IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

POWDER RIVER BASIN RESOURCE COUNCIL et al., Plaintiffs, v. **U.S. DEPARTMENT OF THE INTERIOR et al.**, Defendants, and **STATE OF WYOMING et al.,** Defendants-Intervenors.	Case No. 1:22-cv-2696-TSC

DEFENDANT-INTERVENORS, CONTINENTAL RESOURCES, INC. AND DEVON ENERGY PRODUCTION COMPANY, LP'S REPLY IN SUPPORT OF THEIR MOTION FOR PARTIAL JUDGMENT ON THE PLEADINGS

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Defendant-Intervenors, Continental Resources, Inc., and Devon Energy Production Company LP (collectively, the "Intervenors") respectfully submit this reply in support of their motion for a partial judgment on the pleadings under Federal Rule of Civil Procedure 12(c).

INTRODUCTION

In their opening brief, Intervenors showed that the Fifth Claim for Relief in the Amended Complaint of Plaintiffs Powder River Basin Resource Council and Western Watersheds Project ("Plaintiffs") was the proper subject of partial judgment on the pleadings. Private Def.-Intervenors Continental Resources, Inc. and Devon Energy Production Company, LP's Mot. for Partial J. on the Pleadings, ECF No. 69-1 ("Def. Intervenors' Mot."). Intervenors showed courts assume a statute does not intend to give the federal government authority to regulate areas covered by the "historic police powers of the States" unless "that was the clear and manifest purpose of Congress." Def. Intervenors' Mot. 5 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). Intervenors then showed the statutes invoked in the Fifth Claim were unambiguously directed toward activities on federal land, not on the non-federal fee land that is the subject of the Fifth Claim. Def. Intervenors' Mot. 8-10, 13-15. Intervenors showed the regulation implementing the statutes was equally focused on the use of the federal "leased lands," Def. Intervenors' Mot. 10, and that if the statutes or regulations were ambiguous, the Defendants' decision to limit its regulation of operations to those on federal land was a reasonable interpretation under *Auer v. Robbins*, 519 U.S. 452 (1997). *Id.* at 18-21.

PLAINTIFFS' POSITION

Plaintiffs agree their Fifth Claim is ready to be decided on the merits. Pls.' Resp. to Private Def.-Intervenors Continental Resources, Inc. and Devon Energy Production Company, LP's Mot. for Partial J. on the Pleadings 2-3, ECF No. 84 ("Pls.' Resp.") (the "existing record is sufficient

for a final merits determination"). On the merits, they first assert that, through three statutory provisions, Congress has "delegated its Property Clause authority as to public lands and minerals to the Secretary of the Interior." *Id.* at 5. These three statutes provide the Secretary of the Interior with certain administrative authorities. First, 43 U.S.C. § 2 provides

> The Secretary of the Interior or such officer as he may designate shall perform all executive duties appertaining to the surveying and sale of the public lands of the United States, or in anywise respecting such public lands, and, also, such as relate to private claims of land, and the issuing of patents for all grants of land under the authority of the Government.

Second, 43 U.S.C. § 1457 provides the "Secretary of the Interior is charged with the supervision of public business relating to the following subjects and agencies:" and lists five subjects[1] and eight agencies.[2] Third, 43 U.S.C. § 1457c provides the "Secretary of the Interior, or such officer as he may designate, is authorized to enforce and carry into execution, by appropriate regulations, every part of the provisions of Title 32 of the Revised Statutes not otherwise specially provided for." To Plaintiffs, these three statutes give Interior "plenary authority over the administration of the public lands," and "[u]nless taken away by some affirmative provision of law," Interior "has jurisdiction over the subject." Pls.' Resp. 6 (quoting *Best v. Humboldt Placer Min. Co.*, 371 U.S. 334 (1963) and *Cosmos Expl. Co. v. Gray Eagle Oil Co.*, 190 U.S. 301 (1903)).

From this premise of a full Congressional delegation of its Property-Clause authority to the Interior Department, Plaintiffs next argue that the Mineral Leasing Act ("MLA") and the Federal Land Policy and Management Act ("FLPMA") did not expressly repeal the sweeping authority conveyed by the three statutory provisions. Pls.' Resp. 8. "Mere silence on this subject does not

[1] The Alaska Railroad, "Bounty-lands," Indians, petroleum conservation, and public lands, including mines.

[2] The Alaska Road Commission, Bureau of Land Management, Bureau of Mines, Bureau of Reclamation, Division of Territories and Island Possessions, Fish and Wildlife Service, Geological Survey, and National Park Service.

amount to an 'affirmative' or 'specific provision' prohibiting BLM from regulating Fee/Fee/Fed wells." *Id.* (citing *Corp. of the Catholic Bishop of Nesqually v. Gibbon*, 158 U.S. 155 (1895)).

