Nos. 16-8068, 16-8069

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

STATE OF WYOMING, *et al.*,
Petitioners-Appellees,

and

STATE OF NORTH DAKOTA, *et al*.,
Intervenors-Appellees,

v.

SALLY JEWELL, Secretary, United States Department of the Interior, *et al.*,
Respondents-Appellants,

SIERRA CLUB, *et al.*,
Intervenors-Appellants,

On Appeal from the United States District Court for the District of Wyoming
Civil Action No. 2:15-CV-41/43-SWS
The Honorable Scott W. Skavdahl

BRIEF OF INTERESTED PUBLIC LANDS, NATURAL RESOURCES, ENERGY, AND ADMINISTRATIVE LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT-APPELLANTS

BRAD BARTLETT
Sturm College of Law
University of Denver
2255 East Evans Avenue
Denver, CO 80208
(303) 871-7870
bbartlett@law.du.edu

KEVIN LYNCH
Sturm College of Law
University of Denver
2255 East Evans Avenue
Denver, CO 80208
(303) 871-6039
klynch@law.du.edu

August 17, 2016 *Counsel for Amici Curiae*

RULE 29(a) STATEMENT OF CONSENT

Pursuant to Fed. R. App. P. 29(a), amici Interested Law Professors state that all parties have consented to the filing of this brief.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

U.S. CONSTITUTION

STATUTES

REGULATIONS

OTHER AUTHORITIES

INTEREST OF AMICI[1]

Amici curiae are professors of law whose research interests include public lands, natural resources, oil and gas, energy, and administrative law. The names and affiliations of amici are included in an addendum to this brief. Amici have published extensive scholarship addressing the broad, plenary powers that federal land managers exercise through statutes such as the Federal Land Policy and Management Act, as well as federal authority to regulate oil and gas development, and the application of environmental and natural resources law more generally to this sector. Amici have a shared interest in the proper interpretation of federal statutes, including agencies' enabling statutes, and in ensuring that federal agencies can exercise their statutory duties alongside state regulation.

The views of amici expressed herein do not necessarily represent those of the affiliated institution.

SUMMARY OF THE ARGUMENT

The Federal Land Policy and Management Act (FLPMA), the Mineral Leasing Act (MLA), the Indian Mineral Leasing Act, and similar statutes[2] require

[1] Amici represent that no portion of this brief was written by counsel for any party to this case, and no party (or counsel for any party) made a monetary contribution intended to fund the preparation or submission of this brief. This brief was funded entirely by amici curiae.

[2] *See* 30 U.S.C. §§ 181-287 (Mineral Leasing Act); 25 U.S.C. § 396d (Indian Mineral Leasing Act); 25 U.S.C. §§ 396, 2107(other Indian Mineral Statutes). In this brief, we focus primarily on the BLM's FLPMA duties, but the Mineral

the Bureau of Land Management (BLM) to manage our nation's public lands and resources on behalf of current and future generations. Among other directives, Congress has made clear that this means "regulating . . . the use, occupancy, and development" of public lands, which include oil and gas resources, and taking "any action necessary to prevent unnecessary or undue degradation" of these public lands. 43 U.S.C. § 1732(b).

The BLM followed this statutory mandate and similar requirements in other enabling statutes by updating its oil and gas regulations in 2015 to regulate stages of oil and gas development, such as lining ("casing") wells, that occur at wells developed using hydraulic fracturing, now the dominant technique for oil and gas extraction. 80 Fed. Reg. 16,128 (Mar. 26, 2015). We refer to this rule as the "hydraulic fracturing rule," although many components of the rule apply to the stages of well development that precede and follow hydraulic fracturing.[3]

Leasing Act and Indian Mineral Statutes are equally important components of the BLM's authority.

[3] For example, the rule applies to investigation of the well site and nearby geology and proper casing and cementing of the well prior to fracturing as well as the surface storage of waste that flows back out of the well after hydraulic fracturing. *See* 80 Fed. Reg. 16,219-210 (Mar. 16, 2015). Some aspects of the rule apply directly to hydraulic fracturing—the process of injecting water and chemicals down wells—including, for example, requirements for disclosing proposed hydraulic fracturing design and water acquisition for hydraulic fracturing and, after fracturing, disclosing the actual amounts of water used and the chemicals used. *See* 80 Fed. Reg. 16,128, 16,218-219, 16,220-221.

The U.S. District Court for the District of Wyoming invalidated the BLM hydraulic fracturing rule, finding that the agency lacked the authority to regulate hydraulic fracturing on public lands notwithstanding the BLM's broad enabling statutes. *State of Wyoming et al. v. U.S. Dept. of the Interior et al*., No. 2:15-CV-043, at 25-26 (D. Wyo., June 21, 2016) [hereinafter Order]. The lower court primarily based this decision on its finding that the unrelated Safe Drinking Water Act (SDWA)—an Act revised by Congress in 2005 to exclude most hydraulically fractured wells from the SDWA's underground injection control (UIC) program — directly speaks to and removes the BLM's authority to regulate hydraulic fracturing on public domain lands. *Id*. at 21-26. The court went further, suggesting that the SDWA removes *all* federal authority over hydraulic fracturing. *Id*. at 22. The court was unable to cite to a single case that supports these unprecedented findings, relying instead on a mischaracterization of a law review article written by one of these amici.

