United States Department of the Interior

BUREAU OF LAND MANAGEMENT
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In Reply Refer To:
SDR-922-15-07
3163.1 (MT9220.AG)

February 11, 2016

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Mr. Craig C. Smith)
Mr. Anthony J. Ford)
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REMANDED

CROWLEY FLECK PLLP (Crowley Fleck), on behalf of their client, North Dakota Petroleum Council (NDPC), requested in a letter dated September 23, 2015 (Enclosure 1), a State Director Review (SDR) with oral presentation, Petition for Stay, and a 30-day extension to submit supporting documentation. Crowley Fleck then submitted a letter requesting an extension of time to submit additional documentation in a letter dated September 30, 2015 (Enclosure 2). The request for administrative review by the State Director is based on a Decision Record (DR) dated August 25, 2015 (Enclosure 3), from the Bureau of Land Management (BLM) North Dakota Field Office (NDFO). The BLM NDFO Decision approved *Sundry Notice Flaring Request* Environmental Assessment (EA) DOI-BLM-MT-C030-2013-229-EA. This EA analyzed and disclosed the potential impacts of 2,211 Sundry Notice flaring requests in the NDFO.

NDPC members included in this SDR request:

- Continental Resources, Inc.
- Marathon Oil Company
- Whiting Oil and Gas Corporation
- Enerplus Resources (USA) Corporation
- WPX Energy, Inc.
- Statoil & Gas LP
- Burlington Resources Oil & Gas Company LP
- Hess Corporation
- QEP Resources
- Oasis Petroleum North America LLC
- Halcon Resources Corporation
- XTO Energy, Inc.

The DR appeal language was revised and republished on October 14, 2015 (Enclosure 4), giving the public until November 19, 2015, to file a SDR request. The SDR request was timely filed in accordance with 43 C.F.R. § 3165.3(b), and assigned number SDR-922-15-07.

In a letter dated October 7, 2015 (Enclosure 5), the BLM contacted Crowley Fleck acknowledging their request for a SDR with oral presentation, establishing a place for the presentation, describing the protocol that would be followed for such a presentation, issuing a stay on the decision, and granting their request for an extension of time.

In a letter to the BLM dated November 18, 2015 (Enclosure 6), Crowley Fleck submitted a supplemental Statement of Reasons in support of their original SDR. The oral presentation was scheduled and held on January 19, 2016. Crowley Fleck's oral presentation reiterated what was provided in their original written arguments.

Background

In the Decision Record (DR), BLM issued a directive regarding how the agency would review and respond to 2,211 pending Sundry Notices concerning flaring gas from Federal oil wells. The Decision mandates how the NDFO will treat two categories of Sundry Notices that request to flare gas from "Federal and Indian oil wells in the western portion of North Dakota:" (i) 1,943 pending Sundry Notice requests that "flared oil-well gas;" and (ii) 268 pending Sundry Notice requests "with ongoing flaring and future flaring requests (DR at 1)."

Notice to Lessees and Operators of Onshore Federal and Indian Oil and Gas Leases (NTL-4A) Royalty of Compensation for Oil and Gas Lost (Enclosure 7) provides the BLM authority to allow venting or flaring of oil-well gas under certain conditions. An operator must request approval to vent or flare produced natural gas by submitting: 1) an evaluation report supported by engineering, geologic and economic data, which demonstrated to the satisfaction of the Supervisor that conservation of gas, if required, would lead to premature abandonment of recoverable oil reserves; or 2) an action plan that will eliminate flaring of gas within one year from the date of application. The operator submits a Form 3160-5, Sundry Notices (SN) and Reports on Wells that details the notice of intent to flare gas.

Bakken pools producing in North Dakota are oil reservoirs, and gas produced in association with the oil at the wellhead is a by-product of oil production. During oil production, it may be necessary to burn or release this gas for a number of operational reasons, including lowering the pressure to ensure safety. The current gas-gathering infrastructure in North Dakota is insufficient to accommodate the volume of gas produced because of, among other reasons, the high liquid content of the gas, the prolific volumes of oil and gas during initial production, increasing pipeline pressure that requires installation of additional compressors, undersized pipe, inadequate infrastructure, and difficulty in obtaining pipeline rights-of-way.

