Nos. 15-8126, 15-8134
Oral Argument Requested

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

STATE OF WYOMING; STATE OF COLORADO; INDEPENDENT PETROLEUM ASSOCIATION; and WESTERN ENERGY ALLIANCE,

Petitioners-Appellees

and

STATE OF NORTH DAKOTA; STATE OF UTAH; and UTE INDIAN TRIBE,

Intervenors-Appellees

v.

S.M.R. JEWELL; NEIL KORNZE; U.S. DEPARTMENT OF THE INTERIOR; and U.S. BUREAU OF LAND MANAGEMENT,

Respondents-Appellants

and

SIERRA CLUB; EARTH WORKS; WESTERN RESOURCE ADVOCATES; WILDERNESS SOCIETY; CONSERVATION COLORADO EDUCATION FUND; and SOUTHERN UTAH WILDERNESS ALLIANCE,

Intervenors-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF WYOMING, NOS. 15-CV-41/43 (HON. SCOTT W. SKAVDAHL)

REPLY BRIEF FOR THE FEDERAL APPELLANTS

JOHN C. CRUDEN
Assistant Attorney General

Of Counsel:
RICHARD MCNEER
Office of the Solicitor
U.S. Department of the Interior
Washington, DC

WILLIAM E. GERARD
DAVID A. CARSON
J. DAVID GUNTER II
NICHOLAS A. DIMASCIO
U.S. Department of Justice
Environment and Natural Resources Div.
999 18th Street, Suite 370
Denver, CO 80202
(303) 844-1384

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GLOSSARY

APA	Administrative Procedure Act
BLM	U.S. Bureau of Land Management
EPA	U.S. Environmental Protection Agency
FLPMA	Federal Land Policy and Management Act
MIT	Mechanical Integrity Test
MLA	Mineral Leasing Act of 1920
SDWA	Safe Drinking Water Act
USGS	U.S. Geological Survey
Indian mineral statutes	Indian Mineral Leasing Act; Act of March 3, 1909; and Indian Mineral Development Act

INTRODUCTION

The preliminary injunction rests on the district court's flawed conclusion that BLM—the agency Congress assigned to oversee all operations on federal and Indian oil and gas leases—somehow lacks authority to regulate subsurface operations like hydraulic fracturing. That conclusion ignores a century of precedent and decades-old federal regulations. It also relies on the notion that states gained exclusive control over federal property via a statutory definition that, on its face, applies only to Part C of the SDWA. Congress would not use such an obscure method to cede all federal control over a use of federal property. The district court's conclusions are even more astounding given that the SDWA's legislative history clearly states Congress's intent to preserve BLM's independent authority to protect groundwater under the MLA and other statutes.

Petitioners effectively concede that key aspects of the district court's reasoning are indefensible. For example, Petitioners do not defend the erroneous holding that BLM may regulate only surface activities to protect surface resources. (Order 14.) Nor do Petitioners adopt the court's mischaracterization of BLM's argument. BLM does not argue that its authority stems from the "absence of an express withholding of power" (Order 21, 51); rather, BLM relies on the delegations of regulatory authority in the MLA, FLPMA, and Indian mineral statutes (Opening Br. 14-18, 23). Petitioners also offer no defense of the court's *sua sponte* and unsupported assertion that BLM disavowed authority over hydraulic fracturing. (Order 10 n.5, 14.) In its

opening brief, BLM rebutted each of those conclusions, and no Petitioner has responded meaningfully. The district court's order therefore should be reversed and the preliminary injunction vacated.

ARGUMENT

I. BLM's interpretation of its authority is correct and warrants deference.

Petitioners fundamentally misunderstand *Chevron* deference. The MLA, FLPMA, and Indian mineral statutes expressly delegate to BLM broad authority to regulate oil and gas operations on federal and Indian lands. This Court must defer to BLM's interpretation of those delegations unless traditional tools of statutory construction "foreclose[] the agency's assertion of authority." *City of Arlington v. FCC*, 133 S.Ct. 1863, 1871 (2013). (*See also* Opening Br. 14-18 & n.9.) The question therefore is not whether those statutes *could* be read as Petitioners contend, but whether the statutes *must* be so read. The district court's order must be reversed because the answer to that question is no.[1]

A. The MLA and FLPMA support BLM's view of its authority.

Petitioners theorize that the MLA is exclusively concerned with leasing, mine safety, and waste of mineral resources, and thus BLM has no power to protect the environment or other resources, like groundwater. (Wyo. Br. 25-28; Industry Br. 40-

[1] The district court did not reach, and no Petitioner briefs, *Chevron* step two. The district court may address that step in its merits ruling (N.D. Br. 27), but a legally defective preliminary injunction cannot remain in place on remand.

41.) Congress did not so constrain BLM's duty to ensure the "exercise of reasonable diligence, skill, and care in the operation of" federal leases. 30 U.S.C. § 187. Congress broadly instructed BLM to protect the "interests of the United States" and the "public welfare." *Id.* And Congress authorized BLM to "prescribe necessary and proper rules and regulations," as well as "to do any and all things necessary to carry out and accomplish the purposes of this chapter." *Id.* § 189. The hydraulic-fracturing rule easily falls within those capacious delegations.

To be sure, the MLA also requires BLM to ensure miner safety, avoid undue waste of resources, prohibit employment of minors, establish standards for weighing coal, achieve reasonable prices, and prevent monopoly. (Wyo. Br. 27-28; Industry Br. 40.) But those diverse concerns show Congress's desire to give BLM broad authority, not to delimit that authority. This Court does not "woodenly apply limiting principles" to broad statutory text. *United States v. West*, 671 F.3d 1195, 1200 (10th Cir. 2012) (quoting *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 227 (2008)). A collection of distinct and independent clauses addressing diverse topics raises no inference that Congress was focused on those topics to the exclusion of all others. *Ali*, 552 U.S. at 225-28; *see also Graham Cty. v. United States*, 559 U.S. 280, 288 (2010).

