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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

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

Respondents S.M.R. Jewell, Secretary of the Interior, the United States Department of the Interior, the United States Bureau of Land Management ("BLM"), and Director of the BLM Neil Kornze hereby submit their supplemental citations to the Administrative Record in support of their Brief in Opposition (ECF No. 83) to the Motion for Preliminary Injunction filed by Petitioner North Dakota (ECF Nos. 52, 56).

In its June 24, 2015 Order (ECF No. 97), the Court directed that "[w]ithin seven (7) calendar days of the lodging of the Administrative Record, the parties may file citations to the record in support of their respective positions" and that "[n]o further argument will be considered." That deadline was extended until September 18, 2015 by this Court's Order of September 2, 2015 (ECF No. 115). The Administrative Record was Noticed and Certified on August 27, 2015 (ECF No. 113) and lodged with the Clerk of Court on August 28, 2015 (ECF No. 113).

Consistent with the Court's Order, the supplemental citations in this brief are organized within the section headings matching those of Respondents' Brief in Opposition, and refer to the page number, paragraph number, and sentence number of that Brief in Opposition.[1] Per the Court's instructions, we have not included any additional argument. However, for the Court's convenience, we have included parenthetical indications of the specific language or contents to which we draw the Court's attention in our record citations.

The citations contained herein supplement those citations to the Final Rule, Rule Preamble and other documents already provided with Respondents' Brief in Opposition – which are incorporated by reference here. For the Court's convenience, the Final Rule and Preamble in

[1] When we refer to a page number from our previous brief herein, we refer to the number at the bottom of the page generated by the word processing system by which the document was created, not the page number at the top of the page generated by the Court's ECF system.

the Federal Register may be located at pages DOIAR0101929-DOIAR0102024 in the Administrative Record. The Regulatory Impact Analysis for [the Final] Hydraulic Fracturing Rule may be located at DOIAR0100522-DOIAR0100640.

ADMINISTRATIVE RECORD CITATIONS

Section II.A.1.b. The Final Rule Does Not "Displace" or "Interfere" with North Dakota's Governmental Functions

p. 16 Second paragraph, second sentence ("operators on federal lands must comply with both the Final Rule and North Dakota's Regulations"). *See* Final Rule Preamble, DOIAR0102721, DOIAR0102719 (discussing the applicability of both BLM's Rule and the relevant state regulations, if any, to oil and gas operations on federal public lands).

p. 17 Final paragraph, second sentence ("Final Rule extends to hydraulic fracturing operations existing requirements under its oil and gas operations regulations to isolate and protect particular groundwater zones"). *See, e.g.*, Final Rule Preamble, DOIAR0102682- DOIAR0102683 (noting that existing regulations already require isolation and protection of particular groundwater zones from oil and gas operations); Onshore Order 2, DOIAR0000286 (Onshore Order 2, issued in 1988, setting the requirement for isolation and protection of groundwater zones during oil and gas operations on federal lands).

p. 19 Final paragraph, first and second sentences, continuing on p. 20 ("Final Rule does not regulate [underground sources of drinking water ("USDWs")] or other groundwater, let alone displace or interfere with their regulation by states" and "[n]o provision of the Final Rule purports to address ownership of, rights to, use of, or allocations regarding USDWs specifically or groundwater generally"). *See, e.g.*, Final Rule Preamble,

DOIAR0101945 (explaining that "BLM has neither the authority nor jurisdiction to designate groundwater as exempt from protection under the [Safe Drinking Water Act ("SDWA")]"), DOIAR0101988 (stating that "BLM agrees that regulation of the quality of surface waters under the Clean Water Act, and the regulation of groundwater under the SDWA, are duties of EPA and states and tribes."), DOIAR0101946 (noting in response to comments that, "no commenter has explained how a requirement for oil and gas wells on Federal or Indian lands to verify isolation and protection of aquifers with up to 10,000 ppm [total dissolved solids ("TDS")] will preempt or interfere with states' or tribes' regulation of their ground water quality or quantity.").