Over the last several years, the operators included in this SDR have filed Sundry Notices associated with gas flaring with the NDFO. These Sundry Notices are included among the 2,211 Sundry Notices that are the subject of the NDFO's decision at issue in this SDR.

Discussion

The Field Office Decision Substantially Modifies the Requirements Imposed by NTL-4A, and the Field Office Lacks Authority to Makes Such Modifications.

The Field Office decision implements royalty standards for flared gas that are substantially different from, and at times incompatible with, the provisions of NTL-4A and NDFO's own policy prior to issuance of the decision. See Section II-C, *infra*, regarding prior policy of BLM Montana and North Dakota Field Offices approval of flared gas from connected wells as unavoidable flaring. At the time the decision was issued, the NDFO had 2,211 pending Sundry Notice requests on file. For 1,943 of those pending Notices, the decision imposes a rule that flaring that occurred for more than 144 hours per month is *per se* royalty bearing, and makes no attempt to determine if the lost gas should be characterized as "avoidably lost" or "unavoidably lost" under NTL-4A. *See* DR at 1. The NDPC contends that any flaring beyond 144 hours requires an avoidable/unavoidable determination based on the criteria outlined in NTL-4A Section I.

Prior decisions of the Interior Board of Land Appeals make it clear that, under NTL-4A, BLM must make an "avoidably lost" determination before royalties can be collected on gas flared from an oil well. *See Rife Oil Properties, Inc.*, 131 IBLA 357, 374 (1995) ("To the extent that BLM read NTL-4A as barring the venting of gas from a producing oil well without regard to whether it was avoidable lost...we find that BLM misread NTL-4A"); *see also Wexpro Company*, 174 IBLA 57, 61-62 (2008) (noting that federal courts have rejected prior attempts by BLM to impose royalty obligations on gas properly classified as unavoidable lost or as used for beneficial purposes).

The Field Office's per se rule also fails to acknowledge that "engineering, geologic, and economic circumstances" can justify venting or flaring gas beyond the blanket periods of permissible flaring that NTL-4A grants to all wells. *Maxus Exploration Co.*, 122 IBLA 190, 196 (1992). Additionally, while "[t]he need for the action is established by the BLM's responsibility under NTL-4A to evaluate...SNs requesting flare oil well gas," the decision imposes a number of requirements not present in NTL-4A. *Id.* at 5. The Field Office seeks to impose a strict 144-hour per month limit on flaring, when the plain language of Section III.A of NTL-4A allows the Supervisor to approve unavoidable flaring beyond 144 hours.

Here, the Field Office decision unquestionably "effects a change in the method used" by BLM to determine whether vented or flared volumes are subject to royalty, and the decision requires BLM to adhere to a strict numerical limitation to make that determination, with no consideration of the factors that the Field Office has previously

used in reviewing sundry notices and no analysis of the circumstances of flaring described in each sundry notice as required by NTL-4A.

The decision requires certain "design features/mitigation measures" – including restrictions on flaring at night, reductions in flare stack height, and measures for camouflaging flares – for wells flaring "within the viewshed of a cultural or historic property." DR at 2. The NDPC believes that requiring mitigation for impacts to viewsheds is outside the scope of NTL-4A, which is specifically aimed at royalty determinations. In addition, the NDPC would like to know whether the viewshed requirement is required on non-federal surface.

The Field Office will, in some circumstances, also require capture of gas, regardless of whether there is a present market for it by "reinjecting the natural gas into the ground for possible future use." *Id.* (emphasis added). These requirements are all well outside the scope of NTL-4A, which simply governs the calculation of royalties owed to the federal government on produced but unsold oil and gas, by classifying that oil or gas as "avoidably lost," "unavoidably lost," or as used for "beneficial purposes." NTL-4A at pt. II. The decision substantially alters the requirements of NTL-4A.

