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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING**

INDEPENDENT PETROLEUM)
ASSOCIATION OF AMERICA, and)
WESTERN ENERGY ALLIANCE,)
)
Petitioners,)
)
v.)
)
SALLY JEWELL, in her official)
capacity as Secretary of the United States)
Department of the Interior, and BUREAU)
OF LAND MANAGEMENT,)
)
Respondents.)
_____)

Civil Case No. 2:15-CV-00041-SWS

**MEMORANDUM IN SUPPORT OF
MOTION FOR PRELIMINARY INJUNCTION**

Petitioners Independent Petroleum Association of America (“IPAA”) and Western Energy Alliance (the “Alliance”) submit respectfully this memorandum in support of Petitioners’ motion for preliminary injunction. Petitioners request that the Court issue a preliminary

injunction enjoining Respondent Bureau of Land Management (“BLM”) from applying BLM’s recently-issued rules related to hydraulic fracturing on federal and Indian lands, *see* 80 Fed. Reg. 16,128 (Mar. 26, 2015), until the resolution of this litigation. Because application of the rule will cause the Petitioners and the Petitioners’ members irreparable harm, because BLM’s rule as presently proposed lacks the factual, scientific, or engineering bases necessary for this Court to sustain the agency’s action, and because the equities and public interest favor a preliminary injunction, the Court should grant the motion.

I. THE PROPOSED REGULATIONS.

For the better part of the last decade, oil and natural gas production from domestic wells has increased steadily. *See* U.S. Energy Inform. Admin., *Int’l Energy Statistics*;¹ Russell Gold, *Fracking Gives U.S. Energy Boom Plenty of Room to Run*, WALL ST. J., Sept. 14, 2014.² Virtually all of this increased production has come through the application of the well stimulation technique known as hydraulic fracturing—the procedure by which oil and gas producers inject water, sand, and certain chemicals into tight-rock formations (typically shale) to create fissures in the rock and allow oil and gas to escape for collection in a well. *See* 80 Fed. Reg. at 16,131 (estimating that ninety percent of wells drilled on federal lands in 2013 were stimulated using hydraulic fracturing). Hydraulic fracturing has been used to stimulate wells in the United States for decades—traditionally in conventional limestone and sandstone reservoirs—and meaningful attempts to use the technique to extract hydrocarbons from shale date back to at least the 1970s. *See* U.S. Dep’t of Energy, *How is Shale Gas Produced?*, at 3.³

¹ Available at: <http://www.eia.gov/cfapps/ipdbproject/IEDIndex3.cfm>.

² Available at: <http://www.wsj.com/articles/fracking-gives-u-s-energy-boom-plenty-of-room-to-run-1410728682>.

³ Available at: http://energy.gov/sites/prod/files/2013/04/f0/how_is_shale_gas_produced.pdf.

Over the last 60 years, hydraulic fracturing has helped produce more than 600 trillion cubic feet of natural gas and 7 billion barrels of oil. *Id.* at 1.

On May 11, 2012, BLM issued proposed regulations purporting to “regulate hydraulic fracturing on public land and Indian land.” 77 Fed. Reg. 27,691, 27,691 (May 11, 2012). The proposed rule focused on: (i) construction standards to ensure well bore integrity; (ii) public disclosure of chemical additives injected during production operations; and (iii) plans for management of water produced during oil and gas operations. *See id.* BLM reports that it received approximately 177,000 public comments on this initial proposal.⁴

More than a year later, on May 24, 2013, BLM issued a revised proposed rule, representing that the agency had “used the comments on [the May 2012 draft rule] to make improvements” to the agency’s proposal. 78 Fed. Reg. 31,636, 31,636 (May 24, 2013). Key changes included the ability to use a broader range of cement evaluation tools to test the integrity of cement casing of wells and revised administrative processes for how operators might report chemicals used to stimulate wells after operations were completed. *See id.* at 31,637. BLM also expressed its intent to “work with States and tribes to establish formal agreements that will leverage the 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.* BLM reports that it received more than 1.35 million public comments responsive to the revised proposal.⁵

⁴ See 80 Fed. Reg. at 16,131; Bureau of Land Mgmt., Docket No. BLM-2012-0001-0001: *Oil and Gas: Well Stimulation, Including Hydraulic Fracturing, on Fed. & Indian Lands*, RIN: 1004-AE26, available at: <http://www.regulations.gov/#!documentDetail;D=BLM-2012-0001-0001>.

⁵ See 80 Fed. Reg. at 16,131; Bureau of Land Mgmt., Docket No. BLM-2013-0002-0011: *Oil and Gas: Hydraulic Fracturing on Fed. & Indian Lands*, RIN: 1004-AE26, available at: <http://www.regulations.gov/#!documentDetail;D=BLM-2013-0002-0011>.

On March 20, 2015, almost three years after issuing its initial proposal, BLM issued the final version of its rule now at issue here.⁶ *See* 80 Fed. Reg. 16,128. The rule’s focus continues to be on the same three aspects of oil and gas development—wellbore construction, chemical disclosures, and water management—each of which is subject to comprehensive regulations under existing federal and state law. *See id.* (explaining the purpose of the rule is to “ensure that wells are properly constructed,” that recovered fluids “are managed in an environmentally responsible way,” and “to provide public disclosure of the chemicals used in hydraulic fracturing fluids”). The rule is scheduled to take effect on June 24, 2015. BLM estimates that the rule will affect at least 2,800 hydraulic fracturing operations per year immediately but that the number of wells affected may grow by a factor of more than thirty-five percent. *See id.* at 16,130.

II. PRELIMINARY INJUNCTION STANDARD.

To prevail on a motion for preliminary injunction, a movant must demonstrate: (i) a likelihood of success on the merits; (ii) that the movant is likely to suffer irreparable harm in the absence of preliminary relief; (iii) the balance of equities tips in favor of an injunction; and (iv) an injunction is in the public interest. *See Winter v. Natural Res. Defense Council*, 555 U.S. 7, 20 (2008); *Awad v. Ziriox*, 670 F.3d 1111, 1125 (10th Cir. 2012). The purpose of a preliminary injunction is to “preserve the relative position of the parties until a trial on the merits can be held.” *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981).

III. THE EQUITIES REQUIRE A PRELIMINARY INJUNCTION.

Ignoring comprehensive comments in the record detailing the technical and legal problems of earlier proposals, BLM has arbitrarily issued a rule that lacks justification, cannot be

⁶ Although announced on March 20, 2015, the final rule was published in the Federal Register on March 26, 2015.

administered technically, and violates federal law. BLM's misunderstanding of numerous technical aspects of oil and gas production, as well as the agency's failure to properly account for the final rule's economic consequences undermines the procedural legitimacy of the rulemaking. Requiring oil and gas operators to comply with these unsustainable regulations would impose costs that cannot be recovered and discourage development that would benefit the public, without any demonstrable environmental or administrative benefits. Because the equities require a preliminary injunction, the Court should grant the Petitioners' motion.

A. PETITIONERS ARE LIKELY TO SUCCEED ON THE MERITS.

On March 20, 2015, Petitioners filed their petition for review of final agency action under the Administrative Procedure Act, 5 U.S.C. §§ 701-706 ("APA"). Under the APA, the reviewing court, must "hold unlawful and set aside agency action" determined to be: "(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; [or] (D) without observance of procedure required by law." 5 U.S.C. § 706(2)(A)-(D); *see also Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1574 (10th Cir. 1994) (construing 5 U.S.C. § 706(2)(A)-(D) as providing "the generally applicable standards"). The court must set aside an agency action "unless it is supported by substantial evidence in the administrative record." *Via Christi v. Leavitt*, 509 F.3d 1259, 1271 (10th Cir. 2007) (quoting *Pennaco Energy, Inc. v. U.S. Dep't of Interior*, 377 F.3d 1147, 1156 (10th Cir. 2004) (internal quotation omitted)). *See also* 5 U.S.C. § 706(2)(E). In determining whether substantial evidence supports the agency's decision, "the court must also

consider that evidence which fairly detracts from the [agency's] decision.” *Hall v. U.S. Dep’t of Labor*, 476 F.3d 847, 854 (10th Cir. 2007).

Agency action must be “based on a consideration of the relevant factors.” *Bowman Transp., Inc. v. Ark.-Best Freight Sys., Inc.*, 419 U.S. 281, 285 (1974). An agency must also “consider and respond to significant comments received during the period for public comment.” *Perez v. Mortg. Bankers Ass’n*, 135 S. Ct. 1199, 1203 (2015). “The agency itself must supply the evidence of that reasoned decisionmaking in the statement of basis and purpose mandated by the APA [*i.e.*, the rule’s preamble].” *Int’l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am. v. United States*, 735 F.2d 1525, 1531 (D.C. Cir. 1984). Because BLM’s final rule is both procedurally and substantive deficient, Petitioners are likely to prevail under this standard.

1. The Final Rule is Arbitrary and Capricious.

Since 1920, the Mineral Leasing Act has authorized the Secretary of the Interior “to prescribe necessary and proper rules and regulations and to do any and all things necessary to carry out and accomplish the purposes of this chapter.” 30 U.S.C. § 189. Congress’ purpose in enacting the Mineral Leasing Act was “[t]o promote the mining of coal, phosphate, oil, oil shale, and sodium on the public domain.” Law of Feb. 25, 1920, c. 85, § 32, 41 Stat. 437. Congress has determined that it is “in the national interest to foster and encourage private enterprise in,” among other endeavors, “the orderly and economic development of domestic mineral resources, reserves, and reclamation of metals and minerals to help assure satisfaction of industrial, security and environmental needs.” Mining & Minerals Policy Act of 1970, 30 U.S.C. § 21a. Congress has instructed that “[i]t shall be the responsibility of the Secretary of the Interior to carry out this policy when exercising [her] authority under such programs as may be authorized by law.” *Id.*

As BLM recognizes in the regulatory preamble, *see* 80 Fed. Reg. at 16,137, the Federal Land Policy & Management Act (“FLPMA”) obligates BLM to “manage the public lands under principles of multiple use and sustained yield.” 43 U.S.C. § 1732(a). To meet this obligation, BLM must consider “a combination of balanced and diverse resource uses that takes into account the long-term needs of future generations for renewable and nonrenewable resources.” 43 U.S.C. § 1702(c). The result of this statutory scheme is that, while BLM has a responsibility to “prevent unnecessary or undue degradation of the [public] lands,” 43 U.S.C. § 1732(b), accounting for the productivity of the federal mineral estate is a statutory imperative.

Because “FLPMA prohibits only unnecessary or undue degradation, not all degradation,” BLM must ensure that regulatory measures do not prevent the extraction of federal minerals. *Theodore Roosevelt Conservation P’ship v. Salazar*, 661 F.3d 66, 78 (D.C. Cir. 2011) (holding setbacks that protected sage-grouse but which prevented natural gas extraction did not satisfy BLM’s obligation to balance development with conservation). The Interior Board of Land Appeals has interpreted “unnecessary or undue degradation” to mean the occurrence of “something more than the usual effects anticipated from appropriately mitigated development.” *Id.* at 76 (quoting *Biodiversity Conservation Alliance*, 174 IBLA 1, 5-6 (2008)). More than speculation is required: “Without evidence that . . . future injury will occur, it cannot be argued that degradation of the lands will occur, . . . or that the future degradation is unnecessary or undue.” *Wyo. Outdoor Council*, 171 IBLA 108, 121-22 (2007) (internal quotations omitted).

Congress has also directed that access to federal lands for energy development must be efficient. BLM is required “[t]o ensure timely action on oil and gas leases and applications for permits to drill” and to effect policy that: (i) “ensures[s] expeditious

compliance” with the National Environmental Policy Act and any other applicable environmental and cultural resources laws; (ii) “improve[s] consultation and coordination with the States and the public”; and (iii) “improve[s] the collection, storage, and retrieval of information relating to the oil and gas leasing activities.” Energy Policy Act of 2005, 42 U.S.C. § 15921(a)(1)(A)-(C). Because the final hydraulic fracturing rule fails to consider the “relevant factors” Congress has prescribed in these statutes, the rule is arbitrary and capricious and should be set aside.

a. Impossible Requirements Are Arbitrary Per Se.

“It is arbitrary and capricious to require compliance with a regulation when compliance is impossible.” *Messina v. U.S. Citizenship & Immigration Servs.*, No. Civ.A. 05-CV-73409-DT, 2006 WL 374564, at *6 (E.D. Mich. Feb. 16, 2006). A regulation must be structured in a manner that permits the regulated community to comply with the regulation’s terms. *RxUSA Wholesale, Inc. v. Dep’t of Health & Human Servs.*, 467 F. Supp. 2d 285, 305 (E.D.N.Y. 2006) (granting preliminary injunction of regulation requiring re-sellers of prescription drugs to certify the pedigree of drugs the distributors sold because the manufactures and authorized distributors from whom the re-sellers obtained the drugs were not required to maintain pedigree records). At least three provisions of the final rule, however, fail to meet this standard.⁷

(1) Impossible Certification Requirements.

The final rule requires that operators certify, in the completion report that operators must file after conducting hydraulic fracturing on a well, that during the time hydraulic fracturing fluids were present on the lease, the fluids complied with all applicable permitting and notice

⁷ Petitioners have provided illustrative examples of arbitrary provisions for the purposes of briefing on this motion. Petitioners intend to identify other aspects of the final rule that are legally flawed at the time the Court conducts briefing on the merits (and after Respondents lodge the administrative record).

requirements as well as all applicable federal, state, tribal, and local laws, rules, and regulations.⁸ *See* 43 C.F.R. § 3162.3-3(i)(8)(ii)-(iii). When an operator requests that certain confidential information be exempted from disclosure, the operator must also certify that “the operator has been provided the withheld information from the owner of the information and is maintaining records of the withheld information, or that the operator has access and will maintain access to the withheld information held by the owner of the information.” 43 U.S.C. § 3162.3-3(j)(1)(iii).

