Case Nos. 13-1172 and 13-1204

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ENTEK GRB, LLC,
Plaintiff – Appellees/Cross-Appellee,
v.
STULL RANCHES, LLC,
Defendant – Appellee/Cross-Appellant.

On Appeal from the United States District Court
For the District of Colorado

Civil Action No. 1:11-cv-01557-PAB-KLM
The Honorable Judge Phillip A. Brimmer, District Judge

BRIEF OF AMICUS CURIAE WESTERN ENERGY ALLIANCE

September 9, 2013

Respectfully submitted,

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CORPORATE DISCLOSURE STATEMENT

The Western Energy Alliance (the Alliance) does not have any parent corporations and no publically held corporation owns more than ten percent of its stock.

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STATEMENT OF IDENTITY AND INTEREST AND JURISDICTION

The Alliance is a non-profit, regional trade association representing more than 400 companies engaged in all aspects of environmentally responsible exploration and production of oil and natural gas in the West. Alliance members operate and develop oil and natural gas resources on hundreds of federal units across the West.

Alliance members are adversely affected by the district court's decision that ignores the plain language of the Mineral Leasing Act and denies access to valid existing leased mineral rights within an approved federal unit based upon internal surface ownership and leasehold boundaries. This decision undermines the orderly and efficient development of federal oil and gas resources through unitization and also creates tremendous regulatory uncertainty that negatively impacts the oil and gas industry's ability to make reasoned operational and planning decisions on how best to access leased minerals and obtain a return on investment in a reasonable timeframe. In an industry as risk-laden and capital intensive as oil and gas development, investment certainty requires the consistent interpretation and application of federal statutes, regulations and Bureau of Land Management policy governing lease access and development.

The Court granted the Alliance until September 9, 2013 to file its motion for leave and amicus curiae brief. *See* Order dated August 15, 2013.

STATEMENT OF SPONSORSHIP

The Alliance's amicus curiae brief was not authored by the counsel of any party to this suit. Entek GRB LLC (Entek) is a member company of the Alliance. No party or party's counsel contributed money to the Alliance, other than normal dues of Entek as a member of the Alliance, for the purpose of funding the development of this amicus curiae brief. The brief's preparation was funded solely by the Alliance and its members and it was prepared by the undersigned counsel retained by the Alliance.

INTRODUCTION & BACKGROUND

This case centers on the development of leased federal oil and gas minerals committed to an oil and gas exploration unit under the authority of the Mineral Leasing Act (MLA). The fundamental principle at issue is the access to, and development of, a lessees' mineral rights committed to a federal unit, regardless of specific surface or mineral ownership within such unit. Given the importance of federal units to the development of America's natural gas and oil resources, Alliance members have a significant interest in the proper construction and implementation of the MLA and upholding the rights conferred by Congress in authorizing the development of private, state and federal minerals through federal oil and gas units.

Most importantly, under the MLA, Congress authorized the use of federal units to manage and promote the orderly and efficient access to, and development of, federal minerals by administering all lands, minerals, and leases committed to a unit as a single oil and gas lease. Therefore, within a federal unit, internal surface and mineral lease boundaries are irrelevant.

The Alliance maintains that because Entek's leased oil and gas minerals are within a valid, existing federal unit, the specifics of surface and mineral ownership in the Focus Ranch Unit (Unit) cannot trump a lessee's right to access and develop their leased minerals in the unit. The issues in this proceeding turn on the Congressional intent of the relevant MLA provisions, BLM regulations and policy governing federal units. Under these authorities, the district court's decision should be reversed.

Indeed, if the lower court's decision is not reversed, the ramifications are dramatic. The district court's decision will render federal oil and gas units worthless and essentially unilaterally amend the MLA and over 70 years of established law and policy by allowing surface owners to deny access to federal oil and gas minerals that have been lawfully committed to federal units. Under the district court's erroneous holdings, the benefits of unitization—developing the unit as a single lease—are completely eliminated. Allowing all lands in a unit to be developed as a single lease reduces surface and environmental impacts from oil

and gas facilities, reduces duplicative operations, and promotes orderly development.

