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.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourteenth Circuit

BRIEF FOR RESPONDENT

ORAL ARGUMENT REQUESTED

TEAM 15
Counsel for Respondent

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QUESTIONS PRESENTED

1. Is an oil and gas lease considered a final agency action that is ripe for review when the agency is not involved in the process to issue a permit to drill and the complaining party is not directly impacted by the lease?

2. Is an agency required to prepare an additional Environmental Impact Statement when it has previously completed an Environmental Impact Statement addressing the petitioner's specific environmental concern?

3. Does an action constitute a major federal action when a federal agency has provided no funding for a private project and only retains limited discretionary powers under a lease that does not inhibit the lessee's ability to perform?

STATEMENT OF THE CASE

In 2001, the respondent, the United States Department of Defense (the "DoD"), contemplated closing Fort Watt. Record at 3–4. The Defense Base Closure and Realignment Commission ("Commission") conducted a thorough review of Fort Watt's current value as a military installation and the impact a closure may have on the surrounding community and environment. R. at 4. The Commission concluded the DoD's best option was to close the base and sell the land. R. at 5. The Commission held a public review period for comments. *Id.* The Commission received input from locals regarding base closure plan, including an op-ed letter from the current Governor of Newtonian, Pedro Tierramante, Sr., discussing his for the local economy if the base were to close. R. at 5 n.3. Next, the Commission completed the Environmental Impact Statement ("EIS") as required by the National Environmental Policy Act of 1969 ("NEPA"). R. at 5. The EIS included a discussion on the effects of conventional oil and gas operations, as well as a discussion of unconventional methods such as hydraulic fracking. R. at 6. The Commission revised the EIS after receiving additional public comments. *Id.* It then published a Record of Decision prior to submitting its recommendation to the President and Congress for approval. R. at 6–7. The Commission's recommendations were approved in November 2002. R. at 8.

Respondent Mainstay Resources, Inc. ("MRI") is one of the major oil and gas exploration and production companies within the United States. R. at 7. In 2003, MRI purchased the surface rights for 750 acres from the 2,200 acres offered for sale,

while the DoD retained all mineral rights. R. at 8. The New Tejas River flows along the western edge of the land purchased by MRI. *Id.*

On June 1, 2003, the respondents, MRI and DoD, entered into a lease for the mineral rights of the 750 acres MRI had purchased. R. at 8. The terms of the lease gave the DoD certain discretionary powers such as the right to inspect the premises at least once a quarter to ensure compliance with the lease and the power to veto a sale of oil or gas produced to individuals or entities that posed a security threat. R. at 9. However, the DoD did not provide any funding to MRI for its oil and gas operations. R. at 17.

MRI originally began drilling two conventional wells, Watt 1 and Watt 2, on the 750 acres. R. at 10. However, MRI eventually halted construction of the wells and contemplated reconfiguring the wells for horizontal drilling. *Id.* In 2010, MRI received the DoD's blessing to prepare the two sites for fracking. *Id.* Next, MRI brought Watt 1 to a vertical depth of 8,200 and 3,750 horizontal length, and Watt 2 to a depth of 12,175 and 5,400 horizontally. *Id.* Both wells were now well below groundwater-level.

Friends of Newtonian ("FON") is an environmental protection organization. R. at 11. Nine years after the Committee completed the EIS, FON filed suit for declaratory and injunctive relief under NEPA and the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701–706. *Id.* The New Tejas River flows 30 miles west from the western edge of the valley on MRI's property to Newtonian. R. at 8. FON is concerned that chemicals from the fracking operation could potentially enter the

river and have a detrimental impact on the reservoirs and fresh water aquifers in Newtonian. R. at 11. The district court denied FON's motion for preliminary injunction. R. at 12. The Fourteenth Circuit upheld the district court's decision, holding that FON failed to prove it was likely to succeed on the merits of its claim or that the public interest tipped in its favor. R. at 17–19.

SUMMARY OF THE ARGUMENT

Petitioner's claim is not ripe for adjudication under the APA. In order to be ripe for review, the petitioner must demonstrate the fitness of the issue for judicial review and show direct and immediate hardship suffered from delay of review. The DoD must have performed an act that constituted a final agency action under the APA for the issue to be fit for judicial decision. Here, Petitioner and the Court of Appeals suggest three theories of final agency action: (1) the Committee's recommendation to close and the subsequent sale of Fort Watt; (2) DoD's "blessing" of fracking at Watt 1 and Watt 2; and (3) the lease executed between the DoD and MRI. None of these actions constitute final agency action under the APA.

First, the Committee's recommendation was not a final agency action. The Committee's report served only as a tentative recommendation to the President and Congress. Ultimately, it was the President and Congress who took the final action to sell under the power provided by the Defense Base Realignment and Closure Act. The President's decisions are not subject to the APA; therefore, the Court cannot consider this a final agency action.

Moreover, the DoD's blessing for MRI to convert the traditional wells into wells for hydraulic fracking was not a final agency action. MRI did not require the DoD's blessing to commence fracking because the lease did not specify the method MRI would use to produce oil and gas pursuant to the lease. The DoD did not grant MRI any additional rights under the lease by providing its "blessing" for MRI to frack. The blessing did not alter any rights or obligations between the parties; therefore, the blessing does not constitute final agency action.

Finally, the subsequent lease to MRI by the DoD was not a final agency action because it merely gave MRI the ability to peruse permits to drill for oil and gas, but the lease did not provide the right to drill. The DoD, unlike the Bureau of Land Management ("BLM"), has no power to issue permits. At the stage of lease issuance, drill development is too uncertain to constitute final agency action.

Additionally, FON cannot show that they will suffer hardship if this court withholds consideration of the request for injunctive relief. In order to show hardship, FON must show that they are directly and immediately impacted by a final agency action. The MRI lease does not directly affect FON. This is evidenced by Respondent's executing the lease in 2003, yet FON waiting until 2011 to file the injunction. The lease does not affect FON's day-to-day business; therefore, the Court will not place hardship on the petitioner by withholding consideration on the claim.

Alternatively, if the claim was ripe, there is no justification for granting FON a preliminary injunction. The petitioner is not likely to succeed on the merits of the case. The DoD addressed hydraulic fracking in its EIS for the sale of Fort

Watt; therefore, there was no need for an additional EIS to address the matter for the subsequent lease. Even if the DoD did not adequately address hydraulic fracking, the lease did not amount to a major federal action. The DoD only retained discretionary powers under the terms of the lease and provided no funding to MRI. MRI can begin and continue its fracking operation without DoD approval or consent.

Additionally, even if this Court found the lease to be a major federal action, the project will not significantly affect the quality of the human environment. There have been no recorded instances where fluid injected into deep shale formations has migrated into groundwater aquifers. The depths of the wells will help to ensure the safety of the groundwater. MRI has also received all the proper permits to perform its operations, which proves the wells are in compliance with all the applicable state and federal laws for fracking.