Plaintiffs then address the cases holding that federal statutes must show a "clear and manifest purpose" to regulate areas subject to the States' police powers. *Id.* at 17; s*ee also Rice v. Santa Fe Elevator Corp.*, 311 U.S. 218, 230 (1947). Plaintiffs argue (1) that presumption applies only if they were to assert that federal jurisdiction over Fee/Fee/Fed lands is "exclusive;" (2) here, because state law would co-exist with the full federal regime, state law is not "superseded;" and (3) the presumption does not apply. *Id.* at 18.

Turning to the two directly relevant statutes, Plaintiffs argue that certain phrases within FLPMA and MLA compel the Bureau of Land Management ("BLM") to regulate oil and gas operations on Fee/Fee/Fed lands. Concerning FLPMA, they argue that when FLPMA directs BLM to regulate the "development" of federal mineral interests underneath the public lands, no statutory language expressly excuses BLM from regulating development "of federal minerals *from private land*." Pls.' Resp. 10 (emphasis in original) (citing 43 U.S.C. § 1732(b)). Concerning MLA, they argue BLM's authority under 30 U.S.C. § 226(g) "explicitly extends to all surface-disturbing activities 'conducted pursuant to any lease,' not simply operations 'within the lease area' as Devon and Continental repeatedly claim." *Id.*

Finally, Plaintiffs argue the Department's interpretation that its authority does not apply to non-federal fee land is not worthy of deference, chiefly because it does not recognize that Congress has already granted the Department all the power Congress has under the Property Clause. *Id.* at 12-17.

ARGUMENT

I. Plaintiffs Fail to Show Congress, Through Unequivocal and Direct Language, Gave the Secretary of the Interior Authority to Regulate Non-Federal Surface Land Use.

The statutes on which Plaintiffs rely do not expressly grant BLM authority to regulate surface disturbing activities on non-federal fee land. Plaintiffs cannot make the showing that Congress clearly and manifestly intended to compel BLM to do so, at least not the kind of clear and manifest intent the precedents have required. To avoid the showing, they assert instead that three statutes assigning administrative responsibilities over the public lands to the Interior Department gave that agency the full measure of Congressional authority under the Property Clause of the Constitution. They claim BLM has not just the authority to regulate surface disturbance on oil and gas operations on neighboring private lands, but "plenary authority" to the fullest extent of the Property Clause. Therefore, they reason, it is the Government's and the Intervenors' burden to find an express statutory provision removing that authority.

Plaintiffs' argument is easily the most astonishing proposition ever advanced in litigation concerning the public lands. BLM manages 245 million acres of land surface and 700 million acres of mineral estate (with attendant surface rights).[3] To borrow the title of the Public Land Law Review Commission's 1970 report to the President, the Federal Government owns "One Third of the Nation's Land." Yet Plaintiffs do not propose any limiting principle on how far BLM's plenary authority reaches: presumably whatever is needed to protect the public lands from impacts from activities elsewhere. In this case, that easily would include the authority to regulate the activities of Plaintiffs' members in Laramie and Sheridan, Wyoming, because they make decisions about

[3] Bureau of Land Management, What We Manage, https://www.blm.gov/about/what-we-manage/national (last visited May 25, 2023).

powering their vehicles, heating their homes, and traveling for recreation that affect public lands in Wyoming and beyond.

There is a reason the Public Land Law Review Commission did not title its report "Two Thirds of the Nation's Land." Plaintiffs are the first to find the purported delegation of plenary authority over non-federal fee, more than 200 years after Congress first created the Department's predecessor, the "General Land Office." *Knight v. United Land Ass'n*, 142 U.S. 161, 179 (1891). No case, no statute, no regulation, nor even any scholarly article has so boldly asserted this expansive scope of regulatory authority. As noted in our opening brief, the Public Land Law Review Commission expressly advised the President against promoting legislative amendments to give the Interior Department power over non-federal fee land. Def. Intervenors' Mot. 20-21. Plaintiffs cannot avoid their obligation to show Congress' clear and manifest intent to give BLM this sweeping authority or even the authority to regulate neighboring lands not in federal ownership. Plaintiffs' Fifth Claim must be rejected under *U.S. Forest Service v. Cowpasture River Preservation Ass'n*, 140 S. Ct. 1837 (2020).

A. Congress Has Not Delegated to the Interior Department the Full Scope of Congressional Authority under the Property Clause with Respect to the Public Lands.

