[Attorney information for the States of Wyoming, Colorado, and Utah at pages 59–60]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

STATE OF WYOMING; STATE OF COLORADO; STATE OF NORTH DAKOTA; and STATE OF UTAH, Petitioners, v. UNITED STATES DEPARTMENT OF THE INTERIOR; SALLY JEWELL, in her official capacity as Secretary of the Interior; UNITED STATES BUREAU OF LAND MANAGEMENT; and NEIL KORNZE, in his official capacity as Director of the Bureau of Land Management, Respondents.	)	Case No. 15-CV-00043-SWS Consolidated with 15-CV-00041- SWS **BRIEF IN SUPPORT OF WYOMING, COLORADO, AND UTAH'S PETITION FOR REVIEW OF FINAL AGENCY ACTION**

TABLE OF CONTENTS

TABLE OF AUTHORITIES iv

INTRODUCTION 1

BACKGROUND 3

I. The EPA declines to regulate hydraulic fracturing under the Safe Drinking Water Act and Congress formally removes the EPA's regulatory authority over hydraulic fracturing through the 2005 Energy Policy Act. 3

A. The creation of the Safe Drinking Water Act and the Underground Injection Control program 3

B. The courts determine that the UIC program covers hydraulic fracturing 6

C. The EPA studies fracking and obtains voluntary agreements to end the use of diesel fuel in fracking fluids. 8

D. Congress removes non-diesel fracking from federal jurisdiction in the 2005 Energy Policy Act 10

II. In the absence of federal authority, states regulate hydraulic fracturing within their borders 11

III. The Bureau attempts to step into the EPA's shoes to regulate hydraulic fracturing, despite Congress's decision in the 2005 Energy Policy Act to allow states to regulate hydraulic fracturing on both state and federal land 14

A. During rulemaking, commenters warned that the Bureau lacked authority to regulate hydraulic fracturing, that its regulation would be harmful to states, and that the rule would not add any measurable environmental benefit beyond existing state regulations 15

B. The Bureau's final hydraulic fracturing rule rests on statutory

authority that has never been understood to grant federal jurisdiction over hydraulic fracturing 18

1. The Federal Land Policy and Management Act 19

2. The federal mineral leasing acts 20

IV. The States' petition to review the rule to prevent the Bureau's unlawful exercise of regulatory power 22

ARGUMENT 24

I. Congress has not given the Bureau authority to regulate hydraulic fracturing 24

A. Standard of review 24

B. The Safe Drinking Water Act is the only source of federal authority to regulate underground sources of drinking water 27

C. The Energy Policy Act of 2005 conclusively removed hydraulic fracturing from federal oversight 30

D. FLPMA is a land management statute; it is not an environmental protection statute 35

E. The federal mineral leasing statutes govern leasing, not the protection of underground sources of drinking water 40

1. The Mineral Leasing Act 40

2. The Right-of-Way Leasing Act 43

3. The Mineral Leasing for Acquired Lands Act 43

4. The Federal Oil and Gas Royalty Management Act 44

II. The Bureau's justification for the rule invents a regulatory problem that does not exist 46

A. Standard of review 46

B. The preamble to the Fracking Rule fails to make a rational connection between the facts on the ground and the final rule 47

C. The Bureau violated the APA by failing to consider and respond meaningfully to significant public comments 50

D. The states comprehensively regulate hydraulic fracturing on federal land, and the Fracking Rule provides little to no protection for underground water sources while unnecessarily increasing delay and costs 53

CONCLUSION 57

TABLE OF AUTHORITIES

CASES

Adams Fruit Co. v. Barrett,
494 U.S. 638 (1990) 25, 26-27

Arizona Pub. Serv. Co. v. EPA,
562 F.3d 1116 (10th Cir. 2009) 50, 53

Berman v. Parker,
348 U.S. 26 (1954) 11, 34

Bulova Watch Co. v. Zale Jewelry Co. of Cheyenne,
371 P.2d 409 (Wyo. 1962) 11, 34

Burlington Truck Lines, Inc. v. United States,
371 U.S. 156 (1962) 50

Cal. Coastal Comm'n v. Granite Rock Co.,
480 U.S. 572 (1987) 2, 15-16, 36, 38-39

Carden v. Kelly,
175 F. Supp. 2d 1318 (D. Wyo. 2001) 20

Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.,
467 U.S. 837 (1984) 25-26

Citizens to Pres. Overton Park v. Volpe,
401 U.S. 402 (1971) 24

City of Arlington, Tex. v. FCC,
--- U.S. ---, 133 S. Ct. 1863 (2013) (Breyer, J., concurring) 25, 26

Colo. Wild, Heartwood v. U.S. Forest Serv.,
435 F.3d 1204 (10th Cir. 2006) 46, 54

Conn. Nat'l Bank v. Germain,
503 U.S. 249 (1992) 42

Dodd v. United States,
545 U.S. 353 (2005).....42

ETSI Pipeline Project v. Missouri,
484 U.S. 495 (1988).....27

Fed. Mar. Comm'n v. Seatrain Lines, Inc.,
411 U.S. 726 (1973).....27

FDA v. Brown & Williamson Tobacco Corp.,
529 U.S. 120 (2000).....27, 34

Geosearch, Inc. v. Andrus,
508 F. Supp. 839 (D. Wyo. 1981).....41

Harvey v. Udall,
384 F.2d 883 (10th Cir. 1967) 41

Home Box Office, Inc. v. FCC,
567 F.2d 9 (D.C. Cir. 1977)..... 50-51

Lamb v. Thompson,
265 F.3d 1038 (10th Cir. 2001) 26

Legal Envtl. Assistance Found. v. EPA,
276 F.3d 1253 (11th Cir. 2001) 6, 31

Legal Envtl. Assistance Found., Inc. v. EPA,
118 F.3d 1467 (11th Cir. 1997) 5-10, 29-31, 37

La. Pub. Serv. Comm'n v. FCC,
476 U.S. 355 (1986).....25

Michigan v. EPA,
--- U.S. ---, 135 S. Ct. 2699 (2015).....45

Morales v. Trans World Airlines, Inc.,
504 U.S. 374 (1992).....38

Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.,
463 U.S. 29 (1983) 46

Natural Res. Def. Council, Inc. v. Berklund,
609 F.2d 553 (D.C. Cir. 1979) (per curiam) 20, 41

Norton v. S. Utah Wilderness Alliance,
542 U.S. 55 (2004) 19

O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft,
389 F.3d 973 (10th Cir. 2004) (Seymour J., concurring) 31

Olenhouse v. Commodity Credit Corp.,
42 F.3d 1560 (10th Cir. 1994) 24-25, 35, 46-47, 50

Perez v. Mortgage Bankers Ass'n,
135 S.Ct. 1199 (2015) 50

Phillips Petroleum Co. v. EPA,
803 F.2d 545 (10th Cir. 1986) 4-5

Pub. Lands Council v. Babbitt,
167 F.3d 1287 (10th Cir. 1999) 25

State Bank of S. Utah v. Gledhill (In re Gledhill),
76 F.3d 1070 (10th Cir. 1996) 32

Tex. Oil & Gas Corp. v. Phillips Petroleum Co.,
277 F. Supp. 366 (C.D. Okla. 1966) 42

U.S. v. Wilson,
503 U.S. 329 (1992) 32

Util. Air Regulatory Grp. v. EPA,
--- U.S. ---, 134 S. Ct. 2427 (2014) 26, 45

Whitman v. Am. Trucking Ass'ns,
531 U.S. 457 (2001) 26, 45

Wyoming v. Udall,
255 F. Supp. 481 (D. Wyo. 1966).....21, 43

STATUTES

2 Colo. Code Regs. § 404-1 (2015) 12-13

5 U.S.C. § 533.....50

5 U.S.C. § 706.....24, 46

30 U.S.C. §§ 181–287..... 18-19

30 U.S.C. § 189.....20, 41, 42

30 U.S.C. § 223.....20

30 U.S.C. § 225.....41

30 U.S.C. § 226.....20

30 U.S.C. § 226-3.....20

30 U.S.C. §§ 301-06.....19

30 U.S.C. § 301.....21, 43

30 U.S.C. §§ 303–05.....21

30 U.S.C. § 306.....21, 43

30 U.S.C. §§ 351–52..... 21, 43-44

30 U.S.C. §§ 351–60..... 19, 43-44

30 U.S.C. § 359.....21

30 U.S.C. §§ 1701-57.....19

30 U.S.C. § 1711 ..... 21-22, 44

30 U.S.C. § 1751 ..... 21-22, 44

42 U.S.C. § 300f 3

42 U.S.C. § 300g-2 3

42 U.S.C. § 300h 3-6, 10, 27-28, 31-32, 37-38, 43, 54

42 U.S.C. § 300h-1 4

42 U.S.C. § 300j-6 ..... 5, 28

43 U.S.C. § 1701 18-20

43 U.S.C. § 1702 ..... 19, 35

43 U.S.C. § 1711 ..... 19, 35

43 U.S.C. § 1712 ..... 19, 35-36, 40

43 U.S.C. § 1732 ..... 20, 35

43 U.S.C. § 1733 ..... 20, 35

43 U.S.C. § 1740 ..... 20, 35

Utah Admin. Code R. § 649-3-39 13

Wyo. Stat. Ann. §§ 30-5-101 through -128 11

LEGISLATIVE HISTORY

H.R. Rep. No. 93-1185 (1974),
reprinted in 1974 U.S.C.C.A.N. 6454 ..... 4-5, 8, 29-30

CODE OF FEDERAL REGULATIONS

40 C.F.R. § 144.6 (2016) 6

40 C.F.R. § 145 3

43 C.F.R. § 3162.3-2(b) 14

ADMINISTRATIVE MATERIALS

52 Fed. Reg. 20672 (June 2, 1987) 6

64 Fed. Reg. 68546 (Dec. 7, 1999) 6

75 Fed. Reg. 77230 (Dec. 10, 2010) 6

77 Fed. Reg. 27691 (May 11, 2012)
(to be codified at 43 C.F.R. pt. 3160) 14

78 Fed. Reg. 31636 (May 24, 2013) 52

80 Fed. Reg. 16128 (March 26, 2015) 14-19, 24, 34-35, 40, 47, 49, 52-53, 56-58

OTHER AUTHORITIES

151 Cong. Rec. H2192-02 (daily ed. Apr. 20, 2005) 10, 30

151 Cong. Rec. S9335-01 (daily ed. July 29, 2005) 10, 30

Energy Policy Act of 2005,
Pub. L. No. 109-58, 119 Stat. 594 (2005) 10, 30, 32, 43, 54

Federal Land Policy and Management Act of 1976,
Pub. L. No. 94-579, 90 Stat. 2743 (1976) 36-37

Safe Drinking Water Act,
Pub. L. No. 93-523, 88 Stat. 1660 (1974) 3, 36

Brent D. Yacobucci, Cong. Research Serv., RL 32873, Selected Environmental Issues Related to the Omnibus Energy Bill (H.R. 6), 109th Congress, 5 (2005) available at http://congressional.proquest.com/legisinsight?id=CRS-2005-RSI-1227&type=MISC_PUB (last visited Mar. 4, 2016) 9, 31

George Cameron Coggins, *The Developing Law of Land Use Planning on the Federal Lands*, 61 U. Colo. L. Rev. 307, 325 (1990).....19

Primary Enforcement Authority for the Underground Injection Control Program, available at http://www.epa.gov/uic/primary-enforcement-authority-underground-injection-control-program (last visited Mar. 4, 2016).....4

