IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WESTERN WATERSHEDS PROJECT, 126 S Main Street, Suite B P.O. Box 1770 Hailey, ID 83333, Plaintiff, v. BUREAU OF LAND MANAGEMENT, 1849 C Street N.W. Washington, DC 20240, Defendant.	Case No. 22-cv-2168 **COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

INTRODUCTION

1. This case challenges the Bureau of Land Management's (BLM) issuance of Permanent Instruction Memorandum 2018-014 (PIM 2018-014), which pertains to the development of federal oil and gas minerals from "Fee/Fee/Fed" wells.

2. Fee/Fee/Fed wells are those that drill directionally into subsurface federal minerals from adjacent non-federal lands overlying non-federal mineral estate. The use of Fee/Fee/Fed wells has surged over the past decade due to advances in directional drilling technologies. Whereas federal oil and gas leases were traditionally developed from the lease surface itself, directional drilling and the checkerboard ownership pattern of western lands now allows developers to tap federal minerals from adjacent private or state lands. Today, the majority of BLM-permitted wells in top-producing states like Wyoming involve a Fee/Fee/Fed scenario.

3. In 2018, BLM issued PIM 2018-014, entitled "Directional Drilling into Federal Mineral Estate from Well Pads on Non-Federal Locations." PIM 2018-014 purports to strip BLM officials of the power to regulate surface operations associated with Fee/Fee/Fed wells, claiming it is beyond BLM's jurisdiction. It also purports to relieve developers of various bonding, reporting, and operating requirements for Fee/Fee/Fed wells.

4. PIM 2018-014 creates an unwarranted loophole in BLM oversight of federal oil and gas development. Since it was issued, BLM has approved the fracking and drilling of hundreds of wells without any restrictions on toxic air emissions, water and soil contamination, wildlife disruptions, noise and visual intrusions, and other impacts. This unchecked extraction of publicly-owned minerals threatens significant public and environmental harm, including to adjacent and downstream public lands and communities.

5. PIM 2018-014 also violates federal law. The Mineral Leasing Act (MLA), Federal Land Policy and Management Act (FLPMA), and their implementing regulations not only authorize but *require* BLM to regulate Fee/Fee/Fed wells and prohibit the exemptions granted by PIM 2018-014. In particular, the MLA requires BLM to "regulate all surface-disturbing activities conducted pursuant to any" federal mineral lease. 30 U.S.C. § 226(g). FLPMA further requires BLM to "regulate . . . [the] development of" federal minerals, 43 U.S.C. §§ 1702(e), 1732(b), and to "take any action necessary to prevent unnecessary or undue degradation of the lands," *id.* § 1732(b). None of these authorities exempt federal mineral development where surface facilities are located on nonfederal lands.

6. Nor is BLM otherwise prohibited from regulating federal minerals in ways that implicate nonfederal lands. To the contrary, BLM has authority flowing from the Property Clause to "prohibit absolutely or fix the terms on which [federal] property may be used." *Light v.*

*United State*s, 220 U.S. 523, 536 (1911). Thus, like any other mineral estate owner, BLM has authority to condition the extraction of federal minerals on the developer's agreement to engage in, or refrain from, certain conduct on private lands. Separately, the Property Clause authorizes the regulation of conduct on private lands, such as development of Fee/Fee/Fed wells, so as to protect nearby public lands. *United States v*. *Alford*, 274 U.S. 264, 267 (1927).

7. In adopting PIM 2018-014, BLM failed to consider these legal authorities, resting instead on an unadorned and untenable disavowal of jurisdiction.

8. Accordingly, Plaintiff Western Watersheds Project seeks an order vacating PIM 2018-014 and declaring that BLM's issuance of PIM 2018-014 was arbitrary, capricious, and not in accordance with law.

JURISDICTION AND VENUE

9. The Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331 because this action arises under federal law.

10. The Court is authorized to award the requested relief under 28 U.S.C. §§ 2201, 2202 and 5 U.S.C. §§ 702, and 706.

11. The challenged agency actions are final and subject to judicial review pursuant to 5 U.S.C. §§ 702, 704, and 706.

12. Venue is proper in this Court under 28 U.S.C. § 1391(e) because Defendant BLM is based in Washington, D.C., BLM adopted PIM 2018-104 in this district, and BLM applies PIM 2018-014 on a nationwide basis in administering its oil and gas program.

