Nos. 16-8068, 16-8069

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

STATE OF WYOMING, *et al.*,
Petitioner-Appellees,
v.

SALLY JEWELL, Secretary, United States Department of the Interior, *et al.*,
Respondent-Appellants,

SIERRA CLUB, *et al.*,
Intervenor-Respondent-Appellants.

On Appeal from the United States District Court for the District of Wyoming
Civil Action No. 2:15-CV-00043-SWS
The Honorable Scott W. Skavdahl

INTERVENOR-RESPONDENT-APPELLANTS' REPLY BRIEF

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I. INTRODUCTION

The Bureau of Land Management (BLM) adopted the regulation challenged in this case, 80 Fed. Reg. 16,128 (Mar. 26, 2015) (the Rule), because the agency's thirty-year-old standards failed to address the environmental risks posed by modern hydraulic fracturing operations. In issuing the Rule, BLM relied on its long-standing authority under the Mineral Leasing Act (MLA) to comprehensively manage federally-owned oil and gas resources for protection of the public interest, and the Federal Land Policy and Management Act (FLPMA) mandate to balance mineral development on public lands with protection of water, wildlife, and other resources. Intervenor-Respondent-Appellants Sierra Club et al. (Citizen Groups) Opening Brief (Open.Br.) 1-9.

Appellees would strip away that well-established authority and prevent BLM from managing modern oil and gas development on the very lands it is charged with protecting. While claiming to raise only a "narrow" question involving a discrete technology, Petitioner-Appellees W. Energy All. & Indep. Petroleum Ass'n of Am. (Industry or Indus.) Br.16, Appellees' challenge actually goes much further. The Rule does not regulate hydraulic fracturing in isolation: instead, it addresses a range of issues, including well construction, waste disposal, informational requirements and approval of operations. Open.Br.7–9. If BLM cannot regulate those activities on hydraulically-fractured wells, no federal

standards would exist for most oil and gas development on public lands today. 80 Fed. Reg. at 16,131 (estimating that 90% of wells are fractured). This change would eviscerate Congress's MLA and FLPMA decisions on how resources belonging to the American public should be managed.

Appellees' justification for this radical shift confuses two issues. They emphasize that prior to 2005, the Safe Drinking Water Act (SDWA) underground injection control (UIC) program regulated all underground injections, including hydraulic fracturing. Appellees then assume that by covering all underground injections, SDWA also must have been the only federal statute addressing this subject. This theory fails because the scope of activities covered under SDWA is a very different question from whether it was intended to be the exclusive federal law addressing those activities.

While SDWA's UIC program was broad in scope, it did not eliminate other sources of federal authority addressing similar activities. On the contrary, SDWA's legislative history expressly states that Congress did not intend the UIC program to replace the Interior Department's MLA authority on public lands. Open.Br.47–48. There is no conflict between SDWA and BLM's role as public lands manager.

Aside from their meritless SDWA theory, Appellees make only a half-hearted effort to defend the district court's decision. Contrary to their argument,

the text and purpose of the MLA and FLPMA, as well as extensive case law, demonstrate that those statutes authorized BLM to promulgate its Rule. Appellees, in fact, cannot cite a single case supporting their view of the MLA and FLPMA. The district court must be reversed.

II. CHEVRON DEFERENCE IS WARRANTED.

As discussed in the Citizen Groups' Opening Brief, the Rule should be upheld under the first step of the test from Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984). Congress has spoken to the issue presented here by giving the Interior Department broad proprietary authority to manage all aspects of oil and gas development on public lands. Open.Br.14–16; see City of Arlington, Tex. v. Fed. Commc'ns Comm'n, 133 S. Ct. 1863, 1868 (2013) ("If the intent of Congress is clear, that is the end of the matter" (quotation omitted)). But if this Court goes to Chevron step 2, the Rule must also be upheld because it reflects a reasonable interpretation of the MLA and FLPMA. Open.Br.54–56.

Appellees offer several meritless arguments against applying Chevron deference. First, they claim BLM's interpretation should be viewed with "skepticism" because the Rule asserts a previously "unheralded power to regulate a significant portion of the American economy." Petitioner-Appellees Wyoming, Colorado, and Utah (States or St.) Br.29–30 (quoting Util. Air Regulatory Grp. v. EPA, 134 S. Ct. 2427, 2444 (2014)). The Rule does no such thing. For nearly a

century, the Interior Department has managed all aspects of oil and gas development on federal lands. Open.Br.30–32. The Rule updates BLM's regulations to account for technological changes that have occurred over the past thirty years, but it addresses issues (such as well construction, waste management and operational approvals) that the agency has managed for decades. Id. at 3–9. Appellees are wrong in characterizing the Rule as a major extension of federal authority.

Second, Industry claims that BLM receives no deference because "the ultimate question in this case" depends on the meaning of SDWA, which BLM does not administer. Indus.Br.12. BLM, however, did not rely on SDWA to promulgate the Rule. Instead, BLM looked to the MLA and FLPMA for its legal authority. Open.Br.14. BLM's interpretation of these two statutes, which it administers, is entitled to deference. Arlington, 133 S. Ct. at 1868.

