CASE NOS. 16-8068, 16-8069
Oral Argument Requested

IN THE
United States Court of Appeals for the Tenth Circuit

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

Petitioners-Appellees

and

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

Intervenors-Appellees

v.

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

Respondents-Appellants

and

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

Intervenors-Appellants

INDUSTRY PETITIONERS-APPELLEES' RESPONSE BRIEF

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CORPORATE DISCLOSURE STATEMENT

Petitioners-Appellees Independent Petroleum Association of America and Western Energy Alliance (collectively, "Industry Petitioners") state under Federal Rule of Appellate Procedure 26.1 that neither trade association has a parent company and that no publicly held corporation owns 10% or more of either trade association's stock.

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES

Page(s)

Constitutional Provisions

Statutes

Regulations

TABLE OF AUTHORITIES

Page(s)

STATEMENT OF RELATED CASES

These consolidated appeals are related to the Respondent-Appellants' and Intervenor-Appellants' previous appeals of the district court's preliminary injunction order, Case Nos. 15-8126 and 15-8134. This Court dismissed those prior appeals as moot after the district court issued its ruling on the merits.

STATEMENT OF THE ISSUE PRESENTED

Whether the district court erred when it determined the hydraulic fracturing rule is invalid under the Administrative Procedure Act ("APA") because the Bureau of Land Management ("BLM") lacks statutory authority to implement the rule.

STATEMENT OF THE CASE

For more than a decade, oil and natural gas production from domestic wells has increased steadily. Virtually all of this increased production has come through the application of the well stimulation technology known as hydraulic fracturing – the procedure by which oil and gas producers inject water, sand, and certain chemicals into tight-rock formations to create fissures in the rock that allow oil and gas to escape for collection in a well. Appellees' Combined Appendix ("C.A.") at 4760 (estimating that 90% of wells drilled on federal lands in 2013 were stimulated using hydraulic fracturing). BLM acknowledges that the oil and gas industry has been using hydraulic fracturing "since the late 1940s," *id.* at 4061, and that hydraulic fracturing has been used to extract hydrocarbons from shale since at least the 1970s. *Id.* at 4188 ("The increase in oil and gas prices during the 1970s led to both an increase of rig count and the development of new technologies, such as massive hydraulic fracturing."). BLM has described hydraulic fracturing as "a proven process with minimal technical problems." *Id.* at 4061.

A. THE HYDRAULIC FRACTURING RULE.

On May 11, 2012, BLM issued proposed regulations purporting to "regulate hydraulic fracturing on public land and Indian land." C.A. at 4159. The

proposed rule focused on: (i) construction standards to ensure wellbore integrity during hydraulic fracturing; (ii) public disclosure of chemical additives injected during hydraulic fracturing operations; and (iii) plans for management of water produced during hydraulic fracturing operations. *Id.* BLM received approximately 177,000 public comments on this initial proposal. *Id.* at 4760.

More than a year later, on May 24, 2013, BLM issued a revised proposed rule, representing that the agency had "used the comments on [the May 2012 draft rule] to make improvements" to the agency's proposal. *Id.* at 4295. Key changes included the ability to use a broader range of cement evaluation tools to test the integrity of a well's cement casing and revised administrative processes for how operators might report chemicals used to stimulate wells after operations were completed. *Id.* at 4296. BLM received more than 1.35 million public comments responsive to the revised proposal. *Id.* at 4760.

On March 20, 2015, four-and-a-half years after initiating the rulemaking process, BLM issued the final version of its rule at issue in this case.[1] *Id.* at 4756. The rule's focus continues to be on the same three components of hydraulic fracturing – wellbore construction, chemical disclosures, and water management – each of which is subject to comprehensive regulations under existing federal

[1] Although announced on March 20, 2015, the final rule was published in the *Federal Register* on March 26, 2015.

and state law. *Id.* at 4757. BLM estimates that the rule will affect at least 2,800 hydraulic fracturing operations per year immediately but that the number of wells affected may grow by more than thirty-five percent. *Id.* at 4759.

B. RELEVANT PROCEDURAL HISTORY.

On March 20, 2015, Industry Petitioners filed the first of these two consolidated lawsuits. Industry Petitioners contend, among other arguments, that aspects of the final rule: (i) violate federal law; (ii) lack justification; (iii) do not account for meaningful technical comments submitted during the rulemaking process; (iv) do not represent a logical outgrowth from the regulations proposed during the rulemaking process; or (v) exceed BLM's statutory authority.

On June 23, 2015, the district court heard argument on Industry and State Petitioners' preliminary injunction motions. C.A. at 3350. The next day, the district court entered a stay of BLM's rule and ordered the parties to submit citations from the to-be-filed administrative record in support of their preliminary injunction arguments before the court would rule on the motions. *Id.*

On August 28, 2015, BLM served the first version of the administrative record.[2] C.A. at 3621. On September 18, 2015, the parties submitted citations in

[2] Despite the ninety days allowed by local rule and more than sixty days of extensions to prepare the record, the administrative record BLM lodged on August 28, 2015 was not the complete administrative record. After both the State and

support of their respective preliminary injunction arguments. *See*, *e.g.*, *id.* at 3627. On September 30, 2015, the district court entered its preliminary injunction order. *Id.* at 3165. The district court determined that the hydraulic fracturing rule is likely to be found invalid under the APA because: (i) BLM has not identified any legally supportable justifications for adopting the final rule and imposing the costs associated with the rule; (ii) components of the final rule do not represent a logical outgrowth of BLM's regulatory proposals; (iii) BLM's failure to protect confidential commercial information is contrary to federal law; (iv) certain provisions represent an unexplained departure from existing policies; (v) components of the rule are irrationally structured making compliance impossible; (vi) the rule's cost assessments rely on unsupported assumptions; and (vii) BLM lacks statutory authority to implement the rule.

