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 PETITIONER

ORAL ARGUMENT REQUESTED

Team 58
Counsel for Petitioner

QUESTIONS PRESENTED FOR REVIEW

1. Whether a published record of decision or executed mineral lease constitutes a final agency action ripe for judicial review.

2. Whether an executed mineral lease and participating royalty interest constitutes a major federal action requiring an environmental impact statement pursuant to the National Environmental Policy Act of 1969.

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The decision below, *Friends of Newtonian v. United States Department of Defense*, No. 12-1314 (14th Cir. 2013), is unreported. This decision is reproduced on pages 3-20 of the Record.

STATUTORY PROVISIONS INVOLVED

This case concerns compliance with the ripeness requirement of the Administrative Procedure Act ("APA"), 5 U.S.C. § 551 (2013), and provisions of the National Environmental Policy Act ("NEPA") concerning major federal action 42 U.S.C. § 4332 (2013).

STATEMENT OF THE CASE

A. Statement of the Facts

Mainstay Resources, Incorporated ("Mainstay Resources") is one of the largest oil and natural gas production companies in the United States. R. at 7. In 2003, Mainstay Resources purchased the surface rights to 750 acres of land in New Tejas. R. at 8. This land is part of Fort Watt, a decommissioned military base. R. at 3. With the blessing of the United States Department of Defense ("Department of Defense"), Mainstay Resources will use this land as drilling sites for a new form of oil recovery and extraction, known as hydraulic fracturing. R. at 6, 10.

Prior to the sale of Fort Watt in 2003, the Defense Base Closure and Realignment Commission ("Commission"), entity of the Department of Defense, completed an Environmental Impact Statement ("EIS"). R. at 5. This EIS was intended to consider the environmental effects of the agency's decision to sell the

land. R. at 5. In conducting this EIS, the Department of Defense weighed the impacts of its proposed action and explored reasonable alternatives. R. at 5. Although the EIS mentioned oil and gas recovery and extraction, it only briefly discussed unconventional resource development. R. at 6. Mainstay Resources intends to conduct such unconventional development using hydraulic fracturing via horizontal drilling. R. at 6. At the time the EIS was conducted, unconventional oil and gas development technology was not feasible and remained economically prohibitive, only becoming a viable means of production in the late 2000s. R. at 6 n.4. After the EIS was completed, the Department of Defense accepted public comment and review on the proposed sale of Fort Watt land tracts. R. at 5.

Comments on the proposed plan raised concerns over the environmental impacts of the project. R. at 5. One particular comment, from Pedro Tierramante, Sr., a former Captain stationed at Fort Watt, expressed concern with the sale of Fort Watt, warning that this sale would cause the area to become a "wasteland of oil derricks and abandoned homes." R. at 5 n.3. Despite this opposition, the Commission prepared a final EIS and issued a Record of Decision. R. at 6-7. Publishing the Record of Decision was the final step before the proposal was submitted to the President and Congress for approval. R. at 7.

The Department of Defense entered into a mineral lease contract with Mainstay Resources encompassing the 750 acre surface tract previously purchased by Mainstay Resources. R. at 8. This lease allowed Mainstay Resources access to the mineral rights for extraction purposes, so long as Mainstay Resources paid

monthly royalties to the Department of Defense. R. at 9 n.7. In addition to the retained royalty interest, the Department of Defense reserved the right to veto the sale of any oil or gas production and inspect all operations and facilities on the land. R. at 9 n.7. Furthermore, Mainstay Resources is required to affirmatively seek out buyers for produced oil and gas, acting as agent for the Department of Defense. R. at 9 n.7.

Subsequently, Mainstay Resources received the necessary state and federal permits and began construction on two separate drilling sites, Watt 1 and Watt 2. R. at 10. These sites are located in a valley and surrounding foothills, with the New Tejas River running along the edge of the valley and flowing across the border into Newtonian, a neighboring state. R. at 8.

Robert Dohan ("Governor Dohan"), the governor of New Tejas, was openly supportive of Mainstay Resources and did everything in his power to expedite permitting so drilling could commence. R. at 10. Despite expedited approval, Mainstay Resources delayed drilling for six-years to acquire new technologies to enable hydraulic fracturing. R. at 10. This new drilling technique required Mainstay Resources to rework the wells to accommodate new drilling technology. In 2010, eight years after the initial EIS, Watt 1 and Watt 2 were reconfigured and hydraulic fracturing was set to begin on February 1, 2011. R. at 10.

Friends of Newtonian filed this action to require the Department of Defense and Mainstay Resources to cease hydraulic fracturing until the environmental impacts of this unconventional method could be considered. R. at 11. Friends of

Newtonian purports to "build widespread citizen understanding and advocacy for policies and actions designed to protect Newtonian's and the United States' environmental health." R. at 11. The New Tejas River plays a vital role in maintaining the environmental integrity of reservoirs and fresh water aquifers in Newtonian. R. at 11. The release of chemicals from Watt 1 and Watt 2 could cause irreparable damage to the New Tejas River. R. at 11.

B. Procedural History

Friends of Newtonian filed for declaratory and injunctive relief under NEPA and the APA. R. at 11. Friends of Newtonian sought to enjoin the Department of Defense and Mainstay Resources from hydraulic fracturing at Watt 1 and Watt 2. R. at 11.

The United States District Court for the Western District of New Tejas ("District Court") denied Friends of Newtonian's motion for preliminary injunction. R. at 12. Friends of Newtonian appealed the District Court's decision to the United States Court of Appeals for the Fourteenth Circuit ("Fourteenth Circuit"). R. at 11. The Fourteenth Circuit affirmed the denial of Friends of Newtonian's request for preliminary injunction. R. at 3, 17, 18. Although the Fourteenth Circuit did determine the issue was ripe for adjudication, it denied the injunction and found the hydraulic fracturing to be a purely private matter and granting injunction was not in the public interest. R. at 13, 17.

Friends of Newtonian appealed to this Court in October 2013, on an order granting writ of certiorari to the Fourteenth Circuit. R. at 2.

C. Standards of Review

This Court has jurisdiction over an interlocutory order from a district court pursuant to 28 U.S.C. section 1292(a)(1) (2013). This jurisdiction extends to the decision to grant or deny an injunction. *Id.* To establish grounds for a preliminary injunction, a party must establish that it is likely to succeed on the merits, that it will suffer irreparable harm absent the injunction, that the balance of equity falls in its favor, and that granting the injunction is in the public interest. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). When looking to each case, a court should balance "the competing claims of injury" and consider "the effect on each party" of granting or withholding the injunction. *Id.* at 24 (quoting *Amoco Production Co. v. Vill. of Gambell*, 480 U.S. 531, 542 (1987)).

