencies attempting to “travel the easy path and hastily label the impact of the [action] as too speculative and not worthy of agency review.”⁹ While agencies are [Not required ... to do the impractical, if not enough information is available to permit meaningful consideration, because the basic thrust of an agency’s responsibilities under NEPA is to predict the environmental effects of proposed action before the action is taken and those effects fully known ... [r]easonable forecasting and speculation is ... implicit in NEPA.¹⁰ As a recent Montana District court decision cautioned BLM in mandating preparation of a SEIS, “an EIS that does not adequately consider the indirect effects of a proposed action violates NEPA.”¹¹ BLM’s analysis here is particularly egregious given the comments on the draft RMP and EIS regarding the need for domestic coal production for efficient and reliable baseload power to support the economic and social needs, domestic security, and quality of life in the United States.

National Mining Association

Katie Sweeney

Issue Excerpt Text: Similarly, BLM’s refusal to evaluate the impacts to reliability and affordable electricity is arbitrary and capricious under the Administrative Procedure Act (APA). One consideration in determining the lawfulness of agency actions, is whether an agency “failed to consider an important aspect of the problem.”³² In attempting to focus its impacts analysis solely on impacts within the NDFO planning area, BLM is failing to consider an important aspect of the problem and is also arbitrarily limiting its analysis. As discussed above, the impacts of BLM’s adoption of the preferred alternative on reliable and affordable electricity is an important aspect the agency was required to analyze.

Summary:

Protestors claimed that the BLM violated NEPA and the APA by failing to consider the direct, indirect, and cumulative impacts on Federal coal production and energy including reliable and affordable electricity.

Response:

Pursuant to CEQ’s NEPA regulations, the BLM is required to consider the environmental impacts of a proposed action and any reasonable alternative when preparing an EIS, which includes the cumulative effects (40 CFR 1502.16(a)(1) and BLM Handbook H-1790-1, Section 6.8.3). The CEQ regulations define cumulative effects as “the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such actions” (40 CFR 1508.1(g)(3)7(2022)).

The APA (5 U.S.C. 551–559) establishes how Federal administrative agencies like the BLM make rules and how they adjudicate administrative litigation, including granting agencies the ability to make rulemaking decisions formally or informally, as well as going beyond the resolution of specific controversies to include administrative functions.

The BLM has fully analyzed the environmental effects associated with the proposed action and the alternatives for the North Dakota PRMP/FEIS, including the cumulative impacts consistent with the requirements of 40 CFR 1502.16, 1508.1(g). The cumulative impact analysis in the North Dakota PRMP/FEIS is based on the broad nature and scope of the proposed management options under

consideration at the land use planning level. The cumulative impact analysis considered the effects of the planning effort when added to other past, present, and reasonably foreseeable (not highly speculative) Federal and non-Federal actions. The cumulative impacts subsection in Section 3.5.1, *Social and Economic Conditions* (North Dakota PRMP/FEIS pp. 3-264–3-265), identifies all actions that were considered in the cumulative impacts analysis and provides a discussion on the cumulative socioeconomic impacts resulting from the proposed action and alternatives.

Additionally, Section 3.3.2, *Energy and Minerals Issues*, and Section 3.5.1, *Social and Economic Conditions*, in the North Dakota PRMP/FEIS acknowledge that the management of Federal coal does not control or have strong influence over the coal market in the planning area, as coal ownership is a mixture of Federal, State, and private interests. Federal coal is a small percentage of total coal mined in North Dakota; for example, in 2019, Federal coal leases only accounted for approximately 11 percent of North Dakota’s coal production. Because most coal production in North Dakota occurs outside of the BLM’s jurisdiction, the impacts from the decisions in the North Dakota PRMP/FEIS would have limited influence on the coal industry (North Dakota PRMP/FEIS, p. 3-246).

Furthermore, electricity generated from coal has been declining since the late 2000s as natural gas and renewable energy costs have decreased. Free-market economics drive the demand for coal. Federal policies and coal management are a factor, but they are not a driver of North Dakota’s predicted coal future demands, and these impacts are outside the scope of this land use planning process, which is why they are not discussed in detail throughout the North Dakota PRMP/FEIS.

Finally, under Alternative D (the Proposed Plan), there is enough Federal coal contained within the 4-mile development area around the existing mine permit boundaries to provide sufficient leasable Federal coal to extend the life of each mine beyond the life span of the PRMP. “The 4-mile development boundary in Alternatives B [and D] is based on existing approved federal mining plans, proximity to existing mine infrastructure, long range mining plans as provided in lease application documents, future areas of interest provided by the mines, and through consideration of a reasonably foreseeable development scenario” (North Dakota PRMP/FEIS, p. M-164). Based on this information, the BLM concluded that leasing of Federal coal is not expected to be constrained under Alternative D, as the North Dakota PRMP/FEIS’s analysis anticipates 4,960 acres to be nominated during the planning period and those acres would be allocated as available under this alternative (North Dakota PRMP/FEIS p. 3-214). As such, Alternative D under the North Dakota PRMP/FEIS would have limited influence on reliable and affordable electricity within the planning area because Federal coal production would not be constrained.

The BLM adequately analyzed the potential direct, indirect, and cumulative impacts on Federal coal production and energy; the impacts on reliable and affordable electricity in the North Dakota PRMP/FEIS are outside the scope of the RMP. Accordingly, this protest issue is denied.

NEPA – Impacts Analysis: Fluid Minerals

***Western Environmental Law Center
Morgan O’Grady***

Issue Excerpt Text: BLM fails to even acknowledge North Dakota’s longstanding flaring problem, must less consider an alternative to address this waste. As discussed above, commenters asked BLM to consider a stipulation limiting flaring to situations where it is infeasible or unsafe to capture the gas and not allowing flaring where there is simply inadequate pipeline capacity or timing issues. BLM has not provided an adequate response to these comments. For example, BLM points to NTL-4A, North Dakota regulations, EPA rules, and new BLM rules. BLM also claims that planned increases in process and pipeline capacities are expected in the future. Notably, none of this information is contained or discussed in the EIS. Nor is there any explanation of how BLM expects

these regulations to reduce flaring. As noted in comments, under North Dakota’s regulations, the state still has the highest flaring rates of publicly owned minerals of any state. And BLM’s cost-benefit analysis for its new water prevention rule does not assume any decrease in flaring as a result of the rule. Given North Dakota’s longstanding flaring problems, BLM must consider the direct, indirect, and cumulative impacts of flaring in the EIS itself and must consider an alternative that mitigates flaring.

Summary:

Protestors stated that the BLM violated NEPA by failing to consider the direct, indirect, and cumulative impacts of flaring in the EIS and by failing to consider any alternative that mitigates or reduces flaring.

Response:

NEPA directs that data and analyses in an EIS must be commensurate with the importance of the impact (40 CFR 1502.15), and that NEPA documents must concentrate on the issues that are truly significant to the action in question, rather than amassing needless detail (40 CFR 1500.1(b), 1502.1). The BLM is required to take a “hard look” at potential environmental impacts of adopting the North Dakota PRMP/FEIS. The level of detail of the NEPA analysis must be sufficient to support reasoned conclusions by comparing the amount and the degree of change (impact) caused by the proposed action and alternatives (BLM Handbook H-1790-1, Section 6.8.1.2). The BLM need not speculate about all conceivable impacts, but it must evaluate the reasonably foreseeable significant effects of the proposed action.