On June 21, 2016, the district court entered the order now on appeal. *Id.* at 3792. Consistent with its findings at the preliminary injunction stage, the district

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Industry Petitioners challenged the legal adequacy of the administrative record as lodged, BLM advised the district court and Petitioners that BLM had voluntarily undertaken a review of the as-lodged administrative record and that BLM intended to lodge a corrected or supplemental record at the conclusion of that process. C.A. at 3847. Not until January 19, 2016 did BLM lodge what the agency purports to be a corrected record. *Id.* at 3854. The corrected record includes more than 333,000 pages which had previously been withheld for privilege; BLM also removed more than 45,000 pages, asserting that the removed pages were either duplicative or irrelevant. *Id.* at 3860.

court ruled that BLM lacked the statutory authority to promulgate the hydraulic fracturing rule. Because the district court's finding on the question of statutory authority was dispositive of all claims the Petitioners presented, the district court did not revisit the additional flaws in BLM's rulemaking identified during the preliminary injunction phase of the case. *Id.* at 3817-18.

SUMMARY OF THE ARGUMENT

It is undisputed that the Property Clause of the United States Constitution grants Congress broad, if not plenary, authority to regulate the manner in which federal property – in this case the federal mineral estate – is managed and developed. But BLM is not Congress. Like all executive branch entities, BLM possesses only the power that Congress has delegated. BLM disregards this fundamental principle of constitutional government, asserting regulatory authority over hydraulic fracturing despite Congress having allocated that authority to a different executive agency, the Environmental Protection Agency ("EPA").

Lacking express authorization, BLM instead relies on a "general authority" over oil and gas operations that BLM represents derives primarily from the Mineral Leasing Act and the Federal Land Policy and Management Act ("FLPMA"). BLM insists that this general authority includes regulatory power over hydraulic fracturing and argues that "Courts must defer under *Chevron* to an agency's interpretation of a statutory ambiguity that concerns the scope of the agency's statutory authority." Gov't's Br. at 3.

BLM's reliance on *Chevron* is misplaced. To resolve this appeal, this Court need not evaluate whether BLM reasonably interpreted the scope of the agency's authority under the statutes that BLM administers. Regardless the scope of BLM's

general authority under the Mineral Leasing Act and FLPMA, Congress allocated regulatory responsibility over hydraulic fracturing to EPA under different statutes that BLM does *not* administer: the Safe Drinking Water Act ("SDWA") and the Energy Policy Act of 2005. *Chevron* is inapplicable and BLM's subjective interpretation of the land management statutes BLM administers is immaterial. By enacting the SDWA, Congress charged EPA with regulating hydraulic fracturing, effectively repealing any authority BLM may have had over the technology. Since at least 1982, BLM has not even attempted to exercise authority over hydraulic fracturing. And in 2005, the Energy Policy Act repealed the only express grant of regulatory authority over hydraulic fracturing that Congress has ever granted to any executive agency.

BLM's reliance on *Chevron* is misplaced for another reason. As the district court recognized at the preliminary injunction phase, BLM's rulemaking was procedurally defective. The district court observed that, among other independent flaws, BLM failed to: (i) address evidence in opposition to the conclusions BLM reached; (ii) explain meaningful changes in existing law and practice; (iii) investigate the costs the rule imposes; and (iv) justify the application of disparate treatment to functionally similar products. Not the least of these problems is BLM's sudden and inadequately explained assertion of regulatory authority over

hydraulic fracturing after decades during which BLM declined to exercise any authority over the technology. "An arbitrary and capricious regulation of this sort is itself unlawful and receives no *Chevron* deference." *Encino Motorcars, LLC, v. Navarro*, 136 S. Ct. 2117, 2126 (2016).

BLM's regulatory authority is statutorily circumscribed and subject to obligations under administrative law. The district court correctly concluded that these limitations preclude BLM's promulgation of the hydraulic fracturing rule and this Court should affirm.

STANDARD OF REVIEW

This Court reviews questions of statutory interpretation de novo. *Kobach v. U.S. Election Assistance Comm'n*, 772 F.3d 1183, 1189 (10th Cir. 2014). A district court's decisions under the APA are likewise reviewed de novo. *Id.*

ARGUMENT

The Property Clause of the United States Constitution affords Congress "Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. Const. art. IV, § 3, cl. 2. Congress' control over federal property, however, "does not place the exclusive control of the federal public domain in the United States Government." *Tex. Oil & Gas Corp. v. Phillips Petroleum Co.*, 277 F. Supp. 366, 368 (W.D. Okla. 1967). The Property Clause "only confers this power on Congress and leaves to Congress the determination of when and where and to what extent this power will be exercised." *Id.* "Although the Constitution empowers Congress to regulate federal lands, Congress determines whether or not to exercise this power." *Kirkpatrick Oil & Gas Co. v. United States*, 675 F.2d 1122, 1124 (10th Cir. 1982) (internal citation omitted). Because Congress has chosen affirmatively not to exercise federal regulatory authority over most forms of hydraulic fracturing, the district court correctly set aside BLM's rule and this Court should affirm.

I. BLM IS NOT ENTITLED TO *CHEVRON* DEFERENCE.

The Supreme Court has acknowledged "that *Chevron* applies to cases in which an agency adopts a construction of a jurisdictional provision of a statute it administers." *City of Arlington, Tex. v. Fed. Commc'ns Comm'n*, 133 S. Ct. 1863,

1871 (2013). *See also Lechmere, Inc. v. Nat'l Labor Relations Bd.*, 502 U.S. 527, 536 (1992) (recognizing that an administrative agency "is entitled to judicial deference when it interprets an ambiguous provision of a statute that it administers"). But this case involves no such inquiry. While BLM spends many pages offering an interpretation of the Mineral Leasing Act, FLPMA, and the Indian mineral statutes that affords BLM broad rulemaking authority over oil and gas operations on federal and Indian lands, the agency's efforts represent little more than an interesting academic exercise.

The ultimate question in this case does not depend on the scope of BLM's general resource management authority under the statutes BLM administers. The point instead is whether different statutes, the SDWA and the Energy Policy Act of 2005, preclude BLM from regulating hydraulic fracturing. BLM has no role in administering those statutes. This case therefore turns on a question of statutory interpretation on which this Court owes no deference to BLM. *See Hydro Res., Inc. v. Envtl. Prot. Agency*, 608 F.3d 1131, 1146 (10th Cir. 2010) (emphasizing that courts do not afford *Chevron* deference "to an agency's interpretation of a statute lying outside the compass of its particular expertise and special charge to administer") (citing *Metro. Stevedore Co. v. Rambo*, 521 U.S. 121, 137 n. 9 (1997) and *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649 (1990)).