The ripeness of an agency's action for judicial review is reviewed de novo. *Sierra Club v. U.S. Dep't of Energy*, 287 F.3d 1256, 1262 (10th Cir. 2002); *Sierra Forest Legacy v. Sherman*, 646 F.3d 1161, 1176 (9th Cir. 2011); *Ouachita Watch League v. Jacobs*, 463 F.3d 1163, 1169 (11th Cir. 2006). The party challenging an agency action bears the burden of proving the issue is ripe for review. *San Juan Citizens Alliance v. Stiles*, 654 F.3d 1038, 1046 (10th Cir. 2011).

An agency's compliance with NEPA is governed by the APA. *Or. Natural Desert Ass'n v. U.S. Bureau of Land Mgmt.*, 625 F.3d 1092, 1109 (9th Cir. 2010) (citing 5 U.S.C. § 551); *see also Karst Envtl. Educ. & Prot., Inc. v. EPA*, 475 F.3d 1291, 1295 (D.C. Cir. 2007) ("challenges to agency compliance with [NEPA] must be brought pursuant to the Administrative Procedures Act"). Further, the APA

dictates the standard of review for cases brought under NEPA, allowing federal courts to "hold unlawful and set aside agency action, findings, and conclusion" if the agency does not conform with any of the six specified standards. *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 375 (1989) (citing 5 U.S.C. § 706 (2013)).

Whether an agency must complete an environmental impact statement is controlled by the arbitrary and capricious standard. *Marsh*, 490 U.S. at 375; *see Kleppe v. Sierra Club*, 427 U.S. 390, 412 (1976) ("Absent a showing of arbitrary action, we must assume that the agencies have exercised this discretion appropriately."). The ultimate decision to issue an injunction is reviewed for abuse of discretion. *Winter*, 555 U.S. at 9.

An agency's decision is arbitrary and capricious if the agency (1) failed to consider "an important aspect of the problem," (2) offered and explanation that "runs contrary to the evidence" or is "so implausible that it could not be ascribed to a different view" or agency expertise, (3) failed to consider relevant factors, or (4) made a "clear error" of judgment. *N.M. ex rel. Richardson v. Bureau of Land Mgmt.*, 565 F.3d 683, 704 (10th Cir. 2009).

SUMMARY OF THE ARGUMENT

This Court should reverse the Fourteenth Circuit's denial of Friends of Newtonian's request for preliminary injunction and find that this case is ripe for judicial review and that the Department of Defense and Mainstay Resources engaged in a major federal action, requiring an environmental impact statement.

This case is ripe because there is a final agency action, as required under NEPA. Final agency action occurred when the Commission issued its Record of Decision, encompassing the 2002 EIS. An additional final agency action occurred when the Department of Defense conveyed the surface rights to 750 acres of land in New Tejas to Mainstay Resource and when it executed a subsequent lease for the mineral rights on the same land. Furthermore, this case is fit for review and hardship will ensue without timely judicial review. Finally, this case is ripe for review because this Court has recognized that a case becomes ripe the moment NEPA procedure is violated.

This Court should also find that the Department of Defense's executed mineral lease with Mainstay Resources constitutes a major federal action, requiring an environmental impact statement before Watt 1 and Watt 2 are operationalized for hydraulic fracturing. Although circuits are divided as to what constitutes a major federal action, the particular relationships between the Department of Defense and Mainstay Resources constitute major federal action. The mineral estate retained by the Department of Defense is the dominant estate, imposing a servitude on the surface estate held by Mainstay Resources. As such, the Department of Defense secured an economic interest in the success of hydraulic fracturing at Watt 1 and Watt 2. Finally, public policy warrants finding that the Department of Defense engaged in a major federal action when it failed to consider the environmental impact of newly developed unconventional drilling techniques.

ARGUMENT

I. THIS CASE IS RIPE BECAUSE THERE WAS FINAL AGENCY ACTION, THE ISSUES ARE FIT FOR JUDICIAL REVIEW, AND DELAYED REVIEW WOULD CAUSE ENVIRONMENTAL HARDSHIP TO FRIENDS OF NEWTONIAN.

This case is ripe for review because the Commission issued a final Record of Decision, the Department of Defense entered into a lease with Mainstay Resources, and unconventional gas development from Watt 1 and Watt 2 will cause hardship to Friends of Newtonian.[1] The ripeness of an agency action that elicits duties under NEPA is controlled by the APA. 5 U.S.C. § 704 (2013). Generally, a case is ripe for review only if a petitioner can show why its challenge must be brought now to gain relief. *Ohio Forestry Assn., Inc. v. Sierra Club*, 523 U.S. 726, 734 (1998). The ripeness doctrine prevents courts from "entangling themselves in abstract disagreements" and protects an agency from judicial interference until "an administrative decision has been formalized and its effects felt in a concrete way by the challenging party." *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49 (1967). This Court should find, as a matter of law, that this case is ripe for judicial review because hydraulic fracturing at Watt 1 and Watt 2 will begin immediately without relief.

[1] Although not an issue in this case, Friends of Newtonian recognizes that a party must have standing to bring a cause of action under the APA and NEPA. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

A. The final agency action requirement is satisfied by the Commission's published Record of Decision and the executed mineral lease between the Department of Defense and Mainstay Resources.

The Commission's published Record of Decision and Department of Defense's lease agreement with Mainstay Resources constitutes final agency action that is ripe for judicial review. An agency action is considered final if the action "marks the consummation of the agency's decision making process" and is "one by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 178 (1977). Since NEPA is designed to protect against private influence on federal decision making power, an agency action must be final to be ripe for review. *See Karst Envtl. Educ. & Prot., Inc.*, 475 F.3d at 1296. This Court has recognized that NEPA claims are ripe upon completion of the NEPA process. *Ohio Forestry*, 523 U.S. at 737 (recognizing that upon a NEPA violation, claims "can never get riper").

To determine whether an agency's action is final, "the core question is whether the agency has completed its decision making process, and whether the result of that process is one that will directly affect the parties." *Franklin v. Massachusetts*, 505 U.S. 788, 797 (1992); *see Port of Bos. Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71 (1970) ("The relevant considerations in determining finality are whether the process of administrative decision making has reached a stage where judicial review will not disrupt the orderly process of adjudication."). This case is ripe for review because the Commission's release of the Record of Decision is considered a final agency action.

Furthermore, the executed mineral interest lease between the Department of Defense and Mainstay Resources equally constitutes final agency action. This Court should find this case is ripe for review and grant Friends of Newtonian's request for preliminary injunction because both actions constitute a final agency action.

