Nos. 21-8047; 21-8048

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

MERIT ENERGY COMPANY, LLC, and
MERIT ENERGY OPERATIONS I, LLC,
Plaintiffs/Appellants – Cross Appellees,

v.

DEBRA HAALAND, in her official capacity as Secretary of the Interior,
U.S. Department of the Interior, and the U.S. OFFICE OF NATURAL
RESOURCES REVENUE,
Defendants/Appellees – Cross Appellants.

Appeal from the United States District Court for the District of Wyoming
No. 20-CV-32-SWS-DB (Hon. Scott W. Skavdahl)

REPLY BRIEF FOR APPELLEES – CROSS APPELLANTS

Of Counsel:

JENNIFER A. MILLER
Attorney
U.S. Dept. of the Interior

TODD KIM
Assistant Attorney General
ROBERT LUNDMAN
MICHAEL T. GRAY
Attorneys
Environment and Natural Resources Division
U.S. Department of Justice
701 San Marco Blvd.
Jacksonville, FL 32207
(202) 532-3147
michael.gray2@usodj.gov

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

GLOSSARY vi

INTRODUCTION 1

ARGUMENT 2

I. Merit's suit is not ripe for adjudication. 2

II. Interior did not act arbitrarily or capriciously when it included a 10% adjustment to the Differential in the Negotiated Rule. 12

CONCLUSION 14

CERTIFICATE OF COMPLIANCE 16

CERTIFICATE OF DIGITAL SUBMISSION 17

CERTIFICATE OF SERVICE 18

TABLE OF AUTHORITIES

Cases

Abbott Lab. v. Gardner,
387 U.S. 136 (1967).....5

Alascom, Inc. v. FCC,
727 F.2d 1212 (D.C.Cir.1984).....3

Club Madonna, Inc. v. City of Miami Beach,
924 F.3d 1370 (11th Cir. 2019).....2

CSG Expl. Co. v. FERC,
930 F.2d 1477 (10th Cir. 1991).....5, 8

Davidson Oil Co. v. City of Albuquerque,
545 F. Supp. 3d 1039 (D. New Mex. 2021).....11

Fort Peck Hous. Auth. v. U.S. Dep't of Hous. & Urb. Dev.,
367 F. App'x 884 (10th Cir. 2010).....13

Media Access Project v. F.C.C.,
883 F.2d 1063 (D.C. Cir. 1989).....3

Merit Energy Operations I, LLC v. Eastern Shoshone,
No. 21-CV-25-F, 2021 WL 7209546, at *1 (D. Wyo. October 13, 2021).....11

Merit Energy Operations I, LLV v. Eastern Shoshone,
No. 21-CV-25-F, ECF No. 58 (January 25, 2022).....11

Mobil Expl. & Producing U.S., Inc. v. Dep't of Interior,
180 F.3d 1192 (10th Cir. 1999).....5, 6

Nat'l Ass'n of Home Builders v. U.S. Army Corps of Engineers,
417 F.3d 1272 (D.C. Cir. 2005).....2, 3

Nat'l Park Hosp. Ass'n v. Dep't of Interior,
538 U.S. 803 (2003).....8

Park Lake Res. v. United States Dep't of Agric.,
197 F.3d 448 (10th Cir. 1999) 9

Peters v. Delaware River Port Authority of PA and NJ,
16 F.3d 1346 (3d Cir. 1994) 11

Pub. Lands Council v. Babbitt,
167 F.3d 1287 (10th Cir. 1999) 4
aff'd, 529 U.S. 728 (2000) 4

Public Serv. Co. of New Mexico v. Federal Power Comm'n,
557 F.2d 227 (10th Cir.1977) 8, 9

