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UNITED STATES DISTRICT COURT
DISTRICT OF WYOMING

STATE OF WYOMING, et al., **Petitioners,** **v.** **UNITED STATES DEPARTMENT OF THE INTERIOR, et al.** **Respondents,** **SIERRA CLUB, et al.,** **Respondent-Intervenors.**	)	**2:15-CV-00043-SWS [Lead]** **[Consolidated With 2:15-CV-00041]** **Assigned: Hon. Scott W. Skavdahl** **RESPONDENT-INTERVENORS' BRIEF IN OPPOSITION TO STATE PETITIONERS' MOTION FOR PRELIMINARY INJUNCTION**

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INTRODUCTION

The motion by Petitioners Colorado and Wyoming (collectively, the States) to enjoin the Bureau of Land Management (BLM) from implementing its new rule on hydraulic fracturing, 80 Fed. Reg. 16128 (Mar. 26, 2015) (the Rule), should be denied. First, the States cannot show a likelihood of success on the merits of their claim that BLM lacks the authority to promulgate the Rule. BLM has well-established authority to regulate oil and gas development on public lands – including technical aspects of drilling like hydraulic fracturing – under the Mineral Leasing Act (MLA), 30 U.S.C. § 181 et seq., the Federal Land Policy and Management Act (FLPMA), 43 U.S.C. § 1701 et seq., and other statutes. The States' argument that BLM's authority was repealed by the Safe Drinking Water Act, 42 U.S.C. § 300f, et seq. (SDWA), or the 2005 Energy Policy Act, Pub. L. No. 109-58, § 322, 119 Stat. 594 (2005) (codified at 42 U.S.C. § 300h(d)) (the 2005 Act), is meritless.

Nor will the States suffer any irreparable harm in the absence of an injunction. BLM's adoption of a regulation governing activities that it is charged with administering on federal lands does not impair any sovereign right or authority held by the States. And the States fail to show that the Rule will cause them to lose any tax revenues or suffer other irreparable economic harms. Finally, the environmental benefits of the Rule make the balance of equities and public interest favor allowing the Rule to take effect.

DISCUSSION

I. THE STATES CANNOT SHOW A LIKELIHOOD OF SUCCESS ON THE MERITS.

Several statutes, including the MLA and FLPMA, give BLM authority to issue regulations addressing the technical aspects of oil and gas development, including hydraulic fracturing. Existing BLM regulations, in fact, already mention hydraulic fracturing. Nothing in

SDWA or the 2005 Act narrowed BLM's well-established authority. As a result, the States cannot show a likelihood of success on the merits of their argument that BLM lacks authority to adopt the Rule.

A. FLPMA, The MLA And Other Statutes Give BLM Broad Authority to Regulate The Technical Aspects Of Oil and Gas Development On Federal Lands.

In issuing the Rule, BLM relied on its authority under the MLA, FLPMA, and other statutes. 80 Fed. Reg. at 16217. This interpretation must be upheld under Chevron, U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984). First, "the intent of Congress" is clear. Id. at 842-43. FLPMA and the MLA assign the Interior Department responsibility for managing oil and gas development on federal lands, and give the agency sweeping authority to issue regulations governing the technical aspects of that development.[1] As one commentator observed, "BLM clearly has the authority to regulate the technical aspects of oil and gas development on public lands." Rebecca Watson et al., Hydraulic Fracturing and Water Supply Protection – Federal Regulatory Developments, 2012 Rocky Mtn. Min. L. Inst. 6, *6-27 (available on Westlaw at 2012 NO. 3 RMMLF-INST PAPER NO. 6). Second, BLM's reading of these statutes as providing that authority is entirely reasonable and has been recognized by many courts. See Chevron, 467 U.S. at 843. BLM should be afforded particular deference here, because this is a long-standing interpretation. Barnhart v. Walton, 535 U.S. 212, 219–20 (2002).

1. Mineral Leasing Act

The MLA gives the Interior Department responsibility for the development of minerals, including oil and gas, owned by the United States. 30 U.S.C. §§ 181, 226. The purpose of the

[1] Other statutes also support BLM's authority to promulgate the Rule. See 80 Fed. Reg. at 16217. For example, the Indian Mineral Leasing Act (IMLA), 25 U.S.C. § 396a–g, vests the agency with rulemaking power on Indian lands.

Mineral Leasing Act is to provide for "the orderly development of the oil and gas deposits in the publicly owned lands of the United States . . . ." Harvey v. Udall, 384 F.2d 883, 887 (10th Cir. 1963) (internal quotation omitted). The MLA grants BLM (through the Secretary of Interior) power "to prescribe necessary and proper rules and regulations and to do any and all things necessary to carry out and accomplish the purposes of" the statute. 30 U.S.C. § 189. In addition, the statute requires that BLM "shall regulate all surface-disturbing activities conducted pursuant to any lease issued under this chapter, and shall determine reclamation and other actions as required in the interest of conservation of surface resources." 30 U.S.C. § 226(g).

In enacting the MLA, Congress authorized the Interior Department to impose "exacting restrictions and continuing supervision" over companies developing oil and gas, and to issue "rules and regulations governing in minute detail all facets of the working of the land." Boesche v. Udall, 373 U.S. 472, 477-78 (1963) (citing 30 U.S.C. § 189). Courts have described the MLA as granting "sweeping authority" to BLM, Indep. Petroleum Ass'n of Am. v. DeWitt, 279 F.3d 1036, 1039 (D.C. Cir. 2002), that provides for "extensive regulation of oil exploration and drilling." Ventura Cty. v. Gulf Oil Corp., 601 F.2d 1080, 1083 (9th Cir. 1979); see also, Getty Oil Co. v. Clark, 614 F. Supp. 904, 916 (D. Wyo. 1985) (Section 189 "grants the Secretary broad powers and authority commensurate with the broad responsibilities imposed upon his office").