Moreover, the Environmental Protection Agency (EPA)—the agency charged with administering SDWA—agrees with BLM. As discussed below, EPA has long interpreted SDWA not to preclude application of other federal statutes to underground injections. And EPA supported BLM's issuance of the Rule. Infra p. 11. EPA's view of SDWA, like BLM's interpretation of the MLA and FLPMA, is entitled to deference.

Third, Industry asserts that Chevron does not apply because the Rule is "procedurally defective." Indus.Br.14–15 (quoting Encino Motorcars, LLC v. Navarro, 136 S. Ct. 2117, 2125 (2016)). Encino holds that "where a proper challenge is raised to the agency procedures, and those procedures are defective, a court should not accord Chevron deference." 136 S. Ct. at 2125 (emphasis added).

Industry cannot escape Chevron deference simply by offering vague allegations—it must prove the Rule actually is procedurally defective. See id. It has failed to do so. The district court order on appeal found no procedural flaws in the Rule. Appellants' Appendix (App.) 320–21. And Industry chose in this appeal not to brief the reasons it believes the Rule is procedurally defective—instead its brief offers a cursory list of the arguments made in the district court. See Indus.Br.8, 14. Industry's arguments are thus waived. Fletcher v. United States, 730 F.3d 1206, 1213-14 (10th Cir. 2013) (appellee waives argument it only "briefly trots out" due to "a lack of adequate development in briefing"); Seifert v. Unified Gov't, 779 F.3d 1141, 1156 (10th Cir. 2015) (same).

Industry also relies on the district court's preliminary injunction order, Indus.Br.14, which has been vacated. See Order 3–4, Wyoming v. Sierra Club, Nos. 15-8126 & 15-8134 (10th Cir. July 13, 2016), 2016 WL 3853806, at *1. Because the preliminary injunction was vacated, its holdings have no "legal consequences" for purposes of this appeal. United States v. Munsingwear, Inc.,

340 U.S. 36, 41 (1950); Wyoming v. U.S. Dep't of Agric., 414 F.3d 1207, 1213 (10th Cir. 2005). If Appellees want this Court to affirm the district court based on alleged procedural deficiencies with the Rule, they must present those arguments in their briefs and support them with administrative record evidence. They have failed to do so.[1]

In any case, the record amply supports BLM's decision to update its regulations. See Indus.Br.14; N.D.Br.35–36; Chamber of Commerce (Chamber) Br.10–16.[2] The record is replete with evidence showing that BLM's outdated thirty-year-old regulations are inadequate to address the risks posed by modern hydraulic fracturing. Open.Br.5–7 & nn.3–11; see also Appellants' Supplemental Appendix (Supp.App.) 90 (BLM New Mexico inspectors do not go on-site to oversee fracturing "because pressures are too high, and the work is too dangerous"). Moreover, BLM is not required to make a determination that state regulations are "inadequate" before adopting its own regulations. Compare

[1] Petitioner-Appellee North Dakota also relies on the vacated preliminary injunction in seeking affirmance on the alternative ground that the Rule is arbitrary and capricious. N.D.Br.5 n.1, 34–39. Its request fails for the same reason.

[2] The Chamber also argues that the Rule requires disclosure of trade secrets with no confidentiality protections. Chamber Br.18–19. This is incorrect: information submitted to BLM under the Rule is protected under Interior Department regulations that apply to any confidential information. 43 C.F.R. §§ 2.26–2.36; App.224–29. Additionally, the Chamber disagrees with BLM's estimate of the Rule's compliance costs. Chamber Br.17. But this disagreement fails to show that BLM's assessment is arbitrary and capricious. App.231–52 (discussing BLM's cost estimates).

Chamber Br.10–16 with App.209–13. Instead, the agency has a legal mandate under the MLA and FLPMA to manage oil and gas development on public lands for the benefit of the American public. Infra pp. 15-25.

Regardless, the Rule does improve on existing state laws in several respects. Unlike the Rule, few states require the use of tanks instead of pits statewide. Open.Br.8; App.853. And no state Appellees mandate review and approval of fracturing operations in a manner comparable to the Rule. Open.Br.8–9; App.211. Appellees also ignore the numerous examples of groundwater contamination and other accidents that have occurred despite state regulations. Open.Br.5-6. Moreover, the Rule is designed not to undercut states that have adopted strong regulations on certain issues. BLM provided for variances from the federal Rule if a similar or stricter state regulation applies. 43 C.F.R. § 3162.3-3(k)(2)–(3) (2016).

III. THE SAFE DRINKING WATER ACT AND ITS 2005 AMENDMENT DID NOT NARROW THE INTERIOR DEPARTMENT'S AUTHORITY ON PUBLIC LANDS.

The district court erred in holding that SDWA, and its amendment in the Energy Policy Act of 2005 (the 2005 Act), limited BLM's authority under the MLA and FLPMA. Open.Br.46–54. SDWA is an entirely different statute administered by a different agency (EPA), and BLM did not rely on SDWA for its

authority to promulgate the Rule. Nothing in SDWA or the 2005 Act restricts BLM's authority over hydraulic fracturing. Id. at 46–50.

The district court mistakenly relied on the statutory construction principle that a more specific statute controls over a more general law. That principle only applies where two laws actually conflict. When the statutes can be reconciled, courts must give effect to both. Morton v. Mancari, 417 U.S. 535, 551 (1974); Open.Br.50–51. No conflict exists here: the plain language of SDWA and the 2005 Act do not address BLM's authority under the MLA or FLPMA. Moreover, the legislative history of both SDWA and the 2005 Act confirm that Congress did not intend those statutes to alter BLM's authority on public lands. Open.Br.47–50.