Reno v. Flores,
507 U.S. 292 (1993).....4

Ritter v. Hughes Aircraft Co.,
58 F.3d 454 (9th Cir. 1995) 11

Rocky Mountain Oil & Gas Ass'n v. Watt,
696 F.2d 734 (10th Cir. 1982) 10

Sierra Club v. Yeutter,
911 F.2d 1405 (10th Cir. 1990) 8

St. Louis Baptist Temple, Inc. v. Fed. Deposit Ins. Corp.,
605 F.2d 1169 (10th Cir. 1979) 11

The Est. of Lockett by & through Lockett v. Fallin,
841 F.3d 1098 (10th Cir. 2016) 11

Utah Envtl. Congress v. Bosworth,
443 F.3d 732 (10th Cir.2006) 13

Winzler v. Toyota Motor Sales U.S.A., Inc.,
681 F.3d 1208 (10th Cir. 2012) 11

Wyoming v. Zinke,
871 F.3d 1133 (10th Cir. 2017) 4, 5, 9

Statutes and Court Rules

5 U.S.C. § 570 13

Fed. R. Civ. P. 8(a) 7

Fed. R. Evid. 201 11

Regulations

30 C.F.R. § 1206.54(d)(2)(iii) 12

30 C.F.R. § 1218.53 10

Other Authorities

OLT News, *Tribes Take Back Full Ownership of Oil and Gas Field,* https://oltnews.com/tribes-take-back-full-ownership-of-oil-and-gas-field-oil-city-news 11

Wyoming News, *Tribes Take Ownership of Reservation Oil Field,* https://www.wyomingnews.com/rocketminer/news/state/tribes-take-ownership-of-reservation-oil-field/article_629480dc-0cea-5077-94d2-6f13634bfefd.html 11

GLOSSARY

APA	Administrative Procedure Act
Differential	Location and Crude Type Differential as defined at 30 C.F.R. § 1206.51
IBLA	Interior Board of Land Appeals
Merit	Merit Energy Company, LLC
Negotiated Rule	Indian Oil Valuation Amendments, 30 C.F.R. Parts 1206 and 1210
NYMEX	New York Mercantile Exchange
ONRR	Interior's Office of Natural Resources Revenue
WCS	Western Canadian Select Index
WTI	West Texas Intermediate

INTRODUCTION

Our principal and response brief explained that this case is not ripe for adjudication because plaintiffs Merit Energy Company and Merit Energy Operations (collectively Merit) do not bring a facial challenge to the Negotiated Rule[1] nor does Merit challenge any past action applying the Negotiated Rule to Merit's leases. Instead, Merit seeks to challenge potential future applications of the Negotiated Rule to its leases. If the Court were to hear that claim now it would interfere with an ongoing administrative appeal raising the same issues but in the context of a concrete factual application of the Negotiated Rule to Merit's leases. This Court should not allow Merit to evade the ongoing administrative process to bring an "as-applied" challenge to actions the agency has not taken. This Court should therefore dismiss Merit's suit and wait for Interior's resolution of Merit's administrative appeal.

Merit's responses are not persuasive. First, it makes no difference that the Negotiated Rule is final and that Merit must comply with it. That might make ripe a *facial* challenge to the Negotiated Rule, but it does not allow Merit to challenge particular potential *applications* of the Negotiated Rule that have not happened yet. Second, Interior's defense against the substance of Merit's lawsuit, made in the

[1] We use "Negotiated Rule" and other terms in this brief as defined in the Glossary and in Interior's principal and response brief.

alternative to the ripeness argument, does not render futile Merit's pending administrative appeal. Third, Merit admits that, should it be successful in its administrative appeal or a later suit challenging that concrete application of the Negotiated Rule to it, it can recoup any royalties it overpays in the interim, undermining its claims of significant hardship. This Court should dismiss the case as unripe and wait for an actual application of the Negotiated Rule to Merit through final action by Interior on Merit's administrative appeal.