2. Federal Land Policy And Management Act

FLPMA also gives the Interior Department broad responsibility for administering oil and gas development on federal lands. The agency does so using a three-stage process. First, the Department (through BLM) develops "an area-wide resource management plan, specifying what areas will be open to development and the conditions placed on such development." New Mexico ex rel. Richardson v. BLM, 565 F.3d 683, 689 n. 1 (10th Cir. 2009) (citing 43 U.S.C. §

1712). Second, "BLM may grant leases for the development of specific sites within an area, subject to the requirements of the plan." Id. Finally, "a lessee may file an application for permit to drill ('APD'), which requires BLM review and approval." Id. In implementing this process (and all activities on federal lands), FLPMA requires that "the Secretary shall, by regulation or otherwise, take any action necessary to prevent unnecessary or undue degradation of the lands." 43 U.S.C. § 1732(b). FLPMA also directs BLM to apply "multiple use and sustained yield" principles" that balance mineral development with protection of wildlife, water, and other resources. Id. §§ 1701(a)(7), 1701(a)(8), 1702(c).

Congress directed BLM to issue regulations for implementing its responsibilities under FLPMA. BLM "shall promulgate rules and regulations to carry out the purposes of this Act and of other laws applicable to the public lands . . . ." Id. § 1740; see also, id. § 1733(a) (BLM "shall issue regulations necessary to implement the provisions of [FLPMA] with respect to the management, use, and protection of the public lands, including the property located thereon"); id. § 1701(a)(5) ("[I]n administering public land statutes and exercising discretionary authority granted by them, the Secretary shall be required to establish comprehensive rules and regulations"). These provisions give BLM "ample authority" to issue regulations addressing mineral development. Humboldt Cty. v. United States, 684 F.2d 1276, 1283 (9th Cir. 1982).

3. The States' Interpretation Of FLPMA And The MLA Is Meritless.

Nothing in the MLA or FLPMA suggests that Congress intended to exempt well stimulation techniques like hydraulic fracturing from the broad regulatory authority granted to BLM. The States' strained interpretation of these statutes does not withstand scrutiny.

First, the States claim that FLPMA Section 202(c)(8), 43 U.S.C. § 1712(c)(8), prevents BLM from taking any steps to prevent groundwater contamination other than to "provide for

compliance with applicable pollution control laws" in its land use plans. Dkt # 32-1 (State Br.) at 11-12. Section 202(c)(8) does direct that BLM land use plans ensure compliance with other state and federal laws. See e.g., SUWA v. Burke, 981 F. Supp. 2d 1099, 1111 (D. Utah 2013). But it does not prevent BLM from taking additional steps to minimize the impacts caused by activities that it approves on federal lands. BLM's effort to minimize those impacts does not "repeal" those other laws, State Br. at 12 – it just supplements them with additional environmental protections.

The States' argument that Section 202(c)(8) provides BLM's only tool for limiting adverse impacts from the activities it approves ignores several other provisions of FLPMA. As discussed above, FLPMA also requires the agency to prevent "unnecessary and undue degradation" of public resources, and to protect water resources and the environment as part of its multiple-use mission. P. 4, supra. These requirements would have little meaning for water, air and many other natural resources if BLM could do nothing more than follow the pollution control rules of other agencies. The States' interpretation ignores the canon of statutory interpretation that "statutes should be construed so that their provisions are harmonious with each other." Negonsott v. Samuels, 933 F.2d 818, 819 (10th Cir. 1991).

In fact, BLM routinely requires best management practices that mitigate the effects of oil and gas development on federal lands, even where those measures are not required by a pollution control statute. See, e.g., BLM White River Field Office, Draft Resource Management Plan Amendment and Environmental Impact Statement for Oil and Gas Development (2012) at B-4 to 14, attached as Ex. 1 (specifying mandatory data submissions, regulations for pits, secondary containment mechanisms, well plugging standards, and other best management practices for oil and gas development). The States' interpretation of Section 202 would not just affect hydraulic

fracturing, but also prevent BLM from requiring best management practices to mitigate a variety of other impacts that the agency routinely addresses like dust, odors and other air emissions, erosion and runoff from well sites, and waste management. See id. at B-2, B-15 to 16, B-19 to 20. This would be an absurd result. See Robbins v. Chronister, 402 F.3d 1047, 1050 (10th Cir. 2005) (statutes interpreted to avoid absurd results). FLPMA gives BLM the authority to ensure that activities it approves do not pollute the air, water or federal lands, regardless of whether such pollution violates other laws.

Second, the States also err in asserting that the Rule violates a provision of FLPMA regarding water rights. State Br. at 12. When Congress passed FLPMA it stated that "[n]othing in this Act shall be construed . . . as affecting" laws governing appropriation or use of water on public land, or changing federal and state rights over water development. 43 U.S.C. § 1701 note (g)(1)–(2), (4). The Rule, however, does not govern water appropriation or impact state water rights. BLM is simply taking steps to ensure that activities it approves will not harm water resources that are administered by other regulatory agencies. That effort is well within its statutory authority. See 80 Fed. Reg. at 16186 (noting that "[o]perators are responsible for complying with state or tribal requirements for obtaining water for use in hydraulic fracturing operations and for discharges into surface or groundwater. The BLM will not be issuing or vetoing rights to use water or discharge permits").

Third, the MLA savings clause in 30 U.S.C. § 189 does not help the States. See 30 U.S.C. § 189 ("Nothing in this chapter shall be construed or held to affect the rights of the States or other local authority to exercise any rights which they may have . . . ."). The States' Section 189 theory is premised on its argument that SDWA and the 2005 Act vested all authority to regulate hydraulic fracturing with the states. See State Br. at 14. But as discussed below, pp. 9-

13, infra, that argument is baseless. Because the States have no right to override federal rules on oil and gas development, the savings clause does not apply. As the Tenth Circuit has held, Section 189 "gives the states no power they do not already possess." Kirkpatrick Oil and Gas Co. v. United States, 675 F.2d 1122, 1124 (10th Cir. 1982) (state order regarding federal leases was not effective absent approval by BLM); see Texas Oil & Gas Corp. v. Phillips Petroleum Corp., 406 F.2d 1303, 1304-06 (10th Cir. 1969) (cited in State Br. at 14) (discussing Section 189 and ruling that state order on federal leases only effective when approved by federal government).

