NO. C13-0124-1

IN THE

Supreme Court of the United States

FRIENDS OF NEWTONIAN,

Petitioner,

v.

UNITED STATES DEPARTMENT OF DEFENSE and MAINSTAY RESOURCES, INC.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTEENTH CIRCUIT

BRIEF FOR RESPONDENTS

TEAM NUMBER 56

QUESTIONS PRESENTED

I. Under the Administrative Procedure Act ("APA"), only "final agency actions" are subject to judicial review. 5 U.S.C. § 704 (West 2013). In 2002, the United States Department of Defense ("DoD") decommissioned Fort Watt, issued a RoD to the President, and sold the surface rights to MRI, an oil exploration and production and company, while retaining the rights to the underlying minerals. In 2003, the DoD executed a mineral lease with MRI that granted them the right to extract oil, and the DoD retained only a royalty interest, discretion to inspect the drilling site to ensure compliance with applicable laws and regulations, and a limited right to veto oil sales to third parties in the interest of national security. Seven years later, in 2010, MRI unilaterally decided to engage in hydraulic fracturing, and the DoD "gave its blessing." The DoD did not grant any permits to MRI and did not have the right to control MRI's method of oil extraction under the terms of the lease. The question presented is whether the DoD's 2002 RoD and sale of Fort Watt, the 2003 mineral lease between the DoD and MRI, or the DoD's 2010 "blessing" of fracking were final federal actions within the meaning of the APA that are ripe for judicial review.

II. Additionally, the National Environmental Policy Act ("NEPA") requires that a final agency action also be a "major federal action" for judicial review under the APA. 42 U.S.C. § 4332(C) (West 2013). *See, e.g., Karst Envtl. Educ. and Prot., Inc. v. U.S. Envtl. Prot. Agency,* 475 F.3d 1291, 1295, 1298 (D.C. Cir. 2007). Under the terms of the lease described above, was the DoD's involvement in MRI's private drilling activities sufficient to federalize MRI's private decisions and transform them into major federal actions within the meaning of NEPA, thus requiring the preparation of a new environmental impact statement?

PARTIES TO THE PROCEEDINGS

Petitioner is Friends of Newtonian, an environmental advocacy organization. Respondents are the United States Department of Defense and Mainstay Resources, Incorporated, an oil and natural gas exploration and production company.

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The opinion of the United States Court of Appeals for the Fourteenth Circuit is reproduced in the Joint Appendix ("J.A.") at pages 3–20. The opinion of the United States District Court for the Western District of New Tejas denying Petitioner's motion for a preliminary injunction is unreported and not contained in the Joint Appendix.

JURISDICTION

The judgment of the court of appeals was entered on October 15, 2013. Petitioners timely filed a petition for writ of certiorari, which this Court granted. J.A. at 2. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III, Section 2 of the United States Constitution extends "[t]he judicial power . . . to all Cases [and] Controversies."

The Administrative Procedure Act provides in relevant part that "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review." 5 U.S.C. § 704 (West 2013).

The National Environmental Policy Act provides in relevant part that

> all agencies of the Federal Government shall . . . include . . . for legislation and other major federal actions significantly affecting the quality of the human environment, a detailed statement . . . on [. . .] the environmental impact of the proposed action . . . 42 U.S.C. § 4332(2)(C) (West 2013).

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

Petitioner, Friends of Newtonian ("FON"), brought this action to challenge the decision of Respondent, the United States Department of Defense ("DoD"), to close and sell the Fort Watt military base and to lease its retained mineral rights interest to Mainstay Resources, Inc. ("MRI") for oil exploration and production. J.A. at 3.

A. The Department of Defense Closes And Sells Fort Watt

Under the Defense Base Realignment and Closure Act of 1990 ("DBRCA"), the DoD has discretion to reorganize the military's infrastructure by closing or realigning military bases "to more efficiently and effectively support its forces and increase operational readiness." *Id.* at 3. The Act permits the DoD to make recommendations regarding specific base closings or realignments to the Defense Base Closure and Realignment Commission (the "Commission"). *Id.* at 3-4.

The DBRCA requires the Commission to conduct a thorough analysis of the continued viability of the military base at issue. *Id.* at 4. The Commission must take into account (1) the impact of the closing on future mission capabilities, training, and readiness; (2) the availability of alternative land and facilities for military operations; (3) future force requirements at existing and potential alternative military bases; and (4) costs of operations. *Id.* The Commission is also required to consider the possible human and economic impact of the base closure and potential environmental impacts to the surrounding area. *Id.*

In 2001, the DoD considered closing or realigning various military bases throughout the United States, including Fort Watt, a 2,200 acre military base installation located in remote northern New Tejas. *Id.* at 3-4. After conducting the required thorough analysis, the Commission concluded that Fort Watt was no longer useful as a military base because all missions and critical personnel at Fort Watt had been transferred to other bases[1]; the remaining, military, civilian, and contractor jobs at Fort Watt were being eliminated; and Fort Watt was running at a deficit and costing the DoD almost $9 million per year to maintain. *Id.* at 4. Also, because of Fort Watt's remote location in northern New Tejas, it was prohibitively expensive to keep the base adequately supplied and there were few remaining communities and business in the area surrounding the base. *Id.* at 5. After thorough and reasoned analysis, the Commission concluded that the DoD should close and sell Fort Watt. *Id.* Fort Watt, like many other military bases in the United States, became a victim of the United States' changing military needs after the conclusion of the Cold War. *See id.* at 4.

During its decision-making process, the Commission completed an Environmental Impact Statement ("EIS") to satisfy its obligations under the National Environmental Policy Act of 1969 ("NEPA"). *Id.* Pursuant to its NEPA obligations, the Commission completed a site visit to Fort Watt in 2002 and notified the public about the proposed closure and sale of the base. *Id.* Shortly thereafter, the Commission opened a public comment period where it invited input from the

[1] The record indicates that Fort Watt formerly served as a command post for a classified Cold War missile defense program. J.A. at 4.

public regarding its proposed plans for the Fort Watt installation. *Id.* Despite Petitioner having the opportunity to participate in the public comment process, it declined to inform the Commission of any environmental concerns it had over potential private uses of the land comprising Fort Watt.[2] *See id.*

Based on agency expertise and the public comments submitted, the Commission prepared a draft EIS ("DEIS") for Fort Watt's proposed closure and sale. *Id.* at 6. The DEIS fully described the environment and communities surrounding Fort Watt that could be affected and analyzed the possible positive and negative impacts of closing the base and selling it to private entities. *Id.* Furthermore, the DEIS also described "a reasonable range of alternative uses" of Fort Watt, including private residential development and private commercial use, and described how each potential use could affect the environment and communities around the base. *Id.*

Notably, the Commission's DEIS carefully considered oil recovery and extraction as one possible commercial use of Fort Watt's land, given Fort Watt's potentially lucrative location atop the Albertus Magnus Shale formation ("Magnus Shale"). *Id.* The Commission extensively analyzed the potential environmental impacts of conventional oil drilling on the area surrounding Fort Watt. *Id.* However, because the oil in Magnus Shale was not economically accessible using

[2] The record indicates that "there were a few public comments and concerns regarding the proposed decommissioning and sale expressed by a local New Tejas environmental group, in one newspaper story, and in a May 2002 op-ed article in the local paper." J.A. at 5. The op-ed article was written by Pedro Tierramante, Sr., a former Army captain stationed at Fort Watt, who vehemently opposed the closure of Fort Watt because of its importance to the local community and economy. *Id.*

conventional drilling methods in 2002, the Commission also analyzed the use of hydraulic fracturing [3] ("fracking").[4] *Id.*

The Commission memorialized its careful analysis of the potential uses of Fort Watt's land and their environmental impacts, published its DEIS, and solicited public comments. *Id.* Although the DEIS informed the public that in the future fracking could occur on Fort Watt's lands, again Petitioner declined to object or raise any concerns whatsoever regarding the proposed uses of Fort Watt during the public comment period. *See id.* at 6-7.

B. MRI Purchases Surface Rights To 750 Acres Of Fort Watt And Obtains A Mineral Interest In The Underlying Oil

After receiving public comments about its DEIS that detailed the potential uses of Fort Watt and the possible environmental impacts, the Commission prepared a final EIS ("FEIS") in response to those comments. *Id.* at 6. The FEIS accompanied the Commission's Record of Decision ("RoD"), which concluded that Fort Watt should be decommissioned and sold to offset the DoD's operational costs because Fort Watt was redundant and no longer necessary to the United States' national security. *Id.* at 4-5, 6-7, 8. The Commission subsequently transmitted its RoD to the President and Congress for approval. *Id.* at 6-7, 8. In November 2002, the President and Congress accepted the Commission's RoD and the sale of Fort Watt to private entities was approved. *Id.* at 8.

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[3] Modern fracking techniques require vertically drilling several thousand feet into the underlying rock formation and drilling horizontal wells that branch out from the vertical well. The operator then injects large amounts of water mixed with sand and other chemicals at high pressure into the rock, creating fissures and allowing oil and natural to flow to the well. The fracking mixture consists of 9.5% sand, 0.5% chemicals, and 90% water. *Id.* at 6.

