IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:24-cv-1608

CENTER FOR BIOLOGICAL DIVERSITY,

Petitioner,

v.

KEITH E. BERGER, in his official capacity as Field Manager for the U.S. Bureau of Land Management's Royal Gorge Field Office, and BUREAU OF LAND MANAGEMENT,

Respondents.

PETITION FOR REVIEW OF AGENCY ACTION

INTRODUCTION

1. This case challenges a set of Bureau of Land Management (BLM) decisions concerning oil and gas development in northeastern Colorado from "Fee/Fee/Fed" wells, which are wells that use directional drilling to extract federal minerals from neighboring private or state surface lands. Specifically, Petitioner Center for Biological Diversity challenges three decisions of Respondents BLM and Field Manager Keith E. Berger approving a total of 26 Applications for Permit to Drill federal oil and gas deposits from Fee/Fee/Fed wells in Weld County, Colorado ("Colorado APD Decisions"). Petitioner also challenges BLM Permanent Instruction Memorandum 2018-014 ("PIM 2018-014"), which governs the approval and development of Fee/Fee/Fed wells, including the Colorado APD Decisions challenged here.

2. PIM 2018-014, entitled "Directional Drilling into Federal Mineral Estate from Well Pads on Non-Federal Locations," purports to strip BLM officials of the power to regulate

surface operations associated with Fee/Fee/Fed wells, including to reduce air emissions, water and soil contamination, wildlife disruptions, noise and visual intrusions, and other impacts. It also relieves Fee/Fee/Fed well developers of ordinary bonding, reporting, and operating requirements. PIM 2018-014 thus allows private developers to reap the benefits of extracting public minerals without assuming the burden of properly mitigating the resulting harms.

3. This is a particular concern for the state of Colorado, where the majority of BLM-permitted wells today involve a Fee/Fee/Fed scenario. The use of Fee/Fee/Fed wells has surged in Colorado over the past decade due to advances in directional drilling technology. Whereas federal oil and gas leases were traditionally developed from vertical wells located atop the federal lease itself, directional drilling and the checkerboard ownership pattern of public lands now allows developers to tap federal minerals from adjacent private or state lands. This unchecked extraction of publicly owned minerals threatens significant harm to Colorado communities and natural resources.

4. Most of Colorado's Fee/Fee/Fed oil and gas wells are located in the Front Range, the most populous region of the state and home to the state's largest cities. Ozone concentrations in the Front Range have for decades exceeded the health-based ozone standard of 70 parts per billion, and the U.S. Environmental Protection Agency has designated the region as an ozone nonattainment area. Fracking and drilling contribute to elevated ground-level ozone concentrations, which in turn has profound effects on human health. Due to PIM 2018-014, BLM refuses to impose, monitor, or enforce any mandatory measures to reduce the ozone or other air quality impacts of Fee/Fee/Fed wells. All three of the challenged Colorado APD Decisions contribute to Front Range ozone concentrations.

5. The Pawnee National Grassland is another Colorado resource particularly hard-hit by Fee/Fee/Fed well development. This 300-square-mile landscape of interspersed federal public and private lands is a popular northern Colorado recreation destination for residents in the northern Front Range. It contains some of the country's last remaining native shortgrass prairie and is a renowned bird and wildlife viewing destination. Nonetheless, the federal lands in the Pawnee National Grassland are increasingly being drilled and fracked from adjacent private lands via Fee/Fee/Fed wells. Because of PIM 2018-014, the intensifying oil and gas development in and around the Grassland occurs with minimal BLM oversight to reduce harms to wildlife, air and water, dark night skies, and the aesthetic and visual character of the Grassland. Two of the challenged Colorado APD Decisions are located in the Grassland.

6. BLM's abdication of authority over the surface operations for Fee/Fee/Fed wells—a position it adopted in PIM 2018-014 and applied to the three Colorado APD Decisions—is arbitrary, capricious, and contrary to 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 oil and gas 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.

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

8. Each of the challenged Colorado APD decisions then applied PIM 2018-014, citing that directive as the basis for withholding ordinary environmental and public health mitigation requirements.

9. Accordingly, Petitioner asks this Court to declare that PIM 2018-014 and the Colorado APD decisions are arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law and to set aside these decisions under the APA.