Review Programs and Activities of the Department of the Interior: Hearing Before the U.S. Senate Comm. on Energy and Natural Resources, 113th Cong. 22 (2013) (statement of the Honorable Sally Jewell, Secretary of the Interior), available at: http://www.energy.senate.gov/public/index.cfm/hearings-and-business-meetings?ID=32bf7170-3281-40c6-8900-801b9c54f18a (last visited Mar. 4, 2016).....12, 34

Rules Wyo. Oil and Gas Conservation Comm'n, ch 3, §45, available at http://soswy.state.wy.us/Rules/RULES/9584.pdf (last visited Mar. 4, 2016).....12

U.S. Dep't of the Interior, Bureau of Land Mgmt., Colorado Oil and Gas Leasing Program, http://www.blm.gov/co/st/en/BLM_Programs/oilandgas.html (last visited March 4, 2016).....55

United States Environmental Protection Agency, *Evaluation of Impacts to Underground Sources of Drinking Water by Hydraulic Fracturing of Coalbed Methane Reservoirs*, EPA 816R04003 at ES-1 (June, 2004), available at https://fracfocus.org/sites/default/files/publications/evaluation_of_impacts_to_underground_sources_of_drinking_water_by_hydraulic_fracturing_of_coalbed_methane_reservoirs.pdf (last visited Mar. 4, 2016).....8-9, 31

INTRODUCTION

Hydraulic fracturing (also referred to as fracking) is a process by which oil and gas operators pump a mixture of water, propping agents (such as sand), and chemicals into the ground at high pressures to create fractures, thereby releasing oil and gas trapped inside tight rock formations. Oil and gas operators have used this process to increase production from wells since the late 1940s. (DOIAR0001055, 0001078). Recently, however, the use of decades-old hydraulic fracturing techniques—combined with new horizontal drilling techniques—have increased production dramatically. By 2013, approximately 90% of all wells on federal and Indian land were stimulated through the use of hydraulic fracturing and 60% of all wells utilized horizontal drilling technology. (DOIAR0069851). As a result, in the last ten to fifteen years, shale oil production has increased more than 500% and shale gas production has increased over 400% in the United States. (DOIAR0039909). Before the advent of these modern techniques, much of the oil and gas in these shale formations was considered unrecoverable. (DOIAR0039909).

At the same time that companies began to combine modern horizontal drilling practices with long standing hydraulic fracturing practices, the regulatory landscape evolved to keep pace with the industry. That regulatory evolution, which provides the necessary background for this litigation, occurred in two stages. At first, the Environmental Protection Agency believed it lacked jurisdiction under the Safe

Drinking Water Act to regulate hydraulic fracturing. When the courts confirmed that the EPA indeed had jurisdiction in this area, Congress, through the Energy Policy Act of 2005, amended the Safe Drinking Water Act to affirmatively remove that responsibility from the EPA before it could begin regulating.

With this change, the next stage of the regulatory evolution saw states exercising their own jurisdiction to regulate hydraulic fracturing within their borders, on both federal and non-federal land. In spite of this history—and in spite of Congress's decision to *remove* hydraulic fracturing from federal environmental regulation—the Bureau of Land Management decided that it too should regulate hydraulic fracturing. In 2015, the Bureau finalized its rule to regulate hydraulic fracturing on public land, thereby creating a sweeping new regulatory regime that attempts to do what Congress prohibited the EPA from doing in 2005. The Bureau claims authority for its rule based on general rulemaking provisions contained in several land planning statutes rather than an environmental regulation statute. *See Cal. Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 587 (1987) (for the distinction between environmental regulation and land planning statutes).

As a matter of law, the rule exceeds the Bureau's statutory jurisdiction, conflicts with the Safe Drinking Water Act and the Energy Policy Act of 2005, and unlawfully interferes with state hydraulic fracturing regulations. As a matter of fact, reflected in the rulemaking record, the implementation of new requirements on

public land where states have successfully regulated for years is unjustified and unnecessary. The rule is unlawful and should be set aside as arbitrary and capricious, contrary to law, and in excess of the Bureau's statutory jurisdiction.

BACKGROUND

I. The EPA declines to regulate hydraulic fracturing under the Safe Drinking Water Act and Congress formally removes the EPA's regulatory authority over hydraulic fracturing through the 2005 Energy Policy Act.

A. The creation of the Safe Drinking Water Act and the Underground Injection Control program.

In 1974, Congress enacted the Safe Drinking Water Act, which sets forth a system of cooperative federalism for protecting drinking water sources. *See* Pub. L. No. 93-523, 88 Stat. 1660 (1974) (codified as amended at 42 U.S.C. §§ 300f to 300j-26 (2014)); 40 C.F.R. § 145. Part C of the Act established a comprehensive scheme to regulate all underground injection of potential contaminants, including the injection of fluids during the hydraulic fracturing process. 42 U.S.C. §§ 300h to 300h-8. States that wish to regulate in place of the EPA can submit an application to obtain primary enforcement responsibility, also known as primacy. *Id.* § 300g-2.

Congress intended Part C, often referred to as the "underground injection control" or "UIC" program, to regulate "underground injection which endangers drinking water sources." *Id.* § 300h(b)(1). To that end, Part C prohibits "any underground injection" without a permit and requires states with primary

enforcement responsibility to implement "inspection, monitoring, recordkeeping, and reporting requirements." *Id.* § 300h(b)(1)(A), (C). As originally enacted, the Safe Drinking Water Act defined "any underground injection" as "the subsurface emplacement of fluids by well injection." *Id.* § 300h(d)(1)(A). States with authorized programs—including petitioners Wyoming, Colorado, North Dakota, and Utah—have primary authority to enforce the UIC program, though the EPA serves as a backstop to ensure states adequately carry out the program's mandates.[1] *Id.* § 300h-1(b), (c).[2]

In designing the UIC program, Congress recognized that one type of injection the program would regulate was underground injections related to oil and gas production: "Energy production companies are using injection techniques to increase production and to dispose of unwanted brines brought to the surface during production." H.R. Rep. No. 93-1185 at 29 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6454, 6481; *Phillips Petroleum Co. v. EPA*, 803 F.2d 545, 547 n.2 (10th Cir. 1986) (explaining that "Congress was particularly aware of the potential adverse effects of

[1] The State of Colorado maintains primary enforcement authority for Class II wells only.

[2] *See also* Primary Enforcement Authority for the Underground Injection Control Program, available at http://www.epa.gov/uic/primary-enforcement-authority-underground-injection-control-program. The Court may take judicial notice of publicly available files on a government agency's website. *Winzler v. Toyota Motor Sales U.S.A., Inc.*, 681 F.3d 1208, 1212–13 (10th Cir. 2012).

oil and gas related injection" when it created the UIC program.).

The UIC program was not intended to be piecemeal; instead, to ensure uniform regulation, it was designed to cover all federal agencies and all land, both federal and non-federal. Congress required **every** federal agency "engaged in any activity resulting, or which may result in, underground injection which endangers drinking water" to comply with the UIC program. 42 U.S.C. § 300j-6(a)(4). In some cases, this requirement results in federal agencies having to comply with **state** regulations in states with authorized UIC programs. *Id*. § 300h(b)(1)(D). In addition, state UIC programs do not apply only to non-federal land; they govern "underground injections … whether or not occurring on property owned or leased by the United States." *Id*. Congress thus dictated that regulators will treat "underground injection wells on Federal property the same as any other ... underground injection well and will enforce applicable regulations to the same extent and under the same procedures." H.R. Rep. No. 93-1185 at 42, 1974 U.S.C.C.A.N. at 6494.

Recognizing the regulatory challenges that underground injections presented, Congress intended Part C to deal with **all** situations that may endanger underground drinking water sources, including oil and gas injections such as hydraulic fracturing. H.R. Rep. No. 93-1185 at 29, 1974 U.S.C.C.A.N. at 6481; *see also Legal Envtl. Assistance Found., Inc. v. EPA*, 118 F.3d 1467, 1474 (11th Cir. 1997) (*LEAF I)* ("it is clear that Congress dictated that *all* underground injection be regulated under the

UIC programs") (citing 42 U.S.C. § 300h(b)(1)(A) (emphasis in original)).

Through its rulemaking authority under the Safe Drinking Water Act, the EPA has created a classification scheme for various well types. 40 C.F.R. § 144.6 (2016) (starting with Classes I, II, and III in 1987 (Water Pollution Control; National Primary Drinking Water Regulations, 52 Fed. Reg. 20672, 20676 (June 2, 1987)), adding Classes IV and V in 1999 (Revisions to the Underground Injection Control Regulations for Class V Injection Wells, 64 Fed. Reg. 68546, 68565 (Dec. 7, 1999)), and finally Class VI wells in 2010 (Federal Requirements Under the Underground Injection Control (UIC) Program for Carbon Dioxide (CO_2), 75 Fed. Reg. 77230, 77287 (Dec. 10, 2010))). The EPA designed the Class II category specifically for the injection of fluids related to conventional oil and gas production, enhanced recovery of oil or natural gas, and storage of hydrocarbons in liquid form. *Id.*

B. The courts determine that the UIC program covers hydraulic fracturing.

Although these rules included regulation of injections for the production of oil and gas under Class II, the EPA—for two decades after the enactment of the Safe Drinking Water Act in 1974—took the position that hydraulic fracturing was not subject to the UIC program. *See LEAF I*, 118 F.3d at 1471.[3] This interpretation

[3] This decision is commonly referred to as *LEAF I*. The subsequent appeal called *LEAF II* dealt with the statutory method EPA used to approve Alabama's revised UIC program and has no bearing on the present case. *LEAF v. EPA*, 276 F.3d 1253 (11th Cir. 2001) (*LEAF II*).

remained intact until the Legal Environmental Assistance Foundation (Foundation) challenged the EPA in the Eleventh Circuit. *Id*. at 1467. The history of that litigation explains the origin of the law governing the current case.

In 1994, the Foundation petitioned the EPA requesting withdrawal of Alabama's UIC program approval, claiming that the EPA was legally required to regulate hydraulic fracturing under the Safe Drinking Water Act and that, because Alabama's program did not regulate hydraulic fracturing, Alabama's program was deficient. *LEAF I*, 118 F.3d at 1471. In its review of the Foundation's petition, the EPA concluded that the term "underground injection" only applied to "those wells whose 'principal function' is the underground emplacement of fluids" and, thus, did not require Alabama to regulate hydraulic fracturing wells under its UIC program. *Id*.

The Foundation filed suit in 1995 claiming that the EPA's interpretation was "not in accordance with law." *Id*. at 1472. The court agreed with the Foundation. *Id*. Citing the unambiguous language of the Safe Drinking Water Act, the court held that Congress intended for the EPA to regulate **all** underground injection activity under the UIC program, including hydraulic fracturing. *Id*. at 1474–75, 78.

The court also analyzed the legislative history of the Safe Drinking Water Act and concluded that it too supports the notion that Congress intended the UIC program to regulate all underground injection.

> The definition of 'underground injection' is intended to be broad enough to cover any contaminant which may be put below ground level and which flows or moves.... The definition is not limited to the injection of wastes or to injection for disposal purposes; it is intended also to cover, among other contaminants, the **injection of brines and the injection of contaminants for extraction or other purposes**.

Id. at 1475 (quoting H.R. Rep. No. 93-1185 at 31, 1974 U.S.C.C.A.N. at 6483 (emphasis added)). As a result, the court granted the Foundation's petition for review and remanded the case to the EPA for further proceedings. *Id*. at 1478.

