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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

INDEPENDENT PETROLEUM ASSOCIATION OF AMERICA, and WESTERN ENERGY ALLIANCE, *Petitioners*, v. SALLY JEWELL, in her official capacity as Secretary of the United States Department of the Interior, and BUREAU OF LAND MANAGEMENT, *Respondents*.	)	Civil Case No. 2:15-CV-41-SWS **RESPONDENTS' BRIEF IN OPPOSITION TO PETITIONERS' MOTION FOR PRELIMINARY INJUNCTION**

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Respondents Sally Jewell, Secretary of the United States Department of the Interior, and Bureau of Land Management ("BLM") respectfully submit this brief in opposition to the motion for preliminary injunction (ECF Nos. 11-13) filed by Petitioners Independent Petroleum Association of America and Western Energy Alliance. That motion seeks to enjoin Respondent BLM from applying its Rule on Hydraulic Fracturing on Federal and Indian Lands[1] until the resolution of this suit.

Petitioners have not demonstrated that this Court should impose the extraordinary remedy of enjoining the final rule and halting its implementation. Rather, all evidence shows that Petitioners are unlikely to succeed on the merits of any of their claims – claims which misread or ignore the applicable provisions of the final rule, the explanations provided, and the regulatory context in which those provisions were promulgated. This alone is a sufficient basis for denying their motion. In addition, Petitioners fail to demonstrate a likelihood of imminent, irreparable harm because they offer no evidence as to which, if any, of their members will make themselves subject to the requirements of the final rule before the conclusion of this litigation. Petitioners also have not established that the modest compliance costs that their members would incur under the final rule qualify as irreparable harm[2] or that there is a likelihood that BLM would not protect from public disclosure any trade secrets and other confidential information that their members may submit pursuant to the final rule. Finally, available evidence and the weight of precedent establish that the balance of harms and the public interest weigh heavily here against an injunction. Consequently, Petitioners' motion for preliminary injunction should be denied.

[1] 80 Fed. Reg. 16,128 – 16,222 (Mar. 26, 2015) (hereinafter, "final rule").
[2] As discussed below, the average compliance cost is expected to be less than 0.25% of the cost of drilling and hydraulically fracturing a horizontal well.

I. INTRODUCTION

BLM regulates oil and gas operations on federal lands, and on Indian lands held in trust by the federal government, pursuant to provisions of several statutes, including the Mineral Leasing Act of 1920 ("MLA"), 30 U.S.C. §§ 181, 223 – 236, the Mineral Leasing Act for Acquired Lands of 1947 ("MLAA"), 30 U.S.C. §§ 351 – 360, the Federal Land Policy and Management Act of 1976 ("FLPMA"), 43 U.S.C. §§ 1701 – 1787, the Indian Mineral Leasing Act ("IMLA"), 25 U.S.C. §§ 396, 396d, and the Indian Mineral Development Act, 25 U.S.C. §§ 2101-2108 ("IMDA"). FLPMA grants broad authority to the Secretary to manage public lands for multiple purposes and sustained yields, including oil and gas production and many other uses, and to prevent, by regulation or otherwise, unnecessary or undue degradation. The MLA and the MLAA grant the Secretary broad discretion to lease public lands for oil and gas development, and to promulgate regulations to prevent waste and to control surface impacts. The Indian minerals statutes comprise part of the Secretary's trust responsibilities to tribes and individual Indian owners of trust or restricted lands. In broad outline, the tribes lease their lands for oil and gas, subject to the Secretary's approval (administered through the Bureau of Indian Affairs). But because of BLM's expertise, the Secretary has delegated her regulatory authority over Indian lands to BLM, and BLM's oil and gas drilling, and operating regulations apply on both public and Indian lands.

In accordance with and pursuant to these authorities, BLM for decades has regulated oil and gas operations on Federal and Indian lands. *See* 43 C.F.R. part 3160. That regulatory framework includes not only provisions codified in the Code of Federal Regulations, but also Onshore Oil and Gas Orders, which are promulgated by notice and comment procedures, published in the Federal Register, and binding on the regulated community. *See* 43 C.F.R. §§ 3164.1(b), 3162.1(a). Under preexisting regulations, operators are required to obtain permits

prior to drilling. *See* 43 C.F.R. 3162.3-1(c). Operators are also required to conduct oil and gas operations in a manner that protects mineral resources, other natural resources, and environmental quality. 43 C.F.R. § 3162.5-1(a). This includes using due care and diligence to prevent undue damage to surface or subsurface resources. *Id*. at (b). Among the protective measures mandated by the preexisting regulations are requirements for well casing and cementing to ensure the structural integrity of the wellbore and isolate and protect groundwater zones. *See* Section III.B of Onshore Oil and Gas Order No. 2, 53 Fed. Reg. 46,798, 46,808 – 46,809 (Nov. 18, 1988) ("Onshore Order 2"). Preexisting regulations also govern storage and disposal of water recovered from the well. *See* 43 C.F.R. 3162.5-1(b); Part III.B of Onshore Oil and Gas Order No. 7, 58 Fed. Reg. 47,354, 47,362 – 47,365 (Sept. 8, 1993) ("Onshore Order 7").

In the years since those basic rules for conventional oil and gas operations were promulgated, "there have been significant technological advances in horizontal drilling, which is now frequently combined with hydraulic fracturing[,]" a "combination" that, "together with the discovery that these techniques can release significant quantities of oil and gas from large shale deposits, has led to production from geologic formations in parts of the country that previously did not produce significant amounts of oil or gas." 80 Fed. Reg. at 16,130 – 16,131. The substantial growth of the use of hydraulic fracturing to increase production from wells "has significantly increased public awareness of hydraulic fracturing and the potential impacts that it may have on water quality and water consumption, and increased calls for stronger regulation and safety protocols." *Id*.

In contrast to the detailed requirements in the existing regulations for permit approval, casing and cementing, and disposal of produced water, BLM's preexisting regulations do not address hydraulic fracturing in any detail. Those regulations required pre-operation notice to

BLM only for "nonroutine fracturing jobs." 43 C.F.R. § 3162.3-2(a) (2014). Unless the operator planned additional surface disturbances, it only needed to submit a post-operation well completion report for "routine fracturing . . . jobs." *Id*. at (b). The regulations did not define "routine" or "nonroutine." In practice, most operators consider all hydraulic fracturing operations as "routine." "Those regulations were established in 1982 and last revised in 1988," "long before the latest hydraulic fracturing technologies were developed or became widely used." 80 Fed. Reg. at 16,131. They have not kept up with the developments in horizontal drilling and hydraulic fracturing technologies that have changed the industry, and altered some of the risks posed by oil and gas operations.

BLM undertook rulemaking to address the risks and concerns posed by these technological developments and changes in practice.[3] As an initial step, BLM released a proposed rule in 2012 to "regulate hydraulic fracturing on public land and Indian land." 77 Fed. Reg. 27,691 (May 11, 2012). After reviewing the 177,000 public comments received on the proposed rule, *see* 80 Fed. Reg. at 16,131, and making several improvements on that basis, BLM produced a supplemental proposed rule in 2013. 78 Fed. Reg. 31,636 (May 24, 2013). BLM received more than 1.35 million public comments on the supplemental proposed rule. BLM then formulated the final rule based on that extensive public input and the agency's extensive expertise in oil and gas operations oversight. 80 Fed. Reg. at 16,131. The final rule was published in the Federal Register on March 26, 2015, *id*. at 16,128 – 16,222, subject to a later correction in the rule's implementation schedule. *Id*. at 16577, and becomes effective on June 24,

[3] BLM was not alone in recognizing the need to promulgate regulations to address hydraulic fracturing. Several states have promulgated improved regulatory programs. Also, in 2011 the Secretary of Energy's Advisory Committee, Subcommittee on Natural Gas, issued a report identifying the need for improvements in the conduct of hydraulic fracturing operations and in public transparency. *See* http://www.shalegas.energy.gov/resources/081811_90_day_report_final.pdf, discussed in the Wells Decl. ¶ 22.

2015. This final rule revises the preexisting oil and gas operating regulations with respect to hydraulic fracturing operations. As BLM explains, "this rule . . . establishes new requirements to ensure wellbore integrity, protect water quality, and enhance public disclosure of chemicals and other details of hydraulic fracturing operations." *Id*. at 16,129. In brief, the rule requires the submission of detailed information on designs, plans, and geology prior to the commencement of hydraulic fracturing operations; performance and design standards for well construction that ensure wellbore integrity and the protection and isolation of particular groundwater zones; testing and monitoring of wellbore and cement integrity; temporary management of fluids recovered from the wellbore; and post-operation disclosure of information relating to the fracturing operation, including public disclosure of the fracturing fluids composition, subject to a process for withholding trade secrets and other proprietary information. *See id*. at 16,129 – 16,130, 16,217 – 16,222.

Petitioners – trade associations that claim to have members among the regulated community (without supporting declarations from those members) – filed a petition for review of the final rule on March 20, 2015 (ECF No. 1). On May 15, Petitioners moved for a preliminary injunction to enjoin the application of the final rule until resolution of this suit (ECF Nos. 11-13).

II. PETITIONERS ARE NOT ENTITLED TO A PRELIMINARY INJUNCTION

"[A] preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, *by a clear showing*, carries the burden of persuasion." *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (quoting 11A C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 2948, 129-30 (2d ed. 1995)) (emphasis in original); *see also N. Arapaho Tribe v. Burwell*, No. 14-cv-247, 2015 U.S. Dist. LEXIS 30480 at *25 (D. Wyo., Feb. 26, 2015) (Skavdahl, J.), citing *Westar Energy, Inc. v. Lake*, 552 F.3d 1215, 1224 (10th Cir. 2009). Consequently, the movant's "right to relief must be clear and unequivocal." *Greater*

Yellowstone Coal'n v. Flowers, 321 F.3d 1250, 1256 (10th Cir. 2003) (citation omitted). The movant's "requirement for substantial proof is much higher" for a motion for a preliminary injunction than it is for a motion for summary judgment. *Mazurek*, 520 U.S. at 972.

To prevail on a motion for preliminary injunction, "the moving party must establish four elements: (1) a substantial likelihood that it will ultimately succeed on the merits of its suit; (2) it is likely to be irreparably injured without an injunction; (3) this threatened harm outweighs the harm a preliminary injunction may pose to the opposing party; and, (4) the injunction, if issued, will not adversely affect the public interest." *N. Arapaho Tribe*, 2015 U.S. Dist. LEXIS 30480 at *25-26, citing *Flood v. ClearOne Commc'ns, Inc*., 618 F.3d 1110, 1117 (10th Cir. 2010) (other citations omitted). If a movant fails to meet its burden on any of these four requirements,[4] its request must be denied. *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 22-23 (2008) (denying injunctive relief on the public interest and balance of harms requirements alone, even assuming irreparable injury to endangered species and a violation of National Environmental Policy Act); *Chem. Weapons Working Grp., Inc. v. U.S. Dep't of the Army*, 111 F.3d 1485, 1489 (10th Cir. 1997) (holding that the Petitioners' failure on the balance of harms "obviat[ed]" the need to address the other requirements). Here, Petitioners have failed to meet any of the four elements – let alone all four – thus their motion should be denied.

A. <u>Petitioners fail to demonstrate a likelihood of success on the merits</u>

On the merits of their claims, Petitioners seek review of BLM's final rule pursuant to the Administrative Procedure Act, 5 U.S.C. §§ 701-706 ("APA"). *See, e.g.*, Pet'rs' Mem. in Supp. of Mot. for Summ. J. ("Pet'rs' Mem.") at 5 (ECF No. 13). Respondents agree with Petitioners that

[4] The Tenth Circuit applies "relaxed" and "heightened" tests for certain categories of preliminary injunctions, but it has "explained [that] the relaxed preliminary injunction standard does not apply where the movant seeks to stay governmental action taken pursuant to a statutory or regulatory scheme." *Northern Arapaho Tribe*, 2015 U.S. Dist. LEXIS 30480 at *26 - 28; *see also Heideman v. S. Salt Lake City*, 348 F.3d 1182, 1189 (10th Cir. 2003).

the applicable APA standard of review for their claims is whether the agency action is "(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; [or] (D) without observance of procedure required by law." Pet'rs' Mem. 5, citing 5 U.S.C. § 706(2)(A)-(D); *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1574 (10th Cir. 1994).

A court's review of agency action under the APA, although "searching and careful[,]" "is highly deferential." *Ecology Ctr. v. U.S. Forest Serv.*, 451 F.3d 1183, 1188 (10th Cir. 2006), quoting *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 378 (1989). "The scope of review under the [APA] is narrow and a court is not to substitute its judgment for that of the agency." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Furthermore, "[a]n agency's action is entitled to a presumption of validity, and the burden is upon the petitioner to establish the action is arbitrary or capricious." *Sorenson Commc'ns, Inc. v. F.C.C.*, 567 F.3d 1215, 1221 (10th Cir. 2009), citing *Citizens' Comm. to Save Our Canyons v. Krueger*, 513 F.3d 1169, 1176 (10th Cir. 2008).

