Wayne Stenehjem (*Pro Hac Vice*)
Matthew A. Saagsveen (*Pro Hac Vice*)
Hope Hogan (*Pro Hac Vice*)
North Dakota Office of the Attorney General
500 N. 9th Street
Bismarck, ND 58501
Phone: (701) 328-2925
ndag@nd.gov

Paul M. Seby (*Pro Hac Vice*)
Andrew C. Emrich (Wyo. Bar No. 6-4051)
Special Assistant Attorneys General
Holland & Hart LLP
555 Seventeenth Street, Suite 3200
Denver, CO 80202-3979
Phone: (303) 295-8430 (P. Seby)
(303) 290-1621 (A. Emrich)
Fax: (303) 291-9177
pmseby@hollandhart.com
acemrich@hollandhart.com

Attorneys for Petitioner State of North Dakota

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

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

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

INTRODUCTION

On June 23, 2015, the Court held a hearing on pending motions to preliminarily enjoin the March 26, 2015 Bureau of Land Management ("BLM") final rule entitled "Oil and Gas; Hydraulic Fracturing on Federal Lands; Final Rule." 80 Fed. Reg. 16128 (Mar. 26, 2015) (to be codified at 43 C.F.R. Part 3160) ("BLM Rule"). The State of North Dakota has, along with several other Petitioners[1], challenged the validity of the BLM Rule. North Dakota and the other Petitioners have also moved the Court to enjoin the BLM Rule pending the Court's final adjudication of Petitioners' Petitions for Review.

At the conclusion of the hearing, the Court notified the parties that it was unable to make the necessary preliminary injunction findings without the administrative record. ECF No. 97 at 2, June 24, 2015 Order Postponing Effective Date of Agency Action. The Court postponed the effective date of the BLM Rule pending BLM's lodging of the administrative record, which was due to be filed on or before July 22, 2015. *Id.* The Court ordered that, following BLM's lodging of the administrative record, each of the parties may submit "citations to the record in support of their respective positions." *Id*. Due to delays in preparing the administrative record, BLM sought, and received, a second extension to file the record. ECF No. 108. On August 28, 2015, counsel for BLM served a copy of the record on North Dakota.

BLM'S ADMINISTRATIVE RECORD CONTAINS SERIOUS DEFICIENCIES

Before enumerating the citations in support of its positions, North Dakota is compelled to bring to the Court's attention two significant deficiencies in BLM's administrative record that have frustrated North Dakota's ability to undergo a thorough record review at this juncture.

[1] A wide variety of entities have challenged the BLM Rule, including four states (North Dakota, Wyoming, Colorado, and Utah), the Independent Petroleum Association of America (IPAA) and the Western Energy Alliance (WEA), and the Ute Indian Tribe of the Uintah and Ouray Reservation.

First, BLM has frustrated a timely and efficient review of the administrative record by failing to properly sort and label a large number of documents. Many documents are missing key information, such as the date or author. *See, e.g.,* DOIAR82443, DOIAR69835, DOIAR71202. Other documents are improperly identified by type. *See, e.g.,* DOIAR66663 (questions and answers related to the BLM Rule characterized as a technical report), DOIAR65101 (list of questions to include in preamble characterized as a technical report); DOI44343 (letter from BLM to Wyoming Governor Mead characterized as a technical report). Still other documents are duplicates that are included under different categories in other places of the record, many of which are inconsistently labeled as privileged. *See, e.g.,* DOIAR80257, DOIAR80260, DOIAR80898, DOIAR81025, DOIAR42814, DOIAR42816, DOIAR43172, DOIAR43179. By failing to properly identify and organize many of the documents in the administrative record, BLM has failed in its fundamental administrative duty to provide the Court, and the litigants to this case, with a true and accurate accounting of the agency's decision-making.

Second and more significantly, BLM has shielded from this Court's review a breathtaking number of documents by asserting that these documents are subject to the deliberative process privilege. As part of its administrative record, BLM provided the Court and the parties with a 331-page single-spaced privilege log. In this privilege log, BLM asserts privilege or exemptions over 7,551 documents out of the 39,881 documents contained in the administrative record. According to the number of pages, BLM claims privilege over approximately 45% of the administrative record. BLM asserts the deliberative process privilege as the basis for failing to disclose the vast majority of these documents.

A large number of the documents labeled by BLM as protected by the deliberative process privilege cannot, on their face, satisfy this privilege. *See, e.g., Dep't of Interior v. Klamath Water Users Prot. Ass'n*, 532 U.S. 1, 12 (2001) (limiting scope of deliberative process privilege to inter-agency and intra-agency documents). The following examples demonstrate BLM's extensive, and inappropriate, application of the deliberative process privilege.

- **Documents that were sent to BLM personnel by outside parties.**
  - Example: North Dakota's May 28, 2013 Comment Letter to BLM (DOIAR48270); Wyoming's September 10, 2012 Comment Letter to BLM, (DOIAR29382); BLM's Summary of Public Comments (DOIAR33803-810).
- **Documents that were sent by BLM personnel to outside parties.**
  - Example: Letter from Secretary Salazar to Chairman of the House Natural Resource Committee (DOIAR4151); Letters to Wyoming Governor Mead (DOI44343, DOIAR65348); Letter to Wyoming County Commissioners (DOIAR110568).
- **Documents that post-date the publication date of BLM's Final Rule.**
  - Example: Emails sent March 26, 2015, the same day the BLM Rule was published in the Federal Register (DOIAR102142-143, DOIAR102623).

While not an exhaustive list of the deficiencies in BLM's administrative record, these examples show that BLM has failed in its obligation to provide the Court and the parties to this litigation with the complete and accurate record. North Dakota will formally address these and other record deficiencies through a motion to supplement and/or modify the administrative

record. *See* ECF No. 116 (Order Granting Unopposed Motion to Extend the Deadline for Motions to Supplement the Administrative Record).

ADMINISTRATIVE RECORD CITATIONS SUPPORTING NORTH DAKOTA'S MOTION FOR PRELIMINARY INJUNCTION

Consistent with the Court's June 24, 2015 Order, North Dakota offers the following citations that support the positions set forth in its Motion for Preliminary Injunction and its oral presentation at the June 23, 2015 hearing. For ease of reference, North Dakota has organized these citations according to the four-part preliminary injunction test articulated in its motion.

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

A. North Dakota has a substantial economic interest in the efficient development of oil and gas resources within its boundaries, including through the use of hydraulic fracturing. Mot. at 1.

- DOIAR43996 (North Dakota Industrial Commission's June 25, 2012 Comment Letter) ("There are currently 214 rigs operating in North Dakota and production has increased to over 600,000 barrels of oil per day, due solely to hydraulically fractured horizontal wells of which a significant amount are located on public and Indian lands. The NDIC believes the United States' lifeline to domestic energy independence is hydraulic fracturing and horizontal wells and North Dakota is part of the energy equation. Therefore, North Dakota has a huge vested interest in this proposed rule.").

- DOIAR68786 (BLM Montana/Dakotas State Director's December 6, 2013 Information Memorandum for the Director) ("The state of North Dakota is the second-largest U.S. oil-producing state behind only Texas in oil production. The BLM Montana/Dakotas manages 58,000 surface acres of public land in North Dakota and has oil and gas management responsibilities for 1,421,000 million Federal subsurface and 568,000 leased Indian Trust subsurface acres in the state. These mineral acres include BLM, U.S. Forest Service (USFS), split-estate, Indian Trust and other agencies. In the Bakken, this equates to roughly 9 percent Federal and Indian minerals versus 91 percent fee and state minerals within the Bakken Area.").

- DOIAR5676 (North Dakota State Legislator Duane DeKrey's Statement at BLM April 20, 2011 Forum) ("in North Dakota now, 25 percent of our revenue stream is from oil and so it's a pretty important industry to North Dakota.").

- DOIAR30226 (BLM October 3, 2012 Internal Memorandum for the Deputy Director) (acknowledging "BLM-managed subsurface acres in North Dakota annually contribute

more than $1.3 billion to the state economy through BLM administered oil and gas production even though the BLM manages only 58,000 surface acres in North Dakota.").

- DOIPS10301 (Institute for 21st Century Energy – U.S. Chamber of Commerce's September 10, 2012 Comment Letter) ("For the past three years U.S. oil production has increased, reversing a 25 year decline. Perhaps the best example is North Dakota, which has a significant portion of the Bakken shale formation within its borders. In six years, North Dakota's oil production has increased 380% from 40 million barrels/year in 2006 to 153 million barrels/year in 2011, making it the second largest oil producing state in the country.").

- DOIAR68786-87 (BLM Montana/Dakotas State Director's December 6, 2013 Information Memorandum for the Director) ("BLM-administered oil and gas leasing, exploration and production contributed approximately $5.9 billion in total (direct and indirect) economic output to North Dakota and generated about 28,700 total (direct and indirect) jobs in North Dakota.").

B. BLM failed to consider the impacts of the BLM Rule on the States' sovereign and economic interests. Mot. at 7-16.

- DOIAR74887 (BLM July 20, 2013 Fact Sheet on the Revised Hydraulic Fracturing Rule) (containing BLM's unsupported and patently erroneous assertions that "[t]his rule will have no impact on state regulation of hydraulic fracturing on state or private lands, nor will it weaken state or tribal regulations currently adhered to by operators working on public or Indian lands.").

- DOIAR44000 (North Dakota Industrial Commission's June 25, 2012 Comment Letter) ("To date, BLM has not contacted the NDIC in an attempt to minimize any duplication.").

- DOIAR29096 (Western Business Roundtable's September 10, 2012 Comment Letter) ("There has been no meaningful consultation with states on this rulemaking.").

- DOIAR28398 (Interstate Oil & Gas Compact Commission's September 7, 2012 Comment Letter) ("IOGCC believes that the rule as proposed was developed without sufficient or meaningful consultation with state regulatory authorities. IOGCC, on behalf of the state regulators, requested to be kept informed of the development of the rules so that collaboration would be possible. The Department ignored requests for input.").

- DOIPS10355 (National Association of Manufacturers' September 10, 2012 Comment Letter) ("BLM appears not to have done proper research as to the scope or applicability of these state regulations.").

1. BLM failed to account for state-specific circumstances and the resulting infringement upon state sovereignty when it promulgated the BLM Rule. Mot. at 9-11; Hearing Tr. at 33:14-17.

- DOIAR5053-59 (February 24, 2011 Information Memorandum to Special Assistant to Counselor re: State Hydraulic Fracturing Regulatory Schemes) (demonstrating BLM's insufficient consideration of state regulatory schemes); DOIAR5052 (February 14, 2011 Email from Department of Interior's Neal Kemkar to BLM) (same); DOIAR7893-95 (BLM October 25, 2011 Information Memorandum from Former BLM Director Bob Abbey to the Deputy Secretary) (same).

- DOIAR4772 (BLM February 3, 2011 Chart Entitled "State Regulations Spreadsheet") (demonstrating BLM's failure to conduct an in-depth review of state regulatory schemes).

- DOIAR101326 (BLM March 24, 2015 Email from James Tichenor to Karen Mouritsen) (evidencing BLM's lack of understanding regarding state regulatory schemes through BLM's confusion of New Mexico and Texas hydraulic fracturing regulations described in the BLM Rule).

- DOIAR98931 (BLM March 19, 2015 Internal State by State Summary) (failing to recognize North Dakota as a state containing "regulations in place addressing hydraulic fracturing" but rather only containing "some form of measures in place for either isolating, and protecting usable water chemical disclosure and/or maintaining well integrity."); *see also* DOIAR98139 (BLM March 17, 2015 Summary of Hydraulic Fracturing Rule) (recognizing twelve states with hydraulic fracturing regulations, but failing to acknowledge North Dakota).

- DOIAR97351 (BLM Document Entitled "Qs&As on Hydraulic Fracturing Rulemaking") (claiming, without any explanation or justification, that "[t]his rule will have no impact on the state regulation of hydraulic fracturing on state or private lands.").

- DOIAR7889-90 (BLM Document entitled "Generic Talking Points – HF Rule Internal Working Document – May 13, 2014") (attempting to explain away duplication and conflict with state regulations by claiming "that operators already submit considerable amount of information to States and Tribes and we have taken that into account as we wrote the revised proposed rule.").

- DOIAR7889 (BLM Document entitled "Generic Talking Points – HF Rule Internal Working Document – May 13, 2014") (claiming, without justification, "[t]he rule only applies to fracturing operations on Federal and Indian trust lands, and is not intended to affect state regulation in any way.").

- DOIAR101805 (BLM March 25, 2015 Email from Linda Lance to Michael Nedd) ("Yesterday I was scrambling to find someone who could explain this to me -- was surprised when I looked at state regs and they didn't match what I'd understood was the case . . . I keep finding confusion or errors in the chart -- which I thought was focused on the four corners of the states' rules but now appears to include some info about state practice as opposed to rule text."); *see also* DOIAR101805 (BLM March 25, 2015 Internal Email from Mike Nedd to Linda Lance) ("I'm sorry to hear you were 'scrambling to find someone who could explain' yesterday and we work real hard to

ensure we had this nailed down but it is obvious we may not have done quite a good of job as we should have.").

- DOIAR5720-21 (North Dakota Industrial Commission's Statements at BLM April 20, 2011 Forum) (for example, BLM failed to account for North Dakota's confidentiality statute, despite statements at a BLM meeting that "[t]here is a confidentiality period in the state of North Dakota for six months.").

2. BLM was unaware of the impact of the BLM Rule on states' sovereign and economic interests because BLM refused to perform a federalism assessment. Hrg. Tr. at 238; 4-10.

- DOIAR20461 (BLM Rule Preamble May 11, 2012) ("Under Executive Order 13132, this rule would not have significant Federalism effects. A Federalism assessment is not required because the rule would not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. The rule would not have any effect on any of the items listed. The rule would affect the relationship between operators, lessees, and the BLM, but would not impact States. Therefore, under Executive Order 13132, the BLM has determined that this rule would not have sufficient Federalism implications to warrant preparation of a Federalism Assessment."); *see also* DOIAR48187 (BLM Supplemental Rule Preamble May 24, 2013) (same); *see also* DOIAR102205 (BLM Final Rule Preamble March 26, 2015) (same).