The lower court's decision has no basis in legal precedent or relevant statutes and violates basic canons of statutory interpretation. It reads a sweeping government-wide exclusion into a surgical amendment explicitly tied to one statute. As a result of this decision, the BLM cannot fulfill its statutory mandate to serve as the chief steward of our public lands. For these reasons, the district court's decision should be reversed.

ARGUMENT

I. The BLM Has Plenary Authority to Regulate Activities on Public Lands

The federal government plays two roles relevant to this action—regulator, and property owner. The Constitution confers separate and distinct authorities on Congress to regulate matters in interstate commerce, U.S. Const. Art. I, § 8, cl. 3, and to "dispose of and make all needful rules and regulations respecting the Territory or other Property belonging to the United States." Art. IV, § 3, cl. 2. Regarding the Property Clause in particular, the Supreme Court has made clear that "[t]he power over the public land … entrusted to Congress is without limitations. 'And it is not for the courts to say how that trust shall be administered. That is for Congress to determine.'" *United States v. San Francisco*, 310 U.S. 16, 29 (1940) (quoting *Light v. United States*, 330 U.S. 523, 537 (1907)).[4]

Congress spoke in plain terms when it enacted FLPMA in 1976. That law, often described as "the BLM Organic Act,"[5] gives the BLM plenary authority to

[4] The Supreme Court has consistently approved the broad authority of Congress and the executive branch to manage our public lands. In *United States v. Midwest Oil Co.*, 236 U.S. 459, 474 (1915), for example, the Court upheld the authority of the President to withdraw oil rich lands in anticipation of federal leasing legislation, even without clear congressional authority, because "the rules or laws for the disposal of public land are necessarily general in nature," and "the power of the Executive, as agent in charge, to retain that property from sale need not necessarily be expressed in writing."

[5] As the BLM itself notes:

manage activities on the public lands. In particular, Section 302(b) of FLPMA expressly provides:

> In managing the public lands, *the Secretary shall …regulate*, through easements, permits, leases, licenses, published rules, or other instruments *as the Secretary deems appropriate, the use, occupancy, and development of the public lands*….

This section goes on to state:

> In managing the public lands the Secretary shall, by regulation or otherwise, *take any action necessary to prevent unnecessary or undue degradation of the lands*.

43 U.S.C. § 1732(b) (emphasis added).

Other statutes provide equally important requirements and authority for the BLM to manage public resources, including minerals such as oil and gas and the resources impacted by development of these minerals. For example, under the MLA, the Secretary of the Interior must "regulate all surface-disturbing activities conducted pursuant to any lease" of minerals, 30 U.S.C. § 226(g), and may suspend or conditionally suspend leases in order "to protect the environmental

---

> FLPMA is called the BLM Organic Act because it consolidated and articulated BLM's management responsibilities. Many land and resource management authorities were established, amended, or repealed by FLPMA, including provisions on Federal land withdrawals, land acquisitions and exchanges, rights-of-way, advisory groups, range management, and the general organization and administration of BLM and the public lands.

The Federal Land Policy and Management Act (FLPMA) of 1976: How the Stage Was Set for BLM's "Organic Act," U.S. DEPT. OF THE INTERIOR, BUREAU OF LAND MGMT., http://www.blm.gov/flpma/organic.htm.

values of the leased properties." *Getty Oil v. Clark*, 614 F. Supp. 904, 916 (D. Wyo. 1985). The Act authorizes the Secretary 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 MLA. 30 U.S.C. § 189.

Secretary Jewell promulgated the hydraulic fracturing rule to address the potential adverse impacts from hydraulic fracturing. The rule does this by ensuring that geologic and other conditions are investigated and reported and wells are properly cased prior to fracturing (which protects oil and gas from water intrusion and helps to prevent contamination of underground and surface waters),[6] and by setting minimum standards for on-site surface storage of fracturing wastes, among other measures. In promulgating this rule, Secretary Jewell has done exactly what she is commanded to do under section 302(b) of FLPMA and similar enabling statutes. Following lengthy consultations and public notice, the Secretary has promulgated reasonable regulations, which the Secretary deemed appropriate to regulate the "use, occupancy and development of the public lands" in the context of federal oil and gas leases and their fracturing operations. 43 U.S.C. § 1732(b).

[6] As noted in a peer-reviewed paper, "[t]he migration of natural gas to the surface through the production casing and/or well annulus is 'a common occurrence in the petroleum industry' and can affect a large fraction of conventional wells." Avner Vengosh et al., *A Critical Review of the Risks to Water Resources from Unconventional Shale Gas Development and Hydraulic Fracturing in the United States*, 48 ENVTL. SCI. & TECH. 8334, 8337 (2014). The authors also note similar migration can occur from unconventional (fractured) wells. *Id*. at 8338.

The Secretary expressly found that the hydraulic fracturing rule is needed "to prevent unnecessary or undue degradation of the [public] lands."[7] Yet the lower court largely ignores FLPMA § 302(b) and the broad powers that it and similar statutes confer on the BLM, instead relegating FLPMA to merely "a land use planning statute," Order at 17, rather than a statute aimed at environmental protection.[8] While FLPMA does address public land use planning, it is much more than a land use planning statute. Section 302(a) directs the Secretary to "manage the public lands under principles of multiple use and sustained yield, *in accordance with the land use plans developed by him under section 1712 of this title when they are available*" (emphasis added). 43 U.S.C. § 1732(a). Therefore, some of the authorities afforded the BLM in FLPMA are in addition and complementary to its authorities as a land use planning body. Moreover, as section 302(b) makes clear, the BLM has an affirmative duty to manage and protect the use, occupancy, and development of our public lands, and to prevent their unnecessary and undue degradation, irrespective of any land use planning responsibility. This provision is broad and powerful, and necessarily includes concern for the environment. Indeed,

[7] *See e.g.,* 80 Fed. Reg. 16,128 at 16144, 16154, 16155, 16169, 16175, 16179, 16191, & 16214.