C. The EPA studies fracking and obtains voluntary agreements to end the use of diesel fuel in fracking fluids.

Simultaneously with the conclusion of the LEAF cases, the EPA conducted a study to "assess the potential for contamination of underground sources of drinking water [] from the injection of hydraulic fracturing fluids into coalbed methane [] wells."[4] In this study, EPA concluded that "the injection of hydraulic fracturing fluids into coalbed methane wells poses little or no threat to underground sources of drinking water and does not justify additional study at this time." *Id*. Similarly, the

[4] United States Environmental Protection Agency, *Evaluation of Impacts to Underground Sources of Drinking Water by Hydraulic Fracturing of Coalbed Methane Reservoirs*, EPA 816R04003 at ES-1 (June, 2004), available at https://fracfocus.org/sites/default/files/publications/evaluation_of_impacts_to_underground_sources_of_drinking_water_by_hydraulic_fracturing_of_coalbed_methane_reservoirs.pdf (herein referred to as the 2004 EPA study). If the Bureau was not aware of this study prior to the commencement of its rulemaking, several commenters brought it to the Bureau's attention through the rulemaking process. (*See e.g.*, DOIPS0000633, DOIPS00008964).

EPA did not find a single confirmed case linking the injection of fracking fluids into coalbed methane wells with drinking water well contamination, despite the hydraulic fracturing of thousands of coalbed methane wells per year. *Id*.

The EPA noted one caveat, however—"in some cases, constituents of concern ... are injected directly into [underground sources of drinking water.]" *Id*. These constituents, such as benzene, toluene, ethylbenzene, and xylenes, are introduced through the use of diesel fuel in fracking fluids. *Id*. In an effort to reduce the use of these constituents in hydraulic fracturing fluids before the 2004 EPA study was finalized, the EPA entered a Memorandum of Agreement with three of the largest oilfield service companies at the time. Brent D. Yacobucci, Cong. Research Serv., RL 32873, Selected Environmental Issues Related to the Omnibus Energy Bill (H.R. 6), 109th Congress, 5 (2005).[5] This voluntary agreement details the companies' pledge to cease the use of diesel fuel in the hydraulic fracturing fluids injected into coalbed methane production wells in underground sources of drinking water within 30 days of signing the agreement. *Id*. With the signing of this memorandum, the EPA and industry eliminated the only potential concern found in the 2004 EPA study.

[5]Available at http://congressional.proquest.com/legisinsight?id=CRS-2005-RSI-1227&type=MISC_PUB. According to the EPA, these three companies performed approximately ninety-five percent (95%) of the hydraulic fracturing jobs in the United States at the time. *Id*.; *see also* 2004 EPA study at ES-2.

D. Congress removes non-diesel fracking from federal jurisdiction in the 2005 Energy Policy Act.

In 2005, Congress proposed an amendment to the UIC program in the 2005 Energy Policy Act, which revised the definition of "underground injection" to exclude "the underground injection of fluids or propping agents (other than diesel fuels) pursuant to hydraulic fracturing operations related to oil, gas, or geothermal production activities." Pub. L. No. 109-58, § 322, 119 Stat. 594 (2005) (codified at 42 U.S.C. § 300h(d)(2)(B)). This change was both a response to the 2004 EPA study, as well as a way to legislatively overturn the *LEAF I* decision.

Members of Congress explained that this provision would "protect [energy companies] from ever facing federal regulation of a practice of drilling for oil using the hydraulic fracturing technique[.]" 151 Cong. Rec. H2192-02, H2194-95 (daily ed. Apr. 20, 2005) (statements of Rep. Markey); *see also* 151 Cong. Rec. S9335-01, S9337 (daily ed. July 29, 2005) (statement of Sen. Feingold). Members of Congress also characterized the amendment as a production incentive to support the Energy Policy Act's broader policy of developing secure, affordable, and reliable energy resources. Pub. L. No. 109-58; *see also* 151 Cong. Rec. H2192-02, H2226 (daily ed. Apr. 20, 2005).

When the Energy Policy Act became law, the EPA's authority to regulate fracking under the Safe Drinking Water Act was removed unless it involved the use of diesel fuel as fracking fluid. 42 U.S.C. § 300h(b)(2)(B). By limiting the EPA's

authority in this way, Congress removed hydraulic fracturing from the regulatory purview of the Safe Drinking Water Act's UIC program and, more importantly, removed the practice from federal environmental regulation.

II. In the absence of federal authority, states regulate hydraulic fracturing within their borders.

States generally retain police power to legislate for the public welfare, including the ability to regulate to protect public health, safety, and morals. *Bulova Watch Co. v. Zale Jewelry Co. of Cheyenne*, 371 P.2d 409, 417 (Wyo. 1962); *see also Berman v. Parker*, 348 U.S. 26, 32 (1954) (explaining that when a state legislature speaks the public interest is declared, subject to constitutional limitations). Exercising its police power, the Wyoming Legislature charged the Wyoming Oil and Gas Conservation Commission with "preventing waste, protecting correlative rights, and protecting human health and the environment … through the utilization of proven methods which are designed to avoid contamination of the soils, groundwater, and surface water at all federal, state, fee, and tribal drilling or producing well locations in the state." (DOIPS0065512); *see also* Wyo. Stat. Ann. §§ 30-5-101 through -128.

Wyoming was one of the first states to regulate hydraulic fracturing. (ECF No. 32-2, Kropatsch Aff. at ¶ 8) The Wyoming Oil and Gas Conservation

Commission began regulating the process when it enacted rules in 2010. [6] (*Id*.). Wyoming's regulations are comprehensive, requiring pre-stimulation fluid and chemical disclosures, monitoring and reporting of pressures and fracture lengths, and post-fracturing reporting of pressures and volumes of fluid used during the process. (*Id*. at ¶¶10–12). Secretary of the Interior Sally Jewell has recognized that Wyoming's program is "sophisticated in its oversight of hydraulic fracturing" and is "a good example of a State that's doing an effective job."[7]

Colorado likewise regulates all phases of oil and gas production, including hydraulic fracturing, through the Colorado Oil and Gas Conservation Commission. 2 Colo. Code Regs. § 404-1 (2015). Colorado's program is robust, requiring operators to construct wells so as to prevent pollution of groundwater formations through the use of cement casings to extend fifty feet above and below each fresh water aquifer. *Id*. § 404-1-317. The rules also require mechanical integrity testing to ensure well integrity. *Id*. § 404-1-326. The Colorado Oil and Gas Conservation Commission further requires operators to line storage pits for produced water and to

[6] Rules Wyo. Oil and Gas Conservation Comm'n, ch. 3, §45, available at http://soswy.state.wy.us/Rules/RULES/9584.pdf.

[7] *Review Programs and Activities of the Department of the Interior: Hearing Before the U.S. Senate Comm. on Energy and Natural Resources*, 113th Cong. 22 (2013) (statement of the Honorable Sally Jewell, Secretary of the Interior) available at: http://www.energy.senate.gov/public/index.cfm/hearings-and-business-meetings?ID=32bf7170-3281-40c6-8900-801b9c54f18a.

meet specifications that protect shallow groundwater. *Id*. § 404-1-904. In 2012, the Colorado Oil and Gas Conservation Commission began requiring operators to disclose fracturing fluid volumes and chemical additives on Fracfocus.org within 60 days of hydraulic fracturing. *Id*. § 404-1-205A. Colorado also became the first state in the country to require detailed sampling of groundwater near wells, both before and after drilling, to detect any effects of oil and gas operations on groundwater quality. *Id*. § 404-1-609(d).

Utah also protects groundwater and surface resources through a comprehensive regulatory regime administered by the Utah Division of Oil, Gas, and Mining (Division). Since 1955, Utah has demanded best-engineering construction practices to ensure wellbore integrity, (e.g., extending steel casing and cement bonding into the cap rock and below any usable water supply) thus protecting water resources. In keeping with its longstanding resource stewardship, Utah proactively responded to increases in hydraulic fracturing by revising its regulations in 2012. Utah Admin. Code R. § 649-3-39. The revision included new requirements for public disclosure of fracking chemicals via FracFocus.org. *Id*. § 649-3-39(1). The rules also require the Division to utilize its institutional knowledge; the Division focuses on the site-specific characteristics of a proposed well's geology and individually approves drilling programs to assure that proper protections are in place. *See id*. § 649-3-39(2.4). For instance, approved well-casing programs require the

operator to circulate cement to the surface and conduct pressure tests to ensure full isolation of oil reservoirs. *Id.* § 649-3-39(2). Finally, any well that indicates inadequate casing cement must either be fixed or plugged and abandoned. *Id.*

In addition to Wyoming, Colorado, and Utah, many other states have exercised their police power to regulate the industry. (*See e.g.*, DOIAR0070200–01).

III. The Bureau attempts to step into the EPA's shoes to regulate hydraulic fracturing, despite Congress's decision in the 2005 Energy Policy Act to allow states to regulate hydraulic fracturing on both state and federal land.

On May 11, 2012, the Bureau proposed regulations governing hydraulic fracturing on federal and Indian land for the first time in the agency's long history. *See* Oil and Gas; Well Stimulation, Including Hydraulic Fracturing, on Federal and Indian Lands, 77 Fed. Reg. 27691 (May 11, 2012) (to be codified at 43 C.F.R. pt. 3160). Historically, the Bureau's only regulation on the topic of hydraulic fracturing addressed additional surface disturbance and did not regulate the fracturing process itself. *See* 43 C.F.R. § 3162.3-2(b) (requiring that operators need only obtain approval to conduct hydraulic fracturing if additional surface disturbance would occur). Because of extensive public interest, the Bureau published a supplemental notice of proposed rulemaking on May 24, 2013. *See* Oil and Gas; Hydraulic Fracturing on Federal and Indian Lands, 80 Fed. Reg. 16128 (March 26, 2015).

A. During rulemaking, commenters warned that the Bureau lacked authority to regulate hydraulic fracturing, that its regulation would be harmful to states, and that the rule would not add any measurable environmental benefit beyond existing state regulations.

Throughout the rulemaking process, the Bureau received over 1.5 million comments from individuals and interest groups. *Id*. According to the Bureau, it "reviewed and analyzed these comments based on thoughtful analysis and robust dialogue, which resulted in a rule that is more protective than the previous proposed rules and current regulations." *Id*.

Many of these comments alerted the Bureau to the fact that it lacked the statutory authority necessary to regulate hydraulic fracturing because that authority rested with the EPA, states, and tribes. (ECF No. 118 at 3–6). The Bureau acknowledged its lack of jurisdiction to regulate groundwater sources, stating that "the [Bureau] lacks statutory authority to control water quality and usage because that authority is vested with the EPA and the states." 80 Fed. Reg. at 16186, 16143 ("The [Bureau] agrees that regulation of groundwater quality is not within the [Bureau's] authority[.]"). Yet, despite these admissions, the Bureau stated that it disagreed with the jurisdictional objections to the rule, arguing that the Federal Land Planning and Management Act (FLPMA) and various mineral leasing statutes gave the agency authority for the rule. *Id*.; *cf. Cal. Coastal Comm'n*, 480 U.S. at 587 ("Land use planning in essence chooses particular uses for the land; environmental

regulation, at its core, does not mandate particular uses of the land but requires only that, however the land is used, damage to the environment is kept within prescribed limits.).