A land use planning-level decision is broad in scope. For this reason, analysis of land use plan alternatives is typically broad and qualitative rather than quantitative or focused on site-specific actions. The baseline data provide the necessary basis to make informed land use plan-level management decisions. As the decisions under consideration by the BLM are programmatic in nature and would not result in on-the-ground implementation-level decisions, the scope of the analysis was conducted at a regional, programmatic level. This analysis identifies impacts that may result in some level of change to the resources, regardless of whether that change is beneficial or adverse.

The BLM’s authority is limited to the management of BLM-administered lands and minerals in the planning area, and site-specific flaring practices are not addressed in this land use planning process. However, in the North Dakota PRMP/FEIS, the BLM does emphasize the importance of reducing flaring on lands under its jurisdiction by incorporating management directions that “prioritize processing of [right-of-way] applications for infrastructure (for example, pipelines) that maximize the recovery and delivery of natural gas from well sites to meet the objectives of reducing lost produc[t] and minimizing air pollutant emissions from venting and flaring” under Alternatives B, C, and D (proposed RMP alternative) (North Dakota PRMP/FEIS Table 2-2, row 19, p. 2-16). Additionally, the North Dakota PRMP/FEIS includes CSU stipulations for fluid mineral leasing that would apply to future decision-making that require “an approved waste minimization plan that includes design features to minimize air pollutants released from venting, flaring, and leaks during drilling, completion, and production operations” (North Dakota PRMP/FEIS, p. 3-9). Specific standards and requirements for minimization for site-specific development during future decision-making in conformance with the approved RMP are discussed in Appendix B, *Stipulations and Allocations Applicable to Fluid Minerals Leasing*.

The BLM developed a reasonable range of alternatives that meet the purpose and need of the North Dakota PRMP/FEIS. The North Dakota PRMP/FEIS analyzed four alternatives, which are described in Chapter 2 (pp. 2-1–2-83). The alternatives analyzed in the North Dakota PRMP/FEIS cover the full spectrum of approaches to management related to air quality and flaring. As provided in Appendix B,

Stipulations and Allocations Applicable to Fluid Minerals Leasing, BLM Lease Notice 14-18, lessees and operators are advised that additional air quality analyses may be required prior to project-specific approval to ensure compliance with NEPA, FLPMA, and other applicable laws and regulations (p. B-55). These analyses may lead to implementation of further project-specific control measures to protect air resources. Additionally, the BLM currently enforces NTL-4A and applies this lease notice to all parcels to mitigate wasteful flaring practices.

An analysis of the potential direct, indirect, and cumulative impacts of flaring under each alternative was included in the North Dakota PRMP/FEIS through analysis of air quality monitoring data as well as air quality modeling described in Section 3.2.1, *Air Quality*. While impacts from flaring are not individually discussed within these analyses, emissions data from practices such as flaring and venting were included in all air quality models and analyses for sites within the planning area. The North Dakota PRMP/FEIS finds that “cumulative air concentration from all sources analyzed would not exceed national or state air quality standards except for isolated exceedances of particulate matter and carbon monoxide (CO) concentrations that are not caused by actions authorized under the RMP” (North Dakota PRMP/FEIS, p. 3-9).

The BLM complied with NEPA’s requirement to analyze the direct, indirect, and cumulative impacts of flaring in the North Dakota PRMP/FEIS. Additionally, the BLM adequately incorporates mitigation and minimization measures to reduce flaring through a range of alternatives and applicable fluid mineral leasing stipulations. Accordingly, this protest issue is denied.

NEPA – Impacts Analysis: Human Health and Safety

Western Environmental Law Center Morgan O’Grady

Issue Excerpt Text: As detailed in comments on the Draft EIS, BLM failed to adequately consider evidence showing that flaring poses a public health risk to communities. BLM does not remedy these deficiencies in the final EIS.

Summary:

Protestors claimed that the BLM violated NEPA by failing to consider evidence indicating that flaring poses a public health risk to surrounding communities.

Response:

NEPA directs that data and analyses in an EIS must be commensurate with the importance of the impact (40 CFR 1502.15), and that NEPA documents must concentrate on the issues that are truly significant to the action in question, rather than amassing needless detail (40 CFR 1500.1(b), 1502.1). The BLM is required to take a “hard look” at potential environmental impacts of adopting the North Dakota PRMP/FEIS. The level of detail of the NEPA analysis must be sufficient to support reasoned conclusions by comparing the amount and the degree of change (impact) caused by the proposed action and alternatives (BLM Handbook H-1790-1, Section 6.8.1.2). The BLM need not speculate about all conceivable impacts, but it must evaluate the reasonably foreseeable significant effects of the proposed action.

A land use planning-level decision is broad in scope. For this reason, analysis of land use plan management alternatives is typically broad and qualitative rather than quantitative or focused on site-specific actions. The baseline data provide the necessary basis to make informed land use plan-level decisions. As the decisions under consideration by the BLM are programmatic in nature and would

not result in on-the-ground implementation-level decisions, the scope of the analysis was conducted at a regional, programmatic level. This analysis identifies impacts that may result in some level of change to the resources, regardless of whether that change is beneficial or adverse.

Impacts of flaring were included in the North Dakota PRMP/FEIS through analysis of air quality monitoring data as well as air quality modeling described in Section 3.2.1, *Air Quality*, which also discusses how increased emissions can adversely affect human health, including those from increased concentration of ozone, hazardous air pollutants (HAP), and cumulative impacts from climate change. However, the air quality analysis concludes that potential effects would fall below any threshold for risk to public health based on public health–related air quality standards. The North Dakota PRMP/FEIS finds that “cumulative air concentration from all sources analyzed would not exceed national or state air quality standards except for isolated exceedances of particulate matter and carbon monoxide (CO) concentrations that are not caused by actions authorized under the RMP” (North Dakota PRMP/FEIS, p. 3-9). This cumulative effects analysis includes emissions from flaring appropriate for the land use planning level.

The BLM also examined the results of a cumulative regional HAPs modeling study of Federal and non-Federal oil and gas development (including flaring and other sources) in North Dakota and other western states with relatively large oil and gas production (North Dakota PRMP/FEIS Table 3-6, p. 3-18). As indicated in the North Dakota PRMP/FEIS (p. 3-286), under all alternatives, risks to public health and safety would increase from current levels due to the increased oil and gas development projected to occur in the planning area. The estimated concentrations from the cumulative sources were compared to health-based thresholds and found to have a low likelihood of noncancerous health issues resulting from exposure to single or cumulative HAPs, and the estimated incremental cancer risks were well below a one in one million risk for carcinogenic HAPs (North Dakota PRMP/FEIS, pp. 3-17 and 3-286).

The BLM complied with NEPA’s requirement to analyze the potential risk of human health impacts from flaring in the North Dakota PRMP/FEIS. Accordingly, this protest issue is denied.

