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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

STATE OF WYOMING; STATE OF COLORADO, Petitioners, v. 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.	)	Case No. 15-CV-00043-SWS

MEMORANDUM IN SUPPORT OF WYOMING
AND COLORADO'S MOTION FOR PRELIMINARY INJUNCTION

INTRODUCTION

In creating its 2015 rule regulating hydraulic fracturing on public land, the Bureau of Land Management disregarded Congress's specific limitation of federal power over the regulation of hydraulic fracturing, and thus, the Bureau exceeded its jurisdiction. The rule creates a sweeping regulatory scheme far beyond the Bureau's authority and takes effect in less than a month. 80 Fed. Reg. at 16128. Should this rule take effect, States that currently regulate hydraulic fracturing on federal land, such as Wyoming and Colorado, will suffer an immediate loss of their exclusive sovereign authority over hydraulic fracturing. Implementation of this rule before a decision on the merits in this case will result in waste of state, federal, and industry resources without providing a benefit to the environment. This Court should preserve the status quo by entering an order enjoining the rule from taking effect until this litigation is resolved.

BACKGROUND

Hydraulic fracturing is a process by which oil and gas operators pump a mixture of water, propping agents (such as sand), and chemicals into the ground at high pressures to create fractures, thereby releasing the oil and gas otherwise trapped inside tight rock formations.[1] Oil and gas operators have used this process to increase production from wells since the 1940s. 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).

[1] For a more in depth discussion, *see* Francis Gradijan, *State Regulations, Litigation, and Hydraulic Fracturing*, 7 Envtl. & Energy L. & Pol'y J. 47, 48 (2012).

Wyoming was one of the first states to regulate hydraulic fracturing when the Wyoming Oil and Gas Conservation Commission enacted rules in 2010. (Kropatsch Aff. at ¶ 8). Wyoming's regulations are comprehensive, requiring pre-stimulation fluid and chemical disclosures, monitoring and reporting of pressures and fracture lengths, and post-fracturing reporting of pressures and volumes of fluid used during the process. (*Id*. at ¶¶10–12). Secretary Jewell herself has recognized that Wyoming's program is "sophisticated in its oversight of hydraulic fracturing" and is "a good example of a State that's doing an effective job." *Review Programs and Activities of the Department of the Interior: Hearing Before the U.S. Senate Comm. on Energy and Natural Resources*, 113th Cong. 22 (2013) (statement of the Honorable Sally Jewell, Secretary of the Interior).[2]

Colorado likewise regulates all phases of oil and gas production, including hydraulic fracturing, through the Colorado Oil and Gas Conservation Commission. 2 Colo. Code Regs. § 404-1. Colorado's program is robust, requiring operators to construct wells so as to prevent pollution of groundwater formations through the use of cement casings to extend fifty feet above and below each fresh water aquifer; the rules also require mechanical integrity testing to ensure well integrity. *Id*. at §§ 404-1-317, -326. The Colorado Oil and Gas Conservation Commission further requires operators to line storage pits for produced water and to meet specifications that protect shallow groundwater. *Id*. at § 404-1-904. In 2012, the Colorado Oil and Gas Conservation Commission began requiring that operators disclose fracturing fluid volumes and chemical additives on Fracfocus.org within 60 days

[2] Available at: http://www.energy.senate.gov/public/index.cfm/hearings-and-business-meetings?ID=32bf7170-3281-40c6-8900-801b9c54f18a.

of hydraulic fracturing. *Id*. § 404-1-205A. Colorado also became the first state in the country to require detailed sampling of groundwater near wells both before and after drilling, enabling documentation of any effects of oil and gas operations on groundwater quality. *Id*. § 404-1-609(d).

Despite the development of effective regulations by the States, on May 11, 2012, the Bureau proposed regulations requiring the federal government to regulate hydraulic fracturing on federal and Indian lands for the first time. 77 Fed. Reg. at 27691 (to be codified at 43 C.F.R. pt. 3160). Historically, the Bureau's only regulation addressing hydraulic fracturing worked to prevent surface disturbance and did not regulate the fracturing process itself. *See* 43 C.F.R. § 3162.3-2(b) (requiring that operators need only obtain approval to conduct hydraulic fracturing if additional surface disturbance would occur).

Due to overwhelming public interest in the 2012 rule proposal, the Bureau issued a supplemental proposed notice of rulemaking and request for comment. 78 Fed. Reg. 31636 (May 24, 2013). On March, 26, 2015, the Bureau finalized the rule entitled Oil and Gas; Hydraulic Fracturing on Federal and Indian Lands; Final Rule (Fracking Rule). 80 Fed. Reg. 16128. The Bureau will begin enforcing the Fracking Rule on June 24, 2015. *Id*.