[8] In finding that the BLM is primarily tasked with concerns about leasing and protecting oil and gas resources, not the environment, the court emphasizes the "distinction between land use planning and environmental protection." Order at 14.

in the context of environmental review of fracturing under the National Environmental Policy Act (NEPA), a district court noted the BLM's affirmative duty to consider the environmental impacts of fracturing, finding:

> [I]t is unclear exactly how the issue of the environmental impact of fracking could lie outside BLM's 'jurisdiction' when NEPA plainly assigns all studying of environmental impacts of its own decision to BLM. Put another way, if not within BLM's jurisdiction, then whose?

Ctr. For Biological Diversity v. BLM, 937 F. Supp. 2d 1140, 1156 (N. D. Cal. 2013).

The lower court also dismisses the BLM's authority as limited to *surface* resources, finding that in the past, the BLM has only issued . . . "a few regulations . . . requiring operators to avoid pollution to groundwater." Order at 14. In fact, for the vast majority of the land that it manages, the BLM or another federal agency is the owner of both the surface and mineral estate in trust.[9] Under FLPMA, MLA, and similar statutory authority, the BLM has long implemented and enforced very detailed, technical regulations regarding the casing and cementing of wells and other programs to protect both underground oil and gas resources and water.[10]

---

[9] *See Mineral and Surface Acreage Managed by the BLM*, U.S. DEPT. OF THE INTERIOR, BUREAU OF LAND MGMT., http://www.blm.gov/wo/st/en/info/About_BLM/subsurface.html (showing that the BLM manages 700 million acres of mineral estate and that only 58 million of these acres are "split estate," in which the BLM is only the owner of the minerals, and a state or other non-federal entity owns the surface).

[10] *See, e.g.*, 53 Fed. Reg. 46,798, 46,801 (1988) (Onshore Order No. 2).

This is because the BLM must protect underground resources such as oil, gas, and water as the owner and manager of "public lands" —defined in the FLPMA as "any land and *interest in land* owned by the United States," 43 U.S.C. § 1702(e), including *all* property interests, whether at or below the surface.

If the district court is correct in holding that Congress must confer upon the BLM "specific authority to regulate hydraulic fracturing" (Order at 17), then a host of other important regulatory programs standards are placed in jeopardy, including, for example, the BLM's hardrock mining regulations,[11] its regulation of off-highway vehicle use,[12] and its regulation of major public land events such as the Burning Man festival in Nevada.[13]

In reviewing a broad federal land management statute like FLPMA, the Court of Appeals for the District of Columbia Circuit has held that "[b]ecause the Organic Act is silent as to the specifics of park management, the Secretary has *especially broad discretion on how to implement his statutory mandate.*" *Davis v. Latschar*, 202 F.3d 359, 365 (D.C. Cir. 2000) (emphasis added) (citations omitted). The same rule should apply in this case. Broad enabling legislation affords the

[11] 43 C.F.R. § 3809.
[12] 43 C.F.R. § 8340.
[13] See U.S. Dept. of the Interior, Bureau of Land Mgmt., Decision, Special Recreation Permit NVW03500-13-01, July 23, 2013, https://eplanning.blm.gov/epl-front-office/projects/nepa/36777/43974/47325/Burning_Man_2013_SRP_Decision_without_attachments.pdf.

BLM the flexibility needed to meet changing circumstances and new activities affecting the public lands.

II. The SDWA Fracturing Exemption Applies Only to SDWA Regulation

The district court's artificially narrow reading of the BLM's FLPMA, MLA, and similar statutory authority is juxtaposed with a remarkably broad reading of the 2005 amendment to the SDWA. Specifically, the lower court found under a *Chevron* step one analysis that the BLM lacks authority to regulate fracturing on federal lands because Congress through the SDWA has "directly spoken to the issue" of whether the BLM may regulate fracturing on federal lands. Order at 9; *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). But the SDWA is irrelevant to the BLM's obligation to manage the impacts of oil and gas development on public lands for the purposes of FLPMA, the MLA, and similar acts, and thus does not speak to the issue at all.

A. No Legal Authority Supports the Lower Court's SDWA Holding

As amended in 2005, the SDWA provides that:

> For purposes of this part **. . .** The term underground injection" — . . . excludes— . . . (ii) 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). Through narrow, clear, and concise language, Congress exempted hydraulically fractured wells (except for those fractured with diesel)

from having to obtain an injection well permit under the SDWA. By its terms, this narrow exemption applies to nothing else.[14] It does not preclude federal agencies or states from protecting groundwater under other statutes.[15] Despite the clear and limiting language of the 2005 amendment to the SDWA, the lower court interpreted this language as modifying all other federal authority, finding that Congress's 2005 SDWA amendment precludes the BLM and other federal agencies from regulating hydraulic fracturing.

