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Attorneys General Balderas and Becerra Oppose Latest Effort to Undermine Department of Interior's Royalties Valuation Rule

Santa Fe, NM – New Mexico Attorney General Hector Balderas and California Attorney General Xavier Becerra today submitted comments opposing the Department of the Interior's (DOI) proposal to undermine key requirements of the Valuation Rule. Finalized in July 2016, the Valuation Rule replaced antiquated regulations that determined how much producers must pay in royalties for the oil, gas, and coal they extract from public and tribal lands. In the comment letter, Attorneys General Balderas and Becerra argue that the proposed rule violates the Administrative Procedure Act, undervalues our nation's natural resources, and enriches the fossil fuel industry at the expense of the American people and the environment.

"The Courts have agreed twice that the attempts to repeal this rule have been unlawful; and we will continue to fight to ensure that the rule of law is followed and that the federal government fulfills its trust obligations to tribes and New Mexican schoolchildren, who should receive the proper royalties they are owed," said Attorney General Balderas.

On October 1, 2020, DOI published a proposed rule that would eliminate several key requirements of the Valuation Rule "in order to return to the definitions and practices that had been in place since the 1980s." The proposal would have the effect of reducing the amount of royalties collected on fossil fuels extracted from federal land and thus, the revenue California and New Mexico receive from such royalties.

In the comment letter, Attorneys General Balderas and Becerra argue that the proposed rule is arbitrary and capricious in violation of the Administrative Procedure Act because:

- DOI's primary rationale for the proposed rule is directly contradicted by the factual record, which shows that this rulemaking will actually increase administrative burdens and have no impact on energy production;
- DOI's reliance on the alleged "deficiencies" in the Valuation Rule identified by the District of Wyoming is misguided because the District Court has only ruled on the motion for a preliminary injunction. California, New Mexico, and DOI are currently defending the merits of the the rule in Court; and
- DOI has entirely failed to consider the many important reasons for its enactment of the Valuation Rule, such as ensuring the accurate calculation of royalties from the development of public resources, fulfilling it trust responsibilities on tribal lands, and ensuring industry compliance with legal obligations.

Attorneys General Balderas and Becerra have repeatedly defended the Valuation Rule from the Trump Administration's attempts to both postpone and repeal the rule's requirements. Shortly after the change in administrations in early 2017, DOI issued a notice attempting to postpone the Valuation Rule's requirements. Attorneys General Balderas and Becerra filed a lawsuit challenging DOI's failure to implement the rule, and in August 2017, a federal district court agreed that DOI acted unlawfully in its attempt to postpone implementation of the rule. Simultaneously, DOI began a process to repeal the Valuation Rule in its entirety. In public comments, Attorneys General Balderas and Becerra urged DOI to not move forward with a repeal that would reopen loopholes exploited by coal companies and deprive taxpayers of a fair return on public resources. Nonetheless, DOI went ahead with the repeal without offering any reasoned basis for doing so. Attorney General Becerra filed a lawsuit challenging the repeal, and the federal district court subsequently ruled this action unlawful as well. In July 2019, Attorneys General Becerra and Balderas filed a motion to intervene in Cloud Peak Energy v. U.S. Department of the Interior to defend the Valuation Rule against corporate interests.

A copy of the comment letter is attached.

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Comments of the Attorneys General of California and New Mexico

November 30, 2020

Via electronic submission to http://www.regulations.gov

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RE: Comments on the Proposed Rule, "ONRR 2020 Valuation Reform and Civil Penalty Rule," 85 Fed. Reg. 62,054 (Oct. 1, 2020), RIN 1012–AA27

Dear Mr. Templin:

The State of California, by and through Attorney General Xavier Becerra,[1] and the State of New Mexico, by and through Attorney General Hector Balderas, respectfully submit these comments in opposition to the proposed rule by the Office of Natural Resources Revenue ("ONRR") entitled, "ONRR 2020 Valuation Reform and Civil Penalty Rule," 85 Fed. Reg. 62,054 (Oct. 1, 2020) (the "Proposed Rule"). The Proposed Rule would undermine key requirements of the 2016 Consolidated Federal Oil & Gas and Federal & Indian Coal Valuation Reform rule, 81 Fed. Reg. 43,338 (July 1, 2016) (the "Valuation Rule"), which provided a much needed update to decades-old regulations governing the collection of royalties on coal, oil, and gas extracted from federal and Indian lands.