The Fracking Rule creates a significant new permitting regime. It duplicates the States' regulations by requiring operators to obtain prior approval from the Bureau before conducting well stimulation activity, including: submitting detailed information to the Bureau regarding geological, hydrological, and engineering data; performing a successful mechanical integrity test; managing recovered fluids in above-ground storage tanks, with

limited exceptions; and disclosing the chemical makeup of stimulation fluids to the public and the Bureau. 80 Fed. Reg. at 16129–30.

ARGUMENT

I. Standard for granting a preliminary injunction.

This Court may grant a preliminary injunction in this matter. Fed. R. Civ. P. 65(a). Petitioners request the Court use its discretion to not require an injunctive bond or surety pursuant to Fed. R. Civ. P. 65(C). *Coquina Oil Corp. v. Transwestern Pipeline Co.*, 825 F.2d 1461 (10th Cir. 1987) (instructing district courts to use discretion if "there is an absence of proof showing a likelihood of harm"). As discussed below, no harm will come to the Bureau should this Court enter a preliminary injunction against its Fracking Rule.

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.'" *Schrier v. Univ. of Colo.*, 427 F.3d 1253, 1258 (10th Cir. 2005) (quoting *Univ. of Tex. v. Camenisch*¸ 451 U.S. 390, 395 (1981)). To grant a preliminary injunction, the Court must find that: (1) the movant is likely to succeed on the merits; (2) the movant is likely to suffer irreparable harm without preliminary relief; (3) the balance of equities favors the movant; and (4) the injunction is in the public interest. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). In making this showing, the movant must demonstrate that their right to relief is clear and unequivocal." *Fundamentalist Church of Jesus Christ of Latter-Day Saints v. Horne*, 698 F.3d 1295, 1301 (10th Cir. 2012).

II. The Court should issue a preliminary injunction to maintain the status quo—regulation of hydraulic fracturing by states, not the Bureau.

A. The States will likely succeed on the merits of their Petition for Review.

The States are likely to succeed on their claims that this Court should strike down the Bureau's Fracking Rule. Likelihood of success on the merits "requires more than a mere possibility that relief will be granted." *Nken v. Holder*, 129 S.Ct. 1749, 1753 (2009). To prevail on their petition, the States must prove that the Bureau does not have authority to regulate hydraulic fracturing activities. If the States show that the Bureau's Fracking Rule is in excess of its statutory authority, this demonstrates that the rule is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706.

The Bureau claims authority to promulgate the Fracking Rule under the Federal Land Policy and Management Act (FLPMA), 43 U.S.C. §§ 1701–84, the Mineral Leasing Act of 1920 (MLA), 30 U.S.C. §§ 181–287, the 1930 Right-of-Way Leasing Act, *id.* §§ 301–06, the Mineral Leasing for Acquired Lands Act of 1947, *id*. §§ 351–60, the Federal Oil and Gas Royalty Management Act of 1982, *id*. §§ 1701–57, as well as various Indian mineral statutes. 80 Fed. Reg. at 16217. However, none of these statutes authorize the Bureau to regulate hydraulic fracturing. Instead, the Safe Drinking Water Act and the 2005 Energy Policy Act grant that authority directly to the states.

i. The Safe Drinking Water Act provides the states, Indian tribes, and the EPA with exclusive authority to regulate underground injections, including fracking.

Unlike the statutes cited by the Bureau, Congress previously provided the EPA with specific statutory authority to regulate fracking. In 1974, Congress enacted the Safe Drinking Water Act, which sets forth a cooperative federalism system for protecting drinking water sources. *See* Pub. L. No. 93-523, 88 Stat. 1660 (1974) (codified as amended at 42 U.S.C. §§ 300f – 300j-26 (2014)). To protect groundwater against contamination, Congress established a comprehensive scheme to regulate all underground injection of contaminants, including hydraulic fracturing, in Part C of the Act. 42 U.S.C. §§ 300h – 300h-8.

Often referred to as the underground injection control (UIC) program, Part C prohibited "any underground injection," without a permit and included "inspection, monitoring, recordkeeping, and reporting requirements." *Id.* § 300h(b)(1)(A), (C). The Act defined "any underground injection" as "the subsurface emplacement of fluids by well injection." *Id.* § 300h(d)(1)(A). States with authorization have primary authority to enforce the UIC program, though the EPA serves as a backstop to ensure states adequately carry out the program's mandates. *Id.* § 300h-1(b), (c).

In designing the UIC program, Congress recognized that:

> underground injection of contaminants is clearly an increasing problem. Municipalities are increasingly engaging in underground injection of sewage, sludge, and other wastes. Industries are injecting chemicals, byproducts, and wastes. **Energy production companies are using injection techniques to increase production** and to dispose of unwanted brines brought to the surface during production. Even government agencies, including the military, are getting rid of difficult to manage waste problems

by underground disposal methods.

