Nos. 16-8068, 16-8069

IN THE
UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

STATE OF WYOMING, ET AL.,
Petitioners-Appellees,
and
STATE OF NORTH DAKOTA, ET AL., STATE OF UTAH,
Intervenors-Appellees,
v.
SALLY JEWELL, SECRETARY, UNITED STATES DEPARTMENT OF THE INTERIOR, ET AL.,
Respondents-Appellants,
and
SIERRA CLUB, ET AL.,
Intervenors-Appellants.

On Appeal from the United States District Court
for the District of Wyoming
No. 2:15-CV-00043-SWS, Hon. Scott W. Skavdahl

BRIEF OF AMICI CURIAE FORMER OFFICIALS OF THE DEPARTMENT OF THE INTERIOR SUPPORTING RESPONDENTS-APPELLANTS

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INTEREST OF AMICI CURIAE[1]

Amicus curiae **Lynn Scarlett** served as the Deputy Secretary and Chief Operating Officer of the Department of the Interior from 2005 to 2009, after being appointed by President George W. Bush. In 2006, she served as the acting Secretary of the Interior. Prior to her appointment as the Deputy Secretary, Scarlett served as the Assistant Secretary of Policy, Management and Budget at the Department from 2001 to 2005.

Amicus curiae **David J. Hayes** served as the Deputy Secretary and Chief Operating Officer of the Department of the Interior for Presidents William J. Clinton and Barack H. Obama from 1999 to 2001 and 2009 to 2013, respectively.

Amicus curiae **James L. Caswell** served as the Director of the Bureau of Land Management under President George W. Bush. Prior to his appointment as Director, Caswell spent almost four decades in various land management positions at the Bureau of Land

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[1] Pursuant to Federal Rule of Appellate Procedure 29, counsel for amici curiae state that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than amici curiae, their members, or their counsel made a monetary contribution to this brief's preparation or submission. All parties have consented to the filing of this brief.

Management, Bonneville Power Administration, U.S. Forest Service, and State of Idaho.

Amicus curiae **Michael P. Dombeck** served as the Acting Director of the Bureau of Land Management for President William J. Clinton from 1994 until 1997 when he was named Chief of the United States Forest Service. Prior to those appointments, Dombeck served as the Special Assistant to the Director of the Bureau of Land Management and Science Advisor under President George H. W. Bush. He also worked in various field positions with the U.S. Forest Service in the Midwest and West.

As former high-ranking officials at the Department of the Interior and other federal and state land management agencies in both Republican and Democratic administrations, amici curiae have a unique perspective on the important role the Interior Department plays in managing and protecting the lands that belong to all Americans. Amici submit this brief to demonstrate that the district court's decision seriously misapprehends the Department's historical mission, its statutory authority, and its important responsibilities for the stewardship of federal lands.

SUMMARY OF THE ARGUMENT

Amici are a group of former high-ranking Department of the Interior officials from both Republican and Democratic administrations. We have different views on many aspects of federal land management and natural resources policy; indeed, amici may not all agree on the wisdom of any particular approach to regulation of hydraulic fracturing (or "fracking") on federal lands or the optimal role for States and tribes in the regulation of hydraulic fracturing on federal lands. But we are unified in our conviction that the Interior Department has—and must have—the authority to promulgate uniform rules to protect federal lands and natural resources from the risks posed by hydraulic fracturing.[2]

This authority has its origins in the Property Clause of the Constitution, which grants Congress plenary authority over the land that the federal government superintends on behalf of all Americans. *See Kleppe v. New Mexico*, 426 U.S. 529, 539 (1976) ("This Court has

[2] Federal lands include federal interests in land, including the minerals under private and state land that belong to all of the citizens of the United States and are administered by the federal government. *See* 43 U.S.C. § 1702(e).

'repeatedly observed' that '[t]he power over the public land thus entrusted to Congress is without limitations.'"), quoting *United States v. San Francisco*, 310 U.S. 16, 29 (1940). In turn, Congress has enacted broad organic statutes that govern mineral leasing and federal land management, and authorize the Bureau of Land Management ("BLM") to regulate oil and gas drilling activities on the public lands. Under these statutes, the BLM has for decades specified operational requirements for lessees engaged in oil and gas drilling activities. The hydraulic fracturing rules are simply the latest manifestation of this well-established authority.

The district court erred in concluding to the contrary. Its deeply flawed decision threatens the federal government's ability to protect its lands from injury and must be reversed.