After unsuccessfully attempting to delay and then repeal the Valuation Rule based on illegal tactics and false justifications, ONRR now asserts that its Proposed Rule is simply an attempt to fulfill the current administration's policy goals of increasing domestic energy production and reducing regulatory burdens for industry. However, just like its prior attempts to undo the Valuation Rule, this proposal is directly contrary to the requirements for agency rulemaking under the Administrative Procedure Act, 5 U.S.C. §§ 551 et seq. ("APA"), for several reasons.

First, ONRR's primary rationale is directly contradicted by the factual record for both the Valuation Rule and Proposed Rule itself, which shows that this rulemaking will actually *increase* administrative burdens and have no impact on energy production. Second, with regard to coal

[1] The California Attorney General submits these comments pursuant to his independent power and duty to protect the environment and natural resources of the State. *See* Cal. Const., art. V, § 13; Gov. Code, §§ 12511, 12600-12612; *D'Amico. v. Bd. of Medical Examiners* (1974) 11 Cal.3d 1, 14-15.

valuation, ONRR's reliance on alleged "deficiencies" in the Valuation Rule identified by the District of Wyoming is unavailing, given that the Wyoming court has only ruled on a motion for preliminary injunction, and California and New Mexico, along with ONRR, are currently defending the merits of the Rule in that court. Furthermore, ONRR has entirely failed to consider the many important reasons for its enactment of the Valuation Rule in 2016, such as ensuring the accurate calculation of royalties from the development of public resources, fulfilling it trust responsibilities on tribal lands, and ensuring industry compliance with legal obligations.

By eliminating key requirements of the Valuation Rule, the Proposed Rule would cause harm to California and New Mexico. According to ONRR data, California received $77 million in royalties from federal mineral extraction within the state in 2019, while royalty payments to New Mexico totaled more than $1.45 billion in the same year. Reverting back to the pre-2016 regulatory structure will deprive taxpayers in California and New Mexico of revenue that is largely spent to support the states' schools. While these royalties do not make up a large percentage of California's budget, nearly 20 percent of New Mexico's public education funds come from federal mineral leasing.

Perpetuating rules that undervalue our nation's natural resources enriches the fossil fuel industry at the expense of the American public. In addition, the promotion and use of fossil fuels contributes heavily to climate change that threatens the health and well-being of California's and New Mexico's citizens. *See Massachusetts v. EPA*, 549 U.S. 497, 521 (2007). Regulations that skew the value of coal, oil, and natural gas create an unlevel playing field that undermines efforts to curb harmful greenhouse gas emissions and delays the necessary transition to a clean energy economy.[2]

For these reasons, California and New Mexico urge ONRR to withdraw this misguided and unlawful Proposed Rule and instead fulfill its longstanding statutory obligations to ensure the accurate collection of royalties from the development of our public lands.

STATUTORY BACKGROUND

Pursuant to authority granted by Congress, the Department of the Interior ("DOI") is responsible for managing the calculation and collection of royalties on oil, gas, and coal produced on federal and Indian lands. 30 U.S.C. §§ 187, 1701. This authority has been delegated to ONRR, a subdivision of DOI. *See* 30 C.F.R. § 1201 *et seq*. Each year, ONRR collects billions of dollars in royalties on oil, gas, and coal extracted from public lands. A significant portion of this revenue is distributed to states through direct disbursements and grants.

