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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

STATE OF WYOMING,
STATE OF MONTANA,
STATE OF NORTH DAKOTA, and
STATE OF TEXAS

Petitioners,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, *et al.*

Respondents,

Civil Case No. 2:16-cv-00285-SWS

[Consolidated with 2:16-cv-0280-SWS]

Reply Brief of Petitioner-Intervenors States of North Dakota and Texas

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INTRODUCTION

Petitioner-Intervenors the States of North Dakota and Texas (collectively "Petitioner-Intervenors") respectfully urge this Court to hold unlawful and vacate the Bureau of Land Management's ("BLM") final rule regulating venting and flaring of natural gas from oil and natural gas production facilities on federal, Indian, state, and private lands entitled "Waste Prevention, Production Subject to Royalties, and Resources Conservation: Final Rule," 81 Fed. Reg. 83008 (Nov. 18, 2016) ("2016 Rule"). *See* ECF Nos. 86, 104. The 2016 Rule is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law" and exceeds BLM's "statutory jurisdiction, authority, or limitations," all in violation of the Administrative Procedure Act ("APA"). 5 U.S.C. § 706(2)(A) and (C).

The 2016 Rule is a drastic and unlawful expansion of BLM's authority under the Mineral Leasing Act ("MLA"), 30 U.S.C. §§ 181-287; the Federal Land Policy and Management Act of 1976 ("FLPMA"), 43 U.S.C. §§ 1701-85; Mineral Leasing Act for Acquired Lands, 30 U.S.C. §§ 351–360; Federal Oil and Gas Royalty Management Act ("FOGRMA"), 30 U.S.C. §§ 1701–1758; Indian Mineral Leasing Act of 1938, 25 U.S.C. §§ 396a–g; and Indian Mineral Development Act of 1982, 25 U.S.C. §§ 2101–2108; Act of March 3, 1909, 25 U.S.C. § 396. In the 2016 Rule, BLM for the first time asserts that it has the authority to impose comprehensive air quality regulations on oil and gas operations conducted on private and State lands and mineral interests. BLM is attempting to leverage its limited authority to manage and collect royalties from the federal portion of pooled federal, State and private mineral interests operating under long-standing communitization agreements to create a new authority to regulate air emissions from the State and private land and mineral interests communitized areas. This would unlawfully extend BLM's jurisdiction to approximately thirty-two percent of the State and private communitized mineral interests in North Dakota, and over 400,000 acres of State and private land in Texas, and supplant

State sovereignty over these non-federal lands and mineral interests. Joint Opening Brief of the States of North Dakota and Texas ("Opening Br."), ECF No. 143, at 12.

BLM has conceded that errors in the 2016 Rule "render the rule inconsistent with the rulemaking requirements of the [APA] and with the [MLA]." Fed. Resp. Br., at 1. Citizen Groups and State Respondents now attack what they term as BLM's "post-hoc" litigation positions,[1] but cannot explain or defend the serious errors in the 2016 Rule, including BLM's unlawful attempt to assert jurisdiction over non-federal communitized mineral interests. Citizen Groups' and State Respondents' arguments are therefore irrelevant – as the BLM never possessed the authority it attempted to assert in the 2016 Rule, and no amount of post-hoc confessions or justifications will remedy the jurisdictional overreaches of the Rule.

First, the 2016 Rule unlawfully displaces State sovereignty and regulatory authority over non-federal minerals by asserting federal authority to regulate *all* State and private interests when State, private and federal tracts are pooled in communitization agreements, regardless of the percentage of federal interests in those communitized fields. 81. Fed. Reg. at 83,079 (43 C.F.R. § 3178.2 ("This subpart applies to . . . Committed state or private tracts in a federally approved unit or communitization agreement.")).

[1] While Citizen Groups and State Respondents protest BLM's supposed "post hoc" confessions of error and claim that this Court must solely rely on the "reasoning set forth in the administrative record" for the 2016 Rule (Citizen Groups and State Respondents Suppl. Resp. Br. at 4), they then attach almost 100 pages of new extra-record materials, including a 2018 study on methane and other air pollution issues. Citizen Groups and State Respondents Suppl. Resp. Br. at Exhibits 1-3. The Court should strike and not consider these post-hoc submissions (i.e., Exhibits 1-3) that are not part of the administrative record for the 2016 Rule. In any event, those exhibits consist of declarations supporting the "need" for BLM to regulate oil and gas development on *federal* and *Indian* lands, and supporting documentation about the alleged nature and impacts of methane emissions, and are not relevant to one the central issues of this case, which is that BLM far exceeded its statutory jurisdictional authority by imposing comprehensive air emission regulations on *state* and *private* lands. BLM's jurisdiction is determined by Congress through BLM's enabling statutes, not the litigants' "needs," however earnestly expressed.

