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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

STATE OF WYOMING, et al., Petitioners, v. UNITED STATES DEPARTMENT OF THE INTERIOR, et al. Respondents.	No. 16-cv-00285-SWS [Consolidated with16-cv-00280-SWS] **INDUSTRY PETITIONERS' REPLY BRIEF**

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INTRODUCTION

Petitioners Western Energy Alliance and the Independent Petroleum Association of America (collectively, "Industry Petitioners") respectfully submit this Reply Brief and request that the Court vacate the Bureau of Land Management's ("BLM") rule titled Waste Prevention, Production Subject to Royalties, and Resource Conservation, 81 Fed. Reg. 83,008 (Nov. 18, 2016) ("2016 Rule"). The Court now has confirmation from BLM itself that the 2016 Rule exceeded BLM's statutory authority and is arbitrary, capricious, and an abuse of BLM's discretion. In any event, Industry Petitioners have independently demonstrated the numerous illegalities underlying the 2016 Rule.

The "ping-ponging regulatory regime" in this case has plagued Industry Petitioners and their members since BLM promulgated the fundamentally flawed 2016 Rule nearly four years ago. When Industry Petitioners sought immediate preliminary injunctive relief in November 2016, they could not fathom that nearly four years would pass without a decision on the merits of the lawsuit. In those intervening years, Respondent-Intervenors have on three separate occasions flocked to the Northern District of California, forcing the parties to expend

significant litigation resources and forcing multiple courts to become familiar with the issues in these rulemakings.[1]

As the Court observed over two years ago, "[s]adly, and frustratingly, this case is symbolic of the dysfunction in the current state of administrative law." ECF No. 215 at 2. We agree. Once again, Industry Petitioners stand on the precipice of the 2016 Rule springing back to life within weeks, with annual costs approaching $279 million. *See* VF_0000451– VF_0000452. Industry Petitioners respectfully request that the Court put an end to the cycle of uncertainty and avoid the substantial costs and even the exacerbation of waste wrought by the 2016 Rule by vacating subpart 3179 in its entirety.

ARGUMENT

I. Respondent-Intervenors Incorrectly Instruct the Court to Limit the Nature and Scope of its Review.

Respondent-Intervenors incorrectly argue that this Court may not consider BLM's purported "post-hoc confessions of error" and that BLM's "contemporaneous legal explanations" during the 2016 Rule are dispositive. Respondent-Intervenors contend the Court is beholden to BLM's

[1] To the extent Respondent-Intervenors rely on the recent decision or rationale from the Northern District of California in their Supplemental Response Brief, that decision has no relevance here. That court directly disclaimed any assessment of the 2016 Rule: "This suit only focuses on the adequacy of the Rescission, and not the 2016 Rule." *California v. Bernhardt*, No. 4:18-cv-0572-YGR, 2020 WL 4001480, at *1 (N.D. Cal. July 15, 2020).

"contemporaneous explanations" when it promulgated the 2016 Rule." *See* ECF No. 279 at 2, 5-6. BLM's erroneous legal conclusions when enacting the 2016 Rule do not cement the agency's legal position for time immemorial.[2] Rather, the Supreme Court has recognized the public policy interest in allowing agencies to rectify positions over time. *See generally Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983) (citing *Permian Basin Area Rate Cases*, 390 U.S. 747, 784 (1968)) (recognizing that agencies "must be given ample latitude to 'adapt their rules and policies to the demands of changing circumstances'").

Further, Respondent-Intervenors incorrectly dismiss BLM's brief as a "post-hoc rationalization." BLM's recognition of its prior errors does not constitute post-hoc rationalization. Post-hoc rationalization is facts or rationale offered after an agency decision and outside of the administrative record to justify that decision, not to invalidate it. *See, e.g.*, *Population Inst. v. McPherson*, 797 F.2d 1062, 1072 (D.C. Cir. 1986) (discussing at length post-hoc rationalization). Generally, courts must evaluate the justification for an agency action based on the administrative record, and courts may not rely on extra-record or post-hoc rationalizations as a

[2] Respondent-Intervenors' refusal to accept BLM's changed position is ironic, given their insistence that the Court defer to BLM's interpretation of "waste" in the 2016 Rule; an interpretation that drastically departed from nearly a century of departmental practice implementing the Mineral Leasing Act ("MLA"), 30 U.S.C. § 181 *et seq*.

reason to uphold an agency decision. *See e.g.*, *Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983) ("It is well-established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself.").