Finally, the balance of equities and consideration of public interest is weights in favor of drilling. The operation will bring an economy back to New Tejas after the base closure for at least twenty years. The DoD will receive royalties from the operation to help offset its losses from operating the base at a large deficit. MRI is also currently paying rent for the right to frack without the opportunity to collect on its investment. At best, the potential harm to FON because of water contamination is remote. Therefore, the potential harm to the petitioner is greatly outweighed by the benefits that both the respondents and the community surrounding what was Fort Watt will realize.

This Court should reverse the circuit court's holding that the matter ripe for adjudication and dismiss the case. Alternatively, if this Court finds the matter ripe, the Court should affirm the circuit and district courts' decisions that there is no justification for a preliminary injunction against the respondents.

STANDARD OF REVIEW

This Court reviews de novo the appellate court's holding that this claim is ripe for judicial review. *Los Alamos Study Grp. v. U.S. Dep't Of Energy*, 692 F.3d 1057, 1064 (10th Cir. 2012). Any findings of historical fact are reviewed for clear error. *Id.* Additionally, the plaintiff bears the burden of providing evidence to establish that the issues are ripe. *Coal. For Sustainable Res. v. Forest Serv.*, 259 F.3d 1244, 1249 (10th Cir. 2001).

The appropriate standard of review for determining the adequacy of an agency's EIS is the APA's arbitrary and capricious standard under 5 U.S.C. § 706(2)(A). *Olmsted Falls v. Fed. Aviation Admin.*, 292 F.3d 261, 269 (D.C. Cir. 2002) (citing *Marsh v. Or. Natural Res. Council,* 490 U.S. 360, 376 (1989)). "The role of the courts is simply to ensure that the agency has adequately considered and disclosed the environmental impact of its actions and that its decision is not arbitrary or capricious." *Baltimore Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 97–98 (1983). In the alternative, if this Court determines the respondent was required to produce a supplemental EIS because of significant new information that affected the environment, then the agency's decision not to

supplement an EIS is also the arbitrary and capricious standard. *Marsh*, 490 U.S. 360, 375–76 (1989).

ARGUMENT

I. The Issue Before the Court Is Not Ripe for Review.

The APA authorizes judicial review of final agency actions for which there is no adequate remedy at law. 5 U.S.C. § 702 (2012). Because NEPA does not provide a private cause of action, Petitioner's claims are properly asserted pursuant to the APA. *See Colo. Farm Bureau Fed'n v. U.S. Forest Serv.*, 220 F.3d 1171, 1173 (10th Cir. 2000). Before a court may consider the merits of a case, the court must determine whether the case is ripe for review to establish subject-matter jurisdiction. *See Tari v. Collier Cnty.*, 56 F.3d 1533, 1535–36 (11th Cir. 1995).

This Court provided the basic test for ripeness in *Abbott Laboratories v. Gardner* requiring reviewing courts to evaluate "the fitness of the issues for judicial decision" and "the hardship to the parties of withholding court consideration.[1]" 387 U.S. 136, 148–49 (1967), *abrogated by Califano v. Sanders*, 430 U.S. 99 (1977). The Court further elaborated on the doctrine to include the following considerations: "(1) whether delayed review would cause hardship to the plaintiffs; (2) whether judicial intervention would inappropriately interfere with further administrative action; and (3) whether the courts would benefit from further factual development of the

[1] The final agency action does not also have to be a major federal action under the ripeness analysis as the D.C. Circuit court previously held. *See Karst Envtl. Educ. & Prot., Inc. v. Envtl. Prot. Agency*, 745 F.3d 1291, 1295–96 (D.C. Cir. 2007). As the court acknowledge in its holding, this confuses the substance of NEPA with the ripeness analysis under the APA. *Id.* Subsequent D.C. district cases citing to Karst have declined to incorporate the major federal action requirement into the ripeness analysis. *See Sierra Club. v. U.S. Dep't of Energy*, 825 F. Supp. 2d 142, 156 (D.D.C. 2011).

issues presented." *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 733 (1998). This analysis protects "the court's interests in avoiding unnecessary adjudication and in deciding issues in a concrete setting." *Eagle-Pricher Indus., Inc. v. U.S. E.P.A.*, 759 F.2d 905, 915 (D.C. Cir. 1985); *see Abbott Labs.*, 387 U.S. at 148–49.

Petitioner's claim is not fit for review, nor will it suffer a hardship if this Court delays review. A claim involving an administrative agency action is fit only when the agency action is final. *See* 5 U.S.C. § 704 (2012). First, Petitioner has failed to present evidence of a final agency action within the meaning of the APA. The court can quickly dispose of the argument, accepted by the Court of Appeals, that the sale of Fort Watt and DoD sanctioning of fracking at Watt 1 and Watt 2 constitute final agency action. R. at 12, 16. Upon further the review, a pragmatic assessment of the lease executed between the DoD and MRI shows that the lease is not final agency action under the APA. Finally, even if Petitioner can demonstrate a final agency action, Petitioner will not suffer hardship within the meaning of the APA by delaying judicial review of this case. Therefore, Petitioner's claims are not ripe and the case should be dismissed.

A. Petitioner Has Not Identified a Final Agency Action That Is Fit for Review.

Under the APA, the fitness of an issue for judicial review may be evaluated as a question of whether the agency action involved is "final agency action," taking into account any benefit the court would receive from factual development of the record and the agency's interest in clarifying their policy. 5 U.S.C. § 704 (2012); *see Pub. Citizen Health Research Grp. v. Comm'r, Food & Drug Admin.*, 740 F.2d 21, 30

(D.C. Cir. 1984); *Ohio Forestry*, 523 U.S. at 733. Generally, two conditions must be satisfied for agency action to be 'final'. First, the action must mark the consummation of the agency's decision-making process—it must not be of a merely tentative or interlocutory nature. *Bennett v. Spear,* 520 U.S. 154, 177–78 (1997). Second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow. *Id.*, (internal quotation marks and citations omitted). FON has failed to identify a DoD action that satisfies both of these conditions.

1. The Commission's Recommendation to Sell Fort Watt and the Subsequent Sale of Fort Watt Were Not Final Agency Actions Taken by the Department of Defense.

The Fourteenth Circuit incorrectly held the Commission's recommendation to sell Fort Watt was final agency action under the APA because the recommendation was both interlocutory and did not determine any rights or obligations. See R. at 14. The ultimate sale of Fort Watt was the action of the President, not the DoD or the Secretary of Defense. Thus, this action is not reviewable under the APA. *See Pub. Citizen v. U.S. Trade Representative*, 5 F.3d 549, 551 (D.C. Cir. 1993).

The administrative process for closing military bases under the Defense Base Closure and Realignment Act precludes a finding of final agency action by the DoD. This "distinctive statutory regime" gives the DoD Commission the power to recommend military bases for closure. *Dalton v. Specter*, 511 U.S. 462, 479 (1994) (Blackmun, concurring). The President, acting on his own discretion, must either approve or disapprove the Commission's recommendations. *Id.* at 480. If the

President approves of the Commission's recommendations, the Secretary of Defense closes the military installations recommended for closure. *Id.* Under this administrative scheme, the DoD does not take final agency action resulting in military base closures.

i. The Commission's Record of Decision Recommending the Sale of Fort Watt Was an Interlocutory Agency Action.