Accordingly, the Alliance requests that the Court reverse the district court and re-affirm the rights of lessees to access and develop oil and gas resources within a federal unit.

I. STANDARD OF REVIEW

The court reviews the "district court's grant of summary judgment *de novo*, applying the same standards that the district court should have applied." *Jensen v. Solvay Chems., Inc.*, 625 F.3d 641, 650 (10th Cir. 2010) (internal quotation marks omitted). Summary judgment "should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c)(2). The Court "can affirm on any ground supported by the record, so long as the appellant has had a fair opportunity to address that ground." *Alpine Bank v. Hubbell*, 555 F.3d 1097, 1108 (10th Cir. 2009) (internal quotations omitted).

Further, this Court reviews "*de novo* the district court's conclusions of law on the applicability of issue and claim preclusion." *Valley View Angus Ranch, Inc. v. Duke Energy Field Servs., Inc.*, 497 F.3d 1096, 1100 (10th Cir. 2007); *see Sussman v. Patterson*, 108 F.3d 1206, 1210 (10th Cir. 1997) (exercising discretion

where issue not raised below was purely legal issue, had been fully briefed by the parties, and involved important public policy concerns). The Court "may decide [an] issue even when it was not reached by the district court." *Southern Utah Wilderness Alliance v. Palma*, 707 F.3d 1143, 1157-58 (10th Cir. 2013).

II. FEDERAL UNIT STATUTORY AND REGULATORY FRAMEWORK

A. The Mineral Leasing Act

Congress passed the MLA on February 25, 1920, establishing the legal framework for leasing and development of federal oil and gas resources to provide for the United States' natural energy security. Act of Feb. 25, 1920, Sec. 1, 41 Stat. 437 (codified at 30 U.S.C. §§ 181 *et seq.*).[1]

To further promote the development of federal oil and gas minerals, Congress amended the MLA in 1930, and again in 1931, to provide for the establishment of cooperative or unit plans and drilling agreements amongst federal, state and private oil and gas lessees for orderly development. *See* 30 U.S.C. § 226(m). Congress explicitly directed through the MLA that:

> For the purpose of more properly conserving the natural resources of any oil or gas pool, field, or like area, or any part thereof . . . lessees thereof and their representatives may unite with each other, or jointly or separately with others, in collectively adopting and operating under a cooperative or unit plan of development or operation of such pool, field, or like area, or any part thereof, whenever determined and

[1] The Alliance has included relevant excerpts of documents relied on in this brief as Attachments.

> certified by the Secretary of the Interior to be necessary or advisable in the public interest.

Id. (emphasis added).

Congress vested the Secretary of the Interior (Secretary) with broad discretion to approve the unitization of federal, state and fee minerals when it is determined that a unit will promote the orderly and efficient development of the nation's oil and gas resources. *See id*. Moreover, Congress granted the Secretary the power to "alter, change, or revoke drilling, producing, rental, minimum royalty, and royalty requirements of" the unitized leases as necessary in order to protect the public interest. *Id*. This authority includes the power to modify lease terms of private and state leases once included in a federal unit approved by the Secretary. *Id*.

In sum, Congress explicitly authorized the development of federal, state and private oil and gas leases through the establishment of a federal unit to promote orderly development and ensure national energy security.

B. Congress Intended that Federal Units would be Operated Without Regard to Internal Property Boundaries

1. Historical Context Surrounding the Mineral Leasing Act's Amendment

The historical context surrounding the creation of federal units demonstrates the underlying purpose and need for unitization in order to effectively and practically develop a field as a single lease regardless of surface ownership or

mineral lease boundaries. Prior to the MLA's amendment in 1930 and again in 1931, unitization was not a common practice in the United States. Clarence E. Hinkle, *Some Legal Aspects of the Unitization of Federal, State and Fee Lands*, 14 MONT. L. REV. 49, 50 (1953). Oil and gas development was restricted to individual leases, and the expansion of early 20th Century oil and gas production was spurred onwards by the competitive development environment created by the "Rule of Capture." *See* George W. Holland et al., *Unit-Operation Agreements of Public Lands*, 1935 A.B.A. SEC. MIN. L. 1, 4; *see also* 2 ROCKY MOUNTAIN MINERAL LAW FOUNDATION, LAW OF FEDERAL OIL AND GAS LEASES, § 18.02(1) (Rel. No. 47, 2012).

