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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

STATE OF WYOMING; STATE OF COLORADO; STATE OF NORTH DAKOTA; and STATE OF UTAH,	)	
Petitioners,	)	Case No. 2:15-cv-00043-SWS
v.	)	Consolidated with 2:15-cv-00041-SWS
UNITED STATES DEPARTMENT OF THE INTERIOR; SALLY JEWELL, in her capacity as Secretary of the Interior; BUREAU OF LAND MANAGEMENT; and NEIL KORNZE, in his capacity as Director, Bureau of Land Management,	)	
Respondents.	)	

NORTH DAKOTA'S OPENING BRIEF

The State of North Dakota, by and through its undersigned counsel, respectfully submits this Opening Brief, pursuant to U.S.D.C.L.R. 83.6, and respectfully requests the Court enter an order permanently enjoining the March 26, 2015 final rulemaking of the Department of the

Interior's Bureau of Land Management ("BLM") entitled "Oil and Gas; Hydraulic Fracturing on Federal Lands; Final Rule" 80 Fed. Reg. 16128 (Mar. 26, 2015) (to be codified at 43 C.F.R. Part 3160) ("BLM Rule").

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Cases

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GLOSSARY

APA	Administrative Procedure Act
BLM	U.S. Bureau of Land Management
CWA	Clean Water Act
EPA	U.S. Environmental Protection Agency
EP Act	Energy Policy Act of 2005
FLPMA	Federal Land Policy and Management Act
Interior	U.S. Department of the Interior
MLA	Mineral Leasing Act of 1920
NDIC	North Dakota Industrial Commission
NEPA	National Environmental Policy Act
SDWA	Safe Drinking Water Act
UIC	Underground Injection Control
USDWs	Underground Sources of Drinking Water

INTRODUCTION

In promulgating the BLM Rule, the BLM insists, for the first time, that it has the authority to regulate hydraulic fracturing on federal and Indian lands. The BLM Rule, however, is flawed in at least three material respects. First, the BLM has exceeded its statutory mandate. Congress clearly intended the SDWA to completely occupy the field of underground injection regulation, including hydraulic fracturing. Equally clear, by the EP Act, Congress withdrew hydraulic fracturing from the realm of federal regulation, thereby electing to leave states with exclusive regulatory authority. The BLM's reliance on FLPMA and other statutes for its attempt to acquire regulatory control is unpersuasive as none of the general provisions cited by the BLM grant it specific authority regarding hydraulic fracturing. Absent a specific grant, the BLM cannot demonstrate Congressional intent to alter the more specific provisions of the SDWA and the EP Act or the longstanding balance of power under which North Dakota has primary responsibility over land and water use. Second, the BLM Rule is contrary to existing law, which precludes the BLM from interfering with the regulatory scheme already in place in North Dakota. The BLM's insistence that the BLM Rule will not interfere with state regulation of hydraulic fracturing or USDWs rings hollow. In practice, the BLM Rule would displace or conflict with the legitimate regulatory scheme established by North Dakota, pursuant to the SDWA. The BLM is prohibited from such interference by the very laws upon which it purports to rely – the FLPMA and the MLA. Finally, by failing to properly consider the consequences of the BLM Rule on North Dakota's split-estate regime and other issues of state sovereignty, the BLM has acted arbitrarily and capriciously.

The BLM cannot make an end-run around Congress' clear intent and infringe upon North Dakota's unmistakable sovereign interest in regulating hydraulic fracturing. Accordingly, this Court should permanently enjoin the BLM from implementing the BLM Rule.

STATEMENT OF FACTS

A. FEDERAL REGULATORY BACKGROUND

The SDWA and EP Act directly grant North Dakota authority to regulate hydraulic fracturing.

1. The Safe Drinking Water Act

In 1974, Congress enacted the SDWA to set forth a system of cooperative federalism for the principal objective of protecting underground water sources. *See* Pub. L. No. 93-523, 88 Stat. 1660 (1974) (codified as amended at 42 U.S.C. §§ 300f - 300j-26 (2012)). Importantly, the SDWA originally provided the EPA – not the BLM – with specific statutory authority to regulate underground injection, including hydraulic fracturing. Specifically, in Part C of the SDWA, 42 U.S.C. §§ 300h to 300h-8, Congress established a comprehensive scheme to regulate *all* underground injection of contaminants, including hydraulic fracturing (the Underground Injection Control ("UIC") Program). *See* H.R. Rep. No. 93-1185, at 6481 (1974) (explaining that the UIC Program covers "injection techniques to increase production"); *see also Legal Envtl. Assistance Found., Inc. v. U.S. E.P.A* ("*LEAF*")., 118 F.3d 1467, 1474 (11th Cir. 1997) ("it is clear that Congress dictated that *all* underground injection be regulated under the UIC programs") (citing 42 U.S.C. § 300h(b)(1)(A)) (emphasis in original).

The SDWA goes on to prohibit federal interference with state regulation of USDWs once a state has established primacy: "[T]he State shall have primary enforcement responsibility for underground water sources until such time as the [EPA] Administrator determines, *by rule*, that such State no longer meets the requirements" upon which primacy is based. 42 U.S.C. § 300h-1(B)(3) (emphasis added).

2. The Energy Policy Act of 2005

Following a pronouncement in 1997 by the Eleventh Circuit Court of Appeals that the language of the SDWA clearly indicated congressional intend for the EPA to regulate "all underground injection" activity under the UIC program[1], including hydraulic fracturing, Congress proposed an amendment to the SDWA in the EP Act. *See* Pub. L. No. 109-58, § 322, 119 Stat. 594 (2005) (codified at 42 U.S.C. § 300h(d)(2)(B)). By the EP Act, Congress amended the SDWA to exclude hydraulic fracturing from federal regulation. *Id.* As the legislative history shows, Congress intended the exclusion to prevent federal interference with state authority "to protect [energy companies] from ever facing *federal* regulation of a practice of drilling for oil using the hydraulic fracturing technique[.]" 151 Cong. Rec. H2192-02, H2194-95 (Apr. 20, 2005) (statements of Rep. Markey; emphasis added); *see also* 151 Cong. Rec. S9335-01, S9337 (July 29, 2005) (statement of Sen. Feingold). Legislators characterized the exclusion, which placed hydraulic fracturing exclusively under state supervision, as an incentive to support the EP Act's broader policy of developing secure, affordable, and reliable domestic energy resources. H.R. 6, 109th Cong. § 327 (as debated Apr. 20, 2005); *see also* 151 Cong. Rec. H2192-02, H2226 (Apr. 20, 2005).

B. NORTH DAKOTA'S REGULATORY BACKGROUND

Even before the EP Act became law, North Dakota had a comprehensive and successful safety-based regulatory program governing hydraulic fracturing on state, tribal, and federal lands, arising out of a statutory mandate that North Dakota both: (1) encourage the development of oil and gas within the State, prevent the waste of oil and gas resources, and protect the correlative rights of all oil and gas owners with the State (N.D. Cent. Code § 38-08-01); and (2)

[1] *LEAF*, 118 F.3d at 1474 ("it is clear that Congress dictated that *all* underground injection be regulated under the UIC programs"), citing 42 U.S.C. § 300h(b)(1)(A).

take statutory ownership of, and control over, all groundwater resources within its borders. (N.D. Cent. Code § 61-01-01). In light of these two statutory mandates, North Dakota has developed extensive and successful regulatory programs to encourage the efficient and responsible development of oil and gas while protecting underground sources of drinking water.[2]

In North Dakota, hydraulic fracturing is regulated by the North Dakota Industrial Commission ("NDIC"). N.D. Cent. Code § 38-08-04; N.D. Admin. Code § 43-02-03-05. The NDIC regulates hydraulic fracturing and related activities under two distinct but statutorily-related regulatory programs: comprehensive oil and gas regulations (the "ND Hydraulic Fracturing Program") and the underground injection control program (the "ND UIC Program"). The ND Hydraulic Fracturing Program and the UIC inspectors under the ND UIC Program control the permitting, construction, and mechanical integrity testing of wells used for hydraulic fracturing. The disposal of flowback water derived from hydraulic fracturing is then managed by UIC inspectors pursuant to the ND UIC program.

