UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

STATE OF WYOMING, *et al.*, Petitioners -Appellees, and STATE OF NORTH DAKOTA, *et al.*, Intervenors-Appellees, v. SALLY JEWELL, Secretary, United States DOI, *et al.*, Respondents-Appellants, SIERRA CLUB, *et al.*, Intervenors-Appellants	C.A. No. 16-8068, 16-8069 D.C. No. 2015-CV-41/43-SWS District of Wyoming

BRIEF OF THE INTERESTED STATES OF MONTANA, ALASKA, KANSAS AND TEXAS AS *AMICI CURIAE* IN SUPPORT OF APPELLEES

On Appeal from the United States District Court
for the District of Wyoming,
The Honorable Scott W. Skavdahl, Presiding

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RULE 29(A) STATEMENT

Pursuant to the authority of Fed. R. App. P. 29(a), amici states of Montana, Kansas, Alaska, and Texas file this Amici Curiae Brief.

INTEREST OF AMICI[1]

Amici curiae are four Western States which administer oil & gas conservation and regulatory programs within their boundaries and which also possess primacy to administer the Underground Injection Control provisions of the Safe Water Drinking Act within their jurisdictions. Amici have a shared interest in the maintenance of federalism as a check on the unwarranted concentration of political power, as well as the interpretation of federal statutes and the viability of federal regulations, the clear demarcation of federal and State regulatory authority concerning groundwater resources, and preservation of the primacy of their Underground Injection Control administrative programs as approved by the Environmental Protection Agency. The Amici States urge this Court to affirm the District Court's ruling that the Federal Appellants lack any rulemaking authority concerning non-diesel hydraulic fracturing.

SUMMARY OF THE ARGUMENT

The question presented is the legal viability of Department of Interior (DOI) administrative rules regulating oil & gas exploration and production via non-diesel

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

fuel hydraulic fracturing. 80 FR 16,128 - 16,222 (March 26, 2015). The Amici four Western States assert that the validity of any such rule must be viewed under a standard of review which preserves Federalism and the separation of powers as a check on political power, so as to preserve the primacy and viability of their State oil & gas conservation programs and the State's general police powers.

Concerns for preservation of Federalism require that this Court ignore *Chevron* deference and apply a more stringent standard of judicial review when evaluating the DOI rules. *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984); *Solid Waste Agency v. United States Army Corps of Engineers*, 531 U.S. 159, 174, (2001) (where Congress chose to preserve the primary responsibility and rights of States to plan the development and use of land and water resources, no *Chevron* deference is appropriate, and the Court must apply a legal construction which preserves the framework of federalism).

Inexplicably, the Federal Appellants have asserted that while Congress in 2005 clearly prohibited the federal government from regulating hydraulic fracturing in connection with oil & gas exploration and production, it simultaneously intended to grant such regulatory authority to the DOI. This erroneous "heads I win, tails you lose" legal interpretation would effect a back-door federalization of State oil & gas conservation programs, and cannot be sustained because:

1) It conflicts with the statutory regulatory primacy of the States in the administration of their Safe Drinking Water Act State regulatory programs until the EPA issues a rule determining that their program does not comply with the minimum standards of the Act (which has not occurred) under 42 U.S.C § 300h-1(b)(3);

2) It is at odds with the fundamental concepts of cooperative federalism and the traditional police power of the States to protect their groundwater resources;

3) It would improperly require that this Court conclude that the Congressional authority for the DOI rulemaking on this subject could be granted by inference or implication, in contravention of the requirement of the Administrative Procedures Act that a delegation of Congressional authority to adopt rules be clear and manifest and 42 U.S.C. § 300j-6(a) which expressly subjects federal agencies injecting substances into groundwater to oversight by States with approved Underground Injection Control programs; and,

4) It would improperly result in Federal control of gigantic areas of private mineral resources due to the presence of insignificant federal tracts within oil & gas spacing units that would effectively

> transfer the regulatory control of those wells to the BLM, which is clearly at odds with the intent of Congress in enacting the Energy Policy Act of 2005.

In short, Federal Appellant's administrative rule cannot be sustained because such rulemaking authority is contrary to the text, structure, purpose, and historical context of the Energy Policy Act of 2005.

