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; and WESTERN ENERGY ALLIANCE,

Petitioners-Appellees

and

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

Intervenors-Appellees

v.

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

Respondents-Appellants

and

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

Intervenors-Appellants

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

REPLY BRIEF FOR THE FEDERAL APPELLANTS

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Aplee. App.	Appellees' Appendix (State Petitioners & Industry)
BLM	U.S. Bureau of Land Management
EPA	U.S. Environmental Protection Agency
FLPMA	Federal Land Policy and Management Act
Indian mineral statutes	Indian Mineral Leasing Act, 25 U.S.C. § 396d; Act of March 3, 1909, 25 U.S.C. § 396; and Indian Mineral Development Act of 1982, 25 U.S.C. § 2107.
MLA	Mineral Leasing Act of 1920
SDWA	Safe Drinking Water Act
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USGS	U.S. Geological Survey

INTRODUCTION

Petitioners try to create the false impression that BLM is broadly regulating drinking-water sources without statutory authority. BLM is actually exercising its specific authority over federal-lease operations under the MLA and FLPMA. Petitioners do not face the central fact that BLM's hydraulic-fracturing rule applies on federal lands that Congress—by statute—has ordered BLM to administer and protect. BLM's rule does not apply on state or private lands, which would have been subject to EPA regulations of non-diesel hydraulic fracturing had Congress not amended SDWA Part C. The district court's judgment must be reversed because BLM's statutory authority over federal lands is clear and Congress has never removed it.

ARGUMENT

I. The MLA and FLPMA delegate to BLM the authority to regulate hydraulic fracturing on federal leases.

The text, structure, history, and judicial interpretation of the MLA and FLPMA show that BLM may regulate well-stimulation activities, including hydraulic fracturing, on federal leases.[1] Such activities comfortably fall within the express delegations of rulemaking authority in BLM's enabling legislation, and nearly a century of case law,

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[1] The Indian mineral statutes delegate to BLM such authority on Indian leases. (Opening Br. 4-5, 16-17.) The district court did not address those statutes, other than to say they provide no "more specific authority over oil and gas drilling and operations than the MLA." (Order 12.) Upon reversing the district court's judgment, the Court should remand the Tribe's alternative arguments for the district court to consider in the first instance. (*See infra* Part III.)

regulatory practice, and subsequent congressional enactments support BLM's interpretation. (Opening Br. 15-42.)

Key aspects of the district court's reasoning are thus indefensible, as Petitioners' briefs effectively concede. For example, no Petitioner contends that BLM claims authority from the "absence of an express withholding of power." (Order 23; Opening Br. 24.) No Petitioner defends the court's unsupported assertion that BLM previously disavowed authority over hydraulic fracturing. (Order 15; Opening Br. 21-22 & n.7.) North Dakota alone argues that BLM may protect only surface resources (N.D. Br. 30), but does not respond to BLM's contrary analysis and authority (Opening Br. 33-34). Nor do Petitioners contest that, in addition to its other goals, the rule protects surface resources and reduces interference with other wells. (Opening Br. 9, 34-35, 55-56.) Those concessions show that the district court's conclusion was not based on a careful analysis of BLM's authority.

A. *Chevron* deference applies to BLM's longstanding interpretation of the broad delegations of authority in its enabling legislation.

This case falls squarely within *Chevron* doctrine. In the MLA and FLPMA, Congress expressly delegated to BLM authority to regulate oil and gas operations on federal leases. Hydraulic fracturing is a well-stimulation technique used in oil and gas operations on federal leases and therefore falls within those express delegations. Even if the text of the MLA and FLPMA were ambiguous concerning BLM's authority, BLM has been regulating well-stimulation activities to protect subsurface

resources, including groundwater, for nearly a century. Congress has never "unambiguously" expressed a contrary intent. *Chevron v. NRDC*, 467 U.S. 837, 842-43 (1984).

BLM acted via notice-and-comment rulemaking pursuant to express delegations in the MLA and FLPMA. *See* 80 Fed. Reg. 16,128, 16,137, 16,143, 16,154, 16,179, 16,186 (Mar. 26, 2015). Consequently, Petitioners need a case where "a general conferral of rulemaking … authority has been held insufficient to support *Chevron* deference for an exercise of that authority within the agency's substantive field." *City of Arlington v. FCC*, 133 S. Ct. 1863, 1868 (2013). There is "no such case." *Id.* North Dakota misinterprets (N.D. Br. 31) one statement in *City of Arlington* that refers to the *manner* of agency action. 133 S. Ct. at 1874 (citing *United States v. Mead Corp.*, 533 U.S. 218 (2001)). As the Court explained: "*Mead* denied *Chevron* deference to action, by an agency with rulemaking authority, that was not rulemaking." *Id.* Here, BLM acted via rulemaking.

North Dakota also argues that *Chevron* does not apply to cases of "deep economic and political significance." (N.D. Br. 29 (quoting *King v. Burwell*, 135 S. Ct. 2480 (2015).) *King* was an "extraordinary case" that affected the "price of health insurance for millions of people" and where the IRS had "no expertise in crafting health insurance policy." 135 S. Ct. at 2489. Those factors are not present here. BLM has extensive experience regulating well-stimulation and other oil and gas operations, and the rule affects the lessees of resources owned by the United States, a

group whose activities BLM already regulates. (Opening Br. 20-24 (distinguishing *Brown & Williamson* and *Utility Air*).)

