Nos. 15-8126, 15-8134

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

STATE OF WYOMING, *et al.*,
Petitioner-Appellees,

v.

DEPARTMENT OF THE INTERIOR, *et al.*,
Respondent-Appellants,

SIERRA CLUB, EARTHWORKS, WESTERN RESOURCE ADVOCATES, CONSERVATION COLORADO EDUCATION FUND, THE WILDERNESS SOCIETY, and SOUTHERN UTAH WILDERNESS ALLIANCE.
Intervenor-Respondent-Appellants.

On Appeal from the United States District Court for the District of Wyoming
Civil Action Nos. 2:15-CV-00041-SWS, 2:15-CV-00043-SWS
The Honorable Scott W. Skavdahl

INTERVENOR-RESPONDENT-APPELLANTS' OPENING BRIEF

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March 21, 2016

ORAL ARGUMENT REQUESTED

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the Respondent-Intervenor-Appellants Sierra Club, Earthworks, Western Resource Advocates, Conservation Colorado Education Fund, The Wilderness Society, and Southern Utah Wilderness Alliance have no parent companies, subsidiaries, or affiliates that have issued shares to the public.

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GLOSSARY

APA: Administrative Procedure Act, 5 U.S.C. §§ 551–559.

API: American Petroleum Institute

Area review: review by BLM of geology in area of well to be hydraulically fractured, including information on nearby faults, fractures and existing wells, and assessment of "confining zone" preventing movement of fluids from formation being hydraulically fractured into usable aquifers. Area review would occur under the Rule as part of approval of hydraulic fracturing. See 80 Fed. Reg. 16,128, 16,217–19 (Mar. 26, 2015) (43 C.F.R. § 3162.3-3(d)); id. at 16,147–53.

EA: Environmental Assessment—a concise public document prepared by an agency under the National Environmental Policy Act (NEPA) to determine whether a full environmental impact statement must be developed to analyze an agency proposal. 40 C.F.R. § 1508.9.

EPA: the Environmental Protection Agency

Flowback (or fracking flowback): when a well is hydraulically fractured, the portion of the fracturing fluids that returns to the surface. Besides the original fluid used for fracturing, flowback can contain produced water (see definition of produced water, infra p. xvi) as well as metals, hydrocarbons and naturally occurring radioactive materials that were in the fractured formation. Admin. Rec. at DOIAR (AR) 29582.

FLPMA: Federal Land Policy and Management Act, 43 U.S.C. §§ 1701–1787. One of the statutes BLM relies on for its authority to promulgate the Rule.

FOIA: Freedom of Information Act, 5 U.S.C. § 552.

FracFocus: a publicly-accessible web site, https://fracfocus.org/, operated by the Ground Water Protection Council and Interstate Oil and Gas Compact Commission. FracFocus provides a registry for disclosure of hydraulic fracturing chemicals. BLM allows companies to comply with the chemical disclosure requirements of the Rule by posting certain information to FracFocus. 80 Fed. Reg. at 16,220 (43 C.F.R. § 3162.3-3(i)).

Horizontal well: a well bore with an "L" shape that is drilled vertically to a point

and then redirected to run substantially horizontally within the formation targeted for production of oil or gas. On horizontal wells, the hydraulic fracturing (and the production of oil and gas) occurs on the horizontal (or "lateral") portion of the well bore.

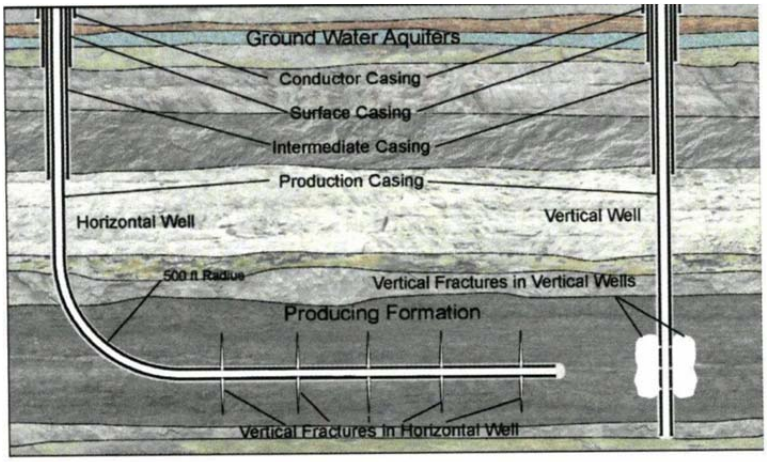

Figure 3—Example of a Horizontal and Vertical Well

AR2084 (API standards).

Hydraulic fracturing (or fracking): a technique used to stimulate production of oil and gas when the hydrocarbons are trapped within small pore spaces in the rock (such as shale) or in other formations with low permeability. After a well has been drilled, a mixture of water, sand, and chemicals is injected through the well into the oil- or gas-bearing rock formation under high pressure. The process is designed to create cracks (fractures) in the formation out to a desired distance and allow the oil or gas to flow through the fractures into the well bore. See 80 Fed. Reg. at 16,217.[1]

Lateral wellbore: see definition of horizontal well, supra pp. xiv–xv.

MIT: Mechanical Integrity Test—a test of well casing required under the Rule prior to hydraulic fracturing to ensure that the casing can withstand the maximum anticipated pressure to be applied during the fracturing operation. 80 Fed. Reg. at 16,219 (43 C.F.R. § 3162.3-3(f)). The MIT is sometimes referred to as a pressure test or casing pressure test. See AR2083 (API guidance); 80 Fed. Reg. at 16,159.

[1] See also GSA Critical Issue: Hydraulic Fracturing, The Geological Society of America, http://www.geosociety.org/criticalissues/hydraulicFracturing/defined.asp (last visited Feb. 2, 2016).

MLA: Mineral Leasing Act, 30 U.S.C. §§ 181–196. One of the statutes BLM relies on for its authority to promulgate the Rule.

NEPA: National Environmental Policy Act, 42 U.S.C. §§ 4321–4335.

PPM: parts per million.

Produced water: water contained in a hydrocarbon-producing formation that is produced from the well as a byproduct along with the oil or gas. Produced water may contain high levels of salinity, as well as metals, naturally-occurring radioactive materials, and other hydrocarbons. AR11483–89, AR29582.

Rule: the BLM regulation challenged in this case, adopted at 80 Fed. Reg. 16128 (Mar. 26, 2015) (43 C.F.R. Subparts 3160, 3162).

SDWA: Safe Drinking Water Act, 42 U.S.C. §§ 300f–300j–26.

Surface casing: a layer of metal pipe (casing) set in the well bore to protect groundwater aquifers by isolating them from the well. Surface casing typically runs from the surface to a depth deemed sufficient to ensure groundwater protection.

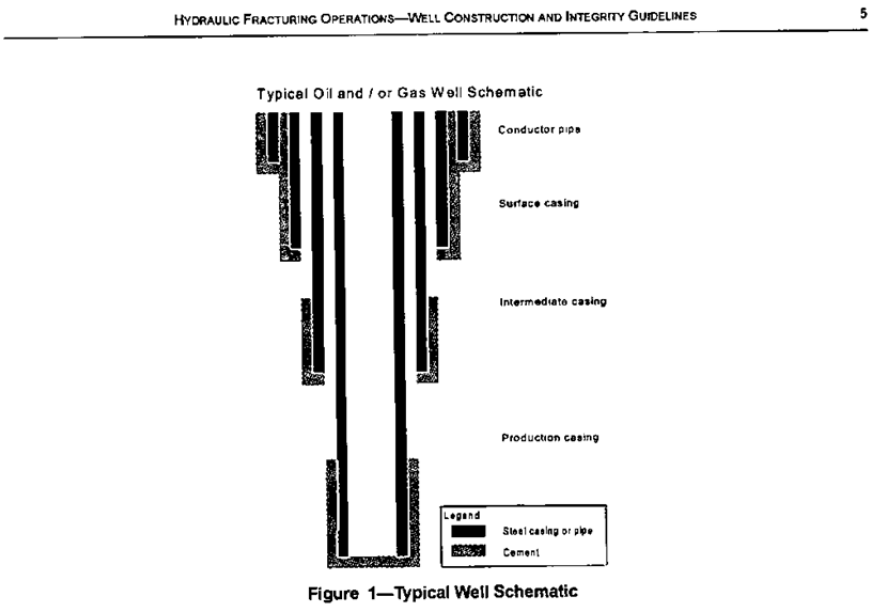

Figure 1—Typical Well Schematic

AR2080, AR2083 (API guidance).

TDS: Total Dissolved Solids—a measure of salinity that describes the inorganic salts and small amounts of organic matter present in solution in water. Sea water has about 35,000 parts per million (ppm) TDS, while Environmental Protection Agency guidelines for drinking water recommend no more than 500 ppm TDS.[2] Produced water from oil and gas operations can contain substantially more than 100,000 ppm TDS. AR11359–60.

UIC: Underground injection control. A Safe Drinking Water Act program intended to prevent underground injection of fluids from endangering underground sources of drinking water. 42 U.S.C. § 300h.

USGS: the United States Geological Survey

Usable water: term used by BLM to define groundwater aquifers that must be isolated and protected from contamination by oil and gas wells. 80 Fed. Reg. at 16,222 (43 C.F.R. § 3162.5-2(d)); 53 Fed. Reg. 46,798, 46,801, 46,805 (Nov. 18, 1988) (Onshore Order No. 2). Under the Rule, "usable water" generally includes waters containing up to 10,000 ppm TDS, with some exclusions and other terms. 80 Fed. Reg. at 16,217 (definition of usable water).

Wellbore: The hole in the ground that forms the well. A wellbore is generally encased by materials such as steel and cement.

Well casing: steel pipe that is cemented inside the wellbore to separate the subsurface formations from material inside the wellbore. There may be multiple layers of casing at different locations in the wellbore (see well schematic, supra p. xvi).

Well completion: the last stage of well construction, which involves making the well ready for production. Hydraulic fracturing and other techniques to stimulate production of oil or gas are performed at the completion stage.

[2] Order 30; AR9702; NGWA Information Brief, Brackish Groundwater, National Groundwater Association, http://www.ngwa.org/media-center/briefs/documents/brackish_water_info_brief_2010.pdf (July 21, 2010).

STATEMENT OF RELATED CASES

This case is a consolidation of two appeals. Case no. 15-8126 is an appeal by Respondent-Intervenors-Appellants Sierra Club, et al. Case no. 15-8134 is an appeal by Respondent-Appellants S.M.R. Jewell, et al. The cases were consolidated by this Court's Order on January 20, 2016.

JURISDICTIONAL STATEMENT

The district court had federal question jurisdiction, 28 U.S.C. § 1331, because this case challenges a Bureau of Land Management (BLM) regulation (the Rule) under federal law.

This Court has jurisdiction under 28 U.S.C. § 1292(a)(1). Respondent-Intervenors/Appellants Sierra Club, et al. (the Citizen Groups) seek review of a district court order enjoining enforcement of the Rule. The preliminary injunction was entered on September 30, 2015. The Citizen Groups timely filed their notice of appeal on November 27, 2015.

STATEMENT OF ISSUES

1. Did the district court err in ruling that Petitioners/Appellees Wyoming, Colorado, North Dakota and Utah (the States) were likely to succeed on the merits of their claim that BLM lacks legal authority to adopt a regulation addressing hydraulic fracturing on federal lands?

2. Did the district court err in ruling that Petitioners/Appellees Western Energy Alliance and Independent Petroleum Association of America (Industry Petitioners) were likely to succeed on the merits of their challenge to the Rule because, inter alia, the administrative record provided no "rational justification" for the Rule?

3. Did the district court err in ruling that an injunction against the Rule was necessary to prevent irreparable harm to the Industry Petitioners:

a. based on the court's view that even minor costs to comply with a regulation represent irreparable harm; and

b. from improper public disclosure of industry trade secrets, where the court disregarded other regulations that prevent such disclosures?

4. Did the district court err in ruling that an injunction was necessary to prevent irreparable harm to the States:

a. because the Rule infringes on their "sovereign authority" over oil and gas development; and

b. from potential losses of tax and mineral revenue, without addressing Tenth Circuit precedent that speculation about such losses is insufficient to prove injury?

STATEMENT OF THE CASE

Hydraulic fracturing is a technique for completing oil and gas wells that injects water, chemicals, and sand through the well into geologic formations under high pressures to fracture the rock and thus release oil and gas. 80 Fed. Reg. 16,128, 16,130–31 (Mar. 26, 2015). While such techniques have existed for decades, their intensity, scale and complexity have increased dramatically in recent years. Id. at 16,128; see also Admin. Rec. DOIAR (AR) 7260 (Environmental Protection Agency (EPA) testimony). Today, companies routinely combine hydraulic fracturing with advanced horizontal drilling technologies (sometimes

referred to as "unconventional drilling") to construct wellbores that are nearly three miles long and where fracturing uses millions of gallons of water per well. Id. In addition to dramatically larger operations, hydraulic fracturing has become much more common as it has driven a rapid expansion of oil and gas development across the country. 80 Fed. Reg. at 16,131; Order on Mots. for Prelim. Inj. 3 (Sept. 30, 2015) (Dkt. 130) (the Order). Today, 90% of wells completed on federal lands are hydraulically fractured. 80 Fed. Reg. at 16,131.

BLM regulations have long included some very limited provisions addressing hydraulic fracturing. But those rules have not been revised since 1988—well before the advent of modern hydraulic fracturing. See id. at 16,131 (explaining that BLM "regulations were established in 1982 and last revised in 1988, long before the latest hydraulic fracturing technologies were developed or became widely used"). These thirty-year-old regulations are inadequate to address the environmental risks presented by modern hydraulic fracturing. The record contains numerous examples of groundwater contamination and other accidents resulting from inadequately-constructed wells, leaks from pits storing hydraulic fracturing wastes, and related activities. Infra pp. 31–37.

EPA explained that the chemicals, huge volumes of water, and high injection pressures used "raise serious concerns regarding exposure of hydraulic fracturing fluids to drinking water resources." AR7260. BLM agreed that updated

regulations were needed to ensure wells are adequately constructed. See 80 Fed. Reg. at 16,188 (noting that modern operations "apply increased pressures and volumes of fluid within the subsurface"). BLM also concluded that the "increased complexity [of modern hydraulically-fractured wells] requires additional regulatory effort and oversight." Id. at 16,128.

On March 26, 2015, BLM issued the Rule to address these risks. Id. The Rule includes four main elements: (1) updating well construction requirements for hydraulically-fractured wells, (2) requiring advance BLM review and approval of fracturing operations, (3) requiring disclosure of the chemicals used for fracturing, and (4) limiting the use of pits for storage of fracturing flowback waste. Infra pp. 31–37.

The Industry Petitioners and States filed suit to challenge the Rule, and moved for a preliminary injunction against its enforcement. Following a June 23, 2015 hearing and post-hearing submissions by the parties, the district court entered an injunction on September 30, 2015. The Citizen Groups and BLM separately appealed that order, and the two appeals were consolidated by this Court on January 20, 2016.

ARGUMENT SUMMARY

In enjoining the Rule, the district court erred by finding that Petitioners were likely to succeed on the merits. First, the court ruled that BLM lacks legal authority

to issue the Rule. This holding ignored decades of law recognizing that the agency has a broad mandate to manage mineral development on public lands. Congress did not carve out one particular technology—hydraulic fracturing—from federal oversight.

Second, the court erred in finding that nothing in the administrative record supports the need for BLM to update its 30-year-old regulations. Numerous materials document the benefits the Rule will provide. The district court disregarded this evidence and improperly substituted its own policy judgment about whether updated regulations are warranted.

The district court also erred as a legal matter in finding that an injunction was necessary to prevent irreparable harm. First, the district court misread Tenth Circuit precedent when it ruled that even modest regulatory compliance costs represent irreparable harm. This Court, and other circuits, do not treat ordinary regulatory compliance costs as sufficient to support an injunction. Second, in finding a risk that BLM would improperly disclose industry trade secrets, the court disregarded existing regulations that prevent such disclosures.

Third, contrary to the court's ruling, the Rule does not irreparably harm the States by infringing on their "sovereign authority" over oil and gas development. The States have no sovereign right to regulate activities on federal lands free from federal oversight. Fourth, speculation that the Rule may result in reduced tax and

mineral revenue to the States is insufficient to establish either standing or irreparable harm under Tenth Circuit precedent.

In addition, the district court erred in finding that the balance of harms and public interest supported the issuance of an injunction. The Citizen Groups incorporate BLM's arguments on these points by reference. The preliminary injunction order should be reversed.

ARGUMENT

I. STANDARD OF REVIEW

A preliminary injunction is an "extraordinary remedy," for which "the right to relief must be clear and unequivocal." Schrier v. Univ. of Colo., 427 F.3d 1253, 1258 (10th Cir. 2005). To obtain a preliminary injunction, Petitioner/Appellees were required to demonstrate: (a) a likelihood of success on the merits; (b) that they were likely to suffer irreparable harm in the absence of injunctive relief; (c) that the balance of equities favored an injunction; and (d) that an injunction was in the public interest. Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 20 (2008); Greater Yellowstone Coal. v. Flowers, 321 F.3d 1250, 1255 (10th Cir. 2003).

The issues raised in this appeal are reviewed de novo. First, the district court's conclusion on the merits that BLM lacks legal authority to promulgate the Rule was a legal determination that is reviewed de novo. Citizens United v.

Gessler, 773 F.3d 200, 209 (10th Cir. 2014); Davis v. Mineta, 302 F.3d 1104, 1110–11 (10th Cir. 2002).

The court's merits determination that the Rule was arbitrary and capricious under the Administrative Procedure Act (APA) is also reviewed de novo. Kobach v. U.S. Election Assistance Comm'n, 772 F.3d 1183, 1189 (10th Cir. 2014); see, e.g., Davis, 302 F.3d at 117–26 (reviewing likelihood of success in APA injunction case without deferring to district court); Valley Cmty. Pres. Comm'n v. Mineta, 373 F.3d 1078, 1087–93 (10th Cir. 2004) (same).

The court's ruling that an injunction was necessary to prevent irreparable harm is also reviewed de novo, because it rested on several legal errors. As discussed below, the court's identification of irreparable harms misapplied (or failed to address) this Court's precedent and other applicable laws. These errors in applying the law represented an abuse of discretion. See, e.g., Greater Yellowstone Coal., 321 F.3d at 1256–58 (reversing district court finding that was based on legal error about level of impact required to show irreparable harm to threatened species); Dominion Video Satellite, Inc. v. Echostar Satellite Corp., 356 F.3d 1256, 1262–66 (10th Cir. 2004) (reversing finding of irreparable harm that was based on legal error about impact of contractual clauses).

II. THE DISTRICT COURT ERRED IN FINDING A LIKELIHOOD OF SUCCESS ON THE CLAIM THAT BLM LACKS LEGAL AUTHORITY TO PROMULGATE THE RULE.

The district court erred in ruling that BLM lacks authority to promulgate the Rule because Congress has not "granted or delegated to the BLM authority or jurisdiction to regulate fracking." Order 53. BLM has a broad statutory mandate to manage all aspects of oil and gas development on public lands, and to protect other public resources. Carrying out that mandate requires the agency to update its rules to address technological changes such as modern hydraulic fracturing. Congress did not carve out hydraulic fracturing from BLM's mandate, or leave the agency powerless to address the environmental risks the practice presents.

In issuing the Rule, BLM relied on its authority under the Mineral Leasing Act (MLA) and Federal Land Policy and Management Act (FLPMA). 80 Fed. Reg. at 16,217.[1] Its interpretation of those laws is reviewed under the two-step test from Chevron, U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984). Under Chevron step 1, the court asks whether "the intent of Congress" regarding an issue is clear. If so, that intent controls. Id. at 842–43. But if the "statute is silent or ambiguous with respect to the specific issue," courts go to Chevron step 2 and

[1] Other statutes also support BLM's authority to promulgate the Rule. Id. For example, the Indian Mineral Leasing Act, 25 U.S.C. § 396a–g, vests the agency with rulemaking power on Indian lands.

uphold the agency's interpretation if it is "based on a permissible construction of the statute." Id. at 843.

BLM's interpretation of FLPMA and the MLA as providing authority to issue the Rule prevails under both Chevron steps. The Court should afford BLM particular deference because the Rule reflects a long-standing agency interpretation of those statutes. Barnhart v. Walton, 535 U.S. 212, 219–20 (2002).

A. Chevron Step 1: Congress Gave BLM Authority To Issue The Rule Under The Mineral Leasing Act And FLPMA.

BLM's interpretation should be upheld under Chevron step 1. More than 50 years ago, the Supreme Court explained that Congress authorized the Interior Department (BLM's parent agency) to impose "exacting restrictions and continuing supervision" over companies developing oil and gas on public lands, and to issue "rules and regulations governing in minute detail all facets of the working of the land." Boesche v. Udall, 373 U.S. 472, 477–78 (1963). Courts have described BLM as having "sweeping authority," Indep. Petroleum Ass'n of Am. v. DeWitt, 279 F.3d 1036, 1039 (D.C. Cir. 2002), that provides for "extensive regulation of oil exploration and drilling." Ventura Cty. v. Gulf Oil Corp., 601 F.2d 1080, 1083 (9th Cir. 1979). This Court also observed that "[t]he federal statutory and regulatory scheme governing oil and gas operations on Indian land covers virtually every aspect of such operations." Ute Mountain Tribe v. Rodriguez, 660 F.3d 1177, 1180–81 (10th Cir. 2011).

Through the MLA and FLPMA, Congress assigned the Interior Department responsibility for managing oil and gas development in a manner that avoids unnecessary and undue degradation, and that follows multiple use and sustained-yield principles. Updating BLM's regulations to address new technologies like modern hydraulic fracturing is a necessary part of fulfilling that mandate.

First, the MLA gives the Interior Department management responsibility for the development of minerals, including oil and gas, owned by the United States. 30 U.S.C. §§ 189, 226. The MLA's purpose is to provide for "the orderly development of the oil and gas deposits in the publicly owned lands of the United States . . . ." Harvey v. Udall, 384 F.2d 883, 887 (10th Cir. 1963) (quotation omitted). The MLA grants BLM power "to prescribe necessary and proper rules and regulations and to do any and all things necessary to carry out and accomplish the purposes of" the statute. 30 U.S.C. § 189 (emphasis added). In addition, the statute requires that BLM "shall regulate all surface-disturbing activities conducted pursuant to [federal oil and gas leases] and shall determine reclamation and other actions as required in the interest of conservation of surface resources." 30 U.S.C. § 226(g).

FLPMA also gives the Interior Department broad responsibility for administering oil and gas development on federal lands. Under FLPMA, BLM plans "what areas will be open to development and the conditions placed on such development." N.M. ex rel. Richardson v. BLM, 565 F.3d 683, 689 n.1 (10th Cir.

2009) (citing 43 U.S.C. § 1712). The agency then issues leases for developing specific sites, and reviews and approves drilling permits at those sites. Id. In implementing this process, BLM must "by regulation or otherwise, take any action necessary to prevent unnecessary or undue degradation" of public lands. 43 U.S.C. § 1732(b). FLPMA directs BLM to apply "multiple use and sustained yield" principles that balance mineral development with protection of water, wildlife, and other resources. Id. §§ 1701(a)(7), 1701(a)(8), 1702(c).

FLPMA also requires BLM to "promulgate rules and regulations to carry out the purposes of this Act and of other laws applicable to the public lands . . . ." Id. § 1740; see also id. § 1733(a) (BLM "shall issue regulations necessary to implement the provisions of [FLPMA] with respect to the management, use, and protection of the public lands"); id. § 1701(a)(5) (in administering public land statutes "the Secretary [shall] be required to establish comprehensive rules and regulations . . . ."). These provisions give BLM ample authority to issue the Rule.

Nothing in the MLA, FLPMA, or caselaw limits BLM's management only to certain drilling technologies, or carves out particular techniques from the agency's authority. Instead, Congress has given BLM a broad mandate to manage the "orderly" development of oil and gas while preventing "unnecessary and undue degradation" and protecting water and other resources. Harvey, 384 F.2d at 887; 43 U.S.C. § 1732(b).

This statutory framework has long been recognized by courts to encompass regulation of the same types of activities addressed in the Rule. See supra p. 4 (listing elements of Rule). These include waste disposal requirements and BLM approval of operations, see San Juan Citizens All. v. Stiles, 654 F.3d 1038, 1044 (10th Cir. 2011) (noting that BLM regulates drilling approvals and "methods of containing and disposing of waste"), in addition to well construction, injections into wells, and surface and subsurface environmental protection. See, e.g., Copper Valley Mach. Works, Inc. v. Andrus, 653 F.2d 595, 605 n.10 (D.C. Cir. 1981); Barlow & Haun, Inc. v. United States, 118 Fed. Cl. 597, 601–03 (Fed. Cl. 2014). Because Congress has spoken directly to the issue, BLM's authority to issue the Rule must be upheld under Chevron step 1.

The district court, however, rejected BLM's interpretation. Applying Chevron step 1, it held that Congress "unambiguously expressed [its] intent" to withhold authority to issue the Rule from BLM. Order 22 (quoting Chevron, 467 U.S. at 842–43). The court dismissed the MLA and FLPMA provisions cited above as not expressly providing "specific" authority for the regulation of hydraulic fracturing. Order 14 (MLA), 16 (FLPMA). The court viewed the MLA as authorizing BLM only to regulate "surface-disturbing activities" for protection of "surface resources." Id. at 14 (emphasis in original). Similarly, the court described

FLPMA as "a land use planning statute" that does not provide "specific authority to regulate hydraulic fracturing or underground injections . . . ." Id. at 16.

By focusing on whether regulation of "hydraulic fracturing or underground injections" is "specific[ally]" authorized by FLPMA or the MLA, the court asked the wrong question. These statutes do not catalogue the particular oil and gas technologies being regulated, and few if any specific techniques are even mentioned. Instead, Congress gave the agency a broad mandate to manage development of oil and gas in a manner that avoids unnecessary degradation of other resources. That mandate is not limited to particular drilling or completion techniques. Supra pp. 8–12. Moreover, while the MLA and FLPMA require protection of surface resources, they do not limit BLM's authority only to regulating surface-disturbing activities. See, e.g., Ventura Cty., 601 F.2d at 1084 (noting that regulations "governing . . . both sub-surface and surface operations" were promulgated under MLA provision authorizing the Interior Department "to do any and all things necessary to carry out and accomplish the purposes" of the Act). The district court's interpretation ignores decades of caselaw and conflicts with the statutory language.

Moreover, even under the district court's interpretation, its injunction against the entire Rule was error. Major parts of the Rule—like limiting the use of waste pits—involve regulation of "surface-disturbing activities." See infra pp. 31–33.

The district court offered no explanation of how limiting pits could fall outside BLM's authority.

In fact, the district court's reasoning leads to an absurd result. If BLM's authority only extends to surface-disturbing activities or other topics specifically enumerated by statute, then hydraulic fracturing would not be the only casualty: the agency could not regulate numerous other aspects of oil and gas development that it has been managing for decades. These include, for example, construction standards for non-hydraulically fractured wells to protect groundwater, plugging abandoned wells, subsurface injection of drilling wastes, and many administrative tasks.[2] None of these are specifically authorized by the MLA or FLPMA, but they are a necessary part of managing oil and gas development on federal lands as Congress intended. See, e.g., Forbes v. United States, 125 F.2d 404, 408-410 (9th Cir. 1942) (rejecting argument that MLA did not authorize Interior Department to require plugging of wells); Arch Mineral Corp. v. Lujan, 911 F.2d 408, 415 (10th Cir. 1990) (rejecting challenge to BLM's authority to administratively collect unpaid royalties and rents).

The same is true of the Rule in this case. The district court's flawed reasoning would leave BLM powerless to manage many aspects of oil and gas development on federal lands.

[2] See, e.g., 43 C.F.R. § 3162.5-1(b) (environmental regulations address protection of "subsurface resources"); 72 Fed. Reg. 10,308, 10,331 (Mar. 7, 2007) (approval of drilling operations); 53 Fed. Reg. 46,798, 46,805–12 (Nov. 18, 1988) (drilling standards); 58 Fed. Reg. 47,354, 47,362–69 (Sept. 8, 1993) (waste management).

B. Chevron Step 1: The 2005 Energy Policy Act Did Not Limit BLM's Authority Under FLPMA And The MLA.

The district court also held that the 2005 Energy Policy Act (the 2005 Act) barred BLM from regulating hydraulic fracturing on public lands. The 2005 Act amended the Safe Drinking Water Act (SDWA), rather than FLPMA or the MLA. But the district court interpreted the SDWA amendment as also barring any federal agencies from regulating hydraulic fracturing under any statutes. Order 19–22. This holding ignored the plain language of the 2005 Act, as well as the history of SDWA.

1. The Safe Drinking Water Act preserves BLM's authority under the MLA.

In 1974, Congress enacted SDWA, which established the underground injection control (UIC) program to regulate subsurface injection of fluids. 42 U.S.C. § 300h. SDWA is a broadly-applicable environmental law that addresses injection activities on all lands—both private and public—by many industries. See id. SDWA is administered by EPA, rather than by BLM. 42 U.S.C. §§ 300f(7) (defining "Administrator"), 300h, 300h-1–8.

When SDWA was enacted, the Interior Department had for more than thirty years been regulating underground fluid injections used to improve oil and gas recovery on federal lands. Infra p. 21. Congress did not limit the Interior Department's authority to continue doing so, or to manage other activities on federal

lands. Instead, SDWA's legislative history expressly preserves the Interior Department's "efforts . . . to prevent groundwater contamination under the Mineral Leasing Act," and states that SDWA was not intended "to repeal or limit any authority the [Department] may have under any other legislation."[3] Accordingly, after SDWA's passage Interior Department regulations continued to address well injection (and hydraulic fracturing) on public lands. Infra pp. 21–22.

2. The 2005 Energy Policy Act does not alter BLM's authority under the MLA or FLPMA.

When amending SDWA in the 2005 Act, Congress gave no indication that it intended to depart from its 1974 decision to maintain BLM's authority over federal lands. Instead, the 2005 Act served to overturn a particular Eleventh Circuit decision that did not involve BLM.

For two decades after SDWA's enactment, EPA took the position that hydraulic fracturing was not subject to the requirements of the UIC program because it did not fall within the definition of "underground injection." Order 18. In 1997, however, the Eleventh Circuit rejected EPA's interpretation, holding that

[3] H.R. REP. NO. 93-1185 (1974), reprinted in 1974 U.S.C.C.A.N. 6454, 6484–85. The 1974 legislative history refers to the MLA authority of the U.S. Geological Survey (USGS) because at that time USGS was the Interior Department agency that administered oil and gas on public lands. That authority was transferred to BLM in the 1980s. 47 Fed. Reg. 47,758, 47,758 (Oct. 27, 1982); 48 Fed. Reg. 36,582, 36,582–84 (Aug. 12, 1983).

hydraulic fracturing met the plain language definition of "underground injection" and thus was subject to SDWA's UIC requirements. Legal Envtl. Assistance Found., Inc. v. EPA, 118 F.3d 1467, 1470–75 (11th Cir. 1997) (LEAF).

In Section 322 of the 2005 Act, Congress amended SDWA to overturn the LEAF decision and exempt most hydraulic fracturing from SDWA's UIC program. The 2005 Act redefined "underground injection" to expressly exclude hydraulic fracturing, except when diesel fuels are used. Pub. L. No. 109-58, § 322, 119 Stat. 594 (2005) (codified at 42 U.S.C. § 300h(d)(1)(B)). This change, however, did not amend any statutes other than SDWA. Nor does the legislative history regarding that provision discuss BLM's authority over public lands.

Congress' silence on the MLA and FLPMA while amending SDWA was not accidental. Congress is deemed to have been aware of SDWA's legislative history and BLM's existing regulations addressing underground injections on public lands. Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 846 (1986) (Congress presumed to be aware of existing agency legal interpretations); United States v. Games-Perez, 667 F.3d 1136, 1141 n.2 (10th Cir. 2012) (same). Congress' decision not to amend the MLA or FLPMA demonstrates that the 2005 Act was not intended to limit BLM's existing authority. Supra pp. 9–15.

Despite the plain statutory language, the district court reasoned that the more "specific" law—which it viewed as the 2005 Act—controls over the "more general

statute." Order 20.[4] But this statutory construction principle only applies where two laws actually conflict. Where the statutes can be reconciled, courts must interpret them in a way that gives effect to both. Morton v. Mancari, 417 U.S. 535, 550–51 (1974); WildEarth Guardians v. Nat'l Park Serv., 703 F.3d 1178, 1189 (10th Cir. 2013). An implied repeal of a statute is found only "when the earlier and later statutes are irreconcilable," and the intention of Congress to repeal must be "clear and manifest." Morton, 417 U.S. at 550–51; Rodriguez v. United States, 480 U.S. 522, 524 (1987).

Reconciling the 2005 Act with the MLA and FLPMA requires nothing more than interpreting the statutes according to their plain language: the 2005 Act limited EPA's regulation of hydraulic fracturing under SDWA, but it did not alter BLM's authority on federal lands under the MLA and FLPMA.

The district court wrongly assumed that by limiting EPA regulation of fracturing under SDWA, Congress "tacit[ly]" meant also to restrict BLM's authority on federal lands. Order 22. But BLM's MLA and FLPMA authority on public

[4] The district court also quoted a law review article noting that the 2005 Act "withdrew frac[k]ing from the realm of federal regulation." Order 20 n.14 (quoting Hannah Wiseman, Untested Waters: The Rise of Hydraulic Fracturing in Oil and Gas Production and the Need to Revisit Regulation, 20 Fordham Envtl. L. Rev. 115, 145 (2009)). The court, however, took this statement out of context: the quoted line immediately followed a description of the SDWA amendment made by the 2005 Act. Wiseman, supra, at 145. The Order also disregarded a passage later in the same paragraph recognizing that other federal statutes may still apply. Id. at 146 & n.159 (recognizing the "sporadic application of federal statutes" and citing example involving BLM land management decision).

lands is "wholly independent" of EPA's obligations under SDWA. See Massachusetts v. EPA, 549 U.S. 497, 532 (2007). The activities regulated "may overlap, but there is no reason to think the two agencies cannot both administer their obligations and yet avoid inconsistency." Id. (rejecting argument that EPA could not regulate motor vehicle carbon dioxide emissions because of Transportation Department authority to set mileage standards).