1. The Commission's published Record of Decision constitutes a final agency action because it was a published assessment of the particular project.

The Commission produced final agency action when it published its Record of Decision for congressional and presidential approval. Circuit courts agree that once an agency issues a record of decision, the agency has taken final agency action, such that an issue is ripe for judicial review. *See Or. Natural Desert Ass'n*, 625 F.3d at 1118; *Goodrich v. United States*, 434 F.3d 1329, 1335 (Fed. Cir. 2006) (for purposes of the APA, a record of decision is a final agency action); *Sierra Club v. U.S. Army Corps of Eng'rs*, 446 F.3d 808, 815 (8th Cir. 2006) (noting that the Supreme Court has accepted an agency's decision to issue an environmental impact statement is final agency action); *Ouachita Watch League v. Jacobs,* 463 F.3d 1163, 1173 (11th Cir. 2006) (recognizing that it is "well settled" that a record of decision constitutes final agency action); *Sierra Club v. Slater*, 120 F.3d 623, 631 (6th Cir. 1997) (recognizing that it is "well-established that a final environmental impact statement or the record of decision issued thereon constitutes final agency action" for purposes of the APA).

A federal agency prepares a record of decision to publish its final assessment of a particular project or procedure, and to identify the alternatives it considered in reaching that decision. 40 C.F.R. § 1505.2 (2013); *Scientists' Inst. for Pub. Info. Inc. v. Atomic Energy Comm'n*, 481 F.2d 1079, 1095 (D.C. Cir. 1973). A record of decision provides a "focal point for judicial review" and furnishes the courts with the benefit of an agency's particular expertise. *Id.*

Here, the release of the Record of Decision was the final step before the proposed action was submitted to the President and to Congress for approval. The Record of Decision was submitted after the Commission received public comments on a draft environmental impact statement and prepared the final EIS based on those comments. This 2002 EIS explicitly mentioned the prospects of oil and gas recovery and extraction, but ultimately concluded that technology was not yet sufficiently viable to enable extraction. The submission of this final report for congressional and presidential approval is definitive, and as recognized by a consensus of circuit courts, constitutes final agency action. Therefore, because the Commission issued a Record of Decision this Court should find that there is final agency action such that this action is ripe for judicial review.

2. The mineral lease between the Department of Defense and Mainstay Resources constitutes final agency action because the lease signified federal control.

In addition to the published Record of Decision, the Department of Defense's mineral lease with Mainstay Resources constitutes a final agency action establishing that this case as ripe for review. The approval of land for a specific use

is a final agency action when that plan is approved. *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 73 (2004). Conversely, in *Center for Biological Diversity v. U.S. Department of Interior*, the issuance of a lease was not final agency action where the lease agreement had not reached its "critical stage." 563 F.3d 466, 480 (D.C. Cir. 2009). That lease was not considered final agency action because without an agreement, there had been no "irreversible and irretrievable commitment" of resources that could have an adverse effect on the environment. *Id.* Because the lease was not executed, the court held that the case was not yet ripe for review. *Id.*

Here, the executed lease between the Department of Defense and Mainstay Resources is sufficient to find a final agency action. In 2003, the Department of Defense conveyed the surface estate of 750 acres in New Tejas to Mainstay Resources with the "full approval" of the federal government. In addition to the conveyed surface rights, the Department of Defense retained the mineral rights to the entire property. Unlike in *Center for Biological Diversity*, here, the final stage was reached upon the conveyance of the surface estate and execution of the mineral lease. Together, the Department of Defense and Mainstay Resources agreed to both the terms of the sale and the terms of the lease. As such, the Department of Defense and Mainstay Resources reached the end of the decision making process and created a final and definitive decision to make this action ripe for judicial review and that decision directly impacts Friends of Newtonian.

B. This action is fit for judicial review and delayed review will cause environmental hardship.

Because Mainstay Resources will begin hydraulic fracturing without review of this case, judicial intervention would not unreasonably interfere with the agreement between the Department of Defense and Mainstay Resources, and additional factual findings are not necessary to grant Friends of Newtonian's preliminary injunction, this case is ripe for review. To determine whether a case is ripe for review, a court should examine both the "fitness of the issue for judicial decision" and the "hardship to the parties" in withholding consideration. *Abbott Labs.*, 387 U.S. at 149. Fitness and hardship are established by examining (1) whether delayed review would cause hardship to the plaintiff; (2) whether judicial intervention would inappropriately interfere with further administrative action; and (3) whether courts would benefit from further factual development of the issues presented. *Ohio Forestry*, 523 U.S. at 733.[2] Here, because the factors to determine ripeness weigh in favor of Friends of Newtonian, judicial review is appropriate.

1. Delayed review would allow for the operationalization of Watt 1 and Watt 2, causing environmental hardship to Friends of Newtonian.

Without a preliminary injunction, the Department of Defense and Mainstay Resources will begin hydraulic fracturing at both Watt 1 and Watt 2, causing a risk

[2] Circuit courts have recognized an alternative test for ripeness: "(1) whether the issues involved are purely legal, (2) whether the agency's action is final, (3) whether the action has or will have an immediate impact on the petitioner, and (4) whether resolution of the issue will assist the agency in effective enforcement and administration." *Qwest Commc'n Int'l, Inc. v. FCC*, 398 F.3d 1222, 1231-32 (10th Cir. 2005). However, these two tests "essentially include all the same considerations." *Los Alamos Study Group v. U.S. Dep't of Energy*, 692 F.3d 1057, 1065 (10th Cir. 2012).

of irreparable environmental damage to the New Tejas River and Newtonian. To determine hardship, this Court looks to whether the action would have adverse effects "of a strictly legal kind" or of a kind "that traditionally would have qualified as harm." *Ohio Forestry*, 523 U.S. at 733. Considerations for determining hardship include: commanding anyone to act or refrain from acting; granting, withholding, or modifying legal license, power, or authority; subjecting anyone to civil or criminal liability; or creating legal rights or obligations. *Id.* at 733 (citing *United States v. L.A. & Salt Lake R.R. Co.*, 273 U.S. 299, 309-10 (1927)). A showing of threatened harm provides a sufficient basis for jurisdiction of review. *Cent. Delta Water Agency v. United States*, 306 F.3d 938, 950 (9th Cir. 2002) ("[A] credible threat of harm is sufficient to constitute actual injury for standing purposes, whether or not a statutory violation has occurred.").[3]

Environmental injuries are often permanent or irreparable. *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 545 (1987). If such injury is sufficiently likely, the balance of harms usually favors issuing an injunction to protect the environment. *Id.* In *Sierra Club v. Marsh*, the court examined the balancing of harms to determine whether there was sufficient environmental injury to warrant a preliminary injunction. 872 F.2d 497, 500-01 (1st Cir. 1989). The court expanded upon the accepted standard that courts should "take account of the potentially irreparable nature" of risk to the environment and further recognized that considering environmental risks reduces the likelihood that bureaucratic decision

[3] The doctrines of ripeness and standing are intertwined. *See Brennan v. Nassau Cnty.*, 352 F.3d 60, 65 n.9 (2d Cir. 2003).

makers will ignore harms simply to continue with a nearly completed project. *Id.* at 501. The court recognized that an injunction should be granted to remedy the harm and injuries inflicted by government actors to the environment. *Id.* at 503-04.

