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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

STATE OF CALIFORNIA, by and through XAVIER BECERRA, Attorney General, and the CALIFORNIA AIR RESOURCES BOARD; and STATE OF NEW MEXICO, by and through HECTOR BALDERAS, Attorney General, et al.,

Plaintiffs,

v.

DAVID BERNHARDT, Secretary of the Interior; JOSEPH R. BALASH, Assistant Secretary for Land and Minerals Management, United States Department of the Interior; UNITED STATES BUREAU OF LAND MANAGEMENT; and UNITED STATES DEPARTMENT OF THE INTERIOR,

Defendants.

Case No. 4:18-cv-05712-YGR
[Consolidated with Case No. 4:18-cv-05984-YGR]

BRIEF OF MEMBERS OF CONGRESS AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS' MOTIONS FOR SUMMARY JUDGMENT

Date: January 14, 2020
Time: 10:00 a.m.
Courtroom: 1, 4th Floor
Judge: Hon. Yvonne Gonzalez Rogers

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INTEREST OF *AMICI CURIAE*

Amici Curiae are members of Congress who have a strong interest in implementing our nation's laws governing federal lands and the resources on those lands, ensuring conservation and avoiding waste of the nation's oil and gas resources, protecting the public interest, and obtaining a reasonable return to the public on these publicly owned assets. While many *amici* represent states that have oil and gas reserves, all *amici* are concerned about the management of federal resources that belong to the public in all states. As demonstrated by the numerous reports requested over the years by members of Congress and prepared by the Government Accountability Office ("GAO"), as well as reports from many other independent bodies, federal management of oil and gas development on federal and tribal lands has long been wasteful and harmful to the public interest, in violation of federal law.

In recent years, the Bureau of Land Management ("BLM") acknowledged its failures in this area. In 2016 BLM adopted new regulations to address waste prevention, royalties, and resource conservation ("Waste Prevention Rule" and "2016 Rule"), which would have gone a long way in addressing these problems and ensuring better management of oil and gas leasing on federal and tribal lands. 81 Fed. Reg. 83,008, 83,019 (Nov. 18, 2016) (AR 909, 920). Attempts to have Congress repeal the 2016 Rule through the Congressional Review Act were unsuccessful when, on May 10, 2017, a majority of Senators voted against the motion to proceed to debate on the issue and upheld the rule as promulgated. 163 Cong. Rec. S2851, S2853 (May 10, 2017). BLM disregarded the Senate's vote in 2018, when it reversed course and replaced the Waste Prevention Rule with a new rule that may lead to even greater waste of oil and gas and harm to the public interest than occurred prior to the 2016 rule.[1] *Amici* members of Congress submit this brief in an effort to ensure proper management of our publicly-owned oil and gas resources to benefit all of our citizens. A listing of *Amici Curiae* is set forth in the Appendix to this brief.

[1] The 2018 Rule is entitled "Waste Prevention, Production Subject to Royalties, and Resource Conservation; Rescission or Revision of Certain Requirements." 83 Fed. Reg. 49,184 (Sept. 28, 2018) (the "Rescission") (Administrative Record p. 1 (hereafter "AR [page number]" excluding leading zeros))

SUMMARY OF ARGUMENT

Congress enacted the Mineral Leasing Act ("MLA") in 1920 to end the well-documented waste of oil and gas resources on public lands, conserve these resources, and manage them wisely to maximize public benefit from their use. Over the past fifteen years, members of Congress have requested and received numerous reports from the GAO documenting the Department of the Interior's ("Interior") failure to manage oil and gas development in a manner that avoids waste and advances the public welfare, as required by the MLA.

As the GAO acknowledged, Interior took a major step toward addressing these shortcomings when it adopted the Waste Prevention Rule in 2016. Unfortunately, two years later, disregarding over a decade of recommendations from the GAO, Interior rescinded and replaced that Rule, resulting in a weakened regulatory framework that has the potential to allow even more waste from venting, flaring and leaking of gas than occurred prior to adoption of the 2016 Rule. As a result, under the Bureau of Land Management's ("BLM") 2018 Rescission, waste of oil and gas resources and harm to the public is likely to be even greater than it was before the 2016 Rule. For the reasons set forth below, *Amici* members of Congress respectfully request that this Court enforce the MLA by setting aside the 2018 Rescission and ordering the Interior Department to reinstate the 2016 Waste Prevention Rule.