EPA's role under SDWA is much different than BLM's role under the MLA and FLPMA. SDWA was adopted under the Commerce Clause, see Nebraska v. EPA, 331 F.3d 995, 999 (D.C. Cir. 2003), and regulates private activities. In contrast, the MLA and FLPMA are exercises of Congress' Property Clause authority. See Defs. of Wildlife v. Andrus, 627 F.2d 1238, 1248 (D.C. Cir. 1980). In those two statutes, Congress delegated to the Interior Department its Property Clause power as "proprietor . . . over the public domain." See Kleppe v. New Mexico, 426 U.S. 529, 540 (1976). As such, the MLA and FLPMA make BLM the proprietor of public lands.

Respecting BLM's proprietary management authority on public property does not "eviscerate" Congress's decision on how hydraulic fracturing should be regulated under SDWA. Order 20. It simply recognizes the different functions of public lands law and environmental regulatory statutes. For example, FLPMA directs BLM to manage public lands for protection of water and wildlife, even

though those resources are also regulated by other environmental statutes. See 43 U.S.C. §§ 1702(c), 1732 (FLPMA); 33 U.S.C. §§ 1251–1274 (Clean Water Act); 16 U.S.C. §§ 1531–1544 (Endangered Species Act). And while grazing and agricultural operations are exempted from Clean Water Act permitting, 40 C.F.R. § 122.3(e), BLM still regulates such activities on public lands under FLPMA. See, e.g., 43 C.F.R. §§ 4180.1–.2 (grazing standards for watershed and water quality protection).

The same is true here: the 2005 amendment of SDWA does not mean Congress intended to strip BLM of its MLA and FLPMA management authority over public lands. The district court erred by refusing to give effect to all three statutes.

C. Chevron Step 2: The Rule Reflects A Permissible And Long-Standing Agency Interpretation.

Because BLM's interpretation prevails under Chevron step 1, "that is the end of the matter." Chevron, 467 U.S. at 842–43. But if this Court does go to Chevron step 2, BLM's view of its authority also must be upheld. Id. In step 2, courts defer to the agency charged with administering the law, and "may not substitute [their] own construction of a statutory provision for a reasonable interpretation" by the agency. Id. Moreover, a long-standing statutory interpretation should be "accord[ed] particular deference." Barnhart, 535 U.S. at 220.

As discussed above, numerous courts have recognized that BLM has broad authority to regulate all aspects of oil and gas development. None of that caselaw, or the text of the statutes, suggest that Congress limited BLM's authority to certain drilling technologies. Supra pp. 8–14. This precedent shows that BLM's view of the MLA and FLPMA is entirely reasonable.

Moreover, the Rule reflects a long-standing agency interpretation that is due particular deference. Since at least the 1940s, Interior Department regulations have addressed the same kinds of activities covered by the Rule—including (a) well construction and testing, (b) disposal of "useless liquid products of wells," (c) approval of post-drilling activities on a well, and (d) informational requirements. 7 Fed. Reg. 4132, 4134–35 (June 2, 1942) (adopting 30 C.F.R. §§ 221.11, 221.21, 221.32 (1942)); see also 43 C.F.R. §§ 3162.3-1–5-2 (1988); 53 Fed. Reg. 46,798 (Nov. 18, 1988) (Onshore Order No. 2); 58 Fed. Reg. 47,354 (Sept. 8, 1993) (Onshore Order No. 7).

In particular, since at least 1942 Interior Department regulations have addressed activities that "stimulate [oil and gas] production by . . . water injection. . . ." 7 Fed. Reg. at 4135. And by 1982, the Interior Department interpreted its authority as extending specifically to hydraulic fracturing. That year, it promulgated a regulation requiring companies to get agency approval "prior to commencing operations to . . . perform nonroutine fracturing jobs," and to submit reports on

fracturing operations. 47 Fed. Reg. 47,758, 47,770 (Oct. 27, 1982) (adopting 30 C.F.R. § 221.27 (1982)); see also 43 C.F.R. §§ 3162.3-2(a), (b) (1988) (recodifying rule). Prior approval was not required for "routine" hydraulic fracturing jobs "[u]nless additional surface disturbance is involved," so long as the "operations conform to the standard of prudent operating practice." 47 Fed. Reg. at 47,770.[5] While imposing only limited requirements, the 1982 provision reflects BLM's understanding that it had authority to regulate hydraulic fracturing. It confirms that the Rule applies a long-standing agency interpretation that is entitled to deference. Barnhart, 535 U.S. at 219–20.[6]

The district court's Order depends in large part on disregarding this history. See Order 21 (stating that historically "BLM had not asserted authority to regulate the fracking process itself"); id. at 10, 14, 21, 52 (citing Food & Drug Admin. v. Brown and Williamson Tobacco Corp., 529 U.S. 120 (2000), where agency had

[5] In practice, companies generally treated "all hydraulic fracturing operations as 'routine'" and did not seek prior BLM approval. Case 15cv00041 Dkt. 20-2 ¶ 10.

[6] Oil and gas industry sources acknowledge the same point, further confirming the reasonableness of BLM's interpretation. The Industry Petitioners' preliminary injunction motion did not argue that BLM lacked legal authority for the Rule; that theory was advanced only by the States and the Ute Tribe. Order 11; see also, e.g., Admin. Rec. DOIPS (PS) 301255 (American Petroleum Institute comments noting "that hydraulic fracturing is already regulated by BLM"). As one oil and gas industry attorney observed, "under the MLA and FLPMA, BLM has direct authority to regulate [hydraulic fracturing] operations when they occur on federal lands." Rebecca Watson et al., Hydraulic Fracturing and Water Supply Protection – Federal Regulatory Developments, 2012 ROCKY MTN. MIN. L. INST. 6-1, 6-26–6-27 (Sept. 13–14, 2012) (available on Westlaw at 2012 NO. 3 RMMLF-INST PAPER NO. 6).

repeatedly taken formal position that it lacked authority to regulate tobacco). The district court did not even acknowledge BLM's seventy-year history of regulating well injections on public lands.

While mentioning BLM's 1982 hydraulic fracturing regulation, the court misinterpreted it as "prevent[ing] any additional surface disturbance and impos[ing] reporting requirements," not "regulat[ing] the fracturing process itself." Order 14. This is not an accurate characterization of the regulation, which: (a) requires submittal of a report on the fracturing operation after it is completed; (b) mandates prior approval of "non-routine" fracturing operations and those involving additional surface disturbance; and (c) requires "prudent operating practice" on fracturing operations. 43 C.F.R. §§ 3162.3-2(a)–(b) (1988). These terms unambiguously asserted BLM's authority over hydraulic fracturing on public lands.

The district court also concluded that BLM had "previously disavowed [its] authority to regulate hydraulic fracturing." Order 10. But the only support offered for that claim was a California district court decision, Ctr. for Biological Diversity v. BLM, 937 F. Supp. 2d 1140, 1156 (N.D. Cal. 2013) (Center). Order 10 & n.5, 14. Center involved a NEPA challenge to an oil and gas lease sale. It briefly quotes BLM as defending its failure to evaluate fracturing-related environmental impacts because they "are not under the authority or within the jurisdiction of the BLM." 937 F. Supp. 2d at 1156 (quoting BLM argument).

The quoted passage, however, is not from any formal BLM policy statement. It comes from a 2011 environmental assessment (EA) prepared by BLM's Hollister, California field office for the oil and gas lease sale. That EA includes a single sentence responding to public comments, stating: "[m]any comments raised concerns about potential effects of climate change and hydraulic fracturing, but these issues are outside the scope of this EA because they are not under the authority or within the jurisdiction of the BLM."[7]

This sentence did not represent the position of BLM. When the Hollister field office issued the EA for the September 2011 lease sale, BLM's national headquarters was already developing the Rule challenged in this case. By September 2011, BLM had developed "draft regulatory text for strengthening the requirements for hydraulic fracturing performed on BLM-managed lands." AR7731 (Sept. 15, 2011 BLM memo). As part of that effort, the agency conducted a series of national public forums to get input from different stakeholders. Id. Far from "disavowing" its authority over hydraulic fracturing, BLM had undertaken a major national rulemaking to update its regulations on the technology. A passing reference offered by a regional office in response to comments cannot be interpreted

[7] BLM Hollister Field Office, Environmental Assessment, Oil & Gas Competitive Lease Sale 118 (Sept.14, 2011) (Hollister EA), www.blm.gov/style/medialib/blm/ca/pdf/pa/energy/minerals.Par.85142.File.dat/CA-0900-2011-04-EA-FINALv5.pdf.

as an expression of BLM's national position on this important legal issue.[8] See WildEarth Guardians, 703 F.3d at 1192 (agency staff opinions were "not a formal position adopted by the agency"); WildEarth Guardians v. Jewell, 738 F.3d 298, 312 (D.C. Cir. 2013) (informal statements by lower-level staff "will not preclude the agency from reaching a contrary decision").

The district court's citation to the Center decision is especially misplaced because Center flatly rejected the argument that BLM was not required to address hydraulic fracturing:

> [I]t is unclear exactly how the issue of the environmental impact of fracking could lie outside BLM's 'jurisdiction' when NEPA plainly assigns all studying of environmental impacts of its own decision to BLM. Put another way, if not within BLM's jurisdiction, then whose?

937 F. Supp. 2d at 1156. Center actually contradicts the view that BLM lacks authority to regulate hydraulic fracturing on federal lands.

Unlike the Brown & Williamson case relied on by the district court, supra pp. 22–23, BLM has not reversed its legal position. Instead, the Rule reflects BLM's reasonable and long-standing view of its authority under the MLA and FLPMA.

[8] Moreover, the EA's ambiguous sentence offers no explanation of its reasoning or intended scope. Any interpretation of the EA as "disavowing" BLM's authority is undercut by other parts of the document, which include a four-page discussion of hydraulic fracturing. Hollister EA at 73–77. That discussion suggests BLM may have been relying on the State of California to address groundwater issues from fracturing pursuant to an inter-agency agreement. Id. at 77.

Under Chevron step 2, the district court erred in rejecting that interpretation. Chevron, 467 U.S. at 843; Barnhart, 535 U.S. at 219–20.

III. THE DISTRICT COURT ERRED IN FINDING THAT THE RULE IS ARBITARY AND CAPRICIOUS.

The district court also found a likelihood of success on Petitioner/Appellees' claim that the Rule is arbitrary and capricious. The court concluded that the administrative record provided no support for BLM's decision to update its 30-year-old regulations, and that specific aspects of the Rule were arbitrary and capricious. The court could only reach these holdings by ignoring much of the evidence in the record and improperly substituting its own policy judgment for that of the agency.

A. The Administrative Record Supports BLM's Decision To Update Its Regulations.

The Rule is reviewed under the APA's arbitrary and capricious standard. 5 U.S.C. § 706(2)(A); Olenhouse v. Commodity Credit Corp., 42 F.3d 1560, 1574 (10th Cir. 1994). That review, although "searching and careful[,]" is "highly deferential." Ecology Ctr., Inc. v. U.S. Forest Serv., 451 F.3d 1183, 1188 (10th Cir. 2006) (quotations omitted). The court must "ascertain whether the agency examined the relevant data and articulated a rational connection between the facts found and the decision made." Citizens' Comm. to Save Our Canyons v. Krueger, 513 F.3d 1169, 1176 (10th Cir. 2008). A court may not "substitute its judgment for

that of the agency." Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

The court found no "rational justification" for the Rule because: (a) "public concern" about hydraulic fracturing is "insufficient justification" for a regulation; (b) there is supposedly no "evidence linking the hydraulic fracturing process to groundwater contamination," and (c) BLM allegedly failed to explain why existing state regulations are inadequate. Order 23–27. These holdings disregarded much of the administrative record, which provides ample evidence supporting the Rule. See Dkt. 125 (identifying evidence for district court). While the district court apparently disagreed with BLM's policy decision that updating the regulations was warranted, that does not render the Rule arbitrary and capricious.

1. It Was Not Arbitrary And Capricious For BLM To Update Its Regulations In Response To Technological Changes.

The court characterized the Rule as an arbitrary response to unsubstantiated "public concern" about hydraulic fracturing. Order 25–26. BLM explained, however, that its regulations had not been revised since 1988 and the Rule represents a necessary update addressing "the increasing use and complexity" of modern hydraulic fracturing, which has resulted in "larger-scale operations" in new areas, wells that are "significantly deeper and cover a larger horizontal area," and require "additional regulatory effort and oversight." 80 Fed. Reg. at 16,128. BLM noted that modern hydraulic fracturing operations "apply increased pressures and volumes

of fluid within the subsurface." Id. at 16,188. BLM also determined that information collected under its current regulations was inadequate for oversight of more complex modern operations. AR10053.

BLM acknowledged that scientific uncertainty exists about the risks of modern hydraulic fracturing, and that it is inherently difficult "to trace contaminants in groundwater to specific" operations. 80 Fed. Reg. at 16,188–89. But there was nothing unreasonable about taking a conservative approach in the face of that uncertainty. See Baltimore Gas & Elec. Co. v. Nat. Res. Def. Council, Inc., 462 U.S. 87, 103 (1983) (holding that agency may "counteract the uncertainties" in its scientific analyses by "overestimat[ing]" environmental impacts); San Luis & Delta-Mendota Water Auth. v. Jewell, 747 F.3d 581, 610 (9th Cir. 2014) (upholding agency use of conservative data when "[f]acing great measurement uncertainty" and "choosing an analytical tool that resulted in greater protections" for imperiled species); Nat. Res. Def. Council v. EPA, 529 F.3d 1077, 1085 (D.C. Cir. 2008) ("[E]rring on the side of protecting public health . . . is a reasonable position."). As BLM put it, "no law requires the BLM to wait for a significant pollution event before promulgating common-sense preventative regulations." 80 Fed. Reg. at 16,189.

The record contains substantial evidence supporting BLM's decision. For example, a 2012 Congressional report found that 30% of oil and gas wells on

federal land were hydraulically fractured in or near an underground source of drinking water. AR12596–97. The report also noted that BLM's decades-old regulations did not reflect current technologies or the tremendous growth in their use. AR12592.

Similarly, an expert committee advising the U.S. Secretary of Energy urged BLM to update its regulations. 80 Fed. Reg. at 16,128. The committee observed "[t]here are serious environmental impacts underlying [public] concerns [about oil and gas] and these adverse environmental impacts need to be prevented, reduced and, where possible, eliminated as soon as possible." PS389638. The committee predicted that "the country will be faced with a more serious problem" from modern hydraulic fracturing "if effective environmental action is not taken today." PS389638–39.

EPA also weighed in, stating that modern hydraulic fracturing "raise[s] serious concerns regarding exposure of hydraulic fracturing fluids to drinking water resources." AR7260. EPA supported BLM's Rule as requiring "prudent, sensible measures" for "safe and responsible" oil and gas development. AR88152.

Numerous other commenters echoed these points, including the American Public Health Association, PS391527, the American Water Works Association, PS292; and Native American tribes, PS365500, PS365504, PS365511–14 (Eastern

Shoshone Tribe).[9] Conservation groups also submitted extensive technical comments describing the need for BLM to revise and strengthen its regulations. See, e.g., PS365166–217; PS365410–49; AR29551–617.

All told, more than one million members of the public submitted comments asking BLM to take a more protective approach in addressing hydraulic fracturing. See AR79600; see also AR20573 (New York Times editorial); AR29650 (congressional letter). This record shows it was not arbitrary and capricious for BLM to update its rules and take a more precautionary approach.

2. The Record Provides Substantial Evidence Supporting The Rule's New Requirements.

The district court dismissed BLM's precautionary approach because, in the court's view, there was "a lack of any evidence linking the hydraulic fracturing process to groundwater contamination." Order 26. The court never explained, however, what it meant by the "hydraulic fracturing process." This confusion was a fundamental error because hydraulic fracturing does not occur in isolation from the rest of the drilling process. When a well is fractured, it affects the adequacy of the well's construction, it generates huge volumes of waste that require disposal, and it impacts many other aspects of oil and gas development.

[9] See also, e.g., AR100532; AR5613, AR5619, AR5623–30, AR5642–43, AR5729–33, AR5735–36, AR5739 (testimony from North Dakota hearing); AR10061, AR10065 (Jan. 12, 2012 tribal consultation in Billings Montana).

Accordingly, BLM's Rule does not regulate the "hydraulic fracturing process." Instead, it addresses four primary elements: (1) limiting the use of waste storage pits, (2) updated well casing and cementing requirements, (3) requiring agency review and approval before fracturing operations, and (4) requiring disclosure of chemicals used for fracturing. The record extensively documents how each of these requirements will help prevent groundwater contamination, surface spills, and other accidents. The district court ignored all of this evidence.

a. Limiting the use of pits

Hydraulically-fractured wells generate huge volumes of produced water from subsurface formations, as well as fracturing fluid "flowback," see supra p. xiii (glossary), that must be stored and disposed. The Rule sharply limits the use of pits to store this waste, and requires companies to use above-ground tanks instead. 43 C.F.R. § 3162.3-3(h). BLM explained that "the storage of flowback, or recovered fluid in pits, poses a risk of impacts to air, water and wildlife. . . . BLM believes that above-ground tanks, when compared to pits, are less prone to leaking, are safer for wildlife, and will have less air emissions." 80 Fed. Reg. at 16,162.

The harms from pits are widely recognized. Halliburton Energy Services—a hydraulic fracturing service company—agreed that "effective management of flowback water" is necessary to "protect against risks to human health or the environment." AR90086. Halliburton cited a 2013 survey in which 215 experts

from regulatory agencies, industry, and other sectors identified "flowback of reservoir fluids" as a "priority environmental risk[ ] related to shale gas development." AR90093–94; see also AR90093 n.35 (citing General Accounting Office report on adverse impacts from flowback pits).

The record contains numerous examples of spills and contamination from pits used for flowback and produced water. See, e.g., PS392567, PS392570–72, PS392581–84 (collecting examples); PS64058 (Colorado resident fell ill after drinking water contaminated by chemicals leaching from a pit); AR3425 (New Mexico official stating "[o]perators have not been maintaining proper control of their waste and some of those . . . wastes have gotten into surface and ground water"); AR29595–99 (examples of pit accidents); see also AR12600, AR12605 (numerous safety violations related to improper pit construction); PS365513–14 (Eastern Shoshone Tribe commenting that pits contributed to groundwater contamination on their reservation). Surveys also document that numerous birds are killed in oil and gas pits. PS10186.

BLM reasonably determined that the "use of storage tanks would largely eliminate the risk of flow back fluids damaging various environmental resources." AR100112. When flowback fluids are stored in pits, leaks that "result from a puncture in the liner" often go unnoticed. Id. In contrast, with an above-ground

storage tank "spills or leaks would be easily identifiable" and can be promptly cleaned up before they "percolate through the ground." Id.

b. Updated well construction requirements

The Rule also updates BLM's well casing and cementing standards, requiring good industry practices such as cement evaluation logs and mechanical integrity tests. The Rule requires companies to submit the results of those tests to BLM, which should improve compliance by companies and create incentives for diligent performance. See 43 C.F.R. §§ 3162.3-3(e)–(g), (i)(9).

The record shows that inadequate well casing and cementing is a major cause of water contamination from oil and gas development. For example, Halliburton cited a survey of experts that identified "casing failure and cementing failure" as a key risk associated with unconventional development. AR90093–94. The Energy Secretary's advisory committee also recommended strengthening requirements for wellbore construction. AR100532; PS389658–59. Other comments noted that faulty well casings near aquifers represent the most likely pathway for oil and gas-related contamination. See, e.g., PS365511–12.

The record provides many examples of faulty well casing and cementing letting gas and fluids migrate into groundwater.[10] BLM also cited a 2011 National

[10] See, e.g., PS365417–18 (examples in Wyoming, Colorado, West Virginia, Ohio and Texas); AR29588–95 (groundwater contamination examples linked to faulty well casing and cementing); PS392568–70, PS392573–75, PS392582–83.

Academy of Sciences study finding systemic evidence of methane contamination of drinking water associated with natural gas wells in Pennsylvania. The study identified leaky well casings as a likely cause. 80 Fed. Reg. at 16,194 n.11 (citing AR5416); see also id. at 16,194 n.12 (citing similar 2012 study); PS390770–76 (collecting examples of "gag orders" imposed when oil and gas companies settle lawsuits alleging water well contamination).

The record also shows that problems with well construction are not isolated incidents. Based on industry sources and enforcement records, BLM estimated that 1%–5% of wells have cementing problems. AR100588; see also PS389262 (3% of wells in the Marcellus Shale region have construction issues). Other studies have found higher rates of well failures. For example, a 2012 Pennsylvania study concluded that at least 6%–7% of unconventional wells had casing and cementing problems. AR30072–74. And a 2012 Congressional report found that more than 20% of major violations identified by BLM involved non-compliance with casing and cementing requirements. AR12587.

c. Advance review and approval of hydraulic fracturing operations

The Rule requires companies to get prior BLM approval for hydraulic fracturing operations. 43 C.F.R. § 3162.3-3(c)–(d). Applicants must provide information such as (a) the length and direction of the fractures to be induced; (b) existing fissures, or existing wellbores, that might intersect with the induced

fractures; and (c) estimating the distance from the top of the zone being fractured to the bottom of the nearest usable aquifer. 80 Fed. Reg. at 16,217–19. BLM explained that this information (sometimes called area review) allows the agency to review the operation and ensure no pathways would allow gas or fluids to escape the area being fractured and contaminate aquifers or cause other accidents. Id. at 16,147, 16,153.

Record comments explain "it is critical that operators show that there is . . . a 'confining layer' such that the well will not create conduits for movement of fluid into a source of protected water." PS365178 (Environmental Defense Fund); see also PS365172–76; PS365444–45 (similar); AR29565–68; AR40662. Even some energy companies acknowledged that "more scrutiny is appropriate" where the zone being fractured is close to a usable aquifer. AR27321 (ConocoPhillips). Area review provides that scrutiny.

A highly-publicized groundwater contamination case in Pavillion, Wyoming illustrates the value of this requirement. The record describes how hydraulic fracturing there occurred in the same geologic formation used for drinking water. AR8552. As a result, there may have been no confining layer separating the aquifer from the formation being fractured. Moreover, the surface casing on oil and gas wells (a layer of well casing that is supposed to create a barrier between the well and the aquifer) apparently did not extend below the depth of nearby water wells,

and thus failed to protect the aquifers supplying those water wells. AR8549; see also AR11755 (Wyoming identified thirty-six wells "with surface casing set depth or cementing issues"). Requiring advance area review could have prevented the Pavillion contamination.

Area review also allows BLM to avoid "frack hits" (or "communication" between wells). A frack hit occurs where the fractures created from one well intersect with an existing well nearby. A frack hit can result in well blowouts or surface spills, and compromise the integrity of other wells. 80 Fed. Reg. at 16,181–82, 16,194.

Frack hits are a growing problem on public lands. See, e.g., AR102823 (identifying "horizontal drilling issues, including avoiding communication issues" as a "key aspect" of fracking concerns); AR12722–24; AR33634–35; AR53644–48; AR65787–89; AR70049; AR75052–53; AR75388; AR76381–83; AR100530–31. BLM reasonably concluded that the Rule will help prevent such accidents. 80 Fed. Reg. at 16,153, 16,181–82; AR67708; AR76381–83; AR95539–40.

d. Disclosure of hydraulic fracturing chemicals

The Rule also requires companies to publicly disclose the chemicals used in hydraulic fracturing, a recommendation of the Energy Secretary's advisory committee. 43 C.F.R. § 3162.3-3(i); AR100532; PS389654. Many chemicals used in hydraulic fracturing are potentially hazardous. PS392791–822 (Congressional

report); PS64073–76 (listing chemicals); see also AR29563–64 (examples of accidents and health effects); PS392570–72 (similar). As a result, there are a variety of benefits from disclosure.

Chemical disclosure assists BLM in addressing contamination incidents. 77 Fed. Reg. 27,691, 27,700–02 (May 11, 2012). It also allows firefighters and paramedics to train for (and safely address) accidents at oil and gas sites, as well as helping medical professionals treat patients exposed to fracturing chemicals. Disclosures let residents concerned about nearby fracturing test their water wells for the correct chemicals. And public disclosure creates an incentive for energy companies to use safer chemicals in fracturing. PS365428.

3. BLM Did Not Disregard Existing State Regulations.

The district court also faulted BLM for adopting the Rule without first determining that existing state regulations are "inadequate to protect against the perceived risks to groundwater." Order 27. This holding should be reversed.

First, nothing in the MLA or FLPMA requires BLM to defer to state laws before regulating activities on federal lands. On the contrary, BLM explained that these statutes impose a duty of "stewardship" to protect public resources that BLM "is not allowed to delegate . . . to the states." 80 Fed. Reg. at 16,130, 16,178. The district court imposed a hurdle without any legal basis.

In any event, BLM did consider existing state regulations. The Rule's preamble repeatedly discusses how states address different issues. See, e.g., id. at 16,128, 16,129–16133, 16,152, 16,178. The agency also conducted an extensive review of regulations in the nine states that account for virtually all drilling on federal and tribal lands. That analysis compared how different states regulate pits, well construction, chemical disclosure, and other issues addressed in the Rule. AR100575–80.

The agency concluded that "regulations continue to be inconsistent across states." 80 Fed. Reg. at 16,178. Because states are not subject to the same "stewardship" mandate as BLM, the Rule "may expand on or set different standards from those" of many states. Id. at 16,133; see also AR95892 (BLM Director noting that state standards "are not at all consistent and in many cases would not meet BLM's needs").

BLM's analysis showed that the Rule is more protective than many state regulations. For example, at least seven of the nine states do not require the use of tanks instead of pits statewide. AR100575–79. BLM also concluded that requiring area review prior to fracturing is "necessary." 80 Fed. Reg. at 16,147, 16,154. But it appears that none of the nine states mandates an equivalent process. See, e.g., PS65601–11 (New Mexico regulations); see also Wyo. Admin. Code Oil Gen. Ch. 3 § 45(c)–(e) (Wyoming requirements), ND Admin. Code § 43-02-03-27.1 (North

Dakota). And most states lack regulations or policies to address frack hits. See AR78378; AR95893 (Feb. 2015 informational memorandum); AR78309.

The Rule is also designed not to undercut states that have adopted strong regulations on particular topics. BLM's preamble makes clear that the Rule "does not preempt any more stringent state or tribal law." 80 Fed. Reg. at 16,178. BLM also provided for variances from the federal Rule if a similar or stricter state rule applies. 43 C.F.R. § 3162.3-3(k)(2)–(3). Contrary to the district court's Order, BLM did not ignore existing state regulations.

At bottom, the district court's various criticisms of the Rule reflect a disagreement with BLM's policy judgment that additional regulation of modern hydraulic fracturing is warranted. But under the APA, "a court is not to substitute its judgment for that of the agency." State Farm, 463 U.S. at 43. Where (as here) substantial evidence supports the agency's decision, the court's policy disagreement does not render the Rule arbitrary and capricious. This is especially true because hydraulic fracturing involves numerous technical matters implicating the agency's expertise. See Marsh v. Or. Nat. Res. Council, 490 U.S. 360, 378 (1989). The district court failed to follow this law, and its ruling must be reversed.

B. The District Court Erred In Finding That Specific Parts Of The Rule Are Arbitrary And Capricious.

The district court also erred in finding several specific requirements of the Rule "problematic" under the APA. Order 28; Dkt. 125 (identifying record support for the requirements).[11]

1. Mechanical Integrity Testing Is Not Arbitrary And Capricious.

The Rule requires a mechanical integrity test (MIT) on the well casing before hydraulic fracturing occurs. 43 C.F.R. § 3162.3-3(f). The MIT replaces a well pressure test BLM has required since 1988. See 53 Fed. Reg. at 46,808–09 (existing Onshore Order No. 2). The district court erroneously held that BLM "offer[ed] no explanation" for the change. Order 28–29.

BLM did explain the distinction between the new MIT and the old pressure test. The MIT ensures that well casing "is able to withstand the applied pressure and contain the hydraulic fracturing fluids." 80 Fed. Reg. at 16,159; see also 78 Fed. Reg. 31,636, 31,653 (May 24, 2013) (MIT "emulate[s] the pressure conditions that would be seen" during fracturing "to ensure that the casing used in the well would be robust enough to handle the pressures"). BLM's existing rule, which requires testing a well to standard numeric pressure thresholds, was adopted in 1988

[11] The district court also ruled that BLM had failed adequately to consult with the Ute Indian Tribe. Order 36–39. The Citizen Groups incorporate BLM's argument on that issue by reference.

and predates modern hydraulic fracturing. See 80 Fed. Reg. at 16,131; 53 Fed. Reg. at 46,798, 46,809. In contrast, the new MIT requires applying the "maximum anticipated surface pressure" that will be used during hydraulic fracturing. 80 Fed. Reg. at 16,160, 16,219. It thus accounts for the increased pressures used during modern hydraulic fracturing operations.

The court also questioned why "testing of the lateral" portion of the well bore on a horizontal well, see supra pp. xiii–xiv (glossary), as opposed to just the vertical segment, "is important." Order 29. The record explains this requirement: the lateral portion is where hydrocarbons are produced, and where the fracturing occurs. AR2083–84. Testing the wellbore around the segment being fractured is necessary to ensure that casing is adequate "to withstand the applied pressure and contain the hydraulic fracturing fluids" from escaping into unintended areas. 80 Fed. Reg. at 16159.

In fact, the Rule's MIT requirement adopts a pressure testing standard recommended by the American Petroleum Institute (API). Id.; AR100562. Like BLM's MIT, the API standards call for testing the lateral leg of horizontal wells. AR2079–84. BLM's adoption of this industry standard further demonstrates that the MIT requirement is neither "unexplained," nor arbitrary and capricious.[12]

[12] The court suggested that the requirement to test the full well bore was improperly added in the final Rule without providing any opportunity for public comment. Order 29. This is incorrect: the original rule proposed in 2012 did not limit the MIT

2. The Rule's Definition of "Usable Water" Is Not Arbitrary And Capricious.

The Rule requires companies constructing wells to isolate and protect "usable waters." 43 C.F.R. § 3160.0-5, 3162.5-2(d). "Usable waters" are defined generally as aquifers with no more than 10,000 parts per million (ppm) total dissolved solids (TDS)–a measure of salinity (see glossary)–in the water. Id. The district court ruled that BLM "provides no reasoned basis or factual support" for this 10,000 ppm definition. Order 30–32. Here again, the court ignored numerous documents in the administrative record.

BLM explained that the Rule's 10,000 ppm definition just clarifies existing law. Since 1988, BLM's Onshore Order No. 2 (which is a legally-binding regulation) has defined "usable water" as having up to 10,000 ppm TDS. 53 Fed. Reg. at 46,798, 46,801, 46,805.[13] An older regulation, however, included a different standard. See 43 C.F.R. § 3162.5-2(d) (1983) (protecting only aquifers with up to 5,000 ppm TDS). BLM explained that as part of updating its regulations, the Rule brings the older provision into conformity with the existing definition in Onshore

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requirement to the vertical portion of the well bore. 77 Fed. Reg. at 27,710. The language of the 2012 draft rule, in fact, closely tracks the language in the final Rule. Compare id. (2012 draft) with 80 Fed. Reg. at 16,219 (final Rule). Numerous industry parties submitted comments on the 2012 draft and stated that (as the API standards indicate) MIT pressure tests were already an established practice. See, e.g., AR26510–11 (Yates Petroleum); AR28550 (API); PS8294 (Black Hills Energy); PS10875–76 (America's Natural Gas Alliance); see also PS10377 (BP).

[13] Onshore Order No. 2 was promulgated by notice-and-comment rulemaking. See 53 Fed. Reg. at 46,798; 43 C.F.R. § 3164.1.

Order No. 2.[14] BLM's explanation is supported by the record.[15] In fact, API guidance confirms that 10,000 ppm is the industry standard today.[16]

The record also supports BLM's policy choice to continue protecting aquifers with up to 10,000 ppm TDS. While such water must be treated before humans can drink it, BLM explained that "[g]iven the increasing water scarcity [in much of the United States] and technological improvements in water treatment equipment, it is not unreasonable to assume [these] aquifers . . . are usable now or will be usable in the future." 80 Fed. Reg. at 16,142. The agency noted that even "if we're not using that water today we may be using it ten years [or] one hundred years from now. So we don't want to contaminate it now so it's unusable in the future." AR9703.

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[14] See, e.g., 77 Fed. Reg. at 27,699 (preamble to proposed rule); 78 Fed. Reg. at 31,646–47 (preamble to 2013 revised proposal); 80 Fed. Reg. at 16,141–42 (2015 final rule preamble).

[15] See, e.g., AR10088, AR10128–29, AR10171–72 (BLM manager from Montana reports that 10,000 ppm standard currently being used to protect usable water); AR9707–08 (Jan. 2012 statement that BLM has "already been using this 10,000" ppm standard); AR88095–96 (BLM New Mexico white paper noting that current requirements are designed to isolate usable water); see also Applications for Permit to Drill in the Kemmerer Field Office, BLM Wyo. (Oct. 24, 2008), www.blm.gov/wy/st/en/programs/energy/Oil_and_Gas/Onshore_Operations/apdk.html (paraphrased at PS178957) (directing that companies must construct wells "to protect usable water (less than 10,000 ppm TDS)").

[16] AR2078 note a, AR2083. Many states and tribes use a similar standard. See AR27323 (Colorado, Wyoming and New Mexico use 10,000 ppm); PS304 (North Dakota requires zones with 5,000-10,000 ppm TDS be isolated with cement); PS65611 (New Mexico uses 10,000 ppm); AR9708 (Osage tribe uses 10,000 ppm).

