Nos. 15-8126, 15-8134

IN THE

United States Court of Appeals for the Tenth Circuit

STATE OF WYOMING, *et al.*,

Petitioners-Appellees,

and

STATE OF NORTH DAKOTA, *et al.*,

Intervenors-Appellees,

v.

U.S. DEPARTMENT OF THE INTERIOR, *et al.*,

Respondents-Appellants,

and

SIERRA CLUB, *et al.*,

Intervenors-Appellants.

Appeal from the United States District Court for the District of Wyoming,
Civil Action Nos. 2:15-cv-00043-SWS, 2:15-cv-00041-SWS
The Hon. Scott W. Skavdahl, Presiding

BRIEF FOR AMICUS CURIAE THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF APPELLEES AND AFFIRMANCE

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June 1, 2016

CORPORATE DISCLOSURE STATEMENT

The Chamber of Commerce of the United States of America is a nonprofit corporation organized under the laws of the District of Columbia. It has no parent company and has issued no stock. *See* Fed. R. App. P. 26.1.

/s/ Jonathan S. Franklin
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RULE 29(a) STATEMENT OF CONSENT

Pursuant to Fed. R. App. P. 29(a), amicus curiae The Chamber of Commerce of the United States of America states that all parties have consented to the filing of this brief.

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INTEREST OF AMICUS CURIAE

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation.[1] It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry, from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, it regularly files amicus curiae briefs in cases raising issues of concern to the Nation's business community, including the regulation and development of U.S. shale energy resources.

SUMMARY OF THE ARGUMENT

The district court correctly imposed a preliminary injunction, and its order should be affirmed. Even if the Bureau of Land Management ("BLM") had the authority to issue the proposed rule (which it did not), it failed to articulate any rational connection between the relevant facts and its decision. The district court correctly determined that the BLM failed to adequately explain any need for additional regulation, provided no evidence in support of the efficacy of its

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the amicus curiae, its members, or its counsel made a monetary contribution to its preparation or submission. All parties have consented to the filing of this brief.

approach, and substantially underestimated the costs of compliance. Further, it failed to balance the non-existent benefits of its rule against the costs that this unnecessary regulation would impose on a critical sector of the U.S. economy.

The BLM's rule is an unnecessary intrusion into an already heavily regulated field. States have been at the vanguard of shale energy development. The mere fact that state regulations may differ in some respects does not justify federal intrusion. The BLM pointed to no safety or other concern that its regulations would address that is not already comprehensively addressed by state regulation. The BLM's failure to provide a reasoned explanation why its rules were necessary renders them arbitrary and capricious. Moreover, because the BLM failed to identify a "regulatory gap" in the existing regulations, there is no need for this Court to rescind the preliminary injunction granted by the district court.

Further, the BLM failed to meaningfully weigh the costs of its rule against the benefits (if any). The BLM substantially underestimated the costs of compliance with the proposed rule. Specifically, the BLM failed to adequately address the potentially devastating cost of forcing U.S. businesses to disclose confidential information and trade secrets. Apart from these immediate costs, the overlapping state and federal regulatory regimes would impose procedural burdens on operators with no direct benefit to the environment or public health. For tribes

and U.S. taxpayers, the rule would cause economic losses in the form of substantially reduced royalties and tax revenues, as operators are driven towards oil and gas production on non-federal land.

Finally, the balance of equities and public interest weigh overwhelmingly in favor of affirmance of the preliminary injunction, as the BLM's rule, if allowed to take effect, would unnecessarily diminish the major economic and strategic benefits of hydraulic fracturing (or "fracking") to the U.S. economy without providing any additional protection for the environment or public health. The shale revolution has created unprecedented economic opportunities by increasing U.S. GDP, job growth, manufacturing investment, and government revenues. Hydraulic fracturing has increased disposable income, lowered the cost of living, and improved U.S. energy security. By arbitrarily implementing a costly and unnecessary rule that overlaps with existing state regulations, the rule threatens to cause yet further significant harm to a vital sector for the U.S. economy that is already suffering from historic price declines. The district court therefore properly issued a preliminary injunction to preserve the status quo pending a final decision on the merits.