ARGUMENT

I. In Enacting the Mineral Leasing Act, Congress Intended to Conserve and Prevent Waste of Oil and Gas Resources and to Protect the Public Interest.

Before 1920, "the Federal government maintained no authority to regulate production practices" on public oil lands. David W. Miller, *The Historical Development of the Oil and Gas Laws of the United States*, 51 Calif. L. Rev. 506, 513 (1963). As a result, "operators could 'capture' oil and gas without regard to safeguarding the natural resource." *Id*. As the House Committee on the Public Lands summarized in its 1918 report on the draft legislation:

> Your Committee on Public Lands are anxious to supplant this unwise,

> unwholesome, nonworkable law[2] with an intelligent leasing law that will be workable, feasible, and bring about the highest development to the end that monopoly and extortion to the consumer may be stamped out, and *at all times conserve the interests of the Federal Government in the property*, and to [sic] *in all things serve in the public interest.*

H.R. Rep. No. 65-563 at 13 (1918) (emphasis added) (AR 21746); *see also id*. at 19 (AR 21752).

The MLA established the oil and gas leasing program still in effect today on federal and tribal lands. The MLA requires that oil and gas leases provide "for the prevention of undue waste," "for the protection of the interests of the United States, for the prevention of monopoly, and for the safeguarding of the public welfare." 30 U.S.C. § 187. In addition, leases must require lessees to "use all reasonable precautions to prevent waste of oil or gas." 30 U.S.C. § 225. The MLA also requires that leases contain a provision "that such rules . . . for the prevention of undue waste as may be prescribed by [the] Secretary shall be observed." 30 U.S.C. § 187.

The MLA's legislative history underscores Congress's goal of preventing continued, wasteful development of the public's oil and gas resources. Congressional reports leading up to the MLA's enactment lamented the lack of appropriate regulation of those resources:

> Everyone acquainted with oil production knows how almost totally inadequate the placer law is for oil development . . . . By this almost criminally lax method the valuable oil deposits of the country . . . have crept away and either have or will find their way into monopolistic control, which means exploitation, extortion, and abuse.

H.R. Rep. No. 65-563 at 12-13 (1918) (AR 21745-46). The House Committee reports on the MLA are replete with references to the need to conserve and avoid waste of oil and gas resources, and safeguard public welfare and interest. *See, e.g.*, H.R. Rep. No. 65-206 at 5, 6 (1917) (AR 21727, 21728); H.R. Rep. No. 65-563 at 36, 37 (1918) (AR 21679, 21770); H.R. Rep. No. 65-1138 at 19, 20 (1919) (AR 21815, 21816).

Members of Congress were well aware of the need to strike a balance between providing

[2] The law referred to is the Act of February 11, 1897, 29 Stat. 526, which opened public lands containing petroleum deposits to development under the provisions of existing placer mining laws.

sufficient incentive for development of oil and gas and protecting the public interest in these resources. Congress sought to eliminate the "monopoly and waste and other lax methods that have grown up in the administration of our public-land laws" (H.R. Rep. No. 65-1138 at 19 (1919) (AR 21815)) in a manner that "will insure a proper development and an intelligent utilization of our mineral resources, without waste and without permitting monopoly or injustice to be pressed down upon those who would develop the West, or upon the interests of the public who are entitled to reap the benefits" (H.R. Rep. No. 65-206 at 8 (1917) (AR 21729)).

BLM acknowledged this intent of the MLA in its discussion accompanying the final Waste Prevention Rule:

> [t]he MLA rests on the fundamental principle that the public should benefit from mineral production on public lands. A primary instrument for public benefit is the requirement that a lessee return a portion of the proceeds from production to the public through the payment of royalties to Federal, State, and/or tribal governments.

