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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF WYOMING

STATE OF WYOMING, et al.,	)	
	)	Civil Case No. 15-CV-43-S
Petitioners,	)	(consolidated with 15-CV-41-S)
v.	)	
	)	
UNITED STATES DEPARTMENT OF THE INTERIOR; et al.,	)	**RESPONDENTS' BRIEF IN OPPOSITION TO NORTH DAKOTA'S MOTION FOR PRELIMINARY INJUNCTION**
Respondents.	)	
	)	

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Intervenor-Petitioner State of North Dakota seeks to enjoin Respondent Bureau of Land Management ("BLM") from applying its Rule on Hydraulic Fracturing on Federal and Indian Lands ("Final Rule")[1] until the resolution of its suit (ECF No. 52). This motion falls far short of the standards for obtaining that extraordinary remedy. Further, North Dakota's motion raises many of the same arguments asserted by Wyoming and Colorado, none of which satisfy the exacting requirements needed to obtain a preliminary injunction here.

On the merits, North Dakota is wrong that BLM lacks authority to promulgate the Final Rule. In fact, several statutes provide the Secretary of the Interior ("Secretary")—and by delegation, BLM—with broad authority over the use and management of federal and Indian lands and mineral resources, including the regulation of hydraulic fracturing used to extract minerals from those lands. This authority is premised on the unexceptional notion that BLM, the federal agency charged with management and stewardship of those lands, would be able to set terms and conditions for their use. North Dakota similarly fails in its argument that several statutory provisions, taken out of context, prevent BLM from regulating hydraulic fracturing. Not only do these provisions not undermine BLM's authority to promulgate the Final Rule, but North Dakota has not established any "displace[ment]" or "interfere[nce with]" its ability to regulate or control groundwater or hydraulic fracturing–state oil and gas regulations remain in full force after the Final Rule. In addition, North Dakota's arguments that Congress intended to displace these authorities through the Safe Drinking Water Act ("SDWA") and the Energy Policy Act of 2005 find no support either in the text of those statutes or in their legislative history. Consequently, North Dakota is unlikely to succeed on the merits of its suit.

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[1] 80 Fed. Reg. 16,128-222 (Mar. 26, 2015).

Petitioners also fail to establish irreparable harm absent a preliminary injunction. Nothing in the Final Rule intrudes on North Dakota's sovereignty, its ability to continue regulating hydraulic fracturing, or its authority to regulate groundwater. Nor is irreparable harm established by the alleged delay in obtaining revenues that North Dakota speculates the Final Rule would cause. Finally, the balance of harms and public interest weigh strongly against an injunction. BLM promulgated the Final Rule to meet its and the Secretary's responsibilities under its governing statutes. That includes authority and responsibility to balance resource exploitation, stewardship responsibilities to manage federal lands and resources for multiple uses and sustained yields, and trust responsibilities to tribes and individual Indians. Individual states, like North Dakota, lack these authorities and responsibilities to manage federal and tribal lands and resources nationwide. Without a rule of nationwide application, the public interest would be harmed; therefore, it can only be served by denying the requested relief. The Court should deny North Dakota's motion for preliminary injunction.

I. INTRODUCTION

A. BLM's Oil and Gas Regulations and Final Rule

BLM regulates oil and gas operations on federal lands, and on Indian lands held in trust by the federal government for tribes and individual allottees, pursuant to several statutes, including the Mineral Leasing Act of 1920, as amended ("MLA"), 30 U.S.C. §§ 181, 223–236, the Mineral Leasing Act for Acquired Lands of 1947 ("MLAA"), 30 U.S.C. §§ 351–360, the Federal Land Policy and Management Act of 1976 ("FLPMA"), 43 U.S.C. §§ 1701– 787, the Indian Mineral Leasing Act ("IMLA"), 25 U.S.C. §§ 396, 396d, and the Indian Mineral Development Act, 25 U.S.C. §§ 2101–2108 ("IMDA").[2] Pursuant to those authorities, BLM for

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[2] A more comprehensive statement of the context and elements of the Final Rule is contained in Respondents' Brief in Opposition to Petitioners' Motion for Preliminary Injunction, at 2-5, filed in *Independent Petroleum Ass'n of*

decades has regulated oil and gas operations on federal and Indian lands. *See* 43 C.F.R. part 3160. These regulations impose on operators permitting and disclosure requirements,[3] requirements for well casing and cementing to ensure the structural integrity of the wellbore and to isolate and protect usable groundwater zones,[4] and requirements for storage and disposal of water produced by the well.[5] However, since those rules for conventional oil and gas operations were last updated, technological advances in horizontal drilling, in combination with hydraulic fracturing, have led to production from geologic formations in parts of the country that previously did not produce significant amounts of oil or gas. 80 Fed. Reg. at 16,130-31. Recognizing that existing requirements—which required pre-operation notice to BLM only for "nonroutine fracturing jobs[,]" 43 C.F.R. § 3162.3-2(a) (2014)—were in need of update, BLM undertook a rulemaking to supplement and revise its existing regulations. *See, e.g.*, 80 Fed. Reg. at 16,131.

B. <u>The Safe Drinking Water Act Underground Injection Control Program</u>

Congress enacted the SDWA, 42 U.S.C. §§ 300f - 300j-26, in 1974 to ensure that the nation's sources of drinking water are protected against contamination. Part C of the SDWA, 42 U.S.C. §§ 300h - 300h-8, established a regulatory program "to prevent underground injection which endangers drinking water sources." 42 U.S.C. § 300h(b). Among other things, the SDWA directed EPA to promulgate regulations containing minimum requirements for State underground injection control ("UIC") programs, 42 U.S.C. § 300h, and required all States that had been identified by EPA to submit UIC programs that met those minimum requirements. *Id.*

America v. Jewell, No. 2:15-cv-00041-SWS (D. Wyo. June 1, 2015) (ECF No. 20), and the Declaration of Steven Wells filed therewith (ECF No. 20-2).

[3] *See* 43 C.F.R. 3162.3-1(c).

[4] *See* Section III.B of Onshore Order 2, 53 Fed. Reg. 46,798, 46,808-09 (Nov. 18, 1988).

[5] *See* 43 C.F.R. 3162.5-1(b); Part III.B of Onshore Order 7, 58 Fed. Reg. 47,354, 47,362-65 (Sept. 8, 1993).

at § 300h-1; *see also* 40 C.F.R. § 144.1(e) (requiring all 50 States to submit UIC programs). Once EPA approves a State UIC program, that State is granted "primary enforcement responsibility" ("primacy") for administering that UIC program. 42 U.S.C. § 300h-1(b)(3).[6] EPA can enforce requirements in an approved State UIC program after a 30-day notice if the State fails to enforce them. *Id.* § 300h-2(a), (b), (c). Requirements of an approved State UIC program may also be enforced under the citizen suit provision of the SDWA. *Id.* § 300j-8.

The SDWA directed EPA to promulgate a Federal UIC program that meets the minimum requirements of the Act, to cover those circumstances where EPA disapproves a State's UIC program or where a State fails to submit a UIC program for approval. 42 U.S.C. § 300h-1(c). In addition, EPA generally exercises SDWA primacy over lands that meet the definition of "Indian lands" under 40 C.F.R. § 144.3. EPA has defined "Indian lands" under 40 C.F.R. § 144.3 to mean lands that are "Indian country" under 18 U.S.C. § 1151. "Indian country" includes Indian reservations (including tribal trust lands), dependent Indian communities, and certain Indian allotments. 18 U.S.C. § 1151. *See also* 40 C.F.R. § 144.3 (same); *HRI, Inc. v. EPA*, 198 F.3d 1224, 1248 (10th Cir. 2000) (discussing 40 C.F.R. § 144.3 and 18 U.S.C. § 1151).[7]

No matter which entity exercises primacy under the SDWA, new underground injection is prohibited unless specifically authorized by a permit or by rule. *See* 40 C.F.R. §§ 141.11, 144.31. In addition, injection wells cannot be operated in a manner that would allow endangerment of an underground source of drinking water. 42 U.S.C. § 300h(b)(1); 40 C.F.R. § 144.12(a) (prohibiting endangerment), 144.3 (defining "underground source of drinking water").

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[6] EPA's regulations implementing Part C of the SDWA are contained in 40 C.F.R. Pts. 144-47. Part 145 contains the requirements that each State must meet in order to obtain primary enforcement authority for the UIC program in that State. The approved State programs are codified in 40 C.F.R. Pt. 147.

[7] EPA may also delegate primary enforcement authority to Tribes. 42 U.S.C. § 300j-11(a).

C. **The Exclusion of Non-Diesel Hydraulic Fracturing Operations From the Statutory Definition of "Underground Injection"**

Congress established the applicability of the UIC program through its definition of "underground injection" as "the subsurface emplacement of fluids by well injection." 42 U.S.C. § 300h(d)(1)(A). Congress narrowed the UIC program's coverage by establishing two exclusions from the definition: (1) "the underground injection of natural gas for purposes of storage" and (2) "the underground injection of fluids or propping agents (*other than diesel fuels*) pursuant to hydraulic fracturing operations related to oil, gas, or geothermal production activities." *Id*. § 300h(d)(1)(B) (emphasis added). The exclusion from the definition of "underground injection" with respect to non-diesel hydraulic fracturing operations was added to the SDWA in 2005 by the Energy Policy Act of 2005. Pub. L. No. 109-58, § 322, 19 Stat. 594 (2005). This occurred after the court's holding in *Legal Envtl. Assistance Found., Inc. v. EPA,* 118 F.3d 1467, 1474 (11th Cir. 1997), that EPA was required to regulate the injections of fluids associated with hydraulic fracturing operations under the UIC program. Under the definition as amended by the Energy Policy Act, neither EPA nor any State may regulate non-diesel hydraulic fracturing operations under the SDWA UIC program, and any State regulation of non-diesel hydraulic fracturing operations under state law is not federally enforceable by EPA or under the SDWA citizen suit provision. *See* 42 U.S.C. § 300h-2 (a), (b), (c) (providing for EPA enforcement of an "applicable underground injection control program"); *id.* at § 300h-1(d) (defining "applicable underground injection control program" as either a state program that has been approved by EPA under the SDWA or a UIC program that has been prescribed by EPA); *id.* at § 300j-8(a)(1) (providing for citizen-suit enforcement of "any requirement prescribed by or under" the SDWA).

D. <u>The Federal Facilities Provision of the SDWA</u>

Under 42 U.S.C. § 300j-6(a), federal agencies:

> (1) owning or operating any facility in a wellhead protection area;
>
> (2) engaged in any activity at such facility resulting, or which may result, in the contamination of water supplies in any such area;
>
> (3) owning or operating any public water system; or
>
> (4) engaged in any activity resulting, or which may result in underground injection which endangers drinking water (within the meaning of section 300h(d)(2) of this title),
>
> shall be subject to, and comply with, all Federal, State, interstate and local requirements . . . respecting the protection of such wellhead areas, respecting such public water systems, and respecting any underground injection in the same manner and to the same extent as any person is subject to such requirements . . . .

Id. See also id. at § 300h-7(h) (providing that federal agencies shall be subject to state programs developed under 42 U.S.C. §§ 300h-7(a)(3) & (a)(4) to protect wellhead protection areas to the same extent as any other person is subject to such requirements).

II. PETITIONERS ARE NOT ENTITLED TO A PRELIMINARY INJUNCTION

"[A] preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, *by a clear showing*, carries the burden of persuasion." *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (per curiam) (emphasis in original; citation omitted); *Greater Yellowstone Coal. v. Flowers*, 321 F.3d 1250, 1256 (10th Cir. 2003) (citation omitted) (the movant's "right to relief must be clear and unequivocal."). The movant's "requirement for substantial proof is much higher" for a motion for a preliminary injunction than it is for a motion for summary judgment. *Mazurek*, 520 U.S. at 972. To prevail, "the moving party must establish four elements: (1) a substantial likelihood that it will ultimately succeed on the merits of its suit; (2) it is likely to be irreparably injured without an injunction; (3) this threatened harm outweighs

the harm a preliminary injunction may pose to the opposing party; and, (4) the injunction, if issued, will not adversely affect the public interest." *N. Arapaho Tribe v. Burwell*, No. 14-CV-247-SWS, 2015 U.S. Dist. LEXIS 30480 at *25-26 (D. Wyo., Feb. 26, 2015) (citations omitted). If a movant fails to meet its burden on any of these four requirements, its request must be denied. *Winter v. Natural Res. Def. Council*, *Inc*., 555 U.S. 7, 22-23 (2008); *Chem. Weapons Working Grp., Inc. v. U.S. Dep't of the Army*, 111 F.3d 1485, 1489 (10th Cir. 1997).

North Dakota mistakenly asserts that it need not meet this four-part test. It argues that it need only satisfy a relaxed test, whereby carrying its burden with respect to irreparable harm, the balance of harms, and the public interest absolves it of the need to demonstrate "a substantial likelihood that it will ultimately succeed on the merits of its suit[,]" and instead allows North Dakota to prevail merely by showing that "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." *See* Mem. in Supp. of N.D.'s Mot. for Prelim. Inj. 18 (ECF No. 52-1) ("N.D. Mem."), quoting *Greater Yellowstone Coal.,* 321 F.3d at 1256 (other citation omitted). While the Tenth Circuit may apply a "relaxed" (or "heightened") test in certain cases, it has "explained [that] the relaxed preliminary injunction standard does not apply where the movant seeks to stay governmental action taken pursuant to a statutory or regulatory scheme." *Northern Arapaho Tribe*, 2015 U.S. Dist. LEXIS 30480 at *26 - 28; *see also Heideman v. S. Salt Lake City*, 348 F.3d 1182, 1189 (10th Cir. 2003) (citations omitted).[8] Consequently, North Dakota must meet the standard test for a preliminary injunction. Here, North Dakota cannot meet any of the elements, let alone all four, and thus its motion should be denied.

[8] Decisions in other Districts in this Circuit have questioned whether the "relaxed" test remains viable in light of *Winter. See, e.g., Predator Intern., Inc. v. Gamo Outdoor USA, Inc*., 669 F.Supp.2d 1235, 1244-45 (D.Colo. 2009), citing *Winter*, 555 U.S. 7 (other citations omitted).

A. North Dakota Has Not Demonstrated a Likelihood of Success on the Merits

North Dakota asserts that BLM lacks authority for the Final Rule, which it argues displaces and interferes with the State's regulation of hydraulic fracturing and its regulatory and ownership interest in groundwater. It also argues that the SDWA demonstrates Congressional intent to preclude such regulation by any federal agency. N.D. Mem. 1-2, 18-36. North Dakota, however, is mistaken on all counts, and has thus failed to show "a substantial likelihood that it will ultimately succeed on the merits of its suit[,]" as it must do in order to obtain a preliminary injunction. *See Northern Arapaho Tribe*, 2015 U.S. Dist. LEXIS 30480 at *25–26. Further, while a relaxed standard for preliminary injunction is inapplicable here, *see id.* at *26–28, North Dakota also cannot meet such a standard.

1. BLM Has Authority under Its Governing Statutes to Promulgate the Final Rule

The plain language of BLM's governing statutes—including the MLA, FLPMA, IMDA, IMLA, among others—provides ample authority for BLM's Final Rule. Through those statutes, Congress delegated authority over federal public lands and minerals under the Property Clause of the U.S. Constitution, art. IV, § 3, cl. 2, as both a regulator and as a proprietor, to set terms and conditions for the use of that property. *See, e.g.*, *Camfield v. United States,* 167 U.S. 518, 525-226 (1897); *United States v. Ohio Oil Co.,* 163 F.2d 633, 639 (10th Cir. 1947), *cert. denied*, 333 U.S. 833 (1948). The MLA and MLAA authorize BLM to lease federal public lands for the extraction of certain minerals, including oil and gas. *See* 30 U.S.C. §§ 181, 223 – 236, 351 – 360. The MLA also "authorize[s]" 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. Finally, the MLA imposes a duty on BLM and its lessees to prevent waste of federal mineral resources, *id.* § 225, and to regulate surface-disturbing activities "in the interest of conservation of surface resources . . . ." *id.* § 226(g).

Through FLPMA, BLM also possesses broad authority and discretion to manage and regulate activities on public lands, including through Section 302's direction to "manage the public lands under principles of multiple use and sustained yield," 43 U.S.C. § 1732(a), a mandate that "breathe[s] discretion at every pore." *Strickland v. Morton*, 519 F.2d 467, 469 (9th Cir. 1975). BLM's broad authority to manage, and its responsibility for stewardship of, federal public lands and resources also derives from FLPMA's direction to "take any action necessary to prevent unnecessary or undue degradation of the lands." 43 U.S.C. § 1732(b). Like the MLA, FLPMA provides a number of tools, authorizing BLM to "regulate, through . . . leases, licenses, published rules, or other instruments . . . the use, occupancy, and development of the public lands," 43 U.S.C. § 1732(b), and to "promulgate rules and regulations to carry out the purposes of [FLPMA] and of other laws applicable to the public lands," *id*. § 1740.

Finally, the Secretary has delegated to BLM authority to regulate oil and gas development on Indian lands – part of her federal trust responsibilities for tribal and individual Indian landowners as delegated by Congress pursuant to IMDA and IMLA.

As with BLM's existing and longstanding regulations governing oil and gas operations on federal and tribal lands, the Final Rule falls well within these broad statutory delegations. *See, e.g.*, 80 Fed. Reg. at 16,129, 16,141, 16,186, 16,211. Federal Respondents address in detail, on pages 7-14 of their Brief in Opposition to Wyoming's and Colorado's Motion for Preliminary Injunction, filed in this case (ECF No. 68), BLM's broad authority and discretion under these statutes to promulgate the Final Rule. Those arguments are incorporated by reference.

In the interest of brevity, Respondents will not repeat those arguments in detail here, except to note that the Final Rule extends, and closely resembles, an existing scheme of federal regulation of oil and gas operations on federal and tribal lands. Indeed, BLM and its predecessor

agencies have regulated many of the same elements of oil and gas operations for ninety-five years, since the passage of the MLA.[9] Moreover, longstanding regulations impose requirements like those that North Dakota finds objectionable here – among them, requirements for cementing, testing and monitoring of wellbore structural integrity to isolate and protect groundwater zones, *see* Section III.B of Onshore Order 2, 53 Fed. Reg. at 46,808-09, and surface handling and temporary storage of produced water, *see* 43 C.F.R. 3162.5-1(b); Part III.B of Onshore Order 7, 58 Fed. Reg. at 47,362-65. Congress has been aware of these requirements, which have been in force since the 1980s, and has not repealed or abrogated them in any way. The Final Rule extends and adapts these requirements to subsequent hydraulic fracturing operations in the well bore, requiring authorization and disclosure, testing well casing and cementing to ensure structural integrity and to isolate and protect usable groundwater zones, and proper temporary storage of water recovered from the well. *See, e.g*., 80 Fed. Reg. at 16,129-30, 16,217-22.