Applying the statutes' plain language does not create any functional conflict. BLM plays a different role as the federal land manager than EPA does as an environmental regulator under SDWA. It is commonplace for public land managers to address activities on public lands that also are covered by federal environmental regulations. Id. at 51–54 (citing examples).

A. SDWA Did Not Supplant The Interior Department's Authority On Public Lands.

Appellees devote much of their briefs to arguing that SDWA regulated "all" underground injections until Congress limited its scope in 2005. Indus.Br.23–24, 37; St.Br.6–7, 31–34, 36, 45; N.D.Br.22–25; see also Legal Envtl. Assistance Found., Inc. v. EPA, 118 F.3d 1467, 1474 (11th Cir. 1997). They then leap to the

erroneous conclusion that by covering all underground injections, SDWA must have been the only federal law addressing those injections. See, e.g., St.Br.32–33. But Appellees are mixing apples and oranges: SDWA's scope is a different issue from whether it is the exclusive federal statute that applies.

Nothing in SDWA's text suggests that Congress intended it to be the exclusive federal law addressing underground injections on public lands. The statute creates a regulatory program administered by EPA, but it does not limit other federal agencies' authority. Open.Br.47. In the 1974 legislative history, Congress made clear that it did not intend SDWA to replace the Interior Department's existing authority on public lands. That history expressly states that Congress intended SDWA to preserve the Interior Department's "efforts . . . to prevent groundwater contamination under the Mineral Leasing Act," and not "to repeal or limit any authority the [Interior Department] may have under any other legislation." H.R. Rep. No. 93-1185, at 32 (1974); Open.Br.47–48. The States dismiss this legislative history, but it forecloses their theory.

Industry argues that SDWA's legislative history does not expressly address "hydraulic fracturing." Indus.Br.27. But Appellees' legal challenge is premised on hydraulic fracturing being a form of underground injection originally covered under SDWA's UIC program. Id. at 25–26. If SDWA did not address hydraulic

fracturing as a form of underground injection, no overlap existed between BLM and EPA regulation, and Appellees' entire theory collapses.[3]

Industry also objects that Congress expressed its view in a committee report, rather than the statutory text. Indus.Br.27. But Appellees point to no statutory text conflicting with that legislative history. Thus, there is no basis to doubt that the committee report reflects Congress' purpose.[4] See Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ., 550 U.S. 81, 90, 100 (2007) (relying on legislative history where it did not conflict with statutory text); Exxon Corp. v. Lujan, 970 F.2d 757, 761 (10th Cir. 1992) ("If . . . legislative history clearly revealed Congress's understanding . . . this court would be bound to apply it.").

[3] Similarly, Industry states that in 1974, Interior Department oil and gas regulations addressed "water injection," rather than hydraulic fracturing. Indus.Br.29. But SDWA's UIC program likewise regulates underground "injections," disproving this theory. See 42 U.S.C. § 300h(d)(1) (defining "injection"). Moreover, in stating its intent to preserve Interior's MLA authority, Congress recognized that SDWA's UIC program covered injections for purposes of oil and gas production. Those are exactly what the 1974 Interior regulations addressed. H.R. Rep. No. 93-1185, at 29 (explaining that "[e]nergy production companies are using injection techniques to increase production . . . . [The UIC program] is intended to deal with all of the foregoing situations insofar as they may endanger underground drinking water resources").

[4] The States inaccurately suggest that reliance on a House Report is inappropriate because Congress passed the Senate's version of SDWA. See St.Br.34. Although the Senate developed the initial draft of SDWA, the House completely rewrote the Senate's version. H.R. Rep. No. 93-1185, at 1 (1974). The House Report addresses the bill that became SDWA with only minimal edits. 120 Cong. Rec. 37,590 (Nov. 26, 1974).

Moreover, EPA has long recognized that SDWA is only one of several federal statutes that can apply to underground injections. For example, EPA supported adoption of BLM's Rule here. Open.Br.5–6. And an EPA regulation, effective since 1983, lists several other federal statutes "that may apply to the issuance of" UIC permits. 40 C.F.R. § 144.4.[5] If SDWA were the exclusive federal law affecting underground injections, those other statutes could not apply. As the agency charged with implementing the statute, EPA receives deference. City of Albuquerque v. Browner, 97 F.3d 415, 422 (10th Cir. 1996). Its support for the Rule confirms that SDWA does not preclude the application of other federal statutes.

B. The 2005 Act Did Not Narrow BLM's Authority.

The 2005 Act did not reverse Congress' 1974 decision to leave Interior's authority intact. The 2005 Act amended SDWA to limit its coverage of hydraulic fracturing. Open.Br.48–49. But Congress made no comparable change narrowing BLM's authority under the MLA or FLPMA, although it made seven other amendments to the MLA on issues other than hydraulic fracturing. Id. at 49–50. Thus, while simultaneously addressing EPA's authority over hydraulic fracturing and various aspects of BLM's MLA authority, Congress chose not to limit BLM's

[5] Contrary to Industry's suggestion, Indus.Br.28–29 n.12, Section 144.4 does not provide an exhaustive list of potentially-applicable statutes. Instead, it only addresses statutory requirements that EPA must satisfy when considering UIC permit applications. 40 C.F.R. § 144.4.

existing authority over fracturing on public lands. Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 846 (1986) (when Congress revisits a statute without repealing existing agency interpretation, that is "persuasive evidence that the interpretation is the one intended by Congress" (quotation omitted)).