H.R. Rep. No. 93-1185 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6454, 6481 (emphasis added). Recognizing the regulatory challenges that underground injections presented, Congress intended Part C "to deal with **all** of the foregoing situations[.]" *Id*. (emphasis added); *see also Legal Envtl. Assistance Found., Inc. (LEAF) v. EPA*, 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). As the Eleventh Circuit held in *LEAF*, Congress contemplated hydraulic fracturing when it created the UIC program under the Safe Drinking Water Act and intended that Act to be the sole means of regulating the practice.

To ensure uniform regulation under the comprehensive framework established in Part C of the Safe Drinking Water Act, Congress required every federal agency "engaged in any activity resulting, or which may result in, underground injection which endangers drinking water" to comply with the UIC program. 42 U.S.C. § 300j-6(a)(4). Congress intended this provision to "require[] each Federal agency with jurisdiction over . . . underground injection activities to comply with requirements of applicable underground injection control programs." H.R. Rep. No. 93-1185 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6454, 6493. Congress, thus, dictated that regulators will 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." *Id*. at 6494.

ii. Subsequent judicial decisions and Congress's enactment of the 2005 Energy Policy Act have removed the EPA from the equation, leaving fracking regulation in the hands of the states.

For two decades after the enactment of the Safe Drinking Water Act in 1974, the EPA took the position that hydraulic fracturing was not subject to the UIC program. Mary Tiemann & Adam Vann, Cong. Research Serv., R41760, *Hydraulic Fracturing and Safe Drinking Water Act Regulatory Issues*. 15 (2013).[3] This interpretation of the UIC program's scope remained until the Legal Environmental Assistance Foundation challenged the EPA's approval of Alabama's UIC program. *LEAF*, 118 F.3d at 1467. In its review of Alabama's program, the EPA concluded that the term "underground injection" only applied to "those wells whose 'principal function' is the underground emplacement of fluids," and thus, did not require Alabama to regulate hydraulic fracturing wells under its UIC program. *Id.* at 1471. The Court, citing the unambiguous plain language of the Safe Drinking Water Act, held that Congress intended for the EPA to regulate **all** underground injection activity under the UIC program, including hydraulic fracturing. *Id*. at 1474–75, 78.

In response to *LEAF* and the EPA's 2004 preliminary review of hydraulic fracturing regulation under the UIC program, Congress proposed an amendment to the Safe Drinking Water Act in the 2005 Energy Policy Act. *See* Pub. L. No. 109-58, § 322, 119 Stat. 594 (2005) (codified at 42 U.S.C. § 300h(d)(2)(B)). The amendment revised the definition of "underground injection" in the UIC program to exclude "the underground injection of

[3] Available at: https://www.fas.org/sgp/crs/misc/R41760.pdf.

fluids or propping agents (other than diesel fuels) pursuant to hydraulic fracturing operations related to oil, gas, or geothermal production activities." 42 U.S.C. § 300h(b)(2)(B).

Legislators understood this provision "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 (daily ed. Apr. 20, 2005) (statements of Rep. Markey); *see also* 151 Cong. Rec. S9335-01, S9337 (daily ed. July 29, 2005) (statement of Sen. Feingold). Legislators also characterized the revision as a production incentive to support the Act's broader policy of developing secure, affordable, and reliable energy resources. Pub. L. No. 109-58 (official title); *see also* 151 Cong. Rec. H2192-02, H2226 (daily ed. Apr. 20, 2005).

When the Energy Policy Act became law, the EPA's authority to regulate fracking under the Safe Drinking Water Act was removed, unless it involved the use of diesel fuel as fracking fluid. 42 U.S.C. § 300h(b)(2)(B). By limiting the EPA's authority in this way, Congress removed hydraulic fracturing from the exclusive regulatory purview of the Safe Drinking Water Act's UIC program and, more importantly, "conclusively withdrew frac[k]ing from the realm of federal regulation." *See*, Wiseman, 20 Fordham Envtl. L. Rev. at 145.

iii. FLPMA charges the Bureau with general federal land use planning responsibility but does not authorize the Bureau to regulate fracking.

In 1976, Congress rewrote public lands management law with the enactment of the Federal Land Policy and Management Act of 1976 (FLPMA). 43 U.S.C. §§ 1701–84. At

its core, "FLPMA is a planning statute." George Cameron Coggins, *The Developing Law of Land Use Planning on the Federal Lands*, 61 U. Colo. L. Rev. 307, 325 (1990). FLPMA charges the Bureau with managing public lands for multiple uses and sustained yield of natural resources, 43 U.S.C. § 1702(c), (h), through routine planning and inventorying of lands and uses, *id.* §§ 1711–12. Ensuring that management actions conform to management plans comprises the "main thrust" of FLPMA. Coggins, 61 U. Colo. L. Rev. at 324.