Other commenters informed the Bureau that states and tribes adequately regulated hydraulic fracturing (ECF No. 118 at 10–20) and that regulation by the Bureau would result in duplication of state effort without any measurable environmental benefit. (*Id*. at 20–29); (DOIAR0009170, DOIAR026852–53). The Bureau's own findings confirmed this. The Bureau reported that from FY 2010 to FY 2013, 99.3% of the total number of well completions on federal and Indian land nationwide occurred in nine states, all of which had existing hydraulic fracturing regulations. 80 Fed. Reg. at 16187, 16198. To date, the Bureau has not found any state hydraulic fracturing program to be insufficient or inadequate. (*See* DOIAR0055854–55 (referencing Secretary Jewell's inability during a 2013 Senate hearing to identify any state that had insufficient regulation)).

The Bureau justified the duplication of regulation based on a desire for uniformity while declining to address comments regarding the negligible environmental benefit of the rule. 80 Fed. Reg. at 16154–55, 16178 (citing inconsistency across states as justification for duplication). The Bureau dismissed comments that states and tribes are adequately regulating the practice, instead asserting that because the Secretary had a stewardship obligation on federal and

Indian land, the Bureau must still regulate. *Id*. at 16178.

Other commenters highlighted the lack of evidence showing any connection between hydraulic fracturing and contamination of underground aquifers. (ECF No. 118 at 56–57). The Bureau's internal analysis also supported these comments. (S*ee* DOIAR0037755_026 (Draft environmental assessment stating that "[t]hus far, all reported events of contamination that attribute the cause of a contamination event to well stimulation operations have not been confirmed. Therefore, it is impossible to predict how many contamination events the proposed amendments would prevent….")); (DOIAR0002408 (Internal memo to the Director stating that "[hydraulic fracturing] is a proven process with minimal technical problems. Some issues have occurred in the fracturing of shallow coal bed natural gas reservoirs. Similar problems do not occur in deep oil and gas reservoirs because of their separation from drinking water aquifers.")); (DOIAR0026852–53 (Comment from Bureau senior petroleum engineer stating "[t]he benefit of these new rules at least for our field office will be more information in our well files but with no incremental protection to [underground sources of drinking water] or useable water zones over [the Bureau's] present regulations and policies.")). The Bureau responded to these comments by concluding that the need for the rule was clear, despite the lack of any scientific support for this conclusion. 80 Fed. Reg. at 16180.

B. The Bureau's final hydraulic fracturing rule rests on statutory authority that has never been understood to grant federal jurisdiction over hydraulic fracturing.

On March, 26, 2015, the Bureau finalized its rule to govern hydraulic fracturing on public land. *See* Oil and Gas; Hydraulic Fracturing on Federal and Indian Lands; Final Rule (Fracking Rule). 80 Fed. Reg. 16128 (March 26, 2015). The Fracking Rule creates a significant new permitting regime. *Id*. at 16129–30. It requires operators to obtain prior approval from the Bureau before conducting well stimulation activity. *Id*. In order to obtain Bureau approval, operators must submit detailed information regarding geological, hydrological, and engineering data; perform a successful mechanical integrity test; create a plan to manage recovered fluids in above-ground storage tanks, with limited exceptions; and disclose the chemical makeup of stimulation fluids to the public and the Bureau, among other things. *Id*.

In the Federal Register notice for the Fracking Rule the Bureau did not cite to any statute as legal authority for the agency to regulate the process of hydraulic fracturing. *Id*. at 16217. Because no statute specifically provides the Bureau with legal authority to regulate fracking, the Bureau relied on general rulemaking provisions within several land planning statutes that have never before been understood to grant the federal government power to regulate hydraulic fracturing, including FLPMA, 43 U.S.C. §§ 1701–84, the Mineral Leasing Act of 1920, 30

U.S.C. §§ 181–287, the 1930 Right-of-Way Leasing Act, *id*. at §§ 301–306, the Mineral Leasing for Acquired Lands Act of 1947, *id*. at §§ 351–360, and the Federal Oil and Gas Royalty Management Act of 1982, *id*. at §§ 1701–1757. 80 Fed. Reg. at 16217.

1. The Federal Land Policy and Management Act

In 1976, Congress rewrote public land management law when it enacted FLPMA. At its core, "FLPMA is a planning statute." George Cameron Coggins, *The Developing Law of Land Use Planning on the Federal Lands*, 61 U. Colo. L. Rev. 307, 325 (1990). FLPMA charges the Bureau with managing public land for multiple uses and sustained yield of natural resources, 43 U.S.C. § 1702(c), (h), through routine planning and inventorying of land and uses, *id.* §§ 1711–12. The "main thrust" of FLPMA is to ensure that management actions conform to management plans. Coggins, 61 U. Colo. L. Rev. at 324.

Congress declared thirteen policies in FLPMA, which expand upon the "deceptively simple" multiple use mandate. 43 U.S.C. § 1701(a); *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 58 (2004). Those policies include "recogn[ition] of the Nation's need for domestic sources of minerals, food, timber, and fiber," as well as the protection of "scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values[.]" 43 U.S.C. §§ 1701(a)(8), (12), 1702(c). In these declarations of policy, Congress intended to

convey to the Bureau "that its purpose was to aid in the management, disposal, and maintenance of federal public land**s** in the nations [*sic*] best interest." *Carden v. Kelly*, 175 F. Supp. 2d 1318, 1325 (D. Wyo. 2001). In pursuit of this general purpose, Congress authorized the Bureau to "prevent unnecessary or undue degradation of the lands" and to promulgate regulations necessary to achieve FLPMA's goals. 43 U.S.C. §§ 1732(b), 1733(a), 1740. Nowhere does FLPMA mention underground injection or hydraulic fracturing. *Id*. §§ 1701–84.

2. The federal mineral leasing acts

The Mineral Leasing Act creates "a program to lease mineral deposits for private mining and marketing while preserving federal ownership of lands." *Natural Res. Def. Council, Inc. v. Berklund*, 609 F.2d 553, 555 (D.C. Cir. 1979) (per curiam). It establishes terms for leasing oil and gas minerals on public land, 30 U.S.C. § 226(d), (e), and prohibits leasing of wilderness land, *id.* § 226-3. It authorizes the Secretary of Interior to lease all other public land for oil and gas development, *id.* § 223, 226(a), regulate surface-disturbing activities, *id.* § 226(g), and establish cooperative development plans to conserve oil and gas resources, *id.* § 226(m). To meet these objectives, Congress granted the Secretary the power to "prescribe necessary and proper rules and regulations and to do any and all things necessary to carry out and accomplish the purposes of this [Act]." 30 U.S.C. § 189.

In the Right-of-Way Leasing Act, Congress expanded the Secretary's leasing

authority to allow leasing of federally owned minerals beneath railroads and other rights of way. 30 U.S.C. § 301; *see also Wyoming v. Udall*, 255 F. Supp. 481, 485 (D. Wyo. 1966). The Act establishes bidding and lease terms, as well as minimum royalty rates. 30 U.S.C. § 303–305. Slightly different from the Mineral Leasing Act, however, the Right-of-Way Leasing Act grants the Secretary of the Interior the authority to "adopt rules and regulations governing the exercise of the discretion and authority conferred by" the Act. *Id.* § 306.

Similarly, the Mineral Leasing for Acquired Lands Act of 1947 expanded the provisions of the Mineral Leasing Act, including the Secretary's leasing authority, to apply to minerals beneath land coming into federal ownership and not already subject to the Mineral Leasing Act. 30 U.S.C. §§ 351–352. And, like the Mineral Leasing Act, the Mineral Leasing for Acquired Lands Act authorized the Secretary "to prescribe such rules and regulations as are necessary and appropriate to carry out the purposes" of the Act. *Id.* § 359.

Lastly, the Bureau relied on the Federal Oil and Gas Royalty Management Act of 1982 for authority to regulate hydraulic fracturing. 30 U.S.C. § 1751. The Federal Oil and Gas Royalty Management Act of 1982 did not bring new land under the Secretary's leasing authority, but instead created a thorough system for collecting federal mineral royalties. 30 U.S.C. § 1711. The Federal Oil and Gas Royalty Management Act provides for annual lease site inspections, auditing of lease

accounts, lessee liability for royalty payments, security plans to prevent theft of oil and gas, and civil and criminal penalties for noncompliance. *Id.* §§ 1711–20. To carry out these objectives, Congress authorized the Secretary to "prescribe such rules and regulations as he deems reasonably necessary[.]" *Id.* § 1751.

Again, none of these statutes mentions hydraulic fracturing, let alone grants the Bureau the authority to create an expansive program for the protection of groundwater.

IV. The States' petition to review the rule to prevent the Bureau's unlawful exercise of regulatory power.

On March 26, 2015, Wyoming petitioned this court to review the Fracking Rule. (Case 2:15-CV-00043, ECF No. 1).[8] On April 22, 2015, the Court granted North Dakota's motion to intervene and, with Wyoming's amended petition, added the State of Colorado as a petitioner. (ECF Nos. 6, 26, 28, 29). Wyoming and Colorado jointly filed a motion for preliminary injunction followed by a similar motion from North Dakota. (ECF No. 32, 52).

Utah entered the suit as a Petitioner-Intervenor and joined the States' motions

[8] Industry groups the Independent Petroleum Association of America and the Western Energy Alliance filed a separate petition for review on March 20, 2015. (Case 2:15-CV-00041, ECF No. 1). On June 4, 2015, this court granted the parties' joint motion to consolidate the two cases. (Case 2:15-CV-00043, ECF No. 44). All references in this brief to docket entries will be to 2:15-CV-00043 unless otherwise noted.

for preliminary injunction. (ECF No. 59, 65). The Ute Indian Tribe of the Uintah and Ouray Reservation also intervened in the suit (ECF No. 91) and requested a temporary restraining order and preliminary injunction of the Fracking Rule. (ECF No. 89).

This court conducted a hearing on all motions for preliminary injunction and temporary restraining order on June 23, 2015, just before the Fracking Rule was set to take effect. (ECF No. 96). At the conclusion of the day-long hearing, this court stayed the effective date of the Fracking Rule pending lodging of the administrative record and supplemental citations to that record in support of the parties' positions. (*Id*.). After multiple extensions of time, the Federal Respondents lodged the initial administrative record on August 27, 2015. (ECF No. 113). All parties then submitted supplemental citations to the record in support of their briefs on September 18, 2015. (ECF Nos. 118–27, 129).

On September 30, 2015, this court granted petitioners' various motions for preliminary injunction. (ECF No. 130). After several months of dispute over the sufficiency of the administrative record, the Federal Respondents lodged a corrected administrative record on January 19, 2016. (ECF No. 184).

ARGUMENT

I. Congress has not given the Bureau authority to regulate hydraulic fracturing.

To justify its Fracking Rule, the Bureau cites a string of statutes, including FLPMA, the Mineral Leasing Act of 1920, the 1930 Right-of-Way Leasing Act, the Mineral Leasing for Acquired Lands Act of 1947, and the Federal Oil and Gas Royalty Management Act of 1982, as well as various Indian mineral statutes. 80 Fed. Reg. at 16217. None of these statutes authorize the Bureau to regulate hydraulic fracturing. Instead, the authority rests with the states and the EPA under the Safe Drinking Water Act and the 2005 Energy Policy Act.

A. Standard of review

Under the applicable Administrative Procedure Act standard of review, this Court must set aside an agency's rule if it finds the rule is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. § 706(2)(A), or if the rule is "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." *Id*. § 706(2)(C). While an agency's decision to promulgate a rule is "entitled to a presumption of regularity,... 'that presumption is not to shield [the agency's] action from a thorough, probing, in-depth review.'" *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1574 (10th Cir. 1994) (quoting *Citizens to Pres. Overton Park v. Volpe*, 401 U.S. 402, 415 (1971)).

