**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF WYOMING**

American Farm Bureau Federation, Wyoming Farm Bureau Federation, Natrona County Farm & Ranch Bureau, American Exploration & Mining Association, American Forest Resource Council, American Petroleum Institute, American Sheep Industry Association, National Cattlemen's Beef Association, National Mining Association, National Rural Electric Cooperative Association, Public Lands Council, *and* Western Energy Alliance,

*Plaintiffs*,

*v.*

United States Department of the Interior; United States Bureau of Land Management; Debra Haaland *in her official capacity as Secretary of the Interior*; Steve Feldgus *in his official capacity as Principal Deputy Assistant Secretary of the Interior*; *and* Tracy Stone-Manning *in her official capacity as the Director of the Bureau of Land Management*,

*Defendants*.

No. 1:24-cv-_____

**DECLARATION OF LOUIS FINKEL IN SUPPORT OF PLAINTIFFS' COMPLAINT**

I, Louis Finkel hereby declare as follows:

1. I am senior vice president of government relations at the National Rural Electric Cooperative Association ("NRECA"). I am over the age of 18 years old, and I am competent to testify concerning the matters stated herein. The facts set forth in this Declaration are based on my personal knowledge and information that I have reviewed and rely upon in the ordinary course of my work. I am authorized to make this Declaration on NRECA's behalf, and I am familiar with

the activities and mission of NRECA and the priorities and concerns of its members. If called and sworn as a witness, I could and would competently testify to the matters discussed in this declaration.

2. I have been employed at NRECA since 2019. I hold a bachelor's degree from George Washington University. I have more than 25 years' experience working on a wide range of federal and state policy matters. Prior to joining NRECA, I served in executive positions leading government affairs programs for CVS Health Corporation, the American Petroleum Institute and the Grocery Manufacturers Association. I also served as a staff member for several members of Congress, including as chief of staff for the Committee on Science and Technology for the U.S. House of Representatives. As the senior vice president of government relations at NRECA, I am responsible for overseeing all aspects of the organization's advocacy before Congress and federal agencies, and I am member of the Association's executive leadership team.

3. This Declaration is submitted in support of NRECA's Complaint regarding the U.S. Bureau of Land Management's ("BLM") Final Rule entitled, *Conservation and Landscape Health*, 89 Fed. Reg. 40308 (May 9, 2024) ("Rule"). I have reviewed and am familiar with the Rule and the Complaint filed in this case. I understand that the lawsuit challenges the Rule.

4. NRECA participated in the rulemaking, commented on the proposed Rule, and has engaged in education of its members on complexities and ambiguities of the Rule.[1]

**NRECA AND ITS MEMBERS**

5. NRECA is the national trade association representing nearly 900 not-for-profit electric cooperatives and other electric utilities. NRECA was formed in 1942 by rural electric cooperative leaders to provide a unified voice for electric cooperatives and to represent their

[1] *See* NRECA, Comments on the Bureau of Land Management's Proposed Rule on Conservation and Landscape Health, Docket No. BLM-2023-0001 (July 5, 2023).

interests in Washington, D.C. NRECA's mission is to promote, support, and protect the community and business interests of electric cooperatives. NRECA advocates on behalf of its members before Congress and federal agencies, including the U.S. Department of the Interior ("DOI"). NRECA's member cooperatives include 64 generation and transmission ("G&T") cooperatives and 832 distribution cooperatives.[2]

6. America's electric cooperatives comprise a unique sector of the electricity industry. These not-for-profit entities are independently owned and democratically governed by the people they serve. They exist in rural areas, where low populations and incomes have not attracted for-profit power companies. Electric cooperatives are focused on providing affordable, reliable, and safe electric power to rural communities.

7. Each cooperative is governed by a board of directors elected from its membership. The G&T cooperatives generate and transmit power to distribution cooperatives which then provide that power to consumer-members. Collectively, G&T cooperatives generate and transmit power to nearly 80% of distribution cooperatives, which in turn provide power directly to consumer-members at the "end of the line"—*i.e.*, the location where electricity is consumed. The remaining distribution cooperatives obtain power directly from other generation sources within the electric utility sector. Both distribution and G&T cooperatives share an obligation to serve their consumer-members by providing affordable, reliable, and safe electric service.

