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9  
 10 IN THE UNITED STATES DISTRICT COURT  
 FOR THE NORTHERN DISTRICT OF CALIFORNIA

	)	
STATE OF CALIFORNIA, et al.,	)	
Plaintiffs,	)	
v.	)	Case No. 4:18-cv-00521-HSG (related)
U.S. BUREAU OF LAND	)	
MANAGEMENT, et al.,	)	Case No. 4:18-cv-00524-HSG (related)
Defendants.	)	<b>FEDERAL DEFENDANTS' CROSS</b>
	)	<b>MOTION FOR SUMMARY JUDGMENT</b>
SIERRA CLUB, et al.,	)	Date: December 5, 2019
Plaintiffs,	)	Time: 2:00 p.m.
v.	)	Judge: Haywood S. Gilliam, Jr.
DAVID BERNHARDT, et al.,	)	Courtroom 2, 4th Floor,
Defendants.	)	1301 Clay Street, Oakland, CA 94612
	)	

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**EXHIBITS**

- 1
- 2 A. Declaration of James Tichenor regarding exhibits (Aug. 1, 2019)
- 3 1. FracFocus spreadsheet indicating wells hydraulically fractured in California (June
- 4 19, 2019)
- 5 2. BLM, 2018 Annual Report for the December 22, 2017 Programmatic Biological
- 6 Opinion on Oil and Gas (December 20, 2018)
- 7 3. BLM, Bakersfield Field Office Record of Decision and Approved Resource
- 8 Management Plan (2014)
- 9 4. Excerpts of California DOGGR Annual Reports of the State Oil and Gas
- 10 Supervisor (2009)
- 11 5. FWS, Programmatic Biological Opinion on Oil and Gas Activities on Bureau of
- 12 Land Management lands in the San Joaquin Valley (2017)
- 13 6. Proclamation, Establishment of the Carrizo Plain National Monument (Jan. 17,
- 14 2001)
- 15 7. BIA, Mitigated Programmatic Environmental Assessment Oil and Gas
- 16 Development on Trust Lands and Minerals Fort Berthold Indian Reservation
- 17 (May 2017)
- 18 8. Map showing mineral ownership on Forth Berthold Indian Reservation
- 19 9. Programmatic Biological Assessment/Biological Evaluation for Oil and Gas
- 20 Development for Fort Berthold Indian Reservation (2014)
- 21 10. Letter from FWS to BIA concurring with BIA's determinations of the effect on
- 22 species in the Programmatic Biological Assessment/Biological Evaluation for Oil
- 23 and Gas Development for Fort Berthold Indian Reservation (June 4, 2014)
- 24 11. BLM, Standard Oil and Gas Lease Stipulation 16-3
- 25 12. BLM, Sample Appendix K Surface Conditions of Approval
- 26 13. FWS, Formal Section 7 Consultation for BLM's Fluid Minerals Program in the
- 27 [South] Platte River Basin, Colorado (Feb. 2, 2015).
- 28 14. BLM Letter to Operators re: South Platte Water Withdrawals (March 2, 2015)
- B. Declaration of James Tichenor regarding email (Aug. 1, 2019)

**LIST OF ABBREVIATIONS**

2015 Rule	“Oil and Gas; Hydraulic Fracturing on Federal and Indian Lands,” 80 Fed. Reg. 16,128 (Mar. 26, 2015)
2017 Rule	“Oil and Gas; Hydraulic Fracturing on Federal and Indian Lands; Rescission of a 2015 Rule,” 82 Fed. Reg. 61,924 (Dec. 29, 2017)
ACEC	Areas of Critical Environmental Concern
APD	Application for Permit to Drill
API	American Petroleum Institute
BA	Biological Assessment
BIA	Bureau of Indian Affairs
BLM	Bureau of Land Management
DOGGR	California Division of Oil, Gas, and Geothermal Resources
EIS	Environmental Impact Statement
ESA	Endangered Species Act
FLPMA	Federal Land Policy Management Act
FONSI	Finding of No Significant Impact
FWS	Fish and Wildlife Service
IMDA	Indian Mineral Development Act
IMLA	Indian Mineral Leasing Act
MLA	Mineral Leasing Act
NEPA	National Environmental Policy Act
NMFS	National Marine Fisheries Service
RMP	Resource Management Plan
Sierra Club	Plaintiffs Sierra Club, Center for Biological Diversity, Diné Citizens Against Ruining Our Environment, Earthworks, Fort Berthold Protectors of Water and Earth Rights, Southern Utah Wilderness Alliance, The Wilderness Society, and Western Resource Advocates

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**NOTICE OF MOTION**

PLEASE TAKE NOTICE THAT on December 5, 2019, at 2:00 p.m. before the Honorable Haywood S. Gilliam, Jr., Courtroom 2, 4th Floor, 1301 Clay Street, Oakland, CA 94612, Federal Defendants, the Bureau of Land Management; the U.S. Department of the Interior; Joseph Balash, in his official capacity as Assistant Secretary for Land and Minerals Management, U.S. Department of the Interior; and David Bernhardt, in his official capacity as Secretary of the Interior, will move the Court to enter summary judgment on behalf of the Federal Defendants. This motion is supported by Federal Rule of Civil Procedure 56 and the attached Memorandum of Points and Authorities.

1

2 **MEMORANDUM OF POINTS AND AUTHORITIES**

3 **I. Introduction**

4 The Bureau of Land Management (“BLM”) promulgated the regulation titled “Oil and  
5 Gas; Hydraulic Fracturing on Federal and Indian Lands; Rescission of a 2015 Rule,” 82 Fed.  
6 Reg. 61,924 (Dec. 29, 2017) (“2017 Rule”), to remove burdensome regulatory requirements.  
7 The rule it rescinded—titled “Oil and Gas; Hydraulic Fracturing on Federal and Indian Lands,”  
8 80 Fed. Reg. 16,128 (Mar. 26, 2015) (“2015 Rule”)—sought to regulate hydraulic fracturing<sup>1</sup> on  
9 federal and Indian lands, but it never went into effect. Nonetheless, in promulgating the 2017  
10 Rule, BLM considered the 2015 Rule’s anticipated benefits and environmental effects and  
11 concluded that state regulations, tribal regulations, existing BLM regulations, and updated  
12 industry guidance made the 2015 Rule unnecessary and duplicative.

13 California and several environmental groups, Sierra Club, Center for Biological Diversity,  
14 Diné Citizens Against Ruining Our Environment, Earthworks, Fort Berthold Protectors of Water  
15 and Earth Rights, Southern Utah Wilderness Alliance, The Wilderness Society, and Western  
16 Resource Advocates (collectively, “Sierra Club”), have challenged the 2017 Rule, but the Court  
17 should enter summary judgment for Federal Defendants because Plaintiffs lack standing. Even if  
18 the Court could properly reach the merits, summary judgment for Federal Defendants would be  
19 warranted because BLM complied with the Administrative Procedure Act (“APA”), National  
20 Environmental Policy Act (“NEPA”), and Endangered Species Act (“ESA”) in promulgating the  
21 2017 Rule.

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26 <sup>1</sup> Hydraulic fracturing is a well stimulation technique that involves injecting fluid, which consists  
27 of water and chemical additives, under high pressure to create or enlarge fractures in rocks.  
28 HFRR\_000158. The fluid usually contains proppants, such as sand, to keep the fractures open.  
*Id.* The fractures then allow oil and gas to flow into the well. *Id.*



## 1        **II.    Background**

### 2                **A.    Oil and Gas Development on Federal Lands**

3                BLM manages federal lands “under principles of multiple use and sustained yield.” 43  
4 U.S.C. § 1732(a). “‘Multiple use management’ is a deceptively simple term that describes the  
5 enormously complicated task of striking a balance among the many competing uses to which  
6 land can be put, ‘including, but not limited to, recreation, range, timber, minerals, watershed,  
7 wildlife and fish . . . .’” *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 58 (2004) (quoting 43  
8 U.S.C. § 1702(c)). Congress has expressly provided for development of oil and gas resources on  
9 public lands. *See* 30 U.S.C. § 181. As the Tenth Circuit has explained, “[i]t is the stated public  
10 policy of the United States to make public lands . . . available for mineral leasing in an effort to  
11 reduce our energy dependence on foreign sources and to protect our national security.” *Park*  
12 *Cty. Res. Council, Inc. v. U.S. Dep’t of Agric.*, 817 F.2d 609, 620 (10th Cir. 1987), *overruled on*  
13 *other grounds by Vill. of Los Ranchos De Albuquerque v. Marsh*, 956 F.2d 970 (10th Cir. 1992).

14                Generally, oil and gas development on federal lands involves three stages. First, BLM  
15 develops an area-wide resource management plan (“RMP”), which specifies public lands that are  
16 appropriate for oil and gas leasing. 82 Fed. Reg. 61,926. The RMP identifies the terms and  
17 conditions—including stipulations that must be incorporated into oil and gas leases—under  
18 which BLM will allow oil and gas development while protecting other resource values. 82 Fed.  
19 Reg. 61,927. The public has the opportunity to comment on and participate in BLM’s  
20 development of RMPs. HFRR\_034631. Through the RMP, BLM may also prohibit oil and gas  
21 leasing in certain areas to protect sensitive resources or recreation areas. 82 Fed. Reg. 61,927;  
22 HFRR\_034631. BLM prepares an Environmental Impact Statement (“EIS”) under NEPA for  
23 each RMP, and the EIS analyzes, inter alia, oil and gas development related impacts that may be  
24 expected to occur over the life of an RMP (typically 20 years). 82 Fed. Reg. 61,926–27. If there  
25 are ESA-listed species in the RMP area, BLM must also ensure compliance with the ESA and  
26 determine whether certain areas can be authorized for oil and gas activities, or whether additional  
27 restrictions are needed to protect the listed species. *Id.* When BLM manages the mineral estate  
28

1 for surface lands managed by other agencies, such as the Forest Service, the other agencies use  
2 their own planning documents to determine whether those lands are suitable for oil and gas  
3 development. HFRR\_034631.

4 At the second stage, interested parties must obtain a lease and BLM conducts another  
5 layer of NEPA review before selling any leases. 82 Fed. Reg. 61,927. BLM may only issue  
6 leases within areas that are open to leasing under the RMP. 43 U.S.C. § 1712(e). Once again,  
7 BLM must ensure that leasing decisions comply with the ESA, including through consultation  
8 with the Fish and Wildlife Service (“FWS”) as necessary. *Id.*

9 At the third stage, operators must submit and obtain BLM approval of a site-specific  
10 Application for Permit to Drill (“APD”). 82 Fed. Reg. 61,927. BLM’s approval of an APD is  
11 also subject to NEPA review and public comment. *Id.* The APD must provide the operator’s  
12 drilling plan; surface use plan, including plans to protect groundwater and surface water; plans  
13 for casing, including size, grade, weight, and depth of casing strings;<sup>2</sup> proposed drilling fluids;  
14 and specifications for blowout prevention equipment. 82 Fed. Reg. 61,927–28. Operators must  
15 also provide geological information, including the estimated depths and thicknesses of geological  
16 formations, the zones containing potentially usable water, and plans for protecting usable water.  
17 82 Fed. Reg. 61,927. Operators must also describe their plans for containing and disposing of  
18 drilling fluids and produced water from drilling. 82 Fed. Reg. 61,928. BLM evaluates the  
19 sufficiency of operators’ plans, particularly the plans to protect usable water zones. *Id.* BLM  
20 may condition APD approval on the lessee’s adoption of “reasonable measures,” delimited by  
21 the lease and the lessee’s surface use rights, to mitigate the drilling’s environmental impacts. 43  
22 C.F.R. § 3101.1-2.

24 When trust or restricted Indian lands are involved, the tribe or individual Indian owner  
25 leases their own oil and gas resources with the consent of the Department of the Interior’s  
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28 <sup>2</sup> Casing strings are connected sections of cemented wellbore pipe.

1 Bureau of Indian Affairs (“BIA”). 82 Fed. Reg. 61,927. In addition, the BLM regulates oil and  
2 gas operations on trust and restricted Indian lands, applying the same operating regulations that  
3 apply on federal lands. *Id.*

#### 4 **B. The 2015 Rule**

5 On March 26, 2015, BLM published the 2015 Rule to complement existing oil and gas  
6 regulations. 80 Fed. Reg. 16,128. The 2015 Rule never went into effect. As soon as BLM  
7 announced and published the 2015 Rule, four states (Wyoming, Colorado, North Dakota, and  
8 Utah), two industry groups (Independent Petroleum Association of America and Western Energy  
9 Alliance), and the Ute Indian Tribe filed suit in the District of Wyoming. The Wyoming District  
10 Court issued a preliminary injunction barring BLM from enforcing the 2015 Rule. *Wyoming v.*  
11 *U.S. Dep’t of the Interior*, 136 F. Supp. 3d 1317, 1354 (D. Wyo. 2015), *vacated and remanded*  
12 *sub nom. Wyoming v. Sierra Club*, Nos. 15-8126 & 15-8134, 2016 WL 3853806 (10th Cir. July  
13 13, 2016). The District of Wyoming concluded that BLM lacked legal authority to regulate  
14 hydraulic fracturing and issued a final decision setting aside the 2015 Rule. *Wyoming v. U.S.*  
15 *Dep’t of the Interior*, Nos. 2:15-CV-041-SWS & 2:15-CV-043-SWS, 2016 WL 3509415, at \*12  
16 (D. Wyo. June 21, 2016), *judgment vacated and appeal dismissed sub nom. Wyoming v. Zinke*,  
17 871 F.3d 1133 (10th Cir. 2017).

18 Several environmental groups and BLM appealed the Wyoming Court’s decisions to the  
19 Tenth Circuit, which held that the appeals were prudentially unripe because BLM had begun the  
20 process to propose rescission of the 2015 Rule under the new Administration. *Wyoming*, 871  
21 F.3d at 1137. The Tenth Circuit “dismiss[ed] these appeals and remand[ed] with directions to  
22 vacate the district court’s opinion and dismiss the action without prejudice.” *Id.*

#### 23 **C. The 2017 Rule**

24 On March 28, 2017, President Donald J. Trump issued an Executive Order titled  
25 “Promoting Energy Independence and Economic Growth,” stating that “[i]t is in the national  
26 interest to promote clean and safe development of our Nation’s vast energy resources, while at  
27  
28

1 the same time avoiding regulatory burdens that unnecessarily encumber energy production,  
2 constrain economic growth, and prevent job creation.” Exec. Order No. 13,783, 82 Fed. Reg.  
3 16,093, § 1(a) (Mar. 28, 2017). That Executive Order directed agencies to “immediately review  
4 existing regulations that potentially burden the development or use of domestically produced  
5 energy resources and appropriately suspend, revise, or rescind those that unduly burden the  
6 development of domestic energy resources beyond the degree necessary to protect the public  
7 interest or otherwise comply with the law.” *Id.* That Order directed the Secretary of the Interior  
8 to “review” the 2015 Rule, among other rules, and “if appropriate, . . . as soon as practicable, . . .  
9 publish for notice and comment proposed rules suspending, revising, or rescinding” the Rule. *Id.*  
10 at 16,096.

11 To implement that Executive Order, Secretary of the Interior Ryan Zinke issued  
12 Secretary’s Order No. 3349 titled, “American Energy Independence,” which directed BLM to  
13 proceed expeditiously with proposing to rescind the 2015 Rule.  
14

15 On July 25, 2017, BLM published a proposed rule to rescind the 2015 Rule. 82 Fed. Reg.  
16 34,464 (July 25, 2017). On December 29, 2017, BLM published a final rule rescinding the 2015  
17 Rule because it imposed unjustified administrative and compliance costs and was duplicative of  
18 other regulations. 82 Fed. Reg. 61,924–25.

#### 19 **D. Procedural History**

20 California and Sierra Club filed separate suits challenging the 2017 Rule. Complaint,  
21 *California v. Bureau of Land Mgmt*, No. 18-521 (N.D. Cal. Jan. 24, 2018), ECF No. 1;  
22 Complaint, *Sierra Club et al. v. Bernhardt*, No. 18-524 (N.D. Cal., Jan. 24, 2018), ECF No. 1.  
23 Federal Defendants moved to transfer these suits to Wyoming, and the Court denied that motion  
24 because, inter alia, “[t]he issue before this Court—the legality of BLM’s rescission of the HF  
25 Rule”—was distinct from the issue in the Wyoming litigation, namely the validity of the 2015  
26 Rule. ECF No. 77 at 9. Federal Defendants lodged the administrative record, the Court  
27 adjudicated certain record disputes, and the parties addressed other disputes via stipulations.  
28

1 Civ. 18-521, ECF Nos. 85, 87, 95, 97, 98, 108, 107, 110, 114, 115; Civ. 18-524, ECF Nos. 86,  
2 87, 93, 95, 96, 106, 105, 108, 124, 125. Plaintiffs moved for summary judgment, and Federal  
3 Defendants now submit their combined opposition to Plaintiffs' motions for summary judgment  
4 and cross-motion for summary judgment. Civ. 18-521, ECF No. 112; Civ. 18-524, ECF No.  
5 110.

