Attorney information for the States of Wyoming, Colorado, and Utah at pages 18–19

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

STATE OF WYOMING; STATE OF COLORADO; STATE OF NORTH DAKOTA; and STATE OF UTAH, Petitioners, v. UNITED STATES DEPARTMENT OF THE INTERIOR; SALLY JEWELL, in her official capacity as Secretary of the Interior; UNITED STATES BUREAU OF LAND MANAGEMENT; and NEIL KORNZE, in his official capacity as Director of the Bureau of Land Management, Respondents.	Case No. 15-CV-00043-SWS Consolidated with 15-CV-00041-SWS **REPLY IN SUPPORT OF WYOMING, COLORADO, AND UTAH'S PETITION FOR REVIEW OF FINAL AGENCY ACTION**

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INTRODUCTION

Respondent Bureau of Land Management (Bureau) and Respondent-Intervenors Sierra Club, Earthworks, The Wilderness Society, Western Resource Advocates, Conservation Colorado Education Fund, and Southern Utah Wilderness Alliance (Special Interest Groups) filed their response briefs with the Court on April 4, 2016.[1] (ECF Nos. 204, 205, 206). The States of Wyoming, Colorado, and Utah (State Petitioners) submit this reply to rebut several assertions made by the Bureau and the Special Interest Groups.

The Respondents equate one agency of the United States Government, the Bureau of Land Management, an agency within the Department of the Interior, with the entire federal government. That is, despite Congress's extensive and fine-tuned legislation parceling out executive authority over particular aspects of the management of federal lands among a significant number of federal agencies, the Respondents continually premise their arguments on the supposition that the Bureau's authority is plenary with respect to all activity on federal land. This premise is belied by what Congress has actually done, and what Congress has said it intended to do, with respect to hydraulic fracturing. The Bureau's departure from its statutory

[1] Collectively the Bureau and the Special Interest Groups are referred to as "Respondents."

authority in its fracking rule must be reined in by setting aside the hydraulic fracturing rule. 5 U.S.C. § 706(2).

In this reply brief the State Petitioners will also address the Special Interest Groups' use of discredited groundwater studies as support for the rule, as well as the newly raised issue of whether this Court requires additional briefing regarding the appropriate remedy.

ARGUMENT

I. Issues pertaining to the merits of this case.

The Respondents have attempted to sidestep the central question in this case—the extent of the Bureau's authority to regulate fracking—by relying on a false premise. Their premise? The Bureau has plenary authority over all conduct that occurs on federal lands within its jurisdiction. This premise crumbles when tested against the actual words of the United States Constitution and relevant statutory grants of authority from Congress.

A. Congress, not the Bureau, has plenary power over federal property.

The Bureau argues that the United States has unlimited power over federal property via the Property Clause of the United States Constitution. (ECF No. 206 at 50). Under the Constitution, however, **Congress** has plenary authority over federal lands; not the Bureau or even the Executive Branch acting for the United States. U.S. Const. art. IV, § 3, cl. 2. Accordingly, any authority the Executive exercises over

federal lands must be pursuant to specific federal legislation. *Wyoming v. United States*, 279 F.3d 1214, 1227 (10th Cir. 2002). Without action by Congress, states are free to exercise civil and criminal jurisdiction on federal land. *Id.* at 1226. In this case, the mere existence of Congress's plenary power is distinct from the actual exercise of that power. Not only did Congress decline to grant the Bureau authority to regulate hydraulic fracturing, but it expressly removed all authority to regulate non-diesel hydraulic fracturing from federal statutory law. (ECF No. 189 at 38-56). Until Congress acts to change this balance, state regulation of hydraulic fracturing is the status quo. (*Id.*).

The Bureau apparently knows this to be true, because it failed to cite to the Property Clause as authority for its rulemaking. *See* Oil and Gas; Hydraulic Fracturing on Federal and Indian Lands, 80 Fed. Reg. 16128 (March 26, 2015). "[T]he grounds upon which the agency acted must be clearly disclosed in, and sustained by, the record…. After-the-fact rationalization by counsel in briefs or arguments will not cure noncompliance by the agency." *Colo. Wild v. U.S. Forest Serv.*, 435 F.3d 1204, 1213 (10th Cir. 2006) (internal citation omitted). Accordingly, the Bureau's newfound reliance on the Property Clause, for the first time in its response brief, cannot create authority for the rule.