8. Most electric cooperatives are considered small entities by the U.S. Small Business Administration under the Regulatory Flexibility Act, which requires agencies to analyze the effects of their regulations on entities including small businesses, small not-for-profits, and small governmental jurisdictions. As such, cooperatives depend on processes such as the Regulatory

[2] National Rural Electric Cooperative Association, *Electric Co-op Facts and Figures* (April 19, 2024), https://tinyurl.com/y89bvn4e ("Co-op Facts").

Flexibility Act ("RFA") to ensure that the impacts of government rules and other actions on electricity supply and rates are fully vetted by government agencies.

9. Electric cooperatives provide power to one in eight Americans and serve as engines of economic development for 42 million people across 56% of the nation's landmass. They own and maintain 2.7 million miles, or 42 percent, of the nation's electric distribution lines and serve large expanses of the United States that are primarily residential and typically sparsely populated, including large areas of our nation's public lands in the Western United States.

10. Those characteristics make it comparatively more expensive for rural electric cooperatives to operate than the rest of the electric sector, which tends to serve more compact, industrialized, and densely populated areas.

11. Since electric cooperatives serve areas with low population density, costs are borne across a base of fewer consumers and by families that spend more of their limited resources on electricity than do comparable customers of municipal-owned or investor-owned utilities serving higher density areas. Using data from the U.S. Energy Information Administration and other sources, NRECA estimates that rural electric cooperatives serve an average of eight consumers per mile of line and collect annual revenue of approximately $19,000 per mile of line. In contrast, for the rest of the industry, the averages are 32 customers and approximately $79,000 in annual revenue per mile of line.

12. Many cooperative consumer-members are among those least able to afford higher electricity rates. Electric cooperatives serve 92% of persistent poverty counties in the United States.[3] In 2022, the average (mean) household income for electric cooperative consumer-members was 12% below the national average.

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[3] Co-op Facts, *supra* n.1.

13. The electricity supplied by cooperatives is vital to rural economies, including those in and around our nation's public lands. Rural development requires access to affordable and reliable electric power. Regulations that are not cost-effective and increase the cost of that electricity, or that threaten its availability and reliability, thus pose serious threats to economies in large regions of America.

14. As not-for-profit entities, electric cooperatives are unique in the way that they are financed. Cooperatives have no equity shareholders who can bear the costs of increased permitting requirements, vegetation management costs, stranded generation assets, or investment in new or alternative generation resources. Cooperatives do not have a rate of return on equity as do investor-owned utilities. All costs are passed through directly to each cooperative's consumer-members via increased electric rates.

15. Because of their not-for-profit nature, cooperatives operate on thin financial margins and maintain minimal cash reserves for anticipated operating expenses and unforeseen events. Should operating or infrastructure project costs rise due to increased regulatory compliance costs, cooperatives either must (1) rely on debt sourced from entities such as the U.S. Department of Agriculture's Rural Utilities Service ("RUS"), which is often subject to loan restrictions and lengthy approval processes, including National Environmental Policy Act ("NEPA") review, for projects; or (2) raise rates for their consumer-members. In either instance all costs, including the costs of borrowing, are necessarily passed on to cooperatives' consumer-members at the end of the line who bear the cost of regulations through increased electric rates.

## COOPERATIVE OPERATIONS ON PUBLIC LANDS

16. Rural communities—including those based upon ranching, mining, and recreation—across the Western United States depend upon the safe, affordable, and reliable

electricity that cooperatives provide to power and safeguard their livelihoods, health and safety, and economic stability.

17. NRECA's members operate tens of thousands of miles of electric transmission and distribution lines across BLM-managed lands. The vast amount of BLM-managed public lands in rural America, and their checkerboard nature, necessarily requires cooperatives to obtain Rights-of-Way ("ROWs") across BLM lands in order to fulfill their mission of providing reliable, affordable, and safe electricity to rural communities.

18. Cooperatives submit applications for generation, transmission, and distribution ROWs on BLM-administered public lands pursuant to the Federal Land Policy and Management Act ("FLPMA") and in accordance with 43 C.F.R. § 2800, et seq.[4]

19. BLM must approve such ROW applications and renewals. Each ROW is subject to conditions and holds the ROW holder liable for damages arising from their operations.[5]

20. BLM is required to manage public lands under FLPMA's mandate of "Multiple Use and Sustained Yield" ("MUSY"), thus maximizing *use* of our Nation's public lands "so that they are utilized in the combination that will best meet the present and future needs of the American people."[6] To implement MUSY, Congress specifically directed BLM in FLPMA to prioritize specific *major and principal uses* of public lands, including mining, domestic livestock grazing, oil and gas production, and utility ROWs.[7]

21. Cooperatives utilize ROWs across BLM-managed public lands under the doctrine of MUSY, and they depend upon FLPMA's consistent prioritization of utility ROWs as a principal

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[4] 43 U.S.C. 1761(a)(4).