Respondent-Intervenors cite no authority holding that courts may not consider an agency's subsequent disavowal of a rule or regulation. Unlike the agency in *Department of Homeland Security v. Regents of the University of California*, 140 S.Ct. 1891 (2020), BLM is not attempting to support its promulgation of the 2016 Rule for reasons not articulated in the administrative record. Instead, BLM is confessing that the administrative record does not support its position as required by the Administrative Procedure Act ("APA"), § 5 U.S.C. 551 *et seq*., and that the 2016 Rule is inconsistent with the MLA. BLM's brief explains why its prior legal conclusions on the record were wrong and identifies numerous record deficiencies.[3] Accordingly, the Court may and should consider the arguments in BLM's brief.

[3] The inconsistencies in Respondent-Intervenors' positions should not escape this Court's notice. They instruct the Court to limit its review to the administrative record and BLM's contemporaneous explanations while, at the same time, submitting over 100 pages of extra record evidence and repeatedly citing both the 2018 Rule and the *California* court's recent decision as support for their position.

II. The 2016 Rule Departs from BLM's Regulation of Waste for Nearly a Century.

Respondent-Intervenors ignore that the 2016 Rule departs from BLM's historical interpretation of waste by conflating "waste" with "loss" of gas, rejecting economic considerations in determining waste, upsetting the system of private leasing and development outlined by Congress in the MLA, and disregarding the waste that would occur if oil and natural gas is left in the ground because wells are prematurely abandoned.

The 2016 Rule is inconsistent with the long-established concept of waste in the MLA partly because it does not allow BLM to consider individual circumstances, operator prudence, or economic feasibility when determining whether waste occurred. *See* ECF No. 142 at 18–22. Because Respondent-Intervenors cannot dispute this truth, they instead attempt to conflate economic operation of a well with an operator's "profits." *See* ECF No. 175 at 19 ("The MLA charges BLM with ensuring that [lessees] use all reasonable precautions to prevent waste, not just those that will make industry money."); ECF No. 175 at 17 ("Nothing in the MLA requires BLM to define 'waste' solely based on what is profitable for a lessee."). This rhetoric may perpetuate the Citizen Groups' false narrative of greedy operators[4] but offers no justification for the 2016 Rule.

[4] WildEarth Guardians, *Guardians Appeals to Overturn Public Lands Fracking in Idaho* (Apr. 2, 2015), https://wildearthguardians.org/press-releases/guardians-

In fact, the 2016 Rule upends the Department of the Interior's century-old administration of the MLA, which evaluated whether the operator of a given oil and gas lease was, under the circumstances, diligently developing the leased resources for the mutual benefit of the lessee and lessor.[5] Fundamentally, Respondent-Intervenors' attempt to dismiss the economic operation of individual wells in the definition of "waste" ignores that the MLA established a system of oil and gas leasing that depends on the mutually beneficial development of leased minerals for the federal lessor and private lessee. *See* ECF No. 153 at 2-3. The interpretation of waste under the MLA must be viewed through this lens. *Id.* at 2-11.

Further, the text and structure of the MLA affirm that the United States has an express interest in economic operation of individual oil and natural gas wells. Under the MLA, a well "capable of producing oil or gas in paying quantities" will extend a federal oil and gas lease beyond its primary term. 30 U.S.C. § 226(i); *see also id.* § 188(b) (describing limits on Secretary's ability to terminate or cancel leases "capable of production of oil or gas in paying quantities"). BLM has defined this standard based on a comparison of lease revenue with operational and other costs. *See* 43 C.F.R. § 3160.0-5 (defining "[p]roduction in paying quantities" as

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appeals-to-overturn-public-lands-fracking-in-idaho/ (describing oil and gas leasing of federal lands as "catering to the greed of a private company").