B. Congress has not granted the Bureau broad authority to regulate hydraulic fracturing.

1. The federal leasing and land planning statutes

The Bureau's mistaken belief that it enjoys the powers of two branches of the United States government, both legislative and executive, leads the Bureau to assert broad authority over not only land and mineral management, but environmental regulation on federal land. This assertion fails for several reasons.

First, Respondents cite lease provisions in § 187 of the Mineral Leasing Act to support their argument that the Bureau has "broad regulatory power." (ECF Nos. 205 at 30, 206 at 15, 21). Specifically, Respondents cite language requiring leases on federal land to "contain provisions for the purpose of insuring the exercise of reasonable diligence, skill, and care" for the "protection of the interests of the United States" and to safeguard "the public welfare." (*Id.*); 30 U.S.C. § 187.

However, the statutory text the Respondents left out of their quotation explains what Congress intended when it required lease conditions that protect the public welfare. In that section—in addition to language stating that lessees must ensure reasonable diligence, skill, and care when operating on federal property—Congress required lease provisions to protect the safety and welfare of miners, restrict work days to eight hours for underground workers, prevent children under the age of sixteen from working in an underground mine, prevent waste of oil and

gas, and ensure the sale of mined minerals to the United States and the public at reasonable prices. 30 U.S.C. § 187.

Read in context, the language quoted by Respondents does not reflect a grant to the Bureau of virtually unlimited authority under the Act to regulate for the protection of the environment. Instead, the language requires only that certain, specific lease provisions appear in all federal oil and gas leases. Not mentioned in this list of lease requirements, however, are any provisions for the regulation of the environment or hydraulic fracturing. Respondents' attempt to create a broad grant of environmental policymaking authority from these specified lease provisions is unsupported.

Second, Respondents assert that past rulemakings provide authority for the current rule. (ECF Nos. 205 at 41–45, 206 at 16–17, 21, 24, 26–28, 35). This too is incorrect. To begin, the Administrative Procedure Act requires courts to analyze whether the Bureau has **statutory** authority for the rulemaking; if not, the rule must be set aside. 5 U.S.C. § 706(2)(C). Regulations created through notice and comment are not statutes, and an Agency cannot create powers for itself out of whole cloth. *New York v. FERC*, 535 U.S. 1, 18 (2002) ("[A]n agency literally has no power to act … unless and until Congress confers power upon it."). Nor does the existence of these rules assist the court in its statutory interpretation analysis. *See St. Charles Inv.*

Co. v. Comm'r. of Internal Revenue, 232 F.3d 773, 776 (10th Cir. 2000) (absent ambiguity, courts construe statutes according to their plain language).

Even assuming past regulations can somehow confer new power on an administrative agency, the prior regulations at issue here do not in fact demonstrate authority to regulate the practice of hydraulic fracturing. The Bureau cites previous versions of 30 C.F.R. Part 221 that required operators to send notice to the Bureau if they chose to stimulate production. (ECF No. 206). But these historic versions of Part 221 only require notice and approval; the regulations did not contain anything like the substantive environmental protection measures, such as mechanical integrity tests, imposed by the new rule. *Compare* 30 C.F.R. § 221.9 (1938) *with* 80 Fed. Reg. 16128.

Later, when the Bureau finally added the phrase "hydraulic fracturing" to its regulations, operators were required to obtain approval for their fracture job only if the job was considered "nonroutine." 43 C.F.R. § 3162.3-2 (2014). For routine jobs, the Bureau required operators to request approval only if the job would cause additional surface damage, otherwise operators could submit a one-page sundry notice report upon job completion. *Id.* These truncated notice requirements can hardly be classified as regulation of the practice of hydraulic fracturing. They were instead designed to provide local supervisors with information regarding activities

in the field.[2] None of these past regulations support a conclusion that the Bureau has long standing statutory authority to regulate the supposed environmental effects of hydraulic fracturing.

