ORAL ARGUMENT REQUESTED
No. 26-1199

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

CENTER FOR BIOLOGICAL DIVERSITY,
Petitioner-Appellant,

v.

DOUG MAYES and BUREAU OF LAND MANAGEMENT,
Respondents-Appellees,

and

BISON OIL & GAS IV, LLC and VERDAD RESOURCES, LLC,
Intervenor-Defendants-Appellees.

Appeal from the United States District Court
for the District of Colorado
No. 1:24-cv-01608 (Hon. Daniel D. Domenico)

REPLY BRIEF OF APPELLANT

SARAH STELLBERG
ANDREW HURSH
HOLLY BAINBRIDGE
ADVOCATES FOR THE WEST
P.O. Box 1612
Boise, ID 83702
(208) 342-7024
sstellberg@advocateswest.org

ALLISON N. HENDERSON
CENTER FOR BIOLOGICAL DIVERSITY
P.O. Box 3024
Crested Butte, CO 81224
(970) 309-2008
ahenderson@biologicaldiversity.org

Counsel for Petitioner-Appellant

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INTRODUCTION

BLM answers an argument the Center has not made. The Center does not contend that BLM may regulate private land. It contends that when an operator seeks permission to drill into federal minerals, BLM may, under 43 U.S.C. § 1732(b), 30 U.S.C. § 226(g), and its lease contracts, condition its approval on terms for the surface operations. A condition on a federal drilling permit binds only the permittee and only if it chooses to use the permit. The surface owner may do what it wishes with its property, short of producing federal minerals free from BLM's conditions. Setting conditions on the use of federal minerals does not regulate private land; it is BLM exercising its proprietary authority over those minerals. *See* Opening Br. 25, 50-51, 65-66.

Indeed, Appellees' merits framing is irreconcilable with their standing arguments, which accept that APD conditions only control whether federal minerals can be produced—not whether the facilities exist. Fed. Br. 21-22; Int. Br. 43.

BLM also concedes most of what matters. It accepts that federal minerals management has never been a traditional state function. Fed. Br. 52. It accepts that BLM has "authority over those minerals even when

developed from and produced on private surface." *Id.* at 42. And it accepts that BLM already oversees "all aspects" of a lessee's conduct on private surface for split-estate wells. *Id.* at 9. What is left is a line between "down-hole" and "surface" that appears nowhere in the statutes or lease and that BLM itself crosses.

Appellees' threshold objections fare no better. BLM does not contest injury to members' use of the Pawnee National Grassland. Fed. Br. 21. It disputes traceability and redressability on the theory that the pads would exist anyway, *id.* at 21-24, but BLM projected that denying the APDs would yield twelve fewer wells and no Speed Goat pad expansion, 2-Appx-377, 480, 496, and eliminating those impacts suffices. And the PIM, which BLM calls the instrument that "draws the line" on permissible permit terms, Fed. Br. 34, and which Intervenors concede is "controlling on the agency," Int. Br. 31, is a final agency action, as the district court held.

The judgment should be reversed.

ARGUMENT

I. The Center Has Standing.

A. The APDs cause member injuries, and vacatur would redress them.

The district court decided standing on the pleadings, where the Center's "burden in establishing standing is lightened considerably." *Petrella v. Brownback*, 697 F.3d 1285, 1292 (10th Cir. 2012). BLM seeks to impose a "heightened burden" because the Center challenges regulation of third parties. Fed. Br. 20-21. But BLM's cases discuss the burden to "adduce facts" at later stages—not the pleading standard. *Lujan v. Defs. of Wildlife* ("*Defenders*"), 504 U.S. 555, 562 (1992) (summary judgment); *FDA v. All. for Hippocratic Med.*, 602 U.S. 367, 382 (2024) (preliminary injunction).

Regardless, the "heightened burden" characterization overstates these cases, which express only that when causation and redressability "depends on the unfettered choices made by independent actors," the plaintiff must "adduce facts showing that those choices have been or will be made in such manner as to produce causation and permit redressability of injury." *Defenders*, 504 U.S. at 562. Here, the Center's allegations

leave no "unfettered choices" to third parties: the fee/fee/fed wells could not occur but for BLM's issuance of APDs.

Injury-in-fact. While the district court found injury, 2-Appx-449, Intervenors alone argue the Center did not "delineate the 'adjacent areas' any member uses" near the Boomhog and Speed Goat sites. Int. Br. 38. Yet the Petition and declarations place members within a quarter-mile of Speed Goat and a half-mile of Boomhog, easily within their areas of effect. Opening Br. 28-29; *e.g.*, 1-Appx-167-70. Members will also pass directly by the sites or encounter their trucks while enjoying the Grassland's scenic roadways. Opening Br. 29.