ARGUMENT

On March 26, 2015, the BLM issued a final rule designed to regulate hydraulic fracturing on federal and Indian lands. *See* 80 Fed. Reg. 16,128 (Mar.

26, 2015) (the "BLM rule"). As a threshold matter, the district court correctly held that "Congress has not authorized or delegated to the BLM authority to regulate hydraulic fracturing." Order on Mots. for Prelim. Inj. at 53 (Sept. 30, 2015), Dkt. 130 ("Order"). But even if the agency were acting within the scope of its authority, the BLM's decision must be set aside as arbitrary and capricious. *See Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1573-74 (10th Cir. 1994).

"The duty of a court reviewing agency action under the 'arbitrary or capricious' standard is to ascertain whether the agency examined the relevant data and articulated a rational connection between the facts found and the decision made." *Id.* at 1574 (footnote omitted) (quoting *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). The Court "must determine whether the agency considered all relevant factors and whether there has been a clear error of judgment." *Id.* Further, "[i]n determining whether [an agency's] decision is supported by substantial evidence, 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).

In this case, the BLM failed to substantiate that there is a regulatory gap under state law, or extant safety concerns, that its rule was necessary to address. The agency also failed to provide reasoned explanation sufficient to support the efficacy of its approach, and vastly underestimated the costs of compliance to U.S.

businesses. Further, it failed to balance the significant benefits of hydraulic fracturing with respect to the U.S. economy, individual consumers, and U.S. energy security—benefits that the proposed BLM rule would diminish. Instead, the agency proposed a solution in search of a problem. The BLM unnecessarily intruded into an already heavily regulated area, and sought to impose an additional layer of overlapping regulation that duplicates and at times contradicts the existing regulatory framework, without identifying benefits that would exceed the rule's significant costs. Accordingly, for this reason the Chamber urges the Court to affirm the preliminary injunction issued by the district court.

I. THE BLM'S RULE IS AN UNNECESSARY INTRUSION INTO AN ALREADY HEAVILY REGULATED FIELD.

The BLM rule focuses on three aspects of oil and gas development: (1) wellbore construction standards; (2) public disclosure of chemical additives; and (3) water management policies. It would set new federal standards for hydraulic fracturing on roughly 700 million acres of public land as well as 56 million acres of Indian land. *See* 80 Fed. Reg. at 16,129.

Each of these aspects of hydraulic fracturing, however, is already subject to comprehensive regulations under existing state and federal law. As the district court held, although the BLM looked at how state regulations differed in some ways from one another and its proposed federal rule, "there is no discussion of how any existing state regulations are inadequate to protect against the perceived risks

to groundwater." Order at 27. In particular, the BLM "fail[ed] to identify any states that do not have regulations adequate to achieve the objectives of the Fracking Rule, nor does the BLM cite evidence that its rule will be any more effective in practice than existing state regulations protecting water and other environmental values. Indeed, the record supports the contrary." *Id*. As a result of this failure by the BLM to "'articulate a satisfactory explanation for its action including a rational connection between the facts and the choice made,' the Fracking Rule is likely arbitrary, requiring that it be set aside." *Id*. (quoting *Sorenson Commc'ns, Inc. v. FCC*, 567 F.3d 1215, 1220-21 (10th Cir. 2009)).

This decision was correct and should be affirmed. Even if the BLM had the statutory authority that it claims, it failed to provide a reasonable explanation as to why that authority should be exercised in an area already subject to extensive state regulation.

A. Hydraulic Fracturing Is A Heavily Regulated Industry.

State governments historically have been the primary regulators of oil and gas development, a pattern that has remained consistent throughout the shale energy boom. *See* Nathan Richardson et al., Resources for the Future, *The State of State Shale Gas Regulation*, at 5 (June 2013) (www.rff.org/research/publications/state-state-shale-gas-regulation). In part, this is because the vast majority of hydraulic fracturing in the United States is done on state and private land and is

governed by state and local regulations. Michael E. Porter et al., Harvard Bus. Sch., *America's Unconventional Energy Opportunity*, at 8 (June 2015) (www.hbs.edu/competitiveness/Documents/america-unconventional-energy-opportunity.pdf) ("Only a small minority of [shale energy development] operations occur on federal lands and are largely catching up to rules that states already have in place."). As a result, states have developed comprehensive regulations of shale energy resources. *See, e.g.*, Molly Feiden et al., Resources for the Future, *Hydraulic Fracturing on Federal and Indian Lands*, at 9 (Aug. 2013) (www.rff.org/research/publications/hydraulic-fracturing-federal-and-indian-lands-analysis-bureau-land-management) ("All western states with large shale gas reserves and significant federal land holdings regulate oil and gas development and have done so for decades."). Where Congress has deemed it appropriate, the federal government also regulates significant aspects of the process.[2]