Congress declared thirteen policies in FLPMA, which expand upon the "deceptively simple" multiple use mandate. 43 U.S.C. § 1701(a); *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 58 (2004). Those policies include "recogn[ition] of the Nation's need for domestic sources of minerals, food, timber, and fiber," as well as the protection of ecological, environmental, and water resources. 43 U.S.C. § 1701(a)(8), (12). In these declarations of policy, Congress intended to convey "that its purpose was to aid in the management, disposal, and maintenance of federal public land**s** in the nations [*sic*] best interest." *Carden v. Kelly*, 175 F. Supp. 2d 1318, 1325 (D. Wyo. 2001). In pursuit of this general purpose, Congress authorized the Bureau 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), 1740. Nothing in FLPMA, however, provides the Bureau with authority to regulate hydraulic fracturing or underground injections of any kind; these sections merely provide the authority to manage the public lands for multiple uses and sustained yield of natural resources. 43 U.S.C. § 1702(c), (h).

In fact, § 202 of FLPMA **precludes** the Bureau from regulating the potential groundwater impacts of fracking. *Id*. at § 1712(c)(8). This provision requires the Bureau to

"provide for compliance with applicable pollution control laws, including State and Federal air, water, noise, or other pollution standards and implementation plans" when creating management plans under FLPMA. *Id*. Given its plain meaning, this provision requires the Bureau to acknowledge pollution control regulations created by the EPA and the states, then ensure that the Bureau's land management plans comply with these laws. *Id*.

When drafting this section of FLPMA, Congress clearly understood that other entities—including state entities—are charged with regulating potential sources of pollution. *See Id*. Thus, Congress instructed the Bureau to follow the applicable state and federal pollution laws, rather than giving it the authority to create its own. *Id.* In the current case, this congressional mandate requires the Bureau to comply with EPA and state hydraulic fracturing regulations when creating its land management plans, rather than promulgating its own regulatory regime.

In addition, Congress expressly stated that "nothing in [FLPMA] shall be deemed to repeal any existing law by implication." Pub. L. No. 94-579, § 701, 90 Stat. 2786–87 (1976) (uncodified). Nor may FLPMA be construed "as affecting in any way any law governing . . . use of . . . water on public lands," "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," or "as expanding or diminishing Federal **or State** jurisdiction, responsibility, interests, or rights in water resources development or control." *Id.* (emphasis added). The Bureau's Fracking Rule is a direct violation of these mandates in FLPMA.

Because FLPMA does not provide the Bureau with the power necessary to regulate underground injections on public land, the Bureau's rule is in excess of its statutory authority and not in accordance with the law.

iv. The Mineral Leasing Acts give the Bureau the authority to lease public land, not regulate fracking.

Federal mineral leasing statutes exist in a patchwork assemblage of nearly 100 years of legislation amending and expanding the Mineral Leasing Act of 1920 (MLA), 30 U.S.C. § 181–287, including the 1930 Right-of-Way Leasing Act, *id*. at § 301 *et seq.*, the Mineral Leasing for Acquired Lands Act of 1947, *id*. at § 351 *et seq.*, and the Federal Oil and Gas Royalty Management Act of 1982, *id*. at § 1701 *et seq.*

The MLA creates "a program to lease mineral deposits for private mining and marketing while preserving federal ownership of lands." *Natural Res. Def. Council, Inc. v. Berklund*, 609 F.2d 553, 555 (D.C. Cir. 1979) (per curiam). The MLA establishes terms for leasing oil and gas minerals on public lands, 30 U.S.C. § 226(d), (e), and prohibits leasing of wilderness lands, *id.* § 226-3. It authorizes the Secretary of Interior to lease all other public lands for oil and gas development, *id.* § 223, 226(a), regulate surface-disturbing activities, *id.* § 226(g), and establish cooperative development plans to conserve oil and gas resources, *id.* § 226(m).

In citing the MLA to support its Fracking Rule, the Bureau asserts general authority 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 [Act]." 30 U.S.C. § 189. However, the MLA merely creates a program for leasing mineral deposits on public land

for private mining. *Natural Res. Def. Council, Inc.*, 609 F.2d at 555. The creation of a regulatory scheme for hydraulic fracturing does not flow from the general authority to lease property.