To support its SDWA holding, the district court references the unremarkable proposition that "'the executive branch is not permitted to administer [an] Act in a manner that is inconsistent with the administrative structure that Congress enacted into law.'" Order at 22 (quoting *FDA v. Brown v. Williamson Tobacco Corp.*, 529

[14] This is also clear from the legislative history, which the lower court ignored. When Congress amended the SDWA in 2005, there was no indication that Congress also intended to depart from its prior 1974 decision to maintain BLM's authority over federal lands. At that time, Congress expressly stated that the SDWA preserves BLM's authority: "The Committee intends . . . that EPA will not duplicate efforts of the U.S.G.S.[BLM's predecessor] to prevent groundwater contamination under the Mineral Leasing Act." H.R. Rep. No. 93-1185, at 32 (1972), *reprinted in* 1974 U.S.C.C.A.N. 6454, 6484085.

[15] The SDWA is not the only statute under which federal agencies may protect groundwater resources. For example, the Comprehensive Environmental Response, Compensation, and Liability Act applies to releases of hazardous substances to the "environment," and the term "environment" includes groundwater, among other resources. 42 U.S.C. § 9601(8). Furthermore, in FLPMA Congress indicated an express policy to protect "water resource . . . values" on federal lands and did not use the limiting term of "surface" prior to "water resource." 43 U.S.C. § 1701(a)(8).

U.S. 120, 125 (2000), which quotes *ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 517 (1988)). But *ETSI Pipeline* addressed a statute in which Congress gave two agencies—the Department of Defense and the Department of the Interior—authority over different aspects of water management. 484 U.S. at 503-505. The SDWA provides no such division of agency authority over hydraulic fracturing; as amended in 2005, it simply provides that the EPA and the states may not regulate this activity under the SDWA UIC program.

Lacking a case on point, the court turns to a law review article written by one of the amici,[16] Hannah Wiseman. Order at 22 (citing *Untested Waters: The Rise of Hydraulic Fracturing in Oil and Gas Production and the Need to Revisit Regulation*, 20 FORDHAM ENVTL. L. REV. 115, 145 (2009)). This article describes the exemption of non-diesel hydraulic fracturing from the SDWA. It does not address the authority to regulate hydraulic fracturing on federal lands, and it specifically identifies several non-SDWA federal regulations that apply or could apply to hydraulic fracturing despite the SDWA exemption. *Untested Waters* at 146, 186. Thus, the court's holding on this issue fundamentally misinterprets the article. The article does not support the conclusion that the SDWA exemption preempts other legal authority to regulate hydraulic fracturing.

[16] As discussed in further detail below, the court purports to have other sources for this conclusion, but none of the sources address the BLM or the SDWA.

The court relies on a statement taken out of context from *Untested Water*s, quoting the statement that the Energy Policy Act of 2005 "'conclusively withdrew fracing (sic) from the realm of federal regulation.'"[17] Order at 22. As the author of that article has testified, however, the article makes clear that federal regulatory authority over hydraulic fracturing remains outside of the SDWA context. *See* Hannah J. Wiseman, *Written Testimony for "The Future of Hydraulic Fracturing on Federal Lands,*" U.S. House of Representatives, Committee on Natural Resources, Subcommittee on Energy and Mineral Resources, July 15, 2015, http://docs.house.gov/meetings/II/II06/20150715/103846/HHRG-114-II06-Wstate-WisemanH-20150715.pdf. Nonetheless, because the court relies on this article, amici address it here in some detail.

Untested Waters concerns a single topic—the exemption of hydraulic fracturing from the SDWA in 2005. The relevant text reads as follows:

> Ultimately, the Energy Policy Act of 2005 exempted all fracing with the exception of diesel fuel from the definition of underground injection in Section 1421 of the Safe Drinking Water Act . . . . Although the Act conclusively withdrew fracing from the realm of federal regulation, the debate over fracing has not died. Several environmental groups have continued to push for federal regulation, while industry and states argue that the Energy Policy Act reached the right result.

[17] Contrary to the lower court's understanding, the term "fracing" is not a misspelling. Industry commonly uses this spelling, and the Texas Supreme Court uses this spelling in the seminal hydraulic fracturing case *Coastal Oil v. Garza Energy Trust*, 268 S.W. 3d 1 (Tex. 2008).

Wiseman, *Untested Waters*, at 145. The debate described in the article was not over whether *any* federal authority over hydraulic fracturing survived the SDWA Amendment, but rather whether the exemption of hydraulic fracturing from the SDWA was a wise policy decision. The article uses the phrase "conclusively withdrew fracing from the realm of federal regulation" to avoid repeating explicit reference to the SDWA's exemption of hydraulic fracturing but was not intended to broaden the discussion beyond this statute. Further on in the text, the article notes that other, non-SDWA federal statutes *could* apply to hydraulic fracturing and describes other federal statutes that *do* apply to hydraulic fracturing.

For instance, the article notes that the "[t]he Endangered Species Act and Clean Water Act could potentially apply" to hydraulic fracturing. *Id.* at 146, n. 159 (*citing N.M. ex rel. Richardson v. Bureau of Land Mgmt.*, 459 F. Supp. 2d 1102, 1107, 1114, 1131 (D.N.M. 2006) (memorandum opinion)). The brief discussion of this case, which suggests that the Endangered Species Act could apply to hydraulic fracturing (indeed, the Fish and Wildlife Service has since listed as endangered several species that are impacted by hydraulic fracturing[18]), marks the only mention of the BLM in the article.