[4] Although the Commission noted that fracking was not economically feasible in 2002, future technological advances could render fracking as a possible method of oil extraction at Fort Watt. *Id.*

Beginning in 2003, the DoD began to sell the surface rights to all 2,200 acres of Fort Watt in pieces while retaining the mineral rights to the oil underlying the entire base. *Id.* MRI, a large oil and natural gas exploration and production company, purchased the surface rights to 750 acres of the former Fort Watt.[5] *Id.* MRI's 750-acre purchase comprises the northwestern quadrant of Fort Watt and consists of a one-mile shallow valley located east of the New Tejas River and south of the surrounding foothills. *Id.* The New Tejas River forms the western border of MRI's land, travels 30 miles west, and crosses over the New Tejas-Newtonian border.[6] *Id.*

On June 1, 2003, the DoD and MRI executed a lease granting MRI mineral interests in the 750 acres to which it owned the surface rights. *Id.* Under the terms of the lease, MRI obtained the mineral rights for "20 years and as long thereafter as production continued in paying quantities." *Id.* The lease stated that the DoD "*may* inspect all operations and facilities at the Leased Premises" to determine whether MRI's drilling activities at Fort Watt complied with the terms of the lease, including MRI's obligation to comply with all applicable federal, state, and local laws, including but not limited to environmental regulations. *Id.* at 9, n. 7 (emphasis added). The lease also granted the DoD extremely limited veto power over "the sale of any oil or gas produced from the Leased Premises to any unaffiliated third party should such a sale be deemed a threat to the national security of the United States

[5] MRI is one of the largest oil and gas producers in the United States, and owns or leases more than 2,000,000 acres of land for oil and gas production. *Id.* at 7.
[6] The border runs for 159 miles along the northwestern edge of New Tejas and the southeastern edge of Newtonian. *Id.* at 8.

of America." *Id.* Finally, under the terms of the lease, MRI was obligated to pay the DoD a monthly royalty payment of 25% of the gross sales of all oil and/or natural gas MRI produced from its 750 acres. *Id.* MRI was also responsible for paying the DoD a "delay rental payment" of $25.00 per acre annually, from June 1, 2003 "until a well actually yielding royalties from oil and/or natural gas came into production on the property." *Id.* at 9.

C. MRI Begins Construction And Is Set To Begin Fracking

Months after the lease was executed, MRI began construction on its Fort Watt property and built two conventional drilling sites, which it named Watt 1 and Watt 2. *Id.* at 10. MRI built Watt 1 at the southwestern foot of the valley and Watt 2 near the foothills along the northern edge of the valley. *Id.* During the construction period, MRI obtained all of the requisite state and federal permits and regulatory approvals to begin drilling at Watt 1 and Watt 2. *Id.* Furthermore, while construction was ongoing, MRI complied with the terms of its lease by making timely delay rental payments to the DoD. *Id.*

Prior to completing the construction of Watt 1 and Watt 2, MRI decided to delay drilling activities at Fort Watt because the company unilaterally decided to study and employ the use of modern fracking technology. *Id.* In 2010, "with the DoD's blessing," MRI modified the wells at Watt 1 and Watt 2 to allow for the use of fracking techniques. *Id.* To make the wells suitable for fracking, MRI increased Watt 1's vertical depth to 8,200 feet and its horizontal reach to 3,750 feet; MRI increased Watt 2's vertical depth to 12,175 and its horizontal reach to 5,400 feet.

Id. Prior to beginning oil production, MRI obtained updated drilling permits from the relevant federal, state, and local authorities, and was ready to begin fracking on February 1, 2011. *Id.* The record contains no evidence that the DoD issued any permits to MRI to engage in conventional drilling or fracking.

II. PROCEDURAL HISTORY

Before MRI was set to begin fracking on February 1, 2011, Petitioner filed suit in the district court for declaratory and injunctive relief under NEPA, 42 U.S.C. § 4321 *et seq*, and the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706. *Id.* at 10-11.

A. Proceedings Before The District Court

In the district court, petitioner filed suit for injunctive and declaratory relief, alleging that the DoD engaged in a "major federal action significantly affecting the quality of the human environment" when it signed the 2003 lease with MRI, retained a managing interest in the mineral rights, and sanctioned fracking at Fort Watt. *Id.* at 12. Petitioners alleged that because the New Tejas River "plays a vital role in recharging several reservoirs and fresh water aquifers in Newtonian . . . fracking at Watt 1 and Watt 2 could irreparably damage the New Tejas River" if fracking chemicals were discharged into the river. *Id.* at 11. Petitioner argued that these actions required the DoD to conduct a new EIS regarding the effects that fracking could have on the environment around Watt 1 and Watt 2. *Id.* at 12. The district court denied Petitioner's motion for a preliminary injunction, and Petitioner

timely appealed to the United States Court of Appeals for the Fourteenth Circuit. *Id.* at 12.

B. Proceedings Before The United States Court of Appeals For The Fourteenth Circuit

On appeal, the Fourteenth Circuit affirmed the district court. *Id.* at 17-18. First, the Fourteenth Circuit held that this matter was ripe for adjudication because the Commission's issuance of the RoD and the DoD's sale of the property were final agency actions subject to judicial review within the meaning of the APA. *Id.* at 14.

On the merits, the Fourteenth Circuit affirmed the district court's denial of Petitioner's motion for a preliminary injunction and concluded that the DoD's approval of the fracking was not a major federal action within the meaning of NEPA and MRI's fracking was purely a private matter not subject to NEPA. *Id.* at 17. The court reasoned that because the DoD did not give federal funding to MRI to purchase Fort Watt or engage in fracking, and because any control the DoD had over whether to conduct optional site visits or to veto certain oil sales was discretionary, no partnership existed between the DoD and MRI that could impute MRI's decision to engage in fracking to the DoD. *Id.* at 16-17. Finally, the court also concluded that enjoining MRI from fracking would not be in the public interest because of the significant economic benefits to Newtonian that would result from fracking. *Id.* at 17.

Judge McBride dissented from the panel's decision and concluded that Petitioner's case was not ripe for adjudication. *Id.* at 18. In his view, the relevant

federal action that caused Petitioner's alleged injury was the execution of the mineral lease. *Id.* at 19. On the merits, Judge McBride concluded that the DoD's "blessing" of MRI's fracking activities was a major federal action subject to NEPA because the DoD retained the right to oversee MRI's operations and to veto a narrow category of MRI's potential sales. *Id.* at 19-20. Thus, Judge McBride the court should have enjoined MRI from fracking pending the DoD's completion of a new EIS. *Id.*

Petitioner timely filed its petition for a writ of certiorari, which this Court granted on October 15, 2013. *Id.* at 2.

SUMMARY OF THE ARGUMENT

Under NEPA and the APA, agency actions are ripe for judicial review only if they are "final" and "major" federal agency actions. NEPA and the APA do not apply to purely private actions that are not "so imbued with a federal character." *Ross v. Federal Highway Admin.,* 162 F.3d 1046, 1052 (10th Cir. 1998). Because this case involves MRI's unilateral and private decision to engage in fracking, which did not require any formal license, permit, sanction, or approval from the DoD, the APA and NEPA do not apply to the DoD's "blessing of fracking" MRI's decision to engage in fracking. Therefore, there is no final, major federal action ripe for review under NEPA or the APA.

I.

Ripeness requires this Court to evaluate "both the fitness of issues for judicial decision and the hardship to the parties of withholding court consideration." *Ohio*

Forestry Ass'n v. Sierra Club, 523 U.S. 726, 733 (1998). Under the APA, an agency action is final if it directly creates an immediate adverse legal impact on the party seeking review. In this case, the DoD's 2002 RoD and subsequent sale of Fort Watt's surface rights, and the 2003 mineral rights lease with MRI are not final federal actions ripe for judicial review because they had no immediate legal effect on MRI's ability to engage in fracking, and therefore could not have caused Petitioner's injury. Because neither action had a formal legal effect of approving or disapproving of MRI's fracking activities, this case does not present an issue fit for judicial resolution, and withholding review will not cause the Petitioner hardship.

A.

The Fourteenth Circuit erred in concluding that the DoD's 2002 RoD and sale of Fort Watt were the relevant "final" actions within the meaning of the APA. First, Agency actions cannot be final and ripe for judicial review if Petitioner's claimed injury depends on future contingent events that may not occur. Here, MRI's ability to engage in fracking could not have resulted from the 2002 sale because its fracking activities depended upon a future site-specific contingent event – the execution of a lease with the DoD – because the DoD retained the mineral rights to oil underlying Fort Watt.

Further, this Court expressly held that RoDs with respect to base closures are not final agency actions subject to judicial review because they necessarily require further approval from the President, and the President is not an agency within the meaning of the APA.

Finally, the sale of Fort Watt's surface rights did not constitute an irretrievable commitment of federal resources to environmental degradation because until the DoD leased the mineral rights to MRI, the DoD had the absolute authority to prevent MRI's fracking activities by refusing to execute the mineral lease. Thus, the Commission's RoD and subsequent sale of Fort Watt's surface rights to MRI were not final agency actions within the meaning of the APA.

B.

Under the APA, an agency action cannot be final and ripe for judicial review if it does not determine a party's obligations, result in immediate and direct legal consequences, or require a party to change its conduct to avoid penalties for noncompliance. In this case, the 2003 mineral lease between the DoD and MRI cannot be a final federal action subject to judicial review because under the applicable federal regulations and the terms of the lease, the DoD had no authority to approve or prevent MRI's fracking activities or otherwise substantially control MRI's *drilling* operations. The mineral lease did not compel or restrain MRI from drilling for oil or engaging in fracking activities. Thus, the 2003 mineral lease between the DoD and MRI did not impose any formal obligation, restriction, or right on MRI to engage any form of oil extraction.

Also, under the applicable federal laws and regulations, the BLM had exclusive jurisdiction over the DoD's Application for Permit to Drill ("APD"), and the DoD had no legal authority under federal law or the lease provisions to authorize or prevent MRI's fracking. As long as MRI obtained the necessary

regulatory permits from the relevant federal agencies, MRI was free to engage in fracking or any other approved method of oil extraction with or without DoD approval. Thus, because the mineral lease had no legal impact on MRI's drilling activities, this case does not present an appropriate issue for judicial resolution, and accordingly Petitioner cannot be prejudiced if review is withheld.