PARTIES

13. Plaintiff WESTERN WATERSHEDS PROJECT (WWP) is a non-profit membership organization founded in 1993 with the mission of protecting and restoring public

lands and natural resources of the American West. WWP is actively engaged in efforts to protect and preserve native ecosystems, watersheds, fish and wildlife, and other natural resources and ecological values throughout the West.

14. WWP has over 12,000 members, supporters, staff, and board members throughout the United States, including in Montana, Nevada, New Mexico, Wyoming, Utah, and other states where federal oil and gas leases are being auctioned and developed. Many of these individuals live, work, and recreate in lands impacted or threatened by Fee/Fee/Fed well development, and view wildlife affected by Fee/Fee/Fed well development. They derive recreational, educational, inspirational, scientific, and aesthetic benefit from their activities on these lands, and intend to continue doing so in the future.

15. As a result of PIM 2018-014, the development of Fee/Fee/Fed wells will entail more harmful impacts to the viewsheds, air quality, water, wildlife, native vegetation, and other natural resources that Plaintiffs' staff and members use and enjoy. Accordingly, BLM's issuance of PIM 2018-014 has and will continue to injure the aesthetic, recreational, and other interests of Plaintiff's staff, members, and supporters, if not vacated. The requested relief would remedy those harms. Apart from this action, Plaintiffs and their staff, members, and supporters have no adequate remedy at law to address the foregoing injuries to their interests.

16. Defendant BUREAU OF LAND MANAGEMENT (BLM) is the agency within the U.S. Department of Interior responsible for carrying out the Department's legal obligations and authority as to the development of federal oil and gas resources. BLM is headquartered in Washington, D.C., where it developed and issued PIM 2018-014.

BACKGROUND

A. BLM AUTHORITY OVER THE DEVELOPMENT OF FEDERAL OIL AND GAS RESOURCES

17. BLM oversees more than 245 million acres of land and 700 million subsurface acres of federal mineral estate. Congress has delegated to BLM, through the Secretary of Interior, plenary authority over these resources pursuant to a patchwork of statutes, including the MLA and FLPMA. Congress's authority for these delegations of power, in turn, is the Property Clause of Article IV the U.S. Constitution.

18. These and other authorities vest BLM with considerable power and duties to regulate both the surface and downhole operations associated with Fee/Fee/Fed well development.

i. Property Clause of the U.S. Constitution

19. BLM's authority over Fee/Fee/Fed wells is grounded in the Property Clause of Article IV of the U.S. Constitution, which declares that "Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. Const. art. IV, sec. 3, cl. 2.

20. Federal mineral estate is property belonging to the United States.

21. The Property Clause vests Congress with essentially two kinds of power: "proprietary" and "sovereign." *See Light v. United State*s, 220 U.S. 523, 536–38 (1911). The proprietary power encompasses the right to "prohibit absolutely or fix the terms on which [federal] property may be used." *Id.* at 536 This power is "without limitations" and Congress is free to fashion whatever limits it chooses "consistent with its views of public policy[.]" *United States v. City of San Francisco*, 310 U.S. 16, 29–30 (1940). The sovereign power encompasses

the right to "legislat[e] for the protection of the public lands." *Camfield v. United States*, 167 U.S. 518, 525–26 (1897).

22. Both powers permit regulation of conduct on nonfederal land. *See Kleppe v. New Mexico*, 426 U.S. 529, 538 (1976) ("the Property Clause is broad enough to reach beyond territorial limits.").

23. First, by virtue of its proprietary authority, the federal government may condition the use of its property on the developer's agreement to engage in, or refrain from, certain activities on private lands. *See, e.g.*, *City of San Francisco*, 310 U.S. at 28–30; *Federal Power Comm'n v. Idaho Power Co.*, 344 U.S. 17 (1952) (both upholding a federal land use condition affecting nonfederal property).

24. Second, pursuant to its sovereign authority, the federal government may regulate private activities on nonfederal property that affect public lands. *See United States v. Alford*, 274 U.S. 264, 267 (1927) ("Congress may prohibit the doing of acts upon privately owned lands that imperil" public lands); *Camfield*, 167 U.S. at 528 (holding that the Property Clause permits federal regulation of fences built on private land adjoining public land).