However, this Court has determined that hardship results when an agency's action has an effect on a petitioner's primary conduct, but not when an agency issues a "general statement of policy" that is merely designed to inform the public about an agency's views. *Nat'l Park Hospitality Ass'n v. Dep't of Interior*, 538 U.S. 803, 809 (2003). In *National Park Hospitality*, this Court found no "practical harm" where the agency action only informed the public as to particular policies, created no legal rights or obligations, and would not subject any party to civil or criminal liability. *Id.* at 810-11. Therefore, the regulation left the petitioner free to "conduct its business as it sees fit." *Id.* at 810.

Here, the harm is more than mere speculation and warrants a preliminary injunction. Without review, Mainstay Resources is poised to begin hydraulic fracturing at Watt 1 and Watt 2. Unlike in *National Park Hospitality*, this action constitutes more than a mere general statement of policy because prior to Friends of Newtonian's filing for a preliminary injunction, Mainstay Resources received the necessary state and federal drilling permits and regulatory approval and there is nothing impeding Mainstay Resources from proceeding.

Respondents will likely argue that no harm has actually accrued because hydraulic fracturing has not begun. However, Mainstay Resources was set to begin "actively fracking Watt 1 and Watt 2" on February 1, 2011. The hydraulic

fracturing at these two wells pose a substantial risk of an accidental release of hazardous chemicals and subsequent contamination of the waterway, causing irreparable environmental harm. This preliminary injunction serves only as a temporary suspension to the operationalization of both Watt 1 and Watt 2.

Considering the often permanent and irreparable nature of environmental injuries and the sufficient likelihood of injury occurring, granting Friends of Newtonian's preliminary injunction will prevent environmental hardship until full consideration is given to the consequences of operationalizing Watt 1 and Watt 2. Without a preliminary injunction, the Department of Defense and Mainstay Resources will begin hydraulic fracturing operations, leading to hardship by increasing the risk of an accidental release of produced water.

2. Judicial intervention would not unreasonably interfere with the Department of Defense.

Granting Friends of Newtonian's preliminary injunction will not interfere with the actions or policies of the Department of Defense. When a party seeks injunctive action, this Court looks to whether granting relief would deny an agency the opportunity to revise or reverse its current position. *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 201-02 (1983). Interference before an action is ripe for review denies an agency the opportunity to "correct its own mistakes and to apply its expertise." *FTC v. Standard Oil Co. of Cali.*, 449 U.S. 232, 242 (1980).

In *Ohio Forestry*, this Court was reluctant to find an agency action was ripe for review because judicial interference would hinder the agency's "efforts to refine

its policies" or apply the proposed plan to practice. 523 U.S. at 735. This Court determined that there was a real possibility that the agency would further consider its logging plans before the plan was implemented. *Id.* As such, this Court found that hearing the challenge would interfere with the congressional system for agency decision making. *Id.* at 736.

Here, granting Friends of Newtonian's preliminary injunction would not interfere with the actions of the Department of Defense. Unlike in *Ohio Forestry*, where this Court was reluctant to find an action ripe for review because the agency may have reconsidered its policies, here it is evident that, but for the filing of this action, hydraulic fracturing would have already begun. The Department of Defense and Mainstay Resources had no intention of looking at the implications of operationalizing Watt 1 and Watt 2. The eight-year delay in initiating this action already allowed for sufficient time to re-consider any standing policies or procedures. Once the Department of Defense and Mainstay Resources re-initiated the project, additional time for reconsideration became moot. As such, finding this action ripe and granting Friends of Newtonian's preliminary injunction would not interfere with agency action.

3. Further factual development would not significantly advance this Court's ability to decide ripeness.

Further factual development would not aid in this Court's determination that this issue is ripe for review because there is sufficient information to conclude that harm would ensue without a preliminary injunction. To determine whether a case would benefit from further factual findings, this Court has analyzed whether

additional facts would "significantly advance [the Court's] ability to deal with the legal issues presented" and would aid in resolution of the issues. *Duke Power Co. v. Carolina Envtl. Study Grp., Inc.*, 438 U.S. 59, 82 (1978). Whether a case would benefit from further factual development prevents courts from deciding on issues where review would have been unnecessary because of foreseen changes in policy or unknown information. *Standard Oil*, 449 U.S. at 242. An issue is not ripe for review if further factual development would "render an issue more complete." *Del Puerto Water Dist.*, 271 F. Supp. 2d 1224, 1238 (E.D. Cal. 2003) (citing *Assiniboine & Sioux Tribes of Fort Peck Indian Reservation v. Bd. of Oil & Gas Conservation of Mont.*, 792 F.2d 782, 789 (9th Cir. 1986)).

Further factual findings would not aid in this Court's determination of this case. There is sufficient information to find that not only is this issue fit for review, but also that hardship will occur without review. Both the District Court and the Fourteenth Circuit found this issue ripe for review based upon current information. Additional time would offer no additional guidance that would make this Court's determination more forthright. Therefore, further factual development is not necessary and this Court should find that this issue is ripe for review and grant Friends of Newtonian's request for preliminary injunction.

C. This case became ripe the moment the Department of Defense violated NEPA procedure, causing de facto environmental harm.

This case is ripe for review because a procedural violation of NEPA accrued the moment the Department of Defense and Mainstay Resources failed to consider

any environmental effects of hydraulic fracturing at Watt 1 and Watt 2. NEPA adds "an important twist" to the general ripeness inquiry. *Ouachita Watch League*, 463 F.3d at 1174. For NEPA purposes, an issue is ripe the moment an agency fails to comply with a particular procedure. *Ohio Forestry*, 523 U.S. at 737. A party who is injured by an agency's failure to comply with a particular NEPA procedure can bring an action at the moment non-compliance occurs, for at that moment, "the claim can never get riper." *Id.*

Harm to the environment may be presumed where an agency fails to comply with a particular NEPA procedure. *Davis v. Mineta*, 302 F.3d 1104, 1114 (10th Cir. 2002). This presumption is appropriate because agency compliance with NEPA's procedural requirement is a necessary safeguard against detrimental environmental consequences. *Id.* (citing 42 U.S.C.§ 4321 (2013)); *see Comm. to Save the Rio Hondo v. Lucero,* 102 F.3d 445, 448-49 (10th Cir. 1996) ("The injury of an increased risk of harm due to an agency's uninformed decision is precisely the type of injury the National Environmental Policy Act was designed to prevent."); *Marsh,* 872 F.2d at 500 (recognizing that a NEPA violation constitutes harm to the environment and is more than a technicality).