In its review, the court must "ascertain whether the agency examined the relevant data and articulated a rational connection between the facts found and the decision made" and must "determine whether the agency considered all relevant factors and whether there has been a clear error of judgment." *Citizens' Committee to Save Our Canyons*, 513 F.3d at 1176, citing *Olenhouse*, 42 F.3d at 1574 (other citation omitted); *see also Friends of the Earth v. Hintz*, 800 F.2d 822, 831 (9th Cir. 1986) ("The court may not set aside agency action as arbitrary or capricious unless there is no rational basis for the action.") (footnote and citation omitted). A deferential approach is particularly appropriate where, as here, the challenged decision

implicates substantial agency expertise. BLM is the agency tasked with regulating oil and gas production on federal and Indian lands, and has done so for decades. *See, e.g.*, 80 Fed. Reg. at 16,131. "When specialists express conflicting views, an agency must have discretion to rely on the reasonable opinion of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive." *Marsh*, 490 U.S. at 378.

Petitioners offer several arguments in an attempt to demonstrate the likelihood of success on the merits required to obtain preliminary injunctive relief. First, Petitioners assert that the final rule fails to consider the relevant statutory factors and is therefore arbitrary and capricious. Pet'rs' Mem. 6-8. But this argument ignores the substantial discussion of the applicable statutes in the preamble to BLM's final rule and either ignores or misinterprets the governing statutes. Second, Petitioners assert that the final rule is arbitrary and capricious because operators will purportedly find it "impossible" to comply with three of its provisions. *Id*. 8-16. Yet, Petitioners' arguments ignore the text and context of each provision, BLM's discussion of the provision in the final rule preamble, and existing regulations and practice.

Third, Petitioners assert that the use of an up to 10,000 ppm TDS standard in the definition of usable water is an unexplained departure from preexisting rules. *Id*. 16-24. In fact, this part of the final rule carries forward the applicable preexisting standard, and BLM offered ample explanation for continuing to apply that standard in the final rule, alongside additions that Petitioners do not challenge. Fourth, Petitioners contend that BLM has failed to justify or substantiate the final rule. *Id*. 24-27. However, this argument ignores the extensive discussion in the final rule preamble of the risks and concerns motivating the rule and the linkages drawn between those concerns and the provisions of the final rule.

Fifth, Petitioners assert that any trade secrets or other proprietary or confidential information required by the final rule to be submitted by operators prior to commencing hydraulic fracturing operations will not be protected from public disclosure. They argue on this basis that the final rule contravenes applicable public records laws, *id*. 27-34. That argument ignores that similar information has long been submitted to BLM and protected from public disclosure, pursuant to applicable statutes, preexisting regulations, and BLM policies. Sixth, Petitioners cannot dispute that, for each of the requirements of the final rule addressed in their brief, BLM examined the costs of that requirement and provided a reasoned and rational basis for their conclusions. Thus, Petitioners have not shown any procedural deficiency or that any of these determinations are arbitrary or capricious.

Therefore, Petitioners' arguments are far from likely to meet the high threshold necessary for them to demonstrate that BLM's final rule is arbitrary or capricious, or otherwise contrary to law. For this reason alone, Petitioners' motion should be denied.

1. BLM considered the statutorily-required factors in promulgating the final rule

Petitioners assert that the final rule fails to consider the applicable statutory factors. *Id*. 6-8. While ignoring most of the statutes that directly govern the regulations at issue here, Petitioners quote the Mining and Minerals Policy Act of 1970 and the Energy Policy Act of 2005, respectively, for the propositions that "Congress has determined that it is 'in the national interest to foster and encourage private enterprise in,' among other endeavors, 'the orderly and economic development of domestic mineral resources . . . [,]'" and "has also directed that access to federal lands for energy development must be efficient." Pet'rs' Mem. 6-8, quoting 30 U.S.C. § 21a and citing 42 U.S.C. § 15921(a)(1)(A)-(C).[5] Although Petitioners also recognize FLPMA

[5] FLPMA also includes statements of national policy, including 43 U.S.C. § 1701(a)(5), (8), (12), which are broader than, but not repealed by, the quoted language.

as supplying applicable guidance, they argue that "FLPMA prohibits only unnecessary or undue degradation, not all degradation," Pet'rs' Mem. 7, quoting *Theodore Roosevelt Conservation P'ship v. Salazar*, 661 F.3d 66, 78 (D.C. Cir. 2011). In Petitioners' estimation, this means that once BLM has prevented unnecessary or undue degradation from occurring, it must "ensure that regulatory measures do not prevent the extraction of minerals." Pet'rs' Mem. 7.

At the outset, Petitioners' argument fails because its premise that the regulation prevents the extraction of minerals – and therefore that BLM has failed to appropriately consider the need to develop the federal mineral estate – has no factual support. As discussed in more detail below, the regulation builds upon existing regulations and at most adds modest compliance costs (less than one-quarter of one percent), which do not prevent oil and gas development. *See* 80 Fed. Reg. at 16,130. In fact, to facilitate efficient and ongoing drilling operations, the regulations have incorporated numerous provisions to minimize regulatory duplication and expense to operators. Among other things, the regulations authorize use of the widely-utilized FracFocus database for reporting the chemical constituents of fracturing fluids and requires only *post*-drilling reporting of some matters to prevent unnecessary delays in drilling. *See* 43 C.F.R. § 3162.3-3(i). In short, the Petitioners provide no rational, factual basis to assert that these modest regulations will "prevent the extraction of minerals."[6]

Petitioners' arguments also misinterpret the referenced statutes, while omitting reference to the MLA or other statutes directly governing the final rule. Petitioners mischaracterize BLM's broad management discretion under governing statutes by arguing that the agency must prioritize

[6] Although access to public lands for oil and gas exploration and development is not at issue in this case, Petitioner's implication that BLM is precluding oil and gas operation on Federal lands is contradicted by the facts. BLM statistics, available at http://www.blm.gov/wo/st/en/prog/energy/oil_and_gas/statistics.html (last visited 5/29/2015) show a robust oil and gas industry on Federal lands, despite fluctuations in oil and gas prices. Those statistics do not include activities on Indian lands.

exploitation of mineral resources over other goals and that BLM's authority to protect public lands and resources is limited to its mandate to prevent unnecessary or undue degradation. BLM addressed the applicable statutory factors in the development of the rule, as explained in the final preamble. Several statutes authorize and govern BLM's development of the rule – including the MLA, FLPMA, the MLAA, the IMLA, and the IMDA. The final rule specifically discusses those statutes and identifies their role in the development of the final rule. *See, e.g*., 80 Fed. Reg. at 16,129, 16,130, 16,137. Furthermore, it is the agency's responsibility to interpret these laws in such a way as to give effect to each of these enactments as appropriate and the agency's interpretation is entitled to a high degree of deference.

Under the MLA and FLPMA, in particular, BLM is charged with administering the public lands and resources for multiple use and sustained yield. The MLA gives BLM broad discretion to regulate oil and gas extraction on federal lands. It authorizes the [BLM] "to prescribe necessary and proper rules and regulations and to do any and all things necessary to carry out and accomplish the purposes of this chapter ..." 30 U.S.C. § 189. "This provision grants [BLM] broad powers and authority commensurate with the broad responsibilities imposed upon [its] office." *Getty Oil Co. v. Clark*, 614 F. Supp. 904, 916 (D. Wyo. 1985), citing *Grindstone Butte Project v. Kleppe*, 638 F.2d 100-102 (9th Cir. 1981); *Pan Am. World Airways v. United States*, 371 U. S. 296, 311-313 (1963) (other citations omitted).

FLPMA provides additional, broad rulemaking authority and discretion to the Secretary. 43 U.S.C. § 1740. That rulemaking authority under FLPMA is also as broad as necessary for the agency to carry out the purposes of FLPMA. *See generally, Topaz Beryllium Co. v. United States*, 479 F. Supp. 309 (D. Utah 1979), *aff'd*, 649 F.2d 775 (10th Cir. 1981). Among its authorities are the direction to "manage the public lands under principles of multiple use and

sustained yield[,]" 43 U.S.C. § 1732(a), and "*by regulation or otherwise, take any action necessary to prevent unnecessary or undue degradation of the lands*." *Id*. at (b) (emphasis added). These provisions have been construed to grant BLM broad discretion in managing federal lands and resources. *See, e.g., W. Org. of Res. Councils v BLM*, 591 F Supp 2d 1206 (D. Wyo. 2008), *aff'd sub nom BioDiversity Conservation Alliance v BLM*, 608 F3d 709 (10th Cir. 2010); *Mineral Policy Ctr. v Norton*, 292 F. Supp. 2d 30 (D.D.C. 2003). FLPMA authorizes BLM to consider a variety of uses in its decisions with respect to federal lands and resources, and does not narrowly constrain those decisions. Under the authority of the MLA and FLPMA, BLM has issued regulations that protect the environment while promoting efficient energy production. *See, e.g.*, 43 C.F.R. § 3101.1-2 (providing, among other things, that leasehold rights are subject to "such reasonable measures as may be required by the authorized officer to minimize adverse impacts to other resource values"); *id*. at § 3162.5-1 (providing that "[t]he operator shall conduct operations in a manner which protects the mineral resources, other natural resources, and environmental quality").

Thus, there is no merit to Petitioners' conclusion that BLM's mandate under FLPMA to manage lands for multiple use translates into a priority to manage lands for mineral extraction, *see* Pet'rs' Mem. 6-8, nor are BLM's decisions about which lands to manage for oil and gas production at issue in this case. Petitioners fail to point to anything in the statute that supports such a reading. Instead, courts that have addressed the issue have found that BLM has wide discretion to implement this mandate in its decisions. *See, e.g. Strickland v. Morton*, 519 F.2d 467, 469 (9th Cir. 1975) (FLPMA's multiple-use principle "breathe[s] discretion at every pore").

Similarly, BLM's obligation under the MLA and FLPMA to prevent unnecessary or undue degradation does not preclude the agency from applying a more protective standard in its

decisions. Courts have found that BLM has broad discretion in determining how best to implement the prohibition on "unnecessary or undue degradations." *See, e.g., Gardner v. BLM*, 638 F.3d 1217, 1222 (9th Cir. 2011) (43 U.S.C. § 1732(b) "leaves BLM a great deal of discretion in deciding how to achieve" its goal of preventing unnecessary or undue degradation "because it does not specify precisely how the BLM is to meet [its goal], other than by permitting the BLM to manage public lands by regulation or otherwise.") (citation omitted). In this respect, Petitioners misread *Theodore Roosevelt Conservation Partnership v. Salazar*, which does not stand for the proposition that, pursuant to FLPMA, BLM may only apply its stewardship obligations to "prohibit[] only unnecessary or undue degradation, not all degradation," as they suggest. Pet'rs' Mem. 7, quoting 661 F.3d at 78. On the contrary, the D.C. Circuit in that case upheld BLM's decision – which included a host of mitigation measures on operations, including seasonal restrictions, buffer zones and a compensatory mitigation fund – but rejected the appellant's argument that FLPMA *required* BLM to do even more. 661 F.3d at 78. The D.C. Circuit stated that the unnecessary or undue degradation provision did not require BLM to prevent all degradation, but in no way implied that this required floor of regulation was also the ceiling, as Petitioners suggest. Moreover, BLM is not proposing to prevent all degradation – it is not prohibiting oil and gas development or hydraulic fracturing – but rather, to prevent degradation that is unnecessary or undue because it is avoidable with common-sense measures.

Petitioners further err in arguing that BLM has not considered the statutory factors with respect to Congress' desire for orderly, economic, and efficient development of oil and gas resources on public lands. The final rule preamble acknowledges BLM's obligation to "administer[] oil and gas operations in a manner that protects Federal and Indian lands while allowing for appropriate development of the resource." 80 Fed. Reg. at 16,129. Moreover, in

developing the additional protections of the rule, BLM sought to avoid "introducing unnecessary new procedures or delays in the process of developing oil and gas resources on public and Indian lands." *Id*. at 16,130. Among other provisions, BLM introduced a state variance provision to address concerns regarding duplicative regulation of hydraulic fracturing under state, tribal, and federal rules and the resulting burden on operators. *See, e.g., id*. And the rule will be phased in to avoid disruption to ongoing activities. 43 C.F.R. § 3162.3-3(a).