25. Congress has delegated its Property Clause authority to the Secretary of Interior through a patchwork of statutes. In addition to delegations under the MLA and FLPMA described below, Congress has broadly charged the Secretary with "perform[ing] all executive duties . . . anywise respecting . . . public lands," 43 U.S.C. § 2 , and supervising all "public business relating to . . . [p]ublic lands, including mines[.]" 43 U.S.C. § 1457. Congress further authorized the Secretary to "enforce and carry into execution, by appropriate regulations, every part of the provisions of . . . [the Title dealing with public lands] not otherwise specifically provided for." 43 U.S.C. § 1457c.

26. The Supreme Court has held that these enactments vest the Secretary of Interior with "plenary authority" over the public lands and minerals. *Best v. Humboldt Placer Min. Co.*, 371 U.S. 334, 336 (1963); *see also Boesche v. Udall*, 373 U.S. 472, 476 (1963).

27. The Supreme Court has also held that authority over federal lands and minerals falls "wholly and absolutely within the jurisdiction" of the Secretary of Interior "in the absence of some specific provision to the contrary[.]" *Corp. of the Catholic Bishop of Nesqually v. Gibbon*, 158 U.S. 155 (1895); *see also Cameron v. United States*, 252 U.S. 450 (1920) ("Unless taken away by some affirmative provision of law, the Land Department has jurisdiction over the subject.") (quoting *Cosmos Exploration Co. v. Gary Eagle Oil Co.*, 190 U.S. 301, 308 (1903).

ii. **Federal Land Policy and Management Act (FLPMA)**

28. The Federal Land Policy and Management Act (FLPMA), 43 U.S.C. §§ 1701–87, vests in the Secretary of Interior general management authority over the public lands. *Id.* § 1732.

29. The Secretary has delegated this authority to the BLM. Dep't of Interior, 235 Departmental Manual 1 (Oct. 5, 2009); Dep't of Interior, 235 Departmental Manual 3 (May 27, 1983).

30. The term "public lands" as used in FLPMA includes any interest in land owned by the United States, including federal mineral estate. 43 U.S.C. § 1702(e); 43 C.F.R. § 5400.0-5.

31. FLPMA provides that the Secretary "shall regulate the use, occupancy, and development of the public lands." 43 U.S.C. § 1732(b).

32. FLPMA provides that the Secretary "shall" manage public lands "for multiple use and sustained yield." *Id.* § 1732(a). Its definition of "multiple use" calls for "harmonious and coordinated management of the various resources without permanent impairment of the

productivity of the land and the quality of the environment with consideration being given to the relative values of the resources and not necessarily the combination of uses that will give the greatest economic return or the greatest unit output." *Id.* § 1702(c).

33. FLPMA further directs that the Secretary "shall" take any action necessary to prevent "unnecessary or undue degradation" of public lands. *Id.* § 1732(b). This duty is "the heart of FLPMA." *Mineral Policy Center v. Norton*, 292 F. Supp.2d 30, 42. (D.D.C. 2003).

34. It announces a broader policy that public lands and minerals be managed "in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values." 43 U.S.C. § 1701(a)(8).

35. FLPMA also authorizes the Secretary of Interior to "issue regulations necessary to implement the provisions of [FLPMA] with respect to the management, use, and protection of the public lands." *Id.* § 1733(a).

36. Pursuant to FLPMA, BLM has issued general regulations governing leases, easements, and permits to use public lands. *See* 43 C.F.R. pt. 2920. They require BLM to include terms and conditions in every lease and permit that "[m]inimize damage to scenic, cultural and aesthetic values, fish and wildlife habitat and otherwise protect the environment," "[p]rotect the interests of individuals living in the general area of the use who rely on the fish, wildlife and other biotic resources of the area for subsistence purposes," "[r]equire the use to be located in an area which shall cause least damage to the environment," and "[o]therwise protect the public interest." *Id.* § 2920.7(b)(2)–(3), (c)(4)–(6).

iii. **Mineral Leasing Act (MLA)**

37. Congress has repeatedly directed the Secretary of Interior to oversee the development of federal oil and gas deposits, including through the Mineral Leasing Act of 1920

(MLA), 30 U.S.C. §§ 181–287, and the Mineral Leasing Act for Acquired Lands of 1947 (MLAAL), 30 U.S.C. §§ 351–59 (extending MLA to acquired land).

