Nos. 16-8068, 16-8069

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; EARTHWORKS; WESTERN RESOURCE ADVOCATES; THE WILDERNESS SOCIETY; CONSERVATION COLORADO EDUCATION FUND; and SOUTHERN UTAH WILDERNESS ALLIANCE,

Intervenors-Appellants

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

BRIEF OF INTERVENOR-APPELLEE STATE OF NORTH DAKOTA (ORAL ARGUMENT REQUESTED)

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STATEMENT OF RELATED CASES

Pursuant to 10th Cir. R. 28.2(C)(1), Intervenor-Appellee North Dakota states that this is a consolidated case of two appeals – Case Nos. 16-8068 and 16-8069 – from the District Court's *Order on Petitions for Review of Final Agency Action* (the "Final Order") setting aside the U.S. Bureau of Land Management's ("BLM") final rulemaking entitled "Oil and Gas; Hydraulic Fracturing on Federal Lands; Final Rule." 80 Fed. Reg. 16128 (Mar. 26, 2015) ("BLM Rule"). A prior consolidated appeal of Case Nos. 15-8126 and 15-8134 regarding the District Court's issuance of a preliminary injunction staying implementation of the BLM Rule was dismissed as moot once the District Court entered its Final Order.

GLOSSARY

App.	Appellants' Appendix
Aplees. App.	Appellees' Supplemental Appendix
APA	Administrative Procedure Act
BLM	U.S. Bureau of Land Management
EPA	U.S. Environmental Protection Agency
EP Act	Energy Policy Act of 2005
District Court	District of Wyoming, Hon. S. Skavdahl presiding
Final Order	Order on Petitions for Review of Final Agency Action
FLPMA	Federal Land Policy and Management Act
MLA	Mineral Leasing Act of 1920
NDIC	North Dakota Industrial Commission
PI Order	Order on Motions for Preliminary Injunction
UIC	Underground Injection Control

ISSUE PRESENTED FOR REVIEW

Whether the District Court properly set aside the BLM Rule because BLM lacks statutory authority to regulate hydraulic fracturing.

STATEMENT OF THE CASE

I. THE BLM RULE AND THE JUDICIAL CHALLENGES THERETO.

The District Court correctly held that BLM lacks delegated authority to regulate hydraulic fracturing. The decision is consistent with federal law and principles of statutory construction, and serves to protect North Dakota's important sovereign interests in regulating hydraulic fracturing within its borders to ensure the responsible and efficient development of oil and gas, as well as the protection of the State's groundwater resources. As the District Court recognized, "regulation of an activity must be by Congressional authority, not administrative fiat." (App. at 319). Because Congress "explicitly removed the only source of specific federal agency authority over fracking, it defies common sense for the BLM to [now] argue that Congress intended to allow it to regulate the same activity under a general statute that says nothing about hydraulic fracturing." (*Id.*). For that reason and others set forth below, this Court should affirm the Final Order.

A. The Origins of the BLM Rule.

On May 11, 2012, BLM proposed regulations purporting to authorize federal regulation of hydraulic fracturing on federal and Indian lands, as well as within North Dakota's split estates. 77 Fed. Reg. at 27,691 (to be codified at 43 C.F.R. pt. 3160).

Due to heightened public interest in the proposed rule, BLM issued a supplemental proposed notice of rulemaking and request for comment in May 2013. 78 Fed. Reg. 31,636 (May 24, 2013). Nearly two years later, on March 26, 2015, BLM finalized the BLM Rule and scheduled June 24, 2015 as its effective date. 80 Fed. Reg. 16,128.

The BLM Rule purported to create a significant new regime, pursuant to which BLM claimed authority to regulate hydraulic fracturing on federal and Indian lands. *Id*. The new regulatory scheme would duplicate North Dakota's existing regulations by, among other things, requiring operators to obtain prior approval from BLM before conducting well stimulation activity. 80 Fed. Reg. at 16,129–30. Believing that the BLM Rule exceeds the BLM's delegated authority and infringes on North Dakota's sovereignty and well-established regulatory scheme for oil and gas activities (including hydraulic fracturing) and groundwater resources, North Dakota intervened in this action to request the BLM Rule be set aside.

B. North Dakota Intervenes and Seeks to Preliminarily and Permanently Enjoin the BLM Rule.

North Dakota intervened in this case to protect its sovereign interests and the significant property and fiscal interests of the State and its citizens. North Dakota's Motion for Preliminary Injunction identified several different substantive grounds that demonstrated that North Dakota was likely to succeed on the merits of its challenge to the BLM Rule, including: (1) The Safe Drinking Water Act's ("SDWA") prohibition on federal regulatory interference; (2) the lack of federal regulatory authority over hydraulic fracturing; and (3) the BLM Rule's failure to account for North Dakota's split-estate lands. (Aplees. App. at 3792-3845).

C. The District Court Issues a Preliminary Injunction.

On September 30, 2015, after briefing and oral argument, the District Court issued its *Order on Motions for Preliminary Injunction* ("PI Order") enjoining the BLM Rule from taking effect pending a final determination on the merits of Petitioners' challenge to the BLM Rule. (*See generally* Aplees. App. at 3792-3845).

In analyzing whether BLM exceeded its statutory authority, thereby warranting relief under the APA, the District Court employed the two-step inquiry adopted by the Supreme Court in *Chevron U.S.A., Inc. v. Natural Res. Def. Council,* 467 U.S. 837 (1984). (Aplees. App. at 3800). The District Court

concluded that, in this case, only the first step in the *Chevron* analysis was needed. (*Id.* at 3801). Based on the plain language of the SDWA and Energy Policy Act of 2005 ("EP Act"), the Court held that "Congress has directly spoken to the issue and precluded federal agency authority to regulate hydraulic fracturing not involving the use of diesel fuels." (*Id*.).

The District Court was not persuaded by BLM's reliance on the general grants of authority in the Mineral Leasing Act of 1920 ("MLA") and Federal Land Policy and Management Act ("FLPMA"). (Aplees. App. at 3801-08). With respect to the MLA, the District Court observed that the statute was directed at "*surface*-disturbing activities . . . in the interest of conservation of *surface* resources" and noted that BLM had failed to cite any provision that would authorize regulation of "underground activity or regulation for the purpose of guarding against any incidental, underground environmental effects." (*Id*. at 3805, quoting 30 U.S.C § 222(g)) (emphasis in original). Similarly, the District Court found BLM's reliance on FLPMA misplaced, noting that BLM had never previously invoked FLPMA to regulate oil and gas drilling operations, pursuant to 43 C.F.R. Part 360. (*Id.* at 3807).