Appellees have no real answer to this flaw in their theory. Instead, the States assert that it "defies common sense" to interpret the 2005 Act according to its plain language. St.Br.39. Their view of common sense, however, ignores the fundamental difference between the roles that BLM and EPA play.[6]

EPA is an environmental regulator, administering a statute adopted under the Commerce Clause (SDWA) that regulates both private and public property. Open.Br.52. In contrast, BLM serves as the federal land manager, with its MLA and FLPMA authority derived from the Constitution's Property Clause. Id. BLM's proprietary authority on public lands is "wholly independent" of EPA's

[6] The States also cite statements by Senator Russell Feingold and Representative Edward Markey from the 2005 Act's legislative history. St.Br.10, 37; N.D.Br.25. Neither shows that the Act divested BLM of its authority over public lands. See 151 Cong. Rec. S9335, S9337 (daily ed. July 29, 2005)) (Sen. Feingold stating that bill exempted hydraulic fracturing "from the Safe Drinking Water Act"); 151 Cong. Rec. H2192-02, H2194–95 (daily ed. Apr. 20, 2005)) (general statement by Rep. Markey). The States' reliance on Representative Markey is especially misplaced because the administrative record extensively documents his understanding that BLM retained its authority after 2005, and his strong support for the Rule. See, e.g., App.635–42; Supp.App.94, 126–37, 139–43, 145, 149, 152, 166, 168. Markey's subsequent conduct is flatly inconsistent with the States' suggestion that he believed the 2005 Act withdrew BLM's authority to issue the Rule.

regulatory obligations under SDWA, and there "is no reason to think the two agencies cannot" implement their overlapping duties without a conflict. See Massachusetts v. EPA, 549 U.S. 497, 532 (2007). Federal land managers protect many resources on public lands, such as water, air and wildlife, that also are addressed by federal environmental regulations. Open.Br.52–53. The States' view of "common sense" disregards the everyday reality of public lands management.[7]

North Dakota also ignores the distinction between public lands management and environmental regulation when it claims to have "traditional and primary power over land and water use" within its boundaries. N.D.Br.20. Its argument relies on inapposite cases applying the Commerce Clause, rather than the Property Clause. Id. (citing Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs, 531 U.S. 159 (2001)).[8] North Dakota has no "sovereign" authority over federal property. Id. at 38–39.

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[7] Nor is the Rule a conspiracy "to resurrect EPA's pre-Energy Policy Act authority" by having BLM "regulate hydraulic fracturing as Class II underground injection wells." See St.Br.40. There is nothing improper about BLM's Rule addressing similar issues to EPA's UIC regulations. Two agencies may use similar approaches to regulate similar activities, even when operating under different statutes with distinct goals. See Pub. Lands Council v. Babbitt, 167 F.3d 1287, 1305 (10th Cir. 1999), aff'd, 529 U.S. 728 (2000) (holding that it was reasonable for BLM to adopt regulations similar to another agency's "so far as consistent with the specific terms of their respective governing statutes").

[8] North Dakota's argument that the Rule cannot apply to "split estate" lands with federal minerals and private surface, N.D.Br.36–38, also fails. In this facial challenge to the Rule, North Dakota must show "there is no set of circumstances in which the challenged regulation might be applied consistent with the agency's

Instead, Congress has "complete" and "plenary" power over federal lands and minerals. Kleppe v. New Mexico, 426 U.S. 529, 535–41 (1976); Wyoming v. United States, 279 F.3d 1214, 1227 (10th Cir. 2002) (Wyoming v. U.S.). The "Property Clause gives Congress the power over the public lands 'to control their occupancy and use, to protect them from trespass and injury, and to prescribe the conditions on which others may obtain rights in them.'" Kleppe, 426 U.S. at 540 (quoting Utah Power & Light Co. v. United States, 243 U.S. 389, 405 (1917)). This power makes management of federal property—including minerals—Congress's prerogative. Ventura Cty. v. Gulf Oil Corp., 601 F.2d 1080, 1083 (9th Cir. 1979), aff'd, 445 U.S. 947 (1980) (discussing Kleppe, 426 U.S. at 537, 539, 543). "State jurisdiction over federal land does not extend to any matter that is not consistent with the full power in the United States" under the Property Clause. Wyoming v. U.S., 279 F.3d at 1227 (quotations omitted).

Congress has delegated its Property Clause authority to the Interior Department through FLPMA and the MLA. States therefore cannot claim primary authority over oil and gas development on federal land.

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statutory authority." Scherer v. U.S. Forest Serv., 653 F.3d 1241, 1243 (10th Cir. 2011) (quotations omitted). North Dakota cannot make that showing. For example, most surface owners will not object to the Rule's requirement to use tanks instead of pits. Open.Br.8.

IV. THE MINERAL LEASING ACT GIVES BLM AUTHORITY TO PROMULGATE THE RULE.

In the MLA, Congress delegated broad authority to Interior to manage all aspects of mineral development on public lands. Nothing in that statute exempts particular technologies such as hydraulic fracturing from BLM's authority. The district court's ruling misreads the MLA's plain language and purpose and decades of case law. Open.Br.16–29.