In *Ouachita Watch League*, the court analyzed this Court's determination that a procedural violation alleges a properly ripe injury. 463 F.3d at 1174-75. A coalition of environmental groups challenged changes to forest plans and the agency's noncompliance with NEPA procedures. *Id.* at 1167. Recognizing the important distinction between a procedural violation and a substantive violation,

the environmental groups' case was ripe because the alleged injury—failure to comply with the environmental impact statement requirements—was a proper NEPA injury. *Id.* at 1175.

Similarly, the Department of Energy's non-compliance with NEPA's procedural requirements before issuing a road easement to a mining company was ripe for judicial review, even though a road had yet to be built and any construction would be supervised by the Department of Energy. *Sierra Club v. U.S. Dep't of Energy*, 287 F.3d at 1263. The issue was ripe because the challenge was not to the construction of the road, but rather to the granting of the easement, which had already occurred. *Id.*

Here, the procedural violation occurred the moment the Department of Defense and Mainstay Resources acted without considering any environmental effects of hydraulic fracturing of Watt 1 and Watt 2. Although hardship can be sufficient for traditional ripeness analysis, here this Court need not address traditional hardship and fitness analysis to find that this issue is ripe. Procedurally, NEPA requires an agency to conduct an environmental impact statement when considering the environmental impacts of its actions. Due to significant technological changes since the completion of the 2002 EIS, the Department of Defense and Mainstay Resources have not properly considered how unconventional gas development will impact the environment. Similar to *Ouachita Watch League* and *Sierra Club v. the Dep't of Energy*, the procedural violation occurred the moment preparation for hydraulic fracturing began without

considering the effects on the environment. As such, the NEPA violation, and therefore ripeness of the issue, accrued at the moment the Department of Defense and Mainstay Resources executed the lease agreement for mineral rights without considering the environmental consequences of their actions on Newtonian aquifers and water reservoirs.

II. BEFORE OPERATIONALIZATION OF WATT 1 AND WATT 2, AN ENVIRONMENTAL IMPACT STATEMENT IS REQUIRED BECAUSE THE DEPARTMENT OF DEFENSE ENGAGED IN MAJOR FEDERAL ACTION BASED ON ITS RELATIONSHIP WITH MAINSTAY RESOURCES.

Pursuant to NEPA provisions, the Department of Defense engaged in a major federal action requiring an environmental impact statement. The duty to prepare an environmental impact statement is triggered where a federal agency undertakes a major federal action that will have a significant effect on the human environment. 40 C.F.R. § 1505.2. Despite a divide among circuit courts regarding what constitutes major federal action, the Department of Defense and Mainstay Resources established sufficient relationships to find a major federal action exists, requiring an environmental impact statement before hydraulic fracturing operations may commence at Watt 1 and Watt 2. Furthermore, public policy and the purpose of NEPA merit an injunction to require the Department of Defense and Mainstay Resources to complete an environmental impact statement, or, at a minimum, an environmental assessment. Because the Department of Defense engaged in a major federal action in executing its mineral lease with Mainstay

Resources, this Court should grant Friends of Newtonian's request for preliminary injunction.

A. Circuits are divided as to what constitutes a major federal action.

Federal agencies are required to produce a detailed statement on the environmental impacts of a proposed action where major federal actions significantly effect the quality of the human environment. 42 U.S.C. § 4332(C). An agency "action" is defined by new or continuing activities, rules, regulations, plans, policies, procedures, or legislative proposals. 40 C.F.R. § 1508.18(a) (2013). An action is "federal" if it is entirely or partially "financed, assisted, conducted, regulated, or approved by federal agencies." 40 C.F.R. § 1508.18(b). Further, federal action is "major" if it might be major. 40 C.F.R. § 1608.18. Major federal actions include actions with "effects that may be major" and are "potentially subject to Federal control and responsibility." 40 C.F.R. § 1508.18.

The significance of a major federal action refers to both the context and the intensity of an agency's action. 40 C.F.R. § 1508.27. The context in which an agency action occurs considers the impacts on society as a whole, the affected region, and the affected interests. 40 C.F.R. § 1508.27(a). Additionally, both short term and long-term effects are relevant. *Id.* Furthermore, an agency is subject to NEPA even if the effect is speculative. 40 C.F.R. § 1508.3 ("Affecting means will or may have an effect on.").

Circuit courts recognize that defining major federal action is varied and undefined. *E.g.*, *Save Barton Creek Ass'n v. Fed. Highway Admin.*, 950 F.2d 1129,

1134 (5th Cir. 1992) ("No litmus test exists to determine what constitutes major federal action."); *Sierra Club v. Penfold*, 857 F.2d 1307, 1314 (9th Cir. 1988) ("[D]ecisions on federal actions are not consistent between the circuits."); *Mineral Policy Ctr. v. Norton*, 292 F. Supp. 2d 30, 54 (D.D.C. 2003) ("[T]he court must wade into cloudy waters" to resolve what constitutes major federal action).

Some circuits indicate that determining what constitutes a major federal action hinges on whether a federal agency has control or decision making authority over a non-federal project. *See Rattlesnake Coal. v. U.S. Envtl. Prot. Agency*, 509 F.3d 1095, 1102 (9th Cir. 2007) ("The United States must maintain decision-making authority over the local plan in order for it to become a major federal action."); *Mayaguezanos por la Salud y el Ambiente v. United States*, 198 F.3d 297, 302 (1st Cir. 1999) (emphasizing "the indicia of control over the private actors by the federal agency").

Other circuit courts look to whether a federal agency must give prior approval before a private actor can begin or stop a project. *See Sugarloaf Citizens Ass'n v. Fed. Energy Regulatory Comm'n*, 959 F.2d 508, 513-14 (4th Cir. 1992) ("[A] non-federal project is considered a federal action if [the project] cannot begin or continue without prior approval by a federal agency and the agency possesses authority to exercise discretion over the outcome."); *N.J. Dep't of Envtl. Prot. & Energy v. Long Island Power Auth.*, 30 F.3d 403, 418 (10th Cir. 1994) ("[W]here a federal agency has control over a private project, its approval can amount to a major federal action.").