The Department of the Interior has long recognized the United States' and the public's strong interests in preventing harm to non-mineral resources and the environment. Indeed, federal regulations promulgated concurrently with the MLA nearly a century ago sought that goal. Federal lessees were required to "use all

reasonable precautions, in accordance with the most approved methods" to prevent damage to formations bearing "water." 1920 I.D. Lexis 47, at *3 (June 4, 1920). Shortly thereafter, federal lessees were required to obtain approval before injecting substances to "stimulate production" and were prohibited from "pollut[ing] streams or … the underground water of the leased or adjoining land." 1 Fed. Reg. 1996, 1998-99, § 2(d), (o) (Nov. 20, 1936). Those early precursors to the hydraulic-fracturing rule evince Interior's "contemporaneous" understanding of the MLA, which deserves deference even if the Court would choose a different interpretation in the first instance. *Udall v. Tallman*, 380 U.S. 1, 16 (1965).[2]

Decades of MLA case law confirms both BLM's authority to regulate all operations on federal leases and the public's interest in protecting mineral and non-mineral resources and the environment. *Boesche v. Udall*, 373 U.S. 472, 477-81 (1963) (BLM may prescribe "rules and regulations governing in minute detail all facets of the working of the land"); *Duesing v. Udall*, 350 F.2d 748, 751 (D.C. Cir. 1965) (rejecting "tail wags dog" argument that BLM may only "promote mineral development"; deferring to BLM's conclusion that wildlife protection is in the "public interest"). (*See also* Opening Br. 19-20 & n.11.) Indeed, the regulations implementing the MLA have *always* sought those goals, including groundwater protection. (Opening Br. 20-21 &

[2] Contrary to Wyoming's assertion (Wyo. Br. 29), Appellants preserved this argument. (JA 512-13, 566, 571, 574, 593-96, 650, 709.)

n.12.) That history and case law flatly contradict Wyoming's assertion that, historically, the "general sentiment" was to protect mineral resources but not groundwater or other resources. (Wyo. Br. 26-27.) And even if the MLA *could* be read that way, the Court must defer to BLM's eminently reasonable interpretation. *City of Arlington*, 133 S.Ct. at 1870-74.

FLPMA further enhances BLM's authority to protect natural resources and the environment.[3] FLPMA "represents an attempt by Congress to balance the use of the public lands by interests as diverse as the lands themselves." *Rocky Mountain Oil & Gas v. Watt*, 696 F.2d 734, 738 (10th Cir. 1982); *see also* 43 U.S.C. § 1701(a)(8), (12) (BLM must balance protection of "environmental … [and] water resource[s]" with the need for "domestic sources of minerals"). "It is past doubt that the principle of multiple use does not require BLM to prioritize development over other uses." *New Mexico v. BLM*, 565 F.3d 683, 710 (10th Cir. 2009). Several FLPMA provisions delegate to BLM the authority to "regulate" the public lands. 43 U.S.C. §§ 1732(b), 1740. In particular, BLM's mandate to, "by regulation or otherwise, take any action necessary to prevent unnecessary or undue degradation" of the public lands "underscor[es] the BLM's duty to protect the environment." *Utah Shared Access All. v. Carpenter*, 463 F.3d 1125, 1129 (10th Cir. 2006) (quoting 43 U.S.C. § 1732(b)). This

[3] No Petitioner defends the district court's incorrect statement that BLM has never cited FLPMA as authority for its oil and gas regulations. (Order 16; Opening Br. 15-16.)

Court has squarely held that § 1732(b) creates a "duty, independent of the planning process, to prevent undue degradation of resources." *Id.* at 1136. FLPMA therefore is not solely a land-use planning statute. (Wyo. Br. 31-36.)

Wyoming misreads *California Coastal Commission v. Granite Rock*, 480 U.S. 572 (1987). (Wyo. Br. 34-36.) In *Granite Rock*, the Supreme Court reviewed the land-use-planning provisions in FLPMA Title II and held they did not preempt a state regulation. *Id.* at 585-89. The Court did not address the separate delegations of regulatory authority in FLPMA Title III, 43 U.S.C. §§ 1732(b), 1740. Thus, *Granite Rock* does not show that FLPMA is exclusively about land-use planning. Petitioners are similarly mistaken that FLPMA restricts BLM to "follow[ing] the applicable state and federal pollution laws." (Wyo. Br. 33; N.D. Br. 25.) BLM's land-use plans must "provide for compliance with applicable pollution control laws," 43 U.S.C. § 1712(c)(8), but Congress also delegated BLM authority to regulate public lands outside of land-use plans. *Carpenter*, 463 F.3d at 1129, 1136. Petitioners' interpretation of § 1712(c)(8)—which appears in FLPMA Title II—must be rejected because it would nullify the separate delegations in Title III. *See Osborne v. Babbitt*, 61 F.3d 810, 813 (10th Cir. 1995).

North Dakota's argument that FLPMA does not affect laws governing appropriation or use of water or federal-agency participation in the "development of water resources" is similarly misplaced. (N.D. Br. 25.) BLM's rule does not regulate water appropriation or use; it regulates hydraulic-fracturing *operations* on federal lands

to, in part, reduce the risk of groundwater contamination. *See* 80 Fed. Reg. 16,128, 16,142-43 (Mar. 26, 2015). The rule is wholly consistent with FLPMA's goal of protecting "water resource[s]." 43 U.S.C. § 1701(a)(8). Nor did BLM ignore the "Nation's need for domestic sources of minerals," 43 U.S.C. § 1701(a)(12). (Industry Br. 41-42.) The rule both ensures that hydraulic fracturing may continue to "provide the Nation with domestically produced oil and gas" and protects "public lands and trust resources." 80 Fed. Reg. at 16,179.