Even if the statutes BLM administers were relevant, the agency would still not be entitled to deference. The framework governing federal regulatory authority over hydraulic fracturing is not a question of first impression open to unfettered agency interpretation. As discussed in more detail below, *see infra* Part II.B, federal courts have previously considered the issues this case presents and interpreted the controlling law.

In *Legal Environmental Assistance Foundation, Inc. v. Environmental Protection Agency*, 118 F.3d 1467 (11th Cir. 1997) *("LEAF")*, the United States Court of Appeals for the Eleventh Circuit ruled that Congress directed EPA to regulate hydraulic fracturing when it passed the SDWA. *Id.* at 1475. Neither the Eleventh Circuit nor the parties in *LEAF* suggested that any federal agency other than EPA was even potentially responsible for regulating hydraulic fracturing. In its briefing before the Eleventh Circuit, the United States offered instead that the State of Alabama was "appropriately regulating production of methane via hydraulic fracturing, and there is no need for EPA to supplant these efforts." Br. of Resp't U.S. EPA at 35, *LEAF* (No. 95-6501), 1995 WL 17057927 ("EPA *LEAF* Br."). BLM is not free to disregard the ruling in *LEAF* and replace it with its own

interpretation of the governing statutes.[3] Once the courts "have determined a statute's clear meaning, [courts] adhere to that determination under the doctrine of *stare decisis*, and [] judge an agency's later interpretation of the statute against [the court's] prior determination of the statute's meaning." *Lechmere*, 502 U.S. at 536-37 (quoting *Maislin Indus., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 131 (1990)).

BLM's reliance on *Chevron* deference also overlooks the procedural defects in BLM's rulemaking. BLM spends the entirety of its brief arguing that the district court erred in concluding BLM lacked statutory authority to promulgate the rule. In so doing, BLM ignores that the district court determined at the preliminary injunction phase that the final rule is also likely to fail on numerous administrative law shortcomings. The district court noted at the preliminary injunction stage that BLM: (i) failed to provide a reasoned explanation for the change in BLM's existing policies; (ii) failed to cite evidence documenting why changes to existing rules were necessary; (iii) did not address evidence contrary to BLM's preferred outcome; and (iv) declined to conduct analyses required to demonstrate the efficacy, cost, and value of the final rule. The Supreme Court has emphasized that

[3] The Federal Respondents' position in this action is a change of course from the position the United States took in *LEAF*. In *LEAF*, the United States acknowledged that the Eleventh Circuit's ruling required EPA to "supplant [state] regulations" – not BLM regulations – "that currently govern hydraulic fracturing techniques used at [] production wells." EPA *LEAF* Br. at 12.

"*Chevron* deference is not warranted where the regulation is 'procedurally defective'–that is, where the agency errs by failing to follow the correct procedures in issuing the regulation." *Encino Motorcars*, 136 S. Ct. at 2125.

Among the procedural infirmities the district court referenced at the preliminary injunction phase are flaws that relate directly to the question pending presently before this Court. As documented below, *see infra* Part II.C, BLM misrepresents its regulatory history. It is undisputed that under the regulations that BLM has had in place since 1982, "companies generally treated all hydraulic fracturing operations as routine" and BLM did not exercise approval authority over hydraulic fracturing. *See* Intvs.' Br. at 32 n.18 (internal quotation marks omitted). And BLM has not provided a single example of any regulation in place before 1982 being applied to a hydraulic fracturing operation. Having not previously regulated the technology, BLM's sudden and inadequately explained assertion of regulatory authority undermines "decades of industry reliance on [BLM's] prior policy." *Encino Motorcars*, 136 S. Ct. at 2126. The procedural defects in BLM's rulemaking cannot be reconciled with "the serious reliance interests at stake" and preclude the application of *Chevron* deference in this appeal. *Id.* at 2127.

II. THE DISTRICT COURT'S HOLDING IS CONSISTENT WITH CONGRESS' EXPRESS DIRECTION.

While BLM and its amici would have this Court interpret the district court's holding as a sweeping refutation of decades of public lands law, the holding is more properly understood as a narrow ruling rooted in a discrete question of statutory interpretation. Nothing about the district court's ruling implicates BLM's general authority over oil and gas development on federal lands or undermines BLM's role as the custodian of the federal mineral estate. The ruling's sole concern is the regulation of one specific technology that Congress has addressed expressly. Contrary to the inference BLM would have this Court draw, no other aspect of federal public lands law is imperiled.

Congress has twice addressed the federal government's power to regulate hydraulic fracturing on federal lands. First in 1974, Congress authorized EPA to exercise regulatory power over hydraulic fracturing. C.A. at 3809-10. Roughly thirty years later, Congress revoked that authority from EPA. BLM does not contend that Congress has ever expressly granted the agency authority over hydraulic fracturing.[4] Unlike BLM, which relies on notions of "general authority,"

[4] Both BLM and the Intervenors contend that the absence of an express reference to hydraulic fracturing in the Mineral Leasing Act is irrelevant, arguing that BLM has general authority over all oil and gas operations. Gov't's Br. at 18; Intvs.' Br. at 14. But even if BLM was correct that Congress need not identify specific well

the district court's determination that BLM lacks statutory authority to regulate hydraulic fracturing is rooted in the plain language of congressional statutes.