ARGUMENT

I. Merit's suit is not ripe for adjudication.

Merit first contends that Interior's decision to require Merit to comply with validly promulgated regulations is final and thus reviewable now. Response and Reply Br. 11-19. It is true both that the Negotiated Rule is final and that Interior instructed Merit to comply with the Negotiated Rule when reporting its royalties. That finality might even support a facial challenge to the Negotiated Rule. *See*, *e.g.*, *Club Madonna, Inc. v. City of Miami Beach*, 924 F.3d 1370, 1380 (11th Cir. 2019) ("A facial challenge presenting a purely legal argument, for example, 'is presumptively ripe for judicial review' because that type of argument does not rely on a developed factual record. In contrast, an as-applied challenge 'necessarily requires the development of a factual record for the court to consider.'") (citation omitted); *Nat'l Ass'n of Home Builders v. U.S. Army Corps of Engineers*, 417 F.3d

1272, 1282 (D.C. Cir. 2005) ("a purely legal claim in the context of a facial challenge" to a regulation is "presumptively reviewable"). But even in a facial challenge "a case may lack ripeness . . . even when it involves a final agency action presenting a purely legal question," if the court would benefit from actual application of the regulation in a concrete setting. *Media Access Project v. F.C.C.*, 883 F.2d 1063, 1071 (D.C. Cir. 1989) (quoting *Alascom, Inc. v. FCC*, 727 F.2d 1212, 1217 (D.C.Cir.1984)). Here, however, Merit does not bring a facial challenge to the Negotiated Rule. 3 Appendix A-415 ("The relief Merit seeks is limited to the Steamboat Butte and Circle Ridge leases at issue in this action, and to calculating the 'major portion' royalty value of Wyoming asphaltic sour crude oil produced from those leases."). Thus, that the regulation is final does not resolve whether the Merit's suit is ripe, and the Court must look to Interior's application of the Negotiated Rule to find an agency action ripe for review.

Every factor that Merit argues favors review here is a factor relevant to a suit asserting a facial challenge to a regulation, not an as-applied challenge. But Merit's suit does not present a facial challenge to the regulation. Besides its admission that it does not bring a facial challenge, 3 Appendix A-415, Merit does not contend that that the Negotiated Rule is contrary to the statute in all applications, as is required for a facial challenge. Merit does not even argue that the Negotiated Rule is *always* contrary to its lease terms. Merit contends only that application of the Negotiated

Rule is contrary to Merit's particular lease terms in some months when there are volatile market conditions, which is not a facial challenge to the Negotiated Rule. *See Pub. Lands Council v. Babbitt*, 167 F.3d 1287, 1301 (10th Cir. 1999), *aff'd*, 529 U.S. 728 (2000) (noting that "to succeed on a facial challenge, [plaintiff] must demonstrate 'that no set of circumstances exists under which the [regulation] would be valid'") (quoting *Reno v. Flores*, 507 U.S. 292, 301 (1993)).

Rather than presenting a facial challenge to the Negotiated Rule, Merit argues that in particular months, when certain exceptional market conditions prevail, the regulation's formula might require Merit to pay some unknown amount more than it alleges it ought to have to pay under the terms of its leases. That is an as-applied challenge, but Merit brings it only for circumstances in which the regulation has yet to be applied. Opening Brief at 10, 14 ("Merit's action related to the Secretary's requirement that Merit pay royalty for current and future production (due on or after January 2020)" which was "the time frame not covered by Merit's administrative appeal"). Adjudicating an as-applied challenge of a regulation to a time where that regulation has not yet been applied is the type of "abstract disagreement[]" the prudential ripeness doctrine seeks to avoid. *See Wyoming v. Zinke*, 871 F.3d 1133, 1141 (10th Cir. 2017). As this Court has explained, when a case "involves the application of complex standards to a specific factual situation." judicial review "should be reserved until the challenged

regulation is actually applied in a particular case by the agency." *CSG Expl. Co. v. FERC*, 930 F.2d 1477, 1484 (10th Cir. 1991). And for months in which Merit contends that it already has had to pay more than it ought to owe, it has a pending administrative appeal, and Merit does not contend that Interior has taken a final agency action with respect to any month in which Merit has already paid royalties. Merit's suit is accordingly not ripe, regardless of the finality of the Negotiated Rule or Merit's obligation to comply with that Rule pending the outcome of its administrative appeal.