Furthermore, the MLA states that "[n]othing 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[.]" 30 U.S.C. § 189. This constraint on the reach of the MLA is "likewise a limitation on the Secretary of the Interior as to his regulation making authority set out in [Section 189]." *Tex. Oil & Gas Corp. v. Phillips Petroleum Co.*, 277 F. Supp. 366, 370 (C.D. Okla. 1966), *aff'd* 406 F.2d 1303 (10th Cir. 1969), *cert. denied* 396 U.S. 829 (1969). As explained above, through the Energy Policy Act, Congress removed federal oversight of hydraulic fracturing, leaving the right to regulate fracking in the capable hands of the states. Wiseman, 20 Fordham Envtl. L. Rev. at 145. For this reason, the MLA prohibits the Bureau's Fracking Rule, rather than authorizes it.

Similarly, the Mineral Leasing for Acquired Lands Act of 1947 expanded 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. And, like the MLA, the Mineral Leasing for Acquired Lands Act authorized the Secretary "to prescribe such rules and regulations as are necessary and appropriate to carry out the purposes" of the Act. *Id.* § 359. However, Congress created the act to amend and expand the Bureau's authority to lease public land for mineral development, not to grant the Bureau the authority to craft a framework for regulating hydraulic fracturing or underground injections. *Id*. at § 351–60.

In the Right-of-Way Leasing Act, Congress again 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; *see also Wyoming v. Udall*, 255 F. Supp. 481, 485 (D. Wyo. 1966). The Act establishes bidding and lease terms, as well as minimum royalty rates. 30 U.S.C. § 303–05. Like the MLA, the Right-of-Way Leasing Act grants the Secretary of the Interior general rulemaking authority to fulfill the purposes of the Act. *Id.* § 306. But general authority to make rules relating to terms of leases on federal rights-of-way does not translate to the ability to create a comprehensive regulatory scheme for all hydraulic fracturing on federal land, especially when Congress has deliberately left that duty to the states.

The Bureau also attempts to justify its Fracking Rule under the Federal Oil and Gas Royalty Management Act of 1982. 30 U.S.C. § 1751. By contrast to the previous acts, the Federal Oil and Gas Royalty Management Act of 1982 did not bring new lands under the Secretary's leasing authority but instead created a thorough system for collecting federal mineral royalties. 30 U.S.C. § 1711. The Act provides for annual lease site inspections, auditing of lease accounts, lessee liability for royalty payments, security plans to prevent theft of oil and gas, and civil and criminal penalties for noncompliance. *Id.* §§ 1711–20. To carry out these objectives, Congress authorized the Secretary to "prescribe such rules and regulations as he deems reasonably necessary[.]" *Id.* § 1751. Similar to other provisions the Bureau claims as authority for its Fracking Rule, this general rulemaking authority to create royalty collection systems cannot justify broad regulation of hydraulic fracturing.

Simply put, the Bureau cannot rest its Fracking Rule on the general authority found in FLPMA and these mineral leasing statutes when Congress has spoken so precisely and specifically against federal regulation in the Energy Policy Act. *See United States v. Porter*, 745 F.3d 1035, 1049 (10th Cir. 2014) ("[w]here there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one.") (internal quotations omitted)). For these reasons, the Bureau does not have authority to promulgate its Fracking Rule and the States will likely succeed on the merits in this case. Accordingly, the Court should issue a preliminary injunction maintaining the status quo during the pendency of this litigation.

B. Irreparable harm to the States will occur if the Court does not grant a preliminary injunction.

The States will suffer an irreparable injury if the Court does not issue a preliminary injunction. "Irreparable harm is, by definition, harm for which there can be no adequate remedy at law." *CBM Geosolutions, Inc., v. Gas Sensing Tech. Corp.*, 2009 WY 113, ¶ 10, 215 P.3d 1054, 1058 (Wyo. 2009). Harm to a party is generally considered to have no adequate remedy at law if an award of damages would not rectify the harm. 11A Charles Alan Wright, Arthur R. Miller, Federal Practice & Procedure, Civil § 2944 (3d ed. 1998).

In this case, the Bureau's Fracking Rule intrudes upon the States' sovereign interest in, and public policies related to, the regulation of hydraulic fracturing. *See Wyoming ex rel. Crank v. United States*, 539 F.3d 1236, 1242 (10th Cir. 2008) ("States have a legally protected sovereign interest in 'the exercise of sovereign power over individuals and entities within the relevant jurisdiction[, which] involves the power to create and enforce a

legal code'"). Any action that deprives a state of its sovereign interests and public policies, without first having a full and fair opportunity to be heard on the merits, irreparably harms the state. *Kansas v. United States*, 249 F.3d 1213, 1227–28 (10th Cir. 2001).

The State of Wyoming has been regulating hydraulic fracturing since 2010. (Kropatsch Aff. at ¶ 8). When the State began its regulatory program, two things were certain: (1) no other entity regulated routine hydraulic fracturing within the state; and (2) in 2005 Congress told the EPA, the only federal agency with authority over hydraulic fracturing, that it could not regulate the practice except in one specific instance. *See* Pub. L. No. 109-58, § 322, 119 Stat. 594 (2005) (codified at 42 U.S.C. § 300h(d)(2)(B)). Without an authorized federal regulator, Wyoming and Colorado stepped up, developing some of the first hydraulic fracturing regulations in the country.