II.

Alternatively, if this court holds that this matter is ripe for adjudication, Petitioner's arguments cannot survive on the merits. Under NEPA, a federal agency is only required to produce an EIS for "major federal actions" significantly affecting the quality of the human environment. 42 U.S.C. §4332(2)(C). However, where a nonfederal entity engages in activities significantly affecting the human environment, NEPA is triggered where the nonfederal actions are subject to federal control and responsibility. 40 C.F.R §1508.18. Courts will look to whether the federal agency provided significant funds necessary to control the project or whether the agency retained sufficient control over the nonfederal actor's decisionmaking and activities. Without significant federal control over the private entity, the project is not federalized for NEPA's purpose.

A.

As is the case here, when the federal agency does not provide funds, the court will examine the control over the private actors such that the project cannot begin or continue without prior approval by the federal agency. The terms of the lease agreement did not grant the DoD the requisite control over MRI's construction

and drilling to rise to the level necessary to transform MRI's activities into major federal actions. The lease created a relationship specifically limiting the DoD's control over MRI to commercial activities. The lease is devoid of any provisions outlining requisite approval from the DoD moving forward in construction or drilling, nor does it outline any limits on the means and methods of surface drilling. Although the lease gives the DoD a discretionary right to inspect the drilling premises, it is not mandatory and it only provides that the premises be in compliance with the terms of the lease agreement.

B.

Additionally, if federal approval of a private party's project is required for the project to move forward, it constitutes a major federal action. The DoD's 'blessing' of MRI's decision to begin fracking was not such approval. This approval was not a perquisite for MRI to begin drilling, nor did the DoD have any unilateral control over MRI's surface disturbances. Throughout MRI's construction of Watt 1 and Watt 2 and the subsequent reconfiguration, MRI applied for a received updated construction and drilling permits from unknown sources. The authority to issue APDs lies solely in the Bureau of Land Management and therefore, cannot come from the DoD. Accordingly, the lack of ultimate authority to issue permits and provide approval forbids Petitioner from transforming the DoD's 'blessing' of MRI's fracking in a major federal action. Further, because the DoD lacks the ultimate authority to approve of MRI's fracking, any failure to prohibit or deter drilling activities cannot be deemed a major federal action either.

III.

If this court holds that the actual execution of the lease is a major federal action, no new or supplemental EIS was required. Following a final EIS, where new information or new circumstances arise, an agency may be required to prepare a SEIS. However, an agency is only required to do so when there are major federal actions remaining and new information poses significant environmental impacts that were not originally considered. Upon the execution of the lease, the final EIS contained all relevant and updated information regarding conventional and unconventional drilling methods. Further, Petitioner has not put forth any evidence undermining the sufficiency and relevancy of the information used in the Commission's final EIS. Therefore, since the lease for oil and gas production was based on the findings within the final EIS, no supplemental EIS was required under NEPA.

ARGUMENT

THE DoD'S EXECUTION OF A MINERAL LEASE WITH A PRIVATE DRILLING COMPANY AND "BLESSING" OF THE PRIVATE COMPANY'S FRACKING ACTIVITIES IS NOT A FINAL OR MAJOR FEDERAL ACTION UNDER THE APA AND NEPA WHERE THE DoD HAS NO AUTHORITY TO PERMIT, PREVENT, OR CONTROL THE FRACKING ACTIVITY

In 1969, as Congress became increasingly aware of environmental concerns and the potential environmental impacts of federal governmental projects, it enacted NEPA, Pub. L. No. 91-190, 83 Stat. 852 (1969). The fundamental purpose of NEPA is to compel federal decision makers to consider the environmental impacts of their actions. *See* 42 U.S.C. § 4332(C) (West 2013). NEPA requires

federal agencies to take a "hard look" at the environmental impacts of proposed major federal actions and to issue EISs where those impacts may "significantly affect the quality of the human environment." 42 U.S.C. § 4332(C); *Marsh v. Oregon Natural Res. Council,* 490 U.S. 360, 373 (1989). NEPA, by its clear and unequivocal language, applies only to *major* federal actions and does not apply to actions of a private character. 42 U.S.C. § 4332; *Atlanta Coal. on Transp. Crisis, Inc. v. Atlanta Reg'l Comm'n,* 599 F.2d 1333, 1344 (5th Cir. 1979). *Accord Ka Makani 'O Kohala Ohana Inc. v. Water Supply,* 295 F.3d 955, 960-61 (9th Cir. 2002).

The APA, codified at 5 U.S.C. §§ 701 – 706, allows parties aggrieved by certain agency actions to seek judicial review in the federal district courts. *See* 5 U.S.C. § 702 (West 2013). The APA, 5 U.S.C. § 704, under which this suit was brought, limits judicial review of agency decisions to only "final agency actions" that create an immediate legal effect on the party seeking review. Furthermore, like NEPA, the APA does not authorize judicial review of private actions that are not "so imbued with a federal character." *See Ross v. Federal Highway Admin.,* 162 F.3d 1046, 1052 (10th Cir. 1998) (citing *Scottsdale Mall v. Indiana,* 549 F.2d 484, 489 (7th Cir. 1977)).

At issue here are the purely private and unilateral actions of MRI, a private company, in furtherance of its own oil drilling operations on privately owned land. Despite Petitioner's best efforts to paint it as such, this case does not implicate any final or major federal agency actions that had the legal effect of licensing,

sanctioning, or formally approving MRI's fracking activities. Instead, this "dispute" is merely about Petitioner's highly generalized and abstract "disapproval" of the DoD's legally irrelevant toleration of MRI's fracking activities on land that MRI owns, the exact type of dispute that the ripeness doctrine precludes federal courts from adjudicating. Further fatal to Petitioner's argument is that the DoD's passive acquiescence to fracking had no legal effect on MRI's drilling operations because under the terms of the mineral lease, the DoD had no authority to permit or prevent fracking or to otherwise substantially control the outcome of MRI's private drilling activities on its own private land. Thus, no *de facto* partnership between the DoD and MRI exists to transform MRI's purely private actions into final, major federal actions.

This Court examines the district court's grant or denial of a preliminary injunction under a "very deferential" standard of review. *See, e.g., Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 422 F.3d 782, 793-94 (9th Cir. 2005); *Charlesbank Equity Fund II v. Blinds to Go, Inc.*, 370 F.3d 151, 158 (1st Cir. 2004). To obtain a preliminary injunction, a plaintiff must show "that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Natural Resources Def. Council,* 555 U.S. 7, 20 (2008). Unless Petitioner can demonstrate that the district court abused its discretion or based its decision on the wrong legal standard or clearly erroneous findings of fact, the district court's denial of the preliminary injunction must be

affirmed. *See Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1119 (9th Cir. 2009); *Waste Mgmt., Inc. v. Nashville & Davidson Cnty.*, 130 F.3d 731, 735 (6th Cir. 1997).

This Court should reverse the Fourteenth Circuit's judgment that this matter is ripe for adjudication for two reasons. First, the relevant action from which Petitioner's alleged injury flows is the DoD's mineral lease agreement with MRI and the DoD's subsequent "blessing" of MRI's fracking on private land that MRI owns. Second, the mineral lease and the DoD's "blessing" of MRI's fracking activities are not "final agency actions" subject to judicial review under the APA because the lease terms do not grant the DoD authority to control MRI's oil extraction operations, and therefore the DoD's "blessing" of fracking had no immediate legal effect. Thus, because neither DoD action had any legal impact, this case does not present a legal issue fit for judicial resolution, and withholding judicial review cannot prejudice Petitioner. Accordingly, Petitioner's APA and NEPA claims are not ripe for judicial review. *See Nat'l Park Hospitality Ass'n v. U.S. Dep't of Interior,* 538 U.S. 803, 809-12 (2003); *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 735-37 (1998).

Alternatively, even if this matter is ripe for adjudication, the Fourteenth Circuit's judgment on the merits of Petitioner's NEPA claim should be affirmed for two reasons. First, the 'partnership' created by the lease did not give the DoD sufficient control and authority over MRI's private actions to transform MRI's private decision to begin fracking into a major federal action. Similarly, the DoD's 'blessing' of MRI's decision to begin fracking did not constitute discretionary approval that was a prerequisite to MRI's ability to engage in fracking. Second,

even if the lease is a major federal action subject to NEPA, the DoD was not required to create a new or supplemental EIS ("SEIS") because no new information nor any change in the surrounding circumstances warranted a new investigation.

I. PETITIONER'S CLAIM IS NOT RIPE FOR JUDICIAL REVIEW BECAUSE THE DoD'S PASSIVE ACQUIESCENCE TO MRI'S PRIVATE DECISION TO ENGAGE IN FRACKING HAD NO LEGAL EFFECT AND THEREFORE DOES NOT CONSTITUTE A FINAL AGENCY ACTION WITHIN THE MEANING OF THE APA

Article III, Section 2 of the United States Constitution limits the judicial power of the federal courts to "Cases [and] Controversies[.]" The ripeness doctrine "is drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction." *Nat'l Park Hospitality Ass'n,* 538 U.S. at 808 (quoting *Reno v. Catholic Soc. Services, Inc.,* 509 U.S. 43, 57, n. 18 (1993)). Ripeness, in the administrative context, is "designed to prevent the courts . . . from entangling themselves in abstract disagreements over administrative policies[.]" *Nat'l Park Hospitality Ass'n,* 538 U.S. at 807-08 (quoting *Abbott Labs. v. Gardner,* 387 U.S. 136, 148-49 (1967)). Specifically, in the context of the APA, to show that an agency action is final and ripe for review, the party seeking review must demonstrate that "the agency has completed its decisionmaking process, and [the] result of that process is one that will directly affect the parties." *Franklin v. Massachusetts,* 505 U.S. 788, 796-97 (1992).