38. In enacting the MLA, Congress sought to "expand, not contract, the Secretary's control over the mineral lands of the United States" and to "reserv[e] to the Government the right to supervise, control, and regulate" the development of federal mineral resources. *Boesche*, 373 U.S. at 481 (quoting H.R. Rep. No. 65-1138, at 19 (1919) (Conf. Rep.)).

39. The Secretary fully delegated this authority to BLM for onshore minerals on federal lands. *See* 48 Fed. Reg. 8,803, 8,983 (Mar. 2, 1983); Dep't of Interior, 235 Departmental Manual 1.1 (Oct. 5, 2009).

40. Pursuant to this delegated authority, BLM has promulgated regulations under the MLA governing onshore oil and gas operations. 43 C.F.R. pt. 3160.

41. The MLA authorizes the Secretary of the Interior to offer certain federal minerals for lease, including oil and gas. 30 U.S.C. § 226. It subjects such leases "to exacting restrictions and continuing supervision by the Secretary[.]" *Boesch*, 373 U.S. at 477–78.

42. In particular, the MLA provides that the Secretary of Interior "shall regulate all surface-disturbing activities conducted pursuant to any lease issued under this chapter, and shall determine reclamation and other actions as required in the interest of conservation of surface resources." 30 U.S.C. § 226(g). Congress did not confine this duty to surface disturbance on federal lands.

43. Leaseholders must submit an Application for Permit to Drill (APD) "for each well" proposed to be drilled into a lease, 43 C.F.R. § 3162.3-1(c), and "[n]o drilling operations, nor surface disturbance preliminary thereto, may be commenced prior to the authorized officer's approval of the [APD]." *Id.*

44. A "complete" APD must include a "surface use plan of operations." *Id.* § 3162.3-1(d)(2).

45. Each well must be drilled at a location that has been "surveyed" and "approved or prescribed" by BLM. *Id.* § 3162.3-1(a).

46. BLM has broad discretion to attach terms and conditions, known as "Conditions of Approval," to an approved APD. In addition to those provided for in the lease itself, BLM may subject an APD to any "reasonable measures . . . to minimize adverse impacts to other resource values, land uses or users" as well as "restrictions deriving from specific, nondiscretionary statutes." *Id.* § 3101.1-2.

47. In addition to such Conditions of Approval, leaseholders are required by regulation to "conduct operations in a manner which protects the mineral resources, other natural resources, and environmental quality," *id.* § 3162.5-1(a), and to "exercise due care and diligence to assure that leasehold operations do not result in undue damage to surface or subsurface resources," *id.* § 3162.5-1(b).

48. The MLA also requires the Secretary to collect a bond sufficient "to ensure the complete and timely reclamation of the lease tract, and the restoration of any lands or surface waters adversely affected by lease operations after the abandonment or cessation of oil and gas operations on the lease." *Id.*

49. BLM regulations similarly require every lease operator to post a bond sufficient to ensure "complete and timely plugging of the well(s), reclamation of the lease area(s), and the restoration of any lands or surface waters adversely affected by lease operations[.]" *Id.* § 3104.1(a).

50. BLM regulations further specify that the operator must "reclaim the disturbed surface" upon the conclusion of operations. *Id.* § 3162.5-1(b); *see also id.* § 3162.3-4 ("Upon the removal of drilling or producing equipment from the site of a well which is to be permanently abandoned, the surface of the lands disturbed in connection with the conduct of operations shall be reclaimed in accordance with a plan first approved or prescribed by the authorized officer.").

51. None of the aforementioned regulations are limited to impacts or activities on federal lands or the leasehold itself, as are other sections of this same subchapter. *See, e.g.*, *id.* § 3163.1 (imposing a penalty for unapproved "surface disturbance on Federal or Indian surface"); *id.* § 3162.3-3 (imposing requirements for surface disturbance "on the leasehold"); *id.* § 3104.1(a) (specifying requirement applicable to "the lease area").