[5] *Amicus* American Petroleum Institute detailed the Department's historic treatment of waste. *See* ECF No. 153 at 2-11.

"production from a lease of oil and/or gas of sufficient value to exceed direct operating costs and the cost of lease rentals or minimum royalties"). Thus, the MLA's structure belies Respondent-Intervenors' dismissal of individual well economics as merely operator "profits."

Further, Respondent-Intervenors discount the MLA's system of leasing for the mutual benefit of the lessor and lessee, as well as the role of individual well economics, to argue that waste must be considered "from a broader perspective." *See* ECF No. 279 at 14. Respondent-Intervenors rely heavily on cherry-picked language in the MLA authorizing BLM to issue rules "for the safeguarding of the public welfare" to argue that the MLA authorizes BLM to protect air quality. *See* ECF No. 279 at 15, 17; ECF No. 175 at 2, 11, 19, 30; ECF No. 174 at 6, 8, 10, 22 (citing 30 U.S.C. § 187). This argument ignores the inherent and historical economic component underlying waste and elevates air quality and environmental considerations, albeit important, above all else.

Moreover, the State Respondents attempt to justify the fact that the 2016 Rule will lead to premature abandonment of wells by arguing that "[n]atural resources that stay in the ground are not wasted resources." ECF No. 174 at 16. This statement contradicts both the current and the well-established historical interpretation of waste. Subsurface waste occurs when a well is prematurely abandoned, leaving the unproduced hydrocarbons beneath the surface. *See* 43

C.F.R. § 3160.0-5 (defining "waste of oil and gas" as certain acts that result in "[a] reduction in the quantity or quality of oil and gas ultimately producible from a reservoir under prudent and proper operations"); *accord, e.g.*, J. Howard Marshall & Norman L. Meyers, *Legal Planning of Petroleum Production*, 41 Yale L. J. 33, 66 n.124 (1931); *Larsen v. Oil & Gas Conservation Comm'n*, 569 P.2d 87, 90 (Wyo. 1977) (citing state statute as defining "waste" as "reduction in the quantity of oil or gas ultimately recoverable from a pool under prudent and proper operations"). State Respondents also ignore that prematurely abandoning wells means oil and gas must be produced elsewhere, either through new domestic oil and gas wells or through imports. Both entail new and additional environmental impacts. Therefore, although the State Respondents' argument conveniently echoes the Citizen Groups' calls to "keep it in the ground,"[6] the end result is simply a shift in production off federally-managed land and a reduction in federal and Indian revenue. Perhaps more importantly, State Respondents' argument is inconsistent with the definition of waste and does not justify the 2016 Rule.

[6] *E.g.*, Center for Biological Diversity, *Keep It In the Ground*, https://www.biologicaldiversity.org/campaigns/keep_it_in_the_ground/ (last visited Sept. 2, 2020); Dashka Slater, *Keep it in the Ground*, Sierra (March/April 2016), *available at* https://www.sierraclub.org/sierra/2016-2-march-april/grapple/keep-it-ground.

III. The Record Demonstrates BLM Purposefully Circumvented the Clean Air Act in Promulgating the 2016 Rule.

BLM did not promulgate the 2016 Rule in a vacuum; the context surrounding the rule's promulgation matters, and this Court may consider those circumstances. The record makes clear that the 2016 Rule was significantly if not overwhelmingly influenced by political air quality and climate goals divorced from BLM's MLA waste authority. To achieve these goals, BLM directly encroached on the Clean Air Act ("CAA"), 42 U.S.C. § 7401, *et seq.*, that vests EPA and the States with exclusive air quality authority and prohibits contemporaneous enactment by BLM of emissions standards for both new and existing sources.

As the Court previously recognized, "an agency may not bootstrap itself into an area in which it has no jurisdiction." *Adams Fruit Co., Inc. v. Barrett*, 494 U.S. 638, 650 (1990). While the APA affords agencies some deference in decision-making, the Court must, nonetheless, make a probing inquiry into BLM's rationale. *See Olenhouse v. Commodity Credit Corp*., 42 F.3d 1560, 1574-80 (10th Cir. 1994). Further, the Court may consider the context and political environment in which the agency decision was made. *See Dep't of Commerce v. New York*, 139 S.Ct. 2551, 2576-77 (2019) ("We are presented, in other words, with an explanation for agency action that is incongruent with what the record reveals about the agency's priorities and decisionmaking process . . . . Our review is

deferential, but we are 'not required to exhibit a naiveté from which ordinary citizens are free.'").

