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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

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

NORTH DAKOTA'S MOTION FOR PRELIMINARY INJUNCTION

Pursuant to Federal Rule of Civil Procedure 65, the State of North Dakota respectfully requests the Court issue an order enjoining the March 26, 2015 final rulemaking of the Department of the Interior's Bureau of Land Management ("BLM") entitled "Oil and Gas; Hydraulic Fracturing on Federal Lands; Final Rule." 80 Fed. Reg. 16128 (Mar. 26, 2015) (to be codified at 43 C.F.R. Part 3160) ("BLM Rule"). Through the BLM Rule, BLM asserts the authority to regulate hydraulic fracturing on federal and Indian lands and interests in North Dakota, thereby infringing upon North Dakota's comprehensive regulation of oil and gas activities (including hydraulic fracturing) and groundwater resources on all lands within its borders. If it is allowed to go into effect, the BLM Rule will irreparably harm North Dakota's sovereign interests and its State budget during the pendency of this litigation. Moreover, North Dakota is likely to prevail on the merits of its Petition for Review because the BLM Rule exceeds BLM's statutory authority and therefore violates the Administrative Procedure Act ("APA"). *See* 5 U.S.C. § 706(2)(c). Both the balance of harms and the public interest favor the instant motion.

In support of its motion, North Dakota submits its Memorandum in Support of North Dakota's Motion for Preliminary Injunction, along with the following declarations: (1) Declaration of Lynn Helms, Director of the North Dakota Industrial Commission, Department of Mineral Resources; (2) Declaration of Dennis Roller, Audit Manager, Division of Royalty Audits; (3) Declaration of Kevin Schatz, State Supervisor of Assessments and Director of the Property Tax Division; and (4) Declaration of Kelly Schmidt, North Dakota State Treasurer.

Accordingly, for the reasons set forth herein and in the accompanying Memorandum, North Dakota respectfully moves the Court to grant its Motion for Preliminary Injunction pending the resolution of the Petitioners' challenges on the merits.

Dated this 8th day of June, 2015.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on June 8, 2015, a true and correct copy of (1) North Dakota's Motion for Preliminary Injunction; (2) Memorandum in Support of North Dakota's Motion for Preliminary Injunction; and (3) the Declarations of Lynn Helms, Dennis Roller, Kevin Schatz, and Kelly Schmidt in Support of North Dakota's Motion for Preliminary Injunction were served via the Court's CM/ECF system to the parties listed below.

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

MEMORANDUM IN SUPPORT OF NORTH DAKOTA'S MOTION FOR PRELIMINARY INJUNCTION

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GLOSSARY

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

INTRODUCTION

North Dakota intervened in this case to protect its unique sovereign interests and the significant property and fiscal interests of the State and its citizens. As the second largest producer of oil and natural gas in the United States, North Dakota has an unmistakable sovereign interest in regulating hydraulic fracturing within its borders to ensure both the responsible and efficient development of oil and gas resources and the protection of the State's groundwater resources. North Dakota is required by statute to encourage the development of oil and gas within the State, prevent the waste of oil and gas resources, and protect the correlative rights of all oil and gas owners with the State. N.D. Cent. Code § 38-08-01. North Dakota also has statutory ownership of, and control over, all groundwater resources within its borders. *Id*. at § 61-01-01. In light of these twin statutory mandates, North Dakota has developed extensive regulatory programs to encourage the efficient and responsible development of oil and gas while protecting underground sources of drinking water.

In an affront to North Dakota's sovereign interests, the Department of the Interior's ("Interior") Bureau of Land Management ("BLM") on March 26, 2015 published a final rule in the *Federal Register* regulating hydraulic fracturing on federal and Indian lands, entitled "Oil and Gas; Hydraulic Fracturing on Federal and Indian Lands; Final Rule" ("BLM Rule"). 80 Fed. Reg. 16128 (Mar. 26, 2015) (to be codified at 43 C.F.R. Part 3160). The BLM Rule infringes upon North Dakota's authority to regulate oil and gas and groundwater resources within its state borders, violates the Energy Policy Act of 2005's ("EP Act") prohibition of federal regulation of hydraulic fracturing activities, and upends North Dakota's delegated authority under the Safe Drinking Water Act ("SDWA").

In light of the significant sovereign state interests at stake in this litigation, North Dakota—along with the States of Wyoming and Colorado (collectively, "State Petitioners")—

sent a letter to the Assistant Secretary of Interior on May 13, 2015 asking the agency to delay implementation of the BLM Rule until the validity of the Rule could be adjudicated by this Court. *See* Exhibit A, May 13, 2015 Letter from State Petitioners to the Assistant Secretary of Interior. On May 27, 2015, the Solicitor for the Department of the Interior responded to the State Petitioners' request and "decline[d] to extend the effective date of the hydraulic fracturing rule." *See* Exhibit B, May 27, 2015 Letter from the Solicitor of the Department of the Interior to Attorney General Stenehjem. Even in its response to State Petitioners' request, the Department of Interior fails to appreciate or acknowledge the BLM Rule's significant adverse effect on state sovereignty and economic interests. Nonetheless, North Dakota cannot stand by as its sovereign interests are undermined and its State budget is irreparably harmed by the annual loss of hundreds of millions of dollars of lost mineral royalties and taxes. As the BLM Rule is set to go into effect on June 24, 2015, North Dakota is compelled to seek a preliminary injunction to delay the implementation of the BLM Rule until this Court has an opportunity to resolve North Dakota's pending petition for review.

NORTH DAKOTA REGULATORY BACKGROUND

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

I. The North Dakota Hydraulic Fracturing Program

Despite the drilling for oil and gas in North Dakota since the early 1950s, the use of hydraulic fracturing became more prevalent in North Dakota following the completion of the first commercial horizontal, hydraulically-fractured Bakken well in 2006. Exhibit C, Declaration of Lynn Helms, Director of the North Dakota Industrial Commission Department of Mineral Resources ("Helms Decl."), ¶ 8. In 2011, the North Dakota legislature formally recognized hydraulic fracturing as an acceptable technique to recover oil and natural gas. N.D. Cent. Code § 38-08-25. In doing so, North Dakota supplemented its existing regulations in 2012. *See* N.D. Admin. Code § 43-02-03-27.1. In coordination with the State's oil and gas conservation regulations, the new regulations provided North Dakota with more comprehensive control over hydraulic fracturing practices within its borders and enabled the State to more fully protect its underground drinking water sources. North Dakota's Motion to Intervene, Helms Decl. ¶ 15, ECF No. 6-3, Case No. 15-cv-43-SWS (Apr. 1, 2015) ("Motion to Intervene, Helms Decl.").

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

requirement is subject to a civil penalty of up to $12,500 per day for each offense, with each day of violation constituting a separate offense. N.D. Cent. Code § 38-08-16.

The ND Hydraulic Fracturing Program contains robust casing requirements to protect North Dakota's groundwater. Motion to Intervene, Helms Decl. ¶ 17. The regulations require at least four layers of casing in a hydraulically fractured well. *See* N.D. Admin. Code §§ 43-02-03-21; 43-02-03-27.1. These casing requirements impose additional structural integrity and monitoring requirements on each type of well. Hydraulically fractured wells must be pressure tested, and wellhead and blowout preventer protection systems must be installed during hydraulic fracturing if the pressure rating does not meet certain specifications. *Id.* at § 43-02-03-27.1. If the intermediate casing level fails any of these integrity tests, the operator must install a fifth level of casing called a frac string to ensure that at least four layers of protection are maintained. *Id.*

After the hydraulic fracturing is complete, North Dakota's oil and gas regulations require that "[a]ll waste material associated with exploration or production of oil and gas must be properly disposed of in an authorized facility" in accordance with all applicable laws. *Id.* at § 43-02-03-19.2. The NDIC field inspectors track the flowback water from the time it leaves the drilling well to the time it arrives at the disposal well using a combination of monthly reports and inspections. During this time, the flowback water is normally stored in closed-top above ground tanks, but may be temporarily stored in lined pits or open receptacles. *Id.* at § 43-02-03-19.3. This tracking system enables the NDIC to know the specific volume of flowback water that left each well where hydraulic fracturing occurred and whether that water was transported to the disposal well by pipe or by truck. The monthly disposal well reports must identify the source of water and whether transported by pipeline or truck.

II. The North Dakota Underground Injection Control Program.

The NDIC also regulates the flowback water produced by hydraulic fracturing through the ND UIC Program. N.D. Admin. Code Chapter 43-02-05. The NDIC has effectively administered the ND UIC Program since 1983 pursuant to a primacy delegation from the Environmental Protection Agency ("EPA") under the SDWA. *See* 48 Fed. Reg. 38,237, 38,238 (Aug. 23, 1983); 42 U.S.C. § 300h-1(b)(1) (process for delegation of SDWA authority to the states).

The ND UIC Program regulates the post-fracturing production of flowback water after the water is removed from the production site. Motion to Intervene, Helms Decl. ¶ 24. Once the water is removed from a fractured well, the ND UIC Program inspectors ensure that the water is properly monitored and disposed of through underground injection. *Id*. at ¶ 26. Under the ND UIC Program, any party seeking to utilize an underground injection must first obtain a permit from the NDIC. N.D. Admin. Code § 43-02-05-04(5). The permit application requires information in 21 categories, including the average and maximum volumes of fluid to be injected each day and the average and maximum requested surface injection pressure. *Id.* at § 43-02-05-04(1). After receiving and reviewing this information, the NDIC determines whether the proposed injection will endanger any underground drinking water source. *Id.* at § 43-02-05-04(4). The NDIC will issue a permit for the underground injection of hydraulic fracturing fluid only after providing notice and a hearing to the project applicant. *Id.* at § 43-02-05-04(1).

After issuing a permit for an underground injection control well, the NDIC requires the well operator to demonstrate the mechanical integrity of the well before putting it into use. N.D. Admin. Code § 43-02-05-07(1). These wells must be tested for mechanical integrity at least once every five years. *Id.* A well is considered to have mechanical integrity if there is (1) "no significant leak in the casing, tubing, or packer" and (2) "no significant fluid movement into an

underground source of drinking water or an unauthorized zone through vertical channels adjacent to the injection bore." *Id.* North Dakota requires that injection pressure at an injection wellhead meet certain maximum pressure specifications in order to prevent failure of the well bore or confining zones that could cause the fluids to leak into the surrounding aquifer. *See* N.D. Admin. Code § 43-02-05-09.

STANDARD OF REVIEW

Preliminary injunctions are intended to "preserve the relative position of the parties until a trial on the merits can be held." *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981). In order to obtain a preliminary injunction in the Tenth Circuit, a moving party must show: (1) it is likely to succeed on the merits; (2) it is likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in its favor; and (4) an injunction is in the public interest. *Warner v. Gross*, 776 F.3d 721, 728 (10th Cir. 2015).

In the Tenth Circuit, courts apply a modified test for a preliminary injunction if the moving party makes the requisite showing with respect to irreparable harm, balance of the harm, and public interest factors.[1] *Davis v. Mineta*, 302 F.3d 1104, 1111 (10th Cir. 2002). Under the modified test, success on the merits is demonstrated by showing "that questions going to the merits are so serious, substantial, difficult, and doubtful as to make the issue ripe for litigation and deserving of more deliberate investigation." *Greater Yellowstone Coal. v. Flowers*, 321 F.3d 1250, 1256 (10th Cir. 2003). When seeking the issuance of a preliminary injunction, "because a showing of probable irreparable harm is the single most important prerequisite . . . the moving party must first demonstrate that such injury is likely before the other requirements for issuance of an injunction will be considered." *Diocese of Cheyenne v. Sebelius*, 21 F. Supp. 3d 1215,

[1] North Dakota satisfies both the modified test and the traditional test for obtaining a preliminary injunction.

1221 (D. Wyo. 2014) (citing *Dominion Video Satellite, Inc. v. Echostar Satellite Corp.*, 356 F.3d 1256, 1260 (10th Cir. 2004)).

ARGUMENT

I. The State of North Dakota will Suffer Irreparable Harm in the Absence of an Injunction.

To obtain a preliminary injunction, the movant must demonstrate that "irreparable injury is *likely* in the absence of an injunction." *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 22 (2008) (emphasis in original). To satisfy the irreparable harm requirement, there must be a "*significant risk* that he or she will experience harm that cannot be compensated after the fact by monetary damages." *Greater Yellowstone Coal.*, 321 F.3d at 1258 (emphasis in original). The relevant inquiry is "whether such harm is likely to occur before the district court rules on the merits." *RoDa Drilling Co. v. Siegal*, 552 F.3d 1203, 1210 (10th Cir. 2009).