52. In addition to these specific directives, the MLA broadly authorizes BLM to "prescribe necessary and proper rules and regulations and to do any and all things necessary to carry out and accomplish the purposes" of the Act. 30 U.S.C. § 189. The MLA's purposes include protecting "the interests of the United States," safeguarding "the public welfare," and conservation of surface resources. *Id.* §§ 187, 226.

iv. **Onshore Order 1**

53. BLM regulations authorize the BLM Director to issue Onshore Oil and Gas Orders when necessary to implement and supplement the regulations found in part 3160. 43 C.F.R. § 3164.1. Onshore Oil and Gas Orders are binding. *Id.*

54. Onshore Order 1 has been in effect since October 21, 1983, and was most recently revised in 2017. *See* Onshore Oil and Gas Order 1, 72 Fed. Reg. 10,308, 10,331 (Mar. 7, 2007); 82 Fed. Reg. 2906 (January 10, 2017) (amendment).

55. Onshore Order 1 provides that a complete APD package "must contain . . . a Surface Use Plan of Operations." 72 Fed. Reg. at 10,329.

56. It also prohibits operators from "commenc[ing] either drilling operations or preliminary construction activities before the BLM's approval of the APD" and provides that "[d]rilling without approval or causing surface disturbance without approval is a violation of 43 CFR 3162.3–1(c) and is subject to a monetary assessment under 43 CFR 3163.1(b)(2)."

57. Onshore Order 1 confirms that BLM, in determining the bond amount, "may consider impacts of activities on . . . non-Federal lands required to develop the lease that impact lands, waters, and other resources off the lease[.]" 72 Fed. Reg. at 10,333.

58. It further requires operators to "conduct operations to minimize adverse effects to surface and subsurface resources, prevent unnecessary surface disturbance, and conform with currently available technology and practice" and provides that "[i]f historic or archaeological materials are uncovered during construction, the operator must immediately stop work that might further disturb such materials [and] contact the BLM."

v. **BLM Standard Lease Forms**

59. In addition to these sources of statutory, and regulatory authority, BLM retains broad contractual rights under the standard terms of its oil and gas leases to regulate the manner in which the leased minerals are developed.

60. Section 6 of BLM's standard lease form requires the leaseholder to "conduct operations in a manner that minimizes adverse impacts to the land, air, and water, to cultural, biological, visual, and other resources, and to other land uses or users." It permits BLM to impose "reasonable measures deemed necessary . . . to accomplish the intent of this section."

61. Section 12 of the standard lease form requires the leaseholder, at the conclusion of operations, to "reclaim the land."

62. Whereas the standard lease form elsewhere uses the term "leased lands" and "leased premises" when specifying provisions applicable to the lease surface itself, these operations and reclamation requirements are not limited to operations on the lease surface.

B. BLM'S ADOPTION OF PIM 2018-014

63. BLM issued Permanent Instruction Memorandum (PIM) 2018-04, entitled "Directional Drilling Into Federal Mineral Estate From Well Pads on Non-Federal Locations," on June 12, 2018 to all BLM field offices. *See* https://www.blm.gov/policy/pim-2018-014. The document states that it supersedes prior Instruction Memorandum (IM) 2009-078.

64. Brian C. Steed, then-BLM Deputy Director of Policy and Programs, signed PIM 2018-014.

65. PIM 2018-014 provides directions to BLM staff regarding APD processing for "wellbores that produce Federal minerals from well pads that are located on . . . lands where both the surface and the mineral estate are not owned or managed by the United States." These wells are commonly referred to as "Fee/Fee/Fed" wells, with "Fee" referring to ownership other than federal.

66. Fee/Fee/Fed wells differ from "split-estate" wells, in which the drill site is located on non-federal surface directly overlying federal minerals.

67. PIM 2018-014 states that "BLM's regulatory jurisdiction is limited to Federal lands (including minerals). . . . BLM's jurisdiction extends to surface facilities on entirely non-Federal lands solely to the extent of assuring production accountability for royalties from Federal

and Indian oil and gas (including prevention of theft, loss, waste, and assuring proper measurement)."

68. It further asserts that BLM lacks authority "to require mitigation of surface disturbances on non-Federal lands."

69. As to bond requirements, PIM 2018-014 states that "bonds for Fee/Fee/Fed wells should be used to address downhole concerns only" and that "BLM does not have authority to require a bond to protect non-Federal surface owner interests."

70. PIM 2018-014 further provides that a Surface Use Plan of Operations (SUPO) is not required for Fee/Fee/Fed wells, and that if submitted, BLM will not enforce its provisions. Relatedly, it asserts that "BLM has no jurisdiction to require an APD before an operator may begin pad and road construction or drilling on the non-Federal land," and that an "APD approval is necessary before an operator may drill into the Federal mineral estate itself."