When federal legislation purports to regulate a subject already regulated under the States' police powers or to add substantial agency authority over areas of the national economy, the courts have required special clarity in the legislative text. *West Virginia v. EPA*, 142 S. Ct. 2587, 2608-09 (2022) (major questions doctrine); *Rice*, 331 U.S. at 230.

> [O]ur precedent teaches that there are "extraordinary cases" that call for a different approach—cases in which the "history and the breadth of the authority that [the agency] has asserted," and the "economic and political significance" of that assertion, provide a "reason to hesitate before concluding that Congress" meant to confer such authority.

West Virginia, 546 U.S. 243, 142 S. Ct. at 2608 (quoting *FDA v. Brown & Williamson*, 529 U.S. 120, 159-60 (2000)). A few examples will illustrate that "different approach."

Gonzales v. Oregon, 546 U.S. 243 (2006), held the Attorney General, acting under the Controlled Substances Act to revoke registration of drugs used in physician-assisted suicide as "inconsistent with the public interest," lacked the authority to find that the Oregon law authorizing that procedure was inconsistent with the public interest. "The idea that Congress gave the Attorney-General such broad and unusual authority through an implicit delegation in the CSA's registration provision is not sustainable." *Id.* at 267. While assisted suicide is surely a topic touching "the public interest," the Court explained, "Congress, we have held, 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." *Id.* (quoting *Whitman v. Am. Trucking Ass'ns., Inc.* 531 U.S. 457, 468 (2001)) (internal quotations omitted).

FDA v. Brown & Williamson addressed the FDA's assertion that its authority under the Food, Drug, and Cosmetic Act to regulate "drugs" and "devices" gave it authority to regulate the marketing of tobacco products. Although the nicotine in tobacco is a drug, the Court found the assertion untenable, especially "against the backdrop of the FDA's consistent and repeated statements that it lacked authority under the FDCA to regulate tobacco." 529 U.S. at 144. The Court rejected a similar agency attempt to substantially expand its authority in *Utility Air Regulatory Group v. Environmental Protection Agency*, 573 U.S. 302 (2014). There, EPA contended it could interpret the term "air pollutant" in various provisions of the Clean Air Act to regulate greenhouse gas emissions from millions of sources.

> When an agency claims to discover in a long-extant statute an unheralded power to regulate a significant portion of the American economy, we typically greet its announcement with a measure of skepticism. We expect Congress to speak

> clearly if it wishes to assign to an agency decisions of vast economic and political significance.

Id. at 324 (quotations and citations omitted).

Cowpasture River is most directly on point. There, over the objections of the federal government, citizens' groups argued the Forest Service lacked statutory authority to grant a pipeline right-of-way across national forest lands because those lands underlay the Appalachian Trail. The groups argued the lands had become part of the National Park System, because the Secretary of the Interior had delegated management of national trails to the Park Service. By that delegation, the Trail "was now an area of land administered by the Secretary acting through the" Park Service, satisfying the test for what lands were within the Park System. *Cowpasture River Pres. Ass'n*, 140 S. Ct. at 1842 (citations and quotations omitted). As a part of the System, no right of way could be issued beneath them. *Id.* The argument was textually plausible, and even persuaded two dissenting members of the Court. But the majority disagreed. First, the Trail was a series of rights-of-way, and rights-of-way are non-exclusive uses of land, not the interest in land itself. Second, whenever Congress has wished to transfer jurisdiction over land from one agency to another, it has "used unequivocal and direct language" to do so. *Id.* at 1847. There, nothing in the statute suggested the Secretary, through a mere delegation of authority, could expand the jurisdiction of the Park Service. *Id.* at 1847-48. Third, the groups' "view would not just apply to the approximately 2,000 mile-long Appalachian Trail. It would apply equally to all 21 national historic and national scenic trails currently administered by the National Park Service." *Id.* at 1849. The Appalachian Trial, for example, would add 58,110 acres of non-federal rights-of-way—"privately-owned and state-owned lands"—to the National Park System. *Id.* "Our precedents require Congress to enact exceedingly clear language if it wishes to significantly alter the balance

between federal and state power and the power of the Government over private property." *Id.* at 1849-50.