JURISDICTION AND VENUE

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

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

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

13. Venue is proper in this Court under 28 U.S.C. § 1391(e) because Respondent Keith E. Berger is based in this judicial district and because a substantial part of the events and omissions giving rise to Petitioner's claims occurred in this judicial district.

14. Petitioner has exhausted any and all available and required administrative remedies.

PARTIES

15. Petitioner CENTER FOR BIOLIGICAL DIVERSITY (the Center) is a national, nonprofit conservation organization with offices throughout the United States, including in Denver, Colorado. The Center uses science, policy, and law to advocate for the conservation and recovery of species on the brink of extinction and the habitats and climate they need to survive.

The organization has advocated for and continues to actively advocate for increased protections for species and their habitats in Colorado, including increased protections of air quality, water quality, and climate stability in Colorado.

16. The Center has over 79,143 members throughout the United States, including in Colorado, Montana, Nevada, New Mexico, Wyoming, Utah, and other states where federal oil and gas deposits are being developed, or may be developed in the future, pursuant to PIM 2018-014. The Center has 3,045 members in Colorado alone. Many of these individuals live, work, and recreate on lands impacted or threatened by Fee/Fee/Fed well development and depend on these areas to further many health, recreational, moral, scientific, spiritual, professional, educational, aesthetic, and other purposes. They intend to continue doing so in the future.

17. As a result of PIM 2018-014, BLM has approved and will continue approving Fee/Fee/Fed wells in these areas without ordinary mitigation measures to avoid harm to viewsheds, air quality, water, wildlife, native vegetation, and other natural resources. 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, air pollution reduction measures, controls on handling and storage of toxic wastewater, project-related traffic restrictions, and noise controls.

18. The development of Fee/Fee/Fed wells without these protections has and will continue to injure the aesthetic, recreational, and other interests of Petitioner's staff, members, and supporters in myriad ways, including by increasing their risk of exposure to harmful air pollutants; depleting bird and wildlife populations they enjoy viewing; increasing smog and light pollution that blurs daytime vistas and dark night skies; and increasing the unsightly visual and noise impacts of oil and gas development in areas they use and enjoy, among other harms.

19. Unless PIM 2018-014 is held unlawful by this Court, BLM will continue implementing PIM 2018-014 in approving Fee/Fee/Fed wells in areas Petitioner's members use and enjoy, causing further such harms. The requested relief would remedy those harms by allowing BLM to impose restrictions on surface operations for Fee/Fee/Fed wells to avoid and mitigate the harmful impacts to viewsheds, air quality, water, wildlife, native vegetation, and other natural resources that Petitioner's members use and enjoy. Apart from this action, Petitioner's and its members have no adequate remedy at law to address the foregoing injuries to their interests.

20. Petitioner's members are also injured by each of the three challenged Colorado APD Decisions.

21. For example, Petitioner's member Jeremy Nichols resides in Lakewood, Colorado, and has a long history recreating in the prairie lands of eastern Colorado. Nichols has visited the Pawnee National Grassland on a regular, at least annual, basis for many years and plans to continue his regular visits in the future. He cherishes the area as some of the best public lands for visiting and appreciating natural prairie ecosystems in Colorado. At the Pawnee National Grassland, Nichols seeks out and appreciates the solitude and quiet of the remote area, and he values seeing wildlife and an abundance of bird species in their natural habitat. Nichols has experienced first-hand how oil and gas development has already harmed segments of the Pawnee National Grassland area, including by degrading the natural scenery; introducing heavy equipment traffic, dust, and noise; resulting in unsightly and polluting surface spills; and noticeably decreasing the number of wildlife and birds he encounters. Encountering these impacts of the Colorado APD Decisions on return visits would diminish his recreational and aesthetic enjoyment.

22. Similarly, Robert Ukeiley is a member of the Center who resides in Boulder County, Colorado, and regularly visits the Pawnee National Grassland. Ukeiley has for years participated in volunteer outings to carry out environmental restoration work in the Grassland. Ukeiley is injured by oil and gas development because of its impacts on native birds, wildlife, insects, and plant species he values seeing when visiting the grassland. Ukeiley gains particular value from viewing and doing volunteer work to protect and restore these native species' habitats. He is concerned about the impacts of oil and gas drilling on the prevalence of native bird, wildlife, plant, and insect populations in the Grassland, and his ability to see them on return visits, and he is concerned about the effect of oil and gas production on the spread of nonnative plant species that incur into important areas of blue grama and other critical native grasses. He values the natural quiet and scenery of the area, and encountering the noise, smells, and visual impacts of oil and gas development would diminish his enjoyment in future trips.