Under the plain language of the MLA, BLM lacks the authority to usurp State sovereignty and regulatory authority over non-federal mineral interests – even when those interests are pooled with federal interests for discrete management purposes authorized under the MLA. Instead, the MLA explicitly recognizes States' sovereign authority and requires that "[n]othing in this chapter shall be construed or held to affect the rights of the States or other local authority to exercise any rights which they may have." 30 U.S.C. § 189.

North Dakota has long declared it to be an essential government function and purpose to "foster, to encourage, and to promote the development, production, and utilization of natural resources of oil and gas in the state in such a manner as will prevent waste." Opening Br. at 53-54 (Citing to N.D. CENT. CODE § 54-17.5-01). North Dakota has historically exercised its sovereign authority and role as the primary regulator over State, private, and (by agreement) tribal mineral interests that are pooled or communitized with federal mineral interests. *See id*. at 18. Similarly, Texas has never relinquished control of its own public lands, and the limited federal lands acquired by the federal government in Texas were acquired by donation. *Id.* at 16. Texas has also diligently and responsibly regulated its State and private mineral interests to prevent waste and protect the environment. *Id.* at 21-22.

Due to their unique "split estate" property ownership structures, North Dakota and Texas have vast State and private resources that are frequently pooled with federal mineral rights. *Id.* at 15-16. Under their own sovereign authority, North Dakota and Texas have enacted statutes that either require, or authorize, State and private interests to be pooled or communitized with federal interests. *Id.* at 41. North Dakota and Texas have always retained the authority to regulate the State and private interests pooled in these agreements for the prevention of waste and protection of the environment, and did not relinquish this long-held sovereignty by entering into pooling arrangements with the federal government. *Id.* at 18-19 (discussing comprehensive regulatory

schemes for regulating venting and flaring in North Dakota and Texas); *see also id.* at 40 (recognizing that BLM regulations previously limited their reach to State and private land to specific circumstances under communization agreements).

Under the 2016 Rule many North Dakota State or privately owned spacing units, typically sized at 1,280 acres, are now subject to BLM's full regulatory authority because of the presence of one acre of subsurface Federal mineral interests. *Id.* at 17 (citing to Helms Affidavit ¶ 10). In Texas, the 2016 Rule would implicate over three million acres of split-estate lands where Texas and private citizens are subject to scattered pooling or communitization agreements. *Id.* at 16. Leveraging the presence of small subsurface federal mineral interests in large State and privately owned lands as a "force multiplier," the 2016 Rule unlawfully extends BLM's jurisdiction to approximately thirty-two percent of the State and private communitized property and mineral interests in North Dakota, and over 400,000 acres of State and private land within Texas. *Id.* at 12.

Second, the 2016 Rule unlawfully regulates air quality under the guise of preventing the "waste" of federal and tribal mineral resources. However, the language in the MLA requiring the "prevention of undue waste" is not a blanket or broad authorization for BLM to regulate air emissions associated with mineral interests for the protection of the environment. Instead, as this Court has recognized, the MLA is a discrete authorization for BLM to use its authority over federal oil and gas leases to include specific provisions to prevent undue waste and "insure the sale of mined minerals to the United States and the public at reasonable prices," and is not a "grant to the BLM of broad authority to regulate for the protection of the environment." *State of Wyoming et. al v. U.S. Dept. of Interior et al.,* Case No. 2:15-CV-043, Order on Petitions for Review of Final Agency Action, ECF No. 219, at 14 (June 21, 2016) (vacated on other grounds). Similarly, FLMPA's authorizing authority is as a land use planning statute, which the Supreme Court has

recognized as distinct from authority to regulate for environmental protection. *Id.* at 18-19 (citing to *California Coastal Comm'n v. Granite Rock Co*., 480 U.S. 572, 587-88 (1987) ("Congress clearly envisioned that although environmental regulation and land use planning may hypothetically overlap in some instances, these two types of activity would in most cases be capable of differentiation."). Under the Clean Air Act ("CAA") the regulation of air quality is solely within the purview of the U.S. Environmental Protection Agency ("EPA") and EPA-authorized State and Tribal programs under 42 U.S.C. §§ 7401 *et seq*.