[2] This comment letter does not address a number of related topics which are beyond the scope of the Valuation Rule, including but not limited to: the sufficiency of the underlying royalty rate, the wisdom of continuing to lease public lands – including both onshore lands and offshore submerged lands – for the extraction of fossil fuels, and the risks that the extraction and use of fossil fuels presents to human health and the environment, particularly with regard to climate change.

30 U.S.C. § 191(a) (providing that 50 percent of federal royalties "shall be paid by the Secretary of the Treasury to the State … within the boundaries of which the leased lands or deposits are or were located"). Because the amount of royalties ONRR collects is derived from the value of the product sold, accurate commodity valuation is an essential component of royalty calculation. *See* 30 U.S.C. § 207(a).

ONRR's duty to accurately and fairly value public commodities is mandated by several federal statutes. In particular, the Federal Oil & Gas Royalty Management Act of 1982, 30 U.S.C. § 1701 *et seq.*, requires ONRR to "establish a comprehensive inspection, collection and fiscal and production accounting and auditing system to provide the capability to accurately determine oil and gas royalties ... and to collect and account for such amounts in a timely manner." *Id.* § 1711(a). Under the Mineral Leasing Act of 1920, 30 U.S.C. § 181 *et seq.*, ONRR is entitled to collect royalties based on the "value of the production removed or sold from the lease." 30 U.S.C. § 206(b)(1)(A) (oil and gas); 30 U.S.C. § 207(a) (coal). In addition, the Federal Land Policy and Management Act, 43 U.S.C. § 1701 *et seq.*, requires that "the United States receive fair market value of the use of the public lands and their resources." 43 U.S.C. § 1701(a)(9). ONRR is responsible for issuing regulations to carry out and accomplish these purposes. *See* 30 U.S.C. §§ 189, 1701.

FACTUAL AND PROCEDURAL BACKGROUND

I. Development of the Valuation Rule.

For too long, taxpayers have not received adequate royalty returns from the sale of publically-owned energy resources because ONRR's regulations failed to keep pace with changes in coal, oil, and gas markets. Prior to the promulgation of the Valuation Rule, the valuation of federal oil, gas, and coal royalties was governed by regulations adopted by the former Minerals Management Service in the late 1980s. These regulations provided that in the case of arm's-length sales, the contract price conclusively determined the "value" of the transaction. *See* 30 C.F.R. § 206.152(b)(1) (1988) (gas); 30 C.F.R. § 206.102(b)(1) (1988) (oil); 30 C.F.R. § 206.257(b) (1989) (coal). For non-arm's-length transactions, also referred to as "captive" transactions involving interested parties or affiliates, the regulations relied upon a "benchmark" system that looked to outside indicia of market value. *See* 30 C.F.R. § 206.152(c) (1988) (gas); 30 C.F.R. § 206.102(c) (1988) (oil); 30 C.F.R. § 206.257(c)(2) (1989) (coal).

In 2007, DOI's Royalty Policy Committee ("RPC") Subcommittee on Royalty Management issued a report identifying pervasive problems with ONRR's existing 1980s-era regulations, which undermined the agency's ability to accurately calculate royalties. *See* 80 Fed. Reg. 608 (Jan. 6, 2015). Because the benchmark method posed various practical difficulties and proved "difficult for industry to follow and ONRR to administer," *id.* at 617, 628, the RPC recommended replacing this outdated system. *Id*. at 608. Further, the report recommended that ONRR clarify and revise its methods for "checking royalty compliance for solid minerals [e.g., coal], with particular attention to non-arm's-length transactions." 76 Fed. Reg. 30,878, 30,881-82 (May 27, 2011).

Additionally, the RPC recommended that ONRR clarify its regulations governing deductions that lessees were permitted to take for transportation costs. 80 Fed. Reg. at 608. Because ONRR's regulations did not require clear reporting of these deductions, lessees could inflate their reported transportation costs with non-transportation expenses. *See* 81 Fed. Reg. at 43,344. Thus, the RPC recommended revising these regulations "to provide more certainty for ONRR, [the Bureau of Land Management], and industry, which should result in better compliance." 80 Fed. Reg. at 608.