Intervenors say the Center does not allege how APD development injures its members' use and enjoyment of these adjacent lands. Int. Br. 39-40. But the Petition details how their effects—dust, noise, light, traffic, and emissions—reach into the Grassland, harming members' health, disrupting recreation and wildlife-viewing, and deterring return trips. 1-Appx-062-65, 1-Appx-056-61, Opening Br. 28-30. In contrast with Intervenors' cases, this places members within delineated areas affected by drilling operations. *See Ctr. for Biological Diversity v. U.S. Dep't of the Interior*, 144 F.4th 296, 308-09 (D.C. Cir. 2025); *Powder River Basin Res.*

Council v. U.S. Dep't of Interior, No. 22-cv-2696, 2023 WL 7298815, at *7 (D.D.C. Nov. 6, 2023).

Causation. BLM's premise is that every injury "arises from development at the Boomhog and Speed Goat pads as a whole," so none can be traced to the APDs. Fed. Br. 21. But the APDs need only contribute "an identifiable trifle" beyond existing operations. *United States v. SCRAP*, 412 U.S. 669, 689 n.14 (1973).

The increment here is no trifle. The APDs authorize ten additional wells at Speed Goat and two at Boomhog, none of which may be drilled without BLM's approval. Fed. Br. 11-13; 43 C.F.R. § 3171.5. Speed Goat's wells took eight months to drill and complete, 1-Appx-118-19, and the daily emissions, trucks, workers, noise, light, and dust to operate the wells will persist for their 30-year life, Opening Br. 32; 2-Appx-503. The Speed Goat wells also required an "expansion of the well pad," Fed. Br. 12, and BLM found that denying the APDs would avoid "impacts from expanding the well pad," 2-Appx-496. Members visit with sufficient frequency that overlap with the drilling period was likely, 1-Appx-142, 1-Appx-264, 1-Appx-278, 1-Appx-287, and they will certainly feel the long-term production-stage impacts.

BLM also suggests the APDs cause only the federal portion of the wellbores. Fed. Br. 21. Yet without a federal APD, these wells could not be drilled. BLM itself found that denying the APDs would prevent the wells and pad expansion altogether. 2-Appx-496; *see also* 2-Appx-377. BLM acknowledges this, Fed. Br. 21-22, but claims the no-action alternative was only a baseline for comparison. Fed. Br. 24. But that baseline was BLM's projection of what would happen if the APDs were denied. Even if the APDs caused only the federal portion of the wellbores, the PIM concedes "effects related to drilling and operating the Federal wellbore (e.g., dust, noise, traffic)" and operating surface facilities "in support of" that wellbore. 1-Appx-028-029. Once extracted, the federal minerals also generate emissions from flaring, venting, and leaks. *See, e.g.*, 2-Appx-478-79. Thus, the APDs indisputably cause new impacts.

Intervenors attempt to disprove harm by pointing to one member who saw wildlife around the Boomhog site after drilling occurred. Int. Br. 41 (citing 1-Appx-294). This does not disprove wildlife impacts or speak to other harms. Intervenors also ignore another member's declaration that Boomhog activity "mars the sense of nature and diminishes the Grassland experience," with corroborating pictures. 1-Appx-166-67. At

most, this raises an evidentiary dispute that cannot be resolved at the pleading stage.

Redressability. Vacatur provides a straightforward path to redress because it will stop the twelve new Speed Goat and Boomhog wells. *See All. for Hippocratic Med.*, 602 U.S. at 381 ("If a defendant's action causes an injury, enjoining the action … will typically redress that injury."). BLM says this would "not remove the pads" or "halt the fee wells," Fed. Br. 25, but it would "reduce[] to *some extent*" the emissions, traffic, dust, noise, and wildlife disturbance, *Consumer Data Indus. Ass'n v. King*, 678 F.3d 898, 902-04 (10th Cir. 2012) (citation omitted). Again, BLM found that if the APDs were denied, it would eliminate the "impacts from expanding the well pad and drilling the new wells," and "traffic, noise, and activity surrounding the [long-term] operation of the wells." 2-Appx-496; *see also* 2-Appx-377.

Appellees speculate that the wells would be reconfigured and drilled to extract only private minerals. Fed. Br. 22-23, 25; Int. Br. 43. This type of "mere speculation" cannot defeat standing, particularly at the pleading stage. *Sierra Club v. U.S. Dep't of the Interior*, 899 F.3d 260, 285 (4th Cir. 2018); *see also* Opening Br. 35. There is no evidence that

drilling these wells would be desirable or feasible, economically or otherwise, without extracting federal minerals. The record thus far suggests not. Opening Br. 32-33, 36. Even assuming reconfiguration were likely, vacatur would still eliminate the harms from federal mineral production: "effects related to drilling and operating the Federal wellbore (e.g., dust, noise, traffic)," 1-Appx-028-029, and emissions released by the federal minerals, *e.g.*, 2-Appx-478-79.[1] As for BLM's speculation that vacatur might result in a well drilled "vertically from federal surface" in the Grassland, Fed. Br. 24, the leases prohibit this, 1-Appx-075.