[18] *See, e.g.*, 77 Fed. Reg. 14,914 (Mar. 13, 2012); 77 Fed. Reg. 43,906 (July 26, 2012).

The article then expressly recognizes that notwithstanding the 2005 SDWA exemption, other federal agencies still regulate aspects of hydraulic fracturing:

> Certain federal regulations already apply to fracing . . . . In Pennsylvania, for example, operators disposing of certain hazardous fluids on the surface must first obtain a National Pollutant Discharge Elimination System Permit under the federal Clean Water Act. New York also alerts drillers to the possibility that there may be threatened or endangered species on the fracing site, raising the possibility of Endangered Species Act restrictions.

Id. at 186. Subsequent articles by the same author detail the federal regulations that apply to hydraulic fracturing, and in no way suggest that other federal agencies lack the authority to promulgate hydraulic fracturing regulations.[19] Moreover, none of these articles discuss the BLM's authority to regulate hydraulic fracturing on federal lands.

B. A Textual Reading of the SDWA Undercuts the Lower Court's Decision

The district court erroneously found that the SDWA exemption clearly and directly stripped the BLM and other federal agencies of authority to regulate hydraulic fracturing. In fact, the SDWA exemption applies only to a definition crafted "for purposes of this part" of the U.S. Code; that is, for purposes of the SDWA. Indeed, in enacting the original SDWA, Congress expressed an intent to

[19] *See, e.g.*, Hannah J. Wiseman, *Regulatory Adaptation in Fractured Appalachia*, 21 VILL. ENVTL. L. J. 229, 241-243 (2010); Hannah J. Wiseman, *Risk and Response in Fracturing Policy*, 84 U. COLO. L. REV. 729, 763-64, 769-70, 793, 798, 805 (2013).

avoid repealing or limiting "any" authority of the Interior Department. H.R. Rep. No. 93-1185 at 32 (1974).

Expressio unius est exclusio alterius is a well-known canon of statutory interpretation and stands for the common-sense proposition that "[w]hen a statute limits a thing to be done in a particular mode, it includes a negative of any other mode." *Raleigh & Gaston Ry. Co. v. Reid*, 80 U.S. 269, 270 (1871). This canon suggests that Congress, by expressly and directly exempting non-diesel hydraulic fracturing from coverage under one statute, did not exempt hydraulic fracturing from regulation under other statutes such as FLMPA. If Congress had intended a broader exemption—particularly one that prevented federal agencies from managing federally-owned resources as authorized and required under sweeping statutory authority —it would have stated this intent clearly.

This canon is particularly important in the context of the court's extraordinary finding that one statute has, by exempting an activity from one act, implicitly removed that activity from regulation under all other federal acts and thus revised or excised portions of those other acts. Statutory "repeals by implication are not favored . . . and will not be found unless an intent to repeal is 'clear and manifest.'" *Rodriguez v. United States*, 480 U.S. 522, 524 (1987) (quoting *United States v. Borden Co.*, 308 U.S. 188, 189 (1939)).

The narrow scope of the 2005 SDWA hydraulic fracturing exemption is highlighted by the structure of the UIC program itself and the events leading up to the exemption of non-diesel hydraulic fracturing from this program. The UIC program requires that before entities inject certain substances underground, such as industrial or hazardous wastes, carbon dioxide, or oil and gas wastes, they must first obtain a permit ensuring that they will not endanger underground drinking water sources. 42 U.S.C. § 300h(b)(1)(A). Only the EPA and the states through delegated EPA authority may issue UIC permits under the SDWA, although the Act grants states "primary enforcement responsibility." 42 U.S.C. §300h.

The EPA and the states had long interpreted the SDWA UIC program *not* to apply to hydraulic fracturing. Instead, they relied on other authorities to regulate this activity. After a federal circuit court held that the SDWA program applied to hydraulic fracturing in Alabama, *Legal Envtl. Assistance Foundation v. EPA*, 276 F.3d 1253 (11th Cir. 2001), state regulators pressed Congress to "clarify" that the SDWA UIC program did not cover this activity. *Resolution 03-5*, Ground Water Protection Council, http://www.gwpc.org/sites/default/files/Res-03-5.pdf. Congress responded to this specific request in the Energy Policy Act of 2005.

Contrary to the lower court's holding, the short 2005 amendment to the SDWA does not evince congressional intent to remove all other federal agency authority to regulate hydraulic fracturing. Rather, it seems clear that Congress

intended a narrowly targeted amendment that responded to a particular court decision involving the SDWA. The district court's attempt to tie the hands of the BLM from adopting rules to protect our public lands has no basis in the law.

C. The SDWA Does Not Narrow a Different Statute's Broad Language

In addition to incorrectly crafting sweeping statutory exemptions from the text of one clear and narrowly-targeted amendment, the lower court relied heavily on the doctrine that in textual analysis of statutes, specific text prevails over general text. Order at 22-23. Yet the court did not solely look within the SDWA in applying this doctrine; instead, out of the universe of numerous other statutes that are more general than the SDWA, it zeroed in on FLPMA and similar BLM enabling statutes. Having located these particular general statutes, it determined that the SDWA language must limit their broad interpretations. This rationale, if extended, would mean that the SDWA prevails over *all* other more general environmental statutes, and prohibits the regulation of hydraulic fracturing under any of those statutes.