A. BLM'S GENERAL RULEMAKING AUTHORITY IS STATUTORILY CIRCUMSCRIBED.

Since 1920, the Mineral Leasing Act has authorized the Secretary of the Interior "to prescribe necessary and proper rules and regulations and to do any and all things necessary to carry out and accomplish the purposes of [the Act]." 30 U.S.C. § 189; Gov't's Br. at 4. To discern these purposes, BLM extrapolates from 30 U.S.C. § 187, a provision that mandates mineral leases include terms "for the purpose of insuring the exercise of reasonable diligence, skill, and care in the operation of said property." Gov't's Br. at 4, 31-32. This requirement is one of numerous contract terms related to miner safety and waste prevention that 30 U.S.C. § 187 mandates be included in federal leases to "insure the sale of the production of such leased lands to the United States and to the public at reasonable

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completion techniques to grant BLM jurisdiction over those activities, it *is* relevant that Congress *did* expressly reference hydraulic fracturing when it removed federal jurisdiction over the technology. BLM's contention that the district court's order "removes all federal authority to regulate a particular use of federal property, effectively placing that property completely at the mercy of state legislation" is a false premise. Gov't's Br. at 50 (internal quotation omitted). BLM's comparison of hydraulic fracturing to the myriad other surface and downhole activities BLM has regulated historically under its general authority fails because, unlike hydraulic fracturing, Congress has never acted to affirmatively remove federal jurisdiction over those specific activities.

prices, for the protection of the interests of the United States, for the prevention of monopoly, and for the safeguarding of the public welfare." But the hydraulic fracturing rule is not about leasing; nothing in BLM's final rule will adjust any of the terms of existing leases or require BLM to modify terms of leases the agency may issue in the future. To say that a single provision devoted to the mechanics of contract terms in federal leases grants authority to implement operational regulations is not a colorable argument.

BLM's characterization of 30 U.S.C. § 187 as a statute focused on environmental regulation ignores the greater context. A review of the statutory text in its entirety demonstrates that the provision is meant to promote mine safety and to prevent waste so as to ensure a fair economic outcome to both miners and the United States. In addition to the diligence requirements BLM emphasizes, leases must also contain terms that: (i) require rules for the safety and welfare of miners; (ii) secure workmen "complete freedom of purchase"; (iii) guarantee the payment of wages to miners; and (iv) insure the "fair and just weighing or measurement of the coal mined by each miner." Nor is there anything about the placement of 30 U.S.C. § 187 within the framework of the Mineral Leasing Act to suggest that Congress meant 30 U.S.C. § 187 to represent a statement of statutory purpose. The section heading makes no reference to congressional purpose; rather the section is

titled: "Assignment or subletting of leases; relinquishment of rights under leases; conditions in leases for protection of diverse interests in operation of mines, wells, etc.; State laws not impaired." Section 187 is located not in a "Purpose" or "General Provisions" portion of the statute, but is instead embedded among the various substantive and operational provisions of the Mineral Leasing Act.[5]

More important, this Court need not interpret 30 U.S.C. § 187 – nor any other technical provision – to derive the purposes of the Mineral Leasing Act. BLM's manipulation of 30 U.S.C. § 187 ignores that the Mineral Leasing Act itself includes an express statement of purpose. The *very first sentence* of the Act explains that Congress' purpose in enacting the Mineral Leasing Act was "[t]o promote the mining of coal, phosphate, oil, oil shale, and sodium on the public domain." Act of Feb. 25, 1920, ch. 85, § 32, 41 Stat. 437. BLM makes no reference to this sentence in its briefing. Yet it is this purpose that regulations promulgated

[5] BLM criticizes the district court for "theorizing that the [Mineral Leasing Act] is exclusively concerned with leasing, mine safety, and waste of mineral resources." Gov't's Br. at 31 (citing C.A. at 3805). But the district court reached no such conclusion. Relying on the text of 30 U.S.C. § 187, the district court reasonably recognized that these were the purposes of the specific section within the Mineral Leasing Act that BLM has cited, not the purpose of the entire Mineral Leasing Act. As discussed below, BLM's focus on 30 U.S.C. § 187 ignores Congress' express statement of purpose for the overall Act.

under the Mineral Leasing Act must achieve.[6] *See* 30 U.S.C. § 189 (authorizing the Secretary to promulgate regulations "necessary to carry out and accomplish the purposes of this chapter").

BLM's reliance on FLPMA is likewise unavailing. BLM asserts that oil and gas operations on federal lands fall within FLPMA's "broad grants of rulemaking authority." Gov't's Br. at 16. But however broad these delegations may be, they are also circumscribed; BLM concedes that regulatory authority under FLPMA is conditioned on regulations: (i) being consistent with principles of "multiple use"; (ii) "necessary to prevent unnecessary or undue degradation,"; and (iii) advancing the purposes of FLPMA and other public lands laws. *Id.* at 37-38.

BLM contends that "[a] central purpose of FLPMA is to protect 'the quality of . . . ecological, environmental, air and atmospheric, [and] water resource' values on the federal public lands." *Id.* at 39 (quoting 43 U.S.C. § 1701(a)(8)). It is not disputed that the values referenced in 43 U.S.C. § 1701(a)(8) reflect one

[6] Disregarding the text of the Mineral Leasing Act itself, BLM attempts to advance a theory of the Act's purpose based on legislative history. *See* Gov't's Br. at 25. BLM's reliance on legislative history is misguided where Congress has spoken expressly in the text. But even if the legislative history were relevant, it does not contradict the statutory statement of purpose. Congress' intent to grant the Secretary power to "supervise, control and regulate," to "prescribe rules and regulations against wasteful practices," and to "secure proper methods of operation, encourage exploration and development, and protect the public," *id.*, are entirely consistent with "promoting the mining" of oil and gas resources "on the public domain."41 Stat. 437.

component of congressional policy. But BLM omits consideration of all others. The same statement of policy from which BLM derives this "central purpose" requires, among other provisions, that "the public lands be managed in a manner which recognizes the Nation's need for domestic sources of minerals, food, timber, and fiber from the public lands including implementation of the Mining and Minerals Policy Act of 1970 (84 Stat. 1876, 30 U.S.C. 21a) as it pertains to the public lands."[7] 43 U.S.C. § 1701(a)(12).