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

p. 33 Second paragraph, second and third sentences ("the Final Rule does not apply to purely state or privately-owned lands" but does apply to "split-estate lands … to comply with the [Mineral Leasing Act's] directive to regulate surface disturbing activities associated with accessing those federal oil and gas leases."). *See, e.g.*, Final Rule Preamble, DOIAR0101931 (stating that, "[l]ike other BLM regulations, this final rule applies to oil and gas operations on public lands (which include split estate lands, *i.e.*, lands where the surface is owned by an entity other than the United States), as well as operations on Indian lands"), DOIAR0102670 (stating that the rule applies to oil and gas operations on public lands, which includes split estate lands with federal ownership of the mineral estate and surface ownership by a non-federal entity); 2008 Revised Memorandum of Understanding Between BLM's California State Office and California Department of Conservation Division of Oil, Gas, and Geothermal Resources, p. 1,

DOIAR0001468 (explaining that the agreement applies where both BLM and the state share jurisdiction, which includes federally owned lands and federal split estates, but not to "[w]ells within a federal unit operation but located on land with private surface and mineral ownership … unless the unit agreement stipulates to BLM regulation of the land" and even then, only to the extent of the authority under the stipulation). *See also id*. at 4, DOIAR0001471 (providing that BLM downhole well permitting, through APDs, applies to "BLM-owned Fee land and Split-estate BLM-owned minerals").

p.34 Second paragraph, first and second sentences ("the Final Rule does not purport to alter or regulate ownership of, rights to, or control of groundwater" but "the only way in which the Final Rule impacts groundwater is through its requirement that operators cement and test cement and wellbore structural integrity to isolate and protect particular groundwater zones."). *See, e.g*., Final Rule Preamble, DOIAR0101946 (stating that despite public comments to this effect, "no commenter has explained how a requirement for oil and gas wells on Federal or Indian lands to verify isolation and protection of aquifers with up to 10,000 ppm TDS will preempt or interfere with states' or tribes' regulation of their ground water quality or quantity."). *See also* April 19, 2012 Email on HF Tribal Consultation Efforts, p. 4, D01AR0014562 (summarizing discussions with various Tribes, and in particular, in response to Jicarilla Apache Tribe's questions regarding state regulation of groundwater, BLM responded that "State has primacy on groundwater issues" and that BLM's role is to "protect[] groundwater through casing design at APD stage.").

p. 34 Second paragraph, fourth sentence ("the Final Rule maintains the existing standard for 'usable water' subject to such protection, except that it introduces

substantially greater deference to states' choices as to which groundwater zones should or should not be isolated and protected."). *See, e.g.*, Final Rule Preamble, DOIAR0101944-DOIAR0101946 (discussing comments as to 10,000 ppm TDS standard from Onshore Order 2 and providing justification for continuing to use that standard), DOIAR0102682 (explaining that the definition for "usable water" in the BLM Rule maintains the existing standard of 10,000 ppm TDS from Onshore Order 2); Onshore Order 2, DOIAR0000278, DOIAR0000286 (setting standard for "usable water" at 10,000 ppm TDS). *See also* April 22, 2011 BLM presentation on hydraulic fracturing regulation in development, DOIAR0006111- DOIAR0006112 (noting that Onshore Order 2's standard for isolation and protection of usable water, to 10,000 ppm TDS, applies to drilling operations); DOIAR0032255 (Draft responses to comments indicating that the existing definition of "Usable Water" is 10,000 ppm TDS).

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

p. 35 Second paragraph, fifth sentence ("BLM analyzed the additional time needed to process applications for drilling in light of the Final Rule, and concluded that this would add four hours to the processing time" of an APD). Final Rule Preamble, Analysis of Incremental Cost, pp. 280-282, DOIAR0099465-DOIAR0099467 (noting that BLM's analysis concludes that "only 4 additional hours" of processing time will be required for APDs with the additional requirements under Final Rule). *See also* BLM Director's Questions and Responses, January 21, 2015, DOIAR0093795 (explaining that BLM concluded that 4 additional hours of APD processing will be required in light of additional requirements in Final Rule); Questions and Answers "Bureau of Land

Management's Hydraulic Fracturing Rule", p. 13, DOIAR0023050 (explaining that, since the rule only adds incremental information to an existing APD process, BLM does not anticipate that the rule's requirements will noticeably impact the processing timing for an APD).

Section II.C. The Balance of Harms and Public Interest Do Not Favor a Preliminary Injunction