Under the Rule of Capture, an oil and gas lessee acquires title to all those minerals produced from a particular tract regardless of whether those minerals migrated from adjacent lands. 1 HOWARD R. WILLIAMS ET AL., WILLIAMS & MYERS, OIL AND GAS LAW, § 204.4. Essentially, the lessee could drill as many wells on a particular lease to maximize production and was not liable to the adjacent lessees and mineral owners whose lands may be drained by such operations. *Id.* Consequently, the drilling of offset wells by the adjacent lessee on each leasehold subject to drainage was necessary in order to avoid losing revenue. *Id.*

The practical result of this competitive development environment was significant economic waste of public oil and gas minerals due to overproduction and duplicative exploration activities. *See* 2 ROCKY MTN. MIN. L. FOUND., LAW OF FEDERAL OIL AND GAS LEASES, § 18.02[1] (citing to Opinion by T. A. Walters, First Assistant Secretary of the Interior, on June 4, 1937). However, the discovery in 1928 of large oil and gas deposits in the North Dome Kettleman Hills field in California, and the waste wrought by the Rule of Capture "demonstrated the necessity for some modification of the 1920 MLA." George W. Holland et al., 1935 A.B.A. SEC. MIN. L. at 4; 2 ROCKY MTN. MIN. L. FOUND., LAW OF FEDERAL OIL AND GAS LEASES, § 18.02.

This competitive development environment, incentivized by the Rule of Capture, provides the backdrop for Congress' decision to amend the MLA to provide for unitization to preserve oil and gas resources, minimize waste and efficiently develop the resource. Unitization also conserved the public lands by consolidating operations and reducing duplicative facilities.

2. Legislative History and Congressional Intent

As a result of the North Dome Kettleman Hills field in California and the inefficient and counterproductive exploration and development environment pervasive within the oil and gas industry at the time, Congress was acutely aware of the staggering waste resulting from the public land lessees' inability to

effectively develop an entire oil and gas field due to the limitations imposed by individual property lines. *See* 72 CONG. REC. 11,767; *see also* George W. Holland et al., 1935 A.B.A. SEC. MIN. L. at 4. Congress solved these problems by enacting the MLA unitization provisions at issue in this appeal to specifically account for the situation where oil and gas lessees, are unable to efficiently access and develop oil and gas because of particular surface and mineral ownership.

In developing the unitization legislative amendment to the MLA, the Committee on Public Lands and Surveys (the Committee) held hearings to flesh out a solution capable of mitigating the Rule of Capture's impact and to minimize waste. The Committee heard testimony from Dr. George Smith, the Director of the Geological Survey, who stated that:

> [U]nder the unit system of control and production there will be no regard for property lines in determining where it is best to put the wells at this time, or next year, or the year following. That would be left to an engineering committee which would give weight simply to the considerations of good management[.]

Cooperative or Unit Plan of Development and Operation of Oil and Gas Pools: Hr'g on S. 4657 Before Subcomm. of the Comm. of Pub. Lands & Surveys, 71st Cong., 2d Sess. 21 (June 18, 1930) (comments of Dr. George Smith, Dir. Geological Survey, Dep't of Interior) (emphasis added).

Moreover, the Committee Report regarding the 1930 amendment explicitly states that "the unit-operation plan [is] the most promising method of effectively

promoting conservation and economy for the benefit of all parties in interest," and that a federal unit "disregards all property lines within the pool[.]" 72 CONG. REC. 11,767 (emphasis added). The Secretary of the Interior, in a letter advocating for MLA's amendment, indicated that unitization "most important[ly], will tend to the avoidance of waste in times of overproduction now constantly occurring from so-called checker-board, town-lot, or property-line drilling." *Id*. Ultimately, the 1930 amendment was reported out of committee and submitted to the Senate for consideration.[2]

This legislative record demonstrates that through unitization, Congress explicitly sought the elimination of internal property and oil and gas lease lines. The MLA amendments allowed oil and gas operators to unitize to promote the conservation of natural resources and to enable the orderly and efficient development of oil and gas.