In addition, BLM addressed comments regarding the potential for the final rule to result in delays in obtaining permits, explained how delays can be avoided or minimized by the operator, observed that "BLM intends to avoid delays whenever possible[,]" and noted that the agency made revisions to the final rule to "reduce the amount of staff time required to implement the rule and limit any permitting delays." 80 Fed. Reg. at 16,177. In this respect, BLM observed that "[t]he operational requirements of the final rule generally conform to industry guidance on hydraulic fracturing and state regulations." *Id*. at 16,203. BLM also evaluated as part of its economic analysis the potential for the rule to "negatively affect jobs, revenue, and effective government[,]" and "found the impacts to be nominal in relation to current overall costs of drilling operations." *Id*. at 16,180. Thus, in the development of the final rule, BLM properly weighed and considered the orderly and efficient exploitation of federal mineral resources by private entities. And it did so in balance with BLM's stewardship obligations under FLPMA and other governing statutes, including the MLA. Since BLM considered the applicable statutory factors and incorporated those factors into its development and assessment of the final rule, Petitioners are unlikely to succeed on the merits of this claim.

2. Petitioners have failed to establish that compliance with any of the final rule's provisions is "impossible"

Petitioners argue next that the final rule violates the APA because, under particular, hypothetical scenarios, it purportedly would be "impossible" for some operators to comply with three of its provisions. Pet'rs' Mem. 8-16. Yet, no impossible compliance scenarios are presented when the final rule is read in context with other relevant oil and gas authorities. Petitioners therefore have failed to establish a likelihood of success on the merits of their "impossibility" arguments with respect to any provision of the final rule.

a) It is not impossible for operators to comply with the certification requirement when invoking trade secret protection

Petitioners first assert that, in certain potential circumstances, operators will be required to make certifications as to the contents of proprietary information to which they lack access – thus creating an "impossibility" of compliance for an operator in such a scenario. However, the alleged "impossibility" ignores the text and context of the provision, as well as explanations supplied in or with the final rule.

The final rule mandates the submission of information to BLM after hydraulic fracturing operations are completed, including information regarding the chemical composition of the fluids used for fracturing. 43 C.F.R. § 3162.3-3(i)(1). However, the final rule also provides a mechanism for withholding any such information that is proprietary and commercially sensitive. *Id*. at (j). The operator withholding such information must submit an affidavit identifying the owner of the withheld information, competitors that could use the information to cause commercial harm if the information were released, and the statute or regulation under which the information would be shielded from public disclosure. *Id*. at (j)(1). The affidavit must also affirm that the withheld information is not publicly available or readily apparent through reverse engineering with publicly available information. *Id*. at j(1)(iv) and (viii). In addition, the operator

must certify that it "has been provided the withheld information from the owner of the information and is maintaining records of the withheld information, or that the operator has access and will maintain access to the withheld information held by the owner of the information[.]" *Id*. at (j)(1)(iii). Where the owner of the information is not the operator, the final rule requires that the *owner* provide an affidavit with the required information above as to the existence of competitors, the risk of competitive harm from release of the information, and the inability of such competitors to reverse-engineer the information from publicly available sources. *Id*. at (j)(2). These certifications are designed to enable BLM to assess, without reviewing the withheld information itself, whether that information is commercially sensitive and protected from disclosure by law. *See* 80 Fed. Reg. at 16,173 – 16,174. BLM is entitled to request the withheld information, after providing the operator and owner advance notice. 43 C.F.R. § 3162.3-3(j)(3)-(4). The final rule also specifies the time periods during which records must be maintained and accessible to BLM in the event that such information is required to, for example, assist with identification of sources of a spill or other contamination discovered after the fracturing operations are complete. *See id*. at (j)(5).

Of those provisions, Petitioners challenge here the requirement to certify that the operator is maintaining the information or has access to the information. *See* Pet'rs' Mem. 8-11. Petitioners allege that it will be "impossible" to comply with this maintenance or access certification, because, "in the oil and gas industry, trade secret holders such as service companies generally do not provide operators—who may function as competitors as well as clients—with access to the trade secret holder's trade secrets and confidential commercial information." *Id*. 9.

Although Respondents agree that most operators engage hydraulic fracturing service companies to conduct fracturing operations, and that many service companies assert that the

composition of their fracturing fluids is confidential information, it is not impossible for an operator to comply with this certification requirement. The provision does not require that the operator have possession of, or the ability to scrutinize, the proprietary information itself – but merely places on the operator the responsibility to ensure that it is able to provide the information to BLM if needed. First, by its terms, the operator can comply with the provision in question by certifying that it "has access and will maintain access to the withheld information held by the owner of the information[.]" 43 U.S.C. § 3162.3-3(j)(1)(iii). Second, this is an *alternative* to certifying that the operator "has been provided the withheld information from the owner of the information and is maintaining records of the withheld information[.]" *See id*. Third, the final rule states that "[t]he operator will be deemed to be maintaining the records if it can promptly provide the complete and accurate information to BLM, *even if the information is in the custody of its owner*." *Id*. at (j)(5) (emphasis added); *see also* Declaration of Steven Wells ("Wells Decl.") ¶ 36.[7]

BLM is aware that often the operator is not the owner of the withheld information, as shown by the final rule's requirement that, "[i]f the operator relies upon information from third parties, such as the owner of the withheld information, to make" the required certifications, "the operator must provide a written affidavit from the third party that sets forth the relied-upon information." 43 U.S.C. § 3162.3-3(j)(2). As explained in the preamble, "because the operator will not always be in the best position to declare why certain information should be withheld, the final rule allows the operator to submit an affidavit from the owner of the information attesting to the confidential status of the information in addition to the affidavit required from the operator." 80 Fed. Reg. at 16,173. Moreover, in such a situation, "both the operator and the owner of the

[7] Petitioners' argument also assumes that operators are incapable of including provisions in their contracts with service providers that would direct the service provider to deliver the withheld information to BLM.

information may provide the BLM with any materials that would substantiate a claim of trade secret status, and both the operator and the owner of the information would receive advance notice of any BLM decision that the information" must nevertheless be submitted. *Id*. Consequently, Petitioners are mistaken in asserting that "BLM has not explained how operators can make certifications about the nature of the chemicals on lease, when the operators are not in possession of information necessary to make those certifications."[8]

Petitioners' assertion that such a certification is "impossible" is also contradicted by the fact that operators already are responsible, under other preexisting BLM regulatory requirements, to maintain, maintain access to, or provide to BLM information that may be in the possession of contractors, service companies, or other third parties and which may contain proprietary information. For example, a regulation in force since the 1980s requires operators to "keep accurate and complete records with respect to all lease operations including, but not limited to, production facilities and equipment, drilling, producing, redrilling, deepening, repairing, plugging back, and abandonment operations, and other matters pertaining to operations[,]" with no exception made for the trade secrets or proprietary information of a third party.[9]

Petitioners also suggest that, where an operator uses a service company to perform the hydraulic fracturing, operators similarly will be unable to certify that "the fluids complied with all applicable permitting and notice requirements as well as all applicable federal, state, tribal, and local laws, rules, and regulations." Pet'rs' Mem. 8-9. But this argument is belied by the existence of similar, longstanding obligations on operators – including duties under the terms of

[8] Pet'rs' Mem. 10. Petitioners also assert that BLM "disregard[ed] comments" from industry on this issue, citing the comments of Halliburton Energy Services, Inc. *Id*. 9 (citation omitted). However, BLM responded to that commenter to explain how operators which are not owners of the withheld information can nonetheless meet the certification requirements of this provision. *See* Wells Decla ¶ 36 and Attachment 6.

[9] 43 C.F.R. § 3162.4-1(a). This provision was amended to impose these requirements on operators, rather than lessees, in 1988. *See* Oil & Gas Leasing, Geothermal Res. Leasing, 53 Fed Reg. 17,340, 17,363 (May 16, 1988).

federal leases and by preexisting regulations to comply with all applicable laws and regulations. *See, e.g.*, 43 C.F.R. §§ 3160.0–5, 3162.1(a). Where work on an operator's site is performed by contractors or others, operators remain responsible to BLM for their contractors' compliance with applicable laws and regulations. *Id.* at § 3162.3(b). Further, operators voluntarily undertake responsibility for their operations conducted on leased lands, a commitment which also covers any contractors retained by the operator. *See id*. at § 3100.0-5(a).

The certification provision at issue here is in line with these preexisting regulatory requirements, which ensure that the operator is meeting all legal obligations. Under existing regulations, "the operator is the entity that is responsible for the operations conducted under the terms and conditions of the lease" and thus "it is appropriate that the operator be responsible for all aspects of hydraulic fracturing operations, regardless of the party that conducts the work." 80 Fed. Reg. at 16,159. While "BLM is aware that the common practice is for operators to engage service companies to conduct hydraulic fracturing … it is the operator who has voluntarily taken responsibility for all operations in and on its wells … and it is the operator who is responsible for submitting all required reports and information." *Id*. at 16,173. Consequently, "the certification requirement underscores the importance of operators taking responsibility for reporting accurate information necessary to assure that hydraulic fracturing operations were properly conducted and is intended to ensure that contractor activities on the lease are properly overseen by the operator." *Id*. at 16,159. The certification requirements are structured to maintain these longstanding obligations while at the same time protecting confidential information.

b) The temporary recovered fluid storage requirement is neither impossible nor irrational

Petitioners next identify a provision for temporary storage of recovered fluids – pending an approved produced water disposal plan – as another provision with which, they assert,

compliance will be impossible. *See* Pet'rs' Mem. 11-12. Yet Petitioners merely argue that such a requirement could never apply, because the approval of a water disposal plan typically precedes the commencement of hydraulic fracturing. *See id*. Petitioners' argument is not supported by the text of the final rule or the preexisting regulatory framework. Even if Petitioners were correct and all operators would avoid the temporary fluids storage provision in the hydraulic fracturing rule, the requirement would simply be inapplicable – not impossible, as they claim.

The provision at issue requires above-ground tank storage for "all fluids recovered between the commencement of hydraulic fracturing operations and the authorized officer's approval of a produced water disposal plan under BLM requirements . . . [,]" except where BLM approves storage in lined pits. 43 C.F.R. § 3162.3-3(h). As Petitioners observe, "BLM's approval of disposal methods and disposal facilities is a process separate from the well approval process, conducted often before the well is even drilled . . . ." Pet'rs' Mem. 11.

Operators, however, are not required to obtain approval for permanent disposal of recovered fluids prior to obtaining approval for drilling a well. The only timing requirement under existing rules is Onshore Order 7's longstanding requirement that operators have a BLM-approved permanent disposal plan in place within 90 days after completion of a well. *See* 58 Fed. Reg. at 47354-56 (Section III.A). Operators may determine that it would be less expensive to obtain advance approval of their plans for permanent disposal and to implement those plans immediately when the fluids begin to be recovered following a hydraulic fracturing operation. BLM promulgated the temporary storage provision in the final rule for operations for which there is a gap between completion of hydraulic fracturing operations, and approval of a permanent disposal plan. Further, the final rule provision fills a regulatory gap in Onshore Order 7, which otherwise allows produced water to be stored in reserve pits for up to 90 days. *See, e.g.*,

id. at 47,356, 47,362. The fact that this provision may not apply to many operators does not render it "irrational[,]" let alone "arbitrary or capricious[.]" Nor have Petitioners explained how a provision that they contend will never apply due to preexisting regulatory requirements can impose an "impossible" new burden on operators. *See* Pet'rs' Mem. 11-12.

c) The pre-operations mechanical integrity test is defined, feasible, and justified

Lastly, Petitioners assert that it is impossible for operators to comply with the final rule's requirement that operators conduct, prior to beginning hydraulic fracturing operations, a mechanical integrity test of the casing or fracturing string through which those operations will be conducted. *Id*. 12-16. Petitioners plead ignorance of the definition of such a test, point to varying BLM, state, and industry definitions of mechanical integrity tests in a variety of different circumstances, and conclude that "[t]he result of BLM's approach is that operators are now faced with a requirement to perform a test without any understanding of what that test is or of how it should be conducted." *See id.* 15-16. Simultaneously, Petitioners argue that BLM has failed to justify its departure from the existing pressure test in Onshore Order 2. *Id*. 16.

Petitioners are mistaken on all counts. First, the final rule defines the applicable test and explains that it is consistent with preexisting industry guidance and the requirements in place in several states. As stated in the final rule:

> Prior to hydraulic fracturing, the operator must perform a successful mechanical integrity test, as follows: (1) If hydraulic fracturing through the casing is proposed, the casing must be tested to not less than the maximum anticipated surface pressure that will be applied during the hydraulic fracturing process. (2) If hydraulic fracturing through a fracturing string is proposed, the fracturing string must be inserted into a liner or run on a packer-set not less than 100 feet below the cement top of the production or intermediate casing. The fracturing string must be tested to not less than the maximum anticipated surface pressure minus the annulus pressure applied between the fracturing string and the production or intermediate casing. (3) The mechanical integrity test will be considered successful if the pressure applied holds for 30 minutes with no more than a 10 percent pressure loss.