Third, the Special Interest Groups cite various cases as support for the notion that the Bureau has "broad authority" under the Mineral Leasing Act. (ECF No. 205 at 29–30). However, each of these cases discuss aspects of leasing activities, not environmental protection. *Boesche v. Udall*, 373 U.S. 472, 477–78 (1963) (explaining that the Secretary retains sufficient ownership interest and authority under the Mineral Leasing Act to cancel a lease when the lessee assigns or subleases his interest without approval); *W. Energy Alliance v. Salazar*, 709 F.3d 1040, 1042–44 (10th Cir. 2013) (discussing the Secretary's "considerable discretion" to choose which lands may be leased and outlining how the competitive bid process occurs); *Mountain States Legal Found. v. Andrus*, 499 F. Supp. 383, 388 (D. Wyo. 1980) ("the Mineral Leasing Act … gives to the Secretary of the Interior broad power to issue oil and gas leases on public lands … and to accept or reject oil and gas lease offers."). These cases do not support claims of broad authority to pass sweeping environmental regulation of hydraulic fracturing. Instead, they support State

[2] In the past, the Bureau conceded that "[e]xisting [Bureau] regulations included some limited provisions that mentioned, but did not attempt to regulate hydraulic fracturing[.]" (ECF No. 20 in 15-CV-041).

Petitioners' argument that the Mineral Leasing Act is a program for the organized leasing of federal mineral deposits and nothing more. (ECF No. 189 at 51–54).

Fourth, Respondents concede that the Mineral Leasing Act does not specifically address hydraulic fracturing. (ECF No. 205 at 32, 206 at 20). Despite Respondents' attempts to find significance in that absence, the most likely explanation is that hydraulic fracturing did not exist when the Mineral Leasing Act was created in 1920. (ECF No. 189 at 12, 52–53; DOIAR0001055 (stating that the first hydraulic fracturing treatment occurred in 1947), 0001078 (recounting that hydraulic fracturing began in the early 1940s)). Given that the statutory scheme as a whole does not grant BLM broad environmental policymaking authority—and given that Congress has since removed the regulation of non-diesel hydraulic fracturing from federal oversight, see *infra*—the **silence** in the Mineral Leasing Act cannot be construed as **authorization** to regulate in this area.

Fifth, the Special Interest Groups cite selective portions of 30 U.S.C. § 225 to argue that the Bureau has authority to keep water and oil or gas from mixing, and thus, the Fracking Rule must be within the Bureau's statutory authority. (ECF No. 205 at 34). This selective reading of the statute leaves out the most crucial aspect of these statutory provisions, which requires operators to prevent water entering oil bearing zones "to the destruction or injury of the oil deposits." 30 U.S.C. § 225. Read in context, the statute demonstrates a concern for the protection of the oil and

minerals, not water quality. *Id.* As State Petitioners asserted in their opening brief, this language reflects the tenor of the times. (ECF No. 189 at 52–53; DOIAR0001663 ("In these early years the principal focus was on protection of the petroleum resource from the effects of water incursion and not on protection of water resources themselves."). Although Respondents may wish to rewrite this history, the fact remains that 30 U.S.C. § 225 is not a broad environmental statute granting authority to regulate groundwater pollution.

Sixth, the Special Interest Groups' selective reading of statutory language continues with their argument that § 229(a), which allows the Secretary to purchase water wells from lessees that strike water instead of oil or gas, demonstrates Congress's intent to grant the Bureau power to regulate water quality. (ECF No. 205 at 34–35). Respondent-Intervenor's contention that this somehow demonstrates an intent to grant the Bureau authority over the protection of groundwater is an unsupported logical leap from the actual language and overall purpose of the statute.[3] The Secretary's right to purchase a well that might turn out to have useful quantities of water does not imply that the Secretary has any authority to ensure, through

[3] The Special Interest Groups also misinterpret the statute when they claim the Secretary's ability to make "repair of well casings" after purchasing a well under this provision allows the Bureau to protect water quality. (ECF No. 205 at 34–35); *see also* 30 U.S.C. § 229(a) (requiring the price paid for the water well to be "fixed" by rule). This provision does not speak to the repair of wells, let alone the regulation of hydraulic fracturing.

regulation or otherwise, that oil or gas operators will produce water of a certain quality in the first instance. The production of water instead of oil or gas in these wells is the result of a mistake, not a planned event. It is a logical fallacy to conclude that Congress, in granting an agency the power to address issues incidentally related to its core mission, also meant to expand the agency's core mission into other policy areas.