I. THE ENERGY POLICY ACT OF 2005 ELIMINATED FEDERAL AUTHORITY TO ADOPT RULES REGULATING HYDRAULIC FRACTURING.

In Section 322 of the Energy Policy Act of 2005, Congress expressly granted exclusive regulatory authority over non-diesel hydraulic fracturing utilized in oil & gas exploration to the States, so as to establish an effective check on wayward federal executive authority which might seek to thwart a flourishing fossil fuel industry, by deleting non-diesel hydraulic fracturing from the purview of the Act. Section 322 of the Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 provides that:

> HYDRAULIC FRACTURING.
>
> Paragraph (1) of section 1421(d) of the Safe Drinking Water Act (42 USC 300h(d)) is amended to read as follows:
>
> (1) Underground injection.-- The term 'underground injection'--

> (A) means the subsurface emplacement of fluids by well injection; and
>
> (B) excludes--
>
> (i) the underground injection of natural gas for purposes of storage; and
>
> (ii) the underground injection of fluids or propping agents (other than diesel fuels) pursuant to hydraulic fracturing operations related to oil, gas, or geothermal production activities.

There is no doubt that by this amendment Congress intended the entirety of the Energy Policy Act of 2005 to alter and limit the rulemaking authority of the DOI because Section 362 of the 2005 Act also directly references that DOI rulemaking authority, as follows:

> Section 362(b)(3) Regulations.--Not later than 180 days after the development of the best management practices under paragraph (1), the Secretary shall publish, for public comment, <u>proposed regulations that set forth specific timeframes for processing leases and applications in accordance with the best management practices</u>, including deadlines for--
>
> (A) approving or disapproving--
>
> (i) resource management plans and related documents;
>
> (ii) lease applications;
>
> (iii) applications for permits to drill; and
>
> (iv) <u>surface use plans</u>; and
>
> (B) related administrative appeals.

(Emphasis added.)

The Federal Appellants could not exercise the rulemaking authority concerning hydraulic fracturing because such rules directly conflict with the legislative framework established by the Energy Policy Act of 2005. This pervasive legislative framework was clearly intended to promote both the separation of powers and federalism. (Congressman Markey noted that there is ". . . a special provision in this bill to protect [an oil & gas Operator] from ever facing any Federal regulation of a practice of drilling for oil using the hydraulic fracturing technique . . . .") Energy Policy Act of 2005, 151 Cong. Rec. H 2192, 2194.

In doing so, Congress established the exclusive authority of the States to regulate environmental impacts to sovereign groundwater resources as an integral aspect of regulating oil and gas exploration and production in their jurisdictions. Doubtlessly, Congress did so in recognition of the wide and scattered pattern of Federal mineral ownership throughout the western States. The Federal Appellants would doubtlessly assert that these federal rules apply to any well which produces oil and gas from any spacing unit, or pooled or communitized area in which federal lands are located. If so, just a small parcel of federal minerals would be sufficient to "federalize" the operation of a non-diesel hydraulically-fractured well that otherwise would be subject only to State regulatory oversight under the State's Underground Injection Control program. For example where a spacing unit of

1280 acres was established for a horizontal well, even the inclusion of a 5-acre parcel of federal minerals within that spacing unit would be sufficient to impose the federal rules upon the well producing minerals from the remaining 1275 acres of private lands. Thus, the possible impacts of the Federal hydraulic fracturing rules are far in excess of the extensive federal acreage under management by the Federal Appellants.

Given that the practical effect of such rules is to impose superseding oil & gas operating standards upon extensive areas of non-Federal lands, the DOI rules at issue erode and undermine the traditional sovereign authority of the States to regulate oil and gas production through their own conservation programs under concepts of cooperative Federalism established by Congress. Moreover, they would relegate the States to simply an advisory role concerning their sovereign groundwater resources.

II. THE WESTERN STATES POSSESSING APPROVED UIC PROGRAMS HAVE ALWAYS HAD PRIMACY TO REGULATE HYDRAULIC FRACTURING UPON FEDERAL LANDS, BOTH BEFORE AND AFTER ENACTMENT OF THE ENERGY POLICY ACT OF 2005.