There is no merit in North Dakota's arguments that BLM lacks authority for this regulation. Primarily, those arguments assert that the SDWA recognizes state primacy over the regulation of hydraulic fracturing – an argument refuted below. However, North Dakota also misconstrues provisions of FLPMA, the MLA, and the Clean Water Act ("CWA"), 33 U.S.C. §§ 1251, *et seq*., as well as a case construing another agency's authority under a CWA provision, as purported bases for its argument that BLM lacks authority for its Final Rule to "displace[]" or "interfere[] with North Dakota's sovereign interests and authority to exercise and maintain control over its groundwater resources and for regulating hydraulic fracturing . . . ." *See* N.D. Mem. 18-20, 25-31. Not only do the cited authorities not undermine BLM's authority to

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[9] *See, e.g*., the 1920 and 1973 edition of the oil and gas regulations-both attached to the Second Declaration of Steven Wells (ECF No. 68-1) ("Second Wells Decl.")–and 43 C.F.R. part 3160 (2014).

promulgate the Final Rule, but North Dakota has not established any such "displace[ment]" or "interfere[nce]" with North Dakota's ability to regulate groundwater or hydraulic fracturing. *Id*. 19-20. North Dakota has also failed to demonstrate any such lack of authority, displacement, or interference with respect to "split estate" lands – *i.e*., lands where there is private ownership of the surface estate and federal ownership of the mineral estate. *Id*. 33.

a) BLM's Authority to Promulgate the Final Rule Is Not Undermined or Limited by the Authorities Cited by North Dakota

North Dakota cites several statutory provisions which, it contends, show that BLM lacks authority to regulate hydraulic fracturing and groundwater. However, in each case, the statutory provisions do not apply to, much less undermine, BLM's exercise of statutory authority in promulgating the Final Rule.

First, North Dakota argues that FLPMA does not provide authority for the Final Rule because FLPMA Section 202 and the note to its section 701 require BLM "to abide by state laws governing" hydraulic fracturing or underground sources of drinking water ("USDWs"). N.D. Mem. 29-30 (citations omitted). Neither provision supports that conclusion. FLPMA Section 202 stipulates that BLM's *land use plans* must provide for compliance with applicable pollution control laws – *i.e*., that BLM's land use plans cannot set a level of protection below that of applicable pollution control laws. *See* 43 U.S.C. § 1712(c)(8). That provision is irrelevant here because it does not apply outside of the land-use planning process. Moreover, the Final Rule does not purport to preempt any state law, and in fact requires that operators comply with all applicable pollution control provisions, including applicable state laws. *See, e.g*., 80 Fed. Reg. at 16178-79; 43 C.F.R. 3162.1(a). Similarly, North Dakota fails to explain how the note to Section 701 would undermine BLM's authority under FPLMA to promulgate oil and gas regulations like the Final Rule. *See* N.D. Mem. 29-30. The quoted portion of that note states that "[n]othing in

this Act shall be construed as limiting or restricting the power and authority of the United States or" changing a list of existing rights, authorities, and relationships with respect to federal and state water rights. *See* 43 U.S.C. § 1701 note (g)(1)-(4), Pub. L. No. 94-579 § 701, 90 Stat. 2743 (1976). The Final Rule does not regulate water rights or their allocation and, accordingly, the note to Section 701 is irrelevant. *See generally* 80 Fed. Reg. at 16,217-22.

Second, North Dakota asserts that BLM's authority under MLA Section 189 "'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' . . . is cabined by the . . . 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.'" N.D. Mem. 30 (citation, emphasis omitted). The quoted language preserves the states' ability "to exercise any rights which they may have, including the right to levy and collect taxes upon improvements, output of mines, or other rights, property, or assets of any lessee of the United States." 30 U.S.C. § 189. The Final Rule does not affect the States' ability to impose taxes on lessees' property or other assets, so the quoted language does not limit BLM's authority to promulgate the Final Rule.

Third, North Dakota quotes CWA Section 101(b), 33 U.S.C. § 1251(b), as Congressional recognition of North Dakota's authority over its water resources, and thus as excluding from BLM's authority the isolation and protection of groundwater zones mandated by the Final Rule. *See* N.D. Mem. 19. That provision reports the Congressional policy in the CWA to "recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator [of EPA] in the exercise of his authority under this chapter." 33 U.S.C. § 1251(b). This general policy statement

in CWA section 101(b) does not address in any way BLM's separate authority under FLPMA and the MLA to protect any water resource (surface or groundwater) on federal lands or Indian lands as part of its regulation of oil and gas operations. *See id.*

Further, North Dakota's reliance on the CWA for this proposition is inconsistent with both the scope of that statute and the State's own arguments elsewhere in its brief. Unlike the SDWA, the CWA is not directed at protecting the quality of potable groundwater. Rather, the CWA is designed to restore and maintain the quality of surface waters in the United States. 33 U.S.C. § 1251(a) (statement of goals); *id.* § 1362(7) (defining "navigable waters" as "waters of the United States"); 55 Fed. Reg. 47,990, 47,997-99 (Nov. 16, 1990) (EPA explaining that a discharge to groundwater is not a discharge to a "water of the United States" within the CWA's regulatory scheme unless there is a hydrologic connection between the groundwater and a nearby surface water body). North Dakota's reliance on the CWA for this proposition is curious, since it (along with Wyoming and Colorado) argues elsewhere that the SDWA is the *only* federal statute providing for the regulation of underground injection to protect groundwater, an argument that is not consistent with its invocation of the CWA to bolster its authority to regulate.

In addition, the CWA provides an extensive oversight role for EPA. *See, e.g., El Dorado Chem. Co. v. EPA*, 763 F.3d 950, 956 (8th Cir. 2014) (rejecting plaintiff company's state primacy argument under CWA section 101(b) because it "ignores the statutory reality that states do not have unfettered discretion under the CWA" but rather are subject to substantial EPA oversight in the setting of water quality standards). Therefore, while Congress may have intended that the States would have a primary role in planning the development and use of certain water resources under the CWA, it did not intend that the States would have the *only* role in protecting the quality of those water resources.

As explained above, Congress intended that BLM would have the authority to protect groundwater resources from impacts to activities that it may allow to occur on federal lands or Indian lands. And BLM and its predecessors have been exercising that authority with respect to oil and gas activities on federal lands under the MLA since the 1920s, which is long before the CWA was enacted. North Dakota has not shown that the CWA was intended to displace that authority, nor can it do so. *See FCC v. Nextwave Pers. Commc'ns,* 537 U.S. 293, 305 (2003) ("[W]hen two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.") (internal quotation and citations omitted).[10]

Similarly, North Dakota's reliance upon *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 172-73 (2001) (*SWANCC)*, a CWA case, is misplaced. That case concerned whether non-navigable, hydrologically isolated, intrastate ponds —specifically, abandoned sand and gravel pits—that may be used as habitat by migratory birds fell within the Army Corps of Engineers' ("Corps") regulatory authority under Section 404 of the CWA. *Id.* at 162. The Supreme Court held that the Corps' exercise of regulatory authority over such hydrologically isolated ponds exceeded the grant of Congressional authority under the plain language of the CWA. *Id.* at 174. The majority raised, but did not decide, the question of whether the Corps could be given such authority under the Commerce Clause. *Id.* at 172-73.

The Court's construction of the Corps' authority to regulate waters of the United States under CWA Section 404 has no bearing on BLM's authority to regulate oil and gas operations under the MLA, FLPMA, and other statutes. Further, the language in *SWANCC* quoted by North

[10] North Dakota's reliance upon *United States v. New Mexico*, 438 U.S. 696, 701 (1978), is also beside the point. N.D. Mem. 19. The Court there was discussing the reserved rights doctrine, not whether BLM had the authority to protect water resources on federal lands under FLPMA and the MLA. *See id.*

Dakota merely states that, for prudential reasons (*e.g.*, to avoid constitutional questions), the Court will expect Congress to clearly indicate that it intends to invoke the outer limits of its power under the Commerce Clause before the Court will find that Congress has done so. *Id.* at 173. The Court indicated that this concern is heightened when an administrative interpretation of the reach of the statute in question would alter "the federal-state framework by permitting federal encroachment upon a traditional state power." *Id.* at 172. That principle has no application here, which involves Congressional power under the Property Clause – not the Commerce Clause, let alone its outer limits. Indeed, the Final Rule does not encroach upon a "traditional state power." Rather, as we have shown, the U.S. Department of the Interior ("DOI") has been regulating oil and gas activities on federal lands since the 1920s. Therefore, the prudential concerns expressed in *SWANCC* do not apply here.

b) The Final Rule Does Not "Displace" or "Interfere" with North Dakota's Governmental Functions

North Dakota's arguments that BLM lacks authority for the Final Rule fail on another, independent basis: they are premised on the erroneous notion that the Final Rule "directly displac[es] the state's regulatory role[,]" or "[i]mpermissibly [i]nterferes with the SDWA and North Dakota's [g]overnmental [f]unctions." N.D. Mem. 25-31. North Dakota has not established that the Final Rule—which expressly preserves state regulatory authority—somehow displaces or interferes with that authority. As a threshold matter, North Dakota's arguments depend on its erroneous construction of the SDWA as displacing BLM's authority and granting states sole authority to regulate hydraulic fracturing. *See id*. Since, as addressed below, that construction of the SDWA is groundless, those arguments also fail.

North Dakota's arguments also fail because the Final Rule in no way displaces state regulation or precludes states from regulating hydraulic fracturing or exercising regulatory

authority or control over groundwater. To begin, North Dakota, like all other states, is still free to regulate hydraulic fracturing and other aspects of oil and gas operations. The Final Rule expressly contemplates this concurrent state regulation of hydraulic fracturing, preserving states' ability to regulate hydraulic fracturing within their borders under state law, including on federal lands. 80 Fed. Reg. at 16,130 ("Operators with leases on Federal lands must comply with both the BLM's regulations and with state operating requirements"). The Final Rule does not purport to preempt any state law and, indeed, existing BLM regulations continue to require all operators to comply with all applicable laws and regulations, including state authorities. *See, e.g.*, 80 Fed. Reg. at 16,178-79; 43 C.F.R. 3162.1(a). Thus, there is no displacement of North Dakota's hydraulic fracturing or other regulations, and the State has offered no basis on which any purported "interference" with such regulations would be legally impermissible.

While North Dakota finds it "[n]otabl[e] [that] certain provisions in the BLM Rule are less stringent than North Dakota regulations[,]" it does not say why that matters in terms of BLM's authority to promulgate the rule, s*ee* N.D. Mem. 26, or how these provisions "frustrate[] state regulations[,]" *see id*. 27. Indeed, since operators on federal lands must comply with both the Final Rule's and North Dakota's regulations, it is difficult to imagine how the Final Rule could frustrate a more stringent North Dakota provision. Moreover, the Final Rule provides states with *the option*, where their regulations meet or exceed the objectives of the Final Rule, to seek a variance that applies the state requirement in place of the relevant provision of the Final Rule.[11] This variance provision is not, as North Dakota asserts, a recognition of "the federalism

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[11] 43 C.F.R. § 3162.3-3(k); 80 Fed. Reg. at 16,221. North Dakota asserts that this variance provision "does nothing to mitigate the problem of interference or encroachment upon North Dakota's authority" because it "offers no deference to the judgment of North Dakota . . ." or provide a "mechanism for North Dakota to administer all or part of any aspect of the BLM Rule." N.D. Mem. 31. Since the State has failed to demonstrate that any such "interference or encroachment" warrants invalidation of the Final Rule, that assertion can be disregarded. *Id*. Moreover, BLM does not have authority to delegate to states its statutory or trust responsibilities for federal and

problems created by the BLM Rule[,]" *see id*. 30, but rather a mechanism designed to reduce potential conflicts or confusion for *operators* where, in select states and with respect to particular provisions, the state regulations meet or exceed the objectives of that provision of the Final Rule. *See, e.g*., 80 Fed. Reg. at 16,175-76.

For the same reasons, North Dakota's argument finds no support in its reference to three provisions—relating to annulus pressure, casing pressure testing, and temporary storage of produced water—where it alleges there are differences between its requirements and those of the Final Rule, N.D. Mem. 26-27. Other than cursory references to purported differences, the State offers no explanation as to why these differences amount to displacement or interference with its rules by the Final Rule, *see id*. – particularly given that both sets of provisions will apply after the Final Rule goes into effect. Indeed, its brief statement regarding these provisions suggests that similarities in the provisions outweigh differences.

Similarly, North Dakota has failed to establish displacement or interference with state regulations as a result of the Final Rule's definition of "usable water[.]" *See* N.D. Mem. 26-27. The Final Rule extends to hydraulic fracturing operations existing requirements under its oil and gas operations regulations to isolate and protect particular groundwater zones from those operations. Isolation of groundwater formations from wellbore operations is required under regulations promulgated in 1982, although those regulations did not define "usable water[.]" *See* 43 C.F.R. § 3162.5-2(d) (2014). That term was defined in Onshore Order 2, which was promulgated in 1988 and requires operators to report to the authorized officer all indications of usable water, and to isolate and protect all usable water zones through proper casing and

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tribal lands. *See, e.g*., Second Wells Decl. ¶ 28; 80 Fed. Reg. at 16,179. Rather, a variance would adopt a state regulatory provision as part of the Final Rule for that state, making it enforceable by BLM.

cementing. 53 Fed Reg. at 46,808-09 (Section III.B). Onshore Order 2 defines "usable water" as "generally those waters containing up to 10,000 ppm [parts per million] of total dissolved solids [TDS]." *Id.* at 46,805 (Section II.Y). The Final Rule maintains that standard within the definition of "usable water[.]" *See* 43 C.F.R. § 3160.0-5. As in Onshore Order 2, the "usable water" standard is applied in the Final Rule to specify the zones that must be isolated and protected by cementing during hydraulic fracturing. *See id.* §§ 3162.3-3(b), 3162.5-2. The Final Rule preamble explains BLM's reasoning in continuing to apply the existing "up to 10,000 ppm TDS" standard by noting, in part, that the rule seeks to protect not only drinking water, but also other aquifers which "might be usable for agricultural or industrial purposes, or to support ecosystems[,]" as well as future uses that may become available in light of "increasing water scarcity and technological improvements in water treatment equipment[.]" 80 Fed. Reg. at 16,142-43. Unlike Onshore Order 2, however, the Final Rule's definition of "usable water[,]" among other things, (i) expressly includes zones that the relevant state or tribe has designated as underground sources of drinking water, or has designated for protection from hydraulic fracturing operations, under their own authorities, and (ii) expressly excludes any zones, other than USDWs, that the state or tribe has exempted from protection from hydraulic fracturing operations. *See* 43 C.F.R. § 3160.0-5 (2015); 80 Fed. Reg. at 16,217-18. Given these caveats, North Dakota cannot credibly assert that the standard for "usable water" in the Final Rule interferes with state regulation of groundwater.

North Dakota's arguments are also inconsistent. Despite asserting that the Final Rule should be invalidated because it applies a more stringent standard that North Dakota feels is necessary, *see* N.D. Mem. 27-28, the State also asserts that this standard should be invalidated because it "is less effective than North Dakota's regulations[,]" *id.* 27. In support, the State

observes that, with respect to a single underground water-bearing formation—the "Dakota Group"—both the Final Rule and North Dakota regulations require cementing to isolate this formation. *Id*. 28-29. However, since North Dakota's cementing requirement serves a different purpose—protection of the wellbore from fluids in the formation—the State would not, in certain circumstances, require remedial cementing where "adequate cement isolation" of the layer was not achieved. *Id*. 28-29. North Dakota's implication is that, while both the Final Rule and state rules are protective, the state rule would be more flexible in a specific, hypothetical scenario. *See id*. However, North Dakota fails to explain how this makes the Final Rule "less effective"—particularly since North Dakota concedes that the rules serve different purposes in this instance—let alone how that fact, if proven, would support invalidation of the Final Rule. *See id*.

With respect to its assertion that, through its definition of "usable water[,]" the Final Rule "encroaches on the regulatory field governed by the SDWA[,]" *id*. 26-27, the State has not shown that the SDWA undermines the legal authority for the Final Rule, as explained below.

In addition, North Dakota fails to explain why it is a problem that the Final Rule takes a "standardized approach" to defining "usable water[,]" *see* N.D. Mem. 26, particularly since that approach expressly defers to state determinations regarding zones that should or should not be isolated and protected from hydraulic fracturing operations. *See* 43 C.F.R. § 3160.0-5. This deference to states' determinations regarding water formations within their borders belies North Dakota's claim that the Final Rule's definition of "usable water" displaces or interferes with state authority.

Further, contrary to North Dakota's repeated assertion, the Final Rule does not regulate USDWs or other groundwater, let alone displace or interfere with their regulation by states. No provision of the Final Rule purports to address ownership of, rights to, use of, or allocations

regarding USDWs specifically or groundwater generally. *See* 80 Fed. Reg. at 16,217-22. Instead, the Final Rule extends, to hydraulic fracturing operations, requirements under existing regulations for cementing and testing of cementing and wellbore structural integrity to isolate particular groundwater zones from the wellbore and protect those zones from wellbore operations, *see id*. While the Final Rule extends to hydraulic fracturing operations the standard under existing regulations by which operators determine the zones which must be protected, the Final Rule defers entirely to states where, as noted above, they designate particular additional zones for protection and, aside from USDWs, where they designate particular zones as to be excluded from protection under the Final Rule, *see* 43 C.F.R. § 3160.0-5. Thus, this distinction between (i) ownership or control of USDWs or groundwater, which is not impacted by the Final Rule, and (ii) isolation or protection of groundwater from oil and gas operations, which is regulated by the Final Rule, is real and not mere "semantics[,]" as North Dakota charges. N.D. Mem. 25-26.

a) North Dakota Has also Failed to Demonstrate, with Respect to Split Estates, Displacement or Interference with State Functions

North Dakota next asserts that BLM lacks authority to regulate surface activities or groundwater with respect to "split estates" – *i.e.*, where there is private ownership of the surface estate and federal ownership of the mineral estate. *See id*. 33-36.[12] With respect to these lands, North Dakota repeats many of the arguments that Respondents refute above – namely, that the SDWA "prohibits . . . federal interference" in state regulation of hydraulic fracturing, that the

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[12] In its arguments, North Dakota also confuses split estate lands with the scenario where, in a spacing unit, one tract contains a federal mineral interest but all other tracts are privately owned, *see* N.D. Mem. 34. Despite North Dakota's claim that this scenario would "subject the entire unit to the BLM Rule[,] *id*., the State fails to explain how that would occur. BLM already has been regulating operations in Federal units or in BLM-approved State pools, pursuant to 30 U.S.C. § 226(m). *See* 43 C.F.R. part 3180; *see also* Third Declaration of Steven Wells (Third Wells Decl.") ¶ 22. The Final Rule does not alter that statutory authority or the rules pertaining to units and unitization. Nor does it regulate oil and gas operations which are conducted in private mineral estates underlying private lands.