43 C.F.R. § 3162.3-3(f). As preamble observes, "[i]ndustry guidance and many state regulations" including those in Texas, Louisiana, Colorado, and Wyoming "are consistent with this requirement[,]" which is the application of the maximum anticipated surface pressure for a "threshold of 30 minutes with no more than 10 percent loss of applied pressure[.]" 80 Fed. Reg. at 16,159. The preamble further provides that a mechanical integrity test "conducted immediately preceding the hydraulic fracturing operation to the specified test pressure would suffice." *Id*. at 16,160. Given the text of the final rule and the preamble discussion, the mechanical integrity test is "defined," is not vague, and does not render any part of the final rule arbitrary.[10]

Second, while this test does vary from the test identified in Onshore Order 2 and promulgated in 1988, the final rule explained the need for a more stringent test for hydraulic fracturing operations. Onshore Order 2 requires that "[a]ll casing strings below the conductor shall be pressure tested to 0.22 psi per foot of casing string length or 1500 psi, whichever is greater, but not to exceed 70 percent of the minimum internal yield[,]" and that "[i]f pressure declines more than 10 percent in 30 minutes, corrective action shall be taken." 53 Fed. Reg. at 46,809 (III.B.1.h). The final rule, by contrast, applies more stringent pressure requirements. This change was appropriate because, whereas Onshore Order 2 applies to *all* oil and gas wells on Federal or Indian lands, including the conventional wells the Order was designed to address, the test in the final rule applies only to those wells that will be hydraulically fractured to address today's technological advances. In line with industry guidance, *see* 80 Fed. Reg. at 16,159, BLM reasonably tailored the latter to test the strength of casings and strings at the much higher pressures of hydraulic fracturing, as compared to the ordinary pressures involved in conventional

[10] *See* Pet'rs' Mem. 15-16. Because the final rule clearly provides what an operator must do in conducting the mechanical integrity test required in this context, and when the test must occur, Petitioners' lengthy discussion of other tests under different authorities and for different purposes, *see id*. 13-14, is irrelevant.

oil and gas operations contemplated under Onshore Order 2. The preamble explains that "BLM believes that ensuring casing integrity prior to hydraulic fracturing is essential and that the only way to verify the integrity of the casing is to require a test to the anticipated hydraulic fracturing pressure." *Id*. at 16,160. The test in the final rule, "together with the other requirements, demonstrate not only the wellbore's structural competency, but that reasonable precautions have been taken to protect usable water and other subsurface resources during hydraulic fracturing operations." *Id*. at 16,161.

BLM thus "suppl[ied] a reasoned analysis" and discussed the reasons for changing course, which fully satisfy the standard of review applicable to such decisions. *See Greater Bos. Television Corp. v. Fed. Commc'ns Comm'n*, 444 F.2d 841, 852 (D.C. Cir. 1970). Ultimately, "it is the agency's function … to make the findings of fact and select the ultimate decision, and where there is substantial evidence supporting each result it is the agency's choice that governs." *Id*. at 853.

3. The definition of "usable water" is neither unexplained nor a departure from existing rules

Petitioners next argue that the rule's definition of "usable water" is an unexplained departure from existing rules and thus arbitrary and capricious. Pet'rs' Mem. 16-24. However, the definition is extensively explained and the definition of "usable water" does not depart from the existing definition in the sense asserted by Petitioners.

The provision at issue concerns the definition of "usable water," which the final rule defines in order to specify the zones that must be isolated and protected during hydraulic fracturing. *See* 43 C.F.R. §§ 3160.0-5, 3162.3-3(b), 3162.5-2. BLM's preexisting regulations promulgated in 1982 required operators to "isolate freshwater-bearing [formations] and other usable water containing 5,000 ppm ["parts per million"] or less of dissolved solids… and protect

them from contamination." *Id*. at § 3162.5-2(d) (2014). The 1982 regulations did not define "usable water." In 1988, BLM promulgated Onshore Order 2, which requires operators to report to the authorized officer all indications of usable water, and to isolate and protect all usable water zones by proper casing and cementing. 53 Fed Reg. at 46,808 – 46,809 (Section III.B). Onshore Order 2 defines "usable water" as "generally those waters containing up to 10,000 ppm [parts per million] of total dissolved solids [TDS]." *Id*. at 46,805 (Section II.Y).

The final rule maintains that standard in the definition of "usable water" promulgated in Onshore Order 2. *See* 43 C.F.R. § 3160.0-5. As in Onshore Order 2, the "usable water" standard is applied in the final rule to specify the zones that must be isolated and protected by cementing during hydraulic fracturing. *See id*. at §§ 3162.3-3(b), 3162.5-2. The final rule also specifically includes in the definition of "usable water" (1) zones that meet the definition of "underground source of drinking water" ("USDW") under the Environmental Protection Agency's ("EPA") Safe Drinking Water Act ("SDWA") regulations, (2) zones that the relevant state or tribe has designated as underground sources of drinking water under their own authorities, and (3) zones that the relevant state or tribe has designated for protection from hydraulic fracturing operations. *Id*. at § 3160.0-5. The final rule also excludes from the definition of "usable water" (1) the zone to be fractured, (2) zones designated as exempted aquifers under EPA's SDWA regulations, and (3) any zones (other than USDWs) that the relevant state or tribe has exempted from protection from hydraulic fracturing operations. *Id*. These exclusions clarify in a way not contained in Onshore Order 2 those waters that do not meet the definition of "usable water" and do not need to be protected.

Petitioners take issue only with the final rule's use of an "up to 10,000 ppm TDS" standard for usable water. Pet'rs' Mem. 16-24. They assert that this is a departure from the 5,000

ppm TDS standard applied in the 1982 regulation, because, under Petitioners' theory, Onshore Order 2 cannot "supersede" the standard in the 1982 rule. *Id*. This departure, Petitioners contend, is unexplained, because it ignores comments that waters at 10,000 ppm TDS are unfit for human consumption, livestock consumption, or irrigation. *Id*. 17-19. Petitioners also take issue with the final rule for relying on the reasoning of Onshore Order 2, which referenced a contemporary EPA rule under SDWA, and which Petitioners assert is "out of context" and thus fails to consider the appropriate statutory factors. *Id*. 20-21.

Contrary to Petitioners' assertion, the final rule's use of an "up to 10,000 ppm TDS" standard to define "usable water" zones for the purposes of isolating them during wellbore operations is no departure from existing regulatory authorities. As the preamble explains, "[t]he requirement to protect and/or isolate usable water generally containing up to 10,000 ppm of TDS has been in effect since 1988, when Onshore Order 2 became effective." 80 Fed. Reg. at 16,141. And there can be no dispute that onshore orders, including Onshore Order 2 are promulgated by notice-and-comment rulemaking and "are binding on operating rights owners and operators, as appropriate, of Federal and restricted Indian oil and gas leases which have been, or may hereafter be, issued." 43 CFR § 3164.1(b); *see also id*. at § 3162.1(a) (operators are responsible for complying with, among other things, all applicable laws and regulations, including onshore orders). Petitioners' argument that Onshore Order 2 cannot "supersede" the earlier rule, Pet'rs' Mem. 19-20, misunderstands the regulatory regime. BLM may promulgate onshore orders "to implement *and supplement* the regulations . . ." via notice and comment rulemaking procedures and publication in the federal register. *Id*. at § 3164.1(a) (emphasis added). Onshore Order 2 supplies the only preexisting definition of "usable water" zones subject to protection and isolation from wellbore operations, and has been in force since 1988.

In addition, Petitioners' recitation of other concentration limits in other contexts is unavailing. BLM's continued use of the "up to 10,000 ppm TDS" limit in its final rule was not intended solely to protect the uses discussed by Petitioners – *i.e*., human consumption, irrigation, or livestock consumption, *see* Pet'rs' Mem. 17-18. Instead, BLM explained that the rule "is not limited to" drinking water, but also other aquifers which "might be usable for agricultural or industrial purposes, or to support ecosystems" – although "the rule defers to the determinations of states (on Federal lands) and tribes (on Indian lands) as to whether such zones must be protected." 80 Fed. Reg. at 16,143. Further, the rule was intended to protect future uses, observing that "[g]iven the increasing water scarcity and technological improvements in water treatment equipment, it is not unreasonable to assume aquifers with TDS levels above 5,000 ppm are usable now or will be usable in the future." *Id*. at 16,142. Thus, while BLM affirms the reasoning for the standard applied in Onshore Order 2, *id*. at 16,142, it supplied additional and independent reasoning for its continued use of that standard in its final rule. *See id*. at 16,142 – 16,143. Petitioners' assertion that the "up-to-10,000 ppm TDS" standard in the final rule is arbitrary and capricious, *see* Pet'rs' Mem. 20-21, is without merit.

4. BLM provided a reasonable and rational justification for the final rule

Petitioners also assert that the final rule is arbitrary and capricious because BLM has not "substantiated the existence of [a] problem this rule is meant to address, identified the gap in existing regulations the final rule will fill, or described the objectives the final rule will achieve." Pet'rs' Mem. 24.

Contrary to Petitioners' claims, BLM supplied ample justification for its final rule. In a 96-page notice in the Federal Register, BLM explains its reasoning for adopting the final rule. *See* 80 Fed. Reg. at 16,128 – 16,222. In brief, the agency explains that the final rule was promulgated to address technological advances and changes in oil and gas operations on federal

and Indian lands. Existing BLM regulations included some limited provisions that mentioned, but did not attempt to regulate hydraulic fracturing, *see* 43 C.F.R. § 3162.3-2, which is now typically coupled with directional and horizontal drilling that can extend for miles from the drill site. However, as BLM explains, "[t]hose regulations were established in 1982 and last revised in 1988, long before the latest hydraulic fracturing technologies were developed or became widely used." 80 Fed. Reg. at 16,131. As the preamble explains,

> [o]ver the past 10 years, there have been significant technological advances in horizontal drilling, which is now frequently combined with hydraulic fracturing. This combination, together with the discovery that these techniques can release significant quantities of oil and gas from large shale deposits, has led to production from geologic formations in parts of the country that previously did not produce significant amounts of oil or gas. The expansion of exploration and production across the United States has significantly increased public awareness of hydraulic fracturing and the potential impacts that it may have on water quality and water consumption, and increased calls for stronger regulation and safety protocols. The BLM's engineers and field managers have decades of experience exercising oversight of these wells during the evolution of this technology. This expertise, together with input from the public, industry, state, academic and other experts discussed below, forms the basis for the decision that new rules are needed and for the requirements contained in this rule.

Id.

In the final rule, BLM discusses the specific concerns raised by the growing use of new hydraulic fracturing techniques and technologies and their link to the provisions of the final rule. For example, the final rule raises the risk of groundwater contamination as a result of hydraulic fracturing operations as one of the concerns motivating many of its provisions. *See, e.g.*, *id*. at 16,143, 16,154, 16,180, 16,193 – 16,194. The rule references and discusses recent studies by the National Academy of Sciences which identify several potential pathways for hydraulic fracturing operations to contaminate water resources, including through (1) the creation or connection of fissures which allow fracking fluids or gas to rise to an aquifer; (2) fluids or gas leaking through or around inadequate wellbore casings and cement; and (3) leaks or spills while managing the

fracturing fluids or recovered fluids on the surface.[11] Further, the preamble notes that there have been "reports suggesting that hydraulic fracturing operations contributed to contamination of water supplies" on the basis "of abnormally high concentrations of methane in water wells or monitoring wells in or near areas with active oil and gas drilling." 80 Fed. Reg. at 16,193; *see also* Wells Decl. ¶¶ 17-19. The final rule links these and related concerns to provisions for the pre-fracturing submission of geologic information, *see, e.g*., 80 Fed. Reg. at 16,154, tests to ensure the integrity of cement bonds, *id*. at 16,155 – 16,159, and temporary storage of recovered water on the surface, *id*. at 16,162 – 16,163, among others.

The preamble also discusses "frack hits," in which a fissure created by hydraulic fracturing connects, through man-made or natural fissures, to another well. Frack hits have occurred recently, resulting in the spill of fracturing fluids, the interruption of well operations, and the stranding and waste of oil and gas resources. *See id*. at 16,193; Wells Decl. ¶¶ 20-21, 57. The final rule addresses the risk of frack hits through provisions requiring the submission of geologic information and information regarding nearby wells prior to commencing hydraulic fracturing operations. *See, e.g.*, 80 Fed. Reg. at 16,153. Other concerns identified as bases for the final rule include, for example, "whether the chemicals used in fracturing pose risks to human health[] and whether there is adequate management of well integrity and the fluids that return to the surface during and after fracturing operations." *See, e.g., id*. at 16,128.