Under the legislative framework of the Safe Drinking Water Act (SDWA), if the EPA determines that a particular state has developed a UIC program that meets the EPA's minimum regulatory standards, that state may assume primary

responsibility, or "primacy," for regulating underground injections. The SDWA provides two statutory procedures by which a State may obtain primacy. First, 42 U.S.C. § 300h-l(b)(1)(A) directs that a State can obtain primacy by showing that its UIC program meets the minimum criteria promulgated by the EPA under 42 U.S.C. § 300h. Those EPA regulations are found in 40 C.F.R. § 145. Alternatively, 42 U.S.C. § 300h-4(a) authorizes a state to gain primacy by demonstrating that its UIC regulations meet the requirements set forth in 42 U.S.C. § 300h(b)(1)(A), and that its regulatory program "represents an effective program to prevent underground injection which endangers drinking water sources." All of the Amici have Underground Injection Control (UIC) programs approved by the EPA[2]

States which obtain an approved UIC regulatory program have the primary authority to regulate underground injections, and that authority cannot be

[2] The following States and Tribes are among those which have obtained approved UIC programs from the EPA: Alaska--May 6, 1986, 51 FR 16683; California--March 14, 1983, 48 FR 6336; Colorado--April 2, 1984, 49 FR 13040; Fort Peck--October 27, 2008, 73 FR 63639; Idaho--June 7, 1985, 50 FR 23956; Kansas--February 9, 1984, 49 FR 4735; Montana--November 19, 1996, 61 FR 58993; Nebraska--February 3, 1984, 48 FR 4777; Navajo--November 4, 2008, 73 FR 65556; Nevada--October 5, 1988, 53 FR 39089; New Mexico--February 5, 1982, 47 FR 5412; North Dakota--August 23, 1983, 48 FR 38327; Oklahoma--December 2, 1981, 46 FR 58488; Oregon--September 25, 1984, 49 FR 37593; South Dakota--October 24, 1984, 49 FR 42728; Texas--April 23, 1982, 47 FR 17488; Utah--October 8, 1982, 47 FR 44561; Washington--August 9, 1984, 49 FR 31875; and Wyoming--November 22, 1982, 47 FR 52434.

withdrawn unless the EPA determines, by rule, that the State's UIC program is out of compliance with the provisions of the Safe Drinking Water Act. 42 U.S.C. § 300h-1(b)(3) mandates that:

> **(3)** If the Administrator approves the State's program under paragraph (2), the State shall have primary enforcement responsibility for underground water sources until such time as the Administrator determines, by rule, that such State no longer meets the requirements of clause (i) or (ii) of paragraph (1)(A) of this subsection.

The EPA has not withdrawn by rule the authority of any approved western State to regulate underground injections within its boundaries.

Once a State obtains primacy for enforcement of the Underground Injection Control provisions of the Safe Drinking Water Act, all federal agencies and entities which engage in underground activities to threaten the utility of groundwater are subject to regulatory oversight by a State approved program under 42 U.S.C. § 300j-6(a), which mandates:

> **(a)** In general. Each department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government--
>
> (1) owning or operating any facility in a wellhead protection area;
>
> (2) engaged in any activity at such facility resulting, or which may result, in the contamination of water supplies in any such area;
>
> (3) owning or operating any public water system; or
>
> (4) engaged in any activity resulting, or which may result in, underground injection which endangers drinking water (within the meaning of section 1421(d)(2) [42 USCS § 300h(d)(2)]),
>
> shall be subject to, and comply with, all Federal, State, interstate, and local requirements, both substantive and procedural (including any

> requirement for permits or reporting or any provisions for injunctive relief and such sanctions as may be imposed by a court to enforce such relief), respecting the protection of such wellhead areas, respecting such public water systems, and respecting any underground injection in the same manner and to the same extent as any person is subject to such requirements, including the payment of reasonable service charges.

(Emphasis added.)

The provisions of 42 U.S.C. § 300j-6 predate the Energy Policy Act of 2005 which deleted any federal authority over non-diesel hydraulic fracturing. Thus, it strains credulity to accept the legal argument by the Federal Appellants that although prior to the Energy Policy Act of 2005, all Federal entities were expressly subject to regulatory oversight by States with approved UIC programs, the deletion of federal authority over non-diesel hydraulic fracturing by section 322 of the Energy Policy Act of 2005, suddenly and implicitly, granted rulemaking authority over non-diesel hydraulic fracturing to the Federal Appellants.