[5] *Id.*

[6] 43 U.S.C. §§ 1701(a)(12); 1732(a) (emphasis added).

[7] *Id.* at § 1702(l) (emphasis added).

use of public lands in their operations, budgeting, and project planning processes. The ability of cooperatives to secure, access, operate on, and maintain ROWs is necessary not only to meet current power needs but also to accommodate the increasing demand for electricity required to enable new loads, including artificial intelligence, data centers, the onshoring of manufacturing and electrification of the economy, incorporating new and renewable sources of energy into the grid, and mitigating for risks such as wildfire.

22. Cooperatives must access their ROWs and maintain their infrastructure on an ongoing basis in order to identify and remove hazardous vegetation; inspect infrastructure; and repair and replace equipment where necessary to ensure that that poles, lines, and other critical infrastructure meet operational and safety standards. Access points and access roads to ROWs are required to conduct these operation and maintenance activities, and heavy equipment must sometimes be moved into and around ROWs to complete tree trimming, maintenance, and other processes essential to maintaining service.

23. Cooperatives also frequently must improve or "harden" their grid to make electric infrastructure more resilient in areas at risk of wildfire or other adverse incidents. This can include replacing a wooden pole with a metal pole; undergrounding power lines; and reducing hazardous vegetation in and around their ROWS, including trees infringing on powerlines or at risk of falling onto electric infrastructure.

24. In an increasingly more electrified world where more energy is needed to meet growing demand, cooperatives also must expand their infrastructure in existing and new ROWs to incorporate new and renewable sources of energy into the electric grid. Planning for expansion and hardening projects must occur years in advance due to financing and permitting timelines.

25. BLM must approve many of the above detailed processes on an activity-by-activity basis, including vegetation management activities, grid hardening and maintenance activities, and

cooperative access to and movements within the ROWs.[8] These approvals often are time-consuming and arduous under existing regulations. Obtaining approval for the removal of even a single hazardous tree can take months or years in some cases; approval to replace a wooden pole with a metal pole in an existing ROW or to create an access road or access point to an existing ROW can require a full NEPA review process, some of which take years to complete.[9]

26. In meetings with NRECA, BLM has cited the complexity of its regulatory requirements and reduced staffing availability for delays in processing and approving new and renewed ROWs, and utility operations and maintenance requests. Implementation of regulatory requirements and approval processes also differ between BLM headquarters in Washington, D.C. and regional offices throughout the country. This inconsistency creates uncertainty for cooperatives operating across multiple jurisdictions. And the delays imposed by BLM on cooperative maintenance, operations, and grid hardening and expansion projects has directly contributed to increased risks for wildfire events and other disruptions to electric reliability.

27. The addition of this detailed Rule, which upends all past BLM decision-making and use prioritization processes, is yet another hurdle in an already complex BLM regulatory landscape. It creates further staffing strain and inconsistency in the agency. Cooperatives are encountering even more uncertainty in navigating BLM approval processes, and suffering delays in access, operation, and maintenance approvals. There is increasing uncertainty and confusion in project planning and permitting processes and more inconsistency in implementation and approval processes between regions. As a result of such delay and confusion, cooperatives' risks, and project timelines and investments increase.

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[8] *See* 43 C.F.R. § 2800 *et seq.*

[9] National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.*

28. Cooperatives that operate on BLM-managed lands are particularly concerned about wildfire risk. Delayed BLM approvals for grid hardening projects and vegetation management activities increase utility vulnerabilities to wildfire events. Cooperatives are strictly liable for up to $2.88 million per incident for wildfires in and around their infrastructure, even if they are not deemed negligent.[10] Liabilities in such amounts can create severe financial distress for many cooperatives and may create challenges in obtaining sufficient insurance coverage and access to capital. BLM has thus far been unable to resolve electricity industry concerns regarding delayed approvals for wildfire mitigation and grid hardening activities. This Rule further complicates and delays those cooperative efforts to reduce wildfire risk.