- DOIAR29883 (BLM September 20, 2012 Email from Nicholas Douglas to Michael Nedd) (failing to conduct a federalism assessment even though **"BLM's lack of authority to regulate water use" was noted by BLM as a key concern raised by commenters).**

- DOIAR44001 (North Dakota Industrial Commission's June 25, 2012 Comment Letter) ("Executive Order 13132 requires a Federalism assessment if the proposed rule would have a substantial direct effect on the states. BLM has determined that the proposed rule would not have sufficient Federalism implications to warrant preparation of a Federalism Assessment. The NDIC disagrees since the proposed rule will negatively affect the royalties and taxes paid to the state of North Dakota because of development delays caused by the proposed rule."); DOIAR48270 (North Dakota Industrial Commission's May 28, 2013 Comment Letter) (although BLM improperly designated North Dakota's comment letter as protected under deliberative process privilege, the comment letter attached to this memorandum (attached as Exhibit 1) similarly informs BLM that a federalism assessment is necessary).

- DOIAR34361 (254 Industry Members' September 10, 2012 Comment Letter) ("Yet despite this infringement on state authority, BLM has failed to conduct a Federalism assessment as required by Executive Order 13132.").

- DOIPS10657 (IPAA's and Western Energy Alliance's September 10, 2012 Comment Letter) ("Executive Order 13132 was implemented, in part, so that when a federal rule or

law was proposed, its federalism implications would be analyzed and presented for public scrutiny. BLM provides no such analysis for its proposed rule and no such opportunity for the public to consider and discuss the serious ramifications the proposal will have on our system of government.").

- DOIAR57095-96 (Mountain States Legal Foundation's August 23, 2013 Comment Letter) ("The BLM provided that it did not need to perform a Federalism Assessment, as required by Executive Order 13132. MSLF disagrees with this conclusion. The Revised Proposed Rule states that it 'would not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.' 73 Fed. Reg. at 31,669. The Revised Proposed Rule further states that it would only affect 'the relationship between operators, lessees, and the BLM.' *Id.* In spite of this conclusion, the Revised Proposed Rule provides that the BLM will continue to work with States and tribes 'to establish formal agreements that will leverage strengths of partnerships, and reduce duplication of efforts for agencies and operators, particularly in implementing the revised proposed rule as consistently as possible with State or tribal regulations.' *Id.* at 31,637. The Revised Proposed Rule further invites States and tribes 'to work with the BLM to craft variances that would allow technologies, processes or standards required or allowed by the States or tribe to be accepted as compliance with the rule.' *Id.* Finally, § 3162.3-3(k) of the Revised Proposed Rule requires States (on federal lands) and tribes (on Indian lands) to work with the BLM if an operator requests a variance from the Revised Proposed Rule.").

3. Commenters apprised BLM that a federalism assessment was necessary because the BLM Rule attempts to regulate state water resources. Hearing Tr. at 238; 4-10.

- DOIPS10360-61 (National Association of Manufacturers' September 10, 2012 Comment Letter) (the BLM Rule "could be viewed as an effort by the federal government to wrest control of water rights from the states, which are guaranteed by the Tenth Amendment;" "Executive Order 13132 requires agencies to complete an impact assessment for any regulation that has significant federalism implications. The BLM claims that the Proposed Rule would not have significant federalism effects and therefore did not undertake such an assessment. This is the wrong conclusion . . . The Proposed Rule creates federalism concerns due to its treatment of water rights. Water is essential to oil and gas extraction and is used throughout the process of drilling, completion and production. Because oil and gas operations require water, operators generally secure access to water or water rights prior to drilling to ensure that water is reliably and economically available throughout their operations. The Proposed Rule appears to allow BLM staff to direct operators to use, or not use, water from various sources without explaining from where the federal government's authority comes to impose water access limitations or requirements.").

- DOIAR29096 (Western Business Roundtable's September 10, 2012 Comment Letter) (federalism assessment is required because "BLM's proposed rule will clearly impact state regulatory authority. The rulemaking would institute a new mandatory federal layer of regulation. Beyond that, the rule actually would extend beyond disclosure of hydraulic

fracturing fluids and into other areas that have clearly been the authority of individual states (i.e. wellbore construction standards, water regulations, etc.)").

- DOIPS37109 (Greater North Dakota Chamber of Commerce's August 8, 2013 Comment Letter) ("The requirement to identify water sources on a Notice of Intent (NOI) sundry will be burdensome to operators AND the BLM. Water sources can change numerous times with availability and technology and at times, come from more than one sources not under federal jurisdiction or under operator control. Prior approval can lead to unnecessary delays. This requirement will pose an additional burden on BLM to review the additional sundry forms.").

C. Application of the BLM Rule to split estate lands will only further delay development in North Dakota and other Western states with large amounts of split estate lands. Mot. at 9-10.

- DOIAR26551 (BLM's August 2, 2012 Testimony before the House Energy and Commerce Committee) ("Given the checkerboard ownership patterns of many public lands in the West, as well as the significant portfolio of split estate ownership, the BLM also must coordinate with other landowners and land managers. Of the 700 million acres of mineral estate managed by the BLM, 57 million acres are under surface acres that belong to private entities and significant number of acres are under surface managed by other Federal agencies.").

D. The BLM Rule will cause substantial permitting delays. Mot. at 12

1. Throughout the rulemaking process, both BLM and commenters recognized that the BLM Rule will result in significant federal permitting delays. Mot. at 12.

- DOIAR70355 (Former Principal Deputy BLM Director Neil Kornze's December 23, 2013 Information Memorandum for the Secretary) ("[I]ndustry is concerned about redundancy delays, and BLM staffing capacity to absorb this added workload with drilling permits taking up to 10 months or longer to approve.").

- DOIAR66302 (BLM November 14, 2013 Meeting Notes) ("Since almost all western oil and natural gas development requires hydraulic fracturing, the implementation of the proposed rule could, by increasing permitting time periods and regulatory uncertainty, delay or discourage new production on federal lands.").

- DOIAR109773 (BLM Document Entitled "Notes Concerning Impact of Rule") (admission that BLM's estimated burden in the BLM Rule "does not reflect all of the potential workload that may result from this rule. There may be an increased need for BLM inspectors to witness and confirm operator compliance. Other potential burdens may be placed on support staff if the rule generates additional FOIA requests, data requests, protests, or challenges.").

- DOIAR69835 (BLM December 17, 2013 Document Entitled "Policy Calls for the Hydraulic Fracturing Rule") (in response to comments, among others, that "BLM does

not have adequate personnel or expertise to process HF requests which will result in additional delays," BLM subject matter experts state that "[t]his is a legitimate concern in some areas, but does not warrant any specific change in the rule.").

- DOIAR96880 (BLM Response to BLM Washington Office Follow Up Questions) ("The BLM conducted review of APDs processed from 2009 to 2013 and found that the average APD takes about 200 to 300 days to be processed.").

- DOIAR44000 (North Dakota Industrial Commission's June 25, 2012 Comment Letter) ("BLM is currently understaffed in North Dakota. The time for the BLM to process a permit currently takes 180-290 days. BLM's analysis indicates an additional 28,560 man hours per year will be needed to implement these rules. Imposing additional permit tasks will only further delay the process.").

- DOIAR48259 (North Dakota Industrial Commission's May 28, 2013 Comment Letter) (although BLM improperly designated North Dakota's comment letter as protected under deliberative process privilege, the comment letter attached to this memorandum (attached as Exhibit 1) notes that the "amount of information that must be submitted and reviewed could result in substantial processing time by BLM staff.").

- DOIAR28034 (North Dakota Association of Oil and Gas Producing Counties' September 4, 2012 Comment Letter) (the BLM Rule's "potential time delay in permitting is also very concerning. The BLM takes a year or more to process permits and this rule could add 100 days to the process.").

- DOIAR30236 (BLM Document Entitled "Hydraulic Fracturing Rule Justification") (BLM summary noting that "[m]any commenters remarked on BLM's excessive delays with respect to permitting and believed the amount of information and approvals requested would only increase the delays and consequently the costs of drilling.").

- DOIAR68786 (BLM Montana/Dakotas State Director's December 6, 2013 Information Memorandum for the Director) ("The BLM is working diligently to fill positions, retain employees, and meet the significant workload demands associated with intense energy development. Applications for permit to drill (APDs) in the Bakken have seen more than 500 percent increase over the past five years. In FY 2013, the North Dakota Field Office received 585 APDs, approved 448 APDS, completed 342 wells and started 393 wells. There are 462 pending permits (APD>90 days), of which 248 are federal and 214 are Indian. Employees from across the Bureau are being engaged to address the backlog of APDs on both Indian and Federal minerals currently experienced by the [North Dakota Field Office].").

- DOIAR68786-87 (BLM Montana/Dakotas State Director's December 6, 2013 Information Memorandum for the Director) ("In the Bakken, an APD may be on the same well pad which can support up to 10 wells. Along with BLM's drilling oversight

and surface protection requirements, the BLM provides inspection and enforcement for production accountability. Each of these workloads has increased 450 percent in the past five years. With this increase comes commensurate responsibility for inspecting and enforcing (I&E) production accountability. As budgets continue to decline, meeting these I & E responsibilities is becoming untenable.").

- DOIAR69882 (U.S. Government Accountability Office Draft Preliminary Facts and Key Information) (noting that, in the context of oil and gas communitization agreements, "GAO found many examples where BLM has taken more than a year to review these agreements," despite the statutory requirement that Interior "is to review [communitization agreements] within 120 days.").

- DOIPS71691 (Anonymous Commenter's August 14, 2013 Comment Letter) ("The Industrial Commission of North Dakota is already effectively regulating the use of hydraulic fracturing in ND. Adding another layer of bureaucracy will only add to delays and additional cost burdens.").

- DOIAR56753 (Ultra Petroleum's August 23, 2013 Comment Letter) ("there is every reason to believe that this new rule will have a widespread negative impact on permitting timeframes and related production on federal lands. BLM's own statistics and history reveal that there are already significant delays between the submission of an APD and the approval of it. Adding additional regulatory hurdles, paperwork, and review time can only have a negative impact on the time it takes to review and approve an APD.").

- DOIAR28543 (API's September 10, 2012 Comment Letter) ("[t]he proposed rule does not establish how BLM will manage the large amount of information to be required from operators;" "[t]he proposed rule creates uncertainty and potential delays for operators if approval of a well simulation plan is not reasonable, timely, and certain. Changes are likely to occur between the approved plan and the actual operations (which may occur several weeks to months apart), which would require resubmission and re-approval of the revised plan.").

- DOIAR24793-94 (Industrial Energy Consumers of America's June 20, 2012 Comment Letter) ("In fact, existing BLM permitting processes already suffer from extraordinary delay. It will take unnecessary time and resources to bring the Federal bureaucracy up to current state levels of technical proficiency. The implementation of these unjustified, extraordinary and costly technical requirements by unqualified personnel spells trouble for timely and cost-effective permitting processes and ultimately exploration, development and production of natural gas and oil on federal lands.").

- DOIAR56610 (Industrial Energy Consumers of America's August 23, 2013 Comment Letter) ("[t]he rule will unquestionably further increase delays for approval of an APD (Application for Permit to Drill) beyond the already very long 228 days that it is currently taking.").

- DOIPS10362 (National Association of Manufacturers' September 10, 2012 Comment Letter) (the BLM Rule will "undoubtedly result in delays for large numbers of drilling activities.").

- DOIAR53909 (Sweetwater County's August 7, 2013 Comment Letter) ("the proposed regulations, due to inadequate BLM staffing levels, will increase time necessary to process Applications for Permits to Drill (APD). It already takes a longer time to process BLM APDs than State oil and gas well permits, and any additional delays caused by the BLM's projected lack of the staffing capacity could only serve to discourage oil and gas development.").

- DOIAR53915 (Railroad Commission of Texas's August 7, 2013 Comment Letter) ("[T]he proposed revised rule will still cause further delay in drilling for and producing resources. We understand that currently, BLM takes 180-290 days to process an application for a permit to drill. Anecdotal information indicates that it can take up to a year for BLM to issue a permit to drill. BLM has indicated that it will need an additional 28,560 man hours per year to implement the proposed rules. Imposition of additional regulations are likely to result in an increase in the amount of time needed by BLM for approval of drilling permits and, therefore, a delay in production on federal and Tribal lands. To avoid duplication and delays, we again recommend that BLM review information that is currently required by the states.").

- DOIPS10663 (IPAA's and Western Energy Alliance's September 10, 2012 Comment Letter) ("The current APD approval process already takes an average of 298 days, well beyond the time limits established in Onshore Orders. It is unrealistic for BLM to assert that the review and analysis of the additional data required to be submitted by this rule will not cause additional delay and significant increased costs to operators while rigs stand idle awaiting federal approval to act.").

- DOIAR56613 (Industrial Energy Consumers of America's August 23, 2013 Comment Letter) ("The shear breadth and number of technical concerns raised suggests that BLM lacks capacity to regulate and process permits and approvals in a timely fashion.").

- DOIPS67108-09 (Greater North Dakota Chamber of Commerce's August 8, 2013 Comment Letter) ("The administrative burden of the additional proposed rules will lead to further delays in approval of Applications for Permit to Drill (APD) from the already overtasked North Dakota Bureau of Land Management (ND BLM). The current backlog of APDs at the Dickinson, ND office of BLM exceeds 400 as of July 2013. Many of these APDs are months old. This number is increasing daily with the BLM-Dickinson reporting the ability to process 75% of new APDs submitted. The office is currently understaffed. The estimated time to process an APD is 180-290 days, while the state of North Dakota completes the process in a maximum of 14 days. It has been estimated that delays of this magnitude can cost upwards of $200, 000 per well. BLM severely

underestimates the cost of the proposed rules by not including the cost of delays in permit approval.").

- DOIAR56883-84 (Devon Energy Corporation's August 23, 2013 Comment Letter) ("Indeed, the BLM already faces significant challenges in processing APDs within the statutory time frame. While APDs for state and private lands are routinely approved in less than 30 days, BLM reports on its website that the average APD approval process takes 228 days. Yet there is no indication that BLM will be able to increase the number or upgrade the expertise of staff needed to implement the Proposed Rule.").

- DOIAR57133 (Continental Resources, Inc.'s August 23, 2013 Comment Letter) ("Today, even without the added administrative burden of the proposed rule, it takes BLM between 120 - 180 days to issue approval of a permit to drill a well involving BLM or Indian minerals. Given the fact BLM's North Dakota and Montana offices are understaffed and already being crushed by the weight of a backlog of more than 400 unreviewed permits, the current backlog and delays in permit approval will likely continue to grow if BLM publishes a final hydraulic fracturing rule and extends its applicability to the Bakken.").