NEPA – Impacts Analysis: Socioeconomics

Lignite Energy Council

Jason Bohrer

Issue Excerpt Text: The LEC originally expressed concerns that the Draft RMP/EIS lacked adequate consideration of the significant economic contributions the lignite energy industry contributes to North Dakota’s economy. The Proposed RMP/EIS now acknowledges “North Dakota contains the single largest deposit of lignite known in the world. The industry contributes substantially to North Dakota’s economy, resulting in \$5.75 billion in gross business volume, 12,000 jobs (direct and secondary), and \$104 million in local and state government revenues (NDSU 2023).” Proposed RMP/EIS at 3-245. While LEC applauds the BLM’s recognition of the vital contributions coal brings to North Dakota’s economy, the RMP simply restates facts cited by the LEC and undertakes no analysis or assessment as to how the RMP/EIS will impact these contributions. In fact, the RMP goes on to conclude “[s]ince most coal production in North Dakota occurs outside federal control, the impacts from the decisions in the RMP would have limited influence on the coal industry.” Proposed RMP/EIS at 3-246. The BLM acknowledges most coal production in North Dakota occurs outside of federal control, and if the agency further believes the RMP will have “limited influence” --- it begs the question as to why then are the RMP’s restrictions being proposed? The answer is simple. The Proposed RMP/EIS seeks to impose roadblocks on North Dakota coal development generally under the guise of federal resource management. The BLM’s conclusion that the RMP will have “limited influence on the coal industry” is contrary to the extensive commentary provided by industry in

response to the Draft RMP/EIS. This conclusion evidences the BLM has not adequately considered the comments the coal industry has provided that expressly detail the impacts and potential harm the RMP/EIS will impose on the economic contributions of coal, and to the industry as a whole. See Proposed RMP/EIS, Appendix M, detailing extensive commentary from the coal industry. Failure to meaningfully consider the RMP's harm renders the conclusions of the Proposed RMP/EIS clearly arbitrary.

***Western Environmental Law Center
Morgan O'Grady***

Issue Excerpt Text: BLM Failed to Analyze Socioeconomic Impacts As detailed in comments, BLM failed to consider the socioeconomic impacts of flaring in the EIS, including the economic losses as a result of lost and flared gas or the increased revenues that would result from a stipulation limiting flaring. Nor does the EIS address the community impacts of the scale of industrial development in the Bakken region. BLM's response to comments fails to address these deficiencies.

Summary:

Protestors stated that the BLM failed to meaningfully consider comments from the coal industry on the restrictions presented in the North Dakota PRMP/FEIS, inaccurately concluding that the socioeconomic impacts of the PRMP will have a "limited influence on the coal industry." Additionally, protestors claimed that the BLM violated NEPA by failing to discuss the socioeconomic impacts resulting from flaring activities.

Response:

NEPA directs that data and analyses in an EIS must be commensurate with the importance of the impact (40 CFR 1502.15), and that NEPA documents must concentrate on the issues that are truly significant to the action in question, rather than amassing needless detail (40 CFR 1500.1(b), 1502.1). The BLM is required to take a "hard look" at potential environmental impacts of adopting the North Dakota PRMP/FEIS.

The level of detail of the NEPA analysis must be sufficient to support reasoned conclusions by comparing the amount and the degree of change (impact) caused by the proposed action and alternatives (BLM Handbook H-1790-1, Section 6.8.1.2). The BLM need not speculate about all conceivable impacts, but it must evaluate the reasonably foreseeable significant effects of the proposed action.

Section 102302(a)(7) of FLPMA directs the BLM to manage public lands on the basis of multiple use and sustained yield, unless otherwise provided by law (43 U.S.C. 1732(a)). FLPMA's multiple-use policy does not require that all uses be allowed on all areas of the public lands. Rather, the BLM has wide latitude to allocate the public lands to particular uses and to employ the mechanism of land use allocation to protect for certain resource values, or, conversely, develop some resource values to the detriment of others, short of UUD. Through the land use planning process, the BLM evaluates and chooses an appropriate balance of resource uses, which involves tradeoffs between competing uses. The BLM notes that "while FLPMA establishes guidelines for the management, protection, development, and enhancement of the public lands, it does not prioritize between uses and does not mandate that every use be available on every acre. Adverse impacts, such as economic loss to some, will occur in certain situations for the overall health of the public lands and resources" (North Dakota PRMP/FEIS, p. M-140).

Section 3.5.1, *Social and Economic Conditions*, discusses how the management actions proposed under the North Dakota PRMP/FEIS, including a management action to reducing flaring under

Alternatives B, C, and D (North Dakota PRMP/FEIS Table 2-2, row 19, p. 2-16), would affect the socioeconomic conditions within 26 surrounding counties, which make up the socioeconomic analysis area. While energy and mineral development represent a key economic sector in the analysis area, particularly in the Bakken region, the North Dakota PRMP/FEIS acknowledges that most mineral production in North Dakota occurs outside of BLM control, limiting the socioeconomic impact of the management actions under the PRMP. Specifically, in 2019, Federal coal leases only accounted for approximately 11 percent of North Dakota’s coal production. Because most coal production in North Dakota occurs outside BLM control, the impacts from the decisions in the North Dakota PRMP/FEIS would have limited influence on the coal industry (North Dakota PRMP/FEIS, p. 3-246). While the North Dakota PRMP/FEIS does acknowledge that changes to mineral production and associated employment could affect local population change including changes to housing, infrastructure, and government services, market conditions outside the scope of this planning effort are more likely to result in such impacts. In addition, with continuing coal production, impacts on employment, labor income, and value added from coal production are anticipated to be the same as those under Alternative A (current management) (North Dakota PRMP/FEIS, p. 2-263). Anticipated socioeconomic impacts projected under each alternative are further discussed in Section 3.5.1 (North Dakota PRMP/FEIS pp. 3-252–3-265). Additionally, under Alternatives A, B, C, and D in the PRMP/FEIS, there is enough Federal coal contained within the 4-mile development area around the existing mine permit boundaries to provide sufficient leasable Federal coal to extend the life of each mine beyond the lifespan of the PRMP, further indicating that the North Dakota PRMP/FEIS would have limited influence on the coal industry (North Dakota PRMP/FEIS, p. M-143).

Regarding flaring, it is important to note that the BLM’s purview surrounding North Dakota’s long-standing flaring problem is limited to the management of BLM-administered lands and minerals in the planning area, and site-specific flaring practices cannot be regulated through this planning process. However, the BLM does emphasize the importance of reducing flaring on lands under its jurisdiction by incorporating management directions that “prioritize processing of [right-of-way] applications for infrastructure (for example, pipelines) that maximize the recovery and delivery of natural gas from well sites to meet the objectives of reducing lost produc[t] and minimizing air pollutant emissions from venting and flaring” under Alternatives B, C, and D (North Dakota PRMP/FEIS Table 2-2, row 19, p. 2-16). Additionally, the North Dakota PRMP/FEIS includes CSU stipulations for fluid mineral leasing that require “an approved waste minimization plan that includes design features to minimize air pollutants released from venting, flaring, and leaks during drilling, completion, and production operations” (North Dakota PRMP/FEIS, p. 3-9). Specific standards and requirements for minimization for site-specific development are discussed in Appendix B, *Stipulations and Allocations Applicable to Fluid Minerals Leasing*.