In sum, here (like in *Cowpasture River* and unlike in *Gonzales*, *Brown & Williamson*, and *Utility Air Regulatory Group*) the agency does not assert the authority to regulate activities on non-federal fee, leaving it to Plaintiffs alone to justify the bold expansion of federal jurisdiction. Here, Plaintiffs' view is not limited to land within the Converse County Oil and Gas Project area, but throughout the public lands of the United States. Here, unlike the trails in *Cowpasture River* affecting hundreds of thousands of state and private rights-of-way, Plaintiffs' view potentially impacts uncounted hundreds of millions of acres of non-federal fee lands. Like in *Cowpasture River*, where state and private lands would become part of the National Park System, here BLM would now be obliged to assert authority under the Property Clause to include state and private lands in its resource management plans under FLPMA. 43 U.S.C. § 1712(a) (under Plaintiffs' theory, the Secretary would develop and revise "land use plans," which provide for "use of the public lands" and would regulate non-federal lands connected to the use of the public lands). And here, as in *Cowpasture River*, where Congress has intended the Interior Department to regulate state and private interests in land in addition to federal interests, it has said so in "unequivocal and direct language." 140 S. Ct. at 1847. *See, e.g.*, *Minnesota v. Block*, 660 F.2d 1240 (8th Cir. 1981) (applying the express language of the Boundary Waters Canoe Area Wilderness Act, 92 Stat. 1649 (1978) to allow federal regulation of motorized transportation on state and federal lands within the external boundaries of the wilderness area); *United States v. Brown*, 552 F.2d 817 (8th Cir. 1977) (enforcing statutory restrictions on firearms expressly applying to state and federal areas within Voyageurs Park).

Does current legislation delegate from Congress to the Interior Department, in "unequivocal and direct language," Congress' full authority under the Property Clause with respect to the public lands?[4] The statutes the Plaintiffs cite to show it are much more modest than Plaintiffs' flamboyant interpretation pretends. The first, 43 U.S.C. § 2, directs the Secretary or her designee to "perform all executive duties" concerning surveying and selling the public lands, duties "in anywise respecting" such lands, and duties relating "to private claims of land" and respecting "issuing of patents" for all government land grants. What this section does not do is describe what those duties are.[5] It just says whatever duties Congress may create on these topics, they are the Secretary's to perform. The second, 43 U.S.C. § 1457, charges the Secretary with supervising the "public business" on thirteen subjects and agencies. Again, this language does not define what the public's "business" is, it merely places that business under the Secretary's supervision. Nor do Plaintiffs identify which of these subjects or agencies give the Department the regulatory power they assert here. The third, 43 U.S.C. § 1457c, provides the "Secretary of the Interior, or such officer as he may designate, is authorized to enforce and carry into execution, by appropriate regulations, every part of the provisions of Title 32 of the Revised Statutes not

[4] It is unclear what Plaintiffs hope to gain from arguing, under *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735 (1996), that "the issue before the Court is the substantive meaning of a variety of statutory delegations, not whether that authority preempts state law." Pls.' Resp. 18 (quotations omitted). *Smiley* addressed a claim that the Court should not defer to an interpretation of the Comptroller of the Currency because a "presumption against preemption" required the Court to address the interpretation *de novo*. 517 U.S. at 743. The Court observed that petitioner Smiley confused the question of whether the interpretation was correct with whether the statute preempted state law. The Court noted there was no doubt the statute in question preempted state law. *Id.* at 744. To the extent Plaintiffs mean to say that *Smiley* directs this Court to not look for "unequivocal and direct" language delegating Congress' Property-Clause power to the Secretary, their point is inconsistent with all the precedents cited above.

[5] Even Plaintiffs do not isolate the phrase duties "in anywise respecting" public lands as their source for the vast delegation of authority to the Secretary. Plaintiffs leave the textual evidence of that delegation concealed.

otherwise specially provided for." Here, at least, there is a specific body of duties which the Secretary is to enforce, but Plaintiffs do not even quote the phrase "Title 32 of the Revised Statutes," let alone explain its relevance to the regulation of non-federal fee land.

Nor would that explanation have helped their cause. Title XXXII of the Revised Code[6] concerns the appointment of surveyors, registers, and receivers; the creation of 93 land districts; the right of pre-emption to federal lands; homestead claims; federal mineral-bearing lands and patents to them; the sale and disposal of public lands; the sale of town-sites on public lands; the survey of public lands; military bounty-lands; and miscellaneous provisions governing the public lands. Plaintiffs cite no provision, and Intervenors' counsel has found none, discussing the discretion or duty of the Secretary of the Interior to regulate any activities on non-federal fee lands.

The cases on which Plaintiffs rely to show the Department's "plenary authority over the administration of public lands," Pls.' Resp. 6 (quoting *Best v. Humboldt Placer Min. Co.*, 371 U.S. 334, 336 (1963)), do not help them, for all of them concern actions on the public lands themselves. These cases never addressed the authority to regulate non-federal fee lands. *Best* concerned the validity of unpatented mining claims, with title to such claims "still being in the United States." 371 U.S. at 336. The only question at issue was whether the government, having filed suit to condemn the claimed land, could require the claimants to pursue their claims before the Interior Department instead of in court. *Id.* at 338-39. The same scenario was present in *Cameron v. United States*, 252 U.S. 450 (1920), where the government succeeded in preventing a mining claimant from using the claim to run a tourist business on public land on the rim of the Grand Canyon. *Id.* at 454-55.