- DOIAR57055 (ANGA-AXPC's August 23, 2013 Comment Letter) ("The Revised Proposed Rule undoubtedly will increase the responsibilities of BLM field offices without a commensurate increase in personnel.").

- DOIAR23298 (BLM June 5, 2012 email from Michael Nedd to BLM Director Neil Kornze) (summarizing tribal concerns that "BLM does not have enough staff to address the current APD workload, so it is hard to believe the HF rule will not cause further delays in processing APD and HF requests.").

- DOIAR28398 (Interstate Oil & Gas Compact Commission's September 7, 2012 Comment Letter) (processing of federal applications for permits to drill (APD) take several months longer than a comparable state APD. Adding requirements will only serve to further delay permitting.").

- DOIAR56634-36 (API's August 23, 2013 Comment Letter) ("[T]he industry is deeply concerned about the addition of unjustified new BLM requirements because delays in the issuance of permits to operators have the potential to add hundreds of millions of dollars or more in the aggregate to the cost of developing onshore leases . . . Since almost all western oil and natural gas development requires hydraulic fracturing, API is concerned that the implementation of the proposed rule could, by increasing permitting time periods and regulatory uncertainty, delay or prevent new production on federal lands.").

- DOIPS10748 (Encana Oil & Gas's September 10, 2012 Comment Letter) ("BLM acknowledges existing backlogs with drilling permit applications, which can delay the process six to twelve months. Adding an approval step in the middle of the process will

cause greater delays and translate into unwieldy work stoppage situations in between drilling and completions activities.").

2. Compliance with the National Environmental Policy Act presents an additional source of delay. Hearing Tr. at 50; 11-15.

- DOIAR102205 (BLM Final Rule Preamble March 26, 2015) ("the BLM will need to know an operator's proposed source of water and planned disposal method in order to consider the potential environmental impacts and compliance with NEPA.").

- DOIAR26857 (BLM August 17, 2012 Email from Steven Wells to BLM employees) (in considering whether hydraulic fracturing should be analyzed under NEPA at the leasing stage, Steven Wells provides that "[t]he more appropriate wellbore site specific [NEPA] analysis is during the APD.").

- DOIAR28539 (API's September 10, 2012 Comment Letter) ("<u>these [permitting delays] are further complicated with additional uncertainty regarding the level of NEPA review to be required.</u>") (emphasis in original).

- DOIPS10361 (National Association of Manufacturers' September 10, 2012 Comment Letter) ("The BLM has stated that it expects that approval of certain elements, such as the cement bond log, will be considered federal actions triggering NEPA. In addition to the delays inherent in the NEPA process, the NAM is concerned that each approval may be subject to challenge in federal court; this will result in even greater delays and added costs.").

3. The BLM Rule will trigger North Dakota's confidentiality provision preventing the release of certain hydraulic fracturing records for six months. Hearing Tr. at 49:25 – 50: 15; 56:18 – 57:8.

- DOIAR5720-21 (North Dakota Industrial Commission Director's Statements at BLM April 20, 2011 Forum) (North Dakota alerted BLM during development of the BLM Rule that "[t]here is a confidentiality period in the state of North Dakota for six months.").

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

- DOIAR13929 (North Dakota Governor Jack Dalrymple's February 8, 2012 Letter to Secretary Salazar) ("Oil and natural gas royalties from drilling on public lands are a significant revenue source for the federal government, the Tribes and North Dakota, and additional burdens for development on public lands could have the adverse effect of forcing operators to shift investment away from public lands, thus depriving the government of needed revenue.").

- DOIAR55854 (United States Congress Members' August 19, 2013 Letter to Secretary Jewell) ("On March 14, 2012, then BLM Director, Bob Abbey, testified that there has been 'a shift [in oil and gas production] to private lands in the East and to the South where there are fewer amounts of Federal mineral estate.' We believe BLM's final rule will contribute to this shift in oil and gas production and cost public land states, Indian tribes, and the federal government hundreds of millions of dollars in revenue.").

- DOIAR44001 (North Dakota Industrial Commission's June 25, 2012 Comment Letter) (federalism assessment required because "the proposed rule will negatively affect the royalties and taxes paid to the state of North Dakota because of development delays.").

- DOIAR54111 (North Dakota Petroleum Council's August 9, 2013 Comment Letter) ("The Bakken is leading the way by creating tens of thousands of jobs, stimulating the U.S. economy, and increasing domestic production of oil which provides energy security for our nation. The proposed BLM HF rules will have a significant impact on oil and gas development in North Dakota, especially on Tribal land development. It has been estimated that the economic impact of this rule will reach $120 million in North Dakota due to delays in the permitting process.").

- DOIAR28406 (Billings County North Dakota Commission Chairman's Comment Letter) ("The cost of this additional rulemaking will trickle down to the American taxpayer by decreasing the amount of royalties and tax revenue to local governments and states.").

- DOIAR20694 (Email Summarizing Fort Berthold Indian Reservation Chairman Tex Hall's Comments at BLM May 8, 2012 Meeting) ("the HF rule would cost the [Fort Berthold Indian Reservation] over 125 million in lost revenue due to the fact that the rule would prevent approximately 100 wells from being drilled in the next year.").

- DOIAR21123-24 (New Mexico Governor's April 16, 2012 Letter to Secretary Salazar) ("Given the fact that states share in federal revenues from such production, states would certainly face reduced income and reduced employment in those who support the oil and gas industry . . . These revenues offset the loss of tax base by having federal lands in states, and contribute to funding a range of state programs from education to emergency services as well as many others.").

- DOIAR28977 (Wyoming Office of the Governor's September 10, 2012 Comment Letter) ("Unnecessary and duplicative regulations will reduce jobs and revenue. Oil and gas royalties from drilling on public lands are a significant source of revenue for the federal government and Wyoming."); *see also* DOIAR11763 (Wyoming Oil and Gas Conservation Commission February 1, 2012 Testimony at House Subcommittee on Energy and Environment) (evidencing Wyoming oil and gas development's contribution to state and local governments).

- DOIAR26793-94 (Hot Springs Wyoming County Commissioners' August 8, 2012 Comment Letter) ("According to an economic study conducted by John Dunham and

Associates, it is estimated the new regulations could cost over 1.5 billion dollars. This huge expense will divert investment away from the energy industry, job creation and economic growth. It will also reduce royalty and tax revenue to the citizens of Wyoming and their local governments. These consequences will be devastating.").

- DOIAR33975, 33986 (Devon Energy Corporation's September 10, 2012 Comment Letter) ("Additionally, the reduced production could cost the federal government and states that share in federal royalties potentially billions of dollars in revenue. Indeed, states receive fifty percent of federal land oil and gas bonus, rental and royalty revenues, amounting to more than $11 billion in 2011;" "the BLM's proposed rule will only discourage exploration and production on federal lands, costing the federal government and states that share in federal royalties - potentially billions of dollars in revenue.").

- DOIAR7591 (Coalition of Local Government's September 10, 2012 Comment Letter) ("[t]he loss of oil and gas development within the state of Wyoming and specifically the CLG member counties' will have a significant impact on the counties' ability to generate revenue to provide the local government services.").

- DOIAR56634 (API's August 23, 2013 Comment Letter) (the BLM Rule's "cost is borne not only by operators, but ultimately by taxpayers and the federal government in the forms of decreased tax and royalty revenues from production of federal oil and gas resources.").

- DOIAR56613 (Industrial Energy Consumers of America's August 23, 2013 Comment Letter) ("The proposed rule will discourage exploration and production on federal lands, which would substantially reduce state and federal royalties when combined, are billions of dollars of revenue.").

- DOIPS239 (Cabot Oil & Gas Corporation's June 14, 2012 Comment Letter) (the BLM Rule "would be detrimental to states, tribes and the American public who would lose out on the local, regional and national economic benefits and public revenue of natural gas development.").

- DOIPS10754 (Encana Oil & Gas's September 10, 2012 Comment Letter) ("BLM also greatly underestimates the potential impact on federal and state revenues, the increased demands on agency staff, and the economic impact on operators and surrounding communities.").

- DOIAR32044 (Western Energy Alliance's June 7, 2012 Comment Letter) ("States in the West predominated by public lands will become less competitive, and will lose jobs and economic activity to other areas of the country unencumbered by the excessive federal regulation.").

- DOIAR53915-16 (Railroad Commission of Texas's August 7, 2013 Comment Letter) (the BLM Rule will "negatively impact royalties and taxes paid to the states and the federal government.").

- DOIPS7872 (Newfield Exploration's September 7, 2012 Comment Letter) ("BLM grossly underestimates the state and federal revenues lost.").

- DOIAR7591 (Coalition of Local Government's September 10, 2012 Comment Letter) ("[T]he CLG member counties do receive 30 percent of the state's sales and use tax revenues, based on where the taxes originated from and the counties' population, plus an additional one percent, based on a direct allocation of $50,000 to each county and the remainder distributed by county population . . . The total amount of sales and use taxes the CLG member counties received in 2011 was about $25 million . . . This amounts to a large portion of the counties' revenue stream. Therefore, the proposed fracking rule will delay permit approvals and discourage the development of some wells, which will lead to a decrease in the amount the counties receive from severance and sales taxes.").

- DOIAR28539 (API's September 10, 2012 Comment Letter) ("Delaying a federal decision on projects . . . delays oil and gas companies from beginning the approved development and production phases of these large-scale projects. Delays in a BLM decision results in deferral of project development, and in the employment and government revenues that can result from such projects.").

- DOIAR28942 (Petroleum Association of Wyoming's September 10, 2012 Comment Letter) ("Permitting delays will ultimately cause production declines which lead to tax revenue and employment declines.").

- DOIAR29127 (QEP Energy's September 10, 2012 Comment Letter) (In North Dakota, delay to QEP's development "results in lost or delayed royalties and taxes to the tribe and state and federal governments.").

F. Permitting delays will cause operators to permanently relocate their oil and gas operations off federal lands, and even out of North Dakota. Mot. at 14.

- DOIAR80222 (BLM June 3, 2014 Economic Analysis for Hydraulic Fracturing Rule) ("A key consideration is the extent to which the costs of the requirements might impact investment, production, employment, and a number of other factors. That is, to what extent, if any, would an operator choose to invest in other areas non-Federal and non-Indian lands when faced with the cost requirements of the rule.").

- DOIAR13931 (February 17, 2012 Letter from the House Energy and Commerce Subcommittee to Secretary Salazar) ("additional burdens for drilling on public lands could have the adverse effect of forcing operators onto private natural gas fields that are not subject to the rigorous NEPA process.").

- DOIAR66302 (BLM November 14, 2013 Meeting Notes) (noting the impact of existing regulations on the rate of oil and gas development on federal lands; "A March 2013 Congressional Research Service (CRS) report concluded that, from fiscal year 2007 through fiscal year 2012, all of the increase in total U.S. oil production took place on non-federal lands, and the federal share of the total U.S. crude oil production fell by 7%. Moreover, since 2007, U.S. natural gas production has increased 20% overall despite production falling on federal lands by 23%.").

- DOIAR28543 (API's September 10, 2012 Comment Letter) ("[t]he risk of a situation presented by the proposed rule in which an operator obtains approval to drill a well without the assurance that it will be able to complete the well using hydraulic fracturing is likely to prove a major disincentive to investing capital to develop federal minerals. In short, the proposed rule is likely to prevent a significant number of wells from being drilled.").

- DOIAR7590-91 (Coalition of Local Government's September 10, 2012 Comment Letter) ("[t]he additional costs from delay, the casing to protect all usable waters, and the cement bond logs will ultimately reduce drilling activity . . . [s]hould these rules go into effect, we can expect a correlative drop in new development and new discoveries.").

- DOIAR71737 (BLM Revised Hydraulic Fracturing Rule January 10, 2014 Memorandum re: Pits vs. Tanks) (one reason for permanent relocation is that "[t]he BLM is planning on requiring tanks unless otherwise approved by the authorized officer. . . The BLM understands that this rule change would present significant cost burden and operational burden, but it believes the benefits of such change are imperative in order to fulfill its stewardship mandate under the Federal Land Policy and Management Act of 1976.").

- DOIAR25444 (Domestic Energy Producer's Alliance June 13, 2012 Comment Letter) ("In their current form, many provisions of the rule will greatly increase the cost to drill and complete oil and gas wells, including project delays and operational uncertainties that all have the potential to inhibit oil and gas resource development on Federal lands with no apparent increase in benefits or protection to the environment.").

- DOIPS1043 (EP Energy's August 31, 2012 Comment Letter) (the BLM Rule "will also place undue economic burdens and time delays on independent oil and natural gas producers that will inevitably drive many smaller companies away from exploring for oil and natural gas on federal lands.").

- DOIAR29126-27 (QEP Energy's September 10, 2012 Comment Letter) (the BLM Rule will "only add additional bureaucracy and uncertainty that will see operators like QEP look for development opportunities outside the domain of the BLM which is detrimental to federal, tribal and state budgets that rely on the revenue associated with resource development for their budget funding base. Even the BLM, in testimony before the Senate Interior, Environment and Related Agencies Appropriations Subcommittee, has

stated that there is a move by operators to shift focus from development of minerals on federal and tribal lands to private lands.").

- DOIPS10658 (IPAA's and Western Energy Alliance's September 10, 2012 Comment Letter) ("Coupling the crushing compliance costs associated with this rule with the time delays and uncertainty in the federal leasing process, will make federal and tribal lands even less appealing for development. The ultimate result of the proposed BLM rule is that the small businesses making up America's oil and natural gas industry will stop exploring for and producing oil and natural gas on federal and tribal lands in the United States. Instead, producers will seek to move their operations to private and state lands that offer more regulatory certainty and more reasonable costs of compliance.").

- DOIPS65492 (Armstrong Corporation's September 10, 2012 Comment Letter) (the BLM Rule "will make the development of Federal and Indian lands less attractive.").

- DOIAR22985 (John Dunham's June 1, 2012 Memorandum Entitled "Review of US BLM Report entitled Well Stimulation Proposed Rule: Economic Analysis and Initial Regulatory Flexibility Analysis") ("While any additional costs would reduce drilling activity (since marginal wells would no longer be financially practical to develop), were these costs to be high enough, they could preclude companies from developing any additional resources on BLM-controlled or impacted land.").

G. BLM's contention that administrative delay will amount to only four hours is not credible. Hearing Tr. at 181; 15-18.

- DOIAR48163 (BLM Supplemental Rule Preamble May 24, 2013) (BLM contends that provisions of the BLM Rule would "limit any permitting delays," yet also acknowledges "[s]ome BLM offices, especially those that process a large volume of drilling applications, may experience delays in implementing the revised proposed rule . . . with the implementation of any new rule, some delays may be inevitable.").

