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Objection Reviewing Officer
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RE: Objection to Northern Great Plains Management Plans Revision, Final Supplemental Environmental Impact Statement for Oil and Gas Leasing

Dear Mr. Tomac and Objection Reviewing Officer,

NP Resources, LLC and NP Energy Services, LLC (together “NP”) respectfully submit this objection to the United States Forest Service’s Northern Great Plains Management Plans Revision Final Environmental Impact Statement for Oil and Gas Leasing (“FEIS”) and the Draft Record of Decision (“Draft ROD”) both published August 13, 2020. NP objects to several aspects of the FEIS, including the scope of the United States Forest Service’s (“Forest Service” or “the Agency”) authority over oil and gas development, an increase in No Surface Occupancy (“NSO”) acreage without sufficient rationale, continued reliance on a flawed Reasonably Foreseeable Development (“RFD”) scenario, and other flaws in the record. Moving forward with the FEIS and a Final ROD would be an abuse of discretion, arbitrary and capricious agency action, and otherwise contrary to law.¹

NP has standing to object to the Draft ROD pursuant to 36 CFR § 218.5. NP submitted comments to the October 2018 USFS Draft Supplemental Environmental Impact Statement for Oil and Gas Leasing (“DEIS”), **Attachment A** and incorporated by reference herein, and

¹ NP reserves all rights and defenses available to it under applicable law and does not intend to waive any argument or claim in any subsequent challenge to the Agency action by virtue of not raising it in this objection.

submitted supplemental comments to the DEIS following a February 21, 2019 meeting at USFS Bismarck offices during which the Forest Service requested additional technical information from NP. *See Attachment B*, which is incorporated by reference herein.

1. The FEIS Overstates the Forest Service’s Authority Over Oil and Gas Development Causing Confusion.

Under the Mineral Leasing Act (“MLA”), the Bureau of Land Management (“BLM”) holds the exclusive right to regulate subsurface mineral development and offer oil and gas leases, which includes deciding which leases to offer. 30 U.S.C. § 226(g)-(h); *W. Energy Alliance v. Salazar*, 709 F.3d 1040, 1044 (10th Cir. 2013). The Forest Service plays an important role in BLM’s administration of oil and gas leases on Forest System lands, but that role is limited and secondary to BLM. *See* 30 U.S.C. § 226(g); *San Juan Citizens Alliance v. BLM*, 326 F.Supp.3d 1277, 1235-36 (D.N.M. 2018); *see also* 85 Fed. Reg. 54,311, 54,312 (Sep. 1, 2020) (Forest Service acknowledging “the [BLM] is the federal agency primarily responsible for managing federally-owned minerals, including those underlying National Forest System lands.”). The Forest Service executes its oil and gas oversight function through the National Environmental Policy Act (“NEPA”) review process, which it has just done in this FEIS/Draft ROD. *See* 36 U.S.C. § 228.102(e) (“[v]erifying that oil and gas leasing of the specific lands has been adequately addressed in a NEPA document, and is consistent with the Forest land and resource management plan.”).²

The Agency, itself, has long acknowledged the limited extent of its NEPA role in oil and gas leasing where USFS system lands are involved. *See e.g., Wyoming Outdoor Council v. U.S. Forest Service*, 981 F.Supp 17, 19 (D.D.C. 1997) (“USFS reads [§ 228.102(e)] in a way which allows it to make a large area of land administratively available for leasing and then make the subsection (e) findings by going back and internally verifying that it has complied with NEPA before actually leasing specific parcels.”). And while the Forest Service’s NEPA function may be exercised at the planning stage, as it was here, or at the leasing stage, nothing in the Forest Service or NEPA regulations confers authority on the Agency to decide whether to offer new oil and gas leases or otherwise exercise authority outside of the NEPA review process. *Center for Biological Diversity v. U.S. Forest Service*, 444 F. Supp.3d 832, 851 (S.D. Ohio 2020) (“Nowhere does [§ 228.102] hold that the USFS can withdraw consent at the APD stage” but “all parties agree that the USFS can only withdraw its consent to lease at the decision-to-lease step.”); *see also* 85 Fed. Reg. at 54,312 (Forest Service acknowledging the BLM “has the final decision whether to issue oil and gas leases on Federal lands, including National Forest System