The DoD's Record of Decision recommending Fort Watt for sale was an interlocutory agency action, and therefore not final under the APA. This Court addressed this question in *Dalton v. Specter. Id.* The Court held that a DoD Commission recommendation to close a military base is not final agency action under the APA. *Id.* at 470–71. Similarly, in *Franklin v. Massachusetts*, this Court held that Secretary of Commerce report of total population by states as required for apportionment of Representatives in Congress does not complete the decision-making process and is therefore not "final" and reviewable under the APA. 505 U.S. 788, 799 (1992). Here, the Commission's Record of Decision, like the Secretary of Commerce's report in *Franklin* and the commission's report in *Dalton*, did not carry "direct consequences" for base closings. *See Id.* at 798. The Record of Decision served "more like a tentative recommendation than a final and binding determination." *Id.* Furthermore, the recommendation did not determine any rights or obligations. For these reasons, the Commission's recommendation is not final and therefore not subject to review.

ii. It Is the President, Not the Department of Defense, That Takes Final, Albeit Unreviewable, Action Related to Base Closure.

Furthermore, the court of appeals incorrectly considered the subsequent sale of Fort Watt to be final agency action. See R. at 14. *Dalton* addressed this question of whether the Secretary of Defense takes final agency action when he closes a base pursuant to the Defense Base Closure and Realignment Act. The Secretary's sale is not final agency action because it is the President, not the Department of Defense, that takes the final action that affects the military installations. *Dalton*, 511 U.S. at 470 (quoting *Franklin*, 505 U.S. at 797). Therefore, the decision to sell Fort Watt does not constitute a final agency action. Moreover, the President is not an "agency" subject to the APA, so the President's compliance with NEPA cannot be challenged directly. *See Pub. Citizen v. U.S. Trade Representative*, 5 F.3d 549, 551 (D.C. Cir. 1993); 5 U.S.C. §§ 701(b)(1), 551(1) (2013).

2. The Department of Defense Did Not Change the Legal Relationship Between the Parties When It "Sanctioned" Fracking at Watt 1 and 2.

Next, Petitioner asserts that the DoD engaged in final federal action when the Department sanctioned fracking at Watt 1 and Watt 2. R. at 12. The form of the DoD's "blessing" is unclear based on the record. *See* R. at 8–12. Still, if the "effect of an agency action is not a change in the legal obligations of a party, the action is non-final for the purpose of judicial review." *Vill. of Bensenville v. Fed. Aviation Admin.*, 457 F.3d 52, 69 (D.C. Cir. 2006) (a letter of intent is not administrative commitment) (quoting *Nat'l Ass'n of Home Builders v. Norton,* 415 F.3d 8, 15 (D.C.

Cir. 2005)). There is nothing in the lease or anywhere in the record to suggest that the DoD's blessing changed any legal relationship or obligations between the parties, or allowed MRI to do anything it wasn't allowed to do before the blessing. *See Nat'l Ass'n of Home Builders*, 415 F.3d at 9–10, 12. Therefore, the DOD's "sanctioning" of fracking at Watt 1 and 2 is not final agency action within the meaning of the APA.

3. The Lease Did Not Consummate the Decision Making Process Regarding Mainstay Resources Inc.'s Oil and Gas Leases.

Finally, the lease negotiated by the DoD and executed on June 1, 2003 was not a final agency action within the APA. R. at 8. The finality requirement of the APA is interpreted in "a pragmatic way" to prevent piecemeal appeals. *Nat'l Wildlife Fed'n v. Goldschmidt*, 677 F.2d 259, 263 (2d Cir. 1982) (quoting *Abbott Labs.*, 387 U.S. at 149). Viewed pragmatically, the lease executed on June 1, 2003 did not confer to MRI any rights to drill at Watt 1 or 2. Further, the court would benefit from further factual development of the record before considering Petitioner's claim. Permitting judicial review of the lease would open the door to piecemeal appeals of the subsequent administrative actions, which did give MRI the ability to drill at Watt 1 and 2. Therefore, the lease executed between DoD and MRI is not a final agency action under the APA.

i. The Lease Executed Between the Department of Defense and Mainstay Resources, Inc. Did Not Consummate the Decision-Making Process Regarding Mainstay Resources Inc.'s Ability to Drill.

The lease executed between the DoD and MRI did not determine rights or obligations that allowed MRI to drill at Watt 1 and 2. The only rights and obligations determined by the lease gave MRI an interest in the mineral rights (if any minerals were ultimately discovered and removed) and obligated MRI to pay delay rentals and royalties. MRI's ability to drill for minerals and oil and gas was out of the hands of the DoD and in the hands of independent permitting agencies.

This distinguishes leases issued by the DoD from leases issued by the BLM. Generally, the BLM cannot deny a lessee the right to drill once a lease is issued unless the action is in direct conflict with another existing law. *Ctr. For Biological Diversity v. Bureau of Land Mgmt.*, 937 F. Supp. 2d 1140, 1152 (N.D. Cal. 2013). This has led courts to determine that after a BLM lease has been issued, the Bureau has engaged in final agency action unless they retain the absolute ability to prevent surface disturbance through a No-Surface-Occupancy ("NSO") clause. *Wyo. Outdoor Council v. U.S. Forest Serv.*, 165 F.3d 43, 49 (D.C. Cir. 1999) (for a BLM lease, irreversible and irretrievable commitment of resources necessary to establish ripeness occurs at lease issuance); *Sierra Club v. Peterson,* 717 F.2d 1409, 1415 (D.C. Cir. 1983) (if the Forest Service chooses not to retain authority to preclude all surface disturbing activities an EIS must be prepared when the leases are issued). This reflects the pragmatic nature of the ripeness analysis.

But the DoD cannot confer any right to disturb the surface in the first place. The DoD can only grant MRI the property rights allowing MRI to seek subsequent and independent drilling permits from agencies with expertise that area. There was no guarantee that MRI would receive these permits. At the time of lease issuance, any administrative consideration of the environmental impact of drilling would be hypothetical. The Plaintiff has identified no DoD "actions that irreversibly lead to" MRI drilling at Watt 1 and Watt 2. *Los Alamos Study Grp.*, 692 F.3d at 1066. It is the permitting agencies, not the DoD, that take the final action that affects the environment. See *Franklin*, 505 U.S. at 797. The pragmatic distinction between BLM leases and the lease executed by the DoD shows that the lease is not final agency action under the APA.

ii. The Court Would Benefit from Factual Development as to Whether Another State or Federal Agency Will Halt Drilling Before It is Set to Commence.