A. Appellees' Argument Conflicts With Decades Of Case Law And The Text Of The MLA.

Appellees cannot cite a single case supporting the district court's MLA interpretation. In fact, Industry's and North Dakota's briefs on this issue are devoid of any case law addressing the MLA. Indus.Br.17–20; N.D.Br.30–32.[9] That silence is unsurprising because courts have consistently upheld the Interior Department's "sweeping authority" as manager of public property, Indep. Petroleum Ass'n of Am. v. DeWitt, 279 F.3d 1036, 1038 (D.C. Cir. 1992), to adopt regulations protecting groundwater and addressing many other issues.

[9] The States cite three MLA cases, St.Br.50, 52, but none support their argument. See Nat. Res. Def. Council, Inc. v. Berklund, 609 F.2d 553, 555 & n.5 (D.C. Cir. 1979) (interpreting pre-1976 version of MLA provision addressing coal leases rather than oil and gas leases); Geosearch, Inc. v. Andrus, 508 F. Supp. 839, 842 (D. Wyo. 1981) (addressing procedural issue related to noncompetitive leasing); Tex. Oil & Gas Corp. v. Phillips Petroleum Co., 277 F. Supp. 366, 370 (W.D. Okla. 1967), aff'd, 406 F.2d 1303 (10th Cir. 1969) (applying Oklahoma state communitization order to federal minerals because order had been approved by the federal government).

Open.Br.17–19, 21, 27–28 (collecting cases). Appellees never reconcile their position with this case law.

Freed from the constraints of precedent, Appellees offer several far-fetched interpretations of the MLA. First, the States and Industry emphasize that the MLA does not expressly reference "hydraulic fracturing." Indus.Br.16–17 n.4; St.Br.18, 22. That absence is meaningless because the MLA does not catalogue the technologies BLM may regulate. Instead, the statute directs BLM to manage development of federally-owned oil and gas resources in a manner that serves the public interest. This sweeping assignment does not carve out certain technologies from federal oversight. See Open.Br.18–19 (collecting cases).

Next, Appellees acknowledge that 30 U.S.C. § 189 authorizes the Interior Department "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. But they claim that the MLA's sole purpose is to "promote" oil and gas development, not to protect public lands and the environment. Indus.Br.19–20; see also N.D.Br.30–31 (asserting that statutory direction to protect "the public welfare" and "interests of the United States" does not encompass environmental protection); St.Br.50 (asserting that MLA serves to promote leasing and development "for private mining—it does not create a program for environmental regulation").

This theory ignores precedent from the Supreme Court and numerous other courts, as well as the MLA's legislative history. Appellees fail even to mention Boesche v. Udall, 373 U.S. 472 (1963), which held that the MLA authorizes "exacting restrictions and continuing supervision" over all facets of oil and gas development on public lands in service of the public interest. Id. at 477–78 (citing 30 U.S.C. § 189). Boesche explains that the "dominant theme" of the MLA's legislative history was "conservation through control." Id. at 481 (citing H.R. Rep. No. 65-1138, at 19 (1919)); see also Open.Br.17–18. Boesche controls here, and it forecloses Appellees' theory. Appellees also ignore numerous cases recognizing that the MLA authorizes the Interior Department to protect groundwater and other resources as part of managing oil and gas development. Open.Br.27–28.

Appellees' theory also conflicts with the MLA's plain language, which directs that all leases contain provisions "safeguarding of the public welfare," protecting "the interests of the United States" and ensuring "reasonable diligence, skill and care." 30 U.S.C. § 187. Industry asserts that these terms only address lease terms and BLM cannot pursue these goals through "operational regulations." Indus.Br.17–18.[10] The MLA, however, must be read as a whole, and interpreted so

[10] Appellees also contend that the terms "public welfare," "the interests of the United States" and ensuring "reasonable diligence, skill, and care," 30 U.S.C. § 187, should not be given their ordinary meaning because they are included in a longer list of other issues such as worker safety and wages. Indus.Br.18; N.D.Br.31. This approach fails because it renders the broader public welfare and

that different sections work together. Wyoming v. U.S., 279 F.3d at 1230. Congress required those terms in every lease because they are "purposes" of the Act. 30 U.S.C. § 189. And Section 189 does not limit Interior to adopting regulations only for matters not covered in lease terms. Instead, it authorizes the Interior Department to adopt regulations and "do any and all things necessary . . . to accomplish the purposes" of the Act. Id. In practice, BLM's operational regulations work hand in glove with lease terms, addressing numerous issues that would be cumbersome to cover in individual lease contracts.[11]

Finally, the States assert that Congress only authorized BLM to protect oil and gas—not groundwater. St.Br.50–51. They cannot cite any cases supporting this novel theory, and it conflicts with the MLA's statutory language. Section 229a(a) authorizes the purchase and repair of well casing when a lessee strikes water that is usable "for agricultural, domestic, or other purposes[.]" 30 U.S.C. § 229a(a). The States also ignore the MLA's directive to prevent "waste" of minerals. Id. § 225. Oil and gas that leaks into an aquifer because of poor well construction is wasted—it is not brought to the surface for productive uses. BLM prevents this waste (and protects groundwater) by requiring proper construction of

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public interest terms surplus language. Kawaauhau v. Geiger, 523 U.S. 57, 62 (1998); Open.Br.24.