The decision imposes requirements on federal lessees that are either incompatible with the provisions of NTL-4A or outside its scope, and it is "a maxim of administrative law" that [i]f a second rule repudiates or is irreconcilable with [a prior…rule], the second rule must be an amendment of the first." *Nat'l Family Planning & Reprod. Health Ass'n, Inc. v. Sullivan*, 979 F.2d 227. 235 (D.C. Cir. 1992) (citation omitted). Regardless of how the Field Office wishes to characterize its actions in this matter, the decision amends the requirements of NTL-4A, and the Field Office had no power to amend a nationally-applicable NTL.

It is undisputed that notice of the Field Office's "Sundry Notice Flaring Requests" project was not published in the Federal Register, and the decision makes no mention of publication of a notice in any North Dakota newspaper. In addition, while the Field Office engaged in a public scoping process under the National Environmental Policy Act, the scoping process does not appear to have included a public comment period. ("Public scoping for this project was conducted by posting the proposed action on the NDFO website"). See DR at 3.

The scoping process for this EA also failed to satisfy the requirements governing NEPA scoping. Agencies are required to "[m]ake diligent efforts to involve the public in preparing and implementing their NEPA procedures." 40 C.F.R. § 1506.6(a). The agency leading the scoping process is required to "[i]nvite the participation of affected Federal, State, and local agencies…and other interested persons." 40 C.F.R. § 1501.7(a)(1). A completed environmental assessment must include "a listing of the agencies and persons consulted." 40 C.F.R. § 1508.9(b). The EA fails to list relevant state agencies such as the North Dakota Industrial Commission, relevant industry groups

such as NDPC, or any North Dakota lessees or operators – suggesting that none of those parties were consulted during the scoping process – and also notes that "[n]o comments were received from the public." EA at 39. In contrast, other scoping processes conducted by the Field Office have included notices published in local newspapers and notices mailed directly to parties identified as possible interested parties.

BLM Response

The BLM agrees that the EA and Decision need to be modified to better describe compliance with NTL-4A, as modified by Washington Office Instruction Memorandum (IM) No. 87-652 (Enclosure 8). The NDFO did not supply an adequate rationale for its decision. The intent of the Decision, although not stated, was to determine as royalty bearing any venting and flaring that was initiated without prior authorization. This determination does comply with the original provisions of NTL-4A. However, NTL-4A has been subsequently amended by Washington Office IM No. 87-652, as cited in IBLA case law.

The BLM agrees that NTL-4A is the regulation that must be followed when processing a request for venting or flaring of oil-well gas from federal mineral estate and that, as such, an avoidable or unavoidable determination must be made before issuing a decision on a Sundry Notice request for venting or flaring. In addition, the BLM agrees that imposing a strict 144-hour limit on flaring is incompatible with NTL-4A, which states that the authorized officer can approve unavoidable flaring beyond the 144-hour time period.

The BLM has the authority to protect the viewsheds of cultural and historic properties on both federal and non-federal surface under the National Historic Preservation Act and 36 C.F.R. § 800 - Protection of Historic Properties.

> § 800.5 (a) (2) Examples of Adverse Effects - Adverse effects on historic properties include, but are not limited to: (v) Introduction of visual, atmospheric or audible elements that diminish the integrity of the property's significant historic features;[.]

The mitigation requirements for venting and flaring locations within the viewsheds of historic or cultural properties are authorized under the National Environmental Policy Act (NEPA). See BLM NEPA Handbook H-1790-1, section 6.8.4.

> Mitigation measures can be applied to reduce or eliminate adverse effects to biological, physical, or socioeconomic resources. Mitigation may be used to reduce or avoid adverse impacts, whether or not they are significant in nature. If mitigation measures are incorporated into the proposed action or alternatives, they are called design features, not mitigation measures. You must describe the mitigation measures that you are adopting in your decision documentation.

The NDFO did not publish the EA in the Federal Register because there is no requirement to do so. The BLM publishes Notices of Intent in the Federal Register for proposed plan amendments, plan revisions, and environmental impact statements. Environmental Assessments (that are not plan amendments) have no requirement for Federal Register publication.