The power to halt MRI's oil and gas extraction project remains with agencies other than the DoD. The DoD expressly reserved additional rights under the lease that could allow other agencies to "scuttle" MRI's drilling process. *See Wyo. Outdoor Council v. U.S. Forest Serv.*, 165 F.3d at 49–50. Under the lease, the DoD reserves the right to veto the sale of any gas produced to any unaffiliated third party if the sale is deemed a threat to national security and, additionally, to inspect the premises. R. at 9 n.7. Taking the restrictions a step further, the lease includes covenants to comply with all federal, state, local laws, and regulations. *Id.* Admittedly, this does not amount to an NSO provision, but read in conjunction with

the opportunity to inspect, creates in other agencies the ability to halt development under the lease. *See N.M. ex rel. Richardson v. Bureau of Land Mgmt.*, 565 F.3d 683 (10th Cir. 2009) (explaining NSO provisions); *Ctr. For Biological Diversity v. U.S. Dep't of Interior*, 563 F.3d 466, 480 (D.C. Cir. 2009) (Petitioners' NEPA-based claims were not ripe due to the multiple stage nature of the Leasing Program).

Given this construction of the lease, the court would benefit from further factual development on the issue of whether any other agency would halt drilling before it was set to commence on February 1. R. at 10. Whereas standing asks "who" may bring a claim, ripeness concerns "when" a claim may be brought. *R.I. Ass'n of Realtors, Inc. v. Whitehouse*, 199 F.3d 26, 33 (1st Cir. 1999). Here, FON brought its claim too early. To decide the case today would "disrupt the administrative process" to which MRI was subjected by the lease by taking away the opportunity for agencies with enforcement power to prevent MRI from drilling. See *Farrell-Cooper Mining Co. v. U.S. Dep't of the Interior*, 728 F.3d 1229, 1235 (10th Cir. 2013) (agency action that is subject to ongoing administrative review is not ripe for review). FON's claim is premature because there is a chance, given the construction of the lease, that drilling would have been halted before MRI was set to commence drilling in February.

Courts have been reluctant to convert the "flexible" ripeness doctrine into a *per se* rule that ripeness in oil and gas leasing cases occurs at the point of lease issuance. *Wyo. Outdoor Council v. Bosworth,* 284 F. Supp. 2d 81, 93 (D.C.C. 2003), *appeal dismissed*, 2004 WL 1345107 (D.C. Cir. 2004); *Am. Fed'n of Gov't Emps. v.*

O'Connor, 747 F.2d 748, 758 (D.C. Cir 1984) (Mikva, J., dissenting). As explained, all leases are not created equal. While a BLM lease gives a blanket right to drill unless in direct contradiction with other law, the DoD's general lease does not. Because lease development is so uncertain at the lease issuance stage, Petitioner's claims rest upon "contingent future events" that may or may not occur. *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 580–81 (1985). At the point of lease issuance, particularly of a lease in which the lessor reserves additional rights to scuttle development, the inherent uncertainty as to whether MRI will ever drill precludes a finding of final agency action.

B. Delaying Review Will Not Cause Undue Hardship on Petitioners.

The absence of final agency action is dispositive of the ripeness issue. *See Friends of Marolt Park v. U.S. Dep't of Transp.*, 382 F.3d 1088, 1093–94 (10th Cir. 2004). Still, even if the court finds that the DoD engaged in final agency action, the case should be dismissed because FON will not suffer undue hardship from the court's delayed review. The hardship criterion is satisfied when "the impact of the regulations upon the petitioners is sufficiently *direct and immediate* as to render the issue appropriate for judicial review at this stage." *Mid-Tex Elec. Co-op., Inc. v. Fed. Energy Regulatory Comm'n*, 773 F.2d 327, 337 (D.C. Cir. 1985) (quoting *Abbott Labs.*, 387 U.S. at 152) (emphasis added). For example, in *Abbott Laboratories*, the regulation at issue had a "direct effect on the day-to-day business" of the plaintiffs because they were compelled to affix required labeling to their products under threat of criminal sanction. *Texas v. United States*, 523 U.S. 296, 301 (1998)

(quoting *Abbott Labs.*, 387 U.S. at 152). The DoD's lease carried no such ramifications for FON.

This Court has not directly answered the question of what constitutes hardship in a pure NEPA claim brought pursuant to the APA. In *Ohio Forestry*, the Court indicated that a NEPA claim would be ripe for review any time a final agency action could be identified which was arguably in violation of NEPA, saying, "a person with standing who is injured by a failure to comply with NEPA procedure may complain of that failure at the time the failure takes place, for the claim can never get riper." 523 U.S. at 737. This language from *Ohio Forestry* is dicta, because the Court was not confronted with a NEPA challenge; therefore, the Court need not follow it. *Jimenez v. Walker*, 458 F.3d 130, 143 (2d Cir. 2006). Still, this language has led some lower courts to eliminate the hardship requirement from NEPA analysis. *See Nulankeyutmonen Nkihtaqmikon v. Impson*, 503 F.3d 18, 32 (1st Cir. 2007); *W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 486 (9th Cir. 2011) *cert. denied*, 132 S. Ct. 366 (2011).

This interpretation of prudential ripeness is contrary to *Abbott* and reads a general citizen suit provision into NEPA that was not provided by Congress. *See* 42 U.S.C. § 4321 (2006). Congress has included a general citizen suit provision in several environmental protection statutes including the Clean Water Act; Clean Air Act; Endangered Species Act; Resource Conservation and Recovery Act; Toxic Substance Control Act; and the Comprehensive Environmental Response, Compensation, and Liability Act. By providing a citizen suit provision, Congress

provides an adequate remedy at law and a complainant need not satisfy the APA requirement of hardship. See 5 U.S.C. § 702 (2012). For example, the broad language of the Endangered Species Act citizen-suit provision provides that "any person" can bring a claim for an alleged violation the Endangered Species Act. 16 U.S.C. § 1540(g)(1) (2012). Even so, the congressional grant of review is not unlimited. Congress frequently includes limitations to the citizens suit provisions, including notice requirements and opportunity for intervention by the EPA. See 16 U.S.C. § 1540 (g)(2)(a) (2012). The court will read an even broader citizen suit provision into NEPA, one not provided by Congress, by following *Ohio Forestry's* dicta and eliminating the traditional hardship requirement.

1. The Lease Does Not Have a Direct Impact on Friends of Newtonian.

The lease executed on June 1, 2003 has no direct or immediate impact on FON. *See Franklin*, 505 U.S. at 788. The lease does not force FON to modify its behavior through threat of future sanctions. *Abbott Labs.*, 387 U.S. at 152—153. Unlike the plaintiff in *Abbott*, FON has not been put to a Hobson's choice between suffering a penalty or complying with an allegedly extrajudicial regulation at a substantial cost. As evidenced by FON's failure to bring its claim between the time of lease issuance in 2003 until now, the lease did not have an impact on FON's day-to-day business. *See Fed. Trade Comm'n v. Standard Oil Co. of Cal.*, 449 U.S. 232, 239 (1980).