Redressability does not require showing that the APDs could not be reapproved, and in any event, delaying their impacts is redress. *See Sierra Club*, 899 F.3d at 285. If the APDs were reapproved, eliminating the legal error standing between members and consideration of mitigation is also sufficient redress. *See id.*; *FEC v. Akins*, 524 U.S. 11, 25 (1998). It is

[1] Vacatur would prohibit emissions from federal mineral production, even if fee wells continue. BLM's attempt to distinguish *Utah Physicians for a Healthy Environment v. Diesel Power Gear, LLC*, 21 F.4th 1229 (10th Cir. 2021) fails for this reason. Fed. Br. 24-25. Members recreating in the Grassland would benefit from less ozone exposure, Opening Br. 30, 38, and *Utah Physicians* does not require that this "measurably affect ozone" across the entire nonattainment region, Fed. Br. 25, just that the APDs "contribut[e]" to ozone there, 21 F.4th at 1242-46.

also at least *plausible* that BLM would add mitigation the PIM led it to omit. *See COPE v. Kansas State Bd. of Educ.*, 821 F.3d 1215, 1221 (10th Cir. 2016) (standing need only be "plausible" at the pleading stage). Appellees say more particulars were required about measures BLM would apply, Fed. Br. 25; Int. Br. 40, but the Center listed specific requirements, routine for other wells, that would address members' harms, 1-Appx-066; 1-Appx-161-62 (flaring limits; wildlife buffers; traffic restrictions; noise limits). These go beyond the sparse mitigation that was "in fact incorporated into the APDs," Int. Br. 43, such as grid power and pipeline takeaway, *id.* at 9.

B. The PIM causes member injuries, and vacatur would redress them.

Injury-in-fact. BLM says there can be no standing to challenge the PIM "in the abstract" apart from any specific APDs that harm Center members. Fed. Br. 31-33. But *Summers v. Earth Island Institute*, 555 U.S. 488, 495 (2009), does not limit the Center to *challenging* concrete applications; it only requires the Center to *identify* them. The Boomhog and Speed Goat projects, and 250 other wells approved within a 15-square-mile Grassland segment members use, are concrete applications that injure members. 1-Appx-075-76, 78-81; 2-Appx-418-19. The

high rate of fee/fee/fed approvals in this Grassland segment also creates a "substantial risk" of more such wells, *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014) (citation omitted), that is unlike the "statistical probability" found too tenuous in *Summers*, 555 U.S. at 497-98. The ongoing injury from existing fee/fee/fed wells also suffices, as BLM on remand could order operational changes to reduce harm. *See* 43 C.F.R. §§ 3161.2, 3162.1, 3162.5-1 (confirming BLM's ongoing authority).

Intervenors assert the PIM causes no injury because it does "nothing" to prevent mitigation. Int. Br. 22. Yet the PIM directs staff that they cannot "require mitigation of surface disturbances," 1-Appx-034, and staff comply by omitting measures required of other wells, 1-Appx-078. BLM acknowledges it "set its limits" in the PIM. Fed. Br. 39. The injury is the loss of that mitigation, and a directive that controls drilling permits is a cause of it. *Utility Air Regulatory Group v. EPA*, 320 F.3d 272, 278 (D.C. Cir. 2003), Int. Br. 16, involved a mere "announcement" of a policy the agency hoped to implement later. This PIM is already applied and "controlling" APD decisions. Int. Br. 31. That effects must be studied in NEPA reviews is not in dispute; the point is BLM cannot mitigate them. Intervenors answer that operators may still "propose" measures, Int. Br.

20 n.5, but that confirms the problem: mitigation depends on what an operator is willing to propose because BLM has been told it cannot require it.[2] Boomhog and Speed Goat illustrate that operators volunteer much less than what BLM ordinarily applies. *See supra* page 9.

Causation and redressability. Appellees argue that any harm depends on the "independent choices" of BLM staff as to permit terms. Fed. Br. 32; Int. Br. 23. But staff are not choosing independently: they cite the PIM as prohibiting mitigation. *See* Opening Br. 43. The Center also need not show that vacating the PIM would *certainly* result in better mitigation, just that a "predictable chain of events" makes it substantially likely. *Diamond Alt. Energy, LLC v. EPA*, 606 U.S. 100, 102 (2025). And at the pleading stage, redress need only be "plausible." *COPE*, 821 F.3d at 1221. It is at the very least *plausible* that eliminating BLM's stated rationale for withholding mitigation would lead staff to impose measures applied elsewhere, and that would abate members' injuries. Opening Br. 44. BLM's oversight of split-estate wells substantiates this.

[2] The PIM also limits BLM's ability to enforce volunteered measures. Opening Br. 43 n.7. Intervenors point to the PIM's bond requirement, Int. Br. 22, but ignore its prohibition on bond coverage for surface impacts, 1-Appx-032.

BLM says it conditions split-estate wells because of its "duty to avoid unnecessary damage" to the private surface, Fed. Br. 52, but that does not explain why it also conditions them "to protect the adjacent Federal or Indian lands." 48 Fed. Reg. 48916, 48927 (Oct. 21, 1983); *see also id.* at 48920. This makes it plausible that BLM, if allowed, would also protect federal lands from fee/fee/fed well impacts. FLPMA's directive to avoid "unnecessary" degradation would compel this much. Opening Br. 49-50.[3]

Redressability also does not depend on a likelihood that BLM would attach better mitigation. Simply lifting the barrier to BLM doing so provides redress. *See Akins*, 524 U.S. at 25; *Sierra Club*, 899 F.3d at 285. This is not a "generalized grievance," Fed. Br. 32, as Center members are concretely injured. BLM attempts to differentiate *Akins* on causation, but its relevance is on redressability: setting aside an agency action that "misinterpreted the law" is sufficient redress "even though the [agency] might reach the same result exercising its discretionary powers lawfully." 524 U.S. at 25; *see also Larson v. Valente*, 456 U.S. 228, 242-43 (1982)

[3] Better BLM mitigation does not "turn on the independent choices of operators" and "state regulators." Fed. Br. 32.