In reaching this finding, the lower court observed that legislative text (like FLPMA) must be read in context, and this context may include "other Acts, particularly where Congress has spoken subsequently and more specifically to the topic at hand." Order at 9. But extensive case law warns about the limits of reading one statute into another. In *Russello v. United States*, 464 US 16, 25

(1983), the Court wrote that "[l]anguage in one statute usually sheds little light upon the meaning of different language in another statutes, even when the two are enacted at or about the same time." There, the criminal defendant argued that limiting language in the Controlled Substances Act should be read into the RICO statute. But "[t]he use of the specific in the one statute cannot fairly be read as imposing a limitation upon the general provision in the other statute," particularly due to the *much broader purpose* that the RICO statute served. *Id*. "If this was Congress' intent, one would expect it to have said so in clear and understandable terms." *Id*.

The court cites to *Food and Drug Admin. v. Brown & Williamson Tobacco* Corporation, 529 U.S. 120, 125 (2000) and *United States v. Romani*, 523 U.S. 517 (1998) to support its view that the narrow SDWA exemption can be read into public lands statutes. Order at 23. In those cases, subsequent legislation created a "distinct regulatory scheme," *Brown & Williamson*, at 159-160, with "comprehensive" provisions for addressing the issue at hand, *Romani at 532*. Here, by contrast, the pre-existing land management statutes are much broader and clearly cover regulation of oil and gas production techniques. Moreover, the statute-specific 2005 SDWA exemption does not create a "comprehensive" or "distinct regulatory scheme" for hydraulic fracturing, as the Court found existed for handling the Government's unpaid tax claims and for tobacco regulation.

III. The District Court Decision Deprives the BLM of Authority to Regulate Activities Not Explicitly Mentioned in FLPMA, MLA, and Similar Statutes

The district court decision paints with a broad brush, and the decision could have broad implications. In striking down the BLM's hydraulic fracturing rules, the court declares that "nothing in FLPMA provides BLM with specific authority to regulate hydraulic fracturing." Order at 17. If that is the measure of the BLM's authority, however, then all manner of other activities that pose risks to public land resources may be immune from federal regulation since they, too, lack specific statutory authority. This list includes the examples mentioned above, such as the BLM's hardrock mining rules and its management of off-highway vehicle use. It also includes a host of other activities, most prominently, perhaps, recreational uses. The BLM currently regulates a wide range of activities that are not explicitly mentioned in the enabling statutes, including backcountry recreation, and various forms of developed recreation, including river rafting, snowmobile use, and in Colorado, even a ski area.[20] FLPMA and other enabling statutes do not contain detailed laundry lists of the activities the BLM may regulate, precisely because they afford broad general authority to the BLM, for instance under FLPMA section

[20] Only one ski area is currently located on BLM lands– the Silverton Mountain Ski Area in Colorado. *See First Tracks*, U.S. DEPT. OF THE INTERIOR, BUREAU OF LAND MGMT., http://www.blm.gov/or/mypubliclands/vol2/MPL_2_First_Tracks.php.

302(b), to address issues and activities as they arise on federal lands. If the district court's effort to strip the BLM of its authority to regulate hydraulic fracturing on public lands is allowed to stand, far more is at risk than this particular BLM regulation.

Further, because the court incorrectly finds that the 2005 SDWA exemption "indicates clearly that hydraulic fracturing is not subject to *federal regulation* unless it involves the use of diesel fuels," Order at 22 (emphasis added), this interpretation would improperly remove *all* federal agency authority—not just the BLM's authority—over hydraulic fracturing. Federal agencies since 2005 have regulated aspects of hydraulic fracturing under non-SDWA statutes. For example, the Fish and Wildlife Service has issued Endangered Species Act regulations relating to hydraulic fracturing, 77 Fed. Reg. 14,914 (Mar. 13, 2012); 77 Fed. Reg. 43,906 (July 26, 2012), and the EPA has limited certain types of air emissions from hydraulic fracturing under the Clean Air Act (CAA). 81 Fed. Reg. 35,824 (June 3, 2016); 40 C.F.R. § 60.5375. We are unaware of any suggestion prior to this case that the SDWA in any way affected these agencies' authority to regulate non-UIC aspects of hydraulic fracturing. Interpreting the 2005 SDWA exemption as removing all federal authority to regulate hydraulic fracturing under acts like FLPMA, the ESA, and CAA, which are entirely unrelated to the SDWA program, is an unreasonable reading of the SDWA with no legal basis.

CONCLUSION

In striking down the BLM's hydraulic fracturing rules, the district court improperly ignored the BLM's plenary authority to manage and protect our public lands under section 302(b) of FLPMA, the MLA, and similar enabling statutes. Moreover, the court's faulty reasoning violates basic rules of statutory interpretation informed by common sense, which make clear that Congress's adoption of a narrowly tailored exemption from hydraulic fracturing under the SDWA cannot be extended to cover all manner of other federal regulation of hydraulic fracturing activities. For these reasons, the decision of the district court must be reversed.