Seventh, the Special Interest Groups justify the rule as a way to prevent waste of oil and gas. (ECF No. 205 at 35). This is specious, as the Bureau never asserted waste of oil and gas as a basis for the rulemaking. 80 Fed. Reg. 16128; *Colo. Wild*, 435 F.3d at 1213 ("[T]he grounds upon which the agency acted must be clearly disclosed in, and sustained by, the record…. After-the-fact rationalization by counsel in briefs or arguments will not cure noncompliance by the agency.").

Eighth, with regard to the Federal Land Management and Planning Act (FLPMA), the Special Interest Groups cite *Utah Shared Access Alliance v. Carpenter* as an example of Congress's intent that the Bureau should protect the environment through FLPMA. (ECF No. 205 at 46–47) (citing *Utah Shared Access Alliance v. Carpenter*, 463 F.3d 1125, 1129 (10th Cir. 2006)). However, this case more clearly illustrates State Petitioners' point. *Carpenter* discusses FLPMA's requirement that the Bureau develop and maintain land use plans for public land. *Carpenter*, 463 F.3d at 1129. The Bureau must craft these plans in a way that

"protect[s] the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values" and "prevent[s] unnecessary or undue degradation of the lands." *Id.* (quoting 43 U.S.C. § 1701(a)(8), 1732(b)). As State Petitioners have shown, the Bureau makes these decisions as part of its land use planning function under FLPMA. (ECF No. 189 at 30–31). However, the Supreme Court, as well as Congress, have distinguished between land use planning and environmental regulation. (*Id.* at 49–51). *Carpenter*, a case about land use planning, does not support the Bureau's attempt at environmental regulation of hydraulic fracturing through rulemaking.

Finally, Respondents acknowledge that traditional tools of statutory construction include consideration of a statute's "relationship to other statutes." (ECF Nos. 205 at 28, 206 at 20) (citing *Hackwell v. United States*, 491 F.3d 1229, 1233 (10th Cir. 2007)). Thus, it is reasonable for this Court to examine the Bureau's claimed authority under the Mineral Leasing Act and FLPMA in conjunction with the Safe Drinking Water Act and the 2005 Energy Policy Act. Placing the statutory language in this context demonstrates that Congress specifically imposed comprehensive regulation of hydraulic fracturing through the Underground Injection Control (UIC) program and vested that authority solely with the Environmental Protection Agency (EPA), states, and tribes. (ECF No. 189 at 38–46). Respondents

cannot import the UIC program's comprehensive treatment of the subject matter into unrelated statutes.

2. The Safe Drinking Water Act and the 2005 Energy Policy Act

Respondents also mischaracterize the State Petitioners' arguments with regard to the Safe Drinking Water Act and the 2005 Energy Policy Act. (ECF Nos. 205 at 53, 206 at 34–35). The States do not argue that the Safe Drinking Water Act or the 2005 Energy Policy Act repealed the Bureau's authority under the Mineral Leasing Act. Instead, the States argue that, as evidenced by Congress's enactment of a comprehensive hydraulic fracturing statutory scheme in the 1974 Safe Drinking Water Act, the Bureau never had authority to regulate hydraulic fracturing. (ECF No. 189 at 46–57).