Encino Motorcars v. Navarro, 136 S.Ct. 2117 (2016), is no help to Industry. (Industry Br. 15.) That case involved a plain procedural defect: The agency gave "almost no reasons at all" for changing its position from a 1978 opinion letter. *Id.* at 2123, 2127. Here, BLM's authority to regulate well-stimulation activities on federal leases, including hydraulic fracturing, is clear in the MLA and FLPMA and is reflected in nearly a century of regulations. (Opening Br. 5-8, 16-29, 35, 43-45, 51.) BLM also explained why those regulations needed to be updated given the risks posed by modern fracturing techniques. 80 Fed. Reg. at 16,128-95.

To briefly summarize, BLM previously required preapproval only for "nonroutine" fracturing operations and those that involved "additional surface disturbance." 43 C.F.R. § 3162.3-2(a)-(b) (1983-2014).[2] Companies knew, however, that even when preapproval was not required, all fracturing operations had to comply with the "environmental obligations" and "control of wells" provisions, *id.* §§ 3162.5-1 to .5-2, as well as Onshore Order 2's well-casing standards, which ensure wellbore integrity and protect groundwater, 53 Fed. Reg. 46,798, 46,808-09 (Nov. 18, 1988).

[2] This determination was made by BLM field-office engineers based on local geology and practices. (Supp. App. 91-93, 144, 162). If helpful, BLM can provide example sundry notices for nonroutine operations.

That is why the American Petroleum Institute said that "hydraulic fracturing is already regulated by BLM." (App. 979-80.)

In the preamble, BLM explained that those previous rules did not address the high pressures, longer distances, and greatly increased scale of development enabled by modern fracturing techniques. *See* 80 Fed. Reg. at 16,128-31, 16,180, 16,188-89, 16,193-95. BLM reviewed hydraulic-fracturing studies showing that a "leak in the wellbore casing" is the most likely pathway for groundwater pollution. *Id.* at 16,176, 16,193-94. BLM also found that state rules do not consistently require operators to meet standards that BLM's experts said are prudent. *Id.* at 16,133, 16,161, 16,175-76, 16,178-79, 16,190. (App. 848-53 (comparison table).) States also do not provide BLM with information it needs as the assigned "resource manager" to "make informed resource decisions" and "respond effectively to incidents." 80 Fed. Reg. at 16,154, 16,195. BLM therefore adopted "industry best practices" for well casing and pressure management in hydraulic-fracturing operations, *id.* at 16,188-89, and explained the necessity of each new requirement, *id.* at 16,141-84. There is no analogy between that detailed explanation and the complete lack of explanation in *Encino Motorcars*, 136 S. Ct. at 2126-27.

Chevron provides the framework for analyzing BLM's interpretation of the scope of its authority under the MLA and FLPMA. *City of Arlington*, 133 S. Ct. at 1868-75. For the reasons explained below, BLM's authority to regulate hydraulic-

fracturing operations on federal leases is clear, or in the alternative, BLM reasonably concluded that it has such authority.

B. The MLA grants BLM authority to regulate federal-lease operations, including well-stimulation activities.

The MLA's text, structure, history, and case law show that BLM may regulate well-stimulation activities on federal leases. (Opening Br. 24-36.) State Petitioners now concede that the MLA permits BLM to "make leasing or related land-management regulatory decisions based on environmental considerations," and to "consider the impact of leasing federal minerals on natural resources including wildlife, water, and oil and gas." (Wyo. Br. 35.) But they deny that BLM can address those topics via operational regulations.

The MLA's plain text says otherwise. Section 189 grants BLM that authority. 30 U.S.C. § 189 (authorizing "necessary and proper rules and regulations"). If BLM may withdraw lands, suspend lease operations, and impose lease terms to avoid harm to other resources (Wyo. Br. 35; Industry Br. 18), then BLM may achieve that same purpose via operational regulations. Indeed, BLM has applied operational regulations for nearly a century, including regulations governing well-stimulation activities like hydraulic fracturing. (Opening Br. 5-8, 18-19, 35.) No court, other than the district court here, has ever suggested such regulations are beyond BLM's authority.

Promoting mineral development was a central goal of the MLA (Industry Br. 19), but it was not the MLA's *only* goal. The MLA "not only reserved to the United

States the fee interest in the leased land, but … also subjected the lease to exacting restrictions and continuing supervision by the Secretary." *Boesche v. Udall*, 373 U.S. 472, 477-78 (1963). The MLA authorizes BLM to prescribe "rules and regulations governing in minute detail all facets of the working of the land." *Id.* As Industry ultimately admits, regulating oil and gas operations is "entirely consistent" with the MLA's purposes. (Industry Br. 20 n.6.)

Section 187 of the MLA affirmatively requires lease operations to be conducted with "reasonable diligence, skill, and care." 30 U.S.C. § 187. That requirement is "[i]n addition to" the other topics addressed in § 187. (Industry Br. 18.) The self-described scope of § 187 is the "protection of *diverse interests* in the operation of mines, wells, etc." 30 U.S.C. § 187 (emphasis added). Section 187 therefore does not aim solely to "promote mine safety and to prevent waste so as to ensure a fair economic outcome to both miners and the United States." (Industry Br. 18; *see* N.D. Br. 7-8.) Each separate clause and term of § 187, including protecting the "interests of the United States" and the "public welfare," must be given operative effect and distinct meaning. (Opening Br. 31-33; Former Officials Br. 8-9 & n.4.)