Final Rule regulates groundwater or displaces state authority over USDWs, that FLPMA's land use planning provision requires BLM to defer to state regulatory regimes, and that the Final Rule displaces or interferes with state regulation of hydraulic fracturing. *See* N.D. Mem. 33-36.

In addition, North Dakota erroneously suggests that, because the United States owns only the mineral estate in split-estate lands, and not the surface estate, BLM has no authority (and apparently no obligation) to regulate surface impacts of oil and gas operations conducted pursuant to a lease of federal minerals. *See id*. 34. In this respect, North Dakota argues variously that the Final Rule "[w]ithout any statutory grant of jurisdiction or basis in property rights . . . asserts authority over private property and the associated state waters[,]" N.D. Mem. 34, and that "because BLM does not own the USDWs or the associated surface, there is no jurisdictional nexus, and Property Clause authority is significantly lessened[,]" *id*. 36.

As stated above, the Final Rule does not assert ownership over groundwater and does not seek to regulate rights to, allocations to, or control of groundwater. With respect to a private surface estate over federal minerals, however, BLM has statutory authority to regulate surface-disturbing activities associated with a lease of federal minerals – and indeed has an express responsibility under the MLA for such regulation. Section 17 of the MLA, as amended, provides that "[t]he Secretary of the Interior . . . *shall regulate all surface-disturbing activities* conducted *pursuant to any lease* issued under this chapter, and *shall determine reclamation and other actions as required in the interest of conservation of surface resources*." 30 U.S.C. § 226(g) (emphasis added). Indeed, as previously explained, the Final Rule extends to hydraulic fracturing operations the preexisting BLM regulatory framework, in place for decades, which regulates oil and gas operations.[13] Those preexisting regulations already apply BLM's regulatory authority to

[13] Nor is North Dakota "unique[,]" as it claims, *see* N.D. Mem. 33, in having large acreage of split estate land. *See, e.g.,* Third Wells Decl. ¶ 19; Pub. Land Law Review Comm'n, *One Third of the Nation's Land*, 137 (1970) (about

oil and gas operations on split estate lands, and BLM has previously addressed the implications and requirements for split estate oil and gas operations at length. *See, e.g*., (revised) Onshore Oil and Gas Order No. 1, 72 Fed. Reg. 10,308, 10,322-24, 10,336 (Mar. 7, 2007) (Section VI) (discussing and formalizing preexisting procedures and authorities with respect to applying BLM's oil and gas operations regulations to split estate lands).

North Dakota cites no support for its contention that BLM's authority under the Property Clause of the U.S. Constitution "is significantly lessened" where the United States owns the minerals in a split estate, *see* N.D. Mem. 36. It is indisputable that the federal minerals at issue are United States' property, and that the Property Clause provides BLM (where delegated by Congress through the MLA, FLPMA, and other statutes) both regulatory and proprietary authority over them. *See, e,g*., *Camfield,* 167 U.S. at 525-26 (1897); *Ohio Oil Co.,* 163 F.2d at 639. Further, North Dakota's suggestion that the private ownership of the surface estate diminishes BLM's power to regulate confuses (i) BLM's authority to regulate *operators* to ensure that lands and resources are protected—regulations which also benefit the surface owner—with (ii) the agency's authority to lease federal minerals underlying private surface estates. The Final Rule does not purport to alter the latter authority, which is governed entirely by preexisting statutes and regulations. And with respect to the former, the MLA expressly requires BLM to regulate such activities.

Similarly, North Dakota's argument that "[w]here BLM only owns the minerals, it cannot show any harm to its property interests that would come by deferring to North Dakota

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60 million acres nationwide have private surface over Federal minerals). Indeed, a number of states have lands that were either (i) patented under statutes that conveyed only surface estates, such as the Stock-Raising Homestead Act of 1916, 64 Pub. L. 290, 39 Stat. 862 (repealed in part by FLPMA), or (ii) foreclosed by Federal land banks, such as the Federal Farm Mortgage Corporation, and only the surface estate (or surface and an undivided partial mineral interest) was then sold to private buyers. *See generally*, *Holbrook v. Cont'l Oil Co*., 73 Wyo. 321, 278 P.2d 798 (1955) (discussing patents under the Act of July 17, 1914, and the MLA).

regulations for hydraulic fracturing[,]" N.D. Mem. 36, is misplaced. BLM is authorized to, and charged with, managing federal property, including federal minerals. That authority and responsibility also extends to preventing waste of federal minerals. *See, e.g.*, 30 U.S.C. § 225. BLM is not, however, authorized to delegate its authority and responsibility to states by "deferring" entirely to their regulatory regimes. *See, e.g.*, 80 Fed. Reg. at 16,179.

2. The SDWA Does Not Displace BLM's Authority under FLPMA and the MLA

Like Wyoming and Colorado, North Dakota argues that Congress intended in the SDWA that the underground injection of fluids, including fluids used in hydraulic fracturing operations, could be regulated solely under the SDWA UIC program and not under any other federal statute. And like Wyoming and Colorado, North Dakota asserts that when Congress amended the SDWA to exclude non-diesel hydraulic fracturing operations from the definition of "underground injection" under the UIC program, the regulation of non-diesel fluid injection associated with hydraulic fracturing operations was left entirely to the States, with no federal role whatsoever.

We have already shown in our separate response to Wyoming and Colorado's motion for a preliminary injunction that this argument is incorrect for numerous reasons. In the interest of brevity, we will not completely repeat those arguments here but refer the Court to our memorandum in opposition to Wyoming and Colorado's motion for a preliminary injunction, ECF No. 68 at 14-19. In sum, there is nothing in the SDWA or the 2005 Energy Policy Act to show that Congress intended to prohibit BLM from addressing any type of underground injection on federal lands, including hydraulic fracturing, under FLPMA or the MLA. And, in fact, the legislative history of the SDWA shows that Congress intended to preserve DOI's long-held authority to regulate oil and gas operations to protect groundwater and other natural resources under the MLA. There is no suggestion that Congress intended to repeal BLM's FLPMA and MLA regulatory authority when it passed the 2005 Energy Policy Act, and the SDWA, as

amended by the Energy Policy Act, is in harmony with BLM's separate authority under FLPMA and the MLA. [14] Moreover, like Wyoming and Colorado, North Dakota's argument would lead to absurd results because it would prevent BLM from protecting groundwater and other natural resources on federal and Indian lands when a State or Tribe does not adequately regulate non-diesel hydraulic fracturing under state or tribal authorities.

North Dakota's primacy argument – its assertion that federal interference with a State's regulation of an underground source of drinking water is generally prohibited under the SDWA – is misplaced. N.D. Mem. 20-21, 25. The fact that States have primacy for approved UIC programs under 42 U.S.C. § 300h-1 is irrelevant to BLM's separate authority under FLPMA and the MLA. As we have previously shown, the legislative history of the SDWA makes clear that Congress intended to preserve BLM's separate authority to address groundwater contamination under the MLA from the very beginning of the SDWA. H.R. Rep. No. 93-1185 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6454, 6484-85.

Moreover, North Dakota does not have primacy under the SDWA with respect to non-diesel hydraulic fracturing. Congress has excluded the injection of fluids (other than diesel fuels) associated with hydraulic fracturing operations from the definition of "underground injection" under the SDWA UIC program regardless of whether EPA or a State would otherwise

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[14] North Dakota (like Wyoming and Colorado) cites to statements by Representative Markey and Senator Feingold as evidence that the Energy Policy Act was intended to prevent any federal regulation of hydraulic fracturing. N.D. Mem. 22. It is well-settled that the views of single legislators are not controlling. *Mims v. Arrow Fin. Svcs.*, 132 S.Ct. 740, 752 (2012). This is true even if the legislators in question are the bill's sponsors, which Representative Markey and Senator Feingold were not as they both opposed the bill. *See id.* Moreover, Senator Feingold stated only that the bill exempts hydraulic fracturing from the SDWA; he said nothing about BLM's authority under FPMA or the MLA. 151 Cong. Rec. S9335-01, S9337 (July 29, 2005) (Statement of Sen. Feingold). Representative Markey's statement more broadly indicated that the bill includes a special provision to protect Haliburton from facing federal regulation for hydraulic fracturing that actually injects diesel fuel into water supplies. 151 Cong. Rec. H2192-02, H2194-95 (Apr. 20, 2005) (Statement of Rep. Markey). This statement should be afforded little weight because hydraulic fracturing using diesel fuel is regulated under the SDWA, as amended by the Energy Policy Act. *See* 42 U.S.C. § 300h(d)(1). Moreover, as we have shown, the Energy Policy Act amended only the definition of "underground injection" in the SDWA; it did not amend FLPMA or the MLA in any respect. *See id.*

be the appropriate regulatory authority for any particular well. *See* 42 U.S.C. § 300h(d)(1). Therefore, North Dakota may no more regulate non-diesel hydraulic fracturing under the SDWA UIC program than EPA. Rather, its regulation of non-diesel hydraulic fracturing is solely under state law, *not* the SDWA UIC program.[15] Accordingly, North Dakota's SDWA primacy argument is incorrect as a matter of law.

The other provision of the SDWA that North Dakota refers to, 42 U.S.C. § 300h(b)(3)(B), is directed solely at the Administrator of EPA, not any other federal official or agency, such as the Secretary of the Interior or BLM. *Id.* *See also id.* at § 300f(7) ("The term 'Administrator' means the Administrator of the Environmental Protection Agency."). N.D. Mem. 21. In addition, North Dakota selectively quotes the statutory language. It does not inform the Court that an EPA regulation will be deemed to disrupt a State UIC program *only* if it would be *infeasible* to comply with both the EPA regulation and an approved State UIC requirement. 42 U.S.C § 300h(b)(3)(B)(ii). Thus, in addition to being completely inapplicable to BLM, the statutory provision would not prohibit the Final Rule even if it were applicable to BLM because it is feasible to comply with the Final Rule and applicable state requirements.[16] In fact, the Final Rule requires that operators comply with state regulatory regimes. 80 Fed. Reg. at 16,178/3 (preamble to Final Rule explaining that "[o]perators on Federal leases must comply

[15] In addition, as a practical matter, hydraulic fracturing did not become prevalent and productive in North Dakota until 2006, which is after the Energy and Policy Act amended the SDWA's definition of "underground injection" to exclude non-diesel hydraulic fracturing. *See* N.D. Mem. 24. Regardless, North Dakota may not regulate non-diesel hydraulic fracturing under the SDWA UIC program. 42 U.S.C. § 300h(d)(1).

[16] North Dakota also grossly overstates the implication of state primacy vis-à-vis EPA's authority under the SDWA. For example, as set forth in the Background Section, EPA must approve a State's UIC program before the State has primacy under the SDWA, and EPA may enforce approved state program requirements if a State fails to do so. In addition, after its UIC program is approved, any proposed aquifer exemptions by the State may be disapproved by EPA. 40 C.F.R. § 144.7(b)(3). Thus, EPA retains a substantial oversight role both before and after it approves a state UIC program.

both with this rule and any applicable state requirements, just as they already must comply with both BLM rules and state rules on a variety of drilling and completion issues.”).

North Dakota’s reliance on the federal facilities provision of the SDWA is also misplaced. N.D. Mem. 21. As set forth above in the Background Section, federal agencies that are themselves engaged in underground injection which endangers drinking water within the meaning of 42 U.S.C. § 300h(d)(2), are subject to federal, state, and local requirements respecting underground injection in the same manner and to the same extent as any other person is subject to such requirements. 42 U.S.C. § 300j-6(a). Thus, like the federal facilities provisions of the other federal environmental statutes, 42 U.S.C. § 300j-6(a) simply requires that federal agencies that are actually engaged in the regulated activity – in this case, “underground injection” – comply with applicable requirements to the same extent as any other person must comply with those requirements. *Id.* *Cf. City of Olmsted Falls v. EPA*, 233 F.Supp.2d. 890, 897 (N.D. Ohio 2002) (“On its face, Section 313 [the federal facilities provision of the CWA] acts to waive the sovereign immunity only where an arm of the federal government is an alleged polluter.”); *Colo. Wild, Inc., v. U.S. Forest Svc.*, 122 F. Supp. 2d 1190, 1194 (D. Colo. 2000) (Clarence Brimmer, J.) (“Section 313 . . . [the federal facilities provision of the CWA is] limited to requiring a federal facility to comply with pollution control measures in the same fashion as a nongovernmental entity.”). Because BLM is not itself engaged in regulated underground injection, the federal facilities provision of the SDWA is irrelevant here and does not curtail BLM’s authority to protect federal lands and resources in its regulatory role under FLPMA and the MLA.

Moreover, as a waiver of the United States’ sovereign immunity, 42 U.S.C. § 300j-6(a) must be narrowly construed and cannot be “‘enlarge[d] . . . beyond what the [statute's] language

requires.'" *U.S. Dep't of Energy v. Ohio*, 503 U.S. 607, 615 (1992) (citations omitted). As discussed above, 42 U.S.C. § 300h(d)(1) specifically excludes non-diesel hydraulic fracturing operations from the definition of "underground injection." 42 U.S.C. § 300h(d)(2) describes the circumstances under which "underground injection" endangers drinking water. Federal agencies are only subject to state UIC requirements when they are engaged in underground injection activities which endangers drinking water within the meaning of 42 U.S.C. § 300h(d)(2). 42 U.S.C. § 300j-6(a). And even then, federal agencies are subject to such requirements only in the same manner and to the same extent as any nongovernmental entity. *Id.*

Because the federal facilities provisions require compliance with federal, state, and local requirements regarding "underground injection," and non-diesel hydraulic fracturing operations are specifically excluded from the definition of "underground injection," federal agencies are not subject to any state or local requirements related to non-diesel hydraulic fracturing under the SDWA federal facilities provision. *See* 42 U.S.C. § 300j-6(a). Thus, North Dakota's regulatory regime respecting hydraulic fracturing would not apply to BLM even if this case concerned something other than BLM's regulatory authority under FLPMA and the MLA, and the State's reliance on the SDWA federal facilities provision should be rejected for this reason as well.

North Dakota's reference to wellhead protection areas does not help its argument. N.D. Mem. 21. The SDWA provides for States to adopt programs to protect wellhead protection areas. 42 U.S.C. § 300h-7(a). A "wellhead protection area" is the "surface and subsurface area surrounding a *water well or wellfield*, *supplying a public water system*, through which contaminants are reasonably likely to move toward and reach such water well or wellfield." *Id.* at § 300h-7(e) (emphasis added). Thus, the wells protected in wellhead protection areas are drinking water wells, not oil and gas wells. North Dakota provides no support for its illogical

assertion that wellhead protection areas originally included hydraulically fractured oil and gas wells. N.D. Mem. 21. It is true that Federal agencies that "own or operate" a facility in a wellhead protection area and are engaged in any activity at that facility which may result in the contamination of water supplies at the wellhead protection area are subject to state regulatory requirements in the same manner and to the same extent as anyone else. *See also* 42 U.S.C. § 300h-7(a), (h) (federal agencies having jurisdiction over any anthropogenic potential source of contamination identified by a state in wellhead protection area must comply with state wellhead protection programs in the same manner and to the same extent as anyone else). However, the fact that BLM may be subject to state regulatory requirements when it is itself engaged in activities that might contaminate water supplies at a wellhead protection area has nothing to do with BLM's authority to regulate hydraulic fracturing under FLPMA and the MLA. *See U.S. Dep't of Energy*, 503 U.S. at 619 ("A clear and unequivocal waiver of anything more cannot be found; a broader waiver may not be inferred.").[17]

North Dakota's claimed authority over Indian lands also provides no basis to overturn the Final Rule. N.D. Mem. 22. In fact, North Dakota's UIC program is not approved for Indian lands in North Dakota. 40 C.F.R. § 147.1750. Rather, EPA administers the UIC program for all classes of wells on Indian lands in North Dakota, except, of course, for non-diesel hydraulically fractured wells, which, as explained above, are not subject to the EPA or any state SDWA UIC program. *Id.* § 147.1752.

North Dakota baldly claims that it has "sovereign authority" to regulate oil and gas development on Indian lands. N.D. Mem. 20. However, this assertion is contrary to the basic

[17] Indeed, it is difficult to understand North Dakota's argument that because federal agencies must protect drinking water wells, BLM cannot assure adequate casing and cementing of oil and gas wells to isolate and protect usable water, or assure isolation of recovered fluids on the surface.

principle of federal Indian law that "[g]enerally speaking, primary jurisdiction over land that is Indian country rests with the Federal Government and the Indian tribe inhabiting it, and not with the States." *Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520, 527 n.1. (1998). *See also Indian Country, U.S.A., Inc. v. Oklahoma ex. rel. the Okla. Tax Comm'n*, 829 F.2d 967, 976 (10th Cir. 1987) ("There is a presumption *against* state jurisdiction in Indian country."). Accordingly, North Dakota's errant and unsubstantiated claim of "sovereign authority" to regulate oil and gas development on Indian lands within the State, provides no basis to overturn the Final Rule.

In addition, any agreement between a State and Tribe, including a contract to provide services, would not affect the statutory authorities and trust responsibilities of the Secretary, such as those provided in the Indian mineral statues. *See* N.D. Mem. 22 (asserting that there is an agreement between North Dakota and the Three Affiliated Tribes regarding hydraulic fracturing on the Fort Berthold Reservation). Conversely, the Final Rule would not displace a service contract, such as the one North Dakota describes. Indeed, contrary to North Dakota's assertions, the Final Rule does not "evict" the State from regulating hydraulic fracturing under state law anywhere in North Dakota. *See* N.D. Mem. 23, 32-33. Rather, the Final Rule is in addition to any such regulation by agreement between the Tribes and the State. 80 Fed. Reg. at 16,178/3 (explaining that operators must comply with applicable state requirements as they have always done). But BLM recognized when it promulgated the Final Rule that the states, unlike BLM, do not have a trust responsibility for Indian trust lands under federal law. 80 Fed. Reg. at 16,133/2. Thus, BLM must exercise its own regulatory authority over hydraulic fracturing on Indian lands regardless of any agreements that North Dakota may have with a tribe.

Moreover, while North Dakota claims that the SDWA recognizes that States are uniquely qualified to determine the type and level of protection for waters under their jurisdiction, N.D. Mem. 32 – an assertion belied by the passage of the SDWA itself and the fact that States do not obtain primacy unless and until EPA approves their SDWA UIC programs – Congress has unquestionably recognized that DOI is uniquely qualified to protect natural resources on federal lands under its jurisdiction. As discussed above, and in response to Wyoming and Colorado's motion for a preliminary injunction, when it passed the SDWA Congress specifically intended to preserve DOI's authority to protect groundwater resources under the MLA. H.R. Rep. No. 93-1185 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6454, 6484-85. Moreover, the Final Rule was not promulgated under the SDWA, but rather under FLPMA and the MLA. North Dakota is therefore wrong in it its assertion that the Final Rule contradicts the SDWA and somehow upsets the SDWA's cooperative federalism approach. N.D. Mem. 32-33.