81 Fed. Reg. 83,019 (AR 920). BLM further noted that, under the MLA, not only are lessees "responsible for taking measures to prevent waste," but they are "also responsible for making royalty payments on wasted oil and gas when waste does occur." 81 Fed. Reg. 83,020 (AR 921).

Courts have likewise underscored prevention of waste and protection of the public interest as central goals of the MLA. In *Boesche v. Udall*, 373 U.S. 472 (1963), the Supreme Court addressed the MLA's intent in determining that the Secretary of the Interior had the power to cancel a noncompetitive oil and gas lease that had been issued erroneously. Noting that "one of the main congressional concerns" prompting enactment of the MLA "was the prevention of an overly rapid consumption of oil resources that the Government, particularly the Navy, might need in the future," the court concluded that "[c]onservation through control was the dominant theme" of the congressional debates that led to enactment of the MLA. 373 U.S. at 481 (citing H.R. Rep. No. 66-398 at 12-13 (1919); H.R. Rep. No. 65-1138 at 19 (1919); and H.R. Rep. No. 65-206 at 5 (1917)).

Following similar reasoning, in *California Co. v. Udall*, 296 F.2d 384, 388 (D.C. Cir. 1961), the D.C. Circuit court held that the Secretary of the Interior did not abuse his discretion in defining "value of production" in the MLA as requiring payment of 12.5% royalties on "gas

conditioned for market" rather than raw gas product before it is conditioned. The court noted that the MLA "was intended to promote wise development of these natural resources and to obtain for the public a reasonable financial return on assets that 'belong' to the public," and that the Secretary must "insure that these resources are not physically wasted and that their extraction accords with prudent principles of conservation." *Id*.; *see also Union Oil Co. of California v. Morton*, 512 F.2d 743, 747 (9th Cir. 1975) ("Oil and gas deposits . . . are precious resources belonging to the entire nation. Congress, although encouraging the extraction of these resources by private companies, provided safeguards to insure that their exploitation should inure to the benefit of all.").

II. The Many GAO Reports Requested by Members of Congress between 2004 and 2019 Underscore the Interior Department's Failure to Ensure That Federal Oil and Gas Leasing Serves the Public Interest and Minimizes Waste.

As an "agent of Congress" (*McDonnell Douglas Corp. v. United States*, 754 F.2d 365, 368 (Fed. Cir. 1985)), the GAO is tasked with "evaluat[ing] the results of a program or activity the Government carries out under existing law" when directed by a House of Congress or by a Congressional committee with relevant jurisdiction. 31 U.S.C. § 717(b). GAO's mission is "to support Congress in meeting its constitutional responsibilities and to help improve the performance and accountability of the federal government for the American people." *See, e.g.*, U.S. Gov't Accountability Office, *Natural Gas Flaring and Venting: Opportunities to Improve Data and Reduce Emissions*, GAO-04-809 at 31 (2004) (AR 21617). GAO's many investigations into Interior's management of federal oil and gas resources reflect its "mandate to detect . . . waste, [and] inefficiency." *Bowsher v. Merck & Co., Inc.*, 460 U.S. 824, 844 (1983).

Beginning in 2004, Congressional committees in both the Senate and the House repeatedly asked the GAO to look into problems with federal oil and gas leasing and identify changes that would better serve the interests of the United States and the public, and more effectively carry out the MLA's mandates. In report after report for Congress, GAO identified glaring, longstanding problems in the federal oil and gas leasing system, including large-scale preventable waste of gas from outdated venting and flaring practices, and lost royalties due to failures in leasing practices and in management of vented and flared gas. To remedy these

problems, the reports consistently highlighted the need for changes in Interior's practices.

GAO's July 2004 report, *Natural Gas Flaring and Venting: Opportunities to Improve Data and Reduce Emissions*, GAO-04-809 (AR 21583), highlighted deficiencies in the Interior Department's collection of data on venting and flaring. It recommended that BLM require producers to flare—and not vent—gas to reduce harmful environmental effects, and "require the use of flare and vent meters at production facilities, which could improve oversight by detecting how much gas is actually flared and vented." *Id*. at 19 (AR 21605).