The administrative record highlights the 2016 Rule's fundamental air quality purpose and Respondent-Intervenors have not demonstrated otherwise. BLM's rationale and motivation in promulgating the 2016 Rule was largely to serve the prior presidential administration's air quality objectives, as outlined in the White House's 2013 Climate Action Plan and its 2014 Strategy to Reduce Methane Emissions—both designed to achieve the administration's air quality and climate goals. *See* VF_0021020; VF_0000617. When BLM became dissatisfied with the speed at which EPA was moving to curb emissions from existing oil and gas sources, it took matters into its own hands—a strategy with which the Court has already taken umbrage. *See* ECF No. 92 at 19, n.10 ("The BLM arrogantly justifies the Rule's application of overlapping air quality regulations to existing sources by expressing its dissatisfaction with the length of the CAA process and the uncertainty of the resulting outcome."). Presumably, BLM quickly realized it could not justify the rule in "waste" terms only as the costs of compliance ($110 million - $279 million) precipitously exceeded the value of any "waste" gas captured ($20 million - $157 million). With its strategy exposed, BLM was forced to quantify air quality/emissions benefits through a "Social Cost of Methane" tool and then extrapolate those benefits *globally*. BLM effectively cooked the books.

But on this record, BLM's actions speak louder than its words. Cloaked in BLM's MLA waste authority, the record as a whole evinces a clear purpose and intent to curb air emissions from existing oil and gas sources. The stark disconnect between the stated rationale (MLA waste prevention) and the facts in the record (CAA existing source air quality requirements) is precisely what the APA disavows. *Dep't of Commerce v. New York*, 139 S.Ct. at 2577 ("The reasoned explanation requirement of administrative law, after all, is meant to ensure that agencies offer genuine justifications for important decisions, reasons that can be scrutinized by courts and the interested pubic.") (emphasis added). Ironically, Respondent-Intervenors admit this very point. *See e.g.*, ECF No. 279 at 6 ("For more than three years, the benefits of the [2016 Rule]—reduced waste, increased royalty payments, and decreased climate and air pollution—have not been realized….").[7]

Respondent-Intervenors also claim BLM "does not support Petitioners' claims that the 2016 Rule is fundamentally an air quality regulation, within the

[7] Although Respondent-Intervenors direct this Court to "look only to the administrative record," they filed a second response with nearly 100 pages of extra-record evidence. This not only breaches the letter and spirit of the parties' Joint Case Management Plan, ECF No. 275 and the Court Order on Expedited Merits Briefing Schedule, ECF No. 276, it directly contradicts Respondent-Intervenor's own legal position. Although the Court should give no consideration to this extra-record evidence, we note that most of the 100 extra pages addresses air quality and climate issues—again belying Respondent-Intervenors' characterization of the 2016 Rule as a waste prevention effort.

purview of EPA and not BLM."[8] ECF No. 279, at 8, n.4. Maybe not in those precise terms, but BLM is resolute in disavowing its prior legal conclusions concerning its statutory authority. *See* ECF No. 278 at 10, 18-23 (the "2016 Rule is premised on an interpretation of its own authority that is inconsistent with the MLA" including "overbroad interpretation of its authority," that runs "contrary to Congress's clear intent," and is "broader than the 1920 statue can bear"). And BLM acknowledges the 2016 Rule "improperly elevat[ed] modern concerns about air quality and the environment above Congress's intent" and "encompass[ed] regulations intended to benefit the environment and improve air quality, regardless of whether those regulations would reflect the behavior of a reasonable, prudent oil and gas operator." ECF No. 278 at 19, 22.