1. The North Dakota Hydraulic Fracturing Program

While drilling for oil and gas in North Dakota has continued since the early 1950s, the

[2] *See* DOIAR1725-32 (NDIC's Testimony to House Committee on Energy and Commerce) (explaining North Dakota's extensive history of regulating oil and gas development, including hydraulic fracturing); *see also* DOIAR57071 (North Dakota Congressional Delegation August 23, 2013 Comment Letter) ("North Dakota's successful record in managing its energy development is becoming a model for the nation . . . The NDIC and [Department of Mineral Resources] have already put strong regulations in place requiring operators to disclose the chemicals they use in fracturing activities as well as regulations addressing hydraulic fracture stimulation, wellbore integrity, flowback, and cement bond testing. State oversight and the unique expertise and experience of our regulators resulted in the NDIC approving extensive new rules regarding well completions in 2012."); DOIAR65135 (US Congress Members' August 23, 2013 Letter to Secretary Salazar) ("After seeing our development and visiting with local officials, you observed that North Dakota has a 'very sophisticated' oil and gas regulatory framework and that it is a model worth studying. North Dakota's successful record in managing its energy development is becoming a model for the nation.").

use of hydraulic fracturing only became prevalent in North Dakota following the completion of the first commercial horizontal, hydraulically-fractured Bakken well in 2006. *See* Dkt. No. 52-4, Declaration of Lynn Helms, Director of the NDIC Department of Mineral Resources ("Helms Decl.") at ¶ 8. In 2011, the North Dakota legislature formally recognized hydraulic fracturing as an acceptable technique to recover oil and natural gas. N.D. Cent. Code § 38-08-25. After which, the NDIC supplemented its existing regulations in 2012. *See* N.D. Admin. Code § 43-02-03-27.1. In coordination with the State's oil and gas conservation regulations, the new regulations provided North Dakota with more comprehensive control over hydraulic fracturing practices within its borders and enabled the State to more fully protect its underground drinking water sources. *See* Dkt. No. 6-3, Declaration of Lynn Helms in support of North Dakota's Motion to Intervene ("Motion to Intervene, Helms Decl.") at ¶ 15.

North Dakota's regulation of hydraulic fracturing begins when a drilling applicant applies to the NDIC for a permit to drill a well. N.D. Cent. Code § 38-08-05. An applicant may not initiate drilling until the NDIC issues this permit. N.D. Admin. Code § 43-02-03-16. Permit applications must include specifications such as: (1) the proposed depth of the well; (2) the estimated depth to the top of important markers; (3) the estimated depth to the top of objective horizons; (4) the proposed mud program; and (5) the proposed casing program, including the casing's size and weight, the depth at which the casing string will be set, the proposed pad layout, and the proposed amount of cement to be used. *Id*. Permits to drill wells using hydraulic fracturing techniques expire one year after they are issued, unless the well is in the process of being drilled or has been drilled below surface casing. *Id*. Any party that violates this permitting requirement is subject to a civil penalty of up to $12,500 per day for each offense, with each day of violation constituting a separate offense. N.D. Cent. Code § 38-08-16.

The ND Hydraulic Fracturing Program contains robust casing requirements to protect North Dakota's groundwater. *See* Dkt. No. 6-3, Motion to Intervene, Helms Decl. at ¶ 17. The regulations require at least four layers of casing in a hydraulically fractured well. *See* N.D. Admin. Code §§ 43-02-03-21, 43-02-03-27.1. These casing requirements impose additional structural integrity and monitoring requirements on each type of well. Hydraulically fractured wells must be pressure tested, and wellhead and blowout preventer protection systems must be installed during hydraulic fracturing if the pressure rating does not meet certain specifications. *Id*. at § 43-02-03-27.1. If the intermediate casing level fails any of these integrity tests, the operator must install a fifth level of casing called a "frac string" to ensure that at least four layers of protection are maintained. *Id*. After the hydraulic fracturing is complete, North Dakota's oil and gas regulations require that "[a]ll waste material associated with exploration or production of oil and gas must be properly disposed of in an authorized facility" in accordance with all applicable laws. *Id*. at § 43-02-03-19.2. The NDIC field inspectors track the flowback water from the time it leaves the drilling well to the time it arrives at the disposal well using a combination of monthly reports and inspections. During this time, the flowback water is normally stored in closed-top above ground tanks, but may be temporarily stored in lined pits or open receptacles in emergencies upon approval. *Id*. at § 43-02-03-19.3.

This tracking system enables the NDIC to know the specific volume of flowback water that left each well where hydraulic fracturing occurred and whether that water was transported to the disposal well by pipe or by truck. The monthly disposal well reports must identify the source of water and whether it was transported by pipeline or truck.

2. The North Dakota Underground Injection Control Program

The NDIC also regulates the flowback water produced by hydraulic fracturing through the ND UIC Program. N.D. Admin. Code Chapter 43-02-05. The NDIC has effectively

administered the ND UIC Program since 1983 pursuant to a primacy delegation from the EPA under the SDWA. *See* 48 Fed. Reg. 38,237, 38,238 (Aug. 23, 1983); 42 U.S.C. § 300h-1(b)(1) (process for delegation of SDWA authority to the states).

The ND UIC Program regulates the post-fracturing production of flowback water after the water is removed from the production site. *See* Dkt. No. 6-3, Motion to Intervene, Helms Decl. at ¶ 24. Once the water is removed from a fractured well, the ND UIC Program inspectors ensure that the water is properly monitored and disposed of through underground injection. *Id*. at ¶ 26. Under the ND UIC Program, any party seeking to utilize an underground injection well must first obtain a permit from the NDIC. N.D. Admin. Code § 43-02-05-04(5). The permit application requires information in twenty-one categories, including the average and maximum volumes of fluid to be injected each day and the average and maximum requested surface injection pressure. *Id.* at § 43-02-05- 04(1). After receiving and reviewing this information, the NDIC determines whether the proposed injection will endanger any underground drinking water source. *Id.* at § 43-02-05- 04(4). The NDIC will issue a permit to the project applicant for the underground injection of hydraulic fracturing fluid only after providing notice and a hearing. *Id.* at § 43-02-05-04(1).

After issuing a permit for an underground injection control well, the NDIC requires the well operator to demonstrate the mechanical integrity of the well before putting it into use. *Id*. § 43-02-05-07(1). These wells must be tested for mechanical integrity at least once every five years. *Id.* A well is considered to have mechanical integrity if there is (1) "no significant leak in the casing, tubing, or packer" and (2) "no significant fluid movement into an underground source of drinking water or an unauthorized zone through vertical channels adjacent to the injection bore." *Id.* North Dakota requires that injection pressure at an injection wellhead meet

certain maximum pressure specifications in order to prevent failure of the well bore or confining zones that could cause the fluids to leak into the surrounding aquifer. *See Id*. § 43-02-05-09.

ARGUMENT

A. LEGAL STANDARD

The Court reviews agency rulemaking in accordance with U.S.D.C.L.R. 83.6 and Fed. R. App. P. 15. *Pennaco Energy, Inc. v. U.S. E.P.A.*, 692 F. Supp. 2d 1297, 1299 (D. Wyo. 2009) ("Reviews of agency action in the district courts must be processed as appeals. In such circumstances the district court should govern itself by referring to the Federal Rules of Appellate Procedure.") (quoting *Olenhouse v. Commodity Credit Corp.,* 42 F.3d 1560, 1580 (10th Cir. 1994)). "[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." *Olenhouse,* 42 F.3d at 1574.

B. THE BLM LACKS AUTHORITY FOR THE BLM RULE

The Administrative Procedure Act ("APA") requires reviewing courts to "hold unlawful and set aside agency action" that is "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2)(c). "[A]n 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). 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." *Olenhouse,* 42 F.3d at 1574. Where, as here, Congress has directly spoken to the issue of agency authority, a court must give effect to that congressional intent. *F.D.A., v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000), citing *Chevron U.S.A.*

Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).