BLM acknowledges that it is “common practice [] for operators to engage service companies to conduct hydraulic fracturing services,” 80 Fed. Reg. at 16,173. BLM understands that it is often these service companies that own the trade secrets or confidential information related to hydraulic fracturing operations. *See id.* (observing that operators “will not always be in the best position to declare why certain information should be withheld”). Yet both the certification and the affidavit requirements disregard comments in the record explaining that, in the oil and gas industry, trade secret holders such as service companies generally do not provide operators—who may function as competitors as well as clients—with access to the trade secret holder’s trade secrets and confidential commercial information. *See* Cmts. of Halliburton Energy Servs., Inc. on the Bureau of Land Mgmt.’s Revised Proposed Regulations Re: Oil & Gas: Hydraulic Fracturing on Fed. & Indian Lands at 13 (Aug. 23, 2013).⁹ “[O]perators will never have the information necessary to know whether the fracturing fluid used on their wells complies with all applicable laws.” *See* Letter from Dan Naatz and Kathleen Sgamma to Neil Kornze at 48-49 (Aug. 22, 2013) (“Pet’rs’ Cmts.”)¹⁰

⁸ When submitting chemical information to FracFocus, operators must also make this certification as part of the operator’s submission to FracFocus. *See* 43 C.F.R. § 3162.3-3(i).

⁹ Available at: <http://www.regulations.gov/#!documentDetail;D=BLM-2013-0002-5557>.

¹⁰ Available at: <http://www.regulations.gov/#!documentDetail;D=BLM-2013-0002-5410>.

BLM has not explained how operators can make certifications about the nature of the chemicals on lease, when the operators are not in possession of information necessary to make those certifications. *Cf. Haney v. Range Res.-Appalachia, Inc.*, No. 1130 WDA 2014 (Pa. Sup. Ct. Apr. 14, 2015), *Slip Op.* at 6 (concluding that operator lacked standing to contest disclosure of chemical ingredients because the manufacturer of the chemical additives had the exclusive right to assert trade secret protection).¹¹

BLM compares its rule to Colorado law, noting that both the final rule and Colorado's rules hold the operator responsible for post-operational disclosures. *See* 80 Fed. Reg. at 16,168 ("The Colorado rule requires vendors and service companies to provide water volume and chemical data to the operator."). But Colorado's rules require service providers and vendors to provide all information, with the exception of information deemed to be a trade secret, to the operator within a period that allows operators to submit timely post-completion reports. *See* 2 COLO. CODE REGS. § 404-205A(b)(1). And Colorado's rules allow service companies or vendors to assert confidentiality directly with state regulators, rather than limiting exemption requests to those requests that operators make on service companies' behalf. *See* 2 COLO. CODE REGS. § 404-205A(b)(2)(C).

Unlike Colorado, BLM fails to account for the structure of oil and gas development, making operators responsible for all necessary certifications. *See* 80 Fed. Reg. at 16,168 (conceding that "[t]here is no corollary requirement in the Colorado rule"). There are no provisions in the final rule: (i) allowing the owner of confidential information, as opposed to the operator, to make any certifications that are premised on confidential information; (ii) allowing

¹¹ A copy of this opinion is attached as Exhibit A to this memorandum.

the trade secret owner, as opposed to the operator, to maintain the protected information; or (iii) authorizing operators to satisfy any request for additional information about a trade secret by having the trade secret owner provide confidential information directly to BLM. Given these omissions, trade secret owners face the conundrum of risking sensitive information in the custody of rivals or, more likely, refusing to use more efficient and more environmentally-sensitive proprietary technologies on federal and Indian lands. Operators are faced with a choice between making certifications without adequate information or risking regulatory sanctions for failing to comply with an obligation impossible to satisfy. Because BLM's regulatory structure creates an "unworkable situation," the certification provision is arbitrary and capricious. *RxUSA Wholesale*, 467 F. Supp. 2d at 305.

(2) **Inapplicable Recovered Fluids Storage Requirements.**

The final rule requires that "all fluids recovered *between* the commencement of hydraulic fracturing operations and the authorized officer's approval of a produced water disposal plan under BLM requirements must be stored in rigid enclosed, covered, or netted and screened above-ground tanks." 43 C.F.R. § 3162.3-3(h) (emphasis added). Because BLM's approval of disposal methods and disposal facilities is a process separate from the well approval process, conducted often before the well is even drilled, it is unclear when this rule would ever apply.

Under Onshore Order No. 7, BLM approves a "disposal method"—whether by injection, storage in long term pits, or other method including treatment and recycling—in association with the permitting of "disposal facilities" on a lease basis. Onshore Oil and Gas Order No. 7, Disposal of Produced Water § III.B, 58 Fed. Reg. 47,354-01, 47,362-63 (Sept. 8, 1993). And while operators reference this disposal method in association with an application for permit to

drill (“APD”) on an individual well, there is no regulatory mechanism for the “approval of a produced water disposal plan” on an individual well basis. Assuming, therefore, that fluids recovered from a hydraulically fractured well are to be ultimately disposed of in accordance with a method and in a facility that has previously been approved under Onshore Order No. 7, *e.g.*, in a previously-approved injection well consistent with the terms of an authorized Underground Injection Control permit, there would be no time “between the commencement of hydraulic fracturing operations and the authorized officer’s approval of a produced water disposal plan.” 43 C.F.R. § 3162.3-3(h).

BLM has provided no explanation how the limitations applicable to recovered fluids storage can apply when the administrative approval process on which those limitations are based does not exist. The storage requirement is crafted in a manner that will, at best, never apply or, at worst, be impossible to comply with. Because the storage requirement is not structured rationally, it should also be set aside. *See RxUSA Wholesale*, 467 F. Supp. 2d at 305; *Messina*, 2006 WL 374564, at *6.

(3) Undefined Mechanical Integrity Test.

The final rule requires that before hydraulic fracturing operations begin, the operator must perform a successful mechanical integrity test (“MIT”) of any casing or fracturing string through which the operation will be conducted. *See* 43 C.F.R. § 3162.3-3(f). This requirement applies not only to vertical casing that is designed to protect usable water, but also to horizontal laterals. *See* 80 Fed. Reg. at 16,159 (explaining that the purpose of the MIT requirement is to ensure that “the entire length of casing or fracturing string, not just the vertical section, prior to the perforations or open-hole section of the well, is able to withstand the applied pressure”).

BLM's Onshore Oil & Gas Order No. 2 already requires operators to conduct extensive casing integrity tests to ensure that all casing can withstand the pressures to which the wellbore will be subject during hydraulic fracturing. *See* Onshore Oil and Gas Order No. 2, Drilling Operations § III.B.h & i, 53 Fed. Reg. 46,798, 46,809 (Nov. 18, 1988) ("Onshore Order 2"). BLM emphasizes, however, that the MIT required under the final rule "is not equivalent" to the casing pressure tests operators are currently conducting. 80 Fed. Reg. at 16,160.

BLM rejected input from commentators suggesting that, if the agency were to distinguish an MIT from the current "casing pressure test," BLM should define the term "mechanical integrity test" for the purposes of the rule. 80 Fed. Reg. at 16,160. BLM declined to provide such a definition, contending that "the term 'Mechanical Integrity Test' is widely understood by the industry." *Id.* BLM is incorrect. No consensus definition of an MIT exists.

BLM itself has used the term "mechanical integrity test" to mean: (i) "a casing pressure integrity test;" (ii) a casing inspection log such as a caliper log or casing wall thickness log; or (iii) fluid level surveys, temperature surveys, pressure gradient surveys, "or other methods generally consistent with professional engineering standards which may be acceptable to the [authorized officer]." BLM Instruction Mem. No. CA-2002-011 at 5-6 (Dec. 3, 2001).¹² Like BLM, the Environmental Protection Agency ("EPA") also permits the use of various testing formats to demonstrate mechanical integrity. Acceptable tests for demonstrating internal mechanical integrity under EPA regulations include: (i) an annulus pressure or annulus monitoring test; (ii) a radioactive tracer test; (iii) a water-brine interface test; (iv) a pressure test with liquid or gas; or (v) monitoring records showing the absence of significant changes in the

¹² Available at: <http://www.blm.gov/ca/dir/pdfs/2002/im/CAIM2002-011.pdf>.

relationship between pressure and injection flow rate. *See* 40 C.F.R. § 146.8(a)(1). Acceptable tests for demonstrating external mechanical integrity include: (i) temperature log; (ii) noise log; (iii) oxygen-activation log indicating lack of fluid migration behind the casing; (iv) radioactive tracer survey indicating lack of fluid migration behind the casing; (v) cement bond log; or (vii) cementing records that demonstrate the presence of adequate cement. *See* 40 C.F.R. § 146.8(a)(1).¹³ A survey of state law likewise demonstrates that tests to ensure mechanical integrity can vary based on local conditions, the phase of operations in which testing is being conducted, and operators' preference. *See* 2 COLO. CODE REGS. § 404-326 (“[A] mechanical integrity test of a well is a test designed to determine if there is a significant leak in the casing, tubing, or packer of the well, and there is significant fluid movement into an underground source of drinking water through vertical channels adjacent to the wellbore.”);¹⁴ N.M. CODE R. § 19.15.26.11(2) (requiring operators to test injection wells at least once every five years to “assure [] continued mechanical integrity”);¹⁵ N.D. ADMIN. CODE § 43-05-01-11.1(1) (providing that an

¹³ *See also* Jonathan Koplos et al., *UIC Program Mechanical Integrity Testing: Lessons for Carbon Capture & Storage?*, Dep't of Energy/Nat'l Energy Tech. Lab. Carbon Capture & Sequestration Conference Paper #139 (May 8-11, 2006),

available at: <http://www.netl.doe.gov/publications/proceedings/06/carbon-seq/Tech%20Session%20139.pdf>.

¹⁴ Under Colorado law, any of the following tests are satisfactory to determine whether significant leaks are present in the casing, tubing, or packer of an injection well: (i) a pressure test with liquid or gas at a pressure of not less than 300 psi or the minimum injection pressure (whichever is greater), and not more than the maximum injection pressure; (ii) monthly monitoring and reporting of the average casing-tubing annulus pressure to the Colorado Oil and Gas Conservation Commission; or (iii) “any equivalent test or combinations of tests approved by the director.” 2 COLO. CODE REGS. § 404-326(a)(1)(A)-(C). Any of the following tests are satisfactory to determine whether there are significant fluid movements in vertical channels adjacent to the wellbore of an injection : (i) cementing records; (ii) tracer surveys; (iii) cement bond log or other acceptable cement evaluation log; (iv) temperature surveys; or (v) “any other equivalent test or combinations of tests approved by the director.” 2 COLO. CODE REGS. § 404-326(a)(2)(A)-(E). A mechanical integrity test of a shut-in well involves “[i]solation of the wellbore with a bridge plug or similar approved isolating device set one hundred (100) feet or less above the highest perforations and a pressure test with liquid or gas at a pressure of not less than three hundred (300) psi surface pressure” or “any equivalent test or combination of tests approved by the Director.” 2 COLO. CODE REGS. § 404-326(b)(1)(A)-(B).

¹⁵ Under New Mexico law, tests demonstrating mechanical integrity include: (i) “measurement of annular pressures in a well injecting at positive pressure under a packer or a balanced fluid seal;” (ii) “pressure testing of the casing-

injection well will be deemed to have mechanical integrity if “[t]here is no significant leak in the casing, tubing, or packer” and “[t]here is no significant fluid movement into an underground source of drinking water through channels adjacent to the well bore”).¹⁶

Beyond the general statement that two tests are distinct, BLM has not offered any explanation detailing the differences between the casing integrity tests that operators already conduct before hydraulic fracturing and the undefined mechanical integrity test that BLM will now require. BLM cites to guidance on hydraulic fracturing that the American Petroleum Institute (“API”) has issued, noting that API recommends operators conduct a pressure test “at a pressure that will determine if the casing integrity is adequate to meet the well design and construction objectives.” 80 Fed. Reg. at 16,159 (quoting Am. Petroleum Inst., *Hydraulic Fracturing Operations—Well Constr. & Integrity Guidelines* § 7.3, at 11, API Guidance Doc. HF1 (Oct. 2009) (“API HF1”). But API describes this test as a traditional “casing pressure test,” *id.*, and, as referenced above, BLM has noted expressly that it considers a mechanical integrity test to be something more than a traditional casing pressure test. *See* 80 Fed. Reg. at 16,160. BLM does not explain the inconsistencies in its preamble.

These failures implicate the validity of BLM’s rulemaking. The result of BLM’s approach is that operators are now faced with a requirement to perform a test without any understanding of what that test is or of how it should be conducted. When a definition is central to the operation of a rule and the agency “has failed to define the terms at all,” the rule is

tubing annulus for a well injecting under vacuum conditions;” and (iii) “other tests that are demonstrably effective and that the division may approve for use.” N.M. CODE R. § 19.15.26.11(2) (a)-(c).

¹⁶ To evaluate the absence of significant leaks, the operator must conduct an initial annulus pressure test and then “continuously monitor injection pressure, rate, injected volumes, pressure on the annulus between tubing and long string casing, and annulus fluid volume.” N.D. ADMIN. CODE § 43-05-01-11.1(2). To determine the absence of significant fluid movement, operators must use either an approved tracer survey or a temperature or noise log. *See* N.D. ADMIN. CODE § 43-05-01-11.1(3)(a)-(b).

arbitrary. *Qwest Corp. v. Fed. Commc'ns Comm'n*, 258 F.3d 1191, 1201 (10th Cir. 2001) (holding agency action to be arbitrary for failing to define two key terms).

And even if it were possible to comply with the final rule's MIT requirement, BLM has failed to justify modifying the pressure test requirement currently implemented through Onshore Order No. 2.¹⁷ "An agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored, and if an agency glosses over or swerves from prior precedents without discussion it may cross the line from the tolerably terse to the intolerably mute." *Greater Boston Television Corp. v. Fed. Commc'ns Comm'n*, 444 F.2d 841, 852 (D.C. Cir. 1970) (footnote omitted). BLM's failure to explain why the undefined mechanical integrity test will be more effective in ensuring casing integrity than the tests operators have been using (and BLM has been accepting) successfully for years requires the Court set aside the requirement.

b. The Final Rule Effects an Unexplained Departure from Existing Rules.