BLM also must "protect oil and gas resources from the intrusion of water." (Wyo. Br. 51.) Although that may have been the "principal" focus of early state regulations (Aplee. App. 3992), it was not the *sole* focus (Aplee. App. 3993). Moreover, *federal* regulations enacted contemporaneously with the MLA in 1920 addressed groundwater pollution, as did decades of subsequent MLA regulations that

Congress expressly ratified in the Mineral Leasing Act for Acquired Lands and preserved when enacting the SDWA, as shown by that Act's legislative history. (Opening Br. 28-31, 43-45.) BLM is not attempting to "suddenly invert" the law—State Petitioners are. (Wyo. Br. 51.)

The MLA also provides (Wyo. Br. 51-52) that it cannot "be construed or held to affect the rights of the States or other local authority to exercise any rights which they may have." 30 U.S.C. § 189. That part of § 189 merely embodies ordinary principles of conflict preemption. *See Kirkpatrick v. United States*, 675 F.2d 1122, 1126 (10th Cir. 1982); *Ventura Cty. v. Gulf Oil,* 601 F.2d 1080, 1086 (9th Cir. 1979). Moreover, BLM's hydraulic-fracturing rule preserves the states' concurrent regulatory authority on federal leases. 80 Fed. Reg. at 16,133, 16,176, 16,178, 16,190.

C. FLPMA grants BLM authority to regulate mineral-development activities on federal lands.

FLPMA's text, structure, history, and case law also authorize BLM to regulate mineral-development activities on federal lands to protect natural resources and the environment. (Opening Br. 17, 30-31, 36-42.) FLPMA declares that BLM should preserve "environmental" quality and protect "water resource" values on public lands. 43 U.S.C. § 1701(a)(8); *see also* § 1702(c) (defining "multiple use" to include protecting the "quality of the environment"). FLPMA also delegates BLM authority to "regulate" the "use, occupancy, and development" of the public lands, and requires BLM to, "by regulation or otherwise, take any action necessary to prevent unnecessary

or undue degradation of the land." 43 U.S.C. § 1732(b); *see also id.* § 1740. Those delegations are not ineffective merely because, as part of the planning process, BLM *also* must require public-land users to comply with applicable pollution-control laws, 43 U.S.C. § 1712(c)(8). (Wyo. Br. 44-45; N.D. Br. 29.) Congress gave BLM a "duty to protect the environment" that is "independent of the planning process." *Utah Shared Access All. v. Carpenter*, 463 F.3d 1125, 1129, 1136 (10th Cir. 2006).

Granite Rock says nothing to the contrary. (Opening Br. 40-42; Former Officials Br. 19-23.) The Court's point was that because environmental regulation and land-use planning are "capable of differentiation," a state environmental regulation was not "*per se* pre-empted" as a form of land-use planning. *Cal. Coastal Comm'n v. Granite Rock*, 480 U.S. 572, 588 (1987). The Court declined to say there was no overlap between land-use planning and environmental regulation. *Id.* at 587. And the Court observed that those two functions can be statutorily delegated to the same agency. *Id.* at 586. BLM's regulations were not at issue in *Granite Rock*, and nowhere did the Court discuss the "unnecessary or undue degradation" standard or FLPMA's other rulemaking delegations. 43 U.S.C. §§ 1732(b), 1740. Those delegations do ensure that "damage to the environment is kept within prescribed limits." *Granite Rock*, 480 U.S. at 587; *see also Carpenter*, 463 F.3d at 1129, 1135-36; *Mineral Policy Ctr. v. Norton*, 292 F. Supp. 2d 30, 41-46 (D.D.C. 2003).

BLM's rule does not regulate the appropriation, use, development, or control of water itself. (Wyo. Br. 46; N.D. 21, 30.) The rule regulates hydraulic-fracturing

operations on federal lands to, in part, reduce the risk of groundwater contamination by requiring operators to follow best practices for well casing. 80 Fed. Reg. at 16,129-30, 16,142-43. Nothing about the rule dictates water uses or sets water-quality standards. (*See* Opening Br. 55.) Nor does the rule ignore the "Nation's need for domestic sources of minerals," 43 U.S.C. § 1701(a)(12). (Industry Br. 21-22.) The rule both ensures that hydraulic fracturing may continue to "provide the Nation with domestically produced oil and gas" and protects "public lands and trust resources." 80 Fed. Reg. at 16,179.

Fundamentally, hydraulic fracturing is a well-stimulation technique. 80 Fed. Reg. at 16,130. BLM has been regulating well-stimulation and other subsurface operations on federal leases under the MLA and FLPMA for nearly a century, including to protect groundwater. Petitioners cannot show why the delegations in the MLA and FLPMA should apply any differently to hydraulic fracturing than to the "myriad other surface and downhole activities BLM has regulated historically" on federal leases. (Industry Br. 16-17 n.4.) That is why Petitioners turn to the SDWA, an entirely different statute that preserves BLM's independent statutory authority on federal leases.

II. The SDWA does not impliedly repeal BLM's statutorily delegated authority to regulate hydraulic fracturing on federal leases.

Petitioners' SDWA theory is that Congress gave EPA exclusive authority to regulate hydraulic fracturing in 1974 and then took that authority away in 2005,

thereby vesting exclusive authority in the states, even on federal leases. There is no evidence here—much less a clear statement—that Congress had those intentions. Instead, in 1974, Congress intended the broad SDWA regime to preserve BLM's specific, preexisting authority to regulate oil and gas operations on federal leases. Congress then narrowly amended the SDWA regime so that states could choose, free from EPA oversight, whether to regulate non-diesel hydraulic fracturing on state and private lands. BLM's hydraulic-fracturing rule applies on federal leases and therefore is entirely consistent with those purposes.