1. By its pronouncements in the SDWA and EP Act, Congress has precluded the BLM's ability regulate hydraulic fracturing

As this Court correctly held in issuing a preliminary injunction, through the SDWA and EP Act, Congress has directly spoken to the issue and precluded federal agency authority to regulate hydraulic fracturing not involving the use of diesel fuels.

As set forth above, the SDWA specifically addresses protection of underground sources of drinking water by requiring all underground injection be regulated under UIC programs like the one developed by North Dakota. *LEAF*, 118 F.3d at 1474 ("it is clear that Congress dictated that all underground injection be regulated under the UIC programs") (citing 42 U.S.C. § 300h(b)(1)(A)).

In addition, the SDWA prohibits federal interference with state regulation of USDWs, which includes promulgating unnecessary regulations.

> 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.
> . . .
> 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*.

42 U.S.C. § 300h(b)(3) (emphasis added).

Congress clearly stated its intention that the BLM and other federal agencies be governed by state regulations promulgated under the SDWA, even in relation to federal groundwater property interests. The SDWA requires:

> "[e]ach department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government . . . *engaged in any activity resulting, or which may result in, underground injection which endangers drinking water*" to comply with the UIC program "to the

same extent as any person is subject to such requirements.

42 U.S.C. § 300j-6(a)(4) (emphasis added). Activities governed by the UIC Program include "the protection of such wellhead areas," which originally included hydraulically fractured well sites. *Id*. at § 300j-6(a). Congress therefore dictated that regulators treat "underground injection wells on Federal property the same as any other . . . underground injection well and will enforce applicable regulations to the same extent and under the same procedures." H.R. Rep. No. 93-1185, at 6494 (1974).

In turn, the EP Act confirms that hydraulic fracturing is not subject to federal regulation. In enacting the EP Act, Congress is presumed to be aware of the *LEAF* decision recognizing the EPA's authority to regulate hydraulic fracturing under the SDWA. *See Passamaquoddy Tribe v. State of Me.,* 75 F.3d 784, 789 (1st Cir. 1996). With this knowledge, Congress included within the EP Act an amendment to the SDWA that expressly and unambiguously revised the definition of "underground injection" to exclude "the underground injection of fluids or propping agents (other than diesel fuels)." 42 U.S.C. § 300h(d)(l)(B)(ii)). As this Court correctly concluded at the preliminary injunction stage, based on the regulatory scheme established by the SDWA and EP Act, "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." Dkt. No. 130, Order on Motions for Preliminary Injunction.

2. None of the statutes relied upon by the BLM authorize regulation of hydraulic fracturing

While the SWDA and EP Act are devoid of reference to the BLM, the agency nevertheless claims authority to promulgate the BLM Rule and regulate hydraulic fracturing under a variety of other federal statutes. The BLM's arguments must fail because its general mandate to regulate public lands is insufficient to overcome the specific statutory mandate

described above in the SDWA and EP Act.

As an initial matter, it is axiomatic that North Dakota and other states have "traditional and primary power over land and water use." *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 174 (2001). North Dakota's authority over its water resources has also been recognized by Congress in the CWA, which provides: "It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States . . . to plan the development and use . . . of land and water resources[.]" 33 U.S.C. § 1251(b). If Congress desires to "alter the usual constitutional balance between the states and the federal government, it must make its intention to do so unmistakably clear in the language of the statute." *Will v. Mich. Dept. of State Police,* 491 U.S. 58, 65 (1989). This principle reflects "an acknowledgment that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere." *Gregory v. Ashcroft,* 501 U.S. 452, 461, 464 (1991).

Here, the BLM cannot to point to any "unmistakably clear" statutory mandate to regulate hydraulic fracturing. Instead, it relies primarily upon FLPMA and the MLA – neither of which expressly provides the BLM with authority to regulate hydraulic fracturing. 80 Fed. Reg. at 16217.

FLPMA, for example, provides the BLM authority over public lands and directs that federal lands be managed using principles of multiple use and sustained yield of natural resources in accordance with land use plans. 43 U.S.C. §§ 1701, 1732. Under FLPMA, the BLM claims it has broad authority to manage federal public lands and resources and to "promulgate rules and regulations to carry out the purposes of [FLPMA] and of other laws applicable to the public lands." *Id*. § 1740. Importantly, however, until the BLM Rule, the BLM

had never asserted FLPMA provided it with authority to regulate oil and gas drilling operations or hydraulic fracturing. *See* Dkt. No. 130, Order on Motions for Preliminary Injunction, citing 43 C.F.R. § 3160.0-3 (1983); *see also* Onshore Oil and Gas Order No. 2, Drilling Operations, 53 Fed. Reg. 46798-01, at 46804 (1988).[3]

Moreover, the BLM's position is belied by several key facts. First, FLPMA was enacted two years *after* the SDWA. Perhaps more importantly, Congress made it clear that FLPMA does not affect "in any way any law governing . . . use of . . . water on public lands," and should not be construed "as superseding, modifying, or repealing . . . existing laws applicable to the various Federal agencies which are authorized to develop or participate in the development of water resources or to exercise licensing or regulatory functions in relation thereto." Pub. L. No. 94-579, § 701, 90 Stat. 2786 (1976). Thus, rather than superseding the SDWA on hydraulic fracturing, FLPMA reinforces the SDWA principle that state authority governs practices involving water and pollution control.

The BLM also claims MLA provides it with authority for the BLM Rule. The MLA authorizes the BLM to productively develop natural resource deposits. The MLA includes a narrow provision allowing the BLM to regulate surface disturbing activities when necessary to enable oil and gas leasing on public lands. 30 U.S.C. § 226(g). This program for leasing mineral deposits on public land for private mining does not address hydraulic fracturing. To the contrary, the MLA requires that nothing in the MLA "shall be construed or held to affect the rights of the States or other local authority to exercise any rights which they may have." 30 U.S.C. § 189. Thus, the MLA cannot displace the state authority granted to North Dakota

[3] 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).

pursuant to the SDWA and UIC Program.

Because North Dakota has traditionally had authority over land and water use, and because the BLM can point only to the general authority found in FLPMA and the MLA, the BLM has failed to adduce the "unmistakably clear" statutory mandate necessary to overcome the election against federal regulation in the SDWA and EP Act. This reality is not lost on the BLM, which, internally, had concerns that agency is without authority to regulate hydraulic fracturing as it has done in the BLM Rule. *See* DOIAR7235 (BLM July 8, 2011 Email from the Deputy Assistant Secretary Ned Farquhar to Bryce Barlan) (acknowledging that the BLM regulations requiring approval prior to hydraulic fracturing "would be huge leap in regulatory authority and action and it was something the Secretary was not enthusiastic about when BLM proposed it in February or thereabouts."); *see also* DOIAR29883 (BLM September 20, 2012 Email from Nicholas Douglas to Michael Nedd) (noting the "BLM's lack of authority to regulate water use" was a key concern raised by commenters). The EPA also raised concerns about the BLM's assertion of jurisdiction. *See* DOIAR16358 (EPA Comments on BLM Proposed Rule) ("EPA recommends that the proposed rule clarify any jurisdictional ambiguity to avoid uncertainty and confusion. EPA also recommends that this discussion in the preamble be expanded to take into account other federal efforts programs that regulate well stimulations.").

3. The variance provision in the BLM Rule does not cure BLM's interference with North Dakota's sovereign governance

The BLM recognizes the federalism problems created by the BLM Rule. *See* 43 C.F.R. § 3162.3-3(k)(2); *see also* 80 Fed. Reg. at 16130 (claiming the variance provision will "address concerns from states and tribes about possible duplicative efforts"). Under the BLM Rule, a state must seek and obtain BLM approval for a variance by demonstrating that its own regulations are "equal to or more protective than the BLM's rules." 80 Fed. Reg. at 16130. The

inclusion of a variance provision, however, is insufficient to overcome the BLM's impermissible interference with North Dakota's sovereign interests and authority.