Despite BLM's articulation of a number of justifications for the final rule, Petitioners insist that there is no substantiated need for this rule, because, they allege, there is "no technical

[11] *See* 80 Fed. Reg. at 16,193 – 16,194, citing Osborn, S., et al., "Methane contamination of drinking water accompanying gaswell drilling and hydraulic fracturing," 108 *Proceedings of the National Academy of Sciences* [8172, 8175] (2011); Warner, N., et al., "Geochemical evidence for possible natural migration of Marcellus Formation brine to shallow aquifers in Pennsylvania," 109 *Proceedings of the National Academy of Sciences* [11961] (July 24, 2012).

discussion in the regulatory preamble related to the likelihood of hydraulic fracturing operations impacting underground water sources" and there is "a lack of any evidence" that hydraulic fracturing operations have caused any particular instances of groundwater contamination. Pet'rs' Mem. 24-25. On the contrary, as discussed above, the preamble explains how hydraulic fracturing operations could contaminate groundwater and presents technical evidence supporting its conclusion that this is a risk. In addition, it is reasonable and consistent with BLM's statutory responsibilities to protect public resources from risks, even where there may not yet be definitive evidence that those risks have manifested in specific instances of harm. In other words, BLM need not wait until there is a catastrophe to act in its capacity as steward of public lands and resources, or in its capacity as an arm of the Secretary in carrying out her trust responsibility to tribes and individual Indians. Rather, under the broad authority to protect such lands for future generations, BLM may promulgate regulations to appropriately address the risk of such harms.

Petitioners also assert a failure to justify the rule on the basis that BLM allegedly ignored "states' long history of successfully regulating oil and gas development" and "fail[ed] to identify any states that do not have regulations adequate to achieve the objectives of the final rule." *Id.* 25-26 (emphasis omitted). But as the record makes clear, BLM did not ignore state regulations – on the contrary, it acknowledged and discussed state regulations in the final rule, *see, e.g.*, 43 C.F.R. §§ 3160.0-5 (applying state regulations and determinations in defining "usable water"), 3162.3-3(d) (allowing operators to use submission to state regulators to meet pre-fracturing submissions requirement), 3162.3-3(k)(2)-(3) (providing for a variance for provisions of the final rule where state regulations are more protective), and throughout the final rule preamble, *see, e.g.*, 80 Fed. Reg. at 16,128, 16,129, 16,130, 16,132 – 16,133, 16,152. If nothing else, the growth of state regulatory regimes for hydraulic fracturing operations in recent years suggests the need

to update BLM's preexisting regulations as BLM has done in the final rule.[12] But the preamble observes that state requirements are not uniform and that the existence of some regulations on hydraulic fracturing does not necessary fulfill BLM's obligations under its statutory responsibilities as a steward of federal land and trustee of Indian lands and resources. *See, e.g.*, 80 Fed. Reg. at 16,133 ("a major impetus for a separate BLM rule is that states are not legally required to meet the stewardship standards that apply to public lands and do not have trust responsibilities for Indian lands under Federal laws" and "[t]hus, the rule may expand on or set different standards from those of states that regulate hydraulic fracturing operations."); *see also id*. at 16,130, 16,132, 16,154 – 16,155, 16,161. As an illustration, with respect to information gathered pursuant to the final rule, BLM

> determined that the collections of information in the rule are necessary to enable the BLM to meet its statutory obligations …. The information that states, tribes, or other Federal agencies collect is neither uniform nor uniformly accessible to the BLM. For these reasons, the BLM has determined that the collections in the rule are necessary, and are not unnecessarily duplicative of existing Federal, tribal, or state collection requirements.

Id. at 16,154. As the preamble explains, [t]he provisions in this final rule provide for the BLM's consistent oversight and establish a baseline for environmental protection across all public and Indian lands undergoing hydraulic fracturing." *Id*. at 16,130.

Particularly in light of the "highly deferential" standard of review applicable here, *Ecology Center*, 451 F.3d at 1188, BLM has more than established that it "examined the relevant data and articulated a rational connection between the facts found and the decision made." *Olenhouse*, 42 F.3d at 1574 (footnote, citation omitted). That Petitioners disagree with BLM's assessments or conclusions is an insufficient basis to overturn BLM's final rule. Petitioners

[12] Also, no statute requires the Secretary to critique individual States' regulatory programs as a pre-condition to promulgating rules to carry out her statutory duties and authorities.

cannot establish that BLM's conclusions are "arbitrary or capricious" or lacking in substantiation and, therefore, they are unlikely to succeed on this claim.

5. BLM's treatment of trade secrets and proprietary information complies with applicable laws

Petitioners assert that the final rule is "contrary to federal public records law" because it fails to extend the same protection to disclosures required prior to commencing fracturing operations that it does to disclosures made after hydraulic fracturing operations are completed, Pet'rs' Mem. 27-34. Because of the absence of any provision in the final rule protecting from public disclosure any commercially sensitive information submitted by operators prior to commencing fracturing operations, Petitioners claim that this information is subject to such public disclosure. As a result, they assert, the final rule is contrary to the Freedom of Information Act ("FOIA"), and other, unspecified, public records laws, and assert that the failure to treat confidential information consistently is arbitrary and capricious. *Id*. (citations omitted).

Petitioners are mistaken. Both pre- and post-operation submissions share the same level of protection from disclosures. As discussed above, the final rule sets out a process by which operators may withhold from their post-operation public submission of fracturing fluid composition information any trade secrets or other proprietary information. *See* 43 C.F.R. § 3162.3-3(j). BLM included this withholding process to reflect the "direct public disclosure" that BLM has specified solely for fracturing fluid composition information. *See* 80 Fed. Reg. at 16,166. In contrast to all other mandated submissions, where the information is provided directly to BLM (or another agency) in the first instance, BLM expects that this information normally will be uploaded to FracFocus, a publicly available database. *See* 43 C.F.R. § 3162.3-3(i); *see also* 80 Fed. Reg. at 16,166 ("BLM strongly encourages operators to submit the chemical disclosure data through the FracFocus database[,]" but "[i]f data is submitted directly to the

BLM, the BLM will upload it to Fracfocus.org."). Special provisions were thus needed to allow companies to withhold confidential information when posting information on a public site.

However, BLM did not vary the level of protection among the provisions, contrary to Petitioners' claims. The preamble explains that the final rule "provides the same procedural safeguards for hydraulic fracturing information as for all other information" submitted to BLM, 80 Fed. Reg. at 16,173. This is because other submissions that operators make directly to BLM are already subject to the protections of public records laws, as implemented in the existing regulations and policies of the Department and BLM. The regulation thus required no special provisions for these types of submissions, which include the pre-operation submissions of concern to Petitioners. As Petitioners acknowledge, Pet'rs' Mem. 29-33, FOIA has specific exemptions governing "trade secrets and commercial or financial information" and "geological and geophysical information." 5 U.S.C. § 552(b)(4) and (9).[13] Congress requires the Secretary of the Interior to "maintain . . . confidentiality of all proprietary data" obtained from exploratory drilling carried out by a person not under contract with the United States. 30 U.S.C. § 208-1(c) and (d). Congress also requires the Department to maintain as "privileged proprietary information" the "extent, nature, value or disposition of the Indian mineral resources, or the production, products or proceeds thereof" on Indian land. 25 U.S.C. § 2103(c). BLM's existing guidance is consistent with those statutory directions, as it classifies some information provided by operators as confidential business information or trade secrets and not subject to disclosure. BLM Instructional Memorandum 2013-026 (2013).

[13] *See also* Federal Trade Secrets Act, 18 U.S.C. § 1905, which makes it a crime for a Federal employee to release trade secrets without legal justification. As shown below, the Department has regulations and procedures to assure that its employees do not violate that criminal statute.

Further, operators have long been able to segregate or mark information they believe to be trade secrets or confidential business information, and to request that such information not be made public. Under existing Departmental regulations, operators may segregate or label any information as confidential at the time that they submit it to the BLM. 43 C.F.R. § 2.26(a). If BLM receives a FOIA request for information that has been identified as confidential, or that may be confidential, those existing regulations provide a review process that involves the submitter before such information is released, including advance notice to allow a court to consider a motion for a temporary restraining order. *Id*. at §§ 2.26 – 2.36. Nothing in the final rule purports to supersede or modify any of these existing laws, rules, or policies with respect to information submitted under its provisions, aside from including an express process for protection where the information is not submitted directly to BLM, but rather through a public database – as is the case with the fracturing fluid disclosures under the final rule.

Petitioners' claims also ignore the fact that the BLM currently collects a significant volume of information from operators about their oil and gas activities on federal and Indian land. S*ee, e.g.*, *id*. at § 3162.3-1 (requiring disclosure of "description of the drilling program, the surface and projected completion zone location, pertinent geologic data, expected hazards, and proposed mitigation measures to address such hazards"), *id.* § 3162.3-2 (disclosures required with sundry notices), *id.* § 3162.3-4 (plan to plug and abandon), *id.* § 3162.4-1 (well operation reports), *id.* § 3162.4-2 (water quality testing), *id.* § 3162.7-1 (disposal records). Some of that data includes trade secrets or confidential information that "is the very essence of how companies compete in the oil and gas industry." *See* Pet'rs' Mem. 32. Nothing in Petitioners' declarations or their brief indicates that BLM has ever, much less routinely, divulged trade secrets or confidential business information.

6. The final rule complies with procedural requirements and its treatment of costs is rational and substantiated

BLM performed an in-depth economic impact analysis for the final rule, and that analysis fully complies with the Regulatory Flexibility Act, 5 U.S.C. § 601, *et seq*. ("RFA"). Therefore, Petitioners are unlikely to succeed on the merits of their procedural challenges, *see* Pet'rs' Mem. 34-47. Petitioners assert that the final rule's analyses of various costs allegedly imposed by the rule was inadequate, and they conclude on that basis that the final rule is "procedurally deficient" and fails to comply with the RFA. *Id*. 34-35. In particular, Petitioners argue that BLM underestimated costs for operators to comply with the useable water casing requirements, *id.* 36-38, to prepare and maintain cement evaluation logs, *id.* 38-40, to perform mechanical integrity tests, *id.* 40-41, to comply with tank storage requirements, *id.* 41-45, and to obtain additional permits and authorizations to engage in hydraulic fracturing, *id.* 45-47. Because of these alleged underestimations, Petitioners dispute BLM's conclusion that the final rule will not have a significant impact on a substantial number of small entities, and thus that the agency did not need to prepare a full regulatory flexibility analysis. *See id*. 35.

Notably, however, Petitioners do not argue that BLM failed to consider these costs; Petitioners instead argue that BLM wrongly underestimated or assigned no value to these costs in its RIA. *Id.* 34-47. In fact, BLM's conclusions are sound and find ample support in the record. Petitioners' arguments fail to demonstrate that any of BLM's analyses are arbitrary or capricious. The mere fact that Petitioners may not agree with BLM's conclusions does not give rise to a procedural defect on which they are likely to achieve *vacatur* of the challenged rule.

The RFA requires agencies to consider the effect that their regulations will have on small entities, including small businesses. *See generally Washington v. Daley*, 173 F.3d 1158, 1171 (9th Cir. 1999). When applicable, it requires agencies to publish an "initial regulatory flexibility

analysis" at the time a proposed rule is published, and a "final regulatory flexibility analysis" at the time a final rule is published. 5 U.S.C. §§ 603 & 604. But, the RFA imposes no substantive requirements on an agency; rather, its requirements are "purely procedural" in nature. *U.S. Cellular Corp. v. F.C.C.*, 254 F.3d 78, 88 (D.C. Cir. 2001); *see also Envtl. Defense Ctr., Inc. v. EPA*, 344 F.3d 832, 879 (9th Cir. 2003), *cert. denied sub nom Tex. Cities Coal. On Stormwater v EPA*, 541 U.S. 1085 (2004) ("Like the Notice and Comment process required in administrative rulemaking by the APA, the analyses required by the RFA are essentially procedural hurdles; after considering the relevant impacts and alternatives, an administrative agency remains free to regulate as it sees fit."). To satisfy the RFA, an agency need only demonstrate a "reasonable, good-faith effort" to fulfill its requirements. *U.S. Cellular*, 254 F.3d at 88; *Alenco Commc'ns, Inc. v. FCC*, 201 F.3d 608, 625 (5th Cir. 2000); *Associated Fisheries of Me. v. Daley*, 127 F.3d 104, 114 (1st Cir. 1997). Judicial review is available only of the final analysis. 5 U.S.C. § 611. Thus, the challenged rule may only be set aside based on Petitioners' procedural compliance cost arguments if BLM's final analysis is arbitrary, capricious, or contrary to law. *Id*. at §§ 611(a)(1), 706(2).[14] While the RFA requires that an agency consider comments, it does not alter the terms of the statutory authority at issue or impose new substantive requirements on the agency.