### 6 **III. Standard of Review**

7 The Court reviews APA, NEPA, and ESA claims under the standard and scope of review  
8 set forth in the APA, 5 U.S.C. § 706. *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d  
9 581, 601 (9th Cir. 2014). Under the APA, a court may set aside an agency action only if it is  
10 "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C.  
11 § 706(2)(A). Review under this standard "is narrow, and a court is not to substitute its judgment  
12 for that of the agency." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S.  
13 29, 43 (1983). An agency's decision can be set aside "only if the agency relied on factors  
14 Congress did not intend it to consider, entirely failed to consider an important aspect of the  
15 problem, or offered an explanation that runs counter to the evidence before the agency or is so  
16 implausible that it could not be ascribed to a difference in view or the product of agency  
17 expertise." *Earth Island Inst. v. U.S. Forest Serv.*, 697 F.3d 1010, 1013 (9th Cir. 2012) (quoting  
18 *Winter v. Natural Res. Def. Council*, 555 U.S. 7 (2008)). An agency need only articulate a  
19 "rational connection between the facts found and the choice made." *Motor Vehicle*, 463 U.S. at  
20 43. Thus, the Court must "not substitute its [own] judgment for that of the agency" and should  
21 uphold even an unclear decision where the agency's path may be reasonably discerned. *Butte*  
22 *Env'tl. Council v. U.S. Army Corps of Eng'rs*, 620 F.3d 936, 945 (9th Cir. 2010).

24 Because review under the APA is limited to the agency's administrative record, *Florida*  
25 *Power & Light v. Lorion*, 470 U.S. 729, 744 (1985); *Camp v. Pitts*, 411 U.S. 138, 142 (1973), the  
26 Court is not required to resolve disputed facts and "summary judgment is the appropriate method  
27 by which the merits of the case can be decided," *Today's IV, Inc. v. Fed. Transit Admin.*, No. 13-  
28 cv-378-JAK, 2014 WL 3827489, at \*6 (C.D. Cal. May 29, 2014) (citing *Nw. Motorcycle Ass'n v.*

1 *U.S. Dep’t of Agric.*, 18 F.3d 1468, 1472 (9th Cir. 1994)).

2 **IV. Plaintiffs Lack Standing**

3 “A federal court is presumed to lack jurisdiction in a particular case unless the contrary  
4 affirmatively appears.” *Stock West, Inc. v. Confederated Tribes of the Colville Reservation*, 873  
5 F.2d 1221, 1225 (9th Cir. 1989) (citation omitted). The party seeking to sue in federal court  
6 bears the burden of establishing that the court has subject matter jurisdiction to hear the action.  
7 *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994); *Ass’n of Am. Med. Coll. v. United*  
8 *States*, 217 F.3d 770, 778–79 (9th Cir. 2000). Absent such proof, jurisdiction presumptively  
9 does not exist. *See In re Hunter*, 66 F.3d 1002, 1005 (9th Cir. 1995). At the summary judgment  
10 phase, Plaintiffs “can no longer rest on such mere allegations, but must ‘set forth’ by affidavit or  
11 other evidence specific facts, Fed. Rule Civ. Proc. 56(e), which for purposes of the summary  
12 judgment motion will be taken to be true.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561  
13 (1992) (quotations omitted).

14  
15 **A. Plaintiffs Failed to Establish Standing Because They Allege Harms from  
16 Hydraulic Fracturing Generally, Not the 2017 Rule Specifically**

17 To seek injunctive relief, a plaintiff must show that he is under threat of suffering “injury  
18 in fact” that is concrete and particularized; the threat must be actual and imminent, not  
19 conjectural or hypothetical; it must be fairly traceable to the challenged action of the defendant;  
20 and it must be likely that a favorable judicial decision will prevent or redress the injury.  
21 *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009) (citing *Friends of Earth, Inc. v. Laidlaw*  
22 *Environmental Services (TOC), Inc.*, 528 U.S. 167, 180–81 (2000)). Where, as here, Plaintiffs  
23 are not themselves the “object of the government action or inaction [they] challenge[], standing  
24 is not precluded, but it is ordinarily substantially more difficult to establish.” *Lujan*, 504 U.S. at  
25 562 (1992). Under these circumstances, it “becomes the burden of the plaintiff to adduce facts”  
26 showing that the “unfettered choices made by independent actors” “have been or will be made in  
27 such manner as to produce causation and permit redressability of injury.” *Id.*

28 None of the Plaintiffs meet this test. Plaintiffs’ alleged harms are not “fairly traceable” to

1 the 2017 Rule itself; they are instead general harms related to hydraulic fracturing that were not  
2 addressed by the 2015 Rule and therefore cannot be traced to the repeal of that Rule.

3 The 2015 Rule never purported to ban or regulate all aspects of hydraulic fracturing on  
4 BLM land. This matters because, in their standing declarations, Sierra Club’s members make a  
5 number of generic statements about the environmental problems caused by oil and gas activities  
6 generally and hydraulic fracturing in particular. *See, e.g.*, Declaration of Ileene Anderson  
7 (“Anderson Decl.”) ¶27, Case No. 4:18-cv-00524-HSG, ECF No. 110-3 (“Conventional oil and  
8 gas extraction in southern California has already damaged or permanently destroyed wildlife  
9 habitat for species that I care deeply about . . . .”); Declaration of Lisa Deville (“Deville Decl.”)  
10 ¶16, Case No. 4:18-cv-00524-HSG, ECF No. 110-3 (alleging harm by a pipeline not regulated  
11 by either the 2015 or 2017 Rule); Declaration of Jolleta Bird Bear (“Bird Bear Decl.”), ¶ 15,  
12 Case No. 4:18-cv-00524-HSG, ECF No. 110-3. The 2015 Rule would not have prevented any of  
13 these alleged harms, and Plaintiffs’ proposed remedy of reinstating the 2015 Rule would provide  
14 them no redress.  
15

16 Similarly unavailing is Sierra Club’s assertion that its members have been injured in the  
17 past due to actions by third parties who have allegedly failed to comply with *other* state and  
18 federal regulations. *See, e.g.*, Deville Decl. ¶17 (alleging illegal treatment of bald eagles by oil  
19 company representative). These allegations cannot serve as evidence that the 2017 Rule was the  
20 source of their injury, or that such injuries could be redressed by this Court if it enjoined the  
21 2017 Rule. *See Summers v. Earth Island Inst.*, 555 U.S. 488, 495 (2009). Past instances of non-  
22 compliance by independent third parties cannot serve as the basis for standing as to the 2017  
23 Rule. *See Lujan*, 504 U.S. at 571 (rejecting standing where it is “entirely conjectural whether the  
24 nonagency activity that affect[ed]” plaintiffs would have been “altered or affected by the agency  
25 activity”); *Id.* at 564 (“Past exposure to illegal conduct does not in itself show a present case or  
26 controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse  
27 effects.” (quoting *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983))). Because these harms  
28 are beyond the scope of the 2015 Rule, they cannot be fairly traced to the 2017 Rule.

## B. Sierra Club Fails to Demonstrate Injury to ESA-Related Interests

Sierra Club failed to provide evidence that its members' interests in ESA-listed species are presently injured by the 2017 Rule or will be injured in the future. Where, as here, Sierra Club is bringing suit on behalf of its members, its standing depends on a demonstration that its members "would otherwise have standing to sue in their own right." *Friends of the Earth, Inc.*, 528 U.S. at 181 (citing *Hunt v. Washington State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977)); *Fleck & Assocs., Inc. v. Phoenix*, 471 F.3d 1100, 1106-07 (9th Cir. 2006). As a result, Sierra Club relies on the facts in the standing declarations of its members to support its standing. See Standing Decls., Ex. C to Sierra Club Mot. for Summ. J., No. 4:18-cv-00524-HSG, ECF110-3. As the Supreme Court has explained, "the 'injury in fact' test requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured." *Sierra Club v. Morton*, 405 U.S. 727, 735-36 (1972); see also *Schimer v. U.S. Court of Appeals for the Ninth Circuit*, 279 F.3d 817, 822 (9th Cir. 2002). To establish standing in the realm of alleged environmental injury, Plaintiffs must plead specific plans to return to the area which will be impacted by the challenged agency decision before sufficient injury in fact can be found. *Lujan*, 504 U.S. at 564; *Summers*, 555 U.S. at 498-99. This is particularly true when Plaintiffs challenge a nationwide rule whose implementation will vary greatly across the country and depend on a number of independent decisions. See *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 889 (1990) (insufficient for plaintiffs to aver use "in the vicinity" of federal action because "Rule 56(e) is assuredly not satisfied by averments which state only that one of respondent's members uses unspecified portions of an immense tract of territory, on some portions of which mining activity has occurred or probably will occur by virtue of the governmental action. It will not do to 'presume' the missing facts because without them the affidavits would not establish the injury that they generally allege."); *Summers*, 555 U.S. at 495 (no standing where "[t]here may be a chance, but is hardly a likelihood, that Bensman's wanderings will bring him to a parcel about to be affected by a project unlawfully subject to the regulations"). Sierra Club has not met its



1 burden here.

2 1. Sierra Club Failed to Provide Evidence that Its Members' Interests in ESA-  
3 Listed Species Are Injured Presently by the 2017 Rule

4 The ESA's provisions do not apply to *all* wildlife species: instead, the Act provides legal  
5 protections for only for threatened and endangered plants and animals "listed" under the Act and  
6 their habitats. 16 U.S.C. § 1532(6), (20).<sup>3</sup> To show standing for the ESA claims, it is therefore  
7 insufficient to demonstrate that an action could affect wildlife. Instead, Sierra Club must adduce  
8 evidence that its members have an interest in specific listed species, and that those interests are  
9 impacted by the 2017 Rule. *See Lujan*, 504 U.S. at 563 (requiring "affidavits or other evidence  
10 showing, through specific facts, not only that listed species were in fact being threatened" by the  
11 challenged action, "but also that one or more of respondents' members would thereby be  
12 'directly' affected apart from their 'special interest' in th[e] subject.").

13 Sierra Club does not, and cannot, meet this burden. While Sierra Club asserts that the  
14 2017 Rule could impact wildlife around the country, it provided declarations indicating that it  
15 has members interested in listed species in only two regions that could theoretically be impacted  
16 by the implementation of 2017 Rule: the Bakersfield area of California, and the Fort Berthold  
17 Indian Reservation in North Dakota. Anderson Decl., ¶¶ 8-10, 12-15; Deville Decl., at 47.<sup>4</sup> As a  
18

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19  
20 <sup>3</sup> The ESA is co-administered by FWS, an agency of the Department of the Interior and/or the  
21 National Marine Fisheries Service ("NMFS"), an agency of the Department of Commerce.  
22 These agencies are collectively referred to as the "Services." NMFS generally has jurisdiction  
23 over marine and anadromous species, while FWS generally has jurisdiction over terrestrial  
24 species. 16 U.S.C. § 1532(15); 50 C.F.R. §§ 17.11, 402.01(b). The ESA charges these agencies  
25 with making determinations regarding what animal and plant species should be listed under, and  
26 thus protected by, the ESA. 16 U.S.C. § 1533(a). The species that fall under the ESA's  
27 protections are referred to in this brief as "listed" species. FWS and NMFS also make  
28 determinations regarding the critical habitat for listed species, and consult with other federal  
agencies regarding the effect that their actions are likely to have on listed species and their  
critical habitat.

<sup>4</sup> Heene Anderson asserts personal interest in BLM-managed land across central and southern  
California within the Bakerfield Field office management area, and notes that areas she visits

1 result, Sierra Club must prove that the specific listed species have been, or will be, injured by the  
 2 2017 Rule, in those two regions. *See Lujan*, 504 U.S. at 566 (“To say that the [ESA] protects  
 3 ecosystems is not to say that the Act creates (if it were possible) rights of action in persons who  
 4 have not been injured in fact, that is, persons who use portions of an ecosystem not perceptibly  
 5 affected by the unlawful action in question.”); *Nat’l Wildlife Fed’n*, 497 U.S. at 889 (insufficient  
 6 for plaintiffs to aver use “in the vicinity” of federal action); *Morton*, 405 U.S. at 735 (injury will  
 7 be felt directly only by those who use areas that will be impacted by agency action).<sup>5</sup> Although  
 8 the 2017 Rule is already in effect, neither of these declarations provides evidence of injuries to  
 9 the specific species in the specific areas where Plaintiffs allege an interest. Instead, they express  
 10 concerns that these species may be injured in the future. *See, e.g.*, Anderson Decl. ¶¶ 21-24;  
 11 Deville Decl. ¶¶ 16, 26.<sup>6</sup>

12  
 13 Likewise, as discussed further in section VI.B.3, the studies cited by Sierra Club do not  
 14 establish a present injury. *See* 4:18-cv-00524-HSG, ECF No.110-2. First, a number of the cited

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15  
 16 serve as habitat for listed species including the California Condor, Tipton’s Kangaroo Rat, San  
 17 Joaquin kit fox, blunt-nosed leopard lizard, and the giant kangaroo rat. Lisa Deville asserts an  
 18 interest in land within the Fort Berthold Indian Reservation in North Dakota, including an  
 19 interest in listed species such as the Dakota Skipper, White Pallid Sturgeon, Northern Long  
 20 Eared Bat, Black footed ferret, Whooping crane, and Piping Plover. Both individuals also note  
 21 an interest in additional wildlife that are not listed under the ESA, and therefore not covered by  
 22 the ESA’s protections. As a result, an interest in these species not listed under the ESA cannot  
 23 serve as the basis for standing for their ESA claims. Joletta Bird Bear also lives on the Fort  
 24 Berthold Indian Reservation and notes the presence of listed species on the reservation. Bird  
 25 Bear Decl., ¶¶ 1, 13. However, she does not assert an interest in these listed species.

26  
 27 <sup>5</sup> Sierra Club’s citations to the record, ECF 110 at 27, relate to species in Utah and Wyoming,  
 28 rather than the areas where its members have averred an interest. They also relate to species  
 other than those where its members have averred an interest. As a result, these citations cannot  
 support standing.

<sup>6</sup> Ms. Deville alleges past illegal conduct towards bald eagles. *See* Deville Decl. ¶ 17. Bald  
 eagles are federally protected, but not under the ESA. Bald and Golden Eagle Protection Act, 16  
 U.S.C. §§ 668-668d, 72 Fed. Reg. 37,345. This alleged conduct therefore cannot serve as the  
 basis for a harm to sue under the ESA.

1 studies are more than a decade old and do not reflect current practices. Second, a number of the  
2 more recent BLM or FWS documents included by Sierra Club actually reflect practices that the  
3 agencies have put in place to protect listed species from impacts associated with oil and gas  
4 activities. *See, e.g.*, 4:18-cv-00524-HSG, ECF No.110-2 at 84 (“The following measures have  
5 been developed by BLM and USFWS and applied to past oil and gas projects near condor  
6 roosting and nesting areas.”). As a result, Sierra Club failed to demonstrate that it is currently  
7 suffering any injury caused by the 2017 Rule.

8           2. *Sierra Club Has Not Demonstrated Injury Because It Relies on a Hypothetical*  
9           *and Attenuated Chain of Independent Actions*

10           Plaintiffs cannot reply “on a highly attenuated chain of possibilities,” to establish  
11 standing for a future injury. *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 410 (2013). Here, the  
12 series of events that must occur before Sierra Club’s alleged future harm is realized is “both too  
13 uncertain and too remote to constitute a reasonably probable threat of injury.” *San Luis & Delta-*  
14 *Mendota Water Auth. v. Haugrud*, 848 F.3d 1216, 1233 (9th Cir. 2017), *as corrected* (Mar. 23,  
15 2017). The Ninth Circuit recently determined that plaintiffs in another ESA challenge lacked  
16 standing because their alleged injury was not fairly traceable to the challenge policy. *See*  
17 *WildEarth Guardians v. U.S. Dep’t of Justice*, 752 F. App’x 421, 423 (9th Cir. 2018). As the  
18 *WildEarth Guardians* court explained, the link between plaintiffs’ injury—increased Mexican  
19 wolf killings—and the challenged policy “necessarily rests upon several layers of speculation,”  
20 because it required the court to guess how both agencies and private parties would react to the  
21 change in policy in the future. *Id.* Likewise, the link between Plaintiffs’ alleged injury to  
22 species and the 2017 Rule is too attenuated to support Article III standing.

23           The 2017 Rule does not itself trigger any oil and gas activities in any particular regions.  
24 Rather, as explained above, oil and gas activities move forward only through regional and site-  
25 specific decisionmaking on both the part of the Agency and independent third-parties, and not  
26 from anything the 2017 Rule does or does not do. Thus, at this stage, Sierra Club’s asserted  
27 harms stem from a series of independent actions—(1) that BLM has or will create RMPs  
28

1 allowing for hydraulic fracturing in the areas where listed species they are concerned about live,  
2 (2) that BLM has or will put these areas of concern out for lease, (3) that industry members have  
3 or will make the independent decisions to seek to lease the land and choose to engage in  
4 hydraulic fracturing operations in those specific areas, (4) that BLM has or will grant a permit to  
5 drill at a specific site and fail to include measures in the permit to protect listed species and (5)  
6 that the operators would conduct hydraulic fracturing operations in a manner that harms listed  
7 species, but which would have not occurred under the 2015 Rule. HFRR\_000145–47. Even  
8 then, before Sierra Club’s alleged harms could be realized, the particular oil and gas operators in  
9 the particular areas of concern to Plaintiffs would also have to ignore industry best practices, and  
10 in some cases flout state regulations, for a listed species to be impacted by absence of the  
11 specific provisions in the 2015 Rule that Plaintiffs have identified.  
12

13 Because no species’ critical habitat is coextensive with all BLM lands that could possibly  
14 be subject to hydraulic fracturing operations, it is these independent decisions by BLM and  
15 individual operators to lease land and provide permits that will determine if any specific areas  
16 where any particular species listed under the ESA, or visited by Plaintiffs, will be subject to  
17 hydraulic fracturing operations at all. It is also these subsequent BLM decisions—all of which  
18 are subject to review under the ESA—that will determine the nature of any hydraulic fracturing  
19 operations allowed at specific sites. But until that point, it is mere speculation to assume that any  
20 listed species, let alone any listed species in which Sierra Club has a cognizable interest, will be  
21 in any way affected by the 2017 Rule. *See Schmier*, 279 F.3d at 821 (injuries must be distinct  
22 and palpable, as opposed to merely abstract, hypothetical, or speculative).