The heart of the final rule is the identification and isolation of "usable water." Since 1982, operators have been required to "isolate freshwater-bearing [formations] and other usable water containing 5,000 ppm ["parts per million"] or less of dissolved solids . . . and protect them

¹⁷ BLM also failed to explain its decision to alter its proposed rule so that the MIT must now also be conducted in the lateral part of the wellbore. *See* 80 Fed. Reg. 16,159 ("The requirement to only perform an MIT on vertical sections of the wellbore in the supplemental proposed rule is also deleted in the final rule."). The lateral part of a horizontal well is the part of the well that is in the producing formation. By BLM's definition, the producing formation is not a "usable water" formation. *Id.* at 16,218 (excluding the producing formation from definition of "usable water"). As explained below, *see* discussion *infra* Part III.A.3.c, this altered requirement will add substantial cost to test casing that is about to be perforated hundreds of time in a zone where there is no risk to "usable water." BLM acknowledges that when an operator tests an already perforated lateral in a re-fracturing operation, the perforated portion of the lateral need not be subject to the MIT. *See* 80 Fed. Reg. at 16,159. BLM fails to explain the basis for treating the same lateral differently in different fracturing operations or how conducting an MIT on casing that is to be perforated is consistent with the "relevant factor" of preventing only "undue" degradation of the public lands.

from contamination.” 43 C.F.R. § 3162.5-2(d). Under the 1982 rule, “fresh water” is defined to mean “water containing not more than 1,000 ppm of total dissolved solids TDS” or other toxic constituents. 43 C.F.R. § 3160.0-5. The 1,000 ppm standard for “fresh water” is double the secondary maximum contaminant level EPA has designated for total dissolved solids (“TDS”) in drinking water (500 ppm). *See* Pet’rs’ Cmts. at 19 (citing Env’tl. Protection Agency, Secondary Drinking Water Regulations: Guidance for Nuisance Chemicals).¹⁸

Gone from BLM’s final rule is any reference to fresh water. The final rule amends 43 C.F.R. § 3162.5-2(d), revising the first sentence of the subsection to require the operator to “isolate all usable water and other mineral-bearing formations and protect them from contamination.” 80 Fed. Reg. at 16,222. The final rule defines “usable water” as “[g]enerally those waters containing up to 10,000 parts per million (ppm) of total dissolved solids.” 43 C.F.R. § 3160.0-5.

Petitioners challenged the BLM’s reasoning for expanding the concept of “usable water” during the rulemaking process. Petitioners noted that a TDS concentration of 2,000 ppm is the highest recommended for irrigation and livestock consumption. *See* Pet’rs’ Cmts. at 19-20. Petitioners cited authorities emphasizing that water “with 10,000 ppm or more ‘may cause brain damage or death’ in livestock.” *Id.* at 20 (quoting G. Lardy et al., *Livestock and Water*, Table 9 (N.D. State Univ. Extension Serv. June 2008)). Commenters also expressed concern that, because there is no reliable way for an operator to determine the salinity of water in an underground formation without direct sampling,¹⁹ the costs of this new requirement could range

¹⁸ Available at: <http://water.epa.gov/drink/contaminants/secondarystandards.cfm>.

¹⁹ One commentator explained that while in controlled conditions one might determine TDS measurements from well logging tools, there has been “little success applying the techniques.” Letter from D.G. Harp to U.S. Dep’t of Interior (Aug. 22, 2013), Ex. B at 4 (citing *Borehole Geophysical Techniques for Determining the Water Quality &*

between \$129 million and \$793 million per year, taking into account water sampling, delays in drilling, additional steel casing in the well, and additional cementing to support the casing. *See* Pet'rs' Cmts. at 19; Devon Cmts., Attach. 4 at 14; Letter from Brad Miller to U.S. Dep't of the Interior at 6 (Aug. 23, 2013);²⁰ discussion *infra* Part III.A.3.a.

BLM offers no empirical evidence or science-based support for a need to protect water that is so saline it can kill livestock. BLM contends instead that, despite the final rule containing an express revision to Section 3162.5-2(d), the final rule does not represent any change from existing requirements. BLM observes that Onshore Oil and Gas Order No. 2, effective since December 1988, provides that "casing and cementing programs shall be conducted as approved to protect and/or isolate all usable water zones," Onshore Order 2 § III.B, and likewise defines "usable water" as "generally those waters containing up to 10,000 ppm of total dissolved solids." *Id.* § II.Y, 53 Fed. Reg. at 46,805. BLM asserts here that the 1982 regulation (still in the Code of Federal Regulations) "was *superseded* by the Onshore Order 2 definition in 1988." 80 Fed. Reg. at 16,196 (emphasis added). Relying on that assertion, BLM alleges that "[b]ecause the definition of usable water has not substantially changed" in the final rule, "there will be no

Reservoir Parameters of Fresh & Saline Water Aquifers in Tex., Report 343, Tex. Water Dev. Bd.), available at: <http://www.regulations.gov/#!documentDetail;D=BLM-2013-0002-5425>. "Well logs lack the precision required to make that determination [of whether TDS content is more or less than 10,000 ppm] with confidence due to the nature of . . . the well logging tools used[.]" *Id.* A second commentator added that, "[b]elow surface casing, operators use open-hole resistivity logs to identify formations contracted in the drilling process, not to determine water quality in such formations." Letter from Marty Durbin and V. Bruce Thompson to Neil Kornze at 9 (Aug. 23, 2013), available at: <http://www.regulations.gov/#!documentDetail;D=BLM-2013-0002-5515>. While logs may allow an inference that salty water is present, they cannot do so "clearly enough to determine . . . an unambiguous 10,000 [ppm] TDS cutoff." *Id.* Another commentator emphasized that well logs are ineffective in wellbores that have already been cased (to protect drinking water and the stability of the well), so relying on well logs to identify "usable water" requires leaving the wellbore uncased longer, creating unnecessary environmental risks. *See* Letter from Rebecca Rosen to Neil Kornze at 24 (Aug. 23, 2013) ("Devon Cmts."), available at: <http://www.regulations.gov/#!documentDetail;D=BLM-2013-0002-5560>.

²⁰ Available at: <http://www.regulations.gov/#!documentDetail;D=BLM-2013-0002-5584>.

significant changes in costs of running casing and cement.” 80 Fed. Reg. at 16,142 & 16,196 (attributing an “incremental cost” of “\$0” to the change in the usable water standard).

As a matter of law, Onshore Orders cannot “supersede” a rule. Nor did Onshore Order No. 2 purport to supersede or repeal the fresh-water rule. BLM may issue Onshore Orders “when necessary to implement and supplement the regulations in this part [43 C.F.R. Part 3160].” 43 C.F.R. § 3164.1(a). But “implement and supplement” does not mean “supersede.” In fact, rather than repeal any element of the 1982 regulations, Onshore Order No. 2 expressly cites the fresh-water rule as one of the authorities the Order implements. *See* 53 Fed. Reg. at 46,804 (“Specific authority for the provisions contained in this Order is found at . . . § 3162.5-2”). And though BLM represents that “Onshore Order 2 superseded the existing regulations in 1988, because it was promulgated pursuant to notice-and-comment rulemaking,” 80 Fed. Reg. at 16,176, that position is inconsistent with express statement in the Code of Federal Regulations that Onshore Order No. 2 did *not* supersede any existing authority.²¹ *See* 43 C.F.R. § 3164.1(b).

By acknowledging in the regulatory preamble the “inconsistency” between the 5,000 ppm standard contained in 43 C.F.R. § 3162.5-2(d) and the 10,000 ppm standard in Onshore Order No. 2’s definition of usable water, BLM admits that the former remains viable today. *See* 80 Fed.

²¹ Petitioners’ research has not disclosed, and BLM’s preamble has not cited, any case in which BLM required an operator after 1988 to protect water zones with greater than 5,000 ppm when the operator’s casing and cement was sufficient to protect water zones with less than 5,000 ppm. The only decision that appears relevant is ruling BLM’s State Director for the Montana State Office issued in 1994. *David L. Robertson*, SDR No. 922-94-05 (BLM Mont. State Office, April 21, 1994), available at: http://www.blm.gov/style/medialib/blm/mt/blm_programs/energy/oil_and_gas/operations/sdrs.Par.38840.File.dat/92-94-05.pdf.

In *Robertson*, field officers had objected to an operator’s proposed casing depth for the initial surface casing string because it was not deep enough to “protect shallow sources of usable water.” On appeal, the operator showed that the proposed casing depth would “isolate the fresh water zones.” The BLM State Director reversed the field officer’s determination, agreeing that “setting the surface casing to a depth of 450 feet would isolate the fresh water sands in the glacial till from deeper aquifers with poorer water quality.” *Id.* at 3. Given that “fresh water” was defined by rule as water with less than 1,000 ppm of TDS, this decision is not consistent with BLM’s current portrayal of how it administered Onshore Order No. 2 in the presence of the “fresh water” regulation.

Reg. at 16,141 & 16,196. Were that not the case, BLM would have no need for notice-and-comment rulemaking here to repeal the 1982 rule. But having engaged in notice-and-comment rulemaking, BLM cannot now disregard the agency's obligation to respond to comments on the change in policy and must defend the agency's conclusion that the new rule will not impose any incremental compliance costs.

BLM's elevation of Onshore Order No. 2 also overlooks important legal context. Onshore Order No. 2 adopted the 10,000 ppm standard "based on the regulatory definition by the Environmental Protection Agency of 'drinking water' at 40 CFR 144.3." 53 Fed. Reg. at 46798. Section 144.3, however, is a rule implementing EPA's underground injection control program under the Safe Drinking Water Act ("SDWA"), 42 U.S.C. §§ 300h – 300h-8; the SDWA is a statute BLM does not enforce and represents the product of an agency with a mandate distinct from BLM's mandate. Remaining mindful of BLM's obligation to prevent "undue degradation," BLM, unlike EPA, must promote mineral development and account for the productivity of the federal mineral estate. Yet the definition of "usable water" in BLM's final rule encompasses even more zones of water than EPA's definition of "underground source of drinking water" in 40 C.F.R. § 144.3.²² Unless BLM bases its new definition on the statutory relevant factors and supports the definition with substantial evidence, then BLM's out-of-context adoption of 10,000 ppm from another agency's statute becomes exactly the sort of "chance correspondence"

²² BLM admits as much, recognizing that "the final rule protects usable water, which includes, but is not limited to USDWs." 80 Fed. Reg. at 16,143. EPA's definition of an "underground source of drinking water" contains criteria beyond a simple numerical TDS content upon which BLM's final rule relies. EPA defines an "underground source of drinking water" as an aquifer (or portion of an aquifer) that supplies a public water system or a non-exempted aquifer that contains a sufficient quantity of ground water to supply a public water system and either currently supplies drinking water for human consumption or contains fewer than 10,000 mg/l total dissolved solids. *See* 40 C.F.R. § 144.3.

between different statutory provisions that the Supreme Court has rejected as a basis for reasoned rulemaking. *See Judulang v. Holder*, 132 S.Ct. 476, 484-85 (2011) (rejecting as arbitrary the Board of Immigration Appeal’s reliance on statutory factors applicable to determining whether aliens should be excluded from entering the United States in deportation proceedings designed to determine whether aliens already present were fit to remain in the United States).

BLM’s strained understanding of Onshore Order No. 2 is even more adrift from relevant statutory factors today than it would have been in 1988. In 2005, Congress amended the SDWA to exclude hydraulic fracturing from the operation of the underground injection control program. *See* 42 U.S.C. § 300h(d)(2) (excluding from the UIC program “the underground injection of fluids or propping agents (other than diesel fuels) pursuant to hydraulic fracturing operations related to oil, gas, or geothermal production activities”). To use SDWA criteria now to regulate hydraulic fracturing on federal lands—after Congress exempted the practice from SDWA regulation—requires at the least careful justification in the administrative record, not a bureaucratic shrug of the shoulders.

Contrary to the inference BLM would have the Court draw, the record before BLM shows the final rule will result in a stark change of practice from BLM’s historical implementation of the purported 10,000 ppm standard. BLM disregards that, under the final rule, operators are assigned an affirmative obligation to identify the location of usable water to be protected based on a quantitative TDS calculation. *See* 43 C.F.R. § 3162.3-3(d)(1)(iii) (requiring identification of the “estimated depths (measured and true vertical) to the top and bottom of all occurrences of usable water”). This is a new burden. Under current practice, state oil and gas agencies and BLM field offices inform operators about the location of usable water that must be

protected, taking into account local geology, and direct the depths at which it is acceptable to set well casing. And while BLM agrees “that in many instances state or tribal oil and gas regulators, or water regulators, will be able to identify for operators some or all of the usable water zones that will need to be isolated and protected,” 80 Fed. Reg. at 16,151, BLM has not explained how information received from States and field offices will assist operators to identify usable water of which even the regulators are unaware. Nor has BLM identified the “substantial evidence” supporting BLM’s apparent determination that compliance with the new rule is both feasible and free of further cost.

BLM’s approach disregards extensive comments in the record emphasizing the difficulty and expense of measuring the numerical quality of water with the precision the final rule requires. As Petitioners explained, no logging tool directly measures TDS. *See* Pet’rs’ Cmts. at 23. Logs are essential for identifying rock properties, but do not represent an effective tool for measuring water salinity. Operators often run resistivity logs for intermediate and production casing and these logs might allow the qualitative identification of high salt content zones. These logs do not, however, directly measure TDS, and there are too many variables for the signature these logs record to be converted into accurate TDS data. *See id.* BLM admits its awareness of the limitations on well logs: “BLM determined that it is not always necessary or practical to require a drill log to identify usable water and that there is no reason to be prescriptive about how usable water is identified.” 80 Fed. Reg. at 16148. The issue is not BLM’s failure to be “prescriptive”; Petitioners oppose BLM not being “descriptive” of any feasible means to comply beyond what is current practice. BLM has not provided any meaningful response to comments raising this concern.