Ripeness requires this Court to evaluate "both the fitness of issues for judicial decision and the hardship to the parties of withholding court consideration." *Ohio Forestry Ass'n,* 523 U.S. at 733 (citing *Abbott Labs.,* 387 U.S. at 152-53). To be fit

for judicial resolution, a claim cannot "rest[] upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. United States,* 523 U.S. 296, 300 (1998). Similarly, to show hardship, a party must demonstrate that the agency action creates immediate "adverse effects of strictly legal kind." *Nat'l Park Hospitality Ass'n,* 538 U.S. at 810 (citing *Toilet Goods Ass'n v. Gardner,* 387 U.S. 158, 164 (1967)); *Ohio Forestry Ass'n,* 523 U.S. at 733.

Because NEPA does not create a private right of action, a party must seek judicial review of an agency's decision not to issue an EIS through the APA, 5 U.S.C. §§ 701 – 706 (West 2013). Under the APA, "[a] person suffering legal wrong because of an agency action, or adversely aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702 (right of review under the APA). Furthermore, to obtain review under the APA, there must be a "final agency action for which there is no other adequate remedy in a court . . . ." 5 U.S.C. § 704 (actions reviewable under the APA).

In this case, Petitioner claims that the 2002 RoD and subsequent sale of Fort Watt, the 2003 lease between the DoD and MRI, and the 2010 DoD "blessing" of MRI's fracking activities were final agency actions within the meaning of the APA. However, Petitioner's argument is fatally flawed because it conflates the relevant federal action from which Petitioner's injury flows. Further, Petitioner ignores that the DoD's alleged actions had no legal effect on MRI's fracking activities because the terms of the lease do not grant the DoD any authority to control MRI's preferred method of oil extraction, and MRI was free to engage in fracking regardless of the

DoD's approval or disapproval. Thus, for the reasons that follow, Petitioner's APA claim is not fit for judicial resolution, the DoD's alleged final actions do not cause the Petitioner immediate hardship, and therefore there is no final agency action ripe for review under the APA.

A. The Fourteenth Circuit Erred In Concluding That The Commission's 2002 RoD And Sale Of The Land Were Final Agency Actions Subject To Review Under The APA And Instead Should Have Concluded That The Execution Of The Mineral Lease Was The Relevant Agency Action

As an initial matter, to show that this case is fit for judicial resolution, Petitioner must first identify a discrete, final agency action that entitles it to review under the APA. *See Norton v. Southern Utah Wilderness Alliance,* 542 U.S. 55, 64-65 (2004). *See also Lujan v. Nat'l Wildlife Fed'n,* 497 U.S. 871, 882-83 (1990) (quoting 5 U.S.C. § 702). For the purposes of the APA, agency action is defined by 5 U.S.C. § 551(13) (West 2013) as "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." *See* 5 U.S.C. § 701(b)(2); *Lujan,* 497 U.S. at 882. The party seeking review must also show that the alleged final action causes him a legal wrong or "adversely affects or aggrieves" him "within the meaning of a relevant statute. *Lujan,* 497 U.S. at 882-83.

In the case at bar, the Fourteenth Circuit erred in concluding that the Commission's 2002 RoD and subsequent sale of Fort Watt were final federal actions within the meaning of the APA. First, as Judge McBride's dissenting opinion correctly noted, the 2003 mineral lease between the DoD and MRI is the relevant

federal action at issue because until MRI obtained the right to extract oil under the lease, MRI could not have engaged in fracking. Thus, without the subsequent mineral lease, the RoD and sale of Fort Watt did not have any legal impact on Petitioner's alleged injury – potential contamination of the New Tejas River from fracking chemicals. J.A. at 19. Additionally, this Court's decision in *Dalton v. Specter,* 511 U.S. 462 (1994), expressly held that the Commission's RoDs with respect to the sale of military bases are not final federal actions under the APA, and therefore, the RoD is not reviewable as a final agency action. Finally, the sale of Fort Watt was not a final agency action subject to judicial review because it did not constitute an irreversible commitment to a federal project that was certain to cause environmental degradation. *See, e.g., Conner v. Burford,* 848 F.2d 1441 (9th Cir. 1988).

1. The sale of Fort Watt to MRI had no adverse legal impact on Petitioner's alleged potential injury because without the subsequent mineral lease, MRI could not engage in fracking

Under the APA, Petitioner "must identify some 'agency action' that affects him in the specified fashion; it is judicial review 'thereof' to which he is entitled." *See Lujan,* 497 U.S. at 882 (quoting 5 U.S.C. § 702). Additionally, to satisfy the APA's threshold requirement, Petitioner must also allege that he was "adversely affected or aggrieved by that action within the meaning of a relevant statute." *See id.* (internal quotation marks omitted). If the particular agency action does not create a "sufficiently direct and immediate impact," or contemplates future agency action, a party is not aggrieved by the agency action and the action is not final

within the meaning of the APA. *Franklin,* 505 U.S. at 796-97. Likewise, a federal action cannot be the source of Petitioner's alleged injury if the effects of the action are not "felt immediately by those subject to it in conducting their day-to-day affairs." *Nat'l Park Hospitality Ass'n,* 538 U.S. at 810 (quoting *Abbott Labs.,* 387 U.S. at 161-62, 164). And where a claim "rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all[,]" the challenged agency action is not final and does not aggrieve the party seeking review. *See Texas,* 523 U.S. at 300.

In *Ohio Forestry Ass'n,* 523 U.S. at 731-32, the Sierra Club sued the United States Forest Service ("USFS"), alleging that the USFS failed to complete an EIS when it developed a Land and Resource Management Plan ("Plan") for Wayne National Forest that would have permitted private logging operations in certain areas of the forest. This Court rejected the Sierra Club's argument and held that the USFS's Plan was not a final federal action that was ripe for judicial review. *Id.* at 739. In concluding that the Plan was not a final federal action, this Court reasoned that the Plan did "not give anyone a legal right to cut trees, nor [did] it abolish anyone's legal authority to object to trees being cut." *Id.* at 733. Furthermore, because the USFS had to develop site-specific plans for logging that proposed a specific harvesting method, the Plan could not be a final federal action because future site-specific federal plans were contemplated. *Id.* at 733-34. Thus, because the Plan was not a final action, it had no impact on logging operations, could not cause the Sierra Club's injury, and could not aggrieve the Sierra Club. *Id.*

See also Texas, 523 U.S. at 301 (holding that Texas's Declaratory Judgment claim that appointing a special master to a school district did not violate the preclearance provision of the Voting Rights Act, 42 U.S.C. § 1973(c), was not ripe because Texas had not actually appointed any special masters, therefore Texas's injury and rested on "contingent future events" and it was not aggrieved by any federal laws or regulations).

In this case, Petitioner's complaint "expressed concerns that fracking . . . could irreparably damage the New Tejas River if the chemicals used in the fracking operations were to infiltrate the river." J.A. at 11. However, in 2002, when the DoD completed its RoD recommending to the President that Fort Watt be sold, and when the DoD actually sold Fort Watt, the DoD only sold the surface rights to MRI. Under the terms of the sale, the DoD retained title to the minerals underneath the surface of MRI's newly purchased land. *Id.* at 8. After part of Fort Watt was sold to MRI but before the DoD leased the mineral rights to MRI, MRI had no right to extract the oil underlying its land. Indeed, until June 1, 2003, the date on which the DoD and MRI executed their mineral rights, MRI lacked any legal authority or opportunity to engage in fracking and cause Petitioner's alleged injury.

Thus, like the plaintiff's alleged injury from the Plan in *Ohio Foresty Ass'n,* here, the Petitioner's alleged injury did not flow from the sale of Fort Watt because MRI's ability to engage in fracking depended on a site-specific "contingent future event," the execution of a mineral lease between MRI and the DoD. Further, like the USFS's Plan in *Ohio Foresty Ass'n,* the DoD's sale of surface rights to MRI

necessarily contemplated contingent future site-specific action before MRI could drill because under the terms of the sale, the DoD retained the rights to the minerals underlying Fort Watt. Without the execution of the mineral lease, MRI could not engage in fracking, that action that Petitioner asserts would cause its alleged potential injury. Thus, like the alleged injuries in *Ohio Forestry Ass'n* and *Texas,* in this case, Petitioner's alleged injury, concerns over potential contamination of the New Tejas river, cannot result from the 2002 RoD and sale of the surface rights of Fort Watt to MRI because neither action had any immediate legal impact on MRI's ability to engage in fracking. *See Ohio Forestry Ass'n,* 523 U.S. at 733; *Texas,* 523 U.S. at 301.

Accordingly, the Fourteenth Circuit erred in concluding that the RoD and sale of Fort Watt were final federal actions for the purposes of judicial review. As Judge McBride correctly noted in his dissenting opinion, Petitioner's alleged injury results from the mineral lease *subsequent* to the sale that granted MRI the ability to extract oil. Therefore, the DoD's sale of Fort Watt's surface rights to MRI was not a final action because it did not have a "sufficiently direct and immediate impact" on Petitioner. Instead, MRI's discretion to engage in fracking and its ability to cause potential contamination of the New Tejas River from fracking chemicals depended on "contingent future events" by the DoD: the execution of the mineral lease. *See Franklin,* 505 U.S. at 796-97; *Texas,* 523 U.S. at 300. Therefore, with respect to Petitioner's alleged potential injury, the DoD's sale of Fort Watt to MRI cannot be a final federal action.