EPA supported this conclusion. AR38117. And according to the Association of Metropolitan Water Agencies (AMWA), such groundwater is already being used for drinking in some parts of the country. See AR38118 (pumping 8,000 ppm TDS groundwater in Florida); AR68337 (desalination already used for municipal water treatment in some areas). AMWA explained that because of "challenges resulting from climactic changes, population growth and land development, many utilities are turning to more challenging groundwater sources such as those that are very deep or have high salinity concentrations . . . given the lack of sufficient water elsewhere." AR38118. Higher salinity water is also being used today for some industrial purposes. AR75763 (power plant cooling); AR2566; AR11478 (hydraulic fracturing); see also AR11480 (noting use of "mobile desalination plants"); AR92709–10.

The district court also erred in holding that BLM did not consider "the difficulty and expense of measuring" aquifers to determine whether they meet the 10,000 ppm standard. Order 32–33. BLM did address this issue, and responded to industry's concerns that companies might be required to drill and test aquifer water quality at each individual well. 80 Fed. Reg. at 16,151. BLM indicated that testing is not necessarily required, and the final Rule only requires use of the "best available information." Id. at 16,151–52, 16,218; see also 43 C.F.R. § 3162.3-3(d)(1)(iii).

For example, BLM noted that water quality information can be collected from existing sources such as state regulators and USGS reports. 80 Fed. Reg. at 16,151–52. In many cases existing oil and gas wells can provide water quality data for new wells drilled in the same area. Id. at 16,152. Moreover, collection of the information is only required once for each area being drilled, rather than for every individual well. As a result, even API noted that the cost per well could be "negligible." PS301535.

Contrary to the district court's ruling, BLM explained the Rule's definition of usable waters and did not ignore industry concerns about costs.

3. The Rule's Protections For Confidential Information Are Not Arbitrary And Capricious.

Finally, the district court found the Rule arbitrary and capricious because "BLM provides no explanation in the record for drawing a distinction between pre- and post-hydraulic fracturing information" submitted by companies that claim it as a trade secret. Order 35. BLM, however, did provide a reasonable explanation for this distinction.

After hydraulic fracturing operations are completed, the Rule requires submitting information about the chemicals used to a privately-operated website called FracFocus. 43 C.F.R. § 3162.3-3(i)(1). However, the Rule allows companies to withhold any information they deem to be a trade secret. Id. § 3162.3-3(j). The

company must keep the withheld information so that it is accessible to BLM if needed later for responding to an accident or for other reasons. See id.

The Rule takes a different approach to information required in advance of fracturing. When companies seek BLM approval for fracturing operations, the Rule does not allow them to withhold confidential information from their applications. Instead, that information is subject to the standard rules that apply to any trade secret information submitted to the agency. 80 Fed. Reg. at 16,173. Long-standing Interior Department regulations allow companies submitting materials to the agency to mark them as confidential, and the rules provide a well-established process for protecting that information from public disclosure. 43 C.F.R. §§ 2.26–2.36. Information submitted in an application for fracturing approval will receive the same protection as any other proprietary information filed with BLM. 80 Fed. Reg. at 16,173.

It was not arbitrary and capricious to treat pre-fracturing applications differently from post-fracturing disclosures. First, the Rule allows post-fracturing disclosures to be made directly to a public web site—FracFocus—instead of BLM. 43 C.F.R. § 3162.3-3(i). Because the post-fracturing disclosures are made to a third party, the agency's existing regulations protecting the confidentiality of such information would not apply. Id. at § 3162.3-3(j)(1).

Moreover, the post-fracturing disclosures serve a different purpose than the information submitted before fracturing. BLM requires the post-fracturing disclosures in order to make that information available to the public. 80 Fed. Reg. at 16,166. Given that purpose, BLM concluded that it does not need to receive confidential information in every post-fracturing disclosure "in order to make informed management decisions." Id. at 16,174.

In contrast, BLM requires information before fracturing for a different purpose. The Rule requires pre-fracturing applications in order to "provide the BLM with enough information" to evaluate proposed operations and avoid potential hazards. Id. at 16,153. BLM determined that collecting this information and approving fracturing operations in advance is "necessary" to avoid frack hits or other threats of contamination "through modification of the proposal or by attaching conditions of approval." Id. at 16,147; see supra pp. 34–36. This goal would not be met if companies could withhold confidential information from BLM.

This explanation is entirely reasonable. Because information required before fracturing serves a much different purpose than post-fracturing disclosures, it was not arbitrary and capricious for BLM to treat them differently with regard to confidentiality claims.

IV. THE DISTRICT COURT ERRED IN RULING THAT THE INDUSTRY PETITIONERS ARE LIKELY TO SUFFER IRREPARABLE HARM FROM THE RULE.

The district court's ruling that the Industry Petitioners would be irreparably harmed by the Rule should also be reversed, for two reasons. First, the district court misapplied this Court's precedent by ruling that even the minimal costs of complying with the Rule constituted irreparable harm. Second, the court found an imminent threat that BLM will improperly publicize trade secret information submitted to it under the Rule, but failed to account for other regulations that prevent such disclosure. Order 42–46; see Dkt. 125 at 40, 43–45 (raising arguments below).

A. Ordinary Compliance Costs Do Not Represent Irreparable Harm.

BLM estimated that the cost of complying with the Rule would be minimal, adding only about 0.13%–0.21% to the cost of drilling each well ($11,400 per well). 80 Fed. Reg. at 16,130, 16,205. The district court ruled, however, that even this minor expense represented irreparable harm because sovereign immunity precludes oil and gas companies from recovering it as damages from the federal government. Order 42. This ruling was legal error and is thus reviewed de novo.

Establishing irreparable harm requires a party to prove "a significant risk that he or she will experience harm that cannot be compensated after the fact by monetary damages." Greater Yellowstone Coal., 321 F.3d at 1258 (emphasis and

quotation omitted). Generally, economic loss alone does not represent irreparable harm. Port City Props. v. Union Pac. R.R. Co., 518 F.3d 1186, 1190 (10th Cir. 2008).

While costs to comply with a government regulation cannot be recovered as damages, courts have held that "ordinary compliance costs are typically insufficient to constitute irreparable harm." Freedom Holdings, Inc. v. Spitzer, 408 F.3d 112, 115 (2d Cir. 2005); Wisc. Gas Co. v. Fed. Energy Regulatory Comm'n, 758 F.2d 669, 674–75 (D.C. Cir. 1985); Am. Hosp. Ass'n v. Harris, 625 F.2d 1328, 1331 (7th Cir. 1980); A.O. Smith Corp. v. Fed. Trade Comm'n, 530 F.2d 515, 527 (3d Cir. 1976).

This is because the harm supporting an injunction must be "great" and "substantial." Heideman v. S. Salt Lake City, 348 F.3d 1182, 1189–90 (10th Cir. 2003) (citing Wisc. Gas, 758 F.2d at 674). A plaintiff seeking to enjoin an agency regulation must make "a strong showing that the economic loss would significantly damage its business above and beyond a simple diminution in profits." Mylan Pharm., Inc. v. Shalala, 81 F. Supp. 2d 30, 43 (D.D.C. 2000); see also Heideman, 348 F.3d at 1189 (affirming denial of injunction where plaintiffs presented no evidence that companies "had been forced out of business" by ordinance).

The district court ignored this requirement. Instead, the court held that under Chamber of Commerce of the U.S. v. Edmondson, 594 F.3d 742 (10th Cir. 2010),

even modest compliance costs represent irreparable injury. Order 42. Chamber, however, did not find irreparable harm based on ordinary compliance costs. Instead, the plaintiffs faced a threat of penalties for failing to comply with an unconstitutional state immigration law. 594 F.3d at 759, 771. The threat of enforcement, and imposition of financial sanctions, were found to represent irreparable injury. Id. at 771.

The Chamber plaintiffs, in fact, emphasized that they were not basing their irreparable harm argument solely on compliance costs. Consolidated Br. of Pls.-Appellants, 2008 WL 4735384, at *69 (Oct. 14, 2008) (arguing that it was "demonstrably false" that plaintiffs had only established "out-of-pocket" compliance costs and "administrative expenses"). Instead, the Chamber plaintiffs alleged disruption of their hiring, enforcement litigation, penalties, and reputational injuries from being accused of employing illegal aliens. Id. at *27–30. Later decisions of this Court have recognized the same point. Planned Parenthood v. Moser, 747 F.3d 814, 833 & n.4 (10th Cir. 2014) (describing Chamber as affirming injunction "to halt enforcement action" and block imposition of sanctions and penalties). The harms alleged in Chamber were much different from the ordinary compliance costs at issue here.

Moreover, Chamber found "a strong likelihood" that the Oklahoma immigration restrictions violated the Supremacy Clause of the U.S. Constitution.

Id. at 770. "When an alleged constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary." Kikumura v. Hurley, 242 F.3d 950, 963 (10th Cir. 2001) (quotation omitted); see also Chamber, Pls.-Appellants' Br., 2008 WL 4735384, at *68 (arguing that where "plaintiffs are forced to comply with" a preempted law, that represents irreparable harm (citing Trans World Airlines, Inc. v. Mattox, 897 F.2d 773, 785 (5th Cir. 1990))).

In contrast, the Industry Petitioners have not alleged that BLM's Rule is unconstitutional. Chamber found irreparable harm on facts much different than this case. Like other Circuits, this Court has not enjoined regulations to shield companies from ordinary compliance costs. Supra pp. 49–50.

The district court's contrary approach would effectively eliminate irreparable harm from the injunction standard whenever a business challenges an agency regulation: "Any time a corporation complies with a government regulation that requires corporation action, it spends money and loses profits; yet it could hardly be contended that proof of such an injury, alone, would satisfy the requisite for a preliminary injunction." A.O. Smith Corp., 530 F.2d at 527. The district court's approach ignores black-letter law that only "great" and "substantial" harm justifies injunctive relief, Heideman, 348 F.3d 1189–90, and that an injunction is an "extraordinary" remedy not normally available for economic harms. Greater

Yellowstone Coal., 321 F.3d at 1256. The district court's holding should be reversed as legal error.

B. The District Court Erred In Finding A Threat Of Irreparable Harm From Disclosure Of Trade Secrets.

The district court also erred in ruling that BLM would irreparably harm the Industry Petitioners' members by disclosing trade secrets submitted in applications for approval of fracturing operations. Order 45–46. The district court based this finding on one sentence in the Rule's preamble: a prediction by BLM that information in those applications "would not routinely meet any of the criteria" for shielding such materials from disclosure under the Freedom of Information Act (FOIA). Id. (quoting 80 Fed. Reg. at 16,154). From this sentence, the court concluded that a nationwide injunction was necessary to prevent great and imminent harm to the Industry Petitioners. Id.

The district court erred by ignoring other regulations that protect confidential information filed with BLM. 80 Fed. Reg. at 16,173 (describing ordinary practice under the Rule); 43 C.F.R. §§ 2.26–2.36. A company submitting information it believes is a trade secret can identify and designate it as such. 43 C.F.R. § 2.26. If BLM later receives a FOIA request, its regulations require the agency to "promptly notify a submitter in writing." Id. § 2.27(a). The submitting company then is given an opportunity to object to release of the information and explain why it represents a trade secret before BLM releases it. Id. §§ 2.28, 2.30–2.32. If BLM decides to

release the information over an objection, the agency must provide the company with ten days advance notice so the company can challenge that decision in court. Id. §§ 2.33, 2.35(c).

These regulations show that no injunction is needed against the Rule. At most, the preamble sentence relied on by the court suggests that a disagreement may arise at some point in the future between BLM and a submitter about the confidentiality of certain information. But BLM's regulations provide for resolution of any such disagreement—and judicial relief if necessary—before that information is disclosed. Id. As a result, no injury is "imminent," and no injunction against the Rule was necessary to prevent disclosure.

The district court never addressed these regulations, or found any likelihood that BLM would violate them. See Order 42–46. BLM employees, in fact, have a powerful incentive to comply: the Trade Secrets Act subjects federal employees to criminal prosecution, civil fines, and loss of employment for unauthorized disclosure of confidential information. 18 U.S.C. § 1905. Thus, any theoretical possibility of improper disclosure is "purely speculative" and does not support an injunction. Greater Yellowstone Coal., 321 F.3d at 1258. The Order should be reversed because it failed to account for these regulations.

V. THE DISTRICT COURT ERRED IN RULING THAT THE STATES WILL BE IRREPARABLY HARMED BY THE RULE.

The district court also erred in determining that the States were likely to suffer two forms of irreparable harm from the Rule: (a) that federal regulation of hydraulic fracturing on federal land would be an "infringement on their sovereign authority," and (b) the Rule would cause "economic losses in the form of substantially decreased royalty and tax revenue." Order 40–42. Neither ruling is supported by the law or the record. Dkt. 67 at 13–21 (raising arguments in district court).

A. The Rule Does Not Infringe On The States' Sovereign Authority.

The district court found an irreparable sovereign injury to the States based on its conclusion that BLM lacked legal authority to promulgate the Rule. It held that the "Rule creates an overlapping federal regime, in the absence of Congressional authority to do so, which interferes with the States' sovereign interests in . . . regulation of hydraulic fracturing." Order 40–41. This ruling must be reversed because BLM does have legal authority to promulgate the Rule. Supra pp. 8–26.

Moreover, the States have no sovereign right to regulate activities on federally-owned lands free from oversight by the federal government. The Constitution's Property Clause makes management of federal property—including federal mineral development—the prerogative of Congress. See Kleppe, 426 U.S. at 540; Ventura Cty., 601 F.2d at 1083. "State jurisdiction over federal land does

not extend to any matter that is not consistent with the full power in the United States" under the Property Clause. Wyoming v. United States, 279 F.3d 1214, 1227 (10th Cir. 2002) (quotations omitted). Congress delegated its proprietary authority over public lands to BLM through FLPMA and the MLA. Because the Rule is authorized by those statutes, the States cannot claim any "sovereign interest" that is injured by the Rule.[17]

B. The District Court's Ruling That The States Are Likely To Suffer Irreparable Economic Injury Conflicts With Tenth Circuit Precedent.

The district court also held that the Rule would cause oil and gas companies to flee federal lands and thus result in irreparable losses of tax and mineral revenues to the States. Order 41. This ruling was based only on speculation, which is inadequate to establish such an injury under Tenth Circuit precedent.

To support a preliminary injunction, a threatened injury must be imminent and "certain, great, actual and not theoretical." Heideman, 348 F.3d at 1189.

[17] The cases cited by the district court, Order 41, are readily distinguishable. Kansas v. United States involved a federal decision that had the effect of extending a tribe's sovereignty to certain private lands, which limited the application of Kansas state law there. 249 F.3d 1213, 1219 (10th Cir. 2001). In contrast, the Rule applies only to lands and minerals owned by the federal government, where (regardless of the Rule) the federal government is the primary sovereign. See also Order 41 (citing Int'l Snowmobile Mfrs. Ass'n v. Norton, 304 F. Supp. 2d 1278, 1287 (D. Wyo. 2004) (describing argument by plaintiffs that a regulation "infringes on Wyoming's sovereignty," but finding no such sovereign injury)).

"Speculation or unsubstantiated fear of what may happen in the future cannot provide the basis for a preliminary injunction." Schrier, 427 F.3d at 1266.

Where a state alleges that it faces injury from reduced tax revenue due to a federal regulation, a high level of specific evidence is required—not just speculative predictions. In Wyoming v. U.S. Dep't of Interior, 674 F.3d 1220 (10th Cir. 2012), this Court ruled that a very similar claim of injury failed to establish Article III standing. Id. at 1231–35. Wyoming shows that the States' speculation about revenues failed to establish that they even had standing to bring this case. Id.; see also Summers v. Earth Island Inst., 555 U.S. 488, 495–496 (2009) (overturning nationwide injunction against regulation for lack of detailed, specific evidence showing application of rule would injure plaintiff). Those same allegations also cannot support the extraordinary remedy of a preliminary injunction, where the right to relief must be "clear and unequivocal." Schrier, 427 F.3d at 1258 (quotation omitted); see also Utah v. Babbitt, 137 F.3d 1193, 1203 n.12 (10th Cir. 1998) (noting that issue of irreparable harm is "[c]losely related to" the injury-in-fact for standing).

In Wyoming, the state challenged an Interior Department regulation limiting snowmobile use in Yellowstone National Park. 674 F.3d at 1224. Wyoming claimed it had standing to challenge the regulation because the limits would harm tourism and thus reduce tax revenues. Id. at 1231–34. This Court rejected these

allegations as a basis for standing because "virtually all federal policies" have some generalized effect on states, and thus, "impairment of state tax revenues should not, in general, be recognized as sufficient injury-in-fact" for standing. Wyoming, 674 F.3d at 1234 (quoting Pennsylvania v. Kleppe, 533 F.2d 668, 672 (D.C. Cir. 1976)); see also Arias v. DynCorp, 752 F.3d 1011, 1015 (D.C. Cir. 2014) ("Lost tax revenue is generally not cognizable as an injury-in-fact for purposes of standing.").

To establish an injury based on lost taxes, Wyoming requires a "fairly direct link between the state's status as a . . . recipient of revenues and the legislative or administrative action being challenged." 674 F.3d at 1234 (quotation omitted). This Court held that "conclusory" affidavits and "speculative economic data" are insufficient where they "provide no underlying evidence" demonstrating that a regulation will actually have such an impact. Id. at 1232–33. Such evidence, Wyoming held, is too "conjectural or hypothetical" to establish an injury-in-fact. Id. at 1231.

The district court failed to apply this Court's Wyoming decision. Its Order never addressed whether the States had established Article III standing to challenge the Rule. Id.; Summers, 555 U.S. at 495-496. And the court's irreparable harm finding relied on exactly the type of speculation rejected in Wyoming. Order 41.[18]

[18] The district court also erred by assuming that any hypothetical loss of revenues during the course of the lawsuit "would be permanent." Order 41. If the Rule is set aside in a final judgment, there is no reason to doubt that development and revenues

The district court cited administrative record comments that expressed generalized concerns about "discourag[ing]" oil and gas production on federal lands, but offered no supporting proof.[19] This does not establish an injury under Wyoming.

While the district court's Order did not rely on it, the evidence offered by the States was just as speculative. Colorado and Utah, in fact, failed to offer any affidavits or evidence in support of their argument. There was thus no basis to conclude that those two states will suffer irreparable harm. See Heideman, 348 F.3d at 1189 (affirming denial of injunction where plaintiffs failed to offer evidence supporting attorney's argument about irreparable harm).

Wyoming and North Dakota offered little more. They failed to name a single company actually expected to move operations out of state as a result of the Rule. See Schrier, 427 F.3d at 1266 (claim of "lost opportunities" by terminated employee was too speculative to support finding of irreparable harm where plaintiff "provided no evidence of actual lost opportunities"). Instead, Wyoming submitted an affidavit predicting that administrative delays "will encourage [Wyoming] operators to invest more money in wells in other states that are not affected by the BLM rule." Dkt.

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would recover. See Heideman, 348 F.3d at 1189 (no irreparable harm where company would be able to "resume their [business activities] in the event they prevail on the merits").

[19] Order 41 n.36 (citing, inter alia, AR55854 (2013 letter from Wyoming congressional delegation stating that "we believe" the Rule will "discourage" production on federal lands); AR66303 (Halliburton (HESI) statement that Rule "could delay or discourage new production on federal lands")).

32-2 ¶ 39. Wyoming offered no evidence supporting this statement, or showing that the Rule would materially impact development in that state. Similarly, North Dakota submitted a declaration predicting that the Rule will nearly "double" current BLM processing times and "will result in approximately one-half the rate of development" on federal and Indian lands in that state, based purely on the declarant's "understanding" of BLM's staffing situation. Dkt. 52-4 ¶¶ 14–16.[20]

The States' case becomes even flimsier when compared with BLM's analysis. Unlike the States, BLM did perform a detailed assessment of the Rule's impact. The agency determined that administrative delays from the Rule would be minimal, and that the modest compliance costs (0.13%–0.21% of the cost of drilling a well) were unlikely to affect companies' investment decisions. See AR100527; 80 Fed. Reg. at 16,208; id. at 16,196 (estimating that applications for fracturing approval would require "only 4 hours of additional review time" by agency staff). The

[20] At the injunction hearing, North Dakota's affiant testified that the Rule would cause a six-month delay in BLM approvals because a state regulation required the state to keep certain information confidential for six months after a well is drilled. He claimed that regulation would prevent any companies from obtaining necessary information about nearby wells for every hydraulic fracturing application required by the Rule. June 23 tr. 49:24–50:10, 56:18–57:8. The state regulation in question, N.D. Admin. Code § 43-02-03-31, does no such thing. First, it imposes the six-month confidentiality period only for newly-drilled wells, and only "if requested by the operator in writing." Id. That is a far cry from requiring a six-month delay for every single hydraulic fracturing application in the state. Further, the same regulation allows the state to release confidential information to federal regulators. Id. Thus, BLM can obtain whatever information it needs directly from North Dakota without delay.

district court never explained why it disregarded BLM's detailed analysis in favor of the speculation offered by the States.

The district court, in fact, disregarded evidence strongly suggesting that federal bureaucracy is not a material constraint on the level of drilling on public lands. The States conceded that under existing federal rules, approval of BLM drilling permits already takes considerably longer than state approvals. See, e.g., Dkt. 32-2 ¶ 27. Despite those delays, by 2014 oil and gas companies had stockpiled more than 4,500 approved federal permits in Wyoming, Utah, Colorado and North Dakota that they were not using. Dkt. 45-4 at 284. These approved permits lay idle for reasons unrelated to BLM permitting delays—such as the depressed market price for oil and gas. The States did not even attempt to show how the modest changes made by the Rule would suddenly reverse this situation.

The district court essentially side-stepped the requirement of irreparable harm to the States. Any state government challenging a regulation can speculate about potential losses of tax revenue. If that were sufficient, the irreparable harm requirement would be meaningless in any state challenge to a federal regulation. The court's approach was legal error, and "would create a dangerous precedent." Wyoming, 674 F.3d at 1234.

CONCLUSION

The district court's preliminary injunction order should be REVERSED.

STATEMENT REGARDING ORAL ARGUMENT

The Citizen Groups believe that because of the importance of the issues presented, oral argument would assist the Court in resolving this appeal.

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

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Date: March 21, 2016

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I hereby certify that on March 21, 2016 I electronically filed the foregoing **INTERVENOR-RESPONDENT-APPELLANTS' OPENING BRIEF** using the court's CM/ECF system which will send notification of such filing to the following:

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ADDENDUM

ADDENDUM INDEX

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF WYOMING

STATE OF WYOMING, STATE OF COLORADO,

Petitioners,

STATE OF NORTH DAKOTA, STATE OF UTAH, and UTE INDIAN TRIBE,

Intervenor-Petitioners,

vs.

UNITED STATES DEPARTMENT OF THE INTERIOR; SALLY JEWELL, in her official capacity as Secretary of the Interior; UNITED STATES BUREAU OF LAND MANAGEMENT; and NEIL KORNZE, in his official capacity as Director of the Bureau of Land Management,

Respondents,

SIERRA CLUB, EARTHWORKS, WESTERN RESOURCE ADVOCATES, CONSERVATION COLOARDO EDUCATION FUND, THE WILDERNESS SOCIETY, and SOUTHERN UTAH WILDERNESS ALLIANCE,

Intervenor-Respondents.

Case No. 2:15-CV-043-SWS
(Lead Case)

ORDER ON MOTIONS FOR PRELIMINARY INJUNCTION

INDEPENDENT PETROLEUM ASSOCIATION OF AMERICA, and WESTERN ENERGY ALLIANCE,

Petitioners,

vs.

SALLY JEWELL, in her official capacity as Secretary of the United States Department of the Interior; and BUREAU OF LAND MANAGEMENT,

Respondents.

Case No. 2:15-CV-041-SWS

This matter comes before the Court on the motions for preliminary injunction filed by the various Petitioners and Intervenor-Petitioners: *Motion for Preliminary Injunction* of Petitioners Independent Petroleum Association of America ("IPAA") and Western Energy Alliance ("Alliance") (hereinafter "Industry Petitioners") (ECF No. 11 in 15-CV-041); *Wyoming and Colorado's Motion for Preliminary Injunction* (ECF No. 32),[1] in which the State of Utah has joined; *North Dakota's Motion for Preliminary Injunction* (ECF No. 52), in which the State of Utah has joined; and *Motion for Preliminary Injunction* filed by the Ute Indian Tribe (ECF No. 89). The Court, having considered the briefs and materials submitted in support of the motions and the oppositions thereto, including the Administrative Record, having heard witness testimony and oral argument of counsel, and being otherwise fully advised, FINDS and ORDERS as follows:

BACKGROUND

On March 26, 2015, the Bureau of Land Management ("BLM") issued the final version of its regulations applying to hydraulic fracturing on federal and Indian lands. 80 Fed. Reg. 16,128-16,222 (Mar. 26, 2015) ("Fracking Rule"). The Fracking Rule's focus is on three aspects of oil and gas development – wellbore construction, chemical disclosures, and water management (*id.* at 16,128 & 16,129) – each of which is subject to comprehensive regulations under existing federal and state law. The rule was scheduled to take effect on June 24, 2015. Following a hearing on the preliminary injunction motions, this Court postponed the effective date of the Fracking Rule pending the BLM's

[1] Unless otherwise noted, all filings referenced herein are from the docket in Case No. 15-CV-043, which has been designated the Lead Case in these consolidated cases. (*See* ECF No. 44.)

lodging of the Administrative Record ("A.R.") and the Court's ultimate ruling on the preliminary injunction motions. (*See* ECF No. 97.)

For the better part of the last decade, oil and natural gas production from domestic wells has increased steadily. Most of this increased production has come through the application of the well stimulation technique known as hydraulic fracturing (or "fracking") – the procedure by which oil and gas producers inject water, sand, and certain chemicals into tight-rock formations (typically shale) to create fissures in the rock and allow oil and gas to escape for collection in a well.[2] *See* 80 Fed. Reg. at 16,131 (estimating that ninety percent of new wells drilled on federal lands in 2013 were stimulated using hydraulic fracturing techniques). Hydraulic fracturing has been used to stimulate wells in the United States for at least 60 years – traditionally in conventional limestone and sandstone reservoirs – and meaningful attempts to use the technique to extract hydrocarbons from shale date back to at least the 1970s. *See* U.S. DEP'T OF ENERGY, *How is Shale Gas Produced?*[3] "More recently, hydraulic fracturing has been coupled with relatively new horizontal drilling technology in larger-scale operations that have allowed greatly increased access to shale oil and gas resources across the country, sometimes in areas that have not previously or recently experienced significant oil and gas development." 80 Fed. Reg. 16,128.

Purportedly in response to "public concern about whether fracturing can lead to or cause the contamination of underground water sources," and "increased calls for stronger

[2] The water and sand together typically make up 98 to 99 percent of the materials pumped into a well during a fracturing operation. 80 Fed. Reg. at 16,131.
[3] Available at http://energy.gov/sites/prod/files/2013/04/f0/how_is_shale_gas_produced.pdf.

regulation and safety protocols," the BLM undertook rulemaking to implement "additional regulatory effort and oversight" of this practice. *Id.* at 16,128 & 16,131. In May of 2012, the BLM issued proposed rules "to regulate hydraulic fracturing on public land and Indian land." 77 Fed. Reg. 27,691 (May 11, 2012). The stated focus of the rules was to: (i) provide disclosure to the public of chemicals used in hydraulic fracturing; (ii) strengthen regulations related to well-bore integrity; and (iii) address issues related to water produced during oil and gas operations. *Id.* The BLM reports it received approximately 177,000 public comments on the initial proposed rules "from individuals, Federal and state governments and agencies, interest groups, and industry representatives." 80 Fed. Reg. at 16,131.

Just over a year later, the BLM issued revised proposed rules, representing that the agency has "used the comments on [the May 11, 2012 draft proposed rules] to make improvements" to the agency's proposal. 78 Fed. Reg. 31,636 (May 24, 2013). Key changes included an expanded set of cement evaluation tools to help ensure protection and isolation of usable water zones and a revised process for how operators could report information about chemicals they claim to be protected as trade secrets. *Id.* at 31,636 & 31,637. The BLM also expressed its intent to "work with States and tribes to establish formal agreements that will leverage the strengths of partnerships, and reduce duplication of efforts for agencies and operators, particularly in implementing the revised proposed rule as consistently as possible with State or tribal regulations." *Id.* at 31,637. The BLM reportedly received over 1.35 million comments on the supplemental proposed rule. 80 Fed. Reg. at 16,131.

The BLM ultimately published its final rule regulating hydraulic fracturing on federal and Indian lands on March 26, 2015. The BLM determined the Fracking Rule fulfills the goals of the initial proposed rules: "[t]o ensure that wells are properly constructed to protect water supplies, to make certain that the fluids that flow back to the surface as a result of hydraulic fracturing operations are managed in an environmentally responsible way, and to provide public disclosure of the chemicals used in hydraulic fracturing fluids." *Id.* at 16,128.

The Industry Petitioners and the States of Wyoming and Colorado filed separate *Petitions for Review of Final Agency Action* on March 20th and 26th, 2015, respectively, seeking judicial review of the Fracking Rule pursuant to the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 et seq. The States of North Dakota and Utah, and the Ute Indian Tribe of the Uintah and Ouray Reservation, later intervened in the States' action, and the Court granted the parties' motion to consolidate the two separate actions. Petitioners and Intervenor-Petitioners request a preliminary injunction enjoining the BLM from applying the Fracking Rule pending the resolution of this litigation.

STANDARD OF REVIEW

To obtain a preliminary injunction, petitioners must show: "(1) a likelihood of success on the merits; (2) that they will [likely] suffer irreparable harm; (3) that the balance of equities tips in their favor; and (4) that the injunction is in the public interest." *Petrella v. Brownback*, 787 F.3d 1242, 1257 (10th Cir. 2015). *See also Glossip v. Gross*, 135 S. Ct. 2726, 2736 (2015) (quoting *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)). "[B]ecause a preliminary injunction is an extraordinary remedy, the

movant's right to relief must be clear and unequivocal." *Fundamentalist Church of Jesus Christ of Latter-Day Saints v. Horne*, 698 F.3d 1295, 1301 (10th Cir. 2012) (internal quotation marks and citation omitted).

> The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held. Given this limited purpose, and given the haste that is often necessary if those positions are to be preserved, a preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits. A party thus is not required to prove his case in full at a preliminary-injunction hearing, and the findings of fact and conclusions of law made by a court granting a preliminary injunction are not binding at trial on the merits.

Univ. of Texas v. Camenisch, 451 U.S. 390, 395 (1981) (citations omitted). *See also Attorney General of Okla. v. Tyson Foods, Inc.*, 565 F.3d 769, 776 (10th Cir. 2009); *RoDa Drilling Co. v. Siegal*, 552 F.3d 1203, 1208 (10th Cir. 2009) (primary goal of preliminary injunction is to preserve the pre-trial status quo). The grant or denial of a preliminary injunction lies within the sound discretion of the district court. *Amoco Oil Co. v. Rainbow Snow*, 748 F.2d 556, 557 (10th Cir. 1984).

DISCUSSION

Petitioners contend the Fracking Rule should be set aside because it is arbitrary, not in accordance with law, and in excess of the BLM's statutory jurisdiction and authority. *See* 5 U.S.C. § 706(2)(A) & (C).[4] The Ute Indian Tribe additionally contends the Fracking Rule is contrary to the Federal trust obligation to Indian tribes.

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[4] The APA's scope of review provisions relevant here are:

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

A. Likelihood of Success on the Merits

Judicial review of agency action is governed by the standards set forth in § 706 of the APA, requiring the reviewing court to engage in a "substantial inquiry." *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1573-74 (10th Cir. 1994) (citing *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971)). While an agency's decision is entitled to a "presumption of regularity," the presumption does not shield the agency from a "thorough, probing, in-depth review." *Id.* at 1574. "[T]he essential function of judicial review is a determination of (1) whether the agency acted within the scope of its authority, (2) whether the agency complied with prescribed procedures, and (3) whether the action is otherwise arbitrary, capricious or an abuse of discretion." *Id.* "Determination of whether the agency acted within the scope of its authority requires a delineation of the scope of the agency's authority and discretion, and consideration of whether on the facts, the agency's action can reasonably be said to be within that range." *Id.*

Under the arbitrary and capricious standard, a court must ascertain "whether the agency examined the relevant data and articulated a rational connection between the facts found and the decision made." *Id.* The agency must provide a reasoned basis for its

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* * *

(2) hold unlawful and set aside agency action, findings, and conclusions found to be--

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

* * *

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

* * *

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error."

5 U.S.C. § 706.

action and the action must be supported by the facts in the record. *Id.* at 1575. Agency action is arbitrary if not supported by "substantial evidence" in the administrative record. *Olenhouse*, 42 F.3d at 1575; *Pennaco Energy, Inc. v. U.S. Dep't of Interior*, 377 F.3d 1147, 1156 (10th Cir. 2004). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Pennaco Energy,* 377 F.3d at 1156 (quoting *Doyal v. Barnhart*, 331 F.3d 758, 760 (10th Cir. 2003)). "Because the arbitrary and capricious standard focuses on the rationality of an agency's decisionmaking process rather than on the rationality of the actual decision, '[i]t is well-established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself.'" *Olenhouse*, 42 F.3d at 1575 (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 50 (1983)). Courts will not accept post-hoc rationalizations for agency action. *Biodiversity Conservation Alliance v. Jiron*, 762 F.3d 1036, 1060 (10th Cir. 2014). "The agency itself must supply the evidence of that reasoned decisionmaking in the statement of basis and purpose mandated by the APA." *Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am. v. United States*, 735 F.2d 1525, 1531 (D.C. Cir. 1984). *See also Wyo. Outdoor Council v. U.S. Forest Serv.*, 165 F.3d 43, 53 (D.C. Cir. 1999) (rule's preamble serves as a source of evidence concerning contemporaneous agency intent).