In sum, BLM has ample authority to regulate oil and gas operations on federal leases, including well-stimulation techniques like hydraulic fracturing, to protect non-mineral resources and the environment. It does not matter that the MLA and FLPMA do not specifically mention hydraulic fracturing. The delegations of regulatory authority in those statutes "extend 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*, 133 S.Ct. at 1874). The Court therefore "need not try to discern whether '*the particular issue* was committed to agency discretion.'" *Id.* (*See also* Opening Br. 16-17.) Rather, the Court should defer to BLM's reasonable interpretation of those broad delegations of authority.

B. The SDWA preserves BLM's independent authority.

Petitioners separately argue that the SDWA—a statute administered by EPA to protect drinking water on all lands nationwide—somehow preempts BLM's authority to regulate hydraulic-fracturing operations on federal and Indian leases. That

argument rests on the defective premise that Congress could not have intended both agencies to regulate from their distinct but complementary positions. *See Arcadia, Ohio v. Ohio Power*, 498 U.S. 73, 88 (1990) (Stevens, J., concurring) (utilities were "subject to the regulation of both the SEC and FERC" and such "overlap[]" was warranted given the differing "goals and expertise of the two agencies"). Congress may, in fact, "provide administrative agencies with overlapping authority," 1-4 Jacob A. Stein, Administrative Law § 4.01 (2015),[4] and such agencies are assumed capable of "administer[ing] their obligations and yet avoid[ing] inconsistency," *Massachusetts v. EPA*, 549 U.S. 497, 532 (2007).

Here, 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 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6454, 6484-85 (emphasis added). Indeed, Congress explained that it did "not intend any of the provisions of [the SDWA] to repeal or limit any authority the U.S.G.S. may have under *any other legislation*." *Id.* (emphasis added).[5] Petitioners do not and cannot explain away that clearly expressed intent. Only Wyoming attempts a response, vaguely asserting that Congress "wanted to avoid potential unintended consequences

[4] Lexis citation: 1-4 Administrative Law 4.01.

[5] FLPMA qualifies as "any other legislation" no matter the timing of its passage. (Wyo. Br. 33.)

of the SDWA," but omitting that Congress expressly preserved efforts to prevent groundwater contamination under the MLA. (Wyo. Br. 40.)

More specifically, Congress expected BLM and its predecessors to continue regulating well-stimulation techniques on federal leases to protect groundwater. In 1974, federal lessees were prohibited from "pollut[ing] streams" or "the underground water of the leased or other land." 30 C.F.R. § 221.32 (1974). And they had to obtain written approval—not simply provide notice—before "shoot[ing]" wells (*i.e.*, detonating explosives)[6] or "stimulating production" via injections or "any other method." *Id.* § 221.21(b). Congress was aware of, and did not intend the SDWA to interfere with, those regulations. *See* 1974 U.S.C.C.A.N. at 6484-85. Nor would Congress have expected the SDWA to interfere with BLM's regulation of modern hydraulic fracturing, which is a newer version of those historic well-stimulation techniques. *See* 80 Fed. Reg. at 16,130-31 (hydraulic fracturing is a "[w]ell stimulation technique" involving "injection of fluid under high pressure" to "enhance[e] oil and gas production").

Petitioners have identified nothing to the contrary. Wyoming misplaces its reliance on *Phillips Petroleum v. EPA*, 803 F.2d 545, 547 n.2 (10th Cir. 1986). That case strengthens BLM's argument that Congress was "aware of the potential adverse

[6] William & Myers, Manual of Oil and Gas Terms (2015), *available on Lexis at* 8-S Manual of Oil and Gas Terms S.

effects of oil and gas related injection," *id.*, but nonetheless expressly preserved BLM's authority to regulate such activities. Petitioners also misread *Legal Environmental Assistance Foundation v. EPA*, 118 F.3d 1467 (11th Cir. 1997), which held only that hydraulic fracturing qualifies as an "underground injection" as originally defined by the SDWA. *Id.* at 1474-75. The court did not address the SDWA's supposed exclusivity. *Id.*

Petitioners also make too much of their ability to administer SDWA programs. (Wyo. Br. 37-38; N.D. Br. 22.) Congress expected BLM to retain authority over operations on federal leases regardless of whether EPA or a state primarily administers the SDWA. 1974 U.S.C.C.A.N. at 6484-85. Nothing Petitioners cite suggests otherwise. *See* 42 U.S.C. § 300h(b)(1). It also is unremarkable that the SDWA applies to federal lands and federal agencies performing underground injections. *Id.* §§ 300h(b)(1)(D), 300j-6(a). Those provisions neither state nor imply that BLM may not act in a regulatory capacity to address well-stimulation activities on federal leases. Again, Congress expected BLM to retain such control.

Petitioners mistakenly invoke the cannon that a specific statute controls over a general one. (Wyo. Br. 40-41; N.D. Br. 15.) That cannon applies only when "there is no clear intention otherwise," *United States v. Porter*, 745 F.3d 1035, 1049 (10th Cir. 2014) (quoting *Morton v. Mancari*, 417 U.S. 535, 550–51 (1974)), and here Congress clearly intended not to displace BLM's authority, 1974 U.S.C.C.A.N. at 6484-85. Moreover, "[t]he canon is impotent … unless the compared statutes are irreconcilably

conflicting." *Adirondack Med. Ctr. v. Sebelius*, 740 F.3d 692, 698 (D.C. Cir. 2014). The "courts are not at liberty to pick and choose among congressional enactments" merely because one is more specific than another. *Morton*, 417 U.S. at 551. "When there are two acts upon the same subject, the rule is to give effect to both if possible …." *Id.*; *see also Adirondack*, 740 F.3d at 698.