2. The Commission's RoD was not a final federal action under the APA because the President was the final federal decision-maker, and he is not an agency within the meaning of the APA

The Fourteenth Circuit's conclusion that the Commission's 2002 RoD was a final federal action within the meaning of the APA was also erroneous. In *Dalton,* 511 U.S. at 469-71 (1994), this Court conclusively held the Commission's Records of Decision on base closings are not final federal actions. Additionally, *Dalton* also conclusively held that the President is the final federal decision-maker with respect to base closings, and the President is not an agency within the meaning of the APA. *Id.* at 468-69. Therefore, *Dalton* bars judicial review of the RoD and sale of Fort Watt's surface rights under the APA. *See id.*

In *Dalton,* the plaintiffs sued the Secretary of Defense under the APA for failing to comply with the procedures of the DBCRA and sought an injunction to prevent the Secretary from complying with the President's decision to close this Philadelphia Naval Shipyard. *Id.* at 464-68. This Court affirmed the denial of plaintiffs request for an injunction, holding that the Commission's RoD was not a final agency action under the APA. *Id.* at 468. Relying on *Franklin v. Massachusetts,* this Court reasoned that because the President had to approve the Commission's RoD before a base could be closed, the RoD, absent Presidential and Congressional approval, "carr[ied] no direct consequences for base closings[,]"and was "more like a tentative recommendation than a final and binding determination." *Id.* at 469. Thus, because "the President, not the Commission, takes the final action that affects the military installations," the RoD was "like the

ruling of a subordinate official, not final, and therefore not subject to review." *Id.* at 469-71 (quoting *Franklin,* 505 U.S. at 797-99). *See also Abbott Labs.,* 387 U.S. at 152 (holding that for an agency action to be final under the APA, it must be more than a mere recommendation to a superior official).

Also, relying on *Franklin,* this Court held that the President's decision to accept the Commissions base closure recommendations were not reviewable under the APA because "the President is not an 'agency' within the meaning of the APA." *Dalton,* 511 U.S. at 468-69 (citing *Franklin,* 505 U.S. at 800-01 (stating that "[o]ut of respect for the separation of powers and the unique constitutional position of the President," the President was not an agency within the meaning of the APA)). Consequently, the President's decision under the DBCRA to accept or reject the Commission's recommendation for base closings was not subject to judicial review under the APA. *Dalton,* 511 U.S. at 468-69 (citing *Franklin,* 505 U.S. at 801).

Here, like in *Dalton,* the Commission and President acted pursuant to the DBCRA in deciding to close Fort Watt. After the Commission "conducted a thorough review regarding the continued viability of Fort Watt" and issued its RoD recommending that the base be closed, the Commission transmitted its RoD to the President for approval. J.A. at 6-7, 8. Subsequently, the President took the final action in the decision-making process when he accepted the Commission's recommendations contained in the RoD. *Id.* at 8. Until the President accepted the Commission's RoD, the RoD was not final and was simply a "ruling of a subordinate official, not final, and therefore not subject to review." *Dalton,* 511 U.S. at 469-72

(quoting *Franklin,* 505 U.S. at 799). And although the President was the final federal decision-maker, he is not an "agency" within the meaning of the APA, and his decision to accept the RoD is not subject to judicial review. *Dalton,* 511 U.S. at 468-69 (citing *Franklin,* 505 U.S. at 801). Finally, even if *Dalton* did not apply and the President's approval of the RoD were subject to APA review, in the case at bar, the President's approval of the closure of Fort Watt was not final because it necessarily contemplated further contingent site-specific action on behalf of the Commission: the actual sale of Fort Watt's surface rights to MRI. *See Ohio Forestry Ass'n,* 523 U.S. at 733-34.

Thus, for these reasons, under *Dalton* and *Franklin,* the Fourteenth Circuit erred in concluding that the Commission's 2002 RoD was a final federal action subject to judicial review under the APA.

3. The DoD's sale of Fort Watt's surface rights to MRI was not an irreversible and irretrievable commitment of federal resources that would affect the environment because MRI could not engage in fracking without the execution of the 2003 mineral lease

In the NEPA context, agency actions are final if they constitute "irreversible and irretrievable commitments of resources to an action that will affect the environment." *Los Alamos Study Grp. v. U.S. Dep't of Energy,* 692 F.3d 1057, 1065-66 (10th Cir. 2012). *See also Wyoming Outdoor Council v. U.S. Forest Serv.,* 165 F.3d 43, 49-50 (D.C. Cir. 1999) (holding that there was no irreversible commitment of resources until oil and gas leases were actually issued); *Conner,* 848 F.2d at 1450 (citing 42 U.S.C. § 4332(C)(v) and holding that execution of mineral leases with no-surface occupancy provisions required an EIS because the government could not

"preclude activities [that were] likely, if not certain, to significantly affect the environment). If the challenged agency action requires further government approval before a private party can engage in oil extraction, the action cannot "constitute[] an irreversible and irretrievable commitment" of federal resources "that could have a significant impact on the environment." *Id.* at 1446.

In *Conner,* the Bureau of Land Management ("BLM") sold 700 leases for oil and gas exploration and development on 1,350,000 acres within the Flathead and Gallatin National Forests. *Id.* at 1443-44. Some of the leases contained no surface occupancy ("NSO") stipulations that prevented the lessees from occupying, using, or constructing oil wells on the surface of the leased land without specific approval from the BLM, while other leases lacked NSO stipulations. *Id.* at 1444. The Ninth Circuit held that the leases with NSO stipulations did not constitute an irreversible commitment of federal resources that could have a significant impact on the environment. *Id.* at 1448. The *Conner* court reasoned that "because the government retain[ed] *absolute* authority to decide whether [drilling activities] would ever take place on the leased lands," the NSO leases only granted the lessee "a right of first refusal" and the lessee's right to drill for oil was expressly conditioned on future BLM approval. *Id.* at 1447-48 (emphasis in original). As such, because the BLM retained the absolute right to prevent drilling activities, the BLM retained absolute authority to prevent significant environmental impacts.[7]

[7] As to the non-NSO leases, however, the court held that they were irreversible commitments of federal resources because they did "not reserve to the government the absolute right" to prevent drilling activity, and only allowed the government to impose "reasonable regulations" that sought to mitigate potential environmental impacts." *Conner,* 848 F.2d at 1449-51.

Accord Sierra Club v. Peterson, 717 F.2d 1409, 1411-15 (D.C. Cir. 1983) (same). Thus, the NSO leases were not "irreversible and irretrievable commitment[s]" of federal resources. *Conner,* 848 F.2d at 1447-48.

Here, like the NSO leases in *Conner*, once the DoD sold Fort Watt's surface rights to MRI, the DoD retained absolute authority to completely preclude potential drilling-related environmental impacts from ever occurring. In *Conner*, the BLM retained complete authority to prevent any substantial environmental impacts from drilling because it retained the absolute right to permit or prevent oil-drilling activities. *Id.* Here, similarly, after the DoD sold Fort Watt, it retained complete authority to prevent any substantial environmental impacts from drilling because it could have refused to execute a lease with MRI. Accordingly, like in the lessee's rights to drill in *Conner*, which required further approval from the BLM, in this case, MRI's right to extract oil was expressly conditioned on further DoD action and the DoD had absolute authority to preclude MRI's drilling activities. Thus, like the NSO leases in *Conner,* in this case, the DoD's sale of the surface rights to Fort Watt did not "constitute[] an irreversible commitment" of agency resources "that could have a significant impact on the environment." *See id. at* 1446.

The Commission's 2002 RoD and the DoD's subsequent sale of Fort Watt were not final federal actions within the meaning of the APA. Petitioner's alleged injury, potential contamination of the New Tejas river from fracking chemicals, does not result from either the RoD or the sale of the land because MRI's ability to engage in fracking depended on a contingent future event, the execution of a lease

with the DoD. *See Texas,* 523 U.S. at 300. Furthermore, the RoD was not final agency action within the meaning of the APA because it was a recommendation of subordinate officials to the President, the final federal decision-maker over base closures, and the President is not an "agency" within the meaning of the APA. *Dalton,* 511 U.S. at 468-71. Finally, the sale of Fort Watt was not a final agency action subject to judicial review because it was not "irreversible and irretrievable commitment[] of resources to an action that will affect the environment." *See Conner,* 848 F.2d at 1446. When the DoD sold Fort Watt's surface rights to MRI, the DoD retained an absolute right to preclude Petitioner's alleged injury until it executed the lease with MRI.

For these reasons, Petitioner cannot show that the Commission's 2002 RoD and the DoD's subsequent sale of Fort Watt were final agency actions subject to judicial review under the APA. Accordingly, the Fourteenth Circuit's conclusion as to the relevant final agency action was erroneous and should be reversed.

B. The DoD's Execution Of The Mineral Rights Lease With MRI Was Not A Final Agency Action Under The APA Because The DoD Had No Legal Authority To Approve Or Prevent Fracking And Therefore Any Alleged DoD Action Had No Adverse Legal Effect On Petitioner

In the context of the APA, the hardship inquiry requires this Court to examine whether the challenged agency action mark[s] the 'consummation' of the agency's decisionmaking process" and determines a party's rights or obligations or results in legal consequences. *See Bennett v. Spear,* 520 U.S. 154, 177-78 (1997); *Abbott Labs.,* 387 U.S. at 152-53. Agency actions cause legal consequences where

they have the force of law or where the impact of the action "is sufficiently direct and immediate" such that it "requires an immediate and significant change in the [party's] conduct" to avoid "serious penalties attached to noncompliance." *Abbott Labs.,* 387 U.S. at 150, 152-53. Correspondingly, if the challenged agency action "carrie[s] no direct consequences[,]" then it cannot be a final agency action ripe for judicial review under the APA. *Franklin,* 505 U.S. at 798. *See also Lujan,* 497 U.S. at 891 (stating that an agency action is ripe for review if "as a practical matter [it] requires a [party] to adjust his conduct immediately").