As a threshold matter, Petitioners wholly ignore the applicable statutory-interpretation rules. First, Petitioners assert that the SDWA "repealed" or "removed whatever authority over hydraulic fracturing BLM might have had previously." (Industry Br. 8, 27, 33, 35 n.15.) Nowhere do Petitioners acknowledge the "cardinal rule" that implied repeals are disfavored and cannot be found unless such intent is "clear and manifest." *Posadas v. Nat'l City Bank*, 296 U.S. 497, 503 (1936). There must be an "irreconcilable conflict" or the latter act must "cover[] the whole subject of the earlier one and … clearly [be] intended as a substitute." *Elephant Butte Irrigation Dist. v. Dep't of Interior*, 269 F.3d 1158, 1164 (10th Cir. 2001).

Second, Petitioners argue that a general statute cannot "eviscerate a statute of specific effect." (Wyo. Br. 39.) That canon applies only when statutory provisions are "irreconcilably conflicting," because courts otherwise have a "duty to harmonize the provisions and render each effective." *Adirondack Med. Ctr. v. Sebelius*, 740 F.3d 692,

698–99 (D.C. Cir. 2014); *accord WildEarth Guardians v. Nat'l Park Serv.*, 703 F.3d 1178, 1189 (10th Cir. 2013) (citing *Morton v. Mancari*, 417 U.S. 535, 551 (1974)). Courts do not "lightly" conclude that two statutes conflict; if "any interpretation permits both statutes to stand, the court must adopt that interpretation." *Miccosukee Tribe v. Army Corps of Eng'rs*, 619 F.3d 1289, 1299 (11th Cir. 2010).

Third, Petitioners infer that Congress removed the federal government's authority to regulate hydraulic fracturing on federal leases and gave that authority "exclusively to the states." (Wyo. Br. 26, 39, 43; N.D. Br. 17, 25.) Courts do not assume that the "public domain of the United States [has been placed] completely at the mercy of state legislation." *Kleppe v. New Mexico*, 426 U.S. 529, 543 (1976) (quoting *Camfield v. United States*, 167 U.S. 518, 526 (1897)). Congress will not be "deemed to have significantly changed the federal-state balance" unless it "conveys its purpose clearly." *United States v. Bass*, 404 U.S. 336, 349 (1971). We are aware of no case—and Petitioners identify none—where a court has concluded that Congress impliedly removed the federal government's control over the development of its own property and placed that control *exclusively* in the states.

A. The design and history of the SDWA evidence Congress's intent to preserve, not repeal, BLM's independent statutory authority.

The district court held that the "issue presented here is whether the 2005 EP Act's explicit removal of the EPA's regulatory authority over non-diesel hydraulic fracturing likewise precludes the BLM from regulating that activity." (Order 22.)

Petitioners have backed away from that position. They now contend that even "if Congress had taken no action in 2005, BLM would still lack statutory authority to regulate hydraulic fracturing" because that authority was "repealed" with the SDWA's enactment in 1974. (Industry Br. 34-35 & n.15.)

To the contrary, in 1974, Congress preserved BLM's authority. Congress did not "intend any of the provisions of this bill to repeal or limit any authority the [BLM][3] may have under any other legislation," and it disclaimed any intent to undermine BLM's efforts to "prevent groundwater contamination under the Mineral Leasing Act." H.R. Rep. No. 93-1185, at 32 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6454, 6484-85. That statement shows Congress's desire to preserve the authority of the agency assigned to regulate the development of federally owned minerals.

State Petitioners cite provisions in SDWA Part C that set standards for state programs, as well as provisions that subject federal lands and federal agencies that are themselves performing injections to Part C's requirements. (Wyo. Br. 31-32; N.D. Br. 23-24.) Those are the very provisions Congress was discussing, 1974 U.S.C.C.A.N. at 6480-87, when it said that it did *not* intend "any of the provisions of this bill to repeal or limit" BLM's authority, *id.* at 6484-85. Interpreting those provisions to revoke BLM's authority would directly contravene Congress's intent. *See id.* at 6481 (state programs must "prohibit unauthorized underground injection," ensure injections "will

[3] "BLM" here refers to BLM's predecessor, the USGS.

not endanger drinking water sources," and apply to "injections by Federal agencies");[4] *id.* at 6485 (approval procedures for state programs).

Industry notes that some statutes expressly disclaim any intent to repeal. (Industry Br. 27-28.) That argument inverts the law. Congress's intent to repeal must be "clear and manifest," *Posadas*, 296 U.S. at 503; there is no requirement that "Congress make a clear statement that it is *retaining* federal control." *Bluebeard's Castle v. Virgin Islands*, 321 F.3d 394, 400 (3d Cir. 2003). And in any event, Congress made clear its intent to preserve BLM's specific authority to prevent "groundwater contamination" under the "Mineral Leasing Act." 1974 U.S.C.C.A.N. at 6484-85. That statement shows that BLM had been acting within its authority under the MLA, and the SDWA was not intended to interfere.

Petitioners also argue that, in 1974, BLM was not specifically regulating hydraulic fracturing. (Wyo. Br. 36; Industry Br. 29.) For decades before *and* after the SDWA's enactment, BLM regulated all well-stimulation activities on federal leases to protect groundwater. (*See* Opening Br. 43-45.) Hydraulic fracturing was not then as prevalent as it is today, *see* 80 Fed. Reg. at 16,128-29, so it is unsurprising that BLM's regulations did not mention the technology by name in 1974. Moreover, the SDWA was not specifically focused on hydraulic fracturing—or even oil and gas

[4] BLM is not itself performing injections, but rather is acting in a regulatory capacity. Congress did not divest BLM of its regulatory role on federal leases.

production—but rather applied to a "wide range of municipal, industrial, and energy extraction injection activity." (Industry Br. 24.)