In 2008, congressional concern over foregone revenues from federal oil and gas leaseholders" resulted in the GAO report, *Oil and Gas Royalties: The Federal System for Collecting Oil and Gas Revenues Needs Comprehensive Reassessment*, GAO-08-691 (2008) (AR 21619). This report found that the Interior Department had "not re-evaluated its oil and gas fiscal system in over 25 years," and had failed to gather the information necessary for it to "assess whether or not there is a proper balance between the attractiveness of federal lands and waters for oil and gas investment and a reasonable assurance that the public is getting an appropriate share of revenues from this investment." *Id.* at 22, 20 (AR 21644, 21642).

In 2010, members of Congress again directed GAO to study federal leaseholders' flaring and venting practices, this time to determine the extent to which those practices were depriving state and federal governments of royalty payments and contributing to greenhouse gas emissions. U.S. Gov't Accountability Office, *Federal Oil and Gas Leases: Opportunities Exist to Capture Vented and Flared Natural Gas, Which Would Increase Royalty Payments and Reduce Greenhouse Gases*, GAO-11-34 (2010) (AR 1905). In this report, the GAO found that, in contrast to Interior's estimates that federal leaseholders vent and flare only minimal amounts of gas, data from the Environmental Protection Agency and industry sources showed gas volumes up to 30 times higher. *Id.* at Highlights, 10-13 (AR 1906, 1919-1922). It also found that "BLM guidance has not kept pace with the development of economically viable capture technologies for a number of sources of lost gas." *Id.* at 32 (AR 1941). GAO found that economically capturing onshore vented and flared methane could increase federal royalty payments by $23 million annually. *Id.* at Highlights; *see also* U.S. Gov't Accountability Office,

High-Risk Series: Substantial Efforts Needed to Achieve Greater Progress on High-Risk Areas, GAO-19-157SP at 104 (2019) (Declaration of Marlene Dehlinger ("Dehlinger Decl."), Ex. A). GAO recommended that Interior improve its venting and flaring data and "revise its guidance to operators to make it clear that technologies should be used where they can economically capture sources of vented and flared gas." GAO-11-34 at Highlights, 34 (AR 1906, 1943). Interior generally concurred with these recommendations. *Id*.

After this succession of critical reports, in 2011 GAO added Interior's management of federal oil and gas resources to GAO's "High Risk" list, a watchlist of federal programs the GAO "identifies as high risk due to their greater vulnerabilities to fraud, waste, abuse, and mismanagement." U.S. Gov't Accountability Office, *High-Risk Series: An Update*, GAO-11-278 at Highlights (2011) (Dehlinger Decl., Ex. B). GAO made this high-risk designation because it found that "Interior does not have reasonable assurance that it is collecting its share of billions of dollars of revenue from oil and gas produced on federal lands." *Id*.; *see also id*. at 36.

Following this high risk designation, in 2013, members of Congress asked GAO to review Interior's collection of oil and gas revenues. GAO's resulting report, *Oil and Gas Resources: Actions Needed for Interior to Better Ensure a Fair Return*, GAO-14-50 (2014) (Dehlinger Decl., Ex. C), found that Interior lacked procedures to ensure "periodic assessments of the fiscal system," and that as a result, it "cannot know whether there is a proper balance between the attractiveness of federal leases for investment and appropriate returns for federal oil and gas resources, limiting Interior's ability to ensure a fair return." *Id*. at 28-29. It recommended that Interior establish such procedures and "revise BLM's regulations . . . to enhance Interior's ability to make timely adjustments to the terms for federal onshore leases," including to royalty rates. *Id*. at 29. This was necessary to ensure that Interior was not "foregoing a considerable amount of revenue" from these leases. *Id*. at 28.