Although it was not a 'formal' scoping process, the North Dakota website does state:

> As a member of the public, you are invited to provide comments/concerns on any of the proposed actions associated with this NEPA log. These comments will be considered during the NEPA analysis and decision-making process for the applicable project. Under the column 'Comment Period,' Y means there is a formal comment period during a definite period. N means there is no formal comment period and comments should be submitted prior to the estimated decision date. Please feel free to provide comments to or request information from the contact identified on the log.

The BLM NEPA Handbook (H-1790-1 National Environmental Policy Act Handbook) states:

> The CEQ regulations direct agencies to encourage and facilitate public involvement to the fullest extent possible.... This means that while some public involvement is required in the preparation of an EA, you have the discretion to determine how much, and what kind of involvement works best for each individual EA. For preparation of an EA, public involvement may include any of the following: external scoping, public notification before or during preparation of an EA, public meetings, or public review and comment of the completed EA and unsigned FONSI. The type of public involvement is at the discretion of the decision-maker.

The BLM agrees that operators that submitted Sundry Notices would be considered "interested and affected parties" and should have been involved in the NEPA process.

The Decision Record Violates the Mineral Leasing Act and Imposes Requirements That Are Arbitrary and Capricious.

Imposing a royalty obligation on flared gas without first determining that the flaring constituted avoidable loss is arbitrary, capricious and an abuse of discretion.

> Any attempt by BLM to require royalty payments on oil or gas that has been unavoidably lost or used in lease operations "is manifestly contrary to the Mineral Leasing Act....[and] arbitrary, capricious and an abuse of discretion." *Marathon Oil Co. v. Andrus*, 452 F. Supp. 548, 553 (D. Wyo. 1978); see also *Gulf Oil Corp. v. Andrus*, 460 F. Supp. 15, 18 (C.D. Cal. 1978). The Interior Board of Land Appeals has explained how the decision in *Andrus* led directly to the BLM's issuance of NTL-4A:

> Following this judicial rejection of portions of NTL-4 [in *Andrus*], the Department ceased seeking payment of royalties [on] oil used in production and unavoidably lost gas and promulgated NTL-4A. See 44 FR 76600 (Dec. 27, 1979). In this Federal Register notice, the Department acknowledged that certain provisions of NTL-4 had been revoked and stated that those provisions would be superseded by NTL-4A.

BLM has an obligation under NTL-4A to determine whether produced gas was avoidable lost, unavoidable lost, or used for beneficial purposes. NTL-4A at pt. I; *see also Rife Oil Properties, Inc.*, 131 IBLA at 374; *Western Production Co.*, 124 IBLA 111, 117-18 (1992) (setting aside an avoidably lost designation when the Board was unable to determine from the record if the designation was justified). Insofar as the Decision Record imposes a royalty obligation on lessees for volumes of production that are "unavoidably lost," it "expand[s] and enlarge[s] upon the legislative enactment," is "manifestly contrary to the Mineral Leasing Act," and must be set aside. *Marathon Oil*, 452 F. Supp. At 551.

While the Field Office will make an avoidably lost or unavoidably lost determination for the 268 flaring requests for present and future flaring, the Field Office will make no attempt to determine if any of the flaring associated with the remaining 1,943 pending Sundry Notices was avoidably lost. *See* DR at 1-2. It is clear that flared gas associated with the 1,943 pending Notices is properly classified as unavoidably lost under NTL-4A and prior BLM policy. The wells associated with this group of Sundry Notices appear to be connected to gas gathering systems, and any flaring that occurs at a connected well is a product of midstream constraints which are beyond the operator's control. The magnitude, timing, and duration of such constraints cannot reasonably be anticipated by an operator. In many circumstances, flaring at a pad is inevitable as newer wells – closet to the compressor stations and operated by different companies – subsequently connect into the gathering system and alter the system's pressure, thereby hindering or eliminating sales volumes at the pad in question.