North Dakota's irreparable harm in this case rests on three independent bases: (1) the BLM Rule deprives North Dakota of its sovereign authority, interests, and policies and deprivation of these interests during the pendency of this action is irreparable; (2) North Dakota will suffer irreparable economic loss because the BLM Rule will immediately harm the State's budget in the impending and future budget years; and (3) even if it is successful on the merits of its challenge to the BLM Rule, North Dakota will not be able to recover economic damages from the federal government to compensate the State for its loss of revenue during the pendency of this action.

First, the BLM Rule improperly infringes on North Dakota's sovereign interests in administering its own comprehensive regulatory programs governing hydraulic fracturing and ensuring the responsible development of oil and gas resources within its borders to adequately

protect the State's groundwater resources.[2] It is well-established in the Tenth Circuit that a federal agency's temporary infringement upon a state's sovereignty constitutes irreparable harm. *Kansas v. United States*, 249 F.3d 1213, 1227-28 (10th Cir. 2001). When a federal agency's decision places a state's "sovereign interests and public policies at stake, [the Tenth Circuit] deem[s] the harm the State stands to suffer as irreparable if deprived of those interests without first having a full and fair opportunity to be heard on the merits." *Id*. at 1227. The court in *Kansas* held that "the State of Kansas' interests in adjudicating the applicability of [the Indian Gaming Regulatory Act], and the ramification of such adjudication" as it applied to a federal administrative decision affecting a single 35-acre parcel of land "are sufficient to establish the real likelihood of irreparable harm if the Defendants' [administrative decision] go[es] forward at this stage of the litigation." *Id*. at 1228.[3]

This District has applied this doctrine to preliminarily enjoin a federal regulation that infringed upon a state's sovereign interests. In *International Snowmobile Manufacturer's Association v. Norton*, the United States District Court for the District of Wyoming held that a 2001 National Park Service regulation banning the recreational use of snowmobiles in Yellowstone and Grand Teton National Parks threatened the State of Wyoming's ability to manage its Wyoming Trails Program and to manage fish populations in Grand Teton National Park. 340 F.Supp.2d 1278, 1287 (D. Wyo. 2004). The court concluded that irreparable harm

[2] The BLM's disregard for federalism concerns is underscored by the agency's refusal to conduct a federalism review of the BLM Rule as required by Executive Order 13132. 80 Fed. Reg. at 16210-11.

[3] The Tenth Circuit has held that an infringement on sovereign rights is sufficient to establish irreparable harm in other contexts, as well. *See Kiowa Indian Tribe of Oklahoma v. Hoover*, 150 F.3d 1163, 1171 (10th Cir. 1998) (finding infringement on a tribe's sovereign interests constituted "irreparable harm as a matter of law").

would result from the regulation's threatened "infringements on state sovereignty" and accordingly, a preliminary injunction was warranted. *Id*.

Other courts have applied this precedent to enjoin federal regulations that impeded a state's administrative authority. For example, the United States District Court for the District of Columbia recently adopted this reasoning. *Akiachak Native Cmty. v. Jewell*, 995 F.Supp.2d 7, 17 (D.D.C. 2014) (noting favorably the District of Wyoming court's ruling that "infringement on Wyoming's state sovereignty in managing its trails and fish populations caused by a federal regulation constituted irreparable harm"). In *Akiachak Native Community*, the State of Alaska sought a preliminary injunction during the pendency of a challenge to a federal regulation which would allow the United States to take Alaska state lands into trust for individual Indians and tribes. *Id*. Persuaded by the holding in *International Snowmobile Manufacturer's Association*, the court granted the preliminary injunction as "necessary to prevent the irreparable harm to state sovereignty and state management of land that will befall Alaska if state land begins to be taken into trust for the Tribes." *Id*.

So too, the implementation of the BLM Rule will irreparably harm North Dakota's sovereign interests by disrupting: (1) North Dakota's regulation of hydraulic fracturing activities within spacing units consisting of federal and nonfederal mineral interests; and (2) North Dakota's ability to regulate activities that have the potential to affect the State's groundwater aquifers. Due to North Dakota's unique history of land ownership, a significant portion of the State consists of split estate lands that will be adversely affected by the BLM Rule. Exhibit C, Helms Decl. ¶ 8-10. Although land ownership in North Dakota historically consisted almost entirely of private and state lands, the federal government acquired significant land parcels during the depression and drought years of the 1930s through foreclosures under the Federal

Land Bank and the Bankhead Jones Act. *Id*. at ¶ 9. As a result of these foreclosures, the federal government acquired ownership over the surface and mineral estates. *Id*. The federal government subsequently sold much of the surface estate, while maintaining ownership over the underlying federal mineral estate. *Id*. As a result, there are a large number of small federally-owned mineral estates in North Dakota that "impact more than 30% of the oil and gas spacing units that utilize hydraulic fracturing." *Id*.

Due to the BLM Rule's expansive application to all lands consisting of either federal surface or federal minerals, the BLM Rule improperly infringes upon North Dakota's sovereign regulatory jurisdiction. The State of North Dakota has clear and unequivocal jurisdiction to regulate oil and gas development on private and state lands within its boundaries. N.D. Cent. Code § 38-08-04. Indeed, the State of North Dakota has a sovereign interest in ensuring the efficient development of oil and gas resources and to protect the economic well-being of the State and its citizens. *Id*. at § 38-08-01. As discussed *infra* at 12, the additional regulatory obligations imposed by the BLM Rule will result in serious permitting delays for oil and gas operations. In light of the significant split estate lands within North Dakota, the delay on federal lands from implementation of the BLM Rule will consequently frustrate the development of oil and gas within the entirety of the spacing unit for all units containing a combination of federal, state, or private lands. Thus, the BLM Rule will substantially interfere with the development of oil and gas resources on state and private lands, which development is squarely within the authority of North Dakota to regulate.

Implementation of the BLM Rule additionally interferes with North Dakota's sovereign interest to regulate activities with the potential to affect the State's surface and groundwater resources. North Dakota is uniquely positioned to regulate hydraulic fracturing because North

Dakota—and not the BLM or other federal government agency—has exclusive ownership rights over groundwater within the state. N.D. Cent. Code § 61-01-01 ("[a]ll waters within the limits of the state from the following sources of water supply belong to the public[:] waters under the surface of the earth whether such waters flow in defined subterranean channels or are diffused percolating underground water"). These water supplies are state resources managed exclusively pursuant to North Dakota water law. *See* N.D. Admin. Code Chapter 89-01-01. In the face of North Dakota's unambiguous ownership and control of subsurface water, BLM states that it promulgated the BLM Rule in part "[t]o ensure that wells are properly constructed to protect water supplies." 80 Fed. Reg. at 16128. As a result, BLM's assertion of exclusive authority over subsurface activities with the potential to affect the State's water resources is an affront to North Dakota's sovereign interests.

Second, implementation of the BLM Rule during the pendency of this action will have irreparable and far-reaching consequences on North Dakota's economic interests in the form of substantially decreased royalties and taxes. While economic loss—on its own—does not ordinarily constitute irreparable harm because such losses may be later recovered through money damages, *Crowe & Dunley, P.C. v. Stidham*, 640 F.3d 1140, 1157 (10th Cir. 2011), this rule does not apply to a state alleging economic harm because "such a stringent test could never be met." *Oklahoma ex rel. Oklahoma Tax Com'n v. Int'l Registration Plan, Inc.*, 264 F. Supp. 2d 990, 996 (W.D. Okla. 2003). When a state alleges economic harm occasioned from the loss of tax or royalty income, the appropriate test is "whether the financial loss is temporary or not." *Id.*

In determining whether an economic loss is temporary, a state's revenue shortfall in a particular year may constitute a permanent and irreparable economic loss because it has "a substantial impact beyond that encountered in the usual commercial or other private context."

Id. at 997. The unique economic hardship results because a state's revenue shortfalls "impact not only the funds available to spend in that year but also impact the amount budgeted in future years" and "[t]he impact on critical state services from any significant revenue shortfall may thus have a pervasive impact spreading over several years." *Id*.

This is precisely the type of unrecoverable economic harm that North Dakota will incur if the BLM Rule is allowed to go into effect. The additional regulatory burden imposed by the BLM Rule will result in a substantial delay—ranging from 6 to 10 months—to permit oil and gas wells for development. Exhibit C, Helms Decl. ¶ 14-15. This delay will double current permitting times. *Id*. These resulting delays will cut the production of oil and gas in half and will consequently reduce the royalties and taxes North Dakota will receive in the coming fiscal year (2016) in the amount of $300 million. *Id*. at ¶ 16.

North Dakota generates revenue from both the oil and gas production tax and the oil extraction tax. N.D. Cent. Code, Chapters 57-51 and 57-51.1. The gross production tax applies to oil at a rate of 5 percent of the gross value at the well for all oil produced within North Dakota. N.D. Cent. Code § 57-51-02; Exhibit D, Declaration of Kevin Schatz, Supervisor of the Motor Fuels, Oil & Gas, and Estate Tax Section of the Tax Commissioner's Office ("Schatz Decl."), ¶ 8. Under the oil extraction tax (an excise tax), the extraction of oil is generally taxed at a rate of six and one-half percent of the gross value at the well. N.D. Cent. Code § 57-51.1-02; Exhibit D, Schatz Decl. ¶ 9-10. The tax revenue generated from oil and gas development on federally-owned land is significant. Over the last ten years, North Dakota has received a total of approximately $5.72 billion under the oil and gas production tax and approximately $6.27 billion under the oil extraction tax. Exhibit D, Schatz Decl. ¶ 11.

Additionally, North Dakota receives revenue from the collection of royalties for oil and gas development on federal lands. Federal oil and gas leases require lessees to pay to the United States 12.5% in royalties of the value of oil and gas produced. 43 C.F.R. § 3103.3-1; *see* Exhibit E Declaration of Dennis Roller, Audit Manager for the Division of Royalty Audits ("Roller Decl."), ¶ 9. After receiving these royalty payments from oil and gas produced on public lands, the federal government disburses 48% of the royalties to the state in which the oil and gas was produced. 30 U.S.C. § 191(b); Exhibit E, Roller Decl. ¶ 9. In North Dakota, the State then disburses 50% of the royalties received to counties within North Dakota. N.D. Cent. Code § 15.1-27-25(7); Exhibit E, Roller Decl. ¶ 9. For lands designated as federal flood control lands, North Dakota receives 75% of the federal mineral revenue with 100% of the revenue disbursed to counties within North Dakota from which the mineral revenue was produced. Exhibit E, Roller Decl. ¶ 9. For acquired lands, 25% of the federal mineral revenue is transferred to counties in North Dakota from which the mineral revenue was produced. *Id*.

Each year, North Dakota collects $72 million in royalties on federal lands. Exhibit C, Helms Decl. ¶ 13. Over the next thirty years, based on oil price projections from the Energy Information Agency, North Dakota estimates that it would otherwise collect $5 billion in royalty revenue. *Id*. In addition to receiving royalties, North Dakota receives payments in the form of lease rentals and bonus payments. Exhibit E, Roller Decl. ¶ 11. Over the last ten years, North Dakota has received $530 million in royalties from federally-owned lands. *Id*. at ¶ 10. In addition, the State disbursed a total of approximately $41 million in federal oil and gas lease payments from flood control lands and acquired lands in 2014 to fund school districts, roads, and townships in North Dakota. *Id*. at ¶ 12-13.

The decreased royalty and tax revenue stemming from implementation of BLM's Rule in the upcoming year will have a cascading adverse effect on North Dakota's budget in subsequent years. Under North Dakota's biennial budget, revenue projections must be made more than two years in advance and a single year of decreased revenue extends into revenue projections up to four years in the future. Exhibit C, Helms Decl. ¶ 16. As such, the decrease in revenue in the next fiscal year will in turn diminish North Dakota's revenue for numerous succeeding years. *Id.* at ¶ 17. North Dakota's biennial budget has already been established for fiscal years 2016-2017. *Id*. ¶ 16. North Dakota did not contemplate or incorporate the anticipated impact of BLM's Rule into its budget for fiscal year 2016. *Id*. As a result, North Dakota anticipates that it will suffer the loss of royalties and taxes in the amount of $600 million over the next biennium, $1.2 billion over the next two biennium, and $20 billion over the next 30 years. *Id*. This resulting economic harm is staggering.

In addition to the cascading adverse effect of revenue loss on its budget, North Dakota stands to lose substantial additional revenue due to permanent relocation of operators on federal lands. Exhibit C, Helms Decl. at ¶ 18. It is estimated that 10 out of 22 significant oil and gas operators on federal lands will permanently relocate to avoid the delay and additional compliance associated with BLM's unnecessarily burdensome and duplicative hydraulic fracturing regulations. *Id*. This will result in the loss of royalties and taxes in the amount of $1.5 billion over 2 years. *Id*. These adverse facts undeniably demonstrate the gravity of North Dakota's harm resulting from implementation of the BLM Rule.