The BLM is required to assess, consider, and respond to all substantive comments received (40 CFR 1503.4). Substantive comments are those that reveal new information, missing information, or flawed analysis that would substantially change conclusions (BLM Handbook H-1601-1, pp. 23–24). In compliance with NEPA, the BLM considered all public comments submitted on the North Dakota Draft RMP/EIS. The BLM complied with 40 CFR 1503.4 by performing a detailed comment analysis that assessed and considered all substantive comments received. Appendix M of the North Dakota PRMP/FEIS presents the BLM’s responses to all substantive comments. Within Appendix M, the BLM summarized the issues raised by each comment letter and provided a meaningful response. The BLM’s responses identify any modifications to the alternatives, improvements to the impacts analysis, or factual corrections made as a result of public comment. The BLM’s responses also explain why certain public comments did not warrant further agency response. It is important for the public to understand that the BLM’s comment response process does not treat public comments as if they were a vote for a particular action. The comment response process ensures that every comment is considered at some point when preparing the North Dakota PRMP/FEIS.

The BLM complied with NEPA’s requirement to analyze the potential impacts on social and economic conditions in the North Dakota PRMP/FEIS and the BLM adequately responded to public comments on the Draft RMP/EIS. Accordingly, this protest issue is denied.

NEPA – Impacts Analysis: Air Quality/Climate

Western Environmental Law Center Morgan O’Grady

Issue Excerpt Text: BLM also argues that “there would not be a measurable reduction in impacts” under the no-new leasing alternative. EIS at 2-8. This reasoning is arbitrary, as it is well-settled that when it comes to climate, every ton of fossil carbon dioxide equivalent emissions matter. It is almost certainly untrue that a no-leasing alternative would be functionally equivalent to the analyzed alternatives in terms of emissions. Although BLM failed to project the emissions under a no-leasing scenario, they would certainly be both measurable and less than under the proposed alternative, which authorizes leasing. See *San Juan Citizens All. v. Bureau of Land Mgmt.*, 326 F. Supp. 3d. at 1248- 49 (rejecting as invalid BLM’s argument that even a de minimis quantity of emissions is equivalent to the no action alternative). BLM failed to specify the ways in which the alternatives were similar (e.g. emissions, surface-impacts, or otherwise), let alone quantify their differences. BLM did not justify its assertion that a no-new-leasing alternative would be functionally equivalent to Alternative F, in terms of emissions or otherwise.

North American Coal, LLC Christopher Friez

Issue Excerpt Text: The National Environmental Policy Act (“NEPA”) requires federal agencies like BLM to “take a hard look” at the “environmental consequences” of their actions. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989) (internal citations omitted). The statute “does not mandate particular results,” rather it delineates “the necessary process” that BLM must follow to detect and analyze “adverse environmental effects of the proposed action.” *Id.* These effects may be direct, indirect, or cumulative in nature. 40 C.F.R. § 1502.16. The NEPA process requires preparation of an EIS that provides a “full and fair discussion of significant environmental impacts.” 40 C.F.R. § 1502.1. This discussion needs to inform “the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment.” *Id.* BLM’s compliance with NEPA will be held to APA standards. *League of Wilderness Defs.-Blue Mountains Biodiversity Project v. U.S. Forest Serv.*, 549 F.3d 1211, 1215 (9th Cir. 2008). An agency action that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,” will be held unlawful and set aside. 5 U.S.C. § 706(2)(A). NEPA requires that alternatives are fully and fairly discussed and explained. As discussed in the above subsection 2, BLM does not fully and fairly justify or explain any reasons for implementing the Air and Climate Coal Screen or any positive environmental consequences of doing so. Further BLM does not explain how the screen protects the use or value of Air as a resource, or the alleged “Climate” resource, use or value.

North American Coal, LLC Christopher Friez

Issue Excerpt Text: BLM’s decision to implement the Air and Climate Coal Screen must comport with the Administrative Procedures Act (“APA”). The APA requires BLM to base its decision on “consideration of the relevant factors.” *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971) (citations omitted). The BLM’s inquiry must be “thorough,” “probing,” and “in-depth.” *Id.* at 415. The BLM’s decisions must not be arbitrary and capricious in nature and must not contain

clear errors of judgment. *League of Wilderness Defs.*, 549 F.3d at 1215. A “clear error of judgment” may exist if BLM has relied on factors “Congress did not intend [for] it to consider,” BLM fails to “consider an important aspect of the problem,” or BLM’s explanation “runs counter to the evidence” or “is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” *Id.*

North American Coal, LLC
Christopher Friez

Issue Excerpt Text: These statutes and regulations make up the multiple-use Coal Screen No. 3 statutory and regulatory boundaries, yet none of the direction and examples within these laws indicate that Congress intended there to be a “Climate” use, or value, and nothing indicates that BLM considered Climate as such when it conducted rulemaking and established the regulations it must now follow. Section 3420.1-4(e)(3) explains that the emphasis on values and uses to be protected does include the value of air quality, and that other values and uses may be protected, however, these should be based upon the values and uses which Congress intended, rather than those made up by BLM without appropriate rulemaking. See Section 3420.1-4(e)(3). Neither is “Climate” a criteria for designating areas as unsuitable for surface coal mining, nor does it even resemble that criteria, which are all geologic or tangible features on, or of, the land. See 30 C.F.R. § 762.5.

Western Environmental Law Center
Morgan O’Grady

Issue Excerpt Text: While BLM points to its new Waste Prevention Rule to claim that flaring and venting will decrease over time, EIS at M-2, the new rules provide no guarantee that their implementation will actually reduce the waste of associated gas rather than merely increasing the proportion of such gas that is royalty bearing.⁴ BLM must still consider a comprehensive suite of measures- including those identified in Conservation Groups’ comments on the Draft EIS-to reduce the waste of associated gas to fulfill its duties under the MLA. Such measures would minimize methane emissions, helping BLM meet its obligations under FLPMA and the Clean Air Act, and also reduce economic losses due to lost royalty payments. And while we welcome the rule’s waste minimization plan requirement, we encourage BLM to bolster proposed stipulations and provide greater stringency and detail in what is required of operators to maximize the chances that such plans will be effective. Additionally, BLM needs to be prepared to use its authority under the MLA to deny APDs for insufficient waste minimization plans, and APDs must be accompanied by substantive measures that maximize their efficacy. There are a number of tools that would allow BLM to achieve these ends, and we believe an appropriate way for BLM to consider use of such tools would be to have collectively aggregated them into an alternative for consideration prior to adoption of the final RMP. BLM must consider ways to implement its legal obligation to use all reasonable precautions to prevent waste, including a stipulation or conditions of approval on leases that provide for no routine venting or flaring, similar to regulations that are already being implemented through State law in Colorado and New Mexico. One mechanism BLM can choose to ensure that the Field Office is considering a comprehensive suite of waste reduction measures is to include them in an alternative that it thoroughly analyzes prior to adoption of a final RMP. NEPA requires no less.