The BLM has not denied that state regulation of hydraulic fracturing is pervasive, nor has it provided evidence of a regulatory gap left by the states.

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[2] For example, federal agencies enforce regulations regarding the potential impact of development projects on air quality and endangered species. *See, e.g.*, Clean Air Act, 42 U.S.C. §§ 7401-7431 (conferring authority on the Environmental Protection Agency to regulate potential threats to air quality); Endangered Species Act, 16 U.S.C. §§ 1531-1544 (requiring operators to consult with the U.S. Fish & Wildlife Service and potentially obtain an "incidental take" permit if the planned activity may affect a protected species); *see also* Richardson et al., *supra*, App. 2 at 6-11 (exploring the division of authority among levels of government regarding shale gas activities).

Instead, the BLM's rationale for imposing additional federal regulation in the area is that state regulation is not uniform. *See* 80 Fed. Reg. at 16,130, 16,133, & 16,154. But as the district court held, "a desire for uniformity, in itself, is insufficient," Order at 27, given that the agency has pointed to no environmental or public health issue that its rules would address that is not already addressed by existing regulations. In these circumstances, the BLM's rules would merely add to the disuniformity by imposing an extra unnecessary layer of superfluous requirements that would increase the regulatory burden on operators while doing nothing at all to protect health or safety.

As the BLM recognized, absent preemption "[a]ll state laws apply on Federal lands," and "[o]perators on Federal leases must comply both with [the BLM] rule and applicable state requirements." 80 Fed. Reg. at 16,178. And state regulation of hydraulic fracturing is comprehensive and pervasive. Among other aspects, states regulate "the location and spacing of well sites, the methods of drilling, casing (lining), [hydraulic fracturing], and plugging wells, the disposal of most oil and gas wastes, and site restoration." Richardson et al., *supra*, at 5. States use a variety of regulatory tools, "from command-and-control regulations to more

flexible performance standards and case-by-case permitting." Richardson et al., Executive Summary, *supra*, at 2.[3]

The BLM provided no evidence that state regulation is inadequate in order to justify its heavy-handed intrusion on that authority. As noted, the district court correctly held that the BLM provided "no discussion of how any existing state regulations are inadequate to protect against the perceived risks to groundwater." Order at 27. Indeed, the BLM has been unable to identify a single groundwater contamination incident that the proposed rule would have prevented, "nor offered any analysis measuring, even in estimate form, the risk of environmental harm that the rule purports to prevent." Order at 47. The BLM rule is therefore a solution in search of a problem.

As a Harvard Business School study noted, "[t]he federal government positioned the rules as a new blueprint for states to follow," but "in reality most states are already leading." Porter et al., *supra*, at 8. Indeed, the relevant states already have well-established regulatory regimes for oil and gas. In FY 2014, the BLM approved 3,769 applications for permit to drill on federal lands in 18 states. Bureau of Land Mgmt., *Public Land Statistics 2014*, at 117, Table 3-16 (May

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[3] For example, "a state might require wells to be cased and cemented to a specific depth below the water table (a command-and-control rule), to a level sufficient to protect all 'freshwater bearing zones' (a performance standard), or it might require each well's casing and cementing to be reviewed before issuing a permit (case-by-case permitting)." *Id.*

2015) (www.blm.gov/public_land_statistics/pls14/pls2014.pdf). Over 97% of the approved permits were for just seven states: California, Colorado, Montana, New Mexico, North Dakota, Utah, and Wyoming. Since the beginning of 2010, all seven of those states have revised their hydraulic fracturing regulations. *See* Cal. Code Regs. tit. 14, §§ 1780-1789; Colo. Code Regs. §§ 404-1:205, 404-1:205a, 404-1:305.e, 404-1:316c, 404-1:317, 404-1:341, 404-1:903, 404-1:904; Mont. Admin. R. 36.22.608, 36.22.1010, 36.22.1015, 36.22.1016, 36.22.1106; N.M. Code R. 19.15.16; N.D. Admin. Code 43-02-03-27.1; Utah Admin. Code r. 649-3-39; 55-3 Wyo. Code R. §§ 45(d)(iv), 45(d)(vi), 45(f), 45(g).