BLM cannot impose comprehensive air emission regulations on State and private interests just because it or some other stakeholder thinks it is a good idea, or because BLM perceived an air quality challenge to be met. Like all federal agencies, BLM is a creature of Congress and its jurisdiction is limited to the authority granted it by the peoples' representatives. What is at issue in this case is not the impact of methane emissions on the environment or whether or how those emissions should be reduced, but the fact that BLM is imposing on State and private interests comprehensive air emission regulations it had no authority to promulgate. Therefore, for the reasons in Petitioner-Intervenors' Opening Brief and as set forth herein, the 2016 Rule must be vacated as "in excess of statutory jurisdiction, authority, or limitations."

ARGUMENT

I. BLM LACKS STATUTORY AUTHORITY TO PROMULGATE THE 2016 RULE

A. The Text of the MLA and Related Authorizing Statutes Do Not Allow BLM to Regulate State and Private Mineral Interests

This case is about BLM imposing comprehensive regulations (including air emission regulations) on State and private mineral interests that it had no statutory authority to promulgate, thus unlawfully usurping State sovereign authority and private property interests. The United States is a nation of laws and BLM's authority is limited by the Constitution and the powers

granted to it by Congress. Under the Tenth Amendment, "[t]he powers not delegated to the United States by the Constitution . . . are reserved to the States respectively, or the people." U.S. CONST., Amend. X. Petitioner-Intervenors unquestionably "retain a significant measure of sovereign authority . . . to the extent the Constitution has not divested them their original powers." *Garcia v. San Antonio Metro. Transit Auth.,* 469 U.S. 528, 549 (1985). Under States' sovereign authority, "regulation of land use is perhaps the quintessential state activity." *FERC v. Mississippi*, 456 U.S. 742, 768 n.30 (1982); *accord City of Edmonds v. Oxford House*, 514 U.S. 725, 744 (1995) ("land-use regulation is one of the historic powers of the States"). Petitioner-Intervenors' "interests at stake are of the highest order" for the protection of their own State and private mineral resources, where oil and gas development are primary sources of public revenue, economic activity, and employment. Opening Br. at 52.

No party has disputed, and this Court has recognized, that the BLM is provided authority under the MLA to regulate "*federal and Indian oil and gas resources* for the prevention of waste." *State of Wyoming et. al v. U.S. Dept. of Interior et al.*, Case No. 2:16-CV-0285-SWS, 2017 WL 161428 at 6 (D. Wyo. Jan. 16, 2017) (emphasis added). However, BLM cannot leverage its sparing congressional authorization to regulate federal and Indian resources under the MLA to regulate State and private mineral resources solely because they are pooled or communitized with those federal and Indian mineral interests, often in *de minimis* amounts. *See* Opening Br. at 24.[2] BLM

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[2] Citizen Groups claimed in their initial response brief that Petitioner-Intervenors never addressed this issue in comments to the 2016 Rule, and have thus waived this argument. Citizen Groups Initial Resp. Br., at 40 n. 12. This is incorrect, as North Dakota explicitly raised this issue in its April 20, 2016 comments to BLM: North Dakota "strongly recommends that this section of the proposed rule be rewritten to exclude: State or private tracts in a federally approved unit." Public Comment from Industrial Commission of North Dakota (April 20, 2016) (VF_0033628, at 0033632). Regardless, as this Court has recognized, agency actions in excess of their statutory authority are invalid. *Wyoming,* 2016 WL 3509415, at *3 ("It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress." (quoting *Bowen v. Georgetown Univ. Hosp*., 488 U.S. 204, 208 (1988))).

and Citizen Groups and State Respondents' devote no time to this issue in their supplemental briefs and do not defend BLM's unlawful expansion of its authority over State and private land and mineral interests, instead focusing on whether the 2016 Rule's definition of "waste" was reasonable under the MLA.[3]

The MLA explicitly recognizes that "[n]othing in this chapter shall be construed or held to affect the rights of the States or other local authority to exercise any rights which they may have." 30 U.S.C. § 189; *see also* 30 U.S.C. § 187 (No leases issued by the Secretary of the Interior "shall be in conflict with the laws of the State in which the leased property is situated."); 30 U.S.C. § 184a (Authorizing States to *consent* to communitization agreements for the purpose of conserving oil and gas resources, and providing that "nothing in this section . . . shall be construed as in any respect waiving, determining or affecting any right, title, or interest, which otherwise may exist in the United States, and that the making of any agreement, as provided in this section, shall not be construed as an admission as to the title or ownership of the lands included."). While the Secretary may approve communitization agreements under section 226(m) of the MLA, any changes to those communitization agreements requires "like consent on the part of the lessees." 30 U.S.C. § 226(m).[4] Under the MLA, States do not cede their sovereignty (nor do private citizens give up