- DOIAR82317 (BLM July 7, 2014 Email from Deputy Assistant Director Karen Mouritsen to Steven Wells and Michael Nedd) (describing BLM "concern about asking the operators for information but us not having the capacity to actually review the information except in a few high-priority cases. [Linda Lance] agrees with my thought that if that turns out to be true (and she doesn't doubt it will be true) then we ask for more resources to implement the reg.").

- DOIAR82833 (BLM July 15, 2014 Internal Working Document entitled "Rocky Mountain Mineral Law Institute -- Draft Speech Talking Points For Tuesday July 17 in Vail Colorado") (acknowledging "[i]f BLM does not obtain a funding source for this work, we will be forced to re-allocate resources including reassigning petroleum engineering staff to I&E functions from APD processing.").

- DOIAR82833 (BLM July 15, 2014 Internal Working Document entitled "Rocky Mountain Mineral Law Institute -- Draft Speech Talking Points For Tuesday July 17 in

Vail Colorado") (noting that BLM "cannot continue to lease and permit drilling at this pace if we do not have the funds to ensure that it is done safely.").

- DOIAR66629 (BLM June 14, 2013 Internal Working Document Entitled "Supplemental Notice of Proposed Regulation on Hydraulic Fracturing Questions and Answers") (recognizing that "funding and personnel constraints" impact permitting times).

- DOIAR31812 (BLM October 24, 2014 Document Entitled "Hydraulic Fracturing (HF) Anticipated Workload Impacts") ("Expanded mission during diminished program capacity—the BLM oil and gas program lost $13 million in funding for drilling permit preparation in 2012 . . . The field is unsure of the anticipated workload; technical coverage by the current 50 operational Petroleum Engineers will be challenged at best.").

- DOIAR26985 (BLM August 21, 2012 Email from Steven Wells to Nicholas Douglas) ("I believe since it is unknown what would be expected, the estimates varied depending on interpretation. CA estimated 12 hours to process, 4 hours to cover the subsequent report. **Some offices would struggle more than others, especially the Dickinson's [North Dakota] and Vernals [Utah], which would have to balance with other APD needs.**") (emphasis added).

- DOIAR28296-98 (Memorandum from State Director to Montana – Dakotas Leadership entitled "North Dakota Workload Strategy and Establishment of Focus Team") ("As you are aware the North Dakota Field Office is experiencing an unprecedented fluid minerals workload. At the same time as workload is increasing exponentially, the office is experiencing rapid turn-over of personnel and difficulties recruiting and backfilling positions--typical of this type of "boom" situation. Through the coming fiscal year there are critical priority workloads and growing backlog of time-sensitive applications that must be addressed.").

- DOIAR20694 (BLM May 20, 2012 Email from Richard Hotaling to BLM employees Summarizing North Dakota Representative Berg Statement's at BLM May 8, 2012 Meeting) (meeting notes summarizing comments "the BLM had over 800 backlogged APDs on [Fort Berthold Indian Reservation] and this was not acceptable and that the BLM needed to improve their efficiency in processing APDs.").

- DOIAR48839 (North Dakota Petroleum Council's August 28, 2013 Comment Letter) ("The administrative burden of the additional proposed rules will lead to further delays in approval of Applications for Permit to Drill (APD) from the already overtasked North Dakota Bureau of Land Management (ND BLM). The current backlog of APDs at the Dickinson, ND office of BLM exceeds 400 as of July 2013. Many of these APDs are months old. This number is increasing daily with the BLM-Dickinson reporting the ability to process 75% of new APDs submitted. The office is currently understaffed. The estimated time to process an APD is 180-290 days, while the state of North Dakota completes the process in a maximum of 14 days. It has been estimated that delays of this magnitude can cost upwards of $200, 000 per well. BLM severely underestimates the cost of the proposed rules by not including the cost of delays in permit approval.").

- DOIAR14009-18 (Internal BLM April 11, 2012 Memorandum entitled "Request for Support to the North Dakota Field Office") (demonstrating BLM's own recognition that it lacks sufficient resources to appropriately process APDs); *see also* DOIAR17361 (BLM March 5, 2012 Email from Associate State Director for Montana/Dakotas to BLM employees) ("this boom has resulted in workload demands in the North Dakota Field Office that we have not been able to keep up with.").

- DOIAR50215 (BLM June 17, 2013 Email from Helen Hankins to Neil Kornze) (BLM employee expressing "concern about our capacity to deal with the full breadth of oil and gas responsibilities from I&E, APD processing, lease sales, MLPs, and new requirements that we will have when the hydraulic fracturing rule becomes final.").

- DOIAR26852-53 (BLM Vernal Field Office Petroleum Engineer's Comment Letter) (new information required under the BLM Rule "will also add up to 230 work weeks (4.4 years) to our current annual work load in the Vernal Field Office based upon the well spuds to date (575) for this fiscal year (using the 16 hours of response time per well as set out in the Estimated Annual Hour and Cost Burdens in the proposal);" "we at the BLM are definitely experience challenged when it comes to the understanding of cement bond logs . . . We are not set up to evaluate and approve CBL for quick turn-around as will be the case with the requirements of a newly submitted APD.").

- DOIPS138518 (Anonymous Commenter's August 22, 2013 Comment Letter) ("[t]o impose the BLM regulations . . . will certainly increase the amount of time it takes to get a permit. I believe the BLM has grossly underestimated the man power required to implement and enforce these rules.").

- DOIPS7872 (Newfield Exploration's September 7, 2012 Comment Letter) ("BLM permitting delays are overwhelmingly and unacceptably underestimated.").

- DOIAR57066 (Wyoming Legislature Select Committee's August 23, 2013 Comment Letter) ("The Committee heard testimony that the BLM Field Offices in Wyoming, while staffed by dedicated public servants, are not prepared to effectively and efficiently manage the additional regulatory responsibilities which will necessarily arise if the proposed rules are enacted. The revised proposed rules, if enacted, will undoubtedly increase the time to obtain a permit to drill for oil and gas on BLM managed lands, which many already consider excessive and unreasonable without another layer of regulatory burden. This is especially true in the current environment of frozen or shrinking federal budgets.").

- DOIAR56292 (Western Energy Alliance's August 22, 2013 Comment Letter) ("BLM fails to account for the fiscal resources and labor burdens that the rule will place on other governmental entities.").

- DOIAR32044 (Western Energy Alliance's June 7, 2012 Comment Letter) ("We conservatively estimate that the proposed HF regulations would add about 100 days onto the permitting process, currently at 298 days on average. 398 days compared to the states' 30 day average will cause a further flight of capital and development from public and Indian lands.").

- DOIPS10358 (National Association of Manufacturers' September 10, 2012 Comment Letter) ("[t]he BLM also appears to understate personnel required to comply with the Proposed Rule. In the Proposed Rule, the BLM estimates that in order to meet additional operational and administrative needs, operators will be required to add 15-18 employees across the industry for each of the next three years after rule implementation . . . The BLM states no basis for the estimate, or the scope of the estimate;" "The Proposed Rule's assumption that operators will experience no delays in the approval process for individual well permits if the proposed rule is adopted is unrealistic based upon documented trends with regards to the length of time needed for the BLM to approve each project. In addition, the Proposed Rule will require a number of additional approvals/permits at various stages in the drilling process, which translate to additional delays and expenses.").

- DOIAR57097 (Mountain States Legal Foundation's August 23, 2013 Comment Letter) ("Aside from the cost to operators themselves, the BLM must fully consider the administrative burdens that will result from enacting the Revised Proposed Rule. Administrative delays are already commonplace in the oil and gas industry. MSLF doubts the validity of the BLM's estimate that only 8.44 additional full time employees will be needed to manage the increased workload that will result from the Revised Proposed Rule. MSLF also doubts that the BLM has the technical expertise necessary to handle the increased workload.").

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

A. North Dakota will suffer tremendous economic harm from implementation of the BLM Rule. Mot. at 16.

- *See supra* Section I in support of North Dakota's immediate and irreparable harm.

B. BLM—and by extension, the public—will not suffer environmental harm from delayed implementation of the BLM Rule because North Dakota and other states have adequate environmental protections in place through its own hydraulic fracturing regulatory scheme. Mot. at 17.

- DOIPS307 (Inland Oil & Gas Corporation's June 26, 2012 Comment Letter) ("[o]ur local [North Dakota] government has continually proved that they are proactive and educated on the concern facing the environment associated with hydraulic fracturing. Any larger, extended government entity that is removed from the unique geological traits of the Bakken would merely impose 'blanket' rules that will not address the specifics of the

formation, and therefore will be noxious and unbeneficial to any and all parties involved.").

- DOIAR1722-24 (Ground Water Protection Council June 4, 2009 Statements to House Committee on Natural Resources, Energy and Mineral Resources Subcommittee) ("[W]e believe that state regulations are designed to provide the level of water protection needed to assure water resources remain both viable and available. The states are continuously striving to improve both the regulatory language and the programmatic tools used to implement that language. In this regard, the GWPC will continue to assist states with their regulatory needs for the purpose of protecting water our most vital natural resource.").

C. BLM will not be harmed if the Rule is delayed. BLM cannot identify any environmental purpose to justify the BLM Rule. Mot. at 16-17.

- DOIAR97399 (BLM March 10, 2015 Email between Beverly Winston and Subijoy Dutta) (Question: "Can you name one case where hydraulic fracturing has ruined underground or surface water supplies?;" Response: "A preliminary, Draft Answer is No. Since modern HD operation (2010+) no such incidents. No Spills or incident reports (MUEs) in our record/database indicates contamination of groundwater due to leaks or spills from HF operation.").

- DOIAR97956 (BLM March 13, 2015 Email from Subijoy Dutta to Beverly Winston) ("we have no records of any hydraulic fracturing operation that has contaminated the usable groundwater zones with hydraulic fracturing fluids.").

- DOIAR8326 (BLM November 14, 2011 Prepared Q&A Responses) ("While the BLM is not aware of any evidence of negative impacts to groundwater as result of hydraulic fracturing on Federal wells, we recognize the need to be diligent.").

- DOIAR34964 (BLM Petroleum Engineer Daniel Lopez's December 3, 2012 Email to Michael Pool) ("The proposed [BLM Rule] guidelines...don't address the primary concern of protecting ground/useable sources of fresh water by protecting the integrity of zonal isolation.").

- DOIAR3356 (BLM Director's Remarks at November 30, 2010 Department of Interior Forum) ("BLM has not conducted any formal studies of the potential impacts of hydraulic fracturing on water and other resources in the West.").

- DOIAR2399 (Department of Interior April 9, 2010 Natural Gas Workshop Information Memorandum to Secretary) (noting only "the potential for fracking fluids to contaminate groundwater supplies" and confirming that attempts to "link between this contamination and hydraulic fracturing is not conclusive.").

- DOIAR26852 (BLM Vernal Field Office Petroleum Engineer's Comment Letter) ("Will the implementation of the new regulations add any additional protection to the useable water zones than the regulations and field office requirements that are currently imposed

on oil and gas operators under the Vernal Field Office at present? The answer is no . . . [a]ccording to the State of Utah Department of Environmental Quality there has been no documented or confirmed evidence of negative impacts to useable water aquifers in our area;" "[t]he cost of these new regulations as they stand will be high for both the BLM and the affected operators of oil and gas wells. The benefit of these new rules at least for our field office will be more information in our well files but with no incremental protection to usdw's (underground sources of drinking water) or useable water zones over our present regulations and policies.").

- DOIAR70354 (BLM Principal Deputy Director Neil Kornze December 23, 2013 Information Memorandum for the Secretary) (justifying the BLM Rule solely on the basis that "[t]he increased use of hydraulic fracturing (HF) on both public and private lands has generated *concern* about its *potential* effects and that HF is not addressed in BLM's 30 year old regulations for oil and gas operations.") (emphasis added).

- DOIAR35491 (BLM Response to Comments and Preamble) ("The BLM disagrees with the suggestion that BLM must wait for aquifer contamination to be traced definitively to hydraulic fracturing operations before promulgating regulations to prevent such contamination.").

- DOIAR97359 (BLM Document Entitled "Q&As –Final HF Rule") (demonstrating that the purpose for the rulemaking was in response to public concerns about hydraulic fracturing, as opposed to scientific studies or other information demonstrating the connection between hydraulic fracturing and groundwater contamination).

- DOIAR80210 (BLM June 3, 2014 Economic Analysis for Hydraulic Fracturing Rule) ("We are unable to estimate the incremental benefits of the rule because we are unable to ascribe incremental benefits to the particular provisions of the rule.").

- DOIAR80210 (BLM June 3, 2014 Economic Analysis for Hydraulic Fracturing Rule) ("There are limitations in using the BLM data on undesirable events for this analysis. First the data do not specify whether the undesirable events occur in conjunction with or as result of hydraulic fracturing operations. In addition, the available data cannot be readily matched with particular provisions in the rule. The data provide figures for the incidence of spills, accidents, injuries, and other impacts on a well, but the pit liner information is generally not specified in the incident reports for spills or leaks. As such, there is difficulty in quantifying the level of risk reduction that would be attributed to the regulations, even though the regulations would most certainly reduce risk.").

- DOIAR80210 (BLM June 3, 2014 Economic Analysis for Hydraulic Fracturing Rule) ("The primary challenge in monetizing benefits lies in the quantification of baseline risk that is largely unknown and in the measurement of the change in that risk that we can attribute to the entire rule (and to its individual requirements).").

- DOIAR80210 (BLM June 3, 2014 Economic Analysis for Hydraulic Fracturing Rule) ("Thus far, there have been no conclusive determinations made regarding claims that

hydraulic fracturing fluids are the primary source of contamination to shallower freshwater formations.").

- DOIAR65811 (BLM October 24, 2013 Summary of API Comments) ("BLM is attempting to justify new regulations based solely on perceived public concern not on actual data or agency experience showing whether contaminations caused by hydraulic fracturing has ever happened while administering oil and gas leases on federal and Indian lands. Absent findings that substantiate the existence of such risks contamination, BLM has no record to justify the costs and burdens of increased regulation of hydraulic fracturing.").

- DOIAR70451 (USGS 2014-5131 Scientific Investigations Report Entitled "Trends in Hydraulic Fracturing Distributions and Treatment Fluids Additives Proppants and Water Volumes Applied to Wells Drilled in the United States from 1947 through 2010 Data Analysis and Comparison to the Literature") ("since the advent of hydraulic fracturing more than a million hydraulic fracturing treatments have been conducted with perhaps only one documented case of direct groundwater pollution resulting from injection of hydraulic fracturing chemicals used for shale gas extraction.") (internal citations omitted).