The Eighth and Third Circuits have identified a three-factor test to determine whether an agency has control over the environmental effects of a project to find major federal action: "(1) the degree of discretion exercised by the agency over the federal portion of the project; (2) whether the federal government has given any direct financial aid to the project; and (3) whether the overall federal involvement with the project is sufficient to turn essentially private action into federal action." *Ringsred v. Duluth*, 828 F.2d 1305, 1308 (8th Cir. 1987); *NAACP v. Med. Ctr. Inc.*, 584 F.2d 619, 629 (3d Cir. 1978).

Some circuits identify what would not constitute major federal action under NEPA as governmental inaction or mere governmental approval of private action. *Mayaguezanos Por La Salud Y El Ambiente*, 198 F.3d at 301-02. The mere "potential or ability" to influence the outcome of a project does not necessarily constitute major federal action. *Nat'l Trust for Historic Pres. v. Dep't of State*, 834 F. Supp. 443, 449 (D.D.C. 1993). Additionally, purely ministerial acts typically fall outside the purview of NEPA. *South Dakota v. Andrus*, 614 F.2d 1190, 1193 (8th Cir. 1980) (finding the Department of Interior was not compelled to prepare an environmental impact statement before issuing a mineral patent where the patent did not enable the private party to begin operations).

Respondents and the Fourteenth Circuit suggest that the proper test to determine whether an agency has engaged in a major federal action is whether federal approval is a prerequisite to a private action. *See Friends of Newtonian v. U.S. Dep't of Defense* No. 12-1314 (14th Cir. October 15, 2013). However, because of

the vast divide and inconsistencies throughout the circuits, there is no particular reason why this prescription is more appropriate than any other.

Even though circuits are divided and the statutory definitions offer little guidance, this Court should find the Department of Defense engaged in a major federal action in executing its mineral lease with Mainstay Resources. The operationalization of Watt 1 and Watt 2 could cause significant environmental harm to the New Tejas River and local communities, including Newtonian. Additionally, because the Department of Defense and Mainstay Resources did not complete an environmental impact statement regarding hydraulic fracturing of Watt 1 and Watt 2, the short-term and long-term effects are unknown.

Furthermore, even though the executed lease furnished Mainstay Resources with the ability to use unconventional extraction methods on Watt 1 and Watt 2, the Department of Defense retained authority over Mainstay Resources. Pursuant to the lease agreement, the Department of Defense retained veto power over whom Mainstay Resources may sell produced oil. Additionally, the Department of Defense is entitled to inspect the premises of Watt 1 and Watt 2 and shut down operations for non-compliance. For these reasons, this Court should find that the Department of Defense's lease agreement constitutes a major federal action requiring an environmental impact statement before hydraulic fracturing may commence.

B. The relationships between the Department of Defense and Mainstay Resources constitutes a major federal action because of the dominant, servient nature and the Department of Defense's retained economic interest in the mineral rights.

This Court should find that the distinct relationship between the Department of Defense and Mainstay Resources warrants finding a major federal action because the circuit courts and the code of federal regulations do not offer a clear litmus test for major federal action. As noted by most circuits, a defining characteristic of major federal action is the level of power and control over the proposed action retained by the federal agency and the agency's ability to materially influence a particular action. *Flint Ridge Dev. Co. v. Scenic Rivers Ass'n of Okla.*, 426 U.S. 776, 789-90 (1976); *see e.g., United States v. S. Fla. Water Mgmt. Dist.*, 28 F.3d 1563, 1572 (11th Cir. 1994) ("The focus . . . is on the federal agencies' control and responsibility over material aspects of the project."); *Sierra Club v. Hodel*, 848 F.2d 1068, 1089 (10th Cir. 1988) ("The touchstone of major federal activity constitutes a federal agency's authority to influence nonfederal activity."). Here, the Department of Defense's authority over the mineral estate coupled with the lessor and lessee relationship between the Department of Defense and Mainstay Resources establishes that fracturing operations at Watt 1 and Watt 2 constitute major federal action subject to an environmental impact statements under NEPA provisions.

1. The dominant and servient estates in land establishes a special relationship between the Department of Defense and Mainstay Resources.

Federal agencies possessing dominant mineral estates over servient surface estates are subject to NEPA provisions warranting an environmental impact

statement. This Court has recognized that where mineral rights are involved, a servitude is placed on a surface estate for the benefit of the dominant mineral estate. *Kinney-Coastal Oil Co. v. Kieffer*, 277 U.S. 488, 504 (1928) (holding mining leases subject to the Mineral Lease Act establish the mineral estate as the dominant estate and that a private entity with title to a surface estate holds the servient estate).

Where the United States retains any interest in the mineral estate, the servitude on the surface estate could not be divested from the dominant mineral estate. *Transwestern Pipeline Co. v. Kerr-McGee Corp.*, 492 F.2d 878, 882-83 (10th Cir. 1974). In *Transwestern Pipeline*, the United States was the fee owner of a mineral estate that had been leased to a private entity to "explore, operate, develop and market" minerals where the lease was subject to specific terms involving payment of royalties made to the United States. *Id.* at 883. Considering the Mineral Lease Act, because the United States, as lessor, did not relinquish complete control over the mineral rights, despite the private entity's use and enjoyment of these minerals, a condemnation action against the private entity is, in actuality, a condemnation action against the United States. *Id.* Under these circumstances, the United States is an indispensible party. *Id.* The owner of the surface estate cannot claim title or a possessory interest in lands in which the United States has any interest, without the consent of the United States. *Id.* (citing *Leiter Minerals, Inc. v. United States*, 352 U.S. 220, 226 (1957)).

Here, the Department of Defense's retained interest in the mineral estate supersedes Mainstay Resources' 750 acre surface estate. Just as the U.S. agency in *Transwestern Pipeline*, the Department of Defense did not relinquish complete control over the servient surface estate held by Mainstay Resources. Here, Mainstay Resources cannot inhibit the Department of Defense's access to the dominant estate and without Mainstay Resources, the Department of Defense could not access the mineral estate. Because these dominant and servient relationships cannot be separated, this unique partnership between the respective estates of the Department of Defense and Mainstay is dispositive of a major federal action.