First, the variance provision places the burden on North Dakota to make demonstrations and obtain approval for the variance: "A State or tribal variance request or decision must specifically identify the regulatory provision(s) of [the BLM Rule] for which the variance is being requested, explain the reason variance is needed, and demonstrate how the operator will satisfy the objectives of the regulation for which the variance is being requested." 43 C.F.R. § 3162.3-3(k)(2). Second, BLM "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." *Id*. at § 3162.3-3(k)(3).

Instead of complying with North Dakota regulations as required by the SDWA, the BLM drafted a variance requirement that forces North Dakota to prove its compliance with the BLM Rule. The variance provision offers no deference to the judgment of North Dakota regarding the appropriate type and level of protection necessary. And there is no option allowing North Dakota to demonstrate that its rules are superior to the BLM Rule for the specific context of the State. Nor is there any mechanism for North Dakota to administer all or part of any aspect of the BLM Rule.[4]

[4] Commentators expressed these concerns with the BLM during the rulemaking stage. DOIAR57038 (ANGA-AXPC's August 23, 2013 Comment Letter) ("[t]he 'meets or exceeds' standard . . . is not sufficient to avoid duplication with state requirements. BLM's proposed rule does not clearly define how a state or tribe can meet this "meets or exceeds" standard. If BLM truly desires to honor its stated commitment to avoid unnecessary duplication, provide consistency, and offer regulatory certainty, then BLM needs to offer a means-prior to finalizing the proposed rule-for state or tribal programs to be recognized . . . Apart from being inherently difficult to apply, practically and politically, such narrow 'meets or exceeds' standard reduces the likelihood that variances will be granted. Thus, operators of wells on public lands would

By requiring North Dakota to meet BLM's regulations, the variance option does nothing to mitigate the problem of interference or encroachment upon North Dakota's authority. Rather than improve consultation and coordination with the states, the BLM presumes authority to evaluate and pass judgment on the adequacy of North Dakota's regulations.

4. Negative consequences result from BLM exceeding its statutory purpose and expertise

The negative impact of the BLM Rule on the system of cooperative federalism established by the SDWA is just one consequence of the BLM exceeding its statutory authority and realm of expertise. The SDWA UIC Program protects USDWs and regulated hydraulic fracturing as originally intended by the drafters. In exempting hydraulic fracturing from the UIC rules, Congress did not intend to grant federal authority to another agency. The BLM claims that it is not regulating USDWs or interfering with the SDWA.[5] However, the BLM's doublespeak is exposed by the BLM Rule's express purposes: (1) "to protect water supplies" (80 Fed. Reg. at 16128); and (2) to "promote the development of more stringent standards by state and tribal governments" (80 Fed. Reg. at 16128). The BLM Rule redefines the states' regulatory authority – when and where it exists and to what extent. The BLM's interference with the SDWA's cooperative federalism system in this way exceeds the BLM's statutory authority and upsets site-specific North Dakota regulations enabled by the SDWA's grant of exclusive state authority.

The one-size-fits-all "baseline" standards of the BLM Rule contradict the SDWA. *See* 80 Fed. Reg. at 16190. As the SDWA recognizes, States are uniquely qualified to determine the

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have to comply with two or more sets of overlapping requirements. This would frustrate BLM's mandate to foster responsible recovery of resources on public lands because it will incentivize preference for development and investment on private lands.")

[5] *See* DOIAR69845 (BLM December 17, 2013 Document Entitled "Policy Calls for the Hydraulic Fracturing Rule") (In response to a comment that the definition of useable water is "different from traditional 'USDW' definition," BLM's subject matter expert indicates that "[u]nderground source of drinking water is managed by EPA and clean water act.").

type and level of protection necessary for waters under their jurisdiction.[6]

> The [UIC] regulations . . . shall permit or provide for consideration of varying geologic, hydrological, or historical conditions in different States and in different areas within a State.

42 U.S.C. § 300h(b)(3)(A). The BLM's one-size-fits-all rule tramples this provision of the SDWA. North Dakota is better situated than the BLM to determine the balance between numerous interests and arrive at the appropriate type and level of regulation.[7]

The BLM Rule not only encroaches upon North Dakota's authority[8] but also abolishes a

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[6] *See* DOIAR28538 (API's September 10, 2012 Comment Letter) (explaining why states are best suited to regulate oil and gas) ("the case has not been made for a federal, one-size-fits-all approach. Oil and gas exploration and production is currently regulated by comprehensive state, local and federal laws. These include laws regulating well design, water use, waste management and disposal, air emissions, surface impacts, health, safety, location, spacing, and operation. State regulation of oil and gas activities pre-dated federal regulation, and is particularly important because it allows laws to be tailored to local geology and hydrology.").

[7] *See* DOIPS67136 (Anonymous Commenter's August 8, 2013 Comment Letter) (providing examples of why "North Dakota already has well thought out and geology specific regulations. These rules are redundant. The one-size-fits-all approach utilized in this rule does not recognize the unique characteristics of each geologic basin."); DOIAR57071 (North Dakota Congressional Delegation August 23, 2013 Comment Letter) ("States require this flexibility and primacy in regulating oil and gas production in order to make adjustments based on their expertise and on the ground assessments. The NDIC and [Dep't of Mineral Res.] are in the best position to determine what regulations are best for oil and gas production[.]"); DOIAR52906 (NDIC's July 30, 2013 Comment Letter) ("Since each sedimentary basin has unique deposits and geologic features, which result in unique local environmental and geologic conditions, regulating oil and gas development is a role best left to state regulation."); DOIAR65135 (US Congress Members' August 23, 2013 Letter to Sec. Salazar) ("The unique geology, technology, and innovation in North Dakota exemplifies why a one-size-fits-all federal approach to oil and gas regulation does not work. You were correct when you noted in North Dakota that our state's resources would be affected by a national energy policy[.]"); *and* DOIPS307 (Inland Oil & Gas Corp.'s June 26, 2012 Comment Letter) (North Dakota "has continually proved that they are proactive and educated on the concern facing the environment associated with hydraulic fracturing. Any larger, extended government entity that is removed from the unique geological traits of the Bakken would merely impose 'blanket' rules that will not address the specifics of the formation, and therefore will be noxious and unbeneficial to any and all parties involved.").

[8] The BLM Rule's requirement to submit water sources and recovered fluid disposal method interferes with North Dakota's SDWA primacy. PI Mot. at 22-23; DOIAR54110 (North Dakota Petroleum Council's August 9, 2013 Comment Letter) ("The requirement to submit water source and recovered fluid disposal method encroach upon state jurisdiction over waters of the state and

regulatory regime established through tribal sovereign authority. North Dakota and the Three Affiliated Tribes of the Fort Berthold Reservation have executed a cooperative agreement whereby the State of North Dakota works with the Tribal government to regulate oil and gas operations, including hydraulic fracturing and the protection of USDWs. *See* Dkt. No. 52-4, Helms Decl. at ¶ 11. The BLM Rule will evict North Dakota from this specific regulatory role, frustrating a legal agreement executed by two sovereign authorities. The BLM's ouster of North Dakota from this regulatory role represents an egregious intrusion on both North Dakota's and the Three Affiliated Tribes' sovereign authority by the BLM Rule.

The BLM Rule also compromises environmental protection measures established by North Dakota. The BLM justifies its decision not to consider deference to state regulations because "the agency needs a baseline set of standards that would apply to Federal and Indian oil and gas leases in all states." 80 Fed. Reg. at 16190. The BLM's reference to a "baseline" contradicts the SDWA provision that regulations should consider different contexts and conditions. 42 U.S.C. § 300h(b)(3)(A). The BLM places more importance on a one-size-fits-all standard than on the value of state regulations that have benefitted from local expertise and the traditional right to regulate USDWs and hydraulic fracturing. States have "traditional and primary power over land and water use" for the very reason that a one-size fits all approach is inappropriate to regulate these resources. *Solid Waste Agency of N. Cook Cnty.*, 531 U.S. at 174. The BLM's faulty assumption that any state standard less stringent than the BLM's is per se wrong illustrates the BLM's failure to understand the benefits of cooperative federalism precepts embodied in the SDWA. Instead, the BLM is imposing the very type of unvarying bureaucratic regulation that the SDWA was enacted to avoid.