- DOIAR82444 (BLM Document entitled "Hydraulic Fracturing Talking Points") (acknowledging that "[t]he findings from the University of Michigan's long-awaited study on hydraulic fracturing concludes . . . that the hydraulic fracturing HF process is safe . . . can co-exist with healthy environment . . . is beneficial to our economy and . . . does not contaminate groundwater.").

- DOIAR79318 (BLM May 21, 2014 Hydraulic Fracturing Meeting Notes) ("Now that we have to go through process for old wells, some wells have been fraced over and over again in area. Now we have to tell the operator they have to submit this information where there is no concern.").

- DOIAR55854 (United States Congress Members' August 19, 2013 Letter to Secretary Jewell) ("On June 2013, you were asked before the Senate Energy and Natural Resources Committee which states currently regulating hydraulic fracturing are not doing a sufficient job. Your inability to identify any state suggests, at the very least, that BLM's final rule should not apply to states currently regulating hydraulic fracturing.").

- DOIAR56613 (Industrial Energy Consumers of America's August 23, 2013 Comment Letter) ("BLM has failed to assert that any specific existing state regulation is inadequate to protect federal and Indian Lands.").

- DOIAR29121 (La Plata County Energy Council's September 10, 2012 Comment Letter) ("In La Plata County and in this country, there have been no incidents of contamination from fracture stimulation in over 1.2 million wells in more than sixty years, and no groundwater contamination incidents on federal public lands. Claims concerning the environmental and health impacts of stimulation activities - including hydraulic

fracturing - have turned out to be unsubstantiated or have resulted from activities or natural occurrences unrelated to fracture stimulation activities.").

- DOIAR57156 (Utah Office of the Governor's August 23, 2013 Comment Letter) ("Adoption of the proposed rules will create an inconsistent, costly, and inefficient regulatory system which will provide no additional environmental protection or public safety than the programs enforced by the state.").

- DOIPS10356-57 (National Association of Manufacturers' September 10, 2012 Comment Letter) ("BLM fails to explain whether any of these concerns are warranted due to actual instances of stimulation activities affecting health or the environment.").

- DOIAR56626 (API's August 23, 2013 Comment Letter) (describing rule as "a solution in search of a problem" and "an attempt to throw the regulatory apparatus of the federal government over an issue solely to address unsubstantiated 'public concern.'").

- DOIAR28536-38 (API's September 10, 2012 Comment Letter) ("the agency has not shown that it has carefully examined whether [public] concerns are warranted based on the volume of information publicly available related to well stimulation activities that have occurred nationwide for decades.").

- DOIAR56610 (Industrial Energy Consumers of America's August 23, 2013 Comment Letter) ("strongly object[ing] to this rule that is a 'rule in search of a problem' - and makes a mockery of public policy. The BLM provides absolutely no environmental justification for its rule that will increase drilling costs that will be passed onto us, the consumer.").

- DOIPS10355-56 (National Association of Manufacturers' September 10, 2012 Comment Letter) (the BLM Rule "not only duplicates state regulations but also lacks any real evidence that would justify the agency's undertaking of such a broad, burdensome new federal regulatory effort;" "the BLM fails to explain whether any of these concerns are warranted due to actual instances of stimulation activities affecting health or the environment, or why it has expanded the regulations so dramatically.").

- DOIAR29095 (Western Business Roundtable's September 10, 2012 Comment Letter) ("BLM is moving forward with this rulemaking without any scientific data that would justify a new federal regulatory mandate. As noted by a number of commenters, BLM fails to cite any meaningful trend of confirmed environmental contamination incidents to justify its action.").

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

A. BLM Lacks Authority for the BLM Rule.

1. BLM lacks authority to interfere with states' water rights. Mot. at 18-19.

- DOIAR34382 (United States Congress Members' November 30, 2012 Letter to Secretary Salazar) ("BLM's proposal creates federal approvals and mitigations for water source water use and water disposal. The rules give BLM veto authority over water use related to oil and natural gas development on federal lands, which is entirely inappropriate. No Administration has the authority to prevent any state or resident from using water consistent with state water laws. BLM lacks statutory authority to manage water appropriation and administration. Congress, as intended, has long referred to the states in this arena. States throughout the West and across the country enshrined this principle in their constitutions.").

- DOIAR31166-67 (BLM October 11, 2012 Document Summarizing Comments and BLM Proposed Actions in Response) (addressing comments on the BLM Rule, BLM's proposed response to industry and state comments that BLM lacks authority to regulate water use was that "[t]he BLM agrees that water management issues are to be left to the States.").

- DOIAR28552 (API's September 10, 2012 Comment Letter) ("As BLM is well aware, allocation of water rights in the West is a matter of state control;" "[i]n light of the comprehensive control by states over allocation of waters within their borders, BLM's directives could conflict with, and therefore undermine, a state's ability to allocate its water.").

- DOIPS138518 (Anonymous Commenter's August 22, 2013 Comment Letter) ("BLM is over reaching its authority, and indeed may be violating the 10th amendment of the constitution as this power was never given to the Federal Government.").

- DOIAR56988 (State Attorney Generals' August 23, 2013 Comment Letter) ("The Supreme Court has long recognized that regulation of land and water use 'is a quintessential state and local power.' Thus, '[i]f Congress intends to alter the usual constitutional balance between the states and the federal government, it must make its intention to do so unmistakably clear in the language of the statute.' Importantly, Congress has not enacted any statute that gives BLM authority to pre-empt state water regulations. On the contrary, federal statutes establishing limited federal regulation of water resources expressly preserve state primacy.").

- DOIAR56989-90 (State Attorney Generals' August 23, 2013 Comment Letter) ("BLM rightfully recognizes that it does not have the state expertise or resources to regulate water resources . . . Despite the BLM's recognition of state primacy in this regard, the newly proposed hydraulic fracturing rule is supposedly predicated on the need for ground and surface water protections and imposes specific regulatory requirements concerning water resources. Yet the BLM has no authority to approve or disapprove well stimulation

activities to regulate operators' use of water resources, or to require operators to mitigate impacts on water resources. Because BLM has no jurisdiction to regulate water resources, BLM cannot demand information about them. Indeed, BLM should eliminate all provisions that seek information about or impose regulations on the use, transport, disposal or other activities involving waters.").

- DOIAR56988-89 (State Attorney Generals' August 23, 2013 Comment Letter) ("[T]he Clean Water Act (CWA) reflects the Congressional policy 'to recognize, preserve and protect the primary responsibilities and rights of states to prevent, reduce and eliminate pollution, [and] to plan the development and use ... of land and water.' The statute further states that '[e]xcept as expressly provided in this chapter, nothing ... shall ... be construed as impairing or in any manner affecting any right or jurisdiction of the states with respect to the waters ... of such states.' Nowhere does the CWA express a desire to adjust the federal-state balance. Similarly, the Safe Drinking Water Act (SDWA) also emphasizes state primacy over drinking water regulation and enforcement. In fact, under the Clean Water Act, agencies like BLM are expressly required to comply with state water regulation-just as if they were private citizens. Absent an express displacement of the Clean Water Act's requirement that BLM follow state water laws, BLM does not have the unilateral authority to set aside state regulations and impose its own preferred water pollution controls. Contrary to your agency's assertion, the Clean Water Act is not superseded by general language in the Federal Land Policy and Management Act (FLPMA), the Mineral Leasing Act, and the Mineral Leasing Act for Acquired Lands that directs BLM to preserve federal land. Such general language is insufficient to clearly override the more specific language of the Clean Water Act. Nor does such general language otherwise demonstrate a congressional intent to displace state water laws. BLM's proposed rules thus impermissibly interfere with state regulatory schemes and with the Clean Water Act. Recognizing state jurisdiction over water resources, the CWA and SDWA carve out a narrow role for the federal government and vest federal regulatory authority in the U.S. Environmental Protection Agency (EPA). Thus, EPA shares, to a limited extent, state responsibility for protecting water resources. But nothing in these statutes confers regulatory authority over water resources on BLM. In a 2011 resolution, the Western States Water Council underscored this point by stating that 'any weakening of the deference to state water and related laws is inconsistent with over a century of cooperative federalism and a threat to water rights and water rights administration in all western states.'").

- DOIPS10360-61 (National Association of Manufacturers' September 10, 2012 Comment Letter) ("In the West a water right is a recognized property right . . . and water rights are routinely purchased and sold like other property rights. To obtain water for a given operation, an operator may enter into a contract to purchase water from a source; may purchase or lease an existing water right; may divert unappropriated water; or may utilize recycled water produced in association with oil and gas operations. For the BLM to now suggest in the Proposed Rule that it has the authority to dictate to operators-especially operators in the Western United States-which sources they may or may not use is entirely inappropriate and completely inconsistent with settled water law . . . This could be viewed as an effort by the federal government to wrest control of water rights from the states, which are guaranteed by the Tenth Amendment.").

- DOIAR28938-39 (Petroleum Association of Wyoming's September 10, 2012 Comment Letter) ("The Constitution of the State of Wyoming gives jurisdiction and use of all water in Wyoming to the Wyoming State Engineer's Office (SEO). Wyoming Constitution, Article 8, Section 1 states, 'Water is state property. The water of all natural streams, springs, lakes or other collections of still water, within the boundaries of the state, are hereby declared to be property of the state.' It is the SEO's responsibility to allow for uses of waters of the state. As the SEO has control over water of the state, regardless of its use, PAW believes the BLM has no authority over any water found within the boundaries of the state of Wyoming, nor does the BLM have any permitting authority in regard to water associated within the boundaries of Wyoming. PAW requests the BLM remove this requirement as it is a right granted to the State and does not belong in federal regulation.").

- DOIAR29122-23 (La Plata County Energy Council's September 10, 2012 Comment Letter) ("In light of the comprehensive control by states over allocation of waters within their borders, BLM's directives could conflict with, and therefore undermine, a state's ability to allocate its water. For example, it is up to a state to determine whether and what kinds of mitigation are required when a new water right is granted or an existing water right is transferred. Also, each state-issued water right identifies the uses to which the water may be applied and the season(s) in which the water right may be used. Thus, to the extent BLM seeks to impose mitigation requirements for certain water uses, it may be usurping a state's authority to make this determination in the first instance. In addition, if BLM seeks to use water source and location information to deprive a water user of the ability to use water for a specified purpose (e.g., hydraulic fracturing) or during specified times of the year, BLM would be interfering with and undermining state prerogatives to allocate water use, given that the type of use and season of use are attributes of a state-issued water right. In Colorado, operators can procure water supplies from various sources but must adhere to state water law when obtaining and using water.").

- DOIPS10678, 10679, 10675, 10676 (IPAA's and Western Energy Alliance's September 10, 2012 Comment Letter) ("Implementation of the proposed rule could also interfere with the allocation of water between states. The rights to interstate waters have been resolved through interstate compacts and equitable apportionment. Article 1, section 10 of the U.S. Constitution authorized interstate compacts negotiated between the states and ratified by the state legislatures and the U.S. Congress. Much like treaties between the states, the compacts resolved water allocation issues for millions of people in the West . . . BLM has absolutely no authority to impose conditions or otherwise regulate the interstate allocation of waters by regulatory fiat. Such issues go to the heart of federalism and the U.S. Constitution;" "Throughout the West, water is held by the states for the benefit and use of the public. The doctrine of prior appropriation generally governs water rights in the 19 western states . . . BLM cannot seek to impose requirements of riparian water law systems in the West . . . North Dakota provides that streams and watercourses 'shall forever remain the property of the state' subject to appropriation for beneficial use. N.D. Const. art. XI, § 3 and N.D. Century Code, 61-01-01. . . Even requirements to report information to the BLM create the potential for a competing federal water rights system. Requirements for federal mitigation clearly interfere with the notion that water is held in trust by the state for use by the public in perpetuity.").

- DOIPS10673 (IPAA's and Western Energy Alliance's September 10, 2012 Comment Letter) ("Such requirements could create a parallel federal permitting or adjudication system in conflict with the state-administered priority system. This would render existing water rights and the States' authority over water allocation meaningless. Water rights and water use in the western states would then face chaos and uncertainty wherever federal and tribal lands are concerned . . . Absent clear and specific congressional authorization, BLM has no authority to impose conditions or mitigation requirements on state water uses. So long as water is used consistent with state water laws, BLM has absolutely no authority to require 'mitigation' for alleged 'impacts.' Consistent with state water laws, operators should be able to use, reuse, store or otherwise dispose of produced water free from federal interference as BLM proposes.").

- DOIAR56885 (Devon Energy Corporation's August 23, 2013 Comment Letter) ("None of the statutes that BLM invokes allow it to dictate non-federal water uses or to intrude upon state water allocation and regulation schemes. Federally-imposed requirements to isolate and protect usable water conflict with state constitutional provisions clarifying that water resources are held in public trust and with state laws governing the allocation and distribution of water.").

- DOIAR56884-85 (Devon Energy Corporation's August 23, 2013 Comment Letter) ("In particular, the BLM's Proposed Rule runs roughshod over state water laws. The Proposed Rule sets forth numerous requirements pertaining to the isolation and protection of usable water and the disclosure of information on water planned for use in hydraulic fracturing operations. Through imposing such requirements, the BLM improperly asserts authority to regulate operators' use of water resources. The Supreme Court has long recognized that regulation of land and water use 'is a quintessential state and local power.' See, e.g., *Rapanos v. United States*, 547 U.S. 715, 738 (2006); *FERC v. Mississippi*, 456 U.S. 742, 767-68 n.30 (1982); *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30, 44 (1944). The Court has further cautioned that '[if] Congress intends to alter the usual constitutional balance between the states and the federal government, it must make its intention to do so unmistakably clear in the language of the statute.' *Gregory v. Ashcroft*, 501 U.S. 452, 460-61 (1991).").

- DOIAR7588 (Coalition of Local Government's September 10, 2012 Comment Letter) ("[I]t is clear from the federal and state statutes that the regulation of water resources is under the jurisdiction of the EPA and the states. The proposed rule will diminish the federal and states' rights in water resources development and control by allowing the BLM to regulate the fracking process in the name of water quality or quantity.").