[11] See BLM Form 3100-11, www.blm.gov/style/medialib/blm/noc/business/eforms.Par.71287.File.dat/3100-011.pdf (BLM standard lease form incorporating its regulations by reference).

wellbores to prevent fluids from moving across the barrier in either direction. Congress was clearly aware that oil and gas might affect groundwater, and gave Interior authority to protect that water.

B. Appellees' Interpretation Would Disrupt Decades Of Interior Department Regulations That Congress Has Ratified.

Appellees claim that this case involves only a "narrow ruling" by the district court that does not "undermine[] BLM's role as custodian" of public property. Indus.Br.16. But their crabbed interpretation of the MLA would do just that. Under Appellees' reasoning, BLM could not manage many aspects of oil and gas development it has regulated for decades, including construction standards for non-hydraulically-fractured wells and management of drilling wastes. Open.Br.22–23, 28–29. Similarly, numerous existing BLM regulations require protection of groundwater and surface resources during oil and gas development. Id. at 30–32. Appellees' theory would invalidate not just the new Rule, but many of BLM's current oil and gas regulations.

Appellees largely ignore the reality that the Interior Department for decades has regulated the same operations they claim fall outside its legal authority, such as "shooting" a well and injecting water to enhance production. In particular, Interior Department regulations since 1982 have expressly addressed fracturing operations. Id. at 31–32. The 1982 regulation requires (a) submittal of a report on the fracturing operation after it is completed; (b) prior approval of "nonroutine"

fracturing operations and operations involving additional surface disturbance; and (c) "prudent operating practice" on fracturing operations. 43 C.F.R. § 3162.3-2(a)–(b) (1988). Congress effectively ratified BLM's authority over those practices by repeatedly amending the MLA without revoking the agency's authority. Open.Br.32–35.

Like the district court, Appellees ignore most of this history. They attempt to downplay the 1982 regulation by asserting that BLM treated almost all fracturing operations as "routine" and did not require prior approval. Indus.Br.31; see also St.Br.14. But even without prior approval, the 1982 regulation required operators to use "prudent operating practice" and submit a post-fracturing report. 43 C.F.R. § 3162.3-2(b) (1988). These provisions unambiguously asserted BLM's legal authority over fracturing.

Moreover, contrary to Appellees' suggestion, BLM field offices did require prior approval for a small number of hydraulic fracturing operations they viewed as non-routine. See Supp.App.144 (estimating about 5% were not considered routine based on "the downhole engineering involved"), 92–93 ("What are considered 'routine' operations varies by geographic location, geologic producing formation, and the industry practices."), 85–89 (surveying practices of different BLM offices). BLM has asserted legal authority over hydraulic fracturing for decades.

V. FLPMA GIVES BLM AUTHORITY TO PROMULGATE THE RULE.

The district court also erred in holding that FLPMA does not authorize the Rule. There is no dispute that FLPMA's goals include protecting the environment and public lands. FLPMA imposes a broad mandate for BLM to oversee oil and gas development (and all other activities) on public lands using "multiple use and sustained yield" principles that balance mineral development with protection of water, wildlife, and other resources. 43 U.S.C. §§ 1701(a)(7), 1701(a)(8), 1702(c), 1732(a). FLPMA directs BLM to implement this mandate both through land use planning and regulation. Open.Br.43–46.

Several FLPMA provisions give BLM rulemaking authority. FLPMA requires the agency to "promulgate rules and regulations to carry out the purposes of this Act and of other laws applicable to the public lands." 43 U.S.C. § 1740; see also id. §§ 1701(a)(5), 1732(b), 1733(a). The Rule is a valid exercise of BLM's multiple-use management authority. Wyoming v. U.S. Dep't of Agric., 661 F.3d 1209, 1266–69 (10th Cir. 2011) (affirming U.S. Forest Service's Roadless Rule as exercise of similar multiple-use management statute); Open.Br.39–46.

Appellees repeat the district court's flawed theory that FLPMA is nothing more than a land use-planning statute. St.Br.19, 43, 47–49; N.D.Br.29–30. This characterization ignores FLPMA's plain language, which directs BLM to issue regulations as well as land-use plans. "[T]o aid in [Interior's] administration of the

public lands, Congress declared part of its policy in FLPMA to be that . . . 'the Secretary be required to establish comprehensive rules and regulations[.]'" Topaz Beryllium Co. v. United States, 649 F.2d 775, 777 (10th Cir. 1981) (quoting 43 U.S.C. § 1701(a)(5)). "FLPMA . . . establishes comprehensive rules for the management and preservation of federal lands." Nat'l Wildlife Fed'n v. Burford, 835 F.2d 305, 307 (D.C. Cir. 1987); accord W. Watersheds Project v. Kraayenbrink, 632 F.3d 472, 478 (9th Cir. 2011) (describing grazing regulations that implement BLM's multiple use mandate).

Like their MLA argument, Appellees' FLPMA discussion is devoid of supporting case law. The only case they discuss, California Coastal Commission v. Granite Rock Co., 480 U.S. 572 (1987), has nothing to do with the scope of Interior Department rulemaking authority on public lands. Granite Rock is a preemption case addressing whether FLPMA—a federal statute—preempts state law. See Open.Br.45–46. State-federal preemption analysis has no bearing on the interplay between two federal statutes like SDWA and FLPMA. See, e.g., Proctor v. United Parcel Serv., 502 F.3d 1200, 1205 n.2 (10th Cir. 2007) (noting that "one federal statute cannot preempt another").