23 Ms. Anderson’s specific allegations provide an example of how “highly attenuated” the  
24 “chain of possibilities,” is between the 2017 Rule and any injury to her. *See Clapper*, 568 U.S.  
25 at 410. In California, hydraulic fracturing is very rare in areas under BLM’s jurisdiction.  
26  
27  
28

1 According to the FracFocus database,<sup>7</sup> there have been a total of only 35 federal wells  
2 hydraulically fractured in California since record keeping began. There were only two wells  
3 hydraulically fractured in 2014, two wells in 2015, and no federal wells fractured in California  
4 since 2015. *See* Ex. 1, FracFocus spreadsheet indicating wells hydraulically fractured in  
5 California (June 19, 2019) (attached to Decl. of James Tichenor regarding exhibits, attached  
6 hereto as Exhibit A).<sup>8</sup> *See also* Ex. 5, FWS, Programmatic Biological Opinion on Oil and Gas  
7 Activities on Bureau of Land Management lands in the San Joaquin Valley (2017) (attached to  
8 Ex. A) at 8 (noting that “[i]n California, less than 10% of new wells on BLM mineral estate are  
9 hydraulically fractured.”). Second, BLM has only identified limited areas under its jurisdiction  
10 in the Bakersfield region with potential for oil and gas activities, meaning that much of the area  
11 is unlikely to ever be fractured in the future. *See* Ex. 3, BLM, Bakersfield Field Office Record of  
12 Decision and Approved Resource Management Plan (2014) Map 2.22 (attached to Ex. A).<sup>9</sup>  
13 Third, Ms. Anderson asserts an interest in a number of specific areas that BLM already manages  
14

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15  
16 <sup>7</sup> FracFocus is a public database managed by the Ground Water Protection Council, an  
17 organization of state water quality regulatory agencies, and by the Interstate Oil and Gas  
18 Compact Commission, a multi-state government agency charged with balancing oil and gas  
19 development with environmental protection. 80 Fed. Reg. 16,130. FracFocus publishes  
information about operators’ disclosures of chemicals used in hydraulic fracturing fluids. 80  
Fed. Reg. 16,168.

20 <sup>8</sup> North Dakota and California state law requirement that operators report to FracFocus. *See* Title  
21 14, California Code of Regulations, Section 1788(b); North Dakota Administrative Code at 43-  
22 02-03-27.1(1)(g); HFRR\_034643–44. While Federal Defendants contend that review of ESA  
23 claims is limited to record review under the APA, *see supra* section VIII, Parties may cite extra-  
24 record evidence for the purposes of establishing or disproving standing. *See Cent. Sierra Envtl.*  
*Res. Ctr. v. U.S. Forest Serv.*, 916 F. Supp. 2d 1078, 1086 (E.D. Cal. 2013) (*citing Nw. Envtl.*  
*Defense Ctr. v. Bonneville Power Admin.*, 117 F.3d 1520, 1527–28 (9th Cir. 1997); *Didrickson v.*  
*U.S. Dep’t of Interior*, 982 F.2d 1332, 1340 (9th Cir. 1992)).

25 <sup>9</sup> In addition, the Trico gas field located in the Atwell Island area identified by Ms. Anderson has  
26 been depleted, and oil and gas activities are unlikely to occur there in the future. *See* Ex. 4,  
27 Excerpts of California DOGGR Annual Reports of the State Oil and Gas Supervisor (2009) at  
28 105 (indicating no producing wells and no estimated oil reserves) (attached to Ex. A).

1 in ways that restrict oil and gas operations, making it even more speculative that hydraulic  
2 fracturing activities governed by the 2017 Rule will someday occur there.<sup>10</sup> If the Court were to  
3 predicate standing on this conjectural chain that at some point, a species of concern to Ms.  
4 Anderson “will stumble across a project tract,” and that the same tract will be developed by the  
5 oil and gas operator who will hydraulically fracture a well in a way that harms Ms. Anderson’s  
6 interests, it “would be tantamount to eliminating the requirement of concrete, particularized  
7 injury in fact.” *Summers*, 555 U.S. at 496.

8 As discussed further below, similar problems exist with regard to the three ways that  
9 Sierra Club asserts that the repeal of the 2015 rule harms its interest in listed species. Moreover,  
10 its arguments ignore the fact that additional site-specific protections are already in place in listed  
11 species habitat, independent of the 2015 or 2017 Rules. These protections further demonstrate  
12 why Sierra Club has not, and cannot, trace its alleged ESA injury to the fact that 2015 Rule  
13 contained these requirements.  
14  
15  
16  
17

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18 <sup>10</sup> As the FWS has recognized, BLM’s Bakersfield RMP delineates areas needed for the  
19 protection of, and to promote the recovery of, listed species. *See* Ex. 5 at 9–10. BLM has closed  
20 149,000 acres of land to oil and gas operations in the Bakersfield RMP and placed special  
21 stipulations on another 1,0011,470 acres. *See* Ex. 3 at 2.14.1.1. Areas closed to oil and gas  
22 operations, and therefore unaffected by either the 2015 or 2017 Rules, include the Bitter Creek  
23 Areas of Critical Environmental Concern (“ACEC”), Blue Ridge ACEC, Erskine Creek ACEC,  
24 Piute Cypress ACEC, and Point Sal ACEC. *Id.* at 2.14.1.1. Areas with wilderness  
25 characteristics, segments of the Lower Kern River, North Fork of the Kaweah River, San Joaquin  
26 River, and Chimney Creek determined to be suitable as Wild and Scenic Rivers, and Deer Spring  
27 area of ecological importance have also been closed to oil and gas activities. *See id.* at 2.14.1.1;  
28 Map 2.22. Likewise, oil and gas activities have been limited to “valid existing rights” in the  
Carrizo Plain National Monument since 2001. *See* Ex. 6, Proclamation, Establishment of the  
Carrizo Plain National Monument (Jan. 17, 2001) (attached to Ex. A). In general, National  
Wildlife Refuges are managed by FWS, rather than BLM, and FWS only allows the extraction or  
development of minerals on National Wildlife Refuge lands if there is a valid existing right to  
engage in such activities. *See* FWS, Mineral Management Policy 612 FW 1 (December 27,  
2016), available at <https://www.fws.gov/policy/612fw1.html#extractionsanddevelopment>.

1                   3. Sierra Club Has Not Shown that Rescission of the 2015 Rule's Tank  
2                   Requirements Caused Its Alleged ESA Injury

3                   Sierra Club argues that the 2017 Rule poses risks to wildlife by allowing the use of open  
4 pits, rather than closed tanks to store hydraulic fracturing wastewater, thus potentially exposing  
5 species to the fluids. Sierra Club Mot. for Summ. J. (“Sierra Club Mot.”) at 28, Case No. 4:18-  
6 cv-524-HSG, ECF No. 110. To understand why the Sierra Club cannot show that its alleged  
7 injuries are caused by the 2017 Rule, it is necessary to understand the scope of the waste storage  
8 provision in the 2015 Rule, and the breadth of the protections for listed species that exist  
9 independent of either the 2015 or 2017 Rules.

10                  First, the 2015 Rule included a provision that applied during the interim period (a  
11 maximum of 90 days) between “the completion of hydraulic fracturing and the implementation  
12 of a plan for the disposal of produced water approved under BLM regulations, which currently  
13 are in Onshore Order 7.” 80 Fed. Reg. 16,162. During this “interim period,” fluids were to be  
14 stored in “rigid enclosed, covered, or netted and screened above-ground tanks.” 80 Fed. Reg. at  
15 16,220. In limited circumstances, operators could apply for approval to use a lined pit. *Id.* at  
16 16,162.

17                  Second, the 2017 Rule does not mandate the use of pits, or prevent BLM, or any state  
18 regulator or individual operator from deciding to use closed tanks in order to ensure compliance  
19 with the ESA. *See Clapper*, 568 U.S. at 412 (“because § 1881a at most authorizes—but does not  
20 mandate or direct—the surveillance that respondents fear, respondents’ allegations are  
21 necessarily conjectural”). Indeed, both California and North Dakota have passed regulations  
22 addressing the storage of fluids. *See* N.D. ADMIN. CODE § 43-02-03-19.3 (except for limited  
23 circumstances, “no saltwater, drilling mud, crude oil, waste oil, or other waste shall be stored in  
24 earthen pits or open receptacles.”); CAL. FISH & GAME CODE § 1016; CAL. CODE REGS. tit. 14, §  
25 740 (regulating any open depression or basin in the ground, whether manmade or natural, which  
26 contains oil or a combination of oil and water and poses a hazard to wildlife); *see also* Ex. 5 at 9  
27 (noting that “all operators [on BLM land] in California are required to comply with [California’s]  
28

1 DOGGR<sup>11</sup> regulations. Currently, DOGGR has very stringent regulations for hydraulic  
2 fracturing, including but not limited to well construction, chemical disclosure, groundwater  
3 monitoring both before and after the operations are conducted, and others.”). In addition to these  
4 requirements, both BLM and the oil and gas operators have a strong incentive to ensure that their  
5 operations do not result in such harm because the ESA contains criminal penalties for anyone  
6 (including federal agencies) who “takes” a listed species. *See* 16 U.S.C. § 1538.

7 Third, and relatedly, the areas that the Plaintiffs’ declarations address are already subject  
8 to requirements wholly independent of the 2015 or 2017 Rules that provide protections for the  
9 listed species that they are concerned about. After the 90-day interim period, BLM’s legally-  
10 binding Onshore Order 7 requires that “[t]he pit shall be fenced or enclosed to prevent access by  
11 livestock, wildlife, and unauthorized personnel. If necessary, the pit shall be equipped to deter  
12 entry by birds,” 58 Fed. Reg. 47,354, 47,364 (Sept. 8, 1993), and that “[t]he pit shall be kept  
13 reasonably free from surface accumulation of liquid hydrocarbons that would retard  
14 evaporation,” *id.* at 47,365.

15 In addition, oil and gas operations on BLM land in both the Bakersfield region and Fort  
16 Berthold are governed by additional requirements for listed species protection. The BLM  
17 Bakersfield Field Office administers all oil and gas operations in accordance with the detailed  
18 instructions contained in a programmatic biological opinion issued by the FWS. This includes  
19 requirements for the handling of potentially hazardous liquids to protect listed species: “operator  
20 will prevent avian and terrestrial animal access to fluids pits that contain or have the potential of  
21 containing salinity sufficient to cause harm, surfactants, or Resource Conservation and Recovery  
22 Act-exempt hazardous substances.” Ex. 5 at 13.<sup>12</sup> BLM further requires that “Federally-listed  
23

24 \_\_\_\_\_  
25 <sup>11</sup> California’s Department of Division of Oil, Gas, and Geothermal Resources (“DOGGR”) regulates hydraulic fracturing operations in the State of California. These regulations also apply  
26 to operations on BLM land within the State.

27 <sup>12</sup> FWS previously issued programmatic biological opinions to the BLM relating to oil and gas  
28 activities over the same geographic area in 1996 and 2001. Ex. 5 at 1. The most recent



1 species and other animals shall be protected from the hazards posed by sumps. All exposed oil  
2 sumps shall be screened or eliminated.” *Id.* BLM places specific requirements on the type of  
3 screening for any remaining sumps. *Id.* In addition, the operator must “take actions necessary to  
4 prevent wildlife and livestock access, including avian wildlife, to all open-topped tanks that  
5 contain or have the potential to contain salinity sufficient to cause harm to wildlife or livestock,  
6 hydrocarbons, or Resource Conservation and Recovery Act of 1976-exempt hazardous  
7 substances. At a minimum, the operator will net, screen, or cover open-topped tanks to exclude  
8 wildlife and livestock and prevent mortality.” *Id.* “If the operator uses netting, the operator will  
9 cover and secure the open portion of the tank to prevent wildlife entry. The operator will net,  
10 screen, or cover the tanks until the operator removes the tanks from the location or the tanks no  
11 longer contain substances that could be harmful to wildlife or livestock.” *Id.* Given the breadth  
12 of these protections—that exist wholly outside of either the 2015 or 2017 Rule—Sierra Club  
13 cannot trace its alleged injuries to the rescission of a regulatory provision that would have  
14 required the use of tanks during a period of time limited to a maximum of 90 days.

15  
16 At Fort Berthold, regulation of oil and gas activities is shared between BLM and the  
17 BIA.<sup>13</sup> *See* Ex. 7, BIA, Mitigated Programmatic Environmental Assessment Oil and Gas  
18 Development on Trust Lands and Minerals Fort Berthold Indian Reservation (May 2017)  
19 (attached to Ex. A). Very little of the mineral estate on the Reservation is governed by BLM.

20  
21 biological opinion was issued in 2017. *Id.* Pursuant to the ESA, BLM requested formal  
22 consultation on the effects of BLM-approved oil and gas activities on the San Joaquin kit fox,  
23 blunt-nosed leopard lizard, giant kangaroo rat, Tipton kangaroo rat, Kern mallow, San Joaquin  
wooly-threads, California jewelflower, and Bakersfield cactus. *Id.*

24 <sup>13</sup> The Reservation includes surface lands and subsurface minerals owned by various entities,  
25 including the Three Affiliated Tribes, individual tribal members (allottees), and persons who are  
26 not members of tribes (fee lands). Ex. 7 at 1.2. The U.S. also owns water and shore areas of  
27 Lake Sakakawea within the Reservation. *Id.* The BIA has trust responsibilities regarding  
28 minerals and lands owned by the Three Affiliated Tribes and tribal allottees, and the BLM is  
responsible for permitting exploration and development of trust minerals. *Id.*

1 See Ex. 8, Map showing mineral ownership on Fort Berthold Reservation (attached to Ex. A).<sup>14</sup>  
2 Both BIA and BLM impose requirements on operators, including the use of closed loop systems  
3 where all drilling fluids and solid wastes are contained in tanks. See Ex. 9, Fort Berthold  
4 Programmatic BA at 2.4.1, 2.10.2.2 (attached to Ex. A); Ex. 7 at 2.2.4.1, 2.5.3, 2.5.6. As a result  
5 of the BIA-imposed requirements and the North Dakota state regulations, there are no open pits  
6 storing wastewater on the Reservation. See *id.*; N.D. ADMIN. CODE § 43-02-03-19.3.  
7 Therefore, Sierra Club cannot trace any ESA injury to the repeal of the 2015 Rule’s 90-day  
8 interim tank requirements.

9 In support of its argument, Sierra Club cites a number of studies that are more than a  
10 decade old indicating that uncovered waste storage pits can result in harms to wildlife. See ECF  
11 No. 110-2 at 6-65. These studies are insufficient to demonstrate the 2017 Rule has caused either  
12 a present or future injury to Plaintiffs.<sup>15</sup> As discussed above, industry practices and agency  
13 requirements have evolved since those studies were completed, so that uncovered pits are no  
14 longer permissible when they pose risks to listed species. As the newer agency documents that  
15 Plaintiffs include demonstrate, federal agencies now place additional requirements, including  
16 fencing, netting, or use of tanks to protect listed species. See, e.g., BLM, Record of Decision and  
17 Approved Resource Management Plan for the Bakersfield Field Office (2014), ECF No. 110-2 at  
18 85 (“All liquids shall be in closed, covered containers. Any spills of hydrocarbon/hazardous  
19 liquids shall not be left unattended until clean-up has been completed. No open drilling mud,  
20 water, oil or other liquid storage or retention structures will be allowed. All such structures will  
21

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22  
23  
24 <sup>14</sup> The map areas in yellow are governed by BLM. The Tribal and Allotted land (purple and  
25 green) are governed by BIA. The areas shown in white do not fall under the jurisdiction of either  
agency and are not governed by the 2017 Rule.

26 <sup>15</sup> As further explained in Section VIII, the Court should not consider these studies when  
27 considering the merits of Plaintiffs’ ESA claims because review of ESA claims is limited to the  
28 administrative record. It may, however consider them for purposes of determining whether  
Plaintiffs have standing. See *Cent. Sierra Env’tl. Res. Ctr.*, 916 F. Supp. 2d at 1086.

1 be required to have some sort of netting or other covering that precludes entry or other use by  
2 condors or other listed avian species.”); BLM, Gunnison Sage-Grouse Rangewide Draft  
3 Resource Management Plan Amendment and Draft Environmental Impact Statement (2016),  
4 ECF No. 110-2 at 70 (“Cover (with fine mesh netting or other effective techniques) all drilling  
5 and production pits and tanks regardless of size to reduce sage grouse mortality.”).

6         Sierra Club notably lacks any recent support for its claim that listed species may be  
7 affected in areas identified in the standing declarations, despite the fact that those areas are  
8 presently subject to the 2017 Rule. For the areas where Sierra Club expresses concern, it  
9 presents no evidence of any listed species being harmed by an open pit since the promulgation of  
10 the 2017 Rule. Indeed, it cites to nothing in the Record, including in the materials filed through  
11 public comment, to indicate that listed species face a present risk of harm from open pits during  
12 the 90-day period that would have been regulated by the 2015 Rule. By contrast, BLM records  
13 during the time that the 2017 Rule has been in effect show that no species have been harmed by  
14 oil and gas activities in the Bakersfield region. Ex. 2, BLM, 2018 Annual Report for the  
15 December 22, 2017 Programmatic Biological Opinion on Oil and Gas (December 20, 2018)  
16 (attached to Ex. A). *See Clapper*, 568 U.S. at 409 (“threatened injury must be certainly  
17 impending to constitute injury in fact, and that [a]llegations of possible future injury are not  
18 sufficient.” (quotations and citations omitted)).