2. BLM lacks authority to interfere with states' regulation of water quality. Mot. at 25-28.

- DOIAR81889 (BLM Document entitled "Linda Lance Comments Summary – HF Rule-Preamble 6.23 Version") ("While it may be appropriate to exempt certain aquifers from protection based on factors such as depth, size, location, or flow rate potential, it is beyond BLM's authority to do so. The rule leaves those decisions to the entities with the authority and responsibility to make them.").

- DOIAR7587 (Coalition of Local Government's September 10, 2012 Comment Letter) ("The BLM, on the other hand, has no authority to regulate the protection of states' water quality. The CWA requires all federal agencies to comply with all 'Federal, State, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of water pollution.' 33 U.S.C. §1323(a).").

- DOIAR7586 (Coalition of Local Government's September 10, 2012 Comment Letter) (BLM's sole reason for proposing a new fracking rule is based on the public concern about contamination of water sources during the fracking process. . . However, the Environmental Protection Agency (EPA) and the states have jurisdiction over water resource quality and the states have exclusive jurisdiction over water development or quantity. The Clean Water Act (CWA) establishes the EPA as the primary federal agency with the responsibility for implementing the CWA. 33 U.S.C. §1251(d). The Administrator of the EPA is to 'prepare or develop comprehensive programs for preventing, reducing, or eliminating the pollution of the navigable waters and ground waters and improving the sanitary condition of surface and underground waters.' Id. at §1252(a). However, this does not affect any right of the states to the waters within their boundaries nor to the right to control pollution in their waters. Id. at §§1251(b), (g), §1370. The EPA also is allowed to delegate its authority under the CWA to the states, such as allowing the states to issue permits for discharges into the navigable waters within their boundaries. See id. at §§1342(a)(5), (b).").

- DOIAR71734 (BLM Revised Hydraulic Fracturing Rule January 10, 2014 Memorandum re: Baseline Water Testing) (acknowledging that "States generally have primarily regulatory authority on water under the Safe Water Drinking Act and proposed requirement related to water could have presented conflict with that law.").

3. BLM claims that is has always regulated hydraulic fracturing are contradicted by BLM personnel themselves. See Hrg. Tr. at 239; 2-12.

- DOIAR2866 (BLM Montana Field Office Comments in BLM August 26, 2010 Document Entitled "Hydraulic Fracturing History and General Discussion") ("Hydraulic fracturing has always been considered routine. Therefore prior approval to perform a hydraulic fracture job has not historically been nor is it currently required. None of our engineers could think of an example of a non-routine hydraulic fracture job that would require prior approval.").

- DOIAR2868 (BLM Utah Field Office Comments in BLM August 26, 2010 Document Entitled "Hydraulic Fracturing History and General Discussion") ("The 1968 USGS regulations do not mention fracturing. Explosives and shredding of casing are discussed. Those were the types of activities industry was proposing and hence the regulations addressed those issues. 43 CFR 3162.3-2 has remained essentially unchanged since 1983 when the BLM converted the USGS regulations to BLM . . . The 3162.3-2 regulations discuss only that 'non-routine' fracturing requires prior approval. 'Non-routine' has no regulatory or WO policy definition.").

- DOIAR70354 (BLM Principal Deputy Director Neil Kornze December 23, 2013 Information Memorandum for the Secretary) (justifying the BLM Rule solely on the basis that "[t]he increased use of hydraulic fracturing (HF) on both public and private lands has generated *concern* about its *potential* effects and that HF is not addressed in BLM's 30 year old regulations for oil and gas operations.") (emphasis added).

B. The Safe Drinking Water Act.

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

A. The BLM Rule interferes with North Dakota's primacy agreement with EPA to regulate underground injection control. Mot. at 22.

- DOIAR16358 (EPA Comments on BLM Proposed Rule) ("EPA recommends that the proposed rule clarify any jurisdictional ambiguity to avoid uncertainty and confusion. EPA also recommends that this discussion in the preamble be expanded to take into account other federal efforts programs that regulate well stimulations.").

- DOIAR38080 (BLM Meeting Notes re: June 28 2012 Industry Stakeholder Meeting to Discuss BLM's Proposed HF Rule) (noting the "[b]elief that the BLM may be usurping State primacy under the Safe Drinking Water Act because the proposed rule derives the description of useable water as defined in the Act without reference to some of the other criteria by which water is identified as usable or non-usable.").

- DOIAR56613 (Industrial Energy Consumers of America's August 23, 2013 Comment Letter) ("EPA and the states have direct or delegated jurisdiction under the Clean Water Act and the Safe Drinking Water Act for the protection of surface water and underground sources of drinking water.").

- DOIPS67136 (Anonymous Commenter's August 8, 2013 Comment Letter) ("[t]he requirement to submit water source and recovered fluid disposal method encroach upon state jurisdiction over waters of the state and over underground injection control covered in the primacy agreement between North Dakota and the EPA.").

B. The BLM Rule's definition of usable water interferes with North Dakota's SDWA primacy. Mot. at 22-23.

- DOIAR105401 (EPA Comments on the BLM Rule) ("EPA is concerned that BLM's definition of Usable Water is inconsistent with EPA's definition of an underground source of drinking water (USDW) under the Safe Drinking Water Act (SDWA). BLM includes the word 'generally' in the definition implying that there are exceptions to protecting waters with less than 10000 parts per million (ppm) of total dissolved solids TDS.").

- DOIAR69845 (BLM December 17, 2013 Document Entitled "Policy Calls for the Hydraulic Fracturing Rule") (In response to a comment that the definition of useable

water is "different from traditional 'USDW' definition," BLM's subject matter expert indicates that "[u]nderground source of drinking water is managed by EPA and clean water act.").

- DOIAR25511 (BLM April 28, 2012 Meeting Notes) (summarizing industry stakeholder beliefs that "BLM may be usurping State primacy under the Safe Drinking Water Act because the proposed rule derives the description of useable water as defined in the Act without reference to some of the other criteria by which water is identified as usable or non-usable.").

- DOIPS10796 (Texas Oil & Gas Association's September 10, 2012 Comment Letter) ("[t]he proposal for 'usable water' broadens the scope of waters covered by BLM as well as establishes the concept of identifying all waters less than 10,000 TDS without any deference for produced waters from hydrocarbon formations. BLM provides no scientific justification for such an expansion nor does the agency explain the benefit to the public. Furthermore, the proposed change threatens state primacy under the Safe Drinking Water Act.").

- DOIAR55745 (Fasken Oil Ranch's August 19, 2013 Comment Letter) ("This rule also adds new requirements for usable quality water protection. Individual states have primacy over usable water quality determinations and protective measures.").

C. The BLM Rule's requirement to submit water sources and recovered fluid disposal method interferes with North Dakota's SDWA primacy. Mot. at 22-23.

- DOIAR54110 (North Dakota Petroleum Council's August 9, 2013 Comment Letter) ("The requirement to submit water source and recovered fluid disposal method encroach upon state jurisdiction over waters of the state and over underground injection control covered in the primacy agreement between North Dakota and the EPA.").

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

A. North Dakota has a set of comprehensive and protective regulations governing hydraulic fracturing. Mot. at 23-25.

- DOIAR65135 (United States Congress Members' August 23, 2013 Letter to Secretary Salazar) ("We appreciate you accepting our invitation to see North Dakota's oil and gas production first hand. The unique geology, technology, and innovation in North Dakota exemplifies why a one-size-fits-all federal approach to oil and gas regulation does not work. You were correct when you noted in North Dakota that our state's resources would be affected by a national energy policy and by rules that are developed to regulate the development of federal oil and gas leases. After seeing our development and visiting with local officials, you observed that North Dakota has a 'very sophisticated' oil and gas regulatory framework and that it is a model worth studying. North Dakota's successful record in managing its energy development is becoming a model for the nation.").

- DOIAR52906 (North Dakota Industrial Commission's July 30, 2013 Comment Letter) ("The BLM's analysis of costs and benefits do not take into consideration that some states, like North Dakota, already have the same requirements in their current rules and BLM's rule is duplicative and unnecessary. Since each sedimentary basin has unique deposits and geologic features, which result in unique local environmental and geologic conditions, regulating oil and gas development is a role best left to state regulation.").

- DOIAR4369-80 (North Dakota Industrial Commission April 26, 2010 Memorandum re: North Dakota Hydraulic Fracturing Simulation Treatment Rules and Regulations) (providing information regarding North Dakota's hydraulic fracturing program); DOIAR5574-84 (North Dakota Industrial Commission Statements at BLM April 20, 2011 Forum) (same).

- DOIAR5813-41 (North Dakota's April 20, 2011 Presentation at BLM Forum) (explaining the North Dakota Water Commission's jurisdiction over state-owned groundwater and North Dakota Industrial Commission's jurisdiction over oil and gas development, including hydraulic fracturing within its boundaries).

- DOIAR1725-32 (North Dakota Industrial Commission's Testimony to House Committee on Energy and Commerce) (explaining North Dakota's extensive history of regulating oil and gas development, including hydraulic fracturing).

- DOIAR57071 (North Dakota Congressional Delegation August 23, 2013 Comment Letter) ("North Dakota's successful record in managing its energy development is becoming a model for the nation. The federal government should allow states and tribes to continue to move forward with their own sophisticated regulatory framework instead of stifling them with a generic blanket of federal regulations. We believe such federal regulations will hamper innovative approaches being developed throughout the country. The North Dakota Industrial Commission (NDIC), made up of the Governor, the Attorney General, and the Agriculture Commissioner, directly oversee and regulate the industry through the Department of Mineral Resources (DMR). The NDIC and DMR have already put strong regulations in place requiring operators to disclose the chemicals they use in fracturing activities as well as regulations addressing hydraulic fracture stimulation, wellbore integrity, flowback, and cement bond testing. State oversight and the unique expertise and experience of our regulators resulted in the NDIC approving extensive new rules regarding well completions in 2012. States require this flexibility and primacy in regulating oil and gas production in order to make adjustments based on their expertise and on the ground assessments. The NDIC and DMR are in the best position to determine what regulations are best for oil and gas production in North Dakota.").

- DOIAR5702 (North Dakota Industrial Commission's Statements at BLM April 20, 2011 Forum) ("we are very resistant to increased federal regulation of things like hydraulic fracturing which we have been dealing with as I said for decades and believe that we do good job.").

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

1. BLM failed to consider how the BLM Rule would conflict with and impermissibly intrude upon state regulatory authority. Mot. at 25-29.

- DOIAR28398-400 (Interstate Oil & Gas Compact Commission's September 7, 2012 Comment Letter) ("IOGCC believes that the rule as proposed was developed without sufficient or meaningful consultation with state regulatory authorities;" "[t]he Department ignored requests for input.").

- DOIPS10355 (National Association of Manufacturers' September 10, 2012 Comment Letter) ("BLM appears not to have done proper research as to the scope or applicability of these state regulations.").

- DOIAR5720-21 (North Dakota Industrial Commission's Statements at BLM April 20, 2011 Forum) (for example, BLM failed to account for North Dakota's confidentiality provision despite North Dakota Industrial Commission's statement at a BLM meeting that "[t]here is a confidentiality period in the state of North Dakota for six months.").

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

2. Commenters objected to the BLM Rule as redundant and duplicative of state regulation. Mot. at 25-29.

- DOIPS8220 (Association of Energy Service Companies' September 10, 2012 Comment Letter) ("[T]he proposed new rule is unacceptable overreach into an area that has been successfully regulated by the states.").

- DOIPS8287 (Black Hills Corporation's September 7, 2012 Comment Letter) ("States have already taken the initiative by devoting significant time and resources to develop rules that adequately regulate hydraulic fracturing. The proposed BLM Rule ignores those efforts and attempts to undermine the accomplishments of many individuals who contributed greatly to consider, debate, refine and finally develop a meaningful regulatory framework that is already in place and working effectively.").

- DOIAR29126 (QEP Energy's September 10, 2012 Comment Letter) ("In fact, the BLM's proposed rule generates requirements that are likely to conflict with or duplicate existing protections.").

3. Commenters objected to the BLM Rule on the grounds that protection of water is a states' rights issue. Mot. at 25-26.

- DOIAR34361 (254 Industry Members' September 10, 2012 Comment Letter) ("[t]he proposed rule amounts to an unnecessary federal usurpation of state authority, and the water use requirements interfere with state water laws.").

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

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

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

a. BLM claims that FLPMA provides BLM with authority to regulate subsurface hydraulic fracturing activities. Mot. at 29-30.

- DOIAR31165 (BLM October 11, 2012 Summary of Comments)("The BLM intends to stick with language in the rule as proposed and believe that subsurface protection is authorized under FLPMA managed multiple use of Federal land.").

b. However, BLM lacks the authority to regulate hydraulic fracturing under FLPMA. Mot. at 29-30.

- DOIAR94158 (BLM Draft Response to Comments) ("Although the BLM has expertise in management of Federal lands monitoring the health of persons or of natural resources on non-Federal lands is entrusted to other local state tribal or Federal agencies with appropriate authority and expertise.").

- DOIAR65811 (BLM's October 24, 2013 Summary of API Comments) ("API finds issue with BLM's assertion that FLPMA requires the agency to promulgate new rules applicable to hydraulic fracturing so as to prevent unnecessary or undue degradation of public land. API asserts that the statute expressly limits BLM's authority to only those actions that can be shown to actually cause degradation beyond what is reasonably anticipated. it does not authorize actions that are merely directed towards hypothetical potential impacts. Additional BLM regulation cannot be justified as necessary to prevent unnecessary or undue degradation without actual evidence that adverse impacts will occur absent such additional regulation.").

- DOIPS10674 (IPAA's and Western Energy Alliance's September 10, 2012 Comment Letter) ("FLPMA land use authority cannot be used to control the use of water allocated to and owned by non-federal water users under state law, or to interfere with state water allocation and administration systems. The provisions contained in the proposed rule

could act like a *de facto* reallocation of water. BLM may not interfere with the exercise of water rights nor may it coerce transfers of water rights through its proposed rule.").