C. BLM Regulatory Framework Governing Federal Units

To implement Section 226(m) of the MLA, BLM promulgated regulations under 43 C.F.R. Subpart 3180 to establish and regulate federal units. The creation of a federal unit requires the participation of "those [parties] owning any right, title, or interest in the oil and gas deposits to be unitized[.]" 43 C.F.R. § 3181.3.

[2] The texts of the 1930 and 1931 amendments to the MLA are identical except that the 1930 amendment was set to expire in January of 1931, after the Secretary of the Interior authorized the unitization of the North Dome Kettleman Hills field in California and the Little Buffalo Basin field in Wyoming. *Compare* 72 CONG. REC. 11,765-66, *and* 74 CONG. REC. 7,204 (1931).

BLM does not require the consent of any surface owner in establishing a federal unit; thus, confirming the surface owner's subservient position—and dominance of the mineral estate—within a federal unit. *See Kinney-Coastal Oil Co. v. Kieffer*, 277 U.S. 488, 504 (1928) (stating that under federal law, the mineral estate is dominant over the surface estate).

BLM has codified within its regulatory scheme the Model Onshore Form Unit Agreement (Model Unit Agreement) at 43 C.F.R. § 3186.1. The Model Unit Agreement, which is the Unit Agreement for the Unit at issue in this appeal, provides the basis for nearly all approved federal units. Section 18 of the Model Unit Agreement, entitled "Leases and Contracts Conformed and Extended," states that "the terms conditions, and provisions of all leases . . . are hereby expressly modified and amended to . . . make the same conform to the provisions" of the unit agreement. 43 C.F.R. § 3186.1(18) (emphasis added). This provision applies to all federal, state, and private oil and gas leases within a unit.

Further, Section 18 of the Unit Agreement specifically modifies all committed leases so that "drilling and producing operations . . . upon any tract of unitized lands will be accepted and deemed to be performed upon . . . each and every tract of unitized land[.]" 43 C.F.R. §3186.1(18)(b); *Kenai Oil and Gas, Inc. v. United States Dept. of Int.*, 671 F.2d 383, 384 (10th Cir. 1982). Accordingly,

BLM treats oil and gas development within a federal unit as if all lands and minerals are included in one single oil and gas lease.

BLM also promulgated regulations regarding surface use rights. *See* 43 C.F.R. § 3101.1-2. This provision further delineates the surface use rights of a federal lessee for developing the leasehold and states that the lessee "shall have the right to use so much of the leased lands as is necessary to explore for, drill for, mine, extract, remove, and dispose of all the leased resources in a leasehold[.]" 43 C.F.R. § 3101.1-2.

This regulation echoes the well established rule that the surface estate is subservient to the dominant mineral estate in order to promote leasehold development. *See Kinney Coastal*, 277 U.S. at 504. Thus, under section 3101.1-2, the lessee is permitted to carry out its development activities anywhere within the leasehold in accordance with applicable federal and state rules and regulations. This principle is equally applicable to federal units. BLM's regulations provide for modification of all unitized interests for the orderly access and development of oil and gas leases. *See* 43 C.F.R. § 3186.1.

BLM has further implemented the MLA's unitization provision in its handbook on federal unitization. BLM's BLM Draft Handbook H-3180-1[3] on

[3] BLM's Handbook 3180-1 has remained in draft form since 1992, but BLM continues to use Handbook 3180-1 as its most current guidance for federal units. *See* BLM Colorado State Office,

unitization provides that in order to adequately and efficiently develop the unitized minerals the "lands within the unit area [are operated] without regard to internal ownership boundaries." BUREAU OF LAND MANAGEMENT, DRAFT HANDBOOK H-3180-1 - UNITIZATION 1 (1992) (emphasis added). The "elimin[ation] of internal property boundaries within the unit area, permits the most efficient and cost-effective means of developing the underlying oil and gas resources." *Id.* BLM's guidelines apply to all federal units that adopt the unit operating agreement provisions codified at 43 C.F.R. § 3186.1. *Id.*

In sum, BLM's regulatory scheme recognizes that orderly and efficient oil and gas development is effectively obtained through the operation of a federal unit as single lease without internal lease and boundary impediments to access and development.