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over underground injection control covered in the primacy agreement between North Dakota and the EPA.").

C. THE BLM CANNOT CURTAIL NORTH DAKOTA'S EXISTING LAWS

The BLM's interpretation of FLPMA and the MLA is untenable for another reason: It would improperly interfere with North Dakota's regulation of hydraulic fracturing, making it contrary to the same statutory authority upon which the BLM purports to rely. As set forth above, both FLPMA and the MLA expressly preclude the BLM from any action that would impact North Dakota's rights under existing law. *See* Pub. L. No. 94-579, § 701, 90 Stat. 2786 (1976); 30 U.S.C. § 189. The BLM's insistence that it is abiding by those provisions and not interfering with state regulation of hydraulic fracturing or USDWs is demonstrably false. The BLM Rule would directly displace the state's regulatory role, thereby impermissibly interfering with the SDWA and North Dakota's sovereignty and governmental functions.

The substantive similarity between the provisions in the BLM Rule and the regulations governing hydraulic fracturing and USDWs of North Dakota demonstrates such interference. The BLM's equivocation is evident from the following statement:

> The BLM agrees that regulation of groundwater quality is not within the BLM's authority; however, the protection of those water zones during well drilling and hydraulic fracturing is a key component of the BLM's jurisdiction and responsibility.

80 Fed. Reg. at 16143; *see also id*. at 16186 ("[t]he BLM agrees that regulation of the quality of surface waters under the Clean Water Act, and the regulation of groundwater under the SDWA, are the duties of EPA and states and tribes. The requirements of this rule do not interfere with those programs").

The BLM even acknowledges the potential of the BLM Rule to interfere with states' regulatory power over water:

> Some commenters objected to the rule on the grounds that protection of water is a states' rights issue. The BLM agrees to a certain extent, and has revised the rule, as discussed elsewhere, to reduce potential conflicts with states' water allocation and water quality regulations.

Id. at 16186 (emphasis added); *see* DOIAR102205 (BLM Rule Preamble March 26, 2015) ("The BLM agrees to a certain extent, and has revised the rule, as discussed elsewhere, to *reduce* potential conflicts with states' water allocation and water quality regulations.") (emphasis added).

It is not credible for the BLM to contend that regulation of the same sources, using the same controls, and setting standards for the same practices are anything other than regulation of groundwater in North Dakota – no matter what semantics the BLM uses. Even if the BLM chooses to label the BLM Rule provisions as "protection" of USDWs rather than as UIC regulations, the BLM Rule displaces or encroaches on North Dakota's regulation of groundwater. Many provisions of the BLM Rule substantively resemble North Dakota's hydraulic fracturing regulations and UIC requirements. Notably, certain provisions in the BLM Rule are less stringent than North Dakota regulations. In any event, the BLM Rule interferes with all of North Dakota's regulations specifically established to address North Dakota-specific circumstances. The examples below illustrate the similarity of the BLM Rule provisions and North Dakota regulations (revealing defects in the BLM's assertions that it is not regulating USDWs) as well as the inferiority of the BLM Rule provisions for North Dakota operations.

One example of the BLM Rule's conflict with and inferiority to a North Dakota regulation, tailored to its specific geology, is the Rule's provision regarding the annulus pressure allowed during hydraulic fracturing stimulation. *Compare* 43 C.F.R. § 3162.3-3(g)(2) *with* N.D. Admin. Code 43-02-03-27.1 §§ 1(g), 2(i), and 3. North Dakota's regulation of "usable water" takes site and regional geologic conditions into account as opposed to the BLM Rule's standardized approach. *Compare* 43 C.F.R. § 3162.3-3(e)(1)(i) *with* N.D. Admin. Code 43-02-03-21. In opposition to North Dakota's regulations, the BLM's casing pressure testing does not

address the maximum treating pressure. *Compare* 43 C.F.R. § 3162.3-3(f)(1) *with* N.D. Admin. Code § 43-02-03-27.1. And unlike the BLM Rule provisions that allow storage of flowback fluids in surface pits, North Dakota regulations prohibit flowback fluids from being stored in pits or open receptacles on the surface, except in cases of an emergency. *Compare* 43 C.F.R. § 3162.3-3(h) *with* N.D. Admin. Code 43-02-03-53 § 1; 43-02-03-19.3. Where such conflicts exist, the BLM Rule frustrates state regulations.

The BLM Rule's treatment of "usable water" demonstrates another conflict, where the BLM's one-size-fits-all regulation (1) encroaches on the regulatory field governed by the SDWA; and (2) is less effective than North Dakota's regulations. The BLM Rule defines the term "usable water" in an attempt to clarify water zones "worthy of protection." See 80 Fed. Reg. at 16141-44. The BLM Rule preamble states:

> . . . the [BLM Rule] protects usable water, which includes, but is not limited to USDWs. Aquifers that are not USDWs might be usable for agricultural or industrial purposes, or to support ecosystems, and the rule defers to the determinations of states (on Federal lands) and tribes (on Indian lands) as to whether such zones must be protected.

Id. at 16143. The term usable water impermissibly expands the definition of USDWs as defined by the SDWA.

The BLM Rule references 40 C.F.R. § 144.3 as part of its definition for usable waters and includes the protection of USDWs without limiting the definition of usable to the definition in the SDWA. Thus, the BLM Rule's definition of usable water covers a broad spectrum of uses in addition to drinking water, such as agriculture, industrial, or other needs. The preamble to the BLM Rule states:

> USDWs do not necessarily include water zones that have been designated by states or tribes as usable water for agriculture, industry, or other needs. The BLM believes that these zones are also worthy of protection.

Id. at 16144. Using this definition, the BLM Rule regulates the protection of all water regardless of quality, depth (surface waters included), or use. *See* 80 Fed. Reg. at 16217-18 (43 C.F.R. §§ 3160.0-5 and 3162.3–3). As defined by the BLM, usable water must be isolated and protected from contamination during hydraulic fracturing. Under the BLM Rule, sources of water used in hydraulic fracturing to stimulate a well would meet the BLM definition of usable water if located underground, meaning they must be protected from contamination during hydraulic fracturing. Under 43 C.F.R. § 3162.3-3(d)(3), the BLM Authorized Officer has the authority to approve or deny the source of the water to be used in the hydraulic fracturing stimulation of the well.

Under the BLM Rule, the Dakota Group formation (a deep subsurface geologic unit in North Dakota that is comprised of lithological conditions that are conducive to disposal of the vast majority of waste water produced by oil and gas operations) is considered to contain usable water. The BLM Rule defines usable water as "[w]ater in zones designated by the State (for federal lands) or tribe (for Indian lands) as requiring isolation or protection from hydraulic fracturing operations." 43 C.F.R. § 3160.0-5. Under North Dakota regulations, wellbore construction casing must be properly cemented to adequately isolate the uppermost sand of the Dakota Group. This results in defining the water within this geologic strata as useable water under the BLM Rule.

Although North Dakota requires cement isolation of the Dakota Group, the intention of the regulation is not to protect the formation fluids but rather to protect the casing of the well from potentially corrosive material and to ensure confinement of fluids that are disposed of within the Dakota Group. In certain instances during the construction of the wellbore the adequate cement isolation of the uppermost sand in the Dakota Group may not be achieved. North Dakota regulations have made provision for this circumstance. The regulation in North

Dakota Administrative Code § 43-02-03-22 provides that remedial cement work may not be required as long as correlative rights are protected without endangering potable waters. Typically in these cases additional monitoring and other restrictions will be required. Under the BLM Rule, the operator will be required to perform remedial action prior to hydraulically fracturing the well. 43 C.F.R. § 3162.3-3(e)(3). This is an example of how a state regulation based on the regional geology and local knowledge of wellbore construction will become less effective under federal regulation in the BLM Rule.

The EPA raised similar concerns to the BLM. *See* DOIAR16358 (EPA Comments on BLM Proposed Rule) ("EPA also recommends that this discussion in the preamble be expanded to take into account other federal efforts programs that regulate well stimulations."); *see also* DOIAR105401 (EPA Comments on the BLM Rule) ("EPA is concerned that BLM's definition of Usable Water is inconsistent with EPA's definition of an underground source of drinking water (USDW) under the Safe Drinking Water Act (SDWA). BLM includes the word 'generally' in the definition implying that there are exceptions to protecting waters with less than 10000 parts per million (ppm) of total dissolved solids TDS.").