[3] Petitioner-Intervenors have maintained that BLM's definition of "waste" was not a permissible construction of the MLA as the 2016 Rule's waste prevention provisions were de facto air regulations, which authority is clearly reserved to EPA and the States under the CAA. Opening Br. at 42-51; *see also* Section I.B., *infra.*

[4] Citizen Groups cite to 30 U.S.C. § 226(m) in their initial response brief as support for BLM's authority over communitized resources, but fail to mention that consent of lessees is required for changes to those agreements. Citizen Groups Initial Resp. Br. at 38. Their reliance on *Sanguine Ltd. v. Dept. of Interior* is equally misplaced. 736 F.2d 1416 (10th Cir. 1984). *Sanguine* dealt with communitized leases located on *Indian lands*, not State or private lands, and in any event recognized leaseholders' rights to challenge changes to communitization agreements on those lands. *Id.* at 1417-18 (acknowledging the lease modification "constituted an improper retroactive modification of Sanguine's leases" and was "beyond the scope of [the director's] delegated authority.")

their property rights) simply by entering into communitization agreements with BLM that pool mineral interests for the purpose of developing those interests: communitization and pooling does not transform State and private lands and mineral interests into federal property.

FOGRMA also fails to provide BLM the authority to regulate private and State interests under communitization agreements. FOGRMA limits the Secretary's duties to establishing a system to "determine oil and gas royalties, interest, fines, penalties, fees, deposits, and other payments owed, and to collect and account for such amounts in a timely manner." 30 U.S.C. § 1711. BLM's specific authority to regulate *royalties* in communitized areas under FOGRMA does not add to BLM's limited authority to prevent waste under the MLA. In fact, FOGRMA recognizes that the Secretary's authority over communitization agreements is limited to royalty collection:

> This subsection applies only to requirements for reporting and paying royalties. Nothing in this subsection is intended to alter a lessee's liability for royalties on oil or gas production based on the share of production allocated to the lease in accordance with the terms of the lease, a unit or communitization agreement, or any other agreement.

30 U.S.C. § 1721(i)(2). There is no language in FOGRMA granting BLM authority to impose comprehensive air emission regulations on private and State mineral interests in communitized areas.

Similarly, Citizen Groups' reliance on the 1979 Notice to Lessees and Operators of Onshore Federal and Indian Oil and Gas Leases, Royalty or Compensation for Oil and Gas Lost ("NTL–4A") as proof that BLM has always regulated State and private lands is equally misguided. *See* Citizen Groups Initial Resp. Br., at 41-42. The NTL-4A was a hybrid guidance document that spoke to BLM's authority to regulate waste under the MLA, and authority over royalties under FOGRMA. *See* 81 Fed. Reg. at 83,017/1 (discussing multiple purposes of the NTL-4A including "circumstances under which an operator owes royalties on oil or gas."). As Petitioner-Intervenors previously demonstrated, BLM has never used the NTL-4A to assert the authority to impose

regulations on private and State interests in communitized leases. *See* also Opening Br., at 38-39 (citing to Order No. 1: "it is not appropriate for the BLM or the [Forest Service] to exercise authority over surface operations conducted on privately owned lands just because those lands are contained within a unit or communitized area.").

Further, as Petitioner-Intervenors previously demonstrated, BLM's regulations under the MLA maintained a sharp distinction between BLM's general supervisory authority over federal leases and its much more limited authority with respect to the private and State leases that may be pooled with federal interests. BLM's regulations have separate detailed regulations applicable to "[p]urelely federal-owned mineral interests." Opening Br., at 29. This is consistent with prior communitization agreements entered into by Petitioner-Intervenors with the BLM, which, consistent with the requirements of the MLA, conditioned changes to those agreements upon consent of the state and private interests under those agreements. *See* BLM Manual Section 3160-9 Communitization (Where form Communitization Agreements state that the agreements "shall be binding upon all parties of who have executed such a . . . ratification or consent hereto." *Id.* at p 32); *see also* BLM "Re-Engineered Communitization Agreement Approval Process" (available at https://www.blm.gov/policy/im-2015-124) (requiring that "the written consents of all of the named owners have been obtained and will be made available to the BLM" for communitization agreements.). BLM's unlawful assertion of the authority to impose comprehensive air emission regulations over any State and private mineral interests covered by communitization agreements is a unilateral and *en masse* revision of all communitization agreements without the consent of the State and private parties to those agreements, violating the MLA, and deviating from BLM's guidance and past practices.