23. Petitioner has other members that live, work, use, and otherwise enjoy—and plan to continue doing so on a regular basis—the lands and resources that will be adversely affected by each of the challenged Colorado APD Decisions.

24. The visits of Nichols, Ukeiley, and other of Petitioner members take them to areas in proximity to the drilling sites of the Colorado APD Decisions as well as areas each Colorado APD Decision will adversely impact. Each Colorado APD Decision is likely to harm their continued use and enjoyment of these areas, including by detracting from the natural scenery; diminishing opportunities to view bird, wildlife, insect, and plant species they enjoy seeing; risking their exposure to unhealthy air pollution or the visual impacts of smog and haze; increasing light pollution and diminishing enjoyment of dark night skies; threatening

contamination of water; and increasing heavy truck traffic, dust, noise, odors, and other intrusions that impair their aesthetic and recreational enjoyment.

25. Each Colorado APD Decision will impact Petitioner's members' use and enjoyment of areas far beyond each drilling site. The light pollution from project equipment and flaring can be seen for many miles during evening and nighttime hours, and the intense noise from drilling, fracking, and flaring also can be heard for miles around in a rural setting. Likewise, the drill rigs, traffic, infrastructure, and other visual intrusions from each Colorado APD Decision are likely to be visible for great distances around each well pad. Nichols, Ukeiley, and other members are also likely to experience the dust, nuisance, and safety hazards of the flow of oil and gas trucks necessary for the development, maintenance, and operation of the wells approved in each Colorado APD Decision.

26. Already, Petitioner's members like Nichols have had to change visitation patterns after past drilling developments, to seek out areas of the Grassland that are quieter and with less impacts on the natural environment, and they are concerned about the similar threat posed by the challenged decisions here.

27. Furthermore, Petitioner's members such as Nichols and Ukeiley live, work, commute, recreate, and otherwise spend time in areas where each Colorado APD Decision will contribute harmful air pollutants, including but not limited to ozone precursors, posing health risks to Petitioner's members who will breathe this air while recreating or going about daily life.

28. A favorable ruling in this case would partially or wholly redress these harms to Petitioner's members. If BLM had properly considered its authority to regulate the surface operations of Fee/Fee/Fed wells, it would likely have conditioned the issuance of the Colorado APD Decisions on mitigation measures that diminish their harm to Petitioner's members.

29. Respondent KEITH E. BERGER is sued solely in his official capacity as Field Manager of the Royal Gorge Field Office of the Bureau of Land Management. Berger is responsible for managing public lands and resources under BLM authority, including those in the Royal Gorge Field Office, in accordance with federal law and regulations. Berger signed the decision records approving the challenged APDs.

30. Respondent BUREAU OF LAND MANAGEMENT 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.

LEGAL BACKGROUND

31. BLM oversees more than 245 million acres of federal surface land and 700 million subsurface acres of federal mineral estate, including for oil and gas development. Congress has delegated to BLM, through the Secretary of Interior, 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.

32. The following sections describe the source and extent of BLM authority over Fee/Fee/Fed wells:

A. Property Clause of the U.S. Constitution

33. The Property Clause of Article IV of the U.S. Constitution 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.

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

35. 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).

36. 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). It includes the right to condition the use of federal property on the developer's agreement to engage in, or refrain from, certain activities on private lands. *See id.*; *Federal Power Comm'n v. Idaho Power Co.*, 344 U.S. 17 (1952) (both upholding a federal land use condition affecting nonfederal property).

37. 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). This power also permits regulation of private activities on nonfederal property that affect public lands. *See id.* at 528 (holding that the Property Clause permits federal regulation of fences built on private land adjoining public land); *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); *Kleppe v. New Mexico*, 426 U.S. 529, 538 (1976) ("the Property Clause is broad enough to reach beyond territorial limits.").

38. Congress has delegated its Property Clause authority to the Secretary of Interior through a patchwork of statutes. In addition to specific 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. 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).

B. Federal Land Policy and Management Act (FLPMA)

39. 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.

40. 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).

41. 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.

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

43. 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).