In its preemption analysis, Granite Rock discussed the distinction between "environmental regulation and land use planning" statutes. 480 U.S. at 588; Open.Br.45. But the Court did not rule that the Interior Department's FLPMA

authority is limited only to land use planning. Nor did it rule that FLPMA is overridden by other federal statutes like SDWA.[12] Appellees' focus on Granite Rock is a red herring.

Appellees also object that FLPMA does not expressly reference "hydraulic fracturing." See St.Br.20; N.D.Br.29. This argument fails for the same reason it does with the MLA. FLPMA does not attempt to list every technology or activity the agency can address in managing public lands. Instead, FLPMA directs BLM to administer oil and gas development (and other activities) under a broad multiple-use framework that gives the agency flexibility to address changing land uses over time. See Topaz Beryllium, 649 F.2d at 778 ("Congress could not foresee and did not attempt to foresee all of the information that might be needed to efficiently administer . . . FLPMA." (quotation omitted)). FLPMA's silence on hydraulic fracturing is no more significant than its silence on commercial filmmaking, Open.Br.42, or the Burning Man festival, Professors' Amicus Br.9 n.13.

Next, Appellees contend that BLM's mandate to "provide for compliance with applicable [state and federal] pollution control laws," 43 U.S.C. § 1712(c)(8), bars the agency from promulgating its own regulations to protect the environment. St.Br.44–45; N.D.Br.29. But this provision is found in FLPMA's land use

[12] Appellees' argument that SDWA was adopted two years before FLPMA is irrelevant because there is no reason to believe Congress intended FLPMA to "repeal the authority" SDWA provides EPA. St.Br.46. FLPMA and SDWA are overlapping, rather than mutually exclusive, statutes. Supra pp. 7-11.

planning section, and it merely requires those plans to provide for compliance with pollution control laws. Other FLPMA provisions obligate BLM to protect the environment outside the land use planning process. For example, BLM must "by regulation or otherwise, take any action necessary to prevent unnecessary or undue degradation" of public lands. 43 U.S.C. § 1732(b).

Moreover, FLPMA's requirement that land use plans provide for compliance with pollution control laws does not prevent BLM from adopting its own requirements to protect those lands. In fact, BLM often requires oil and gas companies to mitigate their impacts on federal lands beyond what other state and federal agencies already require. See, e.g., Supp.App.7–17 (BLM plan listing measures required for oil and gas development). Appellees' interpretation of Section 1712(c)(8) would prevent BLM from requiring routine best management practices to address dust, lights, erosion, and other impacts. See id. at 6, 11, 15.

Further, Appellees assert that BLM's Rule violates a "note" that Congress attached to FLPMA regarding water rights. See St.Br.45–46, N.D.Br.30. When Congress passed FLPMA it stated that "[n]othing in this Act shall be construed . . . as affecting" laws governing appropriation or use of water on public land, or changing federal and state rights over water development. 43 U.S.C. § 1701 note (g)(1)–(2), (4). The Rule, however, does not modify water appropriation laws or limit state water rights. Instead, it simply ensures that BLM-approved activities

will not harm water resources. This is well within BLM's authority. As BLM noted, a requirement that oil and gas wells be constructed to protect aquifers does not "preempt or interfere with states' . . . regulation of their ground water quality or quantity." See 80 Fed. Reg. at 16,144. BLM also clarified that the Rule does not address water rights. See id. at 16,186 ("Operators are responsible for complying with state or tribal requirements for obtaining water for use in hydraulic fracturing operations . . . . The BLM will not be issuing or vetoing rights to use water.").

Finally, Industry suggests that the Rule impermissibly elevates environmental protection over oil and gas development. Indus.Br.20–22. This is nonsense. "It is past doubt that the principle of multiple use does not require BLM to prioritize development over other uses." N.M. ex rel. Richardson v. BLM, 565 F.3d 683, 710 (10th Cir. 2009). BLM has broad discretion to balance FLPMA's different policy goals. See Pub. Lands Council, 167 F.3d at 1299–1300.[13]

Regardless, Industry fails to show that the Rule prioritizes environmental protection over development, or that it will prevent "efficient" or timely "access to federal lands for energy development." Indus.Br.21–22 (citing FLPMA and the

[13] Another statute cited by Industry, 30 U.S.C. § 21a, does not create an "unfettered right" or "invitation" to develop minerals on public lands free from federal regulation. Pub. Lands for the People, Inc. v. U.S. Dep't of Agric., 697 F.3d 1192, 1198 & n.2 (9th Cir. 2012); Maher v. United States, 56 F.3d 1039, 1042 (9th Cir. 1995).

2005 Act, 42 U.S.C. § 15921(a)(1)(A)–(C)). The district court made no such finding, see App.320–21 (declining to address issues other than BLM's legal authority), and the only support Industry offers is a single footnote citing Appellees' own district court briefs. Indus.Br.22 n.8. This footnote—which does not explain its allegations, or even cite any administrative record evidence—is wholly inadequate to raise this issue on appeal. Kitchen v. Herbert, 755 F.3d 1193, 1213 n.6 (10th Cir. 2014) ("Arguments raised in a perfunctory manner" are waived) (quotation omitted); see also Fletcher, 730 F.3d at 1213–14.