Because BLM properly considered all potential compliance costs identified by Petitioners in their motion, and considered similar comments submitted by Petitioners and Petitioners' members during the comment period, BLM complied with the RFA and Petitioners' procedural challenges are without merit. The final rule was accompanied by a regulatory impact analysis that, among other things, compares the industry's costs of compliance with the final rule with the costs for drilling and hydraulic fracturing operations without the final rule (including costs for

[14] Because BLM prepared and made available to the public a final regulatory impact analysis, judicial review under 5 U.S.C. § 706(1) is unavailable.

compliance with state regulations and for meeting industry standards). *See Regulatory Impact Analysis for Hydraulic Fracturing Rule* ("RIA"), Attachment A to the Declaration of James Tichenor ("Tichenor Decl."). Based on the RIA, BLM conducted an analysis pursuant to the RFA to determine whether the final rule "would have a significant economic impact, either detrimental or beneficial, on a substantial number of small entities[,]" and thus, whether a final regulatory flexibility analysis would be required. 80 Fed. Reg. at 16,209, citing 5 U.S.C. §§ 601-612. "Using the net income data for the small businesses that filed SEC Form 10-K, the BLM used the estimated compliance costs per hydraulic fracturing operation to calculate the percent of compliance costs as a portion of annual company net incomes for 2011[,]" and concluded that "the average [incremental] costs of the rule are expected to represent about 0.15 percent of the[se] compan[ies'] net incomes." 80 Fed. Reg. at 16,209. Thus, while "[s]mall entities represent the overwhelming majority of entities operating in the onshore crude oil and natural gas extraction industry … BLM expects that the costs of compliance with this rule would be minor in comparison to overall operations costs[,]" and therefore "the rule would not have a significant economic impact on a substantial number of small entities." *Id*. at 16,209 – 16,210. Given this, BLM was not required to prepare a final regulatory flexibility analysis.

As discussed below, the RIA includes reasonable and defensible cost analyses for each of the final rule requirements at issue. Therefore, Petitioners' claims as to the sufficiency of these analyses, and its predicate dispute with BLM's conclusions under the RFA, are meritless.[15]

[15] While Petitioners identify a series of legal authorities that allegedly require an "enhanced analysis" of costs, they neglect to substantiate their assertion. *See* Pet'rs' Mem. 34-35 & n.30. Plaintiffs also fail to present any arguments under those authorities or explain what requirements were not satisfied by the final rule. *Id*. Instead, their brief asserts procedural deficiencies in the framework of the RFA. *See id*. 35. Regardless, BLM complied with all of the authorities cited by Petitioners. Compare *id*. 35 n.30 with 80 Fed. Reg. at 16,193 – 16,217.

Identification & Protection of Usable Water: BLM considered and evaluated probable costs associated with testing for useable water and casing and cementing usable water zones. RIA 59-60; *see also id*. 1-2, 11-12, 41-51, 51-56. BLM concluded that, because the final rule continues the existing requirements applicable under Onshore Order 2 (aside from additions that may provide relief), these requirements would impose no new incremental costs. *Id*. 59-60.

Petitioners assert that operators' obligation to identify the location of usable water based on the up to 10,000 ppm TDS standard is "a new burden" and "stark change of practice[,]" with new and substantial costs that were improperly omitted from BLM's analyses. Pet'rs' Mem. 21-22, 36-38. Petitioners also claim that measuring water-bearing zones to determine if they contain usable water is difficult and expensive. *Id*. 22. And they claim that these costs will apply to operators that hydraulically fracture existing wells, which Petitioners speculate may have to add casing or cement to comply with the final rule, costs which were not included in BLM's analyses. *Id*. 23.

As set forth above, Petitioners' useable water arguments are premised on a fundamental misunderstanding of current law. Petitioners' members have an existing obligation to isolate and protect (with casing and cement) water-bearing strata with total dissolved solids "up to 10,000 ppm TDS" under Onshore Order No. 2. 53 Fed Reg. at 46,805 (Section II.Y defines "usable water" as "generally those waters containing up to 10,000 ppm [parts per million] of total dissolved solids [TDS]"), 46,808 – 46,809 (Section III.B requires operators to report to the authorized officer all indications of usable water and to isolate and protect all usable water zones by proper casing and cementing). Contrary to Petitioners' assertions, the final rule does not increase or impose new requirements in this respect. Thus, any additional "costs" asserted by Petitioners, *see* Pet'rs' Mem. 37, are actually expenses that their members should already be

incurring when drilling. Insofar as Petitioners suggest their members were not previously complying with the casing requirements in Onshore Order 2, that in no way supports Petitioners' attempt to attribute the corresponding costs to the final rule at issue here.

Furthermore, the obligations of Onshore Order 2 – including casing and cementing to isolate and protect usable water zones at the "up to 10,000 ppm TDS" standard – have applied since 1988. *See generally* 53 Fed. Reg. 46798 – 46811. Thus, contrary to Petitioners' assertion, *see* Pet'rs' Mem. 23, any operator with an existing well drilled since 1988 is already subject to these requirements. But as BLM Division Chief for Fluid Minerals Steven Wells explains in his attached Declaration, even absent the strictures of Onshore Order 2, no operator would hydraulically fracture a well with without isolating a water-producing zone, because this would cause loss of pressure into the porous zone, reducing the effectiveness of the fracturing operation and potentially causing the loss of oil and gas into the porous zone or introduction of water and dissolved solids into the oil and gas production. Wells Decl. ¶ 55.

Insofar as Petitioners complain that the final rule changes some of the requirements applicable to isolation and protection of usable water zones, *see* Pet'rs' Mem. 36-38, that argument is unavailing because the referenced change is likely to *reduce* operators' costs. Unlike Onshore Order 2, the final rule provides new categories of zones which are excluded from the definition of "usable water" and thus from the isolation and protection requirements. 43 C.F.R. § 3160.0-5. The final rule also provides that aquifers are deemed to be isolated and protected if the operator can show there are at least 200 feet of good cement around the casing between the hydraulically fractured zone and the aquifer. *See id*. at § 3162.3-3(e)(2)(i). In such instances, the final rule spares the operator from needing to test water located above that 200 feet of cement.

These cost saving changes in the final rule undermine – rather than support – Petitioners' arguments.

Petitioners also assert that BLM failed to assess the cost of this option to cement. Pet'rs' Mem. 37. The argument fails because nothing in the final rule obliges an operator to use this approach. The operator's alternative is to comply with the continuing obligation to measure for zones containing usable water and to isolate them with casing and cementing, as has been required under Onshore Order 2 for over 25 years.

Cement Evaluation Log ("CEL") Requirements: BLM considered and evaluated the cost to prepare and maintain CELs for surface, intermediate, and production casings to assure that the cementing is competent to prevent ruptures and leaks through the casings, as well as costs associated with corrective action.[16] With respect to the cost to prepare and maintain CELs for intermediate casing to protect usable water, BLM's analysis concluded that this requirement will result in incremental costs of $111,200 per well. RIA 62-63. However, since "[b]ased on field experience, [BLM] anticipate[s] that only about 5 percent of wells have intermediate casing to protect usable water[,]" BLM concluded that the rule applies to 5% of wells in all states but three. *Id*. In those three states – Colorado, North Dakota, and Texas – BLM estimated that the incremental costs would apply to zero, zero, and 2.5% of wells, respectively, on the basis that those "states [already] require logging of the intermediate casing through regulation in a manner that is consistent with this rule[,]" – *i.e.*, "North Dakota requires a CBL[17] on the intermediate

[16] RIA 60-65; *see also id*. 1-2 (summary discussion), 10, 16-18 (assessment of provision), 26-27 (considering alternatives to the CEL requirement, including a requirement to use cement bond logs), 36-40 (considering industry standards for monitoring and evaluating cement bonding and the integrity of the wellbore), 41-51 (considering existing BLM regulations), 51-56 (considering state regulations applicable to hydraulic fracturing operations).
[17] A "CBL" is a "cement bond log," a specific tool to identify voids or gaps in the cementing around a casing. As discussed in the preamble, the rule allows use of a "cement evaluation log," or "CEL," which is any tool that is at least as effective as a CBL. *See, e.g.*, 80 Fed Reg. 16,155 – 16,159. The additional flexibility was added to the rule in response to industry comments as to cost. *See id*.

casing, Colorado requires a CBL if the operator uses a production liner, and Texas specifies that the operator must identify the top of cement (with a CBL or temperature log) if it does not cement to the surface." *Id*.

BLM stated that this is a conservative approach that would likely overstate the number of states in which incremental costs would apply, because (i) the use of such tests is consistent with industry guidance, which also states that such tests are widespread in the industry; (ii) BLM expects that operators would normally use such tests, as they are prudent to conduct regardless of regulatory requirements; and (iii) other states, including Wyoming and California, may also require equivalent tests. *Id*, citing API Guidance Document HF1. BLM elected to use the more conservative approach because it did not have evidence that would allow it to quantify the prevalence of voluntary use of CELs. *Id*. 63; *see also* Tichenor Decl. ¶ 13.

Petitioners take issue with several of these contentions, but their flyspecked criticisms are unsupported and fail to demonstrate that BLM's conclusions are arbitrary or capricious. To begin, Petitioners dispute BLM's conclusion that zero and 2.5% of wells in Colorado and Texas, respectively, would face incremental costs, based on an alleged failure to account for those fraction of wells within each state that would not need to apply a CEL under state regulations. Pet'rs' Mem. 38-39. But Petitioners have not shown that this adjustment would have any appreciable impact on BLM's conclusions, especially in light of the conservative nature of BLM's estimate, due to widespread voluntary use of CELs. *See* RIA 62-63. Petitioners' disagreement with BLM's reference to the possibility that Wyoming and California may require a CEL, Pet'rs' Mem. 39, is also of no moment, because BLM's analysis applied the full incremental cost to both states and did not exclude them as it did with Colorado and North Dakota. RIA 62-63.

Petitioners also dispute that industry guidance "reveals [anything] about the incremental costs a requirement to perform CELs on intermediate casing would impose." Pet'rs' Mem. 39. But BLM did not use industry guidance for this purpose – rather, it referenced industry guidance as one element among several suggesting that use of CELs is more widespread than state requirements alone would suggest, and thus that BLM's conclusions (which are not based on voluntary use of CELs) overstate costs. Petitioners also take issue with the lack of data on such voluntary use, *id*. 39-40, but provide no evidence or basis on which BLM could have obtained such data. Indeed, as BLM Economist James Tichenor reports, "there was no credible data on the prevalence of voluntary compliance or the prevalence of CEL requirements as conditions of approval in State permits to drill, so estimates were used for analysis." Tichenor Decl. ¶ 13, citing RIA 63. The prevalence of voluntary use confirmed, but did not factor into, the conservative approach to these costs taken in the RIA. RIA 62-63.

Finally, Petitioners attack BLM's conclusion that, "[b]ased on field experience, the BLM anticipates that only about [five] percent of wells have intermediate casing to protect usable water." Pet'rs' Mem. 40, quoting 80 Fed. Reg. at 16,197 (internal quotations omitted). But Petitioners have offered no contrary evidence to dispute this figure or its basis. *Id*. Simply because Petitioners disagree with BLM's cost estimate does not mean that BLM's analysis is arbitrary or capricious. *See Am. Paper Inst., Inc. v. Am. Elec. Power Serv. Corp.*, 461 U.S. 402, 422 (1983) (a court need not find that the agency's decision is "the only reasonable one, or even that it is the result [the court] would have reached had the question arisen in the first instance in judicial proceedings.") (citations omitted).

Mechanical Integrity Test: BLM considered and evaluated the costs associated with mechanical integrity testing.[18] On the basis that this testing is consistent with preexisting industry guidance and with requirements in the nine states which account for 99.3% of the total well completions on Federal and Indian lands nationwide, BLM concluded that this requirement will impose no incremental costs. RIA 65.

Petitioners argue that "BLM does not explain how a new test that operators are not presently required to apply can have no incremental costs on operations." Pet'rs' Mem. 40. They also assert that the assumption of no incremental cost "cannot be reconciled with BLM's acknowledgement that 'certain wellbore configurations may require modifications to perform this test.'" *Id*., quoting 80 Fed. Reg. at 16,160. Petitioners instead assert that the such modifications are "likely to increase costs of completing a well by $75,000 to $100,000 per well[,]" although they cite no support for this figure. *Id*. 41.

As noted above, BLM did analyze the potential for incremental costs based on its awareness that the mechanical integrity test is a new requirement under BLM regulations. But BLM concluded that there will be no incremental cost because this requirement is not a significant departure from existing practice or state requirements in the nine states that comprise 99.3% of the total well completions on Federal and Indian lands nationwide. RIA 65. And the prevalence of this practice is confirmed by its practicality – as BLM Division Chief for Fluid Minerals Steven Wells observes, "[a] prudent operator would pressure test a well to assure that the hydraulic fracturing operation will not be jeopardized by a loss of pressure." Wells Decl., ¶ 55. Consequently, Petitioners err in their premise – that BLM ignored a change in existing

[18] RIA 65; *see also id*. 1-2 (summary discussion), 18-19 (assessment of provision), 36-40 (considering industry standards for monitoring and evaluating cement bonding and the integrity of the wellbore), 41-51 (considering existing BLM regulations), 51-56 (considering state regulations applicable to hydraulic fracturing operations)

practice and requirements in its analysis – and in their conclusion that any costs of testing would be new or incremental requirements imposed by the final rule. Furthermore, Petitioners offer no support for their asserted testing cost of $75,000 to $100,000 per well, and have failed to point to any comments that were before BLM when it developed the RIA and which contained, let alone supported, such figures. *See* Pet'rs' Mem. 41.