The Federal Appellants cannot conjure up rulemaking authority where none previously existed, especially where the clear and manifest intent of Congress was to convey exclusive regulatory authority over non-diesel hydraulic fracturing to the States, so as to thwart any wayward plans of the executive branch of the federal government. When Congress legislates in a field which the States have traditionally occupied, Courts must begin ". . . with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless

that was the clear and manifest purpose of Congress". *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). The Federal Appellants cannot show any rulemaking authority granted to the Department of Interior after 2005 which clearly and manifestly allows it to adopt rules concerning non-diesel hydraulic fracturing and its effects upon groundwater resources. None of its asserted DOI rulemaking authority from Congress mention the words "hydraulic fracturing".

The assertions by the Federal Appellants to the contrary directly conflict with the prior express recognition by Congress that the States possess the primary jurisdiction to regulate the land and water resources within their boundaries. The Federal Water Pollution Control Act (commonly referred to as the Clean Water Act), 33 U.S.C. § 1251(b), expresses the intent of Congress that it is the primary responsibility and right of the States to prevent, reduce, and eliminate pollution of land and water resources within their boundaries.

III. "REVERSE PREEMPTION" IS A COMMON CONGRESSIONAL STRATEGY TO PRESERVE FEDERALISM.

Generally, in exercising its constitutional powers under the Property Clause, U.S. Const. art. IV, § 3, cl. 2, Congress may:

- grant exclusive jurisdiction for certain purposes to the executive branch of the federal government as in *Pacific Coast Dairy v. Department of Agriculture of Cal.*, 318 U.S. 285 (1943);

- grant overlapping authority over federal lands to both federal and state governments as in *Collins v. Yosemite Park Co.*, 304 U.S. 518, 528-30 (1938); or
- grant exclusive regulatory jurisdiction and authority to State governments consistent with its extensive powers as recognized in *Kleppe v. New Mexico*, 426 U.S. 529 (1976).

Whether it takes the form of Federalism, cooperative Federalism, or reverse preemption, there is no doubt that Congress has often deliberately limited the regulatory powers of the Federal government in deference to local and State regulation of natural resources. In *California Coastal Comm'n v. Granite Rock Co.*, the U.S. Supreme Court held that:

> *In Kleppe*, 426 U. S., at 543, . . . [w]e made clear that "the State is free to enforce its criminal and civil laws" on federal land so long as those laws do not conflict with federal law. Ibid. The Property Clause itself does not automatically conflict with all state regulation of federal land. Rather, as we explained in *Kleppe*: "Absent consent or cession a State undoubtedly retains jurisdiction over federal lands within its territory, but Congress equally surely retains the power to enact legislation respecting those lands pursuant to the Property Clause. And when Congress so acts, the federal legislation necessarily overrides conflicting state laws under the Supremacy Clause."

480 U.S. 572, 580-581 (1987) (emphasis added).

There are numerous instances where Congress has deemed it expedient to impose reverse preemption provisions to make State laws controlling over federal law or entities, in keeping with preservation of federalism, including:

- the McCarran-Ferguson Act, 15 U.S.C. § 1011, *et seq.*,

  (exempting the business of insurance from most federal

regulation, and recognizing that individual State statutory requirements prevail.); *SEC v. National Sec., Inc.*, 393 U.S. 453 (1969);

- The McCarran Amendment, 43 U.S.C. § 666 (authorizing State adjudication and administration of federally-held water rights);
- the Clean Water Act (CWA) 33 U.S.C. §§ 1342(a), (b) (2006) (section 401 of the Clean Water Act requires applicants for federal permits involving "discharges" to navigable waterways to obtain state certifications that the permits will be consistent with state water quality standards); *see S.D. Warren v. Maine Bd. of Envtl. Protection*, 547 U.S. 370, 386-87 (2006) (Congress intended that applications of State water quality standards are essential to the preservation of the authority of States to prevent the pollution of their waters);
- the Coastal Zone Management Act (CZMA) 16 U.S.C. § 1456(c) (2012) (requiring that projects must be consistent with a State's coastal management plan to the maximum extent practical);
- National Banking Act, 12 U.S.C. § 92a (The grant of trust powers to National Banks by the Office of the Comptroller of the Currency requires that such grant be consistent with the laws of

the State in which they are located, which is recognition by Congress that estates and trusts are traditionally and primarily matters of State concern);