The Bureau's Fracking Rule upsets the status quo by attempting to inject federal oversight in an area already adequately regulated by the States. (Kropatsch Aff. at ¶¶ 14–21). Not only do the States' hydraulic fracturing programs adequately protect groundwater, but the States have far more flexibility than the Bureau in the execution of their rules. (*Id.* at ¶ 24). For example, it takes the Bureau an average of 200 days to approve an Advanced Permit to Drill, when it otherwise takes the State of Wyoming just 60 days on average. (*Id.* at ¶ 27). With the Bureau's rigid, slow review process now imposed on all hydraulic fracturing plans on federal lands, operators will likely seek out states with less federal oversight, causing the States to lose high paying oil and gas jobs, as well as mineral lease royalties and severance tax revenues. (*Id.* at ¶ 39).

Instead of deferring to the States, who have flexibility and expertise with regional

geology and groundwater conditions, the Bureau has created an overlapping federal regime that produces nothing more than duplication of effort. (*Id*. at ¶¶ 28, 32, 34–37). Under the Bureau's final rule, well operators will be required to comply with both state and federal fracturing standards where states already regulate on public land. (*Id*. at ¶ 17). This means that well operators will be required to submit duplicate verification of their hydraulic fracturing plans to both state and federal agencies before they can begin the fracking process. (*Id*.). The end result of this extra layer of federal oversight does not increase the level of regulatory protection for groundwater. Instead, the standards imposed by the Bureau are similar and, in some instances, less protective than the standards in place in states like Wyoming and Colorado. (*Id*. at ¶¶ 14–21).

Even without the rigidity, delay, and duplication created by the Bureau's Fracking Rule, the rule infringes on the States' right to be the sole entity regulating hydraulic fracturing within their borders. *See Argument Section II.A.* With the passage of the Energy Policy Act, Congress intended to remove the federal government from the realm of fracking, leaving the matter to the states to regulate. *See* 151 Cong. Rec. H2192-02, H2194-95 (daily ed. Apr. 20, 2005) (statements of Rep. Markey); *see also* 151 Cong. Rec. S9335-01, S9337 (daily ed. July 29, 2005) (statement of Sen. Feingold). The States have a right to the benefit they procured in the Energy Policy Act.

The Bureau attempts to assuage the States' concern for their sovereignty by proposing that the States obtain a variance. 80 Fed. Reg. at 16175–76. According to the Bureau, a variance will not eliminate duplicative regulation; instead, it will allow the Bureau the ability to enforce those provisions of the state's hydraulic fracturing program

that meet the objectives of the Bureau's Fracking Rule. (Kropatsch Aff. at ¶¶ 34–37). In other words, the Bureau will grant itself increased regulatory power over fracking on public land if the state's program is equally or more protective than the Bureau's Fracking Rule. (*Id*.). Thus, the Bureau's variance process does nothing to accommodate the States' legitimate sovereign interests—instead, it further impairs them.

The Bureau has stated that approval of the variance is subject to the absolute discretion of the State Bureau Director. 80 Fed. Reg. at 16221 (stating that the Director **may** approve a variance if the state program meets or exceeds the objectives of the Bureau's Fracking Rule). Furthermore, there is no check on this discretion: the Fracking Rule states that "[t]he decision on a variance request is not subject to administrative appeals." *Id*. This means that the State Director has unbridled discretion to rescind or modify the conditions of a variance without being subject to administrative review. *Id*. Thus, even if the States were to seek a variance with the Bureau, there is little the States can do to assure that the Bureau will grant it and even less they can do to ensure that the Bureau does not arbitrarily modify or rescind it. *Id*. A variance process such as this fails to eliminate the irreparable harm to the States' sovereign interests. *See Taylor Diving and Salvage Co. v. U.S. Dep't of Labor*, 537 F.2d 819, 821 (5th Cir. 1976) (noting that "the ultimate and uncertain grant of variances from [federal] standards" does not obviate irreparable harm and is "too uncertain to justify the denial of a stay.").

Not only is the harm to the States' sovereignty irreparable, but it is guaranteed to occur if the Fracking Rule takes effect. The Bureau has stated that it will begin enforcing its Fracking Rule on June 24, 2015. 80 Fed. Reg. at 16128. The moment the Fracking Rule

goes into effect, the Bureau infringes on the States' sovereign interests because the states no longer have sole authority to regulate fracking within their borders. *See Wyoming ex rel. Crank*, 539 F.3d at 1242. Thus, irreparable harm is not only likely, but certain, to occur should the Fracking Rule take effect before the Court can decide on the merits. *RoDa Drilling Co. v. Siegal*, 552 F.3d 1203, 1210 (10th Cir. 2009) (suggesting that a preliminary injunction is warranted only if injury would occur before a merits trial can take place).