19  
20         Essentially, the Sierra Club’s theory rests on the following causal chain: (1) BLM has or  
21 will authorize hydraulic fracturing in specific regions of California or North Dakota; (2) BLM  
22 will not require the operators of these operations to use closed tanks to store waste fluid during  
23 the 90-day interim period; (3) during that 90-day period, a listed species in which Sierra Club is  
24 interested will wander onto the site; (4) the operator will fail to take measures necessary to  
25 ensure that the listed species stays out of any waste pits; and (5) listed species will be harmed by  
26 contact with the hydraulic fracturing waste fluid. This chain is too attenuated to be cognizable  
27 under Article III. *See Clapper*, 568 U.S. at 410; *id.* at 413 (expressing reluctance “to endorse  
28 standing theories that require guesswork as to how independent decisionmakers will exercise

1 their judgment.”); *Lujan*, 504 U.S. at 562 (Plaintiff has the burden to “adduce facts” showing that  
2 the “unfettered choices made by independent actors” “have been or will be made in such manner  
3 as to produce causation and permit redressability of injury.”).

4 4. *Sierra Club Has Not Shown that Rescission of the 2015 Rule Caused an ESA*  
5 *Injury from Surface and Groundwater Pollution*

6 Sierra Club also asserts that the 2015 Rule’s well construction standards, and the use of  
7 tanks instead of pits, provided additional protections to listed species. Sierra Club Mot. at 29.  
8 This claim likewise relies on far too speculative of a causal chain to be constitutionally  
9 cognizable, and again ignores the existing protections in place where oil and gas activities have  
10 the potential to harm listed species. Specifically, Sierra Club asserts in its brief that “[m]any  
11 ESA-listed species that coexist with BLM-authorized hydraulic fracturing rely on clean surface  
12 and groundwater,” Sierra Club Mot. at 29, and that “FWS and BLM have both acknowledged  
13 that spills and accidents causing contamination of waters in the Upper Colorado River Basin can  
14 kill and otherwise harm the listed fish and their aquatic habitat,” *id.* First, Sierra Club has not  
15 provided any evidence that it has members who have a constitutionally cognizable interest in any  
16 listed species of Colorado River fish. The only standing declarations that it has provided that  
17 profess *any* interest in listed species are limited to regions of California and the Fort Berthold  
18 Indian Reservation in North Dakota; they do not mention any interest in any listed Colorado  
19 River fish. *See supra* section IV.B.1; Anderson Decl., ¶¶ 8-10, 12-15; Deville Decl. at 47.

20  
21 Second, even if it did have a cognizable interest in these fish, Sierra Club never explains  
22 how the 2017 Rule is causally linked to its injury. In addition to the protections for species  
23 described above in Section VI.B.3, BLM requires operators in the Bakersfield management area  
24 to follow measures to ensure that species are not impacted by potential water pollution outlined  
25 in the FWS biological opinion. For example, operators must “prevent all hazardous, poisonous,  
26 flammable, and toxic substances from coming into contact with soil and water.” Ex. 5 at 13.  
27 This includes installing and maintaining an “impervious secondary containment system for any  
28 tank or barrel containing hazardous, poisonous, flammable, or toxic substances sufficient to

1 contain the contents of the tank or barrel and any drips, leaks, and anticipated precipitation” as  
2 well as maintaining “all secondary containment systems to prevent wildlife and livestock  
3 exposure to harmful substances” and installing “effective wildlife and livestock enclosure  
4 systems such as fencing, netting, expanded metal mesh, lids, and grate covers.” *Id.* If a spill  
5 does occur, any “released materials will be cleaned up immediately and disposed of properly.”  
6 *Id.* at 12. In the case of a release of potentially hazardous materials, including produced fluids,  
7 within listed species habitat the operator must contact FWS and/or BLM “as soon as possible,  
8 but not later than 24 hours after the release occurs or is discovered.” *Id.* And within 48 hours of  
9 being notified of a release that may affect listed species, BLM will issue additional clean-up  
10 provisions to the operator, and, within 60 days of completing clean-up activities, a compliance  
11 report will be submitted by the monitoring biologist to the BLM. *Id.*

12  
13 At Fort Berthold, operators are required to follow BLM’s Onshore Oil and Gas Order No.  
14 2 in both BLM and BIA jurisdictional areas to ensure safeguards for the prevention of blowouts  
15 and to maintain fluid control during drilling. *See* Ex. 10, Letter from FWS to BIA concurring  
16 with BIA’s determinations of the effect on species in the Programmatic Biological  
17 Assessment/Biological Evaluation for Oil and Gas Development for Fort Berthold Indian  
18 Reservation (June 4, 2014) at 3 (attached to Ex. A). In addition, well pads must be at least 150  
19 feet from wetlands and perennial and intermittent streams, and have a 24-inch perimeter berm to  
20 prevent contaminants from leaving the well pad in the event of a spill in BIA-regulated areas.  
21 *Id.*; *see also* Ex. 9 BIA, Programmatic Biological Assessment/Biological Evaluation for Oil and  
22 Gas Development for Fort Berthold Indian Reservation (2014) at 2.10.2.4 (noting additional  
23 protections for water). BLM also requires at least 500 to 1,000 foot set-backs from water  
24 sources, *see* Ex. 11, BLM, Oil and Gas Lease Stipulation 16-3 and places additional  
25 requirements in specific APDs to protect against spills (attached to Ex. A). *See, e.g.*, Ex. 12,  
26 BLM, Sample Appendix K Surface Conditions of Approval for Application for Permit to Drill  
27 (attached to Ex. A).

28 As a result, before Plaintiffs could hypothetically suffer an injury from the rescission of

1 the 2015 Rule’s extra requirements, a long list of speculative events would have to occur: (1)  
2 BLM would have to approve a permit for an operator in an area where a spill had the potential to  
3 enter into surface or groundwater used by a listed species in which Plaintiffs have an interest, (2)  
4 an accident would have to occur at the site, and that accident would have to be one that would  
5 have been prevented if the 2015 Rule was in effect; (3) the accident must also occur in such a  
6 way that it resulted in hazardous materials entering into the water in sufficient quantity that they  
7 resulted in harm to the listed species despite the requirements already in place. This chain is too  
8 attenuated to be cognizable under Article III. *Cf. Ground Zero Ctr. for Non-Violent Action v.*  
9 *U.S. Dep’t of Navy*, 383 F.3d 1082, 1092 (9th Cir. 2004) (“[W]e do not think that risks of missile  
10 explosion, based on any discretionary acts of the Navy, required additional ESA section 7  
11 consultations because the likelihood of jeopardy is too remote.”).

12  
13 5. *Sierra Club Has Not Shown Any ESA Injury from Rescission of the 2015 Rule’s*  
*Water Source and Volume Disclosure Requirements*

14 Finally, Sierra Club alleges that “water depletions associated with BLM-approved  
15 hydraulic fracturing operations adversely impact listed species and their habitat”—and points to  
16 Colorado River fish as examples of listed species that could be harmed. *Sierra Club Mot.* at 29.  
17 It claims that the never-implemented 2015 Rule would have prevented this harm by disclosing  
18 the source of water used in hydraulic fracturing operations. *Id.*

19  
20 As noted above, Sierra Club has not provided any evidence that it has members who have  
21 a constitutionally cognizable interest in any listed species of Colorado River fish. Even if Sierra  
22 Club had an interest in listed Colorado River fish, it cannot demonstrate how the 2015 Rule’s  
23 disclosure requirement would prevent water depletions, or how the 2017 Rule causes any injury  
24 to the fish. This is particularly true because BLM already has protections in place independent  
25 of either the 2015 or 2017 Rule to prevent harm to the listed Colorado River fish from water  
26 withdrawals.

27 Specifically, BLM engaged in consultation with FWS on its Fluid Minerals Program in  
28 the South Platte River Basin, which resulted in a programmatic biological opinion which

1 includes specific measures that BLM implements to ensure that water withdrawal do not harm  
2 listed fish species. *See* Ex. 13, FWS, Formal Section 7 Consultation for BLM’s Fluid Minerals  
3 Program in the [South] Platte River Basin, Colorado (Feb. 2, 2015) (attached to Ex. A). On a  
4 project-by-project basis, BLM assesses whether or not the operator will use a water source that is  
5 a tributary to the South Platte River. If the operator commits to using a source that the state  
6 deems non-tributary, such as water from a designated groundwater basin that is not  
7 hydrologically connected to the South Platte, then river flows will not be affected. *See* Ex. 14,  
8 BLM Letter to Operators (March 2, 2015) at 2 (attached to Ex. A) (Before BLM approves an  
9 APD, energy companies must certify that “100% of the water that will be used in construction,  
10 drilling and completion activities is designated non-tributary to the South Platte River by the  
11 State of Colorado . . . disclose the source of the water supply, and provide a copy of the well  
12 permit or water right that shows that the water is designated non-tributary.”). In addition, the  
13 operator will likely be required to “prepare a biological assessment on the effect of water  
14 depletion resulting from construction, drilling and completion activities in the South Platte Basin  
15 on federally listed species whose habitat is dependent on water in the South Platte in Nebraska.”  
16 *Id.* BLM also requires operators to “replace any water used from oil and gas development that  
17 may affect” listed species. Ex. 14, BLM, Endangered Species Act Section 7 Consultation on  
18 Water Depletions Caused by Oil and Gas Activity in Platte River Basin in Colorado (Jan. 9,  
19 2015).  
20

21 Ms. Deville is the only declarant to raise concerns about how water withdrawals may  
22 impact listed species. *See* Deville Dec. ¶ 26 (“But I know that there are many endangered  
23 species that could be threatened by spills and other pollution or water depletion associated with  
24 hydraulic fracturing here on Fort Berthold, including the Dakota skipper.”). First, BLM only  
25 controls the mineral estate in a very limited portion of the Fort Berthold reservation. *See* Ex. 8.  
26 Second, in a programmatic biological evaluation for Fort Berthold Indian Reservation Oil and  
27 Gas Development, FWS explained the limited impact of the possible water withdrawals by oil  
28 and gas activities: “While water management will always be a concern to the management of

1 Lake Sakakawea . . . if water is drawn from Lake Sakakawea directly or from water wells  
2 hydrologically connected to the reservoir, the Proposed [oil and gas] Action would use  
3 approximately 0.04 percent of the volume of the lake.” Ex. 9 at 5.4.1. Third, Sierra Club has not  
4 demonstrated that water withdrawals would cause injury to species in which Ms. Deville is  
5 interested. *See* Ex. 10 (noting that [t]he greatest potential stressor for the Dakota skipper from  
6 the proposed action is destruction and degradation of habitat” rather than any issues subject to  
7 additional regulations under the 2015 Rule such as water pollution or depletion as well as noting  
8 water protections in place for the Pallid Sturgeon). As a result, Plaintiffs’ alleged injury is not  
9 fairly traceable to the 2017 Rule.

10 Nor would any purported injury be redressed even if the 2015 Rule was in effect. *See*  
11 *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 75 n.20 (1978) (plaintiff  
12 must show a “substantial likelihood” that the alleged injury will be redressed by the relief it  
13 seeks). The only difference between the 2015 Rule and the 2017 Rule identified by Plaintiffs is  
14 that the 2015 Rule required disclosure of the source of water used. *Sierra Club Mot.* at 28–29.  
15 As noted above, operators are *already* required to disclose the source of the water used in the  
16 areas that Sierra Club professes to be interested in. *Id.* at 29. In addition, Sierra Club fails to  
17 explain how the mere disclosure of source of the water would prevent any water withdrawal and  
18 therefore have an impact on listed species. As a result, vacatur of the 2017 Rule would not  
19 redress its alleged injury.

21 **C. California Lacks Standing Because It Asserts Parens Patriae Injuries, Not**  
22 **Direct Harms**

23 It is settled law that a “State does not have standing as parens patriae to bring an action  
24 against the Federal Government.” *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458  
25 U.S. 592, 610 n.16 (1982) (citing *Massachusetts v. Mellon*, 262 U.S. 447, 485–86 (1923));  
26 *accord Nevada v. Burford*, 918 F.2d 854, 858 (9th Cir. 1990) (relying on “the Supreme Court’s  
27 clear statement in *Snapp*”); *Alaska v. United States*, 981 F.2d 1259 (9th Cir. 1992) (same);  
28 *People ex rel. Lockyer v. U.S. Dep’t of Agric.*, No. CIV.A05-0211 MCE GGH, 2005 WL



1 1719892, at \*2 (E.D. Cal. July 18, 2005). As the D.C. Circuit has recently explained, this  
 2 longstanding principle remains true even after *Massachusetts v. EPA*, 549 U.S. 497 (2007),  
 3 because there the Supreme Court concluded that the state had standing based on an injury to the  
 4 state’s proprietary interest as a landowner. See *Gov’t of Manitoba v. Bernhardt*, 923 F.3d 173,  
 5 178–83 (D.C. Cir. 2019); *Ctr. for Biological Diversity v. U.S. Dep’t of Interior*, 563 F.3d 466,  
 6 475–79 (D.C. Cir. 2009). Likewise, California does not have standing to sue the U.S. based on  
 7 the generalized interests of its citizens.

8 In a very similar situation, the Eastern District of California held that California lacked  
 9 standing to sue the U.S. Department of Agriculture for alleged failures to comply with NEPA  
 10 and the APA in creating the 2004 Sierra Nevada Forest Plan Amendment. *People ex rel.*  
 11 *Lockyer*, 2005 WL 1719892, at \*1. The court first explained that the state had not asserted any  
 12 particular injuries to California itself, outside of its general interests in the health and welfare of  
 13 its citizens. *Id.* at \*2–3. The *Lockyer* court dismissed the case, explaining that such generalized  
 14 allegations are “insufficient to state a cognizable claim against the federal government. In  
 15 actions regarding citizens’ rights relating to the federal government, it is the United States, not an  
 16 individual state, that represents citizens as *parens patriae*.” *Id.* at \*3.<sup>16</sup>

18 Here, California has similarly failed to assert direct injuries to California outside of the  
 19 interests of its citizens. California’s Complaint states:

20 The Attorney General is the chief law enforcement officer of the State and has the  
 21 authority to file civil actions in order to protect public rights and interests,  
 22 including actions to protect the natural resources of the State. Cal. Const., art. V,  
 § 13; Cal. Gov. Code §§ 12600-12612. This challenge is brought in part pursuant

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25 <sup>16</sup> Even assuming that *parens patriae* standing is available to California, the State has not met its  
 26 burden for invoking it because there exists here “a small group of citizens who are likely to  
 27 challenge the [government action] directly.” *Maryland v. Louisiana*, 451 U.S. 725, 739 (1981)  
 28 (holding that a state may rely on *parens patriae* standing and “act as the representative of its  
 citizens in original actions where the injury alleged affects the general population of a State in a  
 substantial way”).

1 to the Attorney General’s independent constitutional, statutory, and common law  
2 authority to represent the public interest.

3 Cal. Compl. ¶ 10. While California notes that the state contains millions of acres of BLM land  
4 and subsurface mineral estate, *id.* ¶ 11, it does not “allege any injuries that such activities would  
5 cause to the land, resources, and wildlife owned, used, and managed by the State.” *Lockyer*,  
6 2005 WL 1719892, at \*3. *See also* Cal. Compl. ¶ 12 (“California has a strong interest in  
7 preventing the adverse environmental and public health impacts from the use of hydraulic  
8 fracturing on federal and Indian lands within the State.”), ¶ 14 (“Plaintiff has an interest in the  
9 protection of federal lands, which belong to the People.”), ¶ 15 (“Defendants’ action will  
10 adversely impact Plaintiff by increasing the potential for harmful environmental and public  
11 health impacts.”); Cal. Mot. for Summ. J. (“Cal. Mot.”) at 13 (“Thus, the Repeal will adversely  
12 impact California by increasing the risks of harmful environmental and public health impacts  
13 from conducting hydraulic fracturing on federal and Indian lands, including increased air  
14 pollution, impacts to surface and groundwater resources, and induced seismicity from the  
15 disposal of wastewater in disposal wells from hydraulic fracturing operations.”).