71. PIM 2018-014 contains no analysis of the applicable legal authorities or explanation of how its terms are consistent with them.

C. PIM 2018-014 MISCONSTRUES AND CONTRAVENES FEDERAL LAW PERTAINING TO FEE/FEE/FED WELLS.

72. PIM 2018-014 fundamentally misconstrues the scope of BLM jurisdiction over Fee/Fee/Fed wells and improperly exempts both BLM and lease operators of various bonding, reporting, and operational requirements for these projects in the following key ways:

i. Mitigation of Surface Disturbances

73. PIM 2018-014 claims that BLM lacks authority "to require mitigation of surface disturbances on non-Federal lands."

74. This violates the plain text of the MLA, which requires BLM to regulate "all surface-disturbing activities conducted pursuant to" federal mineral leases. 30 U.S.C. § 226(g) (underscore added). Congress did not confine this duty to surface disturbance on federal lands.

75. It further violates FLPMA, which provides that BLM "shall . . . regulate . . . the development" of federal minerals. 43 U.S.C. §§ 1732(b) (underscore added); *see also* 1702(e) (definition of public lands). This broad delegation places no restrictions on BLM's authority to regulate activities on nonfederal lands used to develop federal minerals.

76. BLM's disclaimer of authority also contravenes its statutory duty under FLPMA to manage federal mineral development so as to protect air and atmospheric values, 43 U.S.C. §§ 1701(a)(8), 1732(b), and to "take any action necessary to prevent unnecessary or undue degradation of the lands," 43 U.S.C. § 1732(b). The term "any action" admits of no exceptions.

77. It is also inconsistent with BLM regulations, which require every BLM permit to include terms and conditions that "[m]inimize damage to scenic, cultural and aesthetic values, fish and wildlife habitat and otherwise protect the environment," "[p]rotect the interests of individuals living in the general area of the use who rely on the fish, wildlife and other biotic resources of the area for subsistence purposes," "[r]equire the use to be located in an area which shall cause least damage to the environment," and "[o]therwise protect the public interest." 43 C.F.R. § 2920.7(b)(2)-(3), (c)(4)-(6). These requirements are not limited to the leasehold itself, as are other sections of this same subchapter. *See, e.g.*, *id.* §§ 3104.1(a), 3162.3-3, 3163.1.

78. BLM's onshore oil and gas regulations also permit the agency to subject an APD to any "reasonable measures . . . to minimize adverse impacts to other resource values, land uses or users[.]" *Id.* § 3101.1-2; *see also id.* § 3162.5-1. BLM's standard lease form and Onshore

Order 1 contain similar authorizations. These provisions do not prohibit BLM from conditioning its APD approvals on mitigation measures implicating nonfederal lands.

ii. Surface Use Plan of Operations

79. PIM 2018-014 provides that a Surface Use Plan of Operations will not be required for Fee/Fee/Fed wells, and that if one is submitted, BLM will treat it as "purely informational" and will not "approve, disapprove, or enforce" the Plan.

80. This contravenes 43 C.F.R. § 3162.3-1(d)(2), which requires a Surface Use Plan of Operations to be submitted for BLM approval with every APD.

81. It also contravenes 43 C.F.R. § 3163.1, which requires BLM to take enforcement action for noncompliance with any portion of an approved APD.

iii. Reclamation

82. PIM 2018-014 asserts that "[a]ctual reclamation of the surface" of Fee/Fee/Fed wells "is a matter to be settled by the surface owner" and, more broadly, claims that BLM jurisdiction over surface disturbance on non-Federal lands extends "solely to the extent of assuring production accountability for royalties."

83. This contravenes BLM regulations, which explicitly require that "the surface of the lands disturbed in connection with the conduct of operations shall be reclaimed in accordance with a plan first approved or prescribed by" BLM. 43 C.F.R. § 3162.3-4 (underscore added); *see also id.* § 3162.5-1(b) (the operator must "reclaim the disturbed surface" upon the conclusion of operations); 30 U.S.C. § 226(g) (requiring bond sufficient to ensure "restoration of any lands or surface waters adversely affected by lease operations") (underscore added).