Of the eleven states that accounted for less than three percent of approved permits on federal and Indian lands, nearly all have amended their regulations for hydraulic fracturing. *See* Alaska Admin. Code tit. 20, §§ 25.005, 25.280, 25.283, 25.990; La. Admin. Code tit. 43:XIX § 118; 26-2 Miss. Code R. § 1.26; Nev. Admin. Code §§ 522.010-522.540; Ohio Admin. Code 1509.01-1509.99; Okla. Admin. Code §§ 165:10-3-4, 165:10-3-10, 165:10-7-16, 165:10-21-22; S.D. Admin. R. 74:12:02:19; 16 Tex. Admin. Code §§ 3.13, 3.29, 3.99, 3.100. From FY 2010 to FY 2013, the number of well completions in nine states—California, Colorado, Montana, New Mexico, North Dakota, Oklahoma, Texas, Utah, and Wyoming—accounted for 99.3% of the total well completions on federal and Indian lands nationwide. 80 Fed. Reg. at 16,187.

As the data demonstrates, all the states in which any meaningful amount of hydraulic fracturing occurs on federal and Indian lands already heavily regulate the process. The BLM has failed to identify any gap in the existing regulations, because there is simply no "regulatory gap" for the BLM to fill, and its failure to provide a reasoned explanation as to why its rules were necessary in the absence of such a gap renders them arbitrary and capricious.

B. Compliance With The Overlapping State And Federal Regulatory Regimes Would Significantly Harm U.S. Businesses.

The BLM also failed to meaningfully weigh the costs of its proposed rule against the non-existent benefits. *See Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015) ("Consideration of cost reflects the understanding that reasonable regulation ordinarily requires paying attention to the advantages *and* the disadvantages of agency decisions.") (emphasis in original); *see also id.* ("No regulation is 'appropriate' if it does significantly more harm than good."). Given the non-existent basis for federal intrusion into an area already comprehensively and effectively regulated by the states, the BLM erred in failing to adequately address the significant costs that this unnecessary regulation would impose on an industry already facing significant price decreases. *Cf. id.* ("One would not say that it is even rational, never mind 'appropriate,' to impose billions of dollars in economic costs in return for a few dollars in health or environmental benefits.").

If the BLM's rule were allowed to go into effect, U.S. businesses in the shale energy industry would suffer at least two sources of immediate injury—the direct costs of compliance with multiple regulatory regimes, and harm from the disclosure of trade secrets and confidential information. *See* Order at 42.

With respect to the former, the BLM has significantly underestimated the costs of compliance with virtually every aspect of its rule. *See id.* ("Evidence in the record suggests the BLM has significantly underestimated the compliance costs."). According to the BLM, the annual cost of complying with the rule is approximately $32 million. 80 Fed. Reg. at 16,130. Other analyses, however, found that the BLM estimate was wildly inaccurate. Even excluding elements such as water testing and fracture modeling costs, an evaluation by an outside economic consulting firm estimated the annual cost of compliance to be $345 million. *See* Independent Petroleum Ass'n of Am., *Comments on BLM's Hydraulic Fracturing Rulemaking Proposal*, at 59 & n.92 (Aug. 22, 2013) (www.regulations.gov/#!documentDetail;D=BLM-2013-0002-5410); *see also id.* App. A (Economic Assessment by John Dunham & Associates). The BLM, moreover, arrived at its estimate by assigning a compliance cost of zero to a number of requirements to which operators have never before been subject. *See, e.g.*, 80 Fed. Reg. at 16,198 (assigning incremental cost of "$0" to requirement that operators perform mechanical integrity test ("MIT")); *id.* at 16,160 (acknowledging that the MIT

required by the rule "is not equivalent" to the pressure tests that operators currently perform); *id.* at 16,142 & 16,196 (assigning incremental cost of "$0" to redefinition of "usable water" that imposes additional burdens on operators). This assertion—that operators will somehow be able to comply with costly regulations for nothing—evidences the speculation, rather than reasoning, underlying the BLM's rule.