The SDWA does not conflict with BLM's authority or the hydraulic-fracturing rule. The SDWA protects drinking water nationwide, while BLM's rule targets operations on federal and Indian oil and gas leases to avoid unnecessary resource impacts, including to groundwater. Unlike the SDWA, the delegations in the MLA and FLPMA derive from the Property Clause, *see United States v. Ohio Oil*, 163 F.2d 633, 639-40 (10th Cir. 1947) (citing U.S. Const. art. IV, § 3, cl. 2), and the delegations in the Indian mineral statutes derive from the Indian Commerce Clause, U.S. Const. art. I, § 3, cl. 8. Thus, in enacting the SDWA, Congress preserved the United States' power to "fix the terms on which its property may be used," *Forbes v. United States*, 125 F.2d 404, 408-09 (9th Cir. 1942), as well as its ability to protect resources held in trust for Indian tribes. The SDWA therefore does not conflict with and is not more specific than BLM's authority under the MLA, FLPMA, and Indian mineral statutes.

The 2005 amendment to the SDWA's definition of "underground injection" does not change the analysis. 42 U.S.C. § 300h(d)(1)(B)(ii). On its face, the amended definition applies only "for purposes of this part," and therefore excludes non-diesel hydraulic fracturing from Part C of the SDWA. *Id.* The amended definition controls

"only within its self-described scope." *Nat'l Cable & Telecomms. Ass'n v. Gulf Power*, 534 U.S. 327, 335-36 (2002) (rejecting specific-general cannon). The amendment does not alter Congress's previous decision to preserve BLM's independent authority. 1974 U.S.C.C.A.N. at 6484-85.

Petitioners speculate that Congress did not address BLM's authority because, they contend, BLM's regulations did not cover hydraulic fracturing in 2005. (Industry Br. 43-45; Wyo. Br. 29-30.) Not so. BLM's regulations required federal lessees to obtain approval before performing "nonroutine fracturing jobs." 43 C.F.R. § 3162.3-2(a) (2005). The regulations also required all hydraulic-fracturing operations to avoid damaging "mineral resources, other natural resources, and environmental quality," including usable groundwater. *Id.* § 3162.5-1 to .5-2, and to be summarized in a post-operation report, *id.* § 3162.3-2(b).[7] It is immaterial that the regulations did not also require pre-approval of "routine" fracturing operations. *Id.* The existence of BLM regulations governing hydraulic-fracturing operations disproves Petitioners' theory. Against the long historical backdrop of regulations governing federal lessees' well-stimulation activities,[8] the only viable conclusion is that, in 2005, Congress again chose not to interfere with BLM's authority. *See Cremeens v. City of Montgomery*, 602

[7] These provisions were originally promulgated in 1982 and remained in effect, with minor revisions, through 2014. *See* 47 Fed. Reg. 47,758, 47,770 (Oct. 27, 1982).

[8] *See, e.g.*, 30 C.F.R. § 221.21(b) (1974); 1 Fed. Reg. at 1998, § 2(d) (1936).

F.3d 1224, 1230 n.4 (11th Cir. 2010) (Congress is presumed aware of "existing administrative regulations").

Moreover, in 2005, the *states* lacked hydraulic-fracturing regulations. (Wyo. Br. 10-12 ("Wyoming, one of the first states to regulate in this area, began regulating in 2010."); N.D. Br. 4 (2012). There consequently is no support for the astounding conclusion that Congress intended *sub silentio* to subject federal property to exclusively state control. The 2005 amendment is nowhere near the kind of clear statement required to "significantly change[] the federal-state balance." *United States v. Ryan*, 894 F.2d 355, 359 (10th Cir. 1990). (*See also* Opening Br. 28-29.)

Industry persists in citing a law review article (Industry Br. 43-44) whose author has emphatically disclaimed Petitioners' argument. (Opening Br. 26 n.16.) State Petitioners also misquote two legislators. (Wyo. Br. 9; N.D. Br. 20.) Senator Feingold said that the 2005 amendment exempts hydraulic fracturing only from the SDWA, not from other federal authorities. 151 Cong. Rec. S9335-01, S9337 (July 29, 2005). And Representative Markey said the amendment precludes "any Federal regulation of … the hydraulic fracturing technique that *actually injects diesel fuel into the water supply*," 151 Cong. Rec. H2192-02, H2194-95 (Apr. 20, 2005) (emphasis added), when in fact that practice remains subject to the SDWA as amended, 42 U.S.C. § 300h(d)(1)(B)(ii). Moreover, the views of single legislators are not controlling, *Mims v. Arrow Fin. Servs.*, 132 S.Ct. 740, 752 (2012), particularly when, as here, the quoted legislators opposed the bill, *see NRDC v. EPA*, 526 F.3d 591, 604-05 (9th Cir. 2008).

The district court's holding that the SDWA precludes BLM from regulating hydraulic fracturing on federal and Indian leases is entirely indefensible. The preliminary injunction therefore must be vacated.

II. BLM did not waive arguments concerning its authority on Indian lands, and the Ute Tribe's arguments on the consultation process lack merit.

The Indian mineral statutes grant the Secretary of the Interior authority to regulate oil and gas operations on Indian lands, and the Secretary has delegated her authority to BLM. (Opening Br. 3-4, 14-16.)[9] The district court did not hold that the Ute Tribe was likely to succeed on any contrary argument, but rather agreed that the Secretary has "broad regulatory jurisdiction over oil and gas development and operations on Indian lands," and on such lands "BLM [is] to oversee implementation of those regulations." (Order 13.) The Tribe nevertheless devotes much of its brief to debating that issue (Tribe Br. 3-20), and accuses BLM of breaching an alleged trust duty and an alleged duty to analyze tribal socio-economic impacts (Tribe Br. 20-42). Those arguments are not before this Court. "It is the general rule … that a federal appellate court does not consider an issue not passed upon below." *Singleton v. Wulff*, 428 U.S. 106, 120 (1976); *see also Evers v. Regents of Univ. of Colo.*, 509 F.3d 1304, 1309-10 (10th Cir. 2007). In fact, several arguments the Tribe now asserts (Tribe Br. 10-18) did not appear in its preliminary-injunction briefs (JA 777-98, 1469-79).