"[T]he essential function of judicial review is a determination of (1) whether

the agency acted within the scope of its authority, (2) whether the agency complied with prescribed procedures, and (3) whether the action is otherwise arbitrary, capricious or an abuse of discretion." *Id*.

Before a court begins its analysis of agency rulemaking, it must look at the statutory rulemaking provisions to determine "whether Congress has delegated to an agency the authority to provide an interpretation that carries the force of law[.]" *City of Arlington, Tex. v. FCC*, --- U.S. ---, 133 S. Ct. 1863, 1876 (2013) (Breyer, J., concurring); *see also* 5 U.S.C. § 706 (requiring the court to "decide all relevant questions of law" when reviewing agency action). "An agency literally has no power to act ... unless and until Congress confers power upon it." *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986); *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649 (1990) ("A precondition to deference under Chevron is a congressional delegation of administrative authority"). Ultimately, "[d]etermination of whether the agency acted within the scope of its authority requires a delineation of the scope of the agency's authority and discretion, and consideration of whether on the facts, the agency's action can reasonably be said to be within that range." *Olenhouse*, 42 F.3d at 1574.

When a court reviews an agency's construction of a statute it administers, the specificity of the statute shapes the court's inquiry. *Pub. Lands Council v. Babbitt*, 167 F.3d 1287, 1293 (10th Cir. 1999) (citing *Chevron, U.S.A., Inc. v. Natural Res.*

Def. Council, Inc., 467 U.S. 837, 842–43 (1984)). First, the court must ask whether Congress has directly spoken to the precise question at issue. *Id.* "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.*

However, if Congress has not directly addressed the precise question at issue, the court asks "whether the agency's answer is based on a permissible construction of the statute." *Id*. This test is frequently referred to as the *Chevron* two-step analysis. *E.g.*, *Lamb v. Thompson*, 265 F.3d 1038, 1050 (10th Cir. 2001).

Even under *Chevron*, "agencies must operate 'within the bounds of reasonable interpretation.'" *Util. Air Regulatory Grp. v. EPA*, --- U.S. ---, 134 S. Ct. 2427, 2442 (2014) (quoting *Arlington*, --- U.S. ---, 133 S. Ct. at 1868). "When an agency claims to discover in a long-extant statute an unheralded power to regulate a significant portion of the American economy, [the Court] typically greet[s] its announcement with a measure of skepticism." *Id*. at 2444 (internal citations and quotations omitted). Congress generally "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions" nor does it "hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001).

"Although agency determinations within the scope of delegated authority are entitled to deference, it is fundamental 'that an agency may not bootstrap itself into an area in which it has no jurisdiction.'" *Adams Fruit Co.*, 494 U.S. at 650 (quoting

Fed. Mar. Comm'n v. Seatrain Lines, Inc., 411 U.S. 726, 745 (1973)). "Regardless of how serious the problem an administrative agency seeks to address,... it may not exercise its authority 'in a manner that is inconsistent with the administrative structure that Congress enacted into law.'" *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125 (2000) (quoting *ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 517 (1988)).

B. The Safe Drinking Water Act is the only source of federal authority to regulate underground sources of drinking water.

The Bureau does not have statutory authority to regulate hydraulic fracturing because the only federal statute on point delegates that power to the EPA and the states. 42 U.S.C. §§ 300h to 300h-8. When Congress created the Safe Drinking Water Act and the UIC program, it created a comprehensive scheme to protect groundwater from contamination through the regulation of all underground injection of contaminants. *Id*.

For two reasons, the plain language of the UIC program clearly demonstrates Congress's intent to create an all-encompassing program for the regulation of underground injections.

First, for a state to obtain authority to implement its own UIC program, it must prohibit "any underground injection" that is not authorized by permit or rule. *Id.* § 300h(b)(1)(A). This subsection effectively mandates that states with program authorization have a hand in crafting the requirements of every underground

injection within the jurisdiction, whether it be through rulemaking, for more commonplace or low hazard injections, or through the more exacting requirements of the permitting process. *Id*.

Second, regardless of the method with which the state chooses to regulate the injection, the state must ensure that the injections it authorizes "will not endanger drinking water sources." *Id*. § 300h(b)(1)(B). Both of these subsections place the responsibility for ensuring the safety of drinking water sources on the states. Furthermore, nothing in these subsections indicate that the states' permitting of underground injection wells on public land is subject to redundant regulation by the Bureau or any agency other than the EPA.

In fact, the statute indicates that the inverse is true. Under the UIC program, states with authorization are required to apply their program regulations to federal agencies performing any underground injections. *Id*. at § 300h(b)(1)(D). This includes granting states the authority to penalize any federal agency up to $25,000 per day per violation of the state's UIC program. *Id*. § 300j-6(b). This demonstrates that no one, not even the federal government, is immune from the requirement that **all** underground injections be regulated through the UIC program.

Further, the statute requires state programs to regulate "underground injections by any other person whether or not occurring on property owned or leased by the United States." *Id*. § 300h(b)(1)(D). Looking at the plain meaning of this

phrase, it is clear that Congress intended states and the EPA to regulate all underground injections, regardless of whether the injection activity occurred on public property. Throughout these provisions, it is plain that Congress created the program to be the exclusive answer to the concerns surrounding underground injection.

The only case on point holds that hydraulic fracturing is within the purview of the Safe Drinking Water Act and the UIC program. *LEAF I*, 118 F.3d at 1474–75. In analyzing claims made by the Foundation that EPA improperly approved Alabama's UIC program without regulations in place for hydraulic fracturing, the court concluded that the unambiguous plain language of the Safe Drinking Water Act required the EPA and the states to regulate all underground injection activity, including hydraulic fracturing. *Id*. at 1474–75, 78.

While this should end the inquiry, it is important to note that the legislative history of the Safe Drinking Water Act also shows that the UIC program was meant to be an all-inclusive approach to the injection of underground contaminants. For example, Congress recognized that not only are municipalities, industry actors, and government agencies injecting waste product into the ground, but "[e]nergy production companies are using injection techniques to increase production and to dispose of unwanted brines brought to the surface during production." H.R. Rep. No. 93-1185 at 29, 1974 U.S.C.C.A.N. at 6481. Congress concluded that "[the UIC

program] is intended to deal with **all** of the foregoing situations insofar as they may endanger underground drinking water resources." *Id*. (emphasis added). It is clear from the legislative history that Congress intended to regulate all underground injections through the UIC program, including those that increase production of oil and gas resources such as hydraulic fracturing.

The plain language and legislative history surrounding the Safe Drinking Water Act demonstrate that the UIC program is meant to comprehensively address all underground injections in the country. Because the EPA and the states administer the UIC program, the Bureau is without statutory authority to regulate the underground injection activity of hydraulic fracturing.

C. The Energy Policy Act of 2005 conclusively removed hydraulic fracturing from federal oversight.

With the passage of the Energy Policy Act, Congress removed the federal government from the realm of fracking, leaving the matter to the states to regulate. *See* 151 Cong. Rec. H2192-02, H2194-95 (daily ed. Apr. 20, 2005) (statements of Rep. Markey); *see also* 151 Cong. Rec. S9335-01, S9337 (daily ed. July 29, 2005) (statement of Sen. Feingold).

Congress enacted the Energy Policy act to "ensure jobs for our future with secure, affordable, and reliable energy." Pub. L. No. 109-58; *see also* 151 Cong. Rec. H2192-02, H2226 (daily ed. Apr. 20, 2005). One of the many ways in which Congress set out to achieve this objective was by removing federal oversight of

hydraulic fracturing; a burgeoning oil and gas recovery technique that EPA had recently concluded "pose[d] little or no threat to [underground sources of drinking water] and does not justify additional study at this time." 2004 EPA study at ES-1. Thus, Congress amended the definition of "underground injection" to exclude "the underground injection of fluids or propping agents (other than diesel fuels) pursuant to hydraulic fracturing operations related to oil, gas, or geothermal production activities." 42 U.S.C. § 300h(b)(2)(B).

This language served multiple purposes. First, it acted as a legislative override of the decisions in the *LEAF* cases, which were finally concluded in 2002. *LEAF I*, 118 F.3d at 1467; *LEAF II*, 276 F.3d at 1253. Second, it served to protect the agreements made by EPA with the companies that used diesel fuel in fracking fluids. *See* Yacobucci, Cong. Research Serv., RL 32873 at 5. Finally, it sought to remove the remaining authority to regulate hydraulic fracturing from the federal purview, thereby leaving it to the states.

Thus, Congress has weighed in on the issue of whether the federal government or the states should regulate hydraulic fracturing and has sided with the states. "When Congress has expressed its view of the proper balance between conflicting statutory policies, it is incumbent upon the courts to give effect to that view." *O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973, 1025 (10th Cir. 2004) (Seymour, J., concurring). When Congress passed the Energy

Policy Act, it determined that the public interest was best served by preventing federal regulation of hydraulic fracturing with one minor exception. *See* Pub. L. No. 109-58, § 322, 119 Stat. 594 (2005) (codified at 42 U.S.C. § 300h(d)(2)(B)) (leaving the regulation of hydraulic fracturing using diesel fuel to the EPA); *see U.S. v. Wilson*, 503 U.S. 329, 336 (1992) (explaining that the presumption is that "Congress contemplates a change whenever it amends a statute."). Because Congress explicitly removed the only source of specific authority on the subject, it defies common sense for the Bureau to argue that Congress intended to allow it to regulate the same activity under a general statute that says nothing about hydraulic fracturing. *State Bank of S. Utah v. Gledhill (In re Gledhill)*, 76 F.3d 1070, 1078 (10th Cir. 1996) ("a court should not construe a general statute to eviscerate a statute of specific effect").

Despite the removal of almost all federal authority to regulate hydraulic fracturing, the Bureau persists in its rulemaking efforts. Indeed, comments made by the EPA itself during the rulemaking process demonstrate that the Fracking Rule is an attempt to resurrect EPA's pre-Energy Policy Act authority. The EPA commented that the Bureau's method for ensuring well integrity for each well is "consistent with the EPA regulatory approach for permitting Class II injection wells." (DOIAR0103278_0003). The EPA continued, commenting that the Bureau's requirements for remedial action in response to inadequate cementing or excess pressure during operation are "similar to the well integrity and corrective action

requirements under the EPA regulations." (*Id*.). The EPA also praised the Bureau for "[t]he requirement for operators to obtain [Bureau] approval for all hydraulic fracturing operations through the submittal of detailed geologic, engineering, and planning information, which is similar to EPA permit application requirements for Class II injection wells." (DOIAR0103278_0002). Finally, the EPA compared the requirements for isolating usable water zones, cementing holes, and mechanical integrity tests to "the protective requirements the EPA regulations specify for injection wells under [the Safe Drinking Water Act]." (DOIAR0103278_0002–03).

These comments show that the Bureau is attempting to regulate hydraulic fracturing as Class II underground injection wells, which is what the EPA would have done absent the Energy Policy Act. Allowing this interpretation to stand would effectively create an end-run around the Energy Policy Act amendment by allowing enactment of the same federal regulations Congress sought to leave to the states.