Ultimately, the District Court concluded that it would be inappropriate to "interpret the more general authority granted by the MLA and FLPMA as providing the BLM authority to regulate fracking when Congress has directly

spoken to the issue in the EPAct." (Aplees. App. at 3811). Because the SDWA specifically addressed protection of underground sources of drinking water by regulating underground injection, and because the EP Act permits federal regulation of hydraulic fracturing only when diesel fuels are involved, the District Court reasoned that the specific authority of the SDWA and EP Act governed over the more general provisions of the MLA and FLPMA. (*Id.*). "If agency regulation is prohibited by a statute specifically directed at a particular activity, it cannot be reasonably concluded that Congress intended regulation of the same activity would be authorized under a more general statute administered by a different agency." (*Id.*).

Separately, the District Court identified numerous problems with the BLM Rule and thus held that Petitioners were also likely to succeed on the merits of a challenge based on the APA's arbitrary and capricious rulemaking standard.[1] Calling the BLM Rule a "remedy in search of harm," the District Court held that

[1] Unlike the PI Order, the District Court's Final Order does not analyze the question of whether the BLM Rule is arbitrary and capricious. This is noteworthy only if this Court takes issue with the District Court's ultimate conclusion in the Final Order that Congress has directly spoken to the issue and precluded the BLM's attempt to regulate hydraulic fracturing. As set forth in more detail below, even if the District Court erred in step one of the *Chevron* analysis (which it did not), this Court should remand for further analysis under *Chevron* step two, including whether the BLM Rule is arbitrary and capricious. Alternatively, the District Court's prior findings, and North Dakota's additional arguments herein, provide more than sufficient grounds for this Court to conclude that the BLM Rule is arbitrary and capricious even without remand.

BLM had failed to identify "substantial evidence to support the existence of a risk" to groundwater caused by hydraulic fracturing. (Aplees. App. at 3814, 3817). The District Court also identified at least three specific areas of the BLM Rule it found particularly problematic. (*Id.* at 3819-27) (discussing mechanical integrity testing, the definition of "usable water," and pre-operation disclosure issues).

D. The District Court Issues a Final Order Setting Aside the BLM Rule.

Notwithstanding a pending appeal of the District Court's issuance of a preliminary injunction, proceedings regarding the propriety of the BLM Rule continued before the District Court. The parties briefed the issues once more – this time with the benefit of the full administrative record – and on June 21, 2016, the District Court issued its Final Order setting aside the BLM Rule. (*See generally* App. at 295-321).

As it had done at the preliminary injunction stage, the District Court applied the *Chevron* analysis and again reached the conclusion that "Congress has directly spoken to the issue and precluded federal agency authority to regulate hydraulic fracturing not involving the use of diesel fuels." (*Id*. at 303). Specifically, the District Court reasoned that in determining congressional intent, it could not simply ignore the implications of "Congress' fracking-specific legislation in the SDWA and 2005 EP Act." (*Id.* at 317). Thus, the Court held that "[h]aving explicitly removed the only source of specific federal agency authority over

fracking, it defies common sense for the BLM to argue that Congress intended to allow it to regulate the same activity under a general statute that says nothing about hydraulic fracturing." (*Id*. at 319).

The District Court once again rejected BLM's purported reliance on the MLA, which it held "creates a program for *leasing* mineral deposits on federal land." (App. at 304) (emphasis added). The District Court observed that the "language of § 225 reflects the general sentiment at the time Congress enacted the MLA that underground water posed a threat to the oil and gas resources of the country," not the other way around. (*Id*.). The purpose of the MLA, therefore, was to promote "the orderly development of oil and gas deposits in publically owned lands…" (*Id*.).

The District Court also rejected BLM's suggestion that it had "long regulated hydraulic fracturing," concluding instead that "BLM's only regulation addressing hydraulic fracturing worked to prevent any additional surface disturbance" but "did not regulate the fracturing process itself." (*Id*.at 306, citing 43 C.F.R. § 3162.3-2(b)).

Similarly, the District Court concluded that BLM's claims regarding § 187 of the MLA were misleading. (*Id*. at 307-08). BLM claimed (and claims again in its Opening Brief to this Court) that § 187 expresses the legislation's purpose as ensuring the "exercise of reasonable diligence, skill, and care in the operation" of

federal leases, protecting "the interests of the United States," and safeguarding "the public welfare." (*Id*.). But, the District Court concluded that BLM had selectively cherry-picked the language it relied upon and ignored the context of the MLA as a whole. (App. at 308). The District Court, on the other hand, analyzed the complete statutory text and concluded that it:

> does not reflect a grant to the BLM of broad authority to regulate for the protection of the environment. Instead, the language requires only that certain, specific lease provisions appear in all federal oil and gas leases for the safety and welfare of miners and prevention of undue waste, and to insure the sale of mined minerals to the United States and the public at reasonable prices.

(*Id*. at 308).

Moreover, with respect to FLPMA, the Court observed that act "represents an attempt by Congress to balance the use of the public lands by interests as diverse as the lands themselves." (*Id*. at 310, quoting *Rocky Mtn. Oil & Gas Ass'n v. Watt*, 696 F.2d 734, 738 (10th Cir. 1982)). And while the District Court acknowledged that FLPMA delegates broad authority to BLM to manage and regulate activities on public lands, it held that "nothing in FLPMA provides BLM with specific authority to regulate hydraulic fracturing or underground injections of any kind." (App. at 310). "At its core, FLPMA is a land use planning statute." (*Id.*at 311).

Unlike its earlier ruling at the preliminary injunction stage, the District Court's Final Order does not address whether the BLM Rule should also be set aside as arbitrary or capricious. Based on the BLM's lack of Congressionally-delegated authority, the District Court set aside the BLM Rule as unlawful. (App. at 320-21). This consolidated appeal followed.

STATEMENT OF RELEVANT FACTS

I. OIL AND GAS DEVELOPMENT IN NORTH DAKOTA IMPACTED BY THE BLM RULE.

North Dakota is the second largest producer of oil and natural gas in the United States, with an annual production of approximately 400 million barrels of oil in 2014. (Aplees. App. at 3339, 3391). One-third of the oil produced in North Dakota comes from Indian lands, and another five percent comes from federal lands. (*Id*.)