BLM also fails to account for the impact of the final rule on operators that drilled and cased existing wells under the former practice, which, by BLM's own calculation, includes any well drilled since at least 1988. BLM's rule regulates all future hydraulic fracturing in both new and existing wells. *See* 43 C.F.R. § 3162.3-3(a). Having relied on prior government instruction about casing depths, operators of existing wells are at risk of having to add casing or cement to comply with the new requirement. BLM's failure to address the impact of this change on those operators is a further act of arbitrariness. "[A]gencies may not impose undue hardship by suddenly changing direction, to the detriment of those who have relied on past policy." *Grace Petroleum Corp. v. Fed. Energy Regulatory Comm'n*, 815 F.2d 589, 591 n. 4 (10th Cir. 1987) (quoting *Cities of Anaheim, Riverside, Banning, Colton & Azusa v. Fed. Energy Regulatory Comm'n*, 723 F.2d 656, 659 (9th Cir. 1984)).

To be sustained, BLM's decision-making must be reasoned. And that reasoning must be articulated; BLM "must supply the evidence of that reasoned decisionmaking in the statement of basis and purpose mandated by the APA [*i.e.*, the rule's preamble]." *Int'l Bhd. of Teamsters*, 735 F.2d at 1531. Whereas operators could previously rely on the guidance of state and federal regulators in setting their casing, now the burden of identification and risk of missing information shifts to the operators. BLM's preamble has failed to explain the reasons for this new approach, the costs and benefits of the new approach, or the evidence of harm (if any) incurred under the former approach. Without these explanations, BLM's final rule must be set aside. "If Congress established a presumption from which judicial review should start, that presumption . . . is . . . *against* changes in current policy that are not justified by the rulemaking

record.” *Motor Vehicle Mfrs. Ass’n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983).

c. The Final Rule Lacks Justification.

A decision “based on random or convenient selection or choice rather than on reason or nature” is the essence of both the legal and dictionary definition of arbitrary. *Webster’s Third New Int’l Dictionary* 110 (1986). In the absence of a “rational justification” for the agency’s action, the “APA’s arbitrary and capricious standard” requires that the action be set aside. *Shays v. Fed. Election Comm’n*, 414 F.3d 76, 97 (D.C. Cir. 2005); *see also Motor Vehicle Mfrs. Ass’n*, 463 U.S. at 43 (noting that the agency must articulate a “rational connection between the facts found and the choice made”) (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)); *Sierra Club N. Star Chapter v. LaHood*, 693 F. Supp. 2d 958, 963 (D. Minn. 2010) (describing a change in agency policy without explanation justifying the change as “the hallmark of an arbitrary and capricious decision”). BLM has neither substantiated the existence of problem this rule is meant to address, identified the gap in existing regulations the final rule will fill, or described the objectives the final rule will achieve.

The chief justification BLM identifies for its final rule is “public concern about whether fracturing can lead to or cause the contamination of underground water sources[.]” 80 Fed. Reg. at 16,128. BLM does not appear to have given any consideration into whether this concern is substantiated, for there is no technical discussion in the regulatory preamble related to the likelihood of hydraulic fracturing operations impacting underground water sources.²³ Numerous

²³ To the extent BLM contends that the alleged public concern results from “increased complexity” in hydraulic fracturing operations or “larger-scale operations,” *see* 80 Fed. Reg. at 16,128, that argument is meritless. Such an argument does not account for detailed evidence in the record documenting the history of large-scale hydraulic fracturing operations, publicly available academic discussions of complex hydraulic fracturing operations dating

commentators pointed out during the public comment process that both experts and government regulators have repeatedly acknowledged a lack of any evidence linking the hydraulic fracturing process to groundwater contamination. *See* Pet'rs' Cmts. at 5-11.²⁴ Yet BLM fails to reference a single confirmed case of hydraulic fracturing contaminating groundwater.²⁵ “Unsubstantiated assumptions are insufficient justification and rational[e] to support the [agency’s] promulgation of this regulation.” *Serv. Emps. Int’l Union, AFL-CIO, v. Gen. Servs. Admin.*, 830 F. Supp. 5, 10 (D.D.C. 1993) (emphasizing that an agency must rely on evidence, and not conclusory statements, to justify a rulemaking).

The final rule fails to account entirely for states’ long history of successfully regulating oil and gas development, including hydraulic fracturing. BLM does not deny that “[s]ome states, including Alaska, Arkansas, Colorado, Illinois, Michigan, New Mexico, Ohio, Oklahoma, Pennsylvania, Texas, Utah, and Wyoming have regulations in place addressing hydraulic fracturing operations.” 80 Fed. Reg. at 16,130. BLM has not explained how it identified these

back decades, and federal officials’ own admissions. *See* Sally Jewell, Sec’y, Dep’t of the Interior, Nat’l Press Club Luncheon Series (Oct. 31, 2013) (“Fracking has been an important tool in the toolbox for oil and gas for over fifty years.”); Hr’g on the Sec’y of Energy Advisory Bd.’s Shale Gas Prod. Subcommittee’s 90-day Report Before the S. Comm. on Energy & Natural Resources 4, 112th Cong. (Oct. 4, 2011) (written testimony of Stephen A. Holditch) (“I have been working in hydraulic fracturing for 40+ years and there is absolutely no evidence hydraulic fractures can grow from miles below the surface to the fresh water aquifers.”); L.W. Teufel & J.A. Clark, *Hydraulic Fracture Propagation in Layered Rock: Experimental Studies of Fracture Containment*, Soc’y of Petroleum Eng’rs (Feb. 1984) (describing the development of “massive hydraulic fractures”); C.R. Fast et al., *The Application of Massive Hydraulic Fracturing to the Tight Muddy “J” formation, Wattenberg Field, Colo.*, (Rocky Mountain Ass’n of Geologists—1977 Symposium, at 293); Pet’rs’ Cmts. at 61-62 (emphasizing that neither hydraulic fracturing operations nor development of unconventional shale plays are “recent innovation[s]”).

²⁴ Available at: <http://www.regulations.gov/#!documentDetail;D=BLM-2013-0002-5410>.

²⁵ Some proponents of additional regulation have responded to this lack of evidence by using “hydraulic fracturing” as a proxy for oil and gas development operations. But this definition of convenience misses the mark. Though undoubtedly important, hydraulic fracturing is only one component of the oil and gas extraction process (and an ephemeral one at that). Hydraulic fracturing is not the entire process of drilling, casing a well, and producing oil and natural gas. Because each part of the development process bears specific and unique risks, regulatory policy aimed at any particular aspect should address the risks that aspect poses. As BLM’s current rulemaking evidences, conflating any one operational aspect with the entire exploration and production process could result in counterproductive public policies, including the implementation of new rules or regulations that do not solve any legitimate problems.

specific states or why it failed to include numerous other states that have regulations that address hydraulic fracturing. BLM observes that, from fiscal year 2010 to fiscal year 2013, more than 99.3 percent of all well completions on federal and Indian lands occurred in nine states. *See* 80 Fed. Reg. at 16,187 (acknowledging that BLM reviewed regulations in California, Colorado, Montana, New Mexico, North Dakota, Oklahoma, Texas, Utah, and Wyoming). BLM's list of states with hydraulic fracturing regulations omits three of the states with significant activity on federal lands—California, Montana, and North Dakota—yet all three of those states have rules addressing hydraulic fracturing. *See* CAL. CODE REGS. tit. 14, §§ 1780-89;²⁶ MONT. ADMIN. R. 36.22.601-608 & 36.22.1001-1016; N.D. ADMIN. CODE 43-02-03-27.1. BLM also fails to list numerous other states identified in the administrative record that have regulations that address hydraulic fracturing. *See* Pet'rs' Cmts. at 3-5 (citing regulations in additional states including Alabama, Arizona, Louisiana, Mississippi, Nevada, and South Dakota).

BLM's most significant omission, however, is not states that *do* have regulations governing hydraulic fracturing, it is the agency's failure to identify any states that *do not* have regulations adequate to achieve the objectives of the final rule. BLM has not identified a single jurisdiction in which it contends hydraulic fracturing occurs on federal lands without sufficient regulatory protections. BLM has no evidence that its costly proposed rule will be any more effective in practice than existing state regulations protecting water and other environmental values. Because BLM has failed to "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts and the choice made,"

²⁶ Effective July 1, 2015, California's well stimulation regulations will be re-codified at CAL. CODE REGS. tit. 14, §§ 1751-89. *See* Cal. Div. of Oil, Gas, & Geothermal Resources, *SB 4 Well Stimulation Treatment Regulations*, available at: <http://www.conservation.ca.gov/index/Pages/prpsregs1.aspx>.

the final rule is arbitrary and must be set aside. *Sorenson Comm'cns, Inc. v. Fed. Comm'cns Comm'n*, 567 F.3d 1215, 1220-21 (10th Cir. 2009) (quoting *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43) (holding restrictions on lobbying expenses promulgated without justification were arbitrary and capricious).

2. The Final Rule is Contrary to Law.

BLM's final rule represents a significant expansion of the information that oil and gas developers are required to disclose publicly both before and after operations. Before commencing hydraulic fracturing operations, producers will now be required to disclose to BLM operational information about the location where drilling will take place, water resources in the vicinity of operations, the location of other wells or natural fractures or fissures in the area, and the producer's fracturing plans (including the amount of fluid to be injected, the pressure to be applied to the formation, and the estimated length, height, and total vertical depth of the fractures). *See* 43 C.F.R. § 3162.3-3(d)(1)-(7). After hydraulic fracturing operations, operators will be required to disclose detailed operational information including the components of hydraulic fracturing fluid used in stimulation, the pressures applied to geologic formations, the length, height, and direction of fractures, and the actual depth of perforations. *See* 43 C.F.R. § 3162.3-3(i). Much of this information, and particularly information regarding local geology and the operators' technical designs for extracting resources from that geology, is highly proprietary and represents economically valuable commercial information. Recognizing the value and proprietary nature of this data, BLM has provided a mechanism for operators to protect the information that is required to be submitted in the completion reports submitted after hydraulic fracturing. But BLM fails to provide any protection for the very similar information that is

required to be submitted before hydraulic fracturing. Because “[t]he disparate treatment of functionally indistinguishable products is the essence of the meaning of arbitrary and capricious,” BLM’s approach violates the APA. *Bracco Diagnostics, Inc. v. Shalala*, 963 F. Supp. 20, 28 (D.D.C. 2012) (citing *Independent Petroleum Ass’n of Am. v. Babbitt*, 92 F.3d 1248, 1260 (D.C. Cir. 1996)). *See also Transactive Corp. v. United States*, 91 F.3d 232, 237 (D.C. Cir. 1996) (holding Department of Treasury’s unexplained decision to apply different disbursement rules to fundamentally similar electronic funds management programs was arbitrary and capricious); *Olenhouse*, 42 F.3d at 1582 (finding regulations were arbitrary and capricious because the regulations treated rain-induced late planting “beyond the Farmers’ control” for the purpose of assigning a disaster credit but regarded the late planting as “within their control” for the purpose of calculating yield reductions).

In the regulatory preamble to the rule, BLM suggests that when submitting information to the agency, an operator “may segregate the information it believes is a trade secret, and explain and justify its request that the information be withheld from the public.” 80 Fed. Reg. at 16,173. The plain language of the final rule itself, however, is much more limited than BLM implies in the preamble. The provision that allows operators to withhold information from disclosure, 43 C.F.R. § 3162.3-3(j), applies only to the information that an operator is required to submit under paragraph (i) of Section 3162.3-3. *See* 43 C.F.R. § 3162.3-3(j) (establishing procedure to assert exemption from disclosure “[f]or information required in paragraph (i) of this section”). Paragraph (i) is the provision that identifies the “[i]nformation that must be provided to the authorized officer after hydraulic fracturing is completed,” *i.e.*, the information in the post-hydraulic fracturing completion report. 43 C.F.R. § 3162.3-3(i). There is no analogous provision

in the final rule that provides a method for operators to withhold information that the rule requires to be submitted before hydraulic fracturing operations or in any other reporting associated with development activities.²⁷

BLM provides no explanation for drawing a distinction between pre- and post-hydraulic fracturing information. BLM acknowledges receiving comments that information required in the pre-hydraulic fracturing reports represent confidential information. Yet BLM responds only that “BLM believes that the submission of these estimated values would not routinely meet any of the criteria within the Freedom of Information Act regulations (43 CFR part 2) which would require such information to be held as confidential information.” 80 Fed. Reg. at 16,1654. BLM provides no explanation of the reasoning it employed to reach this conclusion or the bases for its belief. This alone is reason to set aside BLM’s rule. Although BLM “is not required to discuss every item of fact or opinion included in the submissions it receives . . . , it must respond to those comments which, if true, would require a change in [the] proposed rule.” *La. Fed. Land Bank Ass’n, FLCA v. Farm Credit Admin.*, 336 F.3d 1075, 1080 (D.C. Cir. 2002) (internal citation and quotations omitted).

BLM’s belief finds no support in law. The Freedom of Information Act, 5 U.S.C. § 552 (“FOIA”), contains nine exemptions that protect specific categories of information from disclosure. *See* 5 U.S.C. § 552(b). Contrary to BLM’s unsupported conclusion that FOIA’s exemptions will not be implicated under the final rule, at least two of those exemptions apply here.

²⁷ Not only will this information be collected, BLM acknowledges that “[i]nformation that would be required to be submitted as part of this rule will be made available to the public, consistent with the requirements of federal law.” 80 Fed. Reg. at 16,182.