III. DISTRICT COURT DECISION AND ORDER ON PRELIMINARY INJUCTION

The district court's holdings are inconsistent with the established purpose of federal unitization under the MLA and Tenth Circuit jurisprudence. Specifically, the district court erroneously held that: (1) development within a particular lease is limited by internal surface ownership boundaries to the extent surface and lease lines are not co-extensive; (2) surface access and development within an approved

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http://www.blm.gov/co/st/en/BLM_Programs/oilandgas/Draft_BLM_Manual_Section_3180_Unitization.html (last visited Sept. 8, 2013).

federal unit is limited to the scope of individual leasehold boundaries; and, (3) limiting internal leasehold and unit development in this manner is consistent with this Court's ruling in *Mountain Fuel Supply Co. v. Smith*, 471 F.2d 594 (10th Cir. 1973). *See Entek GRB, LLC v. Stull Ranches, LLC*, No. 11-cv-01557-PAB-KLM, 2013 WL 1313786, at *8, *12-*13 (D. Colo. Mar. 29, 2013). Entek appealed the district court order denying its request for a declaratory judgment on these issues related to the development of federal oil and gas resources within the Unit.

SUMMARY OF THE ARGUMENT

The district court erred in ruling that surface access and development within an approved federal unit is limited by internal surface ownership and oil and gas leasehold boundaries. The purpose and intent of the federal unit is to collectively, uniformly, and efficiently develop oil and gas in the interest of conserving environmental surface resources regardless of property boundaries. The district court's decision—and lack of recognition of these authorities—completely undermines the federal unit's purpose as established by Congress through the MLA, BLM's regulatory framework, and Tenth Circuit precedent. Therefore, the lower court's decision should be reversed.

Congress amended the MLA with express purpose of uniting the lands within a federal unit to enable the cooperative and orderly access to and development of oil and gas resources without regard to internal property

ownership. To implement this MLA provision, BLM's regulations require the modification and conformance of all unitized lands and leases to permit oil and gas development without regard to leasehold or surface ownership boundaries. *See* 43 C.F.R. § 3186.1(18); BLM DRAFT HANDBOOK H-3180-1 - UNITIZATION 1.

This Court has interpreted the purpose and effect of unitization as requiring the operation of the unit as a single lease without regard to surface and subsurface ownership boundaries. *Coosewoon v. Meridian Oil Co.*, 25 F.3d 920, 923 n.1 (10th Cir. 1994) (stating that unitization permits the unit to be "operated as a single entity, without regard to surface boundaries."). This Court's interpretation in *Coosewoon* is consistent with BLM's construction of the MLA. The district court's decision conflicts entirely with this precedent.

This Court, in *Mountain Fuel*, recognized that unitization may actually and legally modify leases committed to the unit. *Mountain Fuel*, 471 F.2d at 597. The *Mountain Fuel* court recognized that under the MLA, unitization alters the lessee and surface owner relationship. *See id*. The district court ignored this Court's recognition of unitization's effect on property boundaries and incorrectly applied *Mountain Fuel*'s ruling in reaching its conclusion.

In addition, the district court's rulings in its previous decision in *Stone & Wolf, LLC v. Three Forks Ranch*, No. Civ. A. 00-RB-01130OES, 2004 WL 561898, at *1 (D. Colo. 2004) misconstrues the principle purpose of the unitization

provisions of the MLA and BLM's implementing regulations. The court in *Three Forks* overlooked explicit Congressional intent to eliminate internal ownership and property boundaries within a federal unit in the interest of orderly and efficient development.

For these reasons, and as detailed below, the district court decision must be reversed.

ARGUMENT

I. THE DISTRICT COURT'S DECISION DIRECTLY CONTRADICTS CONGRESSIONAL INTENT IN AUTHORIZING THE FEDERAL UNIT PROVISIONS IN THE MINERAL LEASING ACT

It is well settled that when "expounding a statute [the] court . . . must look to the provisions of the whole law, and to its object and policy." *Phillbrook v. Glodgett*, 421 U.S. 707, 713 (1975). Further, the court's objective in construing a statute "is to ascertain the congressional intent and give effect to legislative will." *Id*.

