

Exhibit A

to

New Mexico Oil and
Gas Association's

Memorandum in
Support of Motion to
Intervene

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
WESTERN DIVISION**

WESTERN ENERGY ALLIANCE

Plaintiff,

v.

UNITED STATES DEPARTMENT OF THE
INTERIOR, SALLY JEWELL, in her official
Capacity as Secretary of the United States
Department of the Interior; BUREAU OF
INDIAN AFFAIRS and MICHAEL S. BLACK,
in his official Capacity as Director of the Bureau
of Indian Affairs

Defendants.

Case No. 16-cv-00050-DLH-CSM

DECLARATION OF STEVEN P. HENKE

I, Steven P. Henke, declare, under penalty of perjury pursuant to 28 U.S.C. § 1746, that the following statements are true and correct to the best of my knowledge:

1. I reside in Sandoval County, in the State of New Mexico. I am over 18 years of age and I am competent to testify to the matters set forth in this Declaration. Each of the statements contained herein is based on my personal knowledge.

2. I am the President of the New Mexico Oil and Gas Association ("NMOGA"), headquartered at 123 East Booth., Santa Fe, New Mexico, 87505.

3. I am authorized to submit this Declaration on NMOGA's behalf.

4. NMOGA's purpose is to promote the safe and responsible development of oil and gas resources in New Mexico through advocacy, collaboration, and education.

5. NMOGA was formed in 1929 to protect, promote, and assert the business, economic, and educational interests of its members, to advocate for fair and effective regulations of their businesses, and to represent the interests of its members before state and federal regulatory agencies, legislatures, and courts.

6. NMOGA has 271 members, representing oil and gas exploration and production companies, oil and petroleum products refineries, gas and electric utility and transmission companies, environmental consultants, banks, insurance companies, logistics and transportation companies, well service companies, gas station and convenience store owners, and other companies with an interest in oil and gas production and energy production and transportation in New Mexico and other states.

7. Many of NMOGA's members are engaged in business on Indian lands in New Mexico as well as other states, including North Dakota.

8. New Mexico is home to nineteen Native American Pueblos and three Native American Tribes with reservations (collectively, "Tribes"), and there are numerous parcels of tribally owned land held by the United States in trust and lands held by the United States in trust for individual Indians ("allotted lands") outside reservation boundaries in New Mexico and in other States. Many of NMOGA's members work with one or more of the Tribes, including leasing tribally owned land and allotted lands.

9. NMOGA's members have facilities on, and currently have or have applied for rights-of-way ("ROW") grants across, lands of multiple Indian Reservations and tribal and allotted lands outside reservation boundaries, in New Mexico and several other States, including North Dakota. In New Mexico, NMOGA's members have facilities or ROWs on the Navajo and Jicarilla

Apache Reservations, tribal lands of several Pueblos, as well as allotted and tribally-owned land outside of the reservations.

10. NMOGA's members rely on ROWs across tribal and allotted land to access their owned or leased land, and for the construction, operation, and maintenance of oil and gas pipelines, access roads and facilities, and utility transmission lines to ensure continued supply of necessary energy resources to the public in New Mexico and nationally. These ROWs have been applied for and/or obtained from the Bureau of Indian Affairs ("BIA") under its regulations located at 25 C.F.R. Part 169 ("current Part 169 Regulations").

11. The ordinary course of the business of many of NMOGA's members require them to assign, mortgage, renew, or amend their ROWs, and some of NMOGA's members have concrete plans to do so in the future.

12. When the BIA announced that it had proposed revisions to its Part 169 Regulations, a number of NMOGA's members filed comments in response to the proposed rule, including Encana Oil & Gas USA Inc., Enterprise Products Operating, LLC and Mid-America Pipeline Company, LLC, Public Service Company of New Mexico (PNM), Western Refining Southwest, Inc. and Western Refining Pipeline, LLC, and Xcel Energy.

13. The concerns NMOGA's members expressed in their comments were not adequately considered by the BIA in the promulgation of its Final Rule, *Rights-of-Way on Indian Land*, 80 Fed. Reg. 72492-72549 (Nov. 19, 2015) ("Final Rule").