D. THE BLM RULE IS ARBITRARY AND CAPRICIOUS

An agency's decision will be deemed arbitrary and capricious if the agency relied on factors which Congress had not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. *Lamb v. Thompson,* 265 F.3d 1038, 1046 (10th Cir. 2001). Here, the BLM failed to consider an important aspect of regulating hydraulic fracturing, the unique and significant split-estate situation in North Dakota, the conflicts its regulations may cause with state regulation, and the negative consequences of its BLM Rule on the states sovereign and

economic interests, and on the economy in general.

1. The BLM failed to consider North Dakota's split-estates lands

a. Background and traditional regulation of split-estate lands in North Dakota

North Dakota has a unique and significant split-estate situation which is not accounted for in the BLM Rule. Unlike many western states with large blocks of land where the federal government owns both the surface and the minerals, the surface and mineral estates in North Dakota were at one time more than 97% private and state owned as a result of the railroad and homestead acts of the late 1800s. *See* Dkt. No. 52-4, Helms Decl. at ¶ 9. However, during the depression and drought years of the 1930s, numerous small tracts in North Dakota went through foreclosure. *Id*. The federal government, through the Federal Land Bank and the Bankhead Jones Act, foreclosed on many farms, taking ownership of both the mineral and surface estates. *Id*. Most surface estates were eventually sold, but the federal government retained some or all of the mineral estates. *Id*. This resulted in a very large number of small federally-owned mineral tracts scattered throughout western North Dakota. *See* Dkt. No. 52-4, Helms Decl. at Exhibit 1. These scattered tracts with federal mineral ownership and private surface ownership impact more than 30% of the oil and gas spacing units in North Dakota that utilize hydraulic fracturing. *See* Dkt. No. 52-4, Helms Decl. at ¶ 9. The enormous quantity of split-estate areas result in large areas containing a checkerboard of lands with private or state surface ownership and a mix of federal, state and private mineral ownership.

Under the BLM Rule, this checkerboard of split-estates results in BLM regulation of hydraulic fracturing and USDWs on private and state surface lands, based only on BLM ownership of the subsurface minerals. As an example, in a spacing unit where membership consisted of private surface and mineral ownership of all tracts but one, the BLM's ownership of

a mineral interest in that single tract would be sufficient to subject the entire unit to the BLM Rule. *See* Dkt. No. 52-4, Helms Decl. at Exhibit 2. Without any statutory grant of jurisdiction or basis in property rights, the BLM asserts authority over private property and the associated state waters. Not only does such authority not exist, the SDWA prohibits such unnecessary federal interference. The private surface owners of these split-estate lands are citizens of North Dakota and the USDWs under their lands are unquestionably under state jurisdiction, not the BLM's.

b. The BLM Rule improperly asserts surface jurisdiction over split-estate lands, making no provision for BLM's reduced surface authority

The BLM does not have the authority to regulate non-federal and non-Indian lands.[9] Therefore, the BLM Rule inappropriately applies to split-estate lands in which the federal government owns the mineral estate, but not the surface estate.

North Dakota law limits the surface rights of the mineral owners on split-estates: "[T]he mineral estate owner has no right to use more of, or do more to, the surface estate than is *reasonably necessary* to explore, develop, and transport the minerals." *Hunt Oil Co. v. Kerbaugh*, 283 N.W.2d 131, 135 (N.D. 1979) (emphasis added). Because of the effectiveness and success of North Dakota law governing hydraulic fracturing and protecting USDWs,[10] the BLM Rule provisions impacting the surface, such as the provision allowing storage of flowback fluids in surface pits, do not qualify as "reasonably necessary." This example demonstrates but one of the direct conflicts between the BLM's claimed jurisdiction to protect USDWs under

[9] The BLM has recognized this limitation on its authority. *See* DOIAR20670 (BLM May 12, 2012 Email from BLM Director Neil Kornze to the Office of the Vice President) ("our authority only comes into play when there are public/federal lands or public/federal minerals."); *see also* DOIAR94158 (BLM Draft Response to OMB Comments) ("Some commenters said that BLM could require operators to obtain permission to test water on non-Federal lands. Although states' or tribal police powers may authorize such requirements, the BLM's statutory authority does not extend to non-federal, non-Indian lands, absent a threat to Federal resources.").

[10] *See*, *supra*, footnote 2.

private surface lands and the State's right to exercise jurisdiction over such USDWs. Jurisdiction over the surface land in question is key to determining jurisdiction over USDWs. *Hydro Res., Inc. v. U.S. E.P.A.*, 608 F.3d 1131 (10th Cir. 2010) (finding state UIC jurisdiction based on EPA's erroneous land status determination to give itself jurisdiction over a specific UIC permit).

The administrative record demonstrates that the BLM was aware of the split-estates issue. *See* DOIAR94158 (BLM Draft Response to OMB Comments) (BLM recognizes the limits of its authority on split-estate lands in its statement that "there are many places where the BLM either does not manage the surface above the leased minerals or the locations where baseline testing and monitoring would be necessary or most useful would be off of BLM managed land. The BLM has no authority to require air or water quality monitoring on non-Federal lands and limited authority on non-Federal surface estates in those instances ('split estates')."); DOIAR93959 (BLM Document entitled "OMB Questions (Jan 7, 2015 and BLM Response and Current Status (Jan 20, 2015)") (similar statements); *and see* DOIAR26551 (BLM's August 2, 2012 Testimony before the House Energy and Commerce Committee) ("Given the checkerboard ownership patterns of many public lands in the West, as well as the significant portfolio of split estate ownership, the BLM also must coordinate with other landowners and land managers. Of the 700 million acres of mineral estate managed by the BLM, 57 million acres are under surface acres that belong to private entities and significant number of acres are under surface managed by other Federal agencies."). The BLM nevertheless failed to reduce its surface jurisdiction over split-estate lands when it promulgated the BLM Rule. *See* DOIAR0034483-85 (BLM Statement at BLM June 5, 2012 Tribal Consultation Forum) ("If its split estate, private surface, Federal minerals, non-Indian but Federal, we require them to do--abide by the Federal rules."). This

failure infringes on North Dakota's sovereign rights. It also resulted in the issuance of a final rule that is both duplicative and often conflicting with state regulations.

2. The BLM failed to consider how the BLM Rule would conflict with and duplicate existing state laws governing oil and gas

The BLM failed to consider the impact of the BLM Rule on the States' sovereign interests when it issued a final rule that unnecessarily conflicts with and duplicates existing state regulations. Dkt. No. 52, North Dakota's Motion for Preliminary Injunction (PI Mot.), at 7-16. The BLM Rule infringes on North Dakota' interest in the implementation and operation of its oil and gas regime, as it was intended to be employed.

The BLM Rule's failure to account for existing state laws also resulted in duplication and conflict. *See* DOIAR52906 (NDIC's July 30, 2013 Comment Letter) ("The BLM's analysis of costs and benefits do not take into consideration that some states, like North Dakota, already have the same requirements in their current rules and BLM's rule is duplicative and unnecessary."); *see also* DOIPS10311 (Halliburton Energy Service's September 10, 2012 Comment Letter) ("BLM's proposed regulations are in many respects duplicative of comprehensive regulatory programs that are already in place in states like Colorado, North Dakota, New Mexico, Montana, and Wyoming, programs which apply to activities on federal lands and which are effective in protecting human health and the environment.").

For instance, the BLM Rule will trigger North Dakota's confidentiality provision preventing the release of certain hydraulic fracturing records for six months. *See* Dkt. No. 96, Preliminary Injunction Hearing ("Hearing Tr.") at 49:25 –50: 15; 56:18 – 57:8; DOIAR5720-21 (NDIC Director's Statements at BLM April 20, 2011 Forum) (North Dakota alerted the BLM during development of the BLM Rule that "[t]here is a confidentiality period in the state of North Dakota for six months.").