Here, the district court's decision ignores entirely the plain statutory language of the MLA and Congress' express intent to authorize the development of federal, state and fee minerals within an approved federal unit as single entity regardless on surface ownership or leasehold boundaries. *Entek*, 2013 WL 1313786 at *6, *8-*9. The purpose and effect of unitization is evident from the MLA's plain language and underline Congressional legislative history.

The MLA specifically provides that for the purpose of promoting the orderly and efficient development of oil and gas, federal, state and fee lessees "may unite with each other" in operating a "unit plan of development[.]" 30 U.S.C. § 226(m). This Court and others have stated that unitization authorizes the development of a federal unit as a single lease that attributes production from one unitized lease to all the leases within the unit. *See Coosewoon*, 25 F.3d at 923 n.1 (stating that "unitization of and gas production 'permits the entire [oil and gas] field (or a substantial portion of it) to be operated as a single entity, without regard to surface boundaries."); *see also Norfolk Energy, Inc. v. Hodel*, 898 F.2d 1435, 1438 (9th Cir. 1990) (finding the same); *Gas Dev. Corp.*, 177 IBLA 201, 208 (2009) (same).

Congress specifically sought the elimination of all internal impediments to the orderly and effective development of the nation's oil and gas resources. Senator Walsh, the sponsor of the bill providing for unitization, explained that the purpose of federal units is to allow lessee's to "unite all of their interests and operate them as a unit" so that the field or pool can be developed irrespective of "individual property." 72 CONG. REC. 11,766. Moreover, the intent of Congress in amending the MLA is evidenced by the Committee Report read into the record that clearly states that a federal unit "disregards all property lines within the pool[.]" 72 CONG. REC. 11,767 (emphasis added); *see supra* part II.B.2.

There are no inconsistencies between the MLA's statutory mandates or the express intent and purpose of Congress in authorizing the creation of federal units. Rather, each complements the other and demonstrates that the development of a federal unit must occur without regard to all internal property lines so that nation can benefit from the orderly and efficient development of its oil and natural gas resources.

Accordingly, the district court's decision that federal unit development is inhibited by surface ownership and leasehold boundaries is patently contrary to the MLA's statutory mandate and the express Congressional intent in providing for unitization. Therefore, it must be reversed.

II. THE DISTRICT COURT'S DECISION IS CONTRARY TO BLM'S REGULATORY SCHEME AND POLICY GUIDANCE ON THE MLA UNITIZATION PROVISION

In accordance with the MLA and the express intent of Congress, BLM's regulatory scheme promotes the Unit's orderly development by conforming the interests of the various lessees to the objectives of the federal unit. The district court erroneously adopted a position that contravenes BLM's regulations implementing the MLA, 30 U.S.C. § 226(m), and warrants reversal.[4]

[4] "[T]he well-reasoned views of the agenc[y] implementing a statute constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance," and courts "have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer[.]" *U.S. v. Mead Corp.*, 533 U.S. 218, 227-28 (2001) (internal quotations and citations omitted).

BLM's regulations governing federal units explicitly provide for the amendment and modification of all committed leases. *See* 43 C.F.R. § 3186.1. The practical result is the "elimin[ation] of internal property boundaries within the unit area, permits the most efficient and cost-effective means of developing the underlying oil and gas resources." BLM DRAFT HANDBOOK H-3180-1 - UNITIZATION 1; *see Gas Dev. Corp.*, 177 IBLA at 208 (stating that "[t]he entire unit area is operated as a single entity, without regard to lease boundaries, and allows for the maximum recovery of production from the reservoir.") (emphasis added). Furthermore, the subservient position of the surface owner, reflected in the BLM's regulations, is necessarily expanded to the entire federal unit in order to ensure the efficient and effective recovery of oil and gas is the principle guiding unit development. *See* 43 C.F.R. § 3101.1-2.