14. The BIA's Final Rule, if implemented and enforced, will cause immediate and substantial harm to the interests of NMOGA's membership, because it will impact their rights under existing ROWs on tribal and allotted land and their ability to efficiently obtain future ROWs on terms conducive to productive production and transportation of energy resources.

15. The Final Rule, as promulgated, will harm NMOGA's members because (a) the Final Rule's purported retroactive application to existing ROW grants deprives NMOGA members who have existing ROW grants of constitutionally protected rights; (b) the Final Rule imposes tribal jurisdictional rules that conflict with existing, controlling Supreme Court caselaw, which is contrary to NMOGA members' settled expectations regarding applicability to existing ROW grants; (c) the Final Rule's requirement that ROW grantees obtain remainder interest consent and tribal consent when a tribe owns a fractional interest in an allotment will immediately, and negatively, impact NMOGA members because those provisions add new, burdensome, and practically unworkable requirements to existing grants.

16. ROWs established under the current Part 169 Regulations historically have been freely assignable without further consent of the landowner or approval of the BIA, and grantees of and allotted ROWs have been free to mortgage or otherwise financially encumber ROW interests as needed to finance operations and development. The assignability of ROWs and the ability to include ROWs as an asset subject to mortgages and other encumbrances have been material to NMOGA's members because those abilities enabled them to execute transactions necessary for the effective development, financing, and management of their businesses. Flexibility regarding assignment and financing is an integral part of their ability to compete in energy markets with companies operating on, and requiring access across, private, federal, and State-owned lands, where free assignability and the ability to encumber for financing are the norm.

17. The Final Rule negatively affects the ability of NMOGA's members to freely assign and mortgage their ROWs by requiring landowner consent and BIA approval whenever the ROW grant does not expressly authorize such transactions, thus impairing the ability to execute needed transactions and decreasing the value of the ROW to NMOGA's members. Indeed, if a NMOGA

member seeks to assign a ROW, but a landowner or the many separate owners who may hold interests in one of several allotments which a single ROW may cross refuses consent, the ability of a company such as a natural gas or petroleum products pipeline or an electric utility to deliver vital energy resources to end users may be destroyed. As stated in the comments submitted by NMOGA's members, the Final Rule threatens substantial economic harm to NMOGA's members.

18. Economic harm to NMOGA's members will also be caused by Tribes and individual tribal member landowners, who the Final Rule encourages to seek additional compensation simply to consent to an assignment or a mortgage of a ROW. Under the current regulations, the opportunity to renegotiate a ROW each time an assignment or mortgage is sought is not permitted.

19. The imposition of additional requirements for consent to assignments also will impose impractical, deal-killing delay as the execution of routine business transactions to continue and finance operations will require, for individual allotments, (a) identifying the dozens or perhaps hundreds of individual landowners of even one allotment, including remaindermen, (b) securing the consent of the numerous individual owners, including any negotiations for compensation for their approvals, (c) presenting such consents to the BIA officials and securing their approval. This process will invariably require months to complete, and some NMOGA members have ROWs across multiple allotments for a single pipeline. In addition, consents and the steps outlined above would be required from Tribes for tribal ROWs. Simply stated, assignment and financing transactions cannot be accomplished under such legal requirements.

20. The Final Rule, contrary to federal law, also seeks to change longstanding rules regarding taxation and regulatory jurisdiction applicable to and allotted ROWs and persons and activities on such ROWs. While NMOGA's members respect Tribes as governments and recognize

the importance of tribal sovereignty, they also require economically viable conditions for operations and identifiable and consistent laws and regulations. NMOGA's members are faced with demands of State governments for the payment of State taxes. I am informed that certain tribal taxes of New Mexico Tribes are assessed at approximately three times the level of the comparable State of New Mexico tax. In addition, tribal laws are not always readily ascertainable.

21. The Final Rule, as promulgated, proclaims that tribal taxes and laws and regulations apply to new grants, and, significantly, to all existing grants that are mortgaged, assigned, renewed, or amended. The Final Rule's retroactive application subjects NMOGA's member companies to immediate, new, and potentially onerous duties and burdens. This will negatively affect the production and transportation of energy resources in New Mexico and nationally.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 7, 2016.

By 
Steven P. Henke