That pending administrative appeal further demonstrates that this case is not ripe. The fitness prong of the ripeness analysis "prevents courts from entangling themselves in administrative policy disagreements and 'protect[s] the agencies from judicial interference until an administrative decision [is] formalized and its effects felt in a concrete way by the challenging parties.'" *Mobil Expl. & Producing U.S., Inc. v. Dep't of Interior*, 180 F.3d 1192, 1197 (10th Cir. 1999) (quoting *Abbott Lab. v. Gardner*, 387 U.S. 136 (1967)). When determining whether a case is fit for review, this Court considers, among other things, "whether judicial intervention would inappropriately interfere with further administrative action." *Wyoming v. Zinke*, 871 F.3d 1133, 1142 (10th Cir. 2017). Here, Merit does not contest that a judicial decision would resolve the very issues pending before

Interior in Merit's administrative appeal, nor does Merit contend that the Court may resolve this case without interfering with that ongoing administrative process.

Merit's responses are not persuasive. Merit attempts to distinguish *Mobil* on the grounds that the Court "recognized in *Mobil*" that "requiring the lessee to pay additional royalty" would "constitute definitive decisionmaking." Response and Reply Br. 13. But this Court actually stated in *Mobil* that Interior "determining royalties owed *as a result of an audit* and requiring [the lessee] to pay such royalties" would be definitive decisionmaking. 180 F.3d at 1199 (emphasis added). Requiring Merit to comply with the Negotiated Rule for *future* royalty payments is not the same thing as requiring a lessee to pay *past due* royalties after an audit, as the *Mobil* court anticipated. There has obviously been no audit here for the "current and future production" that is the subject of Merit's suit. Opening Br. 10, 14. Indeed, Interior agrees that once it issues a final decision in the administrative appeal, if adverse to Merit, that decision may be reviewed through a suit filed under the Administrative Procedure Act challenging the final decision. But *Mobil* does not hold that the mere requirement to pay royalties in accordance with the terms of the extant regulations is itself a challengeable action in court. If it were, then every lessee paying royalties would be able to bring any claim related to the royalties without going through the administrative appeal process. *Mobil* did not hold or even suggest that the Court could disrupt an ongoing administrative appeal

because the lessee thinks it might be required to pay more royalties than it thinks it ought to owe in future months, much less circumvent the entire administrative appeal process because royalties are due under the terms of a lease.

It also makes no difference that Interior has, in the alternative to its ripeness argument, defended the regulation on the merits and thus made its position that the regulation is lawful "patently clear." Response and Reply Br. 15-16. Interior has throughout the litigation maintained that Merit's suit is not ripe, including because the administrative appeal is pending and might be resolved in Merit's favor, ECF 50 at 4, and Interior's choice to defend the substance of the regulation as an alternative argument does not undermine the ripeness argument. *See* Fed. R. Civ. P. 8(a) (permitting alternative pleading).

Nor does Interior's defense against this suit suggest that Interior—whether the Bureau of Indian Affairs, the Interior Board of Land Appeals, or the Secretary—is bound to reach any particular conclusion in the administrative appeal. Indeed, the positions can be easily reconciled, as Interior could conclude in the administrative appeal both that the regulation, including the 10% adjustment to the Location and Crude Type Differential, is lawful and that, as Interior explained in its principal and response brief, an anomalous but short-lived divergence between the NYMEX price and the price Merit received for its oil warrants relief for the affected months. Or Interior may require Merit to pay under the regulation

but provide an explanation based on, for example, the newly discovered contracts raised in Interior's Rule 60(b) motion that would affect later review of the agency action in court. Either possibility is reason to allow the administrative process to be completed before judicial review of the same issues.