[9] BLM never argued that FLPMA provides such authority. (Tribe Br. 5 n.2.) *See also* 80 Fed. Reg. at 16,184.

The Tribe makes just three points on tribal consultation. First, the Tribe accuses BLM of concocting a "straw man" by focusing on Interior's consultation policy, rather than 25 U.S.C. § 2107. (Tribe Br. 43-44.) BLM focused on Interior's policy because that is all the district court addressed. (Order 36-39.) The district court did not address § 2107 because the Tribe's opening brief did not cite § 2107. (JA 789-93.) This Court also should decline to address § 2107, *Singleton*, 428 U.S. at 120, though BLM notes that the Tribe omits relevant text from that provision: "The Secretary shall, *to the extent practicable*, consult with national and regional Indian organizations and tribes …." 25 U.S.C. § 2107 (emphasis added). The provision therefore lends no support to the district court's conclusion that BLM must provide "extra" consultation procedures. (Order 38-39.)

Second, the Tribe contends the consultation policy is legally enforceable because it uses mandatory words, like "shall" and "must," and because the draft policy was published in the Federal Register. (Tribe Br. 45-46 (citing *Hymas v. United States*, 117 Fed. Cl. 466, 502 (2014), *vacated and remanded*, 810 F.3d 1312 (Fed. Cir. 2016).) The Federal Register notice says otherwise: "Except to the extent already established by law, this Policy is intended only to improve the internal management of the Department, and is not intended to create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law by a party against the Department or any person." 76 Fed. Reg. 28,446, 28,449 (May 17, 2011). Similar Federal Register statements have been held to evidence procedural guidance, not enforceable rules,

despite "mandatory" language in the policy. *River Runners for Wilderness v. Martin*, 593 F.3d 1064, 1071-72 (9th Cir. 2010); *Wilderness Soc'y v. Norton*, 434 F.3d 584, 595-96 (D.C. Cir. 2006). When, as here, the *final* policy is not published in the Federal Register or Code of Federal Regulations, the policy is not legally enforceable. *Id.*[10]

The Tribe's last argument is that BLM's consultation efforts were a "paternalistic charade." (Tribe Br. 48.) The record refutes that mischaracterization. BLM's efforts were early, extensive, and meaningful. (*See* Opening Br. 49.) BLM had not already "made all of the key decisions" when it began consultations. (Tribe Br. 48.) In fact, BLM had not yet published the proposed rule. *See* 77 Fed. Reg. 27,691, 27,693 (May 11, 2012). Nor did BLM's December 2011 letter prejudge the outcome. (Tribe Br. 48.) The letter explained that BLM had begun an "internal review of proposed regulations" and wished to meet with tribes to "explain what we are proposing" and request feedback. (JA 2069.) BLM sent that letter the same month as Order No. 3317,[11] which later was converted to, and superseded by, the Departmental Manual, *id.* § 11.

BLM therefore began consultations even before the consultation policy was finalized. BLM faithfully followed the policy, and neither the Tribe nor a court may impose additional procedures. *Wyoming v. USDA*, 661 F.3d 1209, 1239 (10th Cir.

[10] BLM apologizes for the misstatement in its opening brief. The draft policy was published, 76 Fed. Reg. at 28,446, but the final policy was not.

[11] Available at http://elips.doi.gov/ELIPS/0/doc/3025/Page1.aspx.

2011) (quoting *Vt. Yankee Nuclear Power v. NRDC*, 435 U.S. 519, 543 (1978)). The preliminary injunction therefore must be vacated as to the Tribe's claim.

III. BLM reasonably exercised its scientific and technical expertise in developing the rule.

Petitioners also misunderstand the deferential standard of review applicable to BLM's scientific and technical conclusions. Courts "must generally be at [their] most deferential" when an agency is "making predictions, within its area of special expertise, at the frontiers of science." *Baltimore Gas & Elec. v. NRDC*, 462 U.S. 87, 103 (1983); *see also Utah Envtl. Cong. v. Russell*, 518 F.3d 817, 824 (10th Cir. 2008) (citing *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 378 (1989)). The district court improperly demanded that BLM identify a "confirmed case of the hydraulic fracturing process contaminating groundwater." (Order 26; Opening Br. 36-37.) BLM reviewed numerous "academic and professional papers" and reasonably concluded that "assurances of the strength of the [well] casing are appropriate" given the risk to groundwater. 80 Fed. Reg. at 16,176, 16,193-95. (*See also* JA 3902-05.)[12]

The rule's preamble did not have to cite and discuss every relevant piece of evidence. (Industry Br. 15-18.) The APA requires only a "concise general statement

[12] The rule additionally protects surface resources through, for example, provisions governing recovered-fluid management and chemical disclosures. No Petitioner challenges BLM's scientific and technical justifications for such provisions, which the district court ignored in imposing its overbroad injunction. (*See* Opening Br. 34-35, 55-57.)

of [a rule's] basis and purpose." 5 U.S.C. § 553(c). That requirement "is not meant to be particularly onerous." *Nat'l Mining Ass'n v. Mine Safety & Health Admin.*, 512 F.3d 696, 700 (D.C. Cir. 2008). "It is enough if the agency's statement identifies the major policy issues raised in the rulemaking and coherently explains why the agency resolved the issues as it did." *Id.*; *accord Citizens' Comm. to Save Our Canyons v. U.S. Forest Serv.*, 297 F.3d 1012, 1035 (10th Cir. 2002).