Congress has also directed that access to federal lands for energy development must be efficient. BLM is required "[t]o ensure timely action on oil and gas leases and applications for permits to drill" and to effect policy that: (i) "ensures[s] expeditious compliance" with the National Environmental Policy Act and any other applicable environmental and cultural resources laws; (ii) "improve[s] consultation and coordination with the States and the public"; and (iii) "improve[s] the collection, storage, and retrieval of information relating to the oil

[7] In the Mining and Minerals Policy Act of 1970, Congress declared that it is "in the national interest to foster and encourage private enterprise in," among other endeavors, "the orderly and economic development of domestic mineral resources, reserves, and reclamation of metals and minerals to help assure satisfaction of industrial, security and environmental needs." 30 U.S.C. § 21a. Congress instructed that "[i]t shall be the responsibility of the Secretary of the Interior to carry out this policy when exercising [her] authority under such programs as may be authorized by law." *Id.*

and gas leasing activities."[8] Energy Policy Act of 2005, 42 U.S.C. § 15921(a)(1)(A)-(C).

BLM characterizes it as "past doubt that the principle of multiple use does not require BLM to prioritize development over other uses." Gov't's Br. at 37 (quoting *New Mexico v. Bureau of Land Mgmt.*, 565 F.3d 683, 710 (10th Cir. 2009)). But neither may BLM elevate hand-picked policy objectives over other statutorily-imposed obligations. Petitioners are not asking BLM "to prioritize development," but simply emphasize that development must be considered. BLM must fulfill *all* the requirements Congress has imposed on the agency, not simply those the agency prefers. To the extent BLM's regulations frustrate *any* of Congress' objectives, those regulations are beyond BLM's statutory authority.

B. CONGRESS INTENDED EPA TO REGULATE HYDRAULIC FRACTURING UNDER THE SAFE DRINKING WATER ACT.

Congress enacted the SDWA to "(1) authorize the Environmental Protection Agency to establish Federal standards for protection from all harmful

[8] The record is replete with examples of how the hydraulic fracturing rule fails to meet these objectives. During proceedings in the district court, both State and Industry Petitioners presented record evidence demonstrating that implementation of the hydraulic fracturing rule will, among other concerns: (i) result in significant delays in oil and gas permit processing and project development, *see* C.A. at 3955-56; (ii) undermine States' ability to ensure that energy production in an individual States was conducted consistent with the State's rules and policies, *see id.* at 3884-88; and (iii) involve information collection methods that violate federal law, *see id.* at 3935-43.

contaminants, which standards would be applicable to all public water systems, and (2) establish a joint Federal-State system for assuring compliance with these standards and for protecting underground sources of drinking water." H.R. Rep. No. 93-1185 (1974), *as reprinted in* 1974 U.S.C.C.A.N. 6454, 6455. To implement protection for underground sources of drinking water, Congress established a cooperative federalism scheme to regulate all underground injection of contaminants in Part C of the SDWA. *See* Pub. L. No. 93-523, pt. C, 88 Stat. 1660, 1674-80 (codified at 42 U.S.C. §§ 300h – 300h-8). Under Part C, states can submit underground injection control ("UIC") programs for EPA's approval; once EPA approves such a program, primary regulatory jurisdiction over underground injection rests with the state.[9] 42 U.S.C. §§ 300h – 300h-8.

[9] Part C requires that every federal agency "engaged in any activity resulting, or which may result in, underground injection which endangers drinking water" to comply with the UIC program. 42 U.S.C. § 300j-6(a)(4). Under this provision, federal agencies must comply with requirements of applicable underground injection control programs" and ensure that state or federal regulators will 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 574, 1974 U.S.C.C.A.N. at 6494. Where a state has earned primary jurisdiction for a UIC program, therefore, even federal agencies may not evade the state's jurisdiction over underground injection on federal lands within the state's borders. Petitioners note that most oil and gas producing states, including all four state petitioners in this lawsuit, exercise primary enforcement authority for injection wells associated with oil and gas production. *See* Mary Tiemann & Adam Vann, Cong. Research

The essence of UIC programs under Part C is the prohibition of "any underground injection" without a permit. 42 U.S.C. § 300h(b)(1)(A), (C). The SDWA defines "underground injection" as "the subsurface emplacement of fluids by well injection." 42 U.S.C. § 300h(d)(1). This broad definition reflects Congress' intention to cover a wide range of municipal, industrial, and energy extraction injection activity.

> [U]nderground injection of contaminants is clearly an increasing problem. Municipalities are increasingly engaging in underground injections of sewage, sludge, and other wastes. Industries are injecting chemicals, byproducts, and wastes. *Energy production companies are using injection techniques to increase production* and to dispose of unwanted brines brought to the surface during production. Even government agencies, including the military, are getting rid of difficult to manage waste problems by underground disposal methods. Part C is intended to deal with *all* of the foregoing situations insofar as they may endanger underground drinking water sources.

H.R. Rep. No. 93-1185, 1974 U.S.C.C.A.N. at 6481 (emphasis added). Pertinent here, Congress understood that "any underground injection" included energy companies' use of injection techniques both to stimulate increased production and to dispose of fluids recovered during the extraction process. *See id.* at 6483 (emphasizing that Congress "intended [the definition] to cover, among other contaminants, the injection of brines and the injection of contaminants for

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Serv., R41760, *Hydraulic Fracturing and Safe Drinking Water Act Regulatory Issues* 15 (2015).

extraction or other purposes"). The SDWA's legislative history makes clear that Congress crafted Part C to regulate injection techniques energy companies use to increase production, including hydraulic fracturing. *See LEAF*, 118 F.3d at 1474-75.

Despite this congressional directive to regulate hydraulic fracturing, EPA failed to do so. In *LEAF*, the Legal Environmental Assistance Foundation challenged EPA's approval of Alabama's UIC program, arguing Alabama's program was ineligible for approval because the program failed to address hydraulic fracturing. *See* 118 F.3d at 1469-72. EPA defended its approval of the state UIC program, contending that hydraulic fracturing did not fall within the regulatory definition of "underground injection" and that oil and gas production wells were not required to be regulated under UIC programs because the "principal function of these wells is not the underground emplacement of fluids." *Id.* at 1471.