84. This requirement is not limited to surface disturbance on federal lands or the leasehold itself, as are other sections of this same subchapter. *See, e.g.*, 43 C.F.R. § 3163.1; *id.* § 3162.3-3; *id.* § 3104.1(a).

iv. Bonding

85. PIM 2018-014 claims that "bonds for Fee/Fee/Fed wells should be used to address downhole concerns only" and that "BLM does not have authority to require a bond to protect non-Federal surface owner interests."

86. This contravenes BLM's statutory duty under the MLA to collect a bond sufficient to ensure "reclamation of the lease tract, and the restoration of any lands or surface waters adversely affected by lease operations." 30 U.S.C. § 226(g) (underscore added); *see also* 43 C.F.R § 3104.1(a). Onshore Order 1 confirms that BLM, in determining the bond amount, "may consider impacts of activities on . . . non-Federal lands required to develop the lease that impact lands, waters, and other resources off the lease[.]" 72 Fed. Reg. at 10,333 (underscore added).

D. PIM 2018-014 CONFLICTS WITH PAST AND CURRENT AGENCY PRACTICE AND POLICY.

87. The argument that BLM lacks the statutory authority to regulate surface operations associated with Fee/Fee/Fed wells also contradicts past and current agency practice and policy.

88. On information and belief, BLM has attached mandatory conditions of approval pertaining to surface operations on past Fee/Fee/Fed well approvals. PIM 2018-014 does not acknowledge this prior practice or explain the reason for BLM's policy shift.

89. PIM 2018-014 is also irreconcilable with BLM's current policy as to split estate wells, which are those drilled from private surface directly into underlying federal minerals.

BLM has long asserted authority to regulate surface operations associated with split-estate wells, even though they are located on private land, and generally subjects split-estate wells to the same restrictions as those on federal land.

90. BLM has never explained how the MLA, MLAAL, and FLPMA can possibly be read to authorize the regulation of surface operations on private lands for split-estate wells but not Fee/Fee/Fed wells. In the split-estate context, common law considers the mineral estate to be "dominant" and gives the mineral owner the right to use so much of the surface as is reasonably necessary for development of the underlying minerals. In contrast, a Fee/Fee/Fed developer must enter into a private surface use agreement with the landowner to develop offsite minerals. However, that property law distinction does not deprive BLM of regulatory authority over Fee/Fee/Fed wells. It simply means that a Fee/Fee/Fed well cannot be developed absent a surface owner's consent to any BLM-imposed conditions. Stated otherwise, the surface owner's power in these contexts differs but BLM's authority over the leaseholder does not.

91. PIM 2018-014 also contradicts BLM practice, in many other contexts including mineral development, of conditioning the use of federal property on the developer's agreement to certain actions on nonfederal lands, such as offsite compensatory mitigation.

92. Finally, PIM 2018-014 contradicts decisions from the Interior Board of Land Appeals confirming that BLM and the Department of Interior have power to reach beyond the lease surface in conditioning a leaseholder's activities. *See Cominco American Inc.*, 26 IBLA 329, 335, 339 (1976) (upholding a stipulation in a phosphate lease even though it applied to privately-owned lands used in conjunction with the lease, reasoning that a party that "chooses to receive the benefits of leasing federal land . . . must also assume the burdens, one of which is responsibility for mitigating adverse environmental impacts resulting from the exploitation of

federally reserved minerals."); *Grindstone Butte Project*, 24 IBLA 49, 52 n. 3 (1976) (upholding a BLM reclamation requirement for portions of an irrigation right-of-way that were located on private lands, rejecting the contention that BLM cannot "dictate requirements on private lands influenced by a federally approved action.").

93. BLM failed to acknowledge or reconcile PIM 2018-034 with these conflicting practices and pronouncements.

E. BLM'S IMPLEMENTATION OF PIM 2018-014

94. Since 2018, BLM has applied PIM 2018-014 to allow extensive development of federal minerals without mandatory protections for wildlife, air, water, and other resources and legally-required surface use plans of operation, mitigation of surface disturbances, reclamation, and bonding.

95. In 2021, roughly one quarter of all BLM-approved oil and gas wells nationwide involved a Fee/Fee/Fed scenario. In the states of Wyoming, Montana, Colorado, and North Dakota, this share exceeded 50%.

96. In authorizing Fee/Fee/Fed wells, BLM staff treat PIM 2018-014 as binding and cite it as the basis for excluding surface use plans of operation, mitigation, bonding, reclamation, reporting, and other requirements that are ordinarily required for development of federal minerals.