The D.C. Circuit correctly engaged in this analysis in *Mid-Tex Elec.* 773 F.2d at 338. The court examined the ripeness of both procedural and substantive claims

that, among other things, the Federal Energy Regulatory Commission failed to satisfy the NEPA requirements in passing a rule regarding rates paid by public utilities. *Id.* In assessing hardship, the court found that "because of the rule, Petitioners are paying higher rates." *Id.* at 337–38. This injury was sufficiently direct and immediate to satisfy the hardship prong of the NEPA analysis. *Id.*

In light of the precedent, the Fourteenth Circuit was incorrect to consider *potential* damage to the New Tejas waterway as a direct and immediate harm to FON under the hardship prong of the APA analysis. R. at 14. By these very terms, any injury suffered by FON has not been direct and immediate, it is merely potential. While injury to environmental interests can satisfy the injury-in-fact and reasonably traceable requirements of standing, the Court cannot conflate Article III standing with the question of ripeness. *See United States v. Students Challenging Regulatory Agency Procedures,* 412 U.S. 669, 686 (1973); *Bennett*, 520 U.S. at 154. The correct question is whether FON will be injured in the interim by a delay of review of DoD's compliance with NEPA. *Atl. States Legal Found. v. Envtl. Prot. Agency,* 325 F.3d 281, 285 (D.C. Cir. 2003).

That NEPA is primarily a procedural mandate does not change the hardship analysis under the APA. As the Fourth Circuit noted in *Food Town Stores, Inc. v. Equal Emp't Opportunity Comm'n,* there is no language in *Abbott* to support the proposition that finality can turn on a substantive-procedural distinction. 708 F.2d 920, 923 (4th Cir. 1983). Because Congress did not provide a citizen suit provision in NEPA, Petitioner's claims are ripe for review only if they can demonstrate undue

hardship under the APA. FON does not claim that they were "directly and immediately" impacted by any failure of the DoD to consider the environmental impacts of accepting royalties should MRI ever drill at Watt 1 and Watt 2. Pointedly, nothing in the lease directly affects FON; therefore, delaying review will not cause FON hardship and the claim is not ripe for review.

II. The District Court Did Not Abuse Its Discretion When It Denied Petitioner's Request for a Preliminary Injunction.

NEPA requires federal agencies to consider the environmental impact of major federal actions that substantially affect the quality of the human environment. 42 U.S.C. § 4332(C) (2006). NEPA establishes two concrete mandates for federal agencies. First, it places an obligation on federal agencies to take a "hard look" at the environmental consequences before taking a major action. *Baltimore Gas & Elec.*, 462 U.S. at 97. Second, NEPA requires the federal agency to inform the public that it took environmental considerations into account before taking action. *Id.* This is accomplished by requiring federal agencies to prepare an EIS for all proposals of major federal actions significantly affecting the quality of the human environment. 42 U.S.C. § 4332(C) (2006).

If a third party believes a federal agency failed to fulfill the EIS requirements under NEPA, the party may ask the court to enter a preliminary injunction to prevent the activity that may negatively affect the environment. A plaintiff seeking to obtain a preliminary injunction must establish: (1) that he is likely to succeed on the merits; (2) that he is likely to suffer irreparable harm in the absence of preliminary relief; (3) that the balance of equities tips in his favor; and (4) that an

injunction is in the public interest. *Winters v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

In the present case, Petitioner is not likely to succeed on the merits because the DoD did not need to prepare a supplemental EIS. The DoD addressed the potential environmental effects of hydraulic fracturing in its EIS accompanying the sale of Fort Watt, and the DoD found the use of hydraulic fracturing would not significantly affect the quality of the human environment. R. at 6. Therefore, no additional EIS is necessary to address the potential effects of hydraulic fracturing. Additionally, the DoD's lease of and participating royalty interest in the mineral rights of Fort Watt do not constitute a major federal action requiring an EIS. Further, MRI's use of hydraulic fracturing is not likely to produce irreparable harm to the environment. Finally, an injunction in favor of Petitioner is not in the public interest because the New Tejas economy will greatly benefit from the economic effects of MRI's use of hydraulic fracturing.

A. Petitioner Will Not Succeed on the Merits.

In order to prevail, Petitioner must prove that it is likely to succeed on the merits. To do this, Petitioner must prove that the DoD's involvement and participating royalty interest in the mineral rights at Fort Watt constitute a major federal action requiring an EIS discussing the impacts of the use of hydraulic fracturing. Petitioner will not be able to prove it is likely to succeed on the merits for two reasons. First, the DoD addressed the environmental effects of hydraulic fracturing in the EIS the DoD prepared before the sale of Fort Watt. Second, even if

this court finds that the DoD did not adequately address the environmental effects of hydraulic fracturing in its EIS accompanying the sale of Fort Watt, the DoD and MRI will still prevail because the DoD's lease of and participating royalty interest in the mineral rights of Fort Watt do not constitute a major federal action requiring the issuance of an supplemental EIS.

1. The Department of Defense's Environmental Impact Statement Addressed Petitioner's Concerns.

The APA governs judicial review of NEPA; therefore, courts apply the arbitrary and capricious standard when reviewing federal agency decisions under NEPA. *Marsh*, 490 U.S. at 375–76 (1989). A federal agency's decision not to prepare an EIS can be set aside only upon a showing that the decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A) (2012). Since the passage of NEPA, this Court has decided fifteen cases regarding the sufficiency and necessity an EIS under NEPA. Jason J. Czarnezki, *Revisiting the Tense Relationship Between the U.S. Supreme Court, Administrative Procedure, and the National Environmental Policy Act*, 25 Stan. Envtl. L.J. 3, 10 (2006). Due to the strenuousness of the arbitrary and capricious standard, this Court has decided every NEPA case in favor of the government. *Id.*

Once a federal agency makes a decision subject to NEPA's procedural requirements, the only role for a court is to insure that the agency has considered the environmental consequences. The court cannot "'interject itself within the area of discretion of the executive as to the choice of the action to be taken.'" *Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 227 (1980) (citing *Kleppe v.*

Sierra Club, 427 U.S. 390, 410, (1976)). In *Strycker's Bay*, this Court held that NEPA does not require an EIS to produce particular results; rather, NEPA imposes procedural requirements to ensure a federal agency will have available and carefully consider information concerning the environmental impact of the federal agency action. *Strycker's Bay*, 444 U.S. at 350.

In the present case, the DoD produced an EIS that "discussed unconventional oil and gas operations, including hydraulic fracturing." R. at 6. After generating its EIS, the DoD complied with the requirements of the APA. The DoD revised the EIS after receiving public comments, published a Record of Decision, and then submitted the EIS to the President and Congress who approved the recommendations in November 2002. R. at 6-7. Therefore, the DoD has adequately addressed the potential effects of the use of hydraulic fracturing. Thus, a supplemental EIS is not required to address the use of hydraulic fracturing in the lease of mineral rights to MRI.

2. Even if This Court Finds the Department of Defense's Environmental Impact Statement Did Not Address Petitioner's Concerns, the Department of Defense's Conduct Does Not Constitute a Major Federal Action.