(redress not defeated by government's ability to provide different justification for same action).

II. The Claims Are Otherwise Justiciable.

A. The PIM is a final agency action.

The district court correctly held that the PIM is a final agency action. 2-Appx-456. The PIM is "binding on BLM," not advice. *Petan Co. of Nev.*, 186 IBLA 81, 97 (2015). BLM acknowledges the PIM dictates what it "may not do": require a surface use plan, a bond for non-federal surface, or mitigation of surface operations off federal surface. Fed. Br. 37. Staff treat it as binding, citing it as their reason for omitting mitigation and stating that APDs are "in full compliance with," "[s]ubject to," and "per" the PIM. Opening Br. 43 (collecting citations).[4]

Appellees say legal consequences flow only from later APD decisions. Fed. Br. 27-28; Int. Br. 33-34. But agency guidance has legal consequences if it binds, formally or practically, agency staff to a particular

[4] Intervenors alone dispute *Bennett*'s first prong, saying the PIM contains no "definitive agency interpretation." Int. Br. 31. The text plainly refutes this. The PIM pronounces limits on BLM's "jurisdiction" and "authority," 1-Appx-026, 32, 34, and nothing suggests these can be revisited in later permitting. This "definitive conclusion" about the scope of BLM's authority satisfies *Bennett*. *See Scenic Am., Inc. v. U.S. Dep't of Transp.*, 836 F.3d 42, 56 (D.C. Cir. 2016).

legal position. *See, e.g.*, *Texas v. EEOC*, 933 F.3d 433, 443-44 (5th Cir. 2019); *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1022-23 (D.C. Cir. 2000); *POET Biorefining, LLC v. EPA*, 970 F.3d 392,405 (D.C. Cir. 2020). That courts are not bound, Int. Br. 31, is beside the point. Finality asks whether legal consequences flow, and a directive that controls BLM permitting decisions has them.

Intervenors argue *Appalachian Power* was different because that guidance had consequences for state permittees, Fed. Br. 32, but the court's reasoning for concluding the guidance was binding was that it announced "a position EPA officials in the field are bound to apply." *Appalachian Power*, 208 F.3d at 1022.

Appellees' cases are inapposite. The guidelines in *Center for Auto Safety v. NHTSA*, 452 F.3d 798, 432-33 (D.C. Cir. 2006), made recommendations for manufacturers but did not bind agency officials. The guidance in *National Mining Association v. McCarthy*, 758 F.3d 243, 252 (D.C. Cir. 2014), only "recommended" permit conditions that states were "free to ignore." In both *WildEarth Guardians v. Bernhardt*, 501 F. Supp. 3d 1192, 1224-25 (D.N.M. 2020) and *Friends of Animals v. Pendley*, 523 F. Supp. 3d 39, 53-55 (D.D.C. 2021), the IMs merely established public

comment procedures. The PIM, in contrast, binds BLM staff to a legal position and controls their permitting decisions.

B. This suit is not a programmatic attack.

This case is not an impermissible "programmatic attack." Fed. Br. 29-30; Int. Br. 24-26. *Lujan v. National Wildlife Federation*, 497 U.S. 871, 890 n.2 (1990), makes clear that if "there is in fact some specific order" by an agency "applying some particular measure across the board" to decisions of a certain type, "it can of course be challenged under the APA by a person adversely affected." The Center's case does just that: it challenges discrete agency actions (the PIM and APDs), not general agency operations like in *Lujan*. 497 U.S. at 890.

BLM maintains that any challenge to the PIM can only proceed through litigation against specific APDs. Fed. Br. 29. This overstates the ripeness doctrine, which is "a question of *timing*." *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 580 (1985) (emphasis added). Cases like *Ohio Forestry Association, Inc. v. Sierra Club*, 523 U.S. 726, 732-33 (1998), do not prohibit facial challenges to agency rules, but require that plaintiffs generally await concrete implementation that causes them harm. The Center has done so: the PIM has been concretely applied for

years to over 250 APDs in the Grassland that harm its members. *See supra* page 9-10. Delayed review would cause hardship on the Center, and the issues are pure questions of law that require no factual development. The PIM claim is ripe, with or without the APD claims.

C. The APD claims are not moot.

Intervenors alone argue mootness. Int. Br. 43-46. The district court rejected the argument, recognizing that "[m]ootness is a high bar." 2-Appx-454. A case is moot only when the court cannot grant "any effectual relief whatever." *Knox v. Serv. Emps. Int'l Union, Loc. 1000*, 567 U.S. 298, 307 (2012) (citation omitted). Intervenors say the APDs authorized only well construction, which is complete. But the APDs are also the federal authorization for the wells' ongoing production of federal minerals. 43 C.F.R. § 3171.5.