Responding to these concerns, ONRR initiated what became a five-year rulemaking process to update and modernize its regulations. In 2011, the agency issued two Advance Notices of Proposed Rulemaking requesting public input on how to revise regulations governing the valuation of federal oil and gas (76 Fed. Reg. 30,878 (May 27, 2011)) and coal (76 Fed. Reg. 30,881 (May 27, 2011)). The agency noted that existing rules governing federal gas and coal had been in effect since 1988 and 1989, respectively, and that the regulations "have not kept pace with significant changes that have occurred in the domestic ... market during the last 20-plus years." 76 Fed. Reg. at 30,878, 30,881. With respect to coal, ONRR specifically sought to address "non-arm's-length valuation and ramifications spurred by changes in the coal mining industry, including increasing vertical integration of mining and power production and increasing production by coal cooperatives."[3] *Id*. at 30,882. In both of these circumstances, ONRR noted that valuation can often be underreported where entities buying and selling coal "lack the opposing economic interests characteristic of arm's-length sales." 81 Fed. Reg. at 43,354.

After conducting outreach to stakeholders, including six public workshops, ONRR issued the proposed "Consolidated Federal Oil & Gas and Federal & Indian Coal Valuation Reform: Proposed Rule." 80 Fed. Reg. 608 (Jan. 6, 2015) (the "Proposed Valuation Rule"). In the Proposed Valuation Rule, ONRR stated that "the Secretary's responsibilities ... require development of flexible valuation methodologies that lessees can accurately comply with in a timely manner." 80 Fed. Reg. at 608. ONRR further announced that it was "proposing proactive and innovative changes" in order to "increase the effectiveness and efficiency of our rules." *Id*. ONRR "solicited comments on how to simplify and improve the valuation of coal disposed of in non-arm's-length transactions." *Id*.

ONRR accepted public comment on the Proposed Valuation Rule over an extended 120-day period, during which the agency received more than 1,000 pages of written comments from over 300 commenters, including "industry, industry trade groups, Congress, State governors, States, local municipalities, two Tribes, local businesses, public interest groups, and individual commenters." 81 Fed. Reg. at 43,338. The agency "carefully considered all of the public comments ... and, in some instances, revised the language of the final rule based on these comments." *Id*.

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[3] The Valuation Rule defines "coal cooperatives" as "formal or informal organizations of companies or other entities sharing in a common interest to produce and market coal or coal-based products." 81 Fed. Reg. at 43,339.

ONRR issued the Valuation Rule on July 1, 2016. The stated purpose of the Rule was:

> (1) to offer greater simplicity, certainty, clarity, and consistency in product valuation for mineral lessees and mineral revenue recipients; (2) to ensure that Indian mineral lessors receive the maximum revenues from coal resources on their land, consistent with the Secretary's trust responsibility and lease terms; (3) to decrease industry's cost of compliance and ONRR's cost to ensure industry compliance; and (4) to provide early certainty to industry and to ONRR that companies have paid every dollar due.

81 Fed. Reg. at 43,338. To accomplish these purposes, the Rule eliminated the antiquated benchmark system for natural gas and coal, and codified ONRR's long-standing position that "[t]he best indication of value is the gross proceeds received under an arm's-length contract between independent persons who are not affiliates and who have opposing economic interests regarding that contract." *Id*. at 43,338-40. The Rule required value to be measured based on the first arm's-length sale of the product, including where coal is sold among members of a coal cooperative, and in cases where coal is sold to an affiliated electric power plant. *Id.* at 43,339, 43,355.

The Valuation Rule also included a "default provision," which codified ONRR's ability to determine value in circumstances where the information provided by the lessee as to value is insufficient or unreliable and ONRR is unable to determine the correct value of production. *Id*. at 43,341. Further, the Rule made certain common-sense changes to the process for taking transportation deductions, including "requiring lessees to report transportation separately," rather than bundling these costs with the product sales price, in order to "facilitate transparency, audits, and reviews." *Id.* at 43,344.