[6] A copy of Title XXXII as codified in 1875 is reprinted in Exhibit 1.

Similarly, *Boesche v. Udall*, 373 U.S. 472 (1963), concerned the leasing of undisputedly public land for oil and gas, and the Secretary's power to cancel a lease issued contrary to regulation. *Id.* at 474. At issue was whether Congress had given the Secretary authority to cancel a lease administratively (on the ground that it was invalid at its inception), even though MLA did not expressly provide that power. The Court agreed that pre-MLA grants of "general managerial powers over the public lands" were the source of that authority. *Id.* at 476.

So, too, is the case of *Knight v. United Land Ass'n*, 142 U.S. 161 (1891). There, the question concerned the authority of the Secretary to set aside an earlier survey of the public lands in favor of a later survey. *Id.* at 176. The Court upheld the Secretary's action, even though the authority to set aside earlier surveys was not explicitly provided in the statutes on which plaintiffs relied. "The general words of those sections are not supposed to particularize very minute duty devolving upon the secretary . . . ." *Id.* at 181. "The obligations of his oath of office oblige him to see that the law is carried out, and that none of the public domain is wasted or disposed of to a party not entitled to it." *Id. Cosmos Exploration Co. v. Gray Eagle Oil Co.*, 190 U.S. 301 (1903), also merely concerned whether the Interior Department had authority to determine "the various questions which may arise [under the "Forest Reserve Act"] before the issuing of any patent for the selected lands." *Id.* at 308-09. The broad statement of the Secretary's obligations refers only to what happens on the public lands. Neither case asserts federal authority to regulate non-federal fee lands. The language of Plaintiffs' three statutes means only this:

> It means that, in the important matters relating to the sale and disposition of the public domain, the surveying of private land claims, and the issuing of patents thereon, and the administration of the trusts devolving upon the government, by reason of the laws of congress or under treaty stipulation, respecting the public domain, the secretary of the interior is the supervising agent of the government . . . .

Knight, 142 U.S. at 177-78.

With no case applying Interior's authority beyond surveys, patents, and the leasing of public lands, it is unsurprising Plaintiffs' final authority does not aid their argument that Congress has already given Interior all the powers of the Property Clause. In *Silver State Land, LLC v. Schneider*, 843 F.3d 982 (D.C. Cir. 2016), at issue again was the propriety of a patent to a 480-acre parcel of "federally-owned public land." *Id.* at 984. The patent seeker argued that the Department erred in not issuing it the patent. Interior's view was that it had agreed to grant the patent on the special premise that the patentee would build a sports complex near Las Vegas but had backed out of that deal after receiving Interior's grant. The patent seeker argued that FLPMA limited Interior's power to rescind to thirty days after receipt of the offer, and that the thirty-day limit superseded the usual rule that Interior can withhold a patent at least as long as the patent has not yet been issued. The court disagreed that the limitation acted to alter the usual rule. *Id.* at 991-92. Once again, the case is limited to the procedures for issuing or denying patents for public lands; it does not extend to the Secretary's regulatory authority beyond public lands.

Plaintiffs have cited nothing to suggest that Congress, through unequivocal and direct language, has given the Secretary its full authority under the Property Clause. If it had, then *Cowpasture River* was wrongly decided. If it had, then the Secretary could largely do what EPA could not do in *Utility Air Regulatory Group* and *West Virginia*. If it had, then the Secretary might have done some of what the FDA could not in *Brown & Williamson* or achieved on and near the public lands of Oregon what the Attorney General could not in *Gonzalez*. It is little wonder Plaintiffs avoid discussing the limits of the power they claim the Secretary has. And this sweeping authority, covering state and private lands in the majority of the States of the Union, lay for 200 years invisible, silent, and still behind the walled framework of the Constitution and federal legislation, a true elephant hiding in a mousehole. *Whitman,* 531 U.S. at 468. Plaintiffs have stated

the controlling legal test backwards. Pls.' Resp. 8-9. A court is not to search to see whether Congress has specifically withheld its Property Clause powers from Interior. It must find Congress unequivocally and directly granted those powers.[7] Plaintiffs fail to make that showing.