In the case at bar, the DoD's execution of the lease and subsequent blessing of fracking had no legal impact on MRI's ability to engage in fracking and therefore had no legal impact on Petitioner's alleged potential injury. First, because the DoD did not compel or prevent MRI's fracking activities under the terms of the lease, and because the DoD did not grant any permits to MRI, the DoD did not grant any formal license, power, or authority to MRI to engage in fracking. Second, after the execution of the lease, MRI was obligated to obtain fracking permits from the BLM and not the DoD. Because the BLM granted MRI the required permits to begin fracking, the DoD's "blessing" of fracking had no "direct and immediate impact" on MRI, and MRI was free to engage in fracking with or without DoD approval once it obtained the required BLM permits. As explained further below, because the DoD's execution of the mineral rights with MRI had no legal impact on MRI's ability to engage in fracking, the DoD did not cause Petitioner's alleged potential injury, and

Petitioner will not suffer hardship from this Court withholding review of the DoD's inconsequential actions. *See Abbott Labs.,* 387 U.S. at 150-53.

1. The mineral lease between the DoD and MRI did not command or prevent MRI's fracking activities, and therefore the lease did not grant MRI any formal license, power, or authority to engage in fracking

Agency actions carry no direct consequences if "they do not command anyone to do anything or refrain from doing anything; they do not grant, withhold, or modify any formal legal license, power, or authority; [and] they do not subject anyone to any civil or criminal liability . . . ." *Ohio Forestry Ass'n,* 523 U.S. at 733 (citation omitted) (holding that the Plan for the Wayne National Forest did not cause the Sierra Club hardship and thus was not ripe for review because it did not grant anyone a formal legal right or authority to commence logging operations or abolish anyone's legal right or authority to object to proposed or ongoing logging operations).

In *Abbott Laboratories,* 387 U.S. at 137-38, the Commissioner of the Food and Drug Administration ("FDA") promulgated a regulation that required manufacturers of prescription drugs to print the "established name" of drugs "prominently" on labels, advertisements, and other printed materials. The regulation also imposed severe civil and criminal sanctions for noncompliance. *Id.* at 152-53. Prescription drug manufacturers brought suit and alleged that the regulation exceeded the Commissioner's statutory rulemaking authority, and this Court held that the drug manufacturers' suit was ripe for judicial review under the APA. *Id.* at 139, 153. This Court reasoned that the challenged regulation required

immediate compliance that forced the drug companies to change their day-today conduct at great financial cost, and failure to comply with the regulation created the threat of costly civil penalties and criminal prosecution from the United States Attorney General. *Id.* at 151-53. Hence, because the regulation "required an immediate and significant change" in the drug companies' day-to-day conduct, the agency action carried "sufficiently direct and immediate" legal consequences to render the case ripe for judicial review under the APA. *Id.* at 152-53.

In the case at bar, the lease is much more similar to the NSO leases in *Conner* than the regulation in *Abbott Laboratories.* Like the NSO leases in *Conner,* which only granted the oil company lessees a right of first refusal, here, the lease between the DoD and MRI only granted MRI *the opportunity* to extract oil from its land if it obtained the requisite federal and state permits. J.A. at 9, n. 7. As long as MRI obtained the necessary regulatory permits, it was free to engage in any manner or method of oil extraction as long as it met its obligation under the lease to comply with all applicable federal, state, and local laws and regulations.

Moreover, unlike the agency action in *Abbot Laboratories,* which legally compelled the drug companies to engage in a specific course of conduct, in this case, the agency action, execution of the lease, did not compel MRI to use fracking techniques or to even drill for oil at all. J.A. at 9, n. 7. In fact, in this case, the lease even contemplated that MRI might *refrain* from oil extraction entirely by requiring MRI to make rental payments at the rate of $25.00 per acre until a well actually produced oil. *Id.* at 9. Further unlike *Abbott Laboratories,* the lease

contains no provisions that would subject MRI to civil or criminal penalties for failing to engage in fracking, failing to drill for oil, or failing to obtain DoD approval for the manner and method of oil extraction. *Id.* at 9, n. 7. Consequently, like the NSO lease in *Conner* and unlike the regulation in *Abbott Laboratories,* the lease between the DoD and MRI did not legally oblige MRI to engage in a specific course of conduct.

Because the lease did not compel or prohibit MRI's fracking activities and did not subject MRI to civil or criminal penalties for fracking or failing to engage in fracking, the lease did not "require[] an immediate and significant change" in MRI's day-to-day conduct and "carried no direct consequences." *Franklin,* 505 U.S. at 798; *Abbott Laboratories,* 387 U.S. at 152-53. And because the DoD's execution of the mineral lease did not order or prevent MRI's fracking activities, the lease had no direct and immediate legal impact on MRI's ability to engage in fracking. Therefore, the lease it could not have caused Petitioner's alleged potential injury, *See Ohio Forestry Ass'n,* 523 U.S. at 733, and withholding review of the DoD's execution of the mineral lease with MRI would not cause Petitioner to suffer prejudice. *See id; Abbott Laboratories,* 387 U.S. at 151-53.

2. The DoD's "blessing" of MRI's fracking activities carried no legal consequences because the DoD was not the federal agency responsible for issuing oil extraction permits to MRI and because the terms of the lease did not grant the DoD control over the manner and method of MRI's drilling activities

Under the APA, no final agency action exists when an agency approves of a private party's action and "that approval is not required for the private party to go

forward." *Mayaguezanos por la Salud y el Ambiente v. United States,* 198 F.3d 297, 301-02 (1st Cir. 1999). *See also, e.g., Minard Run Oil Co. v. U.S. Forest Serv.,* 670 F.3d 236, 250 (3rd Cir. 2012) (holding that mineral owners were not required to obtain approval from the Forest Service prior to commencing drilling operations in the Allegheny National Forest because the owners were free to extract minerals as long as they complied with federal environmental laws and regulations); *Sierra Club v. Penfold,* 857 F.2d 1307, 1314 (9th Cir. 1988) (holding that the BLM could not require approval of Notice placer mines before miners commenced operations, and therefore BLM's approval or denial of mining operations was not a final agency action because the project could proceed regardless of the BLM's decision). *Accord Named Individual Members of San Antonio Conservation Soc'y v. Texas Highway Dep't,* 496 F.2d 1017, 1023-24 (5th Cir. 1974).

In this case, the DoD lacked any authority under United States law to formally approve or disapprove of MRI's fracking. United States drilling law provides that "deposits of . . . oil [and] oil shale . . . and lands containing such deposits . . . shall be subject to disposition . . . to any corporation organized under the laws of the United States, or of any State or Territory thereof . . . ." 30 U.S.C. § 181 (West 2013). Further, "[a]ll lands . . . which are known or believed to contain oil or gas deposits may be leased by the *Secretary [of the Interior].*" 30 U.S.C. § 226(a) (West 2013) (emphasis added). Although federal regulations provide that MRI must obtain permits and approval to commence oil extraction operations even if it owns the surface rights to the land, 43 C.F.R. § 3161.1 (West 2013), MRI must obtain the

requisite permits and approval for oil extraction operations from the BLM, not the DoD. *See* 43 C.F.R. § 3162.3-1 (West 2013) (requiring parties that drill pursuant to federal mineral leases to file APDs with the Secretary of the Interior). Thus, because the BLM had exclusive jurisdiction over MRI's APD, the DoD lacked any authority to grant MRI the necessary permits to extract oil. *See id.* *See also* 30 U.S.C. § 21(a) (West 2013) (stating that the Secretary of the Interior is responsible for carrying out national mining and minerals policies). And because the DoD lacked authority under federal law to permit or approve MRI's fracking activities, its approval did not determine any legal rights and therefore "carried no direct consequences." *Franklin,* 505 U.S. at 798. Thus, once MRI obtained a lease interest in the oil and the requisite permits and approval from the BLM, it was free to commence drilling operations without any further approval from the DoD. *See id.*

Further, as discussed earlier, under the terms of the mineral lease MRI did not need any approval from the DoD to engage in fracking. Instead, the lease only required MRI to obtain the requisite drilling and fracking permits from the BLM and the relevant state agencies. J.A. at 10. As such, in 2010, when MRI received updated drilling permits from the BLM to engage in fracking, MRI obtained the legal right to engage in fracking with or without DoD approval pursuant to 43 C.F.R. § 3162.3-1. Therefore, the BLM's formal approval of drilling permits was the relevant federal action that "grant[ed] . . . formal legal license, power, or authority[,]" and the DoD's blessing of MRI's fracking activities had no legal effect on MRI's fracking operations. *See Ohio Forestry Ass'n,* 523 U.S. at 733. Because

the DoD's approval of MRI's fracking was legally inconsequential, it cannot cause Petitioner's alleged potential injury, and Petitioner cannot be prejudiced by this Court withholding judicial review.