16 Moreover, the State has failed to provide any evidence to indicate that it has suffered a  
17 legally cognizable injury separate and apart from the generalized interest of its citizens.  
18 Plaintiffs have the burden of establishing standing for each claim raised in the complaint. *See*  
19 *Valley Outdoor, Inc. v. City of Riverside*, 446 F.3d 948, 952 (9th Cir. 2006); *Schmier*, 279 F.3d  
20 817, 821 (9th Cir. 2002). At the summary judgment phase, Plaintiffs “can no longer rest on such  
21 mere allegations, but must ‘set forth’ by affidavit or other evidence specific facts, Fed. Rule Civ.  
22 Proc. 56(e), which for purposes of the summary judgment motion will be taken to be true.”  
23 *Lujan*, 504 U.S. at 561 (quotations omitted). “It is a long-settled principle that standing cannot  
24 be inferred argumentatively from averments in the pleadings, but rather must affirmatively  
25 appear in the record.” *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231 (1990), *holding*  
26 *modified by City of Littleton, Colo. v. Z.J. Gifts D-4, L.L.C.*, 541 U.S. 774 (2004) (citations  
27 omitted); *Wyoming v. Oklahoma*, 502 U.S. 437, 448-49 (1992); *see also, Gov’t of Manitoba*, 923  
28

1 F.3d at 178 (contrasting direct injury and *parens patriae* standing). Here, California filed no  
2 declarations supporting its claim of direct injury, as it must at the summary judgment stage. *See*  
3 *Lujan* 504 U.S. at 561 (1992). This lack of evidence distinguishes this case from the Ninth  
4 Circuit’s finding that a state had established standing based on its proprietary interests in the  
5 state’s natural resources. *See Sierra Forest Legacy v. Sherman*, 646 F.3d 1161, 1178–79 (9th  
6 Cir. 2011). In that case, the court specifically noted that California had submitted an affidavit to  
7 support its unique propriety interest and explaining the future harm that the State would suffer  
8 from the proposed rule. *Id.* Here, California has not submitted any such affidavits, and instead  
9 cites to its own comment letter to BLM, Cal. Mot. at 13 (citing HFRR\_005056–57), and to a  
10 report by California’s DOGGR of oil and gas activities apparently under the State’s own  
11 regulatory purview. *See* Cal. Mot. at 13.<sup>17</sup> These documents do not indicate how the 2017 Rule  
12 harms California’s unique propriety interest. California has thus failed to meet its burden of  
13 demonstrating any direct injury to its own interests.

14  
15 Because California does not have standing to sue the U.S. in *parens patriae*, and has not  
16 established a direct injury, its suit must be dismissed.

#### 17 **D. California Lacks Standing to Bring IMLA Claims**

18 California lacks standing to make claims and arguments under the Indian Mineral  
19 Leasing Act (“IMLA”).<sup>18</sup> California brings an IMLA claim alleging that the IMLA “provides

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21 <sup>17</sup> Notably, the report opens by explaining that “[i]n September 2013, Governor Brown signed  
22 into law Senate Bill 4 SB 4), establishing the *most comprehensive Well Stimulation Treatment*  
23 *(WST) regulatory program in the United States.*” HFRR\_023336 (emphasis added). Except in  
24 rare instances of federal preemption, state laws and regulations also apply on BLM lands within  
that state.

25 <sup>18</sup> These two cases are separate, even though the parties are managing them jointly. Thus the law  
26 providing that “[o]nly one of the [plaintiffs] needs to have standing” to bring a claim does not  
27 allow California to bring IMLA claims in *California v. Bureau of Land Management*, regardless  
28 of whether Sierra Club can bring those claims in *Sierra Club v. Bernhardt*. *Massachusetts v.*  
*E.P.A.*, 549 U.S. 497, 518 (2007).

1 Defendants with a trust responsibility to ensure that “[a]ll operations under any oil, gas, or other  
2 mineral lease issued pursuant to the terms of [the IMLA] or any other Act affecting restricted  
3 Indian lands shall be subject to the rules and regulations promulgated by the Secretary of the  
4 Interior.” Cal. Compl. ¶ 55 (quoting 25 U.S.C. § 396d). California claims that Federal  
5 Defendants violated the IMLA by acting in a manner that was arbitrary, capricious, an abuse of  
6 discretion, not in accordance with law, and in excess of their statutory authority. *Id.* ¶ 58.  
7 Because California is outside the IMLA’s zone of interest, its claim under that statute must be  
8 dismissed.

9 “[S]tanding is not dispensed in gross,” and “a plaintiff must demonstrate standing for  
10 each claim he seeks to press and for each form of relief that is sought.” *Town of Chester, N.Y. v.*  
11 *Laroe Estates, Inc.*, 137 S. Ct. 1645, 1650 (2017) (quoting *Davis v. Fed. Election Comm’n*, 554  
12 U.S. 724, 734 (2008)). The APA “grants standing to a person ‘aggrieved by agency action  
13 within the meaning of a relevant statute.’” *Clarke v. Sec. Indus. Ass’n*, 479 U.S. 388, 394 (1987)  
14 (quoting 5 U.S.C. § 702). The “zone of interest” test is a guide for deciding whether a particular  
15 plaintiff should be heard to complain of a particular agency decision. *Id.* at 399. “In cases where  
16 the plaintiff is not itself the subject of the contested regulatory action, the test denies a right of  
17 review if the plaintiff’s interests are so marginally related to or inconsistent with the purposes  
18 implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the  
19 suit.” *Id.* at 399–400.

20  
21 California is well outside the zone of interests that Congress intended the IMLA to  
22 protect and, therefore, it lacks standing to bring those claims. The IMLA “imposes extensive  
23 responsibilities on the government in tribal mineral leasing matters for the benefit of Indians.”  
24 *Assiniboine & Sioux Tribes of Fort Peck Indian Reservation v. Bd. of Oil & Gas Conservation of*  
25 *State of Montana*, 792 F.2d 782, 794 (9th Cir. 1986). “[T]he IMLA aimed to foster tribal self-  
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28

1 determination by ‘giv[ing] Indians a greater say in the use and disposition of the resources found  
2 on Indian lands.’” *United States v. Navajo Nation*, 537 U.S. 488, 493–94 (2003) (quoting *BHP*  
3 *Minerals Int’l Inc.*, 139 I.B.L.A. 269, 311 (1997)).

4         Several Circuits have held that nontribal entities lack standing to bring IMLA claims.  
5 The Eighth Circuit has held that a nontribal lessee of Indian land lacked standing to sue the  
6 Secretary of the Interior under the IMLA because Congress intended the IMLA “to protect only  
7 Native American interests.” *Rosebud Sioux Tribe v. McDivitt*, 286 F.3d 1031, 1036–37 (8th Cir.  
8 2002). The Eleventh Circuit agreed, concluding that the IMLA and its accompanying  
9 regulations “protect Indian landowners, not nontribal lessees.” *Hollywood Mobile Estates, Ltd.*  
10 *v. Seminole Tribe of Fla.*, 641 F.3d 1259, 1270 (11th Cir. 2011); *see also Chuska Energy Co. v.*  
11 *Mobil Expl. & Producing N. Am., Inc.*, 854 F.2d 727, 732 (5th Cir. 1988) (“That the Navajos or  
12 the Secretary of the Interior could have standing in federal court to challenge the assignment  
13 [under the IMLA] does not confer a similar right on non-tribal or non-governmental litigants  
14 whom it was not designed to protect.”); *cf. San Xavier Dev. Auth. v. Charles*, 237 F.3d 1149,  
15 1153 (9th Cir. 2001) (“[A] non-Indian party to a contract does not have the right to employ  
16 statutory remedies enacted to protect Indian tribes and their members.”). That reasoning applies  
17 to California’s IMLA claim: it lacks standing to bring that claim because the IMLA was not  
18 intended to protect states.  
19

20         Furthermore, California has not shown that it has any relevant regulatory authority—any  
21 environmental protection role—over tribal lands. There is a “‘deeply rooted’ policy in our  
22 Nation’s history of ‘leaving Indians free from state jurisdiction and control.’” *Okla. Tax*  
23 *Comm’n v. Sac & Fox Nation*, 508 U.S. 114, 123 (1993) (quoting *McClanahan v. State Tax*  
24 *Comm’n of Ariz.*, 411 U.S., 164, 168 (1973)). “Generally speaking, primary jurisdiction over  
25 land that is Indian country rests with the Federal Government and the Indian tribe inhabiting it,  
26 and not with the States.” *Alaska v. Native Vill. of Venetie Tribal Gov’t*, 522 U.S. 520, 531 n.1  
27 (1998). States lack authority to enforce civil laws and regulations on tribal lands. *California v.*  
28 *Cabazon Band of Mission Indians*, 480 U.S. 202, 209 (1987); *see also* 80 Fed. Reg. 16,128,

1 16,133 (Mar. 26, 2015) (“[S]tates . . . do not have trust responsibilities for Indian lands under  
2 Federal laws.”). Accordingly, California has no standing to bring IMLA claims.<sup>19</sup>

### 3 **V. The 2017 Rule Satisfied the APA’s Requirements**

4 The APA standard of review is no more stringent when an agency changes its position  
5 than in any other context. *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 514 (2009)  
6 (“We find no basis in the [APA] or in our opinions for a requirement that all agency change be  
7 subjected to more searching review.”). An agency must “display awareness” that it is changing  
8 position and “show that there are good reasons for the new policy.” *Id.* at 515. But an agency  
9 “need not demonstrate to a court’s satisfaction that the reasons for the new policy are *better* than  
10 the reasons for the old one; it suffices that the new policy is permissible under the statute, that  
11 there are good reasons for it, and that the agency *believes* it to be better, which the conscious  
12 change of course adequately indicates.” *Id.* When an agency’s “new policy rests upon factual  
13 findings that contradict those which underlay its prior policy,” it must provide a “detailed  
14 justification” for its change in position. *Id.*

15 BLM satisfied the requirements for changing its position. First, it clearly displayed  
16 awareness that it was changing its position, acknowledging that it was rescinding the 2015 Rule.  
17 *See, e.g.*, 82 Fed. Reg. 61,926. Second, it clearly “believe[d] that the 2017 Rule was “better”  
18 than the 2015 Rule “because it decided to adopt it.” *Organized Vill. of Kake v. U.S. Dep’t of*  
19 *Agric.*, 795 F.3d 956, 967 (9th Cir. 2015). Third, the 2017 Rule is “legally permissible.” *Id. at*  
20 *966*. And finally, BLM provided “good reasons” and a detailed explanation for promulgating the  
21 2015 Rule. *Id.* The third and fourth points warrant further discussion below.

#### 22 **A. The 2017 Rule Is Legally Permissible**

23 Sierra Club argues that the 2017 Rule violates BLM’s legal obligations under the Federal  
24  
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26

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27 <sup>19</sup> In any event, there is no oil and gas development on federally-managed tribal lands in  
28 California. HFRR\_034621 (listing all oil and gas operations between 2010 and 2017 on tribal  
lands, all of which are outside of California).

1 Land Policy and Management Act (“FLPMA”), the Mineral Leasing Act (“MLA”), the Indian  
2 Mineral Development Act (“IMDA”), and the IMLA. *Sierra Club Mot.* 19–22. On the contrary,  
3 BLM had no statutory obligation to promulgate the 2015 Rule—and, consequently, no statutory  
4 obligation to keep that Rule in place.

5 None of those statutes has any provision mandating that the agency “shall promulgate”  
6 hydraulic fracturing regulations. The MLA authorizes BLM to “prescribe necessary and proper  
7 rules and regulations,” as well as “to do any and all things necessary to carry out and accomplish  
8 the purposes” of the Act. 30 U.S.C. § 189. The MLA further requires that “[e]ach lease shall  
9 contain provisions for the purpose of ensuring the exercise of reasonable diligence, skill, and  
10 care in the operation of said property” and “such other provisions as [the Secretary] may deem  
11 necessary . . . for the safeguarding of the public welfare.” *Id.* § 187. The IMLA and IMDA  
12 similarly subject oil and gas “operations” on Indian lands “to the rules and regulations  
13 promulgated by the Secretary.” 25 U.S.C. § 396d; *see also id.* §§ 396, 2107. These three  
14 statutes do not require BLM to promulgate hydraulic fracturing regulations.

15  
16 Nor does FLPMA. FLPMA provides that “the Secretary shall . . . regulate, through  
17 easements, permits, leases, licenses, published rules, or other instruments as the Secretary deems  
18 appropriate, the use, occupancy, and development of the public lands.” 43 U.S.C. § 1732(b). It  
19 further states that “[i]n managing the public lands the Secretary shall, by regulation or otherwise,  
20 take any action necessary to prevent unnecessary or undue degradation of the lands.” 43 U.S.C.  
21 § 1732(b). In fact, FLPMA gives the Secretary discretion—as evidenced by the “as the  
22 Secretary deems appropriate” language—to manage public lands via various methods, including  
23 permits, leases, or rules. Its “broad wording . . . does not mandate that the BLM adopt  
24 restrictions” or regulations regarding hydraulic fracturing. *Gardner v. Bureau of Land Mgmt.*  
25 638 F.3d 1217, 1222 (9th Cir. 2011).

26 When Congress requires an agency to promulgate regulations on a particular topic, it says  
27 so clearly. *See, e.g.,* 30 U.S.C. § 871 (“Each coal mine shall be provided with suitable  
28 firefighting equipment. . . . The Secretary [of Labor] shall establish minimum requirements for

1 the type, quality, and quantity of such equipment.”); 15 U.S.C. § 78 (c)(3) (SEC shall by rule or  
2 regulation establish minimum financial responsibility requirements for brokers and dealers);  
3 *Env'tl. Def. Fund, Inc. v. Gorsuch*, 713 F.2d 802, 804 (D.C. Cir. 1983) (Resource Conservation  
4 and Recovery Act “required the [EPA] to promulgate regulations establishing standards for the  
5 generation, transportation, treatment, storage, and disposal of hazardous waste within eighteen  
6 (18) months of its enactment” (citing 42 U.S.C. §§ 6922–6924)); *Pub. Citizen v. NRC*, 901 F.2d  
7 147, 148 (D.C. Cir. 1990) (“[T]he United States Nuclear Regulatory Commission must  
8 promulgate mandatory instructional requirements for the personnel training programs of civilian  
9 nuclear powerplant licensees”). The 2017 Rule simply does not violate any statute mandating  
10 that BLM must promulgate a regulation governing hydraulic fracturing. 82 Fed. Reg. 61,935.  
11

12 In the same vein, no statute requires that all federal and Indian lands be subject to the  
13 same set of regulations. BLM promulgated the 2015 Rule because, at the time, it believed “the  
14 agency need[ed] a baseline set of standards that would apply to Federal and Indian oil and gas  
15 leases in all states.” 80 Fed. Reg. 16,190. However, no statute requires BLM to regulate  
16 hydraulic fracturing on federal and Indian lands, and no statute requires BLM to have a  
17 consistent regulatory baseline for all federal and Indian lands nationwide. The 2017 Rule is  
18 therefore legally permissible.

19 In addition, the MLA specifically contemplates that state laws will play a role in  
20 regulation of federal lands. It mandates that lease provisions may not “be in conflict with the  
21 laws of the State in which the leased property is situated,” 30 U.S.C. § 187, and that “[n]othing”  
22 in the MLA “shall be construed or held to affect the rights of the States or other local authority to  
23 exercise any rights which they may have,” 30 U.S.C. § 189.

24 Sierra Club argues that the 2017 Rule unlawfully delegates BLM’s duties under FLPMA,  
25 the MLA, and the IMLA, but the 2017 Rule does not constitute a delegation, much less an  
26 unlawful delegation. *Sierra Club Mot.* at 23; *see also Cal. Mot.* at 20. BLM did not, by any  
27 means, abdicate its obligation to oversee oil and gas development on federal and Indian lands.  
28 To the contrary, as explained above, BLM still develops RMPs and, where appropriate, issues



1 leases and approves APDs subject to all requirements that BLM deems appropriate. Moreover,  
2 BLM still maintains and enforces oil and gas regulations, including 43 C.F.R. subpart 3162 and  
3 Onshore Oil and Gas Orders 1, 2, and 7, which mandate requirements for well permitting;  
4 construction, casing, and cementing; and disposal of produced water. The 2017 Rule does not  
5 delegate those responsibilities to states or tribes. And while it is true that the MLA and other  
6 statutes afford BLM discretion to take regulatory steps beyond those outlined above, they do not  
7 require it. A delegation occurs when an agency allows another entity to determine statutory  
8 compliance or abdicates its reviewing authority. *Fund for Animals v. Kempthorne*, 538 F.3d 124,  
9 133 (2d Cir. 2008). The 2017 Rule does no such thing. Instead of delegating its authority, BLM  
10 simply chose not to occupy a discretionary regulatory space. And while BLM previously took  
11 the position that the 2015 Rule was “necessary” because BLM cannot delegate to states and  
12 tribes its statutory responsibilities, 80 Fed. Reg. 16,190, 16,133, BLM has more than adequately  
13 explained its change in position.  
14

15 Sierra Club relies heavily on *Assiniboine & Sioux Tribes of Fort Peck Indian Reservation*  
16 *v. Bd. of Oil & Gas Conservation of State of Montana*, 792 F.2d 782, 795 (9th Cir. 1986), e.g.,  
17 *Sierra Club Mot.* at 23, which in fact illustrates that the 2017 Rule is not a delegation of  
18 authority. *Assiniboine* involved a cooperative agreement between BLM and the State of Montana  
19 holding that the Montana Board of Oil and Gas Conservation could issue recommendations and  
20 even make decisions regarding management of tribal lands. The Ninth Circuit explained that if  
21 BLM was approving Montana State Board orders “without meaningful independent review, then  
22 its procedures would constitute an unlawful delegation of authority.” *Id.* In stark contrast, here  
23 BLM has not surrendered any of its authority to issue leases and approve APDs, and the 2017  
24 Rule does not “rubber stamp[]” any drilling decisions on federal and Indian lands. *Assiniboine*,  
25 792 F.2d at 789.

#### 26 **B. BLM Had “Good Reasons” and a Detailed Justification for the 2017 Rule**

27 BLM had good reasons for promulgating the 2017 Rule: it wanted to reduce and  
28

1 eliminate unnecessary regulatory requirements. 82 Fed. Reg. 61,926. BLM followed “this  
2 Administration’s policy to reduce unnecessary regulatory burdens on energy development.” 82  
3 Fed. Reg. 61,924. That reason is “entirely rational.” *Fox Television Stations, Inc.*, 556 U.S. at  
4 517. BLM also provided a detailed justification—describing developments in state and tribal  
5 regulations and industry guidance, BLM’s pre-existing regulations, and its thorough cost-benefit  
6 analysis—to support its good reasons.