Intervenors concede that denying an APD would "preclude the production of federal minerals." Int. Br. 43. This would redress the harms Center members continue to incur from production activities, which will persist through the life of the wells. *See supra* page 6. Relief that would end federal production is thus effectual. Remand alone would also let

BLM attach conditions to the wells' continuing operation to reduce harm. *See supra* page 10.

In contrast, Intervenors' cases involved completed construction that no remedy could affect. *One Thousand Friends of Iowa v. Mineta*, 364 F.3d 890, 893-94 (8th Cir. 2004); *Neighborhood Transp. Network, Inc. v. Pena*, 42 F.3d 1169, 1172 (8th Cir. 1994).

Even if the case were otherwise moot, this controversy "is capable of repetition, yet evading review." *Kingdomware Techs., Inc. v. United States*, 579 U.S. 162, 170 (2016) (citation omitted). First, Grassland wells are drilled within an average of nine months of APD approval, 2-Appx-417, a period "too short to complete judicial review of [their] lawfulness," *Kingdomware*, 579 U.S. at 170. Second, it is "reasonable to expect" the same legal issue will recur as to future fee/fee/fed APDs approved in the Grassland. *Id.*; 2-Appx-418-19 (noting ongoing permitting).

III. BLM May Condition Fee/Fee/Fed APDs to Address Surface Operations.

A. The clear-statement canon does not apply because conditioning federal mineral access is not regulation of private surface.

BLM frames this appeal as asking whether BLM may "regulate private surface." Fed. Br. 35. But what the Center contends is that if an

operator requests BLM permission to drill federal minerals, BLM may attach conditions for the associated surface operations. Federal minerals are federal property, and a condition on their use is an exercise of proprietary authority over federal minerals, not regulation of private land. Opening Br. 50-51. The federal permit binds only the operator that chooses to drill federal minerals. The surface owner remains free to use its property as it wishes: BLM cannot "manage" that land or "modify private surface facilities" on it. Fed. Br. 36. The APD controls only whether federal minerals can be developed there, as Appellees concede in their standing arguments. Fed. Br. 10; Int. Br. 43. Conditions that operate only on extraction of federal minerals are not regulation of private land.

Congress's proprietary power over federal property indisputably includes the power to condition its use. Opening Br. 65-66. Thus, Appellees do not dispute that Congress could condition the right to use federal minerals on requirements for associated surface operations, wherever they occur. Interior's general statutory delegations encompass that authority unless "taken away by some affirmative provision of law." Opening Br. 66 (quoting *Cosmos Expl. Co. v. Gray Eagle Oil Co.*, 190 U.S. 301, 309

(1903)). The Center does not claim the Property Clause is "self-executing," Fed. Br. 38; its claim rests on the statutes below.

The clear-statement canon thus does not fit. First, it guards against construing a federal statute to alter the federal-state balance. *Gregory v. Ashcroft*, 501 U.S. 452, 460-61 (1991). But BLM concedes federal minerals are not a traditional state province. Fed. Br. 52. Where there is a "history of significant federal presence," federalism canons are not triggered. *United States v. Locke*, 529 U.S. 89, 108 (2000). The disputed conditions would add federal terms to a fee/fee/fed well just as federal and state rules already coexist at split-estate and federal-surface wells. Opening Br. 67-68. Colorado's authority over siting and operating the pad is untouched; operators must satisfy both sovereigns.

Second, BLM's clear-statement cases do not involve conditions on the privilege to use federal property. Each involved claims of direct federal authority to regulate land or water, or preemption of state law. *See Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 172-74 (2001) (land or water use); *Rapanos v. United States*, 547 U.S. 715, 738 (2006) (same); *U.S. Forest Serv. v. Cowpasture River Pres. Ass'n*, 590 U.S. 604, 621-23 (2020) (authority over private lands);

Utah Native Plant Society v. U.S. Forest Serv., 923 F.3d 860, 867-69 (10th Cir. 2019) (authority to prohibit state conduct on state land); *Va. Uranium, Inc. v. Warren*, 848 F.3d 590, 596 (4th Cir. 2017) (preemption dispute over private minerals).

Third, BLM "has a much freer hand" when exercising proprietary authority versus traditional regulatory authority. *Bradford v. U.S. Dep't of Lab.*, 101 F.4th 707, 726 (10th Cir. 2024) (citation omitted); Opening Br. 69. Finally, even if the canon applied, the statutes here are a sufficiently clear statement of coverage.