B. FLPMA and MLA Govern Leases of Federal Lands Only.

Plaintiffs argue Intervenors misread FLPMA and MLA, but each of their points can be briefly dismissed. First, they urge that "public lands" is defined in FLPMA to include federal mineral interests in land. Pls.' Resp. 10. Therefore, they urge, the Secretary shall regulate the use of the federal mineral interest by regulating surface operations on private lands if the wells there are used to develop the federal mineral interest. Pls.' Resp. 10. But as shown in in the chart attached as Exhibit 3 to Private Intervenors' Opposition to Plaintiffs' Motion for Preliminary Injunction, ECF No. 80-3, the use of the federal mineral interest in the Fee/Fee/Fed scenario does not begin until the well penetrates the federal minerals thousands of feet below the surface. Activities on the surface of the non-federal fee are not "uses" of the federal mineral estate. The same surface "uses" typically support development of state and private minerals from the same surface location.[8]

[7] Plaintiffs argue this entire line of cases is inapplicable because they apply only when the federal law "supersedes" state authority and, to them, supersession means federal authority is exclusive. Pls.' Resp. 17. Here, they urge, "the existing regime of state and local regulations of oil and gas development simply coexist with federal requirements." *Id.* That statement is true only if federal regulations are never more stringent than state regulations. Otherwise, the more stringent federal regulation supersedes the state's, as could happen if BLM were to impose more onerous construction requirements on an oil field road or on the disposal of produced waters. In *Cowpasture River*, state and private requirements still applied to rights-of-way along the Appalachian Trail; it was the imposition of additional federal restrictions that raised the need for the plaintiffs to show with unequivocal and direct language that Congress intended that expansion of federal authority.

[8] Therefore, when Plaintiffs argue Intervenors fail to show what in FLPMA excludes Interior's authority to regulate development from private lands, Pls.' Resp. 10, the Intervenors continue to point to the plain meaning of the words Congress used.

Second, claiming Intervenors "play fast and loose with the text of the MLA," Pls.' Resp. 10, Plaintiffs argue the Secretary must regulate all surface-disturbing activities conducted pursuant to any lease issued under this chapter," *id.* (quoting 30 U.S.C. § 226(g)). Plaintiffs see a distinction between "activities conducted pursuant to any lease" and activities "within the lease area." *Id.* The law and the English language see no such distinction. The federal oil and gas lease does not give the federal lessee the right to enter the surface of non-federal fee owners to drill a well into neighboring federal minerals. The Intervenors' Fee/Fee/Fed wells are drilled only once the fee owners separately grant the operator leases or surface use agreements. Decl. of Rebecca A. Byram & David Broussard in Supp. of Private Intervenor-Defs.' Resp. to Pls.' Mot. for a Prelim. Inj. ¶¶ 26-27, 29, ECF No. 80-2; Decl. of Ryan Baker in Supp. of Private Intervenor-Defs.' Resp. to Pls.' Mot. for a Prelim. Inj. ¶¶ 26-27, ECF No. 80-4.

Plaintiffs even realize this. They assert that the "fact that surface use rights for a Fee/Fee/Fed well must be separately obtained from the surface owner does not change" the "fact" that "Fee/Fee/Fed operations are conducted in the course of carrying out" the federal lease. Pls.' Resp.10-11. But "Fee/Fee/Fed operations" (as Plaintiffs would use the phrase) include a great many activities, such as driving drill pipe from steel mills out of state to the well pad. No authority (judicial or technical) would interpret "operations conducted pursuant to the lease" in Plaintiffs' sweeping way. Plaintiffs rely on nothing more than an endlessly elastic use of the English language.

Third, Plaintiffs see a textual distinction within the relevant subsection of the MLA, 30 U.S.C. § 226(g). They acknowledge that the Secretary's duty to require a surface-use plan of operations is limited to operations "within the lease area." Pls.' Resp. 11. But, they stress, the subsection does not repeat the phrase "within the lease area" when discussing (the previously

analyzed) operations conducted "pursuant to" a lease and when discussing the lessee's duty to post a bond covering restoration of lands or waters after lease operations are abandoned. *Id.* Plaintiffs' points suffer two flaws. One is that, as already explained, "within the lease area" is the same area covered by the phrase "operations pursuant to the lease." The other is that the bond is (1) to be "established prior to the commencement of surface-disturbing activities on any lease" (and operations on neighboring fee lands are not on the federal lease), (2) to "ensure the complete and timely reclamation of the lease tract," and (3) to ensure the "restoration of any lands or surface waters adversely affected by lease operations."[9] 30 U.S.C. § 226(g) (emphasis added). Everything about the bond is tied to operations on the federal lease. Furthermore, Plaintiffs cannot explain why Congress would have limited the surface-use plan—the key regulatory feature of section 226(g)—to operations "within the lease area" but expand the bond requirement to operations anywhere.[10]

Plaintiffs have failed to show that FLPMA and MLA require the Secretary to regulate surface operations on non-federal fee.