4. BLM's View Of The MLA And FLPMA Is A Reasonable And Long-Standing Agency Interpretation.

Moreover, BLM's view of its statutory authority is entirely reasonable. See Chevron, 467 U.S. at 843. BLM has long interpreted the broad rulemaking authority provided by FLPMA, MLA and other statutes as including the power to regulate the technical aspects of drilling – including well stimulation practices like hydraulic fracturing. Because the Rule reflects a long-standing interpretation of statutes that BLM is charged with implementing, it should be "accord[ed] particular deference." Barnhart, 535 U.S. at 220.

For decades, the Interior Department has interpreted its statutory authority as encompassing the technical aspects of federal oil and gas development. Since at least the 1940s, Department regulations have addressed the same kinds of activities covered by the Rule – including (a) well construction, (b) disposal of "useless liquid products of wells," and (c) approval of post-drilling activities on a well. 7 Fed. Reg. 4132, 4134-35 (June 2, 1942) (adopting 30 C.F.R. §§ 221.11, 221.21, 221.32 (1942)); see also, 31 Fed. Reg. 6414, 6414-15 (April 28, 1966) (amending 30 C.F.R. § 221.21); 43 C.F.R. §§ 3162.3-1, 3162.3-2 (1988);

Onshore Order No. 2, 53 Fed. Reg. 46798 (Nov. 18, 1988); Onshore Order No. 7, 58 Fed. Reg. 47354 (Sept. 8, 1993) (later rules addressing same activities).

In particular, since at least 1942 Interior Department oil and gas regulations have addressed activities that "stimulate production by . . . water injection, or any other method . . . ." 7 Fed. Reg. at 4135; see also, 31 Fed. Reg. at 6415 (same). And by 1982 – after the passage of SDWA – the Department interpreted its statutory authority as extending specifically to hydraulic fracturing. 47 Fed. Reg. 47758, 47770 (Oct. 27, 1982) (adopting 30 C.F.R. § 221.27 (1982)). While the agency did not require prior approval of "routine" hydraulic fracturing operations, its 1982 regulation provided for approval of "nonroutine fracturing jobs." Id.; see also, 43 C.F.R. §§ 3162.3-2(a), (b) (1988) (later recodification of rule).[2] These regulations demonstrate that BLM's assertion of authority to regulate hydraulic fracturing, well casing and cementing, and the other technical issues addressed by the Rule is nothing new. It represents a long-standing agency interpretation that is entitled to deference. Barnhart, 535 U.S. at 219–20.

The reasonableness of BLM's interpretation is confirmed by numerous courts that have acknowledged BLM's broad authority. In addition to the Supreme Court's 1963 ruling in Boesche v. Udall, p. 3, supra, many cases recognize BLM's authority to regulate technical and other aspects of oil and gas drilling on federal lands. See, e.g., Copper Valley Machine Works, Inc. v. Andrus, 653 F.2d 595, 605 n. 10 (D.C. Cir. 1981) (discussing BLM's authority to impose drilling restrictions under regulation addressing well casing, injection and stimulation); Barlow & Haun, Inc. v. United States, 118 Fed. Cl. 597, 602-03 (Fed. Cl. 2014) (describing the variety of technical, geologic and environmental issues that BLM considers in reviewing a drilling

[2] In practice, companies generally treated "all hydraulic fracturing operations as 'routine'" under the old rules and did not seek BLM approval. Wells Decl. ¶ 10 (Dkt # 20-2 in Case No. 2:15-cv-00041-SWS).

permit application); Ute Mountain Tribe v. Rodriguez, 660 F.3d 1177, 1180-81 and n. 10 (10th Cir. 2011) (describing BLM's authority on federal and Indian lands, and noting that "[t]he federal statutory and regulatory scheme governing oil and gas operations on Indian land covers virtually every aspect of such operations on the Ute Reservation"); San Juan Citizens Alliance v. Stiles, 654 F.3d 1038, 1044 (10th Cir. 2011) (noting that drilling permit application requires applicants to address issues including the "details of pad construction and methods of containing and disposing of waste, and a surface reclamation plan for when the well is put out of service"); see also, New Mexico, 565 F.3d at 689 n. 1 (noting that under FLPMA, BLM determines "the conditions placed on such development").

In short, the Interior Department and courts have long recognized the agency's authority to regulate the technical aspects of oil and gas development on federal lands, including hydraulic fracturing. This Court should defer to the agency's reasonable and long-standing interpretation of its statutory power under FLPMA, MLA, and other statutes. Chevron, 467 U.S. at 843; Barnhart, 535 U.S. at 219–20.

B. The Safe Drinking Water Act And The 2005 Act Did Not Repeal BLM's Existing Authority Under FLPMA And The MLA.

The heart of the States' case is their theory that SDWA and the 2005 Act repealed BLM's statutory authority under FLPMA and the MLA and assigned all responsibility for hydraulic fracturing to the states. But SDWA and the relevant section of the 2005 Act do not even mention FLPMA or the MLA. Instead, they address the underground injection control (UIC) requirements of SDWA, a completely different law. BLM does not administer SDWA and did not rely on that law for its authority to promulgate the Rule. Even after the 2005 Act, "under the MLA and FLPMA, BLM has direct authority to regulate [hydraulic fracturing] operations when they occur on federal lands." Rebecca Watson et al., supra p. 2 at * 6-26.

1. The Plain Language Of SDWA And The 2005 Act Did Not Amend FLPMA Or The MLA.

On their face, SDWA and the 2005 Act did not amend FLPMA and MLA or revoke BLM's authority under those statutes to regulate hydraulic fracturing. In 1974, SDWA established the UIC permitting program and made its requirements applicable to federal agencies. 42 U.S.C. §§ 300h, 300j-6(a)(4). But the States fail to cite anything suggesting that Congress intended the UIC program to repeal the Interior Department's existing authority under the MLA. State Br. at 7-8. SDWA's legislative history, in fact, says the opposite. It expressly preserves the Interior Department's "efforts . . . to prevent groundwater contamination under the Mineral Leasing Act" and states that SDWA was not intended "to repeal or limit any authority the [Department] may have under any other legislation."[3] After SDWA was passed, the Interior Department continued to cover well injection and fracturing in its own regulations. P. 8, supra.