As detailed below, both the Mineral Leasing Act ("MLA"), 30 U.S.C. § 187 *et seq*., and the Federal Land Policy and Management Act ("FLPMA"), 43 U.S.C. § 1701 *et seq*., grant the Department of the Interior broad authority to protect federal lands from injury caused by the activities of lessees of that land, including lessees who wish to conduct hydraulic fracturing operations on federal lands. Congress has

never limited the Interior Department's authority under these public lands statutes to regulate oil and gas activities, in general, or hydraulic fracturing, in particular.

This well-established Interior Department stewardship authority and responsibility over the management of the public lands was not silently removed by a provision in the Energy Policy Act that sidelined a different agency, the Environmental Protection Agency, from regulating hydraulic fracturing under a different statute, the Safe Drinking Water Act, 42 U.S.C. § 300f *et seq*. Indeed, the legislative history of the Safe Drinking Water Act, which the district court found ousted the Interior Department's authority, specifically states that Congress did not intend through that Act to limit or repeal any of the Department's authority, including authority "to prevent groundwater contamination under the Mineral Leasing Act." H.R. Rep. No. 93-1185, at 32 (1974), reprinted in 1974 U.S.C.C.A.N. 6454, 6484-85.

ARGUMENT

The outcome of this case hinges on one fundamental consideration: the lands at issue are under the stewardship of the *federal* government. The Constitution's Property Clause grants plenary

authority over them to Congress. Congress, in turn, has granted the Department of the Interior broad discretion under the MLA and FLPMA to do what is necessary to safeguard those lands from undue degradation that may be caused by lessees. And Congress has never taken that authority away with respect to oil and gas drilling using hydraulic fracturing techniques.

I. The Mineral Leasing Act grants the Interior Department broad authority to "protect[] … the interests of the United States," and "safeguard[] … the public welfare."

The history of, plain language of, and case law regarding the MLA all support the Department of the Interior's broad authority to regulate hydraulic fracturing on federal lands. This broad authority has been widely recognized throughout the Act's history by authorities and experts across the political spectrum.

A. The MLA's history, text, and case law demonstrate that the Interior Department has authority to regulate hydraulic fracturing on federal lands.

Prior to the passage of the Mineral Leasing Act in 1920, federal oil and gas deposits were governed largely by the Mining Law of 1872, 17 Stat. 91 (May 19, 1872). Under that law, a private actor who made a proper location and submitted proof of a valuable discovery was entitled

to a federal patent. Once a patent issued, the United States relinquished its ownership interest. This patenting system caused many problems, including wasteful development of the country's critical oil and gas resources, and the federal government began to withdraw federal lands from the scope of the Mining Law. The Supreme Court upheld these withdrawals, recognizing the federal government's authority to disallow mining on certain lands under the Property Clause, over a century ago. *United States v. Midwest Oil Co.*, 236 U.S. 459, 483 (1915).[3]

This "ownership" regime changed dramatically in 1920 with passage of the Mineral Leasing Act, 30 U.S.C. § 187 *et seq.*, which replaced the patenting system with a system in which the United States retained title to the land subject to a system of leasing for exploitation, and federal regulation. As the Supreme Court later explained:

> Unlike a land patent, which divests the Government of title, Congress under the Mineral Leasing Act has not only

[3] The Supreme Court had long recognized that "the Government has with respect to its own land the rights of an ordinary proprietor to maintain its possession and prosecute trespassers[;] … [it] can prohibit absolutely or fix the terms on which its property may be used." *Light v. United States*, 220 U.S. 523, 536 (1911); *see Camfield v. United States*, 167 U.S. 518, 524 (1897) (similar).

> reserved to the United States the fee interest in the leased land, but has also subjected the lease to exacting restrictions and continued supervision by the Secretary. … [The Secretary] may prescribe, as he has, rules and regulations governing in minute detail all facets of the working of the land. In short, a mineral lease does not give the lessee anything approaching the full ownership of a fee patentee, nor does it convey an unencumbered estate in the minerals.

Boesche v. Udall, 373 U.S. 472, 477-78 (1963).