Like the court's finding in *Oklahoma Tax Commission*, North Dakota will suffer a unique economic harm because the tremendous losses of revenue from taxes and royalties will directly impact funding for the provision of "critical state services." 264 F. Supp. 2d at 997. The funds

collected from royalties are distributed into funds which make financial distributions to school districts, public facilities and services, roads, and townships. Exhibit E, Roller Decl. ¶ 11-13. These funds finance health districts, emergency management, human services, roads, schools, and law enforcement. Exhibit C, Helms Decl. ¶ 17. With respect to taxes, the oil extraction tax development fund is used primarily to fund elementary and secondary education in North Dakota and to provide water development and energy conservation and development programs for municipalities and rural areas. Exhibit F, Declaration of Kelly Schmidt, State Treasurer of the Office of State Treasurer ("Schmidt Decl."), ¶ 8. With respect to the oil and gas production tax, that tax is dispersed to provide funding for several state services such as local cities supporting oil and gas production, school districts, the Oil and Gas Impact Grant Fund, the North Dakota Outdoor Heritage Fund, and the Abandoned Oil and Gas Well Plugging and Site Reclamation Fund. *Id*. at ¶ 10. This tremendous interference with North Dakota's ability to provide important public services for its citizens is a clear representation of the irreparable harm that will occur from implementation of the BLM Rule.

Third, North Dakota's economic harm is irreparable because reduced royalty and tax revenue cannot be recovered from BLM. The threat of unrecoverable economic losses is sufficient to warrant the issuance of a preliminary injunction. *Iowa Utils. Bd. v. FCC*, 109 F.3d 418, 426 (8th Cir. 1996) ("threat of unrecoverable economic loss, however, does qualify as irreparable harm"). North Dakota's challenge to the BLM Rule is brought under the APA, which allows a party to challenge final agency action and seek "relief other than money damages." 5 U.S.C. § 702. Because the APA does not afford North Dakota—or any other petitioner—a mechanism for recovering economic damages caused by the BLM Rule following a successful adjudication of the merits of petitioners' claims, those damages are considered to be

"irreparable" as a matter of law. *Chamber of Commerce v. Edmondson*, 594 F.3d 742, 770-71 (10th Cir. 2010) ("[i]mposition of monetary damages that cannot later be recovered for reasons such as sovereign immunity constitutes irreparable injury").

Because the State of North Dakota will suffer irreparable harm prior to receiving a "full and fair opportunity to be heard on the merits," it is imperative that this Court immediately issue a preliminary injunction prohibiting the implementation of the BLM Rule until the merits of North Dakota's (and the other petitioners') Petitions are resolved. *Kansas,* 249 F.3d at 1227-28.

II. The Balance of Harms Weighs in Favor of North Dakota

The key question in the balance of harms inquiry is whether "the threatened injury to the movant outweighs the injury to the other party under the preliminary injunction." *Kikumura v. Hurley,* 242 F.3d 950, 955 (10th Cir. 2001). As discussed *supra* at 7-11, the implementation of the BLM Rule will cause North Dakota tremendous harm to its sovereign interests, the interests of its citizens, and to the North Dakota treasury. On its own, the unrecoverable economic harm—amounting to $300 million a year in economic losses—justifies the immediate issuance of a preliminary injunction. In contrast with the considerable harm that will befall North Dakota if the BLM Rule is implemented, BLM will suffer no harm from preservation of the status quo until the resolution of Petitioners' claims on the merits. Specifically, BLM will not suffer any harm because: (1) groundwater resources, such as underground aquifers, are already adequately protected by North Dakota's comprehensive hydraulic fracturing and other regulations; and (2) BLM's desire to conduct preparatory work during the pendency of litigation does not constitute harm.

First, BLM cannot demonstrate that any environmental harm will result if hydraulic fracturing continues under North Dakota's existing regulatory scheme during the pendency of this litigation. As discussed *supra* at 2-6, North Dakota has established comprehensive

regulations governing the use of hydraulic fracturing and these regulations are protecting North Dakota's groundwater resources. *See also* Motion to Intervene, Helms Decl. ¶¶ 15-28. BLM does not allege in the BLM Rule that North Dakota's Hydraulic Fracturing Program and ND UIC Program do not adequately protect the State's underground water supply. As such, BLM will suffer no environmental harm from the issuance of a preliminary injunction of BLM's Rule.

In addition, in BLM's Response to IPAA's Motion for Preliminary Injunction, BLM contends that it will suffer irreparable harm "caused by a disruption of the ongoing implementation of the BLM Rule." BLM Response to IPAA Motion for Preliminary Injunction at 57, ECF No. 20, Case No. 15-cv-41-SWS (June 1, 2015). Specifically, BLM claims that an injunction will disrupt "internal BLM implementation efforts as well as ongoing coordination with states and tribal authorities." *Id.* However, the Fifth Circuit recently held that delayed administrative agency implementation efforts cannot constitute irreparable harm. *Texas v. United States*, 2015 U.S. App. LEXIS 8657, 74-75 (5th Cir. May 26, 2015). In upholding the district court's issuance of an injunction against implementation of the Deferred Action for Childhood Arrivals program, the Fifth Circuit held that the "government's allegation that the injunction is delaying preparatory work is unpersuasive [because] [i]njunctions often cause delays, and the government can resume work if it prevails on the merits." *Id.* Moreover, the fact that BLM has expended substantial time and resources to implement a new regulatory scheme bears no relationship to the harm the BLM would allegedly suffer from a *delay* of that implementation during the pendency of litigation. Indeed, if BLM ultimately prevails in defending against Petitioners' challenges, BLM may resume its efforts to implement the BLM Rule.

Accordingly, the balance of the harms warrants preservation of the status quo pending resolution of North Dakota and other Petitioners' claims on the merits.

III. North Dakota is Likely to Succeed on the Merits.

Because North Dakota has adequately demonstrated that implementation of the BLM Rule will inflict irreparable harm upon North Dakota's sovereign and economic interests and that the balance of the harms and public interest favors an injunction, this Court should apply the modified test for a preliminary injunction. Under the Tenth Circuit's modified test, success on the merits is demonstrated by showing "the questions going to the merits are so serious, substantial, difficult, and doubtful as to make the issue ripe for litigation and deserving of more deliberate investigation." *Greater Yellowstone Coal.*, 321 F.3d at 1256.

A. BLM Lacks Authority for the BLM Rule.

The BLM Rule far exceeds BLM's delegated statutory authority to protect federal surface or lease federal minerals and impermissibly encroaches on North Dakota's primary authority to regulate hydraulic fracturing and underground sources of drinking water (USDWs) within its boundaries. As recognized by the Supreme Court, states have "traditional and primary power over land and water use." *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 174 (2001). As indicated above, North Dakota has primary authority over water resources within its boundaries. North Dakota's Constitution recognizes state ownership of waters of the state and pursuant to North Dakota statute, the North Dakota Water Commission has exclusive authority over groundwater resources. *See* N.D. Const. Art. XI, § 3 and N.D. Cent. Code § 61-01-01(2), respectively. North Dakota has also enacted its own laws and regulations to ensure adequate groundwater protection and safe hydraulic fracturing practices. The stated purpose for such programs is to "adequately protect and isolate all formations containing water."

See, e.g., N.D. Admin. Code. § 43-02-03-21. North Dakota administers these programs on private, state, federal, and tribal lands in North Dakota.

North Dakota's authority over its water resources has also been recognized by Congress in the federal Clean Water Act: "It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States ... to plan the development and use ... of land and water resources ...." 33 U.S.C. § 1251(b). The Supreme Court has further recognized, "[w]here Congress has expressly addressed the question of whether federal entities must abide by state water law, it has almost invariably deferred to the state law." *United States v. New Mexico*, 438 U.S. 696, 701 (1978).

The BLM Rule interferes with North Dakota's sovereign interests and authority to exercise and maintain control over its groundwater resources and for regulating hydraulic fracturing by ignoring the plain text and structure of the SDWA and by relying on untenable interpretations of BLM's governing statutes. The BLM Rule does this despite the Supreme Court's admonition that even "[i]n the face of [statutory] ambiguity, we will not attribute to Congress an intent to intrude on state governmental functions . . . ." *Gregory v. Ashcroft*, 501 U.S. 452, 470 (1991). Yet this is exactly what the BLM Rule does in North Dakota by impermissibly intruding on state government functions clearly granted to North Dakota through the SDWA and reserved to North Dakota by the tenth amendment to the Constitution of the United States. North Dakota's own Constitution and laws demonstrate the State's intent to fulfill its regulatory prerogatives. Moreover, the Supreme Court forbids federal agency interference with state powers unless explicitly granted by statute.

> Where an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result. . . . This requirement stems from . . . our assumption that Congress does not casually authorize

> administrative agencies to interpret a statute to push the limit of congressional authority. This concern is heightened where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power. See *United States v. Bass*, 404 U.S. 336, 349, 92 S.Ct. 515, 30 L.Ed.2d 488 (1971) ("[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance").

Solid Waste Agency of N. Cook Cnty., 531 U.S. at 172-73 (some citations omitted). In the absence of a clear congressional grant of authority to do so, BLM lacks authority to displace North Dakota's sovereign authority to regulate oil and gas development (including hydraulic fracturing) and groundwater protection measures on both Indian lands and the prevalent split-estate lands in North Dakota, where the federal government's only property interest is in the mineral estate, not in the surface estate or USDWs.

B. The Safe Drinking Water Act.

The SDWA governs federal authority over hydraulic fracturing and protection of USDWs. In 1974—two years prior to the enactment of the Federal Land Policy and Management Act of 1976 ("FLPMA")—Congress enacted the SDWA to set forth a system of cooperative federalism for the principal objective of protecting underground water sources. *See* Pub. L. No. 93-523, 88 Stat. 1660 (1974) (codified as amended at 42 U.S.C. §§ 300f - 300j-26 (2012)). In Part C of the SDWA, 42 U.S.C. §§ 300h to 300h-8, Congress established a comprehensive scheme to regulate *all* underground injection of contaminants, including hydraulic fracturing (the UIC Program). *See* H.R. Rep. No. 93-1185, at 6481 (1974) (explaining that the UIC Program covers "injection techniques to increase production"); *see also Legal Envtl. Assistance Found., Inc. v. U.S. Envtl. Prot. Agency*, 118 F.3d 1467, 1474 (11th Cir. 1997) ("it is clear that Congress dictated that *all* underground injection be regulated under the UIC programs") (citing 42 U.S.C. § 300h(b)(1)(A)) (emphasis in original). Congress understood Part

C of the SDWA to completely occupy the field of underground injection regulation, including hydraulic fracturing.

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

> In prescribing regulations under this section the Administrator shall, to the extent feasible, *avoid promulgation of requirements which would unnecessarily disrupt State underground injection control programs* which are in effect and being enforced in a substantial number of States. . . .
>
> For the purpose of this subparagraph, *a regulation prescribed by the Administrator under this section shall be deemed unnecessary only if, without such regulation, underground sources of drinking water will not be endangered by an underground injection*.

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

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

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

42 U.S.C. § 300j-6(a)(4) (emphasis added). Activities governed by the UIC Program include "the protection of such wellhead areas," which originally included hydraulically fractured well sites. *Id*. at § 300j-6(a). Congress therefore dictated that regulators treat "underground injection

wells on Federal property the same as any other … underground injection well and will enforce applicable regulations to the same extent and under the same procedures." H.R. Rep. No. 93-1185, at 6494 (1974).

1. The SDWA prohibits the type of federal regulatory interference contained in the BLM Rule.

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

Even before the EP Act became law, North Dakota had a comprehensive and successful safety-based regulatory program governing hydraulic fracturing on state, tribal, and federal lands. In fact, both BLM and the tribes on Fort Berthold have executed agreements with North Dakota to ensure safe and effective governance of hydraulic fracturing on all lands within the state. Exhibit C, Helms Decl. ¶ 11. Pursuant to the SDWA, North Dakota submitted an application for primacy over the UIC Program governing hydraulic fracturing injection wells on July 19, 1982. *See* 48 Fed. Reg. at 38,238. EPA approved North Dakota's primary enforcement authority on August 23, 1983. *Id.*; *see also* 42 U.S.C. § 300h-1.

By now evicting the State from regulating in certain areas it has long done so, the BLM Rule impermissibly intrudes on the cooperative federalism structure established under the SDWA and violates North Dakota's sovereign regulatory authority. Far from being authorized by BLM's governing statutes, such interference is explicitly prohibited by the SDWA, judicial precedent, and common law traditions of cooperative federalism.