44. FLPMA further directs that the Secretary "shall" take any action necessary to prevent "unnecessary or undue degradation" of public lands. *Id.* § 1732(b).

45. 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).

46. 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).

47. 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).

C. Mineral Leasing Act (MLA)

48. 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).

49. 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).

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

51. The MLA authorizes the Secretary of the Interior to offer certain federal minerals for lease, including oil and gas. 30 U.S.C. § 226.

52. 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 activities on federal surface.

53. 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.*

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

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

56. 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.

57. 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).

58. 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.*

59. 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).

60. 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.").

61. None of the aforementioned regulations are limited to impacts or activities on federal surface 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").

62. 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.

D. Onshore Order 1

63. 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.*

64. 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).

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

66. 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)."

67. 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.

68. 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."

E. BLM Standard Lease Forms

69. 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.

70. 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."

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

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

FACTUAL BACKGROUND

A. OIL AND GAS DEVELOPMENT IN NORTHEASTERN COLORADO'S FRONT RANGE AND PAWNEE NATIONAL GRASSLAND

73. Most of Colorado's oil and gas development occurs in Denver Basin field of northeastern Colorado, a region spanning from the Front Range to the surrounding eastern plains.

74. The Front Range is a densely populated urban corridor along the eastern face of the Rockies, containing Colorado's largest cities like Denver and Colorado Springs. Ozone concentrations in the Front Range have for decades exceeded the health-based ozone standard of

70 parts per billion. The U.S. Environmental Protection Agency has designated the region as a nonattainment area for ozone.

75. Ground-level ozone is the primary component of smog and a harmful air pollutant. It is created when volatile organic compounds ("VOCs") and nitrogen oxides ("NOx")—known as "ozone precursors"—react in the presence of sunlight. Oil and gas development creates emissions of ozone-producing pollutants from equipment engines, storage tanks, vehicle traffic, and other means. The Environmental Protection Agency has found that the oil and gas industry is the largest industrial source of VOC emissions.

76. Exposure to ozone at any concentration poses adverse health risks, including to heart and lung function. *See Clean Wisconsin v. EPA*, 964 F.3d 1145, 1156-57 (D.C. Cir. 2020) ("More ozone is more ozone, and there is no 'threshold concentration below which' ground-level ozone is 'known to be harmless.'") (quoting *Am. Trucking Ass'ns, Inc. v. EPA*, 283 F.3d 355, 360 (D.C. Cir. 2002)); *see also* NAAQS for Ozone, 62 Fed. Reg. 38,856, 38,863 (July 18, 1997)).

77. Another area in the crosshairs of Colorado oil and gas development is the Pawnee National Grassland, a 300-square-mile landscape of interspersed federal public and private lands just an hour's drive from Denver. The Grassland encompasses 193,060 acres of public lands spread out across two administrative units. The surface public lands of the National Grassland system are administered by the U.S. Forest Service, but it is BLM that manages, leases, permits, and regulates the federal minerals underlying these lands. *See* 30 U.S.C. §§ 181 et seq.

78. The Grassland consists of wide-open and gently rolling grassland plains, interspersed with small canyon and rock formations. The twin Pawnee Buttes, iconic topographic features that punctuate the eastern unit, were once used as an important landmark for Native Americans and settlers. The Grassland is one of the best-preserved shortgrass prairie ecosystems

in the country and supports abundant wildlife species, including pronghorn, mule deer, prairie dogs, swift foxes, coyotes, and as many as 300 unique species of birds. The abundance of wildlife attracts birders and other wildlife enthusiasts from around the world, including large numbers from the northern Front Range area.

79. Despite its ecological significance, the Pawnee National Grassland has been experiencing a surge of oil and gas development over the past two decades. Prompted by this increase, the Forest Service in 2014 initiated an analysis of oil and gas leasing on the Grassland. It concluded this process with a 2015 decision to impose a "No Surface Occupancy" stipulation on all new leases issued in the Grassland, attempting to protect the Grassland's resources by redirecting development to private inholdings.

80. A consequence of the Forest Service's decision to shift oil and gas development infrastructure off the Grassland surface, while continuing to allow leasing of the underlying federal minerals, has been a surge in Fee/Fee/Fed wells in and around the Pawnee National Grassland. Pursuant to PIM 2018-014, these Fee/Fee/Fed wells are developed with minimal federal oversight. Although not located on federal surface, these wells nonetheless continue to harm the Grassland by polluting the airshed; depleting water supplies; disturbing bird and wildlife populations; and introducing noise, light, fumes, dust, and traffic that interfere with the Grassland's natural setting and feeling.