² Section 228.102(e) provides that the Forest Service “shall authorize the [BLM] to offer specific lands for lease” but expressly limits the exercise of such authority to “verifying” consistency with NEPA and RMPs, ensuring conditions of occupancy are properly met through lease stipulations, and determining development could be allowed somewhere on each lease except where there is an NSO. 36 CFR § 218.102(e). In other words, nothing in § 228.102(e) authorizes the Forest Service to decide whether to offer new oil and gas leases and courts have routinely held the Forest Service’s authority in the context of federal mineral leasing and development to be narrow. *See Center for Biological Diversity v. U.S. Forest Service, infra*.

lands.”). In other words, the Forest Service’s role in overseeing oil and gas development on Forest System lands is one largely of advice and consent.

Thus, it comes as a surprise that the FEIS proclaims that “the responsible official, the Dakota Prairie Grassland supervisor, will decide whether . . . to no longer offer new oil and gas leases.” FEIS, Decision Framework, at v. Similarly, Attachment A to the FEIS, Steps to Approving Oil and Gas Production on National Forest System Lands, states that “[t]he decision to lease Federal minerals within National Forest System surface ownership . . . [is] made by the Forest Service responsible official.” FEIS, Attachment A. Neither statement finds support in the law.³ BLM retains the sole authority to decide *whether* to offer new oil and gas leases. BLM makes this decision, even within National Forest system surface ownership, subject to the Forest Service’s NEPA review and consent process. *See* 30 U.S.C. § 226(g) (the Forest Service’s authorization to regulate surface disturbing activities on Forest System lands is done “pursuant to any lease issued [by the BLM].”). But BLM does not make this decision subject to the Forest Service’s decision whether to offer new oil and gas leases in the first instance.

Not only are these statements legally incorrect, they inject confusion and regulatory uncertainty into the decision-making process moving forward. NP recognizes and appreciates the Forest Service’s important NEPA role in overseeing oil and gas development in the Grasslands—both via this FEIS/ROD and at a future date when reviewing NEPA-compliance with BLM leasing decisions. Nonetheless, regulatory certainty demands that the FEIS and final ROD accurately represent how and by whom decisions will be made in the future. Accordingly, NP objects to the statements identified above and requests they either be revised to comport with legal requirements or be removed from the final ROD.

2. The FEIS and Draft ROD do Not Consider, Address, Nor Rectify the Core Concerns Raised by NP.

NP’s initial and supplemental comments focused on the DEIS’s lack of support for a change from Alternative #1. As NP noted in those documents, the DEIS ignored technological and operational improvements, new regulatory requirements (both state and federal), and generally failed to establish why the current permitting and regulatory scheme was not sufficiently protective of the environment. NP provided specific examples of well pads it had permitted in cooperation with the Forest Service and under applicable regulatory regimes that minimized disturbances and other impacts associated with oil and gas development. NP also noted that the additional NSO areas being contemplated, rather than minimizing or reducing impacts, may actually have the effect of concentrating and pushing development onto adjacent private and state landowners (i.e., shifting the impact onto those without a say in the matter and onto lands without the mitigations imposed by the Forest Service and the BLM). Relatedly, NP noted that the DEIS summarily concluded without further analysis that the lease stipulations would be limited to administratively available leases within Forest System surface lands. Based on NP’s past experience with permitting development projects in multiple lease tracts with a

³ These legally incorrect statements are contradicted by statements made elsewhere in the record. *See e.g.*, FEIS at 3 (“The BLM is a cooperating agency for this environmental analysis, as they have the authority to offer National Forest System minerals for lease and apply the stipulations and conditions of approval specified in Forest Service decisions.”); *id.* at 11 (“The [BLM] administers oil leasing sales”).

combination of different mineral estates (federal, state, and private) within the same unit, in fact, the new stipulations would affect all leases within the unit. As a result of these and other comments, NP concluded that the DEIS was insufficient to establish a purpose and need to deviate from current conditions and current stipulations (i.e., Alternative #1).