In addition, contrary to North Dakota's assertion, BLM has not determined that any state standard less stringent than the Final Rule is per se "wrong." N.D. Mem. 33. BLM simply found that a wide range of state regulatory regimes for hydraulic fracturing exists, with some having no such regime, demonstrated the need for the Final Rule as a nationwide baseline for operations on federal and Indian lands. 80 Fed. Reg. at 16,176. BLM also observed that "states are not legally required to meet the stewardship standards that apply to public lands . . . ." *Id.* at 16,133/2. The Final Rule implements BLM's responsibility to apply such standards precisely as Congress intended.

Finally, North Dakota's long history of regulating oil and gas development since 1953 is beside the point. N.D. Mem. 23-25. DOI has been regulating oil and gas development involving federal lands and federal minerals under the MLA since the 1920s. Second Wells Decl. ¶ 17.

Given that federal and state regulatory programs have coexisted for so long in more than thirty states, North Dakota's assertion that the Final Rule is prohibited by "common law traditions of cooperative federalism" is inexplicable. N.D. Mem. 23.

B. Petitioners Fail to Demonstrate Irreparable Harm

North Dakota has failed to demonstrate a substantial likelihood that it will ultimately succeed on the merits of its suit, and thus the Court may deny its motion on that basis alone. *See, e.g., Winter*, 555 U.S. at 23-24; *Sprint Spectrum, L.P. v. State Corp. Comm'n of Kan.*, 149 F.3d 1058, 1060-62 (10th Cir. 1998). Moreover, North Dakota's motion should also be denied because it has failed to demonstrate irreparable harm as a result of the Final Rule.[18] A showing of probable irreparable harm is the most important prerequisite for the issuance of a preliminary injunction. *Dominion Video Satellite, Inc. v. Echostar Satellite Corp.*, 356 F.3d 1256, 1260 (10th Cir. 2004). To be entitled to an injunction, North Dakota "must show that the injury complained of is of such imminence that there is a clear and present need for equitable relief to prevent irreparable harm." *Heideman v. S. Salt Lake City*, 348 F.3d 1182, 1189 (10th Cir. 2003) (quotes and emphasis omitted). North Dakota must show that "irreparable injury is likely in the absence of an injunction." *Winter*, 555 U.S. at 22 (emphasis omitted). Thus, to be entitled to its requested injunction, North Dakota must show that there is "likely," "imminent," and "irreparable" injury. North Dakota has not made this showing.

[18] While North Dakotas has failed to meet any of the elements required for a preliminary injunction, should the Court disagree, any such relief should be narrowly tailored to protect only (i) those parties that have shown *irreparable harm* from the Final Rule and (ii) against the irreparable harm shown. *See* 5 U.S.C. § 705 (a court "may issue" orders under the APA to "preserve status or rights pending conclusion of the review proceedings," but *only* "to the extent necessary to prevent irreparable injury.")

1. The Final Rule Will Not Impair or Harm any of the State's "Sovereign Authority"

The Final Rule does not infringe upon, usurp, or displace North Dakota's sovereign authority. As addressed in detail on pages 7-14 and 20-21 of Respondents' Brief in Opposition to Wyoming's and Colorado's Motion for Preliminary Injunction (ECF No. 68), federal public lands are federal property, to be managed by federal agencies on the basis of delegations of Congressional authority pursuant to the Property Clause of the U.S. Constitution. State regulations may apply, but they do not displace federal regulation and in fact may be preempted by United States' sovereign authority. *Ventura Cty v. Gulf Oil Corp.*, 601 F.2d 1080, 1086 (9th Cir. 1979), *aff'd mem.*, 445 U.S. 947 (1980). Nor has North Dakota asserted a basis on which it can claim sovereignty or a sole right to regulate lands and minerals held in trust for sovereign tribes or individual Indians.

The Final Rule applies to hydraulic fracturing operations on federal and Indian lands, and as described above, in federal minerals in split estates. 43 C.F.R. § 3160.0-1. The Final Rule does not apply to hydraulic fracturing on state or private land within North Dakota where no federal minerals are present. At best, North Dakota has shown that regulations on federal and Indian land may have an indirect effect on oil and gas operations on private land because of how North Dakota has voluntarily structured its state regulations. N.D. Mem. 7-11. But this situation is wholly distinguishable from that where federal action would result in the transfer of jurisdiction or regulatory authority over real property from a state to an Indian tribe. *Cf. Kansas v. United States*, 249 F.3d 1213, 1227-28 (10th Cir. 2001) (government's recognition of real property as "Indian Country" would automatically deprive State of authority to preclude Class II or Class III gaming on the land under the Indian Gaming Regulatory Act). Here, the Final Rule does not transfer or diminish any state regulatory authority – the State already has regulatory authority over the federal public land affected by the Final Rule and nothing in the rule purports

to preclude or diminish such regulatory authority. Absent consent or cession, a state retains jurisdiction over federal public lands within its territory, but Congress retains concurrent power to enact legislation respecting those lands pursuant the Property Clause of the Constitution. *Kleppe v. New Mexico*, 426 U.S. 529, 542 (1976). When the federal government exercises regulatory jurisdiction over federal or Indian lands, those regulations "necessarily override[] conflicting state laws under the Supremacy Clause." *Id*. at 543.

While North Dakota has broad trustee and police powers over land and water within its boundaries, those powers exist only "in so far as [their] exercise may be not incompatible with, or restrained by, the rights conveyed to the federal government by the constitution." *Geer v. Connecticut*, 161 U.S. 519, 528 (1896). Contrary to North Dakota's assertion, N.D. Mem. 10, the Final Rule does not apply to purely state or privately-owned lands. 43 C.F.R. § 3160.0-1. For split-estate lands within North Dakota, as within all other states, the Final Rule applies in full to protect the federal mineral resources and to comply with the MLA's directive to regulate surface disturbing activities associated with accessing those federal oil and gas leases. Moreover, the surface provisions of the Final Rule (primarily, the handling of recovered fluids) are consistent with existing North Dakota regulations. *Compare* N.D. Mem. 4 (recovered fluids are "normally stored in closed-top above ground tanks, but may be temporarily be stored in pits or receptacles") *with* 43 C.F.R. § 3162.3-3(h). The Final Rule was not intended to, and does not, regulate purely private or state lands. No sovereign authority is harmed by the Final Rule.

Nor does the Final Rule affect the State's spacing regulations. North Dakota suggests that the regulations will prevent the State from "regulating the orderly development" of spacing units because of the alleged permitting delays that will result from implementation of the Final Rule. *See* N.D. Mem. 10; Helms Decl. ¶ 12. As discussed below, the State's premise of delay is

completely unsubstantiated. But in any event, the Final Rule does not change the size or regulatory scheme governing existing units, nor does it affect the State's authority or ability to create and regulate spacing units in the future.

With respect to North Dakota's assertion that the Final Rule intrudes on its ownership or regulatory authority over groundwater in the State, *see* N.D. Mem. 10-11, the Final Rule does not purport to alter or regulate ownership of, rights to, or control of groundwater, as explained above. The only way in which the Final Rule impacts groundwater is through its requirement that operators cement and test cement and wellbore structural integrity to isolate and protect particular groundwater zones. The basic casing and cementing requirements have been in place for decades under preexisting BLM regulations for drilling operations, with only new verification and testing requirements applying to wells to be hydraulically fractured. Moreover, as explained above, the Final Rule maintains the existing standard for "usable water" subject to such protection, except that it introduces substantially greater deference to states' choices as to which groundwater zones should or should not be isolated and protected.

The Final Rule does not harm, but instead expressly preserves, North Dakota's sovereign regulatory authority. Specifically, it maintains states' ability to regulate hydraulic fracturing within their borders, including on federal public lands. 80 Fed. Reg. at 16,130. Furthermore, the Final Rule regulates conduct on federal and Indian lands, conduct wholly within the federal government's regulatory and proprietary authority. This is distinguishable from the rule at issue in *Achiachak Native Community v. Jewell*, 995 F. Supp. 2d 7 (D.D.C. 2014), which would have allowed the DOI to accept land into trust for Indian tribes within Alaska (necessarily removing those lands from state ownership and jurisdiction). *Id.* at 16-17. Here, the Final Rule does not transfer any regulatory jurisdiction, and only has an indirect impact on state or private land

because of how North Dakota chooses to structure its own regulations. There is no likely or imminent harm to North Dakota's sovereign authority as a result of the Final Rule.

2. North Dakota Will Not Suffer a Direct, Imminent, or Irreparable Economic Harm.

Delayed tax or royalty revenue is not lost revenue. North Dakota has not presented evidence establishing that the Final Rule will decrease oil and gas production on federal or Indian land. Instead, North Dakota argues that additional permitting may "delay" state royalty and tax income, *see* Declaration of Lynn D. Helms (ECF No. 52-4) ("Helms Decl.") ¶¶ 14-16. BLM's regulatory impact analysis shows that the Final Rule is not likely to decrease the amount of oil and gas production on federal and Indian land. 80 Fed. Reg. at 16,208 ("Since the estimated compliance costs are not substantial when compared with the total costs of drilling a well," BLM concluded "that the rule is unlikely to have an effect on the investment decisions of firms. . . ."). Thus, North Dakota has not shown it will suffer any loss of royalties or tax revenue.

It has, at best, made an argument that royalty or tax revenue may be delayed. Mere "delay" in obtaining revenue can hardly justify the extraordinary relief sought here. *See League of Wilderness Defenders/Blue Mountains Biodiversity Project v. Connaughton*, 752 F.3d 755, 765 (9th Cir. 2014) (delaying jobs and government tax revenue is only "marginal harm"). Moreover, North Dakota has failed to produce evidence substantiating its argument that royalty or tax revenue will be delayed. Mr. Helms baldly asserts that existing BLM personnel will require more time to act upon permitting requests so that the Final 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." Helms Decl. ¶ 15. But BLM analyzed the additional time needed to process applications for drilling in light of the Final Rule, and concluded that this would add four hours to the processing time. *See, e.g.*, 80 Fed. Reg. at 16,196, 16,198, 16,203; Third Wells Decl. ¶¶ 25-26. North Dakota provides no substantiated information to counter this assessment.

Moreover, North Dakota must admit that the Final Rule does not impact the over $3.4 billion in production taxes and extraction taxes it receives from *producing* wells. *See* Declaration of Kevin Schatz (ECF No. 52-5) ("Schatz Decl.") ¶ 11. The Final Rule applies only to new wells drilled after June 24, 2015, or existing wells that are stimulated by hydraulic fracturing after the rule becomes effective. 43 C.F.R. § 3160.0-5. Mr. Helms provides no support, only speculation that $300 million in bonuses, rents, royalties, and taxes on *new* wells will be delayed in the State's Fiscal Year 2016. *See* Helms Dec. ¶ 16. Nor does he offer any of the predicate information needed to determine this – such as how many wells are expected to be spudded (*i.e.*, having an initial well drilled) in North Dakota in the next year, how many wells are typically spudded in North Dakota in a year, how many of those wells are on federal or Indian land, and how many of those will use hydraulic fracturing. Since none of the foregoing information is provided by Mr. Helms, his estimate of future royalty and tax delays are speculative and should not be considered by the Court. *See* Fed. R. Evid. 402, 602, 701, 702, 703.

Further, it is not credible for North Dakota to argue that "the impacts of the BLM Rule were not contemplated in the biennial budget for fiscal years 2016-2017." Helms Decl. ¶ 16. North Dakota has had over three years to prepare for implementation of the Final Rule. BLM first published a proposed hydraulic fracturing rule in 2012. *See* 77 Fed. Reg. 27,691 (May 11, 2012). BLM published a proposed supplemental rule in 2013. 78 Fed. Reg. 31,636 (May 24, 2013). But even if the Court were to accept North Dakota's estimate of $300 million in delayed revenue, that is less than two percent of the State's executive recommendation of a $15.7 billion budget for 2015-2017, 2015-2015 Executive State Budget, available at <http://www.nd.gov/fiscal/budget/state> (last visited June 11, 2015), and less than nine percent of North Dakota's 2014 oil and gas royalty and tax income, Schatz Decl. ¶ 11. This amount of

impact, even if deemed accurate, is not akin to an economic harm that would threaten the very existence of a business–warranting a preliminary injunction, *see Wisc. Gas Co. v. FERC*, 758 F.2d 669, 674, *aff'd in part, remanded in part* 770 F.2d 1144 (D.C. Cir. 1985).

In sum, North Dakota has failed to establish that it will suffer any economic harm from the Final Rule. North Dakota's claimed economic harm is speculative and is not supported by the evidence. Moreover, North Dakota has at most provided evidence of a delay in royalty or tax revenue, not that it will lose royalty or tax revenue.

3. Even if North Dakota Were to Suffer Some Economic Harm, That is not a Basis to Grant an Injunction

The general rule that potential economic loss is insufficient to support a preliminary injunction applies here. *Port City Props. v. Union Pac. R.R. Co.*, 518 F.3d 1186, 1190 (10th Cir. 2008). As in the briefing by the other movants in this case and the consolidated case, North Dakota asserts that its economic harms qualify for an exception to this general rule because it will not be able to recoup its harms from the United States due to sovereign immunity. N.D. Mem. 11, 14-16. Like the Industry Petitioners and the States of Wyoming and Colorado, North Dakota relies for this proposition on two Tenth Circuit cases, *see id*. 11, 16, which addressed situations in which the movant, absent injunctive relief, would be forced to pay fees or fines to a sovereign entity. *See Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140, 1156-57 (10th Cir. 2011) (tribal court order, if not enjoined, would force the movant to return his fees to an Indian tribe); *Chamber of Commerce v. Edmondson,* 594 F.3d 742, 770-71 (10th Cir. 2010) (absent injunction, state law on the employment of illegal immigrants would lead to imposition of fines on businesses that failed to comply with law). By contrast, North Dakota is not alleging that the Final Rule would result in payment of any fines or fees to the federal government.

The only other case that North Dakota cites in support of its proposition that it can sidestep the general rule on economic losses is *Iowa Utilities Board v. FCC*, in which the Eighth Circuit found irreparable harm where movants not only demonstrated that they would suffer undue economic losses as a direct result of the pricing rule that they sought to enjoin–losses which they would be unable to recoup through later participation in the market–but also that the rule would substantially disrupt the existing pricing system in telecommunications markets, disrupt ongoing negotiations and arbitrations between private parties, including new market entrants, and result in loss of goodwill. *See* 109 F.3d 418, 425-26 (8th Cir. 1996). While that case does not bind this Court, it is also distinguishable both on the basis of the multifarious harms supporting the Eighth Circuit's irreparable harm finding and a demonstration of substantial harm directly attributable to the rule sought to be enjoined.

Here, at most, the Final Rule may indirectly delay the collection of revenues by North Dakota – but even this harm is unsubstantiated. There is no basis to deviate from the well-established rule in this Circuit that economic injuries are insufficient to establish irreparable harm for a preliminary injunction in this case, and North Dakota's motion should be denied.

C. <u>The Balance of Harms and Public Interest Do Not Favor a Preliminary Injunction</u>

The Final Rule "complement[s] existing regulations designed to ensure the environmentally responsible development of oil and gas resources on Federal and Indian lands." 80 Fed. Reg. at 16,128. Strong public interests, both in protection of the environment and in resource development, are served by the Final Rule and enjoining the rule from becoming effective would not serve the public interest. In considering the extraordinary relief North Dakota requests, "courts must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief [and] [i]n exercising their sound discretion, courts of equity should pay particular regard for the public consequences . . .

[,]" *Winter*, 555 U.S. at 24 (citations omitted). With respect to the federal government, those two inquiries merge. *Nken v. Holder*, 556 U.S. 418, 435 (2009). North Dakota has failed to meet its heavy burden of establishing that an injunction would serve the public interest.

As explained in greater detail in Federal Respondents' Brief in Opposition to Petitioners' Motion for Preliminary Injunction, filed in Case 2:15-cv-00041-SWS (ECF. No. 20) at 52-57, the injunction sought by North Dakota would frustrate BLM's considerable efforts to develop a rational, supportable and effective rule of national scope to adapt a long-standing regulatory framework to substantial changes in the technology and practice of modern oil and gas drilling, while meeting a suite of federal statutory guidelines. A preliminary injunction would frustrate the public interests motivating the Final Rule and deny BLM the tools needed to respond to risks and public concerns associated with the growth of hydraulic fracturing of oil and gas wells – among them, potential groundwater contamination, use of chemicals during the fracturing process, frack hits, and issues related to the management of recovered water.

Further, without the rule in place, BLM would be handicapped in its efforts to meet its statutory and trust responsibilities to protect Indian lands and mineral resources, while supporting tribal efforts to "develop independent sources of income and strong self-government." *See, e.g., Seneca-Cayuga Tribe of Okla. v. Oklahoma*, 874 F.2d 709, 716 (10th Cir. 1989). Tribal and individual Indian commenters in the rulemaking expressed a wide range of views. The Secretary considered all those views in deciding that the Final Rule would be in the best interests of the Tribes and the individual Indian owners of restricted fee lands. Thus, the public interest as expressed in the Indian minerals statutes would also best be served by an order denying any injunctive relief until the Court is able to make a final determination on the merits.

This Court should presume "that all governmental action pursuant to a statutory scheme . . . is taken in the public interest." *N. Arapaho Tribe*, 2015 U.S. Dist. LEXIS 30480 at *41, quoting *Aid for Women v. Foulston*, 441 F.3d 1101, 1115 n.15 (10th Cir. 2006) (internal quotations omitted). North Dakota has not overcome that presumption. The only argument it advances in its motion, N.D. Mem. 36-39, is that it would prioritize differently the balance between resource development and environmental protection. The Final Rule will not engender "regulatory uncertainty" or "regulatory chaos," *id.* 36-37, if allowed to become effective; it would provide clear and explicit guidance to regulated entities in an area that was previously not specifically addressed in BLM regulations. As stated by BLM, when it promulgated the Final Rule it considered, and balanced, the public's interest in both environmental protection, *see V-1 Oil Co. v. Wyo., Dep't of Envtl. Quality*, 902 F.2d 1482, 1486 n.1 (10th Cir. 1990) ("protection of the environment and the public from pollution in general . . . is a substantial governmental interest"), and resource development. North Dakota focuses exclusively on resource development, *see* N.D. Mem. 37 ("the protection of business," "efficient development of federal oil and gas resources," "significant revenue," "generation of revenue from mineral development projects"), while ignoring or dismissing any environmental benefits from the final rule, *id.* 38. The Court should not substitute North Dakota's balancing of the public interests for the Secretary's. The public interest will not be served by issuing an injunction.

III. CONCLUSION

For the foregoing reasons, North Dakota has failed to establish any of the requirements for preliminary injunctive relief, and therefore the Court should deny its motion for preliminary injunction (ECF No. 52).