In sum, the mineral lease between MRI and the DoD and the DoD's subsequent blessing of MRI's fracking activities are not final agency actions within the meaning of the APA. The mineral lease did not grant the DoD the authority to control the manner or method of MRI's private oil extraction activities and did not compel or prevent MRI's fracking activities. As such, the DoD did not grant or deny any formal right, license, or authority to MRI to engage in fracking. *Id.* Finally, under federal laws and regulations, because the BLM had exclusive jurisdiction over the grant or denial of MRI's drilling permits, the DoD lacked any authority to grant MRI the necessary permits to engage in conventional drilling or fracking. Accordingly, the DoD's "blessing" was not required for MRI to engage in fracking and the DoD's actions had no immediate legal effect on MRI's decision or ability to engage in fracking. *See Penfold,* 857 F.2d at 1314. As such, the DoD's actions were not final agency actions within the meaning, and withholding review cannot prejudice petitioner. Therefore, because it cannot demonstrate that it would suffer hardship from this Court withholding review, Petitioner's argument that this case is ripe for adjudication must fail.

II. EVEN IF THE 2003 MINERAL LEASE IS A FINAL FEDERAL ACTION, THE RELATIONSHIP BETWEEN THE DoD AND MRI UNDER THE LEASE IS INSUFFICIENT TO TRANSFORM MRI'S PRIVATE ACTIVITIES INTO MAJOR FEDERAL ACTIONS

NEPA provides that an agency must release an EIS for "major federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). The Code of Federal Regulations defines major federal actions as

> new and continuing activities, including projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by Federal agencies; new or revised agency rules, regulations, plans, policies, or procedures; and legislative proposals. Actions do not include funding assistance . . . with no Federal agency control over the subsequent use of such funds. 40 C.F.R §1508.18(a) (West 2013).

Notably, the Council on Environmental Quality's ("CEQ") guidelines provide that nonfederal actions can become "major federal actions" if they are "subject to Federal control and responsibility." 40 C.F.R. § 1508.18 (West 2013).

Petitioner argues that the lease between the DoD and MRI created a partnership between the parties, thereby transforming MRI's fracking activity into a major federal action requiring an EIS. J.A. at 16. However, Petitioner's argument requires this Court to presume that the 'partnership' created by the lease imputes MRI's private actions to the DoD. And based on the terms of the mineral lease, Petitioner's allegation that the DoD has ultimate control and approval over MRI's fracking activity must fail.

A. Because The DoD Did Not Provide Federal Financial Assistance To MRI's Construction and Drilling Activities, The DoD Lacked Sufficient Control Over MRI's Private Actions To Transform Its Involvement Into a Major Federal Action

Federal funding and other means of federal control may transform a private action into a major federal action. *See, e.g., Fund for Animals, Inc. v. Lujan*, 962 F.2d 1391, 1397-98 (9th Cir. 1992). Under NEPA, a private project becomes federalized if significant federal funding is necessary to control the project. *Ka'Makani 'O Kohala Ohana,* 295 F.3d at 960. Courts scrutinize the amount and use of federal funds to determine if funding is "significant" enough to provide federal control over the project, thereby triggering NEPA analysis. *Id.* at 960-62. S*ee also Village of Los Ranchos de Albuquerque v. Barnhart*, 906 F.2d 1477, 1481 (10th Cir. 1990) (holding that "eligibility [for federal funding] in itself is not sufficient to establish a major federal action"). Further, courts examine the overall purpose of the funding to determine whether the agency gains actual control over the project. *Ross,* 162 F.3d at 1051.

In this case, federal funding is insufficient to federalize MRI's private drilling operations. As the record demonstrates, the DoD did not extend any type of funds to MRI either directly or indirectly. Rather, MRI paid the DoD for the surface rights to Fort Watt and must pay the DoD a percentage of the profits from the sale of oil. J.A. at 8-9. Moreover, subsequent to the execution of the lease agreement, the DoD nor any other federal agency provided any federal funds or resources to help develop MRI's drilling sites or to subsidize MRI's investments in technology, drilling equipment, employee re-training, and advanced earth imaging equipment.

Id. at 10. MRI, by itself, financed the entire construction of its drilling, paid the fees associated with filing permits, and paid the DoD delay rental payments. *Id.* Therefore, Petitioner cannot claim that the DoD engaged in any major federal action under the theory that federal funds were used to begin, assist, or finalize MRI's activities.

B. The Lease Did Not Grant The DoD Sufficient Control Or Authority Over MRI's Private Drilling Activities To Transform the DoD's Limited Involvement Into A Major Federal Action

Because NEPA only applies to *federal* projects, private actions are only subject to NEPA's requirements where there is continuing federal involvement through direct federal decision-making. *See United States. v. Southern Fla. Water Mgmt. Dist.*, 28 F.3d 1563, 1573 (8th Cir. 1994) ("NEPA applies only when there is federal decision-making, not merely federal involvement in nonfederal decision-making"). Therefore, this Court must examine whether the agency has sufficient control over the private actors to render the project a "major federal action". *Mayaguezanos*, 198 F.3d at 301-302. *See also Ross*, 162 F.3d at 1051 (holding that major federal action means that the federal government has actual power to control the project). Additionally, a nonfederal project becomes a major federal action where it cannot begin or continue without prior approval by a federal agency. *Sugarloaf Citizens Ass'n v. Fed. Energy Regulatory Comm'n*, 959 F.2d 508, 513-514 (4th Cir. 1992);

For the reasons that follow, the lease agreement did not create a relationship where the DoD retained control or authority that granted it the right to prohibit,

suspend, or eliminate MRI's fracking activity. Instead, the DoD had no control over MRI's well construction and drilling method, as MRI and *other* federal and state agencies had full control over the parcel and MRI's fracking activities.

1. After the execution of the lease, no major federal actions were contemplated because the lease did not contain an NSO stipulation

In *Ctr. for Biological Diversity v. BLM*, the BLM granted two oil and gas leases with NSO stipulations and two with stipulations mandating the protection of endangered species and cultural resources. 937 F. Supp. 2d 1140, 1150 (N.D. Cal. 2013. The court determined that when the BLM contemplated new leases five years after its first EIS was published in 2006, only the two NSO leases permitted postponing NEPA review until the drilling stage. *Id.* at 1153. It reasoned that for the non-NSO leases, even strict stipulations that enabled the BLM to mitigate potential impacts to endangered species and cultural resources were insufficient to delay NEPA review because BLM was unable to unilaterally deny any drilling permit. *Id.* at 1153. Thus, NEPA analysis of the impacts of fracking was required *before* issuing leases that did not contain NSO provisions. *Id.*

In this case, under the terms of the lease, the only actual control the DoD has involves MRI's commercial activities. J.A. at 9. Indeed, the mineral lease is devoid of any NSO provision, and therefore does not contemplate any further approval of MRI's drilling activities from the DoD. Furthermore, the DoD is prohibited from incorporating NSO provisions in the lease because the BLM retains control over APDs for all federal mineral leases, including land owned private or by other

federal agencies. *See* 43 C.F.R § 3161.1. Therefore, the DoD had no legal or lease-based authority to permit MRI's fracking activities on MRI's own land.

2. The DoD's extremely limited and discretionary ability to veto MRI's sale of oil and gas does not create sufficient control over MRI's private fracking activities to transform the DoD's involvement into a major federal action requiring an EIS

The DoD's extremely limited, discretionary 'veto power' over a narrow category of MRI's potential sales does not create sufficient federal control over MRI's fracking activities to be subject to NEPA. In *Richland Park Homeowners Ass'n v. Pierce*, 671 F.2d 935 (5th Cir. 1982), the plaintiffs sought to enjoin the United States Department of Housing and Urban Development ("HUD") from providing federal financial assistance for the construction and operation of an apartment complex for low income families. The HUD construction financing mandated that 20% of the units be reserved for qualified low income tenants, and HUD continued to pay the apartment complex owner the remainder of the monthly fair market rent for these units. *Id.* at 940.

Richland Park is distinguishable from the case at bar because there, the HUD's control stemmed directly from the financing of the actual construction. In *Richland Park*, ending federal financial assistance would have stopped the construction of the apartment complex because HUD financed the entire project. *Id.* Here, however, MRI's land, construction, reconfiguration, and investments were entirely self-funded and self-directed. Although the lease allowed the DoD a limited veto power over certain sales of MRI's oil and gas, those restrictions would not stop the actual drilling procedures. Thus, unlike in *Richland Park,* once the DoD

executed the lease and granted a mineral rights interest to MRI, the DoD no longer had any authority to stop MRI's private drilling activities.

Under the lease terms, any control the DoD possesses does not impact the environment. First, the DoD's royalty interest in the Fort Watt oil only entitles it to a share of profits from MRI's oil sales and does not grant the DoD any substantive control over MRI's drilling activities. Further, under the terms of the lease, the DoD's control is extremely limited because it may only veto oil sales to third parties where the sale is deemed to be a threat to national security of the United States. J.A. at 9. The argument that MRI would only choose to sell oil to entities that pose a threat to national security strains credulity because in that situation, MRI, a private for-profit company, and the DoD would not be able to reap any financial benefits from MRI's drilling activities. Additionally, were the DoD to disallow all of MRI's proposed sales, MRI would likely continue drilling and producing oil until it found a buyer that the DoD would approve. And even if the DoD imposed a blanket prohibition on MRI's oil sales, MRI still had the right to extract oil, and therefore, the DoD was powerless to stop MRI's drilling activities. Thus, irrespective of the DoD's extremely limited 'veto power,' MRI could continue fracking with or without DoD approval and potentially impact the surrounding environment.

C. The DoD's 'Blessing' Of MRI's Reconfiguration Of Watt 1 And Watt 2 For Fracking Purposes Did Constitute A Major Federal Action Because It Did Not Amount To Formal, Discretionary Approval Of MRI's Fracking Activity

Federal approval of a private party's project, "where that approval is not required for the project to go forward, does not constitute a major federal action."