In 2016, members of Congress again turned to the GAO, this time to review Interior's management of onshore natural gas emissions by federal leaseholders. GAO's report, *Oil and Gas: Interior Could Do More to Account for and Manage Natural Gas Emissions*, GAO-16-607 (2016) (AR 8787) described how BLM was operating under decades-old guidance that lacked

clear direction for federal leaseholders on when gas lost through venting, flaring, and leaks was subject to royalties, or when they had to report these emissions to BLM. *Id*. at 9-10 (AR 8769-70). As a result, Interior lacked "a consistent accounting of natural gas emissions from onshore federal leases, and does not have the information it needs to reasonably ensure it is minimizing waste on these leases." *Id*. at Highlights (AR 8758). The report further highlighted that the lack of complete national gas emissions data could "affect both BLM's collection of royalties as well as its tracking of harmful greenhouse gas emissions from federal leases." *Id*. at 27 (AR 8787). Released just a few months after BLM's draft regulation (which BLM adopted in final form in November 2016 as the Waste Prevention Rule), the report noted where the proposed regulations would remedy these problems. *Id*. at 26-27 (AR 8786-87). At the same time, the report also emphasized where BLM still fell short of addressing significant issues GAO had identified in its report. *Id*. at 16-18 (AR 8776-78).

Most recently, GAO's March 2019 report *High-Risk Series: Substantial Efforts Needed to Achieve Greater Progress on High-Risk Areas*, GAO-19-157SP (Dehlinger Decl., Ex. A) emphasizes the devastating effects of the Interior Department's decision to replace the 2016 Waste Prevention Rule with the 2018 Rescission. The report states:

> [I]n November 2016, Interior issued revised regulations intended to reduce wasteful methane emissions from onshore oil and gas production, which were consistent with our recommendations . . . Interior subsequently issued revised regulations in September 2018. Interior's revised regulations were not consistent with our prior work because they eliminated certain regulations that would potentially have addressed our recommendations. Better methane control is important for ensuring the federal government receives all the royalties it is due.

Id. at 104. The report recognized that in repealing the Waste Prevention Rule, BLM disregarded years of congressional efforts to ensure management of oil and gas resources in the public interest.

III. The Rescission Violates the Mineral Leasing Act by Authorizing Practices Known to Waste Oil and Gas Resources and Harm the Public Interest.

A. BLM acknowledged findings by the GAO and other independent entities that under the pre-Waste Prevention Rule regulatory regime, an unacceptably large and ever-increasing amount of oil and gas has been wasted in mining on federal and tribal lands.

GAO's reports to Congress painted a clear picture of significant and preventable waste of the public's mineral resources under the federal oil and gas leasing system, and of Interior's failure to protect the public interest in managing those leases. GAO's alarming findings were confirmed and supplemented by other independent analyses provided to BLM. *See, e.g.*, ICF International, *Economic Analysis of Methane Emission Reduction Opportunities in the U.S. Onshore Oil and Natural Gas Industries* 4-4 (Mar. 2014) (cited by BLM at 81 Fed. Reg. 83,012 (AR 913)); Environmental Defense Fund, *New EPA Stats Confirm: Oil & Gas Methane Emissions Far Exceed Prior Estimates* (April 2016) (cited by BLM at 81 Fed. Reg. 83,015 (AR 916)); Taxpayers for Common Sense, "*Gas Giveaways: Methane Losses Are a Bad Deal for Taxpayers*" (April 4, 2018) (AR 84726). These reports also made clear that loss of resources through venting, flaring, and leaks has been dramatically increasing in recent years, causing ever greater harm to the public through the loss of both gas and royalties.

In issuing the Waste Prevention Rule, BLM acknowledged this wealth of evidence of its long-running failure to administer oil and gas leasing in compliance with the MLA. 81 Fed. Reg. 83,009-19 (AR 910-920). In addition to citing many of the GAO reports discussed above as well as to reviews by the Interior Department Inspector General's Office, BLM cited other analyses by both the Interior Department and other entities as underscoring the need for the new rule. *Id*.

The Waste Prevention Rule also discussed estimates of the large amounts of gas wasted due to venting, flaring and leaks from federal leases and acknowledged that recent studies suggested that actual gas emissions were higher – perhaps two to three times higher – than previously indicated. *Id*. at 83,010-15 (AR 911-16). In the Rule, BLM further confirmed that "the problem of natural gas loss on BLM-administered leases is growing," and that "reported flaring from Federal and Indian leases increased by over 1000 percent from 2009 through 2015." *Id*. at 83,015 (AR 916). Tracking that increase, BLM noted that applications to vent or flare gas

royalty-free grew dramatically from 50 applications in 2005 to 1248 applications—25 times as many—in 2014. *Id*.