The Mineral Leasing Act grants the Interior Department broad authority to "subject … lease[s] to exacting restrictions," *id.*, through several key provisions. Indeed, the Act specifically directs that each lease "shall contain provisions for the purpose of insuring the exercise of reasonable diligence, skill, and care in the operation of said property." 30 U.S.C. § 187. That same provision further authorizes the Secretary of the Interior to include such other "provisions" as she deems necessary "for the protection of the interests of the United States … and for the safeguarding of the public welfare." *Id.* This language explicitly grants authority to the Secretary of the Interior to condition leases for the protection of public lands, and calls upon the Secretary's expert judgment as to how best to protect the public interest.[4] The Act further

[4] The district court dismissed this explicit authority by concluding that "[r]ead in [the] context" of the entire provision—which lists a number of

grants the Secretary authority "in the interest of conservation of natural resources" to "waive [or] suspend … an entire leasehold … whenever in his judgment the leases cannot be successfully operated under the terms provided therein." 30 U.S.C. § 209. This court has interpreted the phrase "in the interest of conservation of natural resources" broadly to "not only encompass conserving mineral deposits, but also to prevent environmental harm." *Hoyl v. Babbitt*, 129 F.3d 1377, 1380 (10th Cir. 1997).

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specific requirements for leases—this broad language "requires only that certain specific lease provisions appear in all federal oil and gas leases for the safety and welfare of miners and the prevention of undue waste, and to insure the sale of mined minerals to the United States and the public at reasonable prices." (Order 14.) The language of § 187, however, is not so limited. In addition to the district court's listed concerns, as described above § 187 specifically requires provisions for the exercise of care in operations on federal property and broadly requires the Interior Department to take into account the interests of the United States and the public welfare. The terms "interests of the United States" and "public welfare" must be interpreted to mean something different from the separate provisions listed by the district court; otherwise, "they have no meaning that does not duplicate the meaning of the other words." *Babbitt v. Sweet Home Chapter, Communities for Greater Ore.*, 515 U.S. 687, 697-98 (1995). "A reluctance to treat statutory terms as surplusage," therefore, "supports the reasonableness of the Secretary's interpretation." *Id.*

This broad authority is not limited to the inclusion of specific lease terms in individual leases. Rather, the MLA also authorizes the Interior Department 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 Act. 30 U.S.C. § 189. Lessees are well aware that their operations on federal lands, including oil and gas drilling-related activities, are subject to departmental regulations. 43 C.F.R. § 3161.1(a).

Based on this clear statutory language, the courts have consistently upheld the Interior Department's authority to condition or deny leases. When, in the early 1930s, the Secretary "by general order, either rejected or refused to receive … applications" for mineral leases on federal lands "[i]n order to effectuate the conservation policy of the President," the Supreme Court upheld that authority. *United States ex rel. McClennan v. Wilbur*, 283 U.S. 414, 419 (1931). Rejecting the would-be lessees' claims, the Court upheld the Secretary's position "that under the Act, the granting of a prospecting permit for oil and gas is discretionary with the Secretary of the Interior, and any application may be granted or denied, either in part or in its entirety, as the facts

may be deemed to warrant." *Id*. at 420. That assertion of authority, the Court found, was "aided by consideration of his general powers over the public lands as guardian of the people." *Id*.

Thirty years later, the Supreme Court again affirmed the broad authority of the Secretary in *Udall v. Tallman*, 380 U.S. 1, 4 (1965). There, applicants for a federal lease complained that the Secretary improperly denied the lease. The Supreme Court disagreed, holding that the "Mineral Leasing Act of 1920 … gave the Secretary of the Interior *broad power* to issue oil and gas leases on public lands," including the "discretion to refuse to issue any lease at all on a given tract." *Id*. (emphasis added); *see also United States ex rel. Jordan v. Ickes*, 143 F.2d 152, 153 (D.C. Cir. 1944) ("The considerations of public policy which must be balanced in determining whether and when the public bounty shall be dispensed, with respect to public lands and minerals, are just as important today as they were when the *McLennan* case was decided and require today, as much then, the exercise of discretion by the Secretary.").[5]

[5] Recognizing that the Mineral Leasing Act calls upon the Secretary's judgment and expertise, the Supreme Court also emphasized that the

As this Court recognizes: "It is clear that the Secretary has broad discretion [to withdraw a lease]. While the statute gives the Secretary the authority to lease government lands under oil and gas leases, his power is discretionary rather than mandatory." *McDonald v. Clark*, 771 F.2d 460, 463 (10th Cir. 1985). The Secretary's greater power to withhold or suspend leases also implies a lesser power to impose reasonable conditions upon them for the protection of the environment. *See Getty Oil Co. v. Clark*, 614 F. Supp. 904, 916 (D. Wyo. 1985) ("Section 209, by implication, authorizes the Secretary to condition the granting of a requested suspension in a manner reasonably tailored to protect the interests of conservation, including conservation of the environmental values of the leased premises.").