p. 39 First full paragraph, final sentence ("A preliminary injunction would frustrate the public interests motivating the Final Rule and deny BLM the tools needed to respond to risks and public concerns associated with the growth of hydraulic fracturing of oil and gas wells – among them, potential groundwater contamination, use of chemicals during the fracturing process, frack hits, and issues related to the management of recovered water"). *See, e.g*., Environmental Defense Fund comments on supplemental proposed rule, p. 37-38, DOIAR0056108- DOIAR0056109 (explaining that "disclosure of chemicals used in hydraulic fracturing[,]" such as through FracFocus, "enhances public safety, promotes transparency, and will ultimately lead to the use of less deleterious chemicals"), pp. 7-8, DOIAR0056078- DOIAR0056079 (noting that an "area of review" concept as in the BLM rule and state regulatory regimes is an increasingly utilized approach to minimize the risk of "[s]ubsurface communication of hydraulic fracturing fluid through existing boreholes and natural fractures [i.e., frack hits,]" which "is a serious concern" in light of "reports from Pennsylvania, Colorado, and Alberta, among others [which] have documented incidences of … 'frack hits'"); Western Urban Water Coalition comments on supplemental proposed rule, pp. 2-7, DOIAR0056735- DOIAR0056740 (noting that hydraulic fracturing could potentially impact water sources

used by Coalition members and urging that BLM's final rule contains necessary tools to minimize that risk through chemical disclosure, monitoring of hydraulic fracturing activities, and isolation and protection of groundwater); Sportsmen for Responsible Energy Development comments on supplemental proposed rule, pp. 2-6, DOIAR0055814-DOIAR0055818 (endorsing measures in BLM rule to protect surface waters, groundwater and other resources, including full disclosure of fracturing chemicals, cement evaluation logs, and mechanical integrity testing, among others); The Wilderness Society comments on supplemental proposed rule, pp. 1, 3-4, DOIAR0056304, DOIAR0056306-DOIAR0056307 (asserting that BLM regulation is a necessary baseline to ensure that hydraulic fracturing is conducted pursuant to robust standards to protect resources, as required under Federal Land Policy and Management Act), pp. 5-14, DOIAR0056308-DOIAR0056317 (explaining the need for disclosure of fracturing chemical information, storage of recovered water in tanks, mechanical integrity testing, and ensuring cement integrity, among others); Environmental Working Group comments on supplemental proposed rule, pp. 1-2, DOIAR0056063-DOIAR0056064 (stating that oil and gas production and drilling operations are "inherently risky activities that can cause significant damage to the environment and human health" and therefore require updated BLM regulations to address these risks and meet BLM's statutory mandate); Tip of the Mitt Watershed Council comments on supplemental proposed rule, p. 2, DOIAR0056184 (stating that "hydraulic fracturing may endanger groundwater, surface water, clean air, human and animal health, fish and wildlife habitat, and recreation opportunities"); Sierra Club, et al comments on supplemental proposed rule, p. 2, DOIAR0056815 (explaining that hydraulic fracturing "presents risks to groundwater,

surface water, air, soil, fish and wildlife habitat, and human and animal health"); Center for Biological Diversity comments on supplemental rule, p. 2, DOIAR0057115 (explaining that fracking and the "resulting toxic wastewater have developed an extensive track record of spills, accidents, leaks, pollution, and property damage" – resulting in "severe and often irreversible" impacts to air, water, wildlife, and health); High Country Citizen's Alliance, et al comments on rule, p. 1, DOIAR0057699 (expressing familiarity with water contamination concerns related to hydraulic fracturing).

p. 39 Last paragraph, second and third sentences ("Tribal and individual Indian commenters in the rulemaking expressed a wide range of views. The Secretary considered all those views in deciding that the Final Rule would be in the best interests of the Tribes and the individual Indian owners of restricted fee lands."). *See, e.g.*, The Saginaw Chippewa Indian Tribe comments on the supplemental proposed rule, DOIAR0049636- DOIAR0049637 (supporting the strengthening of the regulations as represented by the BLM Rule); Standing Rock Sioux Tribe comments on supplemental proposed rule, DOIAR0056784 (asserting that the proposed rule is too weak); Kashia Band of Pomo Indians comments on supplemental proposed rule, DOIAR0057197 (supporting BLM's endeavors to create an oversight and disclosure model that will work with other regulators' requirements while protecting Federal and Tribal interests and resources); Eastern Shoshone Tribe's comments on supplemental proposed rule, DOIAR0056789 (expressing concerns with the proposed BLM Rule); Fort Peck Tribes' comments on supplemental proposed rule, DOIAR0062990 (expressing concerns with the proposed BLM Rule); Final Rule Preamble, DOIAR0102672- DOIAR0102673 (noting the extensive consultation BLM undertook with the tribes in preparation of the BLM

Rule and BLM's approach to the Rule in light of the views expressed at those consultations).

Respectfully submitted this 18th day of September 2015.

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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of September 2015 a copy of the foregoing **Respondents' Supplemental Citations to Administrative Record in Support of Brief in Opposition to North Dakota's Motion for Preliminary Injunction** was electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

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