Later, the 2005 Act amended SDWA's definition of "underground injection" to expressly exclude hydraulic fracturing from regulation under that statute's UIC requirements except where diesel fuel is used. Pub. L. No. 109-58, § 322, 119 Stat. 594 (2005) (codified at 42 U.S.C. § 300h(d)(2)(B)). The language of this amendment, however, was limited to SDWA. The 2005 Act did not expressly repeal—or even address—BLM's existing authority under FLPMA or the MLA. See Rodriguez v. United States, 480 U.S. 522, 524 (1987) (refusing to infer that Congress revoked judges' authority to impose probation instead of other sentences where later statute did "not explicitly divest sentencing judges of their authority" under earlier law).

[3] H.R. Rep. No. 93-1185 (1974), as reprinted in 1974 U.S.C.C.A.N. 6454, 6484-85. The 1974 legislative history refers to the MLA authority of the U.S. Geological Survey (USGS) because at that time USGS was the Department of Interior agency that administered oil and gas on public lands. That authority was transferred to BLM in the 1980s. 47 Fed. Reg. 47758, 47758 (Oct. 27, 1982); 48 Fed. Reg. 36582, 36582-584 (Aug. 12, 1983).

The absence of any such reference in the 2005 Act is particularly telling given the legislative history of the 1974 statute, and because Interior Department regulations asserted the authority to regulate hydraulic fracturing on federal lands. P. 8, supra. The 2005 Act's later silence on this issue confirms that Congress did not intend to repeal BLM's authority. See Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 846 (1986) (ruling that when Congress revisits a statute, failure to repeal existing agency interpretation is "persuasive evidence that the interpretation is the one intended by Congress"); United States v. Games-Perez, 667 F.3d 1136, 1141 n.2 (10th Cir. 2012) (similar).

2. SDWA And The 2005 Act Did Not Impliedly Repeal BLM's Authority Under The MLA Or FLPMA.

The States also are wrong in arguing that (regardless of their plain language) SDWA and the 2005 Act were intended to repeal BLM's existing statutory authority and bar any federal regulation of hydraulic fracturing on federal lands. State Br. at 7-10.

Implied repeals of prior legislation are disfavored. 1A Norman J. Singer, Statutes and Statutory Construction § 23:10, at 480-85 (6th ed. 2002); see also Posadas v. Nat'l City Bank of N.Y., 296 U.S. 497, 503 (1936) ("The cardinal rule is that repeals by implication are not favored."). Congressional intent to repeal prior legislation "must be clear and manifest." Town of Red Rock v. Henry, 106 U.S. 596, 602 (1883); accord Rodriguez, 480 U.S. at 524. An implied repeal is found only "when the earlier and later statutes are irreconcilable," Morton v. Mancari, 417 U.S. 535, 550 (1974), and courts interpret later legislation narrowly to avoid inconsistency with an earlier statute. Singer, supra, § 23:10, at 485-86.

There is nothing irreconcilable between SDWA and the 2005 Act, on one hand, and BLM's authority under FLPMA and the MLA on the other. Different agencies often regulate the same activity under different sources of authority. See, e.g., pp. 16-17, infra (describing dual

state-federal permitting of oil and gas development on federal lands); James A. Holtkamp, Access and Permitting for Oil and Gas Exploration, Drilling and Development, 1980 Rocky Mtn. Min. L. Inst. 3 (available on Westlaw at 12A RMMLF-INST 3) (1980 article listing both SDWA UIC permits and Interior Department approvals as required). Because SDWA and the 2005 Act's amendment of that statute are entirely compatible with BLM's continued exercise of authority on federal lands under FLPMA and the MLA, the States' argument must fail. Morton, 417 U.S. at 550; Singer, supra, § 23:10, at 485-86.

The States' implied repeal theory relies primarily on the legislative history of the 2005 Act. But that history also does not support their argument. For example, the States note that Section 322 of the Act was a legislative response to the ruling in Legal Environmental Assistance Foundation, Inc. (LEAF) v. EPA that Congress directed "all underground injection be regulated under the UIC programs." 118 F.3d 1469, 1474 (11th Cir. 1997); State Br. at 9. But the LEAF decision was limited solely to the scope of SDWA. See 118 F.3d at 1469 (stating that "[t]he issue…is whether [EPA] is legally required to regulate hydraulic fracturing…under the [UIC] programs established pursuant to [SDWA]"). Like the later 2005 Act, the LEAF decision does not mention BLM, FLPMA, or the MLA. See id.

The States also point to isolated remarks by legislators who were opposed to the 2005 Act. The States rely heavily on Representative Edward Markey's comment that the 2005 Act would "protect Halliburton from ever facing federal regulation of a practice of drilling for oil using the hydraulic fracturing technique . . . ." 151 Cong. Rec. H2192-02, H2194-95 (daily ed. Apr. 20, 2005); see State Br. at 10. Representative Markey, however, was plainly talking about broadly-applicable federal laws like SDWA that regulate activities occurring anywhere in this country. See 151 Cong. Rec. at H2194-95 (stating that the 2005 Act "tramples on the right of

State and local governments" and that other provisions allow for construction of liquefied natural gas facilities "right in the middle of densely populated cities…even though we know they would be the number one terrorist target constructed in that city"). Unlike the 1974 legislative history, Representative Markey made no mention of BLM or federal lands in this remark. This passing reference by a single legislator cannot be interpreted to reflect a Congressional intent to repeal BLM's long-established authority under federal lands statutes.[4]

Other Congressional remarks provide even less support for the States' position. See 151 Cong. Rec. S9335-01, S9337 (daily ed. July 29, 2005) (cited in State Br. at 10) (statement from Senator Feingold that the "bill also exempts hydraulic fracturing from the Safe Drinking Water Act") (emphasis added); see also 151 Cong. Rec. E1725-02, E1726 (daily ed. July 29, 2005) (similar statement from Rep. Udall) (emphasis added); 151 Cong. Rec. S9335-01, S9342 (daily ed. July 29, 2005) (similar statement from Sen. Feinstein). "[T]he totality of the legislative history," Rodriguez, 480 U.S. at 525, shows that Congress understood the 2005 Act only to address SDWA. The States cannot show a likelihood of success on the merits of their claim.