- The National Labor Relations Act, section 14b of the Taft-Hartley Act, 29 U.S.C. § 164(b) (nothing in the National Labor Relations Act mandates union membership in those States adopting "right to work" laws);
- The Resource Conservation and Recovery Act (RCRA), section 6001, 42 U.S.C. § 6961 (federal entities disposing of solid or hazardous waste are subject to state and local permitting and regulation.);
- The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9652(d) (federal entities are subject to state permitting and regulation); *see also United States v. Colorado*, 990 F.2d 1565, 1578 (10th Cir., 1993) (Congress did not intend a CERCLA response action to bar a RCRA enforcement action, or an equivalent action by a state which has been authorized by EPA to enforce its state hazardous waste laws in lieu of RCRA);

- The Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 12 U.S.C. §§ 5551, 5552(d) (nothing in the Dodd-Frank Act alters or limits the authority of State securities or insurance regulators or the authority of a State to bring an action to enforce financial laws in that State).

In these demonstrated instances, Congress has granted power to the States in order to trump the policy decisions of federal executive branch agencies, and impose the State's policies upon federal entities. In doing so, Congress respects the framework of federalism and the States' traditional jurisdictional roles in decentralizing political power. Federalism is premised upon the principle that "the great security against a gradual concentration of the several powers in the same department consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. . . . Ambition must be made to counteract ambition." The Federalist No. 51, at 321-22 (James Madison) (Clinton Rossiter ed., 1961). When administrative agencies claim powers under vague, open-ended assertions of rulemaking authority, the result is an executive branch that usurps political power and ignores the tripartite structure of government.

The DOI improperly urges this Court to accept a prior vague rulemaking authorization within the Mineral Leasing Act as sufficient authority to betray the

clear 2005 intent of Congress to prevent the executive branch from regulating non-diesel hydraulic fracturing. This back-door effort to federalize oil & gas exploration standards would destroy the cooperative federalism framework established by Congress and effectively end the primacy of States to regulate the oil & gas and groundwater resources within their borders.

IV. THE FEDERAL APPELLANTS CANNOT DEMONSTRATE THE "CLEAR AND MANIFEST" INTENT OF CONGRESS" TO EXTEND RULEMAKING AUTHORITY TO THEM OVER NON-DIESEL HYDRAULIC FRACTURING IN CONTRAVENTION TO THE STATES' REGULATORY JURISDICTION UNDER THEIR UIC PROGRAMS AND THEIR SOVEREIGN POLICE POWER TO REGULATE GROUNDWATER.

This Court in reviewing the limits of the DOI's authority to adopt administrative rules concerning hydraulic fracturing must evaluate that authority under 5 U.S.C. § 706, which provides:

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--
>
> (1) compel agency action unlawfully withheld or unreasonably delayed; and
>
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be--
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> (B) contrary to constitutional right, power, privilege, or immunity;

> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
>
> (D) without observance of procedure required by law;
>
> (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title [5 USCS §§ 556 and 557] or otherwise reviewed on the record of an agency hearing provided by statute; or
>
> (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.
>
> In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

Contrary to the assertions of the Federal Appellants, the rulemaking powers of the DOI are not plenary over all Federal lands for all purposes. Just as federal courts do not wield plenary jurisdiction over every legal action, the authority of both courts and administrative agencies is restricted by design. As this Court once observed, "the task of ensuring ourselves of our own subject matter jurisdiction 'is not a mere nicety of legal metaphysics,' but essential to the rule of law in 'a free society. . . . The courts, no less than the political branches of government, must respect the limits of their authority.'" *Hydro Res., Inc. v. United States EPA*, 608 F.3d 1131, 1144 (10th Cir. 2010) (determining that the EPA did not possess jurisdiction to regulate ground water injections on a tract of land because it was not part of a dependent Indian community under 18 U.S.C. § 1151(b)).

In this case, the clear intent of Congress in 2005 was to delegate regulatory control over oil & gas conservation and production involving non-diesel hydraulic fracturing to the states, and the rulemaking powers of the DOI were withdrawn by the Energy Policy Act of 2005, sections 322 and 362. Given such legislative history, text, and context, as well as the traditional role of the States in regulating the groundwater within their boundaries, the Federal Appellants must point to the "clear and manifest intent of Congress" that the Federal Appellants be granted rulemaking authority concerning non-diesel hydraulic fracturing after the enactment of the Energy Policy Act of 2005. As the U.S. Supreme Court held in *Solid Waste Agency v. United States Army Corps of Engineers*,

> Where an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result. [Citation omitted.] This requirement stems from our prudential desire not to needlessly reach constitutional issues and our assumption that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority. *See ibid.* This concern is heightened where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power. . . . Thus, "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *DeBartolo*, 485 U.S. at 575.