- DOIPS10673-74 (IPAA's and Western Energy Alliance's September 10, 2012 Comment Letter) ("[The] FLPMA does not authorize BLM to unilaterally impose water quality standards on water use or otherwise interfere with water use on public lands . . . In short, BLM has proposed a tremendous roadblock to water use related to oil and gas production on federal lands. Contrary to longstanding deference to the states, BLM seems to seek veto power over whether water can be used for drilling and, if so, how it may be stored and disposed of. BLM's proposed rule has no legitimate foundation in federal statute or caselaw. Two major statutes authorize management of the public domain by the BLM: the Taylor Grazing Act and FLPMA. Neither reserved water rights to the BLM. *See Federal Water Rights of the National Park Service, Fish and Wildlife Service, Bureau of Reclamation and the Bureau of Land Management*, 86 Int. Dec. 553, 592 (June 25, 1979). There is no congressional intent to preempt state control in the instances discussed in the proposed rule. See California v. United States, infra, and United States v. New Mexico, 438 U.S. 696 (1978). BLM has no specific statutory directive authorizing this intrusion into the realm of state water laws. Neither the application of state water law, nor the use of water for industrial purposes, frustrates BLM's ability to manage the public domain lands consistent with the purposes established by Congress. The proposed rule contradicts FLPMA savings provisions that protect water rights as 'valid existing rights.' 43 U.S.C. § 1701 note (2000) . . . Decreed water rights, permitted water rights and appropriative rights to place water to beneficial use are valid existing rights under FLPMA. Without clear congressional authorization, federal agencies may not use their administrative authority to 'alter the federal-state framework by permitting federal encroachment upon a traditional state power.' *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159, 172-173 (2001). Here, BLM may not use its permitting authority to require any such provisions contained in the proposed rule. Congress has not delegated to the BLM the authority to require operators relinquish a part of their existing water supplies or transfer their water rights to the BLM as a condition of approvals. Nor can BLM use its permitting authority to reallocate or otherwise obtain water from non-federal water rights that have been or will be recognized in McCarran proceedings.").

- DOIAR33959-60 (Devon Energy Corporation's September 10, 2012 Comment Letter) ("Neither the Federal Land Policy and Management Act ("FLPMA") nor the Mineral Leasing Act, which BLM invokes as its statutory authority for the Proposed Rule, disturb historic and existing state regulation of oil and gas drilling. Instead, those statutes emphasize the preservation of state authority. See 30 U.S.C. § 189 (preserving 'rights of States or other local authority to exercise any rights which they may have'); 43 U.S.C. § 1701 (g)(6) ('Nothing in this act shall be construed as ... a limitation upon ... the police power of the respective States ...or as depriving any State or political subdivision thereof of any right it may have to exercise civil and criminal jurisdiction on the natural resource lands[.]'); see also Carden v. Kelly, 175 F. Supp. 2d 1318, 1323 (D. Wyo. 2011) (stating that the FLPMA savings language's 11intended purpose was not to preempt or conflict with state civil laws). Thus, BLM has not identified any Congressional grant of authority

to displace state authority and to regulate hydraulic fracturing and well stimulation activities.").

- DOIAR7591 (Coalition of Local Government's September 10, 2012 Comment Letter) ("The Federal Land Policy and Management Act (FLPMA) established a policy for the BLM to manage the public lands in a manner that will protect the quality of the water resources, among other things. 43 U.S.C. §1701(a)(8). FLPMA however provides that such policy has no legal effect without separate statutory authority. Id. at §1701(b). Instead BLM's regulatory or enforcement authority is limited to Section 303, which states in relevant part: 'The Secretary shall issue regulations necessary to implement the provisions of this Act with respect to the management, use, and protection of the public lands, including the property located thereon.' U.S.C. §1733(a). The term property does not include water, especially in light of yet another provision that provides that nothing in FLPMA should be construed as 'expanding or diminishing Federal or State jurisdiction, responsibility, interests, or rights in water resources development or control.' Id. §1701 note (Sec. 701 of Pub. L. No. 94-579 (Oct. 21, 1976) (emphasis added)).").

c. BLM lacks the authority to regulate hydraulic fracturing under the Mineral Leasing Act. Mot. at 30.

- DOIAR33959-60 (Devon Energy Corporation's September 10, 2012 Comment Letter) ("Neither the Federal Land Policy and Management Act ('FLPMA') nor the Mineral Leasing Act, which BLM invokes as its statutory authority for the Proposed Rule, disturb historic and existing state regulation of oil and gas drilling. Instead, those statutes emphasize the preservation of state authority. See 30 U.S.C. § 189 (preserving 'rights of States or other local authority to exercise any rights which they may have'); 43 U.S.C. § 1701 (g)(6) ('Nothing in this act shall be construed as ... a limitation upon ... the police power of the respective States ...or as depriving any State or political subdivision thereof of any right it may have to exercise civil and criminal jurisdiction on the natural resource lands[.]'); see also Carden v. Kelly, 175 F. Supp. 2d 1318, 1323 (D. Wyo. 2011) (stating that the FLPMA savings language's purpose was not to preempt or conflict with state civil laws). Thus, BLM has not identified any Congressional grant of authority to displace state authority and to regulate hydraulic fracturing and well stimulation activities.").

d. BLM has even questioned whether it has regulatory authority over hydraulic fracturing. Mot. at 29-30.

- DOIAR7235 (BLM July 8, 2011 Email from the Deputy Assistant Secretary Ned Farquhar to Bryce Barlan) (acknowledging that BLM regulations requiring approval prior to hydraulic fracturing "would be huge leap in regulatory authority and action and it was something the Secretary was not enthusiastic about when BLM proposed it in February or thereabouts.").

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

A. The BLM Rule's variance provision does nothing to resolve the conflict with state regulation. Mot. at 30-31.

- DOIAR93959 (BLM Document entitled "OMB Questions (Jan 7, 2015 and BLM Response and Current Status (Jan 20, 2015)") (BLM responds "yes" to CEQ question "Is it possible to incorporate this explanation/definition into the preamble or rule itself to make clear that BLM maintains regulatory primacy including enforcement obligations even in the event of variance?").

- DOIAR57038 (ANGA-AXPC's August 23, 2013 Comment Letter) ("[t]he 'meets or exceeds' standard in the current proposal (§ 3162.3-3(k)(2)) is not sufficient to avoid duplication with state requirements. BLM's proposed rule does not clearly define how a state or tribe can meet this "meets or exceeds" standard. If BLM truly desires to honor its stated commitment to avoid unnecessary duplication, provide consistency, and offer regulatory certainty, then BLM needs to offer a means-prior to finalizing the proposed rule-for state or tribal programs to be recognized, adopted, and utilized in fulfilling as many regulatory aspects associated with permitting, operational oversight and reporting as possible. Apart from being inherently difficult to apply, practically and politically, such narrow 'meets or exceeds' standard reduces the likelihood that variances will be granted. Thus, operators of wells on public lands would have to comply with two or more sets of overlapping requirements. This would frustrate BLM's mandate to foster responsible recovery of resources on public lands because it will incentivize preference for development and investment on private lands.").

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

a. BLM failed to consider the impact of the BLM Rule on the States' sovereign interests. Mot. at 7-16.

- DOIAR28398-400 (Interstate Oil & Gas Compact Commission's September 7, 2012 Comment Letter) ("IOGCC believes that the rule as proposed was developed without sufficient or meaningful consultation with state regulatory authorities;" "[t]he Department ignored requests for input.").

- DOIPS10355 (National Association of Manufacturers' September 10, 2012 Comment Letter) ("BLM appears not to have done proper research as to the scope or applicability of these state regulations.").

- DOIAR44000 (North Dakota Industrial Commission's June 25, 2012 Comment Letter) ("To date, BLM has not contacted the NDIC in an attempt to minimize any duplication.").

- DOIAR29096 (Western Business Roundtable's September 10, 2012 Comment Letter) ("There has been no meaningful consultation with states on this rulemaking.").

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

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

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

a. The BLM Rule applies to split-estate lands in which the federal government owns the mineral estate, but not the surface estate. Mot. at 35-36.

- DOIAR0034483-85 (BLM Statement at BLM June 5, 2012 Tribal Consultation Forum) ("If its split estate, private surface, Federal minerals, non-Indian but Federal, we require them to do--abide by the Federal rules.").

b. However, BLM lacks authority to regulate surface activity on split-estate or private lands. Mot. at 35-36.

- DOIAR94158 (BLM Draft Response to OMB Comments) (BLM recognizes the limits of its authority on split estate lands in statement that "there are many places where the BLM either does not manage the surface above the leased minerals or the locations where baseline testing and monitoring would be necessary or most useful would be off of BLM managed land. The BLM has no authority to require air or water quality monitoring on non-Federal lands and limited authority on non-Federal surface estates in those instances ('split estates').").

- DOIAR93959 (BLM Document entitled "OMB Questions (Jan 7, 2015 and BLM Response and Current Status (Jan 20, 2015)") (BLM recognizes the limits of its statutory authority where BLM does not own the surface estate: "BLM is aware of the recommendations of the Secretary of Energy's Advisory Board, but is limited in its statutory authority. BLM does not have EPA's Commerce Clause powers, or a State's police powers. BLM cannot authorize or require an operator to enter surface estates that BLM does not manage to test surface waters or to drill monitoring wells. Where BLM does manage Federal surface estates, and where water monitoring from such areas would be scientifically and practically useful, BLM can require operators to drill monitoring wells as determined to be necessary in the course of the review under NEPA.").

- DOIAR94158 (BLM Draft Response to OMB Comments) ("Some commenters said that BLM could require operators to obtain permission to test water on non-Federal lands Although states' or tribal police powers may authorize such requirements, the BLM's statutory authority does not extend to non-federal, non-Indian lands, absent a threat to Federal resources.").

- DOIAR20670 (BLM May 12, 2012 Email from BLM Director Neil Kornze to the Office of the Vice President) ("our authority only comes into play when there are public/federal lands or public/federal minerals.").

- DOIAR33959 (Devon Energy Corporation's September 10, 2012 Comment Letter) ("Congress has never chosen to pre-empt state regulation of drilling on federal lands by invoking the Property Clause of the Constitution.").

- DOIAR33985 (Devon Energy Corporation's September 10, 2012 Comment Letter) ("As currently drafted, the Proposed Rule and its requirements can apply to private or state leases, or to split estates where private or state land lies above a mineral estate. For example, BLM may require operators drilling on a unit that includes federal leases to abide by the Proposed Rule, even if the unit also includes private or state leases and the drilling actually occurs on private or state lands. . . The Property Clause, by its terms, does not authorize BLM to impose such requirements on state and private land, either. BLM has identified no other Constitutional grant of authority to regulate non-federal or tribal lands. To the extent this Proposed Rule purports to provide such authority to BLM, it is unconstitutional and cannot be promulgated.").

- DOIAR56856 (Devon Energy Corporation's August 23, 2013 Comment Letter) (The BLM Rule "is likely to be illegal as applied. In its current form, the Proposed Rule impermissibly intrudes upon state authority. It unlawfully regulates state and fee lands and existing leases and operations.").

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

A. Implementation of the BLM Rule will create regulatory uncertainty and confusion over intersect between the BLM Rule and North Dakota's regulatory regime. Mot. at 36-37.

- DOIAR69837 (BLM December 17, 2013 Document Entitled "Policy Calls for the Hydraulic Fracturing Rule") (In response to a concern that the BLM Rule's "requirement to provide additional information creates too much uncertainty," BLM's subject matter expert claims that "[t]he BLM needs to reserve the right to require additional information when necessary. It is anticipated that this requirement will only be used in special situations such as an area where there are concerns about a specific environmental issue or in situations where there may be a past history of issues with the operations.").

- DOIAR43997-98 (North Dakota Industrial Commission's June 25, 2012 Comment Letter) ("[a]n operator cannot comply with these proposed regulations and comply with all applicable federal, tribal, state, and local laws at the same time.").

- DOIAR56632 (API's August 23, 2013 Comment Letter) ("[B]ecause the proposed rule significantly conflicts with existing federal and state regulations, its adoption would *create* regulatory uncertainty and confusion.").

- DOIAR28542 (API's September 10, 2012 Comment Letter) ("Imposing new BLM regulations in addition to the comprehensive state regulation of oil and gas operations

presents a high likelihood of inconsistencies between two overlapping regulatory regimes as these new rules are finalized, implemented, and enforced.").

- DOIPS10796 (Texas Oil & Gas Association's September 10, 2012 Comment Letter) ("The multi-step permit approval process will create regulatory uncertainty and costly delays in the development of domestic oil and gas.").

- DOIPS1043 (EP Energy's August 31, 2012 Comment Letter) (the "uncertainty this rule imposes will only further cloud the leasing process on federal lands that is rapidly becoming untenable for America's small oil and natural gas operators.").

- DOIPS10655 (IPAA's and Western Energy Alliance's September 10, 2012 Comment Letter) ("Duplication causes unnecessary delay, expense, and potential confusion as operators must comply with two distinct regulatory schemes.").

- DOIPS10358 (National Association of Manufacturers' September 10, 2012 Comment Letter) ("Dual regulations by state and federal entities cause unnecessary delay, expense, and confusion as operators must comply with two distinct regulatory schemes.").

- DOIPS8302 (Black Hills Corporation's September 7, 2012 Comment Letter) ("The proposed BLM Rules on hydraulic fracturing are excessively vague. This vagueness will undoubtedly lead to discrepancies in interpretation on the part of the individual BLM employees responsible for reviewing and approving APDs and on a larger scale increase and further complicate the permitting process;" "The proposed BLM hydraulic fracturing Rules will cause significant regulatory confusion and inconsistency between States and the BLM.").

- DOIPS138518 (Anonymous Commenter's August 22, 2013 Comment Letter) ("to impose the BLM regulations creates confusion for those engaged in the extraction of these natural resources.").

- DOIPS83002 (Black Hills Corporation's August 23, 2013 Comment Letter) ("The proposed BLM hydraulic fracturing Rules will cause significant regulatory confusion and inconsistency between States and the BLM exemplified as follows: (a) States are already established as the regulator of water rights and have established and oversee related permitting aspects. The proposed BLM Rule will add unnecessary regulatory and permitting duplication regarding water rights and permitting . . . (b) By allowing the already established State regulations to govern the process the regulations are better tailored to the specific characteristic and geology of each State, which the individual oil and gas commissions are best equipped to asses, and will provide a sense of consistency within the within the State, without the burden of duplicate and unnecessary reporting to the BLM.").

B. Denial of the preliminary injunction motion would not serve the public interest because BLM has not demonstrated that the BLM Rule serves any legitimate public interest. Mot. at 38.

- DOIAR97399 (BLM March 10, 2015 Email between Beverly Winston and Subijoy Dutta) (Question: "Can you name one case where hydraulic fracturing has ruined underground or surface water supplies?;" Response: "A preliminary, Draft Answer is No. Since modern HD operation (2010+) no such incidents. No Spills or incident reports (MUEs) in our record/database indicates contamination of groundwater due to leaks or spills from HF operation.").