When Congress addresses a broad concern, such as the nationwide protection of drinking water, courts do not infer that it intended to repeal preexisting statutes addressing a more specific concern, like the development of federal oil and gas leases. For example, in *Radzanower v. Touche Ross & Co.*, 426 U.S. 148 (1976), the Supreme Court held that Congress had not impliedly repealed the National Bank Act's venue provision by later enacting the Securities Exchange Act. *Id.* at 152-57. The National Bank Act "focus[ed] on the particularized problems of national banks," whereas the Exchange Act addressed a "broad universe" of actors and covered a "more generalized spectrum." *Id.* at 153-54. The latter act's legislative history did not contain a "clear and manifest" expression of intent to repeal. *Id.* at 158. And the Court emphasized that if two statutes are "capable of co-existence," courts have a "duty" to "regard each as effective." *Id.* at 155 (quoting *Mancari*, 417 U.S. at 551).

Similarly here, there is no "positive repugnancy" between the MLA and the SDWA. *Id.* at 155. The MLA specifically governs mineral-development operations performed by federal lessees on federal leases. The SDWA, on the other hand, addresses a broad universe of actors performing a wide range of injection activities on public and private lands. *See Legal Envtl. Assistance Found. v. EPA* ("*LEAF*"), 118 F.3d 1467, 1469-70 (1997). Congress intended both to facilitate state programs covering that wide-ranging activity and to preserve the federal government's specific,

preexisting authority to regulate the development of its own property. 1974 U.S.C.C.A.N. at 6480-87. The SDWA was not "clearly intended as a substitute" for BLM's authority. *Radzanower*, 426 U.S. at 154; *see also Wyoming v. USDA*, 661 F.3d 1209, 1234-35 & n.20 (10th Cir. 2001).

LEAF says nothing to the contrary. (Wyo. Br. 33; N.D. Br. 24-25; Industry Br. 29.) *LEAF* held that Part C's definition of "underground injection" was intended to "cast a wide regulatory net" covering a broad range of injection activities, including hydraulic fracturing. *Id.* at 1474-76. The SDWA's breadth does not imply that Congress intended to repeal BLM's more specific, preexisting authority to regulate well-stimulation activities on federal leases. State Petitioners concede (Wyo. Br. 34) that Congress wished EPA to "coordinate and consult" and "not duplicate" BLM's efforts to prevent "groundwater contamination" under the MLA. 1974 U.S.C.C.A.N. at 6484-85. Coordination presupposes overlapping authority. *See Massachusetts v. EPA*, 549 U.S. 497, 532 (2007).[5]

Congress also did not intend to "limit" any authority BLM "may have under any other legislation." 1974 U.S.C.C.A.N. at 6484-85. The SDWA therefore cannot

[5] BLM's position does not conflict with the United States' position in *LEAF*. (Industry Br. 14 n.3.) The *LEAF* plaintiff petitioned to withdraw Alabama's program under SDWA Part C. (*See infra* Part II.B.) BLM's authority simply was not at issue. Moreover, *LEAF* was decided in 1997. Even after the boom, there are virtually no shale wells on federal lands in Alabama. (*See* Opening Br. 7, Figure 1.) 80 Fed. Reg. at 16,206 (Table 3B). *LEAF* therefore did not implicate BLM's authority.

be interpreted to limit BLM's authority under FLPMA, which "supplement[s]" existing authorities like the MLA. 43 U.S.C. § 1701(b). FLPMA reinforces BLM's "sweeping" authority to regulate federal-lease operations to protect the environment. *See* One Third of the Nation's Land 132 (1970). (Opening Br. 30-31.) FLPMA is precisely the kind of legislation Congress thought the SDWA would not limit.

Nor have Petitioners shown any "plain inconsistency," *United States v. Estate of Romani*, 523 U.S. 517, 520 (1998), or "irreconcilable conflict," *Adirondack*, 740 F.3d at 698, between BLM's authority and the SDWA as originally enacted. They do not argue that BLM's authority on federal leases somehow prevents states from fulfilling their SDWA duties. In states with approved programs under Part C, companies using injections to stimulate wells on federal leases simply would need state and BLM approval. The states and BLM exercise concurrent jurisdiction to permit all manner of oil and gas operations on federal leases. *See* 80 Fed. Reg. at 16,178 (operators already comply with BLM and state rules). Congress essentially said that such concurrent jurisdiction should continue on federal leases, even in states with approved programs under Part C. 1974 U.S.C.C.A.N. at 6480-87.[6]

[6] This inquiry is largely hypothetical because, as explained *infra*, neither EPA nor the states believed Part C applied to hydraulic fracturing until the *LEAF* decision in 1997, and the subsequent amendment to Part C overturned *LEAF*, effectively ratifying EPA and the states' prior view.

"Repeal is to be regarded as implied only if necessary to make the later enacted law work, and even then only to the minimum extent necessary." *Radzanower*, 426 U.S. at 155. Because the MLA, FLPMA, and SDWA are entirely "capable of co-existence," this Court must "regard each as effective." *Id.* To take another example, North Dakota tries to demonstrate a conflict between BLM's authority and 42 U.S.C. § 300h(b)(3)(B). (N.D. Br. 23.) That provision is inapplicable because it does not address BLM's authority, but rather the EPA Administrator's authority to impose requirements for state permitting programs. *id.*; *see also id.* § 300f(7) (defining "Administrator"). BLM is not imposing requirements for state permitting programs; BLM is setting standards for its own permits on federal leases.[7]

Even if § 300h(b)(3)(B) did apply, that provision is effective only when it is "infeasible to comply with both such regulation and the State underground injection control program." *Id.* § 300h(b)(3)(B)(ii). As just explained, Petitioners do not and cannot show that it would be infeasible to get approval from a state and BLM on federal leases. A conflict occurs only where "compliance with both the federal and state laws is a physical impossibility," and the mere fact that it is "possible to comply with one law while failing to comply with another does not render compliance with both impossible." *Keith v. Rizzuto*, 212 F.3d 1190, 1193 (10th Cir. 2000).