The FEIS simply ignores NP's comments and provides no further rationale for why Alternative #1 is insufficient or why new restrictions that go even further than those proposed under Alternative #3 are necessary. *See e.g.*, FEIS at ii (listing the "issues" identified in comments and scoping, none of which cover the issues and concerns raised by NP). Most notably, the new preferred Alternative #3B would dramatically increase the acreage of leases subject to an NSO—the most draconian tool available to "mitigate" impacts. *See* FEIS at Table S-1 (Alt #1 – 75,100 acres; Alt 3 – 107,800 acres; Alt 3B – 118,500 acres). Generally speaking, the FEIS does not identify why this result is necessary. The NSO as applied to future developed recreation sites is particularly problematic given the FEIS's failure to specify with any further clarity than existed in the DEIS where these sites are or are likely to be. *See* NP Comments at 16 ("The new and revised lease 'recreation-based' stipulations are grounded entirely on an unsubstantiated, future, and unknown potential for adverse impacts.").

The FEIS also fails to address NP's concern that more stringent stipulations and increased NSO acreage, by forcing development onto adjacent private or state surface, could actually create significantly more impacts; or at a minimum, shift impacts onto non-federal surface where the stipulations do not apply. And despite the fact there are 107,100 acres of Federal minerals that have a split estate with non-Forest Service surface ownership and 996,100 acres of "other" minerals with non-Forest Service surface ownership, the FEIS does not discuss how NP's concerns will be avoided aside from passing, general comments regarding how the new preferred Alternative #3B will avoid imposing stipulations or conditions on oil and gas development targeting federal minerals but with no affected Forest System surface lands.

In these critical respects, the FEIS remains inadequate to support Alternative #3B. Accordingly, the administrative record upon which the final ROD would be based remains insufficient to allow the Forest Service to make a reasoned decision where the choice to adopt the stipulations created by Alternative #3B is supported by the facts in the record.

a. The FEIS Makes No Changes to Nor Addresses the Deficiencies in the Reasonably Foreseeable Development Scenario.

The RFD scenario is the linchpin of the FEIS and final ROD. It underlies the document's purpose and need, which in turn, serves as the Agency's basis for the chosen alternative. The FEIS frames the purpose as determining whether current stipulations are adequate and states "the action is needed because the pattern of development and type of operations have changed" since 2008. *See* FEIS at i. The FEIS then states "[i]n order to provide a basis for analysis for this [SEIS], an updated [RFD] was prepared, which gives both long-term and near-term (5 years) estimates for oil and gas development on the Little Missouri National Grassland." *Id.* Put another way, the FEIS selects the preferred alternative based on the RFD scenario. Accordingly, for the Agency's chosen alternative to provide any reasonable assurance of meeting the stated

objective—*i.e.*, to ensure adequate protection of grasslands resources in light of predicted changes in oil and gas development—the RFD must be accurate.

As an initial matter, it is simply incongruous to argue, as the FEIS appears to do, that the purpose and need (*i.e.*, the objective) for the Forest Service’s actions somehow exists in a vacuum untethered to the Agency’s assessment of future development and potential impact.⁴ The courts have expressly disavowed such an approach. *See e.g., Food & Water Watch v. U.S. Dep’t of Ag.*, No. 17-1714, 2020 WL 1479462 at 24 (D.D.C. Mar. 26, 2020) (“the agency’s purpose and need for action . . . will determine the range of alternatives and provide a basis for the selection of an alternative decision.”); *see also City of Alexandria v. Slater*, 198 F.3d 862, 867 (D.C. Cir. 1999) (“Courts evaluate an agency’s choice of reasonable alternatives in light of the objects of the federal action . . .”). Thus, it must be assumed that the RFD scenario will and must inform the Agency’s choice in determining what is needed to adequately protect the resource. It is here that the FEIS breaks down.