The Eleventh Circuit disagreed. Looking to the dictionary definition of "injection,"[10] the Eleventh Circuit observed that "[t]he process of hydraulic fracturing obviously falls within this definition, as it involves subsurface emplacement of fluids by forcing them into cavities and passages in the ground

[10] "[W]e readily find that the word 'injection' means the act of 'forcing (a fluid) into a passage, cavity, or tissue.'" *LEAF*, 118 F.3d at 1474 (quoting *The Random House Dictionary of the English Language* 983 (2d ed. Unabridged 1987)).

through a well." *Id.* 1474-75 (footnotes omitted). The Eleventh Circuit explained that EPA could not "exclude from the reach of the regulations an activity (i.e., hydraulic fracturing) which unquestionably falls within the plain meaning of the definition" of underground injection merely because "the well that is used to achieve that activity is also used – even primarily used – for another activity (i.e., methane gas production)." *Id.* at 1475. Because "Congress directed EPA to regulate 'underground injection' activities, not 'injection wells,'" the Eleventh Circuit concluded that hydraulic fracturing fell squarely within the scope of the regulatory authority Congress endowed to EPA in the SDWA.[11] *Id.*

C. THE SAFE DRINKING WATER ACT ELIMINATED ANY AUTHORITY BLM MIGHT HAVE HAD OVER HYDRAULIC FRACTURING.

BLM's assertion of a general rulemaking authority over oil and gas operations on federal lands misses the point. Even if such a general authority exists, it does not free BLM from the limits the constitutional separation of powers imposes. BLM only has the power Congress assigns the agency. And Congress assigned – and then removed – regulatory authority over hydraulic fracturing not to

[11] BLM suggests that it was only after the *LEAF* decision that hydraulic fracturing was subject to "SDWA regulation for the first time." Gov't's Br. at 45. BLM is incorrect. The *LEAF* decision did not subject hydraulic fracturing to EPA regulation, the SDWA did that; the *LEAF* decision only instructed EPA to begin exercising its authority under the SDWA.

BLM, but to EPA. Irrespective of the extent that BLM's general rulemaking authority over oil and gas operations would have allowed the agency to regulate hydraulic fracturing, the passage of the SDWA removed that authority.

1. The SDWA Did Not Preserve Any Existing BLM Authority.

BLM asserts that when Congress enacted the SDWA, Congress was aware of BLM regulations that BLM contends were intended "to prevent groundwater contamination under the Mineral Leasing Act." Gov't's Br. at 43. BLM references a House of Representatives report in the legislative history for the proposition that the SDWA was not intended to duplicate efforts in which BLM's predecessor agency was already engaged nor to "repeal or limit any authority that [BLM] may have under any other legislation." Gov'ts Br. at 43 (quoting H.R. Rep. 93-1185, 1974 U.S.C.C.A.N. at 6484-85). But that House report neither references any authority that BLM had over hydraulic fracturing nor explains how regulating hydraulic fracturing would "duplicate" BLM's efforts. And BLM overlooks that no provision preserving the existing authority of BLM, or any other agency, was actually included in the as-passed version of the SDWA.

Congress' failure to insert a provision preserving BLM's existing authority is meaningful, because a review of contemporary environmental statutes demonstrates that, when Congress wished to preserve existing legal authority

related to an environmental statute's subject, Congress did so expressly. The Clean Air Act, passed in 1963, provides that the Act "shall not be construed as superseding or limiting the authorities and responsibilities, under any other provision of law, of the Administrator or any other Federal officer, department, or agency." 42 U.S.C. § 7610(a). In the Clean Water Act, passed two years before the SDWA, Congress provided that the Act "shall not be construed as . . . limiting the authority or functions of any office or agency of the United States under any other law or regulation not inconsistent with this chapter." 33 U.S.C. § 1371(a). When enacting FLPMA in 1976, Congress provided that the policies FLPMA advanced would only become effective when legislation implementing those policies was enacted and "shall then be construed as supplemental to and not in derogation of the purposes for which public lands are administered under other provisions of law." 43 U.S.C. § 1701(b). Given that the SDWA lacks any provision similar to these clauses, this Court cannot assume that Congress intended to preserve any authority BLM might have had over hydraulic fracturing in 1974.[12]

[12] In subsequently enacted regulations implementing the SDWA, EPA also failed to draw a connection between the SDWA and the laws on which BLM relies in this case. EPA lists five specific "Federal laws that may apply to the issuance of permits under these [SDWA] rules:" (i) the Wild and Scenic Rivers Act; (ii) the National Historic Preservation Act; (iii) the Endangered Species Act; (iv) the Coastal Zone Management Act; and (v) the Fish and Wildlife Coordination Act. 40

Nor was there any reason for Congress to believe there was any existing regulatory authority to preserve with respect to hydraulic fracturing. BLM contends that at the time the SDWA was passed, BLM's predecessor agency, the United States Geological Survey, already had authority over hydraulic fracturing. BLM points to regulations enacted in 1942 requiring operators to obtain approval before "stimulat[ing] production by vacuum, acid, gas, air, water injection, or any other method." 30 C.F.R. § 221.21(b) (1942); Gov't's Br. at 43-44. But BLM provides no explanation for the agency's presumption that a regulation focused on traditional methods of enhanced oil recovery prevalent in 1942 – and that was enacted before hydraulic fracturing was invented – put Congress on notice that BLM was regulating hydraulic fracturing. It is therefore not surprising that BLM has been unable to provide a single example demonstrating that this regulation was ever applied to a hydraulic fracturing operation, before or after 1974.

As the Eleventh Circuit recognized in *LEAF*, Congress' intent in enacting the SDWA was to assign regulatory authority over hydraulic fracturing to EPA. To the extent that any other federal agency had regulatory authority over the technology, Congress could have preserved that authority, but chose not to. BLM's reliance on a statement from legislative history that did not make it into the text of

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C.F.R. § 144.4. Neither the Mineral Leasing Act nor FLPMA is on EPA's list of related statutes.