Summary:

Protestors claimed that the BLM violated NEPA and the APA by:

- Failing to conduct adequate impacts analysis associated with air quality;

- Arbitrarily concluding that there would not be a measurable reduction in impacts under the no new leasing alternative and failing to project the emissions under the no leasing alternative for comparison purposes in the FEIS;
- Failing to fully and fairly justify or explain reasons for implementing the Air and Climate Coal Screen or describing any positive environmental consequences of doing so; and
- Utilizing an unsuitable criterion of “climate” instead of an officially protected value such as air quality in the coal screening.

Additionally, protestors claimed that the BLM violated NEPA, FLPMA, and the Clean Air Act (CAA) by failing to consider a comprehensive suite of air quality minimization and mitigation measures for flaring and venting activities, despite claims that the new Waste Prevention Rule will decrease flaring and venting over time.

Response:

NEPA directs that data and analyses in an EIS must be commensurate with the importance of the impact (40 CFR 1502.15), and that NEPA documents must concentrate on the issues that are truly significant to the action in question, rather than amassing needless detail (40 CFR 1500.1(b), 1502.1). The BLM is required to take a “hard look” at potential environmental impacts of adopting the North Dakota PRMP/FEIS. The level of detail of the NEPA analysis must be sufficient to support reasoned conclusions by comparing the amount and the degree of change (impact) caused by the proposed action and alternatives (BLM Handbook H-1790-1, Section 6.8.1.2). The BLM need not speculate about all conceivable impacts, but it must evaluate the reasonably foreseeable significant effects of the proposed action.

The APA (5 U.S.C. 551–559) establishes how Federal administrative agencies like the BLM make rules and how they adjudicate administrative litigation, including granting agencies the ability to make rulemaking decisions formally or informally, as well as going beyond the resolution of specific controversies to include administrative functions.

FLPMA requires that when preparing land use plans, the BLM must “provide for compliance with applicable pollution control laws, including State and Federal air, water, noise, or other pollution standards or implementations plans” such as the CAA (FLPMA, Section 202(c)(8)). The State of North Dakota and EPA have primacy with regard to implementation of the CAA. Under the CAA, the State of North Dakota and EPA regulate the emission of air pollutants to protect air quality.

A land use planning-level decision is broad in scope. For this reason, analysis of land use plan management alternatives is typically broad and qualitative rather than quantitative or focused on site-specific actions. The baseline data provide the necessary basis to make informed land use plan-level decisions. As the decisions under consideration by the BLM are programmatic in nature and would not result in on-the-ground implementation-level decisions, the scope of the analysis was conducted at a regional, programmatic level. This analysis identifies impacts that may result in some level of change to the resources, regardless of whether that change is beneficial or adverse.

The North Dakota PRMP/FEIS does not actually authorize any on-the-ground action that will result in emissions of air pollutants. All future Federal actions in conformance with the management in the North Dakota PRMP/FEIS would be subject to additional analysis of possible air effects before approval. When a project is proposed with potential air quality impacts, the BLM would conduct a site-specific analysis. No development of a new or modified source of air pollutants would be allowed to proceed unless it could be demonstrated that the proposed source or facility will not prevent attainment or maintenance of any state or Federal ambient air quality standard.

The BLM analyzed the potential impacts on air quality and climate from the alternatives and reasonably foreseeable actions in Section 3.2.1, *Air Quality and Climate*. Impacts on air quality and

climate under each alternative were assessed by comparing the concentrations of air pollutants in the ambient atmosphere with national ambient air quality standards for criteria air pollutants as well as visibility, HAPs, and GHGs using air quality modeling and emissions assessment methods. Appendix C of the North Dakota PRMP/FEIS also provides an Air Resources Management Plan, which describes air resources management actions and the BLM’s commitment for managing air resources and BLM-authorized activities that have the potential to adversely affect air resources within the North Dakota PRMP/FEIS planning area. An Air Quality Technical Support Document was also completed for the North Dakota PRMP/FEIS to help further describe the potential effects of each alternative considered using a state-of-the-art regional photochemical air quality model that is available on the project’s ePlanning website at <https://eplanning.blm.gov/eplanning-ui/project/1505069/570>. The emission comparison approach provides a sound basis for comparing current air quality emissions with those expected to be produced from implementing future projects in conformance with the North Dakota PRMP/FEIS. This approach was selected because of uncertainties about the number, nature, and specific location of future sources and activities. Based on this analysis, the BLM does not expect emissions related to future Federal actions anticipated under the North Dakota PRMP/FEIS to prevent attainment or maintenance of any State or Federal ambient air quality standard.

The BLM’s decision not to analyze a no new leasing alternative in detail is outlined in Section 2.2.1 (North Dakota PRMP/FEIS, pp. 2-7–2-8). The BLM considered a no new leasing alternative but determined that impacts of a such an alternative would be substantially similar to the effects of Alternatives B, B.1, and D that are analyzed in detail, which is why it was not analyzed in detail. This determination is based on the BLM’s calculation that a no new leasing alternative would result in less than a 1-percent reduction in the number of producing wells compared to the effects under Alternatives B, B.1, and D (North Dakota PRMP/FEIS, p. 2-7). As noted in the BLM’s response to comments, “most production and new wells would occur on federal minerals that are already under an existing lease and thus would not be affected by a no leasing alternative because existing leases remain managed under the terms of the RMPs they were issued under” (North Dakota PRMP/FEIS Appendix M, p. M-75). The BLM also concluded that “federal royalties would be lost, and development of surrounding non-BLM-administered minerals would likely be less efficient under a no-new leasing alternative” (North Dakota PRMP/FEIS, p. 2-8). As such, the BLM adequately justified the decision to consider but eliminate a no new leasing alternative from detailed analysis in the North Dakota PRMP/FEIS.

Coal screens are prepared consistent with 43 CFR 3420.1-4. The BLM also considered the District Court’s decision in *WORC v. BLM* (4:20-cv-00076-GF-BMMM 8/3/2022), which determined that the BLM should have considered air and climate as a multiple-use coal screen (i.e. the “Air and Climate Coal Screen”) in the Miles City RMP decision challenged in that case. While the WORC decision did not apply to this planning effort and was not decided by the Federal District Court in North Dakota, the WORC court’s analysis and decision as guidance informed the BLM coal program as a whole and this planning effort in particular given the geographic proximity, issues addressed in the planning efforts, and that both planning efforts are being carried out by the same authorized officer. Accordingly, the BLM used a similar analysis in both the Miles City EIS and this EIS but substituted North Dakota-specific factors in this analysis. As such, the BLM implemented Coal Screen 3, which rationalizes its inclusion and implementation in North Dakota PRMP/FEIS Appendix F, *Coal Screening Process* (pp. F-5–F-8).