1. Whether BLM Has Authority to Regulate Hydraulic Fracturing

"It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). "Regardless of how serious the problem an

administrative agency seeks to address, [] it may not exercise its authority 'in a manner that is inconsistent with the administrative structure that Congress enacted into law.'" *Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125 (2000) (quoting *ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 517 (1988)). Accordingly, an "essential function" of a court's review under the APA is to determine "whether an agency acted within the scope of its authority." *WildEarth Guardians v. U.S. Fish and Wildlife Serv.*, 784 F.3d 677, 683 (10th Cir. 2015).

Where a case involves an administrative agency's assertion of authority to regulate a particular activity pursuant to a statute that it administers, the court's analysis is governed by *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). *See Brown & Williamson*, 529 U.S. at 132.

> Under *Chevron*, a reviewing court must first ask whether Congress has directly spoken to the precise question at issue. If Congress has done so, the inquiry is at an end; the court must give effect to the unambiguously expressed intent of Congress. But if Congress has not specifically addressed the question, a reviewing court must respect the agency's construction of the statute so long as it is permissible. Such deference is justified because the responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones, and because of the agency's greater familiarity with the ever-changing facts and circumstances surrounding the subjects regulated[.]

Id. (internal quotation marks and citations omitted). This Court must first determine, then, whether Congress has directly addressed the issue of BLM's authority to regulate hydraulic fracturing.

The Supreme Court has provided the following guidance for determining whether Congress has specifically addressed the question at issue:

> In determining whether Congress has specifically addressed the question at issue, a reviewing court should not confine itself to examining a particular statutory provision in isolation. The meaning—or ambiguity—of certain words or phrases may only become evident when placed in context. *See Brown v. Gardner*, 513 U.S. 115, 118, 115 S. Ct. 552, 130 L. Ed. 2d 462 (1994) ("Ambiguity is a creature not of definitional possibilities but of statutory context"). It is a "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809, 109 S. Ct. 1500, 103 L. Ed. 2d 891 (1989). A court must therefore interpret the statute "as a symmetrical and coherent regulatory scheme," *Gustafson v. Alloyd Co.*, 513 U.S. 561, 569, 115 S. Ct. 1061, 131 L. Ed. 2d 1 (1995), and "fit, if possible, all parts into an harmonious whole," *FTC v. Mandel Brothers, Inc.*, 359 U.S. 385, 389, 79 S. Ct. 818, 3 L. Ed. 2d 893 (1959). Similarly, the meaning of one statute may be affected by other Acts, particularly where Congress has spoken subsequently and more specifically to the topic at hand. *See United States v. Estate of Romani*, 523 U.S. 517, 530–531, 118 S. Ct. 1478, 140 L. Ed. 2d 710 (1998); *United States v. Fausto*, 484 U.S. 439, 453, 108 S. Ct. 668, 98 L. Ed. 2d 830 (1988). In addition, we must be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency. Cf. *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*, 512 U.S. 218, 231, 114 S. Ct. 2223, 129 L. Ed. 2d 182 (1994).

Id. at 132-33. Guided by the foregoing principles, the Court finds that Congress has directly spoken to the issue and precluded federal agency authority to regulate hydraulic fracturing not involving the use of diesel fuels.

Despite having previously disavowed authority to regulate hydraulic fracturing,[5] the BLM now asserts authority to promulgate the Fracking Rule under various statutes: the Federal Land Policy and Management Act of 1976 ("FLPMA"),[6] 43 U.S.C. §§ 1701-

[5] *See Center for Biological Diversity v. BLM*, 937 F. Supp. 2d 1140 (N.D. Cal. 2013) (holding BLM's failure to consider environmental impact of fracking on leased lands violated "hard look" obligations under the National Environmental Policy Act ("NEPA"); but lease sales did not violate the MLA).

[6] FLPMA was not initially asserted as a basis for BLM's authority to promulgate the Fracking Rule; FLPMA was added to the authorities section in the supplemental rules issued in May of 2013. 78 Fed. Reg. at 31,646.

1787; the Mineral Leasing Act of 1920 ("MLA"), 30 U.S.C. §§ 181-287; the 1930 Right-of-Way Leasing Act, *id.* §§ 301-306; the Mineral Leasing Act for Acquired Lands, *id.* §§ 351-360; the Federal Oil and Gas Royalty Management Act of 1982, *id.* §§ 1701-1759; the Indian Mineral Leasing Act of 1938 ("IMLA"), 25 U.S.C. §§ 396a-396g; and the Indian Mineral Development Act of 1982 ("IMDA"), *id.* §§ 2101-2108. 80 Fed. Reg. at 16,217. The State Petitioners and Ute Indian Tribe argue none of these statutes authorize the BLM to regulate hydraulic fracturing activities.

The MLA creates a program for leasing mineral deposits on federal lands.[7] Congress authorized the Secretary "to prescribe necessary and proper rules and regulations and to do any and all things necessary to *carry out and accomplish the purposes* of the [the MLA]." 30 U.S.C. § 189 (emphasis added). "The purpose of the Act is to promote the orderly development of oil and gas deposits in publicly owned lands of the United States through private enterprise." *Geosearch, Inc. v. Andrus*, 508 F. Supp. 839, 842 (D. Wyo. 1981) (citing *Harvey v. Udall*, 384 F.2d 883 (10th Cir. 1967)). *See also Arkla Exploration Co. v. Texas Oil & Gas Corp.*, 734 F.2d 347, 358 (8th Cir. 1984) ("broad purpose of the MLA was to provide incentives to explore new, unproven oil and gas areas through noncompetitive leasing, while assuring through competitive bidding adequate compensation to the government for leasing in producing areas"). Specifically for oil and gas leasing, the MLA, *inter alia,* establishes terms of the lease and royalty and rental amounts (30 U.S.C. §§ 223, 226(d)&(e)), requires the lessee to

[7] The MLA applies to deposits of coal, phosphate, sodium, potassium, oil, oil shale, gilsonite, or gas, and virtually all lands containing such deposits owned by the United States. 30 U.S.C. § 181.

"use all reasonable precautions to prevent waste of oil or gas developed in the land" (*id.* § 225), authorizes the Secretary of Interior to lease all public lands subject to the Act for oil and gas development (*id.* § 226(a)),[8] directs the Secretary to regulate *surface*-disturbing activities (*id.* § 226(g)), and allows for the establishment of cooperative development plans to conserve oil and gas resources (*id.* § 226(m)).

In the Right-of Way Leasing Act, Congress expanded the Secretary's leasing authority to allow leasing of federally owned minerals beneath railroads and other rights of way. 30 U.S.C. § 301. Like the MLA, the Right-of-Way Leasing Act grants the Secretary general rulemaking authority to carry out the Act. *Id.* § 306. The Mineral Leasing Act for Acquired Lands again extended the provisions of the MLA, including the Secretary's leasing authority, to apply to minerals beneath lands coming into federal ownership and not already subject to the MLA. 30 U.S.C. §§ 351-52. Although, like the MLA, the Act grants the Secretary rulemaking authority to carry out the purposes of the Act, *id.* § 359, the Act simply expanded the BLM's authority to issue and manage leases for the development of specified minerals, including oil and gas. *See Watt v. Alaska*, 451 U.S. 259, 269 (1981). The Fracking Rule's authority section also cites the general rulemaking authority granted by the Federal Oil and Gas Royalty Management Act of 1982 ("FOGRMA"). 30 U.S.C. § 1751. FOGRMA, however, simply creates a thorough system for collecting and accounting for federal mineral royalties. *See Shell Oil Co. v. Babbitt*, 125 F.3d 172, 174 (3rd Cir. 1997). The general rulemaking authority granted by

[8] The MLA expressly excepts wilderness lands from oil and gas leasing. 30 U.S.C. § 226-3.

these ancillary mineral leasing statutes, which is cabined by the purposes of the Acts, cannot be interpreted as authority for comprehensive regulation of hydraulic fracturing.

The Secretary also invokes the statutory authority granted to the BLM by the Indian Mineral Leasing Act and the Indian Mineral Development Act as a basis for the Fracking Rule.[9] These statutes, generally, grant the Secretary broad regulatory jurisdiction over oil and gas development and operations on Indian lands. 25 U.S.C. §§ 396d, 2107. However, neither the IMLA nor the IMDA delegates any more specific authority over oil and gas drilling operations than the MLA, nor has BLM promulgated separate regulations for operations on Indian lands. Rather, existing Bureau of Indian Affairs ("BIA") regulations incorporate 43 C.F.R. Part 3160 (Onshore Oil and Gas Operations – General) and require BLM to oversee implementation of those regulations. 25 C.F.R. §§ 211.4, 225.4. The Fracking Rule amends and revises the Part 3160 regulations. *See* 80 Fed. Reg. at 16, 217.

BLM claims the Fracking Rule simply supplements existing requirements for oil and gas operations set out in 43 C.F.R. 3162.3-1 and Onshore Oil and Gas Orders 1, 2 and 7. 80 Fed. Reg. at 16,129. BLM asserts its decades-old "cradle-to-grave" regulations governing oil and gas operations, promulgated pursuant to its MLA § 189 authority, already include regulation of hydraulic fracturing, albeit minimally "because the practice was not extensive (or similar to present-day design) when the regulations were promulgated." (*Resp't Br. in Opp'n to Wyoming and Colorado's Mot. for Prelim.*

[9] "The IMLA aims to provide Indian tribes with a profitable source of revenue and to foster tribal self-determination by giving Indians a greater say in the use and disposition of the resources on their lands." *United States v. Navajo Nation*, 537 U.S. 488 (2003).

Inj. at 11) (ECF No. 68). Historically, however, BLM's only regulation addressing hydraulic fracturing worked to prevent any additional surface disturbance and impose reporting requirements and did not regulate the fracturing process itself.[10] *See* 43 C.F.R. § 3162.3-2(b) ("Unless additional surface disturbance is involved . . . prior approval is not required for routine fracturing or acidizing jobs . . . ; however, a subsequent report on these operations must be filed . . . ."). This requirement makes sense because the MLA expressly authorizes regulation of "all *surface*-disturbing activities . . . in the interest of conservation of *surface* resources." 30 U.S.C. § 226(g) (emphasis added). The BLM cites to no other existing regulation addressing hydraulic fracturing. Neither does the BLM cite any specific provision of the mineral leasing statutes authorizing regulation of this underground activity or regulation for the purpose of guarding against any incidental, underground environmental effects. Indeed, the BLM has previously taken the position, up until formulation of the Fracking Rule, that it lacked the authority or jurisdiction to regulate hydraulic fracturing. *See Center for Biological Diversity v. BLM*, 937 F. Supp. 2d 1140, 1156 (N.D. Cal. 2013).

> When an agency claims to discover in a long-extant statute an unheralded power to regulate "a significant portion of the American economy," [the Court] typically greet[s] its announcement with a measure of skepticism. [The Court] expect[s] Congress to speak clearly if it wishes to assign to an agency decisions of vast "economic and political significance."

Utility Air Regulatory Group v. EPA, 134 S. Ct. 2427, 2444 (2014) (quoting *Brown & Williamson*, 529 U.S. at 159, 160).

[10] In its opposition brief to the Industry Petitioners' preliminary injunction motion, the Government admits, "Existing BLM regulations included some limited provisions that mentioned, but did not attempt to regulate hydraulic fracturing, [] which is now typically coupled with directional and horizontal drilling that can extend for miles from the drill site." (*Resp't Br. in Opp'n to Pet'rs' Mot. for Prelim. Inj.* at 27) (ECF No. 20 in 15-CV-041).

In 1976, Congress enacted the Federal Land Policy and Management Act to provide "a comprehensive statement of congressional policies concerning the management of the public lands" owned by the United States and administered by the BLM. *Rocky Mtn. Oil and Gas Ass'n v. Watt*, 696 F.2d 734, 737 (10th Cir. 1982). As with the MLA, Congress authorized the Secretary of the Interior to "promulgate rules and regulations *to carry out the purposes of this Act* and of other laws applicable to the public lands[.]" 43 U.S.C. § 1740 (emphasis added). FLPMA charges the BLM with managing public lands on the basis of "multiple use and sustained yield" of their various resources – that is, utilizing the resources "in the combination that will best meet the present and future needs of the American people . . . [taking] into account the long-term needs of future generations for renewable and nonrenewable resources, including, but not limited to, recreation, range, timber, minerals, watershed, wildlife and fish, and natural scenic, scientific and historical values[,]" and "achievement and maintenance in perpetuity of a high-level annual or regular periodic output of the various renewable resources of the public lands consistent with multiple use." *Id.* §§ 1701(a)(7), 1702(c) & (h).

"'Multiple use management' is a deceptively simple term that describes the enormously complicated task of striking a balance among the many competing uses to which land can be put[.]" *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 58 (2004). The public lands are to be managed in a manner "that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values," while at the same time recognize "the Nation's need for domestic sources of minerals, food, timber, and fiber from the public lands[.]" 43 U.S.C. §

1701(a)(8) & (12). FLPMA "represents an attempt by Congress to balance the use of the public lands by interests as diverse as the lands themselves." *Rocky Mtn. Oil and Gas Ass'n*, 696 F.2d at 738. In pursuit of this general purpose, Congress authorized the BLM to "take any action necessary to prevent unnecessary or undue degradation of the lands" and to promulgate regulations necessary to achieve FLPMA's goals. 43 U.S.C. §§ 1732(b), 1733(a), and 1740.

Although the Secretary asserts FLPMA delegates to BLM broad authority and discretion to manage and regulate activities on public lands, the BLM has not heretofore asserted FLPMA as providing it with authority to regulate oil and gas drilling operations pursuant to 43 C.F.R. Part 3160.[11] Nothing in FLPMA provides BLM with specific authority to regulate hydraulic fracturing or underground injections of any kind; rather, FLPMA primarily establishes congressional policy that the Secretary manage the public lands under principles of multiple use and sustained yield. At its core, FLPMA is a land use planning statute. *See* 43 U.S.C. § 1712; *Rocky Mtn. Oil and Gas Ass'n*, 696 F.2d at 739 ("FLPMA contains comprehensive inventorying and land use planning provisions to ensure that the 'proper multiple use mix of retained public lands' be achieved"); *S. Utah Wilderness Alliance*, 542 U.S. at 57 (FLPMA establishes a dual regime of inventory and planning); *Klamath Siskiyou Wildlands Center v. Boody*, 468 F.3d 549, 555 (9th Cir. 2006) (FLPMA establishes requirements for land use planning on public land). In the

[11] *See* 43 C.F.R. § 3160.0-3 (1983); *Onshore Oil and Gas Order No. 2, Drilling Operations*, 53 Fed. Reg. 46798-01, at 46804 (1988). Although Onshore Order No. 7 governing disposal of produced water cites to FLPMA's enforcement provision, 43 U.S.C. § 1733, it did not amend the text of Part 3160's authority section to include reference to FLPMA or cite to FLPMA's general rule-making authority in § 1740. 58 Fed. Reg 47354-01, at 47361 (1993).

context of oil and gas operations, FLPMA generally comes into play "[a]t the earliest and broadest level of decision-making" when a land use plan is developed identifying allowable uses for a particular area. *Pennaco Energy, Inc. v. U.S. Dep't of Interior*, 377 F.3d 1147, 1151 (10th Cir. 2004). If oil and gas development is allowed, BLM first determines whether the issuance of a particular oil and gas lease conforms to the land-use plan. *Id.* (citing 43 C.F.R. § 1610.5-3(a)). The lessee must then obtain BLM approval of an Application for Permit to Drill ("APD") before commencing any "drilling operations" or "surface disturbance preliminary thereto" and comply with other provisions of Part 3160.[12] *See id.*; 43 C.F.R. 3162.3-1(c).

In the meantime, and prior to the enactment of FLPMA, Congress had enacted the Safe Drinking Water Act ("SDWA"). Pub. L. No. 93-523, 88 Stat. 1660 (1974) (codified as amended at 42 U.S.C. §§ 300f through 300j-26). Part C of the SDWA establishes a regulatory program specifically for the protection of underground sources of drinking water. 42 U.S.C. §§ 300h through 300h-8. This program requires the Environmental Protection Agency ("EPA") to promulgate regulations that set forth minimum requirements for effective State underground injection control ("UIC") programs "to prevent underground injection which endangers drinking water sources."[13] *Id.* §

[12] BLM's administration of oil and gas leases on federal land is also subject to the National Environmental Policy Act ("NEPA"), "which requires federal agencies to examine and disclose the environmental impacts of their proposed actions." *San Juan Citizens Alliance v. Stiles*, 654 F.3d 1038, 1042 (10th Cir. 2011) (internal quotation marks and citation omitted). Thus, oil and gas APD's not otherwise exempted must undergo the NEPA environmental review process. *See Western Energy Alliance v. Salazar*, No. 10-CV-237-F, 2011 WL 3738240, at *3 (D. Wyo. Aug. 12, 2011) (unpublished). Regulation of the lease and APD process is outlined in 43 C.F.R. § 3101.1-2, which defines what reasonable measures BLM can require.

[13] "A state must submit to the EPA a proposed UIC program that meets these minimum requirements, and receive EPA approval, in order to obtain primary regulatory and enforcement responsibility for underground injection activities within that state. § 300h–1. The state retains primary responsibility until EPA determines, by rule, that

300h(b)(1). Part C prohibits "any underground injection" without a permit and mandates that a UIC program include "inspection, monitoring, recordkeeping, and reporting requirements[.]" *Id.* § 300h(b)(1)(A) & (C). The SDWA defined "underground injection" as "the subsurface emplacement of fluids by well injection." *Id.* § 300h(d)(1). *See Legal Envtl. Assistance Found., Inc. v. EPA*, 118 F.3d 1467, 1470 (11th Cir. 1997) ("*LEAF*").

For two decades after the enactment of the SDWA, the EPA took the position that hydraulic fracturing was not subject to the UIC program because that technique for enhancing the recovery of natural gas from underground formations did not, by its interpretation, fall within the *regulatory* definition of "underground injection." *See LEAF*, 118 F.3d at 1471. Responding to a challenge of Alabama's UIC program because it did not regulate hydraulic fracturing activities, the EPA stated it interpreted the definition of "underground injection" as encompassing only those wells whose "principal function" is the underground emplacement of fluids. The EPA had determined that the principal function of gas production wells which are also used for hydraulic fracturing is gas production, not the underground emplacement of fluids. *Id.* The Eleventh Circuit Court of Appeals rejected the EPA's position. Applying the first step in the *Chevron* framework, the *LEAF* court concluded the unambiguous language of the statute made clear that Congress intended for the EPA to regulate *all* underground injection under the UIC programs, and the process of hydraulic fracturing obviously fell within the plain

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the state UIC program no longer meets the minimum requirements established under the SDWA. § 300h–1(b)(3)." *Legal Envtl. Assistance Found., Inc. v. EPA*, 118 F.3d 1467, 1469-70 (11th Cir. 1997). The SDWA also contains provisions allowing an Indian Tribe to assume primary enforcement responsibility for UIC. § 300h-1(e).

meaning of the *statutory* definition of "underground injection." *Id.* at 1474-75. Thus, pursuant to the SDWA's cooperative federalism system for regulating underground injection, including hydraulic fracturing, the States and Indian Tribes could assume primary enforcement responsibility for UIC programs, subject to EPA approval and oversight. *See* 42 U.S.C. § 300h-1(b), (c) & (e).

Such was the state of the law when Congress enacted the Energy Policy Act of 2005 ("EPAct"), a comprehensive energy bill addressing a wide range of domestic energy resources, with the purpose of ensuring jobs for the future "with secure, affordable, and reliable energy." Pub. L. No. 109-58, 119 Stat. 594 (2005). The EPAct was intended, at least in part, to expedite oil and gas development within the United States. *See Western Energy Alliance v. Salazar*, No. 10-CV-237-F, 2011 WL 3738240, at *2 (D. Wyo. Aug. 12, 2011) (unpublished). Recognizing the EPA's authority to regulate hydraulic fracturing under the SDWA, the EPAct included an amendment to the SDWA, expressly and unambiguously revising the definition of "underground injection" to *exclude* "the underground injection of fluids or propping agents (other than diesel fuels) pursuant to hydraulic fracturing operations related to oil, gas, or geothermal production activities." EPAct Sec. 322 (codified at 42 U.S.C. § 300h(d)(1)(B)(ii)). There can be no question that Congress intended to remove hydraulic fracturing operations (not involving diesel fuels) from EPA regulation under the SDWA's UIC program.

The issue presented here is whether the EPAct's explicit removal of the EPA's regulatory authority over non-diesel hydraulic fracturing likewise precludes the BLM from regulating that activity, thereby removing fracking from the realm of federal

regulation.[14] Although the BLM does not claim authority for its Fracking Rule under the SDWA, a statute administered by the EPA, it defies common sense to interpret the more general authority granted by the MLA and FLPMA as providing the BLM authority to regulate fracking when Congress has directly spoken to the issue in the EPAct. The SDWA specifically addresses protection of underground sources of drinking water through regulation of "underground injection," and Congressional intent as expressed in the EPAct indicates clearly that hydraulic fracturing is not subject to federal regulation unless it involves the use of diesel fuels. "[T]he Executive Branch is not permitted to administer [an] Act in a manner that is inconsistent with the administrative structure that Congress enacted into law." *ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 517 (1988). If agency regulation is prohibited by a statute specifically directed at a particular activity, it cannot be reasonably concluded that Congress intended regulation of the same activity would be authorized under a more general statute administered by a different agency.[15] "[I]t is a commonplace of statutory construction that the specific governs the general[.]" *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992). *See also In re Gledhill*, 76 F.3d 1070, 1078 (10th Cir. 1996) ("a court should not construe a general statute to eviscerate a statute of specific effect").

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[14] *See* Hannah Wiseman, *Untested Waters: The Rise of Hydraulic Fracturing in Oil and Gas Production and the Need to Revisit Regulation*, 20 Fordham Envtl. L. Rev. 115, 145 (2009) (EPAct "conclusively withdrew fracing (sic) from the realm of federal regulation," leaving any regulatory control to the states).

[15] "[A]gencies must operate within the bounds of reasonable interpretation." *Michigan v. EPA*, 135 S.Ct. 2699, 2707 (2015). The BLM's "interpretation is also unreasonable because it would bring about a [] transformative expansion in [BLM's] regulatory authority without clear congressional authorization." *Utility Air Regulatory Group*, 134 S. Ct. at 2444.

In determining whether Congress has spoken directly to the BLM's authority to regulate hydraulic fracturing under the MLA or FLPMA, this Court cannot ignore the implication of Congress' fracking-specific legislation in the SDWA and EPAct.

> The "classic judicial task of reconciling many laws enacted over time, and getting them to 'make sense' in combination, necessarily assumes that the implications of a statute may be altered by the implications of a later statute." *United States v. Fausto*, 484 U.S., at 453, 108 S. Ct. 668. This is particularly so where the scope of the earlier statute is broad but the subsequent statutes more specifically address the topic at hand. As [the Supreme Court] recognized [] in *United States v. Estate of Romani*, "a specific policy embodied in a later federal statute should control our construction of the [earlier] statute, even though it ha[s] not been expressly amended." 523 U.S., at 530-531, 118 S. Ct. 1478.

Brown & Williamson, 529 U.S. at 143. The BLM argues that because no provision in the SDWA or EPAct expressly prohibits regulation of underground injection under any other federal statute, those Acts do not displace its authority to regulate the activity under FLPMA and the MLA. However, a court "[does] not presume a delegation of power simply from the absence of an express withholding of power[.]" *Chamber of Commerce of U.S. v. NLRB*, 721 F.3d 152, 160 (4th Cir. 2013).[16] At the time the EPAct was enacted, the BLM had not asserted authority to regulate the fracking process itself and a Circuit Court of Appeals had determined Congress intended the activity to be regulated by the EPA under the SDWA. "Congress does not regulate in a vacuum." *Passamaquoddy Tribe v. State of Me.*, 75 F.3d 784, 789 (1st Cir. 1996). "The chief objective of statutory interpretation is to give effect to the legislative will. To achieve

[16] *See also Am. Bar Ass'n v. FTC*, 430 F.3d 457, 468 (D.C. Cir. 2005) ("Plainly, if we were to *presume* a delegation of power from the absence of an express withholding of such power, agencies would enjoy virtually limitless hegemony . . . .") (internal quotation marks and citation omitted); *Sierra Club v. EPA*, 311 F.3d 853, 861 (7th Cir. 2002) ("Courts will not presume a delegation of power based solely on the fact that there is not an express withholding of such power.") (internal quotation marks and citation omitted).

this objective a court must take into account the tacit assumptions that underlie a legislative enactment, including not only general policies but also preexisting statutory provisions." *Id.* at 788-89.

The BLM further argues that interpreting the EPAct as precluding all federal regulation of hydraulic fracturing would leave a regulatory gap on federal and Indian lands where the relevant States or Tribes are not sufficiently regulating the activity under state or tribal law.[17] Even so, "no matter how important, conspicuous, and controversial the issue, . . . an administrative agency's power to regulate in the public interest must always be grounded in a valid grant of authority from Congress." *Brown & Williamson*, 529 U.S. at 161. And even if the BLM's interpretation was entitled to any deference in these circumstances, *Chevron* "is not a wand by which courts can turn an unlawful frog into a legitimate prince." *Associated Gas Distrib. v. F.E.R.C.*, 824 F.2d 981, 1001 (D.C. Cir. 1987). It seems the BLM is attempting to do an end-run around the EPAct; however, regulation of an activity must be by Congressional authority, not administrative fiat. The Court finds the intent of Congress is clear, so that is the end of the matter; "for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-43.

2. Whether the Fracking Rule is Arbitrary, Capricious, an Abuse of Discretion or Otherwise Not in Accordance with Law

Even if the BLM had the authority to promulgate the Fracking Rule, the Court is troubled by the paucity of evidentiary support for the Rule. Agency action must be the

[17] From FY 2010 to FY 2013, 99.3% of the total well completions on federal and Indian lands nationwide occurred in states with existing regulations governing hydraulic fracturing operations. 80 Fed. Reg. at 16,187. *See also* DOI PS 0066530-31; DOI PS 0178935-37.

product of "reasoned decisionmaking" and supported by facts in the record. *Olenhouse*, 42 F.3d at 1575; *see also Michigan v. EPA*, 135 S. Ct. 2699, 2706 (2015). In the absence of a "rational justification" for the agency's action, the "APA's arbitrary and capricious standard" requires that the action be set aside. *Shays v. Federal Election Comm'n*, 414 F.3d 76, 97 (D.C. Cir. 2005). The Fracking Rule's preamble references the "*potential* impacts that [fracking] may have on water quality and water consumption" as justification for federal regulation. 80 Fed. Reg. at 16,131 (emphasis added). While "public concern" and "potential impacts" certainly warrant further study and investigation, such speculation, in itself, cannot justify comprehensive rulemaking. There must be a rational connection between the facts found and the decision made. *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43. The BLM has neither substantiated the existence of a problem this rule is meant to address, identified a gap in existing regulations the final rule will fill, nor described how the final rule will achieve its stated objectives. Rather, the Fracking Rule seems a remedy in search of harm.

The BLM asserts the Fracking Rule is necessary to address concerns raised by the increased technological complexity and expansion of hydraulic fracturing.[18] 80 Fed. Reg. 16,128. Specifically, the final rule raises the risk of groundwater contamination as a primary concern motivating many of its provisions. The rule references and discusses

[18] The BLM suggests that the "increased complexity" of fracking and "larger-scale operations" allowing significantly deeper wells covering a larger horizontal area than operations of the past, in itself, justifies this comprehensive regulation. *See* 80 Fed. Reg. 16,128. However, the BLM does not explain why this is necessarily so; rather, the agency simply links the advanced technology to increased production, which in turn has increased public awareness and calls for stronger regulation. Such reasoning does not account for evidence in the record documenting the history of large-scale hydraulic fracturing operations, publicly available academic discussions of complex hydraulic fracturing operations dating back decades, and federal officials' own admissions. *See* DOI AR 0001188, 0002408, 0025662, 0027608, 0056272.

two reports by the National Academy of Sciences issued in 2011 and 2012 identifying "three *possible* mechanisms for fluid migration into shallow drinking-water aquifers that could help explain the increased methane concentrations observed in water wells that existed around shale gas wells in Pennsylvania." *Id.* at 16,194 (emphasis added). The reports indicated that of the three mechanisms, the first (movement of gas-rich solutions within the shale formations up into shallow drinking-water aquifers) was the "least likely possibility," and the third (migration of gases through new or enlarging of existing fractures above the shale formation) is "unlikely." *Id.* The second possible mechanism (contamination from leaky gas-well casings) is the "most likely." *Id.* From this, the BLM determined that "assurances of the strength of the casing are appropriate" but does not discuss how its existing regulations governing well casing are insufficient. *Id.* at 16,193.[19]

The BLM also cited "*potential* impacts" identified by the EPA in a 2014 report, which itself admitted the national study being undertaken at the time "to understand the potential impacts of hydraulic fracturing on drinking water resources" would enhance its scientific knowledge.[20] *Id.* at 16,194. Also within that report, the EPA noted a core

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[19] In the opinion of a BLM Senior Petroleum Engineer in the Vernal, Utah Field Office, with 28 years experience working with oil and gas in both geology and engineering, the Fracking Rule will provide "no incremental protection to [underground sources of drinking water] or useable water zones over [BLM's] present regulations and policies." DOI AR 0026853.

[20] The EPA released its draft assessment of the potential impacts to drinking water resources from fracking in June 2015. U.S. Environmental Protection Agency, *Assessment of the Potential Impacts of Hydraulic Fracturing for Oil and Gas on Drinking Water Resources,* http://www2.epa.gov/hfstudy. The "major findings" of the study, as stated in the Executive Summary, are as follows:

> We did not find evidence that these mechanisms have led to widespread, systemic impacts on drinking water resources in the United States. Of the potential mechanisms identified in this report, we found specific instances where one or more mechanisms led to impacts on drinking water resources, including contamination of drinking water wells. The number of identified cases, however, was small compared to the number of hydraulically fractured wells.

element of the SDWA's UIC program is setting requirements for proper well siting, construction, and operation to minimize risks to underground sources of drinking water and pointed to its own UIC permitting guidance specific to oil and gas hydraulic fracturing activities using diesel fuels. "Thus, states and tribes responsible for issuing permits and/or updating regulations for hydraulic fracturing will find the recommendations useful in improving the protection of underground sources of drinking water and public health wherever hydraulic fracturing occurs." U.S. Environmental Protection Agency, *Natural Gas Extraction – Hydraulic Fracturing: Providing Regulatory Clarity and Protections against Known Risks*, http://www2.epa.gov/hydraulicfracturing#providing.

The final rule's preamble briefly discusses prevention of "frack hits," "which are unplanned surges of pressurized fluids from one [oil and gas] wellbore into another [oil and gas] wellbore." 80 Fed. Reg. at 16,193. "During these instances of downhole inter-well communication, . . . the pumped-in hydraulic fracturing fluid *may* flow into and up through a nearby well, causing a blow out and spill." *Id.* at 16,194 (emphasis added). Although frack hits have resulted in surface spills and caused the loss of recoverable oil and gas, "they have not yet been shown to be a source of contamination of usable water." *Id.* at 16,193. So, while frack hits may very well be a concern the BLM should address, they do not appear to be a valid justification for the Fracking Rule, particularly where they were not even raised as an issue in the supplemental rule. *See* 78 Fed. Reg. 31,636; 80 Fed. Reg. 16,149; DOI AR 0080262. Finally, the BLM also references public concern

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Id., Executive Summary at 6.

about "whether the chemicals used in fracturing pose risks to human health, and whether there is adequate management of well integrity and the fluids that return to the surface during and after fracturing operations." 80 Fed. Reg. 16,128.

The BLM does not appear to have given any consideration to whether these concerns or potential impacts are substantiated by fact or to the evidence contrary to its conclusion that there is a need for "additional regulatory effort and oversight." *Id.* at 16,128. "In determining whether [an agency's] decision is supported by substantial evidence, the court must also consider that evidence which fairly detracts from the [agency's] decision." *Hall v. U.S. Dep't of Labor*, 476 F.3d 847, 854 (10th Cir. 2007). The record reflects that both experts and government regulators have repeatedly acknowledged a lack of evidence linking the hydraulic fracturing process to groundwater contamination.[21] The BLM fails to reference a single confirmed case of the hydraulic fracturing process contaminating groundwater. While the Court agrees the BLM need not wait for "a catastrophe" to take action for the protection of public resources from risks,[22] there must be substantial evidence to support the existence of a risk. The Court sees nothing in the BLM's official explanation (or the record) that satisfies the APA's arbitrary and capricious standards.

While recognizing that many states have regulations in place addressing hydraulic fracturing operations, the BLM determined that the state requirements are not uniform and do not necessarily fulfill BLM's statutory obligations, and further reasoned that

[21] *See* DOI AR 0008326, 0026855, 0027636, 0056216-22, 0056627-29, 0065277.
[22] *See Resp't Br. in Opp'n to Industry Pet'rs' Mot. for Prelim. Inj.* at 29.

"[t]he provisions in this final rule provide for the BLM's consistent oversight and establish a baseline for environmental protection across all public and Indian lands undergoing hydraulic fracturing." 80 Fed. Reg. at 16,130. *See also id.* at 16,133 and 16,154. While the record contains some comparative analyses regarding how the state regulations differ from one another and from the Fracking Rule (*see* DOI AR 0004772, 0007893-94, 0045522-27, 0100575-80), there is no discussion of how any existing state regulations are inadequate to protect against the perceived risks to groundwater. The BLM fails to identify any states that do not have regulations adequate to achieve the objectives of the Fracking Rule, nor does the BLM cite evidence that its rule will be any more effective in practice than existing state regulations protecting water and other environmental values. Indeed, the record supports the contrary.[23] The Court finds a desire for uniformity, in itself, is insufficient.[24] Because the BLM has failed to "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts and the choice made," the Fracking Rule is likely arbitrary, requiring that it be set aside. *Sorenson Commc'ns, Inc. v. FCC*, 567 F.3d 1215, 1220-21 (10th Cir. 2009) (quoting *Motor Vehicle Mfrs. Ass'n of U.S.*, 463 U.S. at 43) (internal quotation marks omitted).