Furthermore, a "rule must be sustained if it is supported by substantial evidence when considered on the record *as a whole*." *Gallegos v. Lyng*, 891 F.2d 788, 795 (10th Cir. 1989) (emphasis added); *see also Highway J Citizens Grp. v. Mineta*, 349 F.3d 938, 958 (7th Cir. 2003) (citing *Citizens to Pres. Overton Park v. Volpe*, 401 U.S. 402, 420 (1971)). Courts therefore have adopted a "functional approach" and will "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." *Schiller v. Tower Semiconductor*, 449 F.3d 286, 302-03 (2d Cir. 2006) (quoting *Bowman Transp. v. Ark.-Best Freight Sys.*, 419 U.S. 281, 286 (1974)); *see also Save Our Canyons*, 297 F.3d at 1034-36; *Citizens to Save Spencer Cty. v. EPA*, 600 F.2d 844, 885 (D.C. Cir. 1979) (statement must be "seen in the context of the multi-faceted rulemaking proceedings in which [the agency] was then engaged").

BLM easily met that standard. BLM explained that hydraulic-fracturing studies have shown "a leak in the wellbore casing" to be the most likely pathway for groundwater pollution. 80 Fed. Reg. at 16,193. The rule therefore reasonably adopts "industry best practices" for well casing and pressure management. *Id.* at 16,188-89.

BLM did not ignore "contrary" evidence, nor did BLM overlook studies concerning the upward migration of contaminants. (Industry Br. 15-17 & n.3; Wyo. Br. 46.) BLM expressly recognized the "controversial" state of the science and explained that fluid or gas migration is the "least likely" pathway of contamination. 80 Fed. Reg. at 16,188-89, 16,193-94. BLM nevertheless concluded, on balance, that "common-sense preventative regulations" are needed to ensure well-casing integrity. *Id.* BLM examined "the evidence which is available" and offered a "rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 52 (1983). The APA requires nothing more.

The statement of a field-office employee does not rebut BLM's conclusions. (Wyo. Br. 46.) "[A] diversity of opinion by local or lower-level agency representatives will not preclude the agency from reaching a contrary decision, so long as the decision is not arbitrary and capricious and is otherwise supported by the record." *WildEarth Guardians v. Nat'l Park Serv.*, 703 F.3d 1178, 1186-87 (10th Cir. 2013) (citing *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 659 (2007)). There is more than substantial evidence in the record showing that casing failures caused by hydraulic-fracturing operations can pollute groundwater. (Opening Br. 36-42 & nn.19-20.)

In the district court, BLM cited both scientific studies discussed in the preamble. (JA 1357 citing AR4211[13] & AR9465[14].) BLM also cited the American Petroleum Institute's hydraulic-fracturing guidelines. (JA 1351 citing AR2075[15].) Intervenor-Defendants cited additional scientific studies and case studies in BLM's record. (JA 1385-86 citing, *e.g.*, AR29589-95,[16] 30072-74[17].) The preamble cites another technical paper (JA 2209, 2264). *See* 80 Fed. Reg. at 16,129, 16,176. And EPA's hydraulic-fracturing study plan (JA 1831, 1849) provides context for the district court's citation of EPA's draft report. (*See* Opening Br. 39 n.19.) Those documents alone constitute substantial evidence. *See Andalex Res. v. Mine Safety & Health Admin.*, 792 F.3d 1252, 1257-60 (10th Cir. 2015); *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1575 (10th Cir. 1994) ("Evidence is substantial in the APA sense if it is enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion to be drawn is one of fact.").

Moreover, all the evidence BLM cited was in the administrative record the district court reviewed. This Court can and should consider that evidence because the district court and Petitioners assert the record lacks evidence of a risk to groundwater

[13] JA 1802. BLM's opening brief cited another copy at JA 1893.

[14] JA 2076.

[15] JA 1737. BLM's opening brief cited another copy at JA 1759.

[16] JA 2561-67; *compare* JA 1969-80.

[17] JA 2603-05.

from hydraulic-fracturing operations. (Order 26; Industry Br. 21, 58; Wyo. Br. 46.) BLM's citations correct that distorted view of the record. *See Russell*, 518 F.3d at 823 (under the APA, "[w]e take an independent review of the agency's action and are not bound by the district court's factual findings or legal conclusions"). Confronted with that evidence, Industry essentially concedes that the record supports BLM's focus on well integrity. (*See* Industry Br. 17-18.)

Petitioners note that BLM already had well-construction rules. (Industry Br. 16, 18; Wyo. Br. 46.) But BLM's standard well-construction rules do not address the high pressures applied during hydraulic fracturing, and BLM's 1982 hydraulic-fracturing rule did not account for the longer distances and greatly increased scale of development enabled by new directional-drilling technology. 80 Fed. Reg. at 16,128-31, 16,180, 16,188-89, 16,193-95. BLM reasonably updated its rules to require operators to follow best practices when using those techniques, and BLM explained the necessity of each new requirement. 80 Fed. Reg. at 16,141-84.

BLM also found that state hydraulic-fracturing regulations do not consistently require operators to meet standards BLM's experts said are prudent. (JA 3947-52 (comparison table).) *See also* 80 Fed. Reg. at 16,133, 16,161, 16,175-76, 16,178-79, 16,190. There is nothing arbitrary or capricious about setting baseline standards for federal leases, but allowing states to impose more stringent requirements. Such arrangements are common. *See, e.g.*, *Granite Rock*, 480 U.S. at 580. Congress delegated its Property Clause authority to BLM via the MLA and FLPMA, and nothing prevents

BLM from regulating activities addressed (however differently) in state regulations. Moreover, state regulations do not provide BLM with information it needs as the assigned "resource manager" to "make informed resource decisions" and "respond effectively to incidents." 80 Fed. Reg. at 16195; *see also id.* at 16,154 (state-collected information is not "uniformly available" to BLM).