While in many states federal minerals occur in large contiguous blocks under land that is also under federal control, in North Dakota, the presence of federal minerals occurs in small blocks that are often interspersed with mineral rights that are state- or privately-owned, or that underlie state- or privately-owned surface estates, or both. This results in a unique and significant split-estate situation. (*Id.* at 3339-41).

A. North Dakota's Split-Estate Regime.

As a result of the federal railroad and homestead acts in the late 1800s, surface and mineral estates in North Dakota were at one time more than 97% state- and privately-owned. (Aplees. App. at 3140). During the depression and drought years of the 1930s, however, numerous small tracts in North Dakota fell into foreclosure. (*Id*). Pursuant to the Federal Land Bank and the Bankhead Jones Act, the federal government foreclosed on many North Dakota farms and took ownership of both the mineral and surface estates. (*Id*.). While the federal government eventually sold most of the surface estates, it frequently retained the mineral rights, resulting in a large number of small federally-owned mineral tracts scattered throughout western North Dakota. (*Id*.).

These "split-estates" where federal mineral ownership has been severed from the surface estate now account for more than 30% of the oil and gas "spacing units" – a term delineating the boundary of a well for drilling, producing, and proration of proceeds (*see, e.g.,* N.D. Admin Code §43-02-03)[2] – in North Dakota. (Aplees. App. at 3140). The enormous quantity of split-estate areas results in large areas containing a checkerboard of lands with private or state surface ownership and a mix of federal, state, and private mineral ownership. (*Id*.). The BLM Rule

[2] *See also* Aplees. App. at 3393-94 (describing typical spacing unit as 1,280 acres with anywhere from 8 to 30 wells).

improperly seeks to impose federal regulatory control over these split-estates regardless of how small the federal mineral ownership and notwithstanding the extensive regulatory scheme for hydraulic fracturing already in place in North Dakota.

B. North Dakota's Regulatory Background.

The State of North Dakota supports the responsible development of the State's natural resources by regulating hydraulic fracturing, which enables the production of otherwise inaccessible oil and natural gas resources from shale formations. (Aplees. App. at 3296-3301, 3383); *see also* N.D. Cent. Code § 38-08-25 (designating hydraulic fracturing as an acceptable form of oil and natural gas recovery). Shale in its natural state contains pockets of trapped hydrocarbons that do not naturally flow into a traditional horizontal wellbore. 80 Fed. Reg. 16,130-31. As a result, energy producers must physically alter these formations in order to extract the resources. *Id.* They do so through the hydraulic fracturing process, which uses pressurized fluid injections to create fissures in the rock that enable the oil and gas pockets to migrate from the shale into the drilling well. *Id.* at 16,131. Water and "proppants" like sand, which are used to keep the fissures open while the oil and natural gas flows to the well, comprise between ninety-eight and ninety-nine percent of the injection fluid. *Id.* Chemical additives used to prevent

corrosion of the well casing and to limit the growth of bacteria comprise the remaining percentage of the injection fluid. *Id.*

The North Dakota Industrial Commission ("NDIC") is delegated authority to regulate hydraulic fracturing in the State. N.D. Cent. Code § 38-08-04; N.D. Admin. Code § 43-02-03-05. The NDIC regulates hydraulic fracturing and related activities under two distinct but statutorily-related regulatory programs: comprehensive oil and gas regulation, including hydraulic fracturing (the "ND Hydraulic Fracturing Program"); and the underground injection control program (the "ND UIC Program"). *See generally,* N.D. Admin. Code § 43-02-03-01, *et seq*. (Oil and Gas Conservation) and N.D. Admin. Code § 43-02-05-01, *et seq*. (Underground Injection Control, or "UIC"). The inspectors under the ND Hydraulic Fracturing Program control the permitting, construction, and mechanical integrity testing of wells using hydraulic fracturing. (Aplees. App. at 3296). The disposal of flowback water derived from hydraulic fracturing is then managed by inspectors pursuant to the ND UIC program. (*Id.*). As set forth in more detail below, North Dakota's regulation of hydraulic fracturing is extensive and comprehensive, from "cradle to grave" – initial permitting through disposal of the fluids and proppants used in the fracking process.

1. The North Dakota Hydraulic Fracturing Program.

While oil and gas drilling has occurred in North Dakota since the early 1950s, the use of hydraulic fracturing became more prevalent in North Dakota following the completion of the first commercial hydraulically-fractured Bakken well in 2006. (Aplees. App. at 3297). In 2011, the North Dakota legislature formally recognized hydraulic fracturing as an acceptable technique to recover oil and natural gas. (*Id*.); see also N.D. Cent. Code § 38-08-25. The State then supplemented its existing oil and gas development regulations in 2012 with regulations specific to hydraulic fracturing. *See* N.D. Admin. Code § 43-02-03-27.1. In coordination with the State's oil and gas conservation rules, the 2012 regulations provided North Dakota with more comprehensive control over hydraulic fracturing practices within its borders and enabled the State to more fully protect its underground drinking water sources. (Aplees. App. at 3297).

North Dakota's regulation of hydraulic fracturing begins as soon as an applicant applies to the NDIC for a permit to drill a well. N.D. Cent. Code § 38-08-05. An applicant may not initiate drilling until the NDIC issues this permit. N.D. Admin. Code § 43-02-03-16. Permit applications must include specifications, such as the depth of the well, specifics about how the well will be drilled, surface location design and the proposed casing program. *Id*. Permits to drill wells using hydraulic fracturing techniques expire one year after they are issued, unless the

well is in the process of being drilled or has been drilled below surface casing. *Id*. Any party that violates this permitting requirement is subject to a civil penalty of up to $12,500 per day for each offense, with each day of violation constituting a separate offense. N.D. Cent. Code § 38-08-16.

At the same time, the State's oil and gas regulations contain robust casing requirements to protect North Dakota's groundwater, including a requirement that at least four layers of casing be used in a hydraulically fractured well. *See* N.D. Admin. Code §§ 43-02-03-21; 43-02-03-27.1. North Dakota's casing standards also impose additional structural integrity and monitoring requirements on each type of well. Hydraulically fractured wells, for example, must be pressure tested, and wellhead and blowout preventer protection systems must be installed if the pressure rating does not meet certain specifications. *Id.* at § 43-02-03-27.1. If the intermediate casing level fails any of these integrity tests, the operator must install a fifth level of casing called a "frac string" to ensure that at least four layers of protection are maintained. *Id*.