Secretary's interpretation of the Act is entitled to "great deference." In a discussion applicable to this case, the Court in *Udall v. Tallman* said:

> This Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration. To sustain the [agency's] application of [a] statutory term, we need not find that its construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in stance in judicial proceedings.

380 U.S. at 16 (internal quotation marks omitted).

B. This authority has been widely recognized throughout the MLA's history.

Evident from the text of the statute, the Interior Department's authority to regulate the conduct of lessees on federal lands has been long and widely recognized.

More than fifty years ago, as competing interests in public lands grew, and "[m]anagement of the public lands under … various laws became chaotic," Congress established the Public Land Law Review Commission "to study the matter." *Lujan v. National Wildlife Fed.*, 497 U.S. 871, 876 (1990). A "bipartisan commission supplemented by an advisory council made up of many interested users of the public lands," was charged with undertaking a "review of existing public land laws and regulations and recommend[ing] revisions necessary therein." *One Third of the Nation's Lands: A Report to the President and to the Congress from the Public Land Law Review Commission* at ix (June 20, 1970) (hereinafter, "PLLRC Report");[6] *see* Pub. L. No. 88-606, 78 Stat. 982 (Sept. 19, 1964). The Commission was chaired by Representative Wayne Aspinall from Colorado, and was comprised of a bipartisan

[6] *Available at* https://archive.org/details/onethirdofnation3431unit (last visited August 9, 2016).

group of Congressmen, as well as a diverse assemblage of former Governors, state and local officials, representatives of the mining, ranching, and timber industries, and law professors. PLLRC Report at iv-vii. In June 1970, the Commission released its final report, *One Third of the Nation's Land*, a comprehensive treatment of public land law supported by 33 individual studies and testimony from hundreds of witnesses.

That Commission's comprehensive review resulted in several conclusions regarding the Interior Department's authority to regulate mineral leasing on federal lands relevant to the question presented here. At the outset of its analysis, the Commission explained "that Congress has largely delegated to the executive branch its plenary constitutional authority over the retention, management, and disposition of public land." *Id.* at 2. Later in the report, as if speaking directly to this case, the Commission emphasized:

> Not only does the administrator have broad discretion to refuse to issue prospecting permits or leases, but he also has broad discretion to prescribe operating terms and conditions. Existing law appears fully adequate to authorize supervision over leasable mineral operations as they may affect other land uses and environmental conditions.

Id. at 132. Accordingly, this bipartisan Commission, advised by a wide range of interested parties, concluded that the Interior Department had broad authority to protect the environment from potential injuries caused by lessees' activities on federal lands.

Two decades later, another Congressionally-directed report reached similar conclusions regarding the Interior Department's authority to regulate oil and gas lessees. As part of the Federal Onshore Oil and Gas Leasing Reform Act of 1987, Congress commissioned a report from the National Academy of Sciences regarding oil and gas leasing on federal lands. National Research Council Committee on Onshore Oil and Gas Leasing, *Land Use Planning and Oil and Gas Leasing on Onshore Federal Lands* at vii (National Academy of Sciences Press 1989).[7] The National Academy, in turn, brought together a group of twelve experts, composed of representatives from the States and tribes, the oil and gas industry, environmental groups, and law professors, to address "the manner in which oil and gas resources are considered in land use plans." *Id.* at vii.

[7] *Available at* http://www.nap.edu/catalog/1480/land-use-planning-and-oil-and-gas-leasing-on-onshore-federal-lands (last visited August 9, 2016).

After reviewing the language and history of the MLA, this diverse group reached the same conclusion, namely, that mineral leasing is subject to the discretion of the Secretary of the Interior, "who may lease lands with or without conditions or withhold lands from leasing." *Id.* at 37.

The district court's decision represents a sharp departure from this well-established and long-held understanding of the Interior Department's authority under the MLA.

II. The Federal Land Policy and Management Act directs the Interior Department to "take any action necessary to prevent unnecessary or undue degradation" of federal lands.

While the MLA provides the Department of the Interior with fully sufficient authority to regulate oil and gas lessees on federal lands to protect those lands, the Federal Land Policy and Management Act, enacted in 1976, reinforces and supplements that authority. FLPMA "arose in large part out of the Report of the Public Land Law Review Commission," *Nat'l Wildlife Federation v. Buford*, 835 F.2d 305, 335 (D.C. Cir. 1987), through which Congress sought to determine what "new management and disposal tools" might help resolve the "conflicting demands" on federal lands. PLLRC Report at ix. And

FLPMA's multiple-use mandate embodies many of the Commission's recommendations.