The district court questioned just three aspects of BLM's rule: the MIT requirement, the usable-water definition, and confidentiality for pre-operation disclosures.[18] Industry says the MIT requirement is unnecessary because Onshore Order 2's pressure test is good enough. (Industry Br. 24-25.) BLM's experts, however, determined Onshore Order 2's pressure test is insufficient to address the increased pressures applied during modern hydraulic-fracturing operations. 80 Fed. Reg. at 16,146-47, 16,153, 16,160-61, 16,166, 16,219-20. The American Petroleum Institute and many states agree that such increased pressures require updated testing standards. *Id.* at 16,159, 16,187. Furthermore, BLM did not "ignore entirely" the MIT requirement's costs. (Industry Br. 27.) BLM explained that the requirement, even as revised to apply to the "entire length of casing or fracturing string, not just the vertical section," 80 Fed. Reg. at 16,159, is consistent with industry guidance and

[18] This Court should not consider North Dakota's cursory discussion (N.D. Br. 30-32) of topics not addressed by the district court. *See Pac. Frontier v. Pleasant Grove City*, 414 F.3d 1221, 1238 (10th Cir. 2005); *New Comm Wireless Servs. v. SprintCom*, 287 F.3d 1, 13 (1st Cir. 2002).

many states' standards and therefore will not "pose an incremental cost to most responsible operators," *id.* at 16,187.

On usable water, Industry abandons the district court's reasoning concerning "public water system[s]." (Order 31; Opening Br. 44-45.) Industry instead quibbles over semantics concerning whether Onshore Order 2's 10,000 ppm standard "superseded" or "supplemented" the previous standard. (Industry Br. 31 & n.10.) Regardless, Onshore Order 2 was binding on operators, *see* 43 C.F.R. §§ 3162.1(a), 3164.1(a)-(b) (2014), and none of the documents Industry cites suggests otherwise. (Industry Br. 31-32.) BLM retained the 10,000 ppm standard partly because "increasing water scarcity and technological improvements in water treatment equipment" have occurred since 1988, when Onshore Order 2 was promulgated. 80 Fed. Reg. at 16,141-42. BLM "rationally explained its decision," and Industry has not shown that BLM's decision "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." *WildEarth Guardians v. EPA*, 770 F.3d 919, 927 (10th Cir. 2014).

The rule does not impose an "increased burden" on operators to identify usable water. (Industry Br. 35.) Operators have always had that burden. 80 Fed. Reg. at 16,151; Onshore Order No. 1, 72 Fed. Reg. 10,308, 10,331 (Mar. 7, 2007) (drilling plan must supply "[e]stimated depth and thickness of formations, members, or zones potentially containing usable water"); Onshore Order No. 2, 53 Fed. Reg. 46,798, 46,808-09 (Nov. 18, 1988). The new rule additionally clarifies that operators need

only use "the best available information" to identify usable water. 80 Fed. Reg. at 16,218 (43 C.F.R. § 3162.3-3(d)(1)(iii)); *see also id.* at 16,151 ("[I]nformation developed by … state agencies is acceptable …."). Moreover, the rule defers to EPA, state, and tribal designations of usable water. *Id.* at 16,217-218 (43 C.F.R. §§ 3160.0-5); *id.* at 16,142-43. Industry therefore has not shown any increased burden.

Industry also speculates that BLM will not follow laws governing confidential information submitted in pre-operation disclosures. (Industry Br. 38-39.) Courts have "long presumed that executive agency officials will discharge their duties in good faith," *CTIA v. FCC*, 530 F.3d 984, 989 (D.C. Cir. 2008), and BLM expressly committed to protect confidential information in its possession. *See* 80 Fed. Reg. at 16,173 (operator "may segregate the information it believes is a trade secret" and BLM will consult "relevant Federal judicial opinions"); 16,182 (BLM will disclose information only "consistent with the requirements of Federal law"). The rule affords equivalent protections before operators must disclose post-operation information directly to the public. (Opening Br. 46-47.) That process "provides the same procedural safeguards for hydraulic fracturing information as for all other information obtained by the Department." 80 Fed. Reg. at 16,173. An operator may withhold post-operation information only if a statute or regulation "would prohibit the BLM from disclosing the information if it were in the BLM's possession." *Id.* at 16,171. There is no "disparate treatment" of identical information. (Industry Br. 39.)

Industry also argues that evidence of "frack hits" cannot justify the rule because BLM did not address that risk until after receiving comments. (Industry Br. 21-23.) BLM responded to comments on frack hits by adjusting data-submission requirements *already announced* in the initial and supplemental proposed rules. 80 Fed. Reg. at 16,148-49; *see also* 77 Fed. Reg. at 27,695, 27,705; 78 Fed. Reg. 31,636, 31675-76 (May 24, 2013). BLM's changes to those requirements—which Industry does not even identify—were minor and were "logical outgrowth[s]" of the proposed rule and the comments BLM received. *See City of Stoughton v. EPA*, 858 F.2d 747, 753 (D.C. Cir. 1988).

BLM's scientific and technical conclusions were not arbitrary or capricious. The preliminary injunction therefore must be vacated.

IV. The district court abused its discretion in evaluating the equities, and the preliminary injunction is overbroad.

Because Petitioners are unlikely to prevail on the merits, this Court "need not address the remaining preliminary injunction factors." *Petrella v. Brownback*, 787 F.3d 1242, 1257 (10th Cir. 2015). Nevertheless, BLM notes that the district court abused its discretion in holding that the equities favor an injunction. For purposes of its findings and conclusions, the court accepted BLM's compliance-cost estimates, but held such minor compliance costs to be irreparable harm merely because they are not recoverable. (Order 42.) This Court should hold that minor compliance costs do not

constitute irreparable harm. (Opening Br. 50-52.) That is the only sensible rule, and no case law requires otherwise.