The final rule requires operators to submit, among other information: (i) detailed information “regarding wellbore geology” including “a geologic description, and the estimated depths (measured and true vertical) to the top and bottom of the formation into which hydraulic fracturing fluids are to be injected,” 43 C.F.R. § 3162.3-3(d)(1)(i); (ii) the estimated depths to the top and bottom of confining zones and all occurrences of usable water, *see* 43 C.F.R. § 3162.3-3(d)(1)(ii)-(iii); and (iii) a “map showing the location, orientation, and extent of any known or suspected faults or fractures within on-half mile (horizontal distance) of the wellbore trajectory that may transect the confining zone(s).” 43 C.F.R. § 3162.3-3(d)(2). This information falls squarely within the plain language of FOIA’s Exemption 9, a provision that protects from disclosure “geological and geophysical information and data, including maps, concerning wells.” 5 U.S.C. § 552(b)(9). Exemption 9 recognizes that “disclosure of seismic reports and other exploratory findings of oil companies would give speculators an unfair advantage over the companies which spent millions of dollars in exploration.” *Black Hills Alliance v. U.S. Forest Service*, 603 F. Supp. 117, 122 (D.S.D. 1984) (quoting H.R.Rep. No. 1497, 89th Cong.2d Sess. 11 (1966), U.S. Code Cong. & Admin. News 1966, p. 2418, *reprinted in* Freedom of Information Act Source book: Legislative Materials, Cases, Articles, Subcomm. on Admin. Practice & Procedure of the Comm. on the Judiciary, 93d Cong. 2d Sess. 32 (1974)). BLM’s regulatory preamble makes no reference to Exemption 9 or to case law applying the exemption to protect as confidential the type of geological information BLM seeks to collect and publish in the final rule. *See Starkey v. U.S. Dep’t of the Interior*, 238 F. Supp. 2d 1188, 1196 (S.D. Cal. 2002) (applying Exemption 9 to exempt from disclosure information in table and narrative form related to ground water inventories, well yields, and the thickness of a particular formation).

BLM also fails to account for Exemption 4, a provision that protects “trade secrets and commercial or financial information obtained from a person that is privileged or confidential.”²⁸ 5 U.S.C. § 552(b)(4). BLM acknowledges that the “final rule will add to existing requirements by providing information to the BLM and the public on the location, geology, water resources, location of other wells or fracture zones in the area, and fracturing plans for the operation before the well is permitted.” 80 Fed. Reg. at 16,130. Because the operational and design information that BLM’s final rule requires oil and gas operators to disclose falls squarely within the categories of information that Exemption 4 protects, BLM’s approach is directly contrary to law.

The federal courts recognize that Exemption 4 “protects persons who submit financial or commercial data to government agencies from the competitive disadvantages which would result from its publication.” *Nat’l Parks & Conservation Ass’n v. Morton*, 498 F.2d 765, 768 (D.C. Cir. 1974). *See also Herrick v. Garvey*, 298 F.3d 1184, 1193 (10th Cir. 2002) (“The purpose of Exemption 4 is “to protect the confidentiality of information which is obtained by the Government ..., but which would customarily not be released to the public by the person from whom it was obtained.”) (quoting *Critical Mass Energy Project v. Nuclear Regulatory Comm’n*,

²⁸ Like Exemption 4, the federal Trade Secrets Act prohibits the disclosure of information that “concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association.” 18 U.S.C. § 1905. In applying the broad language of the Trade Secrets Act, the federal courts have looked to the scope of Exemption 4; to determine whether Section 1905 prohibits any particular disclosure, the Court must first determine whether the information falls within Exemption 4. *See* U.S. Dep’t of Justice, Freedom of Information Act Guide (May 2004) (quoting 5 U.S.C. § 552(b)(4)), available at: http://www.justice.gov/oip/foia-guide-2004-edition-exemption-4#N_1_. *See also Gen. Motors Corp. v. Marshall*, 654 F.2d 294, 297 (4th Cir. 1981) (characterizing the scope of Section 1905 and Exemption 4 as “the same” and “coextensive” and concluding that “material qualifying for exemption under [Exemption 4] falls within the material, disclosure of which is prohibited under [Section] 1905”). If material would qualify for protection under Exemption 4, an agency must prohibit public disclosure. The Department of Justice has recognized that Section 1905 “stands as a potent barrier to the disclosure of any information that falls within the protection of Exemption 4.” U.S. Dep’t of Justice, Discretionary Disclosure & Exemption 4 (1985), available at: <http://www.justice.gov/oip/blog/foia-update-oip-guidance-discretionary-disclosure-and-exemption-4>. The Supreme Court has explained that disclosures violating Section 1905 are “not in accordance with law” within the meaning of the APA, 5 U.S.C. § 706(2)(A). *See Chrysler Corp. v. Brown*, 441 U.S. 281, 318 (1979).

975 F.2d 871, 877 (D.C. Cir. 1992). And when the submission of that information is involuntary, “the information is protected from disclosure by FOIA if disclosure will either: “[i] ... impair the government’s ability to obtain necessary information in the future or [ii] ... cause substantial harm to the competitive position of the person from whom the information was obtained.” *Utah v. U.S. Dep’t of Interior*, 256 F.3d 967, 969 (10th Cir. 2001) (quoting *Nat’l Parks*, 498 F.2d at 770).

To satisfy this second prong, all Petitioners need show “is actual competition and the likelihood of substantial competitive injury.” *Utah*, 256 F.3d at 970. Establishing the existence of competition is easily satisfied here. The compilation of geologic data and the development of technical plans for extracting resources from that geology is the very essence of how companies compete in the oil and gas industry. Geologic assessments identifying the location and accessibility of oil and gas deposits represent oil and gas companies’ most closely held commercial information and form the framework for all operators’ decisions regarding where to invest and the tools and strategies used to explore for and develop specific assets.

Nor is the potential of competitive injury in doubt. The final rule requires, as part of an operator’s request for authorization to conduct hydraulic fracturing activities, that the operator submit “[a] map showing the location, orientation, and extent of any known or suspected faults or fractures within one-half mile (horizontal distance) of the wellbore trajectory that may transect the confining zone(s).” 43 C.F.R. § 3162.3-3(d)(2). To the extent that this information is available at all,²⁹ it is closely held and confidential. Operators would not willingly share this

²⁹ The mapping information that BLM requests will only be available in circumstances where seismic mapping has been conducted. Seismic analyses constitute intensive surveys that cannot be conducted on every well; these surveys are normally run in the early phase of field development, and on only a few wells, to help calibrate the drainage area and evaluate the most effective spacing between wells. When seismic mapping has not been conducted, operators

information with offset operators who did not participate in the time and expense of a seismic shoot required to obtain this data. That is because this geological understanding influences the productivity of development and the value of regional assets. When operators drill wells in a less favorable direction, for example, those wells may not perform optimally and that inferior well performance may motivate decisions to re-assign resources to other locations, to sell acreage to competitors, or to enter cooperative operating or farmout agreements.

And direction is only one feature of an operator's extraction plan. The design and details of hydraulic fracturing plans have a substantial effect on the recoveries that oil and gas operators can achieve. The final rule will require operators submit significant aspects of these plans: (i) the volume of fluid to be used; (ii) the pressure that will be applied; (iii) the trajectory in the wellbore into which hydraulic fracturing fluids are to be injected; (iv) the direction and length of the fractures that will be propagated; and (v) the depth of perforations. *See* 43 C.F.R. § 3162.3-3(d)(4). Companies spend millions of dollars annually in research and development to formulate designs that maximize recovery, reduce operational costs, and minimize environmental impact. The features of a hydraulic fracturing plan, and the ability to adjust those features in a manner that promotes operational objectives, are what separate oil and gas producers from their competition. Making those features public and accessible to competitors will undermine the value of that ability and dilute the investment of producers who are constantly striving to extract oil and gas with less waste, less costs, and more environmental sensitivity.

will not be able to produce maps, except along well-mapped, well-known faults and fault structures where information has already been published publicly. Under these conditions, BLM will already have access to the same publicly available geologic information as operators. But because no data sharing center for seismic information on federal lands exists, Petitioners expect that publicly-available seismic information will be available only a very small percentage of federal and Indian lands.

This impact on producer's investment is sufficient alone to invoke Exemptions 4's protection. To show that disclosure threatens to injure a competitor, the Court "need not conduct a sophisticated economic analysis of the likely effects of disclosure." *Utah*, 256 F.3d at 970 (quoting *Pub. Citizen Health Research Grp. v. Food & Drug Admin.*, 704 F.2d 1280, 1291 (D.C.Cir.1983)). "Although "[c]onclusory and generalized allegations of substantial competitive harm ... are unacceptable and cannot support an agency's decision to withhold requested documents," *actual* economic harm need not be proved; evidence demonstrating the existence of potential economic harm is sufficient." *Utah*, 256 F.3d at 970 (quoting *Pub. Citizen*, 704 F.2d at 1291). BLM's rule, which requires public disclosure of information that operators keep confidential to gain an advantage over competitors, satisfies that standard.

Information is not public simply because the government wishes to collect it. Despite detailed explanatory comments in the administrative record, BLM's final rule fails to account for the confidential nature of the information the rule requires to be disclosed or the commercial consequences of that disclosure. Because BLM's rule requires public disclosure of highly confidential and commercially valuable information, the rule is contrary to federal public records law and cannot be sustained.

3. BLM's Rulemaking Was Procedurally Deficient.

BLM's failure to account for all the substantive impacts of its final rule has undermined the procedural adequacy of the approach the agency employed to promulgate the rule. Numerous statutes and executive orders require federal agencies to conduct enhanced analyses of a proposed action when the action will have a significant economic effect or when the action implicates novel legal or policy issues. Because BLM did not undertake analyses the law

requires during the rulemaking process, its final rule is procedurally deficient and should be set aside.³⁰

The Regulatory Flexibility Act, 5 U.S.C. §§ 601-12, requires that, unless the head of an agency determines that a proposed rule will not have a significant economic impact on a substantial number of small entities, the agency must prepare a regulatory flexibility analysis discussing the impact of the proposed rule on small entities. *See* 5 U.S.C. §§ 603-05. Although BLM acknowledges that the final rule imposes new administrative and operational burdens, BLM has not prepared a regulatory flexibility analysis because the agency contends that the rule “will not have a significant impact on a substantial number of small entities.” 80 Fed. Reg. at 16,195. Given the thousands of small businesses operating on federal and Indian lands that are members of IPAA and the Alliance and that conduct business with members of IPAA and the Alliance, it is difficult to understand BLM’s dismissal of the final rule’s effect on small entities.

BLM’s final rule imposes new costs on operators before drilling begins, during drilling, during stimulation operations, and after a well is completed. Notwithstanding detailed technical comments in the record explaining the costs of complying with these regulatory and operational requirements, BLM has underestimated both the economic and operational impact of every aspect of its rule.

³⁰ As discussed in more detail below, BLM’s significantly underestimates the costs the final rule will impose. Because of the costs and the important policy implications of the rule, BLM was required to conduct enhanced analyses under: (i) Executive Order 13563; (ii) Executive Order 12866 (Regulatory Planning and Review); (iii) the Regulatory Flexibility Act of 1980; (iv) the Small Business Regulatory Enforcement Fairness Act; (v) the Unfunded Mandates Reform Act; and (vi) the National Environmental Policy Act (“NEPA”). The references to obligatory analyses discussed specifically in this section are intended to be illustrative, not exhaustive.

a. Identification & Protection of Usable Water.

The clearest example of this underestimate is reflected in one of the most fundamental components of the final rule—the identification and isolation of “usable water.” As discussed above, *see* discussion *supra* Part III.A.1.b, BLM contends that, “[b]ecause the definition of usable water has not substantially changed” in the final rule (as opposed to under pre-existing regulations), “there will be no significant changes in costs of running casing and cement.” 80 Fed. Reg. at 16,142. BLM has not addressed any of the comments in the record estimating the costs of obtaining the more precise TDS data necessary to comply with the final rule. Academic studies cited in the record explain that this cost is likely to exceed \$100,000 per well; if sampling is done only on representative wells, costs could still average between \$8,000 and \$12,000 per well. *See* Pet’rs’ Cmts. at 26 (citing Russell Evans & Jacob Dearmon, *Individual Well Costs & Proposed Fed. BLM Rule Changes* (Okla. City Univ. 2013)). BLM’s economic analysis has not accounted for any of these costs.

Once this data is acquired, operators will now face the additional costs of casing and cementing associated with isolating formations that meet the numerical definition of usable water under the final rule, but which are located at depths deeper than the zones that state agencies and BLM field offices have previously designated as requiring isolation. The scope of this potential cost is documented in administrative record, yet BLM provides no assessment of, among other factors: (i) additional casing costs associated with deeper surface or intermediate casing needed to cover and cement over usable water zones; (ii) additional intermediate casing string needed when surface casing cannot be extended deep enough to cover all newly-identified usable water

zones due to fluid circulation and geologic constraints;³¹ and (iii) the necessity of multi-stage cementing for wells where covering all usable water zones with a single-stage cement job would result in hydraulic pressures exceeding the fracture point of exposed formations.³² Additional casing costs would result both from the larger volumes of cement required to reach increased depths as well as from the use of lighter, specialty cements to avoid exceeding the fracture pressure of geologic formations. In the regulatory preamble, BLM suggests that, like Onshore Order No. 2, the final rule does not require cement behind pipe across all usable water zones. *See* 80 Fed. Reg. at 16,152. BLM states instead that the operator must be able to demonstrate “at least 200 feet of adequately bonded cement between the zone to be hydraulically fractured and the deepest usable water zone.” *Id.* BLM makes no attempt, however, to estimate the additional amount of cement that it would take to meet even this alternative standard if the depths of water with a TDS count less than 10,000 parts per million extend below the casing depths that operators currently install based on instructions from state agencies and BLM field offices.

Not all incremental costs would be incurred for all wells. Many wells might not have any incremental casing and cementing costs. Other wells may be subjected to very high additional costs, particularly where fracture pressures limit the amount of cement that can be circulated. Under these circumstances, specialty cements, additional pipe, and multi-stage cementing would be significant costs, as would the additional rig and equipment time needed to implement these additional design factors. Evidence in the record suggests that, even assuming an average of only 1,000 feet of additional casing, the added costs could total approximately \$132 million per year. *See* Pet’rs’ Cmts.

³¹ Running an additional casing string would mean additional rig, cementing, and pipe costs. It would also mean that earlier drill bits and casing strings would need to be a larger diameter (and therefore more expensive).

³² Multi-stage cementing is more technically complex and requires more time because earlier stages must initially set (so that they do not add to the hydraulic pressure) before later stages are run. The result is additional rig and equipment rental time.

at 26. For purposes of this motion, identifying the precise incremental cost of this requirement is not necessary; what is important is that, whatever the exact incremental costs attributable to additional casing requirements may be, BLM has failed to account for those costs.

b. CEL Requirements for Intermediate Casing.