For example, the Commission found that while "there [were] provisions in regulations and other administrative directives to prevent or minimize environmental abuses of the public lands, there are important gaps in authority and practice." *Id.* at 83. It urged that the "public land agencies must be in a position, and have controls available, to respond to adverse environmental impacts as their nature becomes known." PLLRC Report at 83.

FLPMA embodied these recommendations in its "declaration of policy," which states that "it is the policy of the United States that … the public lands be managed in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archaeological values." 43 U.S.C. § 1701(a)(8). Congress further declared as policy that "in administering the public land statutes and exercising discretionary authority granted by them, the Secretary be required to establish comprehensive rules and regulations after considering the views of the general public." *Id.* § 1701(a)(5).

FLPMA operationalized these policies through explicit grants of authority to the Secretary of the Interior. FLPMA directs that, "[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." *Id.* § 1732(b) (emphasis added). It also grants the Secretary authority to "regulate" through "published rules," as she deems appropriate, "the use, occupancy and development of the federal lands." *Id.* And FLPMA mandates that the Secretary, with respect to federal lands, "shall promulgate rules and regulations to carry out the purposes of this Act," *id.* § 1740, including the purpose of protecting the environment and, in particular, water resources, *id.* § 1701(a)(8).[8] As this Court long ago recognized, "FLPMA is a complex statute, containing many interdependent sections in order to provide the BLM with a versatile framework for its management efforts." *Rocky Mountain Oil & Gas Ass'n v. Watt*, 696 F.2d 734, 739 (10th Cir. 1982).

[8] Shortly after the Act's passage, a congressional transmittal document noted that FLPMA "provides comprehensive authority and guidelines for the administration and protection of the Federal lands and their resources." SENATE COMM. ON ENERGY & NATURAL RES., 95TH CONG., LEGISLATIVE HISTORY OF THE FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976, at vi (Comm. Print 1978).

The district court dismissed these explicit statutory authorizations—and this Court's understanding of FLMPA's versatility—by making a sweeping, incorrect assertion that FLPMA is only a *planning* statute and, as such, is not concerned with *environmental regulation*. (Order 17-19.) According to the district court, only the Environmental Protection Agency has jurisdiction over environmental regulatory matters affecting underground water resources on federal lands. (Order 19-20.) The district court reached this remarkable and plainly incorrect conclusion by relying almost entirely on *California Coastal Commission v. Granite Rock, Co.*, 480 U.S. 572, 587-88 (1987), a preemption case that did not question the federal government's broad regulatory authority over environmental matters arising on and under lands it is responsible for managing. *Id.*

The District Court's conclusion is based on a number of serious errors. Indeed, the very name of FLPMA—the "Federal Land *Policy* and *Management* Act" belies a conclusion that FLPMA is exclusively concerned with planning. Likewise, its plain language speaks to *both* environmental planning *and* regulation. Its declaration of policy states that it shall be the policy of the United States that "regulations *and*

plans for the protection of public land areas of critical environmental concern be promptly developed." 43 U.S.C. § 1701(11) (emphasis added). And the statute's "unnecessary and undue degradation" mandate specifically requires the Secretary to, "by *regulation* or otherwise, take *any action necessary*" to prevent such degradation. 43 U.S.C. § 1732(b) (emphases added). Thus, the plain language of the statute contradicts the district court's claims that FLPMA is only a planning statute.

Second, the district court's conclusion that only the Environmental Protection Agency has jurisdiction over environmental regulatory matters affecting subsurface water resources on public lands is undermined by the many regulations that the Interior Department has promulgated regulating oil and gas operations on federal lands to protect surface and subsurface resources, including groundwater, for nearly a century. *See* Br. of Federal Appellants 5-6.

Third, *California Coastal* does not support the district court's conclusion that the Interior Department lacks authority under FLPMA to address environmental issues arising on lands that it manages. In that case, a mining company that had a permit from the Forest Service under FLPMA's sister statute, the National Forest Management Act

(NFMA), argued that NFMA ousted the State of California's authority to regulate the mine under the State's coastal zone protection laws. 480 U.S. at 577. The company maintained that NFMA demonstrated a legislative intent to limit States to a purely advisory role in federal land use planning decisions, thereby negating the potential applicability of California's coastal zone protection law, which it characterized as a land use planning law. *Id.*

The Supreme Court rejected the mining company's argument. It concluded that even if NFMA and FLPMA occupied the field of land use planning, thus preempting state land use planning laws, the mining company had not applied for a permit under California's coastal zone protection laws and, in the absence of any indication of the type of permit requirements that California might seek to impose on the company, the Court could not say whether the California law was preempted. *Id.* at 586-589. In so concluding, the Court recognized that land use planning and environmental regulation are "distinct activities." *Id.* at 587-88.