The BLM should have considered state specific circumstances, as noted by those who submitted comments during the rulemaking stage to the BLM. Dkt. No. 96, Hearing Tr. at 238; 4-10; *See* DOIAR44000 (NDIC's June 25, 2012 Comment Letter) ("To date, BLM has not contacted the NDIC in an attempt to minimize any duplication."); DOIAR98139 (BLM March 17, 2015 Summary of Hydraulic Fracturing Rule) (recognizing twelve states with hydraulic fracturing regulations, but failing to acknowledge North Dakota); DOIAR98931 (BLM March 19, 2015 Internal State by State Summary) (failing to recognize North Dakota as a state containing "regulations in place addressing hydraulic fracturing" but rather only containing "some form of measures in place for either isolating, and protecting usable water chemical disclosure and/or maintaining well integrity."); DOIPS10657 (IPAA's and Western Energy Alliance's September 10, 2012 Comment Letter) ("Executive Order 13132 was implemented, in part, so that when a federal rule or law was proposed, its federalism implications would be analyzed and presented for public scrutiny. BLM provides no such analysis for its proposed rule and no such opportunity for the public to consider and discuss the serious ramifications the proposal will have on our system of government."); DOIAR34361 (254 Industry Members' September 10, 2012 Comment Letter) ("Yet despite this infringement on state authority, BLM has failed to conduct a Federalism assessment[.]"); DOIAR29096 (Western Business Roundtable's September 10, 2012 Comment Letter) ("There has been no meaningful consultation with states on this rulemaking."); DOIAR28398 (Interstate Oil & Gas Compact Commission's September 7, 2012 Comment Letter) ("IOGCC believes that the rule as proposed was developed without sufficient or meaningful consultation with state regulatory authorities. IOGCC, on behalf of the state regulators, requested to be kept informed of the development of the rules so that collaboration would be possible. The Department ignored requests for input.");

DOIPS10355 (Nat'l Assoc. of Manufacturers' September 10, 2012 Comment Letter) ("BLM appears not to have done proper research as to the scope or applicability of these state regulations."); DOIAR5053-59 (February 24, 2011 Information Memorandum to Special Assistant to Counselor re: State Hydraulic Fracturing Regulatory Schemes) (demonstrating BLM's insufficient consideration of state regulatory schemes); DOIAR5052 (February 14, 2011 Email from Department of Interior's Neal Kemkar to BLM) (same); DOIAR7893-95 (BLM October 25, 2011 Information Memorandum from Former BLM Director Bob Abbey to the Deputy Secretary) (same); DOIAR4772 (BLM February 3, 2011 Chart Entitled "State Regulations Spreadsheet") (demonstrating BLM's failure to conduct an in-depth review of state regulatory schemes); *and* DOIAR101805 (BLM March 25, 2015 Email from Linda Lance to Michael Nedd) ("Yesterday I was scrambling to find someone who could explain this to me – was surprised when I looked at state regs and they didn't match what I'd understood was the case . . . I keep finding confusion or errors in the chart -- which I thought was focused on the four corners of the states' rules but now appears to include some info about state practice as opposed to rule text." Mike Nedd's Response: "I'm sorry to hear you were 'scrambling to find someone who could explain' yesterday and we work real hard to ensure we had this nailed down but it is obvious we may not have done quite a good of job as we should have.").

Despite the evidence presented to it, the BLM has continually asserted that the BLM Rule does not affect the states. *See* BLM Rule, 80 Fed. Reg. at 16210 (concluding an Executive Order 13132 Federalism Assessment is not required because the BLM Rule "will not have a substantial direct effect on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government . . . The rule affects the relationship between operators, lessees, and the BLM, but it does not impact

states."); DOIAR74887 (BLM July 20, 2013 Fact Sheet on the Revised Hydraulic Fracturing Rule) (containing BLM's unsupported and patently erroneous assertions that "[t]his rule will have no impact on state regulation of hydraulic fracturing on state or private lands, nor will it weaken state or tribal regulations currently adhered to by operators working on public or Indian lands."); DOIAR20461 (BLM Rule Preamble May 11, 2012) (same); DOIAR48187 (BLM Supplemental Rule Preamble May 24, 2013) (same); DOIAR102205 (BLM Final Rule Preamble March 26, 2015) (same); *and see* DOIAR7889 and DOIAR97351 (asserting the BLM Rule would not affect states or impact state regulations).

3. The BLM failed to consider the negative consequences the BLM Rule will have on oil and gas development

The BLM also failed to consider the negative consequences the BLM Rule will have on the states sovereign and economic interests. Dkt. No. 52, at 9-11; Dkt. No. 96, Hearing Tr. at 33:14-17. As a result of North Dakota's unique split-estate lands and the BLM Rule's provisions that are duplicative of and conflict with North Dakota's comprehensive oil and gas regulations, the BLM Rule will frustrate the development of oil and gas within the entirety of the spacing unit for all units containing a combination of federal, state, or private lands. The BLM Rule will also negatively affect the development of oil and gas and the royalties and taxes paid to the State of North Dakota because it creates unnecessary permitting delays due to its provisions that duplicate and conflict with state regulations. PI Mot. at 12.

The additional regulatory burden imposed by the BLM Rule will result in a substantial delay – ranging from six to ten months – to permit North Dakota oil and gas wells for development. *See* Dkt. No. 52-4, Helms Decl. at ¶¶ 14-15. This delay will double the current permitting time.[11] *Id.* The BLM severely underestimated the cost of the BLM Rule by not

[11] *See* footnote [2], *supra*, describing DOIAR26551.

including the cost of delays in permit approval. *See* DOIPS67108-09 (Greater North Dakota Chamber of Commerce's August 8, 2013 Comment Letter) ("The administrative burden of the additional proposed rules will lead to further delays in approval of Applications for Permit to Drill (APD) from the already overtasked North Dakota Bureau of Land Management (ND BLM). BLM severely underestimates the cost of the proposed rules by not including the cost of delays in permit approval.").

The delays would be exacerbated by the fact that the BLM is understaffed and underprepared to implement its own rule. *See* DOIAR44000 (NDIC's June 25, 2012 Comment Letter) ("BLM is currently understaffed in North Dakota. The time for the BLM to process a permit currently takes 180-290 days. BLM's analysis indicates an additional 28,560 man hours per year will be needed to implement these rules. Imposing additional permit tasks will only further delay the process."); DOIAR48259 (NDIC's May 28, 2013 Comment Letter) ("amount of information that must be submitted and reviewed could result in substantial processing time by BLM staff."); DOIAR26985 (BLM August 21, 2012 Email from Steven Wells to Nicholas Douglas) ("I believe since it is unknown what would be expected, the estimates varied depending on interpretation. CA estimated 12 hours to process, 4 hours to cover the subsequent report. *Some offices would struggle more than others, especially the Dickinson's [North Dakota]* and Vernals [Utah], which would have to balance with other APD needs.") (emphasis added); *and* DOIAR68786-87 (BLM Montana/Dakotas State Director's December 6, 2013 Information Memorandum for the Director) ("[T]he BLM provides inspection and enforcement for production accountability. Each of these workloads has increased 450 percent in the past five years. With this increase comes commensurate responsibility for inspecting and enforcing (I&E) production accountability. As budgets continue to decline, meeting these I & E responsibilities

is becoming untenable."); DOIAR57133 (Continental Resources, Inc.'s August 23, 2013 Comment Letter) ("Today, even without the added administrative burden of the proposed rule, it takes BLM between 120 - 180 days to issue approval of a permit to drill a well involving BLM or Indian minerals. Given the fact BLM's North Dakota and Montana offices are understaffed and already being crushed by the weight of a backlog of more than 400 unreviewed permits, the current backlog and delays in permit approval will likely continue to grow if BLM publishes a final hydraulic fracturing rule and extends its applicability to the Bakken."); *and* DOIAR26852-53 (BLM Vernal Field Office Petroleum Engineer's Comment Letter) (new information required under the BLM Rule "will also add up to 230 work weeks (4.4 years) to our current annual work load . . .[and] we at the BLM are definitely experience challenged when it comes to the understanding of cement bond logs . . . We are not set up to evaluate and approve CBL for quick turn-around as will be the case with the requirements of a newly submitted APD.");

Compliance with the NEPA presents an additional source of delay. Dkt. No. 96, Hearing Tr. at 50; 11-15; BLM Rule, 80 Fed. Reg. at 16186 ("the BLM will need to know an operator's proposed source of water and planned disposal method in order to consider the potential environmental impacts and compliance with NEPA[.]"); *see also* DOIAR102205 (BLM Final Rule Preamble March 26, 2015) (same); DOIAR26857; DOIAR28539; *and* DOIPS10361.