Site-specific flaring practices are not addressed in this planning effort, as they are specifically related to a particular project and are outside the scope of this planning-level process. However, the BLM does emphasize the importance of reducing flaring on lands under its jurisdiction by incorporating management directions that “prioritize processing of [right-of-way] applications for infrastructure (for example, pipelines) that maximize the recovery and delivery of natural gas from well sites to meet the

objectives of reducing lost produc[t] and minimizing air pollutant emissions from venting and flaring” under Alternatives B, C, and D (North Dakota PRMP/FEIS Table 2-2, row 19, p. 2-16). Additionally, the North Dakota PRMP/FEIS includes CSU stipulations for fluid mineral leasing that require “an approved waste minimization plan that includes design features to minimize air pollutants released from venting, flaring, and leaks during drilling, completion, and production operations” (North Dakota PRMP/FEIS, p. 3-9). Specific standards and requirements for minimization for site-specific development are discussed in Appendix B, *Stipulations and Allocations Applicable to Fluid Minerals Leasing*. The North Dakota Field Office can implement these mechanisms to minimize and mitigate the impacts from flaring during site-specific reviews and decision-making. Compliance with regulations such as the BLM’s waste prevention rule and EPA’s regulations governing oil and gas production operations will also be required at the site-specific phase of development, and will minimize, reduce, and mitigate air quality impacts from flaring and venting. As such, the BLM has adequately addressed minimization and mitigation measures associated with flaring and venting based on the scope of the RMP planning process and has outlined further mechanisms that will be implemented during authorization of any future on-the-ground actions.

The North Dakota PRMP/FEIS is compliant with NEPA, FLPMA, the APA, and the CAA. Accordingly, this protest issue is denied.

NEPA – Impacts Analysis: Environmental Justice

Western Environmental Law Center Morgan O’Grady

Issue Excerpt Text: BLM also failed to take a hard look at environmental justice, either in relation to health or in its own right. Although BLM identifies “populations for environmental justice considerations,” EIS at 3-265-268, and discusses general categories of potential environmental justice impacts associated with various project alternatives, it continues to defer a thorough analysis, or discussion of mitigation measures, to later stages and site-specific analyses. See, e.g., EIS at 3- 269. The intent of NEPA is for agencies to study the impact of their actions on the environment before the action is taken. See *Conner v. Burford*, 848 F.2d 1441, 1452 (9th Cir. 1988) (NEPA requires that agencies prepare an EIS before there is “any irreversible and irretrievable commitment of resources”); see also *Upper Pecos Ass’n v. Stans*, 500 F.2d 17 (10th Cir. 1974) (concluding that “consideration of environmental factors should come in the early stages of program and project formulation”). BLM may not defer this analysis to a later stage. Additionally, BLM essentially uses the response to comments-rather than the EIS itself-to suggest that there is no evidence of impacts to environmental justice communities. BLM essentially attempts to claim that there are no adverse health effects from oil and gas development in North Dakota, discounting ample evidence in the administrative record and its own analysis. BLM also claims that commentors “provide no evidence that communities potentially affected by the plan are already ‘disproportionately impacted, or that the impacts will be greater for these communities than for the general population.’” In the same response, however, BLM admits that ND Health’s data on Native American health issues shows that there are “notable health disparities” for indigenous populations. BLM then shockingly claims that these disparities “are endemic to reservation populations caused by numerous social factors, none of which are connected to BLM leasing decisions.” In doing so, BLM misses the point: it must analyze the impacts of existing and future oil and gas development expected under the plan when added to these existing health disparities. BLM makes no attempt to do so. Nor does BLM address its own findings that the Fort Berthold Indian Reservation is modeled to experience the highest impact for all four Air Quality Related Values (AQRVs). In sum, BLM fails to adequately analyze the direct, indirect, and cumulative impacts to indigenous communities in violation of NEPA. None of its responses to comments adequately explain this failure. Its

analysis is also inconsistent with Executive Order 14096 and CEQ Guidance on considering environmental justice in NEPA analysis.

Summary:

Protestors stated that the BLM violated NEPA and EO 14096 by failing to take a “hard look” at impacts on environmental justice (EJ) communities, including indigenous communities. Protestors claim that while EJ communities are discussed in the North Dakota PRMP/FEIS, the analysis is not sufficient and does not adhere to the “hard look” mandate.

Response:

NEPA directs that data and analyses in an EIS must be commensurate with the importance of the impact (40 CFR 1502.15), and that NEPA documents must concentrate on the issues that are truly significant to the action in question, rather than amassing needless detail (40 CFR 1500.1(b), 1502.1). The BLM is required to take a “hard look” at potential environmental impacts of adopting the North Dakota PRMP/FEIS. The level of detail of the NEPA analysis must be sufficient to support reasoned conclusions by comparing the amount and the degree of change (impact) caused by the proposed action and alternatives (BLM Handbook H-1790-1, Section 6.8.1.2). The BLM need not speculate about all conceivable impacts, but it must evaluate the reasonably foreseeable significant effects of the proposed action.

A land use planning-level decision is broad in scope. For this reason, analysis of land use plan alternatives is typically broad and qualitative rather than quantitative or focused on site-specific actions. The baseline data provide the necessary basis to make informed land use plan-level decisions. As the decisions under consideration by the BLM are programmatic in nature and would not result in on-the-ground implementation-level decisions, the scope of the analysis was conducted at a regional, programmatic level. This analysis identifies impacts that may result in some level of change to the resources, regardless of whether that change is beneficial or adverse.

In spring 2023, Congress amended NEPA as part of the Fiscal Responsibility Act in tandem with EO 14096, which defined EJ to mean the “just treatment and meaningful involvement of all people” in agency decision-making and actions “regardless of income, race, color, national origin, Tribal affiliation, or disability.” NEPA provides a procedural framework by which agencies may consider the environmental effects of their actions and, through EO 14096, agencies are encouraged to include effects that relate to EJ.

Specific effects on EJ populations cannot be determined at this planning stage due to a lack of site-specific information; specifically, projects have not been located or described in detail. The North Dakota PRMP/FEIS states that “due to the uncertainty in specific development locations, a further site-specific analysis would be required at the project-implementation level. This analysis would include an additional examination of the site-specific impacts of management actions on low-income, minorities, and Tribal populations” (North Dakota PRMP/FEIS, pp. 3-268). Project-specific mitigation could also be required based on details for a proposed action.

While specific effects on EJ populations cannot be determined at this planning stage, Section 3.5.2, *Environmental Justice*, discusses potential impacts on EJ communities from each of the proposed alternatives as well as cumulative impacts (North Dakota PRMP/FEIS, pp. 3-269–3-272). The North Dakota PRMP/FEIS acknowledges the potential for disproportionate impacts on EJ communities, including indigenous and Tribal populations. The PRMP/FEIS notes that populations living or working near drilling and development sites could experience adverse effects at higher rates, such as the Fort Berthold Indian Reservation. As such, the North Dakota PRMP/FEIS explains that best management practices (BMP) “could be applied at the site-specific level as stipulations to future

development under any alternative could mitigate some of these impacts on affected populations” (North Dakota PRMP/FEIS, pp. 3-269–3-270). Appendix D, *Design Features and Best Management Practices*, indicates specific BMPs that could be implemented at the site-specific level to mitigate potential impacts on EJ communities in proximity to the planning area. Finally, the North Dakota PRMP/FEIS notes that “in all future site-specific analyses, the BLM would continue to ensure opportunities for the participation of potentially affected low-income, minority, or Tribal populations. If specific disproportionately high and adverse impacts are identified in subsequent NEPA analyses, the [North Dakota Field Office] would encourage members of affected populations to provide input on appropriate modifications to avoid or mitigate effects” (North Dakota PRMP/FEIS, p. 3-270).