II. WYOMING AND COLORADO HAVE NOT SHOWN THAT THEY FACE IRREPARABLE HARM IN THE ABSENCE OF AN INJUNCTION.

The States claim they will suffer two forms of irreparable harm if the Rule takes effect: (a) impairment of an alleged "sovereign interest in . . . the regulation of hydraulic fracturing," and (b) "economic harm" from lost state revenue. State Br. at 16, 20. Both arguments fail.

[4] Similarly, the States quote an article noting that the 2005 Act "withdrew frac[k]ing from the realm of federal regulation." State Br. at 10 (quoting Hannah Wiseman, Untested Waters: The Rise of Hydraulic Fracturing in Oil and Gas Production and the Need to Revisit Regulation, 20 Fordham Envtl. L. Rev. 115, 145 (Spring 2009)). They neglect to note that the quoted line immediately followed a description of the SDWA amendment made by the 2005 Act. Wiseman, supra, at 145. And they ignore a passage later in the same paragraph recognizing that other federal statutes may still apply. Id. at 146 and n.159 (recognizing the "sporadic application of federal statutes" and citing example involving BLM land management decision).

A. The Rule Does Not Impair Any Sovereign Interest Of The States.

The States allege that BLM's decision to update its rules will irreparably harm them by impairing "the States' right to be the sole entity regulating hydraulic fracturing within their borders." State Br. at 18. States, however, have no such interest that could be impaired: on federal lands, they have no sovereign right to be the "sole" (or even the primary) regulator of oil and gas development or hydraulic fracturing.

The Constitution's "Property Clause gives Congress the power over the public lands 'to control their occupancy and use, to protect them from trespass and injury, and to prescribe the conditions on which others may obtain rights in them'." Kleppe v. New Mexico, 426 U.S. 529, 540 (1971) (quoting Utah Power & Light Co. v. United States, 243 U.S. 389, 405 (1917)). This power makes management of federal property – including federal mineral development – the prerogative of Congress. Id.; see also Ventura Cty., 601 F.2d at 1083. "State jurisdiction over federal land does not extend to any matter that is not consistent with the full power in the United States" under the Property Clause. Wyoming v. United States, 279 F.3d 1214, 1227 (10th Cir. 2002) (internal quotations omitted).

The federal government's authority over federal property does not preclude the application of all state laws. But "federal legislation necessarily overrides conflicting state laws under the Supremacy Clause . . . . [W]here [the] state laws conflict with . . . legislation passed pursuant to the Property Clause, the law is clear: The state laws must recede." Kleppe, 426 U.S. at 543; accord Calif. Coastal Comm'n v. Granite Rock Co., 480 U.S. 572, 580-81 (1987); see e.g., Tex. Oil & Gas Corp., 406 F.2d at 1304 (state police power can apply on federal land "unless and until the federal government has asserted its constitutionally paramount power by appropriate statute and regulation"); Ventura Cty., 601 F.2d at 1083-86 (local zoning regulation

that conflicted with federally-approved oil and gas development on national forest was preempted by MLA and other federal statutes).

Congress has delegated its authority under the Property Clause to the Interior Department through FLPMA and the MLA. Because those statutes vest authority with the Department, the States cannot claim to have any sovereign interest in being the sole regulator of hydraulic fracturing on federal land. See N. Arapaho Tribe v. Burwell, No. 14-cv-247-SWS, 2015 WL 872190, **15-16 (D. Wyo. Feb. 26, 2015) (rejecting argument that tribe suffered irreparable harm from Affordable Care Act regulations infringing on its sovereign authority where tribe unlikely to succeed on merits of that claim).

Nor can the States show that any sovereign interests they do have are impaired merely by BLM's adoption of the Rule. The cases cited by the States found injuries to state sovereign interests based on much different facts. Kansas v. United States involved a federal decision by the National Indian Gaming Commission that certain privately-owed lands in Kansas were "[I]ndian lands" under the jurisdiction of the Miami Tribe. 249 F.3d 1213, 1218-19 (10th Cir. 2001). Absent that decision, the State of Kansas "exercise[d] a degree of sovereignty over the tract which allows it the right to prohibit gaming thereon . . . ." Id. at 1223. By granting them "[I]ndian land" classification, however, the decision extended the tribe's sovereignty over those lands and meant that the State of Kansas "may not extend application of its laws to the tract absent Congressional consent." Id.

In contrast, the Rule does not transfer jurisdiction over any lands or change their legal status. The Rule applies only to lands and minerals owned by the federal government, where (regardless of the Rule) the federal government is the primary sovereign. The Rule simply addresses how BLM will administer its own decisions for activities on federal lands.

The other case cited by the States involved the preemption of state law by a federal statute. See Wyoming ex rel. Crank v. United States, 539 F.3d 1236, 1242 (10th Cir. 2008) (Wyoming had Article III standing to challenge application of federal firearms statute that conflicted with state statute). That also is not the situation here: the States do not assert that the Rule preempts all state oil and gas regulation of well construction, waste management, and hydraulic fracturing.[5] Colorado and Wyoming can continue to enforce their own rules on federal lands, side by side with the federal requirements.