The Bureau also argues that if the Energy Policy Act is interpreted to preclude all federal regulation of hydraulic fracturing this "would leave a regulatory gap on federal lands and Indian lands where the relevant States or Tribes are not sufficiently regulating hydraulic fracturing[.]" (ECF No. 68 at 20). However, the Bureau has not, as part of this rulemaking or otherwise, made a determination that any state or tribal program is insufficient in its regulation of the practice of hydraulic fracturing. (*See* DOIAR0055854–55 (referencing Secretary Jewell's inability during a 2013 Senate

hearing to identify any state that has insufficient regulation)). In fact, Secretary Jewell has recognized that Wyoming's program is "sophisticated in its oversight of hydraulic fracturing" and is "a good example of a State that's doing an effective job."[9]

Regardless, "no matter how 'important, conspicuous, and controversial' the issue,... an administrative agency's power to regulate in the public interest must always be grounded in a valid grant of authority from Congress." *Brown & Williamson Tobacco*, 529 U.S. at 161. Thus, absent authority from Congress to regulate hydraulic fracturing, the Bureau may not regulate to fill a purported regulatory gap.

Unlike federal agencies, states do not need express grants of authority from Congress to carry out their own independent regulation of the environment. Absent preemption by Congress, the states are free to regulate, under their inherent police power, for the protection of the public welfare including environmental regulation. *See Berman*, 348 U.S. at 32; *Bulova Watch Co.*, 371 P.2d at 417. Indeed, many states have regulated the practice of hydraulic fracturing; 99.3% of hydraulically fractured wells on federal land are covered by state regulation. (*E.g.*, DOIAR0070200–01); 80

[9] *Review Programs and Activities of the Department of the Interior: Hearing Before the U.S. Senate Comm. on Energy and Natural Resources*, 113th Cong. 22 (2013) (statement of the Honorable Sally Jewell, Secretary of the Interior) available at: http://www.energy.senate.gov/public/index.cfm/hearings-and-business-meetings?ID=32bf7170-3281-40c6-8900-801b9c54f18a.

Fed. Reg. at 16187, 16198.

Because the Energy Policy Act of 2005 removed federal authority to regulate non-diesel hydraulic fracturing under the Safe Drinking Water Act, states and tribes are the only entities with authority to regulate the practice. For the above reasons, the Bureau is without statutory authority to promulgate the Fracking Rule. Therefore, this Court should set aside the Fracking Rule in its entirety.

D. FLPMA is a land management statute; it is not an environmental protection statute.

The Bureau's attempt to justify the Fracking Rule through FLPMA is an overreach. 80 Fed. Reg. at 16217. FLPMA is not a blank check. The defined scope and purpose of FLPMA limits the Bureau's authority under the statute. *See Olenhouse*, 42 F.3d at 1574. FLPMA charges the Bureau with managing the public land for multiple use and sustained yield of natural resources through routine planning and inventorying of land and uses. 43 U.S.C. §§ 1702(c), (h), 1711 to 1712. In pursuit of this general land management purpose, Congress authorized the Bureau to "prevent unnecessary or undue degradation of the lands" and to promulgate regulations necessary to achieve FLPMA's goals. 43 U.S.C. §§ 1732(b), 1733(a), 1740. Nothing in FLPMA or case law interpreting it provides the Bureau with authority to regulate hydraulic fracturing or underground injections of any kind. In fact, for three reasons, FLPMA points in precisely the opposite direction.

First, section 1712(c)(8) of FLPMA requires the Bureau to "provide for

compliance with applicable pollution control laws, including State and Federal air, water, noise, or other pollution standards and implementation plans" when creating management plans under FLPMA. *Id*. Given its plain meaning, this provision requires the Bureau to acknowledge pollution control regulations created by the EPA and the states, then ensure that the Bureau's land management plans comply with these laws. *Id*. When drafting this section of FLPMA, Congress clearly understood that other entities—including states—are charged with regulating potential sources of pollution. *See id*.; *Cal. Coastal Comm'n*, 480 U.S. at 587 ("Congress has also illustrated its understanding of land use planning and environmental regulation as distinct activities by delegating the authority to regulate these activities to different agencies."). Thus, Congress instructed the Bureau to follow the applicable state and federal pollution laws, rather than giving it the authority to create its own. 43 U.S.C. § 1712(c)(8). In the current case, this congressional mandate requires the Bureau to comply with EPA's diesel fuel guidance as well as states' general hydraulic fracturing regulations when creating its land management plans, rather than promulgating its own regulatory regime.

Second, the fact that the Safe Drinking Water Act was enacted two years **before** FLPMA further belies the argument that FLPMA somehow grants the Bureau the authority to regulate underground injection of hydraulic fracturing fluids. *Compare* Pub. L. No. 93-523, 88 Stat. 1660 (1974), *with* Pub. L. No. 94-579, 90

Stat. 2743 (1976). Through the passage of the Safe Drinking Water Act, and more specifically the UIC program, Congress intended to regulate all underground injection of contaminants, including hydraulic fracturing. *LEAF I*, 118 F.3d at 1474 ("it is clear that Congress dictated that **all** underground injection be regulated under the UIC programs") (citing 42 U.S.C. § 300h(b)(1)(A) (emphasis in original). In addition, Congress did not intend for any provision in FLPMA to implicitly repeal any existing statutes. Pub. L. No. 94-579, § 701, 90 Stat. 2786–87 (1976) (uncodified). Thus, FLPMA did not repeal any of the authority created two years before under the Safe Drinking Water Act. *Id*.

Third, FLPMA also may not be construed "as affecting in any way any law governing ... use of ... water on public lands" or be read "as superseding, modifying, or repealing ... existing laws applicable to the various Federal agencies which are authorized to develop or participate in the development of water resources or to exercise licensing or regulatory functions in relation thereto." *Id*. Likewise, it cannot be interpreted "as expanding or diminishing Federal **or State** jurisdiction, responsibility, interests, or rights in water resources development or control." *Id.* (emphasis added). Thus, the unambiguous language of FLPMA shows that it does not vest the Bureau with authority to regulate fracking.

It is difficult to imagine a situation where Congress, a mere two years after enacting specific environmental statutes governing underground injections, would

return to the table and grant a wholly separate agency identical powers through vague and unspecific language. Indeed, the specific language in the Safe Drinking Water Act regarding the regulation of underground injections demonstrates that Congress knew what language to use should it have desired to give another agency the same powers. *See* 42 U.S.C. §§ 300h to 300h-8. The mere two-year time difference between the statutes, coupled with the lack of specific language in FLPMA aimed at underground injections, shows that Congress did not intend to give the Bureau any authority over underground injections or hydraulic fracturing. The specific language in the Safe Drinking Water Act that created the UIC program controls over any general notions contained in FLPMA. *See e.g.*, *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384–85 (1992) (explaining that the specific governs over the general in the statutory construction context).

Case law supports this reading of FLPMA. The Supreme Court has directly acknowledged the difference between the Bureau's land planning statutes and environmental regulations such as the Safe Drinking Water Act. *Cal. Coastal Comm'n*, 480 U.S. at 587–88.

In *California Coastal Commission*, the Granite Rock Company exercised its right under the Mining Act of 1872 to stake a claim to valuable mineral deposits underlying federally owned land in the Los Padres National Forest in California. *Id.* at 575-76. Granite Rock prepared a 5-year mining plan and submitted it to the Forest

Service, which made modifications to the plan before ultimately approving the mining operation. *Id*.

According to the California Coastal Commission (Commission), the California Coastal Act required Granite Rock to also secure a state permit from it to mine within the State's coastal zone. *Id*. Granite Rock sued the Commission, arguing that its permit was pre-empted by the Forest Service regulations and the Mining Act of 1872. *Id*. at 577. The district court dismissed the suit. *Id*. The Ninth Circuit Court of Appeals reversed, holding that the Commission's permit requirement was pre-empted by both the Mining Act of 1872 and the Forest Service regulations. *Id*.

The Supreme Court took jurisdiction and reversed. In addressing Granite Rock's claims of pre-emption, the Court contrasted land management statutes like FLPMA and the National Forest Management Act with environmental regulations imposed by the Commission. *Id*. at 585–86. The Court opined that

> [T]he line between environmental regulation and land use planning will not always be bright . . . . However, the core activity described by each phrase is undoubtedly different. Land use planning in essence chooses particular uses for the land; environmental regulation, at its core, does not mandate particular uses of the land but requires only that, however the land is used, damage to the environment is kept within prescribed limits.

Id. at 587. The Court explained that Congress understands land use planning and environmental protection to be two distinct activities. *Id*. For example, FLPMA requires that federal "land use plans be consistent with state [land use] plans only 'to

the extent [the Secretary] finds practical.'" *Id*. (citing to 43 U.S.C. § 1712(c)(9)). By contrast, FLPMA requires that federal land use plans must "provide for compliance with applicable pollution control laws, including State and Federal air, water, noise, or other pollution standards or implementation plans." *Id*. (citing to 43 U.S.C. § 1712(c)(8)). Thus, when Congress granted the Bureau wide discretion to create land use plans, it was not also giving the Bureau the authority to create out of whole cloth a new environmental program to regulate hydraulic fracturing.

While the current case does not deal with issues of pre-emption, *California Coastal Commission* illustrates the States' point here. The Bureau's Fracking Rule is nothing more than an attempt at environmental regulation (the protection of underground aquifers from contamination) by a land management agency, all the while citing only to land use planning statutes as authority for the rule.

Because FLPMA does not provide the Bureau with the statutory authority necessary to regulate underground injections on public land, the Bureau's rule is in excess of its statutory authority and not in accordance with the law.

E. The federal mineral leasing statutes govern leasing, not the protection of underground sources of drinking water.

As with its reliance on FLPMA, the Bureau's reliance on the various mineral leasing statutes as justification for its rule is misplaced. 80 Fed. Reg. at 16217.

1. The Mineral Leasing Act

In citing the Mineral Leasing Act to support its Fracking Rule, the Bureau

asserts general authority to "prescribe necessary and proper rules and regulations and to do any and all things necessary to carry out and accomplish the purposes of [the Mineral Leasing Act]." 30 U.S.C. § 189. However, the Mineral Leasing Act merely creates a program for leasing mineral deposits on public land for private mining. *Natural Res. Def. Council, Inc.*, 609 F.2d at 555. "The purpose of the [Mineral Leasing] Act is to promote the orderly development of oil and gas deposits in publicly owned lands of the United States through private enterprise." *Geosearch, Inc. v. Andrus*, 508 F. Supp. 839, 842 (D. Wyo. 1981) (citing *Harvey v. Udall*, 384 F.2d 883 (10th Cir. 1967)). The authority to regulate hydraulic fracturing does not flow from the authority to lease and develop public property.

As part of the orderly development of the nation's resources, the Mineral Leasing Act makes all leases on federal land explicitly conditioned upon the lessee's use of "all reasonable precautions to prevent waste of oil or gas developed in the land, or the entrance of water through wells drilled by him to the oil sands or oil-bearing strata, to the destruction or injury of the oil deposits." 30 U.S.C. § 225. This language squares with the general sentiment during the early 1900s (when Congress enacted the Mineral Leasing Act) that underground water posed a threat to the oil and gas resources of the country. (DOIAR0001663). "Early casing and cementing programs of oil and gas wells were practical measures to prevent waters from adjacent non-productive formations and upper aquifers from flooding the oil-

producing reservoir during drilling and subsequent production activities." (*Id*.). "In these early years the principal focus was on protection of the petroleum resource from the effects of water incursion and not on protection of water resources themselves." (*Id*.).

The Mineral Leasing Act unambiguously directs the Bureau to protect oil and gas resources from the intrusion of water. Courts "'must presume that [the] legislature says in a statute what it means and means in a statute what it says there.'" *Dodd v. United States*, 545 U.S. 353, 357 (2005) (quoting *Conn. Nat'l. Bank v. Germain*, 503 U.S. 249, 253–254, (1992)). The Bureau cannot suddenly invert this straightforward statement of law, nearly 100 years after Congress enacted it, to now require the Bureau to protect underground sources of water from oil and gas activities.