7 1. *Developments in State and Tribal Regulations and Industry Guidance*

8  
9 When the 2015 rule was issued, 20 of the 32 states with Federal oil and gas leases had  
10 regulations addressing hydraulic fracturing. Since the promulgation of the 2015 rule, an  
11 additional 12 states updated or finalized regulations addressing hydraulic fracturing. 82 Fed.  
12 Reg. 61,925, HFRR\_034640, HFRR\_000151. Thus, by the time BLM promulgated the 2017  
13 Rule, every state in which federal oil and gas leasing occurred had hydraulic fracturing  
14 regulations. HFRR\_000151. Moreover, some tribes had taken steps to regulate oil and gas  
15 development, and DOI encourages tribes to exercise their sovereignty over their lands and  
16 mineral resources. HFRR\_000151, HFRR\_034646–47.

17 Some states that already had regulations before 2015 strengthened them. For example,  
18 since 2015, North Dakota updated its regulations to require closed rigid tanks for fluids that flow  
19 back after a well is hydraulically fractured and New Mexico required companies to disclose  
20 chemicals to FracFocus. HFRR\_034642.

21 In addition, BLM believed that the 2015 Rule’s requirement to disclose the chemicals in  
22 fracturing fluids was unnecessary because disclosure to state regulatory agencies and databases  
23 such as FracFocus was more prevalent in 2017 than it was in 2015. 82 Fed. Reg. 61,925–26.  
24 For example, before 2015, only 20 states required operators to use FracFocus, but, by 2017, that  
25 number had risen to 25. HFRR\_000316, DOIAR0020255, HFRR\_034651–52.<sup>20</sup>

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26  
27  
28 <sup>20</sup> California suggests that BLM wanted to rescind the 2015 Rule before it finished reviewing

1           Aside from the changes in state and tribal regulations, the American Petroleum Institute  
2 updated two guidance documents for operators after BLM published the 2015 Rule.  
3 HFRR\_000174–75. The updated guidance documents addressed many of the same topics—such  
4 as cement monitoring, pressure testing well casing, and isolating producing zones—that the 2015  
5 Rule addressed. *Id.* They also specified that operators should maintain information about site  
6 design, additives used, additives stored on site, spills, and volume and sources of produced  
7 water. HFRR\_034630. BLM noted that API guidance documents are highly influential,  
8 although BLM acknowledged that it lacked data about the percentage of operators that comply  
9 with those documents. *Id.* BLM reasonably anticipated that operators typically would follow  
10 industry recommended practices. HFRR\_034631. For example, industry guidance recommends  
11 that operators monitor cementing operations and, thus, BLM concluded that operators would  
12 monitor cementing operations regardless of whether the 2015 Rule was in place.  
13 HFRR\_034648; HFRR\_092046 (noting that some companies have voluntarily exceeded  
14 regulatory requirements). In short, after BLM promulgated the 2015 Rule, both the regulatory  
15 landscape and industry guidance changed, leading BLM to conclude that the 2015 Rule was  
16 unnecessary.  
17

## 18           2. BLM's Pre-Existing Regulations

19           BLM also concluded that its pre-existing regulations, including those located at 43 C.F.R.  
20 subpart 3162 and Onshore Oil and Gas Orders 1, 2, and 7, adequately ensured that operators  
21 conduct oil and gas operations in an environmentally sound manner. 82 Fed. Reg. 61,926.

22           While Plaintiffs complain that these pre-existing rules are outdated, the rules in fact address  
23

24 \_\_\_\_\_  
25 state regulations, Cal. Mot. at 17 n.5, but, even if that suggestion were true, the APA allows an  
26 administration to have policy preferences before completing its analysis. *Dep't of Commerce v.*  
27 *New York*, 139 S. Ct. 2551 (2019) (“It is hardly improper for an agency head to come into office  
28 with policy preferences and ideas . . . and work with staff attorneys to substantiate the legal basis  
for a preferred policy.”).

1 many of the same issues that the 2015 Rule addressed. Onshore Order No. 2, for example, has  
2 long mandated the same the definition of “usable water” as the 2015 Rule. It defines usable  
3 water as those waters containing up to 10,000 ppm of total dissolved solids and requires  
4 operators to using casing and cement to protect all usable water zones. HFRR\_034614. Thus,  
5 while it is true that the 2015 Rule revised 43 C.F.R. § 3162.5-2(d) by defining usable water to  
6 include waters containing up to 10,000 ppm instead of 5,000 ppm, this was not a substantive  
7 change: “The requirement to protect and/or isolate usable water generally containing up to  
8 10,000 ppm of TDS has been in effect since 1988, when Onshore Order 2 became effective.” 80  
9 Fed. Reg. 16,141. BLM thus reasonably concluded that this portion of the 2015 Rule was  
10 unnecessary. HFRR\_034647.

11 Onshore Order 2 further requires that operators take remedial steps if the cement does not  
12 circulate back to the surface (an indication of well integrity) or if pressure tests indicate that the  
13 casing strings do not satisfy minimum standards. HFRR\_034648. BLM concluded that  
14 operators would remedy inadequate cementing to protect their investments, follow industry  
15 recommended practices, and comply with state regulations and Onshore Order 2.  
16 HFRR\_034649. For example, 10 of 11 states that BLM surveyed require operators to test well  
17 casings to ensure they can handle pressures from hydraulic fracturing (and the eleventh state may  
18 require testing). HFRR\_034650. BLM may also require cement logs and reports as conditions  
19 of approving drilling permits. HFRR\_034648. BLM thus concluded that there would be no  
20 impacts from removing the 2015 Rule’s cement evaluation log and mechanical integrity test  
21 requirements. HFRR\_034650.

### 22 3. Cost-Benefit Analysis

23 BLM conducted a thorough cost-benefit analysis and concluded that any incremental  
24 benefits of the 2015 Rule had been eliminated by existing and improved state and federal  
25 regulations and industry guidance, thus making the 2015 Rule’s burdens unnecessary.  
26 HFRR\_034612.

1 The 2017 Rule reduced compliance costs by \$9,690 per well or \$14 to 34 million per year  
2 on federal lands from 2018 to 2027.<sup>21</sup> HFRR\_034607, HFRR\_034664. On Indian lands, the  
3 2017 Rule reduced compliance costs by \$1.6 to \$3.8 million per year. HFRR\_034657. This  
4 savings represents 0.1 to 0.2% of the cost of drilling a well, and up to 1.4% for wells with high  
5 volumes of recovered fluid. HFRR\_034607. The cost savings impacted 1,500 to 3,500  
6 hydraulic fracturing operations per year. HFRR\_034655.

7 The 2017 Rule also saved time for operators and BLM. For example, the 2015 Rule  
8 would have required an additional eight hours of industry time to submit and four hours of BLM  
9 time to process applications to conduct fracturing operations and an additional nine hours of  
10 industry time to submit and 4.5 hours of BLM time to process notices after fracturing operations  
11 were complete. HFRR\_034646–47. BLM also concluded that rescinding the 2017 Rule would  
12 reduce regulatory burdens because operators would be subject to only one set of regulations (i.e.,  
13 state or tribal regulations), not two sets (i.e., state or tribal regulations, plus federal).  
14 HFRR\_003507.

15 California contends that BLM contradicted its prior finding in 2015 that the 2015 Rule’s  
16 compliance costs would be minimal. Cal. Mot. at 19. To the contrary, however, BLM  
17 acknowledged that the cost savings would be “a small percentage of the cost of a well.” 82 Fed.  
18 Reg. 61,924. BLM acknowledged that the cost savings were small, but it still chose to prioritize  
19 those savings, as it is entitled to do. BLM “was entitled in [2017] to give more weight to  
20 socioeconomic concerns than it had in [2015].” *Organized Vill. of Kake*, 795 F.3d at 968.

21 BLM concluded that the cost savings in the 2017 Rule exceeded the foregone benefits of  
22 the 2015 Rule, HFRR\_034658, particularly because BLM never quantified the 2015 Rule’s  
23

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24  
25 <sup>21</sup> The figure of \$9,690 in compliance cost savings differs from BLM’s estimate of \$11,400 in  
26 compliance costs when it published the 2015 Rule because baseline conditions, including  
27 changes in oil and gas drilling activity, had changed since 2015. HFRR\_034655–56.  
28 Furthermore, states had more regulations in 2017 than they did in 2015, which reduced the  
savings since operators would have to comply with the new state regulations. HFRR\_034655.

1 benefits when it was promulgating the 2015 Rule, HFRR\_023925. BLM acknowledged that the  
2 cost savings were unlikely to substantially alter operators' investment or employment decisions  
3 or affect the supply, distribution, or use of energy. HFRR\_034662.

4 California contends that BLM did not consider the 2015 Rule's benefits, Cal. Mot. at 21,  
5 but BLM acknowledged the benefits of the 2015 Rule that would be lost with the 2017 Rule,  
6 HFRR\_034657. For example, BLM appropriately acknowledged that the 2015 Rule reduced  
7 risks associated with hydraulic fracturing operations, reduced risks to surface and groundwater  
8 resources, and increased public awareness of the nature of hydraulic fracturing operations,  
9 including the chemicals used. *Id.* BLM also recognized that rescinding the 2015 Rule would  
10 leave the regulated community without a regulatory baseline across all federal lands given the  
11 variability in state regulations. Nonetheless, BLM reasonably concluded that other federal and  
12 state regulations could offset some of the foregone benefits, HFRR\_034658, and that the cost  
13 savings of the 2017 Rule exceeded the foregone benefits of the 2015 Rule, even though the 2015  
14 Rule's "costs [we]re a small percentage of the cost of a well." 82 Fed. Reg. 61,924,  
15 HFRR\_034658.  
16

17 As with any analysis, BLM acknowledged the uncertainties in its cost-benefit analysis.  
18 *See Idaho Wool Growers Ass'n v. Vilsack*, 816 F.3d 1095, 1109 (9th Cir. 2016) (upholding  
19 agency's analysis where agency "clearly explained the assumptions on which it built the model  
20 and the uncertainties inherent in it, thereby identifying the model's limitations"). For example, it  
21 noted that the number of hydraulic fracturing operations could vary in the future, which could  
22 impact the accuracy of the cost-benefit analysis. HFRR\_034654. In addition, BLM noted  
23 uncertainties related to the cost savings from removing the 2015 Rule's requirement that  
24 operators must run a cement evaluation log. *Id.* Specifically, it recognized that some operators  
25 might run a cement evaluation log as a matter of practice, thus obviating any cost savings from  
26 the 2017 Rule's removal of that requirement, and other operators may structure their operations  
27 to avoid delays while running the log, which would also reduce any cost savings. *Id.* The cost  
28 analysis also had uncertainties because BLM was estimating the frequency with which operators

1 would voluntarily use tanks, instead of storage pits. *Id.* Finally, the 2015 Rule had a variance  
2 provision, but the 2015 Rule never went into effect, which means that BLM had to estimate—in  
3 calculating cost savings from the 2017 Rule—the frequency with which BLM would have  
4 applied the 2015 Rule’s variance provision. *Id.*

5 BLM promulgated the 2015 Rule “with the intention of improving public awareness and  
6 strengthening oversight of hydraulic fracturing operations.” 80 Fed. Reg. 16,130. In 2017, it  
7 decided to prioritize minimizing regulatory burdens instead. 82 Fed. Reg. 61,926. “[T]he  
8 agency must show that there are good reasons for the new policy. But it need not demonstrate to  
9 a court’s satisfaction that the reasons for the new policy are *better* than the reasons for the old  
10 one.” *Fox Television Stations, Inc.*, 556 U.S. at 515–16. BLM had good reasons for the 2017  
11 Rule; Plaintiffs may dislike those reasons, but their displeasure does not invalidate the 2017 Rule  
12 and their claims in these cases must be denied.

### 13 **C. BLM Considered a Range of Alternatives**

14 California faults BLM for not considering a range of alternatives, but this argument fails  
15 for several reasons. Cal. Mot. at 20. Most fundamentally, while California contends that BLM  
16 must consider alternatives that “narrowly address” the agency’s concerns before rescinding a  
17 regulation, *id.*, the APA has no such requirement. BLM “was required to consider the evidence  
18 and give reasons for [its] chosen course of action. [It] did so. It is not for [courts] to ask whether  
19 [its] decision was ‘the best one possible’ or even whether it was ‘better than the alternatives.’”  
20 *Dep’t of Commerce*, 139 S. Ct. at 2571 (quoting *FERC v. Electric Power Supply Assn.*, 136 S.  
21 Ct. 760, 782 (2016) (slip op., at 30)).

22 In any event, BLM did consider a range of alternatives. BLM explained that the purpose  
23 of the proposed action was to reduce and eliminate unnecessary regulatory requirements.  
24 HFRR\_000150. BLM examined four alternatives in depth: not rescinding the 2015 Rule (no  
25 action); rescinding the 2015 Rule (proposed action); rescinding the 2015 Rule and amending the  
26 previous regulations to remove the requirement for operators to obtain approval of non-routine  
27  
28

1 hydraulic fracturing operations (preferred alternative); and rescinding the 2015 Rule except for  
2 the chemical disclosure requirements. HFRR\_000144. BLM selected the preferred alternative.  
3 HFRR\_000189.

4 BLM also considered—but decided not to conduct a detailed analysis of—(1) an  
5 alternative that would keep the 2015 Rule’s requirement for operators to notify BLM before  
6 conducting hydraulic fracturing operations and provide detailed information about their plans  
7 and (2) an alternative requiring operators to provide notice before fracturing without specifying  
8 any particular information that they must provide. HFRR\_000153. BLM decided not to  
9 consider these alternatives in depth because the detailed information would be burdensome for  
10 operators to provide and requiring notification without detailed information would not provide  
11 any benefits. HFRR\_000154. BLM also concluded that other alternatives that would retain or  
12 strengthen other provisions of the 2015 Rule did not meet its purpose and need of reducing  
13 regulatory burdens and therefore did not warrant detailed consideration. *Id.*

14  
15 California may dislike BLM’s chosen alternative, but that does not invalidate BLM’s  
16 decision. *See Arrington v. Daniels*, 516 F.3d 1106, 1112 (9th Cir. 2008) (“The court is not  
17 empowered to substitute its judgment for that of the agency.” (quoting *Citizens to Preserve*  
18 *Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971))).

19 **VI. NEPA Does Not Apply to the 2017 Rule, But BLM Satisfied NEPA Anyway**

20 NEPA does not apply to the 2017 Rule, but BLM satisfied NEPA anyway when it  
21 promulgated the 2017 Rule. NEPA serves the dual purpose of informing agency decisionmakers  
22 of the environmental effects of proposed major federal actions and ensuring that relevant  
23 information is made available to the public. 42 U.S.C. § 4321; 40 C.F.R. § 1501.1; *Robertson v.*  
24 *Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). The statute imposes procedural  
25 rather than substantive requirements. *Robertson*, 490 U.S. at 351 (NEPA “prohibits  
26 uninformed—rather than unwise—agency action.”). Thus, NEPA does not require an agency to  
27 follow the most environmentally sound course of action, but rather to take a “hard look” at the  
28 environmental consequences of proposed actions. *Id.* at 350. “A court must avoid passing



1 judgment on the substance of an agency’s decision”; instead, its “focus must be on ensuring that  
2 agencies took a ‘hard look’ at the environmental consequences of their decisions.” *Westlands*  
3 *Water Dist. v. U.S. Dep’t of Interior*, 376 F.3d 853, 865 (9th Cir. 2004) (quoting *Robertson*, 490  
4 U.S. at 350).

5 As an initial matter, BLM had no obligation to conduct a NEPA analysis because the  
6 2017 Rule rescinded a rule that had never gone into effect, which means that it did not change  
7 the status quo. “NEPA procedures do not apply to federal actions that maintain the  
8 environmental status quo.” *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1114 (9th Cir.  
9 2002), *abrogated on other grounds by Wilderness Soc. v. U.S. Forest Serv.*, 630 F.3d 1173 (9th  
10 Cir. 2011); *see also Burbank Anti-Noise Grp. v. Goldschmidt*, 623 F.2d 115, 116 (9th Cir. 1980).

11 Even if BLM was required to perform a NEPA review, it satisfied NEPA’s requirements.  
12 BLM prepared an Environmental Assessment to examine the environmental impacts that may  
13 occur from promulgating the 2017 Rule. HFRR\_000140. The 2017 Rule did not authorize any  
14 particular operations on federal or Indian lands, and BLM’s NEPA analysis, therefore, did not  
15 analyze site-specific impacts of particular operations. HFRR\_000145. In the nationwide  
16 rulemaking context, “[t]here is nothing in the statute or CEQ Regulations that requires an agency  
17 to include a site-specific analysis for every particular area affected by the proposed action.”  
18 *Wyoming v. U.S. Dep’t of Agric.*, 661 F.3d 1209, 1255 (10th Cir. 2011).

19 BLM estimated that the 2017 Rule would impact 2,800 hydraulic fracturing operations  
20 that presently occur annually on federal and Indian lands, but, in the future, there would be up to  
21 3,500 operations per year on federal and Indian lands. HFRR\_000165. BLM determined that  
22 the 2017 Rule would have no impact on the number of future hydraulic fracturing operations. *Id.*  
23 It therefore concluded that the environmental impacts of promulgating the 2017 Rule were not  
24 significant, and it issued a Finding of No Significant Impact. HRFF\_000194.