As noted by NP in its prior comments, the RFD is not accurate in key and material respects. As a result, the record lacks a connection showing how the Agency’s actions (*i.e.*, lease stipulations and NSOs) will ensure its objective is met (*i.e.*, adequate protection of resources on the Little Missouri National Grasslands on lands previously determined to be administratively available for leasing”). FEIS at i. *See Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 56 (1983) (an agency must “articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.”). Although NP provided extensive comments on the RFD and its shortcomings, nothing was done to address those comments or otherwise improve or even change the RFD. The FEIS simply carries over the same flawed analysis, using it to justify even more stipulations and placing development off limits through NSO acreage.

This flaw is more than harmless error. By the Agency’s own admission, the RFD provides the rationale for its selection of Alternative #3B, in large part to protect surface impacts. But the need for the specific protective measures and the extent to which they are applied in the FEIS is, at best, unclear and largely misses the mark. As NP noted, multi-well pad development has decreased surface impacts to on average 1.0-1.25 acres per well rather than the 5 acres assumed in the RFD. *See* NP Comments at 4. Yet, the RFD persists in its 5 acre estimate, placing total potential disturbed acres at 3,100 acres over 10 years. This mis-assumption alone overestimates potential surface impact by five times. Rather than correcting for this error, or otherwise explaining why NP’s assessment is incorrect or the issue is not material, the FEIS “agree[s] that industry efficiencies are increasing and that multi-well pads reduce some impacts,” and then carries forth the same RFD and the same analysis. This is a critical and material error as the FEIS and nearly all of its stipulations are designed to mitigate surface impacts, including an overall reduction in total acres with potential for disturbance and a corresponding increase in aggregate NSO acres, particularly when compared with Alternative #1. *See* Table ES-1. It is,

⁴ The FEIS’s response to prior comments related to the RFD and the purpose and need is nonsensical. On one hand, the FEIS says “the purpose and need for the SEIS presumes neither increased nor decreased impacts from the current pattern of oil and gas drilling” while on the other states “the [RFD] recognizes a change in the pattern of development” and that the “purpose and need of the analysis is to assess the adequacy of environmental protections in light of such change.”). *See* FEIS at 219.

therefore, reasonable to assume that if the FEIS overestimates potential surface impacts by five-fold, it too has overestimated the measures needed to mitigate such impacts. Such an outcome epitomizes arbitrary and capricious agency decision-making.

The FEIS further compounds the error by pointing out other additional impacts, including increases in the “general level of activity (traffic, flaring, construction of pipelines and transmission lines, etc.)” and “increas[ed] water for fracking and completion” but does nothing to address them.⁵ See FEIS at 222. Moreover, as NP noted in its prior comments, by adopting widespread NSOs and timing restrictions, the FEIS may actually exacerbate some of these impacts by creating inflexible lease stipulations and administrative policies that disincentivize the use of existing well pads, which decrease impacts and disturbances associated with new access roads and pipelines. Furthermore, multi-well pad development and the use of existing well sites can connect “stranded” oil and gas wells that would not otherwise be connected to gas gathering infrastructure, thereby reducing surface and flaring impacts (among others). The additional NSO acreage and overall increased stringency of Alternative #3B will further prevent these outcomes from the alternatives considered in the DEIS and risk exacerbating, rather than mitigating, future impacts.

b. Alternative #3B Would Increase the Percentage of NSO Area and Force Surface Disturbances Onto Private and/or State Land.