The failure to account for additional casing requirements also undermines BLM's calculation of the incremental costs associated with the new requirement to run a cement evaluation log ("CEL") on intermediate casing that protects usable water, when that intermediate casing is not cemented to the surface. *See* 43 C.F.R. § 3162.3(e)(2)(ii). BLM estimates that this requirement will impose costs of \$111,200 per well, but concludes that this cost will rarely constitute an incremental burden associated with the final rule based on three assumptions: (i) that operators are already required to perform this test under some states' laws; (ii) that even where not required, running a CEL on intermediate casing is consistent with industry guidance; and (iii) BLM's estimates that only five percent of wells have intermediate casing that protects usable water. *See* 80 Fed. Reg. at 16,197. Each of these assumptions lacks support in the record.

BLM's reliance on state laws is misplaced. BLM attributes zero additional costs associated with its enhanced CEL requirement for operations in Colorado, asserting that Colorado requires a CEL be conducted on intermediate casing. *See id.* But Colorado only requires a CEL when an operator uses a production liner, *see* 2 COLO. CODE REGS. § 404-317(o), and BLM offers no information on the frequency with which operators use production liners in Colorado. BLM assumes only 2.5% of wells would be impacted in Texas because "Texas specifies that the operator must identify the top of cement (with a CBL or temperature log) if it does not cement to the surface. 80 Fed. Reg. at 16,197. Texas does require that operators identify the top of cement for intermediate casing, but provides that this can be determined through

calculation, a temperature survey, or a CEL. *See* 16 TEX. ADMIN. CODE § 3.13(b)(2)(A)(i)-(iii). BLM provides no information regarding the frequency that operators in Texas choose to use a CEL to satisfy this requirement nor offers any comparison between the relative costs of the various methods Texas allows to meet this requirement. And BLM states, without explanation, “California and Wyoming may require [a CEL] in certain circumstances.” *Id.* BLM has not identified the circumstances under which California or Wyoming “may require” operators conduct a CEL on intermediate casing or provided any explanation why BLM could not determine from those states’ regulations whether the states would in fact require a CEL.

BLM’s suggestion that, even where state rules do not require a CEL, industry guidance counsels operators run a CEL on intermediate casing is likewise flawed. BLM cites the American Petroleum Institute’s Guidance document HF1 for the proposition that if cement is not circulated to surface on intermediate casing, “operators may run a CEL or other diagnostic tools to determine the adequacy of the cement integrity and that the cement reached the desired height.” 80 Fed. Reg. at 16,197. This unremarkable proposition, however, reveals nothing about the incremental costs a requirement to perform CELs on intermediate casing would impose. Guidance Document HF1 states only that, “[d]epending on the well design, it may be appropriate to run a CBL and/or other diagnostic tool(s) to determine that the cement integrity is adequate to meet the well design and construction objectives.” API HF1 § 7.4, at 12. BLM has not offered any analysis considering how frequently well design will support a need to run a CEL on intermediate casing or made any comparison between the costs of a CEL requirement and the “other diagnostic tool(s)” that industry guidance contemplates. To the contrary, BLM

acknowledges that it “does not have credible data on the prevalence of voluntary compliance or the prevalence of CEL requirements as conditions of approval.” 80 Fed. Reg. at 16,197.

A lack of data condemns another aspect of BLM’s cost calculation—BLM’s assertion that, “[b]ased on field experience, the BLM anticipates that only about [five] percent of wells have intermediate casing to protect usable water.” *Id.* BLM has no evidentiary or mathematical support for this supposition. BLM’s “field experience” is based on its application of existing rules. But as discussed above, *see supra* Part III.A.1.b, the final rule re-assigns the burden to identify usable water from government agencies to operators and amends the method by which usable water is identified, requiring precise mathematical calculations. These modifications are likely to expand the number of wells with intermediate casing to protect this numerically-identified “usable water.” Failing to account for this change in the final rule, BLM has no support for its assumption that the CEL requirement will affect just five percent of wells.

c. Mechanical Integrity Tests.

As discussed above, BLM contends that the MIT test that will now be required before hydraulic fracturing can be conducted is distinct from the casing integrity tests that operators now perform. Relying on BLM’s own distinction, the MIT therefore represents a requirement to which operators are not presently subject. Yet BLM concludes that the requirement does not pose an incremental cost. *See* 80 Fed. Reg. at 16,198. BLM does not explain how a new test that operators are not presently required to apply can have no incremental costs on operations.

BLM’s failure to attribute any cost to the MIT requirement cannot be reconciled with BLM’s acknowledgement that “certain wellbore configurations may require modifications to perform this test.” 80 Fed. Reg. at 16,160. For a horizontal well, where the lateral portion of the

well is entirely in the zone to be completed, the MIT requirement is a mechanically onerous and expensive proposition. BLM understands that such modifications may be necessary, among other circumstances, “when the configuration contains a pressure-actuated valve or sleeve at the end of a lateral completion” or when an operator is using an “open-hole completion.” *Id.* To conduct these tests operators will have to use complicated tools to seal off the toe of the well during testing or rely on tubing conveyed perforation techniques after the pressure test. Either method is likely to increase costs of completing a well by \$75,000 to \$100,000 per well. Yet BLM conducts no survey to determine how frequently wellbore construction methods that will require these modifications are used on federal lands nor provide any information about the cost of modifications necessary to perform the MIT when these methods are employed.

d. Recovered Fluids Storage.

BLM’s estimate of costs associated with the final rule’s new requirement that all recovered fluids be stored in above-ground tanks suffers from the same failure to validate and support the assumptions on which BLM’s calculations are based. BLM estimates an average incremental cost of using tanks instead of a pit for recovered fluids storage to be \$74,400 per operation, but applies that figure to “only those operations where we do not estimate that the operator will voluntarily comply.” 80 Fed. Reg. at 16,202. BLM contends that “[o]perations that are most likely to incur this cost are in states where 0.8% of all oil and gas activity on public lands occurs.” *Id.* BLM again fails to support its assumptions, disregarding important information in the record.

BLM has attributed no incremental costs to the tank requirement in New Mexico and Texas “based on state regulations.” *Id.* To the extent that BLM is suggesting that New Mexico

and Texas do not permit storage of recovered fluids in pits, that suggestion is false. As BLM concedes, both states “allow operators to apply for permits to use pits,” *id.* at 16,199, and some operators do indeed use pits in those states. Even absent a requirement to use tanks, BLM indicates that it has assumed voluntary compliance with the tank provision “in situations where tanks would cost the same as or less than pits, and this may be largely dependent on the volume of recovered fluids expected.” *Id.* at 16,200. On this basis, BLM has: (i) attributed no incremental cost to the tank requirement in Alaska, California, South Dakota, and Utah; and (ii) assigned very limited incremental costs in other states with significant activity on public lands including Colorado, Montana, North Dakota, Oklahoma, and Wyoming.³³ *See id.* at 16,202.

BLM’s supposition that costs represent the dominant factor in an operator’s selection of a recovered fluids storage method disregards evidence in the record to the contrary. Petitioners have explained that an operator’s preference often “varies on a project-by-project basis, depending on a wide variety of economic, geographic, logistical, and environmental factors.” Pet’rs’ Cmts. at 44-45. Although tanks are mobile and can frequently be re-used, tanks also involve large upfront costs and are subject to availability from service providers. *See id.* at 45.

While BLM appears to have considered the rental cost of tanks and some transportation costs,³⁴ its analysis omits numerous other economic and environmental factors attendant to the use of tanks. Tanks do not necessarily reduce the potential for leaks because, as explained in Petitioners’ comments, manifolded tanks together involves more piping than is required to

³³ BLM contemplates an impact on 28.3% of operations in Colorado, 20.4% of operations in Montana, 24.9% of operations in North Dakota, 38.1% of operations in Oklahoma, and 7.7% of operations in Wyoming. *See* 80 Fed. Reg. at 16,202.

³⁴ BLM indicates that it assumed transportation to and from the operating site will take four hours. *See* 80 Fed. Reg. at 16,201. BLM does not indicate how the agency derived this assumption. Given that operations in the western public land states are often quite far from population centers, BLM’s estimate appears unreasonable.

transfer fluids to and from a pit. *See id.* The increased amount of piping connections poses a release threat, even with the implementation of best management practices to ensure the integrity of transfer lines. *See id.* Setting, emptying, and removing tanks will also result in increased truck traffic compared to pits. *See id.*

BLM's assumption fails to account for factors such as the surface area available to an operator. As an example, a 150,000-barrel hydraulic fracturing operation can be done from a single 300'x300'x12' pit, which requires approximately 2 acres of surface. To handle this same volume with 500-barrel steel tanks, an operator would need approximately 325 tanks (45' long x 8.5' wide x 10' high) which will disturb 2.9 acres, assuming that the tanks have no room between them and are lined up in a single row.³⁵ In practice, tanks would not be set touching each other nor lined up in a single row. Assuming 10 rows of approximately 32 tanks, 2 feet between tanks on the row and 20 feet between the rows, the surface area required to store the tanks increase to approximately 4.9 acres. BLM's has not considered the costs and management challenges associated with providing this extra surface area or the potentially negative environmental aspects of increasing the project footprint in this manner.

BLM makes unsupported observations about the ability of tanks "to service multiple operations in different locations at the same time." 80 Fed. Reg. at 16,200. BLM provides no information about the likelihood that operations would be located in reasonable proximity to make this happen, explain how BLM accounted for transportation costs between various well sites, or consider whether dispersing tanks to multiple well sites simultaneously would leave enough tanks in any one place to service each individual location. To the extent there is evidence

³⁵ Such a row would be 2,760 feet long.

in the record related to BLM's assumption, it demonstrates that pits often present an operational advantage when servicing recovered fluids from multiple wells. Tanks used for the management of returned fluids typically cannot store the entire volume of fluids returned from the well. A tank's contents must be transferred for disposal throughout the recovery period, thereby making space for operations to continue. In comparison, a pit can generally be sized to handle the entire volume of recovered fluids, which facilitates reuse and decreases impacts on fresh water resources. *See* Pet'rs' Cmts. at 45.

Comments in the record provided BLM with detailed and comprehensive examples of circumstances under which lined pits provided meaningful economic and environmental advantages. One commentator provided an example of a reuse pit that that stored 502,000 barrels of water and which was capable of receiving recovered fluids from 196 wells. *See* Letter from Rebecca Rosen to Neil Kornze at 28 (Aug. 23, 2013).³⁶ The commentator explained that the equivalent number of 500 barrel tanks needed to store that volume of recovered fluid was 1,004, with a rental cost of over \$14.6 million per year; given that the capital costs for the reuse pit was \$550,000 and that the pit was designed to store water for at least three years, the savings over three years to service the 196 wells from the reuse pit is approximately \$35 million. *See id.*

As suggested above, the savings are not limited to economics. The commentator explained that the tanks needed to replace the reuse pit would require 602,400 square feet for adequate storage, whereas the pit's footprint constituted only 326,700 feet. *See id.* at 29. The commentator also observed that storage in enclosed tanks delays oxidation of recovered fluids; because oxidation can remove a wide variety of compounds from recovered fluids, facilitating

³⁶ Available at: <http://www.regulations.gov/#!docketBrowser;rpp=25;po=0;s=Devon%252BEnergy;D=BLM-2013-0002>.

oxidation can remove the need for costly treatment processes or the addition of microorganism that might otherwise be necessary before the recovered fluids can be reused or recycled. *See id.*

BLM fails to acknowledge or incorporate detailed explanations in the record identifying operational circumstances under which operators may choose to store recovered fluids in lined pits irrespective of costs. BLM has reached a conclusion based on unsupported assumptions that disregards the documented economic and environmental benefits that storing recovered fluids in properly constructed pits can have on common operational parameters. Given this failure, BLM's estimate of the incremental costs the storage tank requirement imposes fails to consider essential information and cannot be sustained. *See Jagers v. Fed. Crop. Ins. Corp.*, 758 F.3d 1179, 1184 (10th Cir. 2014) (acknowledging that agency action must be set aside if the agency "entirely failed to consider an important aspect of the problem") (quoting *Colo. Wild v. U.S. Forest Serv.*, 435 F.3d 1204, 1213 (10th Cir. 2006)).

e. Administrative Costs.

BLM's calculation of administrative costs is equally inadequate. Although the final rule will add an additional authorization request and decision-making process to BLM's administrative responsibilities—*i.e.*, yet *another* permit—BLM has assumed only de minimis values to the expense and time necessary to prepare and review applications for permission to conduct hydraulic fracturing. *See* 80 Fed. Reg. at 16,196 (calculating an incremental cost of \$643 per application and assuming only 8 hours of preparation time and 4 hours of review time). BLM's extraordinarily low estimate is presumably based on the BLM's assumption that BLM "fully expects to process requests for hydraulic fracturing concurrently with the processing of drilling applications." *Id.* at 16,186. BLM concedes that, "[i]f an operator submits a request [to

conduct hydraulic fracturing] in an NOI, . . . further processing time should be expected,” and recognizes that “delays in approvals of operations can be costly to operators.” *Id.* at 16,177.

BLM has not presented any explanation, however, supporting the basis for the agency’s assumption that an operator is likely to submit a request for authorization to conduct hydraulic fracturing at the time an operator submits an APD. And to the extent that there is evidence in the record relevant to this assumption, that evidence suggests the opposite conclusion. There is substantial evidence in the record documenting the administrative delays attendant to development on public lands. *See* Petr’s Cmts. at 13; Hr’g on Energy in America: BLM’s Red-Tape Run Around and Its Impact on American Energy Production, H.R. Subcomm. on Energy & Mineral Resources (Feb. 4, 2014).³⁷ Given that there are often many months, if not years, between the time an APD is submitted and the time BLM approves the APD, it is rare that an operator will have all the information related to hydraulic fracturing that the final rule requires at the time an APD is submitted.³⁸ It is not uncommon for significant aspects of the hydraulic fracturing design to change during that period because of changes in, among other factors, commodity prices, material availability, vendor availability, and geological information acquired during the drilling and logging process. Designs can also change based on what an operator has learned from developing other nearby wells—information that is not always available at the time an APD is submitted. And designs can change based on information gathered from drilling the well itself, which by definition occurs after the APD is approved. Because BLM’s economic analysis fails to account for any of these considerations and is based on unsupported

³⁷ Background and testimony available at: <http://naturalresources.house.gov/calendar/eventsingle.aspx?EventID=367516>.