2. North Dakota has comprehensive and protective regulations governing oil and gas development and hydraulic fracturing.

As discussed *supra* at 2-7, North Dakota's comprehensive and successful regulation of hydraulic fracturing embodies the role intended for states like North Dakota under the system of cooperative federalism established through the SDWA. The first oil well in North Dakota was drilled in 1951. *See* American Oil & Gas Historical Society, First North Dakota Oil Well (last accessed June 8, 2015), http://aoghs.org/states/north-dakota-williston-basin/. Two years later, in 1953, North Dakota enacted the Act for the Control of Oil and Gas Resources (the "O&G Act"). *See* N.D. Cent. Code § 38-08-01. North Dakota has exercised its sovereign authority to regulate oil and gas development since this time pursuant to the O&G Act. The O&G Act mandates "that the greatest possible economic recovery of oil and gas be obtained within the state to the end that the landowners, the royalty owners, the producers, and the general public realize and enjoy the greatest possible good from these vital natural resources." *Id.* The NDIC implemented oil and gas conservation regulations under the O&G Act in 1983. *See* N.D. Admin. Code Chapter 43-02-03.

The NDIC has also directly implemented a UIC Program since obtaining primacy in 1983. *See* N.D. Admin. Code Chapter 43-02-05; North Dakota Underground Injection Control Program Memorandum of Agreement between the State of North Dakota Industrial Commission

Oil & Gas Division and the U.S. EPA (Sept. 1, 1989). The NDIC manages flowback water from hydraulic fracture sites pursuant to the UIC Program. Motion to Intervene, Helms Decl. ¶ 24.

North Dakota's original UIC Program regulations allowed for "Perforating, Fracturing, and Chemically Treating Wells" and included three key provisions: (1) requirements for pretreatment casing pressure testing and operations to protect wellhead and casing strings during treatment of a production well; (2) a requirement that operators immediately notify the NDIC if fracturing a well caused damage; and (3) provisions requiring plugging of a well if fracturing resulted in irreparable damage that threatened the well's mechanical integrity. N.D. Admin. Code § 43-02-03-27 (1983).

Hydraulic fracturing became prevalent and productive in North Dakota following the completion of the first commercial horizontal-hydraulic fractured Bakken well in 2006. Exhibit C, Helms Decl. ¶ 8. In response, the North Dakota legislature designated hydraulic fracturing as an acceptable technique to recover oil and natural gas. N.D. Cent. Code § 38-08-25. North Dakota also supplemented its existing regulations under the title of "Hydraulic fracture stimulation." N.D. Admin. Code § 43-02-03-27.1. In conjunction with the O&G Act, these revised regulations provide comprehensive control over hydraulic fracturing practices and enable strong protection of USDWs. Motion to Intervene, Helms Decl. ¶ 15. North Dakota ensures that all underground injections are conducted in accordance with state law by sending NDIC UIC inspectors to conduct monthly monitoring of well construction and underground injection at all disposal wells. During these inspections, the inspectors determine and monitor the exact volume of fluids.

North Dakota's hydraulic fracturing regulations and UIC Program have protected USDWs from endangerment while supporting dramatic economic growth and development in

North Dakota. Motion to Intervene, Helms Decl. ¶ 23. The BLM Rule makes no claim or any suggestion that North Dakota does not effectively protect USDWs. *See, e.g.*, 80 Fed. Reg. at 16152, 16161 (instead discussing successful North Dakota regulations and practices). Once a state has gained primacy, the SDWA restricts federal involvement to correcting ineffective programs and completely exempts federal involvement in regulating hydraulic fracturing. Under the SDWA, EPA cannot exercise federal regulatory jurisdiction over USDWs in North Dakota unless it demonstrates—through rulemaking—that the state has not effectively protected the USDWs. 42 U.S.C. § 300h-1(b)(1)(B)(3). BLM has no role under the SDWA to regulate USDWs or underground injections.

C. The BLM Rule Impermissibly Interferes with the SDWA and North Dakota's Governmental Functions.

While BLM claims it is not interfering with state regulation of hydraulic fracturing or USDWs, the BLM Rule demonstrates otherwise. Such "interference" takes the form of directly displacing the state's regulatory role. The substantive similarity between the provisions in the BLM Rule and the regulations governing hydraulic fracturing and USDWs of North Dakota demonstrates such interference. BLM's equivocation is evident from the following statement:

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

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

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

Id. at 16186 (emphasis added).

It is not credible for BLM to contend that regulation of the same sources, using the same controls, and setting standards for the same practices are anything other than regulation of groundwater in North Dakota—no matter what semantics BLM uses. Even if BLM chooses to label the BLM Rule provisions as "protection" of USDWs rather than as UIC regulations, the BLM Rule displaces or encroaches on North Dakota's regulation of groundwater.

Many provisions of the BLM Rule substantively resemble North Dakota's hydraulic fracturing regulations and UIC requirements. Notably, certain provisions in the BLM Rule are less stringent than North Dakota regulations. In any event, the BLM Rule interferes with all of North Dakota's regulations specifically established to address North Dakota-specific circumstances. Below are several examples that illustrate the similarity of BLM Rule provisions and North Dakota regulations (revealing the lie in BLM's assertions that it is not regulating USDWs) as well as the inferiority of the BLM Rule provisions for operations within North Dakota.

Conflicts between the BLM Rule and North Dakota regulations regarding the annulus pressure allowed during hydraulic fracturing stimulation. (Compare 43 C.F.R. § 3162.3-3(g)(2) with N.D. Admin. Code 43-02-03-27.1 §§ 1(g), 2(i), and 3). North Dakota's regulation of "usable water" takes site and regional geologic conditions into account as opposed to the BLM Rule's standardized approach. (Compare 43 C.F.R. § 3162.3-3(e)(1)(i) with N.D. Admin. Code 43-02-03-21). In opposition to North Dakota's regulations, BLM's casing pressure testing does not address the maximum treating pressure. (Compare 43 C.F.R. § 3162.3-3(f)(1) with N.D.

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

The BLM Rule's treatment of "usable water" demonstrates another conflict, where BLM's one-size-fits-all regulation: (1) encroaches on the regulatory field governed by the SDWA; and (2) is less effective than North Dakota's regulations. The BLM Rule defines the term "usable water" in an attempt to clarify water zones "worthy of protection." *See* 80 Fed. Reg. at 16141-16144. The BLM Rule preamble states:

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

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

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

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

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

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

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

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

D. BLM Lacks Authority to Interfere with North Dakota Regulations Governing Hydraulic Fracturing and Underground Sources of Drinking Water.

1. BLM's governing statutes do not grant authority over hydraulic fracturing or USDWs.

BLM lacks authorization from any explicit statutory authority to overcome the SDWA's provisions granting state authority to regulate USDWs and hydraulic fracturing without federal interference and directing BLM to comply with such regulation. BLM's authority over public lands is derived from specific statutes enacted by Congress, including FLPMA, to ensure that federal lands are managed using principles of multiple use and sustained yield in accordance with land use plans. 43 U.S.C. §§ 1701, 1732. While overlooked by the BLM Rule, FLPMA reinforces the SDWA principle that state authority governs BLM practices involving water and pollution control. Under FLPMA, BLM must "provide for compliance with applicable pollution control laws, including State and Federal air, water, noise, or other pollution standards or implementation plans." 43 U.S.C. § 1712(c)(8).

FLPMA was enacted two years *after* the SDWA. Congress made it clear that FLPMA does not affect "in any way any law governing . . . use of . . . water on public lands," and should not be construed "as superseding, modifying, or repealing . . . existing laws applicable to the

various Federal agencies which are authorized to develop or participate in the development of water resources or to exercise licensing or regulatory functions in relation thereto." Pub. L. No. 94-579, § 701, 90 Stat. 2786 (1976). While BLM claims FLPMA provides the agency with authority for the BLM Rule, FLPMA does not explicitly grant federal authority to regulate hydraulic fracturing or USDWs. Quite the opposite, FLPMA requires BLM to abide by state laws governing such practices.

BLM also claims the Mineral Leasing Act ("MLA") provides it with authority for the BLM Rule. The MLA authorizes BLM to productively develop natural resource deposits. The MLA includes a narrow provision allowing BLM to regulate surface disturbing activities when necessary to enable oil and gas leasing on public lands. 30 U.S.C. § 226(g). Specifically, this statute allows 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 (emphasis added). "Necessary and proper" regulation is cabined by the additional MLA requirement that nothing in the MLA "shall be construed or held to affect the rights of the States or other local authority to exercise any rights which they may have." *Id.*

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

BLM recognizes the federalism problems created by the BLM Rule. *See* 43 C.F.R. § 3162.3-3(k)(2); *see also* 80 Fed. Reg. at 16,130 (claiming the variance provision will "address concerns from states and tribes about possible duplicative efforts"). Under the BLM Rule, a state must seek and obtain BLM approval for a variance by demonstrating that its own regulations are "equal to or more protective than the BLM's rules." 80 Fed. Reg. at 16,130. However, the variance provision is not sufficient to overcome BLM's impermissible interference with North Dakota's sovereign interests and authority.

First, the variance provision places the burden on North Dakota to make demonstrations and obtain approval for the variance: "A State or tribal variance request or decision must specifically identify the regulatory provision(s) of [the BLM Rule] for which the variance is being requested, explain the reason variance is needed, and demonstrate how the operator will satisfy the objectives of the regulation for which the variance is being requested." 43 C.F.R. § 3162.3-3(k)(2). Second, BLM "may approve the variance, or approve it with one or more conditions of approval, only if the BLM determines that the proposed alternative meets or exceeds the objectives of the regulation for which the variance is being requested." *Id.* at § 3162.3-3(k)(3). Instead of BLM complying with North Dakota regulations as required by the SDWA, the variance requirement forces North Dakota to prove its compliance with BLM regulations. The variance provision offers no deference to the judgment of North Dakota regarding the appropriate type and level of protection necessary. And there is no option allowing North Dakota to demonstrate that its rules are superior to the BLM Rule for the context of that state. Nor is there any mechanism for North Dakota to administer all or part of any aspect of the BLM Rule.

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

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

The negative impact of the BLM Rule on the system of cooperative federalism established by the SDWA is just one consequence of BLM exceeding its statutory authority and realm of expertise. The SDWA UIC Program protected USDWs and regulated hydraulic

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

The one-size-fits-all "baseline" standards of the BLM Rule contradict the SDWA. *See* BLM Rule at 16190. State jurisdiction brings North Dakota's sovereign interests to bear when determining the necessary and proper measures to protect USDWs from the risks of hydraulic fracturing. North Dakota is better situated than BLM to determine the balance between numerous interests and arrive at the appropriate type and level of regulation. As the SDWA recognizes, States are uniquely qualified to determine the type and level of protection necessary for waters under their jurisdiction.

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

42 U.S.C. § 300h(b)(3)(A). BLM's one-size-fits-all rule tramples underfoot this provision of the SDWA.

The BLM Rule not only encroaches upon North Dakota's authority but also abolishes a regulatory regime established through tribal sovereign authority. North Dakota and the Three Affiliated Tribes of the Fort Berthold Reservation have executed a cooperative agreement whereby the State of North Dakota works with the Tribal government to regulate oil and gas

operations, including hydraulic fracturing and the protection of USDWs. Exhibit C, Helms Decl. ¶ 11. The BLM Rule will evict North Dakota from this specific regulatory role, frustrating a legal agreement executed by two sovereign authorities. BLM's ouster of North Dakota from this regulatory role represents an egregious intrusion on both North Dakota's and the Three Affiliated Tribes' sovereign authority by the BLM Rule.

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

E. The BLM Rule Cannot Regulate Surface or Groundwater Where Only Federal Ownership of Minerals is Involved.

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

North Dakota has a unique and significant split estate situation which is not accounted for in the BLM Rule. Unlike many western states with large blocks of land where the federal

government owns both the surface and the minerals, the surface and mineral estates in North Dakota were at one time more than 97% private and state owned as a result of the railroad and homestead acts of the late 1800s. Exhibit C, Helms Decl. ¶ 9. However, during the depression and drought years of the 1930s, numerous small tracts in North Dakota went through foreclosure. *Id*. The federal government, through the Federal Land Bank and the Bankhead Jones Act, foreclosed on many farms, taking ownership of both the mineral and surface estates. *Id*. Most surface estates were eventually sold, but the federal government retained some or all of the mineral estates. *Id*. This resulted in a very large number of small federally-owned mineral tracts scattered throughout western North Dakota. Exhibit C, Helms Decl. Attachment 1.

These scattered tracts with federal mineral ownership and private surface ownership impact more than 30% of the oil and gas spacing units in North Dakota that utilize hydraulic fracturing. Exhibit C, Helms Decl. ¶ 9. The enormous amount of split-estate areas result in large areas containing a checkerboard of lands with private or state surface ownership and a mix of federal, state and private mineral ownership. Under the BLM Rule, this checkerboard of split-estates results in BLM regulation of hydraulic fracturing and USDWs on private and state surface lands, based only on BLM ownership of the subsurface minerals. As an example, in a spacing unit where membership consisted of private surface and mineral ownership of all tracts but one, BLM's ownership of a mineral interest in that single tract would be sufficient to subject the entire unit to the BLM Rule. Exhibit C, Helms Decl. Attachment 2. Without any statutory grant of jurisdiction or basis in property rights, BLM asserts authority over private property and the associated state waters. Not only does such authority not exist, the SDWA prohibits such unnecessary federal interference. The private surface owners of these split-estate lands are

citizens of North Dakota and the USDWs under their lands are unquestionably under State jurisdiction, not the BLM.