Nor have State Petitioners ever asserted that the Fracking Rule "interfere[s] with states' federally-approved Safe Drinking Water Act regulations" as the Special Interest Groups believe. (ECF No. 205 at 64). Because the 2005 Energy Policy Act removed the authority to regulate non-diesel hydraulic fracturing from the Safe Drinking Water Act, **no entity** regulates non-diesel hydraulic fracturing under the Act. Pub. L. No. 109-58, § 322, 119 Stat. 594 (2005) (codified at 42 U.S.C. § 300h(d)(2)(B)). Instead, **the States** regulate hydraulic fracturing pursuant to their own police powers. The Fracking Rule interferes with the State Petitioners' lawful

exercise of their own sovereign power without Congressional authorization for that interference. (ECF No. 189 at 22–25, 45–46).

Respondents also misconstrue the States' arguments when they cite congressional committee language to argue that the Safe Drinking Water Act did not repeal whatever authority the United States Geological Survey had to lease oil and gas deposits on federal land. (ECF Nos. 205 at 54–55, 206 at 35 (citing H.R. Rep. No. 93-1185 at 32 (1974) *reprinted in* 1974 U.S.C.C.A.N. 6454, 6484–85 (Congress did not "intend any of the provisions of this bill to repeal or limit any authority the [Geological Survey] **may** have under any other legislation.") (emphasis added))). This blanket language was meant to avoid potential unintended consequences of the Safe Drinking Water Act and cannot be taken to mean that Congress understood the United States Geological Survey had authority over the practice of hydraulic fracturing. Had Congress intended otherwise, it could have, and would have, expressly authorized a dual regulatory system that would delineate both the EPA and the Geological Survey's authority over the practice.

The Bureau also urges the Court to disregard the comprehensive nature of the UIC program by arguing that since state programs do not apply to Indian lands, this must mean that the Bureau has a role to play. (ECF No. 206 at 36). However, in its footnote on the same page, the Bureau acknowledges that the UIC program allowed for regulation of Indian lands by either the EPA or a Tribe with primary enforcement

authority. (*Id.* at n.15). As created, the UIC program did not leave any gaps, on Indian, federal, or state land, whether publicly or privately owned. Only after Congress amended the Safe Drinking Water Act through the 2005 Energy Policy Act did Congress create a so-called gap for the states to fill through their inherent authority to regulate for the public welfare. (ECF No. 189 at 38–46).[4]

Lastly, with regard to the Safe Drinking Water Act, the Bureau contends that 42 U.S.C. § 300j-6(a) must be read narrowly. (ECF No. 206 at 43). However, the case the Bureau cites for this proposition deals with construction of statutes for the purpose of sovereign immunity and waiver. *See U.S. Dep't of Energy v. Ohio*, 503 U.S. 607, 615 (1992). Sovereign immunity is irrelevant to the current dispute. The State Petitioners cited § 300j-6(a) as further evidence of Congress's intent to create an expansive program for the regulation of underground injections, applicable to all actors, including the federal government, on both public and private lands. (ECF No. 189 at 16). The State Petitioners do not cite § 300j-6 to argue waiver of sovereign immunity. This Court may consider § 300j-6(a) as further evidence of Congress's

[4] The same is true for the Bureau's assertion that there is a "federal regulatory gap" that they seek to fill with the Fracking Rule. (ECF No. 206 at 62). Because Congress specifically removed federal authority for non-diesel hydraulic fracturing when it enacted the 2005 Energy Policy Act, leaving regulation up to the states and tribes, any remaining "federal" gap is by Congress's design. In a federal system of dual sovereignty, there is nothing improper about a congressional decision to leave regulation to the states, and that decision logically **forecloses**, rather than authorizes, a federal agency's assertion of regulatory power.

intent when it enacted the Safe Drinking Water Act. *Hackwell*, 491 F.3d at 1233 (10th Cir. 2007).

C. The Special Interest Groups cite out-of-date and incorrect information to create a need for the rule.

Despite the fact that the Bureau never mentions Pavillion, Wyoming, as a basis for its rulemaking, or in its response brief, the Special Interest Groups use discredited EPA studies of groundwater in Pavillion as justification for the rule. (ECF No. 206 at 84–85). Because the Bureau did not discuss this information or otherwise use the information to support its rulemaking, this argument by the Special Interest Groups is inappropriate. *Colo. Wild*, 435 F.3d at 1213 ("[T]he grounds upon which the agency acted must be clearly disclosed in, and sustained by, the record…. After-the-fact rationalization by counsel in briefs or arguments will not cure noncompliance by the agency."). However, the Court should be aware of the complete factual picture, rather than the Special Interest Groups' incomplete description of the Pavillion studies.