Compared with current conditions, Alternative #3B would increase NSO acreage by nearly 60%, taking it from 75,100 to 118,500 acres. As discussed above, new technologies and operating practices allow for more efficient development with minimized impacts. But, by establishing such an extensive amount of NSO area, the FEIS may ensure those benefits are not realized, or at least not realized in any impactful manner. The FEIS, instead, has chosen an alternative framework that encourages patchwork development and forces production onto non-federal land.

The result of the NSO expansion, in many cases will be fragmented development with increased adverse impacts, especially to wildlife resources. Development will concentrate in other areas, resulting in increased development density and ultimately increased adverse impacts off Forest System lands. The goal of NEPA should not be to merely shift impacts elsewhere. Yet, that is one likely outcome of the FEIS.

The Forest Service has failed to consider the adverse impacts resulting from the increase of NSO area that Alternative #3B would create through the additional and unnecessary stipulations.

⁵ NP recognizes that in some instances, like flaring, the Forest Service may not be able to mitigate the impact. Nonetheless, there are many indirect steps the Agency could take that could reduce such impacts, such as incentivizing gathering infrastructure and efficient collection of “stranded” production from existing pads, both of which would reduce flaring.

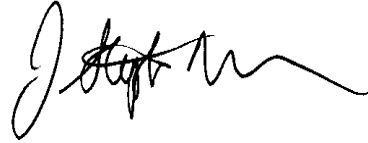
3. The Record Does Not Support Alternative #3B's New Engine Requirements.

NP objects to the new requirement that Tier 4 diesel-fueled non-road engines must be used on new leases during drilling and completion activities or the lessee must conduct additional analysis and near-field air quality monitoring to demonstrate compliance with National Ambient Air Quality Standards ("NAAQS") and potentially conduct additional project-specific control measures. As NP noted in its initial comments, the DEIS acknowledged that "overall air quality conditions are considered good by the NDDH." *See* DEIS at 41. NP also noted that none of the actual monitored criteria pollutants, including nitrogen dioxide (the primary pollutant of concern from engines), were anywhere close to exceeding the NAAQS or relevant federal health standards. And NP provided extensive comments on the DEIS's near-field nitrogen dioxide modeling, which included NP's conclusion that "the only scientifically-supportable course of action is to address the anticipated air quality concerns . . . at the permitting stage." More generally, NP commented that any additional air quality stipulations chosen for the FEIS must recognize the aforementioned air quality levels demonstrating no concern and the fact that under existing regulations and requirements that pre-date the FEIS "oil and gas emission in the Williston Basin should be declining on a per well basis." DEIS at 48.

The FEIS appears to impose the new engine requirement because prior near-field monitoring was based on the assumption that Tier 4 engines are used combined with the FEIS's determination that this stipulation is required to "ensure that [NAAQs] are not exceeded." FEIS at 63. The FEIS conducted no further analysis from the DEIS and no corrections were made to the modeling to address NP's comments, nor is there any discussion in the FEIS concerning addressing air quality concern related to engines at the permitting stage. Moreover, as NP previously noted, the most recent ozone levels were measured at 59 parts per billion (ppb) compared to the 70 ppb regulatory standard and the one-hour nitrogen dioxide level was 30 ppb compared to the 100 ppb standard. In short, there is no indication that the NAAQS is in jeopardy of being exceeded. And finally, the requirement to potentially "conduct additional project-specific control measures" is impermissibly vague and does not provide lessees with adequate or fair notice concerning what might be required to comply with this new stipulation. Accordingly, the record does not support the new engine stipulation in Alternative #3B.

4. Conclusion

For the reasons stated in this Objection as well as NP's prior comments, NP objects to the preferred Alternative #3B and issuance of a Final ROD incorporating the FEIS and remains convinced the record only supports Alternative #1. NP respectfully requests the opportunity to meet in person to resolve the identified issues and objections.



J. Stephen Mercer
CEO & President
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Attachments

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