At the completion of the hydraulic fracturing process, North Dakota's oil and gas regulations require that "[a]ll waste material associated with exploration or production of oil and gas must be properly disposed of in an authorized facility" in accordance with all applicable laws. N.D. Admin. Code at § 43-02-03-19.2. The NDIC tracks the flowback water from the time it leaves the drilling

well to the time it arrives at the disposal well using a combination of monthly reports and inspections. During this time, the flowback water is normally stored in closed-top above ground tanks, but may, in an emergency be temporarily stored in lined pits or open receptacles. *Id.* at § 43-02-03-19.3.

This tracking system enables the NDIC to know the specific volume of flowback water that left each well where hydraulic fracturing occurred and whether that water was transported to the disposal well by pipe or by truck. (Aplees. App. at 3298). The monthly disposal well reports must identify the source of water and whether transported by pipeline or truck. (*Id.*).

2. The North Dakota Underground Injection Control Program.

The NDIC also regulates the flowback water produced by hydraulic fracturing through the ND UIC Program. *See* N.D. Admin. Code Chapter 43-02 - 05. The NDIC has effectively administered the ND UIC Program since 1983, pursuant to a primacy delegation from the EPA under the SDWA. *See* 48 Fed. Reg. 38,237, 38,238 (Aug. 23, 1983); 42 U.S.C. § 300h-1(b)(1) (process for delegation of SDWA authority to the states).

The ND UIC Program regulates the post-fracturing production of flowback water after the water is removed from the production site. (Aplees. App. at 3299). Once the water is removed from a fractured well, inspectors ensure that the water is properly monitored and disposed of through underground injection. (*Id.*). Under

the ND UIC Program, any party seeking to utilize underground injection to dispose of flowback water must first obtain a permit from the NDIC (in addition to the drilling permit noted above). N.D. Admin. Code § 43-02-05-04(5). The permit application requires information in twenty-one categories, including the average and maximum volumes of fluid to be injected each day and the average and maximum requested surface injection pressure. *Id.* at § 43-02-05-04(1). After receiving and reviewing this information, the NDIC determines whether the proposed injection will endanger any underground drinking water source. *Id.* at § 43-02-05-04(4). The NDIC will issue a permit for the underground injection of hydraulic fracturing fluid only after providing notice and a hearing to the project applicant. *Id.* at § 43-02-05-04(1).

After issuing a permit for an underground injection control well, the NDIC requires the well operator to demonstrate the mechanical integrity of the well before putting it into use. N.D. Admin. Code § 43-02-05-07(1). These wells must be tested for mechanical integrity at least once every five years. *Id.* A well is considered to have mechanical integrity if there is (1) "no significant leak in the casing, tubing, or packer" and (2) "no significant fluid movement into an underground source of drinking water or an unauthorized zone through vertical channels adjacent to the injection bore." *Id.* North Dakota requires that injection pressure at an injection wellhead meet certain maximum pressure specifications

in order to prevent failure of the wellbore or confining zones that could cause the fluids to leak into the surrounding aquifer. *See* N.D. Admin. Code § 43-02-05-09.

SUMMARY OF THE ARGUMENT

The District Court's Final Order correctly concludes that the BLM Rule exceeds the authority delegated to BLM by Congress. BLM's overreach results in improper infringement upon North Dakota's authority to regulate oil and gas and groundwater resources within its state borders, violates the EP Act's prohibition of federal regulation of hydraulic fracturing activities, and upends North Dakota's delegated authority under the SDWA. Accordingly, this Court should affirm the District Court's Final Order.

The District Court properly held that Congress originally intended the SDWA to completely occupy the field of underground injection regulation, including hydraulic fracturing. Equally clear is that in the EP Act, Congress explicitly withdrew hydraulic fracturing from the realm of federal regulation, thereby electing to leave states to exercise their sovereign powers and be the exclusive source of regulation for hydraulic fracturing. BLM's reliance on the MLA and FLPMA for its attempt to acquire regulatory control is unpersuasive. As the District Court observed, none of the general provisions cited by BLM grant it specific authority regarding hydraulic fracturing. Absent a specific grant, BLM cannot demonstrate Congressional intent to displace the more specific provisions

of the SDWA and the EP Act or the longstanding balance of power under which North Dakota has primary responsibility over land and water use.

Accordingly, the analysis in the District Court's Final Order begins and ends with *Chevron* step one. Because Congress has spoken directly to the regulation of hydraulic fracturing, there is no need to analyze whether BLM's interpretation is entitled to deference under *Chevron* step two.

Because the District Court did not analyze *Chevron's* second step in its Final Order, it would be inappropriate for this Court to do so now. Rather, if this Court were to disagree with the District Court's statutory construction conclusion, it should remand the case for further proceedings before the District Court on *Chevron* step two. That issue should not be addressed here without giving the District Court the opportunity to reach a fully-considered merits opinion with benefit of the full administrative record.

Alternatively, if this Court were to consider the second prong of the *Chevron* analysis at this point, as Appellants urge, the Court should afford significant weight to the District Court's conclusion in the PI Order that the BLM Rule was likely arbitrary and capricious. Evidence of the arbitrary nature of the BLM Rule can also be found, *inter alia*, in BLM's election to ignore North Dakota's split-estate regime and instead attempt to enact rulemaking that overlaps and conflicts with existing state laws. Thus, if the Court does reach the second step of the

Chevron analysis (even though the District Court did not analyze that issue in its Final Order), it should affirm the District Court's decision to set aside the BLM Rule on the alternative grounds that the BLM Rule is arbitrary and capricious, and thus, not entitled to deference.

The District Court saw BLM's actions for what they are – an improper end-run around clear Congressional intent and an attack upon North Dakota's unmistakable sovereign interest in regulating hydraulic fracturing. The District Court's decision should, therefore, be upheld.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY HELD THAT CONGRESS HAS EXPRESSLY PRECLUDED BLM'S ATTEMPT TO REGULATE HYDRAULIC FRACTURING.

The APA requires reviewing courts to "hold unlawful and set aside agency action" that is "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2)(c). "[A]n administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988).[3]

[3] In light of this well-established limitation on agency power it matters not whether some people – including the former government officials who have filed an amicus brief in this matter – believe that "a uniform comprehensive rule is vital." (Brief of Amici Curiae Former Officials at p. 32). The question before the Court is whether Congress has authorized BLM to promulgate such a rule. As the District Court correctly held, the answer to that question is no.