The *California Coastal* Court did not address whether FLPMA authorized the Department of the Interior to promulgate environmental

regulations for oil and gas leasing—and that question was not presented.[9] Rather, *Coastal Commission* is a preemption case that rested on the familiar principle that state law is not displaced in the absence of evidence that Congress or its designated agent intended to preempt it, which may be demonstrated by showing that the relevant statutes and regulations fully occupy the field, or actually conflict with state law. *See* 480 U.S. at 582-83. Because of the "purely facial" nature of the mining company's claim, *see id.* at 580, the Court had no occasion to examine whether the state permit requirement conflicted with any particular federal regulations. The Department of the Interior's authority was thus not at issue in *Coastal Commission*. But even if it

[9] If anything, the Court's discussion of the relevant authorities reflects a recognition that the Interior Department *does* enjoy that authority. In language immediately following the passage quoted by the district court (Order 18-19.), the Court explained that while Forest Service regulations "'set forth rules and procedures' through which mining on unpatented claims in national forests, 'shall be conducted so as to minimize adverse environmental impacts on National Forest System *surface* resources,'" the Forest Service regulations disclaimed any purpose "'to provide for the management of *mineral* resources; the responsibility for managing such resources is in the Secretary of the Interior.'" *California Coastal*, 480 U.S. at 588 (quoting 36 C.F.R. § 228.1 (1986) (emphasis added)). Thus, the Court recognized that the *Department of the Interior* has the authority to minimize adverse environmental impacts in its management of mineral resources.

were, that case does not establish an either/or proposition in which a finding that state law is *not preempted* means that there is no federal regulatory authority over the relevant subject matter. The proposition that a federal regime might not entirely displace state law does not show that the federal government lacks any authority to act in the area.

Indeed, given that FLPMA's plain language clearly provides for regulation to prevent unnecessary and undue degradation of federal lands, it would have been quite surprising for the Court to have held that FLPMA did not authorize environmental regulation. The district court erred in concluding to the contrary.

III. The District Court's decision threatens the Interior Department's ability to fulfill Congress's mandate to protect federal lands.

Through the MLA and FLPMA, Congress granted the Department of the Interior broad authority to regulate lessees' activities on federal lands.[10] And Congress has never specifically preempted that broad authority where oil and gas drilling activities are concerned. The

[10] Although not separately discussed in this brief, the Department of the Interior also has broad statutory authority to protect Indian lands from adverse effects from mineral leasing. *See* Br. of Federal Appellants 4-5. (citing 25 U.S.C. § 396d; *see also id.* § 396 (Act of March 3, 1909); *id.* § 2107 (Indian Mineral Development Act).

district court's decision hinges on the conclusion that in passing the Energy Policy Act, Congress ousted all of this longstanding statutory and court-confirmed authority to regulate hydraulic fracturing on federal lands—a mainstream oil and gas drilling technique that, according to the BLM, is utilized on 90 percent of the oil and gas wells on federal lands. Oil and Gas; Hydraulic Fracturing on Federal and Indian Lands, 80 Fed. Reg. 16,128, 16,131 (March 26, 2015). That conclusion is wrong. To support it, the district court needed to show either that (a) when Congress passed the Safe Drinking Water Act ("SDWA"), it clearly intended to oust any authority that the Interior Department had to regulate hydraulic fracturing, or (b) Congress directly withdrew the Interior Department's authority to regulate hydraulic fracturing through the Energy Policy Act. The district court's opinion demonstrated neither, and neither proposition can sustain scrutiny.

First, the SDWA nowhere references, much less purports to vacate, the Department of the Interior's authority to promulgate environmental requirements that pertain to drilling operations on federal lands. It does not follow, therefore, that the Energy Policy Act's

reference to the interplay between hydraulic fracturing activities and EPA's responsibilities under the Safe Drinking Water Act "clear[ly] and manifest[ly]" repealed the Interior Department's authorities to govern oil and gas drilling operations on federal lands, including the most common technique now utilized in drilling operations – hydraulic fracturing. *Nat'l Ass'n of Homebuilders v. Defenders of Wildlife*, 551 U.S. 644, 662 (2007). Because virtually all oil and gas drilling activities on public lands now involve the use of hydraulic fracturing techniques, the district court's decision removes virtually all of the Department's regulatory oversight over federal oil and gas leasing activity, an astounding result.