2. Control is established through the Department of Defense's economic interest in the success of Watt 1 and Watt 2.

The Department of Defense's lease with Mainstay Resources creates a distinct relationship based on financial incentives to warrant finding a major federal action and require an environmental impact statement. To determine whether a federal agency has the ability to influence a private party the Second Circuit looks to whether there is a nexus between the government agency and the private actor. *Proetta v. Dent*, 484 F.2d 1146, 1148 (2d Cir. 1973). In *Proetta*, appellants sought a preliminary injunction against the United States Economic Development Administration ("EDA") from proceeding with the demolition and clearing of a site where the EDA did not complete an environmental impact statement prior to making a loan commitment. *Id.* at 1147. The court determined that because the demolition and expansion project could "proceed independently" of

the EDA loan, an environmental impact statement was not required. *Id.* at 1148. However, the court recognized that approval of the loan application constituted a major federal action. *Id.* at 1149.

Conversely, the execution of an initial grant or loan creates major federal action. *S.F. Tomorrow v. Romney*, 472 F.2d 1021, 1025 (9th Cir. 1973). Petitioners sought a preliminary injunction against the secretary of Housing and Urban Development ("HUD") for financing urban development projects. *Id.* at 1022. The Ninth Circuit found a major federal action was triggered when HUD created a loan and grant contract, however the preliminary injunction was denied because the executed lease did not have a significant effect on the environment. *Id.* at 1023, 25.

An agency's monetary involvement with a particular project is sufficient to find a major federal action. *Minn. Pub. Interest Research Group v. Butz*, 498 F.2d 1314, 1322-23 (8th Cir. 1974). In *Minnesota Public Interest Research Group*, a private organization sought an injunction against the Forest Service from logging in a particular area of the state. *Id.* at 1316. The Forest Service's monetary involvement in logging operations included receipt of a portion of the gross revenues from all logging sales. *Id.* at 1323. Although the mere contractual relationship did not constitute a major federal action, the agency had a significant economic interest in the success of the project. *Id.*

Here, the financial nexus is sufficient to find a partnership arrangement between the Department of Defense and Mainstay Resources. Although the Department of Defense has not directly funded hydraulic fracturing at Watt 1 and

Watt 2, federal funding is not a precondition in determining major federal action. The nexus between the Department of Defense and Mainstay Resources rests upon the Department of Defense's retained interest in Mainstay Resources' successful extraction, production, and sale of gas and oil resources.

Unlike in *Minnesota Public Interest Research Group*, the relationship between the Department of Defense and Mainstay Resources is not merely contractual. Pursuant to the executed lease, Mainstay Resources agreed to pay the Department of Defense one-quarter of gross proceeds for the sale of "all oil, gas, condensate, and/or liquid hydrocarbons" produced from Watt 1 and Watt 2. The Department of Defense's economic interest is contingent on Mainstay Resources' unconventional gas development, thereby creating a financial nexus and clear co-dependency between the parties. Further, Mainstay Resources has a duty to market the oil and gas produced from hydraulic fracturing as an agent of the Department of Defense.

Mainstay Resources cannot engage in gas development without the Department of Defense and the Department of Defense cannot realize a proper economic return on its mineral estate without Mainstay Resources. This co-dependent financially driven relationship constitutes major federal action and therefore requires an environmental impact statement before Watt 1 and Watt 2 are operationalized.

C. Public policy warrants giving deference to the environmental impacts of an agency action in determining whether there is a major federal action because of the environmental harm of hydraulic fracturing.

Requiring the Department of Defense to complete an environmental impact statement before hydraulic fracturing can begin is supported by the public interest underlying NEPA. NEPA serves as "our basic national charter for protection of the environment." 40 C.F.R. § 1500.1(a) (2013). NEPA seeks to compel federal decision makers to consider "environmental consequences" prior to taking action. *Atlanta Coal. on Transp. Crisis v. Atlanta Reg'l Comm'n*, 599 F.2d 1333 (5th Cir. 1979). Although it is well settled that NEPA does not require or pursue a particular result, NEPA does prescribe that a particular process is followed. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989).

NEPA establishes two mandates for federal agencies: first, it requires that agencies take a "hard look" at the impacts of a proposed action, and second, it requires agencies to inform the public that the agency has contemplated environmental hardship. *Ctr. for Biological Diversity v. Bureau of Land Mgmt.*, 937 F. Supp. 2d 1140, 1151 (N.D. Cal. 2013) (citing *Balt. Gas & Elec. Co. v. Natural Res. Def. Co.*, 462 U.S. 87, 97 (1983)). As proclaimed by the legislature, NEPA is intended to "encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate danger to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation." 42 U.S.C. § 4321. Furthermore, NEPA ensures that agencies consider

"every significant aspect of the environmental impact of a proposed action" and inform the public that it has "considered environmental concerns in its decision making process." *Balt. Gas & Electric*, 462 U.S. at 97.

Although the Department of Defense was not required to consider *every* possible effect of operationalizing Watt 1 and Watt 2, it is required to take a hard look at the environmental consequences of this action. However, because the Department of Defense did not complete an environmental impact statement, it acted arbitrarily and capriciously in failing to consider or disclose the environmental impacts of hydraulic fracturing.

1. The environmental impacts of new technology supports a finding of major federal action because of the potential harm to the environment.

Public policy supports finding a major federal action because without an environmental impact statement proper consideration is not given to unconventional extraction methods. Hydraulic fracturing did not become a feasible means of deep shale gas production until the late 2000s. *Ctr. for Biological Diversity v. Dep't of Interior*, 937 F. Supp. 2d at 1145. Modern hydraulic fracturing involves vertical drilling into shale beds thousands of feet deep, and then horizontally between 1000 and 6000 feet away from the well. *Id.* Although this advanced technology has accrued economic benefits, it comes at a cost of potentially devastating environmental impacts, such as ground water contamination, air quality deterioration, gas and slick water flowback, and polluted surfaces from spills. *Id.* Furthermore, the Congressional Committee on Energy and Commerce

identified twenty-nine chemicals used in hydraulic fracturing that are either known or possible human carcinogens or listed as hazardous pollutants under the Clean Air Act. *Id.*[4]

NEPA enacted so agencies would contemplate the environmental impacts of their actions, and not "as an abstract exercise." *Balt. Gas*, 462 US. at 100. In *Center for Biological Diversity v. Bureau of Land Management*, the court recognized that the Bureau of Land Management could not have considered the potential concerns of hydraulic fracturing when it published its final environmental impact statement because technological advancements raised too many unanswered questions. 937 F. Supp. 2d at 1157. Updated drilling techniques involve risks and concerns not addressed in a cursory discussion of oil and gas development. *Id.* Because the final environmental impact statement did not address concerns of new and specific environmental impacts, "further environmental analysis was necessary." *Id.*

Here, the Department of Defense should complete an environmental impact statement to consider the harms of hydraulic fracturing that were not considered before construction began. Similar to *Center for Biological Diversity*, here the Department of Defense and Mainstay Resources did not contemplate the concerns of the unconventional extraction methods that were to be used at Watt 1 and Watt 2.