Furthermore, the Mineral Leasing Act states that "[n]othing in this chapter shall be construed or held to affect the rights of the States or other local authority to exercise any rights which they may have[.]" 30 U.S.C. § 189. This constraint on the reach of the Mineral Leasing Act is "likewise a limitation on the Secretary of the Interior as to his regulation making authority set out in [Section 189]." *Tex. Oil & Gas Corp. v. Phillips Petroleum Co.*, 277 F. Supp. 366, 370 (C.D. Okla. 1966), *aff'd* 406 F.2d 1303 (10th Cir. 1969). As explained above, through the Energy Policy Act, Congress removed federal oversight of hydraulic fracturing, leaving the right to

regulate fracking in the capable hands of the states. For this reason, the Mineral Leasing Act prohibits the Bureau's Fracking Rule, rather than authorizes it.

2. The Right-of-Way Leasing Act

The Bureau's claim that the Right-of-Way Leasing Act authorizes the Fracking Rule is similarly spurious. The Right-of-Way Leasing Act grants to the Department of the Interior the authority to "adopt rules and regulations governing the exercise of the discretion and authority conferred by" the Act. 30 U.S.C. § 306. Congress enacted the Right-of-Way Leasing Act to expand the Secretary of the Interior's ability to lease federal land for mineral development by authorizing leasing of minerals beneath railroads and other federal rights-of-way. 30 U.S.C. § 301; *see also Udall*, 255 F. Supp. at 485. General authority to make rules relating to terms of leases on federal rights-of-way does not translate to the ability to create a comprehensive regulatory scheme for all hydraulic fracturing on federal land, especially when Congress has deliberately left that duty to the states. *See* Pub. L. No. 109-58, § 322, 119 Stat. 594 (2005) (codified at 42 U.S.C. § 300h(d)(2)(B)).

3. The Mineral Leasing for Acquired Lands Act.

Nor is the Bureau able to find authority for its rule in the Mineral Leasing for Acquired Lands Act of 1947. Congress granted to the Bureau the authority to "prescribe such rules and regulations as are necessary and appropriate to carry out the purposes" of the Mineral Leasing for Acquired Lands Act of 1947. 30 U.S.C. §§

351–352. However, Congress enacted the Mineral Leasing for Acquired Lands Act to amend and expand the Bureau's authority to lease public land for mineral development, not to grant the Bureau the authority to craft a framework for regulating hydraulic fracturing or underground injections. *Id*. §§ 351–360. The Bureau cannot rely on the Mineral Leasing for Acquired Lands Act as justification for the Fracking Rule.

4. The Federal Oil and Gas Royalty Management Act.

The Bureau also attempts to justify its Fracking Rule under the Federal Oil and Gas Royalty Management Act of 1982. 30 U.S.C. § 1751. In enacting the Federal Oil and Gas Royalty Management Act, Congress again granted general rulemaking authority to the Secretary. *Id*. ("The Secretary shall prescribe such rules and regulations as he deems reasonably necessary to carry out this chapter."). Rather than create authority for the Bureau to regulate hydraulic fracturing, however, the Federal Oil and Gas Royalty Management Act provides for financial audits of lease accounts, lessee liability for royalty payments, security plans to prevent theft of oil and gas, annual lease site inspections, and civil and criminal penalties for noncompliance. *Id.* §§ 1711–20. Similar to other provisions the Bureau claims as authority for its Fracking Rule, such general rulemaking authority to create royalty collection systems cannot justify broad regulation of hydraulic fracturing.

* * *

Even considering the sum of its parts, the Bureau's argument to regulate hydraulic fracturing through its suite of mineral leasing statutes falls short. Taken together with the Indian mineral leasing statutes, the various mineral leasing statutes cited by the Bureau as justification for the rule are just what their titles denote; mineral leasing statutes that provide for the orderly production of the nation's oil and gas resources. Invoking all of the mineral leasing statutes at once does not transform their purpose from property management into environmental protection.

When an agency puts forth rulemaking such as the Fracking Rule, it "must operate within the bounds of reasonable interpretation." *Michigan v. EPA*, --- U.S. ---, 135 S. Ct. 2699, 2707 (2015). The Bureau's justification for its rulemaking is akin to "discover[ing] in a long-extant statute an unheralded power to regulate a significant portion of the American economy," and as such, should be met with a heavy dose of skepticism. *Util. Air Regulatory Grp.*, 134 S. Ct. at 2444. After all, Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions." *Whitman*, 531 U.S. at 468.

Because none of the mineral leasing statutes provide authority to regulate for the protection of groundwater, the Bureau is without statutory authority to promulgate the Fracking Rule.

II. The Bureau's justification for the rule invents a regulatory problem that does not exist.

A. Standard of review

Under the APA, a court must set aside an agency rule if the rule is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). When conducting this inquiry, the court should review the preamble and the administrative record to "ascertain whether the agency examined the relevant data and articulated a rational connection between the facts found and the decision made." *Olenhouse*, 42 F.3d at 1574 (internal footnote omitted). Agency action shall be set aside

> if the agency relied on factors which Congress has not intended for it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Id. (quoting *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). "Because the arbitrary and capricious standard focuses on the rationality of an agency's decisionmaking process rather than on the rationality of the actual decision, '[i]t is well-established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself.'" *Id.* at 1575 (quoting *State Farm*, 463 U.S. at 50). "Thus, the grounds upon which the agency acted must be clearly disclosed in, and sustained by, the record." *Colo. Wild, Heartwood v. U.S. Forest Serv.*, 435 F.3d 1204, 1213 (10th Cir. 2006). "After-the-

fact rationalization by counsel in briefs or arguments will not cure noncompliance by the agency with these principles." *Id*.

B. The preamble to the Fracking Rule fails to make a rational connection between the facts on the ground and the final rule.

In the Federal Register notice for the Fracking Rule, the Bureau tried to justify the rule on several factual foundations, but none of these stand up to scrutiny. 80 Fed. Reg. at 16128, 16193.

First, the Bureau claimed that, despite the long history of hydraulic fracturing, the increased complexity associated with horizontal drilling warrants the Fracking Rule. 80 Fed. Reg. at 16128. Other than a brief reference to increased volumes and pressures associated with deeper horizontal wells, *id*. at 16188, the Bureau did not elaborate how these wells are more complex than previously fracked wells, let alone how that presumed increase in complexity leads to some new harm that is not addressed through existing regulations. Here, the Bureau did not justify the need for the rule, let alone provide a rational justification for it.

Second, the Bureau raised the specter of groundwater contamination as a main justification for the rule. *Id*. at 16128–29. However, the overwhelming evidence in the administrative record shows no correlation between fracking and contamination of underground aquifers. (ECF No. 118 at 56–57). The Bureau's own draft environmental assessment acknowledges that "[t]hus far, all reported events of contamination that attribute the cause of a contamination event to well stimulation

operations have not been confirmed. Therefore, it is impossible to predict how many contamination events the proposed amendments would prevent[.]" (DOIAR0037755_026). Furthermore, the record contains internal memoranda to the Director stating that "[hydraulic fracturing] is a proven process with minimal technical problems. Some issues have occurred in the fracturing of shallow coal bed natural gas reservoirs. Similar problems do not occur in deep oil and gas reservoirs because of their separation from drinking water aquifers." (DOIAR0002408).

The Bureau also had before it comments from a senior petroleum engineer in the Bureau's Vernal, Utah field office written at the request of the Lead Petroleum Engineer in the Bureau's Washington office. (DOIAR0026852). In his comments, the engineer indicates that the rule would have a **major impact** on oil and gas operators while providing **no benefit** to underground aquifers. (*Id*.). He also explains that there has been no confirmed evidence of groundwater contamination linked to oil and gas wells in his area due to "the geology with good confining units and … the management practices that have been used over the past 40 years." (*Id*.). The Bureau engineer concludes that "[t]he benefit of these new rules at least for our field office will be more information in our well files but with no incremental protection to [underground sources of drinking water] or useable water zones over [the Bureau's] present regulations and policies." (DOIAR0026852–53).

These documents illustrating the paucity of evidence showing environmental

harm, coupled with the Bureau's inability to cite a single confirmed case of groundwater contamination as a result of hydraulic fracturing, demonstrate that the prevention of groundwater contamination cannot be rationally justified as a basis for the rule. Accordingly, the Bureau's conclusion that it must enact the rule to combat environmental contamination runs counter to the evidence that was before the agency.

Lastly, the Bureau justified the Fracking Rule on the grounds that it will combat contamination of water through the prevention of "frack hits" or "unplanned surges of pressurized fluids from one wellbore into another wellbore." 80 Fed. Reg. at 16193. However, the Bureau readily admitted that "[f]rack hits have resulted in surface spills ... and have caused the loss of recoverable oil and gas, but they have not yet been shown to be a source of contamination of usable water." *Id*. Given that the record does not show frack hits cause contamination of usable water, the rule lacks a rational connection between the desire to prevent frack hits and the goal of protecting the environment. Again, the Bureau's justification here runs counter to the evidence presented to the agency.

These three justifications for the rule are not rational because the Bureau lacks evidence and because the Bureau explained the need for regulation in ways that are counter to the administrative record. The BLM's failure to "articulate any rational connection between the facts found and the choice made," warrants an order setting

aside the Fracking Rule. *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962).

C. The Bureau violated the APA by failing to consider and respond meaningfully to significant public comments.

The APA guarantees a meaningful opportunity for the public to participate in an agency's regulatory scheme through the notice-and-comment process. 5 U.S.C. § 533. The APA also obligates federal agencies to respond meaningfully when the public comments raise points going to the merits of a proposed rule. *Olenhouse*, 42 F.3d at 1575. "[T]he opportunity to comment is meaningless unless the agency responds to significant points raised by the public." *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35–36 (D.C. Cir. 1977); *accord Arizona Pub. Serv. Co. v. EPA*, 562 F.3d 1116, 1128 (10th Cir. 2009) (collecting cases that address the comment requirement). A rule is procedurally defective when the agency fails to "consider and respond to significant comments received during the period for public comment." *Perez v. Mortgage Bankers Ass'n*, 135 S.Ct. 1199, 1203 (2015). Significant comments are those "which raise relevant points and which, if adopted, would require a change in the agency's proposed rule." *Home Box Office*, 567 F.2d at 35 n.58. A court must set aside agency action that is "procedurally defective[or] arbitrary or capricious in substance." *Arizona Pub. Serv. Co.*, 562 F.3d at 1122.

Even if there were a rational connection between the facts found and the Bureau's decision, the Rule is procedurally deficient because the BLM failed to consider and respond to important public concerns raised during the rulemaking process regarding the Bureau's ability to administer the new rule.

The State of Utah's comments raised one such public concern, namely that the Bureau would need to employ three "Full Time Equivalents (FTE) in the Vernal Field Office alone to administer the proposed regulation." (DOIPS0392218). Based on the Bureau's economic analysis, employing three FTEs would "cost the Vernal Field Office approximately $59,200 per FTE – totaling $177,500 plus per year." *Id.* Utah's comment tied these increased costs to the Bureau's difficulty maintaining a trained workforce in the Vernal Field Office, which results in delays in permitting. *Id*.

Internal comments made by a Senior Petroleum Engineer in the BLM's Vernal Field Office confirm the public's point. (DOIAR0026852) ("the proposed set of rules will have a *major impact* with the BLM's present staffing, especially in the field offices like Vernal." (emphasis in original)). Because these comments raised significant concerns about the Bureau's ability to administer its new rule, the Bureau had an obligation under the APA to provide a reasoned and meaningful response. *Home Box Office*, 567 F.2d at 35 n.58.