ONRR stated that the Rule took "steps toward ensuring that the valuation process for federal and Indian coal resources better reflects the changing energy industry while protecting taxpayers and Indian assets." *Id*. ONRR estimated that the Rule would create an "estimated annual increase in royalty collections of between $71.9 million and $84.9 million." *Id*. at 43,359. In addition, ONRR determined "that industry will experience reduced annual administrative costs of $3.61 million." *Id*.

The Rule went into effect on January 1, 2017, providing regulated parties with 180 days to adjust their accounting systems before the effective date. *Id*. at 43,338. Moreover, lessees were not required to report and pay royalties under the Rule until February 28, 2017. *See* 30 C.F.R. §§ 1210.53(a), 1210.201(b)(1). Prior to the specified effective date of the Valuation Rule, ONRR held a series of eleven training sessions from October 17, 2016 to December 15, 2016, to assist the industry's transition to the new valuation system. *See* 82 Fed. Reg. 36,934, 36,935 (Aug. 7, 2017).

II. Attempts by Industry and the Trump Administration to Undo the Valuation Rule.

In late-December 2016, almost six months after the Valuation Rule was finalized, several petitions were filed challenging the Rule in the District of Wyoming. *See Cloud Peak Energy, Inc., et al. v. U.S. Dep't of Interior*, Case No. 16-cv-315-NDF (D. Wyo. petition filed Dec. 29, 2016); *American Petroleum Institute v. U.S. Dep't of Interior*, Case No. 16-cv-316-NDF (D. Wyo. petition filed Dec. 29, 2016); *Tri-State Generation & Transmission Ass'n, et al., v. Jewell*, Case No. 16-cv-319-NDF (D. Wyo. petition filed Dec. 29, 2016). Following the change in presidential administrations in January 2017, ONRR embarked on a series of efforts to roll back the Rule that were subsequently found to be illegal.

First, ONRR attempted to "postpone the effectiveness" of the Rule after it had already become effective, asserting authority to do so under Section 705 of the APA, 5 U.S.C. § 705. 82 Fed. Reg. 11,823 (Feb. 27, 2017). As the result of a legal challenge by California and New Mexico, the U.S. District Court for the Northern District of California found this action to be a violation of the plain text of APA Section 705, and an improper end-run around the APA's notice-and-comment requirements. *Becerra v. U.S. Dep't of Interior,* 276 F. Supp. 3d 953 (N.D. Cal. 2017).

On a parallel track, ONRR also initiated a rulemaking to repeal the Valuation Rule in its entirety. 82 Fed. Reg. 16,325 (Apr. 4, 2017). The agency finalized this rule just four months later. 82 Fed. Reg. 36,934 (Aug. 7, 2017). The repeal reinstated preexisting regulations based on the rationale that the Valuation Rule was vague, complicated, and unworkable. The agency claimed it "discovered several significant defects in the rule that would have undermined its purpose and intent," and pointed to "comments from the regulated community and other members of the public … that were highly critical of certain provisions in the rule." *Id*. As a result of the repeal, the Wyoming petitioners voluntarily dismissed their petitions for review. California and New Mexico again filed suit in the Northern District of California. On March 29, 2019, the court granted our motion for summary judgment, finding that ONRR had acted arbitrarily and capriciously in multiple respects, and vacated the repeal. *See California v. U.S. Dep't of Interior*, 381 F. Supp. 3d 1153 (N.D. Cal. 2019).

On June 13, 2019, ONRR notified the public that the Rule had been reinstated and that lessees would be required to recalculate royalties going back to January 2017 and submit amended royalty reports by January 2020. That same day, three industry challengers – Cloud Peak Energy, the American Petroleum Institute, and the Tri-State Generation and Transmission Association – re-filed petitions in the District of Wyoming challenging the Rule. California and New Mexico intervened on the side of ONRR to defend the Valuation Rule. Following briefing and a hearing on the petitioners' motion for a preliminary injunction, the Wyoming district court enjoined the Rule with regard to coal valuations over concerns about the use of electricity sales to value coal, but upheld the Rule with regard to federal oil and gas valuation. *Cloud Peak Energy v. U.S. Dep't of Interior*, 415 F. Supp. 3d 1034 (D. Wyo. 2019). Briefing on motions for summary judgment in the matter is set to begin in December 2020.