The amicus Pacific Legal Foundation ("PLF") argues that the Property Clause confers only a power to dispose of land and make rules for disposal. PLF Br. 4-13. This argument was neither raised below nor advanced by Appellees, so should not be addressed. *United States v. Bd. of Cnty. Comm'rs of Cnty. of Otero*, 843 F.3d 1208, 1215 (10th Cir. 2016). Binding precedent also forecloses it. The Supreme Court "has declared that the Property Clause gives the federal government plenary power, including legislative and police power, over federal property." *Id.* at 1212. Congress's power over public land "is without limitations," *Kleppe v. New Mexico*, 426 U.S. 529, 538-39 (1976) (citation omitted), and is "analogous

to the police power of the several states," *Camfield v. United States*, 167 U.S. 518, 525 (1897). That binds this Court even if PLF calls it dicta. *See Gaylor v. United States*, 74 F.3d 214, 217 (10th Cir. 1996). Ultimately, PLF concedes the government may exercise "the power of a property owner," PLF Br. 15, which is all the Center claims here.

B. FLPMA's development duty is a clear statement.

FLPMA directs the Secretary to "regulate … the use, occupancy, and development of the public lands," 43 U.S.C. § 1732(b), and public lands include any "interest in land owned by the United States," *id.* § 1702(e), such as minerals. BLM concedes that "[t]he property being developed here is the federal minerals." Fed. Br. 36. The Secretary's authority therefore reaches any operations that constitute "development" of those federal minerals, wherever they occur.

Surface operations are development. The "development" of minerals includes surface operations to extract them from the ground. *See United States v. Osage Wind, LLC*, 871 F.3d 1078, 1089-90 (10th Cir. 2017). BLM stresses that the minerals are themselves underground, Fed. Br. 36, but they are not developed only at the far end of a wellbore. Developing them means building the pad, erecting the rig, drilling the

wellbore, and handling what comes up. By BLM's own definition, development is "modifying a … property … to enhance its profitability." *Id.* Federal minerals are modified and made profitable by being drilled from and extracted to the surface. The lease grants the right to "drill for, mine, extract, remove and dispose of" the oil and gas, 1-Appx-021, and each of those acts is carried out from, and ends at, the pad. Thus, as BLM ultimately acknowledges, the minerals here are "developed from … private surface." Fed. Br. 42.

BLM's authority does not turn on surface ownership. FLPMA authorizes regulation of "the use, occupancy, and development *of* the public lands," not development *on* them. 43 U.S.C. § 1732(b) (emphasis added). BLM's reading substitutes "on" for "of." It says that work ceases to be "development" of federal minerals if someone else owns the surface, but nothing in § 1732(b) draws that line. The authority is defined by ownership of the interest being developed, 43 U.S.C. § 1702(e), not location of the work, and BLM concedes that the interest being developed is the federal minerals, Fed. Br. 36.

Split-estate wells refute BLM's surface-ownership rule. BLM acknowledges it "can regulate all aspects of" split-estate wells even

though they occur on private land. Fed. Br. 9. This cannot be squared with an interpretation of "development" that turns on surface ownership. BLM traces the split-estate distinction to the doctrine of mineral estate "dominan[ce]" over surface, Fed. Br. 9, 52, but the buried mineral estate is still the only federal land. The statutory analysis remains the same: in both contexts, the leaseholder is developing federal minerals from private surface.

Clear statement. The federalism clear-statement canon does not apply, *see supra* Part III.A, but FLPMA's text is sufficiently clear: "development" of federal minerals unambiguously covers surface operations. The text need not specify where the development occurs to cover it everywhere. Unambiguous statutory text satisfies the clear-statement rule. *Pa. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 209-12 (1998). While Congress may not have anticipated the rise of fee/fee/fed wells, "the fact that a statute can be applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth." *Yeskey*, 524 U.S. at 212 (cleaned up).

C. FLPMA's degradation duty is a clear statement.

The second FLPMA directive requires the Secretary, "[i]n managing the public lands," to "take any action necessary to prevent unnecessary or undue degradation of the lands." 43 U.S.C. § 1732(b). BLM says the duty applies only when BLM is "managing the public lands." Fed. Br. 39. Agreed, and federal minerals are "public lands" BLM manages. 43 U.S.C. §§ 1702(e), 1732(b). When BLM decides whether and on what terms to approve an APD, it is "managing the public lands." *See supra* Part III.A. Section 1732(b) itself describes "managing the public lands" in just these terms: setting "terms and conditions" on their "use, occupancy, and development" "through … permits."

BLM warns this would "transform the object of [BLM's] regulation" to "private lands." Fed. Br. 43. Not so. The object remains the development of federal minerals, and the injury addressed is to adjacent public land. BLM has a long history of doing this very thing for split-estate APDs. 48 Fed. Reg. at 48927 (approving conditions on private-surface operations "to protect the adjacent Federal or Indian lands."). The Center asks for nothing more.

"Deems appropriate." BLM's fallback is that the Secretary may regulate as he "deems appropriate," so the PIM is a reasonable exercise of discretion. Fed. Br. 38-39 (citing *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 395 (2024)). That phrase modifies only the "instruments" through which BLM may regulate. 43 U.S.C. § 1732(b). It is also an improper post-hoc rationalization: the PIM does not rest on discretion. It says there is no authority. 1-Appx-034.