In addition, the harm to U.S. businesses that are forced to disclose valuable trade secrets and confidential information may be incalculable. *See FMC Corp. v. Taiwan Tainan Giant Indus. Co., Ltd.*, 730 F.2d 61, 63 (2d Cir. 1984) (per curiam) ("A trade secret once lost is, of course, lost forever."). For many businesses, confidential information relating to geology and extraction techniques is the source of their competitive advantage. Forcing businesses to disclose this information with little meaningful assurance of confidentiality could be financially devastating.

Apart from these immediate costs, U.S. businesses would be forced to comply with overlapping layers of regulation that may duplicate or even contradict existing regulations. If the BLM rules are different from state or tribal regulations, "operators would appear to be left with two layers of regulation," which "may require operators on federal lands in many cases to interact with multiple layers of government." Feiden et al., *supra*, at 9. Even if the BLM rule does not impose additional *substantive* requirements in a particular case, it would impose additional

procedural burdens. For example, the "BLM could require operators to undergo a separate permit process with identical (or weaker) standards than states, or to submit documents in different formats than state require." *Id.* at 11. As a recent analysis of the proposed BLM rule advised, "[s]uch procedural burdens should not be ignored—they impose costs on operators without any direct environmental or public health benefit." *Id.*

And the costs are not limited to the business community—tribes and U.S. taxpayers would suffer economic losses in the form of substantially decreased royalties and tax revenues. Drilling on federal lands will take longer and cost more as the regulatory hurdles increase. By increasing the layers of approval necessary to develop and produce oil and gas on federal and Indian lands, the BLM's rule creates a disincentive to invest in federal and tribal oil and gas leases, and instead drives operators towards production on non-federal land that is governed by greater regulatory certainty. This would only exacerbate what has already emerged as an existing trend.

In practice, the states have far more experience than federal agencies at efficiently managing oil and gas development. In Texas, for example, an operator can generally obtain a drilling permit in 2 to 5 days, while the BLM often measures its timeline in *years*. The BLM's own statistics reveal the staggering disparity—162 days between receipt of an APD and approval in Farmington, New Mexico;

211 days in Canon City, Colorado; 233 days in Lander, Wyoming; 359 days in Milwaukee, Wisconsin; 518 days in Kemmerer, Wyoming; 635 days in Moab, Utah; and 952 days in Buffalo, Wyoming. Zimmerman & Leggette, *Western Lands and Energy Newsletter*, Fig. 3 (June 26, 2013). The BLM rule would only make matters worse. The agency estimates that merely reviewing the paperwork required by the rule "will pose an additional workload to the BLM of about 25,400 hours per year." 80 Fed. Reg. at 16,207. And as shown above, the BLM provided no evidence showing that these more efficient state regulatory regimes have been insufficient to protect public health or safety.

For states with minimal amounts of federal land, like Texas, the inconvenience and delay of operating on federal lands may lead operators to develop resources on non-federal lands elsewhere in the state. But the regulatory burden of the BLM rule is particularly acute for states like Nevada and Wyoming, where between 80-98% of the land in some counties is under federal management, and for tribes like the Ute, which rely on energy production as the primary source of funding for tribal government services. *See* Order at 41 & n.37. For these communities, as with many U.S. businesses, complying with the proposed BLM rule could lead to substantial economic losses.

II. THE BLM'S RULE UNNECESSARILY DIMINISHES THE MAJOR ECONOMIC AND STRATEGIC BENEFITS OF HYDRAULIC FRACTURING TO THE U.S. ECONOMY.