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

By promulgating duplicate and often conflicting rules to govern hydraulic fracturing and USDWs, BLM impermissibly encroaches on the State's police power, which BLM cannot do unless specifically given such authority under the Constitution. BLM has traditionally claimed broad authority to regulate activities on federal lands under the Property Clause of the United States Constitution. However, in the case of split-estate lands, BLM does not own the surface, which substantially limits its regulatory authority. As an example, North Dakota law limits the surface rights of the mineral owners on split-estates: "[T]he mineral estate owner has no right to use more of, or do more to, the surface estate than is reasonably necessary to explore, develop, and transport the minerals." *Hunt Oil Co. v. Kerbaugh*, 283 N.W.2d 131, 135 (N.D. 1979). Because of the effectiveness and success of North Dakota law governing hydraulic fracturing and protecting USDWs, the BLM Rule regulations impacting the surface, such as the provision allowing storage of flowback fluids in surface pits, do not qualify as "reasonably necessary."

There is direct conflict between BLM's claimed jurisdiction to protect USDWs under private surface and the State's right to exercise jurisdiction over such USDWs. Jurisdiction over the surface land in question is key to determining jurisdiction over USDWs. *Hydro Res., Inc. v. U.S. Envt'l Prot. Agency*, 608 F.3d 1131 (10th Cir. 2010) (finding state UIC jurisdiction based on EPA's erroneous land status determination to give itself jurisdiction over a specific UIC permit). BLM's claimed authority to protect USDWs under surface lands owned by North Dakota or its citizens is even more attenuated than EPA's. EPA, at least, is granted explicit regulatory authority over USDWs in specific situations under the SDWA. BLM, on the other

hand, has no explicit statutory jurisdiction and, on split estate lands, cannot claim any property interest which might conceivably allow it to regulate USDWs.

Where BLM only owns the minerals, it cannot show any harm to its property interests that would come by deferring to North Dakota regulations for hydraulic fracturing. Further, because BLM does not own the USDWs or the associated surface, there is no jurisdictional nexus, and Property Clause authority is significantly lessened. The BLM Rule has no basis or authority to disrupt the regulatory regime established by the state that governs split-estate lands. Instead, BLM's own governing statute, FLPMA, explicitly requires BLM to comply with state environmental regulations. 43 U.S.C. § 1712(c)(8).

IV. Enjoining Implementation of the BLM Rule Favors the Public Interest.

The issuance of a preliminary injunction to enjoin BLM's Rule serves the public interest. In order to obtain a preliminary injunction, the moving party must demonstrate that "the injunction, if issued, will not adversely affect the public interest." *Wilderness Workshop v. Bureau of Land Mgmt.*, 531 F.3d 1220, 1224 (10th Cir. 2008). In this case, the issuance of an immediate preliminary injunction would serve the public interest by maintaining the status quo, avoiding the unwarranted intrusion into the sovereign interests of North Dakota and other states, and preventing needless regulatory uncertainty.

The public has a considerable interest in avoiding regulatory uncertainty. *See, e.g.*, *Texas v. United States*, 2015 LEXIS 18551, 207-09 (S.D. Tex. Feb. 16, 2015). The implementation of BLM's Rule threatens to upend the current hydraulic fracturing regulatory scheme and imposes both additional and duplicative requirements on operators to obtain permits to drill oil and gas wells. *Akiachak Native Cmty.*, 995 F. Supp. 2d at 18 (finding that the application of a regulation in the absence of a preliminary injunction would result in "confusion over land title [which] is not in the public interest"). The initial implementation of BLM's Rule

will generate significant confusion concerning the intersect between the BLM Rule and the State of North Dakota's comprehensive oil and gas regulations. Even more concerning is the regulatory chaos that is certain to result if BLM's Rule is ultimately struck down several years after implementation. For this reason, the public interest favors the protection of businesses—in this case, oil and gas operators—from the application of unlawful regulations. *See Int'l Snowmobile Mfrs. Ass'n*, 304 F.Supp.2d at 1289 (the "[p]ublic interest is served by protecting the business owners … who relied on the [agency's] proposed regulations").

In addition, the public has an important interest in the efficient development of federal oil and gas resources. Oil and gas development generates significant revenue for the state and federal governments in the form of taxes and royalties. Each year, oil and gas development on federal lands in North Dakota generates hundreds of millions of dollars in revenue from oil and gas royalties and taxes. Exhibit E, Roller Decl. ¶ 10; Exhibit D, Schatz Decl. ¶ 11. This revenue is used to fund critical state services such as education, public facilities development, water development and energy conservation projects, and the provision of other important public services. Exhibit F, Schmidt Decl. ¶¶ 8, 10, 12. Presumably the federal government is similarly interested in allowing oil and gas development to generate federal revenue unimpeded by the administrative burdens and delays inherent in BLM's Rule. Ensuring a continued flow of royalty and tax revenue during the course of this litigation will benefit both the state and federal governments.

Courts have also recognized that the generation of revenue from mineral development projects serves the public interest. *See Nat'l Indian Youth Council v. Andrus*, 623 F.2d 694, 696 (10th Cir. 1980). In *National Indian Youth Council v. Andrus*, the Tenth Circuit considered a preliminary injunction in a challenge concerning the validity of a Navajo Nation lease for coal

mining operations on the Navajo Reservation. *Id*. In seeking to invalidate the lease, the Navajo Nation sought an injunction to prevent the coal mining development project. In weighing the public interest factor, the Tenth Circuit found that "the Navajo benefits from the lease" and "will receive approximately $4.58 billion in revenues from the activities of [operations]." *Id*. In addition, "[i]n the first year of mining the Nation will receive about $709,000 in royalties" and "will have needed opportunities of employment available." *Id*. Accordingly, the Court found that revenue generated by minerals development served the public interest and upheld the denial of the preliminary injunction. This is directly applicable to the instant situation where North Dakota stands to lose $300 million per year in royalties and taxes from implementation of the BLM Rule. Exhibit C, Helms Decl. ¶ 16.

Finally, any argument from BLM that heightened environmental protections under BLM's Rule will best serve the public interest is unpersuasive because, as described *supra* at 2-6, adequate groundwater protections are already covered under North Dakota's oil and gas regulations. *See, e.g.*, N.D. Admin. Code. § 43-02-03-21 ("[a]ll wells drilled for oil, natural gas, or injection shall be completed…to adequately protect and isolate all formations containing water"). BLM's Rule adds little value to the environmental protections already in place and thus, BLM assertions concerning the need for heightened environmental protections do not raise legitimate public interest concerns.[4] *See Tribal Village of Akutan v. Hodel*, 859 F.2d 662, 664

[4] The recently-released EPA Hydraulic Fracturing Study should allay public concern that hydraulic fracturing is causing widespread harm to water resources. *See* EPA, Assessment of the Potential Impacts of Hydraulic Fracturing for Oil and Gas on Drinking Water Resources, 80 Fed. Reg. 32111 (June 5, 2015). The BLM cites these unfounded public concerns as one justification behind the BLM Rule: "Rapid expansion of [hydraulic fracturing] and its complexity have caused public concern about whether fracturing can lead to or cause the contamination of underground water sources, whether the chemicals used in fracturing pose risks to human health, and whether there is adequate management of well integrity and the fluids that return to the surface during and after fracturing operation s." 80 Fed. Reg. at 16128; *see also id*. at 16194

(9th Cir. 1988) ("[a]s no danger to the environment stems from the [requested injunction], the public interest in favor of developing oil and gas reserves also weighs on the side of lifting the injunction"); *see also Nat'l Indian Youth Council*, 623 F.2d at 696 (noting the public interest favored coal development where "the possibility of environmental damage is presently minimized").

Accordingly, because clear public interests will be served by enjoining BLM's Rule during the pendency of this litigation, this factor weighs heavily in favor of a preliminary injunction.

CONCLUSION

For the foregoing reasons, an immediate preliminary injunction is warranted to preserve the status quo pending the resolution of Petitioners' claims on the merits. Therefore, North Dakota respectfully requests that the Court grant its Motion for Preliminary Injunction.

Dated this 8th day of June, 2015.

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(section addressing public concern). Unfounded public concerns cannot form the basis for BLM to supplant effective state regulation of the practice. The BLM Rule fails to establish that North Dakota's regulatory program does not protect underground drinking water.

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ATTORNEYS FOR PETITIONER STATE OF NORTH DAKOTA

Exhibit List

Exhibit A – May 13, 2015 Letter from State Petitioners to Asst. Secretary Schneider

Exhibit B – May 27, 2015 Letter from Dept. of Interior Solicitor to State Petitioners

Exhibit C—Lynn Helms Declaration

- Exhibit 1 to Helms Decl. (Map of Norwest ND Fed. Minerals & Affected Drilling Spacing Units)
- Exhibit 2 to Helms Decl. (Diagram of hypothetical spacing unit)

Exhibit D—Kevin Schatz Declaration

Exhibit E—Dennis Roller Declaration

Exhibit F—Kelly Schmidt Declaration

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EXHIBIT A

May 13, 2015

VIA OVERNIGHT COURIER

Hon. Janice Schneider
Assistant Secretary
Land and Minerals Management
U.S. Department of the Interior
1849 C Street, N.W.
Washington, DC 20240

Dear Assistant Secretary Schneider:

On March 26, 2015, you signed a final regulation entitled "Oil and Gas: Hydraulic Fracturing on Federal and Indian Lands" on behalf of the U.S. Department of Interior and the Bureau of Land Management. 80 Fed. Reg. 16128-16222 ("Hydraulic Fracturing Rule"). The Hydraulic Fracturing Rule, which is set to go into effect on June 24, 2015, provides sweeping new restrictions on oil and gas drilling operations on millions of acres of federal and Indian lands.

As you know, the Hydraulic Fracturing Rule was immediately challenged by the State of Wyoming in the United States District Court for the District of Wyoming. *Wyoming v. U.S. Dep't of the Interior*, Case No. 15-cv-43 (filed March 26, 2015). The State of North Dakota moved to intervene in this action as a petitioner shortly after Wyoming's initial challenge was filed. On April 22, 2015, the U.S. District Court granted North Dakota's intervention motion and also granted Wyoming's motion to amend its own petition to add the State of Colorado as a petitioner. Two oil and gas trade associations—the Independent Petroleum Association of America (IPAA) and the Western Energy Alliance (WEA) also challenged the Hydraulic Fracturing Rule, *IPAA v. Jewell*, Case No. 15-cv-41 (filed March 20, 2015). Although initially assigned to a different District Court judge, the IPAA/WEA case has since been transferred to the same District Court judge who was assigned to hear the states' challenges.

Although the states and trade associations promptly filed their petitions challenging the Hydraulic Fracturing Rule, it will necessarily take some time for the Court to resolve the merits of these cases. Under the local rules of the U.S. District Court, the Department of Interior has 90 days from the date it was served with the petitions for review to lodge and serve the administrative record. The parties then have roughly 90 days from the lodging of the

administrative record to complete briefing on the merits of their challenges. Once briefing has been completed, the Court will likely schedule a hearing to hear oral argument on the pending challenges. Even under a fairly aggressive schedule, the pending challenges will likely not be fully briefed and argued for at least 7-9 months.

Under the schedule set by the Department of Interior, the Hydraulic Fracturing Rule will become effective well before the Court has an opportunity to resolve the merits of the significant pending challenges to this Rule. This will cause hardship on states—including North Dakota, Wyoming, and Colorado—as they evaluate the extent to which their own regulatory programs governing oil and gas operations and underground injection activities will be affected by Interior's sweeping new restrictions. The current June 24, 2015 effective date will also place a significant hardship on oil and gas operators as they try to navigate between established state regulatory programs and Interior's new burdensome and conflicting federal requirements. This uncertainty especially threatens those states such as North Dakota, Wyoming, and Colorado that rely on revenues from federal oil and gas development to fund a wide variety of state programs for the benefit of their respective citizens.

In order to avoid these hardships and to give the court an opportunity to resolve the pending challenges to Interior's new Hydraulic Fracturing Rule, we ask that you immediately act to extend the effective date of the Hydraulic Fracturing Rule by at least 9 months. A federal regulation of this scope and significance demands a thorough judicial review before imposing costly and disruptive burdens on the states and their citizens.