Respectfully submitted this 17th day of August, 2016.

s/ Kevin Lynch
KEVIN LYNCH
Sturm College of Law
University of Denver
2255 East Evans Avenue
Denver, CO 80208
(303) 871-6039
klynch@law.du.edu

s/ Brad Bartlett
BRAD BARTLETT
Sturm College of Law
University of Denver
2255 East Evans Avenue
Denver, CO 80208
(303) 871-7870
bbartlett@law.du.edu

HANNAH WISEMAN
Florida State University College of Law

MARK SQUILLACE
University of Colorado Law School

SUSAN SAKMAR
University of Houston Law Center

KATE KONSCHNIK
Harvard Law School

FEDERICO CHEEVER
University of Denver Sturm College of Law

NADIA AHMAD
Dwayne O. Andreas School of Law

MICHAEL C. BLUMM
Lewis & Clark Law School

MICHAEL BURGER
Columbia Law School

MARCILYNN A. BURKE
University of Houston Law Center

SARA A. COLANGELO
Georgetown University Law Center

DEBRA L. DONAHUE
University of Wyoming College of Law (signed in personal capacity)

TIM DUANE
University of San Diego School of Law

STEPHEN DYCUS
Vermont Law School

JOEL B. EISEN
Richmond School of Law

VICTOR B. FLATT
University of North Carolina School of Law

WILLIAM FUNK
Lewis & Clark Law School

ROBERT L. GLICKSMAN
George Washington University Law School

HILLARY HOFFMANN
Vermont Law School

BLAKE HUDSON
Louisiana State University Law Center

SAM KALEN
University of Wyoming College of Law (signed in personal capacity)

ALICE KASWAN
University of San Francisco School of Law

ALEXANDRA B. KLASS
University of Minnesota Law School

CHRISTINE A. KLEIN
University of Florida Levin College of Law

ALBERT C. LIN
UC Davis School of Law

JOEL A. MINTZ
Nova Southeastern University College of Law

KENNETH M. MURCHISON
Louisiana State University Law Center

JESSICA OWLEY
University of Buffalo School of Law

CYMIE R. PAINE
Rutgers School of Law

PATRICK PARENTEAU
Vermont Law School

ERIN RYAN
Florida State University College of Law

EDWARD P. RICHARDS
Louisiana State University Law Center

JASON ANTHONY ROBINSON
University of Wyoming College of Law (signed in personal capacity)

JAMES SALZMAN
University of California at Santa Barbara
UCLA Law School

AMY STEIN
University of Florida Levin College of Law

PETER STRAUSS
Columbia Law School

JEFFREY THALER
University of Maine School of Law

ADDENDUM: LIST OF AMICI

The affiliations of amici are provided for informational purposes only. As indicated above, the views of amici expressed herein do not necessarily represent those of the affiliated institution.

Nadia Ahmad is an Assistant Professor of Law at Barry University, Dwayne O. Andreas School of Law.

Michael C. Blumm is the Jeffrey Bain Faculty Scholar & Professor of Law at Lewis & Clark Law School.

Michael Burger is a Research Scholar and Lecturer-in-Law at Columbia Law School.

Marcilynn A. Burke is the Associate Dean and an Associate Professor of Law at the University of Houston Law Center.

Federico Cheever is a Professor of Law at the University of Denver, Sturm College of Law.

Sara A. Colangelo is the Environmental Law and Policy Program Director and Adjunct Professor of Law at the Georgetown University Law Center.

Debra L. Donahue is a Professor of Law at the University of Wyoming, College of Law.

Tim Duane is a Professor of Environmental Studies at the University of California Santa Cruz and a Visiting Professor of Law at the University of San Diego School of Law.

Stephen Dycus is a Professor of Law at Vermont Law School.

Joel B. Eisen is a Professor of Law at the Richmond School of Law.

Victor B. Flatt is the Tom & Elizabeth Taft Distinguished Professor in Environmental Law, at the University of North Carolina School of Law.

William Funk is a Lewis & Clark Distinguished Professor of Law at Lewis & Clark Law School.

Robert L. Glicksman is the J.B. and Maurice C. Shapiro Professor of Environmental Law at the George Washington University Law School.

Hillary Hoffmann is a Professor of Law at Vermont Law School.

Blake Hudson is the Burlington Resources Professor of Environmental Law and the Edward J. Womac, Jr. Professor of Energy Law at Louisiana State University Law Center.

Sam Kalen is the Winston S. Howard Distinguished Professor at the University of Wyoming College of Law.

Alice Kaswan is a Professor at Law at the University of San Francisco School of Law.

Alexandra B. Klass is the Distinguished McKnight University Professor at the University of Minnesota Law School.

Christine A. Klein is a Professor of Law at the University of Florida Levin College of Law.

Kate Konschnik is a Lecturer-in-Law and Director of the Harvard Environmental Policy Initiative at Harvard Law School.

Albert C. Lin is a Professor at Law at UC Davis School of Law.

Joel A. Mintz is a Professor of Law at Nova Southeastern University College of Law.

Kenneth M. Murchison is a Professor Emeritus at Louisiana State University Law Center.

Jessica Owley is an Associate Professor at the University at Buffalo School of Law.

Patrick Parenteau is a Professor of Law at Vermont Law School.

Cymie R. Payne is an Associate Professor at the Rutgers School of Law and the Department of Human Ecology at the Rutgers School of Environmental and Biological Sciences (SEBS).

Edward P. Richards is the Clarence W. Edwards Professor of Law at Louisiana State University Law Center.

Jason Anthony Robinson is an Associate Professor at the University of Wyoming College of Law.

Erin Ryan is the Elizabeth C. & Clyde W. Atkinson Professor at the Florida State University College of Law.