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[23] *See* DOI AR 0055854 (letter from Wyoming Congressional delegation referencing Secretary of the Interior Sally Jewell's June 2013 testimony before the Senate Energy and Natural Resources Committee that she could not identify any state currently regulating hydraulic fracturing which was not doing a sufficient job); DOI AR 0001723, 0007036, 0009170, 0014055, 0026852, 0027636, 0052532-33, 0094637.

[24] *See* DOI AR 0045527 (*The State of State Shale Gas Regulation – Executive Summary*, May 2013) ("Heterogeneity alone is not a bad thing, and is not necessarily surprising. But whether it is justified – in an economic and environmental sense – depends on whether it is rooted in underlying differences among states that affect the costs and benefits of policy choices (for example, differences in hydrology, geology, and demographics).").

The Industry Petitioners further challenge particular aspects of the Fracking Rule as being arbitrary and capricious. Given the Court's preliminary findings above, which are dispositive on the validity of the final rule as a whole, the Court need not address each of the specific issues raised by Petitioners. Nevertheless, the Court will briefly address those issues it finds most problematic.

a. Mechanical Integrity Testing

The final rule requires that before hydraulic fracturing operations begin, the operator must perform a successful mechanical integrity test ("MIT") of any casing or fracturing string through which the operation will be conducted. *See* 43 C.F.R. § 3162.3-3(f). BLM's Onshore Oil and Gas Order No. 2 already requires operators to conduct casing integrity tests to ensure that all casing can withstand the pressures to which the wellbore will be subject. *See Onshore Oil and Gas Order No. 2, Drilling Operations* § III.B.1.h & i, 53 Fed. Reg. 46,798-01, at 46,809 (Nov. 18. 1988). "The MIT required by final section 3162.3-3(f) is not equivalent to either the casing pressure test required by Onshore Order 2, section III.B.1.h., or the casing shoe pressure test as currently required by Onshore Order 2, section III.B.1.i." 80 Fed. Reg. at 16,160. Aside from brief reference to consistency with industry guidance and many state regulations (without citation), the BLM offers no explanation for modifying the pressure test requirement.

Additionally, the Fracking Rule's new MIT requirement applies not only to vertical casing that is designed to protect usable water, but also to horizontal laterals. This requirement was a change from the supplemental proposed rule which required an MIT on only vertical sections of the wellbore. *See* 80 Fed. Reg. at 16,159. The BLM

briefly explains that the purpose of this change is to ensure "that the entire length of casing or fracturing string, not just the vertical section, prior to the perforations or open-hole section of the well, is able to withstand the applied pressure and contain the hydraulic fracturing fluids." *Id.* There is no further discussion or explanation of the reason(s) why this additional testing of the lateral is important. This is particularly troubling since this change was made in the final rule without opportunity for the public to comment on the viability or costs of such a requirement.[25] It does not appear that any comments were submitted addressing the initial requirement to only perform an MIT on vertical sections of the wellbore. *See id.* at 16,159-161.

"An agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed and not casually ignored, and if an agency glosses over or swerves from prior precedent without discussion it may cross the line from the tolerably terse to the intolerably mute." *Grace Petroleum Corp. v. F.E.R.C.*, 815 F.2d 589, 591 (10th Cir. 1987) (quoting *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970)). And, while an agency is permitted to make changes in the proposed rule after the comment period without a new round of commentary, the changes must be "in character with the original scheme and be foreshadowed in proposals and comments advanced during the rulemaking." *Beirne v. Sec'y of Dep't of Agric.*, 645 F.2d 862, 865 (10th Cir. 1981) (internal quotation and citation omitted). The record does not reflect the BLM fulfilled these principles.

[25] Although testing the lateral wellbore is an admittedly new requirement, and the Fracking Rule's MIT test is "not equivalent" to current casing pressure test requirements, the BLM inexplicably assigns no incremental costs to this requirement, suggesting only that industry guidance and state regulations already require such testing. 80 Fed. Reg. at 16,198.

b. "Usable Water" Definition

A core provision of the Fracking Rule is the identification and isolation of "usable water." Since 1982, operators have been required to "isolate freshwater-bearing [formations] and other usable water containing 5,000 ppm ["parts per million"] or less of dissolved solids . . . and protect them from contamination."[26] 43 C.F.R. § 3162.5-2(d). Under the 1982 rule, "fresh water" is defined to mean "water containing not more than 1,000 ppm of total dissolved solids ["TDS"]" or other toxic constituents. *Id.* § 3160.0-5. The 1,000 ppm standard for "fresh water" is double the secondary maximum contaminant level the EPA has designated for TDS in drinking water (500 ppm). *See* DOI AR 0056230. The Industry Petitioners' comments on the proposed rule noted that a TDS concentration of 2,000 ppm is the highest recommended for irrigation and livestock consumption and cited authorities emphasizing that water with 10,000 ppm or more may cause brain damage or death in livestock. *See* DOI AR 0056230-31.

Gone from the Fracking Rule is any reference to fresh water. The final rule amends § 3162.5-2(d), revising the first sentence of the subsection to require the operator to "isolate all usable water and other mineral-bearing formations and protect them from contamination." The final rule defines "usable water" as "[g]enerally those waters containing up to 10,000 parts per million (ppm) of total dissolved solids." 43 C.F.R. § 3160.0-5. The BLM states the reason for this modification to the previous rule is to remove the inconsistency between the requirement in the CFR and the requirement in Onshore Order No. 2. 80 Fed. Reg. at 16,141. The BLM claims "[t]he requirement to

[26] *See also* DOI AR 0005111, 0005309.

protect and/or isolate usable water generally containing up to 10,000 ppm of TDS has been in effect since 1988, when Onshore Order 2 became effective."[27] *Id.*

Onshore Order No. 2 explains, "The standard for 'usable water' of 10,000 ppm of total dissolved solids is based on the regulatory definition by the Environmental Protection Agency of 'drinking water' at 40 CFR 144.3." 53 Fed. Reg. 46,798. The EPA's definition is a rule implementing the UIC program under the SDWA. Yet, the definition of "usable water" in BLM's final rule encompasses even more zones of water than the EPA's definition of "underground source of drinking water" in § 144.3. The EPA's definition of an "underground source of drinking water" contains criteria beyond a simple numerical TDS content upon which the Fracking Rule relies. The EPA defines "underground source of drinking water" as a non-exempt aquifer (or a portion of an aquifer) that supplies a public water system or that contains a sufficient quantity of ground water to supply a public water system and either currently supplies drinking water for human consumption or contains fewer than 10,000 mg/l TDS. *See* 40 C.F.R. § 144.3. The BLM provides no reasoned basis or factual support for its broader definition of usable water; instead, the BLM simply speculates that other aquifers "might be usable for agricultural or industrial purposes, or to support ecosystems" now or in the future. 80 Fed. Reg. at 16,143.

The BLM further disregards its existing *practice* with respect to implementation of the purported 10,000 ppm standard, insisting that this provision will not be an increased burden on operators because it simply incorporates the existing *requirements* in Onshore

[27] *But see* DOI AR 0021777, 0022886, 0027276, 0027483; DOI PS 0179035, 0301573.

Order Nos. 1 and 2. *Id.* at 16,142, 16,151. Under the Fracking Rule, operators are assigned an affirmative obligation to identify the location of usable water to be protected based on the quantitative TDS calculation. *See* 43 C.F.R. § 3162.3-3(d)(1)(iii) (requiring request for approval of hydraulic fracturing to include identification of the "estimated depths (measured and true vertical) to the top and bottom of all occurrences of usable water"). The record reflects this is a new burden. Under current practice, state oil and gas agencies and BLM field offices inform operators about the location of usable water that must be protected, taking into account local geology, and direct the depths at which it is acceptable to set well casing.[28] And while the BLM agrees "that in many instances state or tribal oil and gas regulators, or water regulators, will be able to identify for operators some or all of the usable water zones that will need to be isolated and protected," 80 Fed. Reg. at 16,151, the agency has not explained how information received from States and field offices will assist operators to identify usable water of which even the regulators are unaware. Nor has the BLM identified the "substantial evidence" supporting its apparent determination that compliance with the new rule is both feasible and free of further cost.[29]

The BLM ignored extensive comments in the record emphasizing the difficulty and expense of measuring the numerical quality of water with the precision the final rule

[28] *See* DOI AR 0027169, 0056234, 0056687; DOI PS 0393425, 0435828. The Government's responsive memorandum does not contain any discussion challenging the assertion that this is the existing practice.

[29] Relying solely on its position that the definition of usable water has not changed, the BLM concluded "there will be no significant changes in costs of running casing and cement." 80 Fed. Reg. at 16,142. This conclusion ignores the comments in the record estimating the costs of obtaining more precise TDS data and the additional costs of casing and cementing associated with isolating formations that meet the numerical definition of usable water under the final rule, but which are located at depths deeper than the zones that state agencies and BLM field offices have previously designated as requiring isolation. *See* record citations in footnote 30; *see also* DOI AR 0056237, 0056638, 0056687.

requires.[30] By failing to acknowledge the existing practice, the BLM further disregards any impact of the final rule on operators that drilled and cased existing wells relying on government instruction about casing depths. The Fracking Rule regulates all future hydraulic fracturing in both new and existing wells. *See* 43 C.F.R. § 3162.3-3(a). There is no evidence in the record that the BLM, under current practice, ever required an operator to add an additional string of casing to protect "usable water" as defined by Onshore Order No. 2. "[A]gencies may not impose undue hardship by suddenly changing direction, to the detriment of those who have relied on past policy." *Grace Petroleum Corp.*, 815 F.2d at 591 n.4 (quoting *Cities of Anaheim, Riverside, Banning, Colton and Azusa v. FERC*, 723 F.2d 656, 659 (9th Cir. 1984)).

To be sustained, an agency's decision must be reasoned and based on consideration of relevant factors and important aspects of the problem. *See Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43. Whereas operators could previously rely on the guidance of state and federal regulators in setting their casing, now the burden of identification and risk of missing information shifts to the operators. The BLM's preamble fails to explain the reasons for this new approach, the costs and benefits of the new approach, or the evidence of harm (if any) incurred under the former approach. "If Congress established a presumption from which judicial review should start, that presumption . . . is . . . *against* changes in current policy that are not justified by the rulemaking record." *Id.* at 42 (emphasis in original).

c. Pre-Operation Disclosures

[30] *See* DOI AR 0056164, 0056234, 0056638, 0056877; DOI PS 0301574, 0435731.

The Fracking Rule represents a significant expansion of the information that oil and gas developers are required to disclose publicly both before and after operations. *See* 80 Fed. Reg. 16,128 ("Key changes to the final rule include . . . more stringent requirements related to claims of trade secrets exempt from disclosure . . . [and] additional disclosure and public availability of information about each hydraulic fracturing operation[.]"). Before commencing hydraulic fracturing operations, producers will be required to disclose operational information about the location where drilling will take place, water resources in the vicinity of operations, the location of other wells or natural fractures or fissures in the area, and the producer's fracturing plans (including the amount of fluid to be injected, the pressure to be applied to the formation, and the estimated length, height, and total vertical depth of the fractures). *See* 43 C.F.R. § 3162.3-3(d)(1)-(7). After hydraulic fracturing operations, operators will be required to disclose detailed operational information including the components of fracturing fluid used in stimulation, the pressures applied to geologic formations, the length, height, and direction of fractures, and the actual depth of perforations. *Id.* § 3162.3-3(i).

Recognizing the proprietary nature of some of this information, particularly regarding local geology and the operators' technical plans and designs, the BLM has provided a mechanism for operators to protect the information that is required to be submitted in the completion reports submitted *after* hydraulic fracturing. *Id.* § 3162.3-3(j). However, the BLM fails to provide any regulatory protection for similar information required to be submitted *before* hydraulic fracturing. In the preamble, the BLM suggests that when submitting information to the agency, an operator "may

segregate the information it believes is a trade secret, and explain and justify its request that the information be withheld from the public." 80 Fed. Reg. at 16,173. The language of the Fracking Rule itself is more limited. The specific provision allowing operators to withhold information from disclosure, 43 C.F.R. § 3162.3-3(j), applies only to the information required to be submitted under paragraph (i) of Section 3162.3-3. *Id.* § 3162.3-3(j)(1). Paragraph (i) is the provision that identifies the information that must be provided *after* hydraulic fracturing is completed. There is no analogous provision in the final rule allowing operators to protect information that the rule requires to be submitted *before* hydraulic fracturing operations.

The BLM provides no explanation in the record for drawing a distinction between pre- and post-hydraulic fracturing information. The BLM acknowledges receiving comments that information required in the pre-hydraulic fracturing reports represents confidential information. 80 Fed. Reg. at 16,154. Indeed, in its responsive brief, the BLM claims "[b]oth pre- and post-operation submissions share the same level of protection from disclosures." (*Resp't Br. in Opp'n to Industry Pet'rs' Mot. for Prelim. Inj.* at 31.) Yet, in response to the public comments, the BLM states its opinion that "the submission of these estimated values would not routinely meet any of the criteria within the Freedom of Information Act regulations (43 CFR part 2) which would require such information to be held as confidential information." 80 Fed. Reg. at 16,154. The BLM provides no explanation of the reasoning it employed to reach this conclusion or the bases for its belief. "The disparate treatment of functionally indistinguishable products is the essence of the meaning of arbitrary and capricious." *Bracco Diagnostics, Inc. v. Shalala*,

963 F. Supp. 20, 28 (D.D.C. 1997) (citing *Indep. Petroleum Ass'n of Am. v. Babbitt*, 92 F.3d 1248, 1260 (D.C. Cir. 1996)).

3. Whether the BLM Adequately Consulted with Indian Tribes

The Court also finds merit in the Ute Indian Tribe's argument that the BLM failed to consult with the Tribe on a government-to-government basis in accordance with its own policies and procedures. On December 1, 2011, pursuant to authority under 25 U.S.C. §§ 2 and 9, the Secretary of the Interior issued Order No. 3317 setting forth the Department of the Interior ("DOI") Policy on Consultation with Indian Tribes.[31] Order No. 3317 stated the following updated and expanded DOI policy on consultation with Indian tribes:

> a. Government-to-government consultation between appropriate Tribal officials and the Department requires Department officials to demonstrate a *meaningful commitment* to consultation by identifying and involving Tribal representatives in a meaningful way *early in the planning process*.
>
> b. Consultation is a process that aims to create *effective collaboration* with Indian tribes and to *inform Federal decision-makers*. Consultation is built upon government-to-government exchange of information and promotes enhanced communication that *emphasizes trust, respect, and shared responsibility*. . . .
>
> c. Bureaus and offices will seek to promote cooperation, participation, and efficiencies between agencies with overlapping jurisdictions, special expertise, or related responsibilities when a Departmental action with Tribal implications arises. Efficiencies derived

[31] Available at http://elips.doi.gov/elips/0/doc/3025/Page1.aspx. The Secretary's intent in issuing this updated and expanded policy was to acknowledge compliance with Executive Order 13175 (Consultation and Coordination with Indian Tribal Governments), directing federal agencies to develop a consultation process "to ensure meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications." (EO 13175, Sec. 5) (65 Fed. Reg. 67249) (Nov. 6, 2000). On November 5, 2009, President Obama issued a Presidential Memorandum directing each agency to submit a detailed plan of action describing how the agency will implement the policies and directives of EO 13175.

> from the inclusion of Indian tribes in all stages of the tribal consultation will help ensure that future Federal action is achievable, comprehensive, long-lasting, and reflective of tribal input.

Id. Sec. 4 (emphasis added). The Secretary's Order directed DOI bureaus and offices to, within 180 days, review their existing practices and revise those practices in compliance with the updated policy. *Id.* Sec. 5(c). The DOI's Policy required each bureau or office to consult with Indian tribes "*as early as possible* when considering a Departmental Action with Tribal Implications." (*Dep't of the Interior Policy on Consultation with Indian Tribes* at ¶ VII.E.1) (emphasis added).[32]

Effective December 2, 2014, still prior to publication of the Fracking Rule, the DOI converted the provisions of Order No. 3317 to the DOI Departmental Manual. *See* Departmental Manual, Part 512, Chapters 4 and 5.[33] Chapter 4 reiterates the DOI policy to "consult with tribes on a government-to-government basis whenever DOI plans or actions have tribal implications." 512 DM 4.4. Chapter 5 sets forth the procedures and process that must be followed for consultation with Indian tribes. The consultation process should include the incorporation of tribal views in the decision-making process, respect for tribal sovereignty, and meaningful dialogue where the viewpoints of tribes and the DOI are shared, discussed, and analyzed. 512 DM 5.4. The appropriate DOI officials shall provide notice to, and begin consultation with, Indian tribes "as early as possible" during the initial planning stage. 512 DM 5.5(A)(1). The DOI's policies and

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[32] Available at http://www.doi.gov/cobell/upload/FINAL-Departmental-tribal-consultation-policy.pdf. "Departmental Action with Tribal Implications" is defined as "[a]ny Departmental regulation, rulemaking, policy, guidance, legislative proposal, grant funding formula changes, or operational activity that may have a substantial direct effect on an Indian Tribe . . . ." (*Dep't of the Interior Policy on Consultation with Indian Tribes* at ¶ III.)

[33] Available at http://elips.doi.gov/elips/browse.aspx.

procedures reflect the unique relationship between Indian tribes and the federal government and recognize Indian tribes' right to self-governance and tribal sovereignty.

The BLM contends it engaged in extensive tribal consultation when promulgating the Fracking Rule by holding four regional tribal consultation meetings ("information sessions") and distributing copies of a draft rule to affected tribes for comment in January 2012, and offering to meet individually with tribes after those regional meetings. 80 Fed. Reg. at 16,132; DOI AR 0023694. In June 2012, after publication of the proposed rule on May 11, 2012, and again after publication of the supplemental proposed rule in May of 2013, the BLM held additional regional consultation meetings and individual consultations with tribal representatives.[34] 80 Fed. Reg. at 16,132. *See also* DOI AR 0026578-81; DOI AR 0049740; DOI AR 0050425. In March 2014, the BLM invited tribes to another meeting in Lakewood, Colorado and offered to meet with individual tribes thereafter. 80 Fed. Reg. at 16,132. *See also* DOI AR 0075037-41 (3/18/2014 "Tribal Hydraulic Fracturing Outreach") (Ute Indian Tribe representative expressed opinion that "BLM has not been consulting with the Tribes in good faith").

The BLM's efforts, however, reflect little more than that offered to the public in general. The DOI policies and procedures require extra, *meaningful* efforts to involve tribes in the decision-making process. The record reflects the BLM spent more than a

[34] Although uniformly characterized by the Government as "consultations," many of these meetings appear to have been more intended as informational and outreach sessions, with more emphasis on "discussion" and less emphasis on "concerns." *See, e.g.,* DOI AR 0034423 at 34431 (transcript of 6/5/2102 "Tribal Consultation Meeting"). Following the initial round of regional information sessions, on May 14, 2012, Tex "Red Tipped Arrow" Hall, Chairman for TAT – MHA Nation (North Dakota), sent a letter to the Secretary of the Interior expressing his opinion that the BLM had not complied with its tribal consultation policies, particularly concerned that: the first regional tribal meetings were held only *after* the regulations had been developed and the draft rule prepared; and individual consultations would be with BLM field offices rather than "appropriate BLM officials." DOI AR 0020690-92.

year developing the proposed rule before initiating any consultation with Indian tribes. *See* 77 Fed. Reg. at 27,693 (describing public forums held in November, 2010, and April, 2011). The BLM had already drafted a proposed rule by the time the agency initiated consultation with Indian tribes in January of 2012. *See id.* Although the BLM asserts comments from affected tribes were considered in developing the final rule, the preamble cites only two changes resulting from tribal consultations: a clarification that tribal and state variances are separate from variances for a specific operator, and a requirement that operators certify to the BLM that operations on Indian lands comply with applicable tribal laws. 80 Fed. Reg. at 16,132. Several tribal organizations attempted to assert their sovereignty by encouraging an "opt out" provision for Indian tribes or allowing the tribes to exercise regulatory authority over hydraulic fracturing. *Id.* However, despite acknowledging "the importance of tribal sovereignty and self-determination," the BLM summarily dismissed these legitimate tribal concerns, simply citing its consistency in applying uniform regulations governing mineral resource development on Indian and federal lands and disavowing any authority to delegate regulatory responsibilities to the tribes. *Id.* This failure to comply with departmental policies and procedures is arbitrary and capricious action. *See Hymas v. United States*, 117 Fed. Cl. 466, 502-04 (2014); *Glendale Neighborhood Ass'n v. Greensboro Housing Auth.*, 901 F. Supp. 996, 1003 (M.D.N.C. 1995).

B. Irreparable Harm

The irreparable harm factor requires a party "seeking preliminary relief to demonstrate that irreparable injury is *likely* in the absence of an injunction." *Winter v.*

Natural Res. Def. Council, Inc., 555 U.S. 7, 22 (2008) (emphasis in original). To satisfy the irreparable harm requirement, a movant must demonstrate "a significant risk that he or she will experience harm that cannot be compensated after the fact by monetary damages." *RoDa Drilling Co. v. Siegal*, 552 F.3d 1203, 1210 (10th Cir. 2009) (quoting *Greater Yellowstone Coal. v. Flowers*, 321 F.3d 1250, 1258 (10th Cir. 2003)). A court must further assess "whether such harm is likely to occur before the district court rules on the merits." *Id.* (quoting *Greater Yellowstone Coal.*, 321 F.3d at 1260).

The States and Ute Tribe Petitioners assert irreparable harm based on the Fracking Rule's infringement on their sovereign authority and interests in administering their own regulatory programs governing hydraulic fracturing. Through the EPAct's amendment to the SDWA, Congress clearly expressed its intent that non-diesel hydraulic fracturing be removed from the realm of federal regulation, thereby lodging authority to regulate that activity within the States and Tribes. Thus, many states, including Petitioners Wyoming, Colorado, Utah and North Dakota, have existing regulations in place addressing hydraulic fracturing operations.[35]

The Fracking Rule creates an overlapping federal regime, in the absence of Congressional authority to do so, which interferes with the States' sovereign interests in, and public policies related to, regulation of hydraulic fracturing. Because the Fracking Rule places the States' and Tribe's "sovereign interests and public policies at stake," the harm these Petitioners stand to suffer is "irreparable if deprived of those interests without

[35] Other states with regulations in place addressing hydraulic fracturing include Alaska, Arkansas, Illinois, Michigan, New Mexico, Ohio, Oklahoma, Pennsylvania, Texas, California, Montana, and Nevada. *See* 80 Fed. Reg. at 16,130 & 16,187; DOI PS 0000910.

first having a full and fair opportunity to be heard on the merits." *Kansas v. U.S.*, 249 F.3d 1213, 1227 (10th Cir. 2001). *See also Int'l Snowmobile Mfrs. Ass'n v. Norton*, 304 F. Supp. 2d 1278, 1287 (D. Wyo. 2004) (National Park Service regulation adversely affecting State of Wyoming's ability to manage its trails program and fish populations was infringement on state sovereignty constituting irreparable harm); *Ute Indian Tribe of the Uintah and Ouray Reservation v. Utah*, 790 F.3d 1000, 1005 (10th Cir. 2015) (invasion of tribal sovereignty can constitute irreparable injury). This harm would occur the moment the Fracking Rule goes into effect.

The States and Ute Tribe further contend irreparable harm through economic losses in the form of substantially decreased royalty and tax revenue. These Petitioners argue, and the record supports, that these losses will be caused by additional delay to permit oil and gas wells for development and/or operators opting to drill on lands not subject to federal regulation.[36] There can be no doubt that for these States, particularly like Wyoming which consists of an inordinate amount of federal land, and any Tribes, like the Ute Tribe, which rely on energy production as the primary source of funding for tribal governmental services, delay or avoidance of drilling operations on these federal and tribal lands would likely lead to substantial economic losses.[37] To the extent such losses would be permanent, they are irreparable because the States and Tribes cannot

[36] *See* DOI AR 0026856 (comment from BLM Sr. Petroleum Eng'r regarding additional delay); DOI AR 0055854 (letter to Secretary of Interior from Wyoming Congressional delegation citing March 2012 testimony of then BLM Director Bob Abbey that there has been "a shift [in oil and gas production] to private lands in the East and to the South where there are fewer amounts of Federal mineral estate"); DOI AR 0023298, 0048262, 0051036, 0053915, 0057066, 0066303, 0080222; DOI PS 0008961-62, 0010358, 0179200-01, 0301256-57.

[37] DOI AR 0021123-24, 0028351-52, 0030226, 0051050, 0056291, 0057066, 0104456; DOI PS 0000910 (letter from Lincoln County, Nevada stating more than 98% of county in federal management); DOI PS 0009100 (80% of Park County, Wyoming is federal land with more than half of its assessed valuation coming from oil and gas development); DOI PS 0010267, 0010570-71.

recover money damages from the federal government. *See Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140, 1157 (10th Cir. 2011) (explaining that while economic loss is usually insufficient to constitute irreparable harm, "imposition of money damages that cannot later be recovered for reasons such as sovereign immunity constitutes irreparable injury").

The Industry Petitioners contend the Fracking Rule subjects their members to at least two distinct and certain risks of irreparable harm: (i) compliance costs and (ii) disclosure of trade secrets and confidential information. The BLM estimates that operational costs attributable to complying with the rule's requirements will be about $32 million per year, equating to approximately $11,400 per well. 80 Fed. Reg. at 16,130. Evidence in the record suggests the BLM has significantly underestimated the compliance costs. Still, even accepting the BLM's estimates, the Fracking Rule will impose compliance costs that the Industry Petitioners' members cannot recover due to sovereign immunity. Economic damages in the form of compliance costs that cannot later be recovered for reasons such as sovereign immunity constitute irreparable injury. *Chamber of Commerce of U.S. v. Edmondson*, 594 F.3d 742, 756, 770-71 (10th Cir. 2010) (finding trade associations' members were likely to suffer irreparable harm from compliance costs related to Oklahoma law that might total more than $1,000 per business per year because such costs were unrecoverable due to sovereign immunity).

The Industry Petitioners also contend the Fracking Rule will require their members to disclose trade secrets and confidential commercial information that cannot be compensated with money damages. *See* Naatz Aff. ¶ 7, Sgamma Aff. ¶ 6 (ECF Nos. 11-1

and 11-2 in 15-CV-041). As discussed above, the Fracking Rule represents a significant expansion of the information that oil and gas developers are required to disclose publicly both before and after operations. *See* 80 Fed. Reg. 16,128 (final rule includes "more stringent requirements related to claims of trade secrets exempt from disclosure" and "additional disclosure and public availability of information about each hydraulic fracturing operation"). The final rule will require operators to disclose proprietary hydraulic fracturing operational and design information, which BLM intends to disclose, at least in large part, to the public.[38] This is particularly concerning with respect to pre-operation disclosures which, as discussed above, are not expressly protected by the regulatory text of the rule. "A trade secret once lost is, of course, lost forever." *FMC Corp. v. Taiwan Tainan Giant Indus. Co., Ltd.*, 730 F.2d 61, 63 (2nd Cir. 1984). *See also Ruckelshaus v. Monsanto Co.*, 463 U.S. 1315, 1317 (1983) (Blackmun, Circuit Justice) (refusing to grant a stay of district court's injunction because the disclosure of Monsanto's trade secrets to other companies and the public would cause Monsanto irreparable harm); *Campbell Soup Co. v. ConAgra, Inc.*, 977 F.2d 86, 92 (3rd Cir. 1992) (threat of trade secret disclosure may establish immediate irreparable harm).

The BLM argues any such economic damages are not likely to occur during the pendency of this litigation. First, the BLM asserts a lack of evidence that any of the Industry Petitioners' members intend to engage in hydraulic fracturing before this Court rules on the merits. However, Petitioners' members include companies with oil and

[38] While some state regulations, like Wyoming's, also require submission of proprietary information related to fracking plans before and after fracking operations, the state regulations also have confidentiality provisions in place to protect such information. *See* Kropatsch Aff. ¶¶ 10, 12 (ECF No. 32-2); DOI AR 0027878.

natural gas leases on federal and Indian lands (Hr'g Tr. at 100); all federal and Indian lands are subject to the Fracking Rule; and contemporary oil and gas development invariably involves hydraulic fracturing (*see* 80 Fed. Reg. at 16,131) (estimating that ninety percent of wells drilled on federal lands in 2013 were stimulated using hydraulic fracturing techniques). Some of Petitioners' members plan to complete wells using hydraulic fracturing in the coming months, likely before this action is resolved on the merits. (*See* Hr'g Tr. at 100, 102-104; Bayless Decl. ¶ 5; Barnes Decl. ¶ 5; Decker Decl. ¶ 5.)

Second, the BLM asserts Petitioners' members will not incur any compliance costs "unless they voluntarily elect to engage in hydraulic fracturing on federal or Indian land before this litigation is over." (*Resp't Br. in Opp'n to Industry Pet'rs' Mot. for Prelim. Inj.* at 51.) The BLM's assertion, however, disregards other costs associated with developing oil and gas assets. The Fracking Rule, which included changes from the supplemental proposed rule, was published on March 26, 2015 and was scheduled to become effective on June 24, 2015 – a period of ninety days. As the BLM recognizes, hydraulic fracturing is only one step in the oil and gas development process and that process often involves coordination with a wide range of contractors and service providers on a schedule that commits money and resources much further out than ninety days. (*See Resp't Br. in Opp'n to Industry Pet'rs' Mot. for Prelim. Inj.* at 54) (noting "BLM's observation that most contracts with hydraulic fracturing service providers are signed about six months prior to the date of fracking"). Once contractually committed, operators cannot simply choose not to conduct hydraulic fracturing without incurring

liability for material and services for which the operator has already contracted. (*See* Bayless Decl. ¶ 6; Barnes Decl. ¶ 6.)

The BLM also suggests the "phase-in" period allows operators to avoid any additional costs or burdens for the first ninety days after implementation of the rule. However, a ruling on the merits is not likely to issue within ninety days. Moreover, the 90-day implementation period simply exempts an operator from complying with the preapproval (paperwork) requirements for ninety days "if . . . an APD was submitted but not approved as of June 24, 2015 [or] an APD or APD extension was approved before June 24, 2015, but the authorized drilling operations did not begin until after June 24, 2015." 43 C.F.R. § 3162.3-3(a). All other requirements of the rule (cementing, casing, monitoring, etc.) apply upon its effective date and, in all other circumstances, an operator must comply with *all paragraphs* of the Fracking Rule. *Id.*

Finally, regarding disclosure of trade secrets and confidential information, the BLM argues Petitioners have not shown the BLM is likely to disclose any proprietary information that should be protected from public disclosure. The BLM cites to "FOIA or other applicable public records law" and regulations outside of the Fracking Rule that supposedly protect the confidentiality of such information, including information that must be submitted prior to commencing fracturing operations. *See, e.g.,* 43 C.F.R. §§ 2.26-2.36. However, the BLM has expressed its unsupported belief that operational information submitted as part of the application for approval to conduct hydraulic fracturing "would not routinely meet any of the criteria within the Freedom of Information Act regulations (43 CFR part 2) which would require such information to be

held as confidential information." 80 Fed. Reg. at 16,154. Thus, it appears the BLM has already determined such information is subject to public disclosure.

The Court finds the State and Ute Tribe Petitioners and the Industry Petitioners have demonstrated the likelihood of irreparable injury in the absence of a preliminary injunction.

C. Balance of Equities and Public Interest

The third preliminary injunction factor requires the Court to determine whether the threatened injury to the movants outweighs the injury to the opposing party under the injunction. *Awad v. Ziriax*, 670 F.3d 1111, 1125 (10th Cir. 2012); *Sierra Club, Inc. v. Bostick*, 539 F. App'x 885, 889 (10th Cir. 2013). When the government is the opposing party, it is appropriate for the Court to consider jointly the balance of harms and public interest. *Nken v. Holder*, 556 U.S. 418, 435 (2009) (assessing the harm to the opposing party and weighing the public interest merge when the government is the opposing party). It is uncontested that the public has an important interest in safe and environmentally responsible oil and gas development on public lands. But there can also be little dispute that, particularly for the western public lands states and Indian Tribes, the stakes of federal oil and gas regulation are high and the public has an important interest in the proceeds derived from oil and gas development on public and tribal lands.

Whereas Petitioners have demonstrated that a preliminary injunction is necessary to avoid irreparable harm, the issuance of an injunction poses little more than an inconvenience to the BLM's interests. First, neither the BLM nor Respondent-Intervenors can demonstrate that any environmental harm will likely result if the effective

date of the Fracking Rule is delayed.[39] The BLM has not identified a single groundwater contamination incident that the Fracking Rule would have prevented, nor offered any analysis measuring, even in estimate form, the risk of environmental harm that the rule purports to prevent. *See Amoco Prod. Co. v. Village of Gambell, AK*, 480 U.S. 531, 545 (1987) (finding the balance of harms tipped in industry's favor when industry had incurred economic costs and movants had failed to show a sufficient likelihood of environmental injury).

To the contrary, the United States Environmental Protection Agency ("EPA") recently released a draft "state-of-the-science assessment" of the available scientific literature and data on the effects of hydraulic fracturing on drinking water resources. U.S. Envtl. Prot. Agency, *Assessment of the Potential Impacts of Hydraulic Fracturing for Oil and Gas on Drinking Water Resources* at Draft ES-1, ES-24 (June 2015).[40] The EPA observed that between 2011 and 2014, as many as 120,000 wells were completed with hydraulic fracturing. *Id.* at ES-5 (estimating 25,000-30,000 new wells were drilled and hydraulically fractured annually in the United States during that time). The EPA also reported that "[a]pproximately 6,800 sources of drinking water for public water systems were located within one mile of at least one hydraulically fractured well during the same period." *Id.* at ES-6. Yet, the EPA identified only three suspected incidents "that have or may have" resulted in impacts to drinking water resources. *Id.* at ES-14 to 15. While the

[39] DOI AR 0026855, 0044000, 0056611, 0082444, 0097398 ("No Spills or incident reports [] in [BLM] record/database indicates contamination of groundwater due to leaks or spills from [hydraulic fracturing] operation."), 0097956 (BLM has "no records of any hydraulic fracturing operation that has contaminated the usable groundwater zones with hydraulic fracturing fluids").
[40] Available at: http://www2.epa.gov/sites/production/files/2015-06/documents/hf_es_erd_jun2015.pdf.