B. BLM'S ADOPTION OF PIM 2018-014

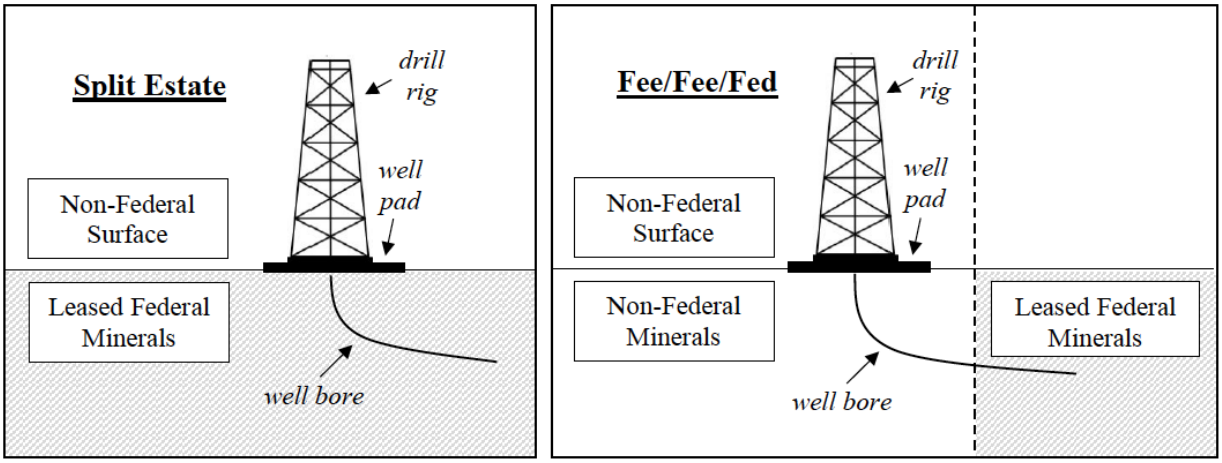
81. BLM issued Permanent Instruction Memorandum (PIM) 2018-04, entitled "Directional Drilling Into Federal Mineral Estate From Well Pads on Non-Federal Locations," on June 12, 2018. *See* https://www.blm.gov/policy/pim-2018-014. The document states that it supersedes prior Instruction Memorandum (IM)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

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

83. 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 non-federal ownership.

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

Figure 1: Split Estate and Fee/Fee/Fed Development



85. 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)."

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

87. 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."

88. 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."

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

90. PIM 2018-014 contravenes the federal laws cited above; 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 Fee/Fee/Fed projects.

91. In authorizing Fee/Fee/Fed wells, including the Colorado APD Decisions challenged here, 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.