Finally, the Citizen Groups illogically argue that the 2016 Rule is not an air quality regulation because it only regulates federal and Indian oil and gas wells. *See* ECF No. 175 at 23-24. Yet the fact that the 2016 Rule only regulates a subset of wells within EPA's authority does not diminish the Rule's air quality requirements. Accordingly, Respondent-Intervenors fail to establish that the 2016 Rule did not usurp EPA's exclusive authority to regulate air quality.

[8] Respondent-Intervenors continue to cite *Massachusetts v. EPA*, 549 U.S. 497, 532 (2007), as authority that excuses the 2016 Rule's foray into air quality regulation. *See* ECF No. 279 at n.4. The 2016 Rule was not merely a case of "overlapping" agency jurisdiction; it usurped EPA's exclusive authority to regulate air quality. *See* ECF No. 142 at 10.

IV. FLPMA Does Not Authorize BLM to Regulate Air Quality.

Because the MLA does not authorize BLM to regulate air quality, Respondent-Intervenors tether authority for the entire 2016 Rule to two lines in the Federal Land Policy and Management Act ("FLPMA"), 43 U.S.C. § 1701 *et seq*.: a general statement of policy providing that the public lands should be managed "in a manner that will protect the quality of . . . ecological, environmental, [and] air and atmospheric . . . values;" and a statement directing BLM to take any action "necessary to prevent unnecessary or undue degradation of the [public] lands." ECF No. 174 at 6, 22; ECF No. 175 at 30; ECF No. 279 at 13-18 (quoting 43 U.S.C. §§ 1701(a)(8)), 1732(b)); *see also* VF_0000372 (citing same).

Neither statement authorizes BLM to comprehensively regulate air quality. As this Court has observed, "[a]t its core, FLPMA is a land use planning statute." ECF No. 92 at 15 n.7 (citing 43 U.S.C. § 1712; *Rocky Mtn. Oil & Gas Ass'n v. Watt*, 696 F.2d 734, 739 (10th Cir. 1982)). FLPMA's general direction that BLM manage the public lands to protect environmental values does not convey regulatory authority over air quality to BLM. Moreover, both BLM's justification for the 2016 Rule, *see* VF_0000372 (citing 43 U.S.C. § 1702(c)), and Respondent-Intervenors' defense thereof, ignore FLPMA's competing policy that "the United States receive fair market value of the use of the public lands and their resources."

43 U.S.C. § 1701(a)(9). This clause, which Respondent-Intervenors ignore, precludes BLM from prematurely rendering existing oil and gas wells uneconomic.

Furthermore, FLPMA's direction that BLM prevent "unnecessary or undue degradation of the public lands" does not justify the 2016 Rule. BLM never determined the 2016 Rule was needed to prevent unnecessary or undue degradation of the public lands. *See* VF_0000303. Although BLM concluded the 2016 Rule would have global benefits, BLM never translated those global benefits as materializing to impact the public lands. *See* VF_0000341–VF_0000348. Rather, with respect to impacts on the public lands, BLM only cited general and localized benefits to wildlife and recreation. *See* VF_0000353–VF_0000356.

Finally, BLM's reliance on FLPMA as authority for the 2016 Rule does not justify application of the Rule to Indian leases. FLPMA only governs BLM's management of the public lands. *See* 43 U.S.C. § 1701. Accordingly, FLPMA does not authorize the 2016 Rule.

V. The Court Must Vacate 43 C.F.R. subpart 3179 in Its Entirety.

Because the 2016 Rule exceeds BLM's authority and is arbitrary and capricious, this Court must vacate the portion of the rule codified at 43 C.F.R. subpart 3179 in its entirety. Industry Petitioners recognize that subpart 3179 may be severed from the remainder of the 2016 Rule. *See High Country Conservation*

Advocates v. U.S. Forest Serv., 951 F.3d 1217, 1228–29 (10th Cir. 2020) (finding that a regulation may be partially set aside if the invalid portion is severable).

The Respondent-Intervenors attempt to distinguish the sections of subpart 3179 that "overlap" with EPA's regulations from the sections of subpart 3179 that specifically regulate flaring. *See* ECF No. 279 at 26. Not only do Respondent-Intervenors fail to identify these provisions, they ignore that the flaws in subpart 3179—that it is an impermissible air quality regulation enacted without regard to economic feasibility—infect it in its entirety.