Please contact Tom Trenbeath at (701) 328-2210 if you have any questions or wish to discuss this letter.

Sincerely yours,

Wayne Stenehjem
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cc: Hon. Sally Jewell
Secretary

U.S. Department of the Interior
1849 C Street, NW
Washington, DC 20240

Hon. Hilary Tompkins
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U.S. Department of the Interior
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Hon. John Cruden,
Assistant Attorney General
Environmental & Natural Resources Division
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

EXHIBIT B

United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

IN REPLY REFER TO:

MAY 27 2015

Honorable Wayne Stenehjem
Attorney General
State of North Dakota
600 E. Boulevard Avenue
Bismarck, North Dakota 58501

Dear Attorney General Stenehjem:

Thank you for your letter of May 13, 2015, to Assistant Secretary Janice Schneider asking the Department of the Interior (Department) to extend the effective date of the hydraulic fracturing rule by at least nine months. I am responding for Assistant Secretary Schneider and the Department because the Department is in litigation with your State about the hydraulic fracturing rule.

After considering your letter, the Department declines to extend the effective date of the hydraulic fracturing rule. The final rule represents the culmination of a multiple-year public process through which the Department's Bureau of Land Management (BLM) developed common-sense regulations "to ensure the environmentally responsible development of oil and gas resources on Federal and Indian lands . . . ." 80 Fed. Reg. 16,128 (March 26, 2015). As explained in the preamble to the final hydraulic fracturing rule, the effective date has already been lengthened to 90 days after publication in the *Federal Register* instead of the minimum 60 days. As noted in the preamble, although BLM considered longer effective dates, "the public also expects new requirements for hydraulic fracturing to be implemented in a timely manner."

In addition, the final rule includes a transition provision (43 C.F.R. 3162.3-3(a)), which allows the industry time to transition from the previous regulations to the new regulations and to adapt contracts and practices to the rule without causing major disruptions in operations. Postponing those published compliance dates would cause confusion for the public and the industry.

Finally, as summarized in the preamble to the final hydraulic fracturing rule, and as explained in more detail in the Regulatory Impact Analysis for the rule, the Department concludes that implementation of the final rule will not be a significant burden for the industry and will not dissuade development of geologically promising public or Indian lands. For all these reasons, the Department believes that the public interest would not be served by a delay in the effective date of the rule.

The Department recognizes that your State shares with us the objective of properly regulating hydraulic fracturing operations. The BLM looks forward to a continued productive partnership with your State's agencies to achieve our shared goals of safe and environmentally sound production of oil and gas for our nation.

An identical letter has been sent to Attorney General Peter Michael of Wyoming and to Attorney General Cynthia Coffman of Colorado.

If you have any questions, please contact Deputy Solicitor Jack Haugrud at 202-208-4507.

Sincerely,

Hilary C. Tompkins
Solicitor

EXHIBIT C

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Attorneys for Petitioner State of North Dakota

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

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

DECLARATION OF LYNN D. HELMS

I, Lynn D. Helms, state and declare as follows:

1. My name is Lynn D. Helms. I am over 21 years of age and am fully competent and duly authorized to make this Declaration. The facts contained in this Declaration are based on my personal knowledge and are true and correct.

2. I am employed as the Director of the North Dakota Industrial Commission ("NDIC") Department of Mineral Resources ("DMR"). I have been employed by NDIC since July 20, 1998, and have continuously served as the Director of DMR since July 1, 2005.

3. The DMR's Oil and Gas Division administers North Dakota's hydraulic fracturing regulations through two distinct but statutorily-related regulatory programs: comprehensive hydraulic fracturing statutes and regulations ("ND Hydraulic Fracturing Program"), found at N.D. Admin. Code Chapter 43-02-03, and the underground injection control program ("ND UIC Program"), found at N.D. Admin. Code Chapter 43-02-05.

4. As Director of the DMR, I manage and direct all responsibilities of the Oil and Gas Division and the DMR Geological Survey. These responsibilities include administration of the ND Hydraulic Fracturing Program and the ND UIC Program. These responsibilities also include regulation of the drilling, producing, and plugging of wells; the restoration of drilling and production sites; the shooting and chemical treatment of wells, including hydraulic fracturing; the spacing of wells; operations to increase ultimate recovery such as cycling of gas, the maintenance of pressure, and the introduction of gas, water, or other substances into producing formations; disposal of saltwater and oil field wastes through the ND UIC Program; and all other operations for the production of oil or gas.

5. In my current position, I am familiar with the above-captioned litigation brought by the State of Wyoming, the State of North Dakota, and the State of Colorado (collectively

"State Petitioners"), in which Petitioners challenge the Bureau of Land Management's ("BLM") hydraulic fracturing rule ("BLM Rule") as exceeding the BLM's statutory authority and unlawfully interfering with North Dakota's hydraulic fracturing and Underground Injection Control ("UIC") regulations. Petition at ¶ 2-3.

6. The State of North Dakota is ranked 2nd in the United States among all states in the production of oil and gas. North Dakota produces approximately 161 million barrels of oil per year and 205 billion cubic feet of natural gas per year from federal and Indian lands.

7. On these federal and Indian lands within North Dakota, 91% of the oil and gas produced is recovered through the use of hydraulic fracturing.

8. Hydraulic fracturing is used for most current oil and gas development on both federal and non-federal lands in North Dakota. Although oil and gas development in North Dakota has been ongoing since the early 1950s, the use of hydraulic fracturing became more prevalent in North Dakota following the completion of the first commercial horizontal, hydraulically-fractured Bakken well in 2006. Of the lands utilizing hydraulic fracturing for oil and gas development, mineral ownership consists of 85% private lands, 9% federal lands, and 6% state lands. However, many of the private lands in North Dakota that utilize hydraulic fracturing for oil and gas development are split estate lands with more than 30% of the potential development drilling occurring on private surface involving federal minerals and therefore subject to the BLM Rule. Given North Dakota's unique land ownership situation, the BLM Rule will have far-reaching adverse impacts on North Dakota's ability to administer its oil and gas regulatory program and will adversely impact North Dakota's budget even during the pendency of the legal challenge mentioned above. These harms are explained below.

9. North Dakota has a unique history of land ownership that has resulted in a significant portion of North Dakota consisting of split estate lands that will be adversely affected by the BLM Rule. Unlike many western states that contain large blocks of unified federal surface and federal mineral ownership, the surface and mineral estates in North Dakota were at one time more than 97% private and state owned as a result of the railroad and homestead acts of the late 1800s. However, during the depression and drought years of the 1930s, numerous small tracts in North Dakota went through foreclosure. The federal government through the Federal Land Bank and the Bankhead Jones Act foreclosed on many farms taking ownership of both the mineral and surface estates. Many of the surface estates were later sold to private parties, but some or all of the mineral estates were retained by the federal government. This resulted in a very large number of small federally-owned mineral estate tracts scattered throughout western North Dakota. Those federal mineral estates impact more than 30% of the oil and gas spacing units that utilize hydraulic fracturing. The enormous amount of split estate lands affected by the BLM Rule can be seen on the attached map (attached as Exhibit 1) by comparing federal surface management/ownership (cross hatched areas), to the federal mineral ownership (red areas) within well spacing units (gray areas), to the private and state mineral ownership (uncolored areas) in the area around the confluence of the Yellowstone and Missouri Rivers in Williams and McKenzie counties.

10. In North Dakota, there are a few large blocks of federal mineral ownership or trust responsibility where the federal government manages the surface estate through the U.S. Forest Service or Bureau of Indian Affairs. These are on the Dakota Prairie Grasslands in southern McKenzie and northern Billings County as well as on the Fort Berthold Indian Reservation. See map, Exhibit 1. However, even within those areas, the State of North Dakota

owns all water rights and federal mineral ownership is interspersed with a "checkerboard" of private and state mineral or surface ownership. Therefore, virtually all federal management of North Dakota's oil and gas producing region consists of some form of split estate.

11. In order to provide the taxation and regulation certainty required for long term oil and gas investment on Fort Berthold Indian Reservation, the Three Affiliated Tribes and the State of North Dakota entered into a tax and regulatory agreement in 2008, which was amended in 2013, and will be renegotiated in 2015. Under the 2008 agreement, the State provided the same oil and gas regulation as it had traditionally provided on private, state and other federal lands in North Dakota. That regulation included well spacing, well permitting, inspection, and enforcement. Under the 2013 agreement, North Dakota has shared jurisdiction with tribe and federal authorities in those areas. The BLM Rule displaces the State and tribe from exercising their regulatory roles under the agreement by assigning final approval of drilling permits, hydraulic fracturing sundry notices, and variances on any well that penetrates federal or trust minerals to the sole authority of the BLM Authorized Officer.

12. Due to North Dakota's unique history of land ownership discussed above, it is typical for oil and gas spacing units in North Dakota to consist of a combination of federal, state, and private mineral ownership. A diagram of a hypothetical spacing unit with private, state, and federal mineral ownership is attached as Exhibit 2. Even in such circumstances where the federal mineral ownership is small relative to other mineral ownership interests within the spacing unit, all the oil and gas operators within the unit must, as a practical matter, conduct operations in accordance with the rules and guidelines pertaining to the development of federal minerals. In order to comply with the additional obligations imposed by the BLM Rule, operations on spacing units that contain federal minerals will be substantially delayed. In the

context of shared development within a spacing unit, this delay adversely affects the development of all minerals within the unit, including state and private oil and gas minerals. This delay substantially frustrates North Dakota's efforts to produce nonfederal minerals within a spacing unit. North Dakota Century Code § 38-08-01 requires the North Dakota Industrial Commission to support the development, production, and utilization of oil and gas while preventing waste of these resources and protecting the correlative rights of all owners. Using the attached hypothetical spacing unit to illustrate, the BLM Rule imposes federal requirements and permitting timelines on all owners in the west half of the spacing unit. This prevents the NDIC from regulating the orderly development of the spacing unit for prevention of waste and from pooling and protecting the correlative rights of the various owners in the spacing unit.

13. Each year, North Dakota collects $72 million in royalties from the production of oil and gas on federal and Indian lands. Based on oil price projections from the Energy Information Agency, over the next 30 years North Dakota anticipates the collection of approximately $5 billion in royalties from federal and Indian lands. The use of the 30-year projection represents the anticipated life of the resource as it is known today.

14. Given my experience and knowledge of North Dakota's oil and gas permitting procedures and understanding of current timelines for permitting oil and gas wells on both federal and non-federal lands, I estimate that compliance with BLM's hydraulic fracturing regulations will delay oil and gas development in North Dakota by forcing operators on federal and Indian lands to undertake additional compliance obligations. This delay will result from the need for operators to seek approval of hydraulic fracturing operations through a separate sundry notice for wells already permitted or through a greatly-expanded application for a permit to drill ("APD") wells that were not permitted by the effective date of the BLM Rule.

15. Based on my understanding of BLM's current drilling permit approval times, and my understanding that BLM has not hired additional staff in the Dickinson, ND or Miles City, MT BLM field offices to implement the increased requirements of BLM's hydraulic fracturing regulations as they apply to North Dakota oil and gas operations, implementation of the BLM Rule will result in a delay of at least 6 to 10 months for every future oil and gas well drilled on federal or Indian lands in North Dakota. This nearly doubles the permitting time for these wells.

16. This delay will result in approximately one-half the rate of development and in turn result in decreased royalties and taxes in the amount of $300 million in the coming fiscal year (2016), which runs from July 1, 2015 through June 30, 2016. North Dakota has already established its biennial budget for fiscal years 2015-2017. The budget estimated annual royalties and taxes in the amount of $600 million. Because the impacts of the BLM Rule were not contemplated in the biennial budget for fiscal years 2016-2017, North Dakota's budget does not account for the anticipated decrease in royalties and taxes resulting from the implementation of the BLM Rule. The anticipated loss in royalties and taxes is estimated to be $600 million over the next biennium, $1.2 billion over the next two biennium, and $20 billion over the next 30 years. This estimate takes into account recent adjustments to North Dakota's oil extraction tax.

17. Because North Dakota operates on a biennial budget, a single year of decreased revenue at the beginning of the biennium adversely impacts revenue for both fiscal years in that biennium. Likewise, because the state budget for the next biennium relies heavily on actual revenue from the previous biennium, decreased revenue in one year can adversely impact budget projections, and corresponding appropriations, for four years or more. As such, the decrease in revenue in the coming fiscal year (FY 2016) will in turn diminish North Dakota's revenue and appropriations for several succeeding years. Because royalty revenue funds are shared with the

counties in North Dakota, any decrease in royalty revenue will adversely affect critical funding sources for services such as health districts, emergency management, human services, roads, schools, and law enforcement.