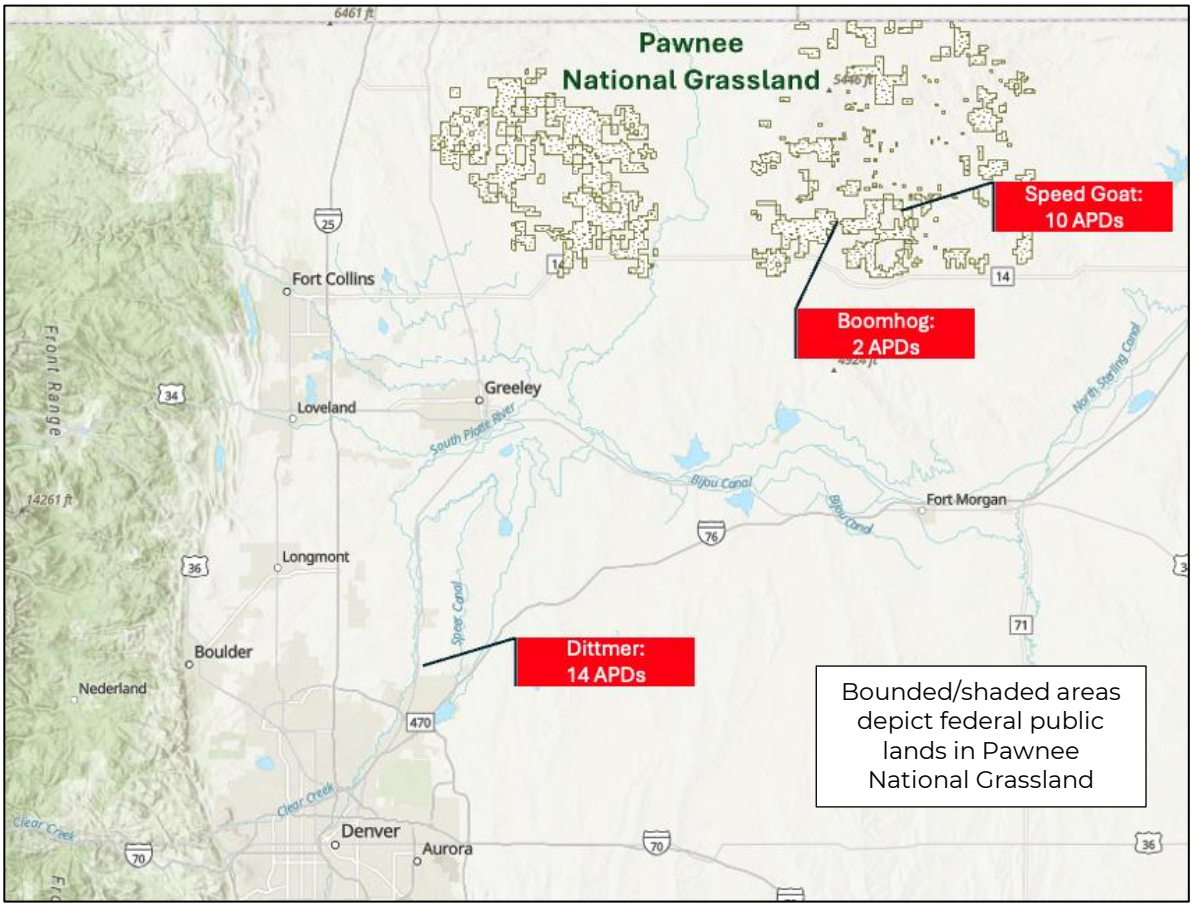
C. CHALLENGED COLORADO APD DECISIONS

92. Colorado has one of the highest proportions of Fee/Fee/Fed wells in the nation. From 2021 to 2023, the share of BLM-approved oil and gas wells in Colorado involving a Fee/Fee/Fed scenario ranged from 50% to 80%, far above the percent in most states.

93. Northeastern Colorado has a higher proportion of Fee/Fee/Fed development than any other significant oil producing region in the country. Nearly every BLM-approved APD in Colorado's Front Range and eastern plains entails a Fee/Fee/Fed well.

94. Petitioner here challenges three recent decisions by Respondents BLM and Field Manager Keith E. Berger approving a total of 26 Applications for Permit to Drill (APDs) federal oil and gas resources in northeastern Colorado from Fee/Fee/Fed wells. These APD decisions each applied PIM 2018-014 as the basis for withholding any mitigation measures pertaining to the surface operations and exemplify the harms from the ongoing application of this directive in Colorado.

Figure 2: Map of Colorado APD Decisions



i. Bison Operating IV Boomhog 8-59 2 APDs

95. On April 11, 2024, BLM issued a decision approving two APDs submitted by Bison IV operating LLC.

96. Bison IV's APDs involves two wells located on the same pad in Weld County, Colorado, named the "Boomhog Federal 8-59" pad.

97. The Boomhog Federal 8-59 well pad is located on a narrow strip of private land sandwiched between two large areas of federal public lands within the eastern section of the Pawnee National Grassland. The location is about 5 miles east of Keota and about 8.5 miles south-southeast of the Pawnee Buttes trail. The well pad sits just north of Wildhorse Creek. The well site is located within a half mile of the areas of federal public lands to both its east and west, along a primary route for public access to one of the largest sections of public lands in the National Grassland.

98. BLM's approval of the two APDs allows Bison Operating to drill, complete, and operate horizontal oil and gas wells that will enter and draw from federal minerals that lie beneath the federal public lands just to the east of the private parcel on which the Boomhog pad sits.