Temporary storage of recovered fluids: In an extensive analysis, BLM considered and evaluated the costs associated with recovered fluid storage in tanks and concluded (in relevant part) that the incremental cost per operation would be $74,400.[19] However, BLM concluded that this incremental cost would only apply "where the use of storage tanks is not required by state regulations and where the operator is not expected to use storage tanks voluntarily[,]" – *i.e.*, where the cost of storage in tanks exceeds the cost of storage in lined pits. RIA 75. BLM also concluded that the operators "most likely to incur this cost are in [the five] states where 0.8% of all oil and gas activity on public lands occurs." RIA 76, 82.

Petitioners dispute BLM's conclusions as to the states in which operators are most likely to incur additional cost through the use of storage tanks. In particular, they assert that the non-attribution of incremental costs for tank storage in New Mexico and Texas is faulty, because "both states 'allow operators to apply for permits to use pits,' … and some operators do indeed use pits in those states." Pet'rs' Mem. 41-42, quoting 80 Fed. Reg. at 16,199. Petitioners also assert that BLM's cost analyses are faulty with respect to several other states, because BLM "assumed voluntary compliance with the tank provision in situations where tanks would cost the same as or less than pits[.]" *Id*. 42-45 (internal quotation marks omitted). Petitioners assert that

[19] RIA 66-76; *see also id*. 1-2 (summary discussion), 20-21 (assessment of provision), 27 (considering alternatives for the temporary storage provision, including storage in either tanks or aboveground lined pits), 40-41 (considering industry standards for management of recovered water), 41-51 (considering existing BLM regulations), 51-56 (considering state regulations applicable to hydraulic fracturing operations).

this assumption is in error because other factors enter into an operator's decision as to how to temporarily store recovered water and BLM's assumption ignored some costs associated with storage tanks, such as surface area needs, leakage, and truck emissions. *Id*. (citations omitted).

As an initial matter, Petitioners' own assertions negate their contention here that BLM underestimated the costs associated with temporary tank storage. Elsewhere in their brief, Petitioners make the case that this requirement would *never* apply to operators, as they would always have a permanent water disposal plan in place before commencing hydraulic fracturing operations. *See id*. 11-12. As explained above, BLM agrees that this will be true for many, or even most, operators. Thus, Petitioners cannot credibly assert that the costs of temporary storage of recovered fluids in above-ground tanks would constitute a significant incremental cost beyond that estimated in the RIA. Indeed, Petitioners' argument here suggests that operators will be even more likely to seek advance approval of a permanent disposal plan and avoid the costs of temporary storage in tanks, and thus, those costs would not be imposed to any significant extent.

Petitioners' arguments are also faulty in assuming that, to the extent that an operator would not have a permanent disposal plan in place at the commencement of hydraulic fracturing, the only temporary storage option available is in tanks. The final rule specifically permits lined pit storage of recovered fluids where certain requirements are met and "use of a tank as described in [the challenged regulations] is infeasible for environmental, public health or safety reasons …." 43 C.F.R. § 3162.3-3(h)(1). Consequently, to the extent that Petitioners are correct and there are reasons other than cost (such as leakage or truck emissions) for operators to prefer storage in pits – those very factors are incorporated into the final rule, allowing BLM to approve pits instead of requiring tanks.

Finally, Petitioners give no indication that, if true, the inclusion of the specific information allegedly missing from BLM's detailed analysis of this provision in the RIA would have any appreciable impact on its overall conclusions.

Administrative costs: BLM considered and evaluated the administrative costs associated with permit applications and concluded that there would be an estimated cost of $643 per application. RIA 1-2, 58-59. In addition, BLM considered alternatives to direct regulation as part of the RIA, including user fees, marketable permits, and information gathering. *Id*. 28. These analyses of costs were inadequate and procedurally deficient, Petitioners allege, because Petitioners disagree with the time estimates used in the RIA and with BLM's assumption that an operator is likely to submit a request for authorization to conduct hydraulic fracturing at the time that it submits an Application for a Permit to Drill ("APD"). Pet'rs' Mem. 45-47.

Yet, the input that BLM has received from operators is that they desire certainty that they can drill and complete their wells in reliance on BLM's permits to drill. Tichenor Decl. ¶ 16. This input confirmed BLM's understanding of operator practices, in light of its substantial experience in regulating these operations and receiving these permits, and supports BLM's assumption that operators would normally submit requests to conduct hydraulic fracturing operations with APDs. *Id*. Again, simply because Petitioners disagree with BLM's analysis does not mean it was uninformed, arbitrary, or capricious. *Am. Paper Inst., Inc.*, 461 U.S. at 422. Nor have Petitioners substantiated that, if true, the inclusion of the specific information allegedly missing from BLM's detailed analysis of this provision in the RIA would have any appreciable impact on its overall conclusions.

In sum, BLM "conducted a detailed economic assessment of the impact of its proposed rule on small businesses." *Ranchers Cattlemen Action Legal Fund United Stockgrowers of Am. v.*

U.S. Dep't of Agric., 415 F.3d 1078, 1101 (9th Cir. 2005). All of Petitioners' costs arguments were submitted to BLM as part of the public comment process, and BLM appropriately considered those comments as evidenced by its response to comments in the final rule. *See id.* at 1102. The mere fact that BLM rejected or disagreed with the comments relied upon by Petitioners does not mean that BLM was wrong or that it violated the RFA. BLM made a "reasonable, good faith effort" to evaluate the economic impacts of the challenged rule on small businesses. *Id.* at 1101. In addition, BLM's analysis was reasoned and supported by substantial evidence, which is all that is required under the APA. Thus, Petitioners are unlikely to prevail on the merits of their procedural challenges to the rule, and Petitioners' motion should be denied.

B. Petitioners fail to demonstrate irreparable harm

Because Petitioners have failed to demonstrate a likelihood of success on the merits, the Court may deny Petitioners' motion on that basis alone. *See, e.g., Winter*, 555 U.S. at 23-24; *Sprint Spectrum, L.P. v. State Corp. Comm'n of Kan.*, 149 F.3d 1058, 1060 (10th Cir. 1998). However, even if Petitioners could establish a likelihood of success on the merits, Petitioners' motion for a preliminary injunction should be denied because Petitioners have failed to establish irreparable harm should the challenged rule go into effect.

A showing of probable irreparable harm is the single most important prerequisite for the issuance of a preliminary injunction. *Dominion Video Satellite, Inc. v. Echostar Satellite Corp.*, 356 F.3d 1256, 1260 (10th Cir. 2004). To be entitled to an injunction, Petitioners "must show that the injury complained of is of such imminence that there is a clear and present need for equitable relief to prevent irreparable harm." *Heideman*, 348 F.3d at 1189 (citations; emphasis omitted)). Petitioners are under the obligation to show that "irreparable injury is likely in the absence of an injunction." *Winter,* 555 U.S. at 22 (emphasis omitted). Thus, to be entitled to their requested injunction, Petitioners must show that there is likely, imminent, and irreparable injury.

Petitioners assert that their members will be subjected to two types of harm if the final rule is not enjoined: (1) harm from public disclosure of trade secrets and other proprietary information which allegedly will be submitted as part of the pre-fracturing submissions required in the final rule, and (2) costs incurred complying with the final rule, which will not be recoverable by Petitioners' members due to the United States' sovereign immunity. Pet'rs' Mem. 47-50. However, Petitioners have not made the requisite showing for either of these harms.

1. Petitioners have failed to properly present evidence establishing imminent application of the final rule to their members

As a threshold matter, Petitioners have not submitted any specific *evidence* that any of their members actually intend to engage in hydraulic fracturing, as defined in 43 C.F.R. § 3160.0-5, on Federal or Indian lands after June 24, 2015, during the pendency of this litigation. *See generally* Nattz Declaration (ECF No. 11-1) (observing that oil and gas development "almost invariably" involves hydraulic fracturing, but not identifying any specific IPAA members that intend to engage in hydraulic fracturing on federal or Indian land between June 24, 2015, and the conclusion of this litigation); Sgamma Declaration (ECF No. 11-2) (asserting same for Western Energy Alliance's members). There is no declaration from any member of either association that specifically states a plan to conduct operations that would be subject to the rule. It is not for the Federal Respondents or for the Court to assume that members of an association would suffer imminent harm. Petitioners' bare assertion that its members are very likely to engage in hydraulic fracturing on public lands, without providing any specific evidence that any particular member will do so, is not sufficient to establish an imminent and concrete harm from the final rule. *See Summers v. Earth Island Institute*, 555 U.S. 488, 495-96 (2009) (rejecting affidavit by petitioner's member indicating a likelihood that he would visit the lands at issue, but no concrete

plan to do so, as insufficiently imminent and concrete a harm to establish the injury required for Art. III standing).

2. There is no imminent risk of disclosure of confidential information

Petitioners also have not demonstrated that any trade secrets or confidential information are likely to be disclosed absent an injunction. Specifically, Petitioners have not shown an imminent likelihood that BLM could or would disclose any proprietary information submitted to it to obtain an approval of hydraulic fracturing, 43 C.F.R. § 3162.3-3(d), prior to fracturing, *id.* § 3162.3-3(e), during fracturing monitoring, *id.* § 3162.3-3(f), or after fracturing is completed, *id.* § 3162.3-3(i). Nothing in Petitioners' declarations or its brief indicates that BLM has ever, much less routinely, divulged trade secrets or confidential business information.

Petitioners acknowledge that the challenged rule specifically protects from public disclosure trade secrets and other confidential information required to be submitted in the post-completion certification. Pet'rs' Mem. 28, citing 43 C.F.R. § 3162.3-3(j). Thus, there is no likely or imminent harm from the disclosure of trade secret information submitted to BLM under that provision of the final rule.

As explained above, Petitioners are mistaken in their assertion that information which operators must submit prior to commencing fracturing operations, and which is otherwise subject to protection under FOIA or other applicable public records law, will become subject to public disclosure under the final rule. Petitioners' argument in that regard is premised on the faulty assumption that no protection of such information is available outside of the final rule – when in fact, trade secret or confidential information provided to BLM is routinely protected from public disclosure by other provisions of law and by the Department of the Interior's own regulations. *See, e.g.,* 43 C.F.R. §§ 2.26 – 2.36. Nothing in the final rule purports to supersede or modify

FOIA, other BLM confidentiality regulations, or BLM policies and manuals addressing the handling of confidential information.

Nor have Petitioners provided any reason to believe that BLM would violate statutes and regulations to disclose information that must be protected from public disclosure. As previously noted, BLM already collects a significant amount of information from operators (including Petitioners' members) about their oil and gas activities on federal and Indian land, and some of that information includes trade secrets or confidential information. Existing rules and BLM practices ensure that information is properly protected. Petitioners supply no bases to believe that, as they contend, "BLM will then disclose to the public and other companies" their proprietary hydraulic fracturing operational and design information, Pet'rs' Mem. 49. At most, Petitioners offer speculation that it *could* happen, if BLM were to disregard applicable statutes and its own regulations and policies, in deviation from its own established practice. "[P]urely speculative harm does not amount to irreparable injury … [A] plaintiff must show a 'significant risk of irreparable harm' in order to obtain a preliminary injunction…." *Greater Yellowstone Coal. v. Flowers*, 321 F.3d 1250, 1258 (10th Cir. 2003) (citations omitted); *cf., Mentor Worldwide v. Craigo*, No. 12-CV-00776-REB-MJW, 2012 WL 1439498, at *4-5 (D. Colo. Apr. 26, 2012) (a showing of *actual or threatened* misappropriation of trade secrets gives rise to a presumption of irreparable harm).

3. Petitioners' assumed increased compliance costs are not a basis for the injunction

Petitioners' asserted increased costs of compliance similarly fail to establish irreparable harm in the absence of an injunction. As a general matter, cost of compliance with a regulatory scheme does not constitute irreparable injury. *Am. Hosp. Ass'n v. Harris*, 625 F.2d 1328, 1331 (7th Cir. 1980); *A.O. Smith Corp. v. FTC*, 530 F.2d 515, 527-28 (3d Cir. 1976).

The costs to be imposed under the rule are modest, even *de miminis*, in the context of applicable operational costs. Credible sources cited in the RIA listed the cost of drilling a well to be between $5.4 – 9 million each. RIA 82 (citations omitted). BLM estimates that the challenged rule will increase compliance costs by about $11,400 per well, and thus will increase the cost of drilling a well by 0.13 to 0.21 percent. *Id*.; *see also* 80 Fed. Reg. at 16,130, 16,205. And a large percentage of these costs are due to a provision for temporary storage of recovered water. *See* 80 Fed Reg. at 16199 – 16203; Wells Decl. ¶ 37. As noted above, Petitioners' own arguments suggest these temporary storage costs are substantially *overstated*.