The unit's practical effect is the ability to create a uniform development plan that reduces the development's overall surface disturbance through an efficient spacing pattern, reducing the number of necessary tank batteries, and maintaining reservoir energy to maximize recovery. *See* Lewis C. Cox, Jr., *The Road Map to Administering Federal Onshore Oil and Gas Leases*, *in* 38 ROCKY MTN. MIN. L. INST. § 20.03(6)(a) (Karen Kilgore Kaiser ed., 1992).

The district court's ruling thoroughly undercuts the purpose for the creation of oil and gas units—efficient development as a single lease—as embodied within

BLM's federal regulatory scheme. Unitization will cease to provide any planning or economic benefit under the district court's ruling. Optimum well spacing and orderly development become impossible so long as development is inhibited by internal surface mineral ownership boundaries within a unit. Further, the refusal of surface access by one or more surface owners will increase overall surface disturbance and potential economic waste through the drilling of unnecessary wells to access leased minerals in the Unit.

The district court's holding unravels the cooperative and economic framework established by Congress in the MLA unit provision in favor of a "checker-board" unit plan that prevents lease access and the efficient and effective recovery of oil and gas and should be rejected.

III. THE DISTRICT COURT ERRED IN CONSTRUING *MOUNTAIN FUEL*; THE *THREE FORKS* DECISION IS CONTRARY TO LAW

A. The 10th Circuit's Ruling in Mountain Fuel Supports Unit Development without regard to Surface Ownership and Lease Boundaries

The district court's decision misinterprets the Tenth Circuit's ruling in *Mountain Fuel* and applies the ruling in a manner inconsistent with other established Tenth Circuit precedent. Specifically, the district court held that *Mountain Fuel* necessitates the limitation surface access and development within a unit by individual surface ownership and leasehold lines. *Entek*, 2013 WL 1313786 at *6, *8. This holding is in error.

Significantly, *Mountain Fuel* did not address a situation where the leases were incorporated into a federal unit, and it does not support a finding that contradicts the express purpose of unitization as established by Congress under the MLA and affirmed by this Court. *See Coosewoon*, 25 F.3d at 923 n.1 (stating that unitization permits the unit to be "operated as a single entity, without regard to surface boundaries."); *see also supra* Section II.B. *Mountain Fuel* did not take into account the extensive MLA legislative history and Interior regulatory framework that fully support the development of the federal unit as a single lease. Thus, the district court's analysis and reliance on *Mountain Fuel*, are likewise in error. *See Entek*, 2013 WL 1313786 at *8.

The district court also ignores key aspects of the *Mountain Fuel* decision resulting in a misapplication of the decision. In *Mountain Fuel*, this Court specifically stated that "lessees are restricted in their use of the surface by the geographic extent of their particular lease or leases, and to the extent they may have been formally modified." *Mountain Fuel*, 471 F.2d at 597 (emphasis added). Further, this Court indicated that the unitization of oil and gas leases is insignificant unless the leases "have been actually and legally modified thereby[.]" *Id*. (emphasis added). The district court erred in ignoring this aspect of the *Mountain Fuel* decision. *See Entek*, 2013 WL 1313786 at *8.

The modification of unitized leases is precisely the circumstance before this Court. Under the MLA and BLM regulations and guidelines, a federal unit unites the rights of the various lessees for the purpose of collectively accessing and developing the leased minerals in the unit. 43 C.F.R. § 3186.1; BLM DRAFT HANDBOOK H-3180-1 - UNITIZATION 1. All of the leases in the Unit are modified and are administered as a single lease regardless of surface and mineral ownership. This is the precise error of the district court's decision.

The district court's analysis of *Mountain Fuel* overlooks unitization's purposeful alteration of the typical lessee and surface owner relationship, as directed by Congress. *Supra* Section II.B.2. Although the district court correctly points out that absent unitization, the lessee's surface use rights must be reasonably incident to the development of the subject mineral estate, *Entek*, 2013 WL 1313786 at *7, as indicated in *Mountain Fuel*, committed leases may be "actually and legally modified" by unitization, which comports with this Court's later pronouncement in *Coosewoon* and the purpose of the MLA. *See Coosewoon*, 25 F.3d at 923 n.1; *see also supra* Sections II.B & II.C.