III. The Proposed Rule.

On October 1, 2020, ONRR published its Proposed Rule to eliminate several key requirements of the Valuation Rule "in order to return to the definitions and practices that had been in place since the 1980s." 85 Fed. Reg. 62,054 (Oct. 1, 2020). These changes include: (1) reinstating the ability of a lessee to request to exceed the 50-percent regulatory limit for transportation costs; (2) reinstating the ability of a lessee to request to exceed the 66 2/3-percent regulatory limit for processing costs; (3) allowing a lessee producing offshore to claim certain gathering costs as a transportation allowance in waters 200 meters and deeper; (4) allowing a lessee producing offshore to request ONRR's approval to claim certain gathering costs as a transportation allowance in waters shallower than 200 meters where "deepwater-like" subsea movement occurs; (5) removing the misconduct definition; (6) removing the default provision - which allowed ONRR to determine value where the lessee's information was inadequate or unreliable - and all references thereto; (7) eliminating the requirement that written contracts be signed by all parties; (8) eliminating the requirement that companies cite legal precedent when seeking a valuation determination; (9) removing the requirement that coal be valued based on sales of electricity in certain circumstances without an arms-length sale; and (10) eliminating the definition of a "coal cooperative." *Id*. at 62,054-55.

ONRR states that "[t]he net impact of the proposed amendments is an estimated $42.1 million annual decrease in royalty collections," while "the Federal oil and gas industry would experience *increased* annual administrative costs of $2.58 million." *Id*. at 62,062.

Unlike the prior repeal, ONRR does not claim any "defects" with the Valuation Rule, and specifically admits that its proposal is not based on any new "factual findings." *Id*. at 62,056. Rather, ONRR states that the Proposed Rule responds to various "policy directives issued after July 1, 2016, [which] give different weight to the factual findings, and also dictate that a different policy-based outcome be pursued." *Id*. These include Executive Orders 13783 (Promoting Energy Independence and Economic Growth) and 13795 (Implementing an America-First Offshore Energy Strategy), as well as Secretarial Orders implementing this policy. *Id*. at 62,056-57. Citing to the D.C. Circuit's opinion in *Nat'l Ass'n of Home Builders v. EPA*, 682 F.3d 1032 (D.C. Cir. 2012), ONRR claims that "[a] revised rulemaking based on 'a reevaluation of which policy would be better in light of the facts' is 'well within an agency's discretion.'" *Id*. at 62,056.

Also on October 1, 2020, ONRR published a rule "re-issuing certain regulations associated with the" Valuation Rule in order to implement the March 29, 2019 order from the Northern District of California. *See* 85 Fed. Reg. 62,016 (Oct. 1, 2020).

COMMENTS ON THE PROPOSED RULE

Under the APA, courts will set aside an agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," or that is "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2)(A), (C). An agency action is arbitrary and capricious where the agency: (i) has relied on factors which Congress has not intended it to consider; (ii) entirely failed to consider an important aspect of the problem; (iii) offered an explanation for its decision that runs counter to the evidence before the agency; or (iv) offered an explanation so implausible that it could not be ascribed to a difference of view or the product of agency expertise. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) ("*State Farm*").