The North Dakota PRMP/FEIS analysis complies with EO 14096 and BLM policy, ensuring proposed actions do not disproportionately affect EJ populations. The BLM also outlines specific BMPs that may be applied to future projects to mitigate any future site-specific adverse impacts on EJ communities in Appendix D of the North Dakota PRMP/FEIS. As such, the BLM complied with NEPA’s requirements to take a “hard look” at the environmental effects related to EJ in the North Dakota PRMP/FEIS. Accordingly, this protest issue is denied.

NEPA – Range of Alternatives

State of North Dakota

Nathan Svihovec, Doug Burgum, Paul Seby

Issue Excerpt Text: The Proposed RMP Violates NEPA Because the Proposed RMP’s Alternatives are Inconsistent with Controlling Policy/Legal Objectives NEPA commands that an agency not consider alternatives inconsistent with its basic policy objectives. *Seattle Audubon Society v. Moseley*, 80 F.3d 1401, 1404 (9th Cir. 1996). Moreover, when an agency ignores a viable alternative (like a middle-ground alternative), such a failure violates NEPA. See, e.g., *Citizens for a Better Henderson v. Hodel*, 768 F.2d 1051, 1057 (9th Cir. 1985) (“a viable but unexamined alternative renders [the] environmental impact statement inadequate.”) Finally, a NEPA analysis must include “every reasonable alternative” so as to provide a meaningful analysis and allow for an informed choice from a full range of options. *Protect Our Communities Found. v. LaCounte*, 939 F.2d 1029, 1038 (9th Cir. 2019). The Proposed RMP represents a dramatic shift in agency policy and practice. It cannot be disputed that the State has managed North Dakota’s coal production for decades to develop natural resources to meet the State’s, and the Nation’s, energy needs. Such a policy and practice are well- grounded in the law, for FLPMA requires the BLM to develop and manage resources to meet resource needs.² Yet, the BLM fails to explain or adequately justify the 180-degree reversal of decades of policy. While a federal agency is allowed to make policy shifts, when it does so it must provide a “reasoned explanation” for doing so. *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). Moreover, “of course” the agency “must show that there are good reasons for the new policy.” *Id.* No such reason exists. Further, the BLM failed to adequately consider that federal mineral ownership in the State is interspersed with a “checkerboard” of private and state mineral or surface ownership. Therefore, virtually all federal management of North Dakota’s oil and gas producing region consists of some form of split estate. For all intents and purposes, the Proposed RMP will effectively end oil and gas development on federal lands in North Dakota, which is in direct conflict with the mandate set forth above and is hardly a reasonable alternative. Thus, a measured examination of the Proposed RMP reveals an inescapable and unavoidable conclusion: the BLM’s selection of Alternative D is outcome-motivated and is neither scientifically sound nor legally sufficient. This conclusion is illustrated by the fact that “NEPA does not require that an agency elevate environmental concerns over other appropriate considerations.” *Sanjuan Citizens Alliance v. Norton*, 586 F. Supp. 2d 1270, 1280 (0. N.M. 2008) (citing *Baltimore Gas and Electric v. Natural Res. Defense Council*, 462 U.S. 87, 97

(1983)). Yet, that is exactly what the BLM did by selecting the Proposed RMP. When all other criteria pointed to a reasonable continuation of coal leasing in the planning area, the BLM let unsound conclusions control the outcome and failed to consider the unique circumstances of the State.

North American Coal, LLC
Christopher Friez

Issue Excerpt Text: As shown by its data, BLM did not consider an alternative that would remove less lands for coal leasing and, further, does not explain why an alternative that would do so is not viable and should not be considered. See Proposed RMP/EIS Section 2.2. Alternatives Considered but Eliminated from Detailed Analysis.

North American Coal, LLC
Christopher Friez

Issue Excerpt Text: The Proposed RMP/EIS alternatives do not include an alternative that increases the planning area lands available to leasing as opposed to the status quo, represented by Alternative A. The 1988 RMP acreage of federal lands unacceptable for coal leasing is 435,800 acres. Proposed RMP/EIS at 3-211, Table 3-119. Alternative B applying the Air and Climate Coal Screen removes 1,042,000 acres of planning area lands as unacceptable for coal leasing. Proposed RMP/EIS at 3-212, Table 3-120. Alternative B.1 removes 1,080,100 acres of planning area lands as unacceptable for leasing. Proposed RMP/EIS at 3-212, Table 3-121. Alternative C is closest to Alternative A, but still removes more lands than Alternative A, 542,000 acres unacceptable for leasing. Proposed RMP/EIS at 3-212, Table 3-123. Alternative D applying Air and Climate Coal Screen removes 1,037,000 acres of planning area lands as unacceptable for coal leasing. Proposed RMP/EIS at 3-212, Table 3-120.

Western Environmental Law Center
Morgan O’Grady

Issue Excerpt Text: BLM’s Failure to Consider a No-New-Leasing Alternative is Arbitrary and Capricious. The urgent need to protect people, the environment, and federal public lands from the potentially devastating impacts of catastrophic global warming, as laid out in Conservation Groups comments on the draft EIS, compels BLM to consider a No-Leasing Alternative. A no-new leasing alternative is entirely reasonable. With 90% of areas with very high potential for development for fluid minerals and 93% of areas with high potential for development already leased, EIS at 2-7, 2-8, and 71% of the coal decision area acceptable for further consideration already leased or otherwise unavailable, EIS at 2-9, such an alternative would not foreclose future oil and gas development. BLM admits as much, projecting 38,100 new production wells to be drilled between 2020 and 2040, regardless of the alternative chosen. See EIS at 2-8, 3-203, M-11. BLM’s failure to consider a no-new-leasing alternative is arbitrary and capricious, and violates NEPA. BLM justifies its decision not to consider such an alternative by claiming that a no-new leasing alternative would be “substantially similar” to Alternatives B, B.1, and D. EIS at M-11. It is almost certainly inaccurate as a matter of fact that a no-leasing alternative would be equivalent to any alternative that makes additional acreage open to leasing. However, without any analysis of a no-new-leasing alternative, BLM makes it impossible for either the agency or the public to know whether and to what extent its assertion is true—contravening NEPA’s “twin aims” of considering “every significant aspect of the environmental impact of a proposed action” and of assuring the public that “it has indeed considered environmental concerns in its decisionmaking process.” *Baltimore Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 97(1983). At its most basic, BLM’s refusal to consider a no-leasing alternative violates the “rule of reason” because it “prevented BLM from taking a hard look at all reasonable options before it.” *New Mexico ex rel. Richardson v. Bureau of Land Mgmt.*, 565 F.3d 683, 710, 711 (10th Cir. 2009).