In addition to loss of sovereign authority, the States are likely to suffer economic harm when the Bureau's Fracking Rule takes effect. Because the Bureau's Fracking Rule substantially increases the amount of information the Bureau must process and approve for each well, the length of time it will take to obtain approval on a permit or notice of intent will increase. (Kropatsch Aff. at ¶¶ 27–28). This increase in Bureau review time will lead to a delay for any well harvesting federal minerals or located on public land. (*Id*.). This delay will also limit the flow of mineral and severance taxes to the States, which may cause important state projects to be put on hold. (*Id*. at ¶¶ 39–40).

Worse yet, the increased costs of submitting information to the Bureau will likely result in operators' choosing to drill on state or private land rather than on those lands containing federal minerals. (*Id*.). For states like Wyoming, which consist of an inordinate amount of federal land, this will lead to loss of mineral and severance taxes, not just delays. (*Id*.). As operators seek out other states with less federal mineral interests, Wyoming stands to lose countless jobs, as well as the incidental jobs and spending created by high paying oil and gas jobs. (*Id*.).

These delays will also likely effect Wyoming's tax revenues. Wyoming assesses

severance and ad valorem tax on the fair market value of oil, gas, and minerals produced in Wyoming, whether on federal, state, or private fee land. (Noble Aff. at ¶ 5). The State uses these taxes to fund state, county, and city programs, including funding for public schools and higher education. (*Id.* at ¶ 6). In 2012, severance and ad valorem taxes from crude oil and natural gas on federal land totaled $747,370,418. (*Id.* at ¶¶ 7–8). In 2013, these same taxes brought in $844,865,398 to Wyoming. (*Id.*). In total, from 2010 to 2013, the State of Wyoming collected $3,612,146,902 in severance and ad valorem taxes from crude oil and natural gas produced on federal land. (*Id.* at ¶ 9). Even if the Bureau's Fracking Rule decreases production on federal lands by a modest one percent, this implicates a loss of potentially millions in tax revenues to the State.

Additional regulatory delays will likewise affect Colorado, whose citizens rely on federal mineral lease proceeds and state severance tax revenues to fund projects at the county, municipal, and school district levels. *See* Colo. Rev. Stat. §§ 39-29-110(1)(c), 34-63-102(5.4)(c). In 2012, these funds amounted to a total of $26,687,870 in severance taxes and $35,252,380 in Federal Mineral Lease revenues. Colo. Dep't of Local Affairs, *Local Gov't Energy and Mineral Impact Assistance Program Biennial Direct Distribution Report* (Jan. 1, 2014).[4] In 2013, the funds amounted to a total of $22,297,004 in severance taxes and $25,107,247 in Federal Mineral Lease revenues. *Id.*

However, the States cannot seek money damages in this case. 5 U.S.C. § 702; *see also Lane v. Pena*, 518 U.S. 187, 196 (1996) (stating that in the Administrative Procedure

[4] Available at http://tinyurl.com/ptxzv52.

Act, Congress waived its sovereign immunity for liability without waiving its immunity for monetary damages). As a result, the economic damages the States will incur should this rule take effect are irreparable. *Crowe & Dunlevy, P.C., v. Stidham*, 640 F.3d 1140, 1157 (10th Cir. 2011) (explaining that while economic harm is usually insufficient to constitute irreparable harm, "the imposition of money damages that cannot later be recovered for reasons such as sovereign immunity constitutes irreparable injury") (internal citations omitted). The Court should enjoin the Fracking Rule during the pendency of this litigation to avoid these harms.

C. The balance of equities favor the States.

When determining the balance of equities, this Court must compare the public interests involved "to determine on which side the risk of irreparable harm weighs most heavily." *Blum v. Caldwell*, 446 U.S. 1311, 1315 (1980). To prevail on this factor, the movant must show that the threatened injury outweighs any potential injury to the non-moving party. *See O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973, 983 (10th Cir. 2004) (en banc majority opinion). Here, the balance of harms weighs heavily in favor of granting a preliminary injunction.

The Bureau's Fracking Rule will alter the status quo by implementing duplicative regulation in an area already regulated by the States. A preliminary injunction pending the outcome of the Petition for Review will maintain the status quo. *O Centro*, 389 F.3d at 1013 (McConnell concurrence) (defining status quo as "the last peaceable uncontested status existing between the parties before the dispute developed." (citation and quotation omitted)). The Court typically favors restoring and maintaining the status quo during the

pendency of litigation. *Cf. id.* at 975 (en banc majority opinion) (disfavoring preliminary injunctions that alter the status quo).