In this case, the District Court correctly applied step one of the *Chevron* test and held that Congress had, through the SDWA and EP Act, directly spoken on the precise question of federal authority to regulate hydraulic fracturing. Appellants' insistence that BLM has broad authority to regulate federal lands pursuant to the MLA and FLPMA is immaterial, misleading, and ignores North Dakota's primary authority over land and water use.

A. North Dakota's Primary Authority.

As an initial matter, the BLM Rule fails to recognize North Dakota's primary authority to regulate hydraulic fracturing and underground sources of drinking water within its boundaries. States, not the federal government, have "traditional and primary power over land and water use." *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 174 (2001). These traditional powers are noteworthy in this context because the Supreme Court has observed that even "[i]n the face of [statutory] ambiguity, we will not attribute to Congress an intent to intrude on state governmental functions . . . ." *Gregory v. Ashcroft*, 501 U.S. 452, 470 (1991); *see also Solid Waste Agency of N. Cook Cnty.*, 531 U.S. at 172-73; *United States v. Bass,* 404 U.S. 336, 349, 92 S.Ct. 515, 30 L.Ed.2d 488 (1971) ("[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance"). Yet this is exactly what the BLM Rule does in North Dakota by impermissibly intruding on

state government functions clearly granted to and undertaken by North Dakota.

Specifically, North Dakota's Constitution recognizes state ownership of waters of the state, and pursuant to North Dakota statute, the North Dakota State Engineer has exclusive authority over groundwater resources. *See* N.D. Const. Art. XI, § 3 and N.D. Cent. Code § 61-01-01(2), respectively. As explained above, North Dakota has also enacted its own comprehensive laws and regulations to ensure adequate groundwater protection and safe hydraulic fracturing practices. The explicit purpose for such programs is to "adequately protect and isolate all formations containing water." *See, e.g.,* N.D. Admin. Code. § 43-02-03-21. North Dakota administers these programs on private, state, federal, and tribal lands in North Dakota.

North Dakota's authority over its water resources has also been recognized by Congress in the federal Clean Water Act: "It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States ... to plan the development and use ... of land and water resources ...." 33 U.S.C. § 1251(b). The Supreme Court has further recognized, "[w]here Congress has expressly addressed the question of whether federal entities must abide by state water law, it has almost invariably deferred to the state law." *United States v. New Mexico*, 438 U.S. 696, 701 (1978).

Therefore, in the absence of a clear congressional grant of authority, BLM

has improperly sought to displace North Dakota's traditional and primary power over land and water use, including hydraulic fracturing.

B. Federal Regulatory Framework

In addition to preexisting North Dakota state law, federal lawmakers have directly spoken on the issue of regulating hydraulic fracturing on only two occasions: (1) in enacting the SDWA in 1974, and authorizing the EPA's regulatory authority over hydraulic fracturing; and (2) in the EP Act's amendment to the SDWA and explicit removal of that same regulatory authority.

1. The SDWA

In 1974, Congress enacted the SDWA to set forth a system of cooperative federalism for the principal objective of protecting underground sources of drinking water. *See* Pub. L. No. 93-523, 88 Stat. 1660 (1974) (codified as amended at 42 U.S.C. §§ 300f - 300j-26 (2012)). Notably, the SDWA originally provided EPA – not BLM – with specific statutory authority to regulate underground injection, including hydraulic fracturing. Specifically, in Part C of the SDWA, 42 U.S.C. §§ 300h to 300h-8, Congress established a comprehensive scheme to regulate *all* underground injection of contaminants, including hydraulic fracturing. *See* H.R. Rep. No. 93-1185, at 6455, 6481 (1974) (explaining that the original SWDA provision covers "injection techniques to increase production"); *see also Legal Envtl. Assistance Found., Inc. v. U.S. E.P.A* ("LEAF"), 118 F.3d

1467, 1474 (11th Cir. 1997) ("it is clear that Congress dictated that *all* underground injection be regulated under the UIC programs") (citing 42 U.S.C. § 300h(b)(1)(A)) (emphasis in original).

The SDWA specifically addresses protection of underground sources of drinking water by requiring all underground injection be regulated under UIC programs like the one developed by North Dakota. In addition, the SDWA prohibits federal interference with state regulation of underground sources of drinking water, which includes promulgating unnecessary regulations:

> In prescribing regulations under this section the Administrator shall, to the extent feasible, *avoid promulgation of requirements which would unnecessarily disrupt State underground injection control programs* which are in effect and being enforced in a substantial number of States. . . .
> For the purpose of this subparagraph, a regulation prescribed by the Administrator under this section shall be deemed unnecessary *only if, without such regulation, underground sources of drinking water will not be endangered by an underground injection*.

42 U.S.C. § 300h(b)(3) (emphasis added).

Congress clearly stated its intention that BLM and other federal agencies be governed by state regulations promulgated under the SDWA, even in relation to federal groundwater property interests. The SDWA requires:

> "[e]ach department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government . . . *engaged in any activity resulting, or which may result in, underground injection which endangers drinking*

> *water*" to comply with the [applicable state] UIC program to the same extent as any person is subject to such requirements.

42 U.S.C. § 300j-6(a)(4) (emphasis added). Activities governed by the UIC program include "the protection of such wellhead areas," which originally included hydraulically fractured well sites. *Id*. at § 300j-6(a). Congress therefore dictated that regulators treat "underground injection wells on Federal property the same as any other . . . underground injection well and will enforce applicable regulations to the same extent and under the same procedures." H.R. Rep. No. 93-1185, at 6494 (1974).

In sum, the SDWA prohibits federal interference with state regulation of underground sources of drinking water once a state has established primacy: "[T]he State shall have primary enforcement responsibility for underground water sources until such time as the [EPA] Administrator determines, *by rule*, that such State no longer meets the requirements" upon which primacy is based. 42 U.S.C. § 300h-1(b)(3) (emphasis added).