25 Plaintiffs argue that BLM failed to take a “hard look” at the 2017 Rule’s impacts, but  
26 they are wrong. *E.g.*, *Sierra Club Mot.* at 31, *Cal. Mot.* at 25. To the contrary, BLM did take a  
27 hard look at the 2017 Rule’s impacts, notably examining several issues, including impacts on  
28

1 water quality and quantity, storage tanks versus pits, and environmental justice.

2 **A. BLM Analyzed Water Quality and Quantity Impacts**

3 BLM adequately assessed the 2017 Rule's impacts on water quality and quantity,  
4 including by reviewing reports from the Environmental Protection Agency and the National  
5 Academy of Sciences regarding water contamination from hydraulic fracturing. HFRR\_000159–  
6 60.

7 BLM noted several possible contamination mechanisms. Environmental impacts are  
8 likely when spills occur and chemicals reach groundwater; when operators inject fracturing  
9 fluids into wells with inadequate casing or mechanical integrity, thus allowing chemicals to  
10 move into groundwater; when operators inject fracturing fluids directly into groundwater; when  
11 operators discharge inadequately treated fracturing wastewater into surface waters; and when  
12 operators store fracturing fluids in unlined pits that allow chemicals to leach into groundwater.  
13 HFRR\_000159, HFRR\_000161, HFRR\_000172. But BLM determined that such incidents are  
14 rare. HFRR\_000159.

15 BLM also recognized and disclosed that releases could occur from tanks, haul trucks, and  
16 pipelines, HFRR\_000172; that spills can occur as a result of human error (improper equipment  
17 handling or installation) or equipment failure (broken pipes or torn pit liners), *id*; and that spills  
18 could result from a blowout, i.e., a pressure control failure that can spill tens of thousands of  
19 gallons of fluid, HFRR\_000173. BLM noted that, when such large spills occur—on the order of  
20 several thousand gallons—containment and recovery measures typically capture less than half  
21 the fluid. *Id*. But BLM concluded that blowouts are also rare, with a rate of approximately one  
22 for every 1,000 drilling operations. HFRR\_078908–34.

23 Another contamination possibility is that, by creating fractures in shale formations,  
24 operators can allow gas to migrate through the fractures into shallow aquifers. HFRR\_000160.  
25 That scenario is also rare because of the distance between shale formations and shallow aquifers  
26 and because of the high pressures in shale formations. *Id*. Contamination via leaky well casings  
27  
28

1 is also a possible, but BLM only identified one such incident since 2011. *Id.*

2 Another possible contamination scenario, a frack hit, is when operators drill one well into  
3 another well, causing unexpected pressure increases and possible spills. HFRR\_000161. Frack  
4 hits have been reported in New Mexico and Oklahoma and typically occur when wells are less  
5 than 1,100 feet apart, but they have occurred at wells up to 8,422 feet apart. *Id.* BLM examined  
6 some frack hits in depth, including a 2012 hit in New Mexico that caused a spill of 9,000 gallons  
7 of oil; a 2012 hit in New Mexico that caused 60 barrels of fracturing fluids to spill into a pasture;  
8 and a 2013 hit in Colorado that spilled 200 barrels of produced water, although none of the fluid  
9 reached the Colorado River. HFRR\_000162. BLM has not received any reports of frack hits  
10 since promulgating the 2015 Rule, even though that rule never went into effect. HFRR\_000173.

11 Contamination incidents are rare because operators use multiple safeguards to avoid  
12 releasing hazardous wastes. HFRR\_000172. They design wells with multiple barriers, i.e.,  
13 casing, cement, and subsurface rock formations, to prevent fluid movement between oil/gas  
14 zones and drinking water resources. HFRR\_076399. BLM concluded that there are risks to  
15 drinking water from fracturing operations, but contamination events are rare. HFRR\_000173.

16 As part of its examination of water contamination pathways, BLM reviewed incident  
17 reports from federal and Indian wells since December 2014 and concluded that resource damage  
18 is unlikely to increase from rescinding the 2015 Rule because of the rarity of adverse  
19 environmental impacts from hydraulic fracturing operations. 82 Fed. Reg. 61,931. BLM is  
20 aware of only one report of a well that suffered a failure that the 2015 Rule could have mitigated,  
21 but not prevented. HFRR\_000173.

22 Sierra Club challenges BLM's conclusion that accidents are rare. Sierra Club Mot. at 13.  
23 But Sierra Club misinterprets BLM's "Major Undesirable Events" data table, which tracks  
24 incidents involving oil spills, gas discharges, salt-water spills, well blowouts, fatalities, and other  
25 uncontrolled events. HFRR\_078908–34. Most of the events on that list are incidents at  
26 production facilities or pipelines or drilling incidents—not hydraulic fracturing operations—and  
27 thus the 2015 Rule would not have prevented them. In addition, the numbers on this list are  
28

1 inflated because each incident can have multiple entries, such as a 2013 incident in Carlsbad,  
2 New Mexico, which appears four times because the incident has entries for oil discharged, oil  
3 recovered, water discharged, and water recovered. HFRR\_078919. Sierra Club’s faulty  
4 interpretation of this data illustrates why courts must treat BLM’s conclusion regarding the rarity  
5 of accidents with “great deference”—because the Court is “reviewing the agency’s technical  
6 analysis and judgments,” based on an evaluation of complex scientific, engineering, and industry  
7 data “within the agency’s technical expertise.” *Env’tl. Def. Ctr., Inc. v. EPA*, 344 F.3d 832, 869  
8 (9th Cir. 2003).

9 In addition to examining the possibility of contamination, BLM also examined potential  
10 impacts on water quantity. BLM noted the potential for severe impacts from water withdrawals,  
11 especially in areas with limited groundwater. HFRR\_000159. Water use from hydraulic  
12 fracturing can stress surface and groundwater supplies since fracturing uses a range between  
13 80,000 gallons of water per well in California and 5.3 million gallons per well in Arkansas.  
14 HFRR\_000162. Five percent of fracturing operations between 2008 and 2014 reused fracturing  
15 wastewater, but reuse is increasing, as evidenced by the fact that operators in the Marcellus Shale  
16 in Pennsylvania reused 90 percent of fracturing wastewater. *Id.* In most areas, fracturing  
17 operations did not stress water supplies, while only in a few cases, water wells went dry after  
18 operators completed nearby fracturing operations. HFRR\_000163. California criticizes BLM  
19 because the 2015 Rule required operators to disclose the source of the water they were using for  
20 fracturing operations, and the 2017 Rule removed that requirement. Cal. Mot. at 16. But BLM  
21 acknowledged this difference, which is all that NEPA requires, and, regardless of whether the  
22 2015 Rule is in place, BLM can obtain that information during the APD process.  
23 HFRR\_000163, 80 Fed. Reg. 61,928.

### 24 **B. BLM Weighed Storage Tanks Versus Pits**

25  
26 Contrary to Sierra Club’s argument, BLM particularly analyzed the impact of removing  
27 the 2015 Rule’s requirement that operators store fluids (either those used in fracturing operations  
28

1 or water that flows back up a well) in rigid tanks, as opposed to above-ground pits. Sierra Club  
2 Mot. at 32. BLM also carefully considered its prior analysis from 2015 regarding the tank  
3 requirement. HFRR\_034669–71.

4 BLM concluded that the 2017 Rule would reduce the frequency (by zero to 100%,  
5 depending on the state) with which operators stored fluids in tanks and, as a result, there was an  
6 incremental potential for adverse impacts. HFRR\_034650–51. In Montana, for example, BLM  
7 has observed operators using earthen pits that lacked leak detection systems. HFRR\_034669.  
8 BLM concluded that removing the tank requirement could cause adverse impacts by increasing  
9 the risk of spills and contamination and make it more difficult to detect and remediate leaks.  
10 HFRR\_034651, HFRR\_000190. Conversely, removing that requirement would reduce  
11 transportation-related impacts and make it easier for operators to reuse recovered fluids.  
12 HFRR\_034651.

13 Overall, BLM estimated that, even without the 2015 Rule, 90 to 94 percent of hydraulic  
14 fracturing operations on federal and Indian lands used tanks. HFRR\_000170. BLM noted that  
15 five of the nine states that have the most hydraulic fracturing on federal and Indian lands require  
16 operators to use tanks. HFRR\_034651. Field personnel observed that rigid storage tanks are  
17 prevalent in certain areas. *Id.* In other words, because of existing state regulations and voluntary  
18 compliance, the 2015 Rule would not have had any impact on tank usage in California, New  
19 Mexico, North Dakota, Texas, Alaska, South Dakota, and Utah, and would have impacted other  
20 states ranging from a low of 7.7 percent of operations in Wyoming to a high of 100 percent of  
21 operations in Nevada. HFRR\_034650–51. BLM expected that operators would use tanks  
22 voluntarily when tanks would cost the same or less than pits, and the comparative costs of the  
23 two methods depend largely on the volume of recovered fluids. HFRR\_034672,  
24 HFRR\_034674–75.

25  
26 BLM acknowledged that using tanks would reduce the amount of air emissions, including  
27 volatile organic compounds that pits can emit into the atmosphere. HFRR\_000170. But it  
28 explained that this reduction from the 2015 Rule would have been minor because the 2015 Rule

1 did not require tanks to have vapor recovery systems. *Id.*

2 Removing the tank requirement would save operators an average of \$74,000, and BLM  
3 prioritized those cost savings after considering the impacts of removing the requirement.  
4 HFRR\_034651. That is all NEPA requires. NEPA “does not mandate particular substantive  
5 results, but instead imposes only procedural requirements,” requiring a “reasonably thorough”  
6 discussion of environmental consequences. *Laguna Greenbelt, Inc. v. U.S. Dep’t of Transp.*, 42  
7 F.3d 517, 523 (9th Cir. 1994). BLM satisfied this standard.

### 8 **C. BLM Considered Environmental Justice Impacts**

9 Sierra Club wrongly asserts that BLM failed to consider the 2017 Rule’s impacts on tribal  
10 lands. Sierra Club Mot. at 34. BLM acknowledged that oil and gas activity on Indian lands was  
11 growing. HFRR\_000165. But it concluded that, because operators are already complying with  
12 many of the 2015 Rule’s requirements as part of industry practice or other regulatory  
13 requirements, the 2017 Rule would not have a disproportionately high impact on minority and  
14 low-income populations. HFRR\_000180. This analysis was sufficient. For a “‘broad’  
15 nationwide rule, the [agency] is permitted . . . to evaluate the common environmental impacts  
16 and effects of the rule ‘generically.’” *U.S. Dep’t of Agric.*, 661 F.3d at 1256 (citing 40 C.F.R. §  
17 1502.4(c)(2)).

### 19 **D. BLM Had No Obligation to Prepare an EIS**

20 Sierra Club erroneously contends that BLM violated NEPA by failing to prepare an EIS.  
21 Sierra Club Mot. at 36. “When an agency takes major federal action, the agency must prepare an  
22 EIS ‘where there are substantial questions about whether a project may cause significant  
23 degradation of the human environment.’” *Pac. Coast Fed’n of Fishermen’s Ass’ns v. U.S. Dep’t*  
24 *of Interior*, 996 F. Supp. 2d 887, 896 (E.D. Cal. 2014) (quoting *Native Ecosystems Council v.*  
25 *U.S. Forest Serv.*, 428 F.3d 1233, 1239 (9th Cir. 2005)). BLM appropriately concluded that the  
26 2017 Rule did not require an EIS. BLM did not prepare an EIS when it promulgated the 2015  
27 Rule, 80 Fed. Reg. 16,216; the 2017 Rule does not authorize any on-the-ground actions; and the  
28

1 2017 Rule did not alter the status quo since the 2015 Rule never went into effect. BLM did  
 2 consider that there may be some adverse effects from the 2017 Rule, but “it does not follow that  
 3 the presence of some negative effects necessarily rises to the level of demonstrating a significant  
 4 effect on the environment” that requires an EIS. *Native Ecosystems Council*, 428 F.3d at 1240.

5 **VII. BLM Rationally Determined that Its 2017 Rule Does Not Affect ESA-Listed Species**  
 6 **or Critical Habitat**

7 Even if the ESA challenge could proceed, it would fail on the merits. Sierra Club alleges  
 8 that, under Section 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2), BLM should have consulted with  
 9 the Services before issuing the 2018 Rule. *Sierra Club Mot.* at 17.

10 The ESA, 16 U.S.C. §§ 1531-1599, “seeks to protect species of animals against threats to  
 11 their continuing existence caused by man.” *Lujan*, 504 U.S. at 558 (1992). The ESA does not  
 12 protect *all* fish wildlife species: instead, it provides legal protections for only for species listed  
 13 under the Act and their habitats. 16 U.S.C. § 1532(6), (20); *id.* § 1533(a). Once a species is  
 14 listed, Section 7(a)(2) of the ESA requires each federal agency (“action agency”) to ensure, in  
 15 consultation with FWS and/or NMFS that any action authorized, funded, or carried out by the  
 16 agency “is not likely to jeopardize the continued existence” of an endangered or threatened  
 17 species, or “result in the destruction or adverse modification of [critical] habitat of such species.”  
 18 16 U.S.C. § 1536(a)(2). Section 7(a)(2)’s provisions are triggered by discretionary and  
 19 affirmative agency action that “may affect” ESA-listed species. 50 C.F.R. §§ 402.03, 402.14(a);  
 20 *Karuk Tribe (en banc)*.

21 To trigger the ESA’s consultation obligation, there must be an affirmative, discretionary  
 22 agency action which is the *cause* of an effect to listed species or critical habitat. 50 C.F.R. §  
 23 402.14(a). *See also* 50 C.F.R. § 402.02 (“effects of the action” includes direct effects and  
 24 “indirect effects . . . that are *caused by* the proposed action . . .” (emphasis added)). If the agency  
 25 determines that a particular action will have no effect on an endangered or threatened species, the  
 26 consultation requirements are not triggered. *Sw. Ctr. for Biological Diversity v. U.S. Forest*  
 27 *Serv.*, 100 F.3d 1443, 1447–48 (9th Cir. 1996).  
 28

1 Under Section 7(a)(2), the action agency—here, BLM—must make an initial  
2 determination of whether its proposed action may affect listed species or critical habitat. 50  
3 C.F.R. § 402.14(a). If the action will have “no effect” on listed species, the consultation is not  
4 required. *Sw. Ctr. for Biological Diversity*, 100 F.3d at 1447–48 (“no effect” finding “obviates  
5 the need for formal consultation under the ESA”); *Ground Zero Ctr. for Non-Violent Action*, 383  
6 F.3d at 1092 (the action agency need not consult if “the likelihood of jeopardy is too remote”).

7 If the action agency determines its action may affect a listed species, it may satisfy its  
8 Section 7 obligations through either formal or informal consultation. 50 C.F.R. § 402.14(b).  
9 Informal consultation ends either in a finding that formal consultation is necessary, or  
10 concurrence by the consulting agency that “the action is not likely to adversely affect listed  
11 species or critical habitat,” in which case “no further action is necessary.” *Id.* § 402.13(a).  
12 Formal consultation is initiated by a written request that includes “[a] description of the action to  
13 be considered.” *Id.* § 402.14(c)(1). It generally concludes in a biological opinion issued by the  
14 consulting agency, *see id.* § 402.14(l), which assesses “whether . . . the action is likely to  
15 jeopardize the continued existence of a listed species or result in the destruction or adverse  
16 modification of critical habitat,” *id.* § 402.14(h)(3). Following issuance of a biological opinion,  
17 the action agency determines whether and in what manner to proceed with the action. 50 C.F.R.  
18 § 402.15(a).

19  
20 BLM determined that the 2017 Rule would not affect ESA-listed species or critical  
21 habitat because “[n]either the rescinding nor the implementation of the 2015 final rule would, by  
22 themselves, authorize or prohibit hydraulic fracturing operations as a whole, or any particular  
23 operation on Federal or Indian lands . . . . [T]hese actions are also not expected to impact the  
24 number of hydraulic fracturing operations. As such, the actions would not, by themselves, have  
25 an effect on any listed species or its habitat . . . .” 82 Fed. Reg. 61,941. This is consistent with  
26 BLM’s longstanding position: it did not consult with FWS on the 2015 Rule, or on the initial  
27 1988 regulation of hydraulic fracturing. DOIAR0100131.

28 BLM was not, as Plaintiffs suggest, deferring its ESA compliance until later. *Sierra Club*



1 Mot. at 31. Indeed, in this case, the compliance measures were already in place through  
2 measures independent of the 2017 Rule, which only maintained the on-the-ground status quo that  
3 had existed since the 1980s because the 2015 Rule never went into effect. *See* 82 Fed. Reg. at  
4 61,926. While the preamble to the 2017 Rule does explain to commenters that BLM continues to  
5 consider the cumulative and site-specific effects as it makes regional and site-specific  
6 determinations, 82 Fed. Reg. at 61,941, those additional protections do not change the fact that  
7 BLM already had an “extensive process in place to ensure that operators conduct oil and gas  
8 operations in a safe and environmentally sound manner that protects resources” independent of  
9 the 2015 or 2017 Rules. 82 Fed. Reg. at 61,926.

10 In addition, under FWS regulations, biological assessments (“BA”) are not required in  
11 every action. Instead, they are only required for major construction activities. 50 C.F.R.  
12 § 402.12(b). That condition is not met here as BLM found in the EA that the 2017 Rule would  
13 not have such an impact. *See* HFRR\_000194. Moreover, a BA’s purpose is to evaluate the  
14 “potential effects of an action” on listed species and habitat. Here, BLM analyzed the effects of  
15 the rule on species and concluded that they would have no effect. Thus, there is no missing  
16 analysis. Plaintiffs simply disagree with the determination made, but bare disagreement is not  
17 sufficient to overturn agency action under the APA.