Without a preliminary injunction, the States will suffer immediate sovereign and economic harms. By contrast, the Bureau will experience no actual harm and will likely save taxpayer money by not implementing an illegal program. *E.g*. 80 Fed. Reg. at 16207 (estimating 25,400 additional Bureau staff hours per year to review applications associated with this rule). Because the Bureau does not currently regulate routine hydraulic fracturing on public lands, *Cf.* 80 Fed. Reg. at 16128, an injunction would prevent the Bureau from implementing the new permitting regime at taxpayer expense. *O Centro*, 389 F.3d at 978 (Murphy concurrence) ("Any injury resulting from a preliminary injunction that merely preserves the status quo is not judicially inflicted injury"). Additionally, there is minimal risk to the environment should this Court temporarily enjoin the Bureau's Fracking Rule because the States already have comprehensive programs regulating hydraulic fracturing on public and private land. (Kropatsch Aff. at ¶ 14–21).

For these reasons, the balance of equities tips heavily in favor of granting a preliminary injunction.

D. Granting a preliminary injunction is in the public interest.

Preventing the Bureau's Fracking Rule from taking effect is in the public interest. In this context, the term "public interest" encompasses any matter of public policy potentially affected by the issuance of an injunction. *See, e.g., Va. Petroleum Jobbers Ass'n v. Fed. Power Comm'n*, 259 F.2d 921, 925 (D.C. Cir. 1958).

First, issuing an injunction to preserve the status quo will serve the public interest

by preventing the Bureau from unnecessarily expending federal dollars to implement a rule that is likely to be invalidated after a full hearing. *See James River Flood Control Ass'n v. Watt*, 680 F.2d 543, 544 (8th Cir. 1982) (avoiding unnecessary expenditures from the public treasury serves the public interest). Should the Fracking Rule take effect, the Bureau will begin reviewing all hydraulic fracturing operations on public lands, an activity that will take work-hours from the Bureau's already limited pool of resources. 80 Fed. Reg. at 16207. Likewise, both the States and the Bureau will save employee work-hours and agency resources by not embroiling themselves in the variance process, which will otherwise take extensive negotiations, discussions, and drafting of formal agreements. 80 Fed. Reg. at 16175–76.

Second, issuance of a preliminary injunction will not harm the public interest in a clean environment because the States already adequately regulate hydraulic fracturing. Wyoming's program protects groundwater in much the same ways as the Bureau's Fracking Rule, including a few provisions that are more protective than the Bureau. (Kropatsch Aff. at ¶ 14–21). In fact, Secretary Jewell has boasted of Wyoming's robust regulation in the area. (*Id*. at ¶ 22). The Bureau's Colorado State Office agrees, proclaiming that "[t]he State of Colorado has led the nation in providing a regulatory framework to manage [oil and gas] development in an environmentally responsible manner on state and private lands." U.S. Dep't of the Interior, Bureau of Land Mgmt., Colorado Oil and Gas Leasing Program, http://www.blm.gov/co/st/en/BLM_Programs/oilandgas.html (last visited May 23, 2015). Thus, the public's interest in safe drinking water and transparency is not harmed by preventing the Bureau's Fracking Rule from taking effect until this

litigation is concluded.

Third, a preliminary injunction would foster the public's interest in flexible and responsive government. Currently, the Wyoming Oil and Gas Conservation Commission takes an average of sixty days to review hydraulic fracturing permits before approval. (Kropatsch Aff. at ¶ 27). The Bureau, on the other hand, takes an average of two-hundred days to review permit documentation. (*Id*.). A government that is responsive to its regulated community best serves the public interest. Thus, during the pendency of this litigation, the public interest in responsive government would favor a preliminary injunction.

Finally, Congress has weighed in on the issue and sided with the States. "When Congress has expressed its view of the proper balance between conflicting statutory policies, it is incumbent upon the courts to give effect to that view." *O Centro*, 389 F.3d at 1025 (Seymour J., concurring). When Congress passed the Energy Policy Act, it determined that the public interest was best served by preventing federal regulation of hydraulic fracturing with one minor exception. *See* Pub. L. No. 109-58, § 322, 119 Stat. 594 (2005) (codified at 42 U.S.C. § 300h(d)(2)(B)) (leaving the regulation of hydraulic fracturing using diesel fuel within the purview of the EPA). Because Congress has decided that state regulation is in the public interest, this Court should issue a preliminary injunction to protect the public interest and maintain the status quo.

CONCLUSION

For the foregoing reasons, the States request that the Court enter an order enjoining the final rule entitled Oil and Gas; Hydraulic Fracturing on Federal and Indian Lands published at 80 Fed. Reg. 16128 (March 26, 2015), during the pendency of this litigation.

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