In addition to the BLM's failure to adequately explain the statutory authority and need for its regulations, the balance of equities and public interest strongly support affirmance of the preliminary injunction. As already noted, the BLM failed to demonstrate that its regulations will provide any benefits to public health or safety not already addressed by existing state regulations. And on the other side of the balance, the unnecessary costs imposed by the regulations threaten to debilitate an industry that provides enormous benefits for the Nation's economy. Accordingly, the district court properly exercised its discretion in maintaining the status quo pending a final decision on the merits.

Hydraulic fracturing has singlehandedly changed the role of the United States in the world's energy markets. Since 2012, the U.S. has been the world's top producer of petroleum and natural gas. U.S. Energy Info. Admin., *United States Remains Largest Producer of Petroleum and Natural Gas Hydrocarbons* (May 23, 2016) (www.eia.gov/todayinenergy/detail.cfm?id=26352). After the 40-year-old oil export ban ended in 2015, U.S. crude is now being sold on world markets. Natural gas produced from shale has been increasingly exported from the U.S. to Mexico and Canada and recently shale gas (in the form of liquefied natural gas) began being exported worldwide. In its *Annual Energy Outlook 2015*, the

U.S. Energy Information Administration projects that the U.S. will be a net natural gas exporter by 2017, and remain that way through 2040. U.S. Energy Info. Admin., *Annual Energy Outlook 2015 with projections to 2040*, at ES-1 (Apr. 2015) (www.eia.gov/forecasts/aeo/pdf/0383(2015).pdf).

On a national level, the development of shale oil and gas reserves through hydraulic fracturing has created unprecedented economic opportunities. According to one study, the development of unconventional oil and gas resources via hydraulic fracturing adds more than $430 billion to annual U.S. GDP—nearly equal to the GDP of the entire state of Ohio. Porter et al., *supra*, at 6. It also has supported more than 2.7 million American jobs that paid, on average, nearly twice the median U.S. salary. *Id.* at 3. By comparison, the entire U.S. economy has only added 4.9 million new jobs since 2005. *Id.* at 6. And the federal tax revenue paid from unconventional oil and gas development reduces the federal budget deficit by 13% compared to what it would be without such revenue. *Id.* at 7.

For many state and local communities, shale energy development has helped turn struggling regions into newly thriving communities. In areas such as North Dakota, Western Pennsylvania, Eastern Ohio, Oklahoma, and West Texas, shale energy development supports local industries, real estate, local services, and other community needs, such as schools. *Id.* In North Dakota—home of the oil-rich Bakken Shale—the unemployment rate in February 2016 was 2.9%, well below the

national average at that time of 4.9%. Sean Hackbarth, U.S. Chamber of Commerce, *Why is Fracking a Dirty Word? An Explainer on America's Shale Energy Boom* (Apr. 19, 2016) (www.uschamber.com/above-the-fold/why-fracking-dirty-word-explainer-america-s-shale-energy-boom). In Pennsylvania—home to the Marcellus Shale—six counties where 751 natural gas wells were drilled and developed using hydraulic fracturing techniques all had lower unemployment rates than the state average in 2014. *Id*.

Moreover, the additional economic impact of the "midstream" and "downstream" sectors of shale energy development—like manufacturing, petrochemical, and pipeline industries—has made shale energy one of the most important forces driving U.S. economic growth. *See* IHS, *America's New Energy Future: The Unconventional Oil and Gas Revolution and the US Economy, Vol. 3: A Manufacturing Renaissance* (Sept. 2013) (www.energyxxi.org/sites/default/files/pdf/Americas_New_Energy_Future_Phase3.pdf). Shale energy also provides one of the largest "employment multipliers" in the U.S.: for every job created in the shale energy sector, more than three jobs are added in other areas. Inst. for 21st Century Energy, *Shale Energy: An Economic Success Story in the Making* (www.energyxxi.org/sites/default/files/shale_energy_economic_success.pdf). By 2025, the full "value chain" of shale energy—from upstream energy development through energy-related chemicals—is projected to support 3.9 million jobs and add

more than $533 billion to annual U.S. GDP. IHS, *America's New Energy Future, Vol. 3*, *supra*, at 69. Between 2012 and 2025, shale energy is expected to contribute more than $1.6 trillion in state and federal government revenues. *Id.*