At the same time that venting and flaring of gas were dramatically increasing, technologies enabling reduction in venting and flaring were rapidly advancing. *Id*. at 83,017 (AR 918). Yet as BLM noted, its regulatory scheme in effect prior to the 2016 Waste Prevention Rule, embodied in the 1979 Notice to Lessees and Operators of Onshore Federal and Indian Oil and Gas Leases ("NTL-4A") (AR 3010), had not been updated to take advantage of those advances. The NTL-4A "neither reflect[ed] today's best practices and advanced technologies, nor [was] particularly effective in minimizing waste of public minerals, as the previously described data and studies show." 81 Fed. Reg. 83,017 (AR 918). By contrast, the Waste Prevention Rule was carefully designed to take advantage of technological advances in reducing waste. *Id*.

B. The 2016 Waste Prevention Rule would have substantially reduced waste of oil and gas resources while increasing economic and other benefits to the public.

In adopting the 2016 Waste Prevention Rule, BLM acknowledged and responded to the dramatic and ever-escalating waste of vented, flared, and leaked gas from oil and gas development on federal and tribal lands, and took advantage of the significant technological advances enabling much more cost-effective prevention and capture of gas emissions. *Id*.

Benefits of the 2016 Rule cited by BLM include "additional production of resources from Federal and Indian leases; reductions in venting, flaring, and leaks of gas, including GHG emissions; and increased opportunities for royalties," all of which furthered the goals of the MLA. *Id*. at 83,069 (AR 970). BLM predicted that the Rule could reduce methane emissions by 35% from the 2014 estimated emissions levels and reduce flaring of associated gas by 49% when the Rule was fully implemented. *Id.* BLM estimated that the Rule's net benefits ranged from $46-199 million per year (discounted at 7%) or $50-204 million per year (discounted at 3%). *Id*. at 83,014 (AR 915). At the same time, BLM estimated that after enactment of the rule, gas production was expected to increase between 9 and 41 billion cubic feet per year and crude oil production to decrease only slightly by 0 to 3.2 million barrels per year. *Id*. BLM estimated

the rule would produce additional royalties of $3-10 million per year (discounted at 7%) or $3-14 million per year (discounted at 3%). *Id*. BLM concluded that the Rule would not meaningfully affect oil and gas production: "[s]ince the relative changes in [oil and gas] production are expected to be small, we do not expect that the final rule will significantly impact the price, supply, or distribution of energy." *Id*.

C. The Rescission could potentially result in even more waste and greater harm to the public than occurred prior to adoption of the Waste Prevention Rule, in violation of the MLA.

1. The Rescission errs in disregarding how loss of royalties under the Rescission's implementation harms the public interest.

BLM's Rescission acknowledged that it would "reverse the estimated [beneficial] royalty impacts of the 2016 final rule[]" and reduce royalty payments over the 10-year period of 2019-2028 by between $26.4 million (discounted at 7%) and $32.7 million (discounted at 3%). 83 Fed. Reg. 7939 (AR 430). However, in the Rescission, BLM made the absurd assertion that this loss of royalty income is not relevant to – and therefore is excluded from – its calculation of "costs, benefits and net benefits" of the Rescission because the royalty payments are "transfer payments" (from oil and gas developers to the public at large) "that do not affect the total resources available to society." *Id*. BLM's baseless decision to ignore the substantial diminution of oil and gas royalty payments resulting from the Rescission is directly contrary to the MLA's mandate to protect the public interest and safeguard the public welfare. Furthermore, it confirms that BLM's cost-benefit analysis of the Rescission is fundamentally flawed and cannot support the rule.

2. The Rescission improperly defers to state and tribal regimes regardless of whether they avoid waste or safeguard the public interest, in violation of the MLA.