In order to succeed on the merits, Petitioner must prove the DoD's involvement with MRI's drilling project constitutes a major federal action that will significantly affect the quality of the human environment. "Based on 40 C.F.R. § 1508.18, as well as the voluminous case law interpreting NEPA's requirements," the court shall consider the following factors to determine whether an action is or is not a major Federal action: (1) when the project is undertaken by a nonfederal

actor, whether the federal agency must undertake affirmative conduct before the nonfederal actor may act; and (2) whether the project receives significant federal funding. *Mineral Policy Ctr. v. Norton*, 292 F. Supp. 2d 30, 54–55 (D.D.C. 2003). The "major" element reinforces but does not have a meaning independent of significantly. 40 C.F.R. § 1508.18 (2013). Therefore, the only two issues this Court must consider to determine whether the action is a major federal action are whether the action is "federal" and whether the action "significantly affects the quality of the human environment." 42 U.S.C. § 4332(C) (2006).

In the present case, the DoD does not need to affirmatively act before MRI may commence drilling under the terms of the lease. R. at 9 n.7. Further, the DoD has not expended, nor has MRI received any federal funds in support or furtherance of its plan to use hydraulic fracturing to extract oil and natural gas from Watt 1 and Watt 2. Therefore, the DoD's involvement in MRI's drilling project does not constitute a major federal action requiring the preparation and issuance of an EIS.

i. The Department of Defense Did Not Exercise Control over Mainstay Resources Inc.'s Drilling Project.

An EIS is required on an agency action only if it is a "federal" action. *Id.* "Major (f)ederal action includes actions with effects that may be major and which are potentially subject to Federal control and responsibility." 40 C.F.R. § 1508.18 (2013). This problem is sometimes called the "small handle" problem because federal action may be only a "small handle" on a nonfederal project. Daniel R. Mandelker, NEPA Law and Litigation § 8:19 (2d ed. 2013). In order for an act of a federal agency to be considered a major federal action, "the federal agency must

possess actual power to control the nonfederal activity." *Ctr. for Biological Diversity v. U.S. Dep't of Hous. and Urban Dev.*, 541 F. Supp. 2d 1091, 1099 (D. Ariz. 2008), *aff'd*, 359 F. App'x 781 (9th Cir. 2009). A federal agency possesses actual power to control a nonfederal project only if the nonfederal action cannot begin or continue without prior approval by a federal agency, and the agency possesses actual authority to exercise discretion over the outcome. *Sugarloaf Citizens Ass'n v. Fed. Energy Regulatory Comm'n*, 959 F.2d 508, 512 (4th Cir. 1992).

In *Mayaguezanos por la Salud y el Ambiente v. United States*, the First Circuit outlined two situations that generally do not constitute major federal actions under NEPA. 198 F.3d 297, 301–02 (1st Cir. 1999). The first is governmental inaction. *Id.*; *see* 40 CFR § 1508.18 (2013). The second situation is where the federal agency merely had the power to approve an action by a private party, and that approval was not required for the private party to go forward. *Mayaguezanos*, 198 F.3d at 301–02; *see also N.J. Dep't of Envtl. Prot. & Energy v. Long Island Power Auth.*, 30 F.3d 403, 415–16 (3d Cir. 1994); *Sierra Club v. Penfold*, 857 F.2d 1307, 1314 (9th Cir. 1988); *Named Individual Members of San Antonio Conservation Soc'y v. Tex. Highway Dep't*, 496 F.2d 1017, 1023–24 (5th Cir. 1974). In the present case, the DoD retained only discretionary power to veto MRI's decision to sell natural resources to third parties when a third party is determined to be a threat to national security. R. at 9. However, MRI does not need the DoD's approval to go forward with drilling projects. Thus, the present case is analogous to the second situation described in *Mayaguezanos*.

Where a private party can proceed with drilling without federal agency approval, there is no major federal action. In *Minard Run Oil Co, v, U.S. Forest Service*, the Forest Service supervised a private party drilling for oil and natural gas in a national forest. 670 F.3d 236, 254 (3d Cir. 2011). The Third Circuit held this did not constitute a major federal action because, while the private party had a duty to inform the Forest Service of its intent to drill, the private party could nevertheless proceed with drilling without first obtaining the Forest Service's approval. *Id.* Here, MRI need not notify the DoD of its intent to drill; rather, MRI must only inform the DoD of its intent to sell natural resources extracted from Watt 1 and Watt 2 to specific third parties. R at 9 n.7. MRI may commence drilling without approval by the DoD. Further, the DoD does not have the power to control when MRI drills and extracts natural resources from Watt 1 and Watt 2. Therefore, the DoD does not have ultimate control over the environmental impacts of MRI's use of hydraulic fracturing. *See Sylvester v. U.S. Army Corps of Eng'rs*, 871 F.2d 817, 823 (9th Cir. 1989), *amended en banc by* 884 F.2d 394 (9th Cir. 1989) (a private party's construction of a resort complex could have gone forward without any federal action, so the Army Corps of Engineers did not have ultimate control over the environmental impacts the private action).

In both its majority and dissent, the Fourteenth Circuit addressed a split among the circuits regarding the determination of whether agency action constitutes a "federal action". The majority applied the reasoning of the First and the Ninth Circuits and rejected the theories relied on by the Fourth Circuit. R. at

16. In his dissent, Justice McBride relied on the reasoning of the Fourth Circuit and determined that the DoD's involvement with MRI's drilling project constituted a major federal action. R. at 19–20. It is well settled that the First, Fourth, and Ninth Circuits all look to whether federal approval is the prerequisite to the action taken by the private actors to determine whether an action is federal. *Mayaguezanos*, 198 F.3d at 302. As discussed above, the DoD's approval is not a prerequisite to MRI's commencement of drilling and use of hydraulic fracturing. *See* R. at 9 n.7. Thus, the First, Fourth, and Ninth Circuits would agree that no major federal action exists in the case at bar.

ii. The Department of Defense Did Not Contribute Federal Funds to Mainstay Resources Inc.'s Drilling Project.

NEPA usually applies when a federal agency provides federal financial assistance for an activity or project to be carried out by a nonfederal entity. Daniel R. Mandelker, NEPA Law and Litigation § 8:20 (2d ed. 2013). While the circuits are split on the issue of federal funding, and there is no definitive Supreme Court case on point, the first and Ninth Circuits agree with the Fourth Circuit on the element of funding required to constitute a major federal action. (E.g. *Scarborough Citizens Protecting Res. v. U.S. Fish and Wildlife Serv.*, 674 F.3d 97, 99 (1st Cir. 2012) (considered whether the federal agency provided funds to help the state purchase land for wildlife protection); *Rattlesnake Coal. v. U.S. Envtl. Prot. Agency*, 509 F.3d 1095, 1101 (9th Cir. 2007) (the court looked to the use of federal funds in support of the project to determine whether a state development plan constitutes a major federal action); *Sugarloaf Citizens*, 959 F.2d at 514 (looked to a facility's receipt of

federal funding to determine whether the action was federal). In this case, MRI did not receive any federal funds.