97. Examples of standard BLM mitigation measures that, pursuant to PIM 2018-014, are not being applied to Fee/Fee/Fed wells include: wildlife protections; erosion and runoff controls; water conservation and recycling requirements; fugitive dust and exhaust reduction measures; controls on handling and storage of toxic wastewater; project-related traffic restrictions; and noise controls.

98. BLM's implementation of PIM 2018-014 thus threatens substantial and irreparable harm, including to public lands and communities surrounding Fee/Fee/Fed wells. Although located on nonfederal lands, Fee/Fee/Fed wells generate toxic pollutants that can impair air quality, visibility, and human health for large distances. They fuel climate change and disturb regional wildlife populations. By introducing unsightly industrial structures and noise, Fee/Fee/Fed wells can also degrade the scenic viewsheds and soundscapes of nearby wildlands. Fee/Fee/Fed wells also deplete and risk contaminating surface and groundwater resources.

99. BLM has applied PIM 2018-014 to approve harmful fracking and drilling projects in numerous areas of the public lands treasured by Plaintiff and its members, staff and supporters.

100. By way of example, BLM has approved hundreds of Fee/Fee/Fed wells in important wildlife habitat in the Powder Basin of Wyoming, which has extensive intermingled surface estates and Fee/Fee/Fed wells. These wells threaten some of the remaining strongholds for the greater sage-grouse and other imperiled species. BLM's refusal to require standard mitigation measures for such wells under PIM 2018-014 threatens the viability of these wildlife populations and irreparable environmental harm to the Powder River basin.

101. Unless PIM 2018-014 is held unlawful by this Court, BLM will continue implementing PIM 2018-014 in approving Fee/Fee/Fed wells across the country for the foreseeable future, causing further irreparable environmental losses and harms.

102. Accordingly, Plaintiff reserves the right to amend and/or supplement this Complaint to seek judicial relief for BLM actions authorizing Fee/Fee/Fed development in reliance on PIM 2018-014.

CLAIM FOR RELIEF

PIM 2018-014 is Arbitrary, Capricious, and Contrary to Law in Violation of the Administrative Procedure Act (5 U.S.C. § 706(2)(A))

103. Plaintiff incorporates by reference all preceding paragraphs.

104. The Administrative Procedure Act (APA) requires courts to "hold unlawful and set aside" final agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

105. PIM 2018-014 is a final agency action subject to judicial review.

106. PIM 2018-014 is contrary to the MLA, MLAAL, FLPMA, their implementing regulations, and other laws governing public lands and minerals. As described more fully above, PIM 2018-014 improperly disclaims BLM's authority and duty to regulate the surface disturbance associated with Fee/Fee/Fed wells and unlawfully exempts operators from various bonding, reclamation, operational, and reporting requirements for Fee/Fee/Fed wells.

107. PIM 2018-014 is also arbitrary and capricious. In promulgating PIM 2018-014, BLM offered no reasonable explanation for how its provisions comply with federal law, instead resting on bare and legally erroneous assertions about the scope of its jurisdiction. BLM failed to explain how PIM 2018-014 is consistent with its duties and authority under the MLA, MLAAL, FLPMA, and other relevant authorities.

108. BLM also failed to consider important aspects of the problem, including the plain text, purpose, and judicial interpretations of the relevant constitutional, statutory, and regulatory authorities.

109. Finally, BLM failed to reconcile PIM 2018-014 with its own past and present practices and interpretations of its authority under the MLA, MLLAL, and FLPMA.

110. For the foregoing reasons, PIM 2018-014 must be set aside as arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law under 5 U.S.C. § 706(2)(A).

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully pray that this Court grant the following relief:

(1) Declare, hold and adjudge that PIM 2018-014 is unlawful under the MLA, MLAAL, FLPMA, APA, and/or their implementing regulations;

(2) Vacate and set aside PIM 2018-014;

(3) Enter such preliminary and/or permanent injunctive relief as Plaintiff may pray for hereafter;

(4) Award Plaintiff's costs incurred in pursuing this action, including attorney's fees, as authorized by the Equal Access to Justice Act, 28 U.S.C. § 2412(d), and other applicable provisions; and

(5) Grant such other and further relief as the Court deems just and proper.

Dated: July 22, 2022

Respectfully submitted.

/s/ Todd C. Tucci
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