An "agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change." *Id*. at 42; *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016) ("Agencies are free to change their existing policies as long as they provide a reasoned explanation for the change."); *see Organized Vill. of Kake v. U.S. Dep't of Agric.*, 795 F.3d 956, 968 (9th Cir. 2015) (finding that "even when reversing a policy after an election, an agency may not simply discard prior factual findings without a reasoned explanation"). Furthermore, when "its new policy rests upon factual findings that contradict those which underlay its prior policy," an agency must "provide a *more detailed justification* than what would suffice for a new policy created on a blank slate." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) ("*FCC v. Fox*") (emphasis added); *see also American Fuel & Petrochemical Mfrs. v. E.P.A.*, 937 F.3d 559, 577 (D.C. Cir. 2019) (agency "was required to provide a more detailed justification" for rulemaking that abandoned former policy) (internal quotations and citation omitted). Any "unexplained inconsistency" between a rule and its repeal is "a reason for holding an interpretation to be an arbitrary and capricious change." *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005); *see Kake*, 795 F.3d at 966-67 (holding that an agency's contrary conclusions "[o]n precisely the same record" were arbitrary and capricious).

Here, ONRR has failed to provide any reasoned explanation for the Proposed Rule, in violation of the basic requirements for agency decisionmaking under the APA. First, while ONRR claims that its proposal is designed to fulfill the administration's policy goals of increasing domestic energy production and reducing industry burdens as provided in Executive Orders 13783 and 13795, the Proposed Rule fails to meet these objectives. For example, ONRR admits that the proposal would result in a net *increase* in annual administrative costs for oil and gas operators, and "would have no economic impact" on federal and tribal coal industries. 85 Fed. Reg. at 62,062. Nor does ONRR claim that the Proposed Rule will have any impacts on energy production or the employment and investment decisions of firms. *Id*. at 62,073-74. This is consistent with ONRR's 2016 findings when it promulgated the Valuation Rule. In that rulemaking, ONRR estimated "that industry will experience *reduced* annual administrative costs of $3.61 million" and that the Rule would not a significant impact on energy supplies. 81 Fed. Reg. at 43,359, 43,368 (emphasis added).

Second, ONRR fails to address the fact that its unsupported reliance on Executive Order 13783 was one of the primary reasons that the Northern District of California found its prior repeal of the Valuation Rule to be arbitrary and capricious. *See California v. U.S. Dep't of Interior*, 381 F. Supp. 3d 1153, 1170 (N.D. Cal. 2019) (finding ONRR's assertions that the Valuation Rule would burden the development of domestic energy sources, as defined by Executive Order 13783, were inadequate where ONRR "failed to provide any data or analysis to support them" and where the agency's position contradicted earlier findings). As the district court stated:

> ONRR's speculation that provisions of the Valuation Rule would be unduly burdensome, difficult to apply and increase costs, directly contradict its previous findings in its promulgation of the Valuation Rule. At that time, the ONRR specifically found that, on a net impact basis, the new regulations would increase royalty collections by between $ 71.9 million and $ 84.9 million and reduce administrative costs by $ 3.61 million. 81 Fed. Reg. 43,338, 43,359. In addition, the ONRR expressly found that the Valuation Rule would not: (1) "cause a major increase in costs or prices for ... individual industries"; (2) "have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises"; (3) "alter, in any material way, natural resources exploration, production, or transportation"; or (4) constitute a significant regulatory action, i.e., one likely to have a significant adverse effect on the supply, distribution, or use of energy. 81 Fed. Reg. 43,338, 43,368. Yet, in the Final Repeal, the ONRR contradicts those findings by asserting that the Valuation Rule would "unduly burden" energy production, and that the coal provisions, in particular, would produce "significant costs." 82 Fed. Reg. 36,934, 36,938. The ONRR's repeal of the Valuation Rule without a reasoned explanation reconciling these inconsistencies is arbitrary and capricious. *See Navarro*, 136 S. Ct. at 2126; *accord Kake*, 795 F.3d at 969.

Id. ONRR's failure to address these findings, and its continued reliance on Executive Order 13783 in the Proposed Rule, is the very definition of arbitrary action.