Respectfully submitted this 19th day of June 2015.

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CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of June 2015 a copy of the foregoing **Respondents' Brief in Opposition to North Dakota's Motion for Preliminary Injunction** was electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

/s/ William E. Gerard
WILLIAM E. GERARD

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

STATE OF WYOMING, et al.,	)	
	)	
Petitioners,	)	
	)	
v.	)	No. 2:15-CV-43-SWS
	)	
UNITED STATES DEPARTMENT OF THE INTERIOR, et al.,	)	
	)	
Respondents.	)	

THIRD DECLARATION OF STEVEN WELLS

1. My name is Steven Wells. I am over 21 years of age and am fully competent and duly authorized to make this declaration. I am the same Steven Wells whose declaration was filed with this court in *Independent Petroleum Association of America v. Jewell,* No. 2:15-CV-41-SWS, on June 1, 2015 (hereinafter, "my first declaration"), and whose declaration was filed with this court in the above-captioned consolidated civil action on June 19, 2015 (hereinafter, "my second declaration"). The facts contained in this declaration are based on my personal knowledge, my review of records and files of the Bureau of Land Management (BLM), and review of publicly available documents, and are true and correct.

2. I have been employed by the Bureau of Land Management (BLM) within the U.S. Department of Interior (Department) for over 25 years. I am presently Division Chief for Fluid Minerals at the headquarters office of the BLM at 20 M St, S.E., Washington, DC 20003. My prior relevant experience is summarized in my first declaration.

3. I earned a Bachelor of Science degree in Petroleum Engineering from the University of Wyoming in 1984.

4. I am familiar with the oil and gas industry, and with BLM's statutory authorities, its oil and gas operating regulations, and its processes and procedures. I supervised the drafting of the final hydraulic fracturing rule at issue in this case, which was signed by the Assistant Secretary for Land and Minerals Management, and published on March 26, 2015. 80 Fed. Reg. 16128 (2015).

5. A brief summary of the authorities of the Secretary of the Interior (Secretary) and the duties of BLM under the Mineral Leasing Act of 1920 (30 U.S.C. 181, *et seq.*) (MLA), the Mineral Leasing Act for Acquired Lands of 1947 (30 U.S.C. 351 – 360), the Federal Land Policy and Management Act of 1976 (FLPMA) (43 U.S.C. 1701, *et seq.*), and the Indian minerals statutes, is contained my first declaration. See also, e.g., 80 Fed. Reg. at 16129.

6. BLM has existing oil and gas leases on Federal lands in 32 states, including Colorado, North Dakota, Wyoming and Utah. BLM regulates oil and gas operations on the trust or restricted lands of 72 tribes and of numerous individual Indians.

9. BLM's oil and gas operating regulations contained or incorporated by reference in 43 C.F.R. part 3160 are comprehensive. See also 80 Fed. Reg. at 16134 – 37. But from time to time they are overtaken by technological developments and need to be updated. A summary of

the preexisting regulations relevant to hydraulic fracturing operations is contained in paragraph 10 of my first declaration. See also 80 Fed. Reg. at 16131. Background information about hydraulic fracturing operations is contained in paragraphs 11 – 14 of my first declaration. See also 80 Fed. Reg. at 16130 – 31.

10. Some issues of public concern about hydraulic fracturing operations are discussed in paragraphs 15 – 17 of my first declaration. See also 80 Fed. Reg. at 16131, 16194. Some of the studies relating to the impacts of hydraulic fracturing are introduced in paragraphs 15 and 18 of my first declaration. See also *id.* A brief discussion of two reports by the Secretary of Energy Advisory Board Shale Gas Subcommittee is in paragraph 10 of my second declaration. See also 80 Fed. Reg. at 16131. A summary of a publication by the National Academy of Science about potential pathways of contamination of groundwater by hydraulic fracturing operations is in paragraph 19 of my first declaration.

11. On June 5, 2015, after the publication of BLM's final rule, the U.S. Environmental Protection Agency (EPA) issued an external review draft of its "Assessment of the Potential Impacts of Hydraulic Fracturing for Oil and Gas on Drinking Water Resources." See 80 Fed. Reg. 32111. See also http://cfpub.epa.gov/ncea/hfstudy/recordisplay.cfm?deid=244651 (Draft Assessment). A discussion of that assessment, including its reports of certain adverse incidents, is in paragraph 11 of my second declaration.

12. A discussion of "frack hits" is in paragraphs 20 and 21 of my first declaration. See also 80 Fed. Reg. at 16148 -49, 16154, 16181, 16193.

13. An outline of the rulemaking process for the hydraulic fracturing rule is in paragraphs 22 – 28 of my first declaration, and in paragraph 13 of my second declaration. See also 80 Fed. Reg. 16131.

14. The final rule was accompanied by a regulatory impact analysis (RIA) that analyzed economic impacts as required by several statutes and Executive Orders. See Attachment A to the declaration of James Tichenor, submitted to this court in *IPAA v. Jewell*, No. 2:15-CV-41-SWS, on June 1, 2015. See also 80 Fed. Reg. at 16130, 16186 – 89, 16195-210. It concludes that the rule will increase costs on average $11,400 per fracked well, or between 0.13% and 0.21% of the total cost of drilling and fracturing a well, and thus will not affect the industry's decisions about whether or where to seek oil and gas leases or to conduct drilling and hydraulic fracturing operations. *See, e.g.,* 80 Fed. Reg. at 16130, 16195 *et seq.* (summarizing economic analyses).

15. The Secretary's regulation of oil and gas operations on Federal lands pursuant to the MLA has been ongoing for 95 years. Attached as Exhibit 1 to my second declaration are the original rules and regulations promulgated by the Secretary of the Interior to administer the provisions of the MLA relative to oil and gas. 47 I.D. [Interior Decisions] 437 (March 11, 1920) (published in 1921). A discussion of those rules is in paragraph 17 of my second declaration.

16. I have read and considered the Motion for Preliminary Injunction filed June 8, 2015, by petitioner State of North Dakota (document 43), and the documents filed concurrently with that

motion, including the memorandum in support (document 43-1), and declaration of Lynn D. Helms (document 43-4) and declarations of others.

17. The declaration of Mr. Helms includes his summary of land ownership in North Dakota, his summary of an agreement between the Three Affiliated Tribes of the Fort Berthold Reservation and the State of North Dakota, his discussion of spacing units in North Dakota, the financial benefits North Dakota receives from the production of oil and gas on Federal and Indian lands, his unsupported "estimate" that the hydraulic fracturing rule will delay oil and gas development in North Dakota by up to 6 to 10 months, his unsupported statement that such delays will reduce the rate of oil and gas development by one-half in the fiscal year from July 1, 2015 through June 30, 2016, his unsupported statement that the Legislature did not anticipate decreases in royalties and taxes (which he estimates to be $600 million over the next biennium, and larger amounts over longer periods), statements about the reliance of the State and its localities on royalty revenues, an un-attributed estimate that 10 of 22 companies with significant oil and gas operations on Federal and Indian lands in North Dakota will relocate from the State rather than comply with the hydraulic fracturing rule resulting in an unsupported estimate that $9.4 billion in royalties and taxes will be permanently lost, and an estimate derived from an un-cited and un-attached study that such relocation of companies would result in loss of 1,900 jobs over an unspecified time period.[1]

[1] BLM staff and I have been unable to locate on the internet a study such as the one described by Mr. Helms involving the three institutions he names, and published after the announcement of the final rule. There are studies concerning the socio-economic impacts of the oil industry in North Dakota, but none we could find that specifically study any effects from the Final Rule.

18. Many of the estimates in Mr. Helms declaration seem premised on the assumption that if current operators leave, no other company would come forward to lease or operate formations that are generally recognized to be geologically attractive on Federal and Indian lands. That premise is unsupported. Also Mr. Helms fails to mention that many drilling rigs are already inactive in North Dakota. According to the counts routinely reported in the "Oil Patch Hotline," the number of active drilling rigs in North Dakota declined from 218 in May 2012, to 91 in December 2014, to 88 on April 10, 2015, to 76 on June 5, 2015. See generally, http://oph.hotlineprinting.com/ (because the publication is copyrighted, I have not attached copies of the pertinent issues). That decline (and any ripple effects in the State budget or North Dakota's economy) cannot be attributed to the Final Rule, which has not taken effect. Indeed if operators feared the Final Rule enough to alter their development plans, one would have expected an increase in drilling activity in April and May 2015 in order to complete wells before June 24, 2015.

19. Contrary to Mr. Helms suggestion, there is nothing unique about split-estate land ownership in North Dakota. BLM administers approximately 58 million acres of Federal minerals beneath non-Federal surface in up to 33 states. See http://www.blm.gov/style/medialib/blm/wo/MINERALS__REALTY__AND_RESOURCE_PROTECTION_/bmps.Par.57486.File.dat/SplitEstate07.pdf. Those split estates are the results of historical events such as patents issued under statutes that authorized only patenting of the surface estate, and the actions of Federal agricultural credit agencies that foreclosed on farms and ranches, and then re-sold only the surface estate, or the surface and a partial mineral estate.

20. BLM has been regulating the surface use of split-estate lands for decades pursuant to its authority under the MLA. BLM has the authority and the responsibility to ensure that oil and gas operations on the surface split-estate lands comply with BLM's regulations. See 30 U.S.C. 226(g). In BLM's regulations, the term "[*l*]*ease site* means any lands, *including the surface of a severed mineral estate*, on which exploration for, or extraction and removal of, oil or gas is authorized under a lease." 43 C.F.R. 3160.0-5 (2014) (second italics added). The hydraulic fracturing rule neither expands nor contracts that longstanding authority and responsibility.

21. In contrast, BLM's authority over wholly non-Federal land used to access Federal oil and gas (by directional (slant) drilling or horizontal drilling) is more limited, because BLM does not have the dominant mineral owner's responsibility for the surface or minerals in such lands. BLM regulates the operations in the Federal mineral zones, the wellbore components (to prevent loss of oil or gas, contamination of oil or gas, or contamination of zones that could communicate with Federal or Indian resources, or to protect other valuable mineral zones such as potash, trona and coal), and facilities and activities that are required to assure site security and proper measurement and accounting for Federal royalties. The hydraulic fracturing rule does not change those limits on BLM's authority.

22. BLM has been regulating operations in Federal units or in BLM-approved State pools (known as "communitization agreements") for decades pursuant to 30 U.S.C. 226(m). See 43 C.F.R. part 3180. The hydraulic fracturing rule does not change that statutory authority or the regulations pertaining to units and unitization. Unit operators will continue to need BLM's approval to drill into and to produce from Federal mineral zones, just as they do now, after the

hydraulic fracturing rule goes into effect. After the rule goes into effect operators will be required to provide information about hydraulic fracturing operations in Federal or Indian minerals that will be undertaken consistent with the requirements of the rule. BLM expects the additional time to approve a hydraulic fracturing plan for a unitized horizontal well through Federal minerals would be about four hours as explained in the preamble to the Final Rule. This additional time represents only a minimal delay and would not frustrate oil and gas development on Federal minerals in North Dakota.

23. BLM agrees with Mr. Helms that processing a request to conduct hydraulic fracturing operations will increase the time required to process an APD, but as noted above BLM anticipates that such increase will only be four hours. See RIA at p. 59 (Attachment A to Tichenor declaration submitted on June 1, 2015); 80 Fed. Reg. at 16196, 16198, 16203. Mr. Helms provides no information undercutting that estimate except unsupported allegations that the delays will be 6 to 10 months, and does not allege that North Dakota provided any information supporting his claims during the rulemaking. .

24. Attached as Exhibit 5 to my second declaration is a graph showing the average days to complete processing of APDs across BLM nationwide from 2005 through 2014. It shows that in 2014, BLM needed an average of 94 days to complete its processing of an APD including the appropriate biological, cultural and other resource surveys plus NEPA analysis as prescribed by Federal laws, but had to wait an average of 133 days for operators to supply necessary information to complete the application. See also http://www.blm.gov/wo/st/en/prog/energy/oil_and_gas/statistics.html. Although BLM continues

to work within its budget to complete all of its tasks in less time, the processing time for an APD seems to be beside the point. All oil and gas operations on Federal or Indian lands need a permit to drill from BLM, but only one. The hydraulic fracturing rule does not require a second permit to drill.

25. Mr. Helms argues that BLM's hydraulic fracturing rule harms the State of North Dakota, asserting that the rule will drive operators out of North Dakota and into (unspecified) states with smaller percentages of Federal minerals. That concern, however, did not prevent North Dakota from promulgating its own regulatory program for hydraulic fracturing, described in Mr. Helms' declaration at paragraph 4, and further states as a more stringent rule than BLM including use of tanks for flowback with pits allowed only in cases of emergency (p.27). As explained in the Paperwork Reduction Act analysis accompany the final rule, the BLM determined that the additional time required to process a request to conduct hydraulic fracturing operations would add four hours to processing a permit to drill on Federal or Indian Lands. According to the Paperwork Reduction Act analysis for the hydraulic fracturing rule, the time required to approve a request to hydraulically fracture an existing well submitted with a sundry notice will also average four hours. See Supporting Statement A, Oil & Gas; Hydraulic Fracturing on Fed'l & Indian Lands (43 C.F.R. Part 3160), OMB Control Number 1004-0203, p.28 (2015), attached hereto as Exhibit 1. That same analysis also concluded that operators would need to devote an average of only eight hours in preparing a request to conduct hydraulic fracturing operations, whether as part of an APD or in a separate notice-of-intent sundry. Id. at p.22. In total, BLM and operators are anticipated to have to spend twelve hours on such requests after the rule goes into effect. No commenter provided evidence indicating that such modest delays would cause

operators to forego drilling and fracturing wells in geologically promising Federal or Indian lands in North Dakota or elsewhere, and Mr. Helms provides no such evidence in his affidavit.

26. To the extent that processing of APDs is of interest, Table 1 in Exhibit 2 hereto shows that in BLM's Dickinson, N.D., field office the number of APDs received, processed, and approved in May 2015 greatly increased as compared with the months of May 2013 and 2014. The data comes from BLM's Automated Fluid Minerals Support System (AFMSS). That data also shows an increase in the number of APDs pending at the end of each of those months, but that figure is increasing at a slower rate than the total number processed by the BLM. At the same time, it should also be of interest that as shown in Table 2 in Exhibit 2 hereto, the number of permits to drill that have been issued by the BLM, but not yet drilled, has increased on both Federal and Indian lands in the Dickinson Field Office from September 30, 2014, to June 9, 2016, according to data from AFMSS. At this time, operators have over 580 permits that are ready to be drilled without any further action by the BLM. Given that inventory of approved permits, it is difficult to imagine that any slowdown in production in North Dakota over the next few months would be necessarily caused by the hydraulic fracturing rule, as opposed to a variety of other factors, including availability of drilling equipment, oilfield personnel, and market conditions.

27. North Dakota errs in asserting that the Final Rule at section 3162.3-3(3)(2) purports to give BLM authority to approve the source of water used as a base for hydraulic fracturing fluids. N.D. P.I. Mem. p. 28. On the contrary, as discussed in the preamble, information about the source of water for the hydraulic fracturing fluid is needed to assure that BLM's decision is in

compliance with the National Environmental Policy Act (NEPA). 80 Fed. Reg. at 16152, 16184, 16186, 16191. If not required in the Final Rule, BLM would nonetheless need operators to provide the information before it could grant permission to conduct hydraulic fracturing operations. BLM would not be approving or disapproving the operator's source of water. If a proposed source of water would result in a significant environmental impact that had not previously been analyzed, then the expense and delay of an environmental impact statement (EIS) would be required, not by the Final Rule, but by NEPA, the regulations of the Council on Environmental Quality, and controlling judicial decisions.

28. North Dakota also errs in asserting that where a state requires casing or cementing to protect an oil and gas well from a water-bearing zone used for waste disposal, as North Dakota does for the Dakota Group formation, then BLM would declare those formations to be usable water. N.D. P.I. Mem. pp.28-29. Despite the State's efforts to turn the Final Rule on its head, nothing in the definition in the Final Rule deems zones where a state requires casing and cementing to be usable water. First, the state would have to determine that a zone requires protection from hydraulic fracturing activities; not that wells need protection from the zone. 80 Fed. Reg. at 16217. Second, zones designated for disposal of waste are excluded from the definition of usable water. 80 Fed. Reg. at 16218.

29. Mr. Helms' discussion of an agreement between his agency and the Three Affiliated Tribes fails to acknowledge that it cannot expand the sovereignty of the State to Indian lands beyond that authorized by treaty and statutes. Mr. Helms did not attach a copy of the agreement to which he refers.

30. In light of the applicable statutes, regulations, published analyses, and my knowledge of the practices of BLM and of oil and gas operators, Mr. Helm does not make a convincing argument that BLM's hydraulic fracturing rule would measurably impact North Dakota's revenue or the employment of persons in the oil and gas industry within its boundaries. Fluctuations in the volatile oil and gas market produce boom/bust cycles. Those cycles are not geographically uniform, or predictable. The relative attractiveness of any geologic play for hydrocarbons is based on a combination of factors – e.g., specific market conditions, forecasts for future prices, availability of necessary infrastructure, etc. – that ultimately will have far more impact on an operator's business decisions, and thus on drilling activity, employment, and production, than implementation of a rule that will add only four additional hours to the BLM's processing of a permit to drill and result in less than $12,000 in additional costs to drill a well that otherwise costs many millions of dollars.

I submit this Declaration under penalty of perjury.

Bureau of Land Management

Date: 19 June 2015

Attachment 1

Supporting Statement A

Oil and Gas; Hydraulic Fracturing on Federal and Indian Lands (43 CFR Part 3160)

OMB Control Number 1004-0203

Terms of Clearance: None.

General Instructions

A completed Supporting Statement A must accompany each request for approval of a collection of information. The Supporting Statement must be prepared in the format described below, and must contain the information specified below. If an item is not applicable, provide a brief explanation. When the question "Does this ICR contain surveys, censuses, or employ statistical methods?" is checked "Yes," then a Supporting Statement B must be completed. OMB reserves the right to require the submission of additional information with respect to any request for approval.

Specific Instructions

Justification

1. **Explain the circumstances that make the collection of information necessary. Identify any legal or administrative requirements that necessitate the collection.**

The Bureau of Land Management (BLM) is requesting approval to conduct a collection of information as presented in a final rule titled, "Oil and Gas; Hydraulic Fracturing on Federal and Indian Lands," RIN 1004-AE26. The BLM has requested approval for the collection in a proposed rule and a supplemental proposed rule.

OMB has neither approved nor disapproved the collection, but has assigned it control number 1004-0203. The collection will add uses and burdens associated with the following existing BLM forms:

- Form 3160-3, Application for Permit to Drill or Re-enter ("APD"); and
- Form 3160-5, Sundry Notices and Reports on Wells ("Sundry Notice" or "Notice of Intent Sundry Notice").