Thus, prior to the 2016 Rule BLM consistently took the position that the communitization agreements it administered did *not* grant BLM power to regulate the State and private interests

pooled through those agreements, except for the discrete royalty and waste prevention purposes authorized under the MLA and FOGRMA, and that changes to communitization agreements required the consent of the parties to the agreements. BLM's novel interpretation of and expansion of its authority under the 2016 Rule does not align with the plain statutory text of the MLA or FOGRMA or BLM's historical interpretations and actions under those statutes.

> When an agency claims to discover in a long-extant statute an unheralded power to regulate "a significant portion of the American economy," [the Court] typically greet[s] its announcement with a measure of skepticism [The Court] expect[s] Congress to speak clearly if it wishes to assign to an agency decisions of vast "economic and political significance.

Utility Air Regulatory Group v. EPA, 573 U.S. 302, 324 (2014) ("*UARG*"). This Court should therefore reject BLM's unlawful expansion of its jurisdiction to State and private interests under the 2016 Rule.

B. BLM Lacks Statutory Authority to Create De Facto Air Emissions Regulations

BLM is an agency of limited jurisdiction, with that jurisdiction limited to what has been granted to it by Congress. Congress did not grant BLM the authority to promulgate comprehensive air emission regulations for oil and gas operations generally, and certainly not the authority to impose them on operations extracting oil and gas from State and private mineral interests. As this Court has previously recognized, section 187 of the MLA "does not reflect a grant to BLM of broad authority to regulate for the protection of the environment . . . instead, the language requires only that certain, specific lease provisions appear in all federal oil and gas leases for the safety and welfare of miners and prevention of undue waste, and to ensure the sale of mined minerals to the United States and the public at reasonable prices." *Wyoming,* ECF No. 219, at 14.

Similarly, other statutes such as FLPMA and FOGRMA do not provide the broad authority BLM has seized upon in promulgating in the 2016 Rule. When analyzing FLPMA in the context of BLM's authority over hydraulic fracturing, this Court recognized that FLPMA is at its core a

land use planning statute, and that there is "a distinction between land use planning and environmental protection." *Wyoming,* ECF No. 219, at 18. Thus, Congress has often delegated "regulatory authority for environmental protection" to the EPA. *Id.* at 19 (discussing how FLPMA did not delegate to BLM authority over underground water sources, but instead reserved that authority to EPA).

Similarly, Congress has properly delegated authority over air emission regulations to EPA and the States under the CAA. The CAA made the States and EPA "partners in the struggle against air pollution," *Gen. Motors Corp. v. United States*, 496 U.S. 530, 532 (1990), wherein the nation's air quality will be protected "through state and federal regulation," *BCCA Appeal Group v. E.P.A.*, 355 F.3d 817, 821-22 (5th Cir. 2003); *see also* 42 U.S.C. § 7401(a)(3) ("air pollution prevention . . . and air pollution control at its source *is the primary responsibility of States and local governments*" (emphasis added); and 42 U.S.C. § 7407(a) ("Each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State. . . ."). BLM cannot regulate air quality because it lacks the Congressionally-delegated authority to do so. *See Bowen*, 488 U.S. at 208 (holding that an administrative agency's power to promulgate regulations is limited to the authority delegated to it by Congress); *See also* Opening Br., at 42-45 (explaining how the CAA employs a 'cooperative federalism' structure under which the federal government develops baseline standards for air quality that the States individually implement and enforce.). Further, it would make no sense to conclude that BLM's general authority to prevent "waste" under the MLA displaces Congresses specific grant of authority to EPA under the CAA to comprehensively regulate air emissions in the cooperative relationship with the States. As this Court has previously held, where a statute speaks directly to a particular activity, "it cannot be reasonably concluded that Congress intended regulation of the same activity would be authorized under a more general statute administered by a different agency. *Wyoming,* ECF No. 219, at 22 (citing to *Morales v. Trans*

World Airlines, Inc., 504 U.S. 374, 384 (1992) ("[I]t is a commonplace of statutory construction that the specific governs the general[.]").