The 2018 Rescission allows any and all royalty-free venting and flaring of oil well gas as long as such venting and flaring does not violate state or tribal requirements. Rescission § 3179.201(a), 83 Fed. Reg. 49,213, (AR 30). Only where a state or tribe has no applicable regulations will BLM step in and apply requirements similar to the NTL-4A framework. 83 Fed. Reg. 7930 (AR 421), 49,188 (AR 5). However, in 2016 BLM reviewed state regulatory

requirements and found that they did not "adequately address the issue of waste of gas from BLM-administered leases." 81 Fed. Reg. 6618 (AR 994). BLM noted that "no State has established a comprehensive set of requirements addressing all three avenues for waste – flaring, venting, and leaks – and only a few States have significant requirements in even one of these areas." *Id*. Even though many state and tribal regulatory regimes are unlikely to adequately avoid waste and protect the public interest as required by the MLA, the 2018 Rescission defers entirely to state and tribal regulations on royalty-free venting and flaring of oil well gas no matter how inadequate or incomplete they are. This approach is more harmful to the public than the previous NTL-4A regime because it fails to provide any assurance that state or tribal requirements deferred to would effectively contain waste and protect the public interest.

Finally, as BLM itself acknowledged in adopting the Waste Prevention Rule, it cannot delegate its enforcement responsibilities to states and tribes because it is legally obligated to carry out the responsibility delegated to it by Congress "to ensure that the public's resources are not wasted." 81 Fed. Reg. 83,010 (AR 911). As BLM pointed out,

> neither…State [nor] tribal requirements obviate the need for this rule [because] the BLM has an independent legal responsibility and a proprietary interest as a land and resource manager to oversee and minimize waste from oil and gas production activities conducted pursuant to Federal and Indian . . . leases, as well as to ensure that development activities on Federal and Indian leases are performed in a safe, responsible, and environmentally protective manner.

Id.

3. Contrary to the language and intent of the MLA, the Rescission includes a new definition of "waste" based entirely on each individual operator's profitability, with no consideration of the public interest.

The Rescission contains a new definition of waste harmful to the public interest and contrary to what Congress intended in enacting the MLA, which was to "bring about the highest development to the end that monopoly and extortion to the consumer may be stamped out, and at all times conserve the interests of the Federal Government in the property, and to in all things serve in the public interest." H.R. Rep. No. 65-563 at 13 (1918) (AR 21746).

Specifically, the Rescission defines "waste of oil or gas" as:

> [A]ny act or failure to act *by the operator* that is not sanctioned by

> the authorized officer as necessary for proper development and production *where compliance costs are not greater than the monetary value of the resources they are expected to conserve,* and which results in:
>
> (1) A reduction in the quantity or quality of oil and gas ultimately producible from a reservoir under prudent and proper operations; or
>
> (2) Avoidable surface loss of oil or gas.

Rescission § 3179.3 (83 Fed. Reg. 49,212) (emphasis added) (AR 29). According to BLM, the highlighted language above was included "to codify the BLM's policy determination that it is not appropriate for 'waste prevention' regulations to impose compliance costs greater than the value of the resources they are expected to conserve." 83 Fed. Reg. 7933 (AR 424).

This definition of "waste" is directly contrary to both the language of the MLA and the legislative intent indicated in the congressional reports discussed above. Nothing in the MLA supports the proposition that avoiding waste requires that every single lease be profitable at all times, or that specific measures required by BLM not reduce operators' profitability, as this new waste definition demands. This definition of waste ignores the public interest entirely, instead focusing exclusively on each individual lessee's representation of its own economic situation, which in turn depends on the highly volatile prices of oil and gas. It places operators' private interest above the public interest and fails to consider the overall viability of the market for oil and gas development on federal and tribal lands.

This new definition of waste is also contrary even to NTL-4A provisions addressing the circumstances in which flaring or venting of gas from oil wells may be permitted. Under NTL-4A, a demonstration that "expenditures necessary to market or beneficially use such gas are not economically justified" was not sufficient to allow venting or flaring that is not explicitly permitted in Sections II (C) and III (e.g., emergencies, malfunctions, testing, etc.). NTL-4A, § IV (AR 3013). The lessee was required to demonstrate that "conservation of the gas, if required, would lead to the premature abandonment of recoverable oil reserves and ultimately to a greater loss of equivalent energy than would be recovered if the venting or flaring were permitted to continue." *Id*. at § IV(B) (AR 3013). The new definition of "waste" in the Rescission, by contrast, omits any requirement to demonstrate that conserving the gas would cause either

abandonment of recoverable oil reserves or a greater loss of energy than would occur through venting or flaring.