EPA noted there are "mechanisms" by which fracking activities have the *potential* to impact groundwater, the agency "did not find evidence that these mechanisms have led to widespread, systemic impacts on drinking water resources in the United States." *Id.* at ES-6. To the extent there are any potential risks of harm, nearly all hydraulic fracturing operations are already subject to existing state regulations protecting groundwater resources.[41] *See* 80 Fed. Reg. at 16,178 (observing that "[a]ll state laws apply on Federal lands"); *id.* at 16,187 (referencing regulations in California, Colorado, Montana, New Mexico, North Dakota, Oklahoma, Texas, Utah, and Wyoming and acknowledging that more than ninety-nine percent of total well completions on federal lands since 2010 were located in one of these states).

The BLM argues the public will be harmed by a disruption of the ongoing implementation of the final rule, including internal agency efforts as well as ongoing coordination with states and tribal authorities. The Court is not persuaded that delayed administrative agency efforts, without more, constitute harm – even so, such harm does not outweigh the likely harm to Petitioners in the absence of an injunction. *See Texas v. U.S.*, 787 F.3d 733, 768 (5th Cir. 2015) ("government's allegation that the injunction is delaying preparatory work is unpersuasive [because] [i]njunctions often cause delays, and the government can resume work if it prevails on the merits"). Moreover, the fact that the BLM has expended substantial time and resources to implement the new regulatory scheme bears no relationship to the harm the BLM would allegedly suffer from a *delay* of

[41] *See* DOI AR 0043104, 0094637; DOI AR 0055854 (letter from Wyoming Congressional delegation referencing Secretary of the Interior Sally Jewell's June 2013 testimony before the Senate Energy and Natural Resources Committee that she could not identify any state currently regulating hydraulic fracturing which was not doing a sufficient job).

that implementation during the pendency of litigation. *See Comanche Nation, Okla. v. U.S.*, 393 F. Supp. 2d 1196, 1211 (W.D. Okla. 2005) (finding balance of harm weighed in favor of movant tribe because United States would bear no additional financial or regulatory burden from any delay of the proposed action but tribe would suffer loss of self-governance). If the BLM ultimately prevails, the agency may resume its efforts to implement the Fracking Rule.

The BLM further asserts a presumption of harm when an agency is prevented "from enforcing regulations that Congress found it in the public interest to direct that agency to develop and enforce." *N. Arapaho Tribe v. Burwell*, --- F. Supp. 3d ---, No. 14-CV-247-SWS, 2015 WL 872190, at *16 (D. Wyo. Feb. 26, 2015). Such an argument begs the question. In this instance, Congress did not direct the BLM to regulate hydraulic fracturing; rather, this Court has found that the BLM likely *lacks* Congressional authority to promulgate the Fracking Rule. When Congress passed the EPAct of 2005, it determined that the public interest was best served by removing federal regulation of hydraulic fracturing with one exception. *See* 42 U.S.C. § 300h(d)(1)(B) (leaving the regulation of hydraulic fracturing using diesel fuels within the purview of the EPA). In sum, any harm to the BLM's or Intervenors' interests is outweighed by the harm to Petitioners.

The issuance of an injunction would also serve the public interest by maintaining the status quo[42] and avoiding the implementation of agency action which was likely

[42] Evidence presented at the preliminary injunction hearing suggested the BLM is presently unprepared to administer the new regulations or meet the additional administrative responsibilities and burdens on the agency. *See also* DOI

promulgated in excess of statutory authority.[43] A preliminary injunction would also avoid regulatory uncertainty and confusion. Delaying implementation of the Fracking Rule will cause the BLM "no appreciable harm" and allowing "a full and final resolution on the merits is in the best interests of the public."[44] Moreover, the generation of revenue and employment from mineral development projects serves the public interest.[45] Duplicative regulation that frustrates or delays development and incentivizes operators to move development activity off of federal lands negatively impacts states and tribes which rely heavily on these revenues to fund public projects and services.[46] Certainly this interest must be balanced against the public interest in protecting the environment.[47] Here, however, where there is no showing of harm to the environment, the public interest factor weighs in favor of Petitioners. *See Nat'l Indian Youth Council v. Andrus*, 623 F.2d 694, 696 (10th Cir. 1980) (the public interest favored coal development where "the possibility of environmental damage is presently minimized").

CONCLUSION

One of the fundamental questions presented in this case is whether Congress granted or delegated to the BLM the authority or jurisdiction[48] to regulate fracking –

AR 0026855-56, 0028392, 0034461, 0050215, 0068786, 0074849, 0078643, 0109773; DOI PS 0008720-21, 0010661, 0301278.

[43] *See Chamber of Commerce of U.S. v. Edmondson*, 594 F.3d 742, 771 (10th Cir. 2010) (public interest served by enjoining the enforcement of invalid provisions of state law likely to be held unconstitutional).

[44] *See North Dakota v. EPA*, No. 3:15-CV-059, 2015 WL 5060744, at *8 (D.N.D. Aug. 27, 2015) (unpublished).

[45] *See* DOI AR 0050435-36, 0068786-87; DOI PS 0010898-907.

[46] *See* DOI AR 0007591, 0021123-24, 0028390-94, 0049740, 0075037-41; DOI PS 0008870-71, 0010476, 0010908-915, 0067101.

[47] *See* DOI AR 0056063-64, 0056108-09, 0056184; DOI PS 0063816.

[48] Chief Justice Roberts recently noted the confusion surrounding the term "jurisdiction" when used in the context of determining whether Congress has delegated to an agency authority to regulate a certain activity by enactment of rules and regulations with the force and effect of law. *See City of Arlington, Tex. v. FCC*, 133 S. Ct. 1863, 1880 (2013) (Roberts, C.J., dissenting).

despite having specifically removed such authority in the Energy Policy Act of 2005 from another federal agency (the EPA) under the SDWA. At this point, the Court does not believe Congress has granted or delegated to the BLM authority to regulate fracking.

Our system of government operates based upon the principle of limited and enumerated powers assigned to the three branches of government. In its simplest form, the legislative branch enacts laws, the executive branch enforces those laws, and the judicial branch ensures that the laws passed and enforced are Constitutional. *See Marbury v. Madison*, 5 U.S. 137, 176 (1803). A federal agency is a creature of statute and derives its existence, authority and powers from Congress. It has no constitutional or common law existence or authority outside that expressly conveyed to it by Congress. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988); *see also Michigan v. EPA*, 268 F.3d 1075, 1081-82 (D.C. Cir. 2001). In the absence of a statute conferring authority, an administrative agency has none. *See American Petroleum Inst. v. EPA*, 52 F.3d 1113, 1119-20 (D.C. Cir. 1995). Mere ambiguity in a statute is not evidence of congressional delegation of authority. *See Sea-Land Serv., Inc. v. Dep't of Transp.*, 137 F.3d 640, 645 (D.C. Cir. 1998). Neither can agency authority be lightly presumed. *Michigan v. EPA*, 268 F.3d at 1082. If the delegation of authority was presumed absent an express withholding of such authority, "agencies would enjoy virtually limitless hegemony, a result plainly out of keeping with *Chevron* and quite likely with the Constitution as well." *Id.* (quoting *Ethyl Corp. v. EPA*, 51 F.3d 1053, 1060 (D.C. Cir. 1995)). *See also City of Arlington, Tex. v. FCC*, 133 S. Ct. 1863, 1886 (2013) (Roberts, C.J., dissenting).

Before the Court can defer to the BLM's methods of regulating fracking, this Court must conclude Congress has delegated that authority to it. It does not appear Congress has done so directly or inferentially. In fact, in a comprehensive legislative enactment addressing domestic energy development, including oil and natural gas, Congress expressly amended the SDWA to remove from the EPA the authority to regulate any non-diesel fracking on federal or state lands.[49] It is hard to analytically conclude or infer that having expressly removed the regulatory authority from the EPA, Congress intended to vest it in the BLM, particularly where the BLM had not previously been regulating the practice. *See Brown & Williamson,* 529 U.S. at 130-33 (in determining whether Congress had granted FDA jurisdiction or authority to regulate tobacco products, Court would look to other Acts to see if Congress had specifically spoken to topic at hand). Moreover, since the enactment of the Energy Policy Act of 2005, several bills have been unsuccessfully introduced in Congress to restore the EPA's regulatory authority under the SDWA over all hydraulic fracturing.[50] Given these

[49] Prior to passing the Energy Policy Act of 2005, Congress was certainly aware of and attune to the use of hydraulic fracturing in oil and natural gas development. *See* 151 CONG. REC. S5533-37 (daily ed. May 19, 2005). *See also* Hydraulic Fracturing Safety Act of 2005, S. 1080, 109th Cong. (2005); Hydraulic Fracturing Act, S. 1374, 107th Cong. (2001). In 1999, responding to concerns raised by Congress, the EPA undertook a study to understand the impacts of hydraulic fracturing of coalbed methane wells. *Id.* at S5535. *See Underground Injection Control (UIC) Program; Proposed Coal Bed Methane (CBM) Study Design*, 65 Fed. Reg. 45,774 (July 25, 2000) (announcement that EPA intends to conduct a study of the environmental risks associated with hydraulic fracturing); *Underground Injection Control (UIC) Program; Hydraulic Fracturing of Coalbed Methane (CBM) Wells Report—Notice*, 67 Fed. Reg. 55,249 (August 28, 2002) ("EPA has preliminarily found that the potential threats to public health posed by hydraulic fracturing of CBM wells appear to be small"); U.S. Envtl. Prot. Agency, *Evaluation of Impacts to Underground Sources of Drinking Water by Hydraulic Fracturing of Coalbed Methane Reservoirs; Nat'l Study Final Report* (June 2004) ("The Agency has concluded that the injection of hydraulic fracturing fluids into CBM wells poses minimal threat to USDWs."). In its 2000 appropriations, Congress specifically proposed $175,000 for the EPA to study the impact of hydraulic fracturing in Alabama. *See* H.R. REP. NO. 106-379 (1999) (Conf. Rep. on H.R. 2684).

[50] *See* To repeal the exemption for hydraulic fracturing in the Safe Drinking Water Act, H.R. 7231, 110th Cong. (2008); Fracturing Responsibility and Awareness of Chemicals (FRAC) Act of 2009, H.R. 2766 and S. 1215, 111th Cong. (2009); Fracturing Responsibility and Awareness of Chemicals Act of 2011, H.R. 1084, 112th Cong. (2011);

circumstances and the ongoing congressional debate,[51] it cannot be concluded that because Congress has not expressly forbidden the BLM's regulation of hydraulic fracturing on federal lands, the agency may now assert it. *See Michigan v. EPA,* 268 F.3d at 1085. An administrative agency derives its existence and authority to regulate from Congressional authorization or delegation. Congress has not authorized or delegated to the BLM authority to regulate hydraulic fracturing and, under our constitutional structure, it is only through Congressional action that the BLM can acquire this authority. *See Bowen*, 488 U.S. at 208; *Michigan v. EPA*, 268 F.3d at 1081.

For the reasons discussed above, the Court finds all four factors warranting the issuance of a preliminary injunction weigh in favor of movants, and Petitioners' right to relief is clear and unequivocal. THEREFORE, it is hereby

ORDERED that the *Motion for Preliminary Injunction* of Petitioners Independent Petroleum Association of America and Western Energy Alliance (ECF No. 11 in 15-CV-041), *Wyoming and Colorado's Motion for Preliminary Injunction* (ECF No. 32), *North Dakota's Motion for Preliminary Injunction* (ECF No. 52), and the *Motion for Preliminary Injunction* filed by Ute Indian Tribe (ECF No. 89) are **GRANTED,** and the

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FRAC Act, S. 587, 112th Cong. (2011); Climate Protection Act of 2013, S. 332, 113th Cong. § 301 (2013); Fracturing Responsibility and Awareness of Chemicals Act of 2013, H.R. 1921, 113th Cong. (2013); FRAC Act, S. 1135, 113th Cong. (2013); Safe Hydration is an American Right in Energy Development Act of 2013, H.R. 2983, 113th Cong. (2013).

[51] Congress continues to debate the policy issues regarding the practice and regulation of hydraulic fracturing. *See* Protecting States' Rights to Promote American Energy Security Act, S. 15, 114th Cong. (2015) (would prohibit federal regulation of fracking in any state that has existing regulations); Native American Energy Act, H.R. 538, 114th Cong. (2015) (would make any DOI rules regulating fracking inapplicable on Indian lands absent consent from Tribe); Protect Our Public Lands Act, H.R. 1902, 114th Cong. (2015) (would ban hydraulic fracturing on federal lands under any new or renewed lease).

BLM is preliminarily enjoined from enforcing the final rule related to hydraulic fracturing on federal and Indian lands, 80 Fed. Reg. 16,128 (Mar. 26, 2015);[52] it is further

ORDERED that Petitioners are not required to post a bond or security.[53]

DATED this 30th day of September, 2015.

Scott W. Skavdahl
United States District Judge

[52] This preliminary injunction shall apply nationwide. *See Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1409-10 (D.C. Cir. 1998) ("when a reviewing court determines that agency regulations are unlawful, the ordinary result is that the rules are vacated – not that their application to the individual petitioners is proscribed"); *Earth Island Inst. v. Ruthenbeck*, 490 F.3d 687, 699 (9th Cir. 2007), *rev'd on other grounds*, 555 U.S. 488 (2009) (nationwide scope of injunction compelled by APA where agency action found to be unlawful).

[53] District courts have wide discretion in determining whether to require security under F.R.C.P. 65(c). *RoDa Drilling Co. v. Siegal*, 552 F.3d 1203, 1215 (10th Cir. 2009). Having determined there is no likelihood of harm to Respondents, the Court finds an injunction bond is unnecessary. *See Coquina Oil Corp. v. Transwestern Pipeline Co.*, 825 F.2d 1461, 1462 (10th Cir. 1987).

United States Code Annotated
Title 30. Mineral Lands and Mining
Chapter 3A. Leases and Prospecting Permits (Refs & Annos)
Subchapter I. General Provisions (Refs & Annos)

30 U.S.C.A. § 189

§ 189. Rules and regulations; boundary lines; State rights unaffected; taxation

Currentness

The Secretary of the Interior is authorized to prescribe necessary and proper rules and regulations and to do any and all things necessary to carry out and accomplish the purposes of this chapter, also to fix and determine the boundary lines of any structure, or oil or gas field, for the purposes of this chapter. Nothing in this chapter shall be construed or held to affect the rights of the States or other local authority to exercise any rights which they may have, including the right to levy and collect taxes upon improvements, output of mines, or other rights, property, or assets of any lessee of the United States.

CREDIT(S)

(Feb. 25, 1920, c. 85, § 32, 41 Stat. 450.)

Notes of Decisions (25)

30 U.S.C.A. § 189, 30 USCA § 189
Current through P.L. 114-114 (excluding 114-92, 114-94, 114-95 and 114-113) approved 12-28-2015

End of Document

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

United States Code Annotated
Title 30. Mineral Lands and Mining
Chapter 3A. Leases and Prospecting Permits (Refs & Annos)
Subchapter IV. Oil and Gas

30 U.S.C.A. § 226

§ 226. Lease of oil and gas lands

Effective: December 19, 2014

Currentness

(a) Authority of Secretary

All lands subject to disposition under this chapter which are known or believed to contain oil or gas deposits may be leased by the Secretary.

(b) Lands within known geologic structure of a producing oil or gas field; lands within special tar sand areas; competitive bidding; royalties

(1)(A) All lands to be leased which are not subject to leasing under paragraphs (2) and (3) of this subsection shall be leased as provided in this paragraph to the highest responsible qualified bidder by competitive bidding under general regulations in units of not more than 2,560 acres, except in Alaska, where units shall be not more than 5,760 acres. Such units shall be as nearly compact as possible. Lease sales shall be conducted by oral bidding, except as provided in subparagraph (C). Lease sales shall be held for each State where eligible lands are available at least quarterly and more frequently if the Secretary of the Interior determines such sales are necessary. A lease shall be conditioned upon the payment of a royalty at a rate of not less than 12.5 percent in amount or value of the production removed or sold from the lease. The Secretary shall accept the highest bid from a responsible qualified bidder which is equal to or greater than the national minimum acceptable bid, without evaluation of the value of the lands proposed for lease. Leases shall be issued within 60 days following payment by the successful bidder of the remainder of the bonus bid, if any, and the annual rental for the first lease year. All bids for less than the national minimum acceptable bid shall be rejected. Lands for which no bids are received or for which the highest bid is less than the national minimum acceptable bid shall be offered promptly within 30 days for leasing under subsection (c) of this section and shall remain available for leasing for a period of 2 years after the competitive lease sale.

(B) The national minimum acceptable bid shall be $2 per acre for a period of 2 years from December 22, 1987. Thereafter, the Secretary, subject to paragraph (2)(B), may establish by regulation a higher national minimum acceptable bid for all leases based upon a finding that such action is necessary: (i) to enhance financial returns to the United States; and (ii) to promote more efficient management of oil and gas resources on Federal lands. Ninety days before the Secretary makes any change in the national minimum acceptable bid, the Secretary shall notify the Committee on Natural Resources of the United

States House of Representatives and the Committee on Energy and Natural Resources of the United States Senate. The proposal or promulgation of any regulation to establish a national minimum acceptable bid shall not be considered a major Federal action subject to the requirements of section 4332(2)(C) of Title 42.

(C) In order to diversify and expand the Nation's onshore leasing program to ensure the best return to the Federal taxpayer, reduce fraud, and secure the leasing process, the Secretary may conduct onshore lease sales through Internet-based bidding methods. Each individual Internet-based lease sale shall conclude within 7 days.

(2)(A)(i) If the lands to be leased are within a special tar sand area, they shall be leased to the highest responsible qualified bidder by competitive bidding under general regulations in units of not more than 5,760 acres, which shall be as nearly compact as possible, upon the payment by the lessee of such bonus as may be accepted by the Secretary.

(ii) Royalty shall be 12 ½ per centum in amount or value of production removed or sold from the lease, subject to subsection (k)(1)(c)[1] of this section.

(iii) The Secretary may lease such additional lands in special tar sand areas as may be required in support of any operations necessary for the recovery of tar sands.

(iv) No lease issued under this paragraph shall be included in any chargeability limitation associated with oil and gas leases.

(B) For any area that contains any combination of tar sand and oil or gas (or both), the Secretary may issue under this chapter, separately--

(i) a lease for exploration for and extraction of tar sand; and

(ii) a lease for exploration for and development of oil and gas.

(C) A lease issued for tar sand shall be issued using the same bidding process, annual rental, and posting period as a lease issued for oil and gas, except that the minimum acceptable bid required for a lease issued for tar sand shall be $2 per acre.

(D) The Secretary may waive, suspend, or alter any requirement under section 183 of this title that a permittee under a permit authorizing prospecting for tar sand must exercise due diligence, to promote any resource covered by a combined hydrocarbon lease.

(3)(A) If the United States held a vested future interest in a mineral estate that, immediately prior to becoming a vested present interest, was subject to a lease under which oil or gas was being produced, or had a well capable of producing, in paying quantities at an annual average production volume per well per day of either not more than 15 barrels per day of oil or condensate, or not more than 60,000 cubic feet of gas, the holder of the lease may elect to continue the lease as a noncompetitive lease under subsection (c)(1) of this section.

(B) An election under this paragraph is effective--

(i) in the case of an interest which vested after January 1, 1990, and on or before October 24, 1992, if the election is made before the date that is 1 year after October 24, 1992;

(ii) in the case of an interest which vests within 1 year after October 24, 1992, if the election is made before the date that is 2 years after October 24, 1992; and

(iii) in any case other than those described in clause (i) or (ii), if the election is made prior to the interest becoming a vested present interest.

(C) Notwithstanding the consent requirement referenced in section 352 of this title, the Secretary shall issue a noncompetitive lease under subsection (c)(1) of this section to a holder who makes an election under subparagraph (A) and who is qualified to hold a lease under this chapter. Such lease shall be subject to all terms and conditions under this chapter that are applicable to leases issued under subsection (c)(1) of this section.

(D) A lease issued pursuant to this paragraph shall continue so long as oil or gas continues to be produced in paying quantities.

(E) This paragraph shall apply only to those lands under the administration of the Secretary of Agriculture where the United States acquired an interest in such lands pursuant to the Act of March 1, 1911 (36 Stat. 961 and following).

(c) Lands subject to leasing under subsection (b); first qualified applicant

(1) If the lands to be leased are not leased under subsection (b)(1) of this section or are not subject to competitive leasing under subsection (b)(2) of this section, the person first making application for the lease who is qualified to hold a lease under this chapter shall be entitled to a lease of such lands without competitive bidding, upon payment of a non-refundable application fee of at least $75. A lease under this subsection shall be conditioned upon the payment of a royalty at a rate of

12.5 percent in amount or value of the production removed or sold from the lease. Leases shall be issued within 60 days of the date on which the Secretary identifies the first responsible qualified applicant.

(2)(A) Lands (i) which were posted for sale under subsection (b)(1) of this section but for which no bids were received or for which the highest bid was less than the national minimum acceptable bid and (ii) for which, at the end of the period referred to in subsection (b)(1) of this section no lease has been issued and no lease application is pending under paragraph (1) of this subsection, shall again be available for leasing only in accordance with subsection (b)(1) of this section.

(B) The land in any lease which is issued under paragraph (1) of this subsection or under subsection (b)(1) of this section which lease terminates, expires, is cancelled or is relinquished shall again be available for leasing only in accordance with subsection (b)(1) of this section.

(d) Annual rentals

All leases issued under this section, as amended by the Federal Onshore Oil and Gas Leasing Reform Act of 1987, shall be conditioned upon payment by the lessee of a rental of not less than $1.50 per acre per year for the first through fifth years of the lease and not less than $2 per acre per year for each year thereafter. A minimum royalty in lieu of rental of not less than the rental which otherwise would be required for that lease year shall be payable at the expiration of each lease year beginning on or after a discovery of oil or gas in paying quantities on the lands leased.

(e) Primary terms

Competitive and noncompetitive leases issued under this section shall be for a primary term of 10 years: *Provided, however*, That competitive leases issued in special tar sand areas shall also be for a primary term of ten years. Each such lease shall continue so long after its primary term as oil or gas is produced in paying quantities. Any lease issued under this section for land on which, or for which under an approved cooperative or unit plan of development or operation, actual drilling operations were commenced prior to the end of its primary term and are being diligently prosecuted at that time shall be extended for two years and so long thereafter as oil or gas is produced in paying quantities.

(f) Notice of proposed action; posting of notice; terms and maps

At least 45 days before offering lands for lease under this section, and at least 30 days before approving applications for permits to drill under the provisions of a lease or substantially modifying the terms of any lease issued under this section, the Secretary shall provide notice of the proposed action. Such notice shall be posted in the appropriate local office of the leasing and land management agencies. Such notice shall include the terms or modified lease terms and maps or a narrative description of the affected lands. Where the inclusion of maps in such notice is not practicable, maps of the affected lands shall be made available to the public for review. Such maps shall show the location of all tracts to be leased, and of all leases already issued in the general area. The requirements of this subsection are in addition to any public notice required by other law.

(g) Regulation of surface-disturbing activities; approval of plan of operations; bond or surety; failure to comply with reclamation requirements as barring lease; opportunity to comply with requirements

The Secretary of the Interior, or for National Forest lands, the Secretary of Agriculture, 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. No permit to drill on an oil and gas lease issued under this chapter may be granted without the analysis and approval by the Secretary concerned of a plan of operations covering proposed surface-disturbing activities within the lease area. The Secretary concerned shall, by rule or regulation, establish such standards as may be necessary to ensure that an adequate bond, surety, or other financial arrangement will be established prior to the commencement of surface-disturbing activities on any lease, to ensure 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. The Secretary shall not issue a lease or leases or approve the assignment of any lease or leases under the terms of this section to any person, association, corporation, or any subsidiary, affiliate, or person controlled by or under common control with such person, association, or corporation, during any period in which, as determined by the Secretary of the Interior or Secretary of Agriculture, such entity has failed or refused to comply in any material respect with the reclamation requirements and other standards established under this section for any prior lease to which such requirements and standards applied. Prior to making such determination with respect to any such entity the concerned Secretary shall provide such entity with adequate notification and an opportunity to comply with such reclamation requirements and other standards and shall consider whether any administrative or judicial appeal is pending. Once the entity has complied with the reclamation requirement or other standard concerned an oil or gas lease may be issued to such entity under this chapter.

(h) National Forest System Lands

The Secretary of the Interior may not issue any lease on National Forest System Lands reserved from the public domain over the objection of the Secretary of Agriculture.

(i) Termination

No lease issued under this section which is subject to termination because of cessation of production shall be terminated for this cause so long as reworking or drilling operations which were commenced on the land prior to or within sixty days after cessation of production are conducted thereon with reasonable diligence, or so long as oil or gas is produced in paying quantities as a result of such operations. No lease issued under this section shall expire because operations or production is suspended under any order, or with the consent, of the Secretary. No lease issued under this section covering lands on which there is a well capable of producing oil or gas in paying quantities shall expire because the lessee fails to produce the same unless the lessee is allowed a reasonable time, which shall be not less than sixty days after notice by registered or certified mail, within which to place such well in producing status or unless, after such status is established, production is discontinued on the leased premises without permission granted by the Secretary under the provisions of this chapter.

(j) Drainage agreements; primary term of lease, extension

Whenever it appears to the Secretary that lands owned by the United States are being drained of oil or gas by wells drilled on adjacent lands, he may negotiate agreements whereby the United States, or the United States and its lessees, shall be compensated for such drainage. Such agreements shall be made with the consent of the lessees, if any, affected thereby. If such agreement is entered into, the primary term of any lease for which compensatory royalty is being paid, or any extension

of such primary term, shall be extended for the period during which such compensatory royalty is paid and for a period of one year from discontinuance of such payment and so long thereafter as oil or gas is produced in paying quantities.

(k) Mining claims; suspension of running time of lease

If, during the primary term or any extended term of any lease issued under this section, a verified statement is filed by any mining claimant pursuant to subsection (c) of section 527 of this title, whether such filing occur prior to September 2, 1960 or thereafter, asserting the existence of a conflicting unpatented mining claim or claims upon which diligent work is being prosecuted as to any lands covered by the lease, the running of time under such lease shall be suspended as to the lands involved from the first day of the month following the filing of such verified statement until a final decision is rendered in the matter.

(l) Exchange of leases; conditions

The Secretary of the Interior shall, upon timely application therefor, issue a new lease in exchange for any lease issued for a term of twenty years, or any renewal thereof, or any lease issued prior to August 8, 1946, in exchange for a twenty-year lease, such new lease to be for a primary term of five years and so long thereafter as oil or gas is produced in paying quantities and at a royalty rate of not less than 12 ½ per centum in amount or value of the production removed or sold from such leases, except that the royalty rate shall be 12 ½ per centum in amount or value of the production removed or sold from said leases as to (1) such leases, or such parts of the lands subject thereto and the deposits underlying the same, as are not believed to be within the productive limits of any producing oil or gas deposit, as such productive limits are found by the Secretary to have existed on August 8, 1946; and (2) any production on a lease from an oil or gas deposit which was discovered after May 27, 1941, by a well or wells drilled within the boundaries of the lease, and which is determined by the Secretary to be a new deposit; and (3) any production on or allocated to a lease pursuant to an approved cooperative or unit plan of development or operation from an oil or gas deposit which was discovered after May 27, 1941, on land committed to such plan, and which is determined by the Secretary to be a new deposit, where such lease, or a lease for which it is exchanged, was included in such plan at the time of discovery or was included in a duly executed and filed application for the approval of such plan at the time of discovery.

(m) Cooperative or unit plan; authority of Secretary of the Interior to alter or modify; communitization or drilling agreements; term of lease, conditions; Secretary to approve operating, drilling or development contracts, and subsurface storage

For the purpose of more properly conserving the natural resources of any oil or gas pool, field, or like area, or any part thereof (whether or not any part of said oil or gas pool, field, or like area, is then subject to any cooperative or unit plan of development or operation), 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 certified by the Secretary of the Interior to be necessary or advisable in the public interest. The Secretary is thereunto authorized, in his discretion, with the consent of the holders of leases involved, to establish, alter, change, or revoke drilling, producing, rental, minimum royalty, and royalty requirements of such leases and to make such regulations with reference to such leases, with like consent on the part of the lessees, in connection with the institution and operation of any such cooperative or unit plan as he may deem necessary or proper to secure the proper protection of the public interest. The Secretary may provide that oil and gas leases hereafter issued under this chapter shall contain a provision requiring the lessee to operate under such a reasonable cooperative or unit plan, and he may prescribe such a plan under which such lessee shall operate, which shall adequately protect the rights of all parties in interest, including the United States.

Any plan authorized by the preceding paragraph which includes lands owned by the United States may, in the discretion of the Secretary, contain a provision whereby authority is vested in the Secretary of the Interior, or any such person, committee, or State or Federal officer or agency as may be designated in the plan, to alter or modify from time to time the rate of prospecting and development and the quantity and rate of production under such plan. All leases operated under any such plan approved or prescribed by the Secretary shall be excepted in determining holdings or control under the provisions of any section of this chapter.

When separate tracts cannot be independently developed and operated in conformity with an established well-spacing or development program, any lease, or a portion thereof, may be pooled with other lands, whether or not owned by the United States, under a communitization or drilling agreement providing for an apportionment of production or royalties among the separate tracts of land comprising the drilling or spacing unit when determined by the Secretary of the Interior to be in the public interest, and operations or production pursuant to such an agreement shall be deemed to be operations or production as to each such lease committed thereto.

Any lease issued for a term of twenty years, or any renewal thereof, or any portion of such lease that has become the subject of a cooperative or unit plan of development or operation of a pool, field, or like area, which plan has the approval of the Secretary of the Interior, shall continue in force until the termination of such plan. Any other lease issued under any section of this chapter which has heretofore or may hereafter be committed to any such plan that contains a general provision for allocation of oil or gas shall continue in force and effect as to the land committed so long as the lease remains subject to the plan: *Provided*, That production is had in paying quantities under the plan prior to the expiration date of the term of such lease. Any lease heretofore or hereafter committed to any such plan embracing lands that are in part within and in part outside of the area covered by any such plan shall be segregated into separate leases as to the lands committed and the lands not committed as of the effective date of unitization: *Provided, however*, That any such lease as to the nonunitized portion shall continue in force and effect for the term thereof but for not less than two years from the date of such segregation and so long thereafter as oil or gas is produced in paying quantities. The minimum royalty or discovery rental under any lease that has become subject to any cooperative or unit plan of development or operation, or other plan that contains a general provision for allocation of oil or gas, shall be payable only with respect to the lands subject to such lease to which oil or gas shall be allocated under such plan. Any lease which shall be eliminated from any such approved or prescribed plan, or from any communitization or drilling agreement authorized by this section, and any lease which shall be in effect at the termination of any such approved or prescribed plan, or at the termination of any such communitization or drilling agreement, unless relinquished, shall continue in effect for the original term thereof, but for not less than two years, and so long thereafter as oil or gas is produced in paying quantities.

The Secretary of the Interior is hereby authorized, on such conditions as he may prescribe, to approve operating, drilling, or development contracts made by one or more lessees of oil or gas leases, with one or more persons, associations, or corporations whenever, in his discretion, the conservation of natural products or the public convenience or necessity may require it or the interests of the United States may be best subserved thereby. All leases operated under such approved operating, drilling, or development contracts, and interests thereunder, shall be excepted in determining holdings or control under the provisions of this chapter.

The Secretary of the Interior, to avoid waste or to promote conservation of natural resources, may authorize the subsurface storage of oil or gas, whether or not produced from federally owned lands, in lands leased or subject to lease under this chapter. Such authorization may provide for the payment of a storage fee or rental on such stored oil or gas or, in lieu of such fee or rental, for a royalty other than that prescribed in the lease when such stored oil or gas is produced in conjunction with oil or gas not previously produced. Any lease on which storage is so authorized shall be extended at least for the period of storage and so long thereafter as oil or gas not previously produced is produced in paying quantities.

(n) Conversion of oil and gas leases and claims on hydrocarbon resources to combined hydrocarbon leases for primary term of 10 years; application

(1)(A) The owner of (1) an oil and gas lease issued prior to November 16, 1981, or (2) a valid claim to any hydrocarbon resources leasable under this section based on a mineral location made prior to January 21, 1926, and located within a special tar sand area shall be entitled to convert such lease or claim to a combined hydrocarbon lease for a primary term of ten years upon the filing of an application within two years from November 16, 1981, containing an acceptable plan of operations which assures reasonable protection of the environment and diligent development of those resources requiring enhanced recovery methods of development or mining. For purposes of conversion, no claim shall be deemed invalid solely because it was located as a placer location rather than a lode location or vice versa, notwithstanding any previous adjudication on that issue.

(B) The Secretary shall issue final regulations to implement this section within six months of November 16, 1981. If any oil and gas lease eligible for conversion under this section would otherwise expire after November 16, 1981, and before six months following the issuance of implementing regulations, the lessee may preserve his conversion right under such lease for a period ending six months after the issuance of implementing regulations by filing with the Secretary, before the expiration of the lease, a notice of intent to file an application for conversion. Upon submission of a complete plan of operations in substantial compliance with the regulations promulgated by the Secretary for the filing of such plans, the Secretary shall suspend the running of the term of any oil and gas lease proposed for conversion until the plan is finally approved or disapproved. The Secretary shall act upon a proposed plan of operations within fifteen months of its submittal.