Forms 3160-3 and 3160-5 have been approved by OMB for uses enumerated at 43 CFR 3162.3-1 and 3162.3-2, respectively. The APD and Sundry Notice and are among the 17 information collection activities that are included in control number 1004-0137, Onshore Oil and Gas Operations (expiration date: January 31, 2018).

Upon OMB's approval to conduct the information collection activities in the final rule, and after the effective date of the final rule, the BLM plans to request that OMB merge control number 1004-0203, and its new uses and burdens, with control number 1004-0137.

Background

Hydraulic fracturing involves the injection of fluid under high pressure to increase the effective permeability of hydrocarbon-bearing rocks, and thereby increase the potential production of oil and gas from such rocks. The following statutes authorize the BLM to regulate hydraulic fracturing in connection with oil and gas operations on public lands and tribal lands (except on the Osage Reservation, the Crow Reservation, and certain other areas):

(1) The Mineral Leasing Act of 1920 (30 U.S.C. 181 *et seq*.);
(2) The Federal Oil and Gas Royalty Management Act of 1982 (30 U.S.C. 1701 *et seq.*);
(3) The Act of August 7, 1947 (Mineral Leasing Act for Acquired Lands) (30 U.S.C. 351-359);
(4) The Indian Mineral Leasing Act, 25 U.S.C. 396 and 396a;
(5) The Indian Mineral Development Act, 25 U.S.C. 2101;
(6) The National Environmental Policy Act of 1969;
(7) The regulations at 43 CFR part 3160; and
(8) Onshore Order Number 7, Disposal of Produced Water.

The BLM published a proposed rule on hydraulic fracturing on May 11, 2012 (77 FR 17691), inviting public comment on the proposed regulations and on the proposed collection of information. The initial public comment period for the proposed regulations ended July 10, 2012. In response to requests from some public commenters, the BLM extended the public comment period for another 60 days, until September 10, 2012. 77 FR 38024 (June 26, 2012).

In conjunction with the proposed rule, the BLM submitted an information collection request to OMB for a new control number. On July 19, 2012, OMB issued a Notice of Action, in which it assigned a new control number (1004-0203) without either approving or disapproving of the proposed collection of information at that time. OMB also instructed the BLM to submit a summary of all comments related to the proposed collection, and the BLM's responses, before publication of a final rule.

Upon review of the comments submitted in response to the May 11, 2012 proposed rule, the BLM decided to publish a supplemental proposed rule on hydraulic fracturing. The supplemental proposed rule, which was published on May 24, 2013 (78 FR 31635), includes a summary of and responses to comments on the proposed collection of information.

On July 10, 2013 OMB issued a Notice of Action, in which it again declined to either approve or disapprove of the proposed collection of information and again instructed the BLM to submit a summary of all comments related to the proposed collection, and the BLM's responses, before

publication of a final rule. That summary and the BLM's responses are included in the preamble of the final rule under the heading "Paperwork Reduction Act." A concise summary is also in this supporting statement under Item No. 8.

The BLM now requests approval to conduct the collection of information as revised in the final rule.

Why the Collection is Necessary

The BLM's existing regulations specific to hydraulic fracturing were promulgated in 1982, and were not written to address modern hydraulic fracturing activities. The BLM's outreach efforts have revealed a high level of public concern about whether fracturing can allow or cause the contamination of underground water sources, whether the chemicals used in fracturing should be disclosed to the public, and whether there is adequate management of well integrity and the "flowback" fluids that return to the surface during and after fracturing operations.

As a result of its deliberations and outreach, the BLM has determined that a rulemaking and this collection of information are necessary to modernize the BLM's management of hydraulic fracturing activities on the public and tribal mineral estate. The final rule includes revisions of the supplemental proposed rule that are relevant to collection of information. Those revisions are discussed below under Item Number 2.

2. Indicate how, by whom, and for what purpose the information is to be used. Except for a new collection, indicate the actual use the agency has made of the information received from the current collection. Be specific. If this collection is a form or a questionnaire, every question needs to be justified.

As revised by the final rule, 43 CFR 3162.3-3[1]:

1. Requires a request for prior BLM approval of all hydraulic fracturing operations, except in limited circumstances outlined in the rule;
2. Requires a cement operation monitoring report before commencing hydraulic fracturing operations;
3. Requires operators to submit a request for prior approval of a remedial plan if there is an indication, before the commencement of hydraulic fracturing operations, of inadequate cement on any casing used to isolate usable water;
4. Requires continuous monitoring and recording of annulus pressure at the bradenhead;
5. Requires a report after completing hydraulic fracturing operations (Subsequent Report Sundry Notice);
6. Requires an affidavit if an operator wants the BLM to treat information in a Subsequent

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[1] New section 3162.3-3 replaces existing section 3162.3-3, which is renumbered and revised as section 3162.3-4. Conforming changes are made in the numbering of the rest of the regulations in 43 CFR Subpart 3162.

Report Sundry Notice as confidential; and
7. Authorizes operators to request a variance from requirements in section 3162.3-3.

1. Request for Prior Approval

An existing regulation, at 43 CFR 3162.3-2, requires operators to use a Sundry Notice (Form 3160-5) to seek prior BLM approval for "nonroutine fracturing jobs" and similar operations. The final rule removes "nonroutine fracturing jobs" from the list of operations covered by section 3162.3-2 and removes the distinction between "routine" and nonroutine" fracturing.

Except in limited circumstances[2], the final rule requires in new section 3162.3-3 that operators propose and seek prior BLM approval for all hydraulic fracturing jobs by submitting a request for prior approval:

A. As part of an application for permit to drill (APD) on Form 3106-3; or
B. By supplementing a previously-submitted APD with a "Notice of Intent (NOI) Sundry" plus additional information listed at section 3162.3-3(d)(6).

Form 3106-3 and Form 3106-5, along with their existing uses and burdens, are authorized by control number 1004-0137.

New section 3162.3-3(c)(3) provides that a request to commence hydraulic fracturing may cover multiple wells if the request is accompanied by a "master hydraulic fracturing plan" (MHFP). As defined in the final rule, an MHFP is "a plan containing the information required in section 3162.3-3(d) of this part for a group of wells where the geologic characteristics for each well are substantially similar, and that operations such as drilling, cementing, and hydraulic fracturing are likely to be successfully replicated using the same design."

Paragraphs 3162.3-3(d)(1) through (7) of new section 3162.3-3 list the required components of a request for prior approval of hydraulic fracturing. In addition, a potential operator who wants to include an application to use lined pits for disposal of produced water must show compliance

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[2] Prior approval is not required where fracturing takes place within 90 days after the effective date of the final rule, and involves a well that is drilled shortly before or after the effective date of the rule. See 43 CFR 3162.3-3(a). In these circumstances, certain activities (such as casing and cementing) would have occurred before the effective date of the rule. Thus, there would be no opportunity to obtain prior BLM approval of those activities.

Rather than forbid hydraulic fracturing of wells for lack of documentation that was not required at the time of construction, the rule provides in section 3162.3-3(e)(1)(ii) that operators must provide available documentation that the relevant documentation that is available. The rule also authorizes the BLM to require additional testing or verifications on a case-by-case basis.

with the conditions listed at paragraph (h)(1).

Paragraph (d)(1) — The following information regarding wellbore geology is required:

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

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

- The estimated depths (measured and true vertical) to the top and bottom of all occurrences of usable water.

The BLM will use the information to determine the properties of the rock layers and the thickness of the producing formation, and identify the confining rocks above and below the zone that would be stimulated.

Paragraph (d)(2) — Map

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

The BLM will use the information to verify that the intended effects of the hydraulic fracturing operation will remain confined to the petroleum-bearing rock layers and will not have unintended consequences for other rock layers, such as aquifers.

Paragraph (d)(3) — Information concerning the source and location of water supply

This provision requires information such as:

- Reused or recycled water; and

- Rivers, creeks, springs, lakes, ponds, and water supply wells.

This information may be shown by quarter-quarter section on a map or plat, or may be described in writing. It must also identify the anticipated access route and transportation method for all water planned for use in fracturing the well.

The BLM will use the information to help protect water resources.

Paragraph (d)(4) — A plan for the proposed hydraulic fracturing design must include, but is not

limited to, the following:

- The estimated total volume of fluid to be used;
- The maximum anticipated surface pressure that will be applied during the hydraulic fracturing process;
- A map at a scale no smaller than 1:24,000 showing:
    - The trajectory of the wellbore into which hydraulic fracturing fluids are to be injected;
    - The estimated direction and length of the fractures that will be propagated and a notation indicating the true vertical depth of the top and bottom of the fractures; and
    - All existing wellbore trajectories, regardless of type, within one-half mile (horizontal distance) of any portion of the wellbore into which hydraulic fracturing fluids are to be injected. The true vertical depth of each wellbore identified on the map must be indicated.
- The estimated vertical distance between the top of the fracture zone and the nearest usable water zone; and
- The measured depth of the proposed perforated or open-hole interval.

The BLM will use the information to verify that the proposed engineering design is adequate for safely conducting the proposed hydraulic fracturing, and that the maximum wellbore design burst pressure will not be exceeded at any stage of the hydraulic fracturing operations.

Paragraph (d)(5) — This provision requires the following information concerning the handling of fluids recovered between the commencement of hydraulic fracturing operations and the approval of a plan for the disposal of produced fluid under Onshore Order 7 (see 58 FR 47354):

- The estimated volume of fluid to be recovered;
- The proposed methods of handling the recovered fluids as required under paragraph (h) of this section; and
- The proposed disposal method of the recovered fluids, including, but not limited to, injection, storage, and recycling.

The BLM will use the information to ensure that the facilities needed to process or contain the estimated volume of fluid will be available on location, that the handling methods will adequately ensure protection of public health and safety, and that the BLM has all necessary

information regarding disposal of chemicals used, in the event it is needed to protect the environment and human health and safety and to prevent unnecessary or undue degradation of the public lands.

Paragraph (d)(6) — If the operator uses an NOI Sundry to request approval to commence hydraulic fracturing, the following additional information must be submitted:

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

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

The BLM will use the information to determine whether or not to approve hydraulic fracturing operations when an operator proposes such operations after a well has been drilled and completed in accordance with a previously-submitted APD. In such circumstances, an operator would be required to submit an NOI Sundry (Form 3160-5) to supplement the APD. Form 3160-5 does not require some of the information that is necessary for the BLM to decide whether or not to approve hydraulic fracturing operations. In contrast, when a proposal for hydraulic fracturing is included in an APD, the information listed at section 3162.3-3(d)(6) would already have been included in the APD.

Paragraph (d)(7) — The BLM may request information in addition to that which is listed above.

The information will assist the BLM in making an informed decision about the proposed hydraulic fracturing.

Paragraph (e)(1)(i) — If an operator requests prior approval for hydraulic fracturing in an APD before drilling and completing a well, the operator must submit a cement operation monitoring report to the BLM before commencing hydraulic fracturing operations.

The required elements of a cement operation monitoring report are (1) the flow rate, density, and pump pressure during pre-fracturing cementing operations on any casing used to isolate usable water zones; and (2) a determination of adequate cement for all casing strings that are used to isolate usable water zones. These requirements are included in the collection activity labeled, "Request for Prior Approval of Hydraulic Fracturing Job Using an Application for Permit to Drill Plus a Cement Operation Monitoring Report." The information will assist the BLM in making an informed decision about the proposed hydraulic fracturing.

Paragraph (e)(1)(ii) — For any well completed pursuant to an APD that did not authorize hydraulic fracturing operations, the operator must submit documentation to demonstrate that

adequate cementing was achieved for all casing strings designed to isolate and protect usable water.

The operator must submit the documentation with its request for approval of hydraulic fracturing operations, or no less than 48 hours prior to conducting hydraulic fracturing operations if no prior approval is required, pursuant to section 3162.3-3(a). The BLM may require such additional tests, verifications, cementing or other protection or isolation operations on a case-by-case basis. The information will enable the BLM to decide whether or not the cementing was sufficient to isolate and to protect usable water, and will assist the BLM in making an informed decision about the proposed hydraulic fracturing.

Paragraph (h)(1) — This provision requires an application and prior approval before using lined pits for disposal of produced water.

Storage of produced water in a lined pit is an exception to the general rule that above-ground storage tanks must be used for all fluids recovered between the commencement of hydraulic fracturing operations and the BLM's approval of a produced water disposal plan under Onshore Order 7. In order to obtain approval for storage in a lined pit, an operator must show, at minimum, that the following conditions exist:

- The distance from the pit to intermittent or ephemeral streams or water sources would be at least 300 feet;
- The distance from the pit to perennial streams, springs, fresh water sources, or wetlands would be at least 500 feet;
- There is no usable groundwater within 50 feet of the surface in the area where the pit would be located;
- The distance from the pit to any occupied residence, school, park, school bus stop, place of business, or other areas where the public could reasonably be expected to frequent would be greater than 300 feet;
- The pit would not be constructed in fill or unstable areas;
- The construction of the pit would not adversely impact the hydrologic functions of a 100-year floodplain; and
- For Federal lands, pit use and location would comply with local, State, and Federal statutes and regulations. For Indian lands, pit use and location would comply with tribal and Federal statutes and regulations.

This information will enable the BLM to determine whether or not to allow storage of produced

water in a lined pit.

2. Cement Operation Monitoring Report

New section 3162.3-3(e) requires operators to submit a cement operation monitoring report to the BLM before commencing hydraulic fracturing operations. Cement operation monitoring is an operational necessity in order to verify compliance with regulations addressing hydraulic fracturing. The elements of that report are listed in paragraphs (e)(1) and (e)(2).

Paragraph (e)(1) requires operators to monitor and record the flow rate, density, and pump pressure during pre-fracturing cementing operations on any casing used to isolate usable water zones.

Paragraph (e)(2) requires operators to determine that there is adequate cement for all casing strings that are used to isolate usable water zones. A casing string is an assembled length of steel pipe configures to suit a specific wellbore. There are three types of casing strings: (1) surface casing; (2) intermediate casing; and (3) production casing.

A surface casing string consists of a large-diameter pipe string that protects fresh-water aquifers, provides pressure integrity, and provides a surface from which other casing strings may be suspended. For this type of casing string, the operator must observe cement returns to surface and document any indications of inadequate cement (such as, but not limited to, lost returns, cement channeling, gas cut mud, failure of equipment, or fallback from the surface exceeding 10 percent of surface casing setting depth or 200 feet, whichever is less). If there are indications of inadequate cement, then the operator must determine the top of cement with a cement evaluation log (i.e., a tool used to verify the integrity of annular cement bonding), temperature log, or other method or device approved by the BLM

An intermediate casing string is a length of pipe below the surface casing string, and enables deepening of a well. One well may contain several intermediate casing strings. A production casing string is set across the reservoir and provides a surface within which the main elements of a producing oil or gas well are placed. Those elements, which depend largely on the type of well, may include pump and motor assemblies.

The information-collection requirements for intermediate and production casing strings depend on whether or not they are cemented to the surface casing string. If they are not cemented to the surface casing string, the operator must run a cement evaluation log to demonstrate that there is at least 200 feet of adequately-bonded cement between the zone to be hydraulically fractured and the deepest usable water zone. If they are cemented to the surface casing string, then the operator must follow the requirements for a surface casing string (i.e., observe cement returns to the surface, document any indications of inadequate cement, etc.)

The information will assist the BLM in making an informed decision about the proposed hydraulic fracturing.

3. Request for Approval of Remedial Plan

New section 3162.3-3(e)(3) is another pre-fracturing requirement. It requires that, for any well, if there is an indication of inadequate cement on any casing used to isolate usable water, the operator must:

- Notify the authorized officer within 24 hours of discovering the inadequate cement; and

- Request prior BLM approval of a plan to perform remedial action to achieve adequate cement.

The proposed plan must include the supporting documentation and logs that comprise the cement operation monitoring report described above. In emergency or other situations of an immediate nature that may result in unnecessary delays, an operator may request oral approval from the BLM for actions to be undertaken to remediate the cement. However, such requests must be followed by a written notice filed not later than the fifth business day following oral approval.

This information-collection requirement will enable the BLM to determine the appropriateness of the proposed remedial action, and thus protect aquifers on a timely basis.

4. Monitoring During Hydraulic Fracturing

New section 3162.3-3(g)(1) requires operators to continuously monitor and record the annulus pressure at the bradenhead ((i.e., an element of a well's surface pressure control equipment). Paragraph (g)(2) applies if during hydraulic fracturing the annulus pressure increases by more than 500 pounds per square inch as compared to the immediately preceding pressure. In this circumstance, the operator must orally notify the BLM as soon as practicable, but no later than 24 hours following the incident. Within 15 days after the occurrence, the operator must submit a report containing all details pertaining to the incident, including corrective actions taken, as part of a Subsequent Report Sundry Notice (Form 3160-5, Sundry Notices and Reports on Wells).

This requirement will enable the BLM to scrutinize incidents of increased pressure during hydraulic fracturing operation. This scrutiny is necessary in view of the recent emergence of increasingly complex hydraulic fracturing operations that apply increased pressures and volumes of fluid within the subsurface.

5. Subsequent Report Sundry Notice

Within 30 days after the completion of the last stage of hydraulic fracturing operations, section 3162.3-3(i) requires operators to submit a Subsequent Report Sundry Notice on Form 3160-5. In addition, section 3162.3-3(e) requires an operator to submit a Subsequent Report Sundry Notice after BLM has determined the course of action an operator must take if there are indications of

an inadequate cement job.

The BLM will use the information in the Subsequent Report Sundry Notice to ensure that hydraulic fracturing operations were conducted as authorized and designed. The required elements of the Subsequent Report Sundry Notice under paragraphs (e) and (i) are as follows:

Paragraphs (e)(3)(iv) and (v) — Implementation of Remedial Action Plan

At least 72 hours before starting hydraulic fracturing operations after BLM has determined the course of action an operator must take if there are indications of an inadequate cement job, the operator must:

- Submit the results from the cement evaluation log or other method approved in advance by the BLM;
- Verify that the remedial action was successful with a cement evaluation log or other method approved in advance by the BLM; and
- Submit a Subsequent Report Sundry Notice for the remedial action that includes:
    - A signed certification that the operator corrected the inadequate cement job in accordance with the approved plan; and
    - The results from the cement evaluation log or other method approved by the BLM; and
- Documentation showing that there is adequate cement.

The BLM will use the information to determine if the operator has complied with the pertinent remedial action plan.

Paragraph (i)(1) — Hydraulic Fracturing Operation

The following data are required:

- The true vertical depth of the well;
- Total water volume used; and
- A description of the base fluid and each additive[3] in the hydraulic fracturing fluid,

[3] If an operator claims that any of the additives are exempt from public disclosure (see section

including:

- The trade name;
- Supplier;
- Purpose;
- Ingredients;
- Chemical Abstract Service Number;
- Maximum ingredient concentration in additive (percent by mass); and
- Maximum ingredient concentration in hydraulic fracturing fluid (percent by mass).