A company working on federal land already is required to obtain drilling permits and other approvals both from BLM and the state agency, and the Rule does not change that. BLM's preamble states: "Operators on Federal leases must comply both with this rule and any applicable state requirements, just as they already must comply with both BLM rules and state rules on a variety of drilling and completion issues." 80 Fed. Reg. at 16178; see also id. at 16220-21 (43 C.F.R. § 3162.3-3(i)(8)) (requiring companies to certify that fracturing chemicals comply with both state laws and federal laws). In Colorado, for example, the state Oil and Gas Conservation Commission has a memorandum of understanding with BLM describing how the agencies will coordinate their administration of dual permitting systems on federal lands. See Memorandum of Understanding (2009) ¶¶ B, H, I, attached as Ex. 2. The same approach can be used to implement the Rule. Wyoming and Colorado will not suffer irreparable injury from coordinating

[5] If the application of a particular state requirement operationally conflicts with the Rule – "that is, when it is impossible to comply with both state and federal law," Granite Rock, 480 U.S. at 581 – the state requirement would be preempted. But in this facial challenge to the Rule, there is no basis to assume that the States will suffer an imminent injury from having their laws preempted. See id. at 588-89 (rejecting preemption challenge to state environmental law where state agency had not yet imposed any permit conditions on mining activity in question). Moreover, BLM's Rule has several provisions to accommodate state regulations. BLM states that "[t]his rule does not preempt any more stringent state or tribal law." 80 Fed. Reg. at 16178. Moreover, to the extent state regulations are more protective than the Rule, BLM has provided for variances allowing the state law to apply instead of the federal rule. Id. at 16130.

with BLM on implementing the Rule, just as they have done for years with existing oil and gas regulations.

B. The States Do Not Demonstrate That They Will Suffer Lost Mineral Or Tax Revenue As A Result Of The Rule.

In addition, the States assert that they "are likely to suffer economic harm" because "the length of time it will take to obtain approval" for operations on federal lands supposedly will slow "the flow of mineral and severance tax revenues to the States" and cost jobs by leading companies to start drilling in states with fewer public lands. State Br. at 20-21. This is nothing more than unsupported speculation.

To support a preliminary injunction, a threatened injury must be imminent and "certain, great, actual 'and not theoretical.'" Heideman v. S. Salt Lake City, 348 F.3d 1182, 1189 (10th Cir. 2003) (quoting Wis. Gas Co. v. FERC, 758 F.2d 669, 674 (D.C. Cir. 1985)). "Speculation or unsubstantiated fear of what may happen in the future cannot provide the basis for a preliminary injunction." Schrier v. Univ. of Colo., 427 F.3d 1253, 1266 (10th Cir. 2005). The States offer no evidence that they face any "actual" economic injury that is "certain" to occur. Heideman, 348 F.3d at 1189. Instead, they offer only "theoretical" speculation that the Rule may affect revenues in the future. Id.

Colorado fails to offer any evidence to support its claim of irreparable injury. Colorado cites various figures noting the amount of federal mineral revenues and severance tax revenues it receives. State Br. at 21. But it offers no affidavits or other evidence showing that those revenues will decline if the Rule takes effect. There is thus no basis to conclude that Colorado will suffer an economic injury. See Heideman, 348 F.3d at 1189 (affirming denial of injunction where plaintiffs failed to offer evidence supporting attorney's argument about irreparable harm).

Wyoming's claims also involve unsupported speculation. Wyoming contends that as a result of the Rule "the length of time it will take to obtain approval [from the federal government] on a permit or notice of intent [to drill] will increase." State Br. at 20. The only support offered for this charge is a conclusory affidavit stating that the workload of reviewing hydraulic fracturing plans "can reasonably be expected to increase" approval times. Dkt # 32-2 ¶ 27. That affidavit acknowledges, however, that it is "unknown" how much additional time may be required. Id.

BLM disagrees that the Rule will force companies to suffer significant approval delays. The Rule allows companies to seek approval of hydraulic fracturing operations as part of the existing drilling permit process, 80 Fed. Reg. at 16218 (43 C.F.R. § 3162.3-3(c)(1)), in which case no new delays would result. "BLM believes that the additional information that would be required by this rule would be reviewed in conjunction with the [application for permit to drill (APD)] and within the normal APD processing timeframe." Id. at 16177. In addition, the Rule allows a company to submit a "master hydraulic fracturing plan" (MHFP) to obtain approval for fracturing multiple wells. Id. at 16217-218 (43 C.F.R. §§ 3162.3-3(c)(3), 3160.0-5). An MHFP allows BLM to "frontload" and "streamline" the approval process for hydraulic fracturing operations, which should avoid delays. Id. at 16147-48.

BLM did acknowledge that "further processing time should be expected" if companies fail to take advantage of either of the procedures described above. Id. at 16177. But the preamble estimated that applications would require "only 4 hours of additional review time" by agency staff. Id. at 16196. "This does not present a measureable delay in processing time." Id. Moreover, companies for whom delay is a concern can be expected to follow the streamlined

procedures above. Wyoming has not shown that the Rule will result in any processing delays substantial enough to impact oil and gas production.[6]

Even more speculative is Wyoming's assertion that any potential increase in approval times will cause oil and gas companies to flee federal lands in that state. State Br. at 20. The declaration offered to support this claim states that the "potentially long wait times for approval will encourage [Wyoming] operators to invest more money in wells in other states that are not affected by the BLM rule." Dkt # 32-2 ¶ 39. Wyoming's declarant, however, offers no basis to conclude that federal approval times will have any meaningful impact on the level of development and production in that state. This falls far short of what is required to establish irreparable harm. See Schrier, 427 F.3d at 1266 (claim of "lost opportunities" by terminated employee was too speculative to support finding of irreparable harm where plaintiff "provided no evidence of actual lost opportunities").