BLM already has distinguished the authority cited by the district court (Opening Br. 50-52), and the additional authority Industry cites fares no better (Industry Br. 49).[19] Justice Scalia's concurrence in *Thunder Basin Coal v. Reich*, 510 U.S. 200, 220 (1994), was not adopted by the majority. Two other cases mention unrecoverable compliance costs in dictum, but both cases turned on the presence of other irreparable harms. *Direct Mktg. Ass'n v. Huber*, 2011 WL 250556, at *6 (D. Colo. 2011) (Commerce Clause violation); *Smoking Everywhere v. FDA.*, 680 F.Supp.2d 62, 76-77 & n.19 (D.D.C.) (threat to "continued viability" of businesses), *affirmed on that ground*, 627 F.3d 891, 898 (D.C. Cir. 2010). Another case is inapposite because the plaintiff's "overwhelming" likelihood of success (absent here) justified the "slight nature" of the harm. *Nat'l Med. Care v. Shalala*, 1995 WL 465650, at *3 (D.D.C. 1995). And another case turned on the "excessive" nature of the compliance costs. *Cent. Valley Chrysler-Plymouth v. Cal. Air Res. Bd.*, 2002 WL 34499459, at *7 (E.D. Cal. 2002).

[19] Because Industry defends the court's flawed analysis (Industry Br. 45-50), this Court should disregard the Chamber's assertion that the rule will cost industry $345 million (Amicus Br. 12). *See Tyler v. City of Manhattan*, 118 F.3d 1400, 1404 (10th Cir. 1997). The Chamber's generic statistics on economic impacts (Amicus Br. 16-24) also are undermined by its concession that the "vast majority of hydraulic fracturing in the United States is done on state and private land" (Amicus Br. 6-7)—to which BLM's rule does not apply.

The district court also clearly erred in finding economic losses due to permitting delays and operators departing federal and Indian lands. (Order 41.) The court relied on documents expressing such concerns without showing that the rule will cause them to occur. (Order 41 n.36; Opening Br. 52-54.) None of the declarations Petitioners cite support the court's findings. (Wyo. Br. 54 (citing JA 324-29 ¶¶ 27-28, 39-40 (hearsay regarding delays; speculation about departures)); N.D. Br. 34-35 (citing JA 398 (unsubstantiated assumptions concerning processing times and staffing; speculation about delays)).[20] And despite a lengthy evidentiary hearing, Petitioners failed to identify any operator that has said it will abandon federal or Indian lands at all, much less during the pendency of this case.

BLM's evidence showed that, on average, it takes 94 days to process permit applications, and the rule will increase total permit preparation and processing time by just 12 hours. (Opening Br. 52-53 & n.23.) BLM also acknowledged and planned to meet the staffing burdens associated with the rule. 80 Fed. Reg. at 16,177, 16,207. BLM ultimately concluded the rule will not cause operators to leave federal or Indian lands. (Opening Br. 50-51.) The district court therefore clearly erred. Additionally, because the states and tribes do not have exclusive regulatory authority, and because

[20] North Dakota improperly incorporated its district-court briefing by reference. Circuit Rule 28.4. BLM nevertheless responds above to the declaration cited at JA 399 (citing Helms Decl. ¶¶ 14-16), which appears at JA 441-42.

BLM will protect confidential business information (*see supra* Parts I-III), the district court also clearly erred in those findings.

BLM estimates that about 2,800 hydraulic-fracturing operations occur on federal and Indian lands each year. 80 Fed. Reg. at 16,130. The injunction precludes BLM from collecting necessary information about, and applying prudent standards to, all those operations. 80 Fed. Reg. at 16,193-95. BLM cannot predict precisely how many pollution incidents the rule will avert, but the rule will reduce their risk. *Id.* at 16,203-04. (*See also* JA 3903, 3973-76; Opening Br. 38-42 & nn.19-20.) The district court abused its discretion by affording greater weight to minor compliance costs and speculative permitting delays than the public's interest in avoiding unnecessary risks to natural resources and the environment.[21]

The preliminary injunction also is greatly overbroad. (*See* Opening Br. 34-35, 55-57.) The district court imposed a sweeping, nationwide injunction of the entire rule.[22] Due to the erroneous authority ruling, the court did not tailor the injunction to remedy any specific harm to Petitioners arising from any particular legal flaw in the rule. (*See* Industry Br. 61; Wyo. Br. 59 (conceding authority ruling's centrality).) At a minimum, the preliminary injunction must be tailored so that it is "no more

[21] Industry wrongfully accuses BLM of litigation delays (Industry Br. 57) despite having opposed BLM's expedition motions in the district court and this Court.

[22] Petitioners' did not specifically ask for a nationwide injunction, nor did any party brief the proper scope of relief. Those issues nevertheless are before this Court because the district court passed upon them. (Order 54 n.52.)

burdensome" than necessary to provide relief to the parties before the Court. *L.A. Haven Hospice v. Sebelius*, 638 F.3d 644, 664-66 (9th Cir. 2011); *Va. Soc'y for Human Life v. FEC*, 263 F.3d 379, 393 (4th Cir. 2001).

CONCLUSION

This Court should reverse the district court's order and vacate the preliminary injunction so BLM may begin applying common-sense protections to hydraulic-fracturing operations on federal and Indian lands.

Respectfully submitted,

JOHN C. CRUDEN
Assistant Attorney General

s/ *Nicholas A. DiMascio*
NICHOLAS A. DIMASCIO
Attorney, Appellate Section
U.S. Department of Justice
Environment and Natural Res. Div.
999 18th St., Suite 370
Denver, CO 80202
(303) 844-1384

JUNE 20, 2016
90-5-1-4-20425

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NICHOLAS A. DIMASCIO

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I hereby certify that on June 20, 2016, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit using the appellate CM/ECF system.

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