- DOIAR97956 (BLM March 13, 2015 Email from Subijoy Dutta to Beverly Winston) ("we have no records of any hydraulic fracturing operation that has contaminated the usable groundwater zones with hydraulic fracturing fluids.").

- DOIAR8326 (BLM November 14, 2011 Prepared Q&A Responses) ("While the BLM is not aware of any evidence of negative impacts to groundwater as result of hydraulic fracturing on Federal wells, we recognize the need to be diligent.").

- *Compare* DOIAR34964 (BLM Petroleum Engineer Daniel Lopez's December 3, 2012 Email to Michael Pool) ("The proposed [BLM Rule] guidelines...don't address the primary concern of protecting ground/useable sources of fresh water by protecting the integrity of zonal isolation.") *with* DOIAR69828-29 (BLM December 17, 2013 Document Entitled "Policy Calls for the Hydraulic Fracturing Rule") (BLM subject matter expert indicates that "[g]roundwater protection should remain one of the tantamount reasons for leaving all wells subject to the HF rule.").

- DOIAR44000 (North Dakota Industrial Commission's June 25, 2012 Comment Letter) ("BLM's benefit analysis assumes that, absent this regulation, a certain number of well stimulation events may result in contamination and pose a cost to society. This is not a valid assumption since there has been no proven contamination case to date; nor has there been any occurrence of mechanical failures in North Dakota since industry self-imposed the NDIC regulations prior to them becoming law.").

- DOIAR70354 (BLM Principal Deputy Director Neil Kornze December 23, 2013 Information Memorandum for the Secretary) (justifying the BLM Rule solely on the basis that "[t]he increased use of hydraulic fracturing (HF) on both public and private lands has generated *concern* about its *potential* effects and that HF is not addressed in BLM's 30 year old regulations for oil and gas operations.") (emphasis added).

- DOIAR80210 (BLM June 3, 2014 Economic Analysis for Hydraulic Fracturing Rule) ("We are unable to estimate the incremental benefits of the rule because we are unable to ascribe incremental benefits to the particular provisions of the rule.").

- DOIAR80210 (BLM June 3, 2014 Economic Analysis for Hydraulic Fracturing Rule) ("There are limitations in using the BLM data on undesirable events for this analysis. First the data do not specify whether the undesirable events occur in conjunction with or as result of hydraulic fracturing operations. In addition, the available data cannot be

readily matched with particular provisions in the rule. The data provide figures for the incidence of spills, accidents, injuries, and other impacts on a well, but the pit liner information is generally not specified in the incident reports for spills or leaks. As such, there is difficulty in quantifying the level of risk reduction that would be attributed to the regulations, even though the regulations would most certainly reduce risk.").

- DOIAR80210 (BLM June 3, 2014 Economic Analysis for Hydraulic Fracturing Rule) ("The primary challenge in monetizing benefits lies in the quantification of baseline risk that is largely unknown and in the measurement of the change in that risk that we can attribute to the entire rule (and to its individual requirements).").

- DOIAR80210 (BLM June 3, 2014 Economic Analysis for Hydraulic Fracturing Rule) ("Thus far, there have been no conclusive determinations made regarding claims that hydraulic fracturing fluids are the primary source of contamination to shallower freshwater formations.").

- DOIAR56611(Industrial Energy Consumers of America's August 23, 2013 Comment Letter) ("[t]here are no cases of hydraulic fracturing contamination of groundwater anywhere in the country. Numerous officials from BLM, DOI and other agencies within the federal government have testified to Congress that there have been no confirmed cases of hydraulic fracturing impacting groundwater. With over one million oil and gas wells hydraulically fractured over 60 years, including about 90 percent of the wells on federal and Indian lands, there is not a single demonstrated instance of the fracturing process affecting groundwater.").

- DOIAR34361 (254 Industry Members' September 10, 2012 Comment Letter) ("there are no incidents of contamination from fracing on public or other lands that necessitate federal regulation, and BLM has offered no justification for proceeding with the development of these rules.").

- DOIAR28542 (API's September 10, 2012 Comment Letter) ("There are no known documented cases of ground water contamination that have resulted from HF operations in properly constructed wells, as has been recently confirmed by then-BLM Director Bob Abbey and Environmental Protection Agency ("EPA") Administrator Lisa Jackson.").

- DOIAR28535-37 (API's September 10, 2012 Comment Letter) ("We believe that the need for the proposed rule has not been supported by technical or scientific information that demonstrate that present federal and state regulations are inadequate to assure that hydraulic fracturing of oil and natural gas wells drilled on federal public lands takes place in a safe an environmentally responsible manner . . . The record shows that there have been no incidents of contamination from hydraulic fracturing in over 1.2 million wells drilled over more than sixty years, and no groundwater contamination incidents from hydraulic fracturing operations that have occurred on federal public lands;" "BLM Director Bob Abbey has testified before Congress that BLM 'has never seen any evidence of impacts to groundwater from the use of fracking technology on wells that have been approved by' BLM. Director Abbey added that BLM believes 'that based upon the track record so far, [hydraulic fracturing] is safe.' . . . U.S. Environmental Protection

Agency (EPA) Administrator Lisa Jackson's testimony that there is no 'proven case where the fracking process itself has affected water.' The evidence to date supports the conclusion that hydraulic fracturing poses no risk of subsurface contamination - a conclusion with which BLM and EPA apparently agree.").

- DOIPS364898 (Crescent Point's August 23, 2013 Comment Letter) ("Despite the fact that, as BLM estimates, 'about 90 percent (approximately 3,400 wells per year) of wells drilled on Federal and Indian lands are stimulated using hydraulic fracturing techniques,' BLM has not identified a single occurrence of groundwater or other environmental contamination documented on Federal or Tribal lands associated with hydraulic fracturing.").

- DOIAR56883-84 (Devon Energy Corporation's August 23, 2013 Comment Letter) ("The BLM has failed to justify a need for this rule. The Proposed Rule places sweeping new regulations on hydraulic fracturing and related operations without identifying any issues that are not currently addressed by existing state programs.").

- DOIPS10320 (Halliburton Energy Service's September 10, 2012 Comment Letter) ("This absence of harm to groundwater due to HF has been confirmed by federal and state agencies alike. For example, in EPA's 2004 study concerning the potential impacts of HF of coalbed methane ("CBM") wells on drinking water supplies, the Agency reviewed incidents of drinking water well contamination believed to be associated with HF and found no confirmed cases that were linked to fracturing fluid injection into CBM wells or subsequent underground movement of fracturing fluids.").

C. The public will not suffer environmental harm from delayed implementation of the BLM Rule because North Dakota and other states have adequate environmental protections in place through its own hydraulic fracturing regulatory scheme. Mot. at 17.

- DOIPS67136 (Anonymous Commenter's August 8, 2013 Comment Letter) ("North Dakota already has well thought out and geology specific regulations. These rules are redundant. The one-size-fits-all approach utilized in this rule does not recognize the unique characteristics of each geologic basin. Hydraulic fracturing in the Williston Basin in North Dakota is focused in oil bearing zones that are 10,000 feet in depth, with 8,000 feet of impermeable shale, carbonate, siltstone, and salt forming a protective barrier between them and the fresh water aquifers found in this region. Natural impermeable geological formations such as those found in the Williston Basin of North Dakota provide protective barriers against contamination of the water aquifer and should be exempted from the proposed rules.").

- DOIAR34361 (254 Industry Members' September 10, 2012 Comment Letter) ("[t]here is no evidence to support the need to further regulate hydraulic fracturing, which has been successfully regulated by states for over sixty years.").

D. Immediate implementation of the BLM Rule is not in the public interest because adequate environmental protections under North Dakota's and other States' regulatory schemes already exist. Mot. at 38-39.

- DOIAR71202 (January 8, 2014 IPAA Proposed Draft Rule Entitled "Variance Requests and Equivalency Determinations") (suggesting the BLM Rule incorporate an equivalency determination for North Dakota "[b]ecause they have standards in place meeting all of the objectives of this section the following States with significant oil and gas activity on public lands.").

- DOIAR95988 (Politico February 19, 2015 Article Entitled "White House report: Fracking impacts best regulated locally, not federal") (recognizing the White House Council of Economic Advisors' "concerns over fracking's land and water impact as best addressed locally.").

- DOIAR57036 (ANGA-AXPC's August 23, 2013 Comment Letter) ("Alabama, Alaska, Arizona, California, Colorado, Louisiana, Mississippi, Montana, Nevada, North Dakota, New Mexico, Ohio, Oklahoma, South Dakota, Texas, Utah, and Wyoming account for greater than 98% of the wells drilled on federal lands in fiscal year 2012. These states individually have amended their regulations within the past two decades, and all but Alabama and Arizona have done so in the last three years, to better address oil and gas development using hydraulic fracturing. Given that each of these states effectively regulates oil and gas development using hydraulic fracturing, these proposed regulations are unjustifiable; they provide tremendous additional cost to industry and to the federal government with no resultant environmental benefit.").

- DOIPS10748 (Encana Oil & Gas's September 10, 2012 Comment Letter) ("The rules in Colorado ensure proper well construction and integrity while recognizing and understanding the drilling and completions process, along with industry's obligation to protect the environment.").

- DOIPS10311 (Halliburton Energy Service's September 10, 2012 Comment Letter) ("BLM's proposed regulations are in many respects duplicative of comprehensive regulatory programs that are already in place in states like Colorado, North Dakota, New Mexico, Montana, and Wyoming, programs which apply to activities on federal lands and which are effective in protecting human health and the environment.").

CONCLUSION

Accordingly, North Dakota respectfully requests that the Court grant its Motion for Preliminary Injunction to preserve the status quo pending the resolution of Petitioners' claims on the merits.

Dated this 18th day of September, 2015.

/s/ *Paul M. Seby*
Paul M. Seby (*Admitted Pro Hac Vice*)
Andrew C. Emrich (Wyo. Bar No. 6-4051)
Special Assistant Attorneys General
Holland & Hart LLP
555 Seventeenth Street, Suite 3200
Denver, CO 80202-3979
Phone: (303) 295-8430 (P. Seby)
Phone: (303) 290-1621 (A. Emrich)
Fax: (303) 291-9177
pmseby@hollandhart.com
acemrich@hollandhart.com

Wayne Stenehjem, Attorney General (*Admitted Pro Hac Vice*)
Matthew A. Sagsveen (*Admitted Pro Hac Vice*)
Hope Hogan (*Admitted Pro Hac Vice*)
North Dakota Office of the Attorney General
500 N. 9th Street
Bismarck, ND 58501
Phone: (701) 328-2925
ndag@nd.gov
masagsve@nd.gov
hhogan@nd.gov

ATTORNEYS FOR PETITIONER STATE OF NORTH DAKOTA

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on September 18, 2015, a true and correct copy of North Dakota's Memorandum of Administrative Record Support in Support of its Motion for Preliminary Injunction was served via the Court's CM/ECF system to the parties listed below.

Michael J. McGrady
Senior Assistant Attorney General
Jeremy A. Gross
Assistant Attorney General
Wyoming Attorney General's Office
123 State Capitol
Cheyenne, Wyoming 82002
Phone: (307) 777-6946
Fax: (307) 777-3542
mike.mcgrady@wyo.gov
jeremy.gross@wyo.gov

Andrew Kuhlmann
Senior Assistant Attorney General
Wyoming Attorney General's Office
123 State Capitol
Cheyenne, Wyoming 82002
Phone: (307) 777-6946
Fax: (307) 777-3542
andrew.kuhlmann@wyo.gov

Attorneys for Petitioner State of Wyoming

Frederick R. Yarger
Solicitor General
Colorado Attorney General's Office
1300 Broadway, 10th Floor
Denver, CO 80203
Phone: (720) 508-6168
fred.yarger@state.co.us

Daniel B. Frank
Frank Law Office, P.C.
519 E. 18th Street
Cheyenne, Wyoming 82001
Phone: (307) 432-0520
frank@tribcsp.com

Attorneys for Petitioner State of Colorado

Steven F. Alder
John Robinson Jr.
Utah Assistant Attorneys General
Sean D. Reyes
Utah Attorney General
Utah Office of the Attorney General
1594 W. North Temple, Suite 300
Salt Lake City, Utah 84116
Phone: (801) 538-7227
jrobinson@utah.gov
stevealder@utah.gov

Attorneys for Petitioner State of Utah

L. Poe Leggette
Mark S. Barron
Alexander K. Obrecht
BAKER & HOSTETLER LLP
1801 California, Suite 4400
Denver, Colorado 80202-5835
Telephone: 303.861.0600
Facsimile: 303.861.7805
pleggette@bakerlaw.com
mbarron@bakerlaw.com
aobrecht@bakerlaw.com

Attorneys for Petitioner-Intervenors Independent Petroleum Association of America and Western Energy Alliance

Scott Klosterman
Williams, Porter, Day & Neville, P.C.
159 North Wolcott, Suite 400
PO Box 10700
Casper, WY 82602-3902
Phone: (307) 265-0700
Facsimile: (307) 266-2306
sklosterman@wpdn.net

Jeffrey Rasmussen
Fredericks Peebles & Morgan LLP
1900 Plaza Drive
Louisville, CO 80027
Phone: (303) 673-9600
Facsimile: (303) 673-9155
jrasmussen@ndnlaw.com

Attorneys for Petitioner-Intervenor Ute Indian Tribe

Nicholas Vassallo
United States Attorney's Office
P O Box 668
Cheyenne, WY 82003-0668
Telephone: (307) 772-2124
Fax: (307) 772-2123
nick.vassallo@usdoj.gov

William E Gerard
United States Department of Justice
Environment & Natural Resources Division
Wildlife & Marine Resources Section
Benjamin Franklin Station
PO Box 7611
Washington, DC 20044-7611
Telephone: (202) 305-0475
Facsimile: (202) 305-0274
william.gerard@usdoj.gov

Attorneys for Federal Respondents

Nathan Maxon
Maxon Law Office
945 S. 4th Street
P.O. Box 898
Lander, WY 82520
(307) 438-9823 (phone)
nate.maxon@gmail.com

Michael S. Freeman
R. Benjamin Nelson
Earthjustice
633 17th Street, Suite 1600
Denver, CO 80202
(303) 623-9466 (phone)
(303) 623-8083 (facsimile)
mfreeman@earthjustice.org
bnelson@earthjustice.org

Nathan Matthews
Sierra Club
85 Second Street, 2nd Floor
San Francisco, CA 94105
(415) 977-5695 (phone)
nathan.matthews@sierraclub.org

Attorneys for Respondent-Intervenors

/s/ Paul M. Seby

8005216_7