It is also instructive, in this regard, that the Environmental Protection Agency—the agency charged with administering the SDWA—did not believe that the SDWA covered hydraulic fracturing activities at all, much less that the SDWA precluded the Interior Department from regulating a central aspect of oil and gas leasing activity that it had the authority and responsibility to manage on public lands. *See Legal Envtl. Assistance Found. v. EPA*, 118 F.3d 1467, 1471 (11th Cir. 1997); *see also* (Order 20.)

Indeed, this first proposition is disproved by the legislative history of the SDWA, which specifically states that Congress "did not intend any of the provisions of this bill to repeal or limit any authority the [Interior agency that oversaw these activities before responsibility was transferred to the BLM] may have under any other legislation." H.R. Rep. No. 93-1185, at 32 (1974), reprinted in 1974 U.S.C.C.A.N. 6454, 6484-85. This included authority "to prevent groundwater contamination under the Mineral Leasing Act." *Id*.

The second proposition is contradicted by the text of the Energy Policy Act itself, which creates a single narrow exception to one definition within the SDWA, carving non-diesel hydraulic fracturing out of EPA's SDWA authority. *See* Energy Policy Act of 2005, Pub. L. No. 109-58 § 332, 119 Stat. 594 (2005). And that new definition applies only "[f]or purposes of this *part*," i.e., Part C of the SDWA, *not* for the purposes of any other law. 42 U.S.C. § 300h(d). If what Congress sought to do in the Energy Policy Act was to oust all federal authority over hydraulic fracturing, even on federal lands, it chose an exceedingly odd way to do so. Rather than saying, for example, "regulation of hydraulic fracturing is reserved to the States," it merely defined one

term in one federal statute administered by one agency to remove hydraulic fracturing from that statute's purview. Moreover, none of the supporters of the Energy Policy Act mentioned such a sweeping intent in the legislative history, a fact that would be surprising had they possessed such an intent. Congress does not "hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'n, Inc.*, 531 U.S. 457, 468 (2001).

Congress had good reasons for distinguishing between EPA's authority under the SDWA and the Interior Department's authority under the MLA and FLPMA. While the SDWA applies to all lands within the United States, "whether or not [the injection] occur[s] on property owned or leased by the United States," 42 U.S.C. §300h(b)(1)(D), the Interior Department's authority is limited to *federal* lands. The Interior Department's regulation, accordingly, has a much narrower sweep. It also serves a different purpose. Exercising its plenary authority of the Property Clause, Congress authorized the Interior Department to protect *federal* lands from injury. The SDWA, in contrast, derives from Congress's Interstate Commerce Clause power, and its goal is the protection of public drinking water systems

throughout the country. There is no reason to think that, in specifically removing EPA's authority under Part C of the SDWA, Congress silently, and without any debate, intended to sweep away the Interior Department's "wholly independent" authority under the MLA and FLPMA. *See Massachusetts v. EPA*, 549 U.S. 497, 532 (2007).

While Congress surely has the power to withdraw the Interior Department's authority to regulate hydraulic fracturing on federal lands, this Court should not read a definitional change in a different statute administered by a different agency with a different scope and addressing a different goal – a statutory amendment that on its face is explicitly limited to a single federal program (Part C of the SDWA) – to oust the Interior Department's broad and longstanding authority to protect public lands from injury by lessees under the MLA and FLPMA. There is nothing to indicate that Congress intended to effect such an extensive change to public land law, and there are good reasons to think it would not do so.