18. In addition, I estimate that a number of oil and gas operators in North Dakota will refocus their planned drilling activities to non-federal lands rather than confront the substantial delay and additional costs of complying with the BLM Rule. There are currently 22 companies with significant oil and gas operations on federal and Indian lands in North Dakota. It is estimated that 10 of these current 22 operators will relocate from North Dakota as a result of the BLM Rule because their only North Dakota operations are located on Indian lands and leases are already held by production and as a result, the State of North Dakota will permanently lose $9.4 billion in royalties and taxes. In the near term, the other 12 operators can shift capital investment to state and private lands, but the delay or loss of full development on federal and Indian lands will result in significant loss of oil and gas resources and associated revenues estimated at $1.5 billion over 2 years.

19. The permanent relocation of numerous oil and gas operators due to implementation of the BLM Rule will also result in the loss of employment. It is estimated that North Dakota will lose 1,900 jobs from the relocation of oil and gas operations due to the implementation of the BLM Rule. This estimate was derived from a study done by the North Dakota Department of Mineral Resources in conjunction with North Dakota State University Department of Agribusiness and Applied Economics, and the Vision West project. This study looked at the average number of jobs per drilling rig and producing well in North Dakota, and how many of those jobs would be lost as a result of the BLM Rule.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 8th, 2015.

Lynn D. Helms

The foregoing Affidavit of Lynn D. Helms was subscribed and sworn before me by Lynn D. Helms on June __, 2015.

Witness my hand and official seal.

Notary Public

My commission expires: May 25, 2017

JEANETTE BEAN
Notary Public
State of North Dakota
My Commission Expires May 25, 2017

EXHIBIT 1

Northwest North Dakota
Federal Minerals and Affected Drilling/Spacing Units

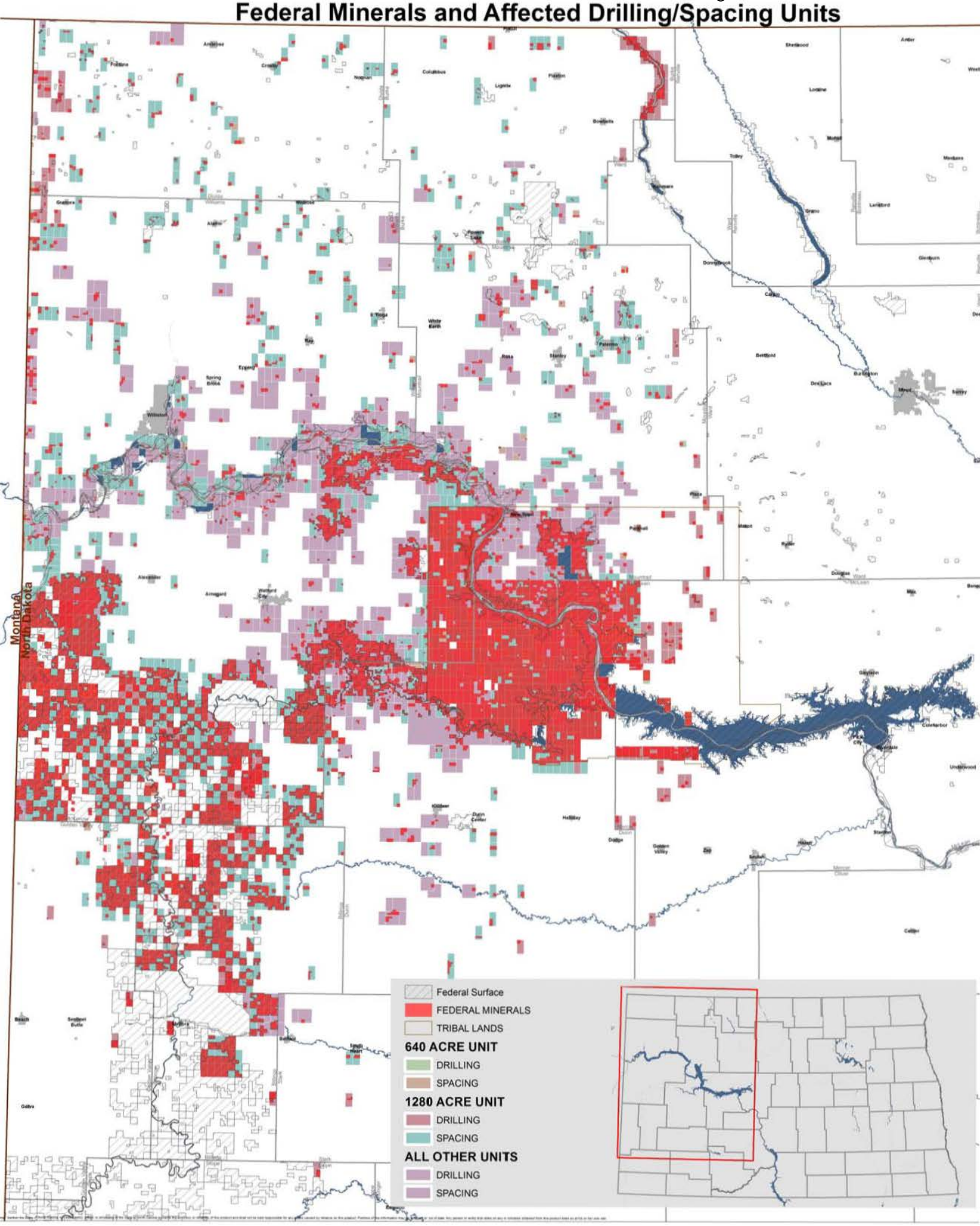

EXHIBIT 2

T155N, R100W Sections 4 and 9

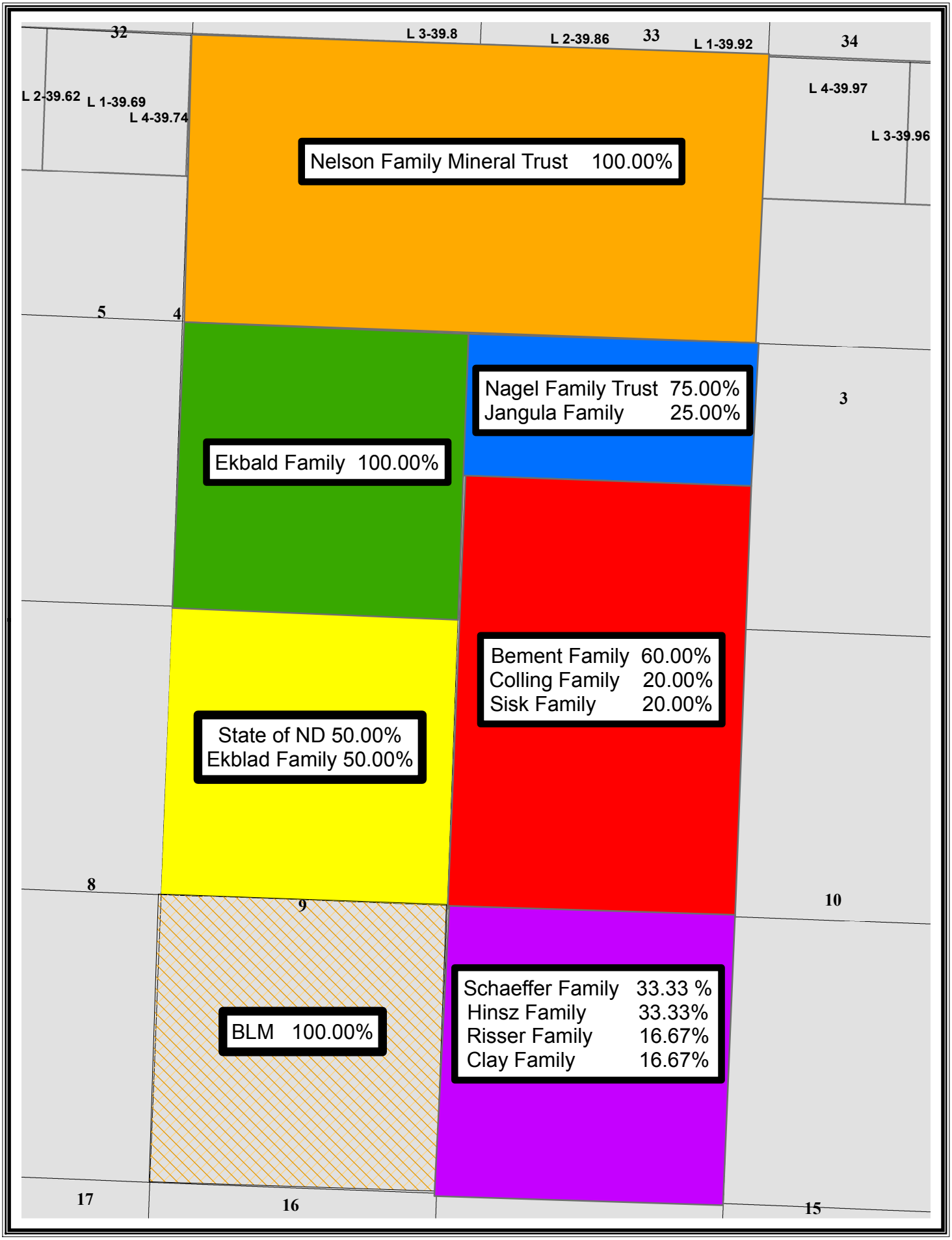

EXHIBIT D

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Attorneys for Petitioner State of North Dakota

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

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

DECLARATION OF KEVIN SCHATZ

I, Kevin Schatz, state and declare as follows:

1. My name is Kevin Schatz. I am over 21 years of age and am fully competent and duly authorized to make this Affidavit. The facts contained in this Affidavit are based on my personal knowledge and are true and correct.

2. I am employed by the Office of State Tax Commissioner as the Supervisor of the Motor Fuels, Oil & Gas, and Estate Tax Section of the Tax Commissioner's Office. I have been employed by the State in this capacity since July 1, 1996 and have continuously served in that position since that date.

3. The Office of State Tax Commissioner ("Office") is a North Dakota State agency responsible for collecting the revenue from many of the taxes required to be paid by law and necessary to fund the operation of state and local government. The Office's primary goals include obtaining voluntary compliance with the tax laws of North Dakota by issuing rules, regulations, and guidelines and enforcing compliance by those who refuse to voluntarily submit taxes.

4. In my current position, I am responsible for overseeing North Dakota's tax collection and compliance efforts related to the oil and gas production tax and the oil extraction tax. Those responsibilities, which include the collection of taxes due, and administration of reports required from oil and gas operators or owners in North Dakota, are provided in North Dakota Century Code Chapters 57-51 and 57-51.1.

5. In my current position, I am familiar with the above-captioned litigation brought by the State of Wyoming, the State of North Dakota, and the State of Colorado (collectively "State Petitioners"), in which State Petitioners challenge the Bureau of Land Management's

("BLM") hydraulic fracturing rule ("BLM Rule") as exceeding the BLM's statutory authority and unlawfully interfering with the state's hydraulic fracturing regulations. Petition at ¶ 2-3.

6. Allowing the BLM Rule to go into effect would impair or impede North Dakota's ability to protect its financial interests in federal oil and gas resources.

7. North Dakota generates revenue from both the oil and gas production tax and the oil extraction tax.

8. North Dakota imposes a gross production tax on all oil and gas produced within North Dakota, with limited exemptions. The gross production tax applies to oil at a rate of 5 percent of the gross value at the well upon all oil produced within North Dakota, less the value of any part thereof, the ownership or right to which is exempt from taxation. N.D. Century Code Chapter 57-51-02. The gross production tax applies to all gas produced within North Dakota unless the gas is exempt from taxation. N.D. Century Code Chapter 57-51-02.2. The gross production tax applies to gas at a rate of four cents times the gas base rate adjustment for each fiscal year. N.D. Century Code Chapter 57-51-02.2.

9. The State imposes an excise tax, known as the "oil extraction tax," upon the activity of extracting oil from the earth within North Dakota. Every owner, including any royalty owner, of any part of the extracted oil is deemed to be engaged in the activity of extracting oil. N.D. Cent. Code § 57-51.1-02.

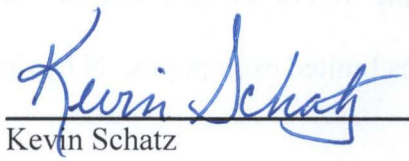
10. In general, the extraction of oil is taxed at a rate of tax of six and one-half percent of the gross value at the well of the oil extracted. N.D. Cent. Code § 57-51.1-02. The oil extraction tax includes limited exemptions. N.D. Cent. Code § 57-51.1-03.

11. Over the last ten fiscal years, North Dakota's oil and gas resources have collectively generated the following amounts in State taxes from oil and gas production in North Dakota:

	Production Taxes	Extraction Taxes
2014:	$1,583,433,363	$1,898,753,345
2013:	$1,345,360,742	$1,556,020,920
2012:	$967,773,719	$1,091,844,028
2011:	$623,440,183	$672,665,790
2010:	$374,148,819	$375,380,870
2009:	$202,761,332	$190,209,867
2008:	$278,015,800	$248,889,423
2007:	$141,945,126	$109,717,052
2006:	$113,082,832	$67,450,528
2005:	$91,567,338	$60,941,425

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 3, 2015.