Third, nowhere does ONRR consider the many important reasons for its enactment of the Valuation Rule. As discussed above, the impetus for that enactment first arose in 2007, when DOI itself identified pervasive problems with its outdated valuation regulations that undermined ONRR's ability to ensure that it was receiving full compensation for the development of fossil fuel resources on public lands. It is a fundamental principle of the APA that an agency's decision is arbitrary and capricious when it "entirely failed to consider an important aspect of the problem." *State Farm*, 463 U.S. at 43. And, unlike the situation in *National Association of Home Builders*, 682 F.3d at 1037-38, which the Proposed Rule relies upon, here ONRR simply ignores its prior factual findings in favor of new, contradictory conclusions without acknowledging or explaining the inconsistency in its positions. *See Kake*, 795 F.3d at 969 (9th Cir. 2015) ("unexplained conflicting findings about the environmental impacts of a proposed agency action violate the APA").

This is particularly true with the specific provisions that ONRR now seeks to remove. For example, with the regard to its restoration of the "Deep Water Policy" allowing a lessee producing offshore to claim certain gathering costs as a transportation allowance in waters 200 meters and deeper, ONRR had previously concluded that this policy "has served its purpose and is no longer necessary. The regulations still allow offshore lessees to deduct considerable transportation costs to move oil and gas from the offshore platform to onshore markets. Rescinding this policy clarifies the meaning of gathering, which, in turn, provides a more consistent and reliable application of the regulations." 81 Fed. Reg. at 43,340. With regard to the requirement to have written contracts signed by all parties, ONRR found in 2016 that this requirement was a "logical evolution of our previous regulations" and "guarantees that we can verify that the lessee's gross proceeds calculations are correct and include all consideration that you documented in the contract." *Id*. at 43,342. And with regard to the definition of "coal cooperative," ONRR explained that it was necessary to provide "a clear, consistent, and repeatable standard for valuing coal at its true market value." *Id*. at 43,339. ONRR completely fails to address these prior findings, among many others, in the Proposed Rule.

Fourth, with regard to its proposed repeal of coal-related provisions, ONRR's reliance on "deficiencies in the 2016 Valuation Rule identified by the United States District Court for the District of Wyoming" is flawed. *See* 85 Fed. Reg. at 62,055. The decision form the Wyoming court was on a motion for preliminary injunction, not a ruling on the merits. *See Ramos v. Wolf*, 975 F.3d 872 (9th Cir. 2020) ("A preliminary injunction ... is not a preliminary adjudication on the merits but rather a device for preserving the status quo and preventing the irreparable loss of rights before judgment"). California and New Mexico (on the side of ONRR) are now defending the Valuation Rule in the Wyoming court, including the coal-related provisions, with the benefit of an administrative record that was not available during the preliminary injunction stage.

Finally, the Proposed Rule would cause harm to California and New Mexico, as well as other states, by eliminating millions of dollars in additional annual royalties that states are due from the development of public resources within their borders. 85 Fed. Reg. at 62,062. According to ONRR data, California received $77 million in royalties from federal mineral extraction within the state in 2019, while royalty payments to New Mexico totaled more than $1.45 billion in the same year. Reverting back to the old, flawed system would deprive taxpayers in California and New Mexico of revenue that is largely spent to support the states' schools, with no indication that other steps would be taken to make up for this lost revenue. Moreover, the Proposed Rule would perpetuate a system that promotes the use and development of fossil fuels, which only serves to enrich the fossil fuel industry at the expense of the American public. As the "statutory guardian of the public interest," the Secretary of the Interior has a responsibility to ensure that these federal resources are not undervalued in a manner that harms the American people. *California Co. v. Udall*, 296 F.2d 384, 388 (D.C. Cir. 1961).

CONCLUSION

The Proposed Rule is yet another illegal attempt by the Trump administration to undo the commonsense updates to ONRR's regulations governing the collection of royalties from coal, oil, and gas extracted from public lands, simply to benefit industry and the administration's deregulatory agenda. ONRR must abandon this misguided proposal and instead focus on serving the public interest by fully implementing the 2016 Valuation Rule.

Sincerely,

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