To allow BLM to become a parallel new air emissions regulatory authority would displace Petitioner-Intervenors' constitutionally and statutorily protected authority to regulate State and private mineral interests and upset the Congressionally mandated cooperative federalism approach to regulating air emissions in which States play a central role. The States of North Dakota and Texas have historically regulated waste from State and private mineral interests under their authority, and have expended significant time and resources enacting, implementing and enforcing statutes and regulations controlling air emissions from those interests consistent with the Tenth Amendment and the Congressionally mandated cooperative federalism framework of the CAA. *See* Opening Br., at 18-22, (describing the comprehensive oil and gas regulations administered by North Dakota and Texas, in addition to stringent venting and flaring restrictions on oil and gas production operators.). Petitioner-Intervenors continue to regulate air emissions from venting and flaring under the cooperative federalism structure of the CAA, under which North Dakota and Texas have been delegated the authority to implement and enforce the CAA.

In addition, North Dakota has set vigorous flaring reduction goals utilizing strict allowable flaring percentages of 20% beginning April 1, 2016, 15% beginning November 1, 2016, 12% beginning November 1, 2018, and 7-9% thereafter. Declaration of L. Helms, ECF No. 143, at 8. Those restrictions remain in place, with a 10% requirement scheduled to take effect November 1, 2020, with a 5% requirement thereafter. *See* NDIC Order 24665 (available at https://www.dmr.nd.gov/oilgas/policies.asp). Similarly, the Texas Railroad Commission regulates venting and flaring in Texas. Statewide Rule 32 authorizes the flaring of gas while drilling a well and for up to 10 days after a well's completion for operators to conduct well potential testing. 16 Tex. Admin. Code § 3.32. Outside of that time period, the Texas Railroad Commission

requires operators to obtain an exception to Rule 32 authorizing flaring for specific situations and circumstances. *Id*. Railroad Commission staff work closely with operators to ensure compliance with rules, including operations, inspections, permitting, and compliance.

Thus, Congress has already directly spoken to the "topic at hand" in the CAA, and has declared that EPA in cooperation with the States, and not BLM, should regulate air emissions from oil and gas activities. *FDA v. Brown & Williamson Tobacco Corp.,* 529 U.S. 120, 121 (2000). It is therefore unlawful for BLM to attempt "an end-run around" the CAA – as Congress has granted BLM no such authority. *Wyoming,* ECF No. 219, at 25.

C. The Major Question Doctrine and the Federalism Clear-Statement Rule Require that Congress Make a Clear Authorization Before Agencies Can Enact Transformative Changes in Regulatory Authority

BLM cannot use its own bootstraps to, without Congressional authorization, expand its jurisdiction over new lands, interests and spheres of regulatory interest. The well-established major questions doctrine rejects statutory readings that "would bring about an enormous and transformative expansion in [an agency's] regulatory authority without clear congressional authorization." *UARG*, 573 U.S. at 324. In other words, Congress must "speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance.'" *Id.* (quoting *FDA*, 529 U.S. at 160; and citing *MCI Telecomms. Corp. v. Am. Tel. & Telegraph Co.*, 512 U.S. 218, 231 (1994); *Indus. Union Dept., AFL-CIO v. American Petroleum Institute*, 448 U.S. 607, 645-46 (1980) (Stevens, J., controlling op.)); *see also, Gonzales v. Oregon*, 546 U.S. 243, 267 (2006); *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468-69 (2001). This is even more true when agencies attempt to interpret their statutory authority and expand their jurisdiction in ways that implicate major economic or political significance to regulated parties, which is what BLM has done in the 2016 Rule. *Loving v. IRS*, 742 F.3d 1013, 1021 (D.C. Cir. 2014) ("[C]ourts should not lightly presume congressional intent to implicitly delegate decisions of major economic or political

significance to agencies." (citation omitted)); *City & Cty. of S.F. v. Trump*, 897 F.3d 1225, 1242 (9th Cir. 2018); *Texas v. United States*, 809 F.3d 134, 182-83, 188 (5th Cir. 2015), aff'd by an equally divided court, 136 S. Ct. 2271, 2272 (2016) (per curiam); *Port Auth. Trans-Hudson Corp. v. Sec'y, U.S. Dep't of Labor*, 776 F.3d 157, 168 (3d Cir. 2015).