Paragraph (i)(2) — Water

This provision requires disclosure of the actual source(s) and location(s) of the water used in the hydraulic fracturing fluid.

Paragraph (i)(3) — Pressure

This provision requires disclosure of the maximum surface pressure and rate at the end of each stage of the hydraulic fracturing operation and the actual flush volume.

Paragraph (i)(4) — Fracture

This provision requires disclosure of the actual, estimated, or calculated fracture length, height and direction.

Paragraph (i)(5) — Perforations or Open-Hole Interval

This provision requires disclosure of the actual measured depth of perforations or the open-hole interval (i.e., channels from the wellbore into the reservoir formation through which oil or gas is produced).

3162.3-3(j)), the operator must include the chemical family name or other similar descriptor associated with such chemical.

Paragraph (i)(6) — Volume of Recovered Fluid

This provision requires disclosure of the total volume of fluid recovered between the completion of the last stage of hydraulic fracturing operations and when the operator starts to report water produced from the well to the Office of Natural Resources Revenue. Depending on the operator, this time interval could be as short as a few days or as long as a few months.

If the operator has not begun to report produced water to the Office of Natural Resources Revenue when the Subsequent Report Sundry Notice is submitted, the operator must submit a supplemental Subsequent Report Sundry Notice to the authorized officer documenting the total volume of recovered fluid.

Paragraph (i)(7) — Other Recovered-Fluid Data

This provision requires disclosure of the following information concerning the handling of fluids recovered after the commencement of hydraulic fracturing and before the approval of a plan for the disposal of produced water under Onshore Order 7 (see 58 FR 47345):

- The methods of handling the recovered fluids, including, but not limited to, transfer pipes and tankers, holding pond use, re-use for other stimulation activities, or injection; and

- The disposal method of the recovered fluids, including, but not limited to, the percent injected, the percent stored at an off-lease disposal facility, and the percent recycled.

Paragraph (i)(8) — Certification

This provision requires a certification signed by the operator that:

- Wellbore integrity was maintained prior to and throughout the hydraulic fracturing operation, and that the operator complied with the requirements in paragraphs (b), (e), (f), (g), and (h) of section 3160.3-3;

- For Federal lands, the hydraulic fracturing fluid constituents, once they arrive on the lease, complied with all applicable permitting and notice requirements as well as all applicable Federal, State, and local laws, rules, and regulations; and

- For Indian lands, the hydraulic fracturing fluid constituents, once they arrive on the lease, complied with all applicable permitting and notice requirements as well as all applicable Federal and tribal laws, rules, and regulations.

Paragraph (i)(9) — Mechanical Integrity Test

This provision requires disclosure of the result of the mechanical integrity test as required by

paragraph (f) of section 3160.3-3.

Paragraph (i)(10) — Documentation

This provision authorizes the BLM to require the operator to provide documentation substantiating any information submitted in the Subsequent Report Sundry Notice.

6. Affidavit in Support of a Claim of Confidentiality

Section 3162.3-3(j) provides that the operator and the owner of information that is required in a Subsequent Report Sundry Notice under paragraph (i) may claim that such information is exempt from public disclosure, provided that the operator provides the BLM with an affidavit that:

- Identifies the owner of the withheld information and provides the name, address and contact information for an corporate officer, managing partner, or sole proprietor of the owner;

- Identifies the Federal statute or regulation that would prohibit the BLM from publicly disclosing the information if it were in the BLM's possession;

- Affirms that the operator has been provided the withheld information from the owner of the information and is maintaining records of the withheld information, or that the operator has access, and will maintain access, to the withheld information held by the owner of the information;

- Affirms that the information is not publicly available;

- Affirms that the information is not required to be publicly available under any applicable State or Federal law (on Federal lands), or tribal or Federal law (on Indian lands);

- Affirms that the owner of the information is in actual competition and identifies competitors or others that could use the withheld information to cause the owner substantial competitive harm;

- Affirms that the release of the information would likely cause substantial competitive harm to the owner and provides the factual basis for that affirmation; and

- Affirm that the information is not readily apparent through reverse engineering with publicly available information.

If in making these affirmations the operator relies upon information from a third party (such as the owner of the information), the operator must provide a written affidavit from the third party that sets forth the relied-upon information.

The BLM may determine that withheld information is not exempt from public disclosure. If the BLM makes such a determination, it will make the information available to the public after providing the operator and the information owner with no fewer than ten business days' notice of its determination.

The operator must maintain records of any withheld information until the later of the BLM's approval of a final abandonment notice, or, for Indian lands, 6 years after completion of hydraulic fracturing operations, or, for Federal lands, 7 years after completion of hydraulic fracturing operations. Any subsequent operator will be responsible for maintaining access to withheld records during its operation of the well. The operator will be deemed to be maintaining the records if it can promptly provide the complete and accurate information to BLM, even if the information is in the custody of its owner.

If any of the chemical identity information required in section 3162.3-3(i)(1) is withheld, the operator must include in the Subsequent Report Sundry Notice the generic chemical name. The generic chemical name must be only as generic as is necessary to protect the confidential chemical identity, and should be the same as or not less descriptive than the generic chemical name provided to the EPA under the Toxic Substances Control Act.

This provision will enable the BLM to allow legitimate exemptions from disclosure with proper documentation and attestations. Requiring exempt records to be retained for seven years or the life of the well, whichever is later, is necessary because they would be the only records of the chemicals injected into Federal or Indian minerals.

7. Requesting a Variance

Under 43 CFR 3162.3-3(k), an operator may submit a written request for an individual, state, or tribal variance from the requirements of the final rule. In addition, a State or tribal variance may be initiated by the State, tribe, or the BLM.

The BLM needs to collect the required information in order to decide whether specific circumstances warrant a waiver. The BLM encourages the use of a Sundry Notice (Form 3160-5, Sundry Notices and Reports on Wells) in seeking a variance.

Paragraph (k) provides for a request for an individual variance or a request for a variance that would apply to:

- All wells within a state or within Indian lands; or

- Specific fields or basins within state or Indian lands.

A state or tribal variance would enable the BLM to accept compliance with state or tribal

requirements as compliance with the applicable provision or provisions of section 3162.3-3, provided that the BLM finds that the state or tribal provisions that meet or exceed the standards in this rule.

Either type of request must specifically identify the regulatory provision for which the variance is being requested, explain the reason the variance is needed, and demonstrate how the operator will satisfy the objectives of the regulation for which the variance is being requested. A BLM authorized officer may grant an individual variance. A state or tribal variance may only be granted by the appropriate BLM State Director, in cooperation with a State (for Federal lands) or a tribe (for Indian lands). Consistent with Onshore Order 1 ("Approval of Operations"), no BLM decision on a variance request may be appealed administratively either to the State Director or to the Interior Board of Land Appeals.

The BLM reserves the right to rescind a variance or modify any condition of approval for reasons such as changes in Federal law, technology, regulation, BLM policy, field operations, or noncompliance. The BLM must provide a written justification if a variance is rescinded or any condition of approval is modified.

3. Describe whether, and to what extent, the collection of information involves the use of automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses, and the basis for the decision for adopting this means of collection. Also describe any consideration of using information technology to reduce burden and specifically how this collection meets GPEA requirements.

In accordance with the Government Paperwork Elimination Act (GPEA), the public can fill out and download Form 3160-5. Thus, the form is fillable and printable.

4. Describe efforts to identify duplication. Show specifically why any similar information already available cannot be used or modified for use for the purposes described in Item 2 above.

No duplication of information occurs in the information we collect. The requested information is unique to the operator/operating rights owner and the lease and is not available from any other data source. No similar information is available or able to be modified. The information is required to obtain or retain a benefit.

5. If the collection of information impacts small businesses or other small entities, describe any methods used to minimize burden.

The BLM has examined potential impacts on small businesses that are most likely to be impacted by the rule and, more specifically, the requirements that would pose a burden to operators. The BLM expects that the 55 firms that have completed wells on public lands within the past 5 years are most likely to be affected by this information collection. From that list the

BLM researched company annual report filings with the Securities and Exchange Commission to determine annual company net incomes and employment figures. Of those, 33 firms were classified as small businesses (i.e., employ fewer than 500 employees) on the basis of Small Business Administration criteria. The information we require from all respondents is limited to the minimum necessary to authorize and regulate oil and gas operations on public lands.

6. Describe the consequence to Federal program or policy activities if the collection is not conducted or is conducted less frequently, as well as any technical or legal obstacles to reducing burden.

If we did not collect the information, or collected it less frequently, oil and gas leasing activities and operations could not occur on Federal or Indian leases in compliance with pertinent statutes and policies.

7. Explain any special circumstances that would cause an information collection to be conducted in a manner:

- **requiring respondents to report information to the agency more often than quarterly;**
- **requiring respondents to prepare a written response to a collection of information in fewer than 30 days after receipt of it;**
- **requiring respondents to submit more than an original and two copies of any document;**
- **requiring respondents to retain records, other than health, medical, government contract, grant-in-aid, or tax records, for more than three years;**
- **in connection with a statistical survey that is not designed to produce valid and reliable results that can be generalized to the universe of study;**
- **requiring the use of a statistical data classification that has not been reviewed and approved by OMB;**
- **that includes a pledge of confidentiality that is not supported by authority established in statute or regulation, that is not supported by disclosure and data security policies that are consistent with the pledge, or which unnecessarily impedes sharing of data with other agencies for compatible confidential use; or**
- **requiring respondents to submit proprietary trade secrets, or other confidential information, unless the agency can demonstrate that it has instituted procedures to protect the information's confidentiality to the extent permitted by law.**

There are no special circumstances that require the collection to be conducted in a manner inconsistent with the guidelines in 5 CFR 1320.5.

8. If applicable, provide a copy and identify the date and page number of publication in the Federal Register of the agency's notice, required by 5 CFR 1320.8(d), soliciting comments on the information collection prior to submission to OMB. Summarize public comments received in response to that notice and in response to the PRA statement associated with the collection over the past three years, and describe actions

taken by the agency in response to these comments. Specifically address comments received on cost and hour burden.

Describe efforts to consult with persons outside the agency to obtain their views on the availability of data, frequency of collection, the clarity of instructions and recordkeeping, disclosure, or reporting format (if any), and on the data elements to be recorded, disclosed, or reported.

Consultation with representatives of those from whom information is to be obtained or those who must compile records should occur at least once every three years — even if the collection of information activity is the same as in prior periods. There may be circumstances that may preclude consultation in a specific situation. These circumstances should be explained.

On May 11, 2012, the BLM published an initial proposed rule entitled "Oil and Gas; Well Stimulation, Including Hydraulic Fracturing, on Federal and Indian Lands" (77 FR 27691). The comment period on the initial proposed rule closed on July 10, 2012. At the request of public commenters, on June 26, 2012, the BLM published a notice extending the comment period for 60 days (77 FR 38024). The extended comment period closed on September 10, 2012. The BLM received over 177,000 comments on the initial proposed rule from individuals, Federal and state governments and agencies, interest groups, and industry representatives.

In accordance with the PRA, the BLM invited public comments on the information collection in the initial proposed rule. One commenter submitted comments specifically in response to this opportunity. In addition, some commenters addressed the necessity, practical utility, and/or estimated burdens of the proposed collections.

Some commenters questioned whether the proposed collections are necessary and avoid unnecessary duplication. For example:

- One commenter stated that the proposed collection of both pre- and post-fracturing information is a requirement to submit basically the same information twice, and recommended that the BLM consider requiring submission of pre-completion information and then requiring operators to advise the BLM of any post-completion changes or deviations;
- Another commenter recommended that operators be allowed to submit a generic or Master Plan for similar operations on a plan of development, at the field or unit level;
- One commenter stated that the proposed collection of information about the water source to be used in hydraulic fracturing duplicates protections afforded by the Environmental Protection Agency and states under the Clean Water Act and the Safe Drinking Water Act;
- One commenter stated that the proposed collections duplicate state-required collections in Colorado, New Mexico, Alabama, and Texas;

- One commenter stated that the proposal to collect an estimate of the volume of fluid to be recovered during flowback, swabbing, and recovery from production facility vessels (43 CFR 3162.3-3(c)(6)(i)) duplicates a requirement in Wyoming for post-fracturing reporting as to the amounts, handling, and disposal or reuse of hydraulic fracturing fluid; and
- One commenter stated that the information in the NOI Sundry and the Subsequent Report Sundry Notice duplicates information required and approved by individual states, and suggested that the BLM provide for exemptions for operators in states that have adopted hydraulic fracturing regulations, or accept information filed under state laws or regulations in lieu of requiring operators to submit duplicative information to the BLM for approval.

Some comments included statements of support. One commenter stated that full disclosure of chemicals involved in the hydraulic fracturing process results in a transparent process that benefits industry, regulatory agencies, and the public. Some other commenters generally supported transparency and full disclosure of pollution data. For example, one commenter stated that the post-fracturing collection of information on the volume of water used in the fracturing process will aid water resource managers in planning water resources on and near Federal lands, and suggested that the same type of information be collected on the Notice of Intent Sundry Notice.

Some commenters questioned whether the BLM has sufficient expertise and staffing to use the information that is collected. One commenter specifically stated that it has seen no indication that the BLM intends to provide the training and education to enable its staff to use the information. The BLM does not share those concerns regarding practical utility. The BLM employs many petroleum engineers and technicians, and they are well qualified to use the information required by the revised proposed rule.

With regard to burdens on the public, some commenters made general assertions that the BLM underestimated the annual costs associated with the proposed rule. For example:

- One commenter stated that the BLM should consider ways to minimize the submission of information by allowing operators to conduct fracturing operations within acceptable operating ranges and allowing operators to use standard completion reports; and
- One commenter suggested that, to reduce the burdens on operators, the BLM should allow operators to submit generic hydraulic fracturing plans for a targeted zone in resource play areas that can be referenced when an Application for Permit to Drill is submitted. Similarly, another commenter requested that the rule provide for acceptance of a general Operator's Master Fluid Management Plan that may be used consistently across a plan of development.

The BLM has not adopted suggestions to allow operators to conduct fracturing operations within acceptable operating ranges, to allow operators to use standard completion reports, or to allow operators to submit Fluid Management Plans or generic hydraulic fracturing plans for a targeted

zone in resource play areas that can be referenced when an APD is submitted. Such provisions would not enable the BLM to meet its statutory responsibilities to regulate operations associated with Federal and some Indian oil and gas leases; prevent unnecessary or undue degradation; and manage public lands using the principles of multiple use and sustained yield. Moreover, the information that states, tribes, or other Federal agencies collect is not necessarily reasonably accessible to the BLM.

The general comments about the BLM's analysis under the Paperwork Reduction Act, other statutes, and various executive orders did not address this specific information collection. Therefore, the BLM has not changed the collection in response to these comments.

9. Explain any decision to provide any payment or gift to respondents, other than remuneration of contractors or grantees.

We do not provide payments or gifts to the respondents.

10. Describe any assurance of confidentiality provided to respondents and the basis for the assurance in statute, regulation, or agency policy.

Section 3162.3-3(j)(1) provides that, for the information required at section 3162.3-3(i), the operator and the owner of the information will be deemed to have waived any right to protect from public disclosure information submitted with a Subsequent Report Sundry Notice or through FracFocus or another designated database. That same paragraph provides that, in order to support a claim that any otherwise required post-fracturing information is exempt from public disclosure as a matter of law, the operator must submit to the BLM an affidavit and comply with other requirements described above under Item Number 2 ("Affidavit in Support of a Claim of Confidentiality").

11. Provide additional justification for any questions of a sensitive nature, such as sexual behavior and attitudes, religious beliefs, and other matters that are commonly considered private. This justification should include the reasons why the agency considers the questions necessary, the specific uses to be made of the information, the explanation to be given to persons from whom the information is requested, and any steps to be taken to obtain their consent.

We do not require respondents to answer questions of a sensitive nature.

12. Provide estimates of the hour burden of the collection of information. The statement should:

- **Indicate the number of respondents, frequency of response, annual hour burden, and an explanation of how the burden was estimated. Unless directed to do so, agencies should not conduct special surveys to obtain information on which to base hour burden estimates. Consultation with a sample (fewer than 10) of potential respondents is desirable. If the hour burden on respondents is expected to vary**

widely because of differences in activity, size, or complexity, show the range of estimated hour burden, and explain the reasons for the variance. Generally, estimates should not include burden hours for customary and usual business practices.

* **If this request for approval covers more than one form, provide separate hour burden estimates for each form and aggregate the hour burdens.**
* **Provide estimates of annualized cost to respondents for the hour burdens for collections of information, identifying and using appropriate wage rate categories. The cost of contracting out or paying outside parties for information collection activities should not be included here.**

As shown at Table 12-1, below, the weighted average respondent hourly cost is $61.99. This cost was determined using national Bureau of Labor Statistics data at http://www.bls.gov/oes/current/oes_nat.htm. The benefits multiplier of 1.4 is supported by information at http://www.bls.gov/news.release/ecec.nr0.htm.

Table 12-1 — Estimated Weighted Average Hourly Costs

A. Position	B. Mean Hourly Pay Rate	C. Hourly Rate with Benefits (Column B x 1.4)	D. Percent of Collection Time	E. Weighted Average Hourly Cost (Column C x Column D)
General Office Clerk (43-9061)	$14.42	$20.19	10%	$2.02
Engineer (17-2199)	$45.34	$63.48	80%	$50.78
Engineering Manager (11-9041)	$65.65	$91.91	10%	$9.19
Totals			100%	$61.99

Hour and cost burdens to respondents include time spent for researching, preparing, and submitting information. The weighted average hourly wage associated with these information collections is shown at Table 12-1, above. The frequency of response for each of the information collections is “on occasion.”

Table 12-2 itemizes the estimated hour and cost burdens for control number 1004-0203 (i.e., this information collection request. The burden estimates in Table 12-2 are in addition to those already reported for control number 1004-0137.

Table 12-3 itemizes the estimated hour and cost burdens for both control numbers, and reflects what the estimated burdens will be when the two control numbers are merged.