Further, Interior's consideration of those newly discovered contracts in the administrative appeal is the sort of necessary further factual development that can render a case unripe. That Merit's sales contracts can be based on NYMEX Index prices introduces new variables that the district court was not able to initially review and consider. *See Sierra Club v. Yeutter*, 911 F.2d 1405, 1417 (10th Cir. 1990) ("Where disputed facts exist and the issue is not purely legal, greater caution is required prior to concluding that an issue is ripe for review." (citations omitted)); *see also Nat'l Park Hosp. Ass'n v. Dep't of Interior*, 538 U.S. 803, 812 (2003) (vacating judgment and remanding with orders to dismiss where the question presented was purely legal and the case reviewed final agency action but the Court found "further factual development would 'significantly advance [its] ability to deal with the legal issues presented" (citation omitted)).

This Court has also explained that an agency order is not ripe for review unless it has "some substantial effect on the parties which cannot be altered by subsequent administrative action." *CSG Expl. Co.*, 930 F.2d at 1485 (quoting *Public Serv. Co. of New Mexico v. Federal Power Comm'n*, 557 F.2d 227, 233

(10th Cir.1977)). Here, any effect on Merit, both from the order to pay already issued or from any royalties Merit pays while the administrative appeal is pending can be altered by the outcome of the administrative appeal. Merit provides many complaints about that process, Response and Reply Br. 20-22, ultimately demonstrating that Merit in fact seeks to evade that process through this suit. This Court should not short-circuit the administrative process in favor of an as-applied challenge to a regulation that precedes a concrete, final application of the regulation by the agency. *See Park Lake Res. v. United States Dep't of Agric.*, 197 F.3d 448, 454 (10th Cir. 1999) (noting that "further agency action could render this challenge moot"). The case is therefore not ripe.

Merit's claim of hardship is also not persuasive. Because Merit does not facially challenge the Negotiated Rule in all its applications, Merit having to comply with the Negotiated Rule is not itself a hardship warranting review now. Merit's claimed hardship is entirely based on potentially having to pay more royalties than it thinks it ought to owe in a limited number of particular months when specific market conditions may occur; but whether, when, and to what extent those conditions will actually occur is speculative and uncertain, making any monetary hardship entirely conjectural, and rendering the case unripe. *See Wyoming v. Zinke*, 871 F.3d at 1142-43.

Not only is any hardship conjectural, if Merit were to ultimately prevail in its administrative appeal or a later lawsuit, it can recoup any royalties it overpays. *See* 30 C.F.R. § 1218.53. Merit does not suggest that complying with the Negotiated Rule while it pursues its administrative appeal would be complex or require it to change its conduct (other than in the amount of royalty it pays), put it in danger of shutting down, or of slowing production, or of suffering any other possibly significant hardship beyond the mere paying of money that it can later recoup. Nor does Merit allege any industry-wide business-related hardship. *See Rocky Mountain Oil & Gas Ass'n v. Watt*, 696 F.2d 734, 743 (10th Cir. 1982) (concluding case ripe where Interior policy "has directly affected the investment decisions of many oil and gas developers, causing them substantial financial losses"). This is a garden-variety dispute between a regulated party and an agency about calculation of a royalty, and the normal administrative appeal process should be allowed to play out. Thus, there is no hardship sufficient to warrant judicial review before Interior has applied the Negotiated Rule to Merit's reported production and royalty payments and resolved any administrative appeal.