[4] The Fracturing Responsibility and Awareness of Chemicals Act (FRAC Act) seeks to return regulation of underground injection control back to the federal government. The adoption of the 2005 Energy Policy Act lifted fracking from federal regulation under the Safe Drinking Water Act ("SDWA") section C. This regulation created a patchwork of varying state regulations governing fracking based on how permits are issued. *See* Fracturing Responsibility and Awareness of Chemicals Act of 2013, H.R. 1921, 113th Congress (2013).

Respondents contend that the 2002 Environmental Impact Statement adequately considered hydraulic fracturing, and as such, an additional environmental impact statement was not necessary. However, in 2002, the known environmental impacts resulting from this unconventional gas development were not fully understood.

When the 2002 EIS was published, the EIS noted that hydraulic fracturing was not economically feasible, but could be an option in the future, pending technological advances. The mere mention of a potential land use in the abstract fails to fully consider the impacts of hydraulic fracturing on the environment. At that time, horizontal drilling was not feasible because of technological limitations. Additionally, because hydraulic fracturing was a particularly undeveloped prosepct when the 2002 EIS was completed, there was no opportunity for public comment on (1) the sources and effect of using local sources for the millions of gallons of water needed for hydraulic fracturing; (2) the implications and hazards from chemical mixing of frack water at the drill sites; (3) the environmental implications of well injection; (4) flowback of produced water; and (5) the treatment and disposal of waste water.[5] In light of advances in unconventional gas development, the Department of Defense should consider the environmental impacts of these actions.

2. Granting a preliminary injunction to conduct an environmental impact statement will resolve unanswered questions raised by technological advancements.

A federal agency is obliged to consider the environmental consequences of its actions in creating the mandated environmental impact statement. 15 U.S.C. §

[5] Office of Research and Development, EPA 601/R-12/011, Study of the Potential Impacts of Hydraulic Fracturing on Drinking Water Resources: Progress Report (December 2012) available at www.epa.gov/hfstudy

720b (2013). Creating an environmental impact statement serves two purposes: it ensures the agency will have considered "detailed information concerning significant environmental impacts" and "guarantees that the relevant information will be made available to the large audience" so to play a role in both the decision making and implementation of that decision. *Robertson*, 490 U.S. at 34.

Even if this Court determines that an environmental impact statement is not required, granting Friends of Newtonian's Preliminary Injunction is appropriate and would permit the Department of Defense and Mainstay Resources to complete a less intensive environmental assessment to comply with the NEPA process. An environmental assessment is a preliminary step, occurring before an environmental impact statement and is optional for federal agencies. 40 C.F.R. § 1501.4(b) (2013). The environmental assessment acts as a filter by eliminating the need to prepare an environmental impact statement by conducting only a cursory review of the proposed action. *Id.* An agency need not complete an environmental impact statement, if after conducting the shorter environmental assessment, it is evident that the proposed action will have no significant impact on the environment. *Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743, 2750 (U.S. 2010) (citing 40 C.F.R. §§ 1508.9(a), 1508(13)).

Generally, an environmental assessment is appropriate if it is unclear whether a particular project would necessitate an environmental impact statement. *Greater Yellowstone Coal. v. Flowers*, 359 F.2d 1257, 1274 (10th Cir. 2004); *see Save the Yaak Comm. v. Block*, 840 F.2d 714, 717 (9th Cir. 1988) ("An agency's

decision not to prepare an environmental impact statement will be considered unreasonable if the agency fails to supply a convincing statement of reasons why potential effects are insignificant."). However, where an agency prepares the less substantial environmental assessment, the agency must still address alternatives to the proposed plan and rely on accurate and up-to-date data. *W. Watershed Project v. Abbey*, 719 F.3d 1035, 1050, 1052 (9th Cir. 2013). However, considering the state of the technology and potential harm to water, air, and ground resources, an environmental assessment would likely result in a requirement to conduct an environmental impact statement anyway.[6]

In *Blue Mountains Biodiversity Project v. Blackwood*, an environmental protection group sought to enjoin the completion of a project that would require the construction and remodel of roads through a national forest. 161 F.3d 1208, 1210 (9th Cir. 1998). The environmental group contended that the Forest Service's completion of an environmental assessment, rather than a comprehensive environmental impact statement, violated NEPA. *Id.* The court determined that "the environmental assessment's cursory and inconsistent treatment of sedimentation issues, alone, raises substantial questions about the project's effects on the environment and the unknown risks to the area's renowned fish populations." *Id.* at 1213-14. In failing to prepare an environmental impact statement, the Forest Service "made a clear error of judgment" and the case was

[6] *See Cronin v. U.S. Dep't of Agric.*, 919 F.2d 439, 443 (7th Cir. 1990) (describing an environmental assessment as "a rough-cut, low-budge environmental impact statement designed to show whether a full-fledged environmental impact statement—which is very costly and time-consuming to prepare and has the kiss of death to many a federal projects—is necessary.").

remanded with a requirement that the Forest Service consider the environmental effects of its actions. *Id.* at 1216.

When the initial environmental impact statement was completed and the Record of Decision released, the Department of Defense received public comment from a New Tejas local environmental group and members of the community. Concerns were raised about impact of hydraulic fracturing on the town, warning of New Tejas becoming a "wasteland of oil derricks and abandoned homes." Despite this warning, the land was sold and prepped for oil extraction.

Since the initial EIS was completed, there has been no opportunity for formal public comment on the use of new technology and the potential environmental impacts of hydraulic fracturing at Watt 1 and Watt 2. New Tejas' pro-business position and lenient environmental regulations create attractive conditions for unconventional gas developers like Mainstay Resources. Governor Dohan's personal relationship with Mainstay Resources could be scrutinized for alleged favoritism. Governor Dohan ensured that Mainstay Resources' permitting process was expedited so production could begin as soon as possible. It is conceivable that both Governor Dohan and Mainstay Resources would argue that an environmental impact statement is not warranted and only represents a significant delay in economic paybacks. Despite these considerations, the law, under NEPA, requires a hard look the potential environmental impacts. However, the economic and political expediency that occurred in permitting for the initial drilling, does not give

reason to rise above compliance with the law. For these reasons, this Court should grant Friends of Newtonian's preliminary injunction.

CONCLUSION

This Court should reverse the Fourteenth Circuit's denial of Friends of Newtonian's preliminary injunction and find that this issue is ripe for judicial review and require the Department of Defense and Mainstay Resource to complete an environmental impact statement to consider the effects of operationalizing Watt 1 and Watt 2.

Respectfully submitted,

/s/

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