II. BLM's Denial of Authority Is Reasonable under FLPMA and the MLA.

Plaintiffs argue that the court should afford the Secretary no deference in her interpretation of FLPMA and MLA. The *Chevron* doctrine is inapplicable, they believe, because the Fee/Fee/Fed interpretation is found in Instructional Memoranda instead of regulations adopted through rulemaking procedures. Pls.' Resp. 12. That argument first overlooks that through regulation the

[9] If lease operations cause impacts beyond the lease, the lessee must remediate them. But that is different from regulating operations on non-federal fee.

[10] Plaintiffs close by observing that the authority to lease minerals in "deposits owned by the United States" does not "purport to define the scope of agency authority to regulate development" of those minerals. Pls.' Resp. 11. More relevant to the issue here—the need to find unequivocal and direct language expanding the Secretary's authority beyond those lands—is that the same language does not expand federal authority to non-federal fee.

Department has limited its regulation of a lessee's operations to those on "the leased lands." *See* Def. Intervenors' Mot. at 11 (citing 43 C.F.R. § 3101.1-2). *Chevron* clearly is in play here.

Plaintiffs next overlook that the interpretation stated in the Instructional Memoranda was adopted by the Secretary in the Record of Decision for the Converse County Oil and Gas Project.[11] Because the Secretary adopted them, he made them "authoritative," coming from the highest officer in the Department. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2416 (2019) (court will not defer to a decision unless it is "authoritative"). And he adopted them after an extensive process of public review and comment on the project. The interpretation is therefore in a form appropriate for *Chevron* deference.

But whether the framework for deference is under *Chevron* or under *Auer v. Robbins*, Intervenors' further response is simplified by the Plaintiffs' repetition of points to try to show the Secretary's position is unreasonable and therefore unworthy of deference. They fault the Secretary, in adhering to the limitations on her authority, for failing to consider that Congress had already delegated its full authority under the Property Clause to the Secretary, a failure that caused the Secretary to ignore that "Supreme Court precedent establishes the reverse presumption" that Interior can do whatever it likes respecting lands outside the public lands unless Congress explicitly removes that authority. Pls.' Resp. 13-15, 16 ("reverse presumption") and 17 (Secretary ignored her "plenary authority" over public lands). It is with significant irony that Plaintiffs refer

[11] Bureau of Land Management, *Converse County Oil & Gas Project Record of Decision, Casper Field Office* (Dec. 23, 2020), at 4, available at https://eplanning.blm.gov/eplanning-ui/project/66551/570 (navigate to PDF titled "Converse.County.ROD.signed.by.Secretary12.23.2020") ("The BLM expects that most of the proposed drilling locations for federal Applications for Permit to Drill . . . within the [Project] would be located off of the federal lease, on non-federal lands, drilled directionally or horizontally to the leased federal minerals (a situation commonly referred to as 'fee-fee-fed,' and the subject of additional BLM policies and procedures).").

to the discussion in the Instructional Memoranda as "cursory statements devoid of any analysis," Pls.' Resp. 14, for Plaintiffs' core argument is as cursory as it gets. They quote the phrase "plenary authority over the public lands" and treat it as the equivalent of "plenary authority over Congress' full power under the Property Clause." They urge the view, without a scrap of evidence, that Congress intended the unheralded and unprecedented delegation of its Constitutional authority to one Department of government. They disregard "the vast economic and political significance" of the change they advocate. *Util. Air Regul. Grp.*, 573 U.S. at 324. And with nothing more than Plaintiffs' own say so, they brush aside the controlling principle governing this Motion. "Our precedents require Congress to enact exceedingly clear language if it wishes to significantly alter the balance between federal and state power and the power of the Government over private property." *Cowpasture River Pres. Ass'n*, 140 S. Ct. at 1849-50. Plaintiffs are not employing legal argument, merely more endlessly elastic English.[12]

III. Plaintiffs Must Demonstrate FLPMA and MLA Compel Interior to Regulate Non-Federal Fee.

Plaintiffs argue that to "prevail on this claim," they need only show that their three statutes (43 U.S.C. §§ 2, 1457, 1457c) give Interior authority to regulate Fee/Fee/Fed operations. Pls.' Resp. 5 n.3. But paragraph 148 of their First Amended Complaint, part of their Fifth Claim for Relief, says the reason the Department was arbitrary in declining to regulate operations on non-federal fee lands is because FLPMA and MLA "require[]" it. To save their Fifth Claim from judgment on the pleadings, they must prove what they claim.

[12] Plaintiffs argue the Department's interpretation is inconsistent with the provisions of Onshore Order No. 1 concerning the operator's bond. Pls.' Resp. 15 (arguing that the bond must cover operations on non-federal fee). There is no inconsistency. Onshore Order No. 1, however, provides that the bond "may consider impacts of activities on both Federal and non-Federal lands[.]" 72 Fed. Reg. 10308, 10333 (Mar. 7, 2007) (emphasis added). As explained in note 9 above, MLA requires the operator to remediate when operations on the lease cause impacts off-lease, including impacts on non-federal lands.