Act is misplaced. Contrary to BLM's suggestion, the statutory text demonstrates clearly that Congress did indeed "intend the SDWA to be the exclusive mechanism for regulating all underground injections." Gov't's Br. at 44. The general statutes under which BLM grasps for regulatory authority over hydraulic fracturing simply cannot provide a backdoor for BLM to regulate hydraulic fracturing on federal or tribal lands when Congress has affirmatively declined to grant BLM that power. *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 663 (1998) (rejecting application of a broad, general statute in a manner that would undermine enforcement of a "statute dealing with a narrow, precise, and specific subject") (quoting *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976)); *In re Gledhill*, 76 F.3d 1070, 1078 (10th Cir. 1996) (recognizing "the fundamental tenant of statutory construction that a court should not construe a general statute to eviscerate a statute of specific effect."). Because BLM's hydraulic fracturing rule attempts to exercise authority Congress has not granted the agency, the district court correctly set the rule aside.

2. BLM Has Not Regulated Hydraulic Fracturing Subsequent to the Passage of the SDWA.

No matter the scope and applicability of 30 C.F.R. § 221.21(b) in 1974, BLM acknowledges that the regulation was repealed and replaced in 1982. In its place, BLM points to 43 C.F.R. § 3162.3-2 (2014), Gov't's Br. at 25, a provision

that requires operators to seek approval of all "nonroutine fracturing jobs," 43 C.F.R. § 3162.3-2(a), but provides that, "[u]nless additional surface disturbance is involved and if the operations conform to the standard of prudent operating practice, prior approval is *not* required for routine fracturing or acidizing jobs, or recompletion in the same interval." 43 C.F.R. § 3162.3-2(b) (emphasis added). There is no dispute that under the 1982 regulation, "companies generally treated all hydraulic fracturing operations as routine" and BLM did not exercise approval authority over hydraulic fracturing.[13] Intvs.' Br. at 32 n.18 (internal quotation marks omitted). BLM cites to no other assertion of authority to regulate underground injection for the purpose of enhancing or stimulating oil and gas recovery.[14]

Unlike BLM, since at least 1983, EPA *has* regulated the injection of fluids through wells to promote energy production. EPA classifies wells into which fluids

[13] BLM has not pointed to any evidence in the administrative record explaining how, or if, the "fracturing" referred to in 43 C.F.R. § 3162.3-2 is equivalent to the hydraulic fracturing operations the final rule is meant to regulate. Given the concession that 43 C.F.R. § 3162.3-2 was not applied to hydraulic fracturing operations, this Court need not decide that issue to resolve this appeal.

[14] The district court emphasized that "BLM cites to no other existing regulation addressing well stimulation or hydraulic fracturing operations." C.A. at 3804. The district court also noted that, during the preliminary injunction phase, BLM conceded that "[e]xisting BLM regulations included some limited provisions that mentioned, but did not attempt to regulate hydraulic fracturing." *Id.* at 3803-05 & n.10 (quoting C.A. at 3130).

are injected "for enhanced recovery of oil or natural gas" as "Class II" wells. 40 C.F.R. § 144.6(b)(2). EPA's regulations establish, among other provisions: (i) the period during which injections will be permitted, 40 C.F.R. § 144.21(b); (ii) conditions under which injections will be prohibited, 40 C.F.R. § 144.21(c); (iii) casing and cementing requirements that must be met before injection, 40 C.F.R. § 144.28(e); (iv) operating requirements, 40 C.F.R. § 144.28(f); (v) monitoring requirements, 40 C.F.R. § 144.28(g); and (vi) reporting requirements, 40 C.F.R. § 144.28, including reports documenting any noncompliance, 40 C.F.R. § 144.28(b).

If BLM's position in this appeal were correct, one would expect that, since at least 1974, both BLM and EPA would have written rules in a manner consistent with dual authority over well stimulation through hydraulic fracturing on federal lands. Both agencies have indeed re-written their operational rules since the enactment of the SDWA. Yet only one, EPA, drafted rules covering well injections to promote resource recovery. BLM's rules, purportedly drafted under its "general authority," resulted in a vague notification requirement that may or may not apply to hydraulic fracturing and which, under any scenario, the agency did not enforce; EPA's specific authority, on the other hand, resulted in comprehensive regulations and a requirement that operators obtain a permit for operation of a Class II well.

Like the statutory text of the SDWA itself, BLM's regulatory conduct since the SDWA's enactment reflects the reality that the SDWA removed whatever authority over hydraulic fracturing BLM might have had previously. And that was before *LEAF* clarified that hydraulic fracturing was an "underground injection" that Congress intended EPA to regulate under the SDWA. The differences in regulations BLM and EPA issued reflect the distinct nature of the statutory authority under which the regulations were promulgated. Because the SDWA "is the later statute, the more specific statute, and its provisions are comprehensive, reflecting an obvious attempt to accommodate [Congress'] strong policy [objectives]," it was correct for the district court to treat the SDWA as "the governing statute" and to set aside the BLM's final rule. *United States v. Estate of Romani*, 523 U.S. 517, 532 (1998).

D. THE ENERGY POLICY ACT WITHDREW FEDERAL REGULATORY AUTHORITY OVER MOST FORMS OF HYDRAULIC FRACTURING.

Responding to the Eleventh Circuit's holding in *LEAF* and EPA's preparations to exercise its previously neglected regulatory authority over hydraulic fracturing under the UIC program, Congress amended the SDWA by passing the Energy Policy Act of 2005. *See* Pub. L. No. 109-58, § 322, 119 Stat. 594 (2005). The amendment excluded from the definition of "underground

injection" in the UIC program "the underground injection of fluids or propping agents (other than diesel fuels) pursuant to hydraulic fracturing operations related to oil, gas, or geothermal production activities." 42 U.S.C. § 300h(b)(2)(B). Opponents of the Energy Policy Act noted that Congress' removal of "hydraulic fracturing for oil and gas production activities" from the definition of "underground injection" was done with the intention that this removal would "eliminate[] existing statutory authority under SDWA to ensure that hydraulic fracturing does not endanger underground sources of drinking water." H.R. Rep. No. 109-215, at 490 (2005) (dissenting views).