(C) When an existing oil and gas lease is converted to a combined hydrocarbon lease, the royalty shall be that provided for in the original oil and gas lease and for a converted mining claim, 12 ½ per centum in amount or value of production removed or sold from the lease.

(2) Except as provided in this section, nothing in the Combined Hydrocarbon Leasing Act of 1981 shall be construed to diminish or increase the rights of any lessee under any oil and gas lease issued prior to November 16, 1981.

(o) Certain outstanding oil and gas deposits

(1) Prior to the commencement of surface-disturbing activities relating to the development of oil and gas deposits on lands described under paragraph (5), the Secretary of Agriculture shall require, pursuant to regulations promulgated by the Secretary, that such activities be subject to terms and conditions as provided under paragraph (2).

(2) The terms and conditions referred to in paragraph (1) shall require that reasonable advance notice be furnished to the Secretary of Agriculture at least 60 days prior to the commencement of surface disturbing activities.

(3) Advance notice under paragraph (2) shall include each of the following items of information:

(A) A designated field representative.

(B) A map showing the location and dimensions of all improvements, including but not limited to, well sites and road and pipeline accesses.

(C) A plan of operations, of an interim character if necessary, setting forth a schedule for construction and drilling.

(D) A plan of erosion and sedimentation control.

(E) Proof of ownership of mineral title.

Nothing in this subsection shall be construed to affect any authority of the State in which the lands concerned are located to impose any requirements with respect to such oil and gas operations.

(4) The person proposing to develop oil and gas deposits on lands described under paragraph (5) shall either--

(A) permit the Secretary to market merchantable timber owned by the United States on lands subject to such activities; or

(B) arrange to purchase merchantable timber on lands subject to such surface disturbing activities from the Secretary of Agriculture, or otherwise arrange for the disposition of such merchantable timber, upon such terms and upon such advance notice of the items referred to in subparagraphs (A) through (E) of paragraph (3) as the Secretary may accept.

(5)(A) The lands referred to in this subsection are those lands referenced in subparagraph (B) which are under the administration of the Secretary of Agriculture where the United States acquired an interest in such lands pursuant to the Act of March 1, 1911 (36 Stat. 961 and following), but does not have an interest in oil and gas deposits that may be present under such lands. This subsection does not apply to any such lands where, under the provisions of its acquisition of an interest in the lands, the United States is to acquire any oil and gas deposits that may be present under such lands in the future but such interest has not yet vested with the United States.

(B) This subsection shall only apply in the Allegheny National Forest.

(p) Deadlines for consideration of applications for permits

(1) In general

Not later than 10 days after the date on which the Secretary receives an application for any permit to drill, the Secretary shall--

(A) notify the applicant that the application is complete; or

(B) notify the applicant that information is missing and specify any information that is required to be submitted for the application to be complete.

(2) Issuance or deferral

Not later than 30 days after the applicant for a permit has submitted a complete application, the Secretary shall--

(A) issue the permit, if the requirements under the National Environmental Policy Act of 1969 and other applicable law have been completed within such timeframe; or

(B) defer the decision on the permit and provide to the applicant a notice--

(i) that specifies any steps that the applicant could take for the permit to be issued; and

(ii) a list of actions that need to be taken by the agency to complete compliance with applicable law together with timelines and deadlines for completing such actions.

(3) Requirements for deferred applications

(A) In general

If the Secretary provides notice under paragraph (2)(B), the applicant shall have a period of 2 years from the date of receipt of the notice in which to complete all requirements specified by the Secretary, including providing information needed for compliance with the National Environmental Policy Act of 1969.

(B) Issuance of decision on permit

If the applicant completes the requirements within the period specified in subparagraph (A), the Secretary shall issue a decision on the permit not later than 10 days after the date of completion of the requirements described in subparagraph (A), unless compliance with the National Environmental Policy Act of 1969 and other applicable law has not been completed within such timeframe.

(C) Denial of permit

If the applicant does not complete the requirements within the period specified in subparagraph (A) or if the applicant does not comply with applicable law, the Secretary shall deny the permit.

CREDIT(S)

(Feb. 25, 1920, c. 85, § 17, 41 Stat. 443; July 3, 1930, c. 854, § 1, 46 Stat. 1007; Mar. 4, 1931, c. 506, 46 Stat. 1523; Aug. 21, 1935, c. 599, § 1, 49 Stat. 676; Aug. 8, 1946, c. 916, § 3, 60 Stat. 951; July 29, 1954, c. 644, § 1(1) to (3), 68 Stat. 583; June 11, 1960, Pub.L. 86-507, § 1(21), 74 Stat. 201; Sept. 2, 1960, Pub.L. 86-705, § 2, 74 Stat. 781; Nov. 16, 1981, Pub.L. 97-78, § 1(6), (8), 95 Stat. 1070, 1071; Dec. 22, 1987, Pub.L. 100-203, Title V, § 5102(a) to (d)(1), 101 Stat. 1330-256, 1330-257; Oct. 24, 1992, Pub.L. 102-486, Title XXV, §§ 2507(a), 2508(a), 2509, 106 Stat. 3107, 3108, 3109; Nov. 2, 1994, Pub.L. 103-437, § 11(a)(1), 108 Stat. 4589; Dec. 21, 1995, Pub.L. 104-66, Title I, § 1081(a), 109 Stat. 721; Aug. 8, 2005, Pub.L. 109-58, Title III, §§ 350(a), (b), 366, 369(j)(1), 119 Stat. 711, 726, 730; Pub.L. 113-291, Div. B, Title XXX, § 3022(a), Dec. 19, 2014, 128 Stat. 3762.)

Notes of Decisions (118)

Footnotes

[1] So in original. Probably should be “subsection (k)(1)(C)”.

30 U.S.C.A. § 226, 30 USCA § 226
Current through P.L. 114-114 (excluding 114-92, 114-94, 114-95 and 114-113) approved 12-28-2015

End of Document

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

United States Code Annotated
Title 42. The Public Health and Welfare
Chapter 6A. Public Health Service (Refs & Annos)
Subchapter XII. Safety of Public Water Systems
Part C. Protection of Underground Sources of Drinking Water (Refs & Annos)

42 U.S.C.A. § 300h

§ 300h. Regulations for State programs

Effective: August 8, 2005

Currentness

(a) Publication of proposed regulations; promulgation; amendments; public hearings; administrative consultations

(1) The Administrator shall publish proposed regulations for State underground injection control programs within 180 days after December 16, 1974. Within 180 days after publication of such proposed regulations, he shall promulgate such regulations with such modifications as he deems appropriate. Any regulation under this subsection may be amended from time to time.

(2) Any regulation under this section shall be proposed and promulgated in accordance with section 553 of Title 5 (relating to rulemaking), except that the Administrator shall provide opportunity for public hearing prior to promulgation of such regulations. In proposing and promulgating regulations under this section, the Administrator shall consult with the Secretary, the National Drinking Water Advisory Council, and other appropriate Federal entities and with interested State entities.

(b) Minimum requirements; restrictions

(1) Regulations under subsection (a) of this section for State underground injection programs shall contain minimum requirements for effective programs to prevent underground injection which endangers drinking water sources within the meaning of subsection (d)(2) of this section. Such regulations shall require that a State program, in order to be approved under section 300h-1 of this title--

(A) shall prohibit, effective on the date on which the applicable underground injection control program takes effect, any underground injection in such State which is not authorized by a permit issued by the State (except that the regulations may permit a State to authorize underground injection by rule);

(B) shall require (i) in the case of a program which provides for authorization of underground injection by permit, that the applicant for the permit to inject must satisfy the State that the underground injection will not endanger drinking water sources, and (ii) in the case of a program which provides for such an authorization by rule, that no rule may be promulgated which authorizes any underground injection which endangers drinking water sources;

(C) shall include inspection, monitoring, recordkeeping, and reporting requirements; and

(D) shall apply (i) as prescribed by section 300j-6(b) of this title, to underground injections by Federal agencies, and (ii) to underground injections by any other person whether or not occurring on property owned or leased by the United States.

(2) Regulations of the Administrator under this section for State underground injection control programs may not prescribe requirements which interfere with or impede--

(A) the underground injection of brine or other fluids which are brought to the surface in connection with oil or natural gas production or natural gas storage operations, or

(B) any underground injection for the secondary or tertiary recovery of oil or natural gas,

unless such requirements are essential to assure that underground sources of drinking water will not be endangered by such injection.

(3)(A) The regulations of the Administrator under this section shall permit or provide for consideration of varying geologic, hydrological, or historical conditions in different States and in different areas within a State.

(B)(i) In prescribing regulations under this section the Administrator shall, to the extent feasible, avoid promulgation of requirements which would unnecessarily disrupt State underground injection control programs which are in effect and being enforced in a substantial number of States.

(ii) For the purpose of this subparagraph, a regulation prescribed by the Administrator under this section shall be deemed to disrupt a State underground injection control program only if it would be infeasible to comply with both such regulation and the State underground injection control program.

(iii) For the purpose of this subparagraph, a regulation prescribed by the Administrator under this section shall be deemed unnecessary only if, without such regulation, underground sources of drinking water will not be endangered by an underground injection.

(C) Nothing in this section shall be construed to alter or affect the duty to assure that underground sources of drinking water will not be endangered by any underground injection.

(c) Temporary permits; notice and hearing

(1) The Administrator may, upon application of the Governor of a State which authorizes underground injection by means of permits, authorize such State to issue (without regard to subsection (b)(1)(B)(i) of this section) temporary permits for underground injection which may be effective until the expiration of four years after December 16, 1974, if--

(A) the Administrator finds that the State has demonstrated that it is unable and could not reasonably have been able to process all permit applications within the time available;

(B) the Administrator determines the adverse effect on the environment of such temporary permits is not unwarranted;

(C) such temporary permits will be issued only with respect to injection wells in operation on the date on which such State's permit program approved under this part first takes effect and for which there was inadequate time to process its permit application; and

(D) the Administrator determines the temporary permits require the use of adequate safeguards established by rules adopted by him.

(2) The Administrator may, upon application of the Governor of a State which authorizes underground injection by means of permits, authorize such State to issue (without regard to subsection (b)(1)(B)(i) of this section), but after reasonable notice and hearing, one or more temporary permits each of which is applicable to a particular injection well and to the underground injection of a particular fluid and which may be effective until the expiration of four years after December 16, 1974, if the State finds, on the record of such hearing--

(A) that technology (or other means) to permit safe injection of the fluid in accordance with the applicable underground injection control program is not generally available (taking costs into consideration);

(B) that injection of the fluid would be less harmful to health than the use of other available means of disposing of waste or producing the desired product; and

(C) that available technology or other means have been employed (and will be employed) to reduce the volume and toxicity of the fluid and to minimize the potentially adverse effect of the injection on the public health.

(d) "Underground injection" defined; underground injection endangerment of drinking water sources

For purposes of this part:

(1) Underground injection

The term "underground injection"--

(A) means the subsurface emplacement of fluids by well injection; and

(B) excludes--

(i) the underground injection of natural gas for purposes of storage; and

(ii) the underground injection of fluids or propping agents (other than diesel fuels) pursuant to hydraulic fracturing operations related to oil, gas, or geothermal production activities.

(2) Underground injection endangers drinking water sources if such injection may result in the presence in underground water which supplies or can reasonably be expected to supply any public water system of any contaminant, and if the presence of such contaminant may result in such system's not complying with any national primary drinking water regulation or may otherwise adversely affect the health of persons.

CREDIT(S)

(July 1, 1944, c. 373, Title XIV, § 1421, as added Dec. 16, 1974, Pub.L. 93-523, § 2(a), 88 Stat. 1674; amended Nov. 16, 1977, Pub.L. 95-190, § 6(b), 91 Stat. 1396; Dec. 5, 1980, Pub.L. 96-502, §§ 3, 4(c), 94 Stat. 2738; June 19, 1986, Pub.L. 99-339, Title II, § 201(a), 100 Stat. 653; Aug. 6, 1996, Pub.L. 104-182, Title V, § 501(b)(1), 110 Stat. 1691; Aug. 8, 2005, Pub.L. 109-58, Title III, § 322, 119 Stat. 694.)

Notes of Decisions (9)

42 U.S.C.A. § 300h, 42 USCA § 300h

Current through P.L. 114-114 (excluding 114-92, 114-94, 114-95 and 114-113) approved 12-28-2015

End of Document

§ 2.22 How will the bureau grant requests?

(a) Once the bureau makes a determination to grant a request in full or in part, it must notify you in writing.

(b) The notification will inform you of any fees charged under subpart G of this part.

(c) The bureau will release records (or portions of records) to you promptly upon payment of any applicable fees (or before then, in accordance with § 2.37(c) of this part).

(d) If the records (or portions of records) are not included with the bureau's notification, the bureau will advise you how, when, and where the records will be made available.

§ 2.23 When will the bureau deny a request or procedural benefits?

(a) A bureau denies a request when it makes a decision that:

(1) A requested record is exempt, in full or in part;

(2) The request does not reasonably describe the records sought;

(3) A requested record does not exist, cannot be located, or is not in the bureau's possession; or

(4) A requested record is not readily reproducible in the form or format you seek.

(b) A bureau denies a procedural benefit only, and not access to the underlying records, when it makes a decision that:

(1) A fee waiver, or another fee-related issue, will not be granted; or

(2) Expedited processing will not be provided.

(c) The bureau must consult with the Office of the Solicitor before it denies a fee waiver request or withholds all or part of a requested record.

§ 2.24 How will the bureau deny requests?

(a)The bureau must notify you in writing of any denial of your request.

(b) The denial notification must include:

(1) The name and title or position of the person responsible for the denial;

(2) A brief statement of the reasons for the denial, including a reference to any FOIA exemption(s) applied by the bureau to withhold records in full or in part;

(3) An estimate of the volume of any records or information withheld, for example, by providing the number of pages or some other reasonable form of estimation, unless such an estimate would harm an interest protected by the exemption(s) used to withhold the records or information;

(4) The name and title of the Office of the Solicitor attorney consulted (if the bureau is denying a fee waiver request or withholding all or part of a requested record); and

(5) A statement that the denial may be appealed under subpart H of this part and a description of the requirements set forth therein.

§ 2.25 What if the requested records contain both exempt and nonexempt material?

If responsive records contain both exempt and nonexempt material, the bureau will consult with the Office of the Solicitor, as discussed in § 2.23(c). After consultation, the bureau will partially grant and partially deny the request by:

(a) Segregating and releasing the nonexempt information, unless the nonexempt material is so intertwined with the exempt material that disclosure of it would leave only meaningless words and phrases;

(b) Indicating on the released portion of the record the amount of information deleted and the FOIA exemption under which the deletion was made, unless doing so would harm an interest protected by the FOIA exemption used to withhold the information; and

(c) If technically feasible, placing the information required by paragraph (b) of this section at the place in the record where the deletion was made.

Subpart F—Handling Confidential Information

SOURCE: 77 FR 76906, Dec. 31, 2012, unless otherwise noted.

§ 2.26 How will the bureau interact with the submitter of possibly confidential information?

(a) The Department encourages, but does not require, submitters to designate confidential information in good faith at the time of submission. Such

designations assist the bureau in determining whether information obtained from the submitter is confidential information, but will not always be determinative.

(b) If, in the course of responding to a FOIA request, a bureau cannot readily determine whether information is confidential information, the bureau will:

(1) Consult with the submitter under §§ 2.27 and 2.28; and

(2) Provide the submitter an opportunity to object to a decision to disclose the information under §§ 2.30 and 2.31 of this subpart.

§ 2.27 When will the bureau notify a submitter of a request for their possibly confidential information?

(a) Except as outlined in § 2.29 of this subpart, a bureau must promptly notify a submitter in writing when it receives a FOIA request if either:

(1) The requested information has been designated in good faith by the submitter as information considered protected from disclosure under Exemption 4 of the FOIA, found at 5 U.S.C. 552(b)(4); or

(2) The bureau believes that requested information may be protected from disclosure under Exemption 4.

(b) If a large number of submitters are involved, the bureau may publish a notice in a manner reasonably calculated to reach the attention of the submitters (for example, in newspapers or newsletters, the bureau's Web site, or the FEDERAL REGISTER) instead of providing a written notice to each submitter.

§ 2.28 What information will the bureau include when it notifies a submitter of a request for their possibly confidential information?

A notice to a submitter must include:

(a) Either a copy of the FOIA request or the exact language of the request;

(b) Either a description of the possibly confidential information located in response to the request or a copy of the responsive records, or portions of records, containing the information;

(c) A description of the procedures for objecting to the release of the possibly confidential information under §§ 2.30 and 2.31 of this subpart;

(d) A time limit for responding to the bureau—no less than 10 workdays from receipt or publication of the notice (as set forth in § 2.27(b) of this subpart)—to object to the release and to explain the basis for the objection;

(e) Notice that information contained in the submitter's objections may itself be subject to disclosure under the FOIA;

(f) Notice that the bureau, not the submitter, is responsible for deciding whether the information will be released or withheld;

(g) A request for the submitter's views on whether they still consider the information to be confidential if the submitter designated the material as confidential commercial or financial information 10 or more years before the request; and

(h) Notice that failing to respond within the time frame specified under § 2.28(d) of this subpart will create a presumption that the submitter has no objection to the disclosure of the information in question.

§ 2.29 When will the bureau not notify a submitter of a request for their possibly confidential information?

The notice requirements of § 2.28 of this subpart will not apply if:

(a) The information has been lawfully published or officially made available to the public; or

(b) Disclosure of the information is required by a statute other than the FOIA or by a regulation (other than this part) issued in accordance with the requirements of Executive Order 12600.

§ 2.30 How and when may a submitter object to the disclosure of confidential information?

(a) If a submitter has any objections to the disclosure of confidential information, the submitter should provide a detailed written statement to the bureau that specifies all grounds for withholding the particular information under any FOIA exemption (see § 2.31 of this subpart for further discussion of Exemption 4 objection statements).

(b) A submitter who does not respond within the time period specified under § 2.28(d) of this subpart will be considered to have no objection to disclosure of the information. Responses received

by the bureau after this time period will not be considered by the bureau unless the appropriate bureau FOIA contact determines, in his or her sole discretion, that good cause exists to accept the late response.

§ 2.31 What must a submitter include in a detailed Exemption 4 objection statement?

(a) To rely on Exemption 4 as basis for nondisclosure, the submitter must explain why the information is confidential information. To do this, the submitter must give the bureau a detailed written statement. This statement must include a specific and detailed discussion of why the information is a trade secret or, if the information is not a trade secret, the following three categories must be addressed (unless the bureau informs the submitter that a response to one of the first two categories will not be necessary):

(1) Whether the Government required the information to be submitted, and if so, how substantial competitive or other business harm would likely result from release;

(2) Whether the submitter provided the information voluntarily and, if so, how the information fits into a category of information that the submitter does not customarily release to the public; and

(3) A certification that the information is confidential, has not been disclosed to the public by the submitter, and is not routinely available to the public from other sources.

(b) If not already provided, the submitter must include a daytime telephone number, an email and mailing address, and a fax number (if available).

§ 2.32 How will the bureau consider the submitter's objections?

(a) The bureau must carefully consider a submitter's objections and specific grounds for nondisclosure in deciding whether to disclose the requested information.

(b) The bureau, not the submitter, is responsible for deciding whether the information will be released or withheld.

§ 2.33 What if the bureau determines it will disclose information over the submitter's objections?

If the bureau decides to disclose information over the objection of a submitter, the bureau must notify the submitter by certified mail or other traceable mail, return receipt requested. The notification must be sent to the submitter's last known address and must include:

(a) The specific reasons why the bureau determined that the submitter's disclosure objections do not support withholding the information;

(b) Copies of the records or information the bureau intends to release; and

(c) Notice that the bureau intends to release the records or information no less than 10 workdays after receipt of the notice by the submitter.

§ 2.34 Will a submitter be notified of a FOIA lawsuit?

If you file a lawsuit seeking to compel the disclosure of confidential information, the bureau must promptly notify the submitter.

§ 2.35 Will you receive notification of activities involving the submitter?

If any of the following occur, the bureau will notify you:

(a) The bureau provides the submitter with notice and an opportunity to object to disclosure;

(b) The bureau notifies the submitter of its intent to disclose the requested information; or

(c) A submitter files a lawsuit to prevent the disclosure of the information.

§ 2.36 Can a bureau release information protected by Exemption 4?

If a bureau determines that the requested information is protected from release by Exemption 4 of the FOIA, the bureau has no discretion to release the information. Release of information protected from release by Exemption 4 is prohibited by the Trade Secrets Act, a criminal provision found at 18 U.S.C. 1905.

Subpart G—Fees

SOURCE: 77 FR 76906, Dec. 31, 2012, unless otherwise noted.

or equitable title to the subject lease(s) which would entitle the applicant to conduct drilling operations.

[47 FR 47765, Oct. 27, 1982. Redesignated and amended at 48 FR 36583, Aug. 12, 1983, further amended at 52 FR 5391, Feb. 20, 1987; 53 FR 17363, May 16, 1988; 53 FR 22846, June 17, 1988; 53 FR 31958, Aug. 22, 1988]

§ 3162.3–2 Subsequent well operations.

(a) A proposal for further well operations shall be submitted by the operator on Form 3160–5 for approval by the authorized officer prior to commencing operations to redrill, deepen, perform casing repairs, plug-back, alter casing, perform nonroutine fracturing jobs, recomplete in a different interval, perform water shut off, commingling production between intervals and/or conversion to injection. If there is additional surface distubance, the proposal shall include a surface use plan of operations. A subsequent report on these operations also will be filed on Form 3160–5. The authorized officer may prescribe that each proposal contain all or a portion of the information set forth in § 3162.3–1 of this title.

(b) Unless additional surface disturbance is involved and if the operations conform to the standard of prudent operating practice, prior approval is not required for routine fracturing or acidizing jobs, or recompletion in the same interval; however, a subsequent report on these operations must be filed on Form 3160–5.

(c) No prior approval or a subsequent report is required for well cleanout work, routine well maintenance, or bottom hole pressure surveys.

[47 FR 47765, Oct. 27, 1982. Redesignated and amended at 48 FR 36583, Aug. 12, 1983, further amended at 52 FR 5391, Feb. 20, 1987; 53 FR 17363, May 16, 1988; 53 FR 22847, June 17, 1988]

§ 3162.3–3 Other lease operations.

Prior to commencing any operation on the leasehold which will result in additional surface disturbance, other than those authorized under § 3162.3–1 or § 3162.3–2 of this title, the operator shall submit a proposal on Form 3160–5 to the authorized officer for approval. The proposal shall include a surface use plan of operations.

[47 FR 47765, Oct. 27, 1982. Redesignated and amended at 48 FR 36583, Aug. 12, 1983, and amended at 52 FR 5391, Feb. 20, 1987; 53 FR 17363, May 16, 1988; 53 FR 22847, June 17, 1988]

§ 3162.3–4 Well abandonment.

(a) The operator shall promptly plug and abandon, in accordance with a plan first approved in writing or prescribed by the authorized officer, each newly completed or recompleted well in which oil or gas is not encountered in paying quantities or which, after being completed as a producing well, is demonstrated to the satisfaction of the authorized officer to be no longer capable of producing oil or gas in paying quantities, unless the authorized officer shall approve the use of the well as a service well for injection to recover additional oil or gas or for subsurface disposal of produced water. In the case of a newly drilled or recompleted well, the approval to abandon may be written or oral with written confirmation.

(b) Completion of a well as plugged and abandoned may also include conditioning the well as water supply source for lease operations or for use by the surface owner or appropriate Government Agency, when authorized by the authorized officer. All costs over and above the normal plugging and abandonment expense will be paid by the party accepting the water well.

(c) No well may be temporarily abandoned for more than 30 days without the prior approval of the authorized officer. The authorized officer may authorize a delay in the permanent abandonment of a well for a period of 12 months. When justified by the operator, the authorized officer may authorize additional delays, no one of which may exceed an additional 12 months. Upon the removal of drilling or producing equipment from the site of a well which is to be permanently abandoned, the surface of the lands disturbed in connection with the conduct of operations shall be reclaimed in accordance with a plan first approved or prescribed by the authorized officer.

[47 FR 47765, Oct. 27, 1982. Redesignated and amended at 48 FR 36583, Aug. 12, 1983, further amended at 53 FR 17363, May 16, 1988; 53 FR 22847, June 17, 1988]

United States Code Annotated
Title 43. Public Lands (Refs & Annos)
Chapter 35. Federal Land Policy and Management (Refs & Annos)
Subchapter I. General Provisions

43 U.S.C.A. § 1701

§ 1701. Congressional declaration of policy

Currentness

(a) The Congress declares that it is the policy of the United States that--

(1) the public lands be retained in Federal ownership, unless as a result of the land use planning procedure provided for in this Act, it is determined that disposal of a particular parcel will serve the national interest;

(2) the national interest will be best realized if the public lands and their resources are periodically and systematically inventoried and their present and future use is projected through a land use planning process coordinated with other Federal and State planning efforts;

(3) public lands not previously designated for any specific use and all existing classifications of public lands that were effected by executive action or statute before October 21, 1976, be reviewed in accordance with the provisions of this Act;

(4) the Congress exercise its constitutional authority to withdraw or otherwise designate or dedicate Federal lands for specified purposes and that Congress delineate the extent to which the Executive may withdraw lands without legislative action;

(5) in administering public land statutes and exercising discretionary authority granted by them, the Secretary be required to establish comprehensive rules and regulations after considering the views of the general public; and to structure adjudication procedures to assure adequate third party participation, objective administrative review of initial decisions, and expeditious decisionmaking;

(6) judicial review of public land adjudication decisions be provided by law;

(7) goals and objectives be established by law as guidelines for public land use planning, and that management be on the basis of multiple use and sustained yield unless otherwise specified by law;

(8) the public lands be managed in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values; that, where appropriate, will preserve and protect certain public lands in their natural condition; that will provide food and habitat for fish and wildlife and domestic animals; and that will provide for outdoor recreation and human occupancy and use;

(9) the United States receive fair market value of the use of the public lands and their resources unless otherwise provided for by statute;

(10) uniform procedures for any disposal of public land, acquisition of non-Federal land for public purposes, and the exchange of such lands be established by statute, requiring each disposal, acquisition, and exchange to be consistent with the prescribed mission of the department or agency involved, and reserving to the Congress review of disposals in excess of a specified acreage;

(11) regulations and plans for the protection of public land areas of critical environmental concern be promptly developed;

(12) the public lands be managed in a manner which recognizes the Nation's need for domestic sources of minerals, food, timber, and fiber from the public lands including implementation of the Mining and Minerals Policy Act of 1970 (84 Stat. 1876, 30 U.S.C. 21a) as it pertains to the public lands; and

(13) the Federal Government should, on a basis equitable to both the Federal and local taxpayer, provide for payments to compensate States and local governments for burdens created as a result of the immunity of Federal lands from State and local taxation.

(b) The policies of this Act shall become effective only as specific statutory authority for their implementation is enacted by this Act or by subsequent legislation and shall then be construed as supplemental to and not in derogation of the purposes for which public lands are administered under other provisions of law.

CREDIT(S)

(Pub.L. 94-579, Title I, § 102, Oct. 21, 1976, 90 Stat. 2744.)

Notes of Decisions (29)

43 U.S.C.A. § 1701, 43 USCA § 1701
Current through P.L. 114-114 (excluding 114-92, 114-94, 114-95 and 114-113) approved 12-28-2015

United States Code Annotated
Title 43. Public Lands (Refs & Annos)
Chapter 35. Federal Land Policy and Management (Refs & Annos)
Subchapter III. Administration

43 U.S.C.A. § 1732

§ 1732. Management of use, occupancy, and development of public lands

Currentness

(a) Multiple use and sustained yield requirements applicable; exception

The Secretary shall manage the public lands under principles of multiple use and sustained yield, in accordance with the land use plans developed by him under section 1712 of this title when they are available, except that where a tract of such public land has been dedicated to specific uses according to any other provisions of law it shall be managed in accordance with such law.

(b) Easements, permits, etc., for utilization through habitation, cultivation, and development of small trade or manufacturing concerns; applicable statutory requirements

In managing the public lands, the Secretary shall, subject to this Act and other applicable law and under such terms and conditions as are consistent with such law, regulate, through easements, permits, leases, licenses, published rules, or other instruments as the Secretary deems appropriate, the use, occupancy, and development of the public lands, including, but not limited to, long-term leases to permit individuals to utilize public lands for habitation, cultivation, and the development of small trade or manufacturing concerns: *Provided*, That unless otherwise provided for by law, the Secretary may permit Federal departments and agencies to use, occupy, and develop public lands only through rights-of-way under section 1767 of this title, withdrawals under section 1714 of this title, and, where the proposed use and development are similar or closely related to the programs of the Secretary for the public lands involved, cooperative agreements under section 1737(b) of this title: *Provided further*, That nothing in this Act shall be construed as authorizing the Secretary concerned to require Federal permits to hunt and fish on public lands or on lands in the National Forest System and adjacent waters or as enlarging or diminishing the responsibility and authority of the States for management of fish and resident wildlife. However, the Secretary concerned may designate areas of public land and of lands in the National Forest System where, and establish periods when, no hunting or fishing will be permitted for reasons of public safety, administration, or compliance with provisions of applicable law. Except in emergencies, any regulations of the Secretary concerned relating to hunting and fishing pursuant to this section shall be put into effect only after consultation with the appropriate State fish and game department. Nothing in this Act shall modify or change any provision of Federal law relating to migratory birds or to endangered or threatened species. Except as provided in section 1744, section 1782, and subsection (f) of section 1781 of this title and in the last sentence of this paragraph, no provision of this section or any other section of this Act shall in any way amend the Mining Law of 1872 or impair the rights of any locators or claims under that Act, including, but not limited to, rights of ingress and egress. In managing the public lands the Secretary shall, by regulation or otherwise, take any action necessary to prevent unnecessary or undue degradation of the lands.

(c) Revocation or suspension provision in instrument authorizing use, occupancy or development; violation of provision; procedure applicable

The Secretary shall insert in any instrument providing for the use, occupancy, or development of the public lands a provision authorizing revocation or suspension, after notice and hearing, of such instrument upon a final administrative finding of a violation of any term or condition of the instrument, including, but not limited to, terms and conditions requiring compliance with regulations under Acts applicable to the public lands and compliance with applicable State or Federal air or water quality standard or implementation plan: *Provided*, That such violation occurred on public lands covered by such instrument and occurred in connection with the exercise of rights and privileges granted by it: *Provided further*, That the Secretary shall terminate any such suspension no later than the date upon which he determines the cause of said violation has been rectified: *Provided further*, That the Secretary may order an immediate temporary suspension prior to a hearing or final administrative finding if he determines that such a suspension is necessary to protect health or safety or the environment: *Provided further*, That, where other applicable law contains specific provisions for suspension, revocation, or cancellation of a permit, license, or other authorization to use, occupy, or develop the public lands, the specific provisions of such law shall prevail.

(d) Authorization to utilize certain public lands in Alaska for military purposes

(1) The Secretary of the Interior, after consultation with the Governor of Alaska, may issue to the Secretary of Defense or to the Secretary of a military department within the Department of Defense or to the Commandant of the Coast Guard a nonrenewable general authorization to utilize public lands in Alaska (other than within a conservation system unit or the Steese National Conservation Area or the White Mountains National Recreation Area) for purposes of military maneuvering, military training, or equipment testing not involving artillery firing, aerial or other gunnery, or other use of live ammunition or ordnance.

(2) Use of public lands pursuant to a general authorization under this subsection shall be limited to areas where such use would not be inconsistent with the plans prepared pursuant to section 1712 of this title. Each such use shall be subject to a requirement that the using department shall be responsible for any necessary cleanup and decontamination of the lands used, and to such other terms and conditions (including but not limited to restrictions on use of off-road or all-terrain vehicles) as the Secretary of the Interior may require to--

(A) minimize adverse impacts on the natural, environmental, scientific, cultural, and other resources and values (including fish and wildlife habitat) of the public lands involved; and

(B) minimize the period and method of such use and the interference with or restrictions on other uses of the public lands involved.

(3)(A) A general authorization issued pursuant to this subsection shall not be for a term of more than three years and shall be revoked in whole or in part, as the Secretary of the Interior finds necessary, prior to the end of such term upon a determination by the Secretary of the Interior that there has been a failure to comply with its terms and conditions or that activities pursuant to such an authorization have had or might have a significant adverse impact on the resources or values of the affected lands.

(B) Each specific use of a particular area of public lands pursuant to a general authorization under this subsection shall be subject to specific authorization by the Secretary and to appropriate terms and conditions, including such as are described in paragraph (2) of this subsection.

(4) Issuance of a general authorization pursuant to this subsection shall be subject to the provisions of section 1712(f) of this title, section 3120 of Title 16, and all other applicable provisions of law. The Secretary of a military department (or the commandant of the Coast Guard) requesting such authorization shall reimburse the Secretary of the Interior for the costs of implementing this paragraph. An authorization pursuant to this subsection shall not authorize the construction of permanent structures or facilities on the public lands.

(5) To the extent that public safety may require closure to public use of any portion of the public lands covered by an authorization issued pursuant to this subsection, the Secretary of the military department concerned or the Commandant of the Coast Guard shall take appropriate steps to notify the public concerning such closure and to provide appropriate warnings of risks to public safety.

(6) For purposes of this subsection, the term "conservation system unit" has the same meaning as specified in section 3102 of Title 16.

CREDIT(S)

(Pub.L. 94-579, Title III, § 302, Oct. 21, 1976, 90 Stat. 2762; Pub.L. 100-586, Nov. 3, 1988, 102 Stat. 2980.)