The EA acknowledges that gas gathering infrastructure in North Dakota currently has "inadequate capacity to handle the volumes of gas being generated," and that, as a consequence, even wells connected to a gas gathering line have been forced to flare because of "pipeline capacity/pressure issues." EA at 22, 74). The NTL-4A lists "relief of abnormal system pressure" as one type of event that justifies emergency flaring. *Id.* at pt. III(A). Pipeline capacity issues in North Dakota justify the flaring of gas beyond NTL-4A's blanket 144 hour period. *See Maxus Exploration Co.*, 122 IBLA at 196 ("engineering, geologic, and economic circumstances justified venting gas from the Marietta well…no assessment for avoidably lost gas should have been made"); *see also infra* Part II.B (discussing economics).

Finally, the fact that the flaring occurred in the past does not allow BLM to avoid making an avoidably or unavoidably lost determination. For any of the flaring associated with the 1,943 pending Notices that was the result of a pipeline capacity or pressure issue, BLM has the authority to allow – even retroactively – such emergency flaring to extend beyond 144 hours a month. *Id.* ("[emergency flaring] is limited to...144 hours cumulative for the lease during any calendar month, except with the prior authorization, approval, ratification, or acceptance of the Supervisor." (emphasis added)); see also *Maxus Exploration Co.*, 122 IBLA at 195 (rejecting BLM's contention that an unavoidably lost determination cannot be made on gas flared prior to the filing of an application). The decision's imposition of a royalty obligation on flared gas associated with the group of 1,943 pending Sundry Notices, without any attempt to determine if the lost gas is properly classified as avoidably lost, is arbitrary, capricious, and an abuse of discretion.

BLM Response

The BLM agrees that the Decision needs to be modified to better explain its compliance with the requirement of NTL-4A to make an avoidably lost or unavoidably lost determination in response to a venting or flaring request.

The BLM is not attempting to make a statement that venting and flaring requests for wells connected to pipelines are automatically royalty bearing. The NDFO made a decision that, because each of the 1,943 Sundry Notice requests for flaring that occurred in the past were for wells that initiated flaring without prior approval, the flaring is considered avoidable. The BLM recognizes, however, that Washington Office IM No. 87-652 modified NTL-4A to allow the operator to justify that gas capture was uneconomical at the time of the venting and flaring request, even without prior authorization.

The Field Office has not adequately examined the costs associated with the compliance measures mandated in the decision, and it would be arbitrary and capricious to impose those measures in cases where capturing the flared gas is economically irrational.

Past decisions of the Interior Board of Land Appeals have upheld NTL-4A "as a proper exercise of the Department's authority pursuant to the regulations at 43 C.F.R. § 3162.7-1 to require the lessee to market oil and gas produced from the lease if economically feasible and to...prevent avoidable loss of oil and gas." *Ladd Petroleum Corp.*, 107 IBLA 5 (1989) (emphasis added); *see also* 43 C.F.R. § 3162.7-1 ("The operator shall put into marketable condition, if economically feasible, all oil, other hydrocarbons, gas, and sulphur produced from the leased land" (emphasis added)). Economic feasibility "is always relevant to a question [of] whether gas was avoidably lost," according to the Board, even in cases where an operator flared gas without first seeking approval from BLM. *Maxus Exploration Co.*, 122 IBLA at 195. A rule that does not take the economic feasibility of gas capture into account "would lead to potential waste of oil" and cause

"premature abandonment" of productive oil wells. *Rife Oil Properties, Inc.*, 131 IBLA at 374 n.12.

There is no indication in the Decision Record that the Field Office considered economic feasibility when it imposed its *per se* rule governing royalty obligations on past flaring events or its special rules mandating capture of "avoidably lost" gas from wells within the viewshed of a cultural or historic property. Again, as noted above, the fact that the flaring occurred in the past does not allow the Field Office to avoid making an avoidably or unavoidably lost determination, and as a consequence, would also not allow the Field Office to avoid considering whether it would have been economically feasible to capture and market the lost gas. NTL-4A at pt. II(C); *Maxus Exploration Co.*, 122 IBLA at 195. Requiring installation of gas capture equipment at an economic loss would not comply with the provisions of NTL-4A and IBLA case law. The small amount of revenue that captured gas will generate makes efforts to increase gas capture – whether through infrastructure upgrades to address pipeline and processing capacity issues, or through the use of remote capture technology at well sites – generally uneconomic.