Finally, Merit's claim to hardship—and indeed Merit's entire theory of why this case is ripe—has been further undermined by recent events. Though Merit contends that this suit is about current and future applications of the Negotiated Rule to its Wind River leases, Merit no longer holds the Circle Ridge lease—one

of the two leases at issue here—as that lease expired on December 31, 2020, 3 Appendix A-605; *see also Merit Energy Operations I, LLC v. Eastern Shoshone*, No. 21-CV-25-F, 2021 WL 7209546, at *1 (D. Wyo. October 13, 2021) (noting parties were not able to reach an agreement on lease renewal); *Merit Energy Operations I, LLV v. Eastern Shoshone*, No. 21-CV-25-F, ECF No. 58 (January 25, 2022) (dismissing Merit's Petition to Partially Vacate Arbitration Award and entering judgment for the Tribes)[2], and that lease was taken over by the Tribes in June of 2021.[3] Merit certainly cannot suffer any current or future hardship related

---

[2] As this Court has explained, Fed. R. Evid. 201 allows courts to take judicial notice of facts "at any stage of the proceeding" if the facts are "not subject to reasonable dispute." *Winzler v. Toyota Motor Sales U.S.A., Inc*., 681 F.3d 1208, 1212–13 (10th Cir. 2012). The Court may take judicial notice of filings in related cases. *See St. Louis Baptist Temple, Inc. v. Fed. Deposit Ins. Corp.*, 605 F.2d 1169, 1172 (10th Cir. 1979).

[3] *See* https://oltnews.com/tribes-take-back-full-ownership-of-oil-and-gas-field-oil-city-news; *and* https://www.wyomingnews.com/rocketminer/news/state/tribes-take-ownership-of-reservation-oil-field/article_629480dc-0cea-5077-94d2-6f13634bfefd.html. "A court may also take judicial notice of facts reported in newspaper articles where those facts were generally known within the local jurisdiction or were capable of a sufficiently accurate and ready determination." *Davidson Oil Co. v. City of Albuquerque*, 545 F. Supp. 3d 1039, 1044 (D. New Mex. 2021); *see*, *e.g.*, *Ritter v. Hughes Aircraft Co.*, 58 F.3d 454, 458-59 (9th Cir. 1995) (report of layoffs concerned matter generally known in Southern California and subject to accurate and ready determination); *Peters v. Delaware River Port Authority of PA and NJ*, 16 F.3d 1346, 1356, n. 12 (3d Cir. 1994) (notice of newspaper accounts reflecting existence of competition between state authorities); *but see The Est. of Lockett by & through Lockett v. Fallin*, 841 F.3d 1098, 1111 (10th Cir. 2016) (declining to accept as true the contents of newspaper articles).

to a lease it no longer holds. The other lease, the Steamboat Butte lease, is set to expire on December 31, 2022, 4 Appendix A-633, and as the Circle Ridge lease shows, there is no guarantee that Merit will remain the leaseholder after that date. In those circumstances, it would make little sense for this Court to adjudicate the future application of a regulation to leases that Merit either no longer holds or may not hold for long, while circumventing an ongoing administrative process that will resolve the same issues in a concrete factual setting.

II. Interior did not act arbitrarily or capriciously when it included a 10% adjustment to the Differential in the Negotiated Rule.

If the Court were to conclude that the case is ripe, it should reverse the district court's judgment insofar as it finds the 10% adjustment to the Differential arbitrary or capricious. Contrary to Merit's assertions, the Index-Based price, including the 10% monthly adjustment to the Differential when triggered, accurately reflects the prices "at the time of production" as contemplated by the leases. 3 Appendix A-607; 4 Appendix A-651; 30 C.F.R. § 1206.54(d)(2)(iii).

First, though Merit contends that the circumstances of the Negotiated Rule's promulgation are irrelevant, it was not arbitrary for Interior to adopt the 10% adjustment when that provision (1) was the product of an extensive negotiation by a Committee that included representatives from both the oil and gas industry and the Tribes; (2) applies across thousands of Indian oil leases; and (3) was adopted to streamline reporting requirements and reduce the administrative burdens on lessees

when reporting royalties. 2 Appendix A-312. While a negotiated rule is not entitled to any greater deference than a rule that is the product of other rulemaking, 5 U.S.C. § 570, this Court will "recognize the import" of the participants in the negotiated rulemaking's "participation and insight" in conducting its review. *See Fort Peck Hous. Auth. v. U.S. Dep't of Hous. & Urb. Dev.*, 367 F. App'x 884, 892 n.14 (10th Cir. 2010).