Table 12-2 — Estimates of Hour and Cost Burdens: Control Number 1004-0203

A. Type of Response	B. Number of Responses	C. Hours Per Response	D. Total Hours (Column B x Column C)	E. Total Wage Cost (Column D x $61.99)
Request for Prior Approval of Hydraulic Fracturing Job Using an Application for Permit to Drill Plus a Cement Operation Monitoring Report 43 CFR 3162.3-3(c)(1), (d), (e)(1), and (e)(2) Form 3160-3	2,614	8	20,912	$1,296,335
Request for Prior Approval of Hydraulic Fracturing Job Using a Notice of Intent Sundry Notice Plus a Surface Use Plan of Operations Plus Documentation of Adequate Cementing 43 CFR 3162.3-3(c)(2), (c)(3), (d), and (e) Form 3160-5	200	8	1,600	$99,184
Sundry Notices and Reports on Wells / Hydraulic Fracturing / Request for Approval of Remedial Plan 43 CFR 3162.3-3(e)(3) Form 3160-5	84	8	672	$41,657
Sundry Notices and Reports on Wells / Hydraulic Fracturing / Subsequent Report Sundry Notice 43 CFR 3162.3-3(g) and (i) Form 3160-5	2,814	8	22,512	$1,395,519
Affidavit in Support of Claim of Confidentiality 43 CFR 3162.3-3(j)	2,814	1	2,814	$174,440

A. Type of Response	B. Number of Responses	C. Hours Per Response	D. Total Hours (Column B x Column C)	E. Total Wage Cost (Column D x $61.99)
Sundry Notices and Reports on Wells / Hydraulic Fracturing / Variance Request 43 CFR 3162.3-3(k) Form 3160-5	281	8	2,248	$139,354
Totals	8,807		50,758	$3,146,489

Table 12-3 — Estimated Hour and Cost Burdens: Control Nos. 1004-0137 and 1004-0203

A. Type of Response	B. Control Number	C. Number of Responses	D. Hours Per Response	E. Total Hours (Column C x Column D)	F. Total Wage Cost (Column E x $61.99)
Application for Permit to Drill or Re-enter (43 CFR 3162.3-1) Form 3160-3	1004-0137	5,000	80	400,000	$24,796,000
Sundry Notices and Reports on Wells (43 CFR 3162.3-2) Form 3160-5	1004-0137	35,000	8	280,000	$17,357,200
Request for Prior Approval of Hydraulic Fracturing Job Using an Application for Permit to Drill Plus a Cement Operation Monitoring Report 43 CFR 3162.3-3(c)(1), (d), (e)(1), and (e)(2) Form 3160-3	1004-0203	2,614	8	20,912	$1,296,335

A. Type of Response	B. Control Number	C. Number of Responses	D. Hours Per Response	E. Total Hours (Column C x Column D)	F. Total Wage Cost (Column E x $61.99)
Request for Prior Approval of Hydraulic Fracturing Job Using a Notice of Intent Sundry Notice Plus a Surface Use Plan of Operations Plus Documentation of Adequate Cementing 43 CFR 3162.3-3(c)(2), (c)(3), and (d) Form 3160-5	1004-0203	200	8	1,600	$99,184
Sundry Notices and Reports on Wells / Hydraulic Fracturing / Request for Approval of Remedial Plan 43 CFR 3162.3-3(e)(3) Form 3160-5	1004-0203	84	8	672	$41,657
Sundry Notices and Reports on Wells / Hydraulic fracturing / Subsequent Report Sundry Notice (43 CFR 3162.3-3(g) and (i)) Form 3160-5	1004-0203	2,814	8	22,512	$1,395,519
Affidavit in Support of Claim of Confidentiality 43 CFR 3162.3-3(j)	1004-0203	2,814	1	2,814	$174,440
Sundry Notices and Reports on Wells / Hydraulic fracturing / Variance Request (43 CFR 3162.3-3(k)) Form 3160-5	1004-0203	281	8	2,248	$139,354
Plan for Well Abandonment (43 CFR 3162.3-4)	1004-0137	1,500	8	12,000	$743,880
Well Completion or Recompletion Report and Log (43 CFR 3162.4-1) Form 3160-4	1004-0137	5,000	4	20,000	$1,239,800

A. Type of Response	B. Control Number	C. Number of Responses	D. Hours Per Response	E. Total Hours (Column C x Column D)	F. Total Wage Cost (Column E x $61.99)
Schematic / Facility Diagrams (43 CFR 3162.4-1(a) and 3162.7-5(d)(1))	1004-0137	1,000	8	8,000	$495,920
Drilling Tests, Logs, and Surveys (43 CFR 3162.4-2(a))	1004-0137	110	8	880	$54,551
Disposal of Produced Water (43 CFR 3162.5-1(b), 3164.1, and Onshore Oil and Gas Order No. 7)	1004-0137	1,500	8	12,000	$743,880
Report of Spills, Discharges, or Other Undesirable Events (43 CFR 3162.5-1(c))	1004-0137	215	8	1,720	$106,623
Contingency Plan (43 CFR 3162.5-1(d))	1004-0137	52	32	1,664	$103,151
Horizontal and Directional Drilling (43 CFR 3162.5-2(b))	1004-0137	2,100	8	16,800	$1,041,432
Well Markers (43 CFR 3162.6)	1004-0137	1,000	8	8,000	$495,920
Gas Flaring (43 CFR 3162.7-1(d), 3164.1, and Notice to Lessees 4A)	1004-0137	120	16	1,920	$119,021
Prepare Run Tickets (43 CFR 3162.7-2, 3164.1, and Onshore Oil and Gas Order No. 4)	1004-0137	90,000	0.75	67,500	$4,184,325
Records for Seals (43 CFR 3162.7-5(b))	1004-0137	90,000	0.75	67,500	$4,184,325
Site Security (43 CFR 3162.7-5(c))	1004-0137	2,500	8	20,000	$1,239,800

A. Type of Response	B. Control Number	C. Number of Responses	D. Hours Per Response	E. Total Hours (Column C x Column D)	F. Total Wage Cost (Column E x $61.99)
Application for Suspension or Other Relief (43 CFR 3165.1)	1004-0137	100	16	1,600	$99,184
State Director Review (43 CFR 3165.3(b))	1004-0137	55	16	880	$54,551
Totals		244,059		971,222	$60,206,052

13. Provide an estimate of the total annual non-hour cost burden to respondents or recordkeepers resulting from the collection of information. (Do not include the cost of any hour burden already reflected in item 12.)

* **The cost estimate should be split into two components: (a) a total capital and start-up cost component (annualized over its expected useful life) and (b) a total operation and maintenance and purchase of services component. The estimates should take into account costs associated with generating, maintaining, and disclosing or providing the information (including filing fees paid for form processing). Include descriptions of methods used to estimate major cost factors including system and technology acquisition, expected useful life of capital equipment, the discount rate(s), and the time period over which costs will be incurred. Capital and start-up costs include, among other items, preparations for collecting information such as purchasing computers and software; monitoring, sampling, drilling and testing equipment; and record storage facilities.**
* **If cost estimates are expected to vary widely, agencies should present ranges of cost burdens and explain the reasons for the variance. The cost of purchasing or contracting out information collection services should be a part of this cost burden estimate. In developing cost burden estimates, agencies may consult with a sample of respondents (fewer than 10), utilize the 60-day pre-OMB submission public comment process and use existing economic or regulatory impact analysis associated with the rulemaking containing the information collection, as appropriate.**
* **Generally, estimates should not include purchases of equipment or services, or portions thereof, made: (1) prior to October 1, 1995, (2) to achieve regulatory compliance with requirements not associated with the information collection, (3) for reasons other than to provide information or keep records for the government, or (4) as part of customary and usual business or private practices.**

No capital and start-up costs are involved with this information collection -- respondents are not required to purchase additional computer hardware or software to comply with these information

collection requirements. The Fiscal Year 2015 appropriations law (Pub. L. No. 113-203) directs the BLM to charge a $6,500 processing fee for Form 3160-3, Application for Permit to Drill or Re-Enter. We estimate that 5,000 of these applications are filed annually under control number 1004-0137, and another 2,614 will be filed under control number 1004-0203. The estimated non-hour cost burden is $32,500,000 under control number 1004-0137, and $16,991,000 under 1004-0203. The total estimated non-hour cost burden is $49,491,000.

14. Provide estimates of annualized cost to the Federal government. Also, provide a description of the method used to estimate cost, which should include quantification of hours, operational expenses (such as equipment, overhead, printing, and support staff), and any other expense that would not have been incurred without this collection of information.

Table 14-1 shows the hourly cost to the Federal Government. The mean hourly wages are U.S. Office of Personnel Management Salary data at : http://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/salary-tables/pdf/2015/RUS_h.pdf. The benefits multiplier of 1.5 is implied by information at http://www.bls.gov/news.release/ecec.nr0.htm.

Table 14-1 — Hourly Federal Wage Cost

A. Position	B. Pay Grade	C. Hourly Pay Rate ($/hour)	D. Hourly Rate with Benefits (Column C x 1.5)	E. Percent of Collection Time	F. Weighted Avg. ($/hour) (Column D x Column E)
Clerical	GS-5, step 5	$17.35	$26.03	10%	$2.60
Professional	GS-9, step 5	$26.28	$39.42	80%	$31.54
Managerial	GS-13, step 5	$45.33	$68.00	10%	$6.80
Weighted Average Hourly Pay Rate ($/hour): $40.94					

Table 14-2 itemizes the estimated hour and cost burdens to the government for control number 1004-0203 (i.e., this information collection request). The burden estimates in Table 14-2 are in addition to those already reported for control number 1004-0137.

Table 14-3 itemizes the estimated hour and cost burdens to the government for both control numbers, and reflects what the estimated burdens will be when the two control numbers are merged.

Table 14-2 — Estimated Annual Cost to the Government: Control No. 1004-0203

A. Type of Response	B. Number of Responses	C. Time Per Response	D. Total Hours (Column B x Column C)	E. Total Wage Cost (Column D x $40.94)
Request for Prior Approval of Hydraulic Fracturing Job Using an Application for Permit to Drill Plus a Cement Operation Monitoring Report 43 CFR 3162.3-3(c)(1), (d), (e)(1), and (e)(2) Form 3160-3	2,614	4 hours	10,456	$428,069
Request for Prior Approval of Hydraulic Fracturing Job Using a Notice of Intent Sundry Notice Plus a Surface Use Plan of Operations Plus Documentation of Adequate Cementing 43 CFR 3162.3-3(c)(2), (c)(3), and (d) Form 3160-5	200	4 hours	800	$32,752
Sundry Notices and Reports on Wells / Hydraulic Fracturing / Request for Approval of Remedial Plan 43 CFR 3162.3-3(e)(3) Form 3160-5	84	4 hours	336	$13,756
Sundry Notices and Reports on Wells / Hydraulic fracturing / Subsequent Report Sundry Notice (43 CFR 3162.3-3) Form 3160-5	2,814	4 hours	11,256	$460,821
Affidavit in Support of Claim of Confidentiality 43 CFR 3162.3-3(j)	2,814	30 minutes	1,407	$57,603
Sundry Notices and Reports on Wells / Hydraulic fracturing / Variance Request (43 CFR 3162.3-3) Form 3160-5	281	4	1,124	$46,017
Totals	8,807		25,379	$1,039,018

Table 14-3 — Estimated Annual Cost to the Government: Control Nos. 1004-0203 and 1004-0137

A. Type of Response	B. Control Number	C. Number of Responses	D. Hours Per Response	E. Total Hours (Column C x Column D)	F. Total Wage Cost (Column E x $40.94)
Application for Permit to Drill or Re-enter (43 CFR 3162.3-1) Form 3160-3	1004-0137	5,000	16	80,000	$3,275,200
Sundry Notices and Reports on Wells (43 CFR 3162.3-2) Form 3160-5	1004-0137	35,000	1	35,000	$1,432,900
Request for Prior Approval of Hydraulic Fracturing Job Using an Application for Permit to Drill Plus a Cement Operation Monitoring Report 43 CFR 3162.3-3(c)(1), (d), (e)(1), and (e)(2) Form 3160-3	1004-0203	2,614	4 hours	10,456	$428,069
Request for Prior Approval of Hydraulic Fracturing Job Using a Notice of Intent Sundry Notice Plus a Surface Use Plan of Operations Plus Documentation of Adequate Cementing 43 CFR 3162.3-3(c)(2), (c)(3), and (d) Form 3160-5	1004-0203	200	4 hours	800	$32,752
Sundry Notices and Reports on Wells / Hydraulic Fracturing / Request for Approval of Remedial Plan 43 CFR 3162.3-3(e)(3) Form 3160-5	1004-0203	84	4 hours	336	$13,756
Sundry Notices and Reports on Wells / Hydraulic fracturing / Subsequent Report Sundry Notice (43 CFR 3162.3-3(g) and (i)) Form 3160-5	1004-0203	2,814	4 hours	11,256	$460,821
Affidavit in Support of Claim of Confidentiality 43 CFR 3162.3-3(j)	1004-0203	2,814	30 minutes	1,407	$57,603

A. Type of Response	B. Control Number	C. Number of Responses	D. Hours Per Response	E. Total Hours (Column C x Column D)	F. Total Wage Cost (Column E x $40.94)
Sundry Notices and Reports on Wells / Hydraulic fracturing / Variance Request (43 CFR 3162.3-3(k)) Form 3160-5	1004-0203	281	4	1,124	$46,017
Plan for Well Abandonment (43 CFR 3162.3-4)	1004-0137	1,500	1	1,500	$61,410
Well Completion or Recompletion Report and Log (43 CFR 3162.4-1) Form 3160-4	1004-0137	5,000	1	5,000	$204,700
Schematic / Facility Diagrams (43 CFR 3162.4-1(a) and 3162.7-5(d)(1))	1004-0137	1,000	3	3,000	$122,820
Drilling Tests, Logs, and Surveys (43 CFR 3162.4-2(a))	1004-0137	110	1	110	$4,503
Disposal of Produced Water (43 CFR 3162.5-1(b), 3164.1, and Onshore Oil and Gas Order No. 7)	1004-0137	1,500	1	1,500	$61,410
Report of Spills, Discharges, or Other Undesirable Events (43 CFR 3162.5-1(c))	1004-0137	215	1	215	$8,802
Contingency Plan (43 CFR 3162.5-1(d))	1004-0137	52	2	104	$4,258
Horizontal and Directional Drilling (43 CFR 3162.5-2(b))	1004-0137	2,100	1	2,100	$85,974
Well Markers (43 CFR 3162.6)	1004-0137	1,000	8	8,000	$327,520
Gas Flaring (43 CFR 3162.7-1(d), 3164.1, and Notice to Lessees 4A)	1004-0137	120	2	240	$9,826
Records for Seals (43 CFR 3162.7-5(b))	1004-0137	90,000	0.25	22,500	$921,150

A. Type of Response	B. Control Number	C. Number of Responses	D. Hours Per Response	E. Total Hours (Column C x Column D)	F. Total Wage Cost (Column E x $40.94)
Site Security (43 CFR 3162.7-5(c))	1004-0137	2,500	1	2,500	$102,350
Prepare Run Tickets (43 CFR 3162.7-2, 3164.1, and Onshore Oil and Gas Order No. 4)	1004-0137	90,000	0.25	22,500	$921,150
Application for Suspension or Other Relief (43 CFR 3165.1)	1004-0137	100	4	400	$16,376
State Director Review (43 CFR 3165.3(b))	1004-0137	55	16	880	$36,027
Totals		244,059		210,928	$8,635,394

15. Explain the reasons for any program changes or adjustments in hour or cost burden.

If OMB approves the collection activities in the final rule, the activities in control number 1004-0203 will become program changes to 1004-0137 after the final rule goes into effect. Those program changes are summarized in Table 15-1.

Table 15-1 — Program Changes

A. Type of Response	B. Requested Responses	C. Requested Hour Burdens	D. Requested Non-Hour Burdens
Request for Prior Approval of Hydraulic Fracturing Job Using an Application for Permit to Drill Plus a Cement Operation Monitoring Report 43 CFR 3162.3-3(c)(1), (d), (e)(1), and (e)(2) Form 3160-3	2,614	20,912	$16,991,000

A. Type of Response	B. Requested Responses	C. Requested Hour Burdens	D. Requested Non-Hour Burdens
Request for Prior Approval of Hydraulic Fracturing Job Using a Notice of Intent Sundry Notice Plus a Surface Use Plan of Operations Plus Documentation of Adequate Cementing 43 CFR 3162.3-3(c)(2), (c)(3), and (d) Form 3160-5	200	1,600	N/A
Sundry Notices and Reports on Wells / Hydraulic Fracturing / Request for Approval of Remedial Plan 43 CFR 3162.3-3(e)(3) Form 3160-5	84	672	N/A
Sundry Notices and Reports on Wells / Hydraulic Fracturing / Subsequent Report Sundry Notice 43 CFR 3162.3-3(g) and (i) Form 3160-5	2,814	22,512	N/A
Affidavit in Support of Claim of Confidentiality 43 CFR 3162.3-3(j)	2,814	2,814	N/A
Sundry Notices and Reports on Wells / Hydraulic Fracturing / Variance Request 43 CFR 3162.3-3(k) Form 3160-5	281	2,248	N/A
Totals	8,807	50,758	$16,991,000

These program changes will affect control number 1004-0137 as follows:

1. The estimated annual number of responses for control number 1004-0137 is 235,252. The addition of 8,807 responses will result in 244,059 total estimated responses annually.

2. The estimated annual hour burden for control number 1004-0137 is 920,464. The addition of 50,758 hours will result in 971,222 total estimated hours annually.

3. The estimated annual non-hour burden for control number 1004-0137 is $32,500,000. The addition of $16,991,000 will result in $49,491,000 in total estimated non-hour burdens.

The increased burdens associated with the program changes are necessary in order to modernize

the BLM's management of hydraulic fracturing operations. Such operations have changed in ways that were not anticipated when the existing collection requirements approved under control number 1004-0137 were developed, and will assist in:

- Ensuring that operators are using best practices in fracturing operations;
- Prevention of unnecessary or undue degradation; and
- Management of public lands using the principles of multiple use and sustained yield.

16. For collections of information whose results will be published, outline plans for tabulation and publication. Address any complex analytical techniques that will be used. Provide the time schedule for the entire project, including beginning and ending dates of the collection of information, completion of report, publication dates, and other actions.

The BLM will not publish the results of this collection.

17. If seeking approval to not display the expiration date for OMB approval of the information collection, explain the reasons that display would be inappropriate.

The BLM will display the expiration date of the OMB approval on the forms included in this information collection.

18. Explain each exception to the topics of the certification statement identified in "Certification for Paperwork Reduction Act Submissions."

There are no exceptions to the certification statement.

Attachment 2

Table 1 - Comparison of Drilling Permit (APD) Activity in Dickinson at this point in the Fiscal Year

	North Dakota - Dickinson APD Activities				
	Received	Approved	Other Than Approved	Processed (Approved plus Other)	Pending APD Count At End of Period
May 27, 2013	369	267	12	279	412
May 31, 2014	455	304	22	326	562
May 31, 2015	577	484	53	537	601

Table 2 - Trend in the Drilling Permits Approved, yet Not Drilled

	North Dakota - Dickinson Approved But Not Drilled (AAPDs)		
	Federal	Indian	Total AAPDs
September 30, 2014	169	187	356
May 31, 2015	337	251	588

Notes:

1) APD reports run biweekly in FY 2013, no 5/31/2013 cut off data captured; monthly cut offs thereafter.

2) BLM AFMSS data, as of Fiscal Year End 2014 & May 2013 to 2015