Similarly, it is a "well-established principle" that Congress must provide a "clear statement," *United States v. Bass*, 404 U.S. 336, 349 (1971), to alter the "'usual constitutional balance of federal and state powers,'" *Bond. v. U.S.*, 572 U.S. 844, 858 (2014) (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991)). BLM's authorizing statutes must therefore be read as not delegating authority to BLM in areas of traditional State power unless Congress made that intent "unmistakably clear in the language of the statute." *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 65 (1989) (citation omitted); *see also, e.g., Bond*, 572 U.S. at 866 (courts presume that Congress does not intend to make "a dramatic departure from [the] constitutional structure" "[a]bsent a clear statement of that purpose"). When an agency attempts to issue a "major rule" of "great economic and political significance," they must have "clear congressional authorization to do so." *U.S. Telecom Ass;n v. Fed. Commc'ns Comm'n,* 855 F.2d 381, 382 (D.C. Cir. 2017).

States' sovereign authority to regulate "land use is perhaps the quintessential state activity." *FERC.,* 456 U.S. at 768 n.30 (1982). Yet it is precisely that historic State power that is trampled on by the 2016 Rule. When a federal statute is based on "a program of cooperative federalism," there is "nothing 'cooperative' about a federal program that compels State agencies to either function as bureaucratic puppets of the Federal Government or abandon regulation of an entire field traditionally reserved to state authority." *Id.* at 783 (1982) (O'Connor, concurring in part and dissenting in part).

As established in Sections I.A and B, the MLA does not include a clear statement by Congress evincing an intent to alter the traditional State and federal regulatory balance governing

mineral interests. In fact, Congress' clear statements acknowledged and supported the States' traditional sovereign authority. "Rather than expressing a desire to readjust the federal-state balance in this manner, Congress chose to 'recognize, preserve, and protect the primary responsibilities and rights of State . . . to plan the development and use . . . of land and water resources." *Solid Waste Agency of N. Cook Cty. v. U.S.*, 531 U.S. 159 (2001) (citation omitted). The MLA explicitly recognizes that "[n]othing in this chapter shall be construed or held to affect the rights of the States or other local authority to exercise any rights which they may have." 30 U.S.C. § 189; *see also* Section I.A., *supra.*

BLM's expansion of its jurisdiction and authority over State and private mineral interests in the 2016 Rule significantly upsets the traditional federal-state balance of regulatory power over those resources. Petitioner-Intervenors have long comprehensively regulated State and private mineral interests on a variety of land use, waste, natural resource preservation, and environmental issues such as air emissions. *See* Section I.A and B., *supra*; Opening Br., at 41-43 (noting how North Dakota and Texas have long regulated venting and flaring on State and private lands to prevent waste *along* with environmental emissions regulations under the CAA (even with communitized with federal interests), and how BLM has never before attempted to "over-reach and usurp" their sovereign authority.").

Separate from prevention of waste, Petitioner-Intervenors have a long history of regulating air emissions associated with the development of State and private mineral interests in cooperation with EPA under the Congressionally mandated cooperative federalism model of the CAA. There is no statutory authority, much less a clear statement by Congress, to support BLM's attempt to take on a novel and unprecedented regulatory authority in the 2016 Rule by imposing comprehensive air emissions requirements on oil and gas operations. In the 2016 Rule, BLM could only vaguely cite to its authority under FOGRMA to regulate oil and gas activities on such tracts

"for the purposes of royalty accountability." 81 Fed. Reg. at 83,039/1. Yet as Petitioner-Intervenors have established, the authority to regulate communitized interests for *royalty* purposes under FOGRMA is a far cry from the authority to regulate *all aspects* of State and private interests under the MLA, which specifically preserves States' sovereign regulatory rights. BLM can point to no statutory provision explicitly authorizing the broad jurisdictional authority BLM claims in the 2016 Rule.

"Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." *Whitman*, 531 U.S. at 468 (citations omitted). Yet that is precisely what the supporters of the 2016 Rule are looking to do here, attempting to "discover in a long-extant statute an unheralded power to regulate 'a significant portion of the American economy'," which this Court must view with "skepticism." *UARG*, 573 U.S. at 324 (citation omitted); *see D.C. v. Dep't of Labor*, 819 F.3d 444, 446 (D.C. Cir. 2016) ("The novelty of the . . . interpretation strongly buttresses our conclusion that the Act does not apply here." (citations omitted)); *Chamber of Commerce of U.S.A. v. U.S. Dep't of Labor*, 885 F.3d 360, 387 (5th Cir. 2018) (expressing presumption against "federal regulations crafted from long extant statutes that exert novel and extensive power over the American economy"). North Dakota and Texas, the two largest oil producing States in the Country, will be greatly impacted if the 2016 Rule is not vacated.