[7] Because BLM's permits are completely independent of SDWA permits, there is no reference to the MLA or FLPMA in 40 C.F.R. § 144.4 (listing federal laws that "may apply to the issuance of permits under these [SDWA] rules"). (Industry Br. 28 n.12.)

In 1974, Congress did not manifestly intend to repeal or limit BLM's authority on federal leases, and because BLM's authority and the SDWA are capable of coexistence, this Court's "duty" is to "render each effective." *Radzanower*, 426 U.S. at 155; *see Mancari*, 417 U.S. at 551.

B. The 2005 amendment removed non-diesel hydraulic fracturing only from SDWA Part C.

The analysis of Part C's amended definition of "underground injection" begins with its text: "For purposes of this part," the term "underground injection" excludes the "injection of fluids or propping agents (other than diesel fuels) pursuant to hydraulic fracturing." 42 U.S.C. § 300h(d)(1)(B)(ii). That text is unambiguous. It removes non-diesel hydraulic fracturing from the term "underground injection" in Part C and thereby eliminates whatever authority EPA *or* the states had to regulate that activity under Part C. The text changes nothing else. Petitioners nevertheless infer that Congress entirely "divested the federal government of authority to regulate the non-diesel fracking process, leaving the matter entirely to the states to regulate." (Wyo. Br. 37.)

That interpretation exceeds the amendment's text and contravenes the canon that a "definition which relates specifically to a term as used in a single article of a code cannot be used *in pari materia* with other articles." 2B Sutherland Statutory Construction § 51:3 (7th ed.); *see also WildEarth Guardians*, 703 F.3d at 1191 (definition limited "*to this chapter*"); *U.S. Postal Serv. v. Amada*, 200 F.3d 647, 650 (9th Cir. 2000).

To conclude that Part C's amended definition repealed BLM's MLA and FLPMA authority would nullify the limitation Congress placed on that definition.

Petitioners incorrectly contend the amendment was intended as a "production incentive." (Wyo. Br. 10; N.D. Br. 25.) Although the Energy Policy of Act of 2005 does contain "Production Incentives," they are in Title III, Subtitle E. *See* Pub. L. No. 109-58, §§ 341-57, 119 Stat. 594, 696. The amendment to the definition of "underground injection" is in Subtitle C. *Id.* § 322, 119 Stat. at 694. Congress's deliberate placement of the amendment outside the Act's list of "production incentives" forecloses any argument that the amendment is a production incentive.

The amendment's history reveals another purpose. "EPA took the position for two decades after the 1974 enactment of the Safe Drinking Water Act that hydraulic fracturing was not subject to the UIC program." (Wyo. Br. 6.) Specifically, EPA interpreted the SDWA to apply only to wells whose "principal function" was the "subsurface emplacement of fluids." 41 Fed. Reg. 36,730, 36,731-32 (Aug. 31, 1976). States consequently did not include hydraulic fracturing in their programs under Part C. *LEAF*, 118 F.3d at 1471. That is why the *LEAF* plaintiff petitioned to withdraw Alabama's program. *Id.* *LEAF* effectively held that, before a state's program could be approved, the state had to regulate hydraulic fracturing. *Id.* at 1478.[8]

[8] At that time, EPA's Class II-well regulations (Industry Br. 31-32) applied only to "secondary and tertiary recovery techniques," not to hydraulic fracturing. *Id.* at 1476 n.12.

Petitioners concede the 2005 amendment was intended to overturn *LEAF*. (Wyo. Br. 38; Industry Br. 33; N.D. Br. 24-25.) Due to the *LEAF* decision, if a state chose not to regulate hydraulic fracturing, EPA could have stepped in with its own such regulations, *see* 42 U.S.C. § 300h-1(c), which would have applied even on state and private lands. Thus, by overturning *LEAF*, the 2005 amendment restored the states' authority to decide, free from EPA oversight, whether and how to regulate non-diesel hydraulic fracturing on state and private lands. BLM's rule does not interfere with that purpose because it applies on federal lands, not state or private lands. (Opening Br. 7, 47-49, 54.) BLM's rule therefore does not "eviscerate" and is not an "end-run" around the amendment. (Wyo. Br. 39-41.)[9]

There is no reason to further infer that Congress gave states exclusive authority to regulate non-diesel hydraulic fracturing on federal leases. Petitioners do not contest that, in 2005, the states had not enacted hydraulic-fracturing regulations under their own laws. (Opening Br. 49-50; Wyo. Br. 11-14; N.D. Br. 13.) And by amending SDWA Part C's definition of "underground injection," Congress removed power not just from EPA, but also from any state seeking to regulate non-diesel hydraulic fracturing under Part C. Congress carved non-diesel hydraulic fracturing out of the

[9] BLM's rule also preserves the states' concurrent regulatory authority on federal leases, subject to ordinary principles of conflict preemption. (*See supra* Part I.B.) Petitioners admit this case "does not deal with issues of pre-emption." (App. 130.)

broad SDWA regime; it did not effect a wholesale transfer of authority from the federal government to the states.