29. Cooperatives also are concerned about the additional regulatory burden placed on them by this Rule in an already highly-regulated landscape as well as how BLM is implementing this Rule in conjunction with other BLM activities in terms of staffing, consistency of rules with each other, and consistency of implementation across regions. For example, many cooperatives that operate on BLM-managed lands also are or will be subject to a recently released Draft Sage Grouse Resource Management Plan.[11] That complex Plan covers most of the western U.S. and similarly dictates how and where users of public lands operate. It places an additional layer of complex regulatory requirements governing operations upon the exact same lands already subject to the complex compliance requirements of this Rule and other existing BLM rules.

30. BLM's inability to timely and effectively approve cooperative wildfire mitigation activities, ROW authorizations and renewals, grid hardening and expansion activities, and regular operation and maintenance activities under its existing regulatory framework already jeopardizes

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[10] 43 C.F.R. § 2807.12.

[11] *See* Notice of Availability of the Draft Resource Management Plan Amendment and Environmental Impact Statement for Greater-Sage Grouse Rangewide Planning, 89 Fed. Reg. 18963 (Mar. 15, 2024).

safety and the supply of reliable electricity. The addition of yet another regulatory hurdle, in the form of the Rule, creates further regulatory and operational uncertainty for cooperatives who already must navigate complex, slow, inconsistent, multilayered, and challenging BLM regulatory requirements and bureaucratic processes. The Rule results in increased compliance costs and increased delays in approvals for necessary operations and maintenance activities. The Rule may even jeopardize cooperatives' ability to serve some areas.

31. In this period of increasing electrification, supply chain shortages, global tension and security threats, and economic uncertainty, it is critical that BLM conducts the proper due diligence to assesses the potential impacts that this fundamental shift in how it manages rights-of-way and generation on public lands would have on electricity rates, reliability, and service; and the impacts that changes to rates or reliability would have on rural communities, persistent poverty counties, and businesses across the nation.

32. Here, BLM also failed to adequately engage with stakeholders by conducting a thorough Regulatory Flexibility Act ("RFA") analysis for the Rule.[12] Nor did BLM prepare a required Statement of Energy Effects ("SEE").[13] As a result of BLM's failure to comply with these procedural requirements, the Rule's adverse impact on energy prices and availability, as well as its adverse effect on cooperatives and the rural communities they serve were not considered by BLM in the rulemaking process.

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[12] *See* Regulatory Flexibility Act, Pub. L. 96-354; 94 Stat. 1164 (1980); Exec. Order No. 13211 (2001) ("RFA"). *See also* 89 Fed. Reg. at 40333– 34.

[13] *See* 89 Fed. Reg. at 40337.

## THE RULE'S IMPACT ON RURAL ELECTRIC COOPERATIVES

33. The doctrine of MUSY has long guided the management and use of our nation's public lands. MUSY's emphasis on use, and FLPMA's designation of utility ROWs as a major and principal use of public lands, create a foundation of regulatory stability upon which cooperatives' operations and future planning have long depended. Continued prioritization of utility ROWs as a major or principal use of BLM-managed public lands under FLPMA is critical to the stability of our electric grid and cooperatives' ability to operate, maintain, and expand the grid to accommodate current and future electricity demand.

34. The Rule unlawfully requires BLM to now prioritize conservation in BLM decision-making, and it designates conservation as a new principal use of public lands on par, or even above, utility ROWs. It also requires that all uses of BLM-managed public lands be "compatible" with conservation.[14] Determinations about "compatibility" are left to the discretion of BLM, resulting in significant operational uncertainty for cooperatives in and around BLM-managed public lands. Cooperatives are adversely impacted by this critical transformation of MUSY and FLPMA from authorizing cooperative *use* of public lands, to instead centering conservation and *non-use* as BLM's primary land management consideration. Critical investment in grid hardening and expansion projects to enable electric demand is being chilled.

35. The Rule also expands BLM's authority to withdraw potentially millions of acres of public lands from non-conservation uses by designating Areas of Critical Environmental

[14] *See, e.g.* 89 Fed. Reg. at 40343, 40310.

Concern ("ACECs").[15] The Rule indicates that BLM will not seek congressional approval to withdraw these areas from public use and that such designations may be indefinite.[16]

36. Even before finalizing the Rule, BLM proposed drastic restrictions on electric utility uses of public lands in some of its Resource Management Plan ("RMP") processes. For example, in its Draft RMP for the Rock Springs, Wyoming Region, BLM proposes to designate a large ACEC and to have ROW exclusion areas across millions of acres in Wyoming.[17] BLM further proposes to place restrictions on ROW width as well as electric infrastructure height and color.[18] Line undergrounding, which often is not financially or geographically feasible for many cooperatives, also may be required.[19] Cooperatives are concerned that this may only be the beginning, and that BLM will use its expanded authority under the Rule to even further restrict utility uses of public lands by designating more ACECs.