Citing *Sea-Land Service, Inc. v. Department of Transporation*, 137 F.3d 640 (D.C. Cir. 1998), Plaintiffs argue that Interior declined to regulate Fee/Fee/Fed operations solely based on a claim of lack of authority. Pls.' Resp. 5 n.3. Therefore, they believe, it suffices to show BLM has the authority to regulate for Plaintiffs to earn a preliminary injunction. But this Motion is not Plaintiffs' motion for a preliminary injunction; it is for judgment based on what they pled. And the Federal Defendants not only concur that Intervenors' Motion should be granted, they also assert that Interior's decision here included a determination that the exercise of authority over operations on non-federal fee lands "is not warranted." Defs.' Resp. to Def.-Intervenors' Mot. for Partial J. on the Pleadings 3, ECF No. 87. In the Record of Decision, for example, Secretary Bernhardt observed while addressing air quality concerns: "the BLM may rely on the State of Wyoming, which is subject to oversight by the EPA, to ensure permitted activities do not exceed of violate any State or Federal air quality standard under the Clean Air Act, including those under the authority of the Wyoming Department of Environmental Quality (WDEQ)." Record of Decision at PIR-0020-22, ECF No. 64-8. Unlike in *Sea-Land Service, Inc.*, Plaintiffs will need to prove this discretionary determination was arbitrary.

IV. It Is Inappropriate to Convert a Fraction of Its Preliminary Injunction Motion into a Motion for Summary Judgment.

Plaintiffs urge the Court to partially convert their Motion for Preliminary Injunction into a Motion for Partial Summary Judgment on only a portion of their Fifth Claim for Relief. See Pls.' Resp. at 3 & n.1. The Court should reject this request.

As an initial matter, conversion is generally inappropriate. *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981) ("[I]t is generally inappropriate for a federal court at the preliminary-injunction stage to give a final judgment on the merits."). The typical preliminary injunction briefing and procedures "are less formal and [based on] evidence that is less complete than in a

trial on the merits." *Id.* Courts will reject conversion when a party will be prejudiced. *See Int'l Swaps & Derivatives Ass'n v. U.S. Commodity Futures Trading Comm'n*, 887 F. Supp. 2d 259, 289 n.1 (D.D.C. 2012).

First, Plaintiffs cite no authority, and Intervenors have found none, that allows for conversion of only a portion of a claim. This makes sense as deciding only a portion of one claim (out of many) will provide no efficiencies. Second, this Court has rejected conversion when its jurisdiction is in question, and both Private Intervenors and the Federal Defendants have challenged Plaintiffs' standing. *Angelo v. Dist. of Columbia*, Civ. No. 22-1878 (RDM), 2022 WL 17974434, at *11 n. 3 (D.D.C. Dec. 28, 2022) (declining to consolidate when "Plaintiffs have not established a substantial likelihood that the Court has jurisdiction"). Third, conversion is only appropriate where the parties have had a full and fair opportunity to present their entire case on the merits. *See Int'l Swaps & Derivatives Ass'n*, 887 F. Supp. 2d at 289 n.1. That is not the case here. Plaintiffs hope to convert one of the most important issues in this case based on cramped briefing—among many other issues—in the preliminary injunction briefing while admitting their belief that something still remains to be briefed for their Fifth Claim for Relief. *See* Pls.' Resp. at 3 & n.1. Fourth, conversion will not be dispositive of the Court's analysis of the Fee/Fee/Fed issue. Continental and Devon still have counterclaims and crossclaims pending on the same issue. *See Melinta Therapeutics, LLC v. U.S. Food & Drug Admin.*, 2022 WL 6100188, at *1 n. 2 (D.D.C. Oct. 7, 2022) (converting PI to MSJ only because "Nexus does not make any counter or cross claims, the Court's entry of judgment in favor or Melinta is dispositive"). Finally, while a court can convert on its own, conversion is usually done after agreement between the parties. *See, e.g., Int'l Swaps & Derivatives Ass'n*, 887 F. Supp. 2d at 289 n.1 ("[T]he parties have concurred that this case is properly disposed of on summary judgment."). Plaintiffs never conferred on their

conversion request, and Intervenors object. The Court should reject Plaintiffs' request for conversion.

CONCLUSION

For the reasons stated in Intervenor-Defendants' opening Memorandum and this Reply, the Motion for Partial Judgment on the Pleadings should be granted.

Respectfully submitted this 26th day of May 2023.

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