Had Congress wished to effect such a transfer, it was required to make a clearer statement than amending a definition that applies equally to EPA and state-administered SDWA programs. "In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." *Bass*, 404 U.S. at 349. In the MLA and FLPMA, Congress expressly delegated to BLM authority to regulate the development of federally owned resources. (Opening Br. 16-18, 24-27, 36-39.) It cannot be inferred that Congress impliedly repealed those delegations by amending a definition in SDWA Part C via a provision in the 2005 Act that says nothing about BLM's authority on federal leases. (*See* Opening Br. 51-52.) Congress does not "hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001).

There are, however, good reasons to presume Congress wished to preserve BLM's authority. Under the MLA and FLPMA, BLM must balance environmental protection against the need for domestic sources of minerals. 43 U.S.C. § 1701(a)(8), (12). The SDWA, on the other hand, is exclusively about drinking-water protection. Accordingly, by removing non-diesel hydraulic fracturing from SDWA Part C, Congress left to BLM's more flexible judgment the extent to which that activity should be regulated on federal leases. That interpretation comports with Congress's

previous decision, in 1974, to preserve BLM's role on federal leases. 1974 U.S.C.C.A.N. at 6484-85.

Furthermore, if Congress "elect[ed] to leave states to exercise their sovereign powers and be the exclusive source of regulation for hydraulic fracturing" (N.D. Br. 17; Wyo. Br. 37), that would place federal resources at the "mercy of state legislation." *Kleppe*, 426 U.S. at 543. Imagine, for example, if a state banned hydraulic fracturing.[10] Under Petitioners' theory, BLM would be powerless under the MLA or FLPMA to strike a different balance on federal leases in that state. Conversely, if a state entirely repealed its hydraulic-fracturing regulations, Petitioners believe BLM would be powerless to protect federal resources and interests. Before this Court can conclude that Congress ceded so much control over a "critical matter" concerning federal property, a far clearer statement is required. *Bass*, 404 U.S. at 349; *cf. Gonzalez v. Arizona*, 677 F.3d 383, 410 (9th Cir. 2012) (en banc) (courts must safeguard enumerated federal powers); *Garcia v. San Antonio*, 469 U.S. 528, 550 (1985) (same).

Nor did BLM's regulations include an "express statement that operators did *not* need BLM's approval to conduct hydraulic fracturing." (Industry Br. 35.) The regulations speak for themselves and did assert BLM's authority over hydraulic fracturing. (*See supra* Part I.A.; Opening Br. 35, 51.) Moreover, Industry again is

[10] *See* Thomas Kaplan, *Citing Health Risks, Cuomo Bans Fracking in New York State* (Dec. 17, 2014), http://www.nytimes.com/2014/12/18/nyregion/cuomo-to-ban-fracking-in-new-york-state-citing-health-risks.html.

attempting to convert congressional silence into affirmative proscription. (*See supra* Part II.A.) Whether there was any "reason for Congress to believe that it needed to amend any statute other than the SDWA" is not the proper inquiry. (Industry Br. 36.) Congress unambiguously amended *only* SDWA Part C, and it is not within a court's power to also amend the MLA or FLPMA.

Petitioners also misquote two legislators who opposed the amendment. (Wyo. Br. 10; N.D. Br. 25.) One said the amendment exempts non-diesel hydraulic fracturing only from the SDWA, not all federal authorities. 151 Cong. Rec. S9335-01, S9337 (July 29, 2005). The other inaccurately said the amendment precludes "any Federal regulation of … the hydraulic fracturing technique that actually injects *diesel fuel* into the water supply." 151 Cong. Rec. H2192-02, H2194-95 (Apr. 20, 2005) (emphasis added). Diesel injections actually remain subject to the SDWA as amended. 42 U.S.C. § 300h(d)(1)(B)(ii). Furthermore, the views of single legislators are not controlling, *Mims v. Arrow Fin. Servs.*, 132 S. Ct. 740, 752 (2012), particularly when the legislators opposed the bill, *see NRDC v. EPA*, 526 F.3d 591, 604-05 (9th Cir. 2008).[11]

EPA's comments on the BLM rule merely show that it is consistent with EPA's standards for similar kinds of injection wells. (Wyo. Br. 40.) There is nothing

[11] Petitioners also cite a report of dissenting views (Industry Br. 34) and a research report (Wyo. Br. 9, 38), both of which say the amendment removed authority only "under SDWA."

nefarious about EPA's noting that consistency, especially since BLM's rule does not apply on state and private lands. Nor is there anything wrong (Industry Br. 37) with BLM's refusing to "ban the use of diesel fuel in hydraulic fracturing" given EPA's standards for such practices. 80 Fed. Reg. at 16,181. Those are perfect examples of two agencies with "obligations [that] overlap" finding ways to "administer their obligations and yet avoid inconsistency." *Massachusetts*, 549 U.S. at 532. (Opening Br. 44-45.)

At bottom, Petitioners use the general-specific canon not to "preserve the operation of the specific provision" but to "restrict the broad language" delegating BLM authority under the MLA and FLPMA. *United States v. Porter*, 745 F.3d 1035, 1049 (10th Cir. 2014). That "is not a proper application of the general-specific canon." *Id.* Petitioners may not "void[] the general provision" here, because doing so is unnecessary to effectuate the plain text of the 2005 amendment. *Id.*; *see also Adirondack*, 740 F.3d at 696–700 (specific provision did not repeal "broad grant of authority"). The district court made the same mistake, and its decision must be reversed.