No federal funds have been appropriated within the DoD in support of MRI's use of hydraulic fracturing. The DoD has not assigned an employee to manage the project; therefore, no DoD employee is receiving compensation for the oversight of MRI's use of hydraulic fracturing. Additionally, no federal funds have passed from the DoD to third parties, including MRI, in support or furtherance of MRI's use of hydraulic fracturing. R. at 17. To the contrary, the DoD may receive royalty and rental payments from MRI for its use of hydraulic fracturing to extract oil and natural gas from Watt 1 and Watt 2. R. at 17. Therefore, the DoD's lease of and participating royalty interest in the mineral rights contained in the lease do not constitute a federal action because MRI has not received any federal funds from the DoD in support of its use of hydraulic fracturing.

B. Even if the Court Finds the Department of Defense's Conduct Constitutes a Major Federal Action, Mainstay Resources Inc.'s Drilling Project Will Not Significantly Affect the Quality of the Human Environment.

If a major federal action is pending, and new information is sufficient to show the pending action will "affect the quality of the human environment in a significant way that had not already been considered, a supplemental EIS must be prepared." Ma*rsh*, 490 U.S. 360 at 393; 42 U.S.C. § 4332(2)(C) (2006). The determination of whether a federal action will have a significant effect on the human environment primarily involves issues of fact. *Kleppe*, 427 U.S.at 412. Thus, when an agency has adequately considered the factors detailed by the regulation, a court will uphold the

agency's finding that its action is not significant. *E.g., Heartwood, Inc. v. U.S. Forest Serv.*, 380 F.3d 428 (8th Cir. 2004) (logging would not significantly affect the quality of the human environment); *Buckeye Forest Council v. U.S. Forest Serv.*, 337 F. Supp. 2d 1030 (S.D. Ohio 2004) (third parties would suffer irreparable injury from forest thinning in the absence of an injunction); *S. Utah Wilderness Alliance v. Norton*, 326 F. Supp. 2d 102 (D.D.C. 2004) (seismic oil and natural gas exploration would not significantly affect the quality of the human environment); *Sierra Club v. Alexander*, 484 F. Supp. 455 (N.D. N.Y. 1980), *aff'd*, 633 F.2d 206 (2d Cir. 1980) (injunction denied where construction of a shopping mall would not significantly affect the quality of the human environment); *Mid-Shiawassee Cnty. Concerned Citizens v. Train*, 408 F. Supp. 650 (E.D. Mich. 1976), *aff'd*, 559 F.2d 1220 (6th Cir. 1977) (environmental assessment for wastewater treatment plant well done and revised).

A court must consider the context and intensity of the environmental impact to determine its significance. 40 C.F.R. § 1508.27 (2013). Where an action is site-specific, context refers to the effects in the locale rather than in the world as a whole. 40 C.F.R. § 1508.27(a) (2013). Thus, in this case, the court must consider the effects of hydraulic fracturing in the areas surrounding MRI's drilling project. Specifically, the court must consider whether MRI's use of hydraulic fracturing will significantly affect the groundwater in New Tejas and surrounding areas. Intensity relates to the severity of the impact on the environment narrowed by context. *Id.* Intensity is determined by scrutinizing ten factors described in 40 CFR § 15.08.27.

Ctr. for Biological Diversity v. Bureau, 937 F. Supp. 2d at 1154–55. Two of the ten factors are relevant to the case at hand: (1) the degree to which the proposed action affects public health or safety; and (2) the degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks. Thus, this Court must consider the probability and the degree of the negative effects of hydraulic fracturing on the citizens of New Tejas and surrounding areas.

In the present case, Petitioner will not be able to prove MRI's use of hydraulic fracturing in New Tejas is likely to irreparably harm the environment, specifically, the groundwater, in New Tejas and surrounding areas, including Newtonian.

1. Irreparable Injury Is Not Likely to Occur if Mainstay Resources Inc. Commences Drilling.

This Court has held plaintiffs seeking preliminary injunctive relief must demonstrate that irreparable injury is *likely* in the absence of an injunction. *Winters*, 555 U.S. at 22. A plaintiff who merely demonstrates the possibility of irreparable harm cannot succeed on the merits because a preliminary injunction based only on a possibility of irreparable harm is inconsistent with the court's characterization of injunctive relief as an extraordinary remedy. *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997).

Petitioner raised concerns over MRI's use of hydraulic fracturing to extract oil and natural gas from Watt 1 and Watt 2. R. at 11. Petitioner specifically expressed concerns about the possibility that the use of hydraulic fracturing could damage the New Tejas River if the chemicals used in the drilling operations were to infiltrate the river. R. at 11. This is the only concern raised by Petitioner in its suit

for a preliminary injunction to halt progress on MRI's use of hydraulic fracturing on Watt 1 and Watt 2. R. at 11-12. Therefore, this is the possibility this court must consider in its determination of whether an irreparable injury is likely to occur.

The risk of water contamination resulting from hydraulic fracturing is virtually impossible to calculate or predict. Thomas W. Merrill & David M. Schizer, *The Shale Oil and Gas Revolution, Hydraulic Fracturing, and Water Contamination: A Regulatory Strategy*, 98 Minn. L. Rev. 145, 228–29 (Nov., 2013). Additionally, current research on hydraulic fracturing is contrary to Petitioner's concerns.

> "Groundwater is protected by several controls in the well drilling and hydraulic fracturing process. The shale gas/oil deposits are usually thousands of feet below groundwater aquifers being pumped for domestic and municipal water. The wells are constructed and designed to ensure isolation of the wellbore. The wellbore is surrounded by several layers of steel casing and cement."

U.S. Dep't of the Interior Bureau of Land Mgmt, *Common Hydraulic Fracturing Questions and Answers*, http://www.blm.gov/pgdata/etc/medialib/blm/nv/field_offices/elko_field_office/information/communications_forum/03_14_13.Par.26009.File.dat/Hydraulic%20Fracturing%20FAQ.pdf, (last updated Feb. 6, 2013).

In *Winters*, this Court held the petitioner failed to prove the government's use of mid-frequency sonar during training exercises in the waters off of Southern California was likely to produce irreparable harm. 555 U.S. at 23. This Court found it pertinent that the military was not conducting a new type of activity with completely unknown effects on the environment because NEPA imposes only procedural requirements to ensure that the agency will have available information

concerning significant environmental impacts. *Id.* (citing *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989)).

In the present case, the DoD addressed the use of hydraulic fracturing in its initial EIS. Like mid-frequency sonar, hydraulic fracturing is not a new technology. Further, the effects of hydraulic fracturing have been studied extensively since the energy industry began using hydraulic fracturing as a means to extract oil and natural gas. In fact, "hydraulic fracturing has been occurring for an estimated 65 years." Independent Petroleum Association of America, *Just the Facts*, Energy In Depth Website (2013) http://www.energyindepth.org/just-the-facts/. According to the Independent Petroleum Association of America ("IPAA"), and based on testimony by Lisa Jackson, EPA Administrator to the U.S. Senate, there have been no known and proven groundwater contamination events in the U.S. as a result of hydraulic fracturing activities. U.S. Dep't of the Interior Bureau of Land Mgmt, *Common Hydraulic Fracturing Questions and Answers*, http://www.blm.gov/pgdata/etc/medialib/blm/nv/field_offices/elko_field_office/information/communications_forum/03_14_13.Par.26009.File.dat/Hydraulic%20Fracturing%20FAQ.pdf, (last updated Feb. 6, 2013).