Far from shutting down oil and gas development, the Rule represents a modest and long-overdue update to BLM's 30-year-old regulations. Most of the standards contained in the Rule just require industry best practices or measures that some states have already adopted. See Open.Br.4–9. Industry's argument is groundless.

VI. THE COURT SHOULD NOT REMAND THIS CASE TO THE DISTRICT COURT.

Finally, the States (but not Industry) ask that if this Court reverses the district court's Chevron step 1 ruling, it remand the case to the lower court for consideration of Chevron step 2 and other issues not addressed by the district court's final judgment. N.D.Br.32–33; St.Br.25 n.6. The Court should reject this invitation.

It is well established that "remand is unnecessary" for issues raising "a question of law." S. Utah Wilderness All. v. Office of Surface Mining Reclamation & Enf't, 620 F.3d 1227, 1243 (10th Cir. 2010) (SUWA); accord Defs. of Wildlife, Inc. v. Endangered Species Sci. Auth., 659 F.2d 168, 179 (D.C. Cir. 1981). Further, when a district court does not address an issue in an Administrative Procedure Act (APA) case, the appellate court "may conduct the necessary review [it]sel[f] based on the same administrative record considered by the district court." Olenhouse v. Commodity Credit Corp., 42 F.3d 1560, 1580 (10th Cir. 1994); accord Etelson v. Office of Pers. Mgmt., 684 F.2d 918, 926 (D.C. Cir. 1982). Remand is unnecessary in APA cases because the appellate "court's task on appeal is the same as the district court's task in the initial review." Ranchers Cattlemen Action Legal Fund United Stockgrowers of Am. v. U.S. Dep't of Agric., 499 F.3d 1108, 1114–15 (9th Cir. 2007).

Here, application of Chevron step 2 presents a pure question of law for which remand is unnecessary. SUWA, 620 F.3d at 1243 n.10. Moreover, in this APA record review case, remand is unnecessary on any of the other issues raised by Appellees. Ranchers Cattlemen, 499 F.3d at 1114–15. Notably, the party that focused on those APA arguments in the district court—Industry—has not requested remand.

A remand would waste the Court's and parties' resources. Appellees could have briefed their procedural claims as an alternative basis for affirmance, but they chose instead to perfunctorily reference them without developed argument. See supra pp. 5-6, 26 (discussing waiver of issues). While an appellee is not required to raise alternative grounds for affirmance, Oldenkamp v. United Am. Ins. Co., 619 F.3d 1243, 1249 (10th Cir. 2010), neither should this Court enable efforts to manipulate the process and drag out the lawsuit. See Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 357 (1988) ("A district court can consider whether the plaintiff has engaged in any manipulative tactics when it decides whether to remand a case [to state court]"); In re Cox Enters., Inc., 790 F.3d 1112, 1116–17 (10th Cir. 2015) (agreeing that failure to raise key issue suggests "an attempt to manipulate the process").

That is exactly what the States seek to do in asking for a remand. Unlike this appeal, Appellees did fully brief their APA arguments (along with the issue of BLM's legal authority) during the preliminary injunction appeal. See, e.g., Indus. Br. at 13–45, Wyoming v. Sierra Club, Nos. 15-8126 & 15-8134 (10th Cir. May 25, 2016). Those issues could have been resolved in that appeal, but Appellees successfully moved for its dismissal. Now, their request for remand seeks to stall BLM's Rule in litigation even longer, and creates the prospect of a third appeal to this Court. Rather than countenance more delay, this Court should reverse without

remanding the case for any further proceedings on Industry's and the States' APA challenges. See, e.g., Hendron v. Colvin, 767 F.3d 951, 957 (10th Cir. 2014) (reversing and remanding with instructions to enter judgment).

Alternatively, if this Court does reverse and remand for further consideration of other issues, it should confirm that the Rule takes effect immediately while the remand proceedings are pending. The Rule was scheduled to take effect on June 24, 2015, 80 Fed. Reg. at 16,128, but was blocked by the district court on June 23—the day before its effective date. That injunction against the Rule has since been vacated. Supra pp. 5-6. As a result, the district court's final judgment "set[ting] aside" the Rule, App.321, is the only barrier to it taking effect. If that judgment is reversed, the Rule becomes effective on the date the mandate issues. See Fed. R. App. P. 41(c); see also Cal. ex rel. Lockyer v. U.S. Dep't of Agric., 575 F.3d 999, 1007 (9th Cir. 2009) (explaining that regulation enjoined by district court "went into effect" on date that appellate court mandate issued reversing the district court's injunction); accord Organized Vill. of Kake v. U.S. Dep't of Agric., 795 F.3d 956, 961 (9th Cir. 2015) (same).

To avoid any dispute over this question, however, the Court should expressly state that the Rule takes effect immediately upon issuance of the mandate, pending further review in the district court on remand.

CONCLUSION

The district court's order setting aside the Rule should be **REVERSED**.

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I hereby certify that on October 7, 2016 I electronically filed the foregoing **INTERVENOR-RESPONDENT-APPELLANTS' REPLY BRIEF** using the court's CM/ECF system which will send notification of such filing to the following:

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