Between 2012 and 2035, state economies have been projected to receive more than $5.1 trillion in capital expenditures for unconventional oil and natural gas activity. IHS, *America's New Energy Future: The Unconventional Oil and Gas Revolution and the US Economy, Vol. 2: State Economic Contributions*, at v (Dec. 2012) (www.energyxxi.org/sites/default/files/Americas_New_Energy_Future_State_Main_Dec12.pdf). For states such as Texas and Oklahoma, with long histories of oil and gas production, and a combined total of 650,000 jobs linked to unconventional energy development in 2012, *id.*, the state-level impacts from shale energy development are clear. In Oklahoma, unconventional oil and gas activity generated $1.3 billion in state and local taxes in 2012, which is the equivalent of roughly 17.5% of the state's budget for that year. IHS, *America's New Energy Future, State Economic Contributions: Highlights*, at 31 (Dec. 2012) (www. energyxxi.org/sites/default/files/Americas_New_Energy_Future_State_Highlights_Dec2012.pdf). In Texas, it generated $10.2 billion in state and local taxes, or roughly 24% of the state's total budget. *Id.* at 37.

Even non-producing states receive significant economic benefits from the development of shale energy by virtue of the lengthy supply chain supporting the

industry. "Among non-producing states, fabricated metal manufacturing in Illinois, software and information technology in Massachusetts, and financial services and insurance in Connecticut are examples of central players in the US unconventional oil and gas supply chain." IHS, *America's New Energy Future, Vol. 2*, *supra*, at vi. For Florida, a state with no shale resources of its own, shale energy development in *other* states supported over 36,500 jobs and generated over $180 million in state and local taxes. IHS, *America's New Energy Future, State Economic Contributions: Highlights*, *supra*, at 54.

For consumers, declining energy prices (driven by the increased production from shale) have lowered the cost of living. *See* U.S. Energy Info. Admin., *Declining Energy Prices Lower the Cost of Living* (May 3, 2016) (www.eia.gov/todayinenergy/detail.cfm?id=26072). According to a 2015 study, "the shale gas revolution has led to an increase in welfare for natural gas consumers and producers of $48 billion per year." Catherine Hausman & Ryan Kellogg, Brookings, *Welfare and Distributional Implications of Shale Gas* (Mar. 19, 2015) (www.brookings.edu/about/projects/bpea/papers/2015/welfare-distributional-implications-shale-gas). In 2014, "American households were estimated to enjoy about $800 in annual savings from lower energy costs attributable to unconventional natural gas, and to reap additional savings from lower oil prices." Porter et al., *supra*, at 7. Because U.S. households making less than $30,000

annually spend 23% of their after-tax income on energy, while households making more than $50,000 annually spend only 7% of their after-tax income on energy, these savings provide the greatest benefit to lower-income Americans. *See* Am. Coal. for Clean Coal Elec., *Energy Cost Impacts on American Families*, at 1 (June 2015) (americaspower.org/sites/default/files/Trisko-National-Family-Energy-Costs-June-2015-FINAL.PDF).

Across the country, U.S. manufacturers have reaped the benefits of hydraulic fracturing as well. Industrial energy costs have fallen and manufacturers have seen their supply costs drop. As a result, many domestic and international companies are electing to build new factories and make other significant investments in the U.S. For example, the American Chemistry Council recently announced that U.S. chemical industry investment linked to plentiful and affordable natural gas from shale has reached $164 billion, and estimated that the capital spending could create 738,000 new jobs by 2023. Am. Chemistry Council, *New U.S. Chemical Industry Investment Linked to Shale Gas Tops $164 Billion* (Apr. 6, 2016) (www.americanchemistry.com/Media/PressReleasesTranscripts/ACC-news-releases/US-Chemical-Industry-Investment-Linked-to-Shale-Gas-Tops-164-Billion.html). Other studies indicate that lower costs for energy and raw materials are driving investments, such as new iron and steel plants and plastics processing, and renewing interest in the use of natural gas in transportation. Porter et al., *supra*, at

8. And because natural gas is the primary feedstock for fertilizer production, an increase in natural gas production will lower the price of fertilizer, which provides a direct benefit to U.S. agriculture. Charles F. Mason et al., Resources for the Future, *The Economics of Shale Gas Development*, at 3 (revised Feb. 2015) (www.rff.org/files/sharepoint/WorkImages/Download/RFF-DP-14-42.pdf).