N.J. Dept. of Env. Prot. and Energy v. Long Island Power Auth, 30 F.3d 403, 417 (3d Cir. 1994). *See also Penfold*, 857 F.2d at 1310. If an agency lacks discretion to affect the outcome of a project, its approval is only ministerial and not a major federal action under NEPA. *Citizens Against Rails–to–Trails v. Surface Transp. Bd.*, 267 F.3d 1144, 1151 (D.C. Cir. 2001). *See also South Dakota v. Andrus*, 614 F.2d 1190 (8th Cir. 1980) (holding that there was no major federal action subject to NEPA where the Department of the Interior was required to issue mineral patents and had no discretion in the matter). The dispositive question then becomes whether MRI was required to obtain DoD approval before drilling or fracking could commence.

When the DoD gave MRI it's 'blessing' to move forward with fracking, such 'approval' did not constitute a major federal action. Although the record is unclear about the context in which the DoD gave it's blessing to MRI to begin fracking, the record is clear that the lease only granted the DoD nondiscretionary approval over the drilling. The limited discretionary oversight power retained by the DoD exists solely to ensure compliance with the royalty payment and limited veto power lease provisions, not compliance with federal laws. Further, under the lease terms, MRI is required to abide by all relevant federal, state and local laws and regulations in connection with construction and drilling. J.A. at 9. Therefore, any regulatory approval required from MRI was under the jurisdiction of other federal agencies, not the DoD, and no DoD approval was required for MRI to engage in fracking. *See id.* at 9.

In *NAACP v. Medical Ctr., Inc.*, 584 F.2d 619, 630 (3d Cir. 1978), the court held that where the agency enabled a project by lease, license, permit, or other entitlement for use, NEPA analysis was required. In *NAACP*, the Secretary of the Department of Health, Education, and Welfare ("HEW") approved a hospital's capital expenditure plan for renovations and expansion after local and state officials certified that renovation and expansion were necessary. *Id.* at 624. The plaintiffs claimed the Secretary should have filed an EIS before issuing his approval of the project. *Id.* Without local and state approval,. *Id.*

The *NAACP* concluded that the Secretary's approval of the project was ministerial and therefore not a major federal action subject to NEPA analysis. The court explained that, "[w]hen the agency 'enables' another to impact on the environment, the court must ascertain whether the agency action is a legal requirement for the other party to affect the environment and whether the agency has any discretion to take environmental considerations into account before acting." *Id.* at 634 (emphasis added). Because the Secretary had a duty to approve the project after state and local certification, and therefore, he lacked discretion to consider the environmental impacts of the project. *Id.* at 628. Furthermore, the Secretary's approval was merely ministerial because the hospital could have legally pursued its renovation and expansion without the Secretary's approval, even though the Secretary could have withheld a portion of federal payments absent state and local certification. *Id.* Thus, because the Secretary lacked discretion to

approve or disapprove of the project, his approval was not a major federal action subject to NEPA analysis. *Id.*

As discussed above, because MRI operates pursuant to a federal mineral lease, the BLM was the only agency that had discretion to grant MRI the required drilling and fracking permits. *See* 43 C.F.R. § 3161.1. Therefore, the legal prerequisite MRI's fracking activity was the issuance of drilling permits from the BLM, not the DoD. Moreover, the DoD had no authority bypass BLM's permitting process and issue MRI the required permits for drilling and fracking.

Further, Petitioner's argument that DoD's failure to object to MRI's fracking constituted a major federal action is legally infirm. Where the DoD lacks clear authority to object to MRI's actions, the inaction is not a major federal action and cannot be subject to NEPA. *See Marbled Murrelet v. Babbitt*, 83 F.3d 1068 (9th Cir. 1996); *Sierra Club v. Babbitt*, 65 F.3d 1502 (9th Cir. 1995). As discussed above, the DoD's only nondiscretionary authority was its limited veto power over oil sales to third parties where the sale was deemed a threat to national security. J.A. at 9. Therefore, the DoD's complete lack of discretionary control over MRI's drilling activities had no legal effect on MRI's ability to engage in fracking, and therefore could not have caused Petitioner's alleged potential injury.

For the reasons stated above, the extremely limited control DoD under the terms of its mineral lease with MRI is insufficient to transform the DoD's nondiscretionary actions into major federal actions subject to NEPA. Thus, an insufficient partnership existed between the DoD and MRI to federalize MRI

private actions and trigger NEPA's analysis. Accordingly, the Fourteenth Circuit's judgment should be affirmed.

III. EVEN IF THE EXECUTION OF THE LEASE WAS A MAJOR FEDERAL ACTION, IT DID NOT REQUIRE A NEW OR SUPPLEMENTAL EIS BECAUSE The DoD DID NOT OBTAIN ANY NEW INFORMATION ABOUT FRACKING AND NO CHANGE IN CIRCUMSTANCES WARRANTED A NEW INVESTIGATION.

After an FEIS is prepared, if new information or new circumstances arise, an agency may be required to prepare an SEIS. *See* 40 C.F.R. § 1502.9(c) (West 2013)*; Marsh,* 490 U.S. at 360. Although NEPA's statutory language does not expressly require an SEIS, the CEQ guidelines require the preparation of an SEIS in specific circumstances. The CEQ guidelines provide that

> Agencies…
>
> 1) Shall prepare supplements to either draft or final environmental impact statements if:
>
> a. The *agency makes substantial changes* in the proposed action that are relevant to environmental concerns; or
>
> b. There are *significant new circumstances or information* relevant to environmental concerns and bear on the proposed action or its impacts. 40 C.F.R. § 1502.9(c) (emphasis added).

In *Marsh*, 490 U.S. at 373, this Court held that agencies do not need to prepare an SEIS every time new information becomes available following publication of the initial FEIS. This Court reasoned that "[t]o require otherwise would render agency decisionmaking intractable, always awaiting updated information only to find the new information outdated by the time the decision is

made." *Id.* This court concluded that agency 's decision to prepare a SEIS must follow the "rule of reason":

> If there remains "major federal action" to occur, and if the new information is sufficient to show that the remaining action will "affect the quality of the human environment" in a significant manner or to a significant extent not already considered, a supplemental . . . [impact statement] must be prepared.

Id. at 374. Thus, an SEIS is only required if there are major federal agency actions remaining and new information indicates that there are significant environmental impacts that were not originally considered. *Id.*

In *Marsh*, the Army Corps of Engineers ("Corps") prepared a final Environmental Impact Statement, Supplement No. 1 ("FEISS") in 1980, relying on water quality studies conducted in 1974 and 1979. *Id.* at 365. In 1982, after reviewing the FEISS, the Corps formally decided to proceed with construction of a dam. *Id.* at 367. In 1985, nonprofit corporations filed an action seeking to enjoin construction of the dam, which was already one-third completed, alleging that the Corps' should have prepared a second SEIS because new information developed after 1980 undermined the conclusions contained in the FEISS. *Id.* at 376. This Court concluded that the Corps' decision not to supplement the FEISS was valid as long because it was not arbitrary or capricious.[8] *Id.* Because the Corps took a hard look at the newly proffered evidence and considered all the relevant factors in

[8] An agency's decision to not issue an SEIS is only arbitrary and capricious if it was not "based on a consideration of the relevant factors" or if it was a "clear error of judgment." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971)

declining to issue a second EIS, its conclusion that a second SEIS was not necessary complied with NEPA. *Id.* at 385.

Here, Petitioner cannot prevail on its claim that the execution of the lease required an SEIS only two years after the Commission completed its initial FEIS. The record is devoid of any new evidence containing significant information about fracking that was not initially available to the Commission during the time it prepared its initial FEIS. Furthermore, during the Commission's preparation of its FEIS, it carefully scrutinized a wide range of possible positive and negative environmental effects that might have resulted from decommissioning and selling the Fort Watt property to private entities. J.A. at 6. Specifically, the FEIS detailed possible future uses for the land, including both conventional oil recovery and extraction and fracking. *Id.* The FEIS addressed, in detail, the potential impacts of conventional oil and gas development and also discussed unconventional operations such as hydraulic fracturing. *Id.* The Commission's FEIS defined fracking and stated that although fracking was not *economically* feasible at the time, *it could be an option in the future. Id.* (emphasis added).

The execution of the lease, which was designed to stimulate oil and/or natural gas production, contemplated both conventional and unconventional drilling techniques analyzed in the initial FEIS. When the RoD was issued and Fort Watt was sold, the accompanying FEIS specifically included all available information about fracking methods. There is no evidence in the record that the 2002 information about fracking changed, or that new information about fracking was

available when the lease was executed on June 1, 2003.[9] And finally, as discussed above, when the lease was executed in 2003, no other major federal actions remained in connection with the drilling project so as to require a new or SEIS.

For these reasons, even if the 2003 mineral lease between the DoD was a major federal action, no new information existed and no future major federal actions were contemplated to trigger supplemental NEPA analysis. Therefore, the DoD did not violate NEPA by declining to supplement its original EIS when it executed the lease or "gave its blessing" to MRI's fracking activities.

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Fourteenth Circuit that Petitioner's lawsuit is ripe for adjudication should be reversed and the case should be dismissed. Alternatively, if this Court concludes this matter is ripe, the Fourteenth Circuit's judgment that Petitioner is not entitled to injunctive relief should be affirmed.

RESPECTFULLY SUBMITTED,

/S/ TEAM NUMBER 56

Counsel for Respondents

NOVEMBER 25, 2013

[9] From 2007 to 2009, the average length of horizontal drilling increase five times over, allowing for a tripling of the initial production rate. *This* technological advance substantially lowered costs, increasing the likelihood of economic feasibility. Amy Myers Jaffe et al, The Status of World Oil Reserves: Conventional and Unconventional Resources in the Future Supply Mix 12 (2011). However, such technological advances occurred four to six years *after* the execution of the lease in 2003.