***Western Environmental Law Center
Morgan O’Grady***

Issue Excerpt Text: BLM Failed to Consider an Alternative that Protects Water Resources BLM also failed to consider an alternative that would protect ground and surface-water resources. Among other considerations detailed in the comments submitted on the Draft EIS, BLM should consider an alternative that prioritizes protection of river segments suitable for inclusion in the National Wild and Scenic River System.

Summary:

Protestors claimed that the BLM violated NEPA’s consistency mandate by considering an alternative inconsistent with its basic policy objectives. Protestors also claimed that the BLM violated NEPA’s range of alternatives mandate by failing to consider every reasonable alternative, including:

- A viable middle-ground alternative,
- An alternative that would remove less land for coal leasing,
- An alternative that would increase planning area lands available to coal leasing,
- A no new leasing alternative,
- An alternative that would protect ground- and surface-water resources, and
- An alternative that prioritizes protection of river segments suitable for inclusion in the National Wild and Scenic River System.

Response:

When preparing an EIS, NEPA requires an agency to rigorously explore and objectively evaluate all reasonable alternatives and, for alternatives eliminated from detailed study, to briefly discuss the reasons for their having been eliminated (40 CFR 1502.14(a)). When there are potentially a very large number of alternatives, the BLM may only analyze a reasonable number to cover the full spectrum of alternatives (BLM Handbook H-1790-1, Section 6.6.1 quoting Question 1b, CEQ, Forty Most Asked Questions Concerning CEQ’s NEPA Regulations, March 23, 1981).

The BLM must analyze a reasonable range of alternatives, but not every possible alternative to a proposed action: “In determining the alternatives to be considered, the emphasis is on what is ‘reasonable’ rather than on whether the proponent or applicant likes or is itself capable of implementing an alternative. ‘Reasonable alternatives include those that are practical or feasible from the technical and economic standpoint and using common sense, rather than simply desirable from the standpoint of the applicant’” (BLM NEPA Handbook, H-1790-1, at p. 50 [citing Question 2a, CEQ, Forty Most Asked Questions Concerning CEQ’s NEPA Regulations, March 23, 1981]; see also 40 CFR 1502.14).

The BLM developed a reasonable range of alternatives that meet the purpose and need of the North Dakota PRMP/FEIS and that address resource issues identified during the scoping period. The North Dakota PRMP/FEIS analyzed four alternatives, which are described in Section 2.1, *Description of the Alternatives*. The alternatives analyzed in the North Dakota PRMP/FEIS cover the full spectrum by varying in: (1) degrees of protection for each resource and use; (2) approaches to management for each resource and use; (3) mixes of allowable, conditional, and prohibited uses in various geographic areas; and (4) levels and methods for restoration.

With regard to coal leasing, the BLM analyzed an appropriate range of alternatives ranging from maintaining the current land management practices under Alternative A (least restrictive to coal development) to more-restrictive policies under Alternative B. Of the action alternatives (Alternatives B, C, and D), Alternative C offers more options for the management of natural and cultural resources

and resource uses. A description of Alternative C can be found in Section 2.1.3 (North Dakota PRMP/FEIS, p. 2-7). The BLM did not consider an alternative in which more lands would be available to coal leasing than those currently managed under Alternative A (no-action alternative), as it is the BLM's mandate to manage for multiple uses, balancing mineral development with the protection of certain resource values. Through the land use planning process, the BLM evaluates and chooses an appropriate balance of resource uses, which involves tradeoffs between competing uses. Under the Proposed Alternative (Alternative D), the BLM manages the planning area in a manner that protects sensitive resources while also managing lands to allow for development of sufficient leasable Federal coal to extend the life of each mine beyond the 20-year life span of the PRMP. Therefore, the BLM would not expect leasing of Federal coal to be constrained by the coal allocations under the Proposed Alternative (North Dakota PRMP/FEIS, p. 3-214). As such, an alternative in which additional lands would be available to coal development would not be considered a reasonable alternative, as it does not achieve FLPMA's multiple-use mandate or provide any reasonable benefit to coal production within the planning area.

The BLM's decision not to analyze a no new leasing alternative in detail is outlined in Section 2.2.1 (North Dakota PRMP/FEIS, pp. 2-7–2-8). The BLM considered but did not analyze in detail a no new leasing alternative because it was determined that impacts of a no new leasing alternative would be substantially similar to the effects of Alternatives B, B.1, and D that are analyzed in detail. This determination is based on the BLM's calculation that a no new leasing alternative would result in less than a 1-percent reduction in the number of producing wells compared to the effects under Alternatives B, B.1, and D (North Dakota PRMP/FEIS, p. 2-7). Of 38,100 new producing wells projected to be developed in all of North Dakota, due to the number of existing leases and leases held by production, a no new leasing alternative would result in a reduction of 97 producing wells, which is less than a 1-percent reduction. As such, the BLM concluded that "analysis of an alternative prohibiting fluid mineral leasing in the decision area would thus not have substantially different effects as the effects already analyzed in Alternative D" and under a no new leasing alternative "federal royalties would be lost, and development of surrounding non-BLM-administered minerals would likely be less efficient" (North Dakota PRMP/FEIS, p. 2-8). As such, the BLM adequately justified the decision to consider but eliminate a no new leasing alternative from detailed analysis in the North Dakota PRMP/FEIS.

The BLM determined it was not necessary to include an alternative that explicitly protected ground- and surface-water resources, as there are regulations and practices already in place to prevent degradation to these resources. Both the State of North Dakota and the BLM enforce requirements for casing, tubing, and cementing (North Dakota Administrative Code 43-02-03 and BLM Onshore Orders [43 CFR 3160]). In addition, the BLM issued a regulatory rule focused on hydraulic fracturing that works in tandem with existing BLM programs to assess the casing of wells, monitor the casings of wells, and take corrective actions when needed (43 CFR 3162.3-3(a)) (North Dakota PRMP/FEIS, p. 3-72). These requirements are enforced by the North Dakota Field Office at the site-specific phase of development, which can include stipulations and site-specific condition of approvals for drilling, completions, and fluids management that greatly reduce the potential for contamination of groundwater aquifers (North Dakota PRMP/FEIS, p. 3-72). Finally, it was not reasonable to consider an alternative that explicitly prioritizes protection of river segments suitable for inclusion in the National Wild and Scenic River System, as Alternatives A, B, and B.1 would find segments of three eligible rivers suitable for Wild and Scenic River designation and would manage them as suitable, and Alternatives C and D would determine these river segments as "Not Suitable" for inclusion in the National Wild and Scenic River System due to the segments being small, fragmented, and impractical to manage (North Dakota PRMP/FEIS, pp. ES-3, 2-5, and 2-61–2-62). As such, under Alternatives C and D, this determination would release segments from interim management protection afforded to eligible and suitable river segments. Therefore, the BLM analyzed a full range of alternatives for the management of wild and scenic river segments.

The BLM considered a reasonable range of alternatives in the North Dakota PRMP/FEIS in full compliance with NEPA. Accordingly, this protest issue is denied.

References

Bureau of Land Management (BLM). 2020. *Analysis of the Management Situation*. North Dakota Field Office, Dickinson, North Dakota. July

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