III. The Court should remand for the district court to consider Petitioners' other arguments in the first instance.

Upon reversing the district court's judgment, this Court should remand for the district court to consider in the first instance any other arguments Petitioners properly preserved, particularly whether BLM's justification for its rule was arbitrary or

capricious. (Wyo. Br. 25 n.6; N.D. Br. 33 & n.7.) The district court declined to consider any issues in its final order other than BLM's statutory authority to promulgate the rule. This Court should follow "the general rule … that a federal appellate court does not consider an issue not passed upon below." *Singleton v. Wulff*, 428 U.S. 106, 120 (1976).

"Where an issue has been raised, but not ruled on, proper judicial administration generally favors remand for the district court to examine the issue initially." *Pac. Frontier v. Pleasant Grove*, 414 F.3d 1221, 1238 (10th Cir. 2005); *see also Greystone Constr. v. Nat'l Fire & Marine Ins.*, 661 F.3d 1272, 1290 (10th Cir. 2011); *Evers v. Regents of Univ. of Colo.,* 509 F.3d 1304, 1310 (10th Cir. 2007); *New Mexicans for Bill Richardson v. Gonzales*, 64 F.3d 1495, 1503 n.4 (10th Cir. 1995). That is particularly appropriate here, where the issues are technical and fact intensive. Moreover, that the district court addressed certain issues in its preliminary-injunction order (which has been vacated by this Court) and then *avoided* them in its final decision is a further reason to exercise restraint.[12]

BLM disagrees, however, that the district court did not address *Chevron* step two on the issue of BLM's authority. (N.D. Br. 32.) The court noted that BLM's interpretation was "unreasonable" because it would effect a "transformative

[12] This Court also should not consider issues raised solely by *amici*. *Tyler v. City of Manhattan*, 118 F.3d 1400, 1404 (10th Cir. 1997).

expansion" of BLM's authority. (Order 22 n.16.) BLM fully briefed that issue. (Opening Br. 53-57.) This Court should hold that BLM's authority is clear or that BLM's interpretation is reasonable, and should allow the district court to consider the arbitrary-and-capricious arguments in the first instance.

The Ute Tribe raises numerous arguments, none of which was the basis of the district court's ruling. The district court merely concluded that the Indian mineral statutes give BLM no "more specific authority over oil and gas drilling and operations than the MLA." (Order 12; Opening Br. 11-12.)[13] BLM's opening brief did not have to address the Tribe's alternative arguments, *United States v. Brown*, 348 F.3d 1200, 1212 (10th Cir. 2003), and "proper judicial administration" favors remanding those arguments for the district court to consider in the first instance. *Pleasant Grove*, 414 F.3d at 1238; *see Greystone*, 661 F.3d at 1290; *Evers,* 509 F.3d at 1310; *Gonzales*, 64 F.3d at 1503 n.4. Because the district court will be addressing other arguments on remand, judicial economy also favors remanding the Tribe's arguments.

Although not part of its merits ruling, the district court's now-vacated preliminary-injunction order held that BLM likely violated its own tribal-consultation policy. (Aplee. App. 3200-03.) The record will show, however, that BLM's efforts were early, extensive, and meaningful. BLM held multiple rounds of tribal-

[13] BLM has never argued that FLPMA provides authority on Indian lands. 80 Fed. Reg. at 16,184. (Opening Br. 4-5, 16-17.)

consultation meetings, even *before* publishing the initial proposed rule. 80 Fed. Reg. at 16,132; 77 Fed. Reg. 27,691, 27,693 (May 11, 2012) (initial proposed rule); 78 Fed. Reg. 31,636, 31,639-40 (May 24, 2013) (supplemental proposed rule). At each step, BLM offered to meet individually with tribes, considered their concerns, and revised the proposed rule in response. *Id.*[14] This Court should not address this issue without the benefit of the district court's merits ruling after a full review of the record.

The Tribe concedes it would be proper to remand for the district court to consider its arguments "in the first instance." (Tribe Br. 5.) The Tribe also waived several arguments (Tribe Br. 11-20) by raising them for the first time in its district-court reply brief (Supp. App. 23-52, 61-67). A judgment may be affirmed only on an alternative ground that was "properly raised" in the district court. *Brown v. Entm't Merchants Ass'n*, 564 U.S. 786, 807 n.1 (2011); *Amadeo v. Zant*, 486 U.S. 214, 228 n.6 (1988); *Evers*, 509 F.3d at 1309-10. It would be "manifestly unfair" to address the Tribe's numerous arguments without full briefing and the district court's analysis. *Gonzalez*, 64 F.3d at 1503 n.4.

CONCLUSION

BLM's updates to its hydraulic-fracturing rule have been delayed for far too long. The rule was originally scheduled to go into effect in June 2015. 80 Fed.

[14] The consultation policy previously addressed by the district court also is not legally enforceable. *See River Runners for Wilderness v. Martin*, 593 F.3d 1064, 1071-72 (9th Cir. 2010); *Wilderness Soc'y v. Norton*, 434 F.3d 584, 595 (D.C. Cir. 2006).

Reg. at 16,128. Since then, the district court's erroneous orders have precluded BLM from applying prudent standards to thousands of hydraulic-fracturing operations. 80 Fed. Reg. at 16,130 (2,800 per year). The district court's preliminary-injunction order has been vacated, the court's merits ruling should be reversed, and the rule should go into effect.

Respectfully submitted,

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s/ *Nicholas A. DiMascio*
NICHOLAS A. DIMASCIO

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I hereby certify that on October 7, 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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