By specifying monthly adjustments to the Differential, the Negotiated Rule provides greater certainty to both the Tribes and to the oil and gas industry, removing the necessity for many later-in-time adjustments. 2 Appendix A-308-312. It was not arbitrary for Interior, in defining "value," to conclude that simplicity and certainty in establishing and maintaining an appropriate Differential, as well as for the industry in reporting royalties, outweighed any temporary deviations the 10% adjustment to the Differential might cause. *Id.* That 10% adjustment adequately protects the Tribes and lessees against wild fluctuations while accurately capturing the major portion price over time, meeting the goals of stability and certainty. 2 Appendix A-308-312. Such matters are well with Interior's expertise, and this Court reviews agency action with great deference when a challenged decision involves matters within the agency's area of expertise. *Utah Envtl. Congress v. Bosworth,* 443 F.3d 732, 739 (10th Cir.2006). The district

court erred when it held applying the 10% adjustment to the Differential violated Merit's lease terms in some months.

It is also worth reiterating here that Merit does not challenge the adoption of the 10% adjustment to the Differential on its face. Merit does not argue that the Negotiated Rule's 10% adjustment to the Differential is unlawful because it violates any provision in the statute, or even that it is unlawful because it always violates Merit's lease terms, but only that under Merit's leases Interior may not apply the adjustment to the Differential to Merit in those months in which the 10% adjustment does not capture the "value" of the oil Merit produces "at the time of production." Thus, even if the Court were to disagree with Interior's arguments, there is no cause for this Court to consider, much less to set aside, any portion of the Negotiated Rule except as to Merit's leases in those particular months (which, again, either have not happened or are not directly challenged here).

CONCLUSION

For the foregoing reasons, this Court should reverse and order the case dismissed as unripe. If the Court were to reach the merits, it should affirm the district court's ruling upholding most of the regulation and reverse the conclusion that the regulation is invalid in one respect.

Respectfully submitted,

s/ *Michael T. Gray*

TODD KIM
Assistant Attorney General
ROBERT LUNDMAN
MICHAEL T. GRAY
Attorneys
Environment and Natural Resources Division
U.S. Department of Justice
701 San Marco Blvd.
Jacksonville, FL 32207
(202) 532-3147
michael.gray2@usodj.gov

Of Counsel:

JENNIFER A. MILLER
Attorney
U.S. Dept. of the Interior

April 5, 2022
90-1-18-15984

CERTIFICATE OF COMPLIANCE

I hereby certify:

1. This document complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B)(i) because, excluding the parts of the document exempted by Rule 32(f), this document contains 3,500 words.

2. This document complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Rule 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman font.

s/ *Michael T. Gray*
MICHAEL T. GRAY

Counsel for Appellees/Cross-Appellants

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing:

(1) all required privacy redactions have been made per 10th Cir. R. 25.5;

(2) if required to file additional hard copies, that the ECF submission is an exact copy of those documents; and

(3) the digital submissions have been scanned for viruses with the most re-cent version of a commercial virus scanning program, Windows Defender Antivirus Version 1.361.1350.0 (updated April 5, 2022), and according to the program are free of viruses.

s/ *Michael T. Gray*
MICHAEL T. GRAY

Counsel for Appellees/Cross-Appellants

CERTIFICATE OF SERVICE

I hereby certify that on April 5, 2022, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the appellate CM/ECF system.

The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

s/ *Michael T. Gray*
MICHAEL T. GRAY

Counsel for Appellees/Cross-Appellants