Federal permitting delays will in turn result in economic losses to North Dakota and other states, including lost production revenue from royalties, taxes, and jobs.[12] PI Mot. at 11-14. *See*

[12] The concern over lost royalties, taxes, and jobs were also shared by other states and local governments. *See* DOIAR21123-24; DOIAR28977; DOIAR26793-94; DOIAR7591 *and* DOIAR7591. And by the industry. DOIAR56634 (API's August 23, 2013 Comment Letter) (the BLM Rule's "cost is borne not only by operators, but ultimately by taxpayers and the federal government in the forms of decreased tax and royalty revenues from production of federal oil and gas resources."); DOIAR33975, DOIAR33986; DOIAR56613; DOIPS239;

DOIAR13929 (North Dakota Governor Jack Dalrymple's February 8, 2012 Letter to Secretary Salazar) ("Oil and natural gas royalties from drilling on public lands are a significant revenue source for the federal government, the Tribes and North Dakota, and additional burdens for development on public lands could have the adverse effect of forcing operators to shift investment away from public lands, thus depriving the government of needed revenue."); DOIAR44001 (NDIC's June 25, 2012 Comment Letter) ("the proposed rule will negatively affect the royalties and taxes paid to the state of North Dakota because of development delays."); DOIAR54111 (North Dakota Petroleum Council's August 9, 2013 Comment Letter) ("The Bakken is leading the way by creating tens of thousands of jobs, stimulating the U.S. economy, and increasing domestic production of oil which provides energy security for our nation. The proposed BLM HF rules will have a significant impact on oil and gas development in North Dakota, especially on Tribal land development. It has been estimated that the economic impact of this rule will reach $120 million in North Dakota due to delays in the permitting process."); DOIAR28406 (Billings County North Dakota Commission Chairman's Comment Letter) ("The cost of this additional rulemaking will trickle down to the American taxpayer by decreasing the amount of royalties and tax revenue to local governments and states."); *and* DOIAR20694 (Email Summarizing Fort Berthold Indian Reservation Chairman Tex Hall's Comments at BLM May 8, 2012 Meeting) ("the HF rule would cost the [Fort Berthold Indian Reservation] over 125 million in lost revenue due to the fact that the rule would prevent approximately 100 wells from being drilled in the next year."). These delays will cut the production of oil and gas in half and will consequently reduce the royalties and taxes North Dakota will receive in the coming fiscal year (2016) in the amount of $300 million. *See* Dkt. No. 52-4, Helms Decl. at ¶ 16.

DOIPS10754; DOIAR32044; DOIAR53915-16; DOIPS7872; DOIAR28539; DOIAR28942; *and* DOIAR29127.

The BLM Rule's duplicative and conflicting requirements will deter and frustrate the development of oil and gas in North Dakota. *See* DOIAR44001 (NDIC's June 25, 2012 Comment Letter) ("the proposed rule will negatively affect the royalties and taxes paid to the state of North Dakota because of development delays caused by the proposed rule."); DOIPS71691 (Anonymous Commenter's August 14, 2013 Comment Letter) ("The Industrial Commission of North Dakota is already effectively regulating the use of hydraulic fracturing in ND. Adding another layer of bureaucracy will only add to delays and additional cost burdens.").

Uncertainty, unreasonable costs, and permitting delays will cause operators to permanently relocate their oil and gas operations off federal lands, and even out of North Dakota. PI Mot. at 14; *see* DOIAR66302 (BLM November 14, 2013 Meeting Notes) ("Since almost all western oil and natural gas development requires hydraulic fracturing, the implementation of the proposed rule could, by increasing permitting time periods and regulatory uncertainty, delay or discourage new production on federal lands."); DOIAR28543 (API's September 10, 2012 Comment Letter) ("[t]he risk of a situation presented by the proposed rule in which an operator obtains approval to drill a well without the assurance that it will be able to complete the well using hydraulic fracturing is likely to prove a major disincentive to investing capital to develop federal minerals. In short, the proposed rule is likely to prevent a significant number of wells from being drilled."); DOIAR22985 (John Dunham's June 1, 2012 Memorandum Entitled "Review of US BLM Report entitled Well Stimulation Proposed Rule: Economic Analysis and Initial Regulatory Flexibility Analysis") ("marginal wells would no longer be financially practical to develop"); *see also* DOIAR7590-91; DOIPS65492; DOIAR71737; DOIAR25444; DOIPS1043; DOIAR29126-27; *and* DOIPS10658.

The negative consequences of the BLM's failure to account for state-specific

circumstances cannot be overstated, for North Dakota and for other states largely depending on the oil and gas development. PI Mot. at 16; *See* DOIAR5676 (North Dakota State Legislator Duane DeKrey's Statement at BLM April 20, 2011 Forum) ("25 percent of [North Dakota's] revenue stream is from oil and so it's a pretty important industry to North Dakota."); DOIAR30226 (BLM October 3, 2012 Internal Memorandum for the Deputy Director) (acknowledging "BLM-managed subsurface acres in North Dakota annually contribute more than $1.3 billion to the state economy through BLM administered oil and gas production even though the BLM manages only 58,000 surface acres in North Dakota."); DOIPS10301 (Institute for 21st Century Energy – U.S. Chamber of Commerce's September 10, 2012 Comment Letter) (North Dakota is "the second largest oil producing state in the country."); *and* DOIAR68786-87 (BLM Montana/Dakotas State Director's December 6, 2013 Information Memorandum for the Director) ("BLM-administered oil and gas leasing, exploration and production contributed approximately $5.9 billion in total (direct and indirect) economic output to North Dakota and generated about 28,700 total (direct and indirect) jobs in North Dakota.").

This intrusion into state sovereignty is even more concerning as the BLM cannot identify any environmental purpose to justify the BLM Rule. PI Mot. at 16-17; *See* DOIAR97956 (BLM March 13, 2015 Email from Subijoy Dutta to Beverly Winston) ("we have no records of any hydraulic fracturing operation that has contaminated the usable groundwater zones with hydraulic fracturing fluids."); DOIAR3356 (BLM Director's Remarks at November 30, 2010 Department of Interior Forum) ("BLM has not conducted any formal studies of the potential impacts of hydraulic fracturing on water and other resources in the West."); DOIAR8326 (BLM November 14, 2011 Prepared Q&A Responses) ("the BLM is not aware of any evidence of negative impacts to groundwater as result of hydraulic fracturing on Federal wells");

DOIAR2399 (Department of Interior April 9, 2010 Natural Gas Workshop Information Memorandum to Secretary) (confirming that attempts to "link between this contamination and hydraulic fracturing is not conclusive."); *see also,* DOIAR97399, DOIAR26852, DOIAR70354, DOIAR35491, DOIAR97359, DOIAR80210, and DOIAR82444 (stating there are no environmental incident records from hydraulic fracturing, discussing only public *concern* about fracking's *potential* effects, acknowledging studies concluding that hydraulic fracturing is an environmentally safe process).

The BLM failed to account for split-estates and existing state laws. As a result, North Dakota's economic and sovereign interests will be harmed.

CONCLUSION

In light of the foregoing, the State of North Dakota respectfully requests the Court enter an order enjoining the BLM from implementing the BLM Rule, and granting such further relief as the Court deems just and appropriate under the circumstances.

Dated this 4th day of March, 2016.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on March 4, 2016, a true and correct copy of the foregoing was served via the Court's CM/ECF system on all parties of record in the above captioned case.

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