99. Because of the Fee/Fee/Fed context of the Boomhog APDs, in its decision authorizing them, BLM cited PIM 2018-014 and disclaimed its authority "to impose certain mitigation measures (as COAs to the approved APD) pertaining to the surface management of the well site."

ii. Speed Goat Fed 3432, Speed Goat Fed 3435

100. On May 10, 2024, BLM approved ten APDs submitted by Verdad Resources LLC.

101. Verdad Resources' application for ten APDs relates to drilling from two well pads, named Speed Goat Fed 3432 and 3435. These well pads are located about 6.8 miles east-northeast of the Boomhog location described above. The Speed Goat wells are also within the boundaries of the eastern unit of the Pawnee National Grassland. The well site is less than a quarter mile, to the north and to the east, from areas of federal public lands in the National Grassland.

102. BLM's approval of the ten Speed Goat APDs allows Verdad Resources to drill, complete, and operate horizontal oil and gas wells that will enter and draw from federal minerals that lie beneath the federal public lands just to the east of the private parcel on which the Speed Goat wells sits.

103. Because of the Fee/Fee/Fed context of the Speed Goat APDs, in its decision authorizing them, BLM relied on PIM 2018-014 to disclaim authority over the surface operations for these wells.

iii. Incline Dittmer 01-14 APDs

104. On May 22, 2024, BLM approved fourteen APDs submitted by Incline Energy Partners LP.

105. Incline Energy's application relates to drilling from one well pad, named Dittmer, near the southern boundary of Weld County and just outside of Brighton, Colorado. The 14 Dittmer APDs occupy an area nearby denser human communities and development on the edge of the Denver metropolitan area.

106. BLM's approval of the fourteen Dittmer APDs allows Incline Energy to drill, complete, and operate horizontal oil and gas wells that will enter and draw from federal minerals to the east of the private parcel on which the Dittmer well sits.

107. On information and belief, the decision approving the Dittmer APDs relied on PIM 2018-014 to disclaim authority over the surface operations for these wells.

FIRST CLAIM FOR RELIEF

PIM 2018-014 Is Arbitrary, Capricious, an Abuse of Discretion, or Otherwise Not in Accordance with Law in Violation of the APA

108. Petitioner realleges and incorporates by reference all preceding paragraphs.

109. The 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).

110. Respondent BLM's issuance of PIM 2018-014 constitutes a final agency action reviewable under the APA.

111. PIM 2018-014 is arbitrary capricious, and not in accordance with the MLA, MLAAL, FLPMA, their implementing regulations, and other laws governing public lands and minerals. As more fully explained above, PIM 2018-014 improperly disclaims BLM's authority and duty to impose bonding, reclamation, operational, and reporting requirements for Fee/Fee/Fed wells.

112. 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.

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

114. For the foregoing reasons, PIM 2018-014 must be held unlawful and set aside under 5 U.S.C. § 706(2)(A).

SECOND CLAIM FOR RELIEF

The Colorado APD Decisions Are Arbitrary, Capricious, an Abuse of Discretion, or Otherwise Not in Accordance with Law in Violation of the APA

115. Petitioner realleges and incorporates by reference all preceding paragraphs.

116. The 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).

117. Respondents' decisions approving the APDs described above—the two Boomhog APDs, the ten Speed Goat APDs, and the fourteen Dittmer APDs (collectively, the "Colorado APD Decisions")—constitute final agency actions subject to judicial review under the APA.

118. The Colorado APD Decisions are arbitrary, capricious, and otherwise not in accordance with the MLA, MLAAL, FLPMA, their implementing regulations, and other laws governing public lands and minerals. As more fully explained above, the decisions are based on an erroneous view of BLM's legal authority and duty to impose mitigation, bonding, reclamation, operational, reporting, and other requirements.

119. Accordingly, the APD decisions must be held unlawful and set aside under 5 U.S.C. § 706(2)(A).

PRAYER FOR RELIEF

WHEREFORE, Petitioner respectfully prays that this Court grant the following relief:

(1) Declare, hold and adjudge that PIM 2018-014 and the Colorado APD Decisions are arbitrary, capricious, an abuse of discretion, or not in accordance with the MLA, MLAAL, FLPMA, APA, and/or their implementing regulations;

(2) Vacate and set aside PIM 2018-014 and the Colorado APD Decisions;

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

(4) Award Petitioner's costs and attorney fees incurred in pursuing this action, 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.

Respectfully submitted this 10th day of June 2024,

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