Relatedly, BLM claims it reasonably exercised its "significant latitude" in meeting the degradation duty. Fed. Br. 40. An agency cannot claim to have reasonably exercised discretion it did not understand it had. *SEC v. Chenery Corp.*, 318 U.S. 80, 94-95 (1943). The same is true of the district court's view that BLM "has taken appropriate actions," 2-Appx-461, and of Intervenors' claim that the PIM merely declines to require what the statute leaves optional, Int. Br. 20 n.5, 26-28. The PIM only says there is no authority. The court must judge that rationale and not "post hoc rationalizations." *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168-69 (1962). Whether degradation exists in a given case and how to respond are questions for remand, not reasons to

uphold the "no authority" rationale BLM actually gave. *See Chenery*, 318 U.S. at 92-94.

Shifted effects. BLM's post-hoc rationalization that it avoided degradation also presents a false dichotomy: shifting wells off public land or mitigating their effects. Fed. Br. 41-42. Those are not alternatives; the alternative to an unconditioned APD is a conditioned one. Relocating may avoid surface disturbance to the public lands, but it does nothing about the dust, noise, light, traffic, and emissions the operations still send onto the adjacent Grassland. Regardless, the record does not support BLM's premise. Fee/fee/fed wells do not "shift" effects off the Grassland because lease stipulations already prohibit surface use there. 1-Appx-272. Nor are fee/fee/fed wells always sited on existing pads. 1-Appx-030.

D. The Mineral Leasing Act ("MLA") is a clear statement.

The Secretary "shall regulate all surface-disturbing activities conducted pursuant to any lease issued under this chapter, and shall determine reclamation and other actions as required in the interest of conservation of surface resources." 30 U.S.C. § 226(g). BLM quotes only the first clause. Fed. Br. 44. It never explains why the second clause, which the

Center emphasized, Opening Br. 57-58, does not reach surface resources beyond the lease.

"Pursuant to." BLM does not dispute the meaning of "pursuant to"; its argument is that pad work is "in compliance with, and as authorized by, state and local law." Fed. Br. 45. But it must also be "[i]n compliance with" the lease, which sets detailed requirements for surface operations. 1-Appx-021-24. The statute does not say, "*solely* pursuant to." Surface disturbing work can be conducted pursuant to both lease and state requirements. BLM's exclusivity reading would nonsensically place *all* wells outside the reach of § 226(g), as Colorado oil and gas rules apply equally to wells on federal or split-estate surface. Fed. Br. 5.

Surface disturbing work undertaken to drill and extract federal minerals is also authorized by the lease, because without the lease and APD the federal minerals cannot be drilled and extracted. 43 C.F.R. § 3171.17(b); Opening Br. 61. That an operator "could" carry out some work without an APD, Fed. Br. 45, is beside the point: drilling the federal wellbore requires a federal lease and APD. Nor does this reading delete the modifying clause. *See id.* (invoking *Duncan v. Walker*, 533 U.S. 167 (2001)). Work serving only fee wells falls outside it. Congress also used

"within the lease area" and "on the lease" elsewhere in § 226(g), and "a material variation in terms suggests a variation in meaning," *Nat'l Ass'n for Gun Rts. v. Polis*, 173 F.4th 1317, 1326 (10th Cir. 2026) (citation omitted). Even if the plan-of-operations sentence is limited to the lease area, that is a minimum scope of one tool, not a limit on the duty in the first sentence.

The bond sentence. BLM's answer on the bond provision omits the key words, rendering the statute as requiring "restoration of any lands or surface waters … on the lease." Fed. Br. 47-48. The statute requires "the complete and timely reclamation of the lease tract, *and the restoration of any lands or surface waters adversely affected by lease operations* after the abandonment or cessation of oil and gas operations on the lease." 30 U.S.C. § 226(g) (emphasis added). BLM's ellipsis hides that "on the lease" modifies when operations cease, not where affected lands lie. Limiting this clause to the lease tract would render it superfluous of the first, violating a core canon of construction. *See Duncan*, 533 U.S. at 174.

No elephant. Section 226(g) is an express grant, not a hidden one, and this Court has held that similarly "expansive language" is no "mouse-hole[]." *Bradford*, 101 F.4th at 726 (quoting *Whitman v. Am. Trucking*

Ass'ns, 531 U.S. 457, 468 (2001)). BLM argues Congress could not have anticipated horizontal wells. Fed. Br. 50. But a statute's application to unforeseen circumstances "does not demonstrate ambiguity … [but] breadth." *Yeskey*, 524 U.S. at 212 (citation omitted). Further, BLM's legislative history, Fed. Br. 49-50, cannot narrow text broader than a committee's summary of it. BLM itself reads § 226(g) to reach some private-surface operations: those with "production accountability implications" or operator-committed mitigation. Fed. Br. 45-46; *id.* at 53. If "pursuant to any lease" reaches those, it is not limited to the lease tract.

E. The lease contract is a clear statement.

BLM's answer on the lease terms rests on three mistakes. First, it says the standard lease cannot "expand [BLM's] authority beyond that granted by Congress." Fed. Br. 46. The Center does not claim otherwise. Congress authorized the Secretary to attach lease terms "necessary … for the protection of the interests of the United States … and for the safeguarding of the public welfare." 30 U.S.C. § 187. No party argues the lease terms exceed this.