2. The EP Act

Following a pronouncement in 1997 by the Eleventh Circuit Court of Appeals that the language of the SDWA clearly indicated congressional intent for the EPA to regulate "all underground injection" activity, including hydraulic

fracturing,[4] Congress proposed an amendment to the SDWA in the EP Act. By enacting the EP Act, Congress amended the SDWA to exclude hydraulic fracturing from federal regulation. *See* Pub. L. No. 109-58, § 322, 119 Stat. 594 (2005) (codified at 42 U.S.C. § 300h(d)(2)(B)). As the legislative history confirms, Congress intended the exclusion to prevent federal interference with state authority "to protect [energy companies] from ever facing *federal* regulation of a practice of drilling for oil using the hydraulic fracturing technique[.]" 151 Cong. Rec. H2192-02, H2194-95 (Apr. 20, 2005) (statements of Rep. Markey)(emphasis added); *see also* 151 Cong. Rec. S9335-01, S9337 (July 29, 2005) (statement of Sen. Feingold). Legislators characterized the exclusion, which left hydraulic fracturing exclusively under state supervision, as an incentive to support the EP Act's broader policy of developing secure, affordable, and reliable domestic energy resources. H.R. 6, 109th Cong. § 327 (as debated Apr. 20, 2005); *see also* 151 Cong. Rec. H2192-02, H2226 (Apr. 20, 2005).

C. Congress Has Directly Spoken Regarding the Regulation of Hydraulic Fracturing

As the District Court correctly held, Congressional action in the SDWA and EP Act evinces intent to preclude federal agency authority to regulate hydraulic

[4] *LEAF*, 118 F.3d at 1474 ("it is clear that Congress dictated that *all* underground injection be regulated under the UIC programs") (citing 42 U.S.C. § 300h(b)(1)(A)).

fracturing not involving the use of diesel fuels. The test articulated in *Chevron* requires courts to first ask "whether Congress has directly spoken to the precise question at issue." *Chevron,* 467 U.S. 827, 842 (1984). If Congress has directly spoken to the issue of agency authority, then a court must give effect to that congressional intent. *F.D.A., v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000) (citing *Chevron*, 467 U.S. 837 (1984)). That is precisely the case here.

The EP Act confirms that hydraulic fracturing is not subject to federal regulation. In enacting the EP Act, Congress is presumed to be aware of the *LEAF* decision recognizing the EPA's authority to regulate hydraulic fracturing under the SDWA. *See Passamaquoddy Tribe v. State of Me.,* 75 F.3d 784, 789 (1st Cir. 1996). With this knowledge, Congress included within the EP Act an amendment to the SDWA that expressly and unambiguously revised the definition of "underground injection" to exclude "the underground injection of fluids or propping agents (other than diesel fuels)." 42 U.S.C. § 300h(d)(l)(B)(ii)).

As the District Court correctly concluded, based on the regulatory scheme established by the SDWA and EP Act,[5] "[t]here can be no question that Congress intended to remove hydraulic fracturing operations (not involving diesel fuels)

[5] Contrary to the assertion of the amici curiae, the District Court's conclusion was premised on well-reasoned analysis of the principles of statutory construction and not solely on the *Untested Waters* law review article.

from EPA regulation under the SDWA's UIC program." (Aplees. App. at 3810).[6]

Appellants now insist the District Court's decision was erroneous because there is nothing in the SDWA or EP Act that expressly forbids BLM from regulating hydraulic fracturing. Fed. Appellants' Opening Brief at p. 15. According to Appellants, Appellees can only succeed at step one of the *Chevron* analysis if some statutory provision "forbids" BLM's attempt to regulate. *Id*. That is not the law. *See, e.g., Louisiana Public Service Com'n v. F.C.C.,* 476 U.S. 355, 374 (1986) ("an agency literally has no power to act… unless and until Congress confers power upon it"). The APA expressly vested the courts with the responsibility to "interpret… statutory provisions" and overturn agency action inconsistent with those interpretations. *Gutierrez-Brizuela v. Lynch*, 2016 WL 4436309, at *8 (10th Cir. 2016) (*citing* 5 U.S.C. § 706).

Indeed, in determining whether Congress has specifically addressed the question of authority to regulate hydraulic fracturing, a court "should not confine itself to examining a particular statutory provision in isolation." *Brown & Williamson,* 529 U.S. at133. Instead, "the words of a statute must be read in their context and with a view to their place in the overall statutory scheme. . . . [T]he meaning of one statute may be affected by other Acts, particularly where Congress

[6] This explicit expression of Congressional intent means the Court need not indulge Citizen Group Appellants' suggestion that Congress has implicitly ratified a contrary course of action by the BLM.

has spoken subsequently and more specifically to the topic at hand." *Id*. (internal citations omitted). The District Court's framework for analyzing statutory construction was, therefore, appropriate.

While Appellants seize on words like "forbid" and "foreclose," the cases they rely upon cannot be fairly read to establish the bright-line pre-requisite to invalidating rulemaking under the first step of *Chevron* as they now suggest. To the contrary, for *Chevron* deference to even apply, the agency must have received congressional authority to determine the "particular matter at issue in the particular manner adopted" – something that is clearly lacking here. *City of Arlington, Tex. v.* FCC, 133 S. Ct. 1863, 1874 (2013). Moreover, even under the test advanced by Appellants, it is clear that, through the EP Act's removal of hydraulic fracturing from the realm of federal regulation, BLM's current effort has, in fact, been expressly foreclosed by lawmakers.

D. The Authorities Relied Upon by BLM in Attempting to Promulgate the BLM Rule Do Not Authorize BLM to Regulate Hydraulic Fracturing.

The Federal Appellants' Opening Brief suggests that BLM has broad authority to regulate hydraulic fracturing on federal lands under the MLA and FLPMA and that its interpretation of its statutory authority deserves deference. Appellants are wrong on both points.

First, none of the statutes relied upon by BLM authorize regulation of hydraulic fracturing. While Appellants give this point short shrift, Congressional silence speaks volumes. The question of authority to regulate hydraulic fracturing is one of "deep economic and political significance," such that "had Congress wished to assign that question to an agency, it surely would have done so expressly." *King v. Burwell*, 35 S. Ct. 2480, 2489 (2015), quoting *Utility Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2444 (2014).

The BLM Rule, and Appellants here, rely on statutes, including FLPMA, which address BLM's general authority over public lands. Those statutes simply ensure that federal lands are managed using principles of multiple use and sustained yield in accordance with land use plans. 43 U.S.C. §§ 1701, 1732. While overlooked by the BLM Rule and Appellant's here, FLPMA actually reinforces the SDWA principle that state authority governs BLM practices involving water and pollution control. For example, under FLPMA, BLM must "provide for compliance with applicable pollution control laws, including State and Federal air, water, noise, or other pollution standards or implementation plans." 43 U.S.C. § 1712(c)(8).