The most significant example is the flaring thresholds in 3179.7, which BLM justified in part on impermissible air quality grounds. *See e.g.*, VF_0000616 (discussing the "benefits from reductions in methane and CO2 emissions" from the various gas capture/flaring alternatives). BLM may have arrived at different gas capture percentages or an entirely different framework if it examined them only through a "waste" lens and did not justify them based on air quality benefits. Yet the more discrete provisions also reveal BLM's intent on regulating air quality. BLM offered alternative justifications for the requirements imposed by sections 3179.6, 3179.101, and 3179.102 but never disputed that BLM may impose these requirements to regulate air quality. *See* VF_0000401–VF_0000402, VF_0000407, VF_0000408 ("the BLM has the authority to regulate air quality and GHG impacts on and from public lands pursuant to FLPMA and the MLA"); *see generally*

VF_0000360, VF_0000366, VF_0000389 (offering air quality benefits as justification for entire subpart 3179). In short, the entirety of subpart 3179 cannot be divorced from BLM's motivation of regulating air quality. The entire subpart must be set aside.

Finally, only vacating portions of subpart 3179 will create uncertainty in its administration and ambiguity as to whether certain gas is considered "unavoidably lost" and royalty-free. Industry Petitioners experienced this uncertainty during the Court's stay of certain sections of subpart 3179, including the gas capture targets. *See* ECF No. 215 at 11. BLM structured subpart 3179.4(a) so that both gas defined as "unavoidably lost" in section 3179.4(a) and gas flared below the gas capture limits would be royalty-free. *See* § 3179.4(b). Therefore, under the 2016 Rule, flared gas that does not qualify as "unavoidably lost" may still be royalty-free if an operator's total flaring remains below the gas capture thresholds. Vacating the flaring limits without vacating the remainder of subpart 3179 could result in the imposition of royalty on flared gas that does not qualify as "unavoidably lost" under section 3179.4(a) but that remains below the gas capture thresholds.[9] Yet the

[9] This result is apparent when gas is flared for reasons beyond an operator's control but the flaring does not qualify as an "emergency" under section 3179.105. As justification for the unreasonably narrow definition of "emergencies," BLM explained that "the gas capture requirements in the final rule are structured to provide operators substantial flexibility to meet the capture targets without providing a blanket exemption for all events that the operator does not directly control." VF_0000400. Thus, non-emergency flaring may be royalty-free if the

flaring limits were expressly motivated by air quality concerns. Thus, all of subpart 3179 must be set aside.

Finally, vacatur of subpart 3179 has the effect of reinstating the portions of Notice to Lessees (NTL) 4A related to venting and flaring of gas, thus ensuring that BLM will continue to regulate venting and flaring from federal and Indian leases. *See* VF_0003796. Vacatur of subpart 3179 will not, however, reinstate NTL 4A in its entirety because BLM has updated other portions of NTL 4A.[10]

CONCLUSION

Respondent-Intervenors have failed to provide any rationale or support for their assertion the Court should uphold the 2016 Rule. BLM, itself, has disavowed the rule as arbitrary and capricious and in excess of its statutory authority, which in this case always has been the legally correct result. Industry Petitioners respectfully request that the Court vacate the 2016 Rule.

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operator's total flaring remained below the gas capture thresholds. *Compare* § 3179.4(a)(vi) *with* § 3179.4(b).

[10] For example, BLM has replaced the provisions of NTL 4A relating to the use of oil or gas beneficial purposes with subpart 3178.

Respectfully submitted this 4th day of September, 2020.

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CERTIFICATE OF WORD COUNT

I hereby certify that this response complies with the Court's July 29, 2020 Order on Expedited Merits Briefing Schedule, paragraph 3.1. as this brief contains 3,960 words.

/s/ Eric P. Waeckerlin

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of September, 2020, the foregoing INDUSTRY PETITIONERS' REPLY BRIEF was served by filing a copy with the Court's CM/ECF system, which will send notice of electronic filing to counsel of record.

/s/ Eric P. Waeckerlin

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