The Tenth Circuit has rejected a very similar attempt by Wyoming to challenge a federal regulation. In Wyoming v. United States Department of Interior, 674 F.3d 1220 (10th Cir. 2012), the State challenged a Department of Interior regulation limiting snowmobile use in Yellowstone National Park. Wyoming claimed that it had Article III standing to challenge the regulation because the limits would affect tourism and result in lost tax revenues. Id. at 1231-34. The Tenth Circuit ruled that Wyoming lacked standing because the State failed to offer evidence

[6] Moreover, to the extent Wyoming asserts that its flow of mineral and tax revenues will be "slowed" rather than lost, that does not represent irreparable harm. Should this Court set aside the Rule following briefing on the merits of the case, any delays will end. See Heideman, 348 F.3d at 1189-90 (no irreparable harm where company would be able to "resume their [business activities] in the event they prevail on the merits"). In fact, because oil and gas prices are so low today, any hypothetical delay in production while this case is pending could actually benefit the States. If oil and gas prices increase, and the Rule is later struck down, the value of later oil and gas production – and thus royalties and tax revenue – will increase. See Dkt # 32-3 ¶ 5 (Wyoming affidavit explaining that state taxes are assessed based on "fair market value" of oil and gas produced).

showing that it would suffer an injury from lost tax revenues. Affidavits offered by the State (and a Wyoming county) were "conclusory" and "provide[d] no underlying evidence to support [the] claim that a reduction in revenue even exists . . . . [or that] revenues will decrease in the future." Id. at 1232. The Tenth Circuit held that evidence "consisting of conclusory statements and speculative economic data are insufficient to lead us to any other conclusion," id. at 1233-34, than that Wyoming had failed to demonstrate any "injury in fact" that was more than "conjectural or hypothetical." Id. at 1231 (internal quotation omitted).

The same is even more true here: the States are relying on unsupported conclusory statements not just to support their standing to bring this case, but to seek the extraordinary relief of a preliminary injunction.[7] Wyoming's speculation about lost taxes and mineral revenue fails to establish irreparable harm.

More broadly, Wyoming's premise that BLM approval times will limit oil and gas development on federal lands is fundamentally flawed. Numerous factors go into a company's decisions on where to drill, and most of them have a far greater impact on the economics of an oil and gas project than permit processing times. These considerations include, for example:

- Natural gas and oil prices;
- The potential production of oil or gas from a well;
- Technical and geological challenges in recovering a given oil or gas deposit;
- The cost of drill rigs and other equipment, as well as labor costs, in an area;
- The availability of existing gathering systems and pipelines in an area to transport oil and gas to the market;
- Whether the company holds a large block of leases or mineral rights in the area;

[7] The Tenth Circuit's decision also establishes that to the extent Wyoming and Colorado rely on hypothetical lost revenues, they lack standing to bring this case at all.

- When the company's leases may expire;
- Whether drilling units, spacing orders, or contractual agreements limit production in an area, or require that it occur within a certain time frame;
- The relative severance tax and other tax rates in different jurisdictions; and
- State and local hydraulic fracturing moratoria and other regulatory requirements.

See, e.g., WPX Energy, Inc. Form 10-K (2014 Annual Report) at 4, 17, 27-30 (attached as Ex. 3); id. at 5, 16-17, 22-23, 36.[8]

These factors are likely to have a much greater impact on a company's development decisions than federal permit processing times. Given the numerous other considerations involved, the States have not shown that the time required for approvals under the Rule would have any measureable impact on the development plans of companies working in Wyoming or Colorado. And there is absolutely no basis to conclude that the Rule will result in any systemic or widespread impact that would affect state revenues.

BLM statistics illustrate this point. Under existing rules, processing times for BLM drilling permits already take longer than they do for Wyoming state approvals. Dkt # 32-2 ¶ 27. Oil and gas companies nevertheless have stockpiled nearly 2,000 approved federal permits in Wyoming that they are not drilling. Dkt # 45-4 at 284. Undoubtedly, Wyoming could generate more taxes and federal mineral revenues if oil and gas companies chose to use these permits. But that loss of revenue cannot be blamed on BLM – instead, companies are making decisions not to drill these wells for a variety of reasons unrelated to permit approval times (such as the factors listed above). Wyoming offers no basis to conclude that the modest changes made by the Rule will reverse this situation or have any measurable impact on state revenues.

[8] Available at: http://d1lge852tjjqow.cloudfront.net/CIK-0001518832/25599b57-fa32-4ea6-ae83-0469799a5bcc.pdf (last viewed June 10, 2015).

III. THE BALANCE OF EQUITIES AND PUBLIC INTEREST WEIGH AGAINST INJUNCTIVE RELIEF.

The other two factors – the balance of equities and the public interest – also support denial of the States' motion.[9] The States are not asking the Court to maintain the status quo on the ground. Instead, they seek to allow companies to drill thousands of new oil and gas wells with outdated and inadequate rules while this case is pending. See 80 Fed. Reg. at 16130 (estimating Rule will affect 2,800-3,800 operations per year). Such an outcome would have a substantial adverse impact on the environment and members of the public who are affected by oil and gas development on public lands. For that reason, the public interest and balance of equities strongly weigh against granting the relief sought by the States.

First, as discussed in response to the preliminary injunction motion filed by Western Energy Alliance, et al. (the Industry Associations), the balance of equities and public interest favor BLM because it is exercising its statutory authority to protect public lands and the environment. See Dkt # 45 at 11-32; Safari Club Int'l v. Salazar, 852 F. Supp. 2d 102, 125 (D. D.C. 2012); N. Arapaho Tribe, 2015 WL 872190 at *16. That public interest is underscored by the almost 1.35 million public comments submitted to BLM urging the agency to adopt protections as strong as or stronger than those in the Rule.

Second, the environmental benefits of the Rule weigh against injunctive relief. The Rule represents a much-needed update to BLM regulations. It will benefit numerous members of the public by reducing damage to land, water and wildlife from waste pits, by protecting aquifers from contamination due to well construction defects and hydraulic fracturing-related accidents,

[9] The Citizen Groups address the balance of equities and public interest factors together because they overlap to a great degree in this case. See Nken v. Holder, 556 U.S. 418, 435 (2009) (balance of harms and public interest factors for stay "merge when the Government is the opposing party").

and by providing informational tools so that members of the public can better protect their health and safety. See Dkt # 45 at 11-32 (response to Industry Associations' motion); Dkt ## 38-2, 38-3 (declarations supporting intervention). Preserving the environmental benefits of the Rule advances the public interest and outweighs the minimal impacts to the States and Industry Associations. See Dkt # 45 at 11-32; Amoco Prod. Co. v. Vill. of Gambell, Alaska, 480 U.S. 531, 545 (1987); Kootenai Tribe of Idaho v. Veneman, 313 F.3d 1094, 1124-25 (9th Cir. 2002); San Luis Valley Ecosystem Council v. U.S. Fish & Wildlife Serv., 657 F. Supp. 2d 1233, 1242 (D. Colo. 2009); Wilson v. Amoco Corp., 989 F. Supp. 1159, 1177-78 (D. Wyo. 1998).