While BLM claims FLPMA provides the agency with authority for the BLM Rule, FLPMA does not explicitly grant federal authority to regulate hydraulic fracturing or underground sources of drinking water. Quite the opposite, FLPMA

requires BLM to abide by state laws governing such practices. Congress made it clear that FLPMA does not affect "in any way any law governing . . . use of . . . water on public lands," and should not be construed "as superseding, modifying, or repealing . . . existing laws applicable to the various Federal agencies which are authorized to develop or participate in the development of water resources or to exercise licensing or regulatory functions in relation thereto." Pub. L. No. 94-579, § 701, 90 Stat. 2786 (1976). And, as the District Court correctly observed, there continues to be a distinction, which Appellants' argument refuses to recognize, between land use planning regulation and environmental protection. (App. at 313, quoting *California Costal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 587-88 (1987)).

Appellants also claim the MLA provides BLM with authority for the BLM Rule. The MLA authorizes BLM to productively develop natural resource deposits. The MLA includes a narrow provision allowing BLM to regulate surface disturbing activities when necessary to enable oil and gas leasing on public lands. 30 U.S.C. § 226(g). But, as the District Court pointed out in its Order, this provision is limited to *surface* disturbing activities and is distinguishable from hydraulic fracturing. (App. at 308).

Perhaps most importantly, BLM's claim that the purpose of the MLA is to ensure the "exercise of reasonable diligence, skill, and care in the operation" of

federal leases, protecting "the interests of the United States," and safeguarding "the public welfare," is taken out of context. As the District Court observed, when the complete language is analyzed, its impact is far more limited that BLM would lead the Court to believe. Specifically, the statutory language "does not reflect a grant to the BLM of broad authority to regulate for the protection of the environment. Instead, the language requires only that certain, specific lease provisions appear in all federal oil and gas leases for the safety and welfare of miners and prevention of undue waste, and to insure the sale of mined minerals to the United States and the public at reasonable prices." (App. at 308).

Second, because BLM was never delegate authority to regulate hydraulic fracturing, the agency is not entitled to the deference Appellants now request. "[F]or *Chevron* deference to apply, the agency must have received congressional authority to determine the particular matter at issue in the particular manner adopted." *City of Arlington,* 133 S. Ct. at 1874; *see also United States v. Mead Corp*., 533 U.S. 218, 226–27 (2000) (stating that Congress must have "delegated authority to the agency" to resolve the specific issue); *EEOC v. Arabian American Oil Co*., 499 U.S. 244, 257 (1991) (declining to apply *Chevron* deference to agency guideline where congressional delegation did not include "authority to promulgate rules or regulations" (quoting *General Electric Co. v. Gilbert*, 429 U.S. 125, 141 (1976)); *Adams Fruit Co., Inc. v. Barrett*, 494 U.S. 638, 649 (1990) (rejecting

application of *Chevron* because a "precondition to deference under *Chevron* is a congressional delegation of administrative authority"). As the District Court noted, "[a]lthough agency determinations within the scope of delegated authority are entitled to deference, it is fundamental that an agency may not bootstrap itself into an area in which it has no jurisdiction." *Id*., quoting *Federal Maritime Comm'n v. Seatrain Lines, Inc.*, 411 U.S. 726, 745 (1973).

II. IF THIS COURT DISAGREES WITH THE DISTRICT COURT, THEN IT SHOULD REMAND FOR FURTHER PROCEEDINGS UNDER *CHEVRON STEP 2* OR, ALTERNATIVELY, CONCLUDE THAT THE BLM RULE SHOULD NEVERTHELESS BE SET ASIDE AS ARBITRARY AND CAPRICOUS.

The District Court did not, and this Court should not, address the second step of the *Chevron* analysis. Importantly, only the Citizen Group Appellants contend that Congress has directly authorized BLM to regulate hydraulic fracturing. Federal Appellants' argument is based solely on the second step of *Chevron* test, which applies only if the underlying statutory authority "is silent or ambiguous with respect to the specific issue." *Chevron,* 467 U.S. at 842. In such cases, "the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843.

While Federal Appellants' Opening Brief insists that BLM's interpretation of its statutory authority is entitled to deference, the District Court never addressed that issue on the merits because it did not find that the statutory authority was

"silent or ambiguous with respect to the specific issue" of hydraulic fracturing. Accordingly, this Court should not entertain Appellants' argument regarding whether BLM's interpretation of its authority is a "permissible construction" of the leasing statutes. *Id*. In the event this Court were to find legal error in the District Court's conclusion that Congress had spoken directly to the regulation of hydraulic fracturing, this Court should instead remand to the District Court for a merits determination of whether BLM's interpretation of its authority was entitled to deference.[7]

Even if this Court were to undertake the second step of the *Chevron* test, however, it would not alter the outcome. Under the second step of *Chevron,* BLM's interpretation is entitled to deference only if: (1) Congress delegated

[7] *Savings & Loan Assoc.,* 665 F.2d at 276-77 (appellate courts consider the merits "only insofar as they bear on the issue of judicial discretion."); *Cont'l Oil Co*., 338 F.2d at 781 (same); *Singleton v. Wulff*, 428 U.S. 106, 119-120 (1976) ("resolution of the [question not addressed below] seems to us to be an unacceptable exercise of its appellate jurisdiction . . . It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below."); *Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am. v. Brock*, 783 F.2d 237, 251 (D.C. Cir. 1986) ("Because the district court disposed of the case on [another issue], it had no opportunity to pass judgment on whether the particular statutory interpretations adopted by the Department are reasonable under . . . *Chevron* . . . [and] the parties' briefs gave minimal attention to [it]. In light of both factors, we think it both efficient and prudent to remand . . . [especially as] the district court [is] the forum in which Congress vested original jurisdiction in this matter[.]") (citations omitted); *R.G. Johnson Co., Inc. v. Apfel*, 172 F.3d 890, 895 (D.C. Cir. 1999) ("It is our normal practice to refuse to hear any claim upon which the district court has not had an opportunity to rule . . . [The parties may] present this argument to the district court on remand.") (citations omitted).

authority to BLM to regulate hydraulic fracturing; and (2) BLM's interpretation is not arbitrary, capricious, or manifestly contrary to the statute. *Chevron,* 467 U.S. at 844. As explained above, BLM's interpretation runs contrary to the SDWA and EP Act and *Chevron* deference does not apply. Moreover, even if it did apply, the BLM Rule is arbitrary and capricious.