BLM contends that, whatever effect the Energy Policy Act may have had on EPA's authority to regulate hydraulic fracturing, it had no effect on BLM's regulatory authority. Citing to BLM's 1982 regulations, BLM alleges a "long historical backdrop of regulations governing federal lessees' well-stimulation activities" and contends that "the only viable conclusion is that, in 2005, Congress again chose not to interfere with BLM's authority." Gov't's Br. at 51.

BLM's representation is meaningless, because as discussed above, BLM had not had any authority over hydraulic fracturing since at least 1974. Even if Congress had taken no action in 2005, BLM would still lack statutory authority to

regulate hydraulic fracturing.[15]

And as described above, BLM's reliance on a "historical backdrop of regulations" is misplaced. BLM's evidence of its historical regulation over hydraulic fracturing is sparse. When Congress enacted the Energy Policy Act, Congress did not act with presumed knowledge that BLM had been regulating hydraulic fracturing "since the MLA's enactment." Gov't's Br. at 29. The district court correctly recognized that the actual context was twenty-three years during which, if BLM's rules could be considered to reference hydraulic fracturing at all, that reference represented an express statement that operators did *not* need BLM's approval to conduct hydraulic fracturing.[16] C.A. at 3814-15 ("At the time the

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[15] To the extent BLM might argue that the removal in 2005 of EPA's regulatory authority over non-diesel hydraulic fracturing under the SDWA somehow revived whatever authority BLM might have had over hydraulic fracturing before the SDWA, that argument is statutorily foreclosed. "Whenever an Act is repealed, which repealed a former Act, such former Act shall not thereby be revived, unless it shall be expressly so provided." 1 U.S.C. § 108. BLM does not, and cannot, argue that the Energy Policy Act expressly provided for the revival of any statutory power that the SDWA repealed.

[16] Intervenors note that the legislative history of the Energy Policy Act includes no discussion of BLM's authority over public lands. Intvs.' Br. at 49. Intervenors' observation proves Industry Petitioners' point. Since BLM was not actively regulating hydraulic fracturing in 2005, and had repealed the only regulation that could arguably limit hydraulic fracturing twenty-three years previously, there was no regulatory activity for Congress to discuss. BLM similarly observes that the Energy Policy Act "amended multiple [Mineral Leasing Act] provisions without mentioning BLM's authority over hydraulic fracturing on federal and Indian

[Energy Policy Act] was enacted, the BLM had not asserted authority to regulate the fracking process itself and a Circuit Court of Appeals had determined Congress intended the activity to be regulated by the EPA under the SDWA."). In 2005, only EPA – through its UIC program for Class II wells – was regulating hydraulic fracturing. At that time, there was no reason for Congress to believe that it needed to amend any statute other than the SDWA to remove federal regulatory authority over hydraulic fracturing because no agency, including BLM, was regulating the practice under any other statute.

BLM's assertion that the SDWA did not allocate exclusive authority to regulate hydraulic fracturing to EPA is also inconsistent with BLM's understanding of EPA's role in regulating hydraulic fracturing using diesel fuels. Since the passage of the Energy Policy Act, EPA has supplemented its UIC regulations for Class II wells with permitting guidance intended for use in association with hydraulic fracturing of oil and gas wells using diesel. *See* Envtl. Prot. Agency, Permitting Guidance for Oil & Gas Hydraulic Fracturing Activities Using Diesel Fuels: Underground Injection Control Program Guidance #84, Docket EPA 816-R-14-001 (Feb. 2014).

During the rulemaking process for BLM's hydraulic fracturing rule, several

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leases." Gov't's Br. at 52. Since BLM had no authority over hydraulic fracturing, there was nothing to mention.

commenters requested that BLM ban the use of diesel fuel in hydraulic fracturing operations on federal and Indian lands. *See* C.A. at 4810. BLM declined, explaining that "Congress has authorized regulation of the use of diesel fuels in hydraulic fracturing fluid by the Environmental Protection Agency (EPA)." *Id.* In other words, BLM expressly renounced the right to regulate hydraulic fracturing using diesel because Congress delegated that authority to EPA in the SDWA. BLM also added that if "a state (on Federal lands) or a tribe (on tribal lands) prohibited the use of diesel, [BLM's hydraulic fracturing] rule would not ordinarily preempt such regulations." *Id.* So BLM understands that, while States and tribes might have authority to regulate hydraulic fracturing independently, Congress left federal authority over hydraulic fracturing using diesel exclusively in EPA's hands.

Applied to other forms of hydraulic fracturing the result is the same. EPA's original source for authority over *all* forms of hydraulic fracturing is the SDWA. If BLM concedes that it can't regulate hydraulic fracturing using diesel because Congress has designated EPA as the agency with regulatory authority over that form of hydraulic fracturing, then BLM cannot exercise regulatory authority over *any* form of hydraulic fracturing.

III. CONCLUSION.

Like all executive branch entities, BLM possesses only the power that Congress has delegated to the agency. BLM disregards this fundamental principle of constitutional government, asserting regulatory authority over hydraulic fracturing despite Congress having never granted BLM that authority and despite Congress removing regulatory authority from the one executive agency that Congress did charge with regulating the technology, EPA. BLM has arbitrarily issued a rule that fails to meet the agency's statutory obligations and exceeds the agency's regulatory authority. The district court correctly set aside the rule and this Court should affirm.

Respectfully submitted,

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STATEMENT AS TO ORAL ARGUMENT

Industry Petitioners believe oral argument will be beneficial to the Court's understanding and resolution of this case because of the complexity and importance of the legal issues involved and because this case involves legal issues of first impression for this Court.

CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

This brief complies with the type-volume limitation of 30 pages or 14,000 words, because this brief contains 8,120 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 in Times New Roman, 14 point.

Date: September 16, 2016.

/s/ Mark S. Barron
Mark S. Barron

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing:

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Date: September 16, 2016.

/s/ Mark S. Barron
Mark S. Barron

CERTIFICATE OF SERVICE

I hereby certify that a copy of this **INDUSTRY PETITIONERS-APPELLEES' RESPONSE BRIEF** was served on September 16, 2016, using the CM/ECF system, to counsel for all parties of record.

/s/ Susan Quinn
Susan Quinn