³⁸ BLM’s average processing time for a drilling permit on federal lands is 227 days, compared to an average processing time of only 33 days on state or private lands. *See* W. Energy Alliance, Red Tape Nation—Tactic 2: Delay (2015), available at: <http://www.westernenergyalliance.org/RedTapeNation>.

assumptions, its assessment of administration costs underestimates the administrative burden the final rule will impose on operators and the agency itself, and must be set aside.

B. PETITIONERS WILL SUFFER IRREPARABLE HARM.

“An ‘irreparable harm requirement is met if a [petitioner] demonstrates a *significant risk* that he or she will experience harm that cannot be compensated after the fact by monetary damages.’” *Greater Yellowstone Coal. v. Flowers*, 321 F.3d 1250, 1258 (10th Cir. 2003) (quoting *Adams v. Freedom Forge Corp.*, 204 F.3d 475, 484-85 (3d Cir. 2000)). Harm generally cannot be proved by economic loss alone, because economic losses may be later recovered through money damages. *See Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140, 1157 (10th Cir. 2011). But the “imposition of money damages that cannot later be recovered for reasons such as sovereign immunity constitutes irreparable injury.” *Id.*; *see also Smoking Everywhere, Inc. v. U.S. Food & Drug Admin.*, 680 F. Supp. 2d 62, 77 n.19 (D.D.C. 2010) (“Where a [petitioner] cannot recover damages from an agency because the agency has sovereign immunity, any loss of income suffered by the [petitioner] is irreparable *per se*.” (internal quotation marks omitted)). The final rule subjects Petitioners’ members to at least two distinct and certain risks of irreparable harm: (i) compliance costs and (ii) disclosure of trade secrets and confidential commercial information. *See Cent. Valley Chrysler-Plymouth v. California Air Res. Bd.*, No. CV-F-02-5017, 2002 WL 34499459, at *7 (E.D. Cal. June 11, 2002) (“[A] finding of irreparable injury has been based on the excessive cost of compliance when coupled with the inability to recoup those costs should the challenge to the regulation ultimately be successful.”); *Nat’l Med. Care, Inc. v. Shalala*, No. 95-0860, 1995 WL 465650, at *3 (D.D.C. June 6, 1995) (emphasizing that “policy considerations behind the judiciary’s general reluctance to label economic injuries as

‘irreparable’ do not come into play” when “even if the Plaintiffs ultimately prevail on the merits,” sovereign immunity precludes “an action to recover the costs of their compliance”). Neither can be recouped through money damages. *See Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 220-21 (1994) (Scalia, J., concurring in part and concurring in the judgment) (“[C]omplying with a regulation later held invalid almost *always* produces the irreparable harm of nonrecoverable compliance costs.”).

It is undisputed that the final rule will impose costs on Petitioners’ members. BLM concedes that operational costs attributable to complying with the final rule’s requirements will be at least \$32 million per year, equating to \$11,400 per well. *See* 80 Fed. Reg. at 16,130. And as discussed above, the evidence in the record demonstrates that BLM’s has underestimated these compliance costs significantly. *See supra* Part III.A.3. But the Court need not calculate costs with precision to conclude that imposition of the rule will cause irreparable harm; BLM’s cost estimates alone prove that the final rule will impose compliance costs that Petitioners’ members cannot recover due to sovereign immunity. *Chamber of Commerce of U.S. v. Edmondson*, 594 F.3d 742, 756, 770-71 (10th Cir. 2010) (affirming a preliminary injunction based on the finding that a trade association’s members would suffer irreparable harm from compliance costs that might total \$1000 per company per year related to a new Oklahoma law because such costs were unrecoverable due to sovereign immunity); *Direct Mktg. Ass’n v. Huber*, No. 10-CV001546, 2011 WL 250556, at *6-*7 (D. Colo. Jan 26, 2011) (granting a preliminary injunction based on the finding that a trade association’s members would suffer irreparable harm from compliance costs of \$3,100 to \$7,000 per company related to new state of Colorado statutory and regulatory requirements because such costs were unrecoverable due to sovereign immunity).

The harm Petitioners' will incur is also not limited to operational costs. As discussed above, the final rule will require Petitioners' members to disclose trade secrets and confidential commercial information with no hope of recouping damages. "A trade secret once lost is, of course, lost forever." *Ruckelshaus v. Monsanto Co.*, 463 U.S. 1315, 1317-18 (Blackmun, Circuit Justice 1983) (refusing to grant a stay of a district court's injunction because the disclosure of Monsanto's trade secret to other companies and the public would cause Monsanto irreparable harm that could not be remedied); *see also FMC Corp. v. Taiwan Tainan Giant Indus. Co.*, 730 F.2d 61, 63 (2d Cir. 1984) (per curium) (reversing the denial of a preliminary injunction based on the finding that loss of trade secrets constitutes irreparable harm because the loss cannot be compensated by money damages). The final rule will require Petitioners' members to disclose their proprietary hydraulic fracturing operational and design information, which BLM will then disclose to the public and other companies. As discussed above, *see supra* Part III.A.2, the disclosure of this information will cause competitive injury. Petitioners' members will not have redress against BLM because of sovereign immunity. Nor will Petitioners' members have redress against other companies because once the trade secrets are public there is no way to expunge that information and there is virtually no way to determine which companies have misappropriated the trade secret. *See Conax Fla. Corp. v. United States*, 625 F. Supp. 1324, 1326-27 (D.D.C. 1985) (granting a preliminary injunction based on a potential violation of 18 U.S.C. § 1905 and irreparable harm from the "government's disclosure of unique data developed at plaintiff's time, effort and expense"); *Westchester Gen. Hosp., Inc. v. Dep't of Health, Ed. and Welfare*, 434 F. Supp. 435, 440 (M.D. Fla. 1977) (granting a preliminary injunction based on a potential violation

of 18 U.S.C. § 1905 and irreparable harm because a court could not identify who misappropriated the trade secret or expunge the knowledge thereof).

C. THE EQUITIES WEIGH IN FAVOR OF AN INJUNCTION.

Whereas Petitioners have demonstrated that a preliminary injunction is necessary to avoid irreparable harm, the issuance of that injunction does not pose any threat to BLM's interest. To the contrary, an injunction will prevent BLM from assuming administrative burdens and the expenditure of resources which may never be necessary. Because BLM has not expressed, either in word or through conduct, a compelling need to apply the final rule immediately, the equities require that the Court preserve the status quo until the merits are decided.

If allowed to become effective, the costs the final rule will impose are not limited to those that operators bear. BLM estimates that the “review of information associated with the application, subsequent report, remedial action report (when applicable), and variance request (when applicable) will pose an additional workload to the BLM of about 25,400 hours per year.” 80 Fed. Reg. at 16,207. And while BLM has offered conclusory statements rejecting commentators’ concerns that BLM does not have the staffing, budget, or expertise to administrate the rule, *see id.* at 16,177, BLM has not articulated any plan for how the agency intends to meet its administrative responsibilities under the final rule or described how BLM will allocate resources to ensure that application of the rule does not cause operational delays.³⁹ Under these circumstances, a preliminary injunction will actually save BLM money and afford

³⁹ Though BLM has suggested that “revisions made from the supplemental rule to final rule would reduce the amount of staff time required to implement the rule and limit any permitting delays,” 80 Fed. Reg. at 206, BLM has not compared the administrative burden of implementing the final rule to the burden attendant to implementing the rules actually in place at this time.

the agency additional time to develop a functional plan to implement and administer the provisions of the final rule.

Nor is there any non-economic reason to implement the rule at this time. As BLM concedes, oil and gas development is already subject to extensive regulation under federal and state law. *See* 80 Fed. Reg. at 16,178 (observing that “[a]ll state laws apply on Federal lands”); *id.* at 16,187 (referencing regulations in California, Colorado, Montana, New Mexico, North Dakota, Oklahoma, Texas, Utah, and Wyoming and acknowledging that more than ninety-nine percent of wells completed on federal lands since 2010 were located in one of these states). There is no dispute that the regulatory status quo has a proven track record of environmental stewardship. While acknowledging the long history of hydraulic fracturing in various forms, BLM has not identified a single example of groundwater contamination resulting from hydraulic fracturing, nor offered any analysis measuring, even in estimate form, the risk of environmental harm that the rule purports to prevent.

Perhaps the most compelling evidence of the lack of urgency in applying the rule is BLM’s own rulemaking process. BLM indicates that it began work on the final rule in November 2010. *See id.* at 16,128. Since that time, BLM has promulgated two iterations of a proposed rule, with almost two years passing since the comment period closed on the supplemental proposal in August 2013. In fiscal years 2011 through 2013 alone, BLM’s own statistics indicate that at least 6,653 wells were completed on federal lands. *See* Bureau of Land Mgmt., *Pub. Lands Statistics*, Table 3-16.⁴⁰ BLM has not identified any incidents of groundwater contamination attributable to these recent completions. And even after the final rule becomes effective, not every provision of

⁴⁰ Available at: http://www.blm.gov/public_land_statistics/. Table 3-16 indicates that 2,345 wells were completed in fiscal year 2011, 2,387 wells in fiscal year 2012, and 1,921 in fiscal year 2013.

the final rule will apply to every well on federal and Indian lands. *See* 43 C.F.R. § 3162.3-3(a). An assertion now, almost five years after BLM's rulemaking exercise began, that application of the rule cannot wait until the merits are decided in this litigation is inconsistent with historical record and cannot be reconciled with BLM's laborious approach to developing the final rule.

Before the Court is undisputed evidence of the certain harm that Petitioners will incur if an injunction is not issued to be balanced against the absence of any evidence that the issuance of an injunction will harm BLM or pose any meaningful risk to the environment beyond the status quo. Because weighing these equities supports the issuance of an injunction, the Court should grant the Petitioners' motion. *See Amoco Production Co. v. Vill. of Gambell*, 480 U.S. 531, 545 (1987) (finding the balance of harms tipped in industry's favor when industry had incurred economic costs and movants had failed to show a sufficient likelihood of environmental harm); *Comanche Nation, Okla. v. United States*, 393 F. Supp. 2d 1196, 1211 (W.D. Okla. 2005) (granting a preliminary injunction based on a finding that the United States would suffer no financial or regulatory harm from delay in publishing a tribal compact).

D. THE PUBLIC INTEREST FAVORS A PRELIMINARY INJUNCTION.

It is uncontested that the public has an important interest in safe and environmentally responsible oil and gas development on public lands. And as discussed above, that interest has been well served under the existing federal and state regulatory schemes. Though millions of wells have been completed with hydraulic fracturing across the United States, BLM has not identified a single groundwater contamination incident resulting from site preparation, drilling, well construction, completion, hydraulic fracturing stimulation, or production operations that the agency contends its final rules would have prevented.

Given this lack of justification, applying the rule would also frustrate the related public interest in proficient and cost-effective administration of the regulations that govern the development of natural resources on public lands. BLM has a statutory obligation “[t]o ensure timely action on oil and gas leases and applications for permits to drill.” 42 U.S.C. § 15921(a)(1). Yet despite acknowledging that the new rule will impose additional administrative burdens on the agency, BLM has not provided any plan regarding how it intends to meet these new responsibilities. It should be self-evident to BLM that incurring the costs of administering the final rule without ensuring that BLM can meet its obligations in a cost-effective matter consistent with the agency’s statutory mandate to ensure the productivity of the federal mineral estate is contrary to public interest. BLM appears to have disregarded public comments emphasizing the agency’s failure to meet its obligation to timely review and process permits for development under currently-existing regulations. *See* Pet’rs’ Cmts. at 13 (observing that because of delays in leasing in permitting, “[o]perators are investing in lands under private lease, where state permitting is quicker and regulation is more predictable”).

Particularly for the western public lands states, the stakes of federal oil and gas regulation are high. A state receives fifty percent of all monies received in the form of sales, bonuses, and royalties (including interest charges) derived from oil and gas production on federal lands within a state’s borders. *See* 30 U.S.C. § 191(a). The states therefore have an incentive to promote responsible energy development within each state’s boundaries. Duplicative regulation that frustrates or delays development and incentivizes operators to move development activity off of federal lands and on to private lands actively harm states. It is not surprising that virtually every state with significant oil and gas development on federal lands submitted comments in

opposition to BLM’s proposed rule, explaining that duplicative regulation would impose costs on development without achieving any commensurate environmental benefit.⁴¹ *See, e.g., State of Utah, Office of the Governor, Oil and Gas; Hydraulic Fracturing on Fed. & Indian Lands, Proposed Rule Supplemental Notice, Volume 78 Federal Register 31636, May 24, 2013 (1004-AE-26)* (Aug. 23, 2013);⁴² W. Governors’ Ass’n, Letter to Secretary Sally Jewell at 1 (Aug. 23, 2013) (asserting that the “states, territories, and flag islands have effectively regulated the practice of hydraulic fracturing and redundant federal regulation is not required”);⁴³ Wyo. Legislature Select Comm. on Fed. Natural Res. Mgmt., Cmts. on BLM’s Proposed Revised Rule to Regulate Hydraulic Fracturing for Oil & Gas on Pub. & Indian Trust Lands at 1 (Aug. 23, 2013) (“[T]he proposed rule duplicates most of the regulations already enforced in Wyoming for hydraulic fracturing in oil and gas operations.”);⁴⁴ N.D. Indus. Comm’n, *Comments Re: Bureau of Land Mgmt. Hydraulic Fracturing Rules* (July 30, 2013) (“The NDIC believes the rule is unnecessary in North Dakota since the NDIC has already promulgated effective regulations requiring chemical disclosure and environmental protection.”);⁴⁵ N.M. Energy, Minerals & Natural Res. Dep’t, *Cmts. of the N.M. Oil Conservation Division on Proposed Rule Entitled Oil & Gas; Well Stimulation, Including Hydraulic Fracturing, on Fed. & Indian Lands* at 5 (Aug.