From 2009 to 2011, EPA conducted field studies near Pavillion, Wyoming in response to complaints about the taste and odor of the water. *Pavillion, Wyoming*

Area Domestic Water Wells Draft Final Report and Palatability Study at 1.[5] EPA initially concluded that hydraulic fracturing fluids may have impacted groundwater near Pavillion. In June of 2013, after heavy criticism of the report's major findings, the EPA announced it was abandoning its draft report, and would not seek peer review to finalize the report. *Id*. at 1, 9. Later, the EPA terminated its request for public comment. *Id*. Subsequently, the EPA agreed that the State of Wyoming would perform a separate investigation of the residents' concerns. *Id*. Accordingly, the Wyoming Department of Environmental Quality, Wyoming Oil and Gas Conservation Commission, and the Wyoming Water Development Office, in coordination with the EPA and Encana Oil and Gas Inc., conducted a separate investigation and released a draft report in December 2015. *Id.*

Based on the State's review of gas development and production practices in the Pavillion area, this new report found that it is unlikely that hydraulic fracturing has caused any impact to the water-supply. *Id.* at 2–3. The State received several

[5] The entire report and extensive documentation is available at http://deq.wyoming.gov/wqd/pavillion-investigation/resources/investigation-draft-report/. While courts reviewing agency action under the Administrative Procedure Act are generally limited to the record before the agency, the Court may consider "evidence coming into existence after the agency acted" that demonstrates the agency's actions were right or wrong. *Am. Min. Cong. v. Thomas*, 772 F.2d 617, 626 (10th Cir. 1985). For evidentiary purposes, the Court may take judicial notice of publicly available files on a government agency's website. *Winzler v. Toyota Motor Sales U.S.A., Inc.*, 681 F.3d 1208, 1212–13 (10th Cir. 2012).

dozen comment letters, including comments from both the EPA and the Bureau, which the State is now working to address.[6] Thus, the Special Interest Groups' focus on a preliminary study by EPA—one that the EPA voluntarily abandoned— to suggest that the Fracking Rule could prevent groundwater contamination is a selective reading of the literature.

II. Additional briefing on the appropriate remedy is not warranted.

The Bureau requests additional, expedited briefing regarding the appropriate remedy should the Court find in favor of any of the Petitioners. (ECF No. 206 at 122). If the court finds that the Bureau is without statutory authority for the rule, or that the rule is arbitrary and capricious, then the Administrative Procedure Act directs the Court to "hold unlawful and set aside" the rule. 5 U.S.C. § 706(2). No additional briefing on remedy is necessary; the Court should follow the Administrative Procedure Act.

CONCLUSION

For the foregoing reasons and the reasoning set forth in the States' brief on the merits (ECF No. 189), the States of Wyoming, Colorado, and Utah request that the Court enter an order holding unlawful and setting aside the final rule entitled Oil

[6] Similar to the previous footnote, public comments are available at http://deq.wyoming.gov/wqd/pavillion-investigation/resources/public-comments/. Included in these comments is a letter from the Bureau's Wyoming State office indicating that it "generally agree[s] with the stated conclusions" in the State's draft report. *Id*.

and Gas; Hydraulic Fracturing on Federal and Indian Lands, published at 80 Fed. Reg. 16128 (March 26, 2015) as both contrary to law and as an arbitrary and capricious agency action.

DATED this 18th day of April 2016.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief is double-spaced and utilizes a proportionally spaced 14-point Times New Roman typeface. The brief comprises a total of 4,064 words.

DATED this 18th day of April, 2016.

/s/ Jeremy A. Gross
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CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of April, 2016, I filed the foregoing with the Clerk of Court using the Court's CM/ECF system, which will serve a Notice of Electronic Filing of the same on the parties.

DATED this 18th day of April, 2016.

/s/ Jeremy A. Gross
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