A. The BLM Rule is Arbitrary and Capricious

Any agency action must be the result of "reasoned decisionmaking" as evidenced and supported by the administrative record. *Olenhouse v. Commodity Credit Corp.,* 42 F.3d 1560, 1575 (10th Cir. 1994). An agency's decision will be deemed arbitrary and capricious if the agency relied on factors that Congress had not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. *Lamb v. Thompson,* 265 F.3d 1038, 1046 (10th Cir. 2001).

In its preliminary injunction Order, the District Court identified several instances where the BLM Rule is likely arbitrary and capricious, each one of which militates in favor of affirming the District Court's Order. (Aplee. App. at 3819-27) (discussing mechanical integrity testing, the definition of "usable water," and pre-operation disclosure issues). In addition, BLM's failure to consider circumstances

unique to North Dakota, including its split-estate regime and extensive State regulatory scheme, is further justification for affirming the District Court's conclusion. *See Richison v. Ernest Group, Inc.*, 634 F.3d 1123, 1130 (10th Cir. 2011) (holding that the Tenth Circuit may affirm on any basis supported by the record, even if the grounds differ from those on which the district court ruled).

1. Speculative Impacts are Insufficient Justification for the BLM Rule

As the District Court observed, "the Fracking Rule seems a remedy in search of harm." (Aplee. App. at 3814). The District Court continued:

> While "public concern" and "potential impacts" certainly warrant further study and investigation, such speculation, in itself, cannot justify comprehensive rulemaking. There must be a rational connection between the facts found and the decision made. *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43. The BLM has neither substantiated the existence of a problem this rule is meant to address, identified a gap in existing regulations the final rule will fill, nor described how the final rule will achieve its stated objectives.

(*Id.*). Because BLM has not established a need for the additional regulatory effort and oversight proposed by the BLM Rule, the District Court concluded neither BLM's official explanation for the rulemaking, nor the record itself, satisfied the APA's arbitrary and capricious standard. The District Court's factual findings with respect to the evidence are entitled to deference and should only be set aside if clearly erroneous. *See Aid for Women v. Foulston*, 441 F.3d 1101, 1115 (10th

Cir. 2006). Appellants' Opening Briefs fail to meet this high bar. Further, as the District Court also found, BLM has never explained how its Rule will meet the stated objectives of the Rule. (Aplee. App. at 3817). That is fatal to the Rule's validity.

2. BLM failed to consider North Dakota's Split-Estate Lands

While not expressly mentioned in the District Court's Final Order, the record includes even more examples of the arbitrary and capricious nature of the BLM Rule, including the following issues of particular importance to North Dakota.

As explained previously, North Dakota has a unique and significant split-estate regime. Under the BLM Rule, this checkerboard of split-estates results in BLM regulation of hydraulic fracturing and underground sources of drinking water on *private* and *state-owned* surface land, based only on federal ownership of the subsurface minerals. As an example, in a spacing unit consisting of private surface and mineral ownership of all tracts but one, the BLM's ownership of a mineral interest in that one tract would be sufficient to subject the entire unit to the BLM Rule. (Aplee. App. at 3328). Without any statutory grant of jurisdiction or basis in property rights, BLM asserts authority over private property and the associated state waters. (*Id.*).

Indeed, this would represent a dramatic departure from BLM's prior

oversight of wells within a spacing unit. Historically, BLM has not overseen operations on non-federal leases within a spacing unit. *See* 43 C.F.R. 3161.1(a) (generally limiting federal jurisdiction over oil and gas operations to federal and Indian leases). Not only is there no authority for such an expansion of federal jurisdiction, the SDWA prohibits such "unnecessary" federal interference. 42 U.S.C. § 300h(b)(3).

Similarly, North Dakota law limits the surface rights of the mineral owners on split-estates: "[T]he mineral estate owner has no right to use more of, or do more to, the surface estate than is *reasonably necessary* to explore, develop, and transport the minerals." *Hunt Oil Co. v. Kerbaugh*, 283 N.W.2d 131, 135 (N.D. 1979) (emphasis added). Because of the effectiveness and success of North Dakota law governing hydraulic fracturing and protecting underground sources of drinking water, the BLM Rule provisions impacting the surface, such as the provision allowing storage of flowback fluids in surface pits, do not qualify as "reasonably necessary." This example demonstrates but one of the direct conflicts between the BLM's claimed jurisdiction to protect drinking water under private surface lands and the State's right to exercise jurisdiction over such underground sources of drinking water. Jurisdiction over the surface land in question is key to determining jurisdiction. *Hydro Res., Inc. v. U.S. E.P.A.*, 608 F.3d 1131 (10th Cir. 2010) (finding state UIC jurisdiction and rejecting EPA's attempt to give itself

jurisdiction over a specific UIC permit).

The private surface owners of these split-estate lands within North Dakota and the water sources under their lands are unquestionably under state jurisdiction, not BLM's. (Aplee. App. at 3328). Therefore, the BLM Rule inappropriately applies to split-estate lands in which the federal government owns the mineral estate, but not the surface estate – even if the former is a miniscule part of the overall spacing unit.

3. The BLM's Rule infringes North Dakota's Sovereignty

Similarly, BLM failed to consider the impact of the BLM Rule on North Dakota's sovereign interests when it issued a final rule that unnecessarily conflicts with and duplicates existing state regulations. Indeed, the BLM Rule improperly infringes on North Dakota's and other States' sovereign interests in administering their own comprehensive regulatory programs governing hydraulic fracturing. When a federal agency's rulemaking places a state's "sovereign interests and public policies at stake, [the Tenth Circuit] deem[s] the harm the State stands to suffer as irreparable if deprived of those interests without first having a full and fair opportunity to be heard on the merits." *Kansas v. United States*, 249 F.Supp.3d 1213, 1227 (10th Cir. 2001). Because the BLM Rule places North Dakota's sovereign interests at stake, by purporting to enact an overlapping federal regime (without Congressional authority to do so), the Rule is arbitrary, capricious, and

invalid under the APA. (PI Order at p. 46).

CONCLUSION

For the reasons stated herein, this Court should affirm the District Court's Order on Motions for Preliminary Injunction and dismiss this appeal.

Dated: September 16, 2016. Respectfully submitted,

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STATEMENT REGARDING ORAL ARGUMENT

Intervenor-Appellee State of North Dakota respectfully requests oral argument as North Dakota believes that oral argument may be helpful to the Court in resolving the important issues on appeal and because the decisional process would be significantly aided by oral argument.

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

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Date: September 16, 2016

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I hereby certify that on September 16, 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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