North Dakota operators that have previously evaluated the use of remote capture technologies have generally found them to be "uneconomic at any scale." Exhibit 3 – Declaration of Darrell Nodland ¶ 4 (further noting that "[t]he lease cost of the remote capture units…are far greater than the value of the natural gas liquids they produce at current prices"); see also Exhibit 2 – Declaration of Brent Miller ¶ 3 ("Our efforts to date establish that remote capture technology is uneconomic and will not alleviate flaring or resolve pipeline capacity and constraint issues"); Exhibit 1 – Declaration of Jeff Hume ¶ 6 (noting the company's ongoing evaluation of remote capture technologies have "consistently led Continental to conclude the technologies are not economically viable given their substantial cost in comparison to the nominal value of gas being flared").

Even for wells already connected to a gas gathering system, the revenue generated by captured gas is in many cases too small to justify the significant infrastructure investments needed to address flaring caused by existing capacity issues, and BLM must consider equipment and infrastructure costs when evaluating the economics of gas capture. *See Rife Oil Properties, Inc.*, 131 IBLA at 377 ("producing pressures would not permit delivery into the pipeline without installation of a rod pump which would make production uneconomic" (emphasis added)), EA at 22 (noting infrastructure issues as a cause of flaring); Exhibit 3 – Declaration of Shane Henry ¶ 3 (noting infrastructure issues as a cause of flaring). Requiring lessees to make uneconomic investments to capture and market gas is irrational, wasteful, and arbitrary and capricious.

BLM Response

The BLM agrees that the NDFO did not examine the costs of the gas capture requirements, and that those costs should be considered when making an avoidable or unavoidable determination. This analysis would be done when evaluating individual Sundry Notices.

The referenced EA analyzed and disclosed the potential impacts (including economic) of venting and flaring. See EA sections 3.8, Affected Environment- Socio-economic Conditions, and 4.4.5, Environmental Impacts-Socio-economic Conditions. These sections describe the existing conditions of and potential impacts to socio-economic resources in western North Dakota as pertaining to the NDFO Decision. However, the BLM agrees that the EA does not sufficiently analyze the potential impacts of the gas capture requirements.

The Field Office has not provided a reasoned explanation for its change in policy regarding the processing of Sundry Notices.

> Like the North Dakota Field Office, BLM's Miles City Field Office also processes Sundry Notice requests for wells in the Williston Basin producing from the Bakken formation. Rather than adopting a *per se* rule that royalties are owed if flared for over 144 hours, the Miles City Field Office has generally required operators to provide only (a) an approximate volume to be flared (mcf/day); (b) an approximate volume used beneficially on lease, if any; (c) a gas analysis including H2S concentration; and (d) economic justification for not selling the gas (e.g., low volume, no sales line, poor quality). Exhibit 1 – Declaration of Jeff Hume, ¶ 3. The Miles City Field Office has continued to process and approve such Sundries as of September 18, 2015.
>
> The Decision Record also constitutes a substantial change to the North Dakota Field Office's own prior policy regarding the processing of Sundry Notices. In contrast to the *per se* rule the Decision Record seeks to impose, the Field Office has previously recognized that pipeline pressure issues and capacity constraints justify unavoidable flaring beyond the blanket 144 hour per month period that NTL-4A grants to all wells for temporary emergency situations. The Decision Record and associated documents fail to acknowledge that the proposed *per se* rule does not conform to the Field Office's past practices regarding flaring Sundry Notices and, therefore fail to provide the "reasoned explanation" for this action necessary under the arbitrary and capricious standard. The Decision Record fails to acknowledge the Field Office's change of policy, and does not provide the substantial justification for this action necessary in light of operators' reasonable reliance on the previous policy. The Field Office's action is therefore arbitrary and capricious.