Second, BLM notes that the lease grants the "right to drill for, mine, extract, remove and dispose of" oil and gas in the lease bounds and to

build "improvements thereupon." Fed. Br. 46 (quoting 1-Appx-021). But in exchange for those rights, the lessee accepts obligations: to "conduct operations" to minimize harm to "land, air, and water, to cultural, biological, visual, and other resources, and to other land uses or users" and "take reasonable measures deemed necessary by lessor" to that end, including "modification to siting or design of facilities." 1-Appx-023. BLM's account omits the lessor's power to deem measures necessary and the reference to facility siting and design, provisions that do not refer to "leased premises" or "leased lands," as other lease clauses do.

Third, BLM answers that Section 6's next sentence, reserving uses "upon or in the leased lands," shows it concerns only federal land. Fed. Br. 47. It shows the reverse: the drafters wrote "leased lands" where they meant that limit and did not in the preceding sentences. That reservation also concerns what the lessor may authorize others to do, not how the lessee conducts its own operations. "[T]o the extent consistent with lease rights granted" limits BLM to measures that do not defeat drilling; it does not limit the impacts they address. BLM also does not address the regulations imposing the same duty, also without a lease-boundary limit. 43 C.F.R. §§ 3171.13(a)(2), 3171.17(a); Opening Br. 63.

F. The "no limiting principle" objection fails.

BLM is wrong that the Center's position has "no stopping point" and would allow BLM to control "any private facility that touches federal minerals before they reach their end use," Fed. Br. 38, and "regulate anything from light pollution to truck traffic," Fed. Br. 43. This ignores critical statutory limits: (1) a trigger: a federal permit that binds only the operator, who may reject it; (2) a nexus: operations that develop federal minerals; (3) standards: "unnecessary or undue degradation," 43 U.S.C. § 1732(b), "conservation of surface resources," 30 U.S.C. § 226(g), and consistency with "granted lease rights," 43 C.F.R. § 3171.13; and (4) APA review of every condition on a concrete record. BLM's longstanding oversight of split-estate wells establishes a guide for how BLM would oversee fee/fee/fed surface operations, dispelling any overbreadth concerns. Nonetheless, whether a particular permit condition would exceed legitimate bounds is a question for remand, not a reason to deny authority altogether.

G. Intervenors' remaining merits arguments fail.

Intervenors say "[a]uthorization to act is not a mandate to do so." Int. Br. 26. The Center does not claim the statutes compel particular

conditions, but that BLM's decisions run afoul of the APA because they rest on a legal error. 1-Appx-081-83. "An agency action, however permissible as an exercise of discretion, cannot be sustained where it is based not on the agency's own judgment but on an erroneous view of the law." *Sea-Land Serv., Inc. v. Dep't of Transp.*, 137 F.3d 640, 646 (D.C. Cir. 1998) (cleaned up); *see Chenery*, 318 U.S. at 94-95.

Intervenors say the MLA "promote[s] mineral development exclusively." Int. Br. 11. The text says otherwise. The Secretary "shall regulate all surface-disturbing activities" and "shall determine reclamation and other actions as required in the interest of conservation of surface resources," 30 U.S.C. § 226(g), and leases must protect "the interests of the United States" and "public welfare," *id.* § 187.

Intervenors' appeal to BLM's "hands-off policy" on private surface, Int. Br. 28-30, fails because practice cannot narrow a statute. *Loper Bright*, 603 U.S. at 394-95. Their history is also wrong. The 1983 Onshore Order No. 1 directs operators to negotiate surface-operation conditions with the surface owner, but confirms BLM "may prescribe additional measures to protect the adjacent Federal or Indian lands." 48 Fed. Reg. at 48920. A 2007 revision went further, stating that BLM is "require[d]"

to control split-estate wells in "essentially the same manner" as those on federal surface. 72 Fed. Reg. 10308 (Mar. 7, 2007); *see also* Fed. Br. 9. Conditioning fee/fee/fed APDs would give BLM no more authority than it has long exercised over split-estate.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the district court and remand for further proceedings.

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Respectfully submitted,

/s/ Sarah Stellberg
SARAH STELLBERG
ANDREW HURSH
HOLLY BAINBRIDGE
Advocates for the West
P.O. Box 1612
Boise, ID 83701
(208) 342-7024
sstellberg@advocateswest.org
ahursh@advocateswest.org
hbainbridge@advocateswest.org

ALLISON N. HENDERSON
Center for Biological Diversity
P.O. Box 3024
Crested Butte, CO 81224
(970) 309-2008
ahenderson@biologicaldiversity.org

Counsel for Petitioner-Appellant
Center for Biological Diversity

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This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B)(ii) because, excluding the parts exempted by Federal Rule of Appellate Procedure 32(f), it contains 6,493 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word for Mac in Century Schoolbook 14-point font, a proportionally spaced typeface.

/s/ Sarah Stellberg
Sarah Stellberg

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/s/ Sarah Stellberg
Sarah Stellberg

CERTIFICATE OF SERVICE

I hereby certify that on November 5, 2026, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

/s/ Sarah Stellberg
Sarah Stellberg