Notes of Decisions (55)

43 U.S.C.A. § 1732, 43 USCA § 1732
Current through P.L. 114-114 (excluding 114-92, 114-94, 114-95 and 114-113) approved 12-28-2015

End of Document

United States Code Annotated
Title 43. Public Lands (Refs & Annos)
Chapter 35. Federal Land Policy and Management (Refs & Annos)
Subchapter III. Administration

43 U.S.C.A. § 1740

§ 1740. Rules and regulations

Currentness

The Secretary, with respect to the public lands, shall promulgate rules and regulations to carry out the purposes of this Act and of other laws applicable to the public lands, and the Secretary of Agriculture, with respect to lands within the National Forest System, shall promulgate rules and regulations to carry out the purposes of this Act. The promulgation of such rules and regulations shall be governed by the provisions of chapter 5 of Title 5, without regard to section 553(a)(2). Prior to the promulgation of such rules and regulations, such lands shall be administered under existing rules and regulations concerning such lands to the extent practical.

CREDIT(S)

(Pub.L. 94-579, Title III, § 310, Oct. 21, 1976, 90 Stat. 2767.)

Notes of Decisions (5)

43 U.S.C.A. § 1740, 43 USCA § 1740
Current through P.L. 114-114 (excluding 114-92, 114-94, 114-95 and 114-113) approved 12-28-2015

End of Document

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Part III

Department of the Interior

Bureau of Land Management

43 CFR Part 3160

Oil and Gas; Hydraulic Fracturing on Federal and Indian Lands; Final Rule

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

43 CFR Part 3160

[LLWO300000 L13100000.PP0000 14X]

RIN 1004–AE26

Oil and Gas; Hydraulic Fracturing on Federal and Indian Lands

AGENCY: Bureau of Land Management, Interior.

ACTION: Final rule.

SUMMARY: On May 11, 2012, the Bureau of Land Management (BLM) published in the **Federal Register** a proposed rule titled Oil and Gas; Well Stimulation, Including Hydraulic Fracturing, on Federal and Indian Lands. Because of significant public interest in hydraulic fracturing and this rulemaking, on May 24, 2013, the BLM published in the **Federal Register** a supplemental notice of proposed rulemaking and request for comment titled Oil and Gas Hydraulic Fracturing on Federal and Indian Lands. The BLM has used the comments on the supplemental proposed rule and the earlier proposed rule in drafting this final rule. Key changes to the final rule include the allowable use of an expanded set of cement evaluation tools to help ensure that usable water zones have been isolated and protected from contamination, replacement of the ''type well'' concept to demonstrate well integrity with a requirement to demonstrate well integrity for all wells, more stringent requirements related to claims of trade secrets exempt from disclosure, more protective requirements to ensure that fluids recovered during hydraulic fracturing operations are contained, additional disclosure and public availability of information about each hydraulic fracturing operation, and revised records retention requirements to ensure that records of chemicals used in hydraulic fracturing operations are retained for the life of the well. The final rule also provides opportunities for the BLM to coordinate standards and processes with individual states and tribes to reduce administrative costs and to improve efficiency.

DATES: This final rule is effective on June 24, 2015.

ADDRESSES:

Mail: U.S. Department of the Interior, Director (630), Bureau of Land Management, Mail Stop 2134 LM, 1849 C St. NW., Washington, DC 20240, Attention: 1004–AE26.

Personal or messenger delivery: Bureau of Land Management, 20 M Street SE., Room 2134 LM, Attention: Regulatory Affairs, Washington, DC 20003.

FOR FURTHER INFORMATION CONTACT: Steven Wells, Division Chief, Fluid Minerals Division, 202–912–7143 for information regarding the substance of the rule or information about the BLM's Fluid Minerals Program. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 to contact the above individual during normal business hours. FIRS is available 24 hours a day, 7 days a week to leave a message or question with the above individual. You will receive a reply during normal business hours.

SUPPLEMENTARY INFORMATION:

Executive Summary

The BLM final rule on hydraulic fracturing serves as a much-needed complement to existing regulations designed to ensure the environmentally responsible development of oil and gas resources on Federal and Indian lands, which were finalized nearly thirty years ago, in light of the increasing use and complexity of hydraulic fracturing coupled with advanced horizontal drilling technology. This technology has opened large portions of the country to oil and gas development.

The BLM began work on this rule in November 2010, when it held its first public forum amid growing public concern about the rapid expansion of complex hydraulic fracturing. Since that time, the BLM has published two proposed rules and held numerous meetings with the public and state officials, as well as many tribal consultations and meetings. The public comment period was open for more than 210 days. During this period, the BLM received comments from more than 1.5 million individuals and groups. The BLM reviewed and analyzed these comments based on thoughtful analysis and robust dialogue, which resulted in a rule that is more protective than the previous proposed rules and current regulations. It also strengthens oversight and provides the public with more information than is currently available, while recognizing state and tribal authorities and not imposing undue delays, costs, and procedures on operators. The final rule fulfills the goals of the initial proposed rules: To ensure that wells are properly constructed to protect water supplies, to make certain that the fluids that flow back to the surface as a result of hydraulic fracturing operations are managed in an environmentally responsible way, and to provide public disclosure of the chemicals used in hydraulic fracturing fluids.

The final rule also: (1) Improves public awareness of where hydraulic fracturing has occurred and the existence of other wells or geologic faults or fractures in the area, as well as communicates what chemicals have been used in the fracturing process; (2) Clarifies and strengthens existing rules related to well construction to ensure integrity and address developments in technology; (3) Aligns requirements with state and tribal authorities with regard to water zones that require protection; and (4) Provides opportunities to coordinate standards and processes with individual states and tribes to reduce costs, increase efficiencies, and promote the development of more stringent standards by state and tribal governments.

Various types of hydraulic fracturing have long been used on a relatively small scale to complete or to re-complete conventional oil and gas wells. More recently, hydraulic fracturing has been coupled with relatively new horizontal drilling technology in larger-scale operations that have allowed greatly increased access to shale oil and gas resources across the country, sometimes in areas that have not previously or recently experienced significant oil and gas development. These newer wells can, among other complexities, be significantly deeper and cover a larger horizontal area than the operations of the past. This increased complexity requires additional regulatory effort and oversight.

Rapid expansion of this practice and its complexity have caused public concern about whether fracturing can lead to or cause the contamination of underground water sources, whether the chemicals used in fracturing pose risks to human health, and whether there is adequate management of well integrity and the fluids that return to the surface during and after fracturing operations.

The BLM's regulations that address issues surrounding hydraulic fracturing are at least 25–30 years old, and pre-date the current common use of the practice. In 2011, the Natural Gas Subcommittee of the Secretary of Energy's Advisory Board recommended that the BLM undertake a rulemaking to ensure well integrity, water protection, and adequate public disclosure. Prior to that, in 2009 the American Petroleum Institute published a guidance document titled ''Hydraulic Fracturing Operations-Well Construction and Integrity Guidelines, First Edition,

statement of ''any adverse effects of energy supply, distribution, or use (including a shortfall in supply, price increases, and increase use of foreign supplies)'' for the action and reasonable alternatives and their effects.

Section 4(b) of Executive Order 13211 defines a ''significant energy action'' as ''any action by an agency (normally published in the **Federal Register**) that promulgates or is expected to lead to the promulgation of a final rule or regulation, including notices of inquiry, advance notices of proposed rulemaking, and notices of proposed rulemaking: (1)(i) That is a significant regulatory action under Executive Order 12866 or any successor order, and (ii) is likely to have a significant adverse effect on the supply, distribution, or use of energy; or 2) That is designated by the Administrator of OIRA as a significant energy action.''

The BLM believes that the additional cost per hydraulic fracturing operation is insignificant when compared with the drilling costs in recent years, the production gains from hydraulically fractured well operations, and the net incomes of entities within the oil and natural gas industries. For the average hydraulic fracturing operation, the compliance costs represent about 0.13 to 0.21 percent of the cost of drilling a well.

Since the estimated compliance costs are not substantial when compared with the total costs of drilling a well, the BLM believes that the rule is unlikely to have an effect on the investment decisions of firms, and the rule is unlikely to affect the supply, distribution, or use of energy. As such, the rule is not a ''significant energy action'' as defined in Executive Order 13211.

Authors

The principal authors of this rule are: Bryce Barlan, Program Analysis Officer, BLM Washington Office; James Tichenor, Economist, BLM Washington Office; Gerald Dickinson, Petroleum Engineer, BLM Rawlins Field Office; John Ajak, Petroleum Engineer, Washington Office; John Pecor, Petroleum Engineer, BLM Tre Rios Field Office; Rich Estabrook, Petroleum Engineer, BLM Washington Office; Rosemary Herrell, Senior Policy Analyst, BLM Washington Office; Steven Wells, Division Chief, Fluid Minerals, BLM Washington Office; Subijoy Dutta, Senior Petroleum Engineer, BLM Washington Office; Will Lambert, Petroleum Engineer, BLM Washington Office; Allen McKee, Petroleum Engineer, BLM Utah State Office; Don Judice, Field Manager, BLM Great Falls Field Office; Bev Winston, Public Affairs Specialist, BLM Washington Office; assisted by the BLM's Division of Regulatory Affairs and the Department of the Interior's Office of the Solicitor.

List of Subjects 43 CFR Part 3160

Administrative practice and procedure, Government contracts, Indians-lands, Mineral royalties, Oil and gas exploration, Penalties, Public lands-mineral resources, Reporting and recordkeeping requirements.

For the reasons stated in the preamble, and under the authorities stated below, the Bureau of Land Management amends 43 CFR part 3160 as follows:

PART 3160—ONSHORE OIL AND GAS OPERATIONS

■ 1. The authority citation for part 3160 is revised to read as follows:

Authority: 25 U.S.C. 396d and 2107; 30 U.S.C. 189, 306, 359, and 1751; and 43 U.S.C. 1732(b), 1733, and 1740.

Subpart 3160—Onshore Oil and Gas Operations: General

§ 3160.0–3 [Amended]

■ 2. In § 3160.0–3 add ''the Federal Land Policy and Management Act (43 U.S.C. 1701 *et seq.*),'' after ''the Mineral Leasing Act for Acquired lands, as amended (30 U.S.C. 351–359),''.

■ 3. Amend § 3160.0–5 by adding definitions of ''annulus,'' ''bradenhead,'' ''Cement Evaluation Log (CEL),'' ''confining zone,'' ''hydraulic fracturing,'' ''hydraulic fracturing fluid,'' ''isolating or to isolate,'' ''master hydraulic fracturing plan,'' ''proppant,'' and ''usable water,'' in alphabetical order and by removing the definition of ''fresh water'' to read as follows:

§ 3160.0–5 Definitions.

* * * * *

Annulus means the space around a pipe in a wellbore, the outer wall of which may be the wall of either the borehole or casing; sometimes also called annular space.

* * * * *

Bradenhead means a heavy, flanged steel fitting connected to the first string of casing that allows the suspension of intermediate and production strings of casing and supplies the means for the annulus to be sealed.

Cement Evaluation Log (CEL) means any one of a class of tools that verify the integrity of annular cement bonding, such as, but not limited to, a cement bond log (CBL), ultrasonic imaging log, variable density logs, CBLs with directional receiver array, ultrasonic pulse echo log, or isolation scanner.

Confining zone means a geological formation, group of formations, or part of a formation that is capable of preventing fluid movement from any formation that will be hydraulically fractured into a usable water zone.

* * * * *

Hydraulic fracturing means those operations conducted in an individual wellbore designed to increase the flow of hydrocarbons from the rock formation to the wellbore through modifying the permeability of reservoir rock by applying fluids under pressure to fracture it. Hydraulic fracturing does not include enhanced secondary recovery such as water flooding, tertiary recovery, recovery through steam injection, or other types of well stimulation operations such as acidizing.

Hydraulic fracturing fluid means the liquid or gas, and any associated solids, used in hydraulic fracturing, including constituents such as water, chemicals, and proppants.

Isolating or to isolate means using cement to protect, separate, or segregate usable water and mineral resources.

* * * * *

Master hydraulic fracturing plan means a plan containing the information required in section 3162.3–3(d) of this part for a group of wells where the geologic characteristics for each well are substantially similar.

* * * * *

Proppant means a granular substance (most commonly sand, sintered bauxite, or ceramic) that is carried in suspension by the fracturing fluid that serves to keep the cracks in the geologic formation open when fracturing fluid is withdrawn after a hydraulic fracture operation.

* * * * *

Usable water means

(1) Generally those waters containing up to 10,000 parts per million (ppm) of total dissolved solids. Usable water includes, but is not limited to:

(i) Underground water that meets the definition of ''underground source of drinking water'' as defined at 40 CFR 144.3;

(ii) Underground sources of drinking water under the law of the State (for Federal lands) or tribe (for Indian lands); and

(iii) Water in zones designated by the State (for Federal lands) or tribe (for Indian lands) as requiring isolation or protection from hydraulic fracturing operations.

(2) The following geologic zones are deemed not to contain usable water:

(i) Zones from which the BLM has authorized an operator to produce oil and gas, provided that the operator has obtained all other authorizations required by the Environmental Protection Agency, the State (for Federal lands), or the tribe (for Indian lands) to conduct hydraulic fracturing operations in the specific zone;

(ii) Zones designated as exempted aquifers pursuant to 40 CFR 144.7; and

(iii) Zones that do not meet the definition of underground source of drinking water at 40 CFR 144.3 which the State (for Federal lands) or the tribe (for Indian lands) has designated as exempt from any requirement to be isolated or protected from hydraulic fracturing operations.

* * * * *

Subpart 3162—Requirements for Operating Rights Owners and Operators

■ 4. Amend § 3162.3–2 by revising the first sentence of paragraph (a) and revising paragraph (b) to read as follows:

§ 3162.3–2 Subsequent well operations.

(a) A proposal for further well operations must be submitted by the operator on a Sundry Notice and Report on Wells (Form 3160–5) as a Notice of Intent for approval by the authorized officer prior to commencing operations to redrill, deepen, perform casing repairs, plug-back, alter casing, recomplete in a different interval, perform water shut off, combine production between zones, and/or convert to injection. * * *

(b) Unless additional surface disturbance is involved and if the operations conform to the standard of prudent operating practice, prior approval is not required for acidizing jobs or recompletion in the same interval; however, a subsequent report on these operations must be filed using a Sundry Notice and Report on Wells (Form 3160–5).

* * * * *

■ 5. Revise § 3162.3–3 to read as follows:

§ 3162.3–3 Subsequent well operations; Hydraulic fracturing.

(a) *Activities to which this section applies.* This section, or portions of this section, apply to hydraulic fracturing as shown in the following table:

If . . .	Then
(1) No APD was submitted as of June 24, 2015	The operator must comply with all paragraphs of this section.
(2) An APD was submitted but not approved as of June 24, 2015. (3) An APD or APD extension was approved before June 24, 2015, but the authorized drilling operations did not begin until after June 24, 2015.	To conduct hydraulic fracturing within 90 days after the effective date of this rule, the operator must comply with all paragraphs of this section, except (c) and (d).
(4) Authorized drilling operations began, but were not completed before June 24, 2015 (5) Authorized drilling operations were completed after September 22, 2015. (6) Authorized drilling activities were completed before September 22, 2015	The operator must comply with all paragraphs of this section.

(b) *Isolation of usable water to prevent contamination.* All hydraulic fracturing operations must meet the performance standard in section 3162.5–2(d) of this title.

(c) *How an operator must submit a request for approval of hydraulic fracturing.* A request for approval of hydraulic fracturing must be submitted by the operator and approved by the authorized officer before commencement of operations. The operator may submit the request in one of the following ways:

(1) With an application for permit to drill; or

(2) With a Sundry Notice and Report on Wells (Form 3160–5) as a notice of intent (NOI).

(3) For approval of a group of wells submitted under either paragraph (c)(1) or (2) of this section, the operator may submit a master hydraulic fracturing plan. Submission of a master hydraulic fracturing plan does not obviate the need to obtain an approved APD from the BLM for each individual well.

(4) If an operator has received approval from the authorized officer for hydraulic fracturing operations, and the operator has significant new information about the geology of the area, the stimulation operation or technology to be used, or the anticipated impacts of the hydraulic fracturing operation to any resource, then the operator must submit a new NOI (Form 3160–5). Significant new information includes, but is not limited to, information that changes the proposed drilling or completion of the well, the hydraulic fracturing operation, or indicates increased risk of contamination of zones containing usable water or other minerals.

(d) *What a request for approval of hydraulic fracturing must include.* The request for approval of hydraulic fracturing must include the information in this paragraph. If the information required by this paragraph has been assembled to comply with State law (on Federal lands) or tribal law (on Indian lands), such information may be submitted to the BLM authorized officer as provided to the State or tribal officials as part of the APD or NOI (Form 3160–5).

(1) The following information regarding wellbore geology:

(i) The geologic names, a geologic description, and the estimated depths (measured and true vertical) to the top and bottom of the formation into which hydraulic fracturing fluids are to be injected;

(ii) The estimated depths (measured and true vertical) to the top and bottom of the confining zone(s); and

(iii) The estimated depths (measured and true vertical) to the top and bottom of all occurrences of usable water based on the best available information.

(2) A map showing the location, orientation, and extent of any known or suspected faults or fractures within one-half mile (horizontal distance) of the wellbore trajectory that may transect the confining zone(s). The map must be of a scale no smaller than 1:24,000.

(3) Information concerning the source and location of water supply, such as reused or recycled water, rivers, creeks, springs, lakes, ponds, and water supply wells, which may be shown by quarter-quarter section on a map or plat, or which may be described in writing. It must also identify the anticipated access route and transportation method for all water planned for use in hydraulically fracturing the well;

(4) A plan for the proposed hydraulic fracturing design that includes, but is not limited to, the following:

(i) The estimated total volume of fluid to be used;

(ii) The maximum anticipated surface pressure that will be applied during the hydraulic fracturing process;

(iii) A map at a scale no smaller than 1:24,000 showing:

(A) The trajectory of the wellbore into which hydraulic fracturing fluids are to be injected;

(B) The estimated direction and length of the fractures that will be propagated and a notation indicating the true vertical depth of the top and bottom of the fractures; and

(C) All existing wellbore trajectories, regardless of type, within one-half mile (horizontal distance) of any portion of the wellbore into which hydraulic fracturing fluids are to be injected. The true vertical depth of each wellbore identified on the map must be indicated.

(iv) The estimated minimum vertical distance between the top of the fracture zone and the nearest usable water zone; and

(v) The measured depth of the proposed perforated or open-hole interval.

(5) The following information concerning the handling of fluids recovered between the commencement of hydraulic fracturing operations and the approval of a plan for the disposal of produced fluid under BLM requirements:

(i) The estimated volume of fluid to be recovered;

(ii) The proposed methods of handling the recovered fluids as required under paragraph (h) of this section; and

(iii) The proposed disposal method of the recovered fluids, including, but not limited to, injection, storage, and recycling.

(6) If the operator submits a request for approval of hydraulic fracturing with an NOI (Form 3160–5), the following information must also be submitted:

(i) A surface use plan of operations, if the hydraulic fracturing operation would cause additional surface disturbance; and

(ii) Documentation required in paragraph (e) or other documentation demonstrating to the authorized officer that the casing and cement have isolated usable water zones, if the proposal is to hydraulically fracture a well that was completed without hydraulic fracturing.

(7) The authorized officer may request additional information prior to the approval of the NOI (Form 3160–5) or APD.

(e) *Monitoring and verification of cementing operations prior to hydraulic fracturing.* (1)(i) During cementing operations on any casing used to isolate and protect usable water zones, the operator must monitor and record the flow rate, density, and pump pressure, and submit a cement operation monitoring report for each casing string used to isolate and protect usable water to the authorized officer prior to commencing hydraulic fracturing operations. The cement operation monitoring report must be provided at least 48 hours prior to commencing hydraulic fracturing operations unless the authorized officer approves a shorter time.

(ii) For any well completed pursuant to an APD that did not authorize hydraulic fracturing operations, the operator must submit documentation to demonstrate that adequate cementing was achieved for all casing strings designed to isolate and protect usable water. The operator must submit the documentation with its request for approval of hydraulic fracturing operations, or no less than 48 hours prior to conducting hydraulic fracturing operations if no prior approval is required, pursuant to paragraph (a) of this section. The authorized officer may approve the hydraulic fracturing of the well only if the documentation provides assurance that the cementing was sufficient to isolate and to protect usable water, and may require such additional tests, verifications, cementing or other protection or isolation operations, as the authorized officer deems necessary.

(2) Prior to starting hydraulic fracturing operations, the operator must determine and document that there is adequate cement for all casing strings used to isolate and protect usable water zones as follows:

(i) *Surface casing.* The operator must observe cement returns to surface and document any indications of inadequate cement (such as, but not limited to, lost returns, cement channeling, gas cut mud, failure of equipment, or fallback from the surface exceeding 10 percent of surface casing setting depth or 200 feet, whichever is less). If there are indications of inadequate cement, then the operator must determine the top of cement with a CEL, temperature log, or other method or device approved in advance by the authorized officer.

(ii) *Intermediate and production casing.* (A) If the casing is not cemented to surface, then the operator must run a CEL to demonstrate that there is at least 200 feet of adequately bonded cement between the zone to be hydraulically fractured and the deepest usable water zone.

(B) If the casing is cemented to surface, then the operator must follow the requirements of paragraph (e)(2)(i) of this section.

(3) For any well, if there is an indication of inadequate cement on any casing used to isolate usable water, then the operator must:

(i) Notify the authorized officer within 24 hours of discovering the inadequate cement;

(ii) Submit an NOI (Form 3160–5) to the authorized officer requesting approval of a plan to perform remedial action to achieve adequate cement. The plan must include the supporting documentation and logs required under paragraph (e)(2) of this section. In emergency situations, an operator may request oral approval from the authorized officer for actions to be undertaken to remediate the cement. However, such requests must be followed by a written notice filed not later than the fifth business day following oral approval;

(iii) Verify that the remedial action was successful with a CEL or other method approved in advance by the authorized officer;

(iv) Submit a Sundry Notice and Report on Wells (Form 3160–5) as a subsequent report for the remedial action including:

(A) A signed certification that the operator corrected the inadequate cement job in accordance with the approved plan; and

(B) The results from the CEL or other method approved by the authorized officer showing that there is adequate cement.

(v) The operator must submit the results from the CEL or other method approved by the authorized officer (see paragraph (e)(3)(iv)(B) of this section) at least 72 hours before starting hydraulic fracturing operations.

(f) *Mechanical integrity testing prior to hydraulic fracturing.* Prior to hydraulic fracturing, the operator must perform a successful mechanical integrity test, as follows:

(1) If hydraulic fracturing through the casing is proposed, the casing must be tested to not less than the maximum anticipated surface pressure that will be applied during the hydraulic fracturing process.

(2) If hydraulic fracturing through a fracturing string is proposed, the fracturing string must be inserted into a liner or run on a packer-set not less than 100 feet below the cement top of the production or intermediate casing. The fracturing string must be tested to not less than the maximum anticipated surface pressure minus the annulus pressure applied between the fracturing string and the production or intermediate casing.

(3) The mechanical integrity test will be considered successful if the pressure applied holds for 30 minutes with no more than a 10 percent pressure loss.

(g) *Monitoring and recording during hydraulic fracturing.*

(1) During any hydraulic fracturing operation, the operator must continuously monitor and record the annulus pressure at the bradenhead. The pressure in the annulus between any intermediate casings and the production casing must also be continuously monitored and recorded. A continuous record of all annuli pressure during the fracturing operation must be submitted with the required Subsequent Report Sundry Notice (Form 3160–5) identified in paragraph (i) of this section.

(2) If during any hydraulic fracturing operation any annulus pressure increases by more than 500 pounds per square inch as compared to the pressure immediately preceding the stimulation, the operator must stop the hydraulic fracturing operation, take immediate corrective action to control the situation, orally notify the authorized officer as soon as practicable, but no later than 24 hours following the incident, and determine the reasons for the pressure increase. Prior to recommencing hydraulic fracturing operations, the operator must perform any remedial action required by the authorized officer, and successfully perform a mechanical integrity test under paragraph (f) of this section. Within 30 days after the hydraulic fracturing operations are completed, the operator must submit a report containing all details pertaining to the incident, including corrective actions taken, as part of a Subsequent Report Sundry Notice (Form 3160–5).

(h) *Management of Recovered Fluids.* Except as provided in paragraphs (h)(1) and ((2) of this section, all fluids recovered between the commencement of hydraulic fracturing operations and the authorized officer's approval of a produced water disposal plan under BLM requirements must be stored in rigid enclosed, covered, or netted and screened above-ground tanks. The tanks may be vented, unless Federal law, or State regulations (on Federal lands) or tribal regulations (on Indian lands) require vapor recovery or closed-loop systems. The tanks must not exceed a 500 barrel (bbl) capacity unless approved in advance by the authorized officer.

(1) The authorized officer may approve an application to use lined pits only if the applicant demonstrates that use of a tank as described in this paragraph (h) is infeasible for environmental, public health or safety reasons and only if, at a minimum, all of the following conditions apply:

(i) The distance from the pit to intermittent or ephemeral streams or water sources would be at least 300 feet;

(ii) The distance from the pit to perennial streams, springs, fresh water sources, or wetlands would be at least 500 feet;

(iii) There is no usable groundwater within 50 feet of the surface in the area where the pit would be located;

(iv) The distance from the pit to any occupied residence, school, park, school bus stop, place of business, or other areas where the public could reasonably be expected to frequent would be greater than 300 feet;

(v) The pit would not be constructed in fill or unstable areas;

(vi) The construction of the pit would not adversely impact the hydrologic functions of a 100-year floodplain; and

(vii) Pit use and location complies with applicable local, State (on Federal lands), tribal (on Indian lands) and other Federal statutes and regulations including those that are more stringent than these regulations.

(2) Pits approved by the authorized officer must be:

(i) Lined with a durable, leak-proof synthetic material and equipped with a leak detection system; and

(ii) Routinely inspected and maintained, as required by the authorized officer, to ensure that there is no fluid leakage into the environment. The operator must document all inspections.

(i) *Information that must be provided to the authorized officer after hydraulic fracturing is completed.* The information required in paragraphs (i)(1) through (10) of this section must be submitted to the authorized officer within 30 days after the completion of the last stage of hydraulic fracturing operations for each well. The information is required for each well, even if the authorized officer approved fracturing of a group of wells (see § 3162.3–3(c)). The information required in paragraph (i)(1) of this section must be submitted to the authorized officer through FracFocus or another BLM-designated database, or in a Subsequent Report Sundry Notice (Form 3160–5). If information is submitted through FracFocus or another BLM-designated database, the operator must specify that the information is for a Federal or an Indian well, certify that the information is both timely filed and correct, and certify compliance with applicable law as required by paragraph (i)(8)(ii) or (iii) of this section using FracFocus or another BLM-designated database. The information required in paragraphs (i)(2) though (10) of this section must be submitted to the authorized officer in a Subsequent Report Sundry Notice (Form 3160–5). The operator is responsible for the information submitted by a contractor or agent, and the information will be considered to have been submitted directly from the operator to the BLM. The operator must submit the following information:

(1) The true vertical depth of the well, total water volume used, and a description of the base fluid and each additive in the hydraulic fracturing fluid, including the trade name, supplier, purpose, ingredients, Chemical Abstract Service Number (CAS), maximum ingredient concentration in additive (percent by mass), and maximum ingredient concentration in hydraulic fracturing fluid (percent by mass).

(2) The actual source(s) and location(s) of the water used in the hydraulic fracturing fluid;

(3) The maximum surface pressure and rate at the end of each stage of the hydraulic fracturing operation and the actual flush volume.

(4) The actual, estimated, or calculated fracture length, height and direction.

(5) The actual measured depth of perforations or the open-hole interval.

(6) The total volume of fluid recovered between the completion of the last stage of hydraulic fracturing operations and when the operator starts to report water produced from the well to the Office of Natural Resources Revenue. If the operator has not begun to report produced water to the Office of Natural Resources Revenue when the Subsequent Report Sundry Notice is submitted, the operator must submit a supplemental Subsequent Report Sundry Notice (Form 3160–5) to the authorized officer documenting the total volume of recovered fluid.

(7) The following information concerning the handling of fluids recovered, covering the period between the commencement of hydraulic fracturing and the implementation of the approved plan for the disposal of produced water under BLM requirements:

(i) The methods of handling the recovered fluids, including, but not limited to, transfer pipes and tankers, holding pond use, re-use for other stimulation activities, or injection; and

(ii) The disposal method of the recovered fluids, including, but not limited to, the percent injected, the percent stored at an off-lease disposal facility, and the percent recycled.

(8) A certification signed by the operator that:

(i) The operator complied with the requirements in paragraphs (b), (e), (f), (g), and (h) of this section;

(ii) For Federal lands, the hydraulic fracturing fluid constituents, once they

arrived on the lease, complied with all applicable permitting and notice requirements as well as all applicable Federal, State, and local laws, rules, and regulations; and

(iii) For Indian lands, the hydraulic fracturing fluid constituents, once they arrived on the lease, complied with all applicable permitting and notice requirements as well as all applicable Federal and tribal laws, rules, and regulations.

(9) The operator must submit the result of the mechanical integrity test as required by paragraph (f) of this section.

(10) The authorized officer may require the operator to provide documentation substantiating any information submitted under paragraph (i) of this section.

(j) *Identifying information claimed to be exempt from public disclosure.*

(1) For the information required in paragraph (i) of this section, the operator and the owner of the information will be deemed to have waived any right to protect from public disclosure information submitted with a Subsequent Report Sundry Notice (Form 3160–5) or through FracFocus or another BLM-designated database. For information required in paragraph (i) of this section that the owner of the information claims to be exempt from public disclosure and is withheld from the BLM, a corporate officer, managing partner, or sole proprietor of the operator must sign and the operator must submit to the authorized officer with the Subsequent Report Sundry Notice (Form 3160–5) required in paragraph (i) of this section an affidavit that:

(i) Identifies the owner of the withheld information and provides the name, address and contact information for a corporate officer, managing partner, or sole proprietor of the owner of the information;

(ii) Identifies the Federal statute or regulation that would prohibit the BLM from publicly disclosing the information if it were in the BLM's possession;

(iii) Affirms that the operator has been provided the withheld information from the owner of the information and is maintaining records of the withheld information, or that the operator has access and will maintain access to the withheld information held by the owner of the information;

(iv) Affirms that the information is not publicly available;

(v) Affirms that the information is not required to be publicly disclosed under any applicable local, State or Federal law (on Federal lands), or tribal or Federal law (on Indian lands);

(vi) Affirms that the owner of the information is in actual competition and identifies competitors or others that could use the withheld information to cause the owner of the information substantial competitive harm;

(vii) Affirms that the release of the information would likely cause substantial competitive harm to the owner of the information and provides the factual basis for that affirmation; and

(viii) Affirms that the information is not readily apparent through reverse engineering with publicly available information.

(2) If the operator relies upon information from third parties, such as the owner of the withheld information, to make the affirmations in paragraphs (j)(1)(vi) through (viii) of this section, the operator must provide a written affidavit from the third party that sets forth the relied-upon information.

(3) The BLM may require any operator to submit to the BLM any withheld information, and any information relevant to a claim that withheld information is exempt from public disclosure.

(4) If the BLM determines that the information submitted under paragraph (j)(3) of this section is not exempt from disclosure, the BLM will make the information available to the public after providing the operator and owner of the information with no fewer than 10 business days' notice of the BLM's determination.

(5) The operator must maintain records of the withheld information until the later of the BLM's approval of a final abandonment notice, or 6 years after completion of hydraulic fracturing operations on Indian lands, or 7 years after completion of hydraulic fracturing operations on Federal lands. Any subsequent operator will be responsible for maintaining access to records required by this paragraph during its operation of the well. The operator will be deemed to be maintaining the records if it can promptly provide the complete and accurate information to BLM, even if the information is in the custody of its owner.

(6) If any of the chemical identity information required in paragraph (i)(1) of this section is withheld, the operator must provide the generic chemical name in the submission required by paragraph (i)(1) of this section. The generic chemical name must be only as nonspecific as is necessary to protect the confidential chemical identity, and should be the same as or no less descriptive than the generic chemical name provided to the Environmental Protection Agency.

(k) *Requesting a variance from the requirements of this section.*

(1) Individual variance: The operator may make a written request to the authorized officer for a variance from the requirements under this section. A request for an individual variance must specifically identify the regulatory provision of this section for which the variance is being requested, explain the reason the variance is needed, and demonstrate how the operator will satisfy the objectives of the regulation for which the variance is being requested.

(2) State or tribal variance: In cooperation with a State (for Federal lands) or a tribe (for Indian lands), the appropriate BLM State Director may issue a variance that would apply to all wells within a State or within Indian lands, or to specific fields or basins within the State or the Indian lands, if the BLM finds that the variance meets the criteria in paragraph (k)(3) of this section. A State or tribal variance request or decision must specifically identify the regulatory provision(s) of this section for which the variance is being requested, explain the reason the variance is needed, and demonstrate how the operator will satisfy the objectives of the regulation for which the variance is being requested. A State or tribal variance may be initiated by the State, tribe, or the BLM.

(3) The authorized officer (for an individual variance), or the State Director (for a State or tribal variance), after considering all relevant factors, may approve the variance, or approve it with one or more conditions of approval, only if the BLM determines that the proposed alternative meets or exceeds the objectives of the regulation for which the variance is being requested. The decision whether to grant or deny the variance request must be in writing and is entirely within the BLM's discretion. The decision on a variance request is not subject to administrative appeals either to the State Director (for an individual variance) or under 43 CFR part 4.

(4) A variance under this section does not constitute a variance to provisions of other regulations, laws, or orders.

(5) Due to changes in Federal law, technology, regulation, BLM policy, field operations, noncompliance, or other reasons, the BLM reserves the right to rescind a variance or modify any conditions of approval. The authorized officer must provide a written justification before a variance is rescinded or a condition of approval is modified.

■ 6. Amend § 3162.5–2 by revising the first sentence of paragraph (d) to read as follows:

§ 3162.5–2 Control of wells.

* * * * *

(d) *Protection of usable water and other minerals.* The operator must isolate all usable water and other mineral-bearing formations and protect them from contamination. * * *

Janice M. Schneider,

Assistant Secretary, Land and Minerals Management.

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