BLM Response

The BLM agrees that the NDFO EA and Decision need to be modified to better describe compliance with NTL-4A. The intent of the Decision, although not clearly stated, was to charge royalties on venting and flaring that was initiated with prior authorization. The BLM recognizes, however, that the provisions of NTL-4A have been modified by Washington Office IM No. 87-652, which states that operators have the opportunity to justify that gas capture was uneconomic, even without prior authorization.

The BLM also agrees that an economical or uneconomical determination must be made in response to a venting or flaring request.

Delays in Approving Pipeline Right-of-Ways Have Contributed to the Need for Flaring From Wells Producing From Private, Federal and Tribal Minerals.

The EA acknowledges the inability to obtain right-of-ways from private, federal, and tribal owners as a legitimate justification for flaring. EA at 22. NDPC believes that delays in the processing and approval of federal and tribal right-of-ways for gas pipelines, along with the inability to obtain easements from a small minority of private owners, have substantially contributed to the continued need to flare gas from Bakken and Three Forks wells in North Dakota, and this fact has not been adequately considered by the Decision Record. These issues have delayed needed pipeline system upgrades to relieve flaring from connected wells, and have additionally delayed or prevented unconnected wells from connecting to a pipeline.

On private lands, the Decision Record does not take into consideration the fact that operators and pipeline companies in North Dakota must negotiate consensual easement agreements with landowners for all gathering lines. North Dakota's eminent domain laws are highly restrictive and of little avail to companies for the purposes of acquiring gathering line easements. Unlike oil and gas producing states such as Oklahoma and Texas, "quick take" eminent domain in North Dakota is strictly prohibited for private corporations by Article I, Section 16, of the State's Constitution. Thus, a single landowner in North Dakota, owning less than 1 percent of the land a 10 mile pipeline needs to cross, can hold up a project indefinitely (or prevent a pipeline from being constructed at all, if an alternative route is not available). If the "quick take" eminent domain remedies that other states allow were available in North Dakota, this would not be an issue. In light of North Dakota's unique eminent domain law, it is perhaps unsurprising that the North Dakota Industrial Commission Order 24665 grants exceptions to its flaring-related production restrictions in the event of a pipeline delay caused by private landowners, in addition to delays caused by other governmental regulations or agency permit delays. The guidance document notes that "[f]lexibility will be provided in the form of temporary exemptions from production restrictions after notice and hearing if the following extenuating circumstances are validated: 1) surface landowner, tribal, or federal government right-of-way delays." *Id.* at 4 (emphasis added).

As already noted, North Dakota is a unique and challenging environment for right-of-way acquisition. In addition, pipeline companies operating in North Dakota face significant federal permitting challenges (including the potential need for multiple agency approvals from some or all of BLM, United States Forest Service, United States Fish and Wildlife Service, Corps of Engineers, Tribal Business Council, individual allottees, and BIA) when attempting to construct a gas gathering pipeline.

Based on the arguments and authorities cited above, NDPC respectfully requests that the State Director issue an order vacating the Decision published on August 25, 2015, and revised and republished on October 14, 2015, by the NDFO.

BLM Response

The BLM understands the difficulties and delays in obtaining rights-of-way, and agrees that when a Sundry Notice flaring request and a right-of-way application have both been properly filed, the venting and flaring of gas will be considered "unavoidably lost," pending the right-of-way approval.

The NDPC's compliance with North Dakota State Law does not remove its responsibility to comply with NTL-4A. The BLM is mandated to enforce the provisions of NTL-4A in accordance with 43 C.F.R. § 3162.7 - Measurement, disposition, and protection of production.

Decision

After review and consideration, it is the decision of the State Director to remand the Decision Record for *Sundry Notice Flaring Request* Environmental Assessment (EA) DOI-BLM-MT-C030-2013-229-EA.