The States' contrary arguments are meritless. First, they assert that an injunction would "likely save taxpayer money by not implementing an illegal program . . . . at taxpayer expense." State Br. at 23 (balance of equities), 23-25 (similar arguments on public interest). These theories fail because the States have not shown a likelihood of success on the merits of their claim that BLM lacks legal authority to adopt the Rule. BLM has ample authority to issue the Rule under FLPMA, the MLA, and other statutes. Nothing in SDWA or the 2005 Act narrowed that authority. See pp. 9-13, supra; see also, N. Arapaho Tribe, 2015 WL 872190 at *16 (ruling that balance of harms and public interest did not support injunction against agency regulations that were authorized by Congress).

Additionally, the States argue that "there is minimal risk to the environment" from enjoining the Rule because "States already adequately regulate hydraulic fracturing" and the Rule will not "provid[e] a benefit to the environment." State Br. at 2, 23-24. But the only evidence offered to support this claim is an affidavit discussing Wyoming's rules. The States provide no reason to doubt that the Rule will provide environmental benefits in Colorado and numerous other states where oil and gas development occurs on federal lands. As BLM

described in its preamble, "regulations continue to be inconsistent across states." 80 Fed. Reg. at 16178. Many states lack the protections included in BLM's Rule, and no state appears to have regulations that match the protections of the BLM regulations across the board. Dkt # 45 at 19.

Moreover, Wyoming's claim that the Rule provides no environmental benefits in that state because its rules are "more protective of groundwater than the BLM rule" does not withstand scrutiny. Dkt # 32-2 ¶ 14 (supporting declaration). For example, the Rule's definition of the "usable water" that must be protected from contamination appears to be broader than what Wyoming requires. See 80 Fed. Reg. at 16217 (43 C.F.R. § 3160.0-5 definition of "usable water" includes "zones designated by the state . . . as requiring isolation or protection from hydraulic fracturing operations" but also includes other aquifers). The Rule also imposes specific requirements that companies monitor and record cementing operations to ensure they protect usable water zones, and requires submittal of a report to BLM in advance of hydraulic fracturing. Id. at 16219 (43 C.F.R. § 3162.3-3(e)). Wyoming's rules do not. See Wyoming Oil and Gas Conservation Commission Operation and Drilling Rules (WOGCC Rules), Ch. 3, Section 8(c)(viii).[10] Unlike Wyoming, the BLM Rule also requires a successful mechanical integrity test of all wells before hydraulic fracturing operations. 80 Fed. Reg. at 16219 (43 C.F.R. § 3162.3-3(f)); compare WOGCC Rules Ch. 3, Section 45(a) (WOGCC "may require" a mechanical integrity test prior to fracturing).

In addition, the BLM Rule requires submittal of more detailed information from companies in advance of hydraulic fracturing operations. This information includes identifying (a) the confining zone that protects usable water sources, (b) existing faults and other wells nearby, (c) the sources and location of water used for fracturing, as well as (d) the estimated

[10] Available at: http://soswy.state.wy.us/Rules/RULES/9584.pdf (last visited June 10, 2015).

volume of fluids to be recovered and (e) how they will be managed. 80 Fed. Reg. at 16218-219 (43 C.F.R. § 3162.3-3(d)); compare WOGCC Rules Ch. 3, Section 45(c)-(e) (less detailed Wyoming requirements). Requiring submittal and review of this information in advance allows BLM to prevent frack hits and other accidents, rather than trying to remediate them after they occur. See 80 Fed. Reg. at 16147, 16181-82 (describing this purpose); compare Dkt # 32-2 ¶ 21 (describing how Wyoming regulations allow WOGCC "to determine if hydraulic fracturing operations **did** in fact create a 'frack hit.'") (emphasis added). All of these benefits will be lost in Wyoming if BLM's Rule is enjoined.

Wyoming identifies a few areas that are addressed under state regulations but not the BLM Rule. See, Dkt # 32-2 ¶¶ 14, 20-21 (discussing pre-fracturing chemical disclosure, and certain more detailed post-fracturing disclosures); id. ¶ 18 (Wyoming rules cover acidizing in addition to hydraulic fracturing); compare 80 Fed. Reg. at 16144, 16149.[11] Nothing in the BLM Rule, however, prevents the State from continuing to apply these requirements. Instead, BLM makes clear that "Operators on federal leases must comply both with this rule and any applicable state requirements." See 80 Fed. Reg. at 16178.

In short, the BLM Rule is designed to give groundwater and the environment the benefit of both state and federal regulations, depending on which is most protective. The public interest and balance of equities support maintaining the stronger federal protections while this case is pending.

[11] Wyoming also asserts that BLM's Rule "allows pits . . . to be located within 300 feet of a residence, school, park, etc." while the State requires that pits and other equipment be at least 500 feet away from occupied structures. Dkt # 32-2 ¶ 19; see 80 Fed. Reg. at 16220 (43 C.F.R. § 3162.3-3(h)(1)(iv)). This claim ignores the details of the BLM Rule, which generally prohibits pits for interim storage of flowback fluids and produced water. 80 Fed. Reg. at 16220 (43 C.F.R. § 3162.3-3(h)). The 300-foot setback only applies in exceptional circumstances – otherwise, the company is required to use tanks instead of pits. Id. In contrast, Wyoming allows companies to use pits. WOGCC Rules Ch. 3, Section 45(j).

CONCLUSION

For the reasons stated above, the States' preliminary injunction motion should be DENIED.

Dated: June 12, 2015

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CERTIFICATE OF SERVICE

I hereby certify that on June 12, 2015, I filed a true and correct copy of **RESPONDENT-INTERVENORS' BRIEF IN OPPOSITION TO STATE PETITIONERS' MOTION FOR PRELIMINARY INJUNCTION** via the Court's ECF system, with notification sent to those listed below.

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