Further, the Petitioner's concerns regarding a link between groundwater contamination and hydraulic fracturing have been raised in similar contexts many times in the last decade. Thomas W. Merrill, *Four Questions About Fracking*, 63 Case W. Res. L. Rev. 971, 983 (Summer, 2013). However, there is currently no documented instance of fracking fluid migrating upward through fractures into

groundwater aquifers, and most experts think it highly unlikely. *Id.* "The basic reason is that shale seams are typically very deep, up to a mile underground, and the enormous weight of rock and soil above these seams will compress any fractures that might otherwise allow fracking fluid to migrate upward." *Id.* at 983–84.

Therefore, the intensity of the potential harm alleged by Petitioner rises only to the level of a possibility at best. Current information regarding the nexus between groundwater contamination and hydraulic fracturing does not meet the likelihood standard proscribed by this Court in *Winters*. Thus, Petitioner cannot prove that MRI's use of hydraulic fracturing is likely to cause irreparable harm and significantly affect the quality of the human environment.

C. The Balance of Equities and Consideration of the Public Interest Tip in Favor of the Department of Defense and Mainstay Resources, Inc.

In each case, the Court "must balance the competing claims of injury and must consider the effect on each party of the granting or" denying of the preliminary injunction. *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 542 (1987). The Court must consider the effects of a preliminary injunction of the DoD, MRI, and Petitioners, as well as whether an injunction is in the public interest. In the present case, the harm to the DoD and MRI greatly outweigh the possibility of future harm to Petitioners. Therefore, the balance of equities tips in favor of DoD and MRI.

1. A Preliminary Injunction Will Harm the Department of Defense and Mainstay Resources, Inc.

Every day drilling is delayed, the DoD and MRI suffer economic harm. According to the lease between the DoD and MRI, the DoD will receive one quarter of the gross proceeds received by MRI from the sale of natural resources extracted from Watt 1 and Watt 2. R. at 9. These royalty payments will help the DoD recover costs incurred as a result Fort Watt's running at a deficit for over ten years. R. at 4. If Petitioner's injunction is granted, the drilling will not commence for the period of the injunction and the DoD will not receive royalty payments.

In addition to paying the DoD one quarter of the gross proceeds from sales, MRI must also pay the DoD delay rental payments until a Watt 1 or Watt 2 actually yields oil or natural gas. R. at 11. If Petitioner's injunction is granted, MRI will continue to pay rental fees without making a profit from the wells. Thus, MRI will be losing money on its investment after spending millions of dollars to purchase the mineral rights from the DoD. Therefore, a preliminary injunction would have a negative economic effect on the DoD and MRI.

2. A Preliminary Injunction Is Not in the Public Interest.

In cases where the public interest is involved, the courts must examine whether the public interest favors the plaintiff. *Fund for Animals, Inc. v. Lujan*, 962 F.2d 1391, 1400 (9th Cir. 1992) (citing *Caribbean Marine Servs. Co. v. Baldrige*, 844 F.2d 668, 674 (9th Cir. 1988); *N. Alaska Envtl. Ctr. v. Hodel*, 803 F.2d 466, 471 (9th Cir. 1986)). The Fourteenth Circuit considered Gov. Pedro Tierramante's op-ed letter of considerable interest. R. at 5 n.3. In his letter, Gov. Tierramante expressed

his concern that the decommissioning of Fort Watt would negatively impact the local community. *Id.* Specifically, Gov. Tierramantre was concerned with the loss of local business and jobs that would otherwise attract families to the area. *Id.* MRI's drilling project alleviates these concerns.

MRI's use of hydraulic fracturing will bring new life to a community that would otherwise suffer economic decline due to the DoD's decommissioning of Fort Watt. Hydraulic fracturing is a part of the drilling process used to access deposits of shale oil and natural gas, and it is used to increase the amount of shale gas and oil that is recoverable within deposits of dense shale rocks. U.S. Dep't of the Interior Bureau of Land Mgmt, *Common Hydraulic Fracturing Questions and Answers*, http://www.blm.gov/pgdata/etc/medialib/blm/nv/field_offices/elko_field_office/information/communications_forum/03_14_13.Par.26009.File.dat/Hydraulic%20Fracturing%20FAQ.pdf, (last updated Feb. 6, 2013). The ability to extract previously untapped natural resources provides the opportunity for declining communities to turn their fate around. For example, a report conducted by Workforce West Virginia outlines the positive effects of hydraulic fracturing on the West Virginia economy. WorkForce W. Va., *The Influence of the Marcellus Shale on Employment and Wages in West Virginia* (Nov. 2012), http://fracking.academic.wlu.edu/files/2013/05/Marcellus_Shale_Report_Nov_2012.pdf. West Virginia suffered economic decline as a result of the United States' waning dependence on coal. However, hydraulic fracturing has improved the West Virginia economy by leveling out the steady economic decline. In its report, Workforce found over its four-year analysis, the

region where hydraulic fracturing was utilized increased its employment by over 31%. *Id.* Additionally the average wage increased by more than 42%. *Id.* Further, businesses engaged in support activities such as excavation, well surveying, running and cutting casings and other well work showed employment and wage gains. *Id.*

Similar studies demonstrate that the use of hydraulic fracturing creates jobs both on-site and off-site. Hydraulic fracturing provides new opportunities for new business and creates new jobs. Granting Petitioner's injunction will only delay this much-needed boost to the local economy, and it will only frustrate the concerns expressed by Gov. Tierrmante. Therefore, a preliminary injunction is not in the public interest.

Thus, in the present case, the economic harm to the DoD and MRI far outweighs any harm to Petitioner. Additionally, an injunction is not in the public interest because New Tejas will suffer the negative economic effects of the decommissioned military base without the opportunity to profit from business generated by MRI's use of hydraulic fracturing. Therefore, the balance of equities tips in favor of DoD and MRI, and this Court should not grant Petitioner's request for an injunction.

For the reasons stated above, Petitioners are not likely to succeed on the merits, Petitioners are not likely to suffer irreparable harm, the balance of equities tips in favor of the DoD and MRI, and an injunction would not be in the public

interest. Therefore, the District Court was correct in denying Petitioner's request for a preliminary injunction.

CONCLUSION

The Fourteenth Circuit erred in holding that Petitioner's claim is ripe for review. For the reasons discussed above, this Court should dismiss the case. Alternatively, even if Petitioner's claim is ripe, the Fourteenth Circuit correctly held that the claim was without merit. Thus, this Court should either dismiss the case or find that it is without merit in favor of Respondents.