Kevin Schatz

The foregoing Affidavit of Kevin Schatz was subscribed and sworn before me by Kevin Schatz on June 3, 2015.

Witness my hand and official seal.

Notary Public

ANTONINA JASPER
Notary Public
State of North Dakota
My Commission Expires April 11, 2020

My commission expires:

7811054_4

EXHIBIT E

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Attorneys for Petitioner State of North Dakota

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

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

DECLARATION OF DENNIS ROLLER

I, Dennis Roller, state and declare as follows:

1. My name is Dennis Roller. I am over 21 years of age and am fully competent and duly authorized to make this Affidavit. The facts contained in this Affidavit are based on my personal knowledge and are true and correct.

2. I am employed by the State of North Dakota Office of the State Auditor ("Auditor's Office") in the position of Audit Manager, Division of Royalty Audits. I have been employed by the State Auditor's Office since October 1, 1990, and have served as Audit Manager of the Division of Royalty Audits since August 2004.

3. The Auditor's Office is a North Dakota State agency responsible for conducting audits of the State; local governments, including counties, cities, school districts, and other subdivisions; state colleges and universities; and federal mineral payments from oil, gas, and coal leases located within North Dakota.

4. The Division of Royalty Audits has had a contract with the Department of the Interior ("DOI") - Office of Natural Resources Revenue ("ONRR") to perform audits and other investigations of federal oil, gas, and coal mineral payments since 1985 ("ONRR Contract"). Per section 1.1 (1) & (2) of the ONRR Contract, the DOI delegates to the State Auditor's Office the authority to perform audits and other investigations of federal mineral revenue pursuant to Section 205 of the Federal Oil and Gas Royalty Management Act (FOGRMA) of 1982 and Public Law 102-154. The State Auditor's Office Division of Royalty Audit uses various processes to determine the accuracy of the federal mineral payments. The processes range from a limited scope compliance review (a review to determine that royalties were paid on the correct volume for a particular mineral) to full scope audits. Per section 3.4 (A) of the Auditor's Office contract with DOI, the Division of Royalty Audit performs audits in accordance with

Government Auditing Standards (GAS –commonly known as the Yellow Book). These audits entail verifying all aspects of the royalty equation: royalties = well head sales X federal allocation X lease royalty rate X unit price less allowances [transportation, processing, washing, etc.].

5. In my current position, I am the principle investigator (PI) under the ONRR Contract. I am responsible for developing the annual budget, the annual work plan, the quarterly mineral revenue certifications and supervising and approving all work within the division. I have access to and analyze information regarding federal mineral payments made from federal lands within North Dakota in order to develop the annual work plan. In addition, per North Dakota Century Code § 15.1-27-25 (2), I am responsible for certifying quarterly to the State Treasurer's Office the amount of mineral revenue North Dakota received during the preceding quarter.

6. In my current position, I am familiar with the above-captioned litigation brought by the State of Wyoming, the State of North Dakota, and the State of Colorado (collectively "State Petitioners"), in which Petitioners challenge the Bureau of Land Management's ("BLM") hydraulic fracturing rule ("BLM Rule") as exceeding the BLM's statutory authority and unlawfully interfering with North Dakota's hydraulic fracturing regulations. Petition at ¶ 2-3.

7. North Dakota's ability to protect its financial interests in the federal oil and gas revenue will be impaired if the BLM Rule is allowed to go into effect.

Federal Mineral Payments from Oil and Gas Leases

8. North Dakota is the 2nd largest oil and gas producer in the United States, with a production of approximately 396,845,811 barrels of oil in 2014. Oil and gas production on

federal lands generated $53,091,982 in average annual mineral revenue to North Dakota from CY2005 through CY2014.

9. The BLM is responsible for oil and gas leasing on federal land pursuant to the Mineral Leasing Act of 1920. 30 U.S.C. §§ 181 *et seq*. Federal oil and gas leases require that lessees pay to the United States royalties of 12.5% of the value of oil and gas produced. 43 C.F.R. § 3103.3-1. In addition to the royalties, North Dakota receives oil and gas lease bonus and rental payments from federal oil and gas leases. There are three land types for which the State of North Dakota receives a portion of the above described federal mineral revenue. For public domain lands, North Dakota receives 48% of the federal mineral revenue. 30 U.S.C. § 19(a) & (b). The State disburses 50% of this revenue received to the counties within North Dakota from which the mineral revenue was produced. N.D. Cent. Code § 51.1-27-25(7). For Corps of Engineers lands (flood control lands), North Dakota receives 75% of the federal mineral revenue. 33 U.S.C. § 701c-3. The State disburses 100% of this revenue received to the counties within North Dakota from which the mineral revenue was produced. N.D. Cent. Code § 21-06-10. For acquired lands (lands the federal government had transferred title to and subsequently have acquired back for various reasons), the county in North Dakota from which the federal mineral revenue was produced receives 25% of the federal mineral revenue directly from the federal government (not passed through the State Government accounts). 7 U.S.C. § 2102.

10. The North Dakota Treasurer's Office receives the mineral disbursements from ONRR for the public domain and the Corps of Engineers lands. For acquired lands, the North Dakota counties from which the mineral revenue was produced receive the mineral disbursements from the Department of Agriculture who receives the mineral disbursement from

ONRR. Records from ONRR and available to the Auditor's Office Division of Royalty Audits show that in the past ten fiscal years, the federal government disbursed to North Dakota the following federal mineral disbursements for oil and gas:

Year	Public Domain	Corps of Engineer	Acquired	Total
2014:	$51,318,039	$19,142,391	$21,850,994	$ 92,311,424
2013:	$46,245,498	$42,498,659	$16,334,540	$105,078,697
2012:	$30,510,371	$19,878,526	$13,936,111	$ 64,325,008
2011:	$41,435,197	$15,557,395	$ 8,669,954	$ 65,662,546
2010:	$16,364,280	$ 9,771,049	$ 5,150,003	$ 31,285,332
2009:	$19,394,039	$47,001,217	$ 9,701,686	$ 76,096,942
2008:	$28,324,952	$ 35,121	$ 7,189,544	$ 35,549,617
2007:	$14,804,727	$ 14,536	$ 5,790,901	$ 20,610,164
2006:	$16,029,882	$ 271,027	$ 4,874,338	$ 21,175,247
2005:	$14,905,764	$ 281,423	$ 3,637,653	$ 18,824,840

11. North Dakota uses revenues received from federal oil and gas lease payments (bonuses, rentals & royalties) on public domain lands to fund various State programs though the State General Fund and the Federal Mineral Royalties Distribution Fund, which make financial distributions to school districts and public facilities and services as per North Dakota Century Code § 15.1-27-25. In calendar year 2014, the State distributed $51,318,039 to the above-mentioned programs.

12. North Dakota uses revenues received from federal oil and gas lease payments (bonuses, rentals & royalties) on Corps of Engineers lands to fund school districts, roads and

townships as per North Dakota Century Code § 21-06-10. In calendar year 2014, the State distributed $19,142,391 to the above-mentioned programs.

13. The counties in North Dakota use the revenues received from federal oil and gas lease payments (bonuses, rentals & royalties) on acquired lands to fund school districts and roads as per 7 U.S.C. § 1012. In calendar year 2014, the Department of Agriculture distributed $21,850,994 to the above-mentioned programs.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 3, 2015.

Dennis Roller

The foregoing Affidavit of Dennis Roller was subscribed and sworn before me by Dennis Roller on June 2, 2015.

Witness my hand and official seal.

DERRICK BECKER
Notary Public
State of North Dakota
My Commission Expires Sept. 20, 2019

Notary Public

My commission expires: Sept. 20, 2019

7811059_4

EXHIBIT F

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

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

DECLARATION OF KELLY SCHMIDT

I, Kelly Schmidt, state and declare as follows:

1. My name is Kelly Schmidt. I am over 21 years of age and am fully competent and duly authorized to make this Affidavit. The facts contained in this Affidavit are based on my personal knowledge and are true and correct.

2. I am employed by the Office of North Dakota State Treasurer ("Treasurer's Office") as the State Treasurer. I have been employed by the State since January 1, 2005, and have continuously served as the State Treasurer since elected in November, 2004.

3. The Office of North Dakota State Treasurer is a North Dakota State agency established under Article V, section 2 of the North Dakota State Constitution. It is responsible for overseeing the investment of the State's general funds, special funds, and several trust funds. The Treasurer's Office disburses money collected by the State to political subdivisions pursuant to a variety of State programs.

4. In my current position, I am responsible for overseeing disbursements by the State to its subdivisions, including those related to oil and gas development.

5. In my current position, I am familiar with the above-captioned litigation brought by the State of Wyoming, the State of North Dakota, and the State of Colorado (collectively "State Petitioners"), in which Petitioners challenge the Bureau of Land Management's ("BLM") hydraulic fracturing rule ("BLM Rule") as exceeding the BLM's statutory authority and unlawfully interfering with North Dakota's hydraulic fracturing regulations. Petition at ¶ 2-3.

6. Allowing the BLM Rule to go into effect would impede North Dakota's ability to protect its financial interests in federal oil and gas leasing and to provide disbursements from State accounts to its local governments and subdivisions.

7. North Dakota generates revenue from an oil and gas production tax and oil and gas extraction tax. N.D. Cent. Code Chapters 57-51 and 57-51.1. These taxes are collected by the Office of State Tax Commissioner and deposited into State accounts. The Treasurer's Office is responsible for disbursing portions of these moneys from the State accounts to several State funds.

8. The Treasurer's Office makes disbursements collected from the oil and gas extraction tax through the Oil Extraction Tax Development Fund, a special fund trust established under State law. N.D. Cent. Code § 57-51.1-06. Some of the purposes of the Oil Extraction Tax Development Fund distributions are to fund elementary and secondary education in North Dakota and to provide water development and energy conservation and development programs for municipalities and rural areas. N.D. Cent. Code § 57-51.1-07.3. The funds in the Oil Extraction Tax Development Fund are distributed as follows: (1) 20% to the common schools trust fund and foundation aid stabilization fund; (2) 20% to the sinking fund and resources trust fund to promote water development and energy conservation; (3) 30% to the Legacy Fund; and (4) 30% to the State's general fund share.

9. Over each of the past five fiscal years, the State has disbursed $287M - $1.69B annually through the Oil Extraction Tax Development Fund.

10. The Treasurer's Office makes disbursements collected from the oil and gas production tax through the Oil and Gas Gross Production Tax Distribution Fund. Approximately 1/5th of the revenue collected is distributed to hub cities (defined as a city with a population of 12,500 or more with more than 1% of its private employment engaged in the mining industry), the hub city school districts (school district with the highest student enrollment within the city limits of a hub city), other school districts, the Oil and Gas Impact Grant Fund, the North Dakota

Outdoor Heritage Fund, and the Abandoned Oil and Gas Well Plugging and Site Reclamation Fund. A portion of the remaining 4/5 of the revenue is distributed to counties, cities, schools, and townships. The portion of the 4/5 not distributed to the political subdivisions is distributed to the Legacy Fund and the State's general fund share.

11. Over each of the past five fiscal years, the State has disbursed $300M - $1.5B annually through the Oil and Gas Gross Production Tax Distribution Fund.

12. During the most recently completed fiscal year, the Treasurer's Office made oil and gas production tax distributions of $197M to counties, $121M to cities, $30M to schools, and $19M to townships in the oil producing counties.

13. The Treasurer's Office makes disbursements collected from federal oil and gas lease payments, including royalty, rental, and bonus payments. Of the revenue collected from federal oil and gas royalties, 50% is distributed to the State for aid to school districts. The remaining 50% of the revenue is deposited into a special fund, known as the Federal Royalties Distribution Fund, and then distributed to the counties within North Dakota. N.D. Cent. Code § 15.1-27-25(7). These funds are used exclusively for the planning, construction, and maintenance of public facilities and the provision of public services. N.D. Cent. Code § 15.1-27-25(4).

14. Over each of the past five fiscal years, the State has disbursed $7M - $25M annually to school districts and $7M - $25M to local counties for development of public facilities and provision of public services.

Executed on June 4, 2015.

Kelly Schmidt

Kelly Schmidt

The foregoing Affidavit of Kelly Schmidt was subscribed and sworn before me by Kelly Schmidt on June 4, 2015.

Witness my hand and official seal.

SHANNON VANDEVENTER
Notary Public
State of North Dakota
My Commission Expires Aug. 13, 2019

Shannon VandeVenter
Notary Public

My commission expires:

8/13/19

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