Accordingly, in the context of federal units, the leases and their attendant surface access rights are combined so that the principle of orderly and efficient operation guides oil and gas development within the unit. The district court's

decision is in error in failing to recognize that within federal units, the surface and mineral ownership boundaries are joined so that all leases can be developed as one.

B. Three Forks Misconstrues the Purpose of the MLA and its Implementing Regulations

The lower court's decision in *Three Forks* is also in error because it constitutes a fundamental misunderstanding of unitization's purpose and effect as authorized by the MLA, BLM's regulatory scheme, and legal precedent. S*ee also Southern Utah Wilderness Alliance*, 707 F.3d at 1157-58 (stating that the Court may reach a legal issue not addressed by the district court). The decision in *Three Forks* is predicated upon a flawed reading of *Mountain Fuel* and a misapprehension of the federal statutory and regulatory scheme governing federal units.

The *Three Forks* decisions misapplied *Mountain Fuel* because it ignored the actual and legal modification of the leases committed to a federal unit. *Mountain Fuel*, 471 F.2d at 597; *see Gas Dev. Corp.*, 177 IBLA at 208. Unitization modifies the unit operator's surface access rights to unitized lands in order to effectuate an orderly development plan and limit the overall surface disturbance needed to develop the leases. *Supra* Section II.B.2; *see also Coosewoon*, 25 F.3d at 923 n.1; *Norfolk Energy*, 898 F.2d at 1438. This Court, under its discretionary review of purely legal issues, should confirm that the underlying predicate of federal

unitization is the conservation of natural resources through the orderly and efficient development of all leases in a unit as a single lease.

Similarly, the court in *Three Forks* misconstrued and largely disregarded the statutory scheme enacted by Congress and BLM's regulations pertaining to federal units. The court reasoned that there is nothing "expressly or impliedly" in the MLA indicating an alteration in the burden placed upon the surface estate in a unit. *Three Forks*, 2004 WL 5615898 at *12. This holding directly contradicts the extensive legislative history and directive in the MLA. Section 226(m) specifically authorizes the creation of federal units that, according to Congress' explicit intent, disregard all property lines within the unit in the interest of natural resource conservation. 30 U.S.C. § 226(m); *supra* Section II.B.2; s*ee* 72 CONG. REC. 11,767; *see also* George W. Holland et al., 1935 A.B.A. SEC. MIN. L. at 4. This Court should affirm that all leases are to be developed in a federal unit as if a single lease as directed by Congress.

CONCLUSION

The Court should reject the district court's holding that internal surface ownership and leasehold boundaries control unit development because it undermines the entire purpose of unitization as established by Congress, BLM's implementing regulation, and confirmed by this Court. Permitting the district court's ruling and the decision in *Three Forks* to stand will render federal units

useless and eliminate unitization's established benefits, and also create tremendous regulatory uncertainty which significantly hinders business, operational, and investment planning for the development of valid existing oil and gas leases committed to a federal unit.

The Court should reverse the district court and hold that the unit may be developed without regard to surface and subsurface lease boundaries.

Respectfully submitted this 9th day of September, 2013.

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CERTIFICATE OF DIGITAL SUBMISSION AND PRIVACY REDACTIONS

I hereby certify that a copy of the foregoing **BRIEF OF AMICUS CURIAE WESTERN ENERGY ALLLIANCE**, as submitted in Digital Form via the court's ECF system, has been scanned for viruses with the Symantec Endpoint Protection Version 12.0.1001.95, virus definition date September 9, 2013, and, according to the program, is free of viruses. In addition, I certify all required privacy redactions have been made.

s/ William E. Sparks

CERTIFICATE OF COMPLIANCE

As required by Fed. R. App. P. 29(c) and (d), and 32(a)(7)(C), I certify that this brief is proportionally spaced and contains 5,575 words.

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I hereby certify that the foregoing **BRIEF OF AMICUS CURIAE WESTERN ENERGY ALLLIANCE** was filed and served using the court's electronic filing system (ECF) on this 9th day of September, 2013 which will automatically send electronic notification of such filing to all attorneys of record.

s/ Martha A. Lair
Paralegal (digital)