The Department of the Interior has long had both the authority and responsibility to protect federal lands from environmental injury, including injury posed by hydraulic fracturing operations. Contrary to

the district court's suggestion, the MLA and FLPMA need not explicitly delineate this authority by using the words "hydraulic fracturing." *See* (Order 17.) Rather, the statutes give the Interior Department the discretion to determine what activities threaten federal land—whether they be hard-rock mining, off road vehicle use, or hydraulic fracturing, all activities not specifically mentioned in the statutes—and to regulate them accordingly. As this Court has said, "the delegation of general authority to promulgate regulations extends to all matters 'within the agency's substantive field.'" *Helfrich v. Blue Cross & Blue Shield*, 804 F.3d 1090, 1109 (10th Cir. 2015) (quoting *City of Arlington v.* FCC, 133 S.Ct. 1863, 1874 (2013)).[11] The protection of federal lands from the

[11] In recognition of the fact that relevant technologies, land uses, and management techniques will change over time, federal statutes typically phrase delegations to land management agencies in broad terms that allow managers to adjust policies to practical realities. The Interior Department's response to the increased use of hydraulic fracturing in recent decades is one typical example of the application of such statutory directives to evolving realities. *See* 80 Fed. Reg. at 16131 (noting that BLM hydraulic fracturing regulations preceding the instant rule "were established in 1982 and last revised in 1988, long before the latest hydraulic fracturing technologies were developed or became widely used"); *see also* Br. of Federal Appellants 8 (quoting regulations from 1936 requiring Department approval before activity on federal or Indian land "stimulat[ing] production by vacuum, acid, gas, air, or water injection." (quoting 1 Fed. Reg. 1996, 1998, § 2(d) (Nov. 20, 1936)).

risks posed by oil and gas drilling activities—including hydraulic fracturing drilling techniques—is squarely within the Interior Department's delegated authority and substantive expertise.

To see the error—and disruptive consequences—of the district court's holding, consider this Court's decision in *State ex rel. Richardson v. BLM*, 565 F.3d 683 (10th Cir. 2009). There, the State of New Mexico objected to an amendment to a land use plan that would allow oil and gas development on certain lands. New Mexico was concerned with the threat of "possible contamination of the Salt Basin Aquifer," which could be "degrade[d] … if leaks or spills occur from pits used for the storage of drilling fluids, or if cathodic protection wells associated with pipelines are installed in a manner that allows for the commingling of shallow surface aquifers." *Id*. at 690-91, 713. This Court concluded that the "BLM acted arbitrarily by concluding without apparent evidentiary support that impacts on the Aquifer would be minimal," and "affirm[ed] the district court's finding that NEPA require[d] BLM to conduct further site-specific analysis before leasing lands." *Id*. at 715, 721.

Under the district court's holding, *Richardson* would make no sense, at least as far as hydraulic fracturing—the most common procedure for mining oil and gas on federal lands—is concerned. It seems unlikely that this Court would order the BLM to do more analysis of a risk that it could not regulate regardless of what that analysis yielded. Perhaps, one might argue, the BLM could include provisions in specific leases where an environmental analysis shows risks to water resources. Even the district court appears to have conceded as much. (Order 18-29 & n. 12.)

But if the BLM may do that, then hydraulic fracturing has not been entirely removed from the realm of federal regulation. And if it has not been entirely removed, then there is no good reason why the Interior Department may not use its broad and clear regulatory authorities under the MLA and FLPMA to create uniform federal standards for lessees who wish to use hydraulic fracturing techniques on federal lands. After seeing many decisions like *Richardson* concluding that the Interior Department and other land management agencies have not adequately taken environmental considerations into account, it is especially frustrating to read the district court's decision

here, striking down a comprehensive rule to protect the public lands based upon extensive study and public input.

Indeed, as former public servants with deep experience administering and managing federal lands on behalf of all Americans, we believe that a uniform comprehensive rule is vital. Under the district court's ruling, protection of the federal lands from hydraulic fracturing would depend entirely on the States. While some States may have adequate regulations to protect the federal lands, others may not regulate hydraulic fracturing at all. In our practical experience, such gaps in regulation are problematic and likely to hinder the Interior Department in its fundamental role as guardian of the federal lands. Uniformity creates certainty for regulated parties. And a uniform rule gives effect to the Interior Department's multiple-use mandate by regulating hydraulic fracturing to protect the environment, so that oil and gas mining and environmental quality may coexist on federal lands.

CONCLUSION

For the foregoing reasons, amici curiae Former Officials of the Department of the Interior urge this Court to reverse the decision of the district court.

Respectfully submitted,

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August 19, 2016

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i) because this brief contains 6,456 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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I certify that a copy of the foregoing BRIEF OF AMICI CURIAE FORMER OFFICIALS OF THE DEPARTMENT OF THE INTERIOR, 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 Avast anti-virus, last updated August 18, 2016, and, according to the program, is free of viruses. In addition, I certify that the foregoing brief contains no information subject to the privacy redaction requirements of 10th Cir. R. 25.5.

Dated: August 19, 2016

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the appellate CM/ECF system on August 19, 2016.

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