18 The statement by Mr. Tichenor that it “[l]ooks like we’ll need to do a biological  
19 assessment for this rule,” *Sierra Club Mot.* at 28 (citing HFRR\_2202), does not change this  
20 result. While it is understandably confusing from the cited email thread, Mr. Tichenor was  
21 requesting information about states listed in the 2017 Rule in order to cross-reference it for  
22 another BLM rule he was working on at the same time. His statement that a BA would be  
23 needed was in reference to the other rule. *See* Ex. B, Tichenor Decl. regarding email. Even if  
24 Mr. Tichenor’s statement had been about the 2017 Rule, the preliminary assessment of one BLM  
25 employee does not represent the final view of the agency regarding whether consultation or a BA  
26 would be required for the 2017 Rule. *See Nat’l Ass’n of Home Builders v. Defs. of Wildlife*, 551  
27 U.S. 644, 658–59, (2007). Here, BLM performed the appropriate inquiry and rationally  
28

1 concluded that the 2017 Rule did not affect ESA listed species or critical habitat. Nothing more  
2 is required. Because the ESA consultation obligation does not apply, Plaintiffs' ESA challenge  
3 fails on the merits.

#### 4 **VIII. ESA Claims Are Limited to Record Review**

5 In support of its ESA claims, Sierra Club cites to a number of documents from outside of  
6 the Administrative Record. *See* Sierra Club Mot. at 28–30; Ex C to Sierra Club Mot., ECF No.  
7 110-3. The Court should not consider these materials because ESA claims are properly limited  
8 to record review.

9 Congress requires agency action to be reviewed pursuant to the standard and scope of  
10 review established in the APA, unless another statute expressly provides a different standard and  
11 scope of review. 5 U.S.C. § 559; *see also United States v. Carlo Bianchi & Co.*, 373 U.S. 709  
12 (1963); *Ninilchik Traditional Council v. United States*, 227 F.3d 1186, 1193–94 (9th Cir. 2000).  
13 The ESA does not provide a separate standard and scope of review, 16 U.S.C. § 1540(g), and so  
14 the Court's review follows the APA standard and is limited to the administrative record. *See*  
15 *Karuk Tribe of Cal. v. U.S. Forest Serv.*, 681 F.3d 1006, 1017 (9th Cir. 2012) (en banc) (a failure  
16 to consult claim under the ESA “is a record review case”); *Village of False Pass v. Clark*, 733  
17 F.2d 605, 609 (9th Cir. 1984); *San Luis & Delta-Mendota Water Auth.*, 747 F.3d at 601–02.

18 The Ninth Circuit, sitting en banc, has made clear that an ESA citizen-suit claim alleging  
19 failure to comply with the consultation provisions in ESA Section 7(a)(2) “is a record review  
20 case” governed by the review standards in the APA. *Karuk Tribe of Cal.*, 681 F.3d at 1017. The  
21 standard and scope of review was “necessary” to the *Karuk* en banc court's decision and  
22 therefore not dicta. *Cf. Bateman v. U.S. Postal Serv.*, 231 F.3d 1220, 1224 (9th Cir. 2000)  
23 (failing of parties to cite or discuss the correct legal standard “did not relieve the district court of  
24 the duty to apply the correct legal standard . . . ,” and the district court erred by applying the  
25 wrong standard); *see, e.g., Export Grp. v. Reef Indus.*, 54 F.3d 1466, 1472 (9th Cir. 1995)  
26 (adopting Black's Law Dictionary definition of “dictum” as “an observation or remark . . . not  
27 necessarily involved in the case or essential to its determination”).  
28

1           Although Sierra Club acknowledges that the APA’s “arbitrary, capricious . . . or  
 2 otherwise not in accordance with law” *standard* of review applies to its citizen suit claim, it  
 3 nonetheless contends that the APA’s *scope* of review—requiring judicial review based on a  
 4 record—does not. That is incorrect. The two concepts are inextricably intertwined: the  
 5 “arbitrary and capricious” standard of review “[has] consistently been associated with a review  
 6 limited to the administrative record.” *Carlo Bianchi & Co.*, 373 U.S. at 715. In fact, the very  
 7 text of the APA requires courts to review the administrative record “in making the . . .  
 8 determinations” that agency action meets the APA’s deferential standard of review. 5 U.S.C. §  
 9 706. For this reason, the Ninth Circuit has repeatedly confirmed that discovery and *de novo*  
 10 review are incompatible with the deferential APA standard and that ESA citizen-suit claims, in  
 11 particular, are reviewed on the basis of the administrative record. Likewise, the D.C. Circuit has  
 12 recently re-affirmed that APA’s record-review standard should apply even when the statute at  
 13 issue requires the agency to consider the “best scientific information available.” *Oceana, Inc. v.*  
 14 *Ross*, 920 F.3d 855, 864 (D.C. Cir. 2019); *see also id.* (noting that the court applied this standard  
 15 to the Fisheries Act at issue there “just as we did in an unrelated matter involving the  
 16 Endangered Species Act, a statute that similarly mandates use of the best . . . data available.”  
 17 (internal quotations omitted)).

18  
 19           The administrative record provides all of the information that the Court needs, and all the  
 20 information that the Court is legally permitted to consider, to resolve Plaintiffs’ ESA claim.

## 21     **IX. Deliberative Documents Are Not Part of the Record**

22           Plaintiffs cite a number of deliberative documents that are not part of the Administrative  
 23 Record and should therefore not be considered when evaluating Plaintiffs’ claims.<sup>22</sup> As a  
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25  
 26 <sup>22</sup> The Parties disagree about whether deliberative documents are properly considered part of the  
 27 record. *See* No. 4:18-cv-000524-HSG, ECF No. 87. Federal Defendants agreed to serve the  
 28 Parties with the privilege log and deliberative materials to facilitate efficient resolution of record  
 disputes and reserved the right to argue that those documents are not properly part of the  
 administrative record, while Plaintiffs reserved the right to argue that deliberative materials are

1 general matter, “judicial review of agency action is limited to review of the record on which the  
2 administrative decision was based.” *Thompson v. Dep’t of Labor*, 885 F.2d 551, 555 (9th Cir.  
3 1989). The administrative record includes “all documents and materials directly or indirectly  
4 considered by agency decision-makers.” *Id.* (emphasis omitted). However, deliberative  
5 documents reveal the mental processes of agency decision-makers and are therefore not part of  
6 the record. It is long settled that agency action should be judged on the basis of the agency’s  
7 stated reasons for its decision, *SEC v. Chenery Corp.*, 318 U.S. 80, 88 (1943), and it is “not the  
8 function of the court to probe the mental processes” of the agency. *United States v. Morgan*  
9 (*Morgan II*), 313 U.S. 409, 422 (1941) (“Just as a judge cannot be subjected to such a scrutiny .  
10 . so the integrity of the administrative process must be equally respected.”). Accordingly,  
11 “[s]uch inquiry into the mental processes of administrative decisionmakers is usually to be  
12 avoided.” *Citizens to Preserve Overton Park, Inc.*, 401 U.S. at 420.

13  
14 The D.C. Circuit, the only court of appeals to have squarely addressed the question, has  
15 concluded that deliberative materials are outside the scope of APA review and thus are not part  
16 of the administrative record. *See San Luis Obispo Mothers for Peace v. NRC*, 789 F.2d 26, 44–  
17 45 (D.C. Cir. 1986). The court analogized an agency’s deliberations to the deliberative processes  
18 of a court and stated that, “[w]ithout the assurance of secrecy, the court could not fully perform  
19 its functions.” *Id.* The D.C. Circuit has subsequently reiterated that “the actual subjective  
20 motivation of agency decisionmakers is immaterial as a matter of law” to APA review. *In re*  
21 *Subpoena Duces Tecum Served on Office of Comptroller of Currency*, 156 F.3d 1279, 1279–80  
22 (D.C. Cir. 1998) (denial of reh’g en banc) (citing, inter alia, *Overton Park*, 401 U.S. at 420;  
23 *Camp*, 411 U.S. 138; *Morgan II*, 313 U.S. at 409); *see also Oceana, Inc.* 920 F.3d at 855, 865  
24 (D.C. Cir. 2019) (“predecisional and deliberative documents are not part of the administrative  
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26  
27 part of the administrative record. *Id.* The Parties stipulated that Federal Defendants retain the  
28 right to challenge any citation to deliberative materials on grounds that they do not form part of  
the record, and the non-federal Parties retain the right to oppose any such challenge. *Id.* at 3.

1 record”).

2 Some district courts within this Circuit have likewise held that internal, deliberative and  
3 predecisional materials are outside the scope of administrative review. *See, e.g., Carlsson v. U.S.*  
4 *Citizenship & Immig. Servs.*, No. 2:12-CV-07893-CAS, 2015 WL 1467174, at \*7 n.5 (C.D. Cal.  
5 Mar. 23, 2015); *California v. U.S. Dep’t of Labor*, No. 2:13-CV-02069-KJM, 2014 WL  
6 1665290, at \*13 (E.D. Cal. Apr. 24, 2014). The Ninth Circuit has not squarely addressed the  
7 issue, but it has suggested that deliberative materials are not properly part of the record for APA  
8 review.<sup>23</sup> *Portland Audubon Society v. Endangered Species Committee*, 984 F.2d 1534 (9th Cir.  
9 1993), involved a request for discovery regarding alleged *ex parte* contacts with the agency  
10 charged with granting exemptions from ESA requirements. The Court distinguished the purely  
11 internal deliberations at issue in the D.C. Circuit’s *Mothers for Peace* case from “allegedly  
12 improper *ex parte* contacts between decisionmakers and outside parties.” 984 F.2d at 1549. In  
13 so doing, the Court approvingly cited *Mothers for Peace* in suggesting that the administrative  
14 record includes “neither the internal deliberative processes of the agency nor the mental  
15 processes of individual agency members.” *Id.*

16  
17 The principle that predecisional, deliberative materials are outside the scope of the  
18 administrative record is also reflected in the scope of review of agency action in the courts of  
19 appeals. When an agency decision is subject to direct review, the “record to be filed in the court  
20 of appeals . . . shall consist of the order sought to be reviewed or enforced, the findings or report  
21 upon which it is based, and the pleadings, evidence, and proceedings before the agency, board,  
22 commission, or officer concerned.” 21 U.S.C. § 2112(b). Rule 16 of the Federal Rules of  
23 Appellate Procedure defines the administrative record in the same terms. The advisory  
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25  
26 <sup>23</sup> A majority of a Ninth Circuit panel denied the mandamus petition in *In re United States*,  
27 holding that the government failed to meet the standards for mandamus in the absence of Ninth  
28 Circuit precedent holding that deliberative materials were not part of the administrative record.  
Order, Case No. 17-71121 (9th Cir. Jan. 26, 2018). The panel did not reach the substance of the  
scope of the record issue.

1 committee that adopted Rule 16 in 1967 explained in the accompanying note that “[t]he record in  
2 agency cases is thus the same as that in appeals from the district court—the original papers,  
3 transcripts, and exhibits in the proceeding below.” Fed. R. App. P. 16, Notes of Advisory  
4 Committee on Rules (1967). No one would suggest that the record “in appeals from the district  
5 court” includes deliberative materials prepared within the court, such as bench memos and  
6 recommendations provided to the presiding judge by his staff, or preliminary drafts of opinions  
7 and orders. The trial record comprises the materials submitted to the court by the parties, the  
8 transcripts of the court’s proceedings, and the orders issued by the court, not the internal  
9 deliberative work product generated within the court’s chambers. As the committee note  
10 indicates, the administrative record in agency review cases is subject to the same limitations.

11 In addition, nothing in the APA compels an agency to include deliberative materials in  
12 the record. It is a fundamental principle of administrative law that a court may “not stray beyond  
13 the judicial province . . . to impose upon the agency its own notion of which procedures are  
14 ‘best’ . . . .” *Vermont Yankee Nuclear Power Corp. v. Nat. Res. Defense Council*, 435 U.S. 519,  
15 549 (1978). Thus, a court has no authority to compel an agency to place deliberative materials in  
16 the administrative record, and should disregard the Plaintiffs’ citations to such materials.

## 18 **X. Remedy**

19 The Court should grant Federal Defendants’ cross-motion for summary judgment and  
20 deny Plaintiffs’ motions. Nonetheless, if the Court rules for Plaintiffs, Federal Defendants  
21 request the opportunity to provide separate briefing on remedy. Even if the Court were to find  
22 that the 2017 Rule is unlawful, vacatur should not automatically follow because the Court “is not  
23 required to set aside every unlawful agency action.” *Nat’l Wildlife Fed’n v. Espy*, 45 F.3d 1337,  
24 1343 (9th Cir. 1995); *see also Sierra Forest Legacy v. Sherman*, 951 F. Supp. 2d 1100, 1105  
25 (E.D. Cal. 2013) (“It is well established in this Circuit that a Court is not mechanically obligated  
26 to vacate an agency decision that it finds invalid.”). Whether agency action should be vacated  
27 depends on a two-factor test: (1) “how serious the agency’s errors are” and (2) “the disruptive  
28 consequences of an interim change that may itself be changed.” *Cal. Cmty. Against Toxics v.*

1 EPA, 688 F.3d 989, 992 (9th Cir. 2012) (quoting *Allied-Signal, Inc. v. NRC*, 988 F.2d 146, 150–  
 2 51 (D.C. Cir. 1993)). If the Court rules in Plaintiffs’ favor, Federal Defendants respectfully  
 3 request an opportunity to brief these two factors.<sup>24</sup>

4 Even if the Court rules in Plaintiffs’ favor and denies remedy briefing, the Court should  
 5 restrict the scope of its ruling to the 2017 Rule, i.e., the agency action that is before this Court.  
 6 See Order, ECF No. 77 at 9 (noting that “[t]he issue before this Court” is “the legality of BLM’s  
 7 rescission of the [2015] Rule,” and “[t]he question in the Wyoming Action, whether BLM had  
 8 statutory authority to enact the [2015] Rule, has not been presented to this Court.”). Sierra  
 9 Club’s proposed order suggests that the Court order the 2015 Rule reinstated, but that outcome  
 10 would be inconsistent with the Court’s reasoning in its order denying transfer. ECF No. 110-4.

## 11 **XI. Conclusion**

12 The Court should enter summary judgment in Federal Defendants’ favor because  
 13 Plaintiffs lack standing. Even if the Court reaches the merits, it should uphold the 2017 Rule  
 14 because BLM complied with the APA, NEPA, and the ESA.  
 15

16  
 17 Respectfully submitted this August 2, 2019.

18 LAWRENCE VANDYKE  
 19 Deputy Assistant Attorney General

20 /s/ Corinne Snow  
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26 <sup>24</sup> For example, the 2015 Rule had a cascading implementation schedule depending on when  
 27 operators had submitted APDs and begun drilling operations. 80 Fed. Reg. 16,218, 16,577. All  
 28 of those deadlines have long passed, and disruption would ensue if there were no corresponding  
 implementation schedule now.

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Counsel for Federal Defendants



IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

	)	
STATE OF CALIFORNIA, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	
U.S. BUREAU OF LAND	)	
MANAGEMENT, et al.,	)	Case No. 4:18-cv-00521-HSG (related)
	)	
Defendants.	)	Case No. 4:18-cv-00524-HSG (related)
	)	
SIERRA CLUB, et al.,	)	<b>[PROPOSED] ORDER GRANTING</b>
	)	<b>FEDERAL DEFENDANTS’ CROSS-</b>
Plaintiffs,	)	<b>MOTION FOR SUMMARY JUDGMENT</b>
	)	
v.	)	
	)	
DAVID BERNHARDT, et al.,	)	
	)	
Defendants.	)	
	)	
	)	

The Court has read and considered the briefing in support of and in opposition to Plaintiffs’ Motions for Summary Judgment, movant Intervenor-Defendants’ Cross-Motions for Summary Judgment, and Federal Defendants’ Cross-Motion for Summary Judgment and has heard and considered the arguments of counsel at the December 5, 2019 hearing.

NOW THEREFORE, good cause appearing, Federal Defendants’ Cross-Motion for Summary Judgment is hereby GRANTED. The Bureau of Land Management within the United States Department of the Interior had good reasons and sufficient support for promulgating the rule titled “Oil and Gas; Hydraulic Fracturing on Federal and Indian Lands; Rescission of a 2015 Rule,” 82 Fed. Reg. 61,924 (Dec. 29, 2017), thus satisfying the standard under *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 514 (2009). In promulgating this Rule, the Bureau of

1 Land Management complied with the National Environmental Policy Act, the Administrative  
2 Procedure Act, the Endangered Species Act, the Indian Mineral Leasing Act, the Mineral  
3 Leasing Act, the Indian Mineral Development Act, and the Federal Land Policy Management  
4 Act.

5 The Court enters judgment for Federal Defendants on Plaintiffs' claims under the  
6 Administrative Procedure Act, 5 U.S.C. § 551 *et seq.*; the Mineral Leasing Act, 30 U.S.C. § 181  
7 *et seq.*; the Federal Land Policy and Management Act, 43 U.S.C. § 1701 *et seq.*; the Indian  
8 Mineral Leasing Act, 25 U.S.C. § 396 *et seq.*, the Indian Mineral Development Act, 25 U.S.C.  
9 § 2101 *et seq.*, and the National Environmental Policy Act, 43 U.S.C. § 4321 *et seq.*

10 IT IS SO ORDERED.

11  
12 Dated: \_\_\_\_\_

13 \_\_\_\_\_  
14 HAYWOOD S. GILLIAM, JR.  
15 UNITED STATES DISTRICT JUDGE  
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