37. The Rule also indicates that BLM will not conduct public notice and comment processes; or perform Regulatory Flexibility Act analyses or Statements of Energy Effects when designating ACECs beyond the regular RMP process.[20] Such failure on the part of BLM to engage in due diligence for ACEC designations will result in unlawful agency decision-making based on incomplete information. Cooperatives thus must operate and plan for the future under significant uncertainty about what areas of their service territories will be designated ACECs and how their operations will be restricted or even prohibited in such areas.

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[15] 89 Fed. Reg. at 40325, 40313.

[16] *Id. See also,* 43 U.S.C. §§ 1702 (j); 1714 (requiring Congressional approval for BLM land withdrawals of five thousand or more acres).

[17] *See* 88 Fed. Reg. 56654 (Aug. 18, 2023).

[18] *Id.*

[19] *Id.*

[20] *Id.*

38. This expanded use and scope of ACEC authority could preclude or limit transmission and distribution ROWs that provide electricity service to rural America. Project costs will increase in order to avoid areas designated as ACECs or to comply with increased restrictions on use in such areas.

39. The Rule also will allow persons, including concerned individuals and non-governmental organizations, to apply for "restoration leases" and "mitigation leases" on BLM-managed lands.[21] This program allows interference with, or even enables parties to block, use of BLM-managed public lands for other purposes, including utility ROWs, generation projects, and related operations. The availability and use of the leasing scheme subjects cooperatives to additional regulatory and operational uncertainty as well as increased project and compliance costs.

40. By withdrawing lands from use via ACECs and mitigation and restoration leasing, BLM is reducing the land available for utility ROWs and other uses. Reduction in available land creates unnecessary competition between users of public lands and increased project costs for cooperatives for lands not subject to such restrictions.

41. The Rule also will subject cooperatives to mitigation requirements for use of BLM-managed public lands, in order to "avoid, minimize, and compensate for all impacts to public land resources."[22] Any mitigation requirements for electricity rights-of-way, operations, or generation facilities necessarily increases costs of cooperative operation and project budgets which then increases rates that must be shouldered by electric co-operative consumer-members—many of whom live in persistent poverty counties.

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[21] 89 Fed. Reg. at 40342–45.

[22] *Id.* at 40346.

42. Additional mitigation costs also chill grid expansion and hardening projects which is particularly concerning as cooperatives navigate supply chain shortages, increased electricity demand, and the need for expanded and hardened electric infrastructure.

43. The Rule also imposes land health standards on all BLM lands and program areas.[23] Electric cooperative ROWs operate across tens of thousands of miles of BLM managed lands, and cooperatives already dedicate significant funding and effort in maintaining their ROWs and infrastructure via vegetation management operations and regular maintenance and upgrades.

44. Imposition of land health standards across tens of thousands of miles of electricity ROWs results in increased maintenance, operation, monitoring, and reporting costs. The volume of cooperative ROWs that are subject to these standards may, quite simply, make implementing and monitoring such standards impossible.

45. The imposition of land health standards also jeopardizes electric reliability and safety in some areas. Cooperatives are obligated under FLPMA to conduct vegetation management activities, including mowing, timber and slash removal, and applications of herbicide, among other actions, to safeguard powerlines and protect against wildfire and power outages.[24] Should landscape health standards be applied across all ROWs, such necessary activities will be even more highly regulated or restricted in some areas, which increases costs and jeopardizes reliability and safety across electric systems.

46. Vacating the Rule would redress these harms to NRECA and its members.

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[23] *Id.* at 40323–25.

[24] *See* 43 U.S.C. § 1772.

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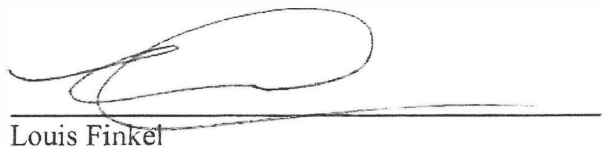
I declare under penalty of perjury under the laws of the United States of America, pursuant to 28 U.S.C. § 1746, that the foregoing is true and correct to the best of my knowledge.

Executed on this 9 day of July, 2024, in Arlington, VA.



Louis Finkel