⁴¹ Like States, Indian tribes also offered comments in opposition to the proposed rule, explaining that tribes, like states, also have regulations governing hydraulic fracturing. *See S. Ute Indian Tribe, Supplemental Notice of Proposed Rulemaking—Oil & Gas: Hydraulic Fracturing on Fed. & Indian Lands* at 1 (Aug. 21, 2013) (characterizing the rule as “unjustified from an economic and scientific point of view”), available at: <http://www.regulations.gov/#!documentDetail;D=BLM-2013-0002-5694>; *Nat’l Congress of Am. Indians, Letter to Principal Deputy Director Neil Kornze* at 2 (Aug. 9, 2013) (observing that tribes “already have regulations in place that are equal to, or greater than federal/state requirements”), available at: <http://www.regulations.gov/#!documentDetail;D=BLM-2013-0002-4214>.

⁴² Available at: <http://www.regulations.gov/#!documentDetail;D=BLM-2013-0002-5621>.

⁴³ Available at: <http://www.regulations.gov/#!documentDetail;D=BLM-2013-0002-5690>.

⁴⁴ Available at: <http://www.regulations.gov/#!documentDetail;D=BLM-2013-0002-5521>.

⁴⁵ Available at: <http://www.regulations.gov/#!documentDetail;D=BLM-2013-0002-0151>.

12, 2013) (pointing out that there is not a single reported incident of groundwater contamination related to hydraulic fracturing in New Mexico).⁴⁶

The public has an important interest in the proceeds derived from oil and gas development on public lands. And while domestic oil and gas production has grown during the five years that BLM has been formulating its final rule, the percentage of that production that is extracted from federal lands has declined in the same period. *See* Congressional Research Serv., U.S. Crude Oil & Natural Gas Prod. in Fed. & Non-Fed. Areas, Figs. 1-2, at 3-4 (Mar. 7, 2013). A complex network of regulatory requirements—both existing and proposed—as well as logistical inefficiencies inherent in the federal government’s management of the nation’s public lands, represent an enormous incentive for operators to focus their efforts on state and private lands. The final rule – which imposes novel and complicated regulatory hurdles and inserts new agency decision points certain to subject BLM and operators to legal and administrative challenges – only exacerbates this problem. The logical result of the rule being applied is to accelerate operators’ exodus from federal lands, reducing revenues to the federal treasury and preventing the public from realizing the economic benefits of the development of public resources. Because the combination of increased administrative costs with decreased revenues is clearly contrary to the public interest, the Court should grant the Petitioners’ motion and grant an injunction.

IV. CONCLUSION.

BLM has issued a final rule detached from the objectives Congress has required the agency achieve. Containing multiple provisions that make both operators’ compliance and

⁴⁶ Available at: <http://www.regulations.gov/#!documentDetail;D=BLM-2013-0002-3515>.

BLM's enforcement impossible, the rule cannot "promote the mining of . . . oil . . . on the public domain," 41 Stat. 437; lacking any identified environmental benefit, the rule cannot be justified as preventing "unnecessary or undue degradation," 43 U.S.C. § 1732(b); undermining the states' long history of applying localized knowledge of geology, geography, environmental science, and socio-economics to regulate oil and gas development, the rule cannot "improve consultation and coordination with the States," 42 U.S.C. § 15921(a)(1)(B); increasing significantly the cost and time required to develop federal assets, the rule cannot secure the productivity of the federal mineral estate, *see* 43 U.S.C. § 1732(a); and requiring the submission and public disclosure of confidential material that federal open records laws protect, the rule cannot improve the management of records relating to oil and gas leasing activities, *see* 42 U.S.C. § 15921(a)(1)(C).

Pursuant to 5 U.S.C. § 705, Petitioners request that the Court issue a preliminary injunction to preserve the status quo and protect the parties' respective rights until the merits of this action can be decided. Because application of the rule will cause the Petitioners and the Petitioners' members irreparable harm, because BLM's rule as presently proposed lacks the factual, scientific, or engineering bases necessary for this Court to sustain the agency's action, and because the equities and public interest favor a preliminary injunction, the Court should grant Petitioner's motion and enjoin BLM from implementing its final rule until the resolution of this litigation.

Submitted respectfully this 15th day of May, 2015,

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CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of May, 2015, a copy of the foregoing **MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION** was electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

/s/ Susan Quinn
Susan Quinn

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

STACEY HANEY, INDIVIDUALLY AND AS
PARENT AND NATURAL GUARDIAN OF
HARLEY HANEY, A MINOR AND PAIGE
HANEY, A MINOR, AND BETH VOYLES
AND JOHN VOYLES, HUSBAND AND
WIFE, ASHLEY VOYLES, INDIVIDUALLY,
LOREN KISKADDEN, INDIVIDUALLY,
GRACE KISKADDEN, INDIVIDUALLY,

v.

RANGE RESOURCES-APPALACHIA, INC.,
NEW DOMINON CONSTRUCTION, INC.,
TERRAFIX ENVIRONMENT TECHNOLOGY,
INC., SKAPS INDUSTRIES, INC.,
ENGINEERED SYNTHETIC PRODUCTS,
INC., RED OAK WATER TRANSFER NE,
LLC, MICROBAC LABORATORIES, INC.,
MULTI-CHEM GROUP, LLC, UNIVERSAL
WELL SERVICES, INC., HALIBURTON
ENERGY SERVICES, INC., SAXON
DRILLING, L.P., HIGHLAND
ENVIRONMENTAL, LLC, EAP
INDUSTRIES, INC., AND TEST AMERICA
INC.

APPEAL OF: RANGE RESOURCES-
APPALACHIA, INC.

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 1130 WDA 2014

Appeal from the Order June 11, 2014
In the Court of Common Pleas of Washington County
Civil Division at No(s): 2012-3534

BEFORE: BENDER, P.J.E., LAZARUS, J., and MUNDY, J.

MEMORANDUM BY BENDER, P.J.E.:

FILED APRIL 14, 2015

Range Resources – Appalachia, LLC (Range Resources) appeals from
the order of court entered June 11, 2014, granting Appellees’ motion to

compel Range Resources' compliance with its discovery obligations. We quash.

Appellees are individuals residing in Amwell Township, Pennsylvania. In May 2012, Appellees commenced this action, claiming personal injuries and property damage from environmental contamination caused by Range Resources in the course of its natural gas operations at the so-called Yeager Drill Site. As this action proceeded to discovery, Appellees sought information regarding all chemicals and/or substances used or brought to the Yeager Drill Site. In response, Range Resources provided citations to Material Safety Data Sheets (MSDS) for products used at the Yeager Drill Site. Range Resources acknowledged that the MSDS did not reveal the proprietary, chemical ingredients of such products, but it suggested that any hazardous proprietary ingredients would have been disclosed in the MSDS.

In November 2013, the trial court issued an order directing all third-party manufacturers of products used at the Yeager Drilling Site to disclose the constituent ingredients of their products.¹ Few third-party manufacturers complied. Thereafter, in February 2014, Appellees filed a motion to compel Range Resources' compliance with the order. According to Appellees, Range Resources was responsible for the site and was best placed to secure the information sought. The trial court agreed. In June 2014, the

¹ The order does not direct any action by Range Resources.

court issued an order expressly placing the burden on Range Resources to secure and provide the desired information, including all proprietary ingredients.

Range Resources timely appealed and filed a court-ordered Pa.R.A.P. 1925(b) statement. The trial court issued a responsive opinion.

Range Resources raises the following issue on appeal:

Whether the lower court violated Pennsylvania public policy and erred in placing a burden on [Range Resources] to secure and produce trade secret or proprietary information from the manufacturers and suppliers of products used or brought to one of [Range Resources'] drill sites, when it has not been established that such proprietary information is relevant and necessary or that any necessity outweighs the potential harm to the owners of the trade secret information.

Range Resources' Appellate Brief at 5.

Preliminarily, we examine our jurisdiction to entertain this appeal.² "Generally, discovery orders are deemed interlocutory and not immediately appealable because they do not dispose of the litigation." ***Pilchesky v. Gatelli***, 12 A.3d 430, 435 (Pa. Super. 2011) (quoting ***Leber v. Stretton***, 928 A.2d 262, 265 (Pa. Super. 2007)); ***Makarov v. Lukenda***, 856 A.2d

² In August 2014, this Court issued a rule to show cause why this appeal should not be quashed as interlocutory. Range Resources timely responded, claiming its appeal was appropriate pursuant to the collateral order doctrine. **See** Pa.R.A.P. 313. Thereafter, this Court discharged the rule, permitting the appeal to proceed but advising Range Resources that the issue of appealability may be revisited. **See** Order of Court, 08/27/2014, at 1. Appellees maintain that this appeal should be quashed. **See** Appellees' Brief at 1.

163, 164 (Pa. Super. 2004). However, “[a]n appeal may be taken as of right from a collateral order of ... a lower court.” Pa.R.A.P. 313(a); **see Pilchesky**, 12 A.3d at 437 (granting collateral review of the court-ordered disclosure of the identity of six John Doe defendants, purportedly in violation of their First Amendment rights); **Crum v. Bridgestone/Firestone North American Tire, LLC**, 907 A.2d 578, 584 (Pa. Super. 2006) (granting collateral review of orders denying a motion for a protective order and compelling a tire manufacturer to produce rubber compound formulas claimed to be trade secrets); **Dibble v. Penn State Geisinger Clinic, Inc.**, 806 A.2d 866, 870 (Pa. Super. 2002) (granting collateral review of an order denying a motion seeking to protect an HMO’s proprietary trade secrets).

A collateral order is an order [1] separable from and collateral to the main cause of action where [2] the right involved is too important to be denied review and [3] the question presented is such that if review is postponed until final judgment in the case, the claim will be irreparably lost.

Pa.R.A.P. 313(b). The Pennsylvania Supreme Court has admonished that the collateral order doctrine is narrow. **Melvin v. Doe**, 836 A.2d 42, 46-47 (Pa. 2003). All three factors must be present before an order may be considered collateral. **Id.** at 47; **Pilchesky**, 12 A.3d at 436; **Crum**, 907 A.2d at 583.

We will focus on the second factor. In assessing importance, we “look[] for rights deeply rooted in public policy going beyond the litigation at hand ... and measure[] any such interests against the public policy interests

advanced by adherence to the final judgment rule.” ***Pridgen v. Parker Hannifin Corp.***, 905 A.2d 422, 431 (Pa. 2006). Here, Range Resources asserts that the right to confidentiality in proprietary business information and trade secrets is too important to be denied review, citing in support ***Dibble***, 806 A.2d at 870. ***See also MarkWest Liberty Midstream & Res., LLC v. Clean Air Council***, 71 A.3d 337, 342 (Pa. Cmwlth. 2013) (citing ***Dibble*** and concluding that a dispute involving a natural gas company’s trade secrets and/or confidential business information was sufficiently important to warrant collateral review).

We do not dispute this precedent. However, despite the recognized importance of protecting trade secrets, Range Resources is without standing to seek such protection here.³

In seeking judicial resolution of a controversy, a party must establish as a threshold matter that he has standing to maintain the action. In Pennsylvania, the requirement of standing is prudential in nature. A challenge to the standing of a party to maintain the action raises a question of law. As this Court [has] explained ..., the core concept of standing is that a person who is not adversely affected in any way by the matter he seeks to challenge is not aggrieved thereby and has no standing to obtain a judicial resolution of his challenge.

³ The Court may not raise standing *sua sponte*. ***See Rendell v. Pennsylvania State Ethics Comm’n***, 603 Pa. 292, 983 A.2d 708, 717 (2009). Appellees assert that Range Resources is without standing. ***See*** Appellees’ Brief at 30-33 (arguing that Range Resources does not have a substantial, direct, and immediate interest in protecting the proprietary and trade secrets of third-parties and is, therefore, without standing).

An individual can demonstrate that he has been aggrieved if he can establish that he has a substantial, direct and immediate interest in the outcome of the litigation.

Fumo v City of Phila., 972 A.2d 487, 496 (Pa. 2009) (citations omitted); ***see also Lujan v. Defenders of Wildlife***, 504 U.S. 555, 560 (1992) (stating that a litigant “must have suffered an ‘injury in fact’ — an invasion of a legally protected interest which is (a) concrete and particularized ... and (b) ‘actual or imminent, not ‘conjectural’ or ‘hypothetical’”).

Range Resources does not have a recognizable interest in the proprietary information it seeks to protect. To the extent the proprietary, chemical ingredients of products used at the Yeager Drill Site are entitled to protection, the right to assert such protection is held by the manufacturers of those products, not Range Resources. Seemingly, Range Resources recognizes this shortcoming, as it makes no attempt to persuade this Court otherwise. ***See, generally***, Range Resources’ Appellate Brief; Reply Brief.⁴

We discern no other right involved, which Range Resources may assert, that would satisfy the importance prong of the collateral order doctrine. The trial court’s June 2014 order merely resolves a discovery dispute, *i.e.*, which party is responsible for identifying the constituent

⁴ This Court has recognized previously federal precedent suggesting that an appellant has standing to raise certain First Amendment concerns on behalf of others. ***See Pilchesky***, 12 A.3d at 437 n.9 (citing cases). However, such precedent is not relevant here.

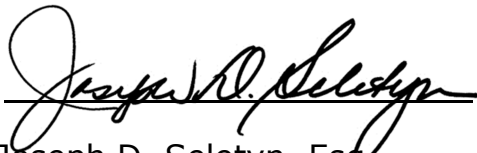
ingredients of products used at the Yeager Drill Site. Accordingly, it is interlocutory and not immediately appealable. **Pilchesky**, 12 A.3d at 435; **Makarov**, 856 A.2d at 164. To the extent Range Resources disagrees with the trial court's decision, it may properly appeal following the entry of a final order.⁵

Appeal quashed.

Judge Mundy joins this memorandum.

Judge Lazarus files a concurring memorandum.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 4/14/2015

⁵ The June 2014 order does not identify sanctions resulting from noncompliance. Thus, at this point in the litigation, it is not clear whether Range Resources will incur any sanction should it fail to comply. We, of course, presume that the trial court will consider the circumstances surrounding any noncompliance prior to imposing any sanction.