The BLM defers to the following IBLA case: *Ladd Petroleum Corp.,* 107 IBLA (1989). In this case, a decision by the BLM that gas flared without prior authorization was considered avoidably lost was remanded. The IBLA cited Washington Office IM No. 87-652, which modified NTL-4A to allow the operator the opportunity to justify that the venting and flaring was for reasons uneconomical and unavoidable, even without prior authorization. Therefore, the Decision to designate the 1,943 SN requests as unavoidable for past flaring without prior approval is remanded. In addition, the NDFO will postpone the processing of the 268 SN requests for present and future flaring associated with this EA pending the following.

Because of the remand, the NDFO will take the corrective actions described below to correct its EA and re-publish for a 30-day public comment period before issuing a DR. After that time, the NDFO will consider economics and make avoidable or unavoidable determinations on the 2,211 requests for venting and flaring associated with this EA in accordance with NTL-4A and Washington Office IM No. 87-652.

The NDFO will rewrite its Decision to clearly demonstrate that each venting and flaring request will be evaluated with an economic analysis and an avoidable or unavoidable determination in accordance with NTL-4A and Washington Office IM No. 87-652. The NDFO will also clearly explain its rationale and specifically reference the legal and regulatory authorities for requiring mitigation impacts to viewsheds of cultural and historic properties on federal and non-federal surface under both an avoidable and unavoidable determination. In addition, the NDFO will address in its EA any potential economic impacts and impacts to reservoir and well integrity that may result from the mitigation requirements. After correcting the EA, the NDFO will reissue the

EA for a 30-day public comment period, and directly notify interested and affected parties before issuing a DR.

This Decision may be appealed to the Interior Board of Land Appeals, Office of the Secretary, in accordance with the regulations contained in 43 C.F.R. § 3165.4 and Form 1842-1 (Enclosure 9). If an appeal is taken, a Notice of Appeal must be filed in this office at the above address within 30 days from receipt of this Decision. A copy of the Notice of Appeal and of any statement of reasons, written arguments, or briefs must also be served on the Office of the Solicitor at the address shown on Form 1842-1. It is also requested that a copy of any statement of reasons, written arguments, or briefs be sent to this office. The appellant has the burden of showing that the Decision appealed from is in error.

If you wish to file a Petition for a Stay of this Decision, pursuant to 43 C.F.R. § 4.21, the Petition must accompany your Notice of Appeal. A Petition for a Stay is required to show sufficient justification based on the standards listed below. Copies of the Notice of Appeal and Petition for a Stay must also be submitted to each party named in the Decision and to the Interior Board of Land Appeals and to the appropriate Office of the Solicitor (see 43 C.F.R. § 4.413) at the same time the original documents are filed with this office. If you request a stay, you have the burden of proof to demonstrate that a stay should be granted.

Standards for Obtaining a Stay

Except as otherwise provided by law or other pertinent regulation, a petition for a stay of a Decision pending appeal shall show sufficient justification based on the following standards:

(1) The relative harm to the parties if the stay is granted or denied;
(2) The likelihood of the appellant's success on the merits;
(3) The likelihood of immediate and irreparable harm if the stay is not granted; and
(4) Whether the public interest favors granting the stay.

Sincerely,

Sandra S. Leach

for Aden L. Seidlitz
Acting State Director

9 Enclosures

1-NDPC's original SDR submittal dated 9/23/2015 (19 pp)
2-NDPC's request for extension of time letter dated 9/30/2015 (4 pp)
3-NDFO DR dated 8/25/2015 (5 pp)
4-Revised NDFO DR dated 10/14/2015 (4 pp)
5-BLM acknowledgement letter to NDPC dated 10/15/2015 (2pp)
6-NDPC's supplemental Statement of Reasons letter dated 11/18/2015 (24 pp)
7-NTL-4A (6 pp)
8-Washington Office Instruction Memorandum No. 87-652 (10 pp)
9-Form 1842-1 (2 pp)

cc: (w/o encls.)

WO-310
District Manager, Eastern Montana/Dakotas
Field Manager, North Dakota Field Office