Finally, the Nation has realized significant geopolitical benefits from the development of shale energy. According to the Chamber's U.S. Energy Security Risk Index, U.S. energy security has improved for three consecutive years. Inst. for 21st Century Energy, *Index of U.S. Energy Security Risk*, at 3 (2015) (www.energyxxi.org/sites/default/themes/bricktheme/pdfs/USEnergyIndex2015.pdf). Today, the U.S. imports only 10% of its energy, compared with 30% a decade ago. *Id.* at 4. This reduction is directly attributable to advances in hydraulic fracturing, which now accounts for 51% of U.S. crude production. Thomas J. Donohue, U.S. Chamber of Commerce, *Setting the Record Straight on Fracking* (Mar. 21, 2016) (www.uschamber.com/above-the-fold/setting-the-record-straight-fracking). Fewer imports not only diminish the power of energy cartels like OPEC, but reduce U.S. reliance on potentially unfriendly regimes as well. Mason et al., *supra*, at 11-12. And, because U.S. energy development and the associated manufacturing renaissance is increasingly export-oriented, *see* Am. Chemistry Council, *supra*, it

has the power to reduce the U.S. trade deficit and open up new avenues for trade and diplomacy abroad.

All these benefits are threatened by the BLM's unnecessary foray into an area already adequately regulated by the states. The hydraulic fracturing industry has always been particularly sensitive to cost increases such as those that would be imposed by the BLM's regulations, and this sensitivity has only increased in light of the dramatic fall in oil prices that began in 2014. *See* BDO, *2015 BDO Oil and Gas Riskfactor Report*, at 2 (2015) (www.bdo.com/getattachment/e8cf6d7b-8614-4fe3-bfc8-9d1fb6b41967/attachment.aspx) (finding that 96% of the 100 largest publicly traded U.S. oil and gas E&P companies identified "hydraulic fracturing regulation" as a significant risk factor in 10-K filings with the SEC, up from only 52% in 2011); *id.* at 1 ("[L]ow prices are dampening companies' enthusiasm for investing and expanding—and amplifying the potential impact of impediments to future growth.").

Accordingly, by overstepping its authority into an area that Congress never intended the agency to regulate, and arbitrarily implementing a costly and unnecessary rule that overlaps with existing state regulations, the BLM's rule threatens to significantly harm the U.S. economy. And given that low-income consumers benefit the most from the economic benefits of hydraulic fracturing, the cost of these superfluous regulations would disproportionately impact the poor,

essentially amounting to a regressive tax. *See Obama Administration's New Fracking Rules Hurt The Poor*, Investor's Bus. Daily, Mar. 23, 2015 (www.investors.com/politics/editorials/epa-fracking-regulations-costly-to-poor/) (suggesting that "the biggest victims of [the BLM rule] will be the poorest Americans, who'll have to pay higher energy costs"). The balance of equities and public interest thus weigh overwhelmingly in favor of preserving the status quo pending a final decision on the merits.

CONCLUSION

For the foregoing reasons and those in the appellees' briefs, the Court should affirm the district court's entry of preliminary injunction, enjoining the BLM from enforcing the final rule related to hydraulic fracturing on federal and Indian lands.

Respectfully submitted,

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June 1, 2016

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 5,331 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word Professional Plus 2010 in 14-point Times New Roman typeface.

Dated: June 1, 2016

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CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that (1) the foregoing brief contains no information subject to the privacy redaction requirements of 10th Cir. R. 25.5; (2) the hard copies of the brief to be submitted to the Court are exact copies of the electronic copy filed using the Court's CM/ECF system; and (3) the electronic submission was scanned for viruses using McAfee antivirus software (version 4.8.0.1938, updated June 1, 2016), and, according to the program, is free of viruses.

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CERTIFICATE OF SERVICE

I hereby certify that on June 1, 2016, I electronically filed a copy of the foregoing brief with the Clerk of the United States Court of Appeals for the Tenth Circuit using the Court's appellate CM/ECF system. I further certify that all participants in the case are registered CM/ECF users who will be served by the appellate CM/ECF system.

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