531 U.S. 159, 172-73 (2001).

This Court has previously recognized and implemented these interpretative limitations when reviewing doubtful claims of federal rulemaking authority,

especially when the questionable administrative rules lie outside the agency's expertise or specific authority. In *Hydro Res., Inc. v. United States EPA*, this Court observed that:

> The Administrative Procedure Act requires federal courts to set aside agency action that is 'not in accordance with law'--which means, of course, *any* law, and not merely those laws that the agency itself is charged with administering.
>
> . . . .
>
> Of course, courts afford considerable deference to agencies interpreting ambiguities in statutes that Congress has delegated to their care, *see Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984), including statutory ambiguities affecting the agency's jurisdiction, . . . [citations]. Courts do not, however, afford the same deference to an agency's interpretation of a statute lying outside the compass of its particular expertise and special charge to administer.

608 F.3d 1131, 1145-46 (10th Cir. 2010).

Because there has been no post-2005 congressional delegation of administrative authority concerning hydraulic fracturing expressly granted to the Federal Appellants, no *Chevron* deference can be recognized. Instead, Congress has directed that the States have primacy over the Underground Injection Control provisions of the Safe Water Drinking Act once they have approved programs, while the EPA only administers federal oversight. The DOI and the Bureau of Land Management, by enactment of the administrative rules at issue, have attempted to replicate the provisions of the Safe Water Drinking Act in the absence

of any delegation of authority by Congress to administer that Act. The Energy Policy Act of 2005 amended provisions of both the Safe Water Drinking Act (section 322) and the Mineral Leasing Act (section 362). By this Amendment, Congress clearly intended that no federal executive branch agency was to regulate the impacts of hydraulic fracturing. Instead, it clearly intended that only states retained the exclusive authority to do so in keeping with the concept of federalism.

Federalism is an essential attribute of the separation of powers crafted by Framers of the U.S. Constitution. James Madison in the *Federalist Paper No. 10* recognized that formation of political factions which endanger the stability of self-government could not be prevented, but the effects of such factions could be best controlled by separation of powers through federalism. Limited spheres of federal and state control created by Federalism would safeguard individual liberty by controlling dangerous tyrannical impulses at the national level while allowing decentralized States the flexibility to determine which policies were best for them. As Justice Brandeis stated in *New State Ice v. Liebmann*, 285 U.S. 262, 311 (1932): "[i]t is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country".

The Amici Western States assert that given a review of the chronology of Congressional Acts on this subject, it is clear that Congress intended to uphold the

sovereign power of States to protect and regulate groundwater and hydraulic fracturing under their inherent police powers. Congress has made no clear delegation of authority to any Federal agency to regulate non-diesel fuel hydraulic fracturing. Nor has Congress sought to impose uniform national standards for hydraulic fracturing. Instead, it has left such matters to the States, and the DOI and the Bureau of Land Management possess no "clear and manifest" rulemaking authority on this subject.

CONCLUSION

For the foregoing reasons, the Amici four western States respectfully request that this Court affirm the judgment of the District Court.

Respectfully submitted this 23rd day of September, 2016.

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STATEMENT OF RELATED CASES

The Appellee is unaware of any related cases pending before this Court.

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Brief of the Interested States of Montana, Alaska, Kansas, and Texas as *Amici Curiae* in Support of Appellees 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 September 23, 2016 .

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

DATED: September 23, 2016

/s/ Tommy H. Butler
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CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. P. 32(A)(7)(C) AND CIRCUIT RULE 32-1 FOR CASE NUMBERS 16-8068 AND 16-8069

I certify that:

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached answering brief is Proportionately spaced, has a typeface of 14 points or more and contains 4,445 words.

/s/ Tommy H. Butler
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CERTIFICATE OF DIGITAL SUBMISSION

I certify that a copy of the foregoing BRIEF OF THE INTERESTED STATES OF MONTANA, ALASKA, KANSAS, AND TEXAS AS AMICI CURIAE IN SUPPORT OF THE APPELLEES, 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 the most recent version of a commercial virus scanning program, 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: September 23, 2016

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