Susan Sakmar is a Visiting Assistant Law Professor at the University of Houston Law Center.

James Salzman is a Professor at Law at UCLA Law School, and the Donald Bren Distinguished Professor of Environmental Law at the Bren School of Environmental Science & Management, University of California at Santa Barbara.

Mark Squillace is a Professor of Law at the University of Colorado Law School.

Amy Stein is an Associate Professor of Law at the University of Florida Levin College of Law.

Peter Strauss is the Betts Professor of Law at Columbia Law School.

Jeffrey Thaler is a Visiting Associate Professor at the University of Maine School of Law.

Hannah Wiseman is the Attorneys' Title Professor at the Florida State University College of Law.

CERTIFICATE OF COMPLIANCE

We certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 5,659 words, excluding the portions of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14-point font.

DATED this 17th day of August, 2016.

s/ Kevin Lynch
KEVIN LYNCH
Sturm College of Law
University of Denver
2255 East Evans Avenue
Denver, CO 80208
(303) 871-6039
klynch@law.du.edu

s/ Brad Bartlett
BRAD BARTLETT
Sturm College of Law
University of Denver
2255 East Evans Avenue
Denver, CO 80208
(303) 871-7870
bbartlett@law.du.edu

CERTIFICATE OF DIGITAL SUBMISSION

We certify that a copy of the foregoing INTERESTED PROFESSORS AMICUS BRIEF, as submitted in Digital Form via the court's ECF system, is an exact copy of the written document filed with the Clerk using the Court's CM/ECF system and has been scanned for viruses with Microsoft Windows Defender, Version 4.8.207.0, last updated August 16, 2016, and, according to the program, is free of viruses. In addition, we certify that the foregoing brief contains no information subject to the privacy redaction requirements of 10th Cir. R. 25.5.

DATED this 17th day of August, 2016.

s/ Kevin Lynch
KEVIN LYNCH
Sturm College of Law
University of Denver
2255 East Evans Avenue
Denver, CO 80208
(303) 871-6039
klynch@law.du.edu

s/ Brad Bartlett
BRAD BARTLETT
Sturm College of Law
University of Denver
2255 East Evans Avenue
Denver, CO 80208
(303) 871-7870
bbartlett@law.du.edu

CERTIFICATE OF SERVICE

We hereby certify that on 17th August, 2016, we electronically filed a copy of the foregoing INTERESTED PROFESSORS AMICUS BRIEF with the Clerk of the United States Court of Appeals for the Tenth Circuit using the Court's appellate CM/ECF system. We further certify that all of the following listed participants in the case are registered CM/ECF users who will be served through the appellate CM/ECF system:

Nicholas A. DiMascio – nicholas.dimascio@usdoj.gov
Frederick Richard Yarger – fred.yarger@state.co.us
Mark Simeon Barron – mbarron@bakerlaw.com
L. Poe Leggette – pheggette@bakerlaw.com
Alexander K. Obrecht – aobrecht@bakerlaw.com
Paul Martin Seby – sebyp@gtlaw.com
Rebecca Sher - rsher@ndnlaw.com
Jeffrey S. Rasmussen – jrasmussen@ndnlaw.com
Stanford Purser – spurser@utah.gov
Tyler R. Green – tylergreen@utah.gov
Steven Adler – stevealder@utah.gov
Melissa Reynolds – mreynolds@utah.gov
Michael J. McGrady – mike.mcgrady@wyo.gov
Erik Petersen – erik.petersen@wyo.gov
Jeremy Patterson – jpatterson@ndnlaw.com
Jeremy A. Gross – jeremy.gross@wyo.gov
Andrew J. Kuhlmann – andrew.kuhlmann@wyo.gov
David Aiken Carson – david.a.carson@usdoj.gov
William E. Gerard – william.gerard@usdoj.gov
Rebecca Jaffe – rebecca.jaffe@usdoj.gov
Jody H. Schwarz – jody.schwarz@usdoj.gov
Nicholas Vassallo – nick.vassallo@usdoj.gov
Hope Hogan – hhogan@nd.gov
Matthew A. Sagsveen – masagsve@ng.gov
Wayne Kevin Stenehjem – ndag@nd.gov
Robert John Walker – rwalker@hickeyevans.com

Scott P. Klosterman – sklosterman@wpdn.net
Daniel Barry Frank – frank@tribcsp.com
Sean David Reyes – seanreyes@utah.gov
John Robinson, Jr. – john@jrobinsonesq.com
Jonathan S. Franklin – Jonathan.Franklin@nortonrosefulbright.com
Jaimie N. Cavanaugh – jcavanaugh@mountainstateslegal.com
Steven J. Lechner – lechner@mountainstateslegal.com
Jonathan J. Franklin – jonathan.franklin@nortonrosefulbright.com
Michael S. Freeman – mfreeman@earthjustice.org
Joel Minor – jminor@earthjustice.org
Nathan Matthews – nathan.matthews@sierraclub.org.

DATED this 17th day of August, 2016.

s/ Kevin Lynch
KEVIN LYNCH
Sturm College of Law
University of Denver
2255 East Evans Avenue
Denver, CO 80208
(303) 871-6039
klynch@law.du.edu

s/ Brad Bartlett
BRAD BARTLETT
Sturm College of Law
University of Denver
2255 East Evans Avenue
Denver, CO 80208
(303) 871-7870
bbartlett@law.du.edu