But none of the Bureau's three responses addressed the public's concern. First, the Bureau responded that it "does not agree with the assertion regarding the lack of BLM staff expertise. The BLM employs qualified and experienced petroleum engineers and geologists." 80 Fed. Reg. at 16177. This response missed the thrust of the issue. The comment was not a criticism of the qualifications of Bureau staff, but rather a concern that it did not have sufficient resources to successfully implement the rule, particularly in hard-to-staff locations like Vernal.

Second, the Bureau responded to the comment by indicating that it "understands the time-sensitive nature of oil and gas drilling and well completion activities and does not anticipate that the review of additional information related to hydraulic fracturing with an [Advanced Permit to Drill] will impact the timing of the approval of drilling permits." *Id.* The Bureau's own calculations undermine this assertion. The Bureau estimated that it will review 2,814 fracking-related operations per year, resulting in an annual administrative burden of $931,744. *Id*. at 16205–06, 08. This additional workload consists of approximately 25,400 hours and "about 13.80 staffed positions" per year. *Id.* at 16207.

The Bureau did not identify how it plans to combat its resource constraints in response to these public concerns; it failed to explain how it plans to hire the extra 13.8 employees needed. BLM cannot simultaneously assert that the rulemaking requires 13.8 new full-time positions and that there will be no delay in permit

approvals without explaining how the staffing concerns will be addressed. The public's concern on this issue required BLM to explain this internal inconsistency.

Third, the Bureau responded to staffing concerns by stating that "revisions made from the supplemental rule to final rule would reduce the amount of staff time required to implement the rule and limit any permitting delays." *Id*. at 16177. As addressed, the final rule suggests an additional 13.8 employees are necessary to carry out the rule. *Id*. at 16207. The supplemental rule, however, only estimated a need for 8.44 new full time employees. Oil and Gas; Hydraulic Fracturing on Federal and Indian Lands, 78 Fed. Reg. 31636, 31666 (May 24, 2013). Thus, the final rule does not reduce staff time required to implement the rule, but instead, increases the staff time by nearly 50%. Nowhere in the preamble or rule does the Bureau address how it will meet these staffing obligations.

These three individual responses to the public concern raised in Utah's comment are procedurally deficient—they are not reasoned responses to significant comments relating to the Bureau's ability to properly implement the rule in light of its own resource limitations. Therefore, the rule must be set aside as procedurally defective. *Arizona Pub. Serv. Co.*, 562 F.3d at 1122.

D. The states comprehensively regulate hydraulic fracturing on federal land, and the Fracking Rule provides little to no protection for underground water sources while unnecessarily increasing delay and costs.

The Bureau claims, through its legal briefing, that the Fracking Rule fills a

regulatory gap on federal and Indian land where states and tribes are not adequately regulating the practice. (ECF No. 68 at 20). Because this justification is not found in the administrative record or the preamble, it cannot serve as justification for the rule. *Colo. Wild, Heartwood*, 435 F.3d at 1213. However, even if this justification was asserted in the record, there is no gap to fill because the states and tribes already regulate hydraulic fracturing adequately.

Wyoming has been regulating hydraulic fracturing since 2010. (ECF No. 32-2 at ¶ 8). When Wyoming began its regulatory program, two things were certain: (1) no other entity regulated routine hydraulic fracturing within the state; and (2) in 2005, Congress told the EPA, the only federal agency with authority over hydraulic fracturing, that it could not regulate the practice except in one specific instance. *See* Pub. L. No. 109-58, § 322, 119 Stat. 594 (2005) (codified at 42 U.S.C. § 300h(d)(2)(B)). Without an authorized federal regulator, states like Wyoming, Colorado, and Utah filled the gap, developing some of the first hydraulic fracturing regulations in the country.

Wyoming's program protects groundwater in much the same ways as the Bureau's Fracking Rule, including a few provisions that are more protective than the Bureau's rule. (ECF No. 32-2 at ¶¶ 14–21). In fact, Secretary Jewell has boasted of Wyoming's robust regulation in the area. (*Id*. at ¶ 22). The Bureau's Colorado State Office agrees, proclaiming that "[t]he State of Colorado has led the nation in

providing a regulatory framework to manage [oil and gas] development in an environmentally responsible manner on state and private lands."[10]

Not only do the states' hydraulic fracturing programs adequately protect groundwater, but the states are far more efficient than the Bureau. (ECF No. 32-2 at ¶ 24). For example, it takes the Bureau an average of 200 days to approve an Advanced Permit to Drill, when it otherwise takes the State of Wyoming just 60 days on average. (*Id*. at ¶ 27). With the Bureau's rigid, slow review process now imposed on all hydraulic fracturing plans on federal land, operators will likely seek out states with less federal oversight, causing the states with large federal acreage to lose high paying oil and gas jobs, as well as mineral lease royalties and severance tax revenues. (*Id.* at ¶ 39); (ECF No. 118 at 31–50).

Instead of deferring to the states, who have expertise with regional geology and groundwater conditions, the Bureau has created an overlapping federal regime that produces no identifiable benefits. (ECF No. 32-2 at ¶¶ 28, 32, 34–37); (ECF No. 118 at 20–29). Under the Fracking Rule, well operators must comply with both state and federal fracturing standards where states already regulate on public land. (ECF No. 32-2 at ¶ 17). This means that well operators will be required to submit duplicate

[10] U.S. Dep't of the Interior, Bureau of Land Mgmt., Colorado Oil and Gas Leasing Program, http://www.blm.gov/co/st/en/BLM_Programs/oilandgas.html (last visited March 4, 2016). Review of the record underlying the fracking rule supports these notions. (*E.g.*, DOIAR0001668, 0001688, 0007036, 0009170, 0027636).

verification of their hydraulic fracturing plans to both state and federal agencies before they can begin the fracking process. (*Id*.). The end result of this extra layer of federal oversight is not an increased level of regulatory protection for groundwater. Instead, the standards imposed by the Bureau are similar and, in some instances, less protective than the standards in place in states like Wyoming and Colorado. (*Id*. at ¶¶ 14–21).

Throughout the rulemaking process the public informed the Bureau of the adequacy of state regulation of hydraulic fracturing (ECF No. 118 at 10–20), as well as the overlap and redundancy created by the Bureau's rule (*Id*. at 20–29); (DOIAR0009170, 026852–53). The Bureau attempts to address concerns of overlap and redundancy through proposal of a variance process. 80 Fed. Reg. at 16175–76. The proposed variance process allows the Bureau to enforce state regulations where state regulations meet or exceed the Bureau's rule. *Id*. at 16132. This variance, however, is subject to the absolute discretion of the State Bureau Director. *Id*. at 16221. Furthermore, there is no check on this discretion: the Fracking Rule states that "[t]he decision on a variance request is not subject to administrative appeals." *Id*. Because the variance process by its terms merely duplicates state regulations, is entirely discretionary, and provides no appeal should the Bureau deny or rescind it, the variance does little to address concerns of overlap and duplication of regulation. Finally, the very notion of a variance process defeats the Bureau's contentions that

the rule is necessary to create uniformity across public lands. These concerns regarding the variance process were expressed through public comment. (ECF No. 118 at 29–31).

Regarding the adequacy of state regulation, the Bureau's own findings show that from FY 2010 to FY 2013, 99.3% of the total number of well completions on federal and Indian land nationwide occurred in nine states, all of which have existing hydraulic fracturing regulations. 80 Fed. Reg. at 16187, 16198. Of these states, all nine require disclosure of fracking chemicals, many of whom use FracFocus.org. (DOIAR0093654_0056). In addition, the Bureau has not made a determination that any of these nine states' hydraulic fracturing programs are insufficient or inadequate. (*See* DOIAR0055854–55 (referencing Secretary Jewell's inability during a 2013 Senate hearing to identify any state that has insufficient regulation)).

Because the Bureau's rule provides no environmental benefit, one of the sole justifications for the rule, and because the states already adequately regulate the industry, this Court should set aside the rule as arbitrary and capricious.

CONCLUSION

The Safe Drinking Water Act once contained a comprehensive program for the regulation of underground injections such as hydraulic fracturing. After the Energy Policy Act of 2005 removed that authority from the EPA (except for hydraulic fracturing using diesel fuels), the states took up the regulation of hydraulic

fracturing. Under state regulation, the industry has flourished, supporting jobs and energy development across the country, while ensuring that the practice is carried out in an environmentally sound manner. The Bureau's Fracking Rule is nothing more than a late attempt at seizing the remnants of EPA's authority by sidestepping the Energy Policy Act. Neither FLPMA nor the various mineral leasing statutes provide the Bureau with statutory authority for the rule. Even if the Bureau had authority to promulgate such an expansive environmental regulation, the rule is arbitrary and capricious because it serves none of the purpose and solves none of the problems that it was created to address.

For the foregoing reasons, the States of Wyoming, Colorado, and Utah request that the Court enter an order setting aside the final rule entitled Oil and Gas; Hydraulic Fracturing on Federal and Indian Lands published at 80 Fed. Reg. 16128 (March 26, 2015) as both contrary to law and arbitrary and capricious agency action.

DATED this 4th day of March 2016.

/s/ Jeremy A. Gross
Michael J. McGrady, WSB No. 6-4099
Senior Assistant Attorney General
Jeremy A. Gross, WSB No. 7-5110
Assistant Attorney General
Wyoming Attorney General's Office
2030 Capitol Ave.
Cheyenne, Wyoming 82002
(307) 777-6946
mike.mcgrady@wyo.gov
jeremy.gross@wyo.gov

Attorneys for Petitioner State of Wyoming

/s/ Frederick R. Yarger (with permission)
Frederick R. Yarger; *pro hac vice*
Solicitor General
Colorado Attorney General's Office
1300 Broadway, 10th Floor
Denver, Colorado
(720) 508-6168
fred.yarger@coag.gov

Andrew Kuhlmann, WSB No. 7-4595
Senior Assistant Attorney General
Wyoming Attorney General's Office
2030 Capitol Ave.
Cheyenne, Wyoming 82002
(307) 777-6946
andrew.kuhlmann@wyo.gov

Attorneys for Petitioner State of Colorado

/s/ John Robinson Jr. (with permission)
Steven F. Alder (pro hac vice)
John Robinson Jr. (pro hac vice)
Utah Assistant Attorneys General
Sean D. Reyes (pro hac vice)
Utah Attorney General
Utah Office of the Attorney General
1594 W. North Temple, Suite 300
Salt Lake City, Utah 84116
(801) 538-7227
jrobinson@utah.gov
stevealder@utah.gov

Daniel B. Frank (WSB No. 5-2978)
Frank Law Office, P.C.
519 E. 18th Street
Cheyenne, Wyoming 82001
(307) 432-0520
frank@tribcsp.com

Attorneys for Petitioner-Intervenor
State of Utah

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief is double-spaced and utilizes a proportionally spaced 14-point Times New Roman typeface. The brief comprises a total of 13,763 words.

DATED this 4th day of March, 2016.

/s/ Jeremy A. Gross
JEREMY A. GROSS
Assistant Attorney General

CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of March, 2016, I filed the foregoing with the Clerk of Court using the Court's CM/ECF system, which will serve a Notice of Electronic Filing of the same on the parties.

DATED this 4th day of March, 2016.

/s/ Jeremy A. Gross
JEREMY A. GROSS
Assistant Attorney General