II. THE FLAWS OF THE 2016 RULE ARE NOT SEVERABLE AND REQUIRE VACATUR OF THE ENTIRE RULE

BLM and Citizen Groups and State Respondents ask this Court to sever any unlawful provisions of the 2016 Rule from unchallenged provisions. Fed. Resp. Br., at 25; Citizen Groups and State Respondents Suppl. Resp. Br., at 26. This is not the correct or adequate relief. The typical remedy for an agency rule promulgated contrary to law is to vacate the rule. *See Humane Soc'y of U.S. v. Zinke* , 865 F.3d 585, 614 (D.C. Cir. 2017) (citing *Sugar Cane Growers Co-op. of*

Fla. v. Veneman, 289 F.3d 89, 97 (D.C. Cir. 2002) ("Normally when an Agency clearly violates the APA we would vacate its action[.]"); *St. Lawrence Seaway Pilots Ass'n, Inc. v. U.S. Coast Guard*, 85 F.Supp. 3d 197, 208 (D.D.C. 2015). This is especially true when an agency acts without statutory authority, which is what BLM has done here. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 413–14 (1971) (Agency action "must be set aside if the action was . . . 'not in accordance with law' or if the action failed to meet statutory, procedural, or constitutional requirements.")

Despite this strong presumption, Courts retain discretion to consider the "'seriousness of the . . . deficiencies . . . and the disruptive consequences of an interim change" that vacatur may bring about prior to ordering vacatur. *International Union, United Mine Workers of America v. Federal Mine Safety and Health Admin.,* 920 F.2d 960, 967 (D.D.C. 1990). However, failure to comply with an agency's authorizing statute constitutes a "serious substantive error[], not mere procedural flaw[]." *Building Industry Legal Defense Foundation v. Norton,* 231 F. Supp. 2d 100, 105 (D.D.C. 2002).

The entire basis for the 2016 Rule rests on BLM's unlawful and novel expansion of its jurisdiction and regulatory authority to cover State and private mineral interests in communitized leases, as well as BLM's unlawful assumption and usurpation of EPA's and the States' authority to regulate air emissions under the cooperative federalism framework of the CAA. BLM's exceedances of its statutory authority in the 2016 Rule are "serious substantive errors" which mandate vacatur. Further, the 2016 Rule is not in effect, and there will be no "disruptive consequences" if this Court vacates the Rule.

Finally, a regulation is only severable "if the severed parts operate entirely independently of one another, and the circumstances indicate the agency would have adopted the regulation even without the faulty provision." *Ariz. Pub. Serv. Co. v. EPA*, 562 F.3d 1116, 1122 (10th Cir. 2009)

(internal quotations omitted). Thus, if the "absence" of the offending provisions would render the regulation one the Agency "would not have enacted," severability is improper. *Alaska Airlines, Inc. v. Brock,* 480 U.S. 678, 685 (1987). This is because otherwise the Court would be required to "write words" into the regulation or otherwise "foresee which of the many different possible ways" the Agency might respond to the statutory errors. *Randall v. Sorrell,* 548 U.S. 230, 233 (2006). As BLM's jurisdictional overreaches form the entire basis for BLM's claimed authority in the 2016 Rule, they are also not severable from the Rule, and it would be inappropriate for the Court (or Petitioner-Intervenors) to attempt to parse out the few remaining provisions that may be within BLM's regulatory authority.

CONCLUSION

For the reasons stated above and in their Opening Brief, Petitioner-Intervenors respectfully move this Court to GRANT their Petitions for Review of Agency Action, find the 2016 Rule is unlawful and in excess of BLM's statutory authority, and Order that the 2016 Rule be VACATED in its entirety.

Dated this 4th day of September, 2020.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of this Court's July 28, 2020 Order on Expedited Merits Briefing Schedule (Docket No. 276) because this brief contains 6,096 words, excluding parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

This brief complies with the typeface and type style requirements of D. Wyo. Local Civ. R. 10.1(a) because it has been prepared in a proportionally spaced typeface using Word 2010 in 12 point font size and Times New Roman.

/s/ *Paul M. Seby*

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 4th day of September 2020, a true and correct copy of this pleading and was filed with the Clerk of the Court using CM/ECF system, which will send notification of this filing to the attorneys of record.

/s/ *Paul M. Seby*