Petitioners' assertions that these and other costs of the rule are underestimated have been refuted and shown to be speculative. But even if Petitioners could show that the incremental costs were double the amount determined by BLM in its RIA, as BLM Division Chief for Fluid Minerals Steven Wells notes in his Declaration, they would still be less than half of one percent of the average cost of drilling and fracturing a horizontal well. Wells Decl. ¶ 55. This is hardly a situation where the economic impact to Petitioners' members "threatens the very existence of the movant's business." *Wis. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985), *aff'd in part, remanded in part* 770 F.2d 1144 (D.C. Cir. 1985). In fact, Petitioners have presented no evidence that any "compliance costs" are injurious to their member's businesses. This is distinguishable from the situation present in *Smoking Everywhere, Inc. v. U.S. Food and Drug Administration*, relied upon by Petitioners, Pet'rs' Mem. 47, where the "FDA has refused admission of Smoking Everywhere's electronic cigarette products and has ordered that they be exported or destroyed," effectively shutting down the movant's business. 680 F. Supp. 2d 62, 76 (D.D.C. 2010). Thus, even if Petitioners' "compliance costs" were unrecoverable, that does not absolve Petitioners

from the considerable burden of proving that those losses are "certain and great; . . . actual and not theoretical." *Wis. Gas Co.*, 758 F.2d at 674. Petitioners have not made that showing here.

Further, Petitioners' members engage in hydraulic fracturing on federal or Indian land, if at all, only as a voluntary matter. Nothing in the contested rule requires or compels Petitioners' members to engage in hydraulic fracturing or to incur any costs associated with hydraulic fracturing on Federal or Indian land during this litigation. Petitioners' members will not incur any "compliance costs," Pet'rs' Mem. 47, unless they voluntarily elect to engage in hydraulic fracturing on federal or Indian land before this litigation is over. Accordingly, the general rule that potential economic loss is insufficient to support a preliminary injunction applies here. *Port City Props. v. Union Pac. R.R. Co.*, 518 F.3d 1186, 1190 (10th Cir. 2008).

It is irrelevant that Petitioners' members' administrative "compliance costs" are not recoverable from the government if the rule is ultimately struck down. In *Chamber of Commerce v. Edmondson*, relied upon by Petitioners, Pet'rs' Mem. 48, the Tenth Circuit found that "imposition of monetary damages that cannot later be recovered for reasons such as sovereign immunity constitutes irreparable injury." 594 F.3d 742, 770-71 (10th Cir. 2010). But *Edmonson* dealt with the actual imposition of *fines* on businesses that failed to comply with a state law on the employment of illegal immigrants, *i.e.*, the actual payment of money by the plaintiff to the authority from which it was then unrecoverable. *Id.* Here, Petitioners are not arguing they are subject to fines or penalties associated with the challenged rule. None of the "compliance costs" will be paid by Petitioners' members to the government. Instead, Petitioners allege they may be subject to additional permitting requirements and incur increased administrative costs to be allowed to engage in future hydraulic fracturing under the rule. A fine or penalty is distinguishable from an expenditure to comply with new regulations.

The other authorities cited by Petitioners do not support their argument that "compliance costs" constitute irreparable harm. In *Thunder Basin Coal Co. v. Reich*, the majority did not reach the issue of irreparable harm, 510 U.S. 200, 216-17 (1994), and Justice Scalia's concurring opinion acknowledged that viewing pre-enforcement administrative costs as irreparable harm would be an exception that would swallow the general rule against pre-enforcement review, *id.* at 220-21 ("Were it otherwise, the availability of pre-enforcement challenges would have to be the rule rather than the exception"). In *Crowe & Dunlevy, P.C. v. Stidham*, the Tenth Circuit addressed a situation where a tribal court order, if not enjoined, would force the movant to return his fees to an Indian tribe. 640 F.3d 1140, 1156-57 (10th Cir. 2011). Again, here, the challenged rule, if allowed to become effective, does not compel Petitioners to incur any "compliance costs" involuntarily or to pay any money to the government.

In sum, Petitioners' economic injury arguments fail to show irreparable harm. The final rule does not mandate the payment of money by Petitioners, nor is there any evidence that "compliance costs" threaten the existence of Petitioners' members' businesses. Nor are fines or penalties at issue. Petitioners' motion therefore should be denied.

C. <u>The balance of harms and public interest do not favor a preliminary injunction</u>

While Petitioners have failed to demonstrate a likelihood of any imminent, irreparable injury if the final rule is not enjoined, all available evidence demonstrates that the harm posed to Respondents and the public interest also weigh heavily against an injunction. Where, as here, a plaintiff shows only "*de minimis* or non-existent" harm, "there is no danger to the public interest" in denying injunctive relief. *Christie-Spencer Corp. v. Hausman Realty Co., Inc.*, 118 F. Supp. 2d 408, 423 (S.D.N.Y. 2000). But even if the Petitioners were able to show irreparable harm, the preliminary injunction should still be denied on the bases of balance of the harms and public interest. A federal court must deny a preliminary injunction, even where irreparable injury

to the movant exists, if the injunction is contrary to the public interest. *See Winter*, 555 U.S. at 22 (holding that even though Petitioners showed a "near certainty" of irreparable injury to marine mammals resulting from the Navy's use of mid-frequency active sonar, that harm was outweighed by the public interest in facilitating effective naval training exercises); *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312-13 (1982) ("[W]here an injunction is asked which will adversely affect a public interest . . . the court may in the public interest withhold relief . . . though the postponement may be burdensome to the plaintiff") (quoting *Yakus v. United States*, 321 U.S. 414, 440 (1944)) (footnote omitted).

When, as here, the non-movant is the government, it is appropriate for the Court to consider jointly the balance of harms between Petitioners and Respondents and the public interest. *Nken v. Holder*, 556 U.S. 418, 435 (2009) ("These factors merge when the Government is the opposing party."). An examination of these factors confirms that an injunction should not issue. Petitioners seek to enjoin a final rule that is the product of several years of work by the agency and its expert staff, along with careful and thorough agency consideration of roughly 1.5 million public comments, which included submissions by industry, states, tribal authorities, environmental groups, and the general public. *See, e.g.*, 80 Fed. Reg. at 16,128. That effort expended substantial agency resources to develop a rational, supportable and effective rule of national scope to adapt a long-standing regulatory framework to watershed changes in the technology and practice of modern oil and gas drilling.

A preliminary injunction would frustrate the public interests motivating the final rule. *See, e.g.*, Wells Decl. ¶ 57 & Attachments 7-12. As described above, the rule responds to a number of risks and concerns posed by the current practice of hydraulic fracturing – among them potential groundwater contamination, use of chemicals during the process, frack hits, and issues

related to the management of recovered water. An injunction would deny BLM the tools needed to ensure that well casings are properly cemented, to prevent migration of liquids or gas around the casings, and to ensure safe temporary above-ground storage of recovered water. If the rule were enjoined, the public would not have assured access to information about the chemicals used during hydraulic fracturing on public and Indian lands, except where required by state regulations or undertaken voluntarily by the regulated community. BLM now estimates that roughly 90 percent of oil and gas operations on federal and Indian lands use hydraulic fracturing. *See* 80 Fed. Reg. at 16,131; Wells Decl. ¶ 14. Further, without the rule in place, BLM would be handicapped in its efforts to meet its statutory and trust responsibilities to protect public and Indian lands and mineral resources. The agency and the public would lose the final rule's carefully struck balance between these stewardship responsibilities, BLM's statutory mandate to allow oil and gas operations on Federal lands (where appropriate), and its mandate to assure development of oil and gas on Indian lands occurs with proper protection of other Indian resources.

An injunction would also disserve the public interest because it would have a detrimental effect on the orderly administration of federal energy policy. Among other concerns, an injunction would likely cause confusion among the public and the industry as to whether and when the final rule will become effective. The final rule contains a phase-in provision which was carefully crafted to promote maximum compliance with the final rule while minimizing disruption to existing contracts with service providers, based on BLM's observation that most contracts with hydraulic fracturing service providers are signed about six months prior to the date of fracking. *See* 80 Fed. Reg. at 16,218, 16,577 (correction notice). That provision arranges for partial phase-in of provisions for six separate categories of hydraulic fracturing operations on a

calendar of triggering events between 180 days before the effective date of the rule through that effective date. 43 C.F.R. § 3162.3-3(a). It would be difficult for BLM and confusing for the industry and concerned members of the public to reinitiate the phase-in period after a preliminary injunction were lifted with a final judgment upholding the hydraulic fracturing rule.

Moreover, no bond or other measure could fully compensate the public for the impairment that would be caused by a disruption of the ongoing implementation of the final rule. That implementation includes internal BLM implementation efforts as well as ongoing coordination with states and tribal authorities. *See, e.g.*, 80 Fed. Reg. at 16,130. Under such circumstances, the public interest would best be served by an order denying any injunctive relief until the Court is able to make a final determination on the merits. *See Yakus*, 321 U.S. at 440.

Petitioners' arguments to the contrary are unavailing. Petitioners assert that a preliminary "injunction does not pose any threat to BLM's interest[,]" because it would "prevent BLM from assuming administrative burdens and the expenditure of resources which may never be necessary[.]" Pet'rs' Mem. 50-52. Petitioners also contend that BLM has not justified that the rule is needed, that there is already extensive regulation of oil and gas operations under federal law, and that time spent in development of the rule demonstrates the absence of an urgent need for such regulation. *Id*. Finally, the Petitioners assert that implementation of the final rule is contrary to the public interest because it will result in delays which will diminish oil and gas development and thereby reduce proceeds to be paid to state and federal coffers. *Id*. 52-55.

Petitioners' arguments are unsupported and contrary to available evidence and precedent. The assertion that enjoining the final rule will have no negative impact on BLM is contradicted by the presumption that an agency is harmed when "prevent[ed] … from enforcing regulations that Congress found it in the public interest to direct that agency to develop and enforce." *N.*

Arapaho Tribe, 2015 U.S. Dist. LEXIS 30480 at *41, quoting *Cornish v. Dudas*, 540 F. Supp. 2d 61, 65 (D.D.C. 2008), *aff'd* 330 F. App'x 919 (Fed. Cir. 2009) (internal quotations omitted). Moreover, as stated above, numerous harms to the agency and the public interest will follow from an injunction of the final rule. While Petitioners contend that BLM's administrative burden will be relieved by temporary injunction of the final rule, their argument ignores the fact that BLM undertook this effort to fulfill Congress's charge to implement a regulatory regime that enables leasing and exploitation of mineral resources on public lands, while also ensuring that such exploitation does not result in undue waste or degradation of those resources, and to regulate oil and gas development on trust and restricted Indian lands to protect other resources. Satisfying those responsibilities requires BLM to periodically update or add to its regulation so that they reflect modern practices, and BLM has done so in the final rule. In addition, Petitioners' assertion ignores the substantial efforts BLM, along with its partners at the state level, have invested thus far in preparing for implementation of the rule. In particular, it ignores BLM's carefully-crafted but necessarily multi-faceted phase-in of the rule's requirements, *see* 43 C.F.R. § 3162.3-3(a).

Petitioners' reliance on the length of the process is similarly unavailing. The time it took to promulgate the final rule is unrelated to the risks posed by the activities to be regulated. BLM's rulemaking process was lengthy due to the agency's need to carefully and thoroughly consider and respond to roughly 1.5 million public comments and numerous public meetings in order to craft an effective, cost-effective, and rational rule. Petitioners' contention that an injunction would harm neither the agency nor the public interest is not credible in view of the investment of resources that BLM and the public devoted to the rulemaking. Similarly,

Petitioners' arguments as to lack of justification, need, or substantiation of the rule, and of the adequacy of existing state regulations, are dispatched above.

Petitioners also have not substantiated their assertions that implementation of the rule will result in delays and that any such delays will cause a significant reduction in oil and gas extraction on public lands and thus a significant reduction in state and federal proceeds. Petitioners, oil and gas industry trade associations, are also not in a position to assert the pecuniary interests of the federal or state governments.

Finally, Petitioners' arguments face a strong contrary presumption in the Tenth Circuit "that all governmental action pursuant to a statutory scheme . . . is taken in the public interest." *N. Arapaho Tribe*, 2015 U.S. Dist. LEXIS 30480 at *41, quoting *Aid for Women v. Foulston*, 441 F.3d 1101, 1115 n.15 (10th Cir. 2006) (internal quotations omitted). Having failed to counter that presumption with any evidence, Petitioners' public interest arguments also must fail.

III. CONCLUSION

For the foregoing reasons, Petitioners have failed to establish any of the requirements for preliminary injunctive relief, and therefore the Court should deny Petitioners' motion for preliminary injunction.

Respectfully submitted this 1st day of June, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of June, 2015 a copy of the foregoing **Respondents' Brief in Opposition to Petitioners' Motion for Preliminary Injunction** was electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

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