4. Where there are no applicable state or tribal regulatory regimes to defer to, the Rescission allows even more wasteful venting, flaring and leaking than was permitted under NTL-4A.

As described above, prior to its adoption of the Waste Prevention Rule, BLM relied on the 1979 NTL-4A to identify and avoid waste in oil and gas development on federal and tribal lands. As BLM itself acknowledged, that approach was a failure that allowed increasingly large amounts of waste. 81 Fed. Reg. 83,015 (AR 916); 83 Fed. Reg. 49,185 (AR 2). BLM asserts that its "improved NTL-4A framework" set forth in the Rescission, that would apply only where there are no applicable state or tribal requirements, "will ensure that operators take 'reasonable precautions' to prevent 'undue waste.'" *Id.* at 49,190 (AR 7). The opposite is true. The new "NTL-4A framework" in the Rescission is both less effective at addressing waste and less protective of the public interest.

An example of the Rescission's weakening of protections of the public interest is its treatment of venting and flaring from gas wells. Whereas even the 1979 NTL-4A did not allow venting or flaring from gas wells except in the specific limited circumstances described in Sections II(C) and III (NTL-4A § IV(B)) (AR 3013), the Rescission allows such venting or flaring wherever BLM has determined the gas to be "unavoidably lost." Rescission § 3179.4(b) (83 Fed. Reg. 49,212) (AR 29). The Rescission does not specify any prerequisites for a BLM finding that vented or flared gas loss is "unavoidable," and therefore not subject to royalty payments.

Regulation of flaring of gas from oil wells is also more lax under the Rescission than it was under NTL-4A. Other than as specified in Sections II(C) and III, NTL-4A permitted such flaring under only the following two circumstances: (1) approval of an evaluation report demonstrating both that "the expenditures necessary to market or beneficially use such gas are not economically justified," and that "conservation of the gas, if required, would lead to the premature abandonment of recoverable oil reserves and ultimately to a greater loss of equivalent energy than would be recovered if the venting or flaring were permitted to continue"; or (2)

submittal of "an action plan that will eliminate venting or flaring of the gas within 1 year from the date of application." NTL-4A, § IV(B) (AR 3013). By contrast, under the Rescission, flaring of gas from oil wells is allowed whenever a lessee submits an evaluation report that "demonstrates to BLM's satisfaction that the expenditures necessary to market or beneficially use such gas are not economically justified." Rescission § 3179.201(c)(1) (83 Fed. Reg. 49,213) (AR 30). This provision aligns with the new "waste" definition in focusing entirely on each individual lessee's economic interests, rather than the larger picture of conservation of the nation's oil and gas reserves. It also will allow more royalty-free flaring of gas than allowed under the NTL-4A, which BLM previously found greatly excessive and contrary to the goals of the MLA. 81 Fed. Reg. 83,015 (AR 916); 83 Fed. Reg. 49,185 (AR 2).

CONCLUSION

For all the reasons set forth above, amici members of Congress respectfully request that this Court find that BLM violated the MLA, vacate the Rescission and reinstate the Waste Prevention Rule.

DATED: June 20, 2019

By: /s/ Ellison Folk

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Richard Blumenthal
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Cory A. Booker
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Maria Cantwell
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Benjamin L. Cardin
U.S. Senator

Tom Carper
U.S. Senator

Catherine Cortez Masto
U.S. Senator

Dianne Feinstein
U.S. Senator

Kirsten Gillibrand
U.S. Senator

Kamala Harris
U.S. Senator

Martin Heinrich
U.S. Senator

Angus King
U.S. Senator

Amy Klobuchar
U.S. Senator